CMC Inquiry into Policing in Indigenous
Communities
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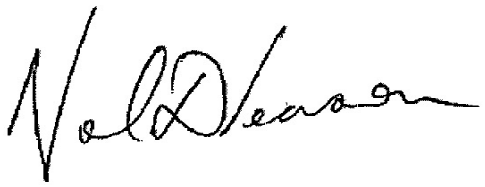
Submission to Inquiry into Policing in Indigenous Communities

Please find attached a submission to the above inquiry from the Cape York Institute for Policy and Leadership.

We would be happy to discuss. Please contact Margaret Palmer on 4046 0609 or email Margaret.palmer@cyi.org.au if you have any queries.

Yours sincerely



Noel Pearson
Director
16 October 2007

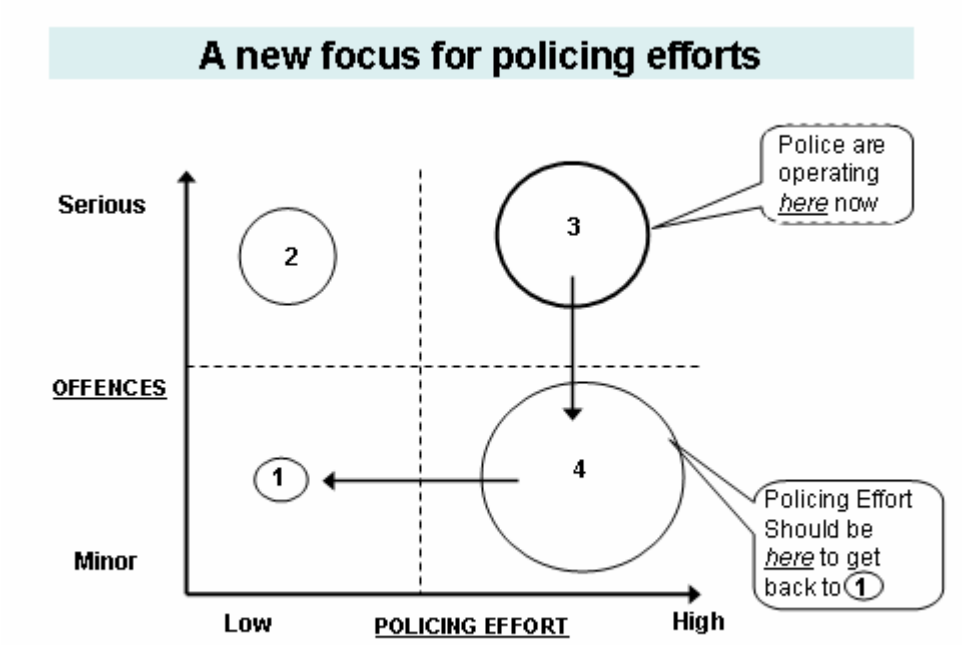
Submission to Inquiry into Policing in Indigenous Communities

General comments

In its report to government on welfare reform, From Hand *Out* to Hand *Up*, CYI identified the starting point of the Cape York reform agenda: that the problems of Cape York Peninsula are to a large extent are caused by a social norms deficit. Further, the deterioration of norms in Cape York Peninsula corresponds with the passive welfare era. To overcome the social norms deficit, and rebuild norms in Cape communities, incentives must support desirable standards of behaviour, with the final aim being the internalisation of positive values and norms so that people comply with them automatically. However this is a long term project, and effective policing is particularly important in the interim to buttress good norms.

Policing approaches and standards are therefore crucial to the outcome of the Welfare Reform Project that we are running in the four Cape communities of Aurukun, Coen, Hopevale and Mossman Gorge. We suggest that the approach most likely to be effective in these communities is zero tolerance of small infringements (the 'broken windows' approach). To this end, we suggest that policing should focus its efforts on responding to all small matters. This, we believe, will greatly reduce the number of larger offences that must be tackled (see diagram below). It is a false economy merely to respond to bigger crimes on the ground that it is not worth doing anything about smaller offences. We recognise that this represents a huge effort in the short term. However it will have significant pay-offs in the longer term.

We urge the trialling of such an approach in at least two of the Welfare Reform communities, as a means of assisting the development of good norms.



Below we address the following question raised by the CMC issues paper, but we go beyond this to the related matter of what laws should be in place to be policed:

c. What changes should be made to improve the delivery of policing services to the remote Indigenous communities?

