IS WHITE JUSTICE DELIVERY IN BLACK COMMUNITIES BY 'BUSH COURT' A FACTOR IN ABORIGINAL OVER-REPRESENTATION WITHIN OUR LEGAL SYSTEM?

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Finding causes of indigenous over-representation in the criminal justice system inevitably raises numerous issues. This article focuses upon the different court process administered to remote living Aboriginal people as a key contributory. Based on field research conducted throughout remote lying Aboriginal communities, the author evaluates the Bush Court system operating throughout the NT and WA. Bush Court refers to the circuiting Magistrate, Prosecution and Aboriginal Legal Service visiting communities once a month and once a quarter, to conduct court (predominantly criminal) over a single day. Inadequate ability for defence services to be provided to the residents of these communities and various obstacles to due process are suggested causes of the disproportion of indigenous people subject to criminal penalties. Further, the article explores issues faced by remote living indigenous Australians that lead to immense Bush Court case numbers and the majority of public order and driving offences. Police practices and administrative court policies are investigated with respect to potential human rights abuses and their ability to continue in an unchecked environment.

I INTRODUCTION

Bush Court defence lawyers face unique, arduous conditions when the Magistrate's Court intermittently circuits remote Aboriginal communities and isolated towns. It is dramatically different from the usual criminal court day the 'ordinary' Australian lawyer will regularly face. The basic facilities upon which lawyers have come to rely and aspects of legal representation we take for granted in any adversarial proceedings in Australia are noticeably absent from Bush Court.

The challenges of a typical Bush Court day are summarily illustrated by one North Australia Aboriginal Legal Aid Service (NAALAS) Lawyer:

> it is impossible to devote as much time to each client as is desirable. This is compounded by the logistical difficulties of working from footpaths, on the side of dirt roads and beside rivers. Of course, we cannot carry every case,

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> every textbook or even every statute to court. We do not have faxes or telephones. We do not speak the language. There is no opportunity to obtain a second opinion and the single lawyer will have to deal with every matter from swearing to murder committals.[1]

The Magistrates' Court circuiting Aboriginal communities, known as the Bush Court, administers the white Australian justice system to the Aboriginal population of an entire region by sitting for a single day in a particular community either once a month or once a quarter. These communities may be located in the middle of vast desert regions or land sparsely populated. In other instances, the Bush Court may be responsible for delivering justice to non-urban regions the size of smaller Australian states.

The 'arrival' of the Court consists of one Magistrate appearing on the day with two court orderlies and sometimes a police prosecutor. The Bush Court hears simple summary offences, but also committals and more serious cases. For the latter, a Crown prosecutor will be flown in for the day. For the remaining cases, a local police officer will conduct the prosecutions. Defence counsel, accompanied by a Client Liaison Officer (CLO), will attempt to access community members for the purpose of advice and instruction taking the day before the Court sits. However, a number of constraining factors surrounding the current operation of the Bush Court make it frequently impossible for the Aboriginal Legal Service (ALS) lawyer to access community clients other than on court day for the purpose of instruction taking and plea advice.[2] Such impediments include the ramifications of a single ALS lawyer constituting the sole defence counsel available at the Bush Court. Further, there is an inordinate number of cases to be completed in the space of a day, a lack of interpreters and a failure to provide crucial police documents and court-lists to Bush Court defence lawyers.

The following is based upon findings of research conducted by the author over a six-month period beginning July 2000, attending eight different Bush Courts throughout the Northern Territory (NT) and Western Australia (WA),[3] where Bush Court administration is in its widest use.

This study begins by documenting predominant differentiating features of the Bush Court from the conventional Australian Magistrates' Court, and then elaborates upon how these differences impact upon the justice deliverable by it. It describes both the legislative and cultural framework in which Bush Courts operate and identifies the elements that make its current procedure unadapted and unsuitable to its environment and the subjects over whom it has jurisdiction. This outcome in turn undermines many premises of due process and, ultimately, increases the number of indigenous people in our jail system.

1 Interview with NAALAS Bush Court lawyer (name witheld) (Darwin, 8 August 2000).
2 Natalie Siegel, *Documenting Bush Court: Uncovering Administration of White Legal Process in Aboriginal Communities* (Unpublished Research Report, Monash University, 2000) 15.
3 Jabiru (Kakadu), Nguyu (Tiwi), Wadeye (Port Keats), Daly River, Oenpelli (Arnhem Land), Hermansburg, Yuendumu and Marble Bar (North-western WA).

II RESEARCH METHODS

Monash University Human Ethics Guidelines were strictly followed in conducting the research. Research participants have provided consent to the publication of their opinions and quotes.

Until this point, the Bush Court process has not been documented, nor has it been recognised as a separate type of justice administration. Therefore, personally observing its procedure is central to reporting its style of operation. While the research adopts quantitative methods in conjunction with qualitative analysis, statistical evidence only serves to augment the conclusions obtained qualitatively. The author notes that quality of justice delivery is not capable of *purely* quantitative analysis. Other writers have drawn similar conclusions in architecting research methods for studies of this nature.[4] Further, personal observation is critical because it is one of the only methods of evaluating whether reforms or procedures allegedly enacted by government and its agencies in fact exist.

A *Nature of the Qualitative Study Undertaken*

In purporting to gain a holistic perspective of events prior to a Bush Court sitting, the author, as an outsider to the process, observed all preparations of the different participants (lawyers, clients, magistrates, police, CLOs). Both Bush Courts and town courts were attended, so as to compare differences in dealing with defendants by magistrates, language barriers and level of understanding, court set-up, demeanour of defendants (relative intimidation, emotional states), prosecutorial methods, and level of co-operation between defence lawyers and police. All parties to the process were interviewed regarding the same issues, so as to cross-reference opinions.

Where possible, Aboriginal community members were sought regarding their opinions. However several factors made this difficult. In most areas, English was not spoken sufficiently to question the people and there were no interpreters available. Secondly, the concept of audio and/or audio-visual recording contravenes cultural rules in most traditional Aboriginal areas. As a result of Australia's violent colonial history, indigenous people, particularly in the more remote regions, hold some reservations about white Australians, especially those with legal affiliations and those conducting research. This is because most interactions with people like police, judges and anthropologists who conducted much of the early research, resulted in reports and legislation to their detriment.[5]

[4] Greta Bird adopted similar research techniques to those employed by the author in her study of the construction of crime in indigenous areas. She chose not to rely on statistical data at all because 'statistics present only the "official" picture of the criminal justice system' without assessing their rationale: Greta Bird, 'The "Civilizing Mission": Race and the Construction of Crime' (1987) 4 *Contemporary Legal Issues* 3.

[5] See Richard Trudgen, *Why Warriors Lie Down and Die: Towards an Understanding of why the Aboriginal People of Arnhem Land Face the Greatest Crisis in Health and Education since European Contact*, Aboriginal Resource and Development Services Inc Darwin (2000); Bird, above n 4.

B *Matters Quantitatively Investigated*

Eight Bush Courts and four town courts throughout the Northern Territory, Western Australia and Victoria were analysed. Statistical data was collated in relation to caseload, adjournment figures, number of 'no-appearances', guilty pleas, scheduled hearings vis-á-vis hearings actually conducted, assault charges, imprisonments, female defendants versus male defendants, awards of Community Based Orders, domestic violence matters, number of juvenile cases, number of conflicts of interest, cases adjourned for lack of interpreter, driving offences, frequency with which court is held, number of attending lawyers and number of attending CLOs. Additionally, where statistics were publicly available on a particular matter, they were cross-referenced with the author's findings. However, given no research has yet been conducted upon Bush Courts until the present, very little was available.

III THE CALL FOR THE RESEARCH

The study appears to be the first research conducted into the Bush Court system in Australia. No other investigation of Bush Courts and the human rights abuses suffered by inappropriate justice delivery in remote Australian Aboriginal Communities has been carried out. The research has been prompted by the crisis Australian Aboriginal communities are facing with respect to incarceration of their peoples.

In the NT, between 75 and 85 per cent of the incarcerated population at any one time is of Aboriginal descent,[6] even though the Aboriginal proportion of the NT's total population is 28.5 per cent.[7] These statistics have aroused high media and political profiles, precipitating a full-scale national inquiry into the issue. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established by the Australian government specifically to investigate vast over-representation and the reasons for the exceedingly high number of indigenous people dying in custody. In May 1991, the RCIADIC delivered a report containing 339 recommendations. Current statistics evidence that the situation is rapidly declining and that the endorsements of the RCIADIC have been largely unheeded.[8]

Today, indigenous people comprise 2.1 per cent of the total Australian population,[9] yet they constitute 20 per cent of the Australian imprisoned

6 Northern Territory Government, *NT Government Implementation Report on the Recommendations of the Royal Commission into Aboriginal Deaths in Custody 1994/5*, (1995) 1.
7 Australian Bureau of Statistics, *Experimental Estimates of the Aboriginal and Torres Strait Islander Population*, 3230.0, 30 June 1991- 30 June 1996.
8 See Chris Cuneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out Of Custody: An Evaluation of The Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (1997: Aboriginal Torres Strait Islander Commission, Canberra).
9 Ibid.

population.[10] In WA, indigenous people are 22.7 times more likely to be incarcerated than non-indigenous people,[11] and indigenous youth are 48 times more likely to be 'locked up' than non-indigenous youth.[12] In WA, however, indigenous people only make up 3.2 per cent of the state's population.[13] Over-representation of indigenous people in their contact with the Australian criminal justice system prevails in all states of Australia.[14]

It seems that through all our government's initiatives, we have not been dealing with material causes of the problem. Traditionally, Australian government agencies and research have displaced the question upon the people themselves: 'what is it about you, about your life-style, about your history, your socio-economic position that gives you a propensity to be "criminal"?'. Throughout all good intentions to alleviate the 'over-representation problem', Australia has never really introverted the question.[15] What is it about the Anglo-Australian criminal process, as it operates in almost entirely black regions of Australia? What type of justice administration actually takes place far from the scrutiny of white Australians, towards communities who are unaware that a right to due process and equal justice exists, let alone the content of that right? Even if such knowledge resided in the communities, there is no information about, or even access to, mechanisms of complaint when such rights have not been protected. Indeed many Bush Court defendants do not even speak the language of their lawyer, nor that of the Court,[16] and are unaware that equivalent treatment would not be tolerated by the broader Australian public.

