

The role of Indigenous justice agreements in improving legal and social outcomes for Indigenous people

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Abstract

Driven for the most part by recommendations of the Royal Commission into Aboriginal deaths in custody, Australian states and territories over the last two decades have introduced Indigenous Justice Agreements and related strategic frameworks in the hope of addressing consistently high rates of Indigenous incarceration and improving justice service delivery to Indigenous people. Through analysis of relevant policy frameworks and associated policy material, rather than statistical analysis alone, we seek to examine whether strategic planning in this area is actually improving Indigenous justice outcomes as intended. We apply seven criteria as a basis for our assessment of policy outcomes.

Despite significant shortcomings, we conclude that quality, Indigenous justice-related strategic planning does have a positive impact, at the very least through the focus it provides for government to work towards addressing Indigenous justice issues, including Indigenous over-representation in the criminal justice system and victimisation. Further development of effective policy is essential. In this context, the dismantling over time of Aboriginal advisory and/or representative bodies and its impact upon policy development is noted as a point of particular concern.

I Introduction

Since the early 1990s, there has been a proliferation of strategies and policies designed to improve the delivery of criminal justice agency services to Indigenous people and to reduce Indigenous over-representation in the criminal justice system. The most important of these has been the development of statewide Indigenous Justice Agreements ('IJAs') negotiated between government and peak Indigenous bodies in New South Wales (NSW), Queensland, Victoria and Western Australia (WA). The over-representation of Indigenous people in criminal justice systems throughout Australia remains an urgent and seemingly intractable problem.¹ We note

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¹ Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40 *Australian and New Zealand Journal of Criminology* 272;

that Indigenous contact with the criminal justice system has not improved in recent years. In Australia, in March 2010, the Indigenous imprisonment rate was 2311 per 100 000 of the adult Indigenous population compared to a general imprisonment rate of 171 per 100 000, and some 26 per cent of the total prisoner population were Indigenous people.² Imprisonment rates for Indigenous men and women have increased quickly: between 2000 and 2008 the imprisonment rate for Indigenous women rose by 46 per cent and for Indigenous men by 27 per cent.³ An analysis of the role of IJAs and strategic planning in addressing this and related issues for Indigenous people has taken on a new importance given the recent Standing Committee of Attorneys-General endorsement of a *National Indigenous Law and Justice Framework 2009–2015*.⁴ It is timely then to pause and consider how effectively strategic policy is working to respond to the needs and circumstances of Indigenous people in their contact with the criminal justice system.

The central question we seek to answer in this article is whether the development of strategic planning by justice agencies has led to improved outcomes for Indigenous people. In particular, we are interested in whether IJAs and related strategic planning documents have made a positive contribution to the way justice agencies provide services and whether they have contributed to reducing Indigenous over-representation in the criminal justice system. The research we have undertaken in order to consider these issues has involved identifying relevant policy frameworks, and thereafter, critically analysing the policy material, evidence of outcomes and evaluations in order to provide some assessment of the effectiveness of Indigenous policy development.⁵

The structure of this paper is as follows. Part II provides some historical context to recent Indigenous justice-related strategic planning, which in large part is a product of a renewed commitment made by governments in 1997 to continued implementation of the Royal Commission into Aboriginal Deaths in Custody ('RCADIC') recommendations. IJAs developed subsequent to 1997 constitute the most significant strategic frameworks in this area and are intended to address Indigenous over-representation in the criminal justice system through improved delivery of justice programs to Indigenous communities, with an emphasis upon Indigenous self-determination.⁶

Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17 *Current Issues in Criminal Justice* 329.

² Australian Bureau of Statistics, *Corrective Services, Australia* (Cat No 4512.0, June 2010) 4–5.

³ Steering Committee for the Review of Government Service Provision, Productivity Commission (Cth), *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009) 4 ('*Overcoming Indigenous Disadvantage Report*').

⁴ Standing Committee of Attorneys-General, 'Communiqué' (6–7 August 2009) <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes>; Working Group on Indigenous Justice, Standing Committee of Attorneys-General, *Draft National Indigenous Law and Justice Framework 2009–2015* (2009) Attorney-General's Department (Cth).

⁵ The research is set out in further detail in Chris Cunneen and Fiona Allison, 'Indigenous Justice Strategies — Analysis and Findings of Current Policy Framework' (Report to the Indigenous Law and Justice Branch, Attorney General's Department (Cth), unpublished, 2008). We note that the detail set out in this article, for the most part, is current as at the time of completion of the research in June 2008.

⁶ For discussion on the right to self-determination, as well as self-determination as governmental policy, see Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 298–301, 311–14.

In Part III, we consider in some detail the effectiveness of IJAs. We raise important questions at the outset in relation to how such an assessment might be properly conducted, given the range of contingencies impacting upon the capacity of IJAs to enact justice-related reform and the lack of independent evaluation at either a national or state and territory level upon which one might base such an analysis. We suggest that IJA performance is best measured by reference to seven criteria, including the broader influence on policy development, the clarity of objectives and outcomes, accountability, community engagement, continuity, addressing social disadvantage and addressing Indigenous victimisation.

Parts III A to C outline the influence that the formulation of an IJA may have upon policy development. The existence of an IJA in a particular jurisdiction appears to correlate with increased planning in relation to both Indigenous social disadvantage more generally and to Indigenous justice issues. We argue that such policy development is generally positive because at a minimum it leads to an increased focus by government on the issues of Indigenous over-representation in the criminal justice system and improved service delivery for Indigenous people within the criminal justice system. We also note the impact that the dismantling of Aboriginal representative bodies (such as Aboriginal Justice Advisory Councils ('AJACs')) has had upon policy development.⁷

In Parts III D to H we apply criteria relating to accountability, community engagement, continuity in policy, the integration of broader non-justice outcomes, and the integration of issues relating to Indigenous victimisation. In Part III I we consider some of the successful initiatives and programs that have developed in the context of IJAs.

Part IV, in conclusion, provides a summary of the existing and potential contributions that IJAs are able to make to improving the circumstances of Indigenous people in contact with the justice system. IJAs appear, for instance, to have resulted in the development of effective programs and strategic planning by justice agencies and, where incorporating those key criteria referred to above, to achieving objectives of Indigenous self-determination within the justice arena. We suggest that further strategic planning is required both in those jurisdictions without IJAs and within those justice agencies where it remains outstanding.

II The recent historical context to Indigenous strategic planning in the justice area

To a significant degree, the recommendations of the RCADIC have driven the development of Indigenous-focussed criminal justice strategic policy over the last two decades.⁸ The RCADIC advocated tackling Indigenous over-representation in the criminal justice system through both changes to the criminal justice system itself and strategies designed to address aspects of Indigenous social disadvantage contributing to such over-representation. The principle of Aboriginal self-

⁷ See also Carmen Parter, 'Cultural Dimensions in Policy Development: A Case Study, the NSW Aboriginal Justice Plan' [2005] 4 *Public Administration Today* 4.

⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

determination was also strongly emphasised by the RCADIC as an essential component of any government activity in this area.⁹

After release of the RCADIC report in 1991, governments in each jurisdiction committed to implementing the majority of the 339 recommendations set out there. Consistent with the need to report on implementation of the recommendations from the RCADIC, some justice agencies also developed strategic plans with an aim to improve service delivery and in some cases to reduce Indigenous over-representation in the criminal justice system. However, as we discuss further below, the development of strategic plans by justice agencies to address Indigenous issues has been highly inconsistent. In addition, by 1997 there was no longer any obligation on governments to report on the implementation of recommendations from the RCADIC.¹⁰ One consequence of this change was that less pressure was then placed on criminal justice agencies to provide overall reporting on performance in addressing Indigenous issues.

As part of establishing a framework for negotiating with Indigenous communities, the RCADIC had recommended that independent AJACs be established at the state and territory level to provide advice to governments on justice-related matters, as well as to monitor the implementation of the Royal Commission recommendations. In the period immediately following the RCADIC, all Australian states and territories established AJACs. However, in subsequent years, many of the AJACs have been either abolished or allowed to collapse by government. Most recently, in 2009 the NSW government abolished an AJAC that had been operating successfully since 1993. The NSW AJAC had engaged effectively with Indigenous communities including with respect to the development of an Aboriginal Justice Plan.¹¹ The Victorian AJAC (also established in 1993) is the only advisory committee still in existence from the period immediately following the RCADIC.