Our proposals focus on four issues:

1. The desirability of local laws as the basis for law enforcement and the need to address gaps in existing bylaws (see examples below)
2. The need to allocate police specifically to bylaws enforcement
3. The desirability of timely and locally knowledgeable forums for dispensing justice, ie JP Magistrates courts.
4. The need to reverse the trend to remote call centres.

1. The desirability of local laws as the basis for law enforcement and the need to address gaps in existing bylaws

Mainstream laws assume, correctly in most cases, that life in Australian communities is underpinned by functional social norms - unwritten but well-understood rules or behavioural standards, enforced by peer pressure and community disapproval. Breaches of these are (relatively) rare and involvement in the criminal justice system is the last resort mechanism, rather than the first, for ensuring basic social order. Most people in the mainstream also see the legal system as the natural culmination of a long period of Western legal historical tradition.

These preconditions for order do not exist in many Indigenous communities in the Cape. Classical Indigenous norms such as demand sharing and reciprocity have been corrupted by Indigenous peoples' interaction with mainstream life and their attempts

to adapt to this. Among the results is the destructive use of alcohol and money as a daily currency of exchange, most notably in drinking and gambling rings, which deplete cash reserves, disrupt sleep and leave many without the initiative or resources to feed and clothe children or to ensure that they attend school. Substance abuse, including the misuse of inhalants, is endemic in some communities. The consequence is intergenerational dysfunction, with high levels of illiteracy, truancy and contact with the justice system even on the part of children.

Nor is there substantial respect for mainstream laws, which are seen as an artificial, imposed construct. Indigenous communities therefore believe that overcoming law and order problems requires community-based initiatives – hence our support for local laws and locally (if possible) constituted JP Magistrates Courts.

1. Local laws can be tailored to the needs of Indigenous communities in a way that State laws cannot be, even when these attempt to address the same subject matter;
2. Local laws empower community police, where these exist, to prosecute offences, powers which they would not otherwise have under State legislation unless these were specifically conferred by that legislation;
3. The State justice system is failing Indigenous communities, and local laws provide one more mechanism to assist in improving law and order;
4. There are reports of unsatisfactory delays in the State process approving locally made laws (contained in Chapter 11 of the Local Law Manual), and the model laws can be adopted through a much simpler process; and
5. We believe that laws made by councils to meet the requirements of Indigenous communities are less likely to be inconsistent with the *Racial Discrimination Act 1975* than are laws made by the State to address those same issues.

Behaviours which are dysfunctional in Indigenous communities are likely already to be the subject of State laws such as the *Criminal Code Act 1899* (eg section 364 (cruelty to children based on failure to provide proper care, and chapter 23, which deals with gambling offences); the *Summary Offences Act 2005* (eg s 9 – public nuisance, which covers a range of threatening and disorderly behaviours); the *Education (General Provisions) Act 2006* (in particular chapter 9 on compulsory schooling and parental obligations to ensure attendance). The *Police Powers and Responsibilities Act 2000* currently provides for the removal of inhalants including petrol and glue from those who are using or likely to use them to become intoxicated, and the removal if possible of those persons to a safe place.

However there is merit in developing model local laws, even when these issues might be addressed in part by Queensland State laws. It is also likely that local laws on the same subject matter, to be effective in Indigenous communities, will place greater or different restrictions upon community members than do the same laws for mainstream Australian communities, in which functional social norms operate and are the main mechanism by which behaviours are prescribed and controlled. We believe that properly considered local laws aimed at dysfunction would be valid as a 'special measure' under section 8 of the RDA. However the legal expertise available to State governments in drafting model local laws in contentious subject areas is likely to ensure their quality and validity.

We note that under the LGA there is a general competency power in s 25 'to make local laws for, and otherwise ensure, the good rule and government of, its territorial unit'. However this does not *specifically* include a power to make laws for 'the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of its council area' as did the prior *Community Services (Aborigines) Act 1984* in s 47(3). Our understanding is that legal advice to the State Government has been provided, based on this different wording, which casts doubt on the validity of councils now making law and order bylaws under the LGA if the subject matter is already addressed by a State law. **Although we do not agree with this, we propose that the LGA should be clarified to ensure that local laws which address conditions specific to Indigenous communities are valid regardless of the existence of State laws (assuming that State interests are not otherwise affected).**

Particular local laws

We welcome the recognition by Department of Local Government's *Model Local Laws Review 2007* Discussion Paper for Indigenous Community Specific Matters that there will be matters specific to Indigenous communities which require regulation. Like those contributing to the discussion paper, we have identified gaps which are not covered by State laws. These relate both to subject matter and to scope.

