8. YOUNG ABORIGINAL PEOPLE AND THE JUVENILE JUSTICE AND WELFARE SYSTEMS (RECOMMENDATION 62)

Chapter 14 of the National Report recognised the overwhelming number of juvenile Indigenous people who make up a large proportion of the total custodial population. The chapter emphasised the variation existing between the eight States and Territories in relation to the legislation, policies and procedures governing youth offences. Recommendation 62 seeks to ensure that offences committed by Indigenous juveniles are dealt with in a model of justice which is based on welfare and rehabilitation, taking into account personal circumstances and the needs of the individual. Related to this, Recommendation 62 also recognises the importance of reducing the rate of separation of Indigenous juveniles from their communities.

Recommendation 62: That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

This Recommendation evolved from various high profile cases involving the deaths of Indigenous juveniles in custody. The RCIADIC found that these deaths were part of a greater issue; the over-representation of Indigenous youth in every level of the juvenile justice system throughout Australia, from apprehension to the final stages of adjudication and dispositions. The RCIADIC examined the common reasons which led to offences by juvenile Indigenous people, in the criminal justice system, and found that the system was prejudicial to the Indigenous youth offender.

It must be noted that Recommendation 62 is not necessarily appropriate for implementation in legislation or policy in accordance with its terms. Nonetheless, this Chapter examines the extent to which, at a broad level, the Recommendation has been implemented by the Federal, State and Territory governments.

1. Commonwealth
The Commonwealth government does not appear to have implemented this Recommendation. This is perhaps not surprising, as the nature of the Recommendation does not allow it to be tangibly incorporated into federal legislation - the issues it addresses are fairly characterised as within the jurisdiction of the States and Territories.

The former Department of Education, Employment and Workplace Relations (now the Department of Education and Training and the separate Department of Employment) has various initiatives in place to 'close the gap' on Aboriginal and Torres Strait Islander disadvantage. The Commonwealth government has undertaken various other initiatives to 'close the gap' and, arguably until recently, has consistently invested in and allowed for new initiatives in its budget. However, these measures are not implemented in response to Recommendation 62, and do not specifically address a reduction in Indigenous juvenile offenders.

2. Tasmania

Recommendation 62 has not been wholly implemented into legislation in Tasmania. Part 2 of the Youth Justice Act 1997 (Tas) is aimed at diverting, where appropriate, youth from the courts' criminal justice system, and so is consistent with the Recommendation albeit not specifically directed at Indigenous youth. For Indigenous youth, it is possible for formal cautions to be issued by an elder or a representative of a recognised Aboriginal organisation.

Otherwise, the criminal justice aspect of Recommendation 62 has to some extent been implemented by Tasmania Police, in their Aboriginal Strategic Plan. The objective of the plan is to encourage greater cross-cultural understanding and to involve Indigenous people in decision making and problem solving processes. Some of the strategies involved directly address the Recommendation by encouraging

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1 Examples of 'Closing the Gap' initiatives include: Remote Jobs and Communities Programs; Indigenous Wage Subsidy; Employment Services Procurement Information; Indigenous Schooling; Indigenous Youth Leadership Program; National Partnership on Youth Attainment and Transition; Indigenous Australian Government Development Program; Indigenous Cadetship Program; Indigenous Opportunities Policy; Indigenous Remote Service Delivery Traineeships; Indigenous Youth Mobility Program; ABSTUDY; “Learn Earn Legend” initiative; Improving School Enrolment and Attendance through Welfare Reform Measure; Australian Indigenous Education Foundation Scholarship Program; and various other initiatives.

2 For example, specific contributions aimed at 'closing the gap' in respect of the 2012-2013 Federal Budget. Some new spending, was announced in the 2014-15 Budget, but this was relatively short term due to the Abbott Government's intention to review Indigenous programs. Cuts to Indigenous programs were also made. This government has not provided a specific Budget paper on investments to Close the Gap (in contrast to the previous government).