State AJACs, the federal Aboriginal and Torres Strait Islander Commission (ATSIC), and other key Indigenous organisations met in Canberra in 1997 to discuss the outcomes of the RCADIC and the continuing issues of deaths in custody and high incarceration rates. As noted above, the broader political context in which this meeting occurred was that from 1997, state and territory governments were no longer required to report on the implementation of the RCADIC recommendations. This Indigenous summit recommended the development of IJAs for each state and territory as a way of improving the delivery of justice programs. It was recommended that Commonwealth, state and territory governments develop bilateral agreements on justice issues, and that they negotiate with AJACs and other relevant Aboriginal organisations in the development of the agreements. It was also recommended that the framework provided by the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal and*

⁹ Ibid 15–22. See also Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out Of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Aboriginal and Torres Strait Islander Commission, 1997) 16–17.

¹⁰ After the RCADIC the Australian government provided specific funding to state and territory governments for a period of five years to establish and support monitoring of the implementation of the Royal Commission recommendations. A reporting process back to the Commonwealth arose from these arrangements.

¹¹ Parter, above n 7.

Torres Strait Islander People be utilised in the development of the IJAs, particularly given that this was a Council of Australian Governments ('COAG')-endorsed process and one that had established precedents in health and education during the early 1990s.¹²

The *National Commitment* had placed a strong emphasis on developing a framework that respected Indigenous self-determination and it was seen as appropriate that this emphasis be included in the development of IJAs. The guiding principles for IJAs as developed at the Indigenous Summit included empowerment, self-determination, and self-management by Aboriginal and Torres Strait Islander people. Significantly, the Indigenous Summit emphasised the need to ensure maximum Indigenous participation in IJAs, including at the negotiation phase through AJACs or other relevant Indigenous organisations.¹³

Following the Indigenous Summit, in July 1997 some 20 Commonwealth, state and territory ministers responsible for various criminal justice portfolios met with Indigenous representatives from ATSIC, the Aboriginal and Torres Strait Islander Social Justice Commission, and AJACs. The meeting resolved to develop IJAs between governments and Indigenous peoples. All states and territories (except for the Northern Territory (NT)) agreed to develop, in partnership with Indigenous people, strategic agreements relating to the delivery, funding, and coordination of Indigenous programs and services. These agreements would address social, economic, and cultural issues; justice issues; customary law; law reform; and government funding levels for programs. They would include targets for reducing the rate of Indigenous over-representation in the criminal justice system, planning mechanisms, methods of service delivery, and monitoring and evaluation.¹⁴

The following IJAs were subsequently developed:

- the 2000 *Queensland Aboriginal and Torres Strait Islander Justice Agreement* ('Qld IJA'),¹⁵
- the 2000 *Victorian Aboriginal Justice Agreement* ('VAJA');¹⁶
- the 2004 *Western Australian Aboriginal Justice Agreement* ('WA AJA');¹⁷ and
- the 2003 *NSW Aboriginal Justice Agreement* ('NSW AJA') and 2004 *Aboriginal Justice Plan* ('NSW AJP').¹⁸

¹² Council of Australian Governments, *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal and Torres Strait Islander People* (7 December 1992) Australian Local Government Association <<http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>> ('*National Commitment*'); Council of Australian Governments, 'Communiqué' (7 December 1992) <http://www.coag.gov.au/coag_meeting_outcomes/1992-12-07/index.cfm#aboriginal>.

¹³ Ministerial Summit on Indigenous Deaths in Custody, *Speeches and Papers from the Summit* (Attorney-General's Department (Cth), 1997) 221.

¹⁴ Mick Dodson, Human Rights and Equal Opportunity Commission, *Aboriginal and Torres Strait Islander Social Justice Commissioner Fifth Annual Report* (1993) 157.

¹⁵ Department of Aboriginal and Torres Strait Islander Policy (Qld), *Queensland Aboriginal and Torres Strait Islander Justice Agreement: Full Text of the Agreement Signed on 19 December 2000 and Summary* (2001).

¹⁶ Department of Justice (Vic), *Victorian Aboriginal Justice Agreement 2000* (2004).

¹⁷ Department of the Attorney-General (WA), *Western Australian Aboriginal Justice Agreement* (2004).

¹⁸ NSW Aboriginal Justice Advisory Council, *Aboriginal Justice Agreement* (2003); NSW Aboriginal Justice Advisory Council, *NSW Aboriginal Justice Plan: Beyond Justice 2004–2014* (2004).

It is not possible to describe each of the IJAs in any detail here. While these frameworks varied in some important respects, we note that in every instance they attempted at a minimum to address the issue of Indigenous over-representation in the criminal justice system through one or more overarching goals, a set of key principles, the identification of specific strategic areas (such as juvenile justice diversionary alternatives and the development of non-custodial sentencing options), and initiatives to achieve outcomes within each strategic sphere. The differences, while without doubt impacting upon the effectiveness of each of these agreements, reflected various factors including the diversity among Indigenous communities residing in each jurisdiction,¹⁹ differences in legislative and/or policy histories between the various jurisdictions,²⁰ and specific policy imperatives,²¹ inter alia.

These IJAs were the product of a negotiation process involving relevant government departments and federal or state Indigenous representative and/or advisory bodies, including ATSIC and AJACs. In fact, independent community-based Aboriginal bodies have not only played an important role in the negotiation of IJAs, but also in initially obtaining an assurance by all governments that such bilateral agreements would be formulated. In this respect, at least, existing IJAs reflected the importance of principles of negotiation and self-determination emphasised by the RCADIC.²²

In many states and territories, criminal justice agencies such as police services, corrections, juvenile justice, and Attorneys-General have also developed their own strategic plans for working with or responding to Indigenous clients. Some have been aimed at reducing Indigenous over-representation in the criminal justice system, while others have focussed on more effective service delivery. These should be distinguished from IJAs because they are not negotiated agreements between Indigenous peak bodies and government, although their aims may be similar to those of the IJAs. A third tier of recent policy development has been the introduction of overarching government policy frameworks that focus on Indigenous people. These are more general in scope but place some emphasis upon Indigenous justice issues. An example of these overarching government policy frameworks is the NSW *Two Ways Together 2003–2012* Aboriginal Affairs Plan ('*Two Ways Together 2003–2012*').²³

¹⁹ For instance, the WA *AJA* needed to reflect the divergent perspectives of a large number of communities spread out across a single state covering a third of the Australian landmass.

²⁰ For instance, the Qld *IJA* may not have dealt with broader, underlying social issues as much as the NSW *AJA* because the Qld *IJA* was the first part in a set of proposed agreements to be developed under that jurisdiction's *Ten Year Partnership* framework.

²¹ For instance, the WA *AJA* incorporated the findings of and government response to the inquiry conducted by Sue Gordon, Kay Hallahan and Darrell Henry, Department of Premier and Cabinet (WA), *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002).

²² Recommendation 188 required that 'governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people': RCADIC, above n 8, vol 5, 73.

²³ Department of Aboriginal Affairs (NSW), *Two Ways Together 2003–2012* (2003).

III The current research

In undertaking research into strategic planning in this area, our initial task was to identify *publicly available* strategic policy developed over the last decade in each jurisdiction within the aforementioned three tiers of policy development. Although our focus was on *current* policy, expired strategic policy frameworks were included where relevant; that is, where they fitted within the broad timeframe of the last 10 years. The decision to focus on publicly available policy was a deliberate one, based on the principle that Indigenous people have an interest in being able to access and participate in policy development, implementation and evaluation, particularly given the exclusionary and discriminatory history of government relations with Aboriginal people in Australia. Transparency in policy is clearly an essential first step to achieving such participation, and is also fundamental to public accountability.

In addition to locating IJAs, Indigenous strategic plans and overarching state-level policy frameworks, as noted above, we were also interested in any relevant supporting documentation such as evaluations or discussion papers. Reports produced by significant government-initiated inquiries and related to Indigenous justice issues were also collected and analysed, including, for example, the report of the Northern Territory Law Reform Committee in relation to Aboriginal customary law,²⁴ and the report of the inquiry into custodial and community corrections in WA.²⁵ Government strategic policy addressing issues of Indigenous family violence, child protection, or Indigenous community engagement were then located. Finally, the most effective Indigenous-specific, justice-related initiatives and programs were identified within each jurisdiction by referring to both independent and government-generated evaluations and other relevant policy material.

Although there are differences between the four IJAs in NSW, Victoria, WA and Queensland, all of them introduced a broad sweep of key strategies, outcomes, and actions generally directed towards reducing the number of Indigenous people in custody. Despite their significance, there has been surprisingly little evaluation undertaken to date at a national or state and territory level with respect to either the implementation of IJA strategies or the overall success of government strategic planning in this area. There is thus no clear picture as to whether (and if so how) these policy frameworks are working effectively either to improve service delivery or to reduce Indigenous contact with the justice system.