We agree that a model law on law and order matters should include juvenile safety via provision of curfews, night patrols, safe houses and stipulated responsibilities and accountability of care givers; alcohol management, including provision of safe houses; gambling; truancy; and banishing trouble makers.

Gambling

Councils should be empowered to prohibit gambling in places other than public places, or to outlaw gambling altogether.

Gambling which the Criminal Code Act currently allows to place in private houses is just as impoverishing and destructive of children's life chances as the prohibited gambling which occurs in a public place. The main concern of government regulation of gambling in Queensland is minimising harm around the use of Electronic Gaming Machines (EGMs). However card gambling in Indigenous communities, even when not in a public place, should also be the subject of regulation to prevent the harm it does to family functioning. The impact on parental attention is indicated by the comment of a young Tiwi mother that:

> 'When I play (cards), I don't hear my children cry for food. I don't hear and I don't see them. I think only about the cards!'[1]

Negative impacts of gambling on children – for example, hunger, and neglect leading to risk of assaults by sexual predators – were confirmed by the 2006 Northern Territory Indigenous Gambling Scoping Study. The Study also pointed to a direct relationship between gambling and substance abuse: in particular petrol sniffing by children who found that this alleviated sensations of hunger and cold. Parents could

[1] JC Goodale (1987), 'Gambling and Hard Work: Card Playing in Tiwi Society', *Oceania*, 58(1), pp 6-20, at 6.

see their children sniffing 'but were too involved in their card games and turned their backs on their children', according to one Indigenous organization staff member consulted.

Hunter and Spargo (a psychiatrist and physician respectively) in a study of gambling in the Kimberley region of Western Australia, found that children as young as 8 years old were given change to gamble with, and that adolescents routinely joined adult gambling circles. They concluded that the fallout affected the whole community, with health impacts in the physical, psychological and social domains. For children,

> 'Parental gambling may mean a care-giver who only intermittently is available to provide both the nutritional and emotional nurture that is required for phase-appropriate development. (The use of extended family networks) concentrates responsibility onto a few over-extended individuals. Thus children of regular heavy gamblers often are neglected both physically and emotionally for variable periods. (Their parents' sudden wins and resulting luxury goods and food mean that) the game itself is associated powerfully with temporary (and frequently lavish) relief from deprivation, which acts in turn as a powerful reinforcer of gambling itself. The spillover of consequences also has an impact upon schooling, as games that are pursued late into the night leave children exhausted and parents little motivated in the morning to prepare them for school. Lack of money for lunch at school has often been cited…as a reason for non-attendance at school.'[2]

These authors also describe the aftermath of a large win being the infusion of a lot of alcohol into the community. Children as the most vulnerable in the community are likely to be affected by this. Gambling prohibitions could be part of tenancy agreements but enforceable with sanctions under bylaws.

Alcohol

We note that under the Aboriginal Communities (Justice and Land Matters) Act, Community Justice Groups (CJGs) have the power on their own initiative or in response to a request by the Council, to declare public places to be dry areas, or, on the application of occupiers of private places eg houses, to declare that these are dry places. Some AMPs will make such a provision redundant (for example where no takeaways are allowed). However where this is not the case and where CJGs are not functional, **we suggest that the Council should also have the power to make bylaws declaring certain houses to be dry if the occupants regularly drink to excess in these houses, to the extent that they cause a nuisance to neighbours or to children in the house, or cause damage to the house itself**. The entity in charge of community housing (where this is not the council) should also be able to request that particular houses be declared to be dry. Another possible source of 'dry' declarations could be the Family Responsibilities Commission, where the Commission determines that the welfare of the rightful occupants of that house is at risk, or Magistrates Courts (including JP Magistrates Courts).

The exclusion of intoxicated persons from private houses, and non-gambling provisions could be made part of tenancy agreements. However tenancy agreements are made between the tenant and landlord. The normal approach is to hold the tenant responsible for breaches by others (non-tenants) of the behavioural requirements of

[2] E Hunter and RM Spargo (1988), 'What's the Big Deal?: Aboriginal Gambling in the Kimberley Region', *The Medical Journal of Australia*, 149, pp 668-672 at 671.

the lease, ie the tenant is taken to be able to control what goes on in the house and grounds. Breaches of these provisions would not be normally a criminal matter, but would usually be followed by sanctions such as warnings, or in the most severe cases, eviction of the tenant, who may be personally blameless.

