

background paper 3

The value of a benchmarking framework to the reduction of Indigenous disadvantage in the law and justice area

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1.	Introduction: the human rights context	122
	Relevant international instruments	123
	Findings of UN treaty bodies	125
2.	International developments and best practice	126
	Deliberate, concrete and targeted steps	126
3.	Benchmarking developments in Australia	128
	A strategic approach	128
	A preventive model	130
	A tiered approach	131
4.	Findings of the 2003 <i>Overcoming Indigenous Disadvantage Report</i>	132
	The role of the strategic change indicators	135
5.	The value of the application of a benchmarking approach to the reduction of Indigenous disadvantage in the law and justice area in Western Australia	135
	Key themes arising from the Commission's community consultations	136
	Implications for a benchmarking approach	139
	Summary	140
6.	Coordination, integration and implementation	140
7.	Conclusion	141

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1. Introduction: the human rights context

The Australian legal and political system increasingly operates in an international context. In a globalised and inter-related world it is not possible to ignore international standards and opinion. International scrutiny is a fact of life.

Consequently, policy development and program implementation at the national level must take account of international standards and practices. This is especially the case in the area of human rights, and for settler societies such as Australia the human rights of Indigenous people are a particular focus. Attempts to avoid international scrutiny, and to claim that Indigenous issues are essentially a domestic concern, are no longer credible. As Paul Keal has pointed out in the context of discussing Indigenous rights:

Increasingly, the moral standing or legitimacy of particular states is bound up with the extent to which other members of international society perceive them to be protecting the rights of their citizens.¹

International human rights law and practice provide considerable guidance as to required standards. United Nations (UN) declarations and treaties set out the applicable principles and norms, and the jurisprudence of UN treaty monitoring bodies provides development, clarification and guidance in respect of these standards. International concern to protect and promote the rights of Indigenous peoples has been a feature of the human rights regime developed since World War II. This concern has been driven in part by the recognition that Indigenous peoples have collective rights arising from their prior occupation of the nations within which they now live.

However, the recognition that Indigenous peoples often suffer significant disadvantage, poverty and distress has also been significant in focussing attention on the human rights situation of such peoples. The socio-economic circumstances of Indigenous people is often marginal and their disadvantage severe. To a considerable extent they do not reach the living standards common in wider society.

This situation is characteristically evident in the area of law and justice. However, international human rights standards provide guidance—both directly and indirectly—in respect of the rights of Indigenous peoples with reference to law and justice matters. This guidance addresses the disadvantage experienced in the interaction of Indigenous peoples with the law and justice systems of nation states, including the obstacles they face in maintaining and applying their own laws and customs, at least in relation to their own internal affairs.

International law prohibits discrimination on the grounds of race. The principle of non-discrimination, contained in a number of widely ratified international instruments, is generally considered to be a peremptory norm of international law from which no derogation is permitted.² Non-discrimination is a bedrock rule of the international order.³

International law provides guidance on the timing and manner of implementing standards. In respect of certain rights, particularly civil liberties and rights of democratic participation, the expectation is that they will apply in full and without delay. In other areas, including economic, social and cultural rights, a progressive approach to implementation is possible, in cognisance of the fact that resource and institutional constraints may not allow for full and immediate realisation. Nonetheless, demonstrated good faith in moving towards full realisation is required of governments.

Law and justice rights have both elements: there are rights, particularly in respect of the treatment of the person, where immediate application is mandated; and there are other aspects, for example developing appropriate judicial processes, where it is accepted that time may be required in order to devote sufficient resources to achieve full realisation. In addressing Indigenous disadvantage in respect of law and justice in Australia, the seriousness of the disadvantage is well known. High arrest and incarceration rates, repeat offending, domestic violence, and alcohol and drug abuse are all too common. The community consultation phase of the Law Reform Commission of Western Australia's Aboriginal customary law project has shown that a very high degree of concern is felt by members of Aboriginal communities about their disadvantage in respect of law and justice matters.⁴

1. Keal P, *European Conquest and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2003) 1.

2. See Article 53 of the *Vienna Convention on the Law of Treaties* 1969 which describes a peremptory norm, or *jus cogens*, as a norm from which no derogation is allowed.

3. See Blay S, Piotrowicz R & Tsamenyi BM (eds), *Public International Law – An Australian Perspective* (Melbourne: Oxford University Press, 1999) 69.

4. See, for example, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton, 26–27 May 2003* and *Thematic Summaries of Consultations – Wiluna and Meekatharra, 27–28 August 2003*.

Relevant international instruments

The two chief human rights instruments are the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic Social and Cultural Rights (ICESCR).⁶ Australia has ratified both Covenants, and in addition has allowed individual complaints to be taken by Australian citizens to the committee of experts that monitors compliance with the ICCPR – the Human Rights Committee. The ICCPR has considerable impact on Australian law and practice. It is annexed to the *Human Rights and Equal Opportunity Act 1986* (Cth) and is incorporated by reference in the legislation establishing the Australian Law Reform Commission.⁷ Other relevant international human rights instruments that have been ratified by Australia are:

- The Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁸
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁹
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);¹⁰
- The Convention on the Rights of the Child (CROC).¹¹

These instruments contain provisions that can apply to the disadvantage experienced by Indigenous Australians in matters of law and justice. Taken together, these instruments provide a pattern of significant obligation, binding at international law, in respect of eliminating discrimination and ensuring equality of Indigenous Australians in law and justice as in other matters. Relevant provisions include:

Self-determination

The ICCPR and ICESCR each provide in Article 1 that '[A]ll peoples have the right of self-determination'. Despite attempts by the Australian and other governments to deny or limit the application of this right in respect of Indigenous peoples, it is clear from the decisions and general comments of UN treaty bodies that this right does extend to Indigenous peoples and, further, that it entails a requirement for Indigenous peoples to give their informed consent before decisions directly affecting their lives and welfare are made.

Whilst self-determination does not mean that there is a right to secession or political independence, it does mean that a large measure of autonomy should be accorded Indigenous peoples. In practical terms, this means that where policies and programs affect Indigenous people and communities, mere consultation is not enough. There must be effective participation, dialogue and negotiation; although, ultimately only informed consent or agreement can provide a legitimate basis for decisions.

Equality

Both the ICCPR and ICESCR mandate equality of treatment, and the consequent illegality of discrimination against people on the grounds of race. The prohibition of racial discrimination is set out in detail in the CERD. However, whilst outlawing negative discrimination, equality of treatment does allow for positive or special measures ('positive discrimination') to overcome historic inequalities.¹² The equality sought is a substantive equality, not merely a formal equality which itself can mask or perpetuate long-term and systemic inequalities.

Specific provisions about law, liberty and the treatment of prisoners and detainees

The ICCPR has a number of provisions prohibiting arbitrary arrest or detention; torture; or cruel, inhuman or degrading punishments. These provisions require that:

5. *International Covenant on Civil and Political Rights*, adopted 1966, 999 UNTS 171.
 6. *International Covenant on Economic, Social and Cultural Rights*, adopted 1966, 993 UNTS 3.
 7. The significance of the ICCPR for Australian common law was noted by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Further, in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 a majority of the High Court decided that ratification of an international Convention by Australia raises a legitimate expectation that decision-makers will exercise statutory discretions consistent with the provisions of relevant international Conventions. Although in *Teoh* the *Convention on the Rights of the Child* was under consideration, the Court's decision extends to all ratified Conventions including the ICCPR.
 8. CERD, adopted 1965, 660 UNTS 195.
 9. CEDAW, adopted 1979, 1249 UNTS 13.
 10. CAT, adopted 1984, UN Doc. A/39/51; 24 ILM 535 (1985).
 11. CROC, adopted 1989, UN Doc. A/44/49; 28 ILM 1448 (1989).
 12. Article 2(2) of CERD requires that states, when circumstances warrant, take special and concrete measures to ensure adequate development and protection of certain racial groups or individuals belonging to them.

- those arrested be treated promptly and lawfully;
- persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person;
- juveniles be segregated from others in detention; and
- the objective of imprisonment be reform and social rehabilitation.

The minimal requirements for the fair and efficacious operation of courts and tribunals—including free assistance of an interpreter if the accused cannot understand or speak the language of the court—are set out in provisions which emphasise the special needs of juveniles, guarantee a right of review of convictions, allow for compensation when there has been a miscarriage of justice and prohibit retrospective laws and punishments.