In the last 10 to 15 years, the criminal justice system has begun to focus on the policing that has effected over-representational rates. It has discovered many disturbing facts regarding the relationship between over-representation and over-arrest rates due to racism, discriminatory practices and similar endemic attitudes (the RCIADIC report is one of just one of many sources documenting this). However there has been little evaluation of the specific court process and advocacy to which most indigenous people in Australia are subject. While issues such as the mandatory sentencing regime in WA call for immediate attention, the question remains as to the nature of the court procedure that results in

10 Greg Gardiner, *Indigenous People and Criminal Justice in Victoria: Alleged Offenders, Rates of Arrest and Over-representation in the 1990s* (2001) Centre for Australian Indigenous Studies, Monash University.

11 *Responding to Custody Levels - Continuing Evidence of Indigenous Australians' Over-representation in Custody*, Indigenous Law Resources: Reconciliation and Social Justice Library, Austlii (accessed 6 November 2001).

12 Ibid.

13 Australian Bureau of Statistics, above n 8.

14 Cuneen and McDonald, above n 10, 1.

15 Michael Mansell discusses attempts by authorities to find solutions to the problem and makes the observation that while instigated with good intent, they have often been 'paternalistic, opportunistic and in many instances, downright racist'. See Michael Mansell, *Law Reform and the Road to Independence* (Paper presented at the Aboriginal Justice Issues Conference, Canberra, 23-25 June 1992).

16 Conversely, very little of the Aboriginal way of life in traditional communities or Aboriginal law is incorporated into, or understood by the Australian Legal system. See Neil Lofgren, 'Common Law Aboriginal Knowledge' (1995) 3 *Indigenous Law Bulletin* 77.

administration of prison penalties to such a high proportion of indigenous people in the first place.

Although 28.5 per cent of the NT's population is Aboriginal, 60 per cent of these Aboriginal people live in remote communities.[17] It follows then, that 17.1 per cent of the entire NT population is subject to the Bush Court process, as opposed to the kind of legal process that would be administered by city courts. The RCIADIC flagged various deficiencies in remote community court process as manifesting the substantive problems for which it has proposed recommendations.[18]

The consequences of the deficient criminal justice system as delivered by the Bush Court are far-reaching. The most severe is that defendants often enter the wrong plea, because the time spent with their Aboriginal Legal Service (ALS) lawyer is insufficient to reveal the complete fact scenario required for correct legal advice. This means a proportion of people being processed by the Bush Court system may be going to jail when they should not.[19]

Adequate legal representation cannot ensue under current Bush Court conditions. This was specifically recognised by the RCIADIC.[20] The problem represents one of several perversions of justice emanating from the current operation of the Bush Court.

IV BASIC FEATURES THAT DIFFERENTIATE THE BUSH COURT SYSTEM FROM THE MAGISTRATES' COURT SYSTEM AS IT OPERATES THROUGHOUT THE REST OF AUSTRALIA.

A *The Dominance of Criminal Matters*

Although the Bush Court is the only form of justice accessible to black communities throughout Australia, and the only forum through which they can also exercise their civil legal rights, virtually all cases heard by the Bush Court concern criminal charges.

Throughout all 486 Bush Court cases witnessed during this research,[21] only three cases were non-criminal charges. According to NAALAS, it is rare that genuine civil matters are brought to the attention of the criminal lawyers sent on the Bush Court circuit. It is arguable that a lack of community legal awareness, exposure and services means that the people living in these communities are unlikely to even be aware of their basic civil legal rights.

17 Australian Bureau of Statistics, above n 9.
18 Canberra, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1.
19 This is a harrowing outcome in light of the recent acknowledgment by the United Nations Committee Against Torture of some claims by Aboriginal people that they are being tortured in violent and overcrowded prisons. See 'UN Body Criticises Jail System', *The Advertiser*, (Adelaide) 23 November 2000, 3.
20 Canberra, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1. ,
21 Although a greater amount of Bush Court cases were in fact observed throughout the eight Bush Courts attended, this number represents those actually documented.

B *The Court's Physical Lay-out*

Jabiru[22] was the only Bush Court location investigated in the NT where proceedings took place in a purpose-built court house resembling typical court room construction.

Proceedings were conducted around a round table in the Land Council boardroom at Nguyu (Tiwi Islands).[23] The boardroom at Oenpelli and the desks and chairs were arranged in a manner that resembled a city court. While the informality of the court room may raise questions, it is arguably a less intimidating and therefore culturally preferable forum for Aboriginal community members who have had little or no exposure to a conventional court room setting.

The tiny concrete building attached to the police station that served as a courtroom in Wadeye[24] was approximately half the size of the boardrooms previously mentioned. An old school bench at the back of the room seated the waiting defendants, while clients that were waiting to give instructions and for their case to be heard, leaned against the cyclone fencing that backed the concrete path around the exterior.[25] The defendant, the Prosecution and the Magistrate find themselves at very close quarters with each other in this common style of court room. Again, old school desks and chairs were set up in the general positions that would accord with an established formal court room. The problems associated with this set-up were recognised by the Queensland Criminal Justice Commission's Report, *Aboriginal Witnesses in Queensland Criminal Courts*. It was stated that 'feelings of intimidation, isolation and disorientation are common among Aboriginal people who give evidence in our courts'.[26] This is particularly pertinent to a Bush Court where the courtroom is often inside the police station.[27]

At Daly River,[28] the children who attend the Daly River Primary School were sent off on an excursion for the day, so that their kindergarten-cum-school-library could host a Bush Court. This was also because the children's school cafeteria[29] served as a client interview room. Tables and chairs were set up in the court room in a 'formal' manner and the library chairs seated the people whose cases were ready to be heard.

Several interviewees asserted that two plastic tables pushed together in the hotel breakfast room constituted the Maningrida Bush Court.[30] This court room

22 Jabiru Bush Court, 11 July 2000.

23 Tiwi Bush Court, 26 July 2000.

24 Wadeye Bush Court, 1, 3 and 4 August 2000.

25 This composed the 'waiting area' at Tiwi also. ALS clients also sat on the patches of dirt around the outside of the cyclone fencing when the concrete area was filled with people. Because of the high caseload, clients often waited in these areas all day (often only to find their cases were to be adjourned to the next Bush Court sitting). These waiting facilities were emulated at every Bush Court attended.

26 Queensland Criminal Justice Commission, 'Aboriginal Witnesses in Queensland Criminal Courts' (1996) 1 *Australian Indigenous Law Reporter* 651, 655.

27 Ibid.

28 Daly River Bush Court, 2 August 2000.

29 This consists of a corrugated tin roof supported by several posts sheltering a few benches and tables.

30 Interview with NAALAS solicitor (name witheld) (Jabiru Bush Court, 11 July 2000). Interview with Alisdair McGregor, Magistrate (Darwin, 27 July 2000).

structure can be very daunting to a domestic violence victim. The director of the Top End Women's Legal Service (TEWLS) suggested that the inappropriateness of the court rooms represents an inestimable obstacle to victims of domestic violence bringing a claim.[31] A scene that commonly presents itself is that of an Aboriginal woman in a tiny courtroom giving evidence against the offender (often a relative) while counsel raises his/her voice at close range. 'She can't talk to her Community Liaison Officer and her abuser sits only a foot away from her'.[32]

This example repeats itself in numerous Bush Courts. In 1996, a joint inquiry by the Australian Human Rights and Equal Opportunities Commission (HREOC) and the Australian Law Reform Commission (ALRC), commented that '[t]here is a certain symbolic and deterrent value in the formal court environment but it should not be threatening or overwhelming'[33]. The fact that many juveniles appear at Bush Court suggests an even greater need for Bush Courts to increase their conformity with the town-court room. The problematic court room design in rural and remote areas was considered particularly acute by the ALRC.[34]

Further, the ALRC endorse the suggestion that a courtroom used for hearing criminal charges against children:

> be of a size that enables all persons involved to address each other at a normal conversational level, have a bench that distinguishes the role of the Magistrate but that does not dominate the room by its height, size or ornateness and be carefully laid out so that there is a clear line of sight between the bench and all others.[35]

Presently, the Bush Courts possess virtually none of these characteristics which would arguably alleviate the physical problems which lead to the intimidation of domestic violence victims.

V PREJUDICES AGAINST INDIGENOUS DEFENDANTS MANIFESTED BY BUSH COURT

A *Lack of Understanding and Lack of Interpreters*[36]

The inability of Bush Court clients to understand the events transpiring in the court room and even to understand their own lawyer was the most consistent

31 Interview with Top End Women's Legal Service solicitor (name witheld) (Darwin, 14 July 2000).
32 Ibid.
33 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the legal Process*, Report No 84 (1997) [18.185].
34 Ibid.
35 Ibid, para 18.188. The suggestion was also made by ex-senior children's Magistrate, R Blackmore in R Blackmore *Children's Court and the Community Welfare in NSW* (1989) 40.
36 For further details regarding the lack of interpreters and their necessity in the area, see Diana Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (1992). Eades also notes the misinterpretation of 'manner' by non-indigenous interviewers, both in the courtroom and in the instruction-taking process [at p55].

observation throughout the research. The NT Government reports that over 95 per cent of Aboriginal people living in remote areas speak a language other than English and that 'approximately 33% of these people self-identify as not speaking English very well'.[37]

According to NAALAS, 12 of the top 15 most frequently used non-English languages in the NT courts are Aboriginal languages'.[38] The situation is obviously exacerbated at Bush Court, because in several communities, English is the least spoken of up to six languages used.[39]

In 1997, the Aboriginal and Torres Strait Islander Commission (ATSIC) reviewed the extent to which the NT government had truthfully enacted the changes it alleged it had made based on the RCIADIC recommendations, particularly regarding the use of interpreters. It was revealed that the use of interpreters is still rare and that '[t]here are people who are pleading guilty to offences they should not be'.[40]

'The absence of trained, professional interpreters in Aboriginal languages is a human rights abuse'[41], commented one NAALAS solicitor. These two features are the greatest impediments to a defence lawyer's instruction taking and provision of advice, which shape the case presented to the court.