Contractual tenancy provisions may be effective in some cases. However situations can occur where the tenant (possibly a frail older person) is powerless, in practice, to prevent kin arriving, drinking, and damaging the house or committing violent acts. These are possibly younger relatives who may humbug their elders for money and insist on visiting or staying for lengthy periods, in some cases even driving out the tenant by their behaviour. In these cases, sanctions against the holder of the tenancy would be unhelpful and unfair.

It is therefore essential to reinforce contractual tenancy arrangements with bylaws imposing criminal sanctions for those who cause their breach: codes or policies which are not enforceable by criminal law are not likely to be adequate.

Foetal Alcohol Syndrome

Although contentious, a model law is required to protect unborn children against Foetal Alcohol Syndrome (FAS). Women now form a significant proportion of drinkers in Indigenous communities. In the community of Aurukun, the canteen played a facilitating role in encouraging women to drink: 'once drinking was removed from being essentially confined to male groups in relatively secluded places, to being legitimately in the public domain of the canteen, and once drinking itself had become an established part of the social dynamics of the township, there was a significant increase in the number of young women in particular who consumed alcohol on a regular basis'.[3]

Heavy chronic alcohol use or frequent heavy intermittent alcohol use during particular stages of pregnancy risks the child being affected by FAS. Major risk to the foetus requires at least 5-6 drinks per occasion, with a monthly intake of at least 45 drinks.[4] However other drug use can intensify the effect of alcohol. Abnormalities include growth retardation, developmental delay, facial abnormalities, structural brain abnormalities, hearing disorders, speech and language difficulties, poor motor skills and intellectual disability. The condition is not curable, and disabilities persist throughout life, manifesting in intellectual problems, poor age-appropriate life skills and behaviour problems, with a number of psychiatric disorders likely to emerge in adolescence. On available evidence, the condition is greatly overrepresented in Indigenous populations, with one Western Australian study showing FAS to be 100 time more likely in the Indigenous population than in non-Indigenous children.[5] These figures are likely to be falsely low, as notification of FAS cases was dependent upon

[3] D Martin (1993), *Autonomy and Relatedness: An ethnography of Wik people of Aurukun, Western Cape York Peninsula*, unpublished PhD thesis, ANU, p 195.
[4] C O'Leary (2002), *Fetal Alcohol Syndrome: A Literature Review*, Commonwealth of Australia, National Alcohol Strategy 2001-2004 Occasional Paper.
[5] C Bower, D Silva, TR Henderson et al (2000), 'Ascertainment of birth defects: the effect on completeness of adding a new source of data', *Journal of Paediatric and Child Health*, Vol 36, pp 574-6.

clinical recognition and voluntary notification.[6] *In one Cape York community, the prevalence was 3.6 percent. By comparison, the highest reported prevalence outside Australia is 0.5 percent in South Africa.*[7]

We suggest therefore that a model law needs to be developed which makes it an offence for a publican to serve alcohol beyond a certain limit to a women who s/he ought reasonably to know is pregnant. It should also be an offence for other people to buy and serve alcohol to such a person beyond these limits, or for the woman herself to drink beyond those limits.

Enforceability is an issue here: however we believe that the existence of such a local law would have value in itself as one more measure to combat FAS, and that publicising it in any case may reduce the levels of heavy drinking among pregnant women who can look to an external constraint as an aid to resisting peer pressure to drink.

Civil liberties and privacy arguments, though likely to arise, can be countered by weighing the right to nine months of heavy drinking against a lifetime of disability and increased risk of involvement in the justice system for the FAS-affected child. The high rate of FAS in Indigenous communities should also put to rest arguments against a model bylaw as a breach of the RDA rather than a 'special measure'.