Protections against domestic violence

The right to be free from domestic violence is provided by CEDAW. The relevant treaty body has made clear since 1992 that the right to freedom from violence is implicit in the right to freedom from discrimination, and also in the ICESCR, where that Committee has noted that a primary goal of Article 12 (concerning the right to the highest attainable standard of health), in respect of women, is protecting women from domestic violence.¹³

Protection of minorities

As well as provisions of general application, there is specific provision in the ICCPR (Article 27) applying to the rights of minorities, including Indigenous peoples. Article 27 requires that in those states where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their culture, to profess and practise their own religion, or to use their own language. This provision has been extensively considered in a number of cases before the Human Rights Committee. It provides a strong basis for affirming that the rights protected are not merely individual rights but collective rights. This provision is highly relevant to the position of Indigenous peoples *vis à vis* the legal system, including the consideration of the place of Aboriginal customary law in that relationship.

ILO Convention 169

Further support for the protection of the legal rights of Indigenous peoples and, in particular, the recognition of their customary law, is found in ILO Convention 169 concerning Indigenous and Tribal Peoples.¹⁴ This is the only international instrument in force dealing specifically with Indigenous peoples. Australia played a significant role in developing the Convention, but has not to date ratified it. Nevertheless, ILO 169 has become an important source for guidance as to international law norms in respect of Indigenous peoples and to some extent can be seen as reflecting customary international law.¹⁵ It is an authoritative source of guidance on international standards and merits close attention by Australian policy makers.

Article 5 of the Convention makes the general proposition that the social, cultural and spiritual values and practices of Indigenous peoples shall be recognised and protected and that due account shall be taken of the nature of the problems that face Indigenous people both as groups and as individuals. The article also provides that the integrity, practices and institutions of these peoples shall be respected.

Specifically regarding the place of customary law, Article 8 provides:

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs and customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

13. CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, 11 August 2000, [21].

14. *ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 1989.

15. See Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) 52.

Article 9 deals with the role of custom in dealing with offences and penalties:

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10 provides guidelines for sentencing:

1. In imposing penalties laid down by the general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Findings of UN treaty bodies

UN treaty bodies, responsible for monitoring compliance with human rights treaties, have made a number of observations over recent years regarding Australia's human rights performance, particularly in the area of Indigenous rights where concerns have been expressed. Some observations by the treaty bodies of relevance to the law and justice area have been:

ICCPR

The Human Rights Committee (HRC) in its July 2000 report on Australia was critical of mandatory imprisonment legislation in Western Australia and the Northern Territory. The HRC reported that such legislation 'leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system'.¹⁶ The HRC further commented that the legislation 'raises serious issues of compliance with various articles of the Covenant'.¹⁷

ICESCR

In its concluding observations of September 2000 on Australia's third Periodic Report under the Convention, the Committee on Economic, Social and Cultural Rights (CESCR) expressed its deep concern that, despite efforts and achievements of the federal government, the Indigenous populations of Australia continued to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights.¹⁸ The CESCR was concerned to ascertain any government initiatives to address domestic violence, particularly in respect of Aboriginal women in remote areas.¹⁹

CERD

The CERD Committee, in its Concluding Observations of March 2000, noted with grave concern that 'the rate of incarceration of indigenous people is disproportionately high compared with the general population'.²⁰ It expressed its concerns about the provision of appropriate interpreter services, socio-economic marginalisation, discriminatory approaches to law enforcement, the lack of sufficient diversionary programs, and mandatory sentencing schemes in Western Australia and, particularly, the Northern Territory. In discussion with the Australian Minister, Phillip Ruddock, CERD's Country Rapporteur commented on the need for the Australian government to define policies and programs and set benchmarks against which its achievements could be measured.²¹

16. Human Rights Committee, *Concluding Observations of the HRC – Australia*, UN Doc. A/55/40, [498]–[528].

17. *Ibid.*

18. Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations Australia*, UN Doc.E/C.12/1/Add.50, [15].

19. CESCR, Pre-sessional Working Group May 2000, *List of Issues to be taken up in connection with the consideration of Australia's third periodic report*, UN Doc. E/C.12/Q/Australia/1, [10].

20. Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations by the CERD: Australia*, CERD/C/304/Add.101, [15].

21. Zifcak, *Mr Ruddock goes to Geneva* (Sydney: UNSW Press, 2003) 13.

It is clear that Australia's performance in respect of meeting its international obligations concerning its Indigenous peoples is under close scrutiny. The widely held expectation is that developed democracies such as Australia will generally meet their human rights obligations. Failure to do so can lead to international concern and criticism.

The particular priority attached to law and justice issues in respect of Indigenous peoples is shown in the work of the UN Special Rapporteur on the human rights of indigenous people, Rodolfo Stavenhagen. In his 2004 Report to the sixtieth session of the UN Human Rights Commission,²² Stavenhagen notes that the Report concentrates on 'the obstacles, gaps and challenges faced by indigenous peoples in the realm of the administration of justice and the relevance of indigenous customary law in national legal systems'²³ and that these are issues that 'indigenous representatives and government delegations, at the Working Group on Indigenous Populations, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Commission on Human Rights and most recently at the Permanent Forum on Indigenous Issues, have identified repeatedly as being of crucial importance for the full enjoyment of the human rights of indigenous peoples'.²⁴

At the Expert Seminar on Indigenous Peoples and the Administration of Justice, convened by Stavenhagen in November 2003,²⁵ papers covered a wide range of law and justice issues affecting Indigenous people, including the recognition of customary law²⁶ and programs to reduce offence and incarceration rates.²⁷

2. International developments and best practice

Deliberate, concrete and targeted steps

The obligation on states parties to ensure the progressive realisation of rights is set out in ICESCR, and further developed in the Decisions and General Comments of the CESCR. Article 2 (1) requires a state party to undertake to:

[T]ake steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means.

The provision is further elaborated in CESCR's General Comment No 3.²⁸ This makes clear that, while the obligation to 'take steps' means that the full realisation of relevant rights may indeed be achieved progressively over time, nevertheless the taking of such steps cannot be delayed, and, further, the obligation is that those steps should be deliberate, concrete and targeted towards meeting Covenant obligations.²⁹ It also makes clear that the obligation on states parties is to move as *expeditiously* and *effectively* as possible.³⁰ In meeting their obligations states are required to develop strategies, identify indicators and determine benchmarks³¹ as the basis for reporting to CESCR on a regular basis.

The 'progressive realisation' of social, economic and cultural rights has become the paradigm for approaching these matters. At the international level, targets, benchmarks and indicators are an integral feature of programs to address poverty and disadvantage. The integration of human rights principles into the design and delivery of programs of technical assistance for poverty elimination is at the cutting edge of policy and program development. Within the UN system these developments have been fostered by the Human Rights Strengthening Project (HURIST) and the United Nations Development Program (UNDP) Oslo Governance Centre (OGC). The OGC has been established to enhance program activities and the advisory role of UNDP in the area of democratic governance. Targeting programs and setting benchmarks is now central to monitoring progress and ensuring accountability.

22. UN Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples*, UN Doc. E/CN.4/2004/80, 2. See <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G04/105/28/PDF/G0410528.pdf?OpenElement>>.

23. *Ibid.*

24. *Ibid.*

25. UN High Commissioner for Human Rights: Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003). See <<http://www.unhcr.ch/indigenous/madridseminar.htm>>.

26. *Ibid.* See Anaya J, 'Indigenous peoples' legal systems', paper presented to the Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003). Anaya notes that: '[T]he Indian nations, or 'tribes', of the United States characteristically have their own functioning judicial systems that are at least partly rooted in historical indigenous custom and authority' (p 1) and that '...within the bounds of their federally-recognised authority, tribal courts can be seen to function as principal pillars upon which indigenous peoples in the United States are exercising and developing meaningful self-governance' (p 3).

27. *Ibid.* See Watson D, 'Discrimination Against Indigenous People in the Justice System', paper presented to the Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003), which notes a number of programs in Canada that address the problem, for example the Urban Aboriginal Strategy (p 4).

28. CESCR, *General Comment No. 3: The nature of states parties obligations*, UN Doc. E/1991/23, 14 December 1990.

29. *Ibid* [2].

30. *Ibid* [9].

31. See, for example, CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, 11 August 2000.

Professor Philip Alston, Chairperson of the CESCR Committee from 1991 to 1998, has noted the importance of the development of benchmarking to the monitoring of progress in realising rights.³² Observing the extensive work done in recent years to elaborate a wide range of economic and social indicators, Alston noted that 'indicators differ in very significant ways from benchmarks'.³³ **Indicators**, for the most part, are essentially statistical in nature, and the need for objectivity, quantifiability and accuracy point in turn to the technical expertise required in order to compile them. The same applies to their subsequent interpretation, which should take account of the known weaknesses of the process, and compensate for any likely biases. Accordingly, as discussed below, caveats and qualifications may be required with the use of indicators.

