

## 8 Conclusions and Recommendations

*You don't know what youse have done by coming in here and talking to us. You've opened up a can of worms. What can you do for us? We don't see nothing out of it. We're all burnt out. We're sick of being the message stick (Indigenous male prisoner).*

### 8.1 Summary

- The conclusions and recommendations in this final section build on specific recommendations detailed in earlier sections of this Review Report. First and foremost is the conclusion about the centrality of underlying issues and the need to make substantial progress in resolving these. While the array of policies, programs and initiatives reported on by government are acknowledged, they have not achieved the desired outcome of substantially reducing Indigenous disadvantage.
- Taking the lead from the Royal Commission, the Review concludes that tackling the underlying issues demands a human rights and social justice framework. This requires shifting the focus of social policies designed to address continuing disadvantage to a human rights and social justice basis.
- At time of writing, the development of the long awaited whole-of-government Indigenous framework, as identified in the 2000 *VAJA*, remains to be finalised by the Victorian Government. Whole-of-government accountability arrangements are needed for departments and should include both the Australian Government and local government sector to contribute effectively to shared outcomes.
- Ongoing monitoring of the Recommendations, in partnership with the Indigenous community, cannot simply be left to individual departments or to the Indigenous community alone. Instead it is proposed that this role should be assumed by an adequately resourced independent Commissioner for Aboriginal Social Justice, supported by a monitoring unit.

### 8.2 Successfully Tackling the Underlying Issues

The Royal Commission was very firm in its view that while there were deficiencies within the criminal justice systems nationwide that required rectification, the essence with regard to Indigenous deaths in custody lay elsewhere. Indigenous people were not dying in custody at any higher *rate* than other detained people; rather, the fact that they were so over-represented in the custodial population that the *number* of Indigenous deaths was higher. Logically therefore, the main focus of any attempts to reduce the number of Indigenous deaths in custody should be focused upstream of the criminal justice system, in those underlying influences leading to over-representation in custody. In this context, it is worth repeating what is perhaps the Royal Commission's most frequently quoted statement of its position on this matter:

*... the fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society – socially,*

*economically and culturally. The report is largely concerned with demonstrating the existence of that inequality and disadvantage in many aspects of social life and situation. The report examines the position of Aboriginal people in relation to health, housing, education, employment and income; it discusses the land needs of Aboriginal people. It shows how the attitude of the dominant non-Aboriginal society, racism both overt and hidden and institutional racism, adversely affect Aboriginal people (Royal Commission 1991b, Vol 1, 1.7.2).*

Section 5 of this Review examined the evidence on underlying issues and presented details of an impressive array of policies, programs and projects by Victorian Government departments. Details of substantial initiatives relating to health, education, housing, economic status, families and land needs were provided – many of which, it should be emphasised, are still in train and are still therefore to yield their desired outcomes. It would therefore be quite wrong for this Review to conclude that Victoria has been inactive in addressing the underlying issues so central to the argument of the Royal Commission. At the same time, it is appropriate for the Review to attempt to provide some rough measure of the overall progress made in this respect. On this score it must be said, first of all, that the reactions elicited from many members of the Indigenous community in the course of the Review ranged from the sceptical to the downright negative. Their views on underlying issues can be seen throughout Section 5 of the Review Report.

More detailed indices of how far Victoria has come, and how far it has left to go, in addressing the underlying issues can be derived from two other sources. First, since the Royal Commission reported in 1991, the Review looked for any beneficial impact on those underlying factors which, by now, should be apparent in the downstream indices pertaining to involvement with the criminal justice system. And secondly, the Review looked to the indices relating to health, employment, education and the like.

In this context, the findings of this Review Report support the statement made by the *VAJA*:

*Factors such as extreme social and economic disadvantage experienced by Aboriginal people (originally identified by the Royal Commission) remain largely unchanged and continue to place enormous stress on families and communities. These factors include high unemployment levels, poor education outcomes, poor health and low life expectancy, inadequate housing and widespread welfare dependency (Department of Justice, 2000: 13).*

The statistical evidence presented in Volume 2 – Statistical Information is designed to underline the fact that Victoria still has a very long way to go before it can plausibly claim to have fulfilled the Royal Commission's Recommendations on these matters.