3 See section 11 of the Youth Justice Act 1997 (Tas).


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communication between Tasmanian Police members and the Indigenous community through pro-active consultation and dialogue to identify critical issues and develop a mutual understanding.\(^5\)

The Plan has a number of strategic focus areas, which are supported by objectives, tailored strategies and performance indicators. The objective of the strategic focus area 'Improving Safety in Custody' is to 'reduce the number of Aboriginal people who are detained in custody and provide a safe environment for those for whom a viable alternative is not readily available'. Although not targeted at Indigenous youth, this plan is consistent with Recommendation 62. One of the strategies within this highly relevant strategic focus area notes that, where appropriate, Indigenous people will be proceeded against through alternative measures including youth justice diversionary processes.\(^6\)

Insofar as the involvement of Indigenous youth in the welfare system is concerned, section 9 of the *Children, Young Persons and their Families Act 1997* (Tas) is relevant. That section states that decisions cannot be made about their placement unless there has been consultation with a recognised Aboriginal organisation, or without regard to submissions from that organisation and Aboriginal traditions and cultural values. The section further provides that children should be kept within the Aboriginal community.

### 2.2 Victoria

The Victorian State Government has implemented various legislation, policy or guidelines in response to the RCIADIC Recommendations, including Recommendation 62.

In 1992, the Koori Youth Justice Program was developed in conjunction with Indigenous communities. That program is aimed at providing culturally appropriate juvenile justice programs specifically designed to minimise the penetration of young Indigenous people within the juvenile justice system, as well as supporting the re-integration into the community of any young Indigenous people who was in custody.\(^7\)

The Victorian Aboriginal Justice Agreement (‘AJA’) introduced in 2000, in accordance with the principles underlying the RCIADIC, aims to review and monitor the implementation of the RCIADIC Recommendations.\(^8\)

That review commenced in 2003, and on 27 October 2005, a review of the implementation in Victoria\(^9\) of the RCIADIC Recommendations (‘Review’) was tabled

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\(^5\) Strategies include: maintaining District and Assistant District Aboriginal Liaison Officers, responsible for liaison between Tasmania Police and the Aboriginal community at police district level, including establishing a framework for regular meetings between Tasmanian Police members and the Aboriginal communities, groups and individuals.

\(^6\) Aboriginal Strategic Plan, p 5.


\(^8\) The AJA aims to minimise the over-representation of Aboriginals in the criminal justice system and to improve the accessibility, utilization and effectiveness of justice-related programs in the community. Phase 3 of the AJA, which commenced in March 2013, dealt directly with reducing re-offending and increasing community safety.
in the Victorian Parliament. It assessed Recommendation 62 as partially implemented.\textsuperscript{10} The Review noted that, significantly, the Children's Koori Court had been established (it commenced operation in October 2005). The purpose of the court is to sentence young Indigenous offenders with the involvement of the individual's family and the Indigenous community.\textsuperscript{11} The Review provided, at recommendation 150, that "the Victorian Government continue to implement and monitor Recommendation 62...through any monitoring process established as a consequence of this Review".

The Victorian Government's response to the Review was also published in October 2005.\textsuperscript{12} Section 3 of the response outlines the various initiatives the government had undertaken to tackle the over-representation of Indigenous people in the justice system, including juvenile justice and diversion (for example, the automatic notification of an Aboriginal Support Worker whenever a young Indigenous person enters a custodial centre, as well as significant programs such as the Koori Youth Justice Program noted above, and the development of pilot diversionary projects utilising funds from the AJA).\textsuperscript{13} The response noted that, among many others, these initiatives complemented or were related to Review recommendation 150 (being, the continued implementation and monitoring of Recommendation 62 of the RCIADIC).

The AJA then moved into a second phase in 2006 (AJA2, to address the recommendations arising out of the Review) and a third phase in 2013 (AJA3, which focuses on, relevantly, expanding emphasis on crime prevention and diversion activities to reduce re-offending and over-representation of Indigenous people in the criminal justice system).

Further, the Victorian Government recently adopted a framework for implementing the 'Closing the Gap by 2031', known as the "Victorian Aboriginal Affairs Framework 2013-2018".\textsuperscript{14} That policy, a COAG initiative, intends to, among other things, close the gap between Indigenous and non-Indigenous youths and adults in the criminal justice system (and cites the AJA as a key strategy in this regard).

There have also been a number of helpful initiatives and programs introduced after the RCIADIC (though not directly in response to the RCIADIC) that do assist in

\textsuperscript{9} The Review was undertaken by the Victorian Government and the Victorian Aboriginal Justice Forum.


\textsuperscript{12} See http://www.justice.vic.gov.au/home/your+rights/aboriginal+justice+agreement/reviewing+and+ responding+to+the+royal+commission+into+aboriginal+deaths+in+custody+leader/victorian+government+response+to+the+implementation+review+of+the+recommendations+from+the+royal+commission+into+aboriginal+deaths+in+custody.