In contrast, **benchmarks** are targets established by government, on the basis of appropriate consultative processes, in relation to each of the economic, social and cultural rights obligations that apply for the state concerned. Those targets will be partly quantitative (and thus more closely assimilated to indicators) and partly qualitative. They will be linked to time frames, and they will provide a basis upon which the reality of 'progressive realisation' can be measured. Benchmarks should be linked to mechanisms of accountability in the sense that failure to reach a given benchmark should trigger an appropriate remedial response. Lastly, to empower those for whom programs are implemented, Alston states that the proposed beneficiaries need to participate in decisions relating to the steps to be taken towards realising the rights, and to contribute to the monitoring and evaluation processes.³⁴

Thus, if benchmarks are to be a tool of accountability and not just the rhetoric of empty promises they must, according to UNDP, be:

- specific, time bound and verifiable;
- set with the participation of the people whose rights are affected, to agree on what is an adequate rate of progress and to prevent the target from being set too low; and
- reassessed independently at their target date, with accountability for performance.³⁵

UNDP also provides some important qualifications on the use of statistical indicators and notes that statistics provide great power for clarity, but also for distortion.³⁶ UNDP further notes that indicators which are based on careful research and method assist in establishing strong evidence, opening dialogue and increasing accountability.³⁷ However, as UNDP indicates in the information reproduced below, care should be taken:³⁸

Statistical Indicators: 'Handle with care'

Statistical indicators need to be:

- **Policy relevant:** giving messages on issues that can be influenced, directly or indirectly, by policy action;
- **Reliable:** enabling different people to use them and get consistent results;
- **Valid:** based on identifiable criteria that measure what they are intended to measure;
- **Consistently measurable over time:** necessary if they are to show whether progress is being made and targets are being achieved;
- **Possible to disaggregate:** for focussing on social groups, minorities and individuals; and
- **Designed to separate the monitor and the monitored where possible:** minimising the conflicts of interest that arise when an actor monitors its own performance.³⁹

The development of law and justice indicators in the UN system

The OGC supports the implementation of democratic reforms necessary for development goals to be achieved. The OGC has a special focus and competency in the area of access to justice, human rights, civil society, governance and

32. Alston P, 'International Governance in the Normative Areas' in UNDP, *Background Papers: Human Development Report 1999*, reproduced in H Steiner and P Alston, *International Human Rights in Context* (New York: Oxford University Press, 2000) 317.

33. *Ibid.*

34. *Ibid.* 318.

35. UNDP, *Human Development Report 2000 – Human rights and human development*, UNDP, New York, 2000. 49. See <<http://hdr.undp.org/reports/global/2000/en/>>.

36. *Ibid.* 90.

37. *Ibid.*

38. *Ibid.*

39. *Ibid.*

conflict prevention. Increasingly, the OGC has identified a causal relationship between access to law and justice and the alleviation of poverty. It has questioned an unduly economic perspective of poverty, and noted the 'learned helplessness' that characterises the poor in the face of the legal system.

Justice is an area of increasing importance in development cooperation, and UNDP views it as closely related to human development and poverty eradication, and as a fulcrum for a human rights based approach to programming.⁴⁰

So, law and justice issues are inextricably linked with overall disadvantage and poverty. UNDP's approach to justice sector programs follows a capacity development perspective. According to UNDP, '[c]apacity is understood as "the ability to solve problems, perform functions, and set and achieve objectives"'.⁴¹ Thus '[a] capacity development approach opts for building on existing strengths, rather than substituting them. It stresses the rule of law, freedom from fear, freedom from want, and the right to development'.⁴²

Finally, in respect of evaluating its Access to Justice Programs, UNDP concedes that justice performance is difficult to evaluate. In this context it notes that:

It is important to have *target indicators* – projecting results based on specific objectives as defined in a project document; *benchmarks* – to compare internal data from the justice sector with data from a different sector; *milestones* – establishing intermediate goals; and *situational indicators* – e.g. workload of judges, length of trials etc.⁴³

UNDP further notes that more work is required on developing indicators related to the provision of justice, in the context of the development of general sets of indicators on good governance.⁴⁴ Despite the difficulties, UNDP believes law and justice programs merit priority 'because justice is the first among public virtues in a good society and therefore should be a first charge on the resources of states'.⁴⁵

3. Benchmarking developments in Australia

In Australia the development of benchmarks and indicators has emerged as central to efforts to increase the effectiveness of programs addressing Indigenous disadvantage. The failure of many programs to significantly improve the socio-economic circumstances of Indigenous Australians and the increasing dysfunction experienced by many communities has highlighted the need for innovative and targeted approaches. In particular, there is now a focus on coordination—a 'whole of government' approach—and on setting objectives, monitoring progress, reporting results and applying results to policy and program development. This is essentially a benchmarking approach. These developments, while having features unique to Australian circumstances, parallel the overseas developments outlined above. Opportunities exist for experiences to be drawn on and synergies to be developed between Australian and international benchmarking approaches. This is most likely to occur if Australian developments are made with international standards and developments in mind.

A strategic approach

The emerging importance of benchmarks and indicators in Australia is exemplified by the recent publication of *Overcoming Indigenous Disadvantage – Key Indicators 2003* (the 'Report'),⁴⁶ a report prepared for the Council of Australian Governments (COAG) by the Steering Committee for the Review of Government Service Provision (SCRGSP).⁴⁷ It is intended that the Report will be presented on a regular basis and that it will become the central benchmarking and monitoring instrument in respect of Indigenous programs for all governments in Australia and a key planning tool for all departments and agencies at state, territory and Commonwealth levels. The approach to setting benchmarks and identifying indicators in the Report is set out below.

40. Sudarshan R, 'Rule of Law and Access to Justice: Perspectives from UNDP Experience', paper presented to the European Commission Expert Seminar on Rule of Law and the Administration of Justice as part of Good Governance (Brussels, 3–4 July 2003) 1. See <<http://www.undp.org/oslocentre>>. Sudarshan is Advisor – Justice, UNDP Oslo Governance Centre, Norway.

41. Ibid.

42. Ibid.

43. Ibid 10.

44. Ibid.

45. Ibid.

46. Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage – Key Indicators 2003* (Canberra: Productivity Commission, November 2003).

47. The SCRGSP comprises representatives from all Australian governments and is convened by the Chairman of the Productivity Commission, which also provides the secretariat.

Background to development of the report

In 1999 the Commonwealth Grants Commission (CGC) had been set the task of developing methods of calculating the relative needs of Indigenous Australians in different regions for health, housing, infrastructure, education, training and employment services, to calculate indexes of need and to compare the results with the actual distribution of expenditure on those functions. The need for focussed target setting and effective monitoring was identified by the CGC in its subsequent *Report on Indigenous Funding 2001* (the 'CGC Report').⁴⁸ The CGC Report took a wide view of the issues involved in addressing Indigenous disadvantage, and contained considerable information and analysis concerning Indigenous funding issues.

The CGC Report identified a number of important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These included:

- the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;
- a focus on outcomes;
- ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;
- ensuring genuine collaborative processes with the involvement of government and non-government funders and service deliverers, to maximise opportunities for pooling of funds, as well as multi-jurisdictional and cross-functional approaches to service delivery;
- recognising the critical importance of effective access to mainstream programs and services, and clear actions to identify and address barriers to access;
- improving the collection and availability of data to support informed decision making, monitoring of achievements and program evaluation; and
- recognising the importance of capacity building within Indigenous communities.⁴⁹

Particularly relevant to the issue of benchmarking was the identification of the need to improve performance in respect of data matters. It was evident to the CGC that much of the required data for analysing service delivery was non-existent, or partial, or unreliable, or not comparable either between regions or over time. As the CGC Report pointed out, access to comparable and reliable data was critical if objective measures of Indigenous need were to be better incorporated in decisions on the allocation of funds.⁵⁰ The CGC Report observed that to achieve good consistent data, the Commonwealth, state and other service providers must, as a matter of urgency:

- identify minimum data sets and define each data item using uniform methods so that the needs of Indigenous people in each functional area can be reliably measured;
- prepare measurable objectives so that defined performance outcomes can be measured and evaluated at a national, state and regional level;
- ensure data collection is effective, yet sensitive to the limited resources available in service delivery organisations to devote to data collection;
- negotiate agreements with community based service providers on the need to collect data, what data should be collected, who can use the data, the conditions on which the data will be provided to others and what they can use it for; and
- encourage all service providers to give a higher priority to the collection, evaluation and publication of data.⁵¹

The CGC Report acknowledged that many of these principles were in fact being followed in work that was underway. It surveyed some initiatives taken to improve data management, including the 1997 request by the Prime Minister for the SCRGSP to oversee the preparation and publication of data on services provided to Indigenous people.⁵²

The identification of a targeted and monitored cross-jurisdictional approach identified by the CGC became the basis of the approach developed through COAG in the context of progressing the reconciliation agenda. COAG, at its

48. Commonwealth Grants Commission (CGC), *Report on Indigenous Funding 2001* (Canberra, 2001).

49. *Ibid* xviii–xix.