Given that some time has now passed since both the release of the RCADIC report and the formal commitment provided by governments to develop relevant strategic plans, evaluation of the effectiveness of IJAs and related strategic policy is well overdue. The completion of such an evaluation is particularly urgent given the demise of ATSIC and most AJACs. The progressive dismantling of Indigenous representative bodies over the last decade has diminished independent oversight and the opportunities available to Indigenous people for genuine participation in and evaluation of policy implementation. We are increasingly reliant on

²⁴ Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law*, Report No 8 (2004).

²⁵ Dennis Mahoney, Department of Premier and Cabinet (WA), *Inquiry into the Management of Offenders in Custody and the Community* (2005) ('Mahoney Inquiry').

departmental or agency self-reporting on progress and effectiveness, rather than independent evaluation or monitoring.

In this context, there are important questions to be raised as to how the effectiveness of IJAs might be measured. We note below that IJAs have contributed positively to policy development in the criminal justice area, providing a coherent framework for policy and program development within and across various agencies and across government. How does one further measure ‘success’ in this context? For instance, is it best estimated simply by considering the number and/or breadth of relevant initiatives that have been implemented or expanded through IJAs as an indication that service delivery has thus been improved for Indigenous communities? Or by calculating the IJA’s effect in concrete terms as measured against overall objectives, including that of reducing rates of incarceration? Certainly, if one is to rely upon statistical data outlining rates of imprisonment or of reoffending alone to evaluate progress of IJAs, it would be reasonable to conclude that they have not been effective.

Inevitably, there will be any number of contingencies impacting upon the ability of IJAs to achieve their intended outcomes (including any reduction in numbers imprisoned), leading to increased complexity in measuring the highs and the lows of IJAs and what they have managed to accomplish over time. We have already noted above, for instance, the relevance that both government dismantling of Indigenous representative bodies, and divergent policy imperatives and legislative histories within the different jurisdictions appear to have in terms of the development of IJAs. We also discuss below how diversity among jurisdictions in terms of the geographical location and range of Indigenous communities will influence government capacity to engage with Indigenous people and the negative impact that punitive law and order agendas imposed by governments have upon Indigenous people in terms of justice outcomes, regardless of any reform achieved in this area through IJAs.

We suggest that the most appropriate method of conducting an assessment of IJAs involves identifying a number of overarching criteria against which their effectiveness might be measured. IJA performance can be measured by reference to seven criteria:

- whether there is a positive influence on policy development within the particular jurisdiction;
- whether the objectives and outcomes of the IJA are clearly articulated (and therefore able to be assessed);
- the extent to which the IJA provides for transparent processes of government accountability;
- the level of Indigenous community engagement achieved throughout the entire life of the IJA;
- how effectively the IJA has integrated justice issues with those underlying factors contributing to Indigenous over-representation in the criminal justice system;
- continuity of policy over time; and
- how effectively Indigenous victimisation (including domestic and family violence) has been incorporated into strategic approaches to justice issues.

The findings we present in the following Parts A to H are the result of the application of the above criteria to the strategic policy frameworks as they exist across the various states and territories of Australia. In Part I we consider some of the successful initiatives and programs that have developed in the context of IJAs.

A *The influence of IJAs on policy development*

The current distribution of Indigenous-specific strategic policy among criminal justice agencies indicates that IJAs have had some influence upon the development of relevant criminal justice strategic policy. Those states and territories with IJAs in place have generated the greatest number of strategic frameworks dealing (at least in part) with the issue of Indigenous over-representation in the criminal justice system and seeking to improve service delivery for Indigenous people. In particular, it appears that development of an IJA has meant that agencies such as police or corrections have been more likely to formulate their own corresponding strategic frameworks.²⁶ IJAs are likely to have also led to increased whole-of-government planning directed towards addressing Indigenous social disadvantage—of relevance to addressing rates of Indigenous incarceration as well as clearly requiring attention from government as a significant issue in its own right. As noted above, to date IJAs have been formulated in four jurisdictions. Three of the four jurisdictions with an IJA (NSW, Victoria, and Queensland) also have in place an ‘overarching’ government Indigenous strategic policy outlining a broader social and economic framework, with some emphasis upon justice issues. Those policies are:

- Two Ways Together 2003–2012 (NSW);
- Victorian Indigenous Affairs Framework—Improving the Lives of Indigenous Victorians (2006) (‘VIAF’);²⁷ and
- Partnerships Queensland: Future Directions Framework for Aboriginal and Torres Strait Islander Policy 2005–2010 (‘Partnerships Queensland’).²⁸

The *VAAJA*, in particular, specifically emphasised the need for development by government of an overarching integrated strategic framework to tackle the “‘whole-of-life’ experience of Aboriginal people’, in keeping with the RCADIC’s dual focus upon both reform of the criminal justice system and underlying factors contributing to Indigenous incarceration rates. This emphasis gave rise to formulation of the VIAF in that jurisdiction. WA, the fourth jurisdiction with an IJA, is also in the process of developing such a framework.

Further, criminal justice agencies in these states are more likely to have in place a strategic plan specifically for Indigenous people. As we argue below, development by agencies of their specific strategic framework has particular benefits. For example, the New South Wales Police Force *Aboriginal Strategic Direction* provides for public acknowledgement of the agency’s approach to

²⁶ See, eg, New South Wales Police Force, *Aboriginal Strategic Direction 2007–2011* (2007).

²⁷ Aboriginal Affairs Victoria, Department for Victorian Communities, *Victorian Indigenous Affairs Framework — Improving the Lives of Indigenous Victorians* (2006).

²⁸ Department of Aboriginal and Torres Strait Islander Policy (Qld), *Partnerships Queensland: Future Directions Framework for Aboriginal and Torres Strait Islander Policy 2005–2010* (2005).

working with Aboriginal people in NSW and thus greater transparency in policy. There are currently agency-specific Indigenous strategic plans in three of the four jurisdictions with an IJA—NSW,²⁹ Victoria³⁰ and WA.³¹ Criminal justice agencies in these jurisdictions are also more likely to have some history of Indigenous strategic planning over the last decade or longer.

By way of contrast, Tasmania, the Australian Capital Territory (ACT), the NT, and SA have not developed IJAs, and they are also the jurisdictions where specific justice agencies such as the police or correctional services have been least likely to develop any form of current strategic framework relating to Indigenous justice issues. Only one of those four jurisdictions, the NT, has developed a relevant government overarching strategic policy framework—*Agenda for Action: A Whole of Government Approach to Indigenous Affairs in the Northern Territory 2005–2009*.³²

Both the ACT and SA, however, are in the process of developing an IJA (the ACT) or an Indigenous-specific justice strategic plan (South Australia). There is no indication that either the NT or Tasmania is intending to develop a policy framework relating specifically to Indigenous justice issues. A draft IJA was formulated in the NT in 2003, but was never ratified by government.³³

The existence of an IJA focuses government attention on the problem of Indigenous over-representation in the criminal justice system and contributes to strategic planning (including whole-of-government planning) in this area. This illustrates the influence that implementation of an IJA may have upon policy development in a particular state or territory and points to the potential of such strategic policy to enact significant change within the criminal justice arena as it impacts upon Indigenous people. The development of an IJA also opens up opportunities for greater Indigenous involvement in policy development and implementation. For these reasons, and in keeping with the original commitment made by governments in responding to the RCADIC and ministerial commitments of 1997, IJAs ought to be developed in those jurisdictions where they remain outstanding.

B Which justice agencies develop Indigenous strategic plans?

Our research showed that with respect to criminal justice agencies, police services were the most likely of all such agencies to have implemented Indigenous-specific strategic plans—perhaps because over time they have had the worst relationship with Indigenous people, representing the frontline of criminal justice system

²⁹ New South Wales Police Force, above n 26; Department of Juvenile Justice (NSW), *Aboriginal Strategic Plan 2007–2011* (2008).

³⁰ Victoria Police, *Aboriginal Strategic Plan 2003–2008* (2003).

³¹ Western Australia Police Service, *Strategic Policy on Police and Aboriginal People* <http://www.police.wa.gov.au/LinkClick.aspx?link=PDFs%2fServiceDelivery_Aboriginal_People.pdf&tabid=995>.

³² Office of Indigenous Policy, Department of the Chief Minister (NT), *Agenda for Action: A Whole of Government Approach to Indigenous Affairs in the Northern Territory 2005–2009* (2005).