On one reading, this could be taken as a justification to call for enhanced policies, more and better programs in designated areas, greater accountability and more robust reliance on program evaluation. Nor would such steps be inappropriate. However, another reading, one espoused by the Royal Commission itself, based on an altogether more fundamental premise: recognising that international instruments and treaties provide one set of standards against which the treatment of persons held in custody may be judged, the Commission went on to indicate the relevance of such instruments and treaties on a much broader scale:

*Such treaties are not limited to the definition of standards applicable to the persons held in custody. Several, such as the International Covenant on Civil and Political Rights (ICCPR), are concerned with very broad human rights which are directly relevant to the underlying social, cultural and legal factors which fall within this Commission's terms of reference (Royal Commission, 1991b, Vol. 5, Intro).*

Elsewhere, the Commission was at pains to reiterate the view that consideration of the underlying issues which were considered so important was indeed something to be interpreted within a framework of rights:

*Australia ratified the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) in September 1975. Article 1 defines racial discrimination as follows:*

*In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

*Article 5 creates a positive obligation on Australia to prohibit and eliminate racial discrimination and to guarantee equality before the law. Such equality of legal protection extends not only to the protection of individuals before the criminal law but also to equality of entitlement to economic, social and cultural rights (Royal Commission, 1991b, Vol. 5, 36.4.1, 36.4.2).*

The Review's purpose in alluding to the Commissioner's statements on rights is not to preface any conclusion as to Victoria's evident continuing shortfall in dealing with the underlying issues. Rather, it aims to suggest that the language and policy approaches used in relation to that shortfall should now change to reflect a much greater emphasis on human rights and social justice as the core of the issue. Such an emphasis is by no means unprecedented. A decade after the Royal Commission expressed its views on the matter, the Commonwealth's Aboriginal and Torres Strait Islander Social Justice Commissioner, Patrick Dodson, declared that:

*Economic, social and cultural rights are as much a part of international human rights law as are civil and political rights, although they have only achieved full recognition in more recent times (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2002: 95).*

More recently, Patrick Dodson (2004) reaffirmed what was needed in terms of substantive equality:

*Lives for our peoples, similar to that of the majority of Australia but lives uniquely ours, not ones that the government wished to impose on us. Lives where we meet our obligations as citizens but where we are also accommodated as Aborigines. Lives where our human and cultural rights are respected by the governments that have told the world they would respect them (Dodson, 2004).*

And, as Commissioner Dodson reiterated:

*Implementation is not support for recommendations or the planning of policies distant from the site of death. Implementation is outcomes. This means changing legislation, changing priorities, changing cultures and changing procedures. While there are discernable improvements, [there is] a large gap between the rhetoric of implementation reports and the circumstances of the deaths of Aboriginal people [since the Royal Commission] (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996: vii).*

The Victorian Attorney-General, in his 2004 Justice Statement, reinforced the same connections.

It is the conclusion of this Review that Victoria's performance in relation to the fundamental, upstream factors behind Indigenous over-representation should become a crucial part of an expanded version of such public discussion and consultation.

Without detracting from current policy deliberations and program formulation, it is suggested that these issues be incorporated into a new and more urgent dialogue on human rights, a dialogue to which politicians, public servants, academics, mainstream service providers and, foremost, representatives of Indigenous communities and organisations must be parties.

The crucial first step must be for government to signal publicly its acceptance that the continuing social, economic and cultural disadvantage of Aboriginal Victorians is a human rights and social justice emergency, and one on which Victoria has a considerable way to go if it is to honour its moral commitment, let alone its legal and human rights obligations.

### **Recommendation 158.**

That the Victorian Government acknowledge that while much has been implemented and achieved in tackling Indigenous disadvantage, there still remains a significant way to go in the attainment of basic civil and human rights of the Indigenous community and in reducing the socio-economic gap between Indigenous Victorians and the broader community.

The language and discourse of rights can very easily lend itself to the idea that rights objectives are primarily to be achieved through access to the means of legal redress. For many disadvantaged people, and not least for the disadvantaged Indigenous peoples of Victoria, such access is still restricted and therefore not realistically to be regarded as the primary means of achieving basic social, economic and cultural human rights. As one leading contemporary social thinker has put it, unconsciously echoing the Victorian Government's statement of favoured locus of engagement for social policy, one of the two outstanding tasks for *community on a battle-ground that really counts [is to ensure] equality of the resources necessary to recast the fate of individuals de jure into the capacities of individuals de facto* (Bauman, 2001: 149).

A rights orientation through law, though commendable, is not therefore enough. More proactive steps directed at the realisation of substantive basic rights for Victoria's Indigenous peoples are, therefore needed to address their general social and economic disadvantage, and to address their basic rights when they are in contact with criminal justice agencies.

This is where a human rights-driven conception of social and public policy must come into play.