\textsuperscript{13} See the Victorian Government Response, pp 7-9.


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effecting Recommendation 62. For example, the Youth Justice arm of the Department of Human Services has for many years conducted a "Group Conferencing Program" in the Melbourne metropolitan area. That group conferencing program, which continues at the time of writing, was designed to divert young people, if possible, from receiving court supervisory sentences. Although not solely for Indigenous youth, the framework for this program specifically considered the needs of young Indigenous people, with specific training provided to the program workforce with respect to those needs.

Further, as to the involvement of Indigenous juveniles in the welfare system, the Children, Youth and Families Act 2005 (Vic) contains a Division containing additional principles for decision-making for Indigenous children. Moreover, a number of initiatives had been developed that were consistent with the RCIADIC Recommendations. They are targeted at reducing out-of-home placement and separation from family and community for Indigenous children involved with Child Protection. One example of such an initiative is the Aboriginal Child Specialist Advice and Support Service, aimed at culturally appropriate decision-making regarding the care of Aboriginal children involved with Child Protection.

2.3 South Australia

The South Australian Government has not implemented Recommendation 62 to any significant extent.

The Young Offenders Act 1993 (SA) provides for a tiered system of diversion, including informal cautions, formal cautions and family conference - but this is not specifically applicable to Indigenous youth.

With regard to the contact of Indigenous youth with the welfare system, South Australia has, in effect, the same provision as Tasmania. Section 5 of the Children’s Protection Act 1993 (SA) provides that decisions cannot be made concerning the placement of an Indigenous child without consulting a recognised Aboriginal organisation, as well as having regard to submissions from that organisation, Aboriginal traditions and cultural values. Again, the section recognises that Indigenous children should be kept within their own community.

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15 There are a number of other initiatives implemented by the Victorian Government which are consistent with Recommendation 62 of RCIADIC (and the AJA): Aboriginal Family Preservation programs; and Aboriginal Family Restoration Programs (these programs both assist families to retain or resume care of their children (http://www.dhs.vic.gov.au/about-the-department/plans-,programs-and-projects/projects-and-initiatives/children-,youth-and-family-services/aboriginal-family-decision-making-sharing-messages).


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Otherwise, policies are in place to support Indigenous youths, but these were not influenced by Recommendation 62 of the RCIADIC.\(^{18}\)

### 2.4 Australian Capital Territory

Similarly, although the ACT Government has measures in place to support Indigenous youths, it has not fully implemented Recommendation 62.\(^{19}\)

That said, in 2010 the ACT Aboriginal Justice Agreement (‘ACT AJA’) was introduced, which aims to reduce the over-representation of Indigenous people in the criminal justice system and improve community safety.\(^{20}\) In relation to young people, the ACT AJA noted measures such as the Restorative Justice Unit, which supports Indigenous youth offenders through a restorative justice process; the expansion of “Circle Sentencing” to provide a more relevant response by courts to Indigenous offenders and victims; supervision through Community Youth Justice, and the culturally appropriate services and activities offered to young Indigenous people at the Bimberi Youth Justice Centre.\(^{21}\)

From the welfare perspective, like other States, the ACT has legislation that is consistent with Recommendation 62. The *Children and Young People Act 2008* (ACT) provides the hierarchy of placement preferences, with the first preference being a kinship carer. The Act also sets out, in section 10, principles decision-makers must take into account when making decisions involving young Indigenous people.

### 2.4 Northern Territory

Recommendation 62 has to some extent been incorporated into legislation and policy in the Northern Territory.

Section 4(o) of the *Youth Justice Act* provides that an Aboriginal youth must be dealt with in a way which involves their community. Section 39 provides for the diversion of youth charges (other than serious offences). However, this does not specifically provide for diversions for Aboriginal youths and as such was not implemented to give effect to the Recommendations of the RCIADIC.

The Northern Territory’s Office of Aboriginal Development regards Recommendation 62 as having been implemented in its 1992/93, 1993/94 and 1996/97 Implementation Reports. The basis of this is the implementation of juvenile justice programs, and the crux of the NT programs is to divert juvenile offenders from a custodial sentence.

\(^{18}\) The Department of Communities and Social Inclusion have developed the Panyappi Indigenous Youth Mentoring Program (http://www.healthinfonet.ecu.edu.au/key-resources/programs-projects?pid=164).