³³ Northern Territory Government, *Aboriginal Justice Agreement (Working Draft)* (2003).

intervention in Indigenous lives,³⁴ and continue to have strained relationships with many Indigenous communities.³⁵ Police have Indigenous policy frameworks in four jurisdictions (New South Wales,³⁶ Tasmania,³⁷ Victoria,³⁸ and Western Australia).³⁹ The NSW Department of Juvenile Justice is the only other criminal justice agency to have a *current* Indigenous-specific strategic plan,⁴⁰ although correctional services in NSW and WA have also had Indigenous strategic policies in place in the past.⁴¹ Overall, taking into account expired policies, both juvenile justice agencies and corrective services appear to be the next most likely (after police services) to have formulated relevant policy frameworks.

Attorneys-General, court administrations, Offices of the Director of Public Prosecutions (DPPs), and Legal Aid Commissions (LACs) are the least likely to have developed Indigenous-specific strategic policy. The latter two agencies are also, notably, the least likely to be identified within IJAs as key agencies with specific responsibilities affecting Indigenous outcomes—a major oversight, which may explain why relatively few relevant initiatives have been introduced by these two justice agencies, and perhaps also illustrating the influence that IJAs can have upon policy development and practice within this area.

It should be noted that most justice agencies are developing and delivering a number of programs directed towards improving the relationship that Indigenous people have with the criminal justice system. These programs might include, for example, circle sentencing and Aboriginal courts in various states or community legal education delivered by LACs. However, while sometimes these initiatives have been informed by or have evolved from an IJA or state policy framework (wherein justice agencies are bound to particular actions, such as taking up positions on various coordinating bodies or providing statistical data to inform policy development), at other times they have been developed independently of any strategic framework. In these situations Indigenous programs can appear ad hoc and unrelated to any broader policy developments. It may be unclear which strategic framework or what decision-making, if any, has given rise to a particular initiative.

Without detracting from the success and significance of initiatives and programs created and operating outside formal policy frameworks by justice agencies, our research indicated that all justice agencies ought to be encouraged to develop their own Indigenous strategic plans so as to focus better the work that is already being undertaken in this area. There are obvious and significant advantages to embedding relevant initiatives within transparent and formal agency-specific policy frameworks. This process, for instance, establishes clear processes of evaluation and implementation to ensure accountability and to also, ultimately,

³⁴ See Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

³⁵ Crime and Misconduct Commission (Qld), *Restoring Order. Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009).

³⁶ New South Wales Police Force, above n 26.

³⁷ Tasmania Police, *Aboriginal Strategic Plan*.

³⁸ Victoria Police, above n 30.

³⁹ Western Australia Police Service, above n 31.

⁴⁰ Department of Juvenile Justice (NSW), above n 29.

⁴¹ Department of Corrective Services (NSW), *Aboriginal Offenders Strategic Plan 2003–2005* (2003); Department of Justice (WA), *Prisons Division Strategic Plan for Aboriginal Services (2002–2005)* (2002).

enhance overall performance. In addition, agency strategic plans should indicate whether or how they are informed by, or aligned with, an existing IJA.

C Formal Indigenous representative and/or advisory bodies

A significant finding of the current research is the connection between the presence of IJAs and the existence of an independent, community-based Indigenous representative and/or advisory body. There is a direct relationship between the existence Indigenous representative bodies and the formulation of a negotiated agreement with government. Given the abolition of the national representative body ATSIC in March 2005, and the limited number of state and territory Indigenous representative bodies in existence, negotiation and consultation with Indigenous people in initiating policy has varied greatly. It is important to note the significant impact that this variation may have upon strategic policy development and, ultimately, upon the ability of government and communities to work together to address issues relating to Indigenous over-representation in the criminal justice system.⁴²

In three of the four states with IJAs, an Indigenous peak advisory body was instrumental in its conception—the Aboriginal and Torres Strait Islander Board (‘ATSIAB’) in Queensland, the AJAC in NSW and the AJAC in Victoria. In WA, the only other jurisdiction with an IJA, the Western Australian Aboriginal Justice Council (‘WAAJC’) assisted with the development of the 2000 *Aboriginal Justice Plan*,⁴³ which was a precursor to the WA *AJA*. The WAAJC was subsequently disbanded and therefore not involved in the formulation of the later WA *AJA*.⁴⁴

Among those jurisdictions without an IJA, SA had an AJAC in the 1990s and early 2000s but currently has no formal Indigenous representative body and no IJA, as is the case in Tasmania. The SA Justice Portfolio’s *Aboriginal Justice Strategic Directions 2004–2006*,⁴⁵ the most recent Indigenous-specific justice framework in that state, relied upon representation from Indigenous communities for input into its development in the absence of any formal Indigenous representative body. In the ACT, the Aboriginal Justice Centre (‘AJC’) (seen to be the primary representative and/or advisory body for Indigenous people in that jurisdiction) has been collaborating with government on the development of an ACT IJA and was also responsible for the now expired *Aboriginal and Torres Strait Islander Justice Strategy 2003–2005*.⁴⁶ Although the NT AJAC was

⁴² For discussion on the Indigenous right to participate in decision-making through representative bodies, see Human Rights and Equal Opportunity Commission, *Building a Sustainable National Indigenous Representative Body — Issues for Consideration* (2008); Mick Gooda, *Statement to the Expert Mechanism on the Rights of Indigenous Peoples — Item 3: The Right to Participate in Decision-Making* (12–16 July 2010) Australian Human Rights Commission <http://www.hreoc.gov.au/social_justice/international_docs/2010_EM RIP_Gooda.html>.

⁴³ Aboriginal Affairs Department (WA), *Aboriginal Justice Plan 2000: A Partnership between the Aboriginal Justice Council and the Justice Coordinating Council* (2000).

⁴⁴ After the WAAJC was disbanded in 2002, the IJA was formulated with representation from the Aboriginal Legal Service, ATSIC, and Aboriginal and Torres Strait Islander Services.

⁴⁵ Justice Portfolio (SA), *Aboriginal Justice Strategic Directions 2004–2006* (2004).

⁴⁶ ACT Aboriginal Justice Advisory Committee, *Aboriginal and Torres Strait Islander Justice Strategy 2003–2005* (2002).

instrumental in negotiating the draft IJA referred to above, there has been no IJA finalised in that jurisdiction after the disbanding of the NT AJAC.

The importance of properly constituted, ongoing Indigenous representative bodies to the development of justice policy was stressed during the Summits of 1997 and has also been recognised in a number of noteworthy inquiries and evaluations in the area of Indigenous justice. The influential Western Australian *Mahoney Inquiry* (conducted in relation to community and custodial corrections), for instance, indicated that a representative state Indigenous Advisory Group (and regional counterpart organisations) needed to be established in that jurisdiction if Indigenous incarceration were to be reduced.⁴⁷ Further, the Western Australian Law Reform Commission also recommended establishing a statewide AJAC to assist in negotiation around Community Justice Groups ('CJGs') in its report on Aboriginal customary law published in 2006.⁴⁸ The independent evaluation of the Qld IJA also recommended the re-establishment of an Indigenous justice advisory group in that state.⁴⁹

Based on our research, it appears that Indigenous participation at a formal, structured level is essential during the negotiation phase of Indigenous strategic policy. Where Indigenous representative and/or advisory bodies do not exist it is significantly less likely that an IJA will be developed and also less likely that justice agencies will develop their own strategic policies and initiatives. It is thus clear that the erosion of state and territory Indigenous representative and/or advisory structures such as AJACs is impacting upon the likelihood of achieving those Indigenous justice outcomes emphasised in the RCADIC and subsequently by government. Without Indigenous independent representative bodies, it is certainly less likely that there will be sufficient political will to develop and drive an IJA.

D Objectives, outcomes and accountability

There has been very little evaluation of IJAs or of justice agency strategic plans, independent or otherwise. The absence of evaluation of particular frameworks necessarily impacts upon either cross-jurisdictional or national analysis of the effectiveness of planning in this area. To date, there have only been independent external evaluations commissioned by governments in relation to two IJAs (Queensland⁵⁰ and Victoria)⁵¹ and two agency-specific strategic plans in NSW

⁴⁷ *Mahoney Inquiry*, above n 25, xxix–xxx.

⁴⁸ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: the Interaction of Western Australian Law with Aboriginal Law and Culture — Final Report*, Project No 94 (2006) 98.