Again, local laws can only supplement wider ranging health promotion efforts. 'Strong talk' by doctors might also be influential, as it has been in helping older people to stop drinking. However indications are that young women who know the risks of heavy drinking continue to do so even while pregnant, their drinking behaviour being influenced more by parental drinking norms.[8]

<u>Petrol and other volatile substance misuse</u>

Volatile substance misuse (VSM) has complex underlying causes and has consequences for basic social order in Indigenous communities. One study showed that more than two-thirds of occasional sniffers aged between 15 and 19 years of age were likely to become regular or chronic sniffers as they got older.[9] The literature generally agrees that chronic sniffers are the hardest to stop sniffing. Brady notes that

> 'sniffers learn to sniff from their peers, from older users and from their siblings. Aboriginal people say that sniffing spreads from one community to the next because experienced sniffers "show" or "teach" the practice to others when they visit another place…Aboriginal children are skilled at learning by observation and by imitation, since much of their socialisation is accomplished this way, rather than through receiving verbal instruction

[6] KR Harris and IK Bucens (2003), 'Prevalence of fetal alcohol syndrome in the Top End of the Northern Territory', *Journal of Paediatric and Child Health*, Vol 39, pp 528-533.
[7] J Rothstein, R Heazlewood and M Fraser (2007), 'Health of Aboriginal and Torres Strait Islander children in remote Far North Queensland: findings of the Paediatric Outreach Service', *Medical Journal of Australia*, Vol 186(10), pp 519-521.
[8] Ernest Hunter, psychiatrist, personal communication.
[9] G Shaw (1999), *The analysis of the impact of Avgas on petrol sniffing in a remote community*, draft report, 7, referred to in Peter D'Abbs and Sarah MacLean, (2000) *Petrol Sniffing in Aboriginal Communities: A Review of Interventions*, Cooperative Research Centre for Aboriginal and Tropical Health.

> or explanation. Observing and witnessing are deemed to be synonymous with some transfer of knowledge or experience. Also significant in the context of petrol sniffing is the technique of learning by identification'.[10]

Despite the well-documented effects of VSM on the brain and on behaviour, mainstream law still does not make it an offence: police may only remove the substance in question from the person using or apparently likely to use it, with the power to take the person doing the sniffing or inhaling to a 'safe place' if one exists, or releasing them if not. Given the threat that volatile substance users pose to themselves and to others, **we believe that a model local law should provide that VSM is an offence, targeting in particular the 'ringleaders' in petrol or other inhalant sniffing gangs**. We note that petrol sniffing and the use of other inhalants with a view to becoming intoxicated was made an offence in the model bylaws developed for Woorabinda in 2001 and for Hopevale in 2006.

Healthcare for children

In relation to health matters, general State laws impose a duty of caregiving on parents. However this is routinely breached by some parents in Indigenous communities. In particular, we believe that a specific offence of failing to ensure adequate medical care for a child should be included in a model law. In our experience, children with easily treatable conditions (scabies, ear infections etc) do not always attend health clinics, and service providers in the community appear to think that no one can force parents to take them to the doctor. However these conditions underwrite later chronic ill health and shortened life spans. They do not appear dramatic at the early stages where long term effects can be prevented, so that no 'emergency' is identified.

The model law should thus require schools to notify the health clinic and caregiver if a child appears unwell, and schools should also be given the authority to send children to the health clinic. However the main responsibility for ensuring health care is provided to children rests with parents, and a local law should make it an offence for a parent or caregiver not to ensure that the child is immediately afforded adequate medical care to restore him/her to health when the parent has reason to suspect that the child is not well. Clearly local laws which deal with issues like this should only be a supplement to a wider ranging health promotion effort. However we do not believe that information is enough to ensure compliance when parenting norms have been so damaged that parents may be pre-occupied with other priorities.

Truancy

Here, the State law (*Education (General Provisions) Act 2006*) contains adequate provisions in Chapter 9, but the process for charging parents with offences (ss 178-179) is a cumbersome one. **We believe that faster, more direct routes to charging parents with the offence of not ensuring that their child is in school should be available. This can be done through a local law**, with the help of the CJG and police.

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[10] M Brady, (1992) *Heavy metal: the social meaning of petrol sniffing in Australia*. Canberra: Aboriginal Studies Press, 84.

Troublemakers

There should be a model law enabling the Council to expel troublemakers from the community. This could be on the recommendation of the CJG or FRC.

Included in the category of troublemakers should be **people who are the ringleaders of riots, who engage in sly grogging or who arrive in a community with VSM problems and encourage others to sniff petrol or other noxious inhalants**. We note that the tendency of VSM to be cyclical and influenced by the arrival in a community of a new family, individual or group with pre-existing VSM issues was highlighted in the CMC's report *Police Powers and VSM: a Review* (September 2005). The report's findings coincide with our own experience of triggering factors in Cape communities. Those who persistently initiate fights should also be classed as troublemakers.