\(^{19}\) The Department of Community Services has various grants, services and programs for Aboriginal youths. These include the ACT Traineeship Program, the CHANCES Program, the ACT Aboriginal and Torres Strait Islander Leadership Grants Program, the ACT Aboriginal and Torres Strait Islander Cultural Grants Program, and the ACT Genealogy Project (http://www.communityservices.act.gov.au/atsia/programs).


\(^{21}\) Through the Narrabundah House Indigenous Supported Residential Facility.

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Regional and remote area resident juvenile justice officers provide a broad range of community-based programs for offenders to minimise the need to separate Indigenous juveniles from their families and communities.\textsuperscript{22} With respect to youth at risk of offending or whom are in detention, there is a focus on cultural healing.\textsuperscript{23} Despite the effective implementation of Recommendation 62 and the efforts of the Government, recent publications indicate that the Northern Territory has the largest proportion of Indigenous youths in prison,\textsuperscript{24} and that over recent years in the NT, Indigenous juveniles have accounted for 96% of detainees.\textsuperscript{25}

As part of the Magistrate’s Court, there is a Community Court in the NT which involves the participation of community members in the sentencing process, which aims for better outcomes for the individual and community such as lower recidivism rates and safer communities. The Court does so by taking into account cultural and community factors when sentencing and aims to provide more meaningful and culturally relevant sentencing options. Juvenile offenders, as well as adults, can participate in the Community Court.

Insofar as the welfare system is concerned, section 12 of the \textit{Care and Protection of Children Act} 2007 (NT) provides that kinship groups, representative organisations and community groups have a major role to play in the wellbeing of Indigenous children and, where nominated by the child’s family, should participate in decision-making about, including placement preferences for, the child.

\subsection*{2.5 New South Wales}

In response to Recommendation 62, the NSW Government enacted the \textit{Young Offenders Act} 1997 (NSW) which aims to divert young people from the criminal justice system.\textsuperscript{26} Sections 13 and 18 outline the offences which may result in a caution or warning, rather than a prosecution. However, these diversionary measures are not specific to young Indigenous offenders.

The Government has also implemented various initiatives to support Aboriginal youths and reduce the risk of them becoming victims or persons of interest in crimes.\textsuperscript{27} The Safe Aboriginal Youth Patrol\textsuperscript{28} and Activity Program are examples of

\begin{itemize}
\item [22] The Northern Territory Government’s Office of Aboriginal Development “Implementation of the Recommendations of RCIADIC“ for 1993/1994 notes that in some situations a custodial sentence is required. When this is the case, the geography and financial resources of the Territory dictate that only one detention facility is available, and that is in Darwin. Juveniles from remote locations and from urban areas outside Darwin are therefore held some distance from their families.
\item [23] For example, the Balunu Foundation and the Elders Visiting Program.
\item [24] with few non-Aboriginal children in juvenile detention at all in the NT.
\end{itemize}
two initiatives by the NSW Department of Justice. The community based programs provide safe transport to remote areas at night and structured activities as well as access to food.

Through Part 2 of the *Children and Young Person's (Care and Protection) Act 1998* (NSW), NSW has also legislated in relation to Indigenous involvement in decision-making about children in the welfare system, and the principles applicable to the placement of Indigenous children (with the child's extended family or kinship group being the first preference, as recognised by the Indigenous community to which the child belongs).

### 2.6 Queensland

The Queensland Government confirmed that it supported this Recommendation in its 1993 Implementation Report and considered the status to be "implemented and ongoing" in its 1997 Implementation Report ("1997 Report"). The 1997 Report referred to the following legislation, policies and initiatives:

- QPS Operational Procedures Manual;
- Child placement principle, similar to the principles in legislation enacted in other States and Territories (*Child Protection Act 1999* (Qld));
- *Youth Justice Act 1997* (Qld);
- Community Justice Groups; and
- The Murri Court (although unfortunately, the Murri Court program was closed by the Queensland Government in 2012).

Chapters 5 and 16 within the QPS Operational Procedures Manual (the Manual)\(^{29}\) provide an obligation for officers to consider alternatives to court for children who have not committed a serious offence. Chapter 5 deals with all children, and provides for officers to consider avenues other than formal action against a child.\(^{30}\) Policy 16.17.1(v)(b) of the Manual deals specifically with Indigenous children in custody and provides that instead of isolation, an Indigenous child may remain with another Indigenous adult prisoner in custody if the child permits and the adult is of the same gender. This provision relates indirectly to the Recommendation in reducing the rate at which Indigenous juveniles are separated from their families and communities.