While it is acknowledged that Victoria was the first Australian state to formally recognise Indigenous people in its constitution with its *Constitution (Recognition of Aboriginal People) Bill Exposure Draft* (June 2004), the Review's conclusion is that it does not go far enough to give Indigenous Victorians the outcomes they want to share with other Victorians.

### Recommendation 159.

That the Victorian Government, within a human rights and social justice framework, re-affirm its commitment to the Indigenous community by working in partnership with the Commonwealth Government and the Indigenous community to address the underlying issues and protect Indigenous languages and cultures, and that this should be done by enshrining, enforcing and effectively protecting (by appropriate enabling legislation and policies) the rights of Indigenous Victorians.

## 8.3 Making Implementation and Monitoring Core Business for Government

There has been virtually no rigorous monitoring of the Royal Commissions Recommendations in Victoria since 1991 until the current Review. If the Victorian Government is to be taken seriously in its commitment to reduce over-representation of Indigenous people in the criminal justice system, and that fact is acknowledged, then the process for monitoring and reporting must be more constant, and with an agreed process put into place with the Indigenous community.

Rigorous monitoring of the Recommendations must continue, and must be carried out in an ongoing way, so that the Recommendations become built in to the fabric of government activity and core business.

*By valuing laws, policies and practices that work best because they achieve an equality of outcome, society begins to understand that extending the protections of a democratic society to those who are marginalised does not disadvantage another sector; it actually makes everyone better off (Behrendt, 2004: 12).*

The value of the Royal Commission Recommendations as practical edicts, or normative standards and codes of conduct, for both the criminal justice agencies and the wider program and service delivery agencies, lies in being driven by an overarching body. To achieve this requires first, that the Recommendations are not forgotten or neglected, but remain a:

*... living document whose value lies not merely in acknowledging the considerable pain and suffering caused by the criminal justice system to Indigenous communities but attempts to ensure that this does not continue over generations and thereby undermining the social capital of Indigenous communities (Edney, 2004: 8).*

Implementing the Recommendations of the Royal Commission is a whole-of-government enterprise. Given the commitment to the Recommendations by the Bracks Government, it should be core business for each department and agency, not just rhetoric. Implementation of the Recommendations involves the broader community as well as the Indigenous community. It involves nearly all Victorian departments and all tiers of government. Apart from the immediate activities of the criminal justice system involving police, courts, the juvenile justice system, corrections and the various ancillary services, the issues involved in implementation span the areas of education, employment, health and well-being, housing, family and children services, reconciliation and many other areas.

In 2000, under the auspices of the *VAJA*, the Government enthusiastically embraced a whole-of-government approach to reducing the high level of disadvantage and inequity suffered by Indigenous Victorians. At that time it was acknowledged that ten years on from the Royal Commission, government responses to the Recommendations, both state-wide and nationally, remained fragmented, and that a new strategically integrated approach was required:

*In line with its Aboriginal Affairs policy, the Government will work with the Aboriginal community to develop a strategic framework. This framework will outline responsibilities and provide linkages across the whole-of-government, and coordinate a range of proposed and existing policies and programs ... The strategic framework should be developed by 30 June 2001 (Department of Justice, 2000: 19).*

The Victorian Government, perhaps intuitively, appears to have grasped the importance of these principles when it was negotiating the *VAJA* in 2000:

*The Government also intends to establish a ministerial committee on Aboriginal Affairs to co-ordinate the whole-of-government approach to Indigenous issues and needs. The committee, to be chaired by the Premier, will ensure the Government works closely with regional councils, Aboriginal communities, ATSIC and the Commonwealth Government. It will report annually on cross-portfolio measures relating to Indigenous matters (Department of Justice, 2000: 9).*

And again:

*As the strategic framework has a whole-of-government approach, and there is a need for a strong co-ordinating role, the Department of Premier and Cabinet will be responsible for its implementation (Department of Justice, 2000: 19).*

This Review applauds the strong leadership and co-ordination role envisaged for the Premier and his Department in the *VAJA*, signalling as it did the strength of central and senior support for many significant initiatives to be taken in this area. It also notes, however, that the centrality of this projected role appears to have become less explicit in the period that has elapsed since the 2000 Agreement was signed and that in fact, by January 2005, the Victorian strategic whole-of-government framework had not yet appeared. Perhaps it is not surprising that while the substantial departmental and agency responses provided to the Review revealed some notable examples of inter-departmental and cross-sectoral cooperation, in the main these examples were more in the tradition of the fragmented, dedicated agency or silo approach referred to above. Moreover, in a draft of the whole-of-government framework presented by AAV in October 2004 to the Aboriginal Justice Forum, there is no indication of any overarching co-ordination role whatsoever for the Department

of Premier and Cabinet, nor of any ministerial committee to be chaired by the Premier (AAV, 2004).

