Recasting Old Solutions to Old Problems

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Preventive apprehension legislation and its impact on Aboriginals.

During the 1990s, New South Wales (NSW) parliamentarians undertook a series of visits to towns in north-western NSW that have large Aboriginal populations. These visits took place against a backdrop of local 'law and order' campaigns. During a visit to Bourke in early 1997, parliamentarians heard non-Aboriginal residents describe Aboriginal youth as 'running amok'.[1] We are told by former Attorney-General, John Hannaford, that in Bourke, he came across a group of Aboriginal women who had organised their own pilot scheme to collect Aboriginal children off the streets and take them home. This same group, he claimed, 'were told by someone in one of the government agencies ... that sooner or later they would be accused of kidnapping the children. As a consequence of that advice the women wanted police to have the powers to take those children home.'[2] According to Hannaford, the *Children (Protection and Parental Responsibility) Act 1997* (NSW) (the CPPR Act) had its genesis from such visits and from such requests by Aboriginal people.[3]

Hannaford and other parliamentarians visited Bourke during the debates surrounding the CPPR Act in 1996–97. On one visit, Dr Marlene Goldsmith described Bourke as a 'town under siege'.[4] She stated that the reason there is a 'high proportion of Aboriginal people in the justice system ... is that they actually commit the crimes'.[5] Furthermore, she claimed such over-representation could be largely explained by a lack of parental responsibility which in turn was the result of state interventionist welfare policies which have 'corroded the self-esteem of Aboriginal parents'.[6] Ironically, Dr Goldsmith advocated as a solution yet another form of state intervention — the proposed CPPR Act — that would provide the 'appropriate support mechanisms' to 'help to redevelop' family life and ensure that 'Aboriginal children receive proper parenting'.[7] Moreover, Dr Goldsmith, together with other parliamentarians, claimed that the proposed CPPR Act had the support of the Aboriginal women of Bourke.

As it appears that the CPPR Act had its genesis in north-western NSW, this article seeks to place the legislation in an appropriate context. North-western NSW has had a continuum of interventionist 'solutions' to the Aboriginal 'problem'. The article explores the potential effect the CPPR Act may have on Aboriginal youth; the concerns raised by Aboriginal people in north-western NSW surveyed about the Act; and the concerns expressed by the Aboriginal people of the Dubbo region in their consultations with their municipal council over the implementation of the Act.

Operation of the Act

The CPPR Act has been described as 'preventive apprehension' legislation. It replaced an earlier Act, the *Children (Parental Responsibility) Act 1994 (NSW)* (the CPR Act) and came into operation on 10 July 1997. Like the earlier Act, the CPPR Act criminalises parents who have contributed to their children's offence(s) through 'wilful default', and increases police powers to remove unsupervised youth (under 16 years)

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from public places if 'at risk'. 'At risk' includes a young person who a police officer believes is about to commit a crime (s.19(3)(a)). Youth removed by police from any public place are to be placed 'in care' for up to 24 hours. 'In care' includes being placed with parents or relatives, or a Department of Community Services (DOCS) approved person (ss.22-24). The Act gives police substantial powers: they may request the young person to state their name, age, parent's/carer's residential address (s.27); can use reasonable force to remove a young person from a public place (s.28); and can search a young person if they believe on reasonable grounds that he/she is carrying a concealed weapon (s.29(1)(a)). A weapon includes a glass bottle or other instrument adapted for use for causing injury to a person (s.29(2)(d)).

Unlike, the earlier Act, the CPPR Act puts in place a juvenile crime prevention structure through a substantial consultative requirement between local government and the community. The NSW Attorney-General requires that a local council seeking to have the CPPR operational in its local government area must put into place a 'crime prevention plan' (see Part 4 of the Act). In theory such a plan would be the result of extensive consultations between the council seeking the operation of the Act and its community, including the Aboriginal community. The content of the plan would include, for instance, Aboriginal community development; crime prevention; open space planning and management; drug and alcohol management; parental education and family support programs; youth development strategies; consultation; arrangements for reporting and coordination. Furthermore, a council must give public notice of a draft local crime prevention plan and place it on public exhibition for 28 days (s.34(3)). After receiving submissions the council may decide to amend or adopt the draft plan (s.35(1)).

Once the 'crime prevention plan' is prepared and approved by the Attorney-General it becomes a 'safer community compact' (s.39(1)). However, before this happens, the Attorney-General must consider a number of provisions (s.39(2)) including:

- whether the plan was prepared in accordance with guidelines issued by the Attorney-General (s.32);
- whether the council has adequately consulted with the local community concerned, including young people and the Aboriginal community; and
- the likely effect of the plan on crime and on the local community, including young people and the Aboriginal community.

Moreover, the Attorney-General is to consult with DOCS and the Police Department before giving approval to the Local Crime Prevention Plan (s.39(3)). The Attorney-General may grant financial assistance to a council which has a safer community compact in place. The council is to report to the Attorney-General on the implementation of the Compact (s.41) which remains in force for three years after it is approved by the Attorney-General (s.42(1)). The council is to monitor, identify and advise the Attorney-General on trends in complaints relating to the operation of the Act in its area (s.44).

Impact on Aboriginal youth

Community groups and legal associations have raised serious concerns about the operation of both the CPR and the CPPR Acts, especially about the targeting of Aboriginal youth. Commentators alerted the NSW Government to the fact that neither Act provided means for judicial review of police decisions, and both, therefore, were open to police abuse.[8] Patrick Fair