The *Child Protection Act 1999* (Qld) sets out the child placement principle and recognises the importance of Aboriginal children to be cared for within their own

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\(^{28}\) Patrols involve skilled workers who staff a bus and patrol the community at night and engage with young people. SAY aims to reduce the risk of young people becoming involved in crimes by transporting them to a safe place, a safe activity or referring them to a support service.


\(^{30}\) Policy 5.4.2 of the Manual provides that officers are to consider in all the circumstances whether it would be more appropriate to talk to the child, issue a caution or refer the offence to a youth justice conference, rather than take formal action.

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families and communities wherever possible, and remaining connected to their family, community and culture.\textsuperscript{31}

The \textit{Youth Justice Act} 1992 (Qld) has implemented programs and services such as rehabilitation or reintegration of Indigenous children into the community and provides an obligation for the court or officer to recognise the importance of the families and communities of these Indigenous children. Section 17 provides that if possible, for a respected person of an Indigenous community to administer a caution to a child who is a member of an Indigenous community to help deter the child from re-offending.

\textbf{2.7 Western Australia}

The Western Australian Government has succeeded in implementing Recommendation 62.

Western Australia has various community based initiatives which aim to support Indigenous youths. The \textit{Young Offenders Act} 1994 (WA) provides for young Indigenous offenders who are the subject of community work, supervision or release orders to be supervised by the council of an Aboriginal community.\textsuperscript{32} Another example is the introduction of the Juvenile Justice Teams, which aims to divert and prevent juveniles from returning to the justice system.\textsuperscript{33} The West Australian Aboriginal Justice Agreement ("the AJA") was signed on 31 March 2004, and was in place for a period of five years. The AJA focused on creating a partnership between the State Government\textsuperscript{34} and Indigenous people regarding justice-related issues.

In November 2013, the Community Development and Justice Standing Committee delivered 'In Safe Custody',\textsuperscript{35} an inquiry into custodial arrangements in police lock-ups in WA, focusing on Indigenous people. In light of submissions to the Committee, it was discovered that the spirit of Recommendation 62 had not been realised. The Committee found that, to take its implementation further, a "justice reinvestment" model as a means of prevention and diversion was worth exploring for reducing offending behaviour and the number of people in custody, particularly for children.\textsuperscript{36} Justice reinvestment diverts money from prisons to community based initiatives which aim to address the underlying causes of crime.

\textsuperscript{31} The principle guides the Department when making a decision about where an Aboriginal child or young person should live if they are placed in out-of-home care. Recognised Entities are required to be given the opportunity to participate in key decision making such as deciding who the child or young person should live with. The Queensland Government Department of Communities, Child Safety and Disability Services website includes information regarding the principle, available at: <www.communities.qld.gov.au/childsafety/foster-care/aboriginal-and-torres-strait-islanders/child-placement-principle>.

\textsuperscript{32} Part 3 Division 2 of the \textit{Youth Offenders Act} 1994 (WA).

\textsuperscript{33} The Juvenile Justice Teams were introduced under the \textit{Youth Offenders Act} 1994 (WA) (Division 3, Part 5). An Aboriginal Juvenile Justice Team Coordinator position was also created to work towards increasing referral and completion rates for Aboriginal youth referred to the teams. This work is done in consultation with Aboriginal community groups.

\textsuperscript{34} Specifically the Department of Justice, the Department of Indigenous Affairs, the Department for Community Development and the Western Australian Police Service.


\textsuperscript{36} "In Safe Custody" Report, pp 123-125.
As to contact with the welfare system, the Department of Family and Children's Services has accounted for the Recommendation in the *Adoption Act 1994 (WA)*, which provides that an Indigenous child should only be adopted out when there is no other appropriate alternative for the child.³⁷ In 2012, section 16A was inserted, which provided steps that must be undertaken before an Indigenous child can be placed, and requires that all adoptions be done in accordance with Schedule 2A ‘Aboriginal and Torres Strait Islander Children Placement for Adoption Principle’.³⁸

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³⁷ This is necessary because adoption is not a part of Aboriginal culture.

³⁸ Section 16A requires the CEO to consult with: (a) an officer of the department who is an Aboriginal person or Torres Strait Islander; or (b) an Aboriginal person or a Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community; or (c) an Aboriginal or Torres Strait Islander agency that, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community, regarding the prospective adoption of a child who is an Aboriginal person or a Torres Strait Islander.

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