50. *Ibid* 95.

51. *Ibid* 96.

52. *Ibid* 78.

November 2000 meeting, agreed on a number of priority actions including:

[R]eviewing and re-engineering programs and services to ensure they deliver practical measures that support families, children and young people. In particular, governments agreed to look at measures for tackling family violence, drug and alcohol dependence and other symptoms of community dysfunction.⁵³

In agreeing to take a lead role in driving necessary changes, COAG directed Ministerial Councils—established at ministerial level to coordinate federal and state programs—to develop (where they had not already done so) action plans, performance monitoring strategies and benchmarks. In April 2002 COAG took this process a step further and commissioned the SCRGSP to:

[P]roduce a regular report against key indicators of indigenous disadvantage. This report will help to measure the impact of changes to policy settings and service delivery and provide a concrete way to measure the effect of the Council's commitment to reconciliation through a jointly agreed set of indicators.⁵⁴

A draft framework for reporting against indicators in respect of addressing Indigenous disadvantage was developed by the SCRGSP through a consultative process and presented to COAG in 2003. In confirming COAG's endorsement of the framework, the Prime Minister wrote:

The framework will provide relevant and meaningful indicators that can demonstrate the impact of government policies and programmes on outcomes for indigenous people.⁵⁵

Given the central role that is intended for the report to COAG against this framework, it is useful to consider in some detail the approach taken, the indicators selected, and, where relevant, their application to the law and justice area.⁵⁶

A preventive model

As the Chairman of the Productivity Commission, Gary Banks, has pointed out, the commissioning of the SCRGSP *Overcoming Indigenous Disadvantage: Key Indicators Report 2003* (the 'Report') arose from the desire to monitor outcomes in a systematic way that crosses jurisdictional and portfolio boundaries and assists in informing policy developments within jurisdictions.⁵⁷ In this context, Mr Banks has observed that:

The purpose of the Report is to be more than just another collection of data. It seeks to document outcomes for Indigenous people within a framework that has both an agreed vision of what life should be for Indigenous people and a strategic focus on key areas that need to be targeted if that longer term vision is to be realised.⁵⁸

As the Report itself indicates, its structure seeks to facilitate interaction between sectors and between governments on programs, but without detracting from the responsibility and accountability of individual agencies.⁵⁹ The Report further notes that:

It is predicated on the view that achieving improvements in the wellbeing of Indigenous Australians in a particular area will generally require the involvement of more than one government agency, and that improvements will need preventive policy actions on a whole-of-government basis.⁶⁰

The Report is forward-looking, rather than merely being an accounting or measuring device. The Report notes that because of the poor connection between high level measurements (termed 'headline' statistics) of disparity in outcomes, such as life expectancy, and the actions of policy makers and service delivery agencies, high level measurements do not provide an adequate focus for action among relevant policy makers.⁶¹ Indeed, as the Report notes:

Because of necessarily long lead times, current policy interventions which aim to improve, for example, Indigenous health or employment outcomes, may take many years to show up in the 'headline' statistics. In the intervening

53. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, appendix 1.1 'Extract from COAG Communiqué, 3 November 2000', 1–2.

54. *Ibid*, appendix 1.2, 'Extract from COAG Communiqué, 5 April 2002'.

55. *Ibid* xix.

56. The information on the COAG Key Indicators Reporting Framework presented here draws on documentation produced by the Productivity Commission, including: Banks G, Chairman Productivity Commission, *Indigenous Disadvantage: Assessing Policy Impacts*, speech delivered at the conference Pursuing Opportunity and Prosperity (Melbourne, November 2003): see <<http://www.pc.gov.au/research/speeches/cs20031113/cs20031113.pdf>>; and SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46.

57. Banks, *ibid* 1–2.

58. *Ibid* 2.

59. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, [2.1].

60. *Ibid* [2.2]

61. *Ibid*.

period, the statistics of disparity may incorrectly suggest inactivity, when much may be being done to ultimately close the gap.⁶²

The Report reinforces the need to go beyond the 'headline' statistics. Thus:

Such statistics, while important to gauging overall progress in the long term, cannot assist policy makers to target the causes of disadvantage at the key times in the lifecycle when interventions can most effectively be made. In some respects, reporting at the headline level (for example, life expectancy) can create a perception that the problem is too big to handle. The problems being reported on with headline indicators generally arise at the end of long chains of causal factors (for example, birth weight, diet and smoking) that cross many sectoral boundaries.⁶³

Accordingly, indicators must be established to report on progress with respect to these causal factors that underlie the headline statistics. Thus, the framework that has been developed for COAG is based on a preventive model that attempts to tackle outcome inequalities by focussing on the causal factors⁶⁴ that are likely to result in the greatest impact on population-wide differentials.⁶⁵ It encourages policy makers and service delivery staff to look to those areas for the factors that are ultimately causing disadvantage at the headline level.

A tiered approach

The framework for the Report takes a tiered approach.⁶⁶ At the apex of this framework are three overarching priorities. They reflect a vision for Indigenous people that is shared by governments and Indigenous people (based on the SCRGP's consultative process). They are:

- safe, healthy and supportive families with strong community and cultural identity;
- positive child development and prevention of violence, crime and self-harm; and
- improved wealth creation and economic sustainability for individuals, families and communities.⁶⁷

'Headline indicators' – a snapshot

Below these overarching (and overlapping) priorities, a first tier of 'headline indicators' has been developed to provide a snapshot of how actual outcomes for Indigenous people measure up against these overarching priorities.⁶⁸ The framework is illustrated in Figure 1 below (p 132).⁶⁹

Mr Banks has stated that the choice of the headline indicators, while subjective, was generally accepted as meaningful by Indigenous people in the consultation process for developing the framework.⁷⁰ The Report identified 12 indicators of social and economic status of Indigenous people relative to other Australians. Mr Banks points out that the framework and report could rest there. However, this would provide little assistance for policy-makers, or those who wish to monitor the impact of programs. Headline indicators do not provide a sufficient policy focus and are only blunt indicators of policy performance.⁷¹

Strategic areas for action – the second tier

At the second tier of the framework, there are seven 'strategic areas for action'. The Report notes that:

They have been chosen for their potential to have a significant and lasting impact in reducing Indigenous disadvantage and for their amenability to policy action. They can assist policy makers to address the causes of disadvantage so that, over time, improvements in the headline indicators and priority outcomes will be achieved. While it may take some time for improvement in the strategic areas to show up in the headline indicators, they serve as intermediate measures of progress.⁷²

62. Ibid.

63. Ibid.

64. The terminology adopted by the *Overcoming Indigenous Disadvantage – Key Indicators 2003 Report* for these causal factors is 'strategic areas for action'.

65. See Banks, above n 56, 2.

66. Compare to the discussion by Professor Alston, above, of the distinction in the UN system between benchmarks and indicators.