> Lack of English... means that legal concepts cannot be explained to clients. Important decisions such as whether to plead guilty or not are often imperfectly understood and more difficult concepts (such as the admissibility of evidence) are not understood at all...many will plead guilty three or four times before the penny drops.[42]

This was exemplified by a case observed at Hermannsburg Bush Court, where a defendant was read the charge and asked how he pleaded. The defendant looked confused. Despite instructions taken immediately prior to the plea, he still bent down and asked the ALS lawyer 'What do I plead? Guilty or not guilty?'[43] This same predicament was repeatedly observed at other Bush Courts.

Time constraints at a Bush Court only compound the limits on time available to make the client understand a legal position, or make the lawyer understand the position of the client. The situation replicates that which the *Anunga Rules* sought to eliminate, ironically at the stage where defence is provided as opposed to the police prosecution stage.

The *Anunga Guidelines*, evolved from the judgments in *R v Anunga*.[44] These were developed to ensure that Aboriginal suspects questioned in the NT were not

37 Northern Territory Government, *NT Government Implementation Report on the Recommendations of the Royal Commission into Aboriginal Deaths in Custody 1994/5*, (1995) 1.
38 Interview with NAALAS solicitor (name witheld) (Darwin, 8 August 2000).
39 This was evident at Tiwi and Wadeye.
40 Cuneen and McDonald, above n 10, Ch 11, 2.
41 Interview with NAALAS solicitor (name witheld) (Darwin, 8 August 2000).
42 Ibid.
43 Hermansburg Bush Court, 28 August 2000.
44 (1976) 11 ALR 412. Embodied by Police General Order Q2 Questioning People Who Have *Difficulties with the English Language - The "Anunga" Guidelines.*

disadvantaged in their dealings with police. They require the use of an interpreter and that questions be phrased so that the suspect understands. The guidelines protect against the suspect's lack of understanding being taken advantage of in recording confessions and admissions.[45]

In the only voir-dire observed during the research at the Wadeye Bush Court, the police record of interview was challenged on the basis that the defendant's English was insufficient to have understood the cautioning of the right to silence; a breach of *Anunga Guidelines*. Ironically, no interpreter was then requested or made available for the administration of the defendant's oath, nor for the questions he was asked by the different people in the court room when on the stand. The defendant was clearly struggling with the questions and each had to be rephrased about four times. It appears that compliance with the *Anunga Guidelines* is rarely ever tested in a Bush Court.

Where there is no interpreter and there is insufficient time to question the defendant properly as to a correct plea, whether a relevant confession complied with *Anunga* cannot be tested unless it is decided that a hearing should take place. According to anecdotal evidence provided by staff of one Aboriginal Legal Service, a particular young indigenous boy was consistently 'framed' for particular offences by local police. His poor understanding of English and the knowledge that at Bush Court there would be little chance he would be able to instruct his lawyer to take the matter to hearing, were frequently taken advantage of by the community's police. Evidence suggested that recorded confessions would often follow this format: the police would ask: 'Did you steal a lawnmower?', then the boy would respond 'Yes I saw a lawnmower' and this would be the basis of the confession.[46] Clearly, scenarios like this leave open paths of exploitation. The *Anunga Rules* which were designed to effect a type of check and balance against such behaviour lose their purpose due to endemic problems in the Bush Court process.

It follows that the defendant's inability to understand the questions of a lawyer who hurriedly takes instructions means the judgment delivered by the Magistrate to the defendant cannot be understood either. One NAALAS lawyer expressed frustration at the fact that Bush Court time constraints do not even allow her time to explain or re-word in simple English to the defendant what the Magistrate's decision actually constituted.[47] On the same day this was mentioned, the attending CLO discovered a young Aboriginal girl standing inside the cyclone fencing that bordered the path around the building in which the court was sitting. She had been there all day, even though her case had been the first of the day and it was now 4.00pm. Despite 'hearing' the Magistrate deliver a decision that her licence was to be suspended, she did not in fact understand this was the consequence. She was not sure if the judge's words meant she was to go to jail or whether she was

45 Butterworths, *Halsbury's Laws of Australia*, vol 1 (31 August 2000) 5 Aboriginals and Torres Strait Islanders, 'IV Criminal Law and Practice' [5-1815].
46 See Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (1995).
47 Tiwi Bush Court, 26 July 2000.

free to leave. Nobody had the time to notice her confusion, let alone clarify her position for her.

Beyond a lack of English, the divide in cross-cultural communication can obscure the meaning of an answer by an Aboriginal client, even if it is given in English. If a Magistrate or Bush Court lawyer has not received sufficient cultural education (currently there are no courses or programs in place to ensure this)[48] they will be unaware that Aboriginal people who do not understand questions in which they are being addressed, or who are intimidated by figures of authority, frequently engage in 'gratuitous concurrence', whereby their cultural politesse is to answer 'yes' where a question is not understood.[49] Further, in many Aboriginal cultures 'silence is a common and positively valued part of conversation, but silence in response to questioning ... may be misinterpreted as indicating agreement with the question or as insolence or guilt.'[50]

An important element in bridging the gap is developing tolerance within the magistracy. Anecdotal evidence tells of a Western Australian Magistrate who interrupted a prosecutor by asking a Bush Court defendant 'What's your name? Well, what is it? Bill? Fred?'. This illustrates the inappropriateness and impatience with Aboriginal defendants' non-understanding and shyness.[51] However it also serves to reiterate the desperate need to reverse the current dearth of qualified interpreters for the different communities visited by Bush Court.[52]

Two pivotal recommendations of the RCIADIC[53] called for legislation in all States and Territories to be enacted obliging courts to supply an interpreter where the English-speaking ability of a defendant is in doubt. Such legislation must include halting proceedings until an interpreter is found, and adopting measures to train and recruit Aboriginal people as court staff and interpreters. In 1994 and 1995, the NT government responded that it had already embarked upon doing so.[54] However, six years after the final report, an ATSIC report in 1997, evaluating practical implementation of the recommendations by the States and Territories, found that the NT was the only Territory which had *not* done so.[55] From the

48 Natalie Siegel, *The Perversions of Justice Resulting from Current Bush Court Procedure: Neglect of the Community/Cultural Context in which Bush Court Law is Administered* (Unpublished Research Report, Monash University, 2001).

49 The Hon Justice Dean Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7.

50 Queensland Criminal Justice Commission, 'Aboriginal Witnesses in Queensland's Criminal Courts' (1996) 1 *Australian Indigenous Law Reporter* 76.

51 The ALS WA Court Officer who was conducting the defence case, requested a transcript of the same proceedings that evening (for the purpose of filing a complaint), only to find the relevant remark deleted. Interview with ALS WA Court Officer (name witheld) (Port Hedland, 17 October 2000).

52 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, art 14(3)(4) (entered into force 23 March 1976). Article 14(3)(4) guarantees a right to 'the free assistance of an interpreter if [a defendant] cannot understand or speak the language used in court'. While Australia has not enacted the ICCPR into its domestic law, it does appear to be negating a fundamental treaty obligation through its failure to address this.

53 Canberra, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, Recommendations 99 and 100.

54 NT Government, *NT Government Implementation Report of the Royal Commission into Aboriginal Deaths in Custody Report 1996/7*, Ch 13.

55 Cuneen and McDonald, above, n 10.

author's research, it is quite obvious that interpreters were rarely available.

According to NAALAS, prior to this research, if any language other than an Aboriginal language was used, the police, the court or the defence lawyer could use a telephone-interpreter service funded by the NT government. However where an Aboriginal language was used, an interpreter had to be independently recruited and NAALAS or the DPP had to pay for its use.

One may expect that, resolution may lie in training particular community members as interpreters in each of the Bush Court locations. However, results gleaned from the current 'Community Based Field Officers' Project (pilot)' in Wadeye may indicate problematic consequences for those already involved. Michael Devery, a NAALAS CLO who instigated and currently coordinates the project in collaboration with the Memlma/Thamrurr elders,[56] enumerated two such dilemmas.

First, the onus is upon the defence lawyer to call for an interpreter where he/she thinks fit. This often fails to occur because the ALS lawyer's cases could not be disposed of promptly if matters were prolonged by calling for an interpreter. Often the lawyer cannot do so because a court interpreter for that language does not exist. Secondly, in situations where an interpreter has been called, the community members who have been trained as NAALAS CLOs through the project, are used by *all* parties to interpret. This places those CLOs in an undesirably compromised position. When community members see their CLOs' services being utilised by the prosecution, the court *and* the defence, this conveys a distorted perception as to 'whose side they are on'. The only solution is for the court to provide and train its own independent interpreters.