Non-physical assaults, public humbugging.

Technically, it may be possible to use the Criminal Code Act and the Summary Offences Act to pursue these kinds of conduct. However, the relevant provisions (Criminal Code Act s 335[11] and Summary Offences Act ss 6 and 8, dealing with nuisance) are general in form and do not address, in particular, public humbugging. Again, **a model bylaw would be useful which specifically dealt with non-physical assaults – violent and aggressive language wherever used – and humbugging in public places**.

We would prefer non-physical assaults – as opposed to physical assaults - to be specifically dealt with in a bylaw and for that bylaw to be enforceable through JP Magistrates Courts operating in the community. Physical assaults could be dealt with in the mainstream justice system.

Other matters

Other matters which should be covered in a model bylaw on law and order are covered in the model local law developed for Woorabinda on law and order, and in the model developed for Hopevale in 2006. Some of these are dealt with either wholly or partially by State laws, but are conveniently found in the model bylaw and are thus more accessible to local community members. They include provisions relating to

- **unlawful entry of a house (ie without lawful tenant/owner's permission, or following threats or intimidation);**

[11] We note that the definition of 'assault' in s 245 covers non-physical acts against the victim: **245 Definition of *assault***
(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture **attempts or threatens to apply force of any kind to the person of another without the other person's consent**, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an ***assault***.

- **possession of dangerous articles or firearms; and**
- **throwing stones or rocks.**

Other possibilities include **unlawful possession of and use of a motor vehicle and vandalism, including graffiti**.

2. The need to allocate police to bylaws enforcement

Under the Act, Queensland police are empowered to enforce bylaws (local laws). However they operate under a single command – the QPS – which allocates their priorities to them. Our experience is that, as a result, police often do not see the enforcement of bylaws as part of their job, and, when they do, the enforcement of local laws is given a lower priority to other mainstream laws.

We suggest therefore that the QPS ensure that **police are specifically allocated to the enforcement of bylaws as their top priority**. We note that this approach assumes that local laws on a range of matters, including those outlined above, will be in force in each community.

This approach could be trialled in one community, say, Hopevale, which has an up to date model set of laws which should easily be able to be gazetted.

3. The desirability of timely and locally knowledgeable forums for dispensing justice.

We propose that **JP Magistrate courts should be resourced to run effectively in two of the welfare reform communities – Aurukun and Hopevale**. Assistance including further training may be needed for them to convene regularly. We understand that earlier consultations with communities in the early 1990s about local JP Courts showed community support for these.

Most remote indigenous communities seem to be visited by a Magistrates Court circuit only once a month. Justice dispensed with this time delay reduces the deterrent effect of appearing before the court. Apart from the greater perceived relevance of local courts, and the likelihood that they will dispense more appropriate sentences, convening JP courts on a more regular basis will reduce the number of matters to be heard by Magistrates on circuit and thus result in cost savings.

Section 552C(1) of the Criminal Code Act enables these courts to be established. They can only hear offences that are dealt with on a plea of guilty, and (in the case of property, of a value not more than $2500), and in which the justices consider they may adequately punish by the imposition of a penalty not more than 6 months imprisonment. However despite these limitations they are one way in which timely justice can be provided to communities.

Other issues

Call centres

We note advice by CMC representatives at discussions with CYI earlier this month that the number of call centres is likely to be reduced even further in Queensland as a cost saving measure.

In our view this is a false economy (particularly in Indigenous communities but also in the mainstream). People in remote Cape communities are not likely to feel safe or to see the police service as accessible if they find their calls routed to a call centre hundreds of kilometres away. Further, personnel at these centres will not have any local knowledge of the issues or the caller, and so their assessment of the urgency of the call is likely to be fatally inaccurate on some occasions, possibly leading to the kind of headlines which are damaging to the reputation of the QPS.

We submit that calls for assistance should be able to be made to local police stations whose staff are much more likely to be familiar with the situations which arise and to be able to make decisions about what kind of response is needed on any occasion. This is particularly the case in remote Indigenous communities when fighting is likely, without immediate intervention, to lead to wider rioting and to the injury of children and vulnerable older people. The knowledge that help is only a local phone call away, and being able to step in quickly when the experience of the local personnel dictates it, would be an important measure in preventing the escalation of disputes, and perhaps in discouraging violence generally.

Although this will require greater staffing resources, it may serve to prevent crime and the community's increased faith in the operation of its police service will also have important benefits.