67. Banks, above n 56, 2.

68. Ibid 3.

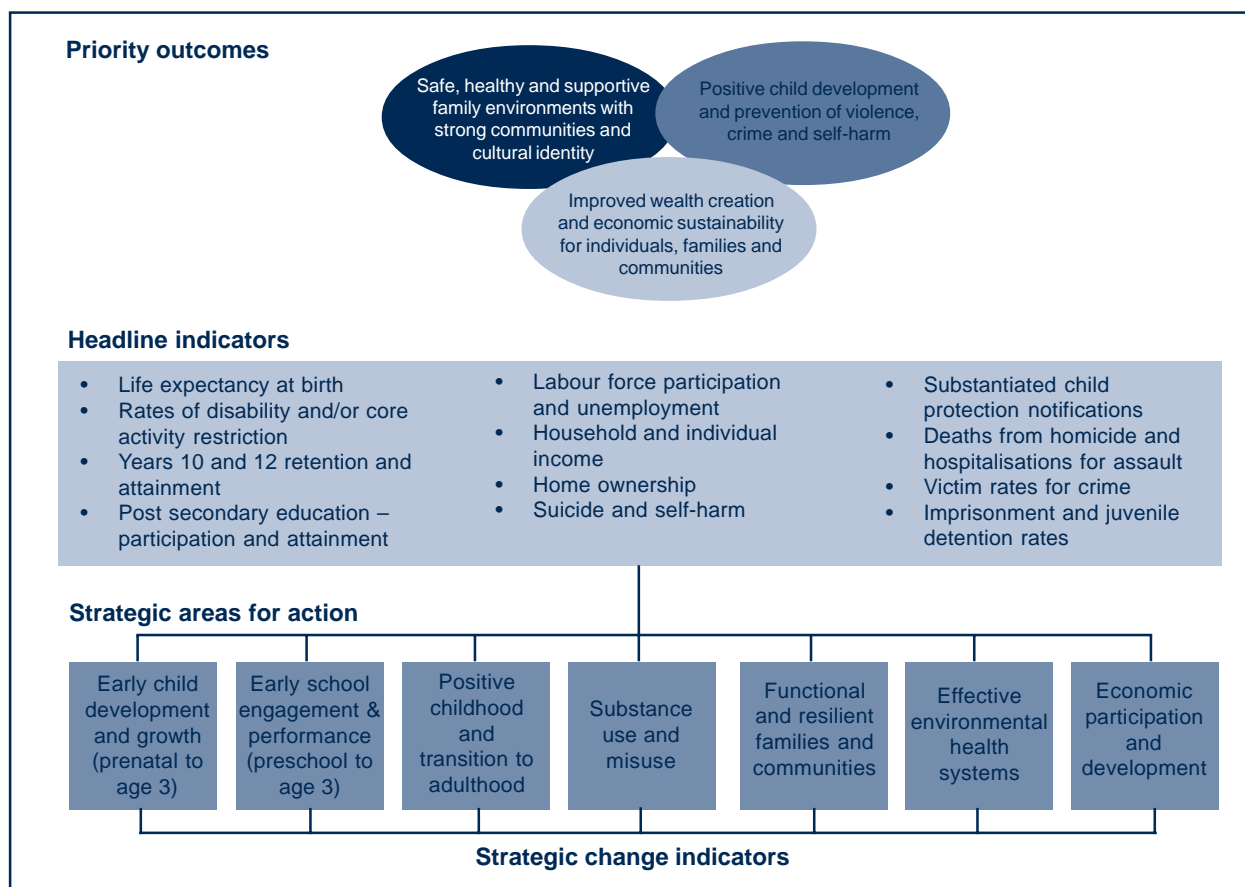
69. SCRGP, *Overcoming Indigenous Disadvantage – Key Indicators 2003, Overview*, above n 46, 2. Figure 1 is reproduced here by kind permission of the Steering Committee for the Review of Government Service Provision. For the full overview document see <<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2003/overview.pdf>>.

70. Banks, above n 56, 3.

71. Ibid.

72. Ibid.

Figure 1: The Framework



The Chair of the SCRGSP, Gary Banks, has said:

The strategic areas for action are not 'rocket science': they sensibly focus on young people, the environmental and social factors bearing on quality of life, and material wellbeing. They – and the indicators that relate to them – have been developed with advice and feedback from governments, experts in the field and, most importantly, Indigenous people and organisations.⁷³

Strategic change indicators – the third tier

The Report notes that 'for each of the strategic areas for action, a few **key indicators** have been developed with their potential to be affected by government policies and programs in mind'.⁷⁴ These indicators are based on actual *outcomes* for Indigenous people, rather than reporting on the operations of specific policy programs.⁷⁵ Relevant indicators are discussed below.

Data limitations

As indicated by the Commonwealth Grants Commission and in UN discussions, validity and reliability of data is a constant difficulty in establishing and measuring benchmarks and indicators. Whilst significant improvements have been achieved in recent years, the Report notes the significance of data limitations.⁷⁶ The data for the Report has been

73. Ibid.
 74. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, xxii.
 75. Ibid.
 76. Ibid xxiii.

drawn from three types of sources—census, survey and administrative data—each of which has strengths and weaknesses that should be taken into account.⁷⁷ Further, the Report notes that '[p]articular limitations arise from variability in the identification of people as being of Indigenous origin, both across collections and over time'.⁷⁸

4. Findings of the 2003 Overcoming Indigenous Disadvantage Report

The Report was the first of its kind submitted under the new reporting framework. The first part of the Report focuses on the 12 headline indicators. Five of these are directly related to law and justice, indicating the centrality of law and justice issues in addressing overall Indigenous disadvantage in Australia. These five are:

- Suicide and self-harm.
- Substantiated child protection notifications.
- Deaths from homicide and hospitalisations for assault.
- Victim rates for crime.
- Imprisonment and juvenile detention rates.

The Report's findings in respect of these headline indicators in the law and justice area are relevant to the potential to apply a benchmarking/indicator framework to the interaction of the Aboriginal people and the Western Australian legal system. A brief summary of these findings follows.

Suicide and self-harm

The Report found that the suicide rate for Indigenous people (35.5 per 100,000) was considerably higher than the rate for other Australians (13.1 per 100,000⁷⁹) and that the rates for the Indigenous population were particularly high in the 25–34 year age group (67.2 per 100,000).⁸⁰ As well, the non-fatal rate for hospitalisation for intentional self-harm was significantly higher for Indigenous people. The Report noted a number of risk factors, including the fact that suicide and self-harming behaviours in Aboriginal communities are often associated with alcohol and other mental disorders.⁸¹

Substantiated child protection notifications

The Report notes that this headline indicator has been chosen because of evidence indicating that many Indigenous children are at risk.⁸² Information on substantiated child protection notifications provides insight into the extent of abuse, neglect and/or harm to children in the family environment.⁸³ As the criteria for substantiation varies across jurisdictions, care has to be taken in interpreting this data. Further, the Report notes that 'the number and rate of substantiations are a proxy indicator because no credible data exists on actual levels of child abuse or neglect'.⁸⁴ As well, increases in notifications may be the result of reduced tolerance to, or increased willingness to take action about, abuse or neglect. These problems with data are indicative of the need to 'handle with care' the information provided by statistical indicators.

The Report found that in the reporting period 2001–2002 the rate of substantiated notifications in all jurisdictions was higher for Indigenous children; the ratio of Indigenous to non-Indigenous notifications being the highest in Western Australia and Victoria.⁸⁵ At the same time, the most common type of substantiation in Western Australia and some other jurisdictions was neglect rather than abuse.

Deaths from homicide and hospitalisations for assault

The Report found that 'although Indigenous people account for around 2.4 per cent of the total population, they comprised 15.1 per cent of all homicide victims, and 15.7 of all homicide offenders'.⁸⁶ It also found that:

77. Ibid.

78. Ibid.

79. Based on Queensland, Western Australia, South Australia and the Northern Territory.

80. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, [3.39].

81. Ibid [3.39]. On this matter the report cites Swan P & Raphael B, *Ways Forward, National Aboriginal and Torres Strait Islander Mental Health Policy, National Consultancy Report* (Canberra: AGPS, 1995).

82. Ibid [3.9].

83. Ibid [3.44].

84. Ibid.

85. Ibid [3.45] (Table 3.9.1).

86. Ibid [3.47].

Substance abuse is a key factor in deaths from homicide and hospitalisation for assaults. A much larger share of Indigenous homicides involved both the victim and the offended having consumed alcohol at the time of the offence, compared with non-Indigenous homicides.⁸⁷

Hospital separation rates for assault in 2001–02 were 13.3 per 1000 for Indigenous people compared to 1.0 per 1000 for non-Indigenous people.⁸⁸

Victim rates for crime

This headline indicator has been used, despite considerable data difficulties, because 'violence and criminal behaviour have demonstrable impacts on health outcomes, safety and positive child development'.⁸⁹ That is to say, they impact significantly on rights to an adequate standard of living and to the highest attainable standard of physical and mental health as set out in the ICESCR. The Report draws only on data from New South Wales and Western Australia, and notes that even then the data is not comparable between the two jurisdictions. Nevertheless, the Report is able to conclude on the limited data available, that 'Indigenous people were much more likely to be the victims of murder, assault, sexual assault and domestic violence than non-Indigenous people'.⁹⁰

In respect of the Western Australian data, it was noted that 'Indigenous people were nearly seven times more likely to be a victim of assault than non-Indigenous, while Indigenous females were almost 13 times more likely to be victims'.⁹¹ Indigenous people were also nearly seven times more likely to be a victim of homicide. Outside of Perth, Indigenous people were approximately 40 times more likely to be victims of domestic violence than non-Indigenous people.⁹²

Imprisonment and juvenile detention rates

As the Report notes, over-representation of Indigenous people in the criminal justice system has been an issue of long standing.⁹³ Of all the headline indicators in respect of law and justice issues, it is the one that shows in most marked contrast the dissonance between Indigenous people and the legal system that has displaced or overshadowed their own systems for maintaining law, social coherence and control. The problems of over-representation of Indigenous people in the justice system and in detention facilities were highlighted by the 1991 Royal Commission into Aboriginal Deaths in Custody.