### Recommendation 160.

That, in taking a strategic approach to tackling Indigenous disadvantage and over-representation, the Victorian Government, in partnership with the Indigenous community, finalise the development of the whole-of-government Indigenous strategic framework as committed to in the *Victorian Aboriginal Justice Agreement* of 2000.

Alongside the need for continued and strengthened action in tackling the underlying issues, there is also a clear requirement to continue with the many actions currently underway to reduce the continued over-representation of Indigenous Victorians in contact with the criminal justice system. A greater understanding is needed of the nature and patterns of Indigenous offending and the extent of and reasons behind, contact with the criminal justice system. In particular, it is noted that the police effectively stand at the entrance to the criminal justice system, and that police can, through their policing practices, attitudes and behaviours, convey respect for the law and perceptions of fairness in its processes – or indeed, convey the contrary.

The *VAJA*, as identified in the 2005 Review of the *VAJA*, has provided an evidence base over the past five years to develop innovative initiatives and best practice in partnerships between the Indigenous community and government, particularly justice agencies. Key to the Agreement's success in developing innovative initiatives has been the quality of the partnership between the Government and the Indigenous community, particularly as promoted through the AJF and the RAJAC Network.

### Recommendation 161.

That the Victorian Government, in partnership with the Indigenous community and led by the Department of Justice, develop Phase 2 of the *Victorian Aboriginal Justice Agreement*, which should include a range of short, medium and long term actions to achieve its objectives.

## 8.4 Strengthening Cultural Awareness and Understanding of Indigenous people

Throughout its deliberations, this Review has been confronted by the spectre of cultural ignorance, perhaps more properly termed lack of cultural sensitivity, understanding and respect – or sometimes, just outright racism. This phenomenon appeared at some point in nearly every substantive issue scrutinised by the Review. From education, health, housing and economic well-being to the criminal justice settings of police, courts and corrections, as well as amongst the general public, the absence of cultural respect and understanding on the part of non-Indigenous people was raised at many points by community members as a serious underlying problem.

The Review has noted the various programs and initiatives that are in place in order to counter this situation, and has commented on the need for their enhancement. Solutions such as increasing the level of cultural awareness training for police or health professionals, important as they are, do not however address the fact that Victoria faces a broader, overall problem in this respect, perhaps best epitomized in the figures quoted earlier suggesting that 59 per cent of Regional and 33 per cent of Melbourne metropolitan dwelling Victorians consider the reconciliation process to be no longer necessary. Thus, lying behind and contributing to many of the problems confronted by Indigenous Victorians in fields like health, education and criminal justice, there may lie a strong residual element of cultural ignorance, disrespect or lack of interest. With adequate cross-cultural training and understanding, the discrepancy between Indigenous community experiences and non-Indigenous perceptions, a recurring theme in this report, could be minimised.

Against this background, the Review is concerned that this issue is not more prominent in the strategic whole-of-government framework incorporating outcome-oriented social performance indicators currently being developed for Victoria.

#### **Recommendation 162.**

That the Victorian Government, in partnership with the Indigenous community, commit to implementing and promoting Indigenous cultural awareness programs across all levels of government and the broader community, and that these programs are regularly evaluated through key performance indicators.

## **8.5 Making Indigenous Participation Effective**

The Review heard from many Indigenous organisations and individuals about the extent to which their capacities are over-stretched and, by both the needs of their people and continual demands for *consultation* with government. Furthermore, developments such as Koori Courts, which have Elders sitting alongside Magistrates, or established programs such as the Community Justice Panels, which are managed by Victoria Police with Indigenous volunteers, also make demands on already under-resourced and over-stretched community members. The term *consulted out* was used at times when referring to what seemed at times the constant stream of agencies wanting to *consult* with the community. Commendable as consultation is, the demands this makes on the Indigenous community's time are huge. Every request for extra data, extra information – a policy necessity – increases the demand. The community is significantly under-resourced to make effective participation work in practice.

At the same time, the Review found that at many points the Aboriginal community is under-skilled or under-trained with regard to the provision of appropriate services by Aboriginal people (for example, health-care and education) and government agencies also found recruitment of suitable Indigenous persons difficult. This raises an educational issue. The need to provide education in Aboriginal culture is no means underestimated. However, there is also a need to progress Aboriginal people through the school system to the higher professional training areas like law, education, health and social work, in order to ensure that there are adequate numbers of people with sufficient skills, training and cultural knowledge, who can make an impact at this fundamental level as teachers, lawyers, and health workers. The need for Koori professional service providers was repeatedly expressed throughout the community consultations.