⁴⁹ Chris Cunneen, Neva Collings and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement* (Institute of Criminology, University of Sydney, 2005) xxxvi. In August 2008, the Bligh Government announced the formation of the Queensland Aboriginal and Torres Strait Islander Advisory Council. The Council, however, focuses on the six 'Closing the Gap' targets, which are health- and education-focussed. For the COAG endorsement of 'Closing the Gap' see Council of Australian Governments, 'Communiqué' (2 July 2009) <http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/index.cfm?CFID=95798&CFTOKEN=66418322&jsessionid=0430b96423efbe8af5eb674515e3f27276e6>.

⁵⁰ Cunneen, Collings and Ralph, above n 49.

⁵¹ Atkinson, Kerr & Associates, *Review of the Victorian Aboriginal Justice Agreement (2000/01–2003/02)* (Department of Justice (Vic), 2005).

(Juvenile Justice⁵² and Police).⁵³ Beyond this there has been little independent academic assessment or evaluation of IJA outcomes.

One reason for the absence of independent evaluation and monitoring is the lack of provision within strategic policy frameworks for this on an ongoing basis. The Western Australian *Strategic Policy on Police and Aboriginal People*, for example, consists, effectively, of an elaborate set of principles, with no detail provided about procedures for evaluation (or implementation).⁵⁴ The NSW Department of Juvenile Justice's *Aboriginal Strategic Plan 2007–2011* sets out four outcome areas and related strategies but no overall objective(s) and no information about implementation, monitoring or evaluation procedures. The absence of clear objectives and outcomes makes evaluation difficult. Other reasons for the absence of monitoring and evaluation may include the failure to carry out evaluation or monitoring as provided for within the relevant IJA or framework, as has occurred with the NSW *AJP*; or the failure to document or make publicly accessible any information gathered as part of monitoring or evaluation, as appears to have occurred in relation to initial monitoring of the Qld IJA.⁵⁵

The independent evaluation of the Qld IJA measured success through a number of factors including whether incarceration rates had been reduced as intended, and against the 20 specific key outcome areas set out within the IJA, pointing out both effective and failed initiatives. The evaluation provided a general overview of how the justice system was responding to Indigenous justice issues in a range of areas (including policing, localising of policy, Murri Courts, and CJGs, inter alia) and what might be done to improve this response within the context of the existing IJA. For instance, the evaluation called for the introduction of a number of 'intrinsically important' strategies, such as providing for Indigenous legal representation and interpreters, although these may not directly impact upon imprisonment rates. Ultimately, some of the specific recommendations made as a result of the evaluation included: retaining the IJA but with some modifications— such as consolidating the outcome areas into three key result areas; development by the Queensland Police of a strategic plan to increase police cautioning of Indigenous youths; and establishment of a statewide Community Justice Group Reference Group.⁵⁶

The lack of independent monitoring or evaluation reduces government accountability to Indigenous communities. It also means that relevant frameworks are not informed by or improved through such processes. The Victorian Aboriginal Justice Agreements (*VAJA1* (2000) and *VAJA2* (2006)) show how timely evaluation can lead to improved policy. *VAJA1* was reformulated most effectively as the *VAJA2* following a Victorian Department of Justice-initiated independent

⁵² Chris Cunneen, Garth Luke and Nina Ralph, *Evaluation of the Aboriginal Over-Representation Strategy — Final Report* (Institute of Criminology, the University of Sydney, 2006).

⁵³ NSW Ombudsman, *Working with Aboriginal Communities: Audit of the Implementation of the NSW Police Aboriginal Strategic Direction (2003–2006)* (2005).

⁵⁴ See also Victoria Police, above n 30; Tasmanian Police, above n 37.

⁵⁵ The first progress report of the Qld IJA in its initial stages of implementation, and reviewed by the Justice Negotiation Group (Qld), appears not to be publicly available.

⁵⁶ The Queensland Government responded formally to the final evaluation report, providing further detail in relation to specific policy initiatives and strategies it had introduced and committing to implementation of some of the recommendations: see Queensland Government, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement: Queensland Government Response* (2006).

review process.⁵⁷ In summary, this evaluation indicated that the *VAJA* had not reduced Indigenous incarceration rates due to the short time span it had in place, but also the absence of a whole-of-government strategic plan to address relevant social factors continuing to lead to Indigenous offending and imprisonment. *VAJA* strategies were assessed for their effectiveness to date, with input by Indigenous stakeholders, and were also prioritised in terms of the future direction of the Agreement (including the *VAJA* infrastructure for community engagement and specific justice programs). The relevance of the Agreement's principles and objectives to its overall goal(s) was also considered. The revised Justice Agreement, formulated in response to the evaluation and through the work of a Steering Committee established subsequent to the evaluation for this purpose, represented a renewed commitment by all parties to tackle Indigenous over-representation in the criminal justice system—introducing new directions and reducing the focus on others in accordance with recognised priorities, as well as improving the basic structure of the document.

In the absence of independent monitoring and evaluation, one must depend almost solely upon internally generated sources of information to ascertain how successful relevant strategic policy has been. The experience of monitoring the implementation of the recommendations from the RCADIC has shown that departmental annual reports or similar review material are not the most reliable means of measuring performance given the tendency of departments and agencies to portray their work in the best possible light.⁵⁸

A further failing of particular relevance to Indigenous-focussed strategic policy occurs where ongoing monitoring or evaluation is completed without effective Indigenous participation. The New South Wales Department of Corrective Services' now-expired *Aboriginal Offenders Strategic Plan 2003–2005*, for example, simply provided that the Aboriginal Support and Planning Unit within that Department was to collate relevant performance data and provide the Department's Board of Management with six-monthly review reports to enable it to monitor progress.⁵⁹ The Plan has no process of evaluation, no independent monitoring, and insufficient Indigenous input and overall content in the review reports. The *VAJA*, by way of contrast, provides for contributions from Indigenous communities (through Indigenous parties to the Agreement) in setting benchmarks, performance indicators, targets and timelines, and their involvement in specific evaluation processes (as occurred with respect to the *VAJA* evaluation discussed above). There is a direct role played by the Indigenous community-based peak coordinating body established under the *VAJA*, the Aboriginal Justice Forum ('AJF'), in evaluating Department of Justice performance.⁶⁰ On the basis of our research we would argue that independent, ongoing monitoring and evaluation at a jurisdictional level, providing for maximum Indigenous input, will enhance the effectiveness of IJAs and strategic plans.

⁵⁷ See Atkinson Kerr & Associates, above n 51.

⁵⁸ See Cunneen and McDonald, above n 9.

⁵⁹ Department of Corrective Services (NSW), above n 41, 20.

⁶⁰ The Victorian *Implementation Review of Recommendations from RCIADIC* provides an example of how Indigenous input might be constituted. The review process used to compile this report involved the release of a discussion paper in 2004, a free-call number and other strategies to encourage maximum Indigenous participation. See Department of Justice (Vic), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005).

E *Ongoing community engagement, coordination and localising*

IJAs often highlight Indigenous capacity building, participation and self-determination as fundamental principles, critical to attaining IJA objectives. In this context, self-determination requires that Indigenous communities are endowed with both the capability and authority to develop their own justice solutions to relevant issues, or to participate in key decision-making processes.⁶¹ Certainly, the most effective IJAs provide for inclusive, *ongoing* engagement with Indigenous communities throughout the entire ‘life’ of any relevant framework; that is, during its initial design, implementation, monitoring, and evaluation. This level of community participation ought also to be present during the development, delivery and assessment of specific initiatives or programs forming part of an IJA, as has occurred in some of the more effective initiatives in Victoria, and to a lesser extent NSW (discussed below).

In order to achieve quality community engagement, state-based IJAs must have relevance at regional and local levels, perhaps through the development of local justice plans or localised, community-based services or groups (such as CJGs).⁶² Indeed, many of the programs identified as constituting best practice in this area incorporate these elements (see Part III I). Effective community engagement, particularly at regional and local levels, has been recognised as a key to the success of state-level strategic policy. The NSW *AJA*, for instance, incorporates support for local Aboriginal community innovation in the justice area and negotiation of policy decisions at local, regional and state levels as a key principle (although there is little evidence that the latter has occurred, particularly with the abolition of AJAC in that state).⁶³ The independent evaluations of the Queensland and Victorian IJAs also recognise the importance of community engagement in achieving the desired outcomes and for the overall successful implementation of these IJAs.⁶⁴

A most important contribution to capacity building in this context is the establishment of Indigenous, community-based, representative and/or advisory mechanisms or structures to enable quality community participation and leadership to be realised. It is positive that in some states, community justice bodies have been set up at state, regional and local levels as part of the implementation of IJAs and justice agency strategic plans. The Victorian process discussed further below is the best example of this strategy. Coordination between the various representative structures and place-based strategic policy is essential and may be achieved, for example, by ensuring that each justice body is aware of its respective role and

⁶¹ See Behrendt, Cunneen and Libesman, above n 6. A useful discussion on how self-determination might be operationalised in criminal justice can be found in the Human Rights and Equal Opportunity Commission’s *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

⁶² See further discussion on CJGs and their contribution to improving justice outcomes in Cunneen, Collings and Ralph, above n 49; Rosemary Grey and Rhys Gardiner, ‘Community Justice Groups: Bridging the Gap between Indigenous Communities and the Law’ (2007) 6(29) *Indigenous Law Bulletin* 22; Michael Limerick, ‘Indigenous Community Justice Groups: the Queensland Experience’ (2002) 80 *Reform* 15.

⁶³ NSW Aboriginal Justice Advisory Council, *Aboriginal Justice Plan*, above n 18, 9.

⁶⁴ Cunneen, Collings and Ralph, above n 49, 130–51; Atkinson, Kerr & Associates, above n 51.

responsibilities, or that state-level policy is well informed as to the implementation of local Indigenous justice plans through regular meetings between regional or local and state-based Indigenous justice bodies.

There is considerable variation in the success that the different IJAs have had in meeting these goals of community engagement. These variations can arise from a number of factors, including the broader political and policy contexts in which IJAs find themselves (for example, the abolition of Indigenous Advisory groups in Queensland and NSW after the establishment of IJAs), the specific needs and wishes of relevant Indigenous communities, and perhaps even differences in terms of the distribution and size of Indigenous populations between jurisdictions (for example, the more confined distribution of Indigenous people may have assisted the success of Victorian initiatives in this area). Where there are numerous, disparate Indigenous communities spread out over vast distances (as occurs, for example, in WA) the process of achieving effective engagement will inevitably be more complicated. However, while one must be mindful of such variations, some comparisons are nevertheless appropriate.

The NSW *AJP* was the product of more than 18 months of consultation and negotiation coordinated by the NSW AJAC, involving over 700 Aboriginal community members and all major government agencies. Public submissions were called for on three occasions in the Plan's development, and 14 Aboriginal community meetings and six regional summits were held across the state.⁶⁵ Significantly, the NSW AJAC was also responsible for coordinating development of an *AJP* discussion paper to inform all stakeholders about the options available—information being an essential component of effective participation.⁶⁶ However, the NSW *AJP* failed to maintain the momentum created during its preliminary development stage. Community-based structures were not established under the NSW *AJP* to promote Aboriginal participation and leadership, and subsequently the AJAC was abolished. In addition, the development of the whole-of-government *Two Ways Together* Aboriginal Affairs Plan, and the NSW *State Plan*,⁶⁷ has shifted the focus of Indigenous policy firmly away from community participation to control by government agencies.

The *VAJA* has been more effective in providing for ongoing Aboriginal ownership of, and participation in, strategic policy development. The creation under the *VAJA* framework of well-coordinated state, regional and local community-based justice structures, involved in implementation of regional and local justice plans, represents the successful application of engagement principles.⁶⁸ The *VAJA* emphasised the importance of establishing, as an essential first step, infrastructure that would guarantee ongoing Indigenous input into the Agreement—

⁶⁵ NSW Aboriginal Justice Advisory Council, *Aboriginal Justice Plan*, above n 18, 6.

⁶⁶ Chris Cunneen, *NSW Aboriginal Justice Plan — A Discussion Paper* (NSW Aboriginal Justice Advisory Council, 2002). The Discussion Paper provides detail in relation to a range of matters, including Indigenous socio-economic and criminal justice (including victimisation) data, a possible structure for the Plan (with reference to examples from other jurisdictions), a discussion of underlying factors contributing to Indigenous over-representation in the criminal justice system, and of evidence-based best practice in terms of community-based approaches to Indigenous justice issues.

⁶⁷ Department of Premier and Cabinet (NSW), *NSW State Plan — A New Direction for NSW* (2006) ('*NSW State Plan*').

⁶⁸ Atkinson, Kerr & Associates, above n 51.

setting up the statewide AJF and the Regional and Local Aboriginal Justice Advisory Committees ('RAJACs' and 'LAJACs') to work alongside relevant government agencies and the Victorian AJAC in implementing the *VAJA*. Detail is provided in the *VAJA* about the respective responsibilities of each body and about how each must collaborate, including with government departments and agencies.⁶⁹ The *VAJA* structure has been independently evaluated, with Indigenous input, as being effective in building, and embodying the goals of, effective partnerships.⁷⁰ Similar structures and place-based plans have been established under the WA *AJA* and some justice agency strategic plans—for example, the New South Wales Police Force's *Aboriginal Strategic Directions*.⁷¹

Our evaluation of IJAs and criminal justice strategic plans indicates the importance of maximum Indigenous participation during all stages of policy development, with provision for localising relevant policy and programs, and for effective coordination between regional, local and state structures and plans. On the basis of existing IJAs, the *VAJA* provides the most effective example of ensuring maximum Indigenous participation in all facets of the development, implementation and evaluation of an IJA.

F *Tackling underlying issues of socio-economic disadvantage*

While the fundamental link between reducing Indigenous over-representation in the criminal justice system and addressing underlying contributory factors (such as low employment rates, alcohol and drug misuse, poor health, and poor educational attainment within Indigenous communities) is acknowledged in all IJAs, it is those IJAs that manage to maintain a specific focus upon justice issues that appear more likely to deliver genuinely positive justice outcomes to Indigenous people.

In general, IJAs have largely delegated any action to be taken in relation to the underlying causes of Indigenous over-representation in the criminal justice system to overarching government strategic frameworks (such as *Two Ways*

⁶⁹ Department of Justice (Vic), above n 16, 26–8, 32–3. The AJF coordinates the Agreement (as well as fulfilling an advisory role with respect to justice issues), and its membership includes high-level Aboriginal community and government representatives. The role of the RAJACs and LAJACs, again consisting of representatives from government and the community, includes developing and monitoring Regional and Local Aboriginal Justice Plans alongside respective communities, as well as advising the AJF, AJAC and related forums about local and regional justice issues.

⁷⁰ Atkinson, Kerr & Associates, above n 51.

⁷¹ WA has created an AJF (now the State Aboriginal Justice Congress) and Regional and Local Justice Forums with largely the same responsibilities as similar bodies in Victoria referred to above. It is worth noting that in its *Aboriginal Justice Agreement Guiding Principles* WA has committed to establishing regional and local planning processes and structures which are inclusive of Aboriginal women, youth and elders: Department of the Attorney-General (WA), *Aboriginal Justice Agreement Guiding Principles* (2004). The NSW Police Service, *Aboriginal Strategic Directions* (2007) ('*ASD*') is similar in that it establishes a three-tiered consultative committee structure consisting of a Local Area Command Aboriginal Consultative Committee ('LACACC') (and sub-LACACC if necessary), a Regional Aboriginal Advisory Committee (with membership from the NSW AJAC, a Police Aboriginal Community Liaison Officer, and community members), and a Police Aboriginal Strategic Advisory Committee (chaired by the Police Commissioner, with membership drawn from the NSW Ombudsman's Office, Aboriginal Land Council, NSW Health, the Attorney-General's Department and other relevant departments). There is also provision for development of local Aboriginal justice plans under the *ASD*.

Together 2003–2012 in NSW or *Partnerships Queensland*). Where, however, IJAs attempt to take on issues that require substantive commitment across various government portfolios, serious difficulties may arise—one of the most obvious problems being that any justice-focussed policy will inevitably only be able to deal relatively superficially with matters outside of the justice arena. Justice agencies are not going to be able to significantly impact upon, for example, school completion or unemployment rates, although justice agency policies might support these outcomes (for example, by providing educational or vocational training in detention and post-release support).

Other potential problems can be seen in the NSW policy context. The NSW *AJP* went further than other IJAs in dealing with underlying factors. Indeed, the *AJP*'s foreword indicates that it is intended to serve as a coordinated policy response to the underlying causes of crime and incarceration for Indigenous people, as well as to Indigenous over-representation in the criminal justice system and victimisation.⁷² Principal actions listed under the Strategic Directions of the NSW *AJP* range from vocational training for youth to the development of private sector partnerships with Indigenous communities.⁷³ These are clearly actions falling outside the core business of justice agencies.

While the essential link between justice and broader socio-economic factors must be understood, firm lines need to be drawn between planning areas if Indigenous justice is to maintain its status as an important issue in its own right. There is, otherwise, a danger that strategies dealing with Indigenous over-representation in the criminal justice system may, in effect, be subsumed within whole-of-government strategic policy, as appears to have occurred in NSW. By way of contrast, the *VAJA*, while referring to findings of the RCADIC linking Indigenous over-representation in the criminal justice system and the 'whole-of-life' experience of Aboriginal people, delegated responsibility to the Victorian government for developing a whole-of-government Indigenous strategic framework dealing with Indigenous structural disadvantage.⁷⁴ In this way, the *VAJA* could focus on Indigenous justice issues almost exclusively, and this approach has contributed to its overall effectiveness.

G *Continuity in justice policy*

The lack of continuity in Indigenous strategic policy development is a problem that affects the ability of justice agencies to engage with Indigenous people, achieve desired outcomes and ensure better service delivery. There may be policy 'black holes' where for a considerable period of time agencies allow strategic policies to lapse, with no account as to why this has occurred in a particular instance. For example, the NSW Department of Corrective Services' *Action Plan for the Management of Indigenous Offenders 1996–1998* was followed after a five-year gap by the *Aboriginal Offenders Strategic Plan 2003–2005* and then after another two years by a draft *Aboriginal Strategic Plan 2007–2012*.⁷⁵ There are many occasions on

⁷² NSW Aboriginal Justice Advisory Council, *Aboriginal Justice Plan*, above n 18, 4.

⁷³ *Ibid* 14–15, 18.

⁷⁴ Department of Justice (Vic), above n 16, 19.

⁷⁵ See Department of Corrective Services (NSW), above n 41. As at August 2009, the *Aboriginal Strategic Plan 2007–2012* was still in draft form.

which a policy implementation or reporting framework disappears (as occurred with 'action plans' under the Qld IJA after 2001), with no indication that it has been phased out due to failure. In the Queensland example, it appears that responsible agencies simply stopped producing the action plans as required by the Agreement.

Issues of continuity and consistency are also problematic when governments decide to introduce whole-of-government strategic planning that essentially overrides a negotiated IJA. Originally, the implementation of the NSW *AJP* was to be handled by a interdepartmental 'cluster group' mechanism established under *Two Ways Together*, the whole-of-government Aboriginal Affairs plan developed after the original Aboriginal Justice Agreement had been signed. The justice cluster group was one of eight such groups within the cluster structure, each covering various aspects of Indigenous wellbeing, and was essentially made up of government department representatives, effectively removing Indigenous community members from the implementation and oversight process. Ultimately, the implementation process for the NSW *AJP* was lost. When the NSW *State Plan* was introduced in 2006, the cluster group mechanism was dismantled, and it is now unclear where responsibility for implementation of the NSW *AJP* lies.

The issue of continuity in strategic planning is important. After reviewing Indigenous justice strategies across Australia, it is clear that constant change in government policy is a significant barrier to success. Regular change disrupts processes of reform and accountability. For example, there may be two or three significant changes in policy frameworks in 5 or 6 years, although there is no indication (through evaluation) that previous strategies failed. It also becomes difficult to determine the extent to which central strategic planning through an IJA or a state-wide plan has impacted on departmental or agency policy, or whether existing policies and programs are simply rearranged, recycled and rebadged to fit a new strategic direction.

H IJAs and Indigenous victimisation

Generally speaking, IJAs have not done enough to address the issue of Indigenous victimisation (including issues of family violence and child protection), despite its close connection with Indigenous incarceration. It is this connection that sets this issue apart from other aspects of Indigenous social disadvantage such as employment or health, which we have argued above are best dealt with quite separately to IJAs. Justice agencies such as police departments already have the responsibility and capacity to respond to Indigenous family violence and sexual assault, in contrast to broader social disadvantage, where they do not. Their capacity and responsibilities in this context need to be clarified and developed within IJAs, including in the development of specific policies and practices for working with Indigenous victims of crime.

Indigenous people are over-represented in the criminal justice system as both offenders *and* victims, and any strategic policy framework seeking to reduce offending rates of Indigenous people must focus (to an appropriate extent) on the high rates of Indigenous victimisation—the latter underpinned by similar factors that lead to Indigenous offending. It is for this reason that the evaluation of the Qld IJA recommended an increased focus on victimisation given the high rates of

offences against the person that are committed against Indigenous people.⁷⁶ The *Overcoming Indigenous Disadvantage Report* provides further evidence of the extent of Indigenous victimisation.⁷⁷

The approach taken to date in relation to this issue in IJAs is, in some respects, piecemeal and inconsistent across jurisdictions. There is some recognition of the connection between family violence and offending in some IJAs. For instance, that the NSW *AJP* commits to developing statewide strategies to reduce family violence in Aboriginal communities, and it includes in its Strategic Directions actions such as providing sexual assault counselling to Aboriginal prisoners.⁷⁸ The WA *AJA* also incorporates as one of its three principal outcomes a reduction in the rate of Indigenous victimisation and makes further reference to this issue by, for example, calling for better protection for victims and their families.⁷⁹

The extent of Indigenous family violence and child sexual assault has been raised at a policy level in most Australian jurisdictions. At times, these matters have been dealt with through some form of consultative inquiry or government-initiated report (which has, to varying degrees, informed relevant strategic policy frameworks). The Northern Territory's 2007 whole-of-government policy framework *Closing the Gap of Indigenous Disadvantage* is in large part a response to the findings of the *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* report into Aboriginal child sexual abuse, for example.⁸⁰ In other instances, strategic policy specifically addressing these issues has been introduced. In Victoria, an Indigenous family violence strategic plan has been implemented.⁸¹ The development of Indigenous-specific policy frameworks in this area, however, has taken place largely independently of any IJA. In Queensland, for instance, the *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* was issued in 2000, but the draft Family Violence Agreement drawn up in that jurisdiction in 2003 has not, to date, been finalised.⁸² A report for the Department of Communities on *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* was completed in 2008 but not released until 2010.⁸³

⁷⁶ Cunneen, Collings and Ralph, above n 49, xviii.

⁷⁷ Steering Committee for the Review of Government Service Provision, above n 3, 127.

⁷⁸ NSW Aboriginal Justice Advisory Council, *Aboriginal Justice Plan*, above n 18, 14–15, 19–22.

⁷⁹ Department of the Attorney-General (WA), above n 17.

⁸⁰ Department of the Chief Minister (NT), *Closing the Gap of Indigenous Disadvantage — A Generational Plan of Action* (2007); Rex Wild and Pat Anderson, Department of the Chief Minister (NT), *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' — Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) ('*Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* report').

⁸¹ Aboriginal Affairs Victoria, Department of Planning and Community Development, *Strong Culture, Strong Peoples, Strong Families: Towards a Safer Future for Indigenous Families and Communities (10 year plan)* (2008).

⁸² Queensland Government, *Safe and Strong Families: A Proposal for a Partnership Agreement to Reduce Family Violence in Aboriginal and Torres Strait Islander Communities throughout Queensland (Draft Family Violence Agreement)* (2003); Aboriginal and Torres Strait Islander Women's Task Force on Violence, Department of Aboriginal and Torres Strait Islander Policy and Development (Qld), *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999).

⁸³ Chris Cunneen, 'Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities' (report commissioned by the Department of Communities (Qld), 2009).

In our view, negotiated IJAs can take the lead on the subject of Indigenous victimisation. The issue is fundamental to any attempt to reduce Indigenous over-representation in the criminal justice system and improve justice outcomes, and so cannot be conceived of separately from such over-representation. Further, a negotiated response through an IJA is more likely to lead to policies that respect Indigenous views, processes and rights, rather than, for example, the Northern Territory Emergency Response, which in the main ignored the recommendations from the *Ampe Akelyernemane Meke Mekarle* 'Little Children are Sacred' report.⁸⁴

I *Initiatives and programs*

It is possible to begin to identify those programs or initiatives that are working successfully with Indigenous offenders and that will be likely, in the longer term, to reduce contact with the criminal justice system. Certain categories or types of programs and initiatives have been identified relatively consistently as being the most effective in this area, including the following:⁸⁵

- circle sentencing (in NSW and the ACT) and Aboriginal sentencing courts (in all jurisdictions except NSW and Tasmania);
- community-based structures or bodies, including, but not limited to, those established under IJAs and agency strategic plans;
- community-based Indigenous family violence programs (such as the *Red Dust Healing* or *Rekindling the Spirit*);
- CJGs in NSW and Queensland and similar community-based justice groups in Victoria and the NT;
- Aboriginal night patrols and other community-initiated policing strategies (in NSW, Victoria, NT and WA);
- Indigenous mentoring programs such as the Rumbalara Koori Women's Mentoring Program in Victoria and the Panyappi Indigenous Youth Mentoring program in Adelaide;
- community-based alternatives to prison such as Wulunggo Ngalu Learning Place residential programs in Victoria; and
- correctional programs delivered by Indigenous community members such as those offered as part of the Yetta Dhinnakkal program in NSW or cultural immersion programs within prisons.

⁸⁴ See Michael King and Rob Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' (2008) Northern Territory Emergency Response Review <http://www.nterreview.gov.au/subs/nter_review_report/125_Faculty_of_Law_Monash_University.htm>; Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (Commonwealth Government, 2008).

⁸⁵ The selection of relevant initiatives was based on recommendations and assessments found within the strategic policy frameworks; relevant evaluative, annual, and other reports; and through recommendations and comments put forward by representatives of relevant government agencies, departments, and Indigenous organisations contacted as part of research. See Cunneen and Allison, above n 5.

Significantly, a number of these and other programs have been developed through IJAs and agency strategic plans, including, for example, the community engagement structures under the first and second phase of the *VAJA* and the NSW Police *ASD*, the development of CJGs in Queensland and NSW, and the Murri and Koori courts in Queensland and Victoria. In this sense, IJAs and agency strategic policy can be seen to have a direct and positive impact upon the provision of services and programs to Indigenous people. The IJAs have provided a coherent policy framework in which specific initiatives can be supported and expanded, thus transforming what might otherwise be an ad hoc initiative into part of a more cohesive strategy for developing change.

Furthermore, IJAs are useful to the extent that they increase awareness of and focus attention upon the breadth and quality of relevant initiatives, most particularly where IJAs include and carry through on monitoring and/or evaluation processes (as in Queensland and Victoria). IJAs can also provide a framework for sharing information across and within governments, and with Indigenous people on best practice initiatives.

Some of the programs identified as best practice have developed in jurisdictions without an IJA. Nevertheless, they all appear to embody a number of the key features essential to the success of any IJA. For example, the Aboriginal specialist courts (such as the Nunga Court in SA, which was developed outside of any IJA) embody principles of effective community engagement and partnership building. Initiatives such as the Law and Justice Committees in the NT (which developed outside of an IJA) and CJGs in various jurisdictions provide evidence that a localised community-based structure can improve justice outcomes, particularly when adequately resourced.⁸⁶ Moreover, the success of cultural immersion programs may be attributed to strong Indigenous involvement in their delivery.⁸⁷ The advantage of an IJA is that it can provide an effective but isolated program with support for further development, and situate what is otherwise a pilot or localised project within a statewide framework, providing greater opportunities for expansion and resourcing.

IV Conclusion

Having discussed the development of Indigenous-specific criminal justice strategic policy, particularly IJAs, it is important to take a step back and consider whether these policy frameworks are working effectively and to the benefit of Indigenous people throughout Australia. If we consider current imprisonment rates for Indigenous people nationally and the levels of Indigenous over-representation in the criminal justice system, then there is perhaps little cause for optimism.

Two jurisdictions with IJAs (WA and NSW) are also the states with the highest and third highest Indigenous imprisonment rates in Australia. The Indigenous imprisonment rate in Western Australia in March 2010 was 4310 per 100 000 and in New South Wales it was 2411 per 100 000. The WA rate in particular was well above the national Indigenous imprisonment rate of 2311 per 100 000.⁸⁸ However, it is also

⁸⁶ On the positive impact of CJGs, see Cunneen, Collings and Ralph, above n 49, 130–41.

⁸⁷ Carmel Barry, 'The Aboriginal Cultural Immersion Program' (Speech delivered at the Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13–15 October 1999) <<http://www.aic.gov.au/events/aic%20upcoming%20events/1999/indigenous.aspx>>.

⁸⁸ Australian Bureau of Statistics, above n 2, 23.

worth noting that Victoria, which has an IJA that meets the highest standards in terms of Indigenous participation, implementation, monitoring and independent evaluation, also has one of the lowest Indigenous imprisonment rates in Australia: at 1304 per 100 000, it is almost half the national figure. Queensland, another state with a well-developed IJA, also has an Indigenous imprisonment rate (1754 per 100 000) well below the national average.⁸⁹

Although it is important to utilise statistical data in evaluating the overall effects of IJAs, we have also argued in this article that a broader examination of the effectiveness of relevant strategic planning is necessary. It is possible to conclude that IJAs *have* made a difference to Indigenous people in their contact with the justice system. IJAs have led to a government focus upon Indigenous justice issues and, in those jurisdictions where they exist, they have been associated with criminal justice agencies developing Indigenous-specific frameworks. As we have outlined previously, they have also led to the development of a number of effective initiatives and programs in the justice area, and have advanced principles of government accountability where they have properly provided for and carried out independent monitoring and evaluation, with maximum Indigenous input. IJAs have effectively progressed Indigenous community engagement, self-management and ownership where they have set up effective and well-coordinated community-based justice structures and/or led to the development of localised strategic planning, as well as through encouraging initiatives that embody such ideals.

There are a number of lessons that can be drawn from the experiences of developing IJAs over recent years. First, there are obvious omissions from the list of jurisdictions that have developed these agreements (including SA, NT and Tasmania). It is only in those jurisdictions with an IJA that contains monitoring and evaluative components (in particular, Victoria and Queensland) that we have any overall picture of the various justice programs and initiatives that are in operation. We argue that IJAs need to be developed in those jurisdictions where they remain outstanding, as do justice agency strategic plans, particularly by those agencies that have made the least effort to date in this regard, namely public prosecutions, LACs, and court administrations. These developments are imperative, given the move towards a national approach through the *National Indigenous Law and Justice Framework 2009–2015*.

Second, there needs to be greater continuity in strategic policy development within jurisdictions, and within and between agencies, to ensure effective outcomes. Our research showed that policy frameworks are formulated and then disappear with little attention to whether they were effective in meeting outcomes. Third, and as part of the commitment by government to deal with Indigenous over-representation in the criminal justice system, IJAs must also address Indigenous victimisation. Fourth, the fact that the development of IJAs has been hindered by the dismantling of independent Indigenous representative and/or advisory bodies should also be cause for some concern. Independent representation for Indigenous communities is a crucial component of any further development of strategic policy. It was one of the great failures of the Howard Government era that at both the federal and state or territory level Indigenous representative bodies were progressively dismantled as part of the attack on the principle of Indigenous self-determination.

⁸⁹ Ibid.

Finally, we need to be aware of the broader political context in which IJAs operate. There has been a stronger emphasis on more punitive approaches to law and order in many Australian jurisdictions over the last 15 or so years and these have not been conducive to either effective reform of the criminal justice system or the recognition of Indigenous rights.⁹⁰ There is little doubt that we have moved into a more punitive period in relation to criminal justice policies as witnessed, for example, by increased police powers, 'zero tolerance'-style laws that increase the use of arrest for minor offences,⁹¹ greater risk aversion, the growth in remand populations,⁹² demands for longer terms of imprisonment for a range of offences, and a significant growth in rates of imprisonment.⁹³ This context makes achieving significant reform more difficult.

⁹⁰ For example, the 48 per cent increase in Indigenous imprisonment rates in NSW between 2001 and 2008 was caused by rising numbers of Indigenous people being remanded in custody and sentenced to imprisonment (rather than to a non-custodial sentencing option), and increasing lengths of custody. None of these increases were a result of more convictions of Indigenous people: Jacqueline Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* (Issue Paper No 41, NSW Bureau of Crime Statistics and Research, 2009).

⁹¹ Roth found that between 1 January 2003 and 31 July 2006 there were over 230 major changes to law and order legislation in Australian states and territories: Lenny Roth, *Law and Order Legislation in the Australian States and Territories 2003–2006* (Briefing Paper No 12/06, NSW Parliamentary Library Research Service, 2006).

⁹² Steel has noted the rapidity with which bail legislation has changed in some jurisdictions, usually in response to some politically expedient incident: Alex Steel 'Bail in Australia: Legislative Introduction and Amendment since 1970' in Marie Segrave (ed), *Australia and New Zealand Critical Criminology Conference 2009: Conference Proceedings* (Monash University and the Australia and New Zealand Critical Criminology Network, 2009) 228.

⁹³ Chris Cunneen, 'Fear: Crime and Punishment' (2010) 29(2) *Dialogue* 44.