Drawing on data from the Australian Bureau of Statistics and the Australian Institute of Criminology the Report notes that Indigenous males were some 15 times more likely to be in prison and Indigenous females 20 times, and that although the rate of juvenile detention has declined over the past five years, Indigenous juveniles were still 19 times more likely to be detained than non-Indigenous juveniles.⁹⁴

The highest ratio of Indigenous to non-Indigenous prisoners can be found in Western Australia – a ratio of just over 19. While the highest Indigenous imprisonment rate of approximately 2,400 prisoners per 100,000 adult Indigenous population was recorded in Western Australia, this was actually well below the 3,000 prisoners per 100,000 adult Indigenous population recorded a year earlier in that state.

The Report also points out that detention data for juveniles only illustrate one aspect of the juvenile justice system and that 'the vast majority of juveniles in the care of juvenile justice agencies are not placed in detention but rather are placed on community service and other types of order'.⁹⁵ This illustrates the need not to rely solely on one indicator, as important as that might be, in assessing the state of the interaction between Indigenous people and the justice system.

In summary, the headline indicators provide an important 'snapshot' of the state of Indigenous disadvantage, and are suggestive of causal factors. Below the headline indicators sit the strategic areas for action, with their concomitant strategic change indicators.

87. Ibid.

88. Ibid [3.51].

89. Ibid [3.53].

90. Ibid [3.54].

91. Ibid [3.56].

92. Ibid [3.57].

93. Ibid [3.57].

94. Ibid [3.58]–[3.59].

95. Ibid [3.58], citing Bareja M & Charlton K, *Statistics on Juvenile Detention in Australia: 1981-2002*, Technical and Background Paper Series No 5 (Canberra: Australian Institute of Criminology, 2003).

The role of strategic change indicators

As indicated above, the Report notes that:

Under the framework seven strategic areas have been chosen for their potential to have a significant and lasting impact on Indigenous disadvantage, with the aim of assisting policy makers to focus on the causes of social and economic disadvantage. None of these strategic areas are portfolio specific. Key indicators have been developed for each strategic area with their potential relevance to government policies and programs in mind.⁹⁶

These key indicators are amenable to policy interventions. Examples include alcohol related crime and hospital statistics (strategic area 'substance use and misuse'), repeat offending (strategic area 'functional families and resilient communities') and children on long term care and protection orders (same strategic area). For the most part they are outcome indicators that are likely to reflect the collective efforts of governments and agencies. Although the framework is predicated on reporting quantitative data against each indicator, some indicators are not altogether quantifiable, and qualitative data including case studies can contribute. Without going into the rationale for the selection of each of the indicators, it can be seen that this approach provides a way of building data from the ground up, providing linkages to strategic interventions and programs, and showing a chain of causality to the headline indicators and eventually the priority outcomes.

The greatest challenge in this approach is to articulate the linkages between indicators and programs. Experience and expertise will be required to turn the Key Indicators Framework into a practical and effective tool for developing and improving programs, policies and coordination. Nevertheless, this approach provides a model for the application of a benchmarking approach to reducing Indigenous disadvantage in the law and justice area. The particular findings of the Report against selected strategic change indicators, particularly in respect of Western Australia, are referred to in the following section.

5. The value of the application of a benchmarking approach to the reduction of Indigenous disadvantage in the law and justice area in Western Australia

In applying a benchmarking approach, including in respect of law and justice issues in Western Australia, the following key questions need to be kept in mind:

- Who is looking?
- What do we see?
- What do we look at?
- What do we not see?
- How do we create meaning from what is seen?
- How do we ensure that new insights are shared and applied?

Participation by all stakeholders is essential to the success of a benchmarking approach. Externally-driven monitoring and evaluation of programs can in fact increase the marginalisation and alienation of those who are disadvantaged (even though the programs are designed to assist them) and can fail to provide valid and reliable data. This is particularly the case in respect of Indigenous people. When it comes to law and justice issues, the legacy of a focus on Indigenous offending and heavy policing adds to the difficulty, given the resentment and distrust that may be present.

Participation by Indigenous people in implementing a benchmarking framework in Western Australia will depend on ensuring the relevance of the process for them. It requires policy makers to take into account the questions raised above. For Indigenous people, benchmarking must sit within the context of self-determination – it needs to be seen as a tool for improved outcomes including autonomy and self-reliance. The substance of developing a partnership with Indigenous people in addressing disadvantage in the law and justice area will include:

^{96.} Ibid [4.1].

Partnership Building

- working through the objectives of the partnership, viewed from the perspectives of both the Indigenous community and of the Western Australian government and its agencies;
- prioritising the objectives for monitoring purposes;
- determining the most useful indicators for tracking progress (taking into account the COAG framework);
- identifying the best methods for collecting and recording information to suit the indicators identified and the local cultural context; and
- establishing collaborative mechanisms for analysing and interpreting data and for considering changes that should result.

The Law Reform Commission of Western Australia's Aboriginal customary law project is based on a participatory model. The terms of reference for the project were designed to 'give room for the incorporation of indigenous perspectives, classifications and priorities'.⁹⁷ A community consultation phase conducted by the Law Reform Commission (the 'Commission') has provided opportunities for Indigenous communities to have wide-ranging discussions of the impact of law and justice issues. Drawing on notes from that consultation phase, this paper identifies some tentative priority objectives in law and justice matters, and discusses the implications for developing relevant benchmarks and indicators, noting also relevant data from the SCRGSP's *Overcoming Indigenous Disadvantage – Key Indicators Report 2003* (the 'Report').

Key themes arising from the Commission's community consultations

Alcohol abuse

A number of the community consultations identified substance abuse in general, and alcohol abuse in particular, as a key concern fundamentally affecting the interaction of Indigenous people with the criminal justice system. Alcohol was also seen as undermining the continued practice of Aboriginal customary law. Thus alcohol abuse is a cross-cutting issue impacting on the maintenance of culture, social order, the personal security of individuals and relations with the criminal justice system. The destabilising influence of alcohol is felt whether communities rely on the introduced western system of law, or the traditional system of customary law, or a combination of the two.

Alcohol has in the past been seen as a *symptom* of social disadvantage and alienation. However, in recent times alcohol has come to be identified itself as a *cause* as much as a *symptom* of Indigenous disadvantage and distress.⁹⁸ As such, alcohol abuse can be targeted directly under a preventive model. Significant community concern over the effects of alcohol and substance abuse on community members emerged from the consultation process. For example, in the consultations conducted by the Commission in the Pilbara region alcohol was named as 'the greatest problem'.⁹⁹ It was said to undermine the effective operation of customary law in that region. Alcohol abuse was also linked with fighting and domestic violence. The inability of the police and courts to make an impact on the situation was noted.¹⁰⁰ The communities that participated in the Commission's consultations at Wiluna and Meekatharra called for increased restrictions on the sale of alcohol; they also complained that parents feel powerless and that alcohol undermines the vitality of the community.¹⁰¹ At the Kalgoorlie consultation it was observed that there is insufficient recognition of the seriousness of the problem at government level and that Aboriginal customary law has no simple answer to problems of alcohol or drugs.¹⁰²

97. Blagg H, Morgan N & Yavu-Kama-Harathunian C, 'Aboriginal Customary Law in Western Australia' (2002) 80 *Reform* 11, 13.

98. See, for example, Pearson N, *On the Human Right to Misery, Mass Incarceration and Early Death* (Charles Perkins Memorial Lecture, University of Sydney, 2001); Anderson A, speech delivered to the ATSIC International Women's Breakfast, 8 March 2004 <www.atsic.gov.au>, 1. Anderson commented in respect of remote communities in the Northern Territory: 'Personally, I think the misuse of alcohol has been a major factor in the increase of violence. The generation before grog took a hold on people were unscarred – now both women and children are scarred by violence'.

99. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara Region*, 6–11 April 2003, 11–12.

100. *Ibid* 23.

101. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna and Meekatharra*, 27–28 August 2003, 4.

102. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 5.

The priority of the issue of alcohol and other substance abuse has also been recognised in research undertaken by the Department of Justice (Western Australia) as part of the Kimberley Regional Justice Report. This research found that 'the overwhelming causal factor behind offending behaviour was misuse of alcohol and drugs and that this led to fighting, stealing and abuse'.¹⁰³ The COAG Key Indicators Framework identifies 'substance abuse and misuse' as a strategic area for action, and notes the potential impact of substance misuse on all the headline indicators discussed in the Report. Three strategic change indicators were identified in the Framework for this strategic action area.¹⁰⁴ They are:

- Alcohol and tobacco consumption (indicator 8.1).
- Alcohol related crime and hospital statistics (indicator 8.2).
- Drug and other substance abuse (indicator 8.3).