Underpinning effective Indigenous participation is a strengthened community capacity. The Government must work with the community to develop a policy on self-determination that is enshrined in legislation with bi-partisan endorsement. Translating such a policy into practical actions could include, for example, establishing a website, and consolidating all Indigenous programs, statistical information and related guidelines and policy applications. In developing the capacity of the community to participate in partnerships with governments there needs to be a common understanding of what is required of both parties. Essential to partnerships between government and community in this context is a set of common principles, such as those the government has already committed to in the 2000 *VAAJA*.

The organisational structure of Aboriginal participation in Victoria presents a complex landscape. Given the broad brief encompassed by the Royal Commission, bodies like VAJAC and the AJF are, at least by their title, too narrowly focused and may contribute to over-emphasis on the criminal justice system at the expense of the upstream underlying issues. Logically, with the establishment of an over-arching Victorian Indigenous body, there is a need for the appointment for a Victorian Aboriginal Social Justice Commissioner for annual reporting.

### Recommendation 163.

That the Victorian Government, in partnership with the Indigenous community, develop a set of standards for Indigenous participation modelled, as a minimum, on the principles and practices of the *Victorian Aboriginal Justice Agreement*, and that these minimum standards be enshrined in legislation and incorporated into specific Indigenous strategies across government to meet identified needs, as agreed to with the specific and relevant Indigenous parties.

## 8.6 Emerging Issues

The Review has acknowledged that the environment in 2005 is vastly different from what it was in 1991 when the Royal Commission released its report. Much has changed and many examples of innovative programs and developments have been brought to the attention of the Review. Under the umbrella of the *VAAJA* there have been numerous initiatives established and much progress made. The *Bringing Them Home Report*, and the implementation of its recommendations, now form part of the current context, as is evident in the *Victorian Indigenous Family Violence Strategy*. Nevertheless, the community responses and the statistical information clearly indicate that much remains to be done – most poignantly in the continued over-representation of Indigenous people in contact with the criminal justice system. At the same time new and emerging issues are being identified.

A number of issues that were not identified or addressed by the Royal Commission, have been identified as having a significant impact on Victoria's Indigenous community. The Review believes that these areas need to be addressed, and can be accommodated within the proposed monitoring framework. These include:

- Substance abuse other than alcohol, specifically chronic, particularly in relation to Indigenous young people;
- Mental health concern about access to culturally relevant services both in the community and within the criminal justice system;

- The introduction of new legislation and policies which can impact on Indigenous contact with the criminal justice system, such as use of DNA testing, reform of the *Vagrancy Act 1966*, decriminalising drunkenness, tendering out of Aboriginal Legal Services and expunging criminal records;
- The *Victorian Indigenous Family Violence Strategy* has identified the underlying issues in the high incidence of family violence in Indigenous communities. Links between the implementation of that Strategy and the outcomes of this Review must be established, and actions co-ordinated; and
- Improved understanding and responses to the increase of Indigenous women in contact with the justice system is required.

The major conclusions and recommendations in this final section build on the specific actions recommended in earlier sections of this Review. First and foremost is the conclusion about the centrality of underlying issues and the need to make substantial progress on these. While the extensive array of policies, programs and initiatives reported by government departments is commended, these have not achieved the desired outcomes of reducing Indigenous disadvantage in Victoria; this conclusion is supported by both the many negative responses received from Indigenous people in the course of this Review, and the statistical information obtained. Victoria still has a considerable way to go on this critical front, a state of affairs that impacts on the downstream criminal justice system.

Taking its lead from the Royal Commission, the Review concludes that tackling the underlying issues demands a human rights framework. This requires shifting the conception of social policies designed to address continuing disadvantage to a human rights basis.

Whole-of-government accountability arrangements are needed for departments to contribute effectively to the same outcomes.

There are an increasing number of partnership forums being established to bring the Victorian Government together with the Indigenous community in the areas of law and justice, health, education, housing and cultural heritage. With the support of government these partnerships, along with the proposed Indigenous strategic framework and the Indigenous representative body, will provide the avenue for promoting discussion of the above emerging issues.

#### **Recommendation 164.**

That the Victorian Government ensure the opportunity for emerging issues to be discussed by the Indigenous community within the various partnership forums and in the proposed representative body.