VI THE EFFECT OF BUSH COURT CASE-NUMBERS UPON THE QUALITY OF JUSTICE SERVED

Case overload is a fundamental problem at Bush Court. An example of comparative caseload between Bush Courts and town Magistrates' Courts can be demonstrated by the Daly River Bush Court which heard 40 cases on court day,[57] and the Yuendumu Bush Court having scheduled 100 cases on one day,[58] as compared to the Darwin Magistrate's Court which heard only 14 cases.[59]

The case overload at Bush Courts exerts tremendous pressure upon defence counsel to settle. If the ALS lawyer cannot view the police statements,[60] they are unaware of the contents and consequently, can only decide which aspects of the

56 Michael Devery, *Post Workshop Assignment upon the Community Based Field Officers' Project* (Unpublished Report, North Australian Aboriginal Legal Aid Serive, 2000) 1. The Memlma/Thamrurr elders constitute tribal elders of the Wadeye Community.

57 The caseload of Daly River Bush Court, 2 August 2000.

58 The caseload of Yuendumu Bush Court, 31 August 2000.

59 The caseload of Darwin Magistrate Court, 18 July 2000.

60 This is a specific problem at Bush Court. See Natalie Siegel, *Documenting Bush Court: Uncovering Administration of White Legal Process in Aboriginal Communities* (Unpublished Research Report, Monash University, 2000).

defence can be used in argument on a very compromised basis. A Darwin Magistrate expressed disappointment at the fact that many cases over which he had presided should have been run as hearings, but collapsed into pleas because of time constraints. The inability to present relevant individual facts frustrates Magistrates who understand that this limits the Bush Court's justice delivery. The same Magistrate complained that at one particular Bush Court observed, he felt he was 'doing the sort of thing trained monkeys ought to be doing'.[61] He recognised that crucial facts are neglected in many of the cases over which he presides at Bush Court, because time constraints force lawyers to work predominantly from the police papers, and time for taking instructions is meagre.

The average time that Bush Court clients spent with both their lawyer and in court was significantly less than clients using a duty lawyer at Melbourne Magistrates' Court. It was observed that Bush Court instruction time was usually five to 15 minutes, while average Melbourne Magistrates' Court duty lawyer instruction time was 25 to 30 minutes.[62]

Intensifying the problem, Bush Court defendants actually require more time with their lawyer and in court than the general city court defendants often need. The Queensland Criminal Justice Commission verify this. The Commission's Report, *Aboriginal Witnesses in Queensland's Criminal Courts*, points out that '[i]t may often be necessary for lawyers to spend more time with Aboriginal clients ... than they might spend with most witnesses [and clients] ... particularly in remote communities, this is not happening'.[63] Language barriers are an obvious reason for this. However the cross-cultural assumptions that belie communication also contribute to this. For example, Aboriginal community members operate within different frames of reference to mainstream white society.

A *The Sparse Distribution of Lawyers Reduces the Instruction-time Available*

Of the ten Bush Court days observed, there was only opportunity for instruction taking from community members the day *before* court, on four occasions.[64] The remainder of days, instructions were taken on the *day of court*. The day prior to Yuendumu Bush Court, one CAALAS lawyer and the CLO arrived in the community at two o'clock in the afternoon. In light of the one hundred clients to be consulted on the list (not including those people in custody), the lawyer reasoned that if he spent ten minutes with each, it would take him in excess of one thousand minutes (equivalent to 16 hours and 40 minutes) of instruction taking to complete his task before Court began at ten o'clock the next morning.[65]

61 Interview with Darwin Magistrate (Darwin, 27 July 2000).

62 The earlier mentioned interpreter problem is reflected here. In comparison, during the day spent observing a Melbourne Magistrates Court duty solicitor, only one client did not speak English as her first language. However she appeared to understand advice and the legal ramifications better than Bush Court clients, who live every day of their lives in a non-English speaking environment without constant exposure to the 'white' legal system.

63 Queensland Criminal Justice Commission, above n 29, 654.

64 Jabiru, Tiwi, Yuendumu and the day before the consecutive four-day Bush Court circuit in the Port Keats region.

65 Theoretically, starting immediately, the lawyer would finish later than six o'clock the next morning, if instructions were taken consecutively without any break.

The fact that more instruction time is required with Bush Court clients than city clients and the fact that numerous clients are not available to give instructions beforehand, but only on the day of court compound this pressing problem.

At every Bush Court observed, only one lawyer and CLO (or in WA, a Court Officer on his own), conducted defence services for up to one hundred clients. This stands in contrast to the author's experience at the Melbourne Magistrate Court where four duty lawyers shared the load of 15 clients.[66]

VII FACTORS CONTRIBUTING TO HIGH CASELOADS AT BUSH COURTS

The specific dynamics of a community will feature in the type and number of cases presented to the Bush Court. The research revealed the main issues which affected this dynamic included the manner in which policing was carried out over the region (including prejudice in policing), the loss of traditional culture, and the absence of access to rehabilitation programs which are available in urban areas of Australia (especially bail programs). Certain legislation and criminal justice practices which have facilitated abuse of police powers and ill treatment of indigenous defendants contribute greatly to the number of cases on a Bush Court list.

A *Loss of Culture and the 'Status' of Imprisonment*

It was not infrequent that elders in a community complained to attending lawyers that the younger generation no longer respected their elders or the traditional culture of their community. Presumably, issues of identity and the 'limbo' between the two cultures are responsible at least to some extent for young people turning to petrol sniffing and alcohol abuse. A contributory factor was seen to be the boredom the youth face in their communities. Further, some authors suggest that alcoholism is a method of self-medication to mask unresolved or intrusive imagery 'such as hiding from police, being taken away or deaths of family members'.[67] According to Gordon and Nunn, many Aboriginal people suffer from unresolved psychological trauma,[68] and this is actually the cause of the problem's magnitude.[69] Without ceremonies and the direction that traditional Aboriginal culture may give to indigenous youths' lives, any therapeutic effect this may offer

66 Melbourne Magistrates Court (Criminal Division), 7 December 2000. The Victoria Legal Aid (VLA) duty lawyer, whom the author accompanied, explained that while the VLA provides three solicitors normally (as opposed to that day's four), 15 clients shared between that number of solicitors was the usual state of affairs.

67 Quentin Beresford and Paul Omaji, *Rites Of Passage: Aboriginal Youth, Crime and Justice* (1996) 40.

68 N Gordon and P Nunn, *Trauma Healing, Counselling and Transformation* (1992) unpublished. Indigenous therapist, Judy Atkinson discusses the interconnectedness of the trauma suffered by many indigenous people and alcohol abuse in Judy Atkinson and Coralie Ober, 'We Al-li "Fire and Water" A Process of Healing' in Kayleen Hazelhurst (ed) *Popular Justice and Community Regeneration: Pathways for Indigenous Reform* (1995) 3.

69 R Trojanowicz and M Morash, *Juvenile Delinquency: Concepts and Control* (1992) 2.

is lost.[70] With respect to the practical realities, the 'limbo' between cultures is enforced by the significantly fewer opportunities available to indigenous people than to the non-remote living white population. Youth who reject their cultural traditions arguably have neither the benefit of the black nor white world.[71]

One elder complained that his juvenile son, who was scheduled to be in Bush Court that day, was there because of lack of respect for his culture. He lamented that there had not been a ceremony in the Wadeye region since 1995 when there was a 'sober man's riot to bust up the club'[72]. The people of Port Keats have attempted to deal with the alcohol problem by trying a range of methods, but tensions in the community capitulate regardless of the stance taken, whether its presence is controlled or whether it is outlawed altogether in the community. Wadeye is currently a dry community. The last controlled drinking had taken place in 1995, when the non-drinkers of the Port Keats region had rebelled against the drinkers and drinking facilities ('the club') by conducting a riot. However, it is since this time that a ceremony has not taken place. The problem arguably remains because the closing of the club still did not attack the cause of the problem. Detachment from roots and identity, and lack of self-worth (arguably influenced by white interaction with Aboriginal peoples and the media) are still an issue that lead to substance abuse. The elder mentioned that the problem now includes the use of marijuana.

A NAALAS CLO agreed that the marijuana problem is getting 'out of control' in the communities and that the police do not seem to be intercepting its traffic into the community or arresting for its possession, though they seem more prepared to arrest for more minor offences.

Symptomatic of the loss of cultural maintenance and opportunities within the community is the alleged rise of 'prison status'. In one region, anecdotal evidence provided by the corrections officer and Magistrate suggested that a term of imprisonment was becoming akin to an 'initiation right' within the community, and that girls were not considering worthy a boy who had not 'done some time'.[73] Both parties qualified their statements as based entirely upon 'hearsay' evidence.

While it must be acknowledged that 'prison status' may only be the subject of anecdote, such reports are compelling. Later the same day this was mentioned, a young offender received a caution after being awarded a suspended sentence by the same Magistrate: 'you are free to go but I don't want to hear that you did the same thing you did last time straight after you left my court room a free man'.[74]

70 Irene Watson explains ceremony as 'fundamental and central to the lives and general well being of Nungas'. While she is referring to the indigenous people of South Australia, this exemplifies the concept's prevalence throughout all nations of Aboriginal people in Australia - and its essence in providing direction and identity. Irene Watson, 'Law and Indigenous Peoples: the Impact of Colonialism on Indigenous Cultures',(Paper presented at the 50th Anniversary Conference of the Australasian Law Teachers Association, La Trobe University, Bundoora, 1995) 76.

71 Interview with NAALAS CLO (name witheld) (Jabiru Bush Courts, 10 July 2000). Interview with NAALAS CLO (name witheld) (Wadeye Bush Court, 3 August 2000).

72 Interview with community elder (name witheld) (Wadeye, 1 August 2000).

73 Interview with community elder (name witheld) (Wadeye, 3 August 2000).

74 Interview with community elder (name witheld) (Wadeye, 3 August 2000).

At a previous Bush Court sitting in this community the boy had been awarded a mandatory sentence (at the time the relevant legislation was effective in the NT), but while delivering judgment, it was realised that the boy had been mistaken for 15 years of age when he was in fact 13 years old. Therefore, he could not be mandatorily imprisoned for the offence. When the boy was informed of this, he walked out of the court room and picked up a rock, throwing it through the window of a nearby vehicle. He was brought back into the courtroom immediately. Apparently he had been dissatisfied with the fact that he received no term of detention and had decided this action might achieve that end.

In another community, a further example of this 'prison status' was reported. The concept of 'Berrimah Muscle' has evolved, suggested one prosecutor and NAALAS CLO.[75] Berrimah is the name of a detention centre in the Top End of the NT. The youth in the community observe their fellow kin going to jail and notice that when they return they are 'bigger and stronger' than before. The recognition of this operating as an incentive to young male community members actually led to the dismantling of the weights-room at Berrimah Detention Centre.

B *Substance Abuse, Crime and Diversionary Programs*

There are a number of historical, political and sociological reasons why substance abuse is a major problem for many indigenous communities. These are dealt with in detail elsewhere.[76] The intention of this part of the article is to deal with the contribution of substance abuse to the number of cases before the court, and the lack of services, even compared with the most basic substance abuse services that are present in most urban regions of Australia. There is a desperate shortage of appropriate programs in regional Australia. There are many independent mechanisms some communities have implemented as best they can to deal with the issue, such as night-patrols and community by-laws to restrict drinking. Nevertheless, the action communities can take unassisted is limited.

Lawyers from the various ALSs separately commented that were it not for alcohol, most of the assaults on the Bush Court case list would never have arisen. The Magistrate for the Kimberley Region remarked that he 'would be out of a job' if it were not for alcohol.[77]

In the 'Top End' of the NT, Darwin-based alcohol and substance abuse rehabilitation programs have limited application at Bush Court. At the Wadeye sitting observed, a counsellor from the Foundation Of Rehabilitation With Aboriginal Alcohol Related Difficulties (FORWAARD) attended. In the Top End, a Magistrate can grant a defendant bail, in certain Bush Court regions, on the condition that the person reside for three months at the organisation's alcohol rehabilitation program in Darwin. This is the only access these communities have to alcohol rehabilitation and counselling. FORWAARD's involvement was only

75 Interview with NAALAS CLO (name witheld) (Wadeye Bush Court, 3 August 2000).
76 See, eg, Q Beresford and P Omaji, above n 69, 40-47; and Trudgen, above n 7.
77 Interview with Magistrate for the Kimberley Region (Broome, 4 December 2000).

observed at one Bush Court. Throughout the entirety of the NT and WA, no similar programs were available. The FORWAARD program has achieved notable success in the Top End, particularly in kerbing re-offending.[78] It is surprising that moves have not been made in either Central Australia or WA toward providing desperately needed rehabilitation services to remote communities, given that alcohol abuse is a recognised precursor to such a substantial portion of the cases that appear on heavy Bush Court case lists.

At the Hermannsburg Bush Court observed, a high proportion of the cases were charges of driving under the influence of alcohol. The attending ALS lawyer was asked whether in his opinion, those penalised for the charge were actually aware of why 'drink-driving' is illegal, principally those before the court for repeat offences. He commented that it was highly unlikely that these offenders knew.[79]

Driving related offences constituted the majority of cases observed at each Bush Court (other than Wadeye). The substantial portion of these took the form of breach of dry-community by-laws, offending restrictions against bringing liquor. Keeping the community dry is the most pro-active step many communities take in attempting to control the problems of alcohol abuse, since they have not been given the resources or training to educate counsellors and institute their own, more sophisticated, rehabilitation programs.

In the NT, the community council is empowered under s 74 of the *Liquor Act* (NT) to apply for a stipulated region to be declared a liquor restricted area. Under s 75 of the same Act, once this declaration is made it carries the force of law. Ss 7(1)(g) and 7(2) of the *Aboriginal Communities Act 1979* (WA) combined, mirror the effect of these provisions in WA.

Unfortunately the breadth, enforcement and consequences of breach of these by-laws present detrimental problems to Aboriginal community members for whom the declared area was intended to benefit. It also increases the high caseload of the relevant Bush Court.

If a person is found by police to have carried even one can of beer on the floor of their car into a liquor-restricted community, the vehicle will be confiscated permanently and impounded. S 95(1)(d) of the *Liquor Act* (NT) empowers this confiscation to take place and s 96(1) stipulates that once the seizure has taken place, the property is forfeited to the NT. According to s 96(2), this confiscation is to take place *in addition to* and not as part of, the penalty imposed. Visits to the relevant communities will often reveal cyclone-fenced yards adjacent to the police compound holding several vehicles which have clearly been sitting idle behind the fencing for years, presumably having been confiscated for this reason.

The capacity to confiscate a person's vehicle and impound it indefinitely imposes a serious set-back when one lives in a remote community. A CAALAS lawyer who routinely handles such matters at Bush Courts explained that a car is

[78] Interview with FORWAARD counsellor/educator (name witheld) (Wadeye, 1 August 2000).
[79] Interview with attending ALS lawyer (name witheld) (Hermannsburg, 28 August 2000).

absolutely essential, being the method of family transport and often, the only family possession. It is crucial to collecting supplies from nearest towns (often three or four hours drive away) and it has become vital to indigenous social fabric in some areas where movement between communities to visit kin is integral. It generally takes a great deal of effort to accumulate the four thousand dollars for the family to afford the vehicle, yet it can be so readily lost.[80]

The defendant owner often suffers because commonly, even without his/her knowledge, the vehicle will be taken by kin to the closest liquor outlet to collect alcohol. If police apprehend the vehicle upon its return, it is permanently confiscated regardless of the owner's lack of involvement. Both NAALAS and CAALAS lawyers also raised the dilemma posed by a vehicle owner who is asked for the keys to his/her vehicle by someone with whom they are in an 'avoidance/respect' relationship. Cultural laws governing kinship in some areas will make it taboo for the owner to refuse the request, such as when a male is asked by his uncle in Walpirri culture. Therefore, if the vehicle is apprehended for carrying alcohol in this situation, it is nonetheless confiscated, independent of the charge being heard by the Bush Court.[81]

Some pitfalls exist as a consequence of the by-laws. Ironically, the laws are thought to *cause* binge drinking. Rather than controlled drinking (a system operating in some communities that meters out the amount of alcohol allowed to people on any single day), the total absence induces some people to drive to the nearest unrestricted community and consume as much as they can while they have the opportunity. One corrections officer explained that such people frequently do not stay the night in the community or township where they purchase the alcohol, but drive back to their home community intoxicated and will ultimately be charged with driving under the influence of alcohol.

Nevertheless, the by-laws do appear to achieve some purpose. The Daly River Bush Court list appeared to run more assaults than the Wadeye list. While both communities are dry communities, the border of the liquor-restricted area for Daly River is only a 15 minute walk from the Daly River Public Bar. The same corrections officer rationalised the basis for the greater number of assaults on the Daly River Bush Court case-list as Daly River's greater experience of the ramifications of drunken behaviour.

Petrol sniffing is a form of substance abuse that affects a considerable proportion of remotely living indigenous youth. In at least one Arnhem Land community, vehicles use aviation gas (commonly called Avgas) because of the problem's severity. Youth will not infrequently come into contact with the criminal justice system while under the influence of the petrol fumes, or in efforts to gain access to petrol for sniffing. The author's own experience in taking instructions from a defendant who has been a consistent 'petrol-sniffer' demonstrated the difficulty in interviewing such a client at a Bush Court. In a client interview at Yuendumu

[80] Comments made by attending solicitor at Yuendumu Bush Court (name witheld) (Yuendumu, 30 August 2000).
[81] Ibid.

Bush Court, the defendant gave two totally different accounts of the facts, claiming that both were true. The irreversible brain damage caused by petrol sniffing had apparently begun to manifest.

One of the co-ordinators of the Mount Theo Yuendumu Substance Misuse Aboriginal Corporation (MYSMAC) explained that no mental health services will assist petrol sniffers because, the services argue, their guidelines only extend the scope of their care to the mentally ill, and not to those suffering irreversible brain damage.[82] When a 'petrol sniffer' is faced with pleading to an indictable offence, the court sees the person as incapable of participating in the process. The coordinator complained that if the person offends as a result of not being able to receive any medical or psychological assistance, it will be the problem of the court, which normally deems them unfit to plead and the cyclical problem remains.

Despite the enormity of the problem, there is not a single Northern Territory funded petrol-sniffing program. MYSMAC runs the only program dealing with petrol sniffing, funded by the local Aboriginal co-operative itself. The Commonwealth government provides sporadic funds, but not enough to keep the program running from the outstation for 12 months a year. The program, because of its proximity to Yuendumu Bush Court, can be used as a conditional bail program. The program began as a community initiative undertaken in 1994 in response to a number of deaths that had occurred due to petrol sniffing. This one small organisation can only accommodate the sniffers in the Yuendumu region. The remainder of communities in the NT and in WA have no such access. ALS lawyers commented that efforts made towards such programs elsewhere have been voluntarily run and as such, could only ever operate for short duration.[83] As a result there is no dissemination of even the most basic education upon the inherent dangers involved with petrol sniffing.

The effects of petrol sniffing unfortunately leave open the floodgates for abuse of the criminal process, particularly in policing. A boy from a community in Arnhem Land is known amongst ALS staff for being apprehended by police when he is under the influence of petrol fumes to make confessions about various alleged offences. The comparatively scarce opportunities to properly challenge *Anunga* at Bush Court aggravate the injustice.

Programs to offer remote Aboriginal community members alternative activities and opportunities are important in this respect. This is the intention of the diversionary programs awardable by police, where juvenile offenders are involved. Section 120H of the *Police Administration Act 1979* (NT) empowers police to refrain from charging a juvenile with an offence, by instead (inter alia) referring him/her to a diversionary program. Anecdotal evidence suggests that ever since a NT government action to divest responsibility for the program to

[82] Comments made by the then coordinator of MYSMAC (name witheld) (Yuendumu, 31 August 2000).

[83] Comments made by CAALAS solicitors (Yuendumu and Hermannsburg, 28 August 2000 and 30 August 2000 respectively).

community councils, the diversionary program at least in one community, is void of content.

C *Literacy's Effect Upon Bush Court Caseload*

Numeracy and literacy are critical skills to survival. Lack of these skills contributes immensely to non-understanding of why a person is before the court and court process itself. This in turn leads to feelings of disempowerment. Community members can feel that regardless of their actions, they have no control over when or why they will interact with the criminal justice system.

At an initial level, basic numeracy skills are required to be able to budget and ration out the 'CDEP' cheque ('work-for-the-dole' wage), which is the only available income source to many remote community dwellers. Some CLOs mentioned that cases before the court involving young boys who had broken into easy targets such as school canteens to steal basic food items were most likely a direct result of the fact that the family's cheque had been spent several days earlier and the next one was not due for a fortnight. Unless adequate numeracy and literacy education is ensured, it is unrealistic to expect adults to be able to budget the CDEP cheque sufficiently to cover them for the entire fortnight. This is particularly so when dealing with cultures where the idea of surplus storage is not a familiar concept. In some communities, the sole community store charges such exorbitant prices that it would be virtually impossible to ration CDEP cheques over two weeks in any event. For example, at one point in May 2000, in the community of Guliwin'ku (Elcho Island, Arnhem Land) a fried chicken cost fifty dollars.

Compounding this is differing concepts of time between indigenous and non-indigenous culture. We may understand that 280 dollars over two weeks means a budget of twenty dollars per day, however we also understand a 'fortnight' as a meaningful period. This is a western numerical/time concept. A NAALAS lawyer explained that if, for example, a Wadeye client receives a 12 month sentence, the person will not understand this unless the lawyer interprets this for his client as 'getting out next wet [season]'.[84]

The Australian legal system presumes its adult subjects are literate. Imposition of fines (see below) and adjournments (for a plethora of reasons) are based on the expectation that the defendant will be able to read and understand a particular notice. Due to the time constraints at Bush Courts, adjournments are frequent.[85] When this occurs, one of the two court orderlies who has accompanied the Magistrate will hand the defendant a slip of paper informing them when their case is next scheduled. In Central Australia, the orderly hands the slip to the defendant in silence, however in the Top End, it was noted that orderlies actually read the slip to the defendant. The practice in the Top End of doing this should be followed in Central Australia in order to justly expect re-appearance. This minimum standard presumes that the defendant has sufficient English to understand what is said by the orderly and sufficient familiarity with 'white' concepts of time.

[84] Comments of NAALAS solicitor (name witheld) (Wadeye/Daly River Circuit, 4 August 2000).
[85] Of the 40 cases observed at Daly River Bush Court, on 2 August 2000, 22 were adjourned.

Fines imposed by a Bush Court Magistrate are administered in a similar way. The ramifications for failure to pay are severe. Fines imposed by police are often issued by mail which again, presume the equivalent level of literacy. In both the NT and WA, illiteracy (combined with financial hardship) frequently results in jail terms for indigenous people. The issue of fine default is dealt with below, however it is worth mentioning at this point that Commissioner Elliott Johnston, in his final report to the RCIADIC, found that almost 40 per cent of all Aboriginal people in custody nationally, over a one month period, were there for fine default.[86]

It was observed that the level of literacy and English decreases, the younger the generation. Comments by a Darwin Magistrate, by some community members and the observations of the author reflected fluent English amongst the older generation, which markedly decreased to the point where people in their young twenties spoke next to no English at all. The Darwin Magistrate argued that the education system in place for Aboriginal people was in decline as a result of the bilingual schooling system which has affected the last two generations of community members.[87] He said that previous to this policy, children were compelled to communicate in English at school and could then return home to speak in their native languages. It appears the NT government have officially recognised this fact although the policy has not changed. In its 1996/7 submission documenting its implementation of the RCIADIC report, the NT government recognised that 'among the older generation there appears to be a greater understanding of English than is the case for people under 50',[88] and that this evidence was supported by the findings of the Public Accounts Committee Report on the Provision of School Education Services for Remote Aboriginal Communities in the NT (hereon 'the Committee Report').

The government recognised '[t]he most disturbing finding' of the Committee Report, to be the 'extremely poor levels of literacy and numeracy' and acknowledged that the average school retention rate in remote Aboriginal communities is grade three (age eight to nine in urban schools).[89] It then attributed blame to the lack of Commonwealth funding for the NT Department of Education, rather than the need to return to the policy that was implemented when the older generation were schooled. [90]

When the issue is inextricably connected with justice deliverable as described above, including being partially responsible for the burdening caseload upon the Bush Court, it seems the problem of Aboriginal over representation in the system cannot be divested of the need to address these educational issues. Without numeracy and literacy, Aboriginal community members are at a vast disadvantage before a justice system that presumes such skills.

86 Canberra, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 207.
87 Interview with Darwin Magistrate (Wadeye, 1 August 2000).
88 NT Government, "Interpreter and Translator Services", *RCIADIC NT Government Implementation Report 1996/7*, "Interpreter and Translator Services", p1.
89 Ibid.
90 Ibid.

D *Driving Offences Predominantly Congest Bush Court Caseload*

At every Bush Court attended in the NT, driving or car related offences were the most common case-type. At Hermannsburg Bush Court, every case involved a 'drive-related' offence. Statistical analysis of the Bush Courts visited compared with cases involving white defendants observed in the base-town courts[91] evidenced that this phenomenon was peculiar to Bush Court cases and Aboriginal defendants. The offences included within this category constituted 'bring liquor into a restricted area', 'drive unlicensed', 'drive unregistered', 'drive disqualified' and 'drive under the influence'. The majority of cases heard in all town-based courts involving non-Aboriginal defendants involved more serious charges.[92] The observations lent themselves to a perception that police were not prosecuting in entirely good faith in Aboriginal community settings, and that some offences where police would normally caution a white person, were consistently the subject of fines at Bush Courts. This severely increases the caseload the court must bear, consequently affecting the justice that can be done in each case. It also adds to the cycle of over representation of Aboriginal defendants.

In WA, a similar pattern emerged. 'Urinating in a public place' and 'drunk and disorderly' appeared to be common charges at both the Marble Bar Bush Court and even the Port Hedland Court (when presided over by Justices of the Peace in the Magistrate's absence). Indigenous legal field research conducted by Greta Bird also concludes that criminal charges against Aboriginal people are 'overwhelmingly public order offences'[93]. At the Alice Springs Magistrates' Court, only two of the 18 Aboriginal defendants processed by the Court in a morning were charged with an offence other than a 'drive-related' offence.

In response to these observations, a NAALAS lawyer argued that while racist policing does occur, it must be remembered that 'it's easier to catch culprits in a remote community setting'.[94] Indigenous criminal law authors and researchers appear to substantiate the position.[95] However, it is arbitrary whether one ALS lawyer's suggestion, that more serious offences are capable of being committed in a city or town-setting, is actually plausible.

The cultural norms mentioned earlier also impose a predicament for Aboriginal people who have been charged with these offences in an indigenous community. A person who would not normally drive due to a suspended licence or disqualification would be subject to enormous pressure if asked to drive by a kinsman with whom an avoidance-respect relationship is shared. It would be culturally taboo for a person to refuse their mother-in-law's request to drive in some Aboriginal cultures, even if forbidden to do so by the court. Further, these

91 Darwin, Alice Springs and Port Hedland Magistrate Courts.
92 The 'over-prosecution' of Aboriginal people for minor public order offences is also recorded in Chris Cuneen, *Conflict, Politics and Crime, Aboriginal Communities and the Police* (2001); and in the Victorian context see Gardiner, above n11.
93 Bird, above n 4, 4.
94 Interview with NAALAS lawyer (name witheld) (Darwin, 17 August 2000).
95 See Faye Gale, Rebecca Bailey-Harris, and Joy Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice* (1990); Cuneen, above n 94, 37.

requests may extend to asking the defendant to drive another car, one they are not aware is unregistered.[96] Even where a Magistrate does possess such cross-cultural consciousness, the court relies upon the lawyer's presentation of that extenuating circumstance. If Bush Court time constraints preclude a lawyer's ability to obtain the full set of facts, as most often happens, the matter may not even be considered. This may also hinge upon whether the lawyer is culturally sensitive enough to question its existence, and whether the lawyer has time to follow the issue through.

E *The Effect of Different Policing Standards on the Bush Court*

It is controversial whether alleged malicious or racist policing leads to the soaring number of drive-related charges for which it was observed fewer white people are charged. However evidence supports this argument's validity and it is submitted that this would then constitute a specific cause of massive Bush Court case-lists.

Certain WA legislation can be extremely prohibitive in an Aboriginal community context, and police enforcement of that legislation creates further problems. The system established by the WA fines enforcement agency ensures that if a person receives a notice to pay *any* type of fine and fails to pay within 28 days, they receive a notice instructing them that their licence is suspended from that day, until the fine is paid[97]. The WA Law Society states that motorists have been jailed for driving under suspension (if caught doing so a second time) after losing their licence over offences as trivial as owning an unlicensed dog[98].

The Magistrate for the Kimberley claims that this law is entirely unworkable in the remote community setting. Common law authority obliges him to consider imprisonment after the third or fourth offence of driving under suspension. The Magistrate explained this law may be appropriate in Perth where there is public transport, but it is not appropriate in Bush Court communities. He comments that if he bound himself strictly to enforce this in his court room 'towns in the Kimberley wouldn't exist'.[99]

As mentioned earlier, due to low levels of literacy in remote communities, these notices will often be received with no comprehension of their content by the recipient. Therefore, the Aboriginal person in default of their fine, may be driving on a suspended licence without even knowing that it has been cancelled. One ALS WA lawyer explained that sometimes the fined amount is one thousand dollars for driving under the influence or two thousand dollars for a second offence. Such amounts, he says, 'are incapable of ever being paid off by these people, meaning their licence is as good as permanently gone'.[100]

96 ABC Radio National, *Bush Court*, The Law Report, 14 August 2001.

97 Interview with ALS WA lawyer for the Carnarvon Region (name witheld) (Carnarvon, 26 October 2000). See also Jim Kelly, 'Jail Risk for Fine Defaulters', *The Sunday Times* (Perth), 12 November 2000, 3.

98 Kelly, above n 99.

99 Interview with Magistrate for the Kimberley Region (Broome, 4 December 2000).

Do police more readily stop a driver with 'a black face rather than a white face' to check a car's registration or driver's licence? If so, does this result in a higher incarceration rate? Lawyers in both WA and the NT submitted that this practice does occur and it directly impacts upon the caseload of the Bush Courts.

An ALS WA lawyer[101] and a Court Officer[102] (each from different regions) separately dubbed WA 'the police state'. The lawyer painted the following scenario of his own observations:

> [p]olice have very wide ranging powers in WA, and they use them. For example with 'drunk and disorderly conduct', police can now detain someone who is drunk 'for their own welfare'.[103] But what classifies as 'drunk'? It's up to the policeman. A lot of the time they just take anyone. Also, often they will see someone [Aboriginal] and they will say "you're drunk, get in the back [of the police-car]". The Aboriginal person will say "no I'm not, leave me alone". The police will persist and the person will say "Fuck off, leave me alone". The police will then grab them and they end up getting charged with assaulting a police-officer. ... Things escalate from nothing that really should really stay as nothing.[104]

Similar legislation and associated problems exist in the NT and these are discussed below. According to ATSIC, the ALS WA lawyer's observations and the argument that police intervene far more frequently and for more minor offences where an Aboriginal person is involved, is substantiated by the RCIADIC Report.

> An assessment of the literature in the area shows general agreement that police intervene in situations involving Aboriginal people in ways that are unnecessary and sometimes provocative. The RCIADIC has noted the importance of discretionary issues in the process of criminalisation, particularly in relation to minor offences.[105]

The Commission went on to say that while no empirical proof can be provided for the argument that 'police consistently use their discretion to intervene adversely in situations involving Aboriginal people where the same behaviour ... would be ignored if it involved non-Aboriginal people', data from a range of authorities and ongoing complaints strongly suggest that 'discretion is used adversely in this regard'.[106]

Sparse distribution of police represents a problem that is converse to the issues mentioned above. This can greatly reduce the number of cases on a Bush Court

[100] Interview with ALS WA lawyer for the Carnarvon region (name witheld) (Carnarvon location, 26 October 2000).
[101] Ibid.
[102] Interview with ALS WA Court Officer (name witheld) (Port Hedland, 4 October 2000).
[103] Ss 53A and 53D of *Police Act 1892* (WA).
[104] Interview with ALS WA lawyer for the Carnarvon region (name witheld) (Carnarvon, 26 October 2000).
[105] Cuneen and Mc Donald, above n 10, Ch 3.
[106] Ibid. See also Beresford and Omaji, above n 75, 70-1.

list. The Tiwi Islands are composed of Bathurst and Melville Island. The major communities on both islands are Nguyu, which is on Bathurst Island and Pulurumpi (Garden Point) and Milikapiti, which are both on Melville Island. However, the only police station is at Nguyu. In Milikapiti, where a NAALAS CLO maintains the crime rate is highest, 'the police' is constituted by one female Aboriginal Community Police Officer (ACPO) acting alone, without a radio.[107] Until two and a half years ago she was forced to police the community on a bicycle, and only received a vehicle after a great deal of petitioning. These restrictions clearly limit the policing that can take place, in addition to the potential dangers such a police officer may face.

This may be one reason why only a few clients come from Milikapiti when the Tiwi Bush Court circuit is held at Nguyu. Similarly, a CAALAS CLO explained that the Mutijulu Bush Court caseload often consists of only ten cases.[108] Arguably this is because of individual community dynamics and a small population size, however the fact there is also only one ACPO stationed there may be relevant.

According to a Darwin police prosecutor, another obstacle facing community police is the lack of legislative provisions or procedures to cover transport of defendants between communities and outstations for Bush Court.

> In the old days, there might be someone in a community 100 kilometres from [the] town [or community centre where Bush Court is being held]. Then it was bad luck if that person couldn't get himself into town - a warrant was issued. These days a cop will find a reason to go out to that community and while there, offer to give the defendant a lift into town. ... But a police officer can get into trouble for this. If the car rolls over, for example, he has no cause to have that person in his custody.[109]

Police further jeopardise their independence, he says, in circumstances where for example, a man is banned from Jabiru for beating his wife and so moves to Darwin, but is still required to appear at the Jabiru Bush Court (approximately three and a half hours drive from Darwin). There are no provisions of any type to facilitate his court attendance. If he cannot make it independently to Jabiru,

> ... [and] police do give him a lift, and the accused says something on the way, the police are forced to reveal this to the prosecution when they arrive [at Bush Court] and then nine times out of ten it will be knocked-back for admissibility because it wasn't recorded.[110]

This author did not observe any defendants arriving at Bush Court escorted by police. A Darwin Magistrate sitting at the Wadeye Bush Court stated that transport for defendants from outstations and communities surrounding the Wadeye region still relied upon the issue and execution of a warrant for their non-

[107] Interview with NAALAS CLO (name witheld) (Tiwi Bush Court, 26 July 2000).
[108] Interview with CAALAS CLO (name witheld) (Yuendumu Bush Court, 31 August 2000).
[109] Interview with Darwin Police Prosecutor (name witheld) (Darwin, 18 July 2000).
[110] Ibid.

appearance before they had the means of arriving at the Bush Court.[111]

Relating to police transport, the manner in which Bush Court defendants are transported (if they receive a sentence of imprisonment), to the jail in the nearest township arguably violates basic human rights.[112] Both in WA and the NT there are no seats or seat-belts for the passengers in these cage-backs. A NAALAS solicitor at a different Bush Court mentioned he had previously attempted to challenge this practice, but was dismissed by authorities.[113]

Adjournments at Bush Courts are prolonged and increased by the problem of police apprehending the 'wrong person'. Lack of adequate communication between police and community members reduces the opportunity for this to be discovered earlier than when the actual case is being conducted in the Bush Court. At the Oenpelli Bush Court, a young boy was interviewed by the NAALAS lawyer, using the boy's father as translator. It was only the minute before the case was taken into the Bush Court that the lawyer realised police had brought the wrong boy into custody and that the charges actually related to the boy's brother. NAALAS and CAALAS lawyers agree that this circumstance is not rare.

Police reluctance to hand over charge-related documents (such as a defendant's priors, the precis and witness statements) is a fundamental procedural problem.[114] An ALS WA Court Officer remarked that he often whispers across the bar table to the prosecution to see the priors, having been unable to access the documents earlier. On occasion, when shown to the defendant, it is discovered that the documents relate to a different person with a similar name. In addition, some Aboriginal people use two names. Because police processes do not cater for this, two different defendants of the same or similar names may have their previous offences confused, or the two sets of records may be merged. These procedural inaccuracies lead to a severe miscarriage of justice, and of course further diminish the available time for the Bush Court to deal with the day's scheduled cases.

[111] Interview with Darwin Magistrate (Darwin, 27 July 2000).

[112] On departing from the Yuendumu Bush Court, the police car in front of the vehicle in which the author travelled, carried four prisoners lying on the floor of the caged back, without protection from the cold desert night or the immense amounts of dust that a vehicle's wheels project into the cabin along a dirt road. The four people had one blanket between them. A NAALAS lawyer commented that he was also constantly appalled at the treatment of Aboriginal Community Members who are held in police custody until Bush Court arrives. When he arrived at one police station, the defendants had been persistently asking for a blanket during the night. The request was not met until the lawyer directly approached police.

[113] Comments of NAALAS solicitor (name witheld) (Wadeye Bush Court, 3 August 2000).

[114] See Siegel, above n 4.

VIII THE LEGISLATION AND PRACTICES THAT PERVERT BUSH COURT JUSTICE

Entwined in the issue of policing and the potential for racist policing, is the legislation that facilitates open abuse of police powers. Such legislation contains provisions that can be manipulated to carry out discriminatory motives. These issues not only escalate Bush Court caseload and minimise the justice that can therefore be done in other cases, but provide outright avenues for human rights abuse.

The earlier mentioned WA provisions that empower police to detain people who 'they think are drunk', and its consequent exploitation, is unfortunately repeated in the NT. Under s 128(1) of the *Police Administration Act 1979* (NT), a police officer may take into custody a person whom he/she has 'reasonable grounds for believing ... is intoxicated'. S 127A simply defines intoxication as being 'seriously affected apparently by alcohol or a drug'. Practically, there is no objective criteria for what qualifies as 'very seriously affected by alcohol'. For example, there is no breath analysis requirement that police must measure a specific blood alcohol content before a person can be taken into custody. One lawyer commented:

> the power doesn't mean the person can be arrested if they have had one can, it doesn't even mean they can be arrested if they are drunk, the provision means the person has to be *very seriously affected by alcohol*.[115]

Despite this, Aboriginal people are persistently apprehended for being far below this criterion. Moreover this empowers police officers to effectively arrest without a warrant. In the absence of checks on this power, there exists scope for exploitation.

The author's own observations of the power's abuse in action, are re-affirmed by the experiences of one CAALAS lawyer. His Aboriginal client recounted being approached by police and ushered into the caged back of the police vehicle after having consumed one can of beer. The man reacted to the police orders by saying that he would not get into the vehicle unless they breathalysed him to verify that he was 'very seriously affected by alcohol'. The man's request was refused and he was put into the 'cage-back'. A series of apparently malicious actions followed as a result of the man's challenge. On arrival at the station, the man was ordered to remove all his clothes. He was then put in an isolation cell, in full-view of female Aboriginal prisoners, for whom it was culturally forbidden to see the initiation scars he bore on his naked body. This was the equivalent of a 'big shame job'. The man said the police then spent a period of time yelling insults and obscenities at him through the speaker inside the cell.[116]

Similarly, racially motivated abuse of power is facilitated by legislation authorising police to sustain detention of a person without their being able to

[115] Comments of CAALAS solicitor (Yuendumu, 30 August 2000)
[116] Ibid.

exercise a right of habeas corpus. Division 2A of the *Justices Act 1928* (NT) when introduced in the 1980s, created a series of offences for which 'on-the-spot' fines could be issued. The imposition of these fines was entirely at police discretion. The legislation required no proof that the alleged offender had committed the offence, and police officers could enforce one of the prescribed fines, whether the offence had been committed or not. Over time the Act has been extended to cover an extremely broad range of offences.[117]

As described earlier, given the socio-economic context of most indigenous people, particularly those living in remote communities, very few of those to whom the fines were issued had the ability to pay them. The inherent problem with the law subsists in s 60E of the *Justices Act 1928* (NT), which prescribes a person's immediate incarceration if they have failed to pay within 28 days of the fine's issue. According to CAALAS, given that most of the people fined were Aboriginal, offenders would be jailed without ever having come before a court.

Clearly this legislation goes against the intentions manifested by the recommendations of the RCIADIC. In 1999 CAALAS lawyer, Mr Kim Kilvington conducted a test case on behalf of a client who had been the subject of an unpaid fine and who was at that point, suicidal in custody.[118] Mr Kilvington had several suicidal clients who were in custody as a direct result of this legislation and its exploitation. Mr Kilvington based his arguments before the Magistrates' Court on the basis that it is unconstitutional for police to execute a warrant remanding people in custody without the accused having an opportunity to defend whether or not the offence had in fact been committed.

Mr. Kilvington successfully achieved a decision that blocked the effect of any warrants that might be issued in the future under Division 2A of the *Justices Act 1928* (NT).[119] The case run by CAALAS has already taken dramatic effect. According to the organisation, it has resulted in reducing the number of all women in custody in the NT by 50 per cent.

Nonetheless, the legislation is still in force. This illuminates the need for ALS' to possess a workload manageable enough to enable them to challenge laws that dispense racist and oppressive effects. Without such an ability, ALS' can only provide 'band-aid' measures to clients who fall victim to the legislation.

Recommendation 105 of the RCIADIC Report implores recognition by governments that '[t]he role of the Aboriginal Legal Services includes investigation and research into areas of law reform which relate to the involvement of Aboriginal people in the system of justice in Australia.'[120]

The above example of ALS action to challenge a draconian law, ripe for exploitation, is a genuine example of how an ALS' ability to devote time and

[117] *Justices Act 1928* (NT) ss 60A, 60B.
[118] *Drover v NT & Ors* [2000], Northern Territory Supreme Court (Unreported, 25 August 2000).
[119] Ibid.
[120] Canberra, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, Chapter 22.

effort to a policy role can ultimately lessen the case-burden upon it. An ALS can do little of this important and broader work, while overwhelmed by the structural impediments of the Bush Court circuit. Yet, responsibility for this must be shared and executed equally by the law makers and territory and state law reform commissions.

IX THE PROBLEM OF THE WESTERN AUSTRALIAN JUSTICE OF THE PEACE COURT

The common usage of Justice of the Peace (JP) Court is specific to WA. A JP Court will be convened in two situations. First, where the sole Magistrate who conducts court for the region is away on Bush circuit, two Justices of the Peace (JPs) will preside over matters scheduled for that day in the court where the Magistrate is usually based. Secondly, in a circuited township, a JP Court will hear matters until the day the Magistrate arrives on circuit. In the Aboriginal community of Burringurrah,[121] plans are currently underway to convene a JP Court of community member JPs, whereby the Magistrate visits monthly, only to adjudicate matters over which the JPs have no authority to deal, or that are being appealed.

The general jurisdiction of JPs over summary offences derives from s 20 of the *Justices Act 1902* (WA). Leave of appeal from any decision made by a JP Court, to the 'proper' court is available under s 184 of the *Justices Act 1902* (WA). There are no specific criteria as to who may be appointed by the Governor as a Justice of the Peace (see s 6 of the *Justices Act 1902* (WA)).

No formal training of JPs exists. It is the responsibility of the region's Magistrate to provide some type of training. The legal knowledge attained by JPs, at least in Port Hedland, exemplifies the perils of insufficient formal education. One ALS WA court officer commented that even with the most common charges, he was still forced to direct JPs to the relevant legislation and provision under which the penalties fell and instruct the JPs as to the usual penalty.[122]

The same court officer noted that the bulk of defendants appearing before the JP Court are Aboriginal. Research undertaken by ATSIC into the implementation of the RCIADIC report confirms this. ATSIC also found that the lack of qualifications and inadequate level of training of JPs, complained of by the RCIADIC in 1991, remained.[123]

The RCADIC Report placed particular concern on the use of JPs at Bush Courts until the Magistrate's circuit arrived to conduct the court. It was argued that these

[121] Gascoyne region of WA.

[122] Author's observation of the JP Court attempting to award a fine where a Community Based Order is normally awarded. When the Court Officer pointed this out to the presiding JPs, they revoked their decision and applied the appropriate penalty upon his advice. In every case, the court orderly was consulted regarding legislation and procedure of several other matters. Author's observations of Port Hedland JP Court, 17 October 2000.

[123] Cuneen and McDonald, above n 10, Ch 11.

courts were presided over by non-Aboriginal people who had a vested interest in keeping Aboriginal people in a subservient position. While the present research found that this still seems largely to be the case, there is now one female Aboriginal JP who presides over the Meekathara Bush Court.

Pertinent to suggested incompetence and racist attitudes of JPs, is their ability to award crippling penalties, especially periods of imprisonment. While in practice it is not common for JPs to award a sentence of imprisonment, they have done so previously[124] and they are technically empowered to do so under s 150 of the *Justices Act 1902* (WA), although as mentioned, such a decision may be appealed.

The RCIADIC found that JPs tend to remand Aboriginal people in custody at a far higher rate than professional judicial officers do.[125] It came to the Commission's attention that many JP's failed to use the non-custodial sentencing options that are more frequently used by such officers.[126]

According to ATSIC research, the WA government has refused to implement the RCIADIC's recommendations that the use of JPs be phased out, despite RCIADIC's conclusion that 'the continued use of Justices of the Peace to determine charges and impose penalties results in the denial of human rights of Aboriginal people to equal access to the law'.[127]

Arguably, eliminating the use of this type of JP court is beneficial. However, it is submitted that this should not be extended to eliminate the use of the Burringurrah JP Court, whereby Aboriginal community members sit in judgment over their own community. In this way, lack of cultural awareness by JPs can be remedied to some extent. Further, such an Aboriginal JP court can alleviate the Bush Court load, by minimising the number of cases that need to be appealed when the Magistrate circuits.

X CONCLUSION

It appears that the major barrier to the disposal of comparable justice at a Bush Court, is caseload and the time constraints in which cases must be completed. While the Office of Courts Administration could implement simple shifts in policy to relieve this burden, legislation and police practice produce circumstances which enlarge Bush Court case numbers.

Governments should not, and should not be seen to be, vindicating inferior justice for Aboriginal people. That these people do not have access to normal urban services because of remote habitation should not diminish the quality of justice they receive. In many respects, the services some remote communities should be

[124] Interview with Port Hedland ALS Court Officer (name witheld) (Port Hedland, 17 October 2000).
[125] Canberra, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, Chapter 22, Recommendation 98.
[126] Ibid.
[127] Cuneen and McDonald, above n 10, 3.

receiving should be more intensive than urban services. For example, in a community setting, some form of witness protection program is crucial due to how closely members live with each other. However, there is not a single witness-protection program in any of the communities. This then perverts the course of justice as it deters witnesses from coming forward at all for the purpose of a Bush Court.

The combined effect of absent legal services and a court system that operates under dramatic constraints, for people to whom the system is entirely foreign, legitimises conclusions like that of *The Regional Report of Inquiry Into Individual Deaths In Custody In Western Australia*:

> It would be wholly unacceptable if the socially and economically disadvantaged in remote areas should be further disadvantaged by the delivery of a third-rate legal system, permitted largely because they were politically powerless and therefore could be considered "out of sight, and out of mind".[128]

The findings of this research are consistent with many of those of the RCIADIC, which was concluded over 10 years ago. Despite the fact that a number of implementation reports have been produced by the various governments with respect to changes they have made to address indigenous over-representation in the justice system, very little has changed.

Reconciliation is high on the political agenda at the moment, but the term is empty without a genuine and concerted effort to address the crises, particularly in criminal justice, that are faced by Australia's indigenous people. If government and law-makers persist in allowing a sub-standard court system to govern Aboriginal people, we cannot expect the tragic and unjustified over-representation of Aboriginal people in custody to diminish. This research establishes that the Bush Court system and the factors that contribute to its over-bearing caseload be met with strategic solutions, as soon as possible.

[128] Western Australia,The *Regional Report of Inquiry Into Individual Deaths In Custody In Western Australia* Volume 1, 1991, at 4.2.5.2, 'Fine Defaults and Community Work and Development Orders'.