The Report notes that reducing substance misuse can significantly reduce the level of assaults and homicides, and that it might also reduce crime and imprisonment rates.¹⁰⁵ However indicator 8.1 (alcohol and tobacco consumption) yields limited information on alcohol abuse, suggesting that the alcohol risk levels (based on average daily consumption) are not significantly higher for Indigenous people than non-Indigenous. This finding does not reflect community concerns and perceptions. Rather, it may reflect insufficient differentiation by consumption patterns between Indigenous and non-Indigenous or insufficient disaggregation by region. As the Report notes, only limited data is currently available on the prevalence of Indigenous drug and other substance use, both by type of drug and jurisdictional or geographic region. There is a need to improve the quality and quantity of this data.¹⁰⁶

In recognising this need, the Ministerial Council on Drug Strategy at its August 2003 meeting recommended 'a stronger focus on prevention, particularly in relation to Indigenous communities, with a more strategic approach to research and use of data'.¹⁰⁷ It endorsed an Aboriginal and Torres Strait Islander Peoples' Complementary Action Plan 2003 2006 with performance indicators that will be used to provide valid and reliable measures of harm or the reduction in harm caused by drug use (including alcohol). As the Report notes, the data collected for the Complementary Action Plan indicators might be useful for reporting against indicators 8.1 and 8.3 (drug and other substance abuse).¹⁰⁸ What these developments highlight is the need to cross reference with developments in a number of portfolio areas and Ministerial Councils in developing benchmarks and indicators.

In the context of Western Australia, a benchmarking framework in reference to the impact of alcohol and substance abuse on crime and safety would appear a high priority and would provide data for evaluating programs to reduce alcohol abuse. The COAG framework provides a starting point for considering this issue. In respect of strategic indicator 8.2 (alcohol related crime and hospital statistics) this would appear to be of central significance, if Indigenous disadvantage in respect of law and justice is to be effectively addressed. However, as the Report notes, there are no reliable data on the overall extent of alcohol related crime.¹⁰⁹ There is however data on alcohol related homicide, so this can provide a proxy for the wider issue of the relationship between criminal behaviour and alcohol. As homicide is at the extreme end of criminal behaviour, the situation is not altogether satisfactory. There is a need to expand the data to cover crimes that do not result in homicide. What the data does show is a marked contrast between Indigenous and non-Indigenous homicides as far the involvement of alcohol. For instance, just under three-quarters (72.9 per cent) of Indigenous homicides involved both the victim and offender having consumed alcohol at the time of the offence, compared with 18.2 per cent of non-Indigenous homicides.¹¹⁰ Alcohol may also be a key factor in other crimes. An indicator to measure the correlation of alcohol with a wider range of crimes could yield valuable data.

Community control

Whilst indicators measuring, for example, alcohol related homicides, provide key data, they do not specifically address some of the major concerns about alcohol and social cohesion reflected in the Commission's community consultations. These concerns revolved around not just the consequences of alcohol abuse but specifically control of supply issues, including restrictions, prohibition and community empowerment. Given expressed concerns about the difficulties and

103. The Hon Jim McGinty, Attorney-General (WA), *Joint Approach to Tackling Kimberley Crime*, Media Release, 27 May 2003.

104. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, ch 8.

105. *Ibid* [8.1].

106. *Ibid* [8.17].

107. Ministerial Council on Drug Strategy, Joint Communiqué, 1 August 2003. See <www.nationaldrugstrategy.gov.au/mcocs/communique_0108.htm>.

108. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, [8.17].

109. *Ibid* [8.8].

110. *Ibid*.

frustrations experienced by communities in exercising control over the availability of alcohol, it may be helpful to go behind statistics on alcohol consumption and effects on crime and violence, to instead measure the progress by communities in gaining a degree of control over alcohol availability and supply. Relevant indicators would attempt to monitor progress at community level in having controls imposed, in cooperation with the authorities, on alcohol availability. Although difficult to establish and measure, such indicators would emphasise the preventive approach.

Whilst a statistical base for indicators is desirable, this is a situation where developing descriptive or subjective indicators may yield useful information. For example, the Report has identified the possibility of using case studies in respect of measuring changes in governance arrangements.¹¹¹ A similar approach could be developed to provide a measure or reporting tool on community empowerment in respect of alcohol control. Other techniques of social science research may be relevant, such as surveys, questionnaires or focus groups. The area of social control and cohesion has a major socio-psychological dimension and subjective responses or perceptions have their own importance as part of a measure of wellbeing. This suggests that even in an area such as alcohol control, indicators can and should reflect progress in establishing self-determination and community empowerment.

Criminal justice issues

Issues relating to policing, the courts and prisons emerged as major themes in the Commission's community consultations. For example, the consultations in the Pilbara region expressed concerns about the treatment of Aboriginal people by the police in terms of lack of cross-cultural training and sensitivity, intrusive policing and interference in traditional punishments. With respect to the courts, significant problems for Aboriginal people were expressed, including understanding of legal processes, differences in approach between the two societies, lack of sufficient participation by Indigenous people and sentencing issues. Concerns with prisons included lack of cultural sensitivity in their administration (arrangements for attendance at funerals seeming to be a particular concern), and at a more significant level, the view that prison in fact only worsens the incidence of delinquency and social breakdown:

Young men treat gaol like a holiday camp, get well fed and television, they have no fear of white law, Aboriginal law is harder. Gaol creates more violence, the young men come back worse. Gaol makes them big fellas, they don't listen to Elders. Instead of sentencing someone to six months in prison why not send them out to live in the bush for six months to do the law.¹¹²

Much of the interaction of Indigenous people in Australia with the criminal justice system has been negative, and rates of offences, convictions and incarceration have been the focus of concerns in public consideration and discussion of such issues. From one perspective, without condoning criminal or delinquent behaviour, these outcomes are very much a measure of Indigenous disadvantage reflecting marginality, powerlessness and social and personal dysfunction. Consequently, statistical indicators are of key importance in tracking trends in the interaction of Indigenous peoples with the criminal justice system, and identifying key strategic areas for interventions.

The Report has identified a number of relevant strategic indicators, and these would need to be taken into account in developing a benchmarking approach in Western Australia in respect of criminal justice matters. For example, under 'functional and resilient families and communities'¹¹³ the indicators 'children on long term care and protection orders'(9.1) and 'repeat offending' (9.2) can provide important data. In respect of repeat offending, ABS data on prior imprisonment provides a proxy measure. Whilst there are significant statistical problems with this data and, in the main, the level of repeat offending is under-represented, nevertheless the Report found that approximately four in every five Indigenous prisoners had previously been in prison, compared to 55 per cent of non-Indigenous prisoners.¹¹⁴ Repeat offending, combined with the relatively high proportion of Indigenous prisoners (see above), is one of the main parameters of the present parlous state of the interaction between Indigenous people and the legal system, so interventions aimed at reducing recidivism need to be tracked and evaluated.

As well, under the strategic area of 'positive childhood and transition to adulthood'¹¹⁵ the indicator 'juvenile diversions as a proportion of all juvenile offenders' provides an indication of the nature of the interaction of juveniles with the criminal justice system. As the Report notes:

111. Ibid, ch 11.

112. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara Region*, 6-April 2003, 21.

113. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, ch 9.

114. Ibid [9.7].

115. Ibid, ch 7.

The use of diversions can have a critical influence on the extent of an individual's involvement in the criminal justice system.¹¹⁶

However, there is no national data set on the extent of Indigenous juvenile diversions,¹¹⁷ and the Report notes that the importance of diversions in Indigenous juvenile justice outcomes necessitates the collection of better data.¹¹⁸ The value of developing a benchmarking approach in such an area is clear.

The consultations also refer to a number of positive and constructive developments in criminal justice areas such as early intervention programs by the police and other agencies in relation to juvenile crime. However, the issue is that the concerns raised by the communities represent deep-seated problems symptomatic, in Australia and other countries, of the relationship between minority groups and the legal system, problems which are often exacerbated in the case of Indigenous peoples. For example, as Robert Reiner has pointed out, powerless minorities tend to become 'police property' and 'tend to be over-policed and under-protected'.¹¹⁹ To the Indigenous minority this appears as racial discrimination. The UN World Conference against Racism held in Durban in 2002 noted, in the context of combating racism, 'the need to promote effective access to justice'.¹²⁰ In its Program of Action:

The World Conference underlines the importance of fostering awareness and providing training to the various agents in the criminal justice system to ensure fair and impartial application of the law. In this respect it recommends that anti-discrimination monitoring services be established.¹²¹

Customary law

As well, the difficulty in understanding and accommodating Indigenous customary law and procedures reflects an inability to acknowledge and proceed on a basis of legal pluralism. Community concerns surrounding the recognition and application of customary law (including punishments) are recorded throughout the Commission's consultation reports. These problems, and some of the possible responses to them, have also been considered in UN forums and reports. As the UN Special Rapporteur Rodolfo Stavenhagen has pointed out:

The widespread lack of access to the formal justice system due to ingrained direct or indirect discrimination against indigenous people is a major feature of the human rights protection gap...it may signal the fact that the official legal culture in a country is not adapted to deal with cultural pluralism and that the dominant values in a national society tend to ignore, neglect and reject indigenous cultures.¹²²

Stavenhagen proceeds to make the following recommendation:

The Special Rapporteur recommends that indigenous law be accorded that status and hierarchy of positive law within the framework of the right to self-determination, and the States that have not yet done so undertake ways and means, in consultation with indigenous peoples, of opening their judicial systems to indigenous legal concepts and customs.¹²³

Implications for a benchmarking approach

The high priority attaching to criminal justice matters by Indigenous communities, suggests that their inclusion in a benchmarking and indicators framework should be given close consideration. Possible benchmarks would relate to areas such as recognition of customary law and indigenous values; participation and responsibility in the court system; and training for police and law officers to take a non-discriminatory approach in carrying out their duties.

The strategic indicators chosen would rely on the benchmarks, but could include participation statistics such as the numbers of Aboriginal Justices of the Peace, progress in including elders in court processes, courses and training for police and court officials, and education arrangements for explaining legal processes to Indigenous communities.

116. Ibid [7.25].

117. Ibid.

118. Ibid [7.26].

119. Reiner R, 'Poaching and the Police', in Maguire M, Morgan R & Reiner R (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1994) 716, 726.

120. UN Commissioner for Human Rights, *Discrimination Against Indigenous Peoples in the Justice System – Note by Secretariat*, Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003), HR/MADRID/IP/SEM/2003/BP.13, 2.

121. Ibid 3.

122. Commission on Human Rights, *Indigenous Issues – Human Rights and Indigenous Issues, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Rodolfo Stavenhagen, UN Doc. E/CN.4/2004/80, [23].

123. Ibid [69].

Benchmarking can contribute in criminal justice areas by:

- focussing on the need for a logical framework, rather than ad hoc interventions;
- highlighting inter-relationships and cross-portfolio aspects;
- identifying the need for major commitment of time and resources; and
- providing a tool for ongoing dialogue and evaluation with Indigenous communities and representatives.

Summary

This discussion about the possible value of a benchmarking approach to law and justice issues in Western Australia has been highly selective, touching on a few key areas that have emerged in the Commission's community consultation process. It is intended to be indicative of the need to:

- build on community priorities;
- incorporate existing developments at the COAG level;
- identify in a comprehensive manner indicators relating to preventive measures and community empowerment;
- identify the need to take account of data shortfalls and institute remedial action; and
- establish ongoing consultative mechanisms for interpreting data and reviewing programs.

6. Coordination, integration and implementation

In developing a benchmarking approach it will be desirable to integrate and coordinate developments at the state level with developments through the COAG framework. This is essential to incorporating the COAG framework 'into policy design and programs across governments and between departments'.¹²⁴ As Gary Banks, Chairman of the SCRGSP has noted, the *Overcoming Indigenous Disadvantage Report* is essentially informational and does not and cannot provide policy answers. Rather it is intended to help governments and Indigenous people identify where programs need to deliver results, and to assess whether they are succeeding.¹²⁵ Banks observes that:

For it to be effective in this, it will be important that governments integrate elements of the reporting framework into their policy development and evaluation processes.¹²⁶

The Social Justice Commissioner, Dr Bill Jonas, has emphasised the importance of this linkage:

This is the most critical issue in relation to the [SCRGSP] report – ultimately it does not matter how refined the statistics that are reported are if the report is not utilised by governments to inform and change the way they go about delivering services to Indigenous peoples.¹²⁷

Although the elaboration of this linkage is yet to be fully developed, indicators relating principally to service delivery are to be elaborated by relevant Ministerial Council action plans, which are intended to link service delivery with the COAG reporting framework. For justice related areas the Standing Committee of Attorneys-General has agreed to develop performance indicators in a number of areas including crime prevention, community safety, improved access to justice related services and enhanced participation by Indigenous peoples in justice administration schemes.

For its part, the Western Australian Government has entered into a Statement of Commitment with Aboriginal Western Australians¹²⁸ which sets out the following partnership framework:

124. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, (Sydney: Human Rights and Equal Opportunity Commission, 2004) 32.

125. Banks, above n 56, 9.

126. Ibid.

127. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, above n 127, 32.

128. Department of Indigenous Affairs, *Statement of Commitment*, 10 October 2001, <<http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx>>.

Western Australian Partnership Framework

The parties agree that between Aboriginal people and the Western Australian Government there will be negotiated partnerships which:

- will be based on shared responsibility and accountability of outcomes;
- should be formalised through agreement;
- should be based on realistic and measurable outcomes supported by agreed benchmarks and targets;
- should set out the roles, responsibilities and liabilities of the parties; and
- should involve an agreed accountability process to monitor negotiations and outcomes from agreements.

It was agreed that:

[T]he Partnership Framework will establish state-wide policies and administrative arrangements to support negotiations and agreements at the regional and local level; will support Aboriginal people to negotiate regional and local agreements according to the priorities of Aboriginal people in partnership with other stakeholders; and should incorporate and be informed by separate agreements in the health, housing, essential services, native title, justice and other issues that impact on Aboriginal people in this state.¹²⁹

A communiqué signed in June 2002 between the Commonwealth Minister for Immigration and Multicultural and Indigenous Affairs, the Western Australian Minister of Indigenous Affairs and the Chairman of the ATSIC (WA) State Council committed the parties to development of formal processes for strategic coordination of planning and program delivery across all levels and sectors of government, linking Commonwealth and state agencies and involving Aboriginal communities in a collaborative approach.¹³⁰

The Western Australian Government has further indicated its commitment to integrating its approach with the COAG framework and with the Commonwealth government in its submission of July 2003 to the Senate *Inquiry into the Progress Towards National Reconciliation*.¹³¹ Mr Kobelke, the Minister for Indigenous Affairs, wrote to the Inquiry, observing that:

Jointly agreed national targets, benchmarks and indicators enable progress at the national and jurisdictional levels to be measured. This approach facilitates a linking of Commonwealth and State government activities around a common purpose that leads to a reduction of duplications and gaps in program development and service delivery.¹³²

The submission noted the need for more work in terms of:

Using the strategic areas for action (developed under the COAG framework) in planning and performance management and evaluation frameworks and processes across government to measure, drive changes to policy settings and inform future policy making.¹³³

7. Conclusion

It is apparent that at both the federal and state levels significant progress has been made in developing the basis for a benchmarking approach to monitoring and evaluating programs and policies for reducing Indigenous disadvantage. At the COAG level a framework for reporting on Indigenous disadvantage has been put in place and the first report presented. At the state level there is a commitment, in the context of a 'whole-of-government' approach to service delivery, to benchmarks and targets as tools for improved policy development and effective program implementation.

129. Ibid.

130. Indigenous Affairs Advisory Committee, *Communiqué*, 7 June 2002. See <<http://www.dia.wa.gov.au/Policies/StateStrategy/IAACSignedCommuniqué070602.pdf>>.

131. Submission of the Government of Western Australia to the Commonwealth Senate Inquiry into the Progress Towards National Reconciliation (July 2003). See <<http://www.aph.gov.au/senate/committee>>.

132. Ibid.

133. Ibid.

The consultation process of the Commission's Aboriginal customary law project has provided important information for the mutual elaboration of a benchmarking framework for addressing Indigenous disadvantage in law and justice matters in Western Australia. The development of a state-based framework in the law and justice area will require coordination with the COAG approach, and negotiation with Indigenous organisations and communities. A comprehensive approach is required, with benchmarks set at a high, system-wide level.

For a benchmarking approach to apply to the law and justice area, including to the recognition of Indigenous customary law, significant challenges will need to be recognised and met. These include:

- the unsuitability of some key indicators in this area to purely statistical quantification and the consequent need to look for a combination of statistical and qualitative indicators as appropriate;
- the need to improve data sets and to be able to disaggregate indicators to allow for regional measurement and interpretation;
- the paramount need to develop benchmarks and indicators that reflect Indigenous understandings, world view and legal perspectives arising from Indigenous peoples' own laws and customs, priorities and goals; and
- the need to continually reflect on the international human rights standards applying to Indigenous peoples in respect of law and justice issues in order to ensure that the approach taken is consistent with Australia's human rights obligations.

Indigenous disadvantage in the area of law and justice is central to the significant problems facing Indigenous Australians. It impacts directly and adversely on community cohesion and progress and on Indigenous Australians' personal security and sense of wellbeing. Reducing disadvantage in law and justice matters, including through acknowledgement and recognition of the role of customary law, is a priority human rights obligation. A benchmarking approach has significant potential to contribute to this goal in respect of law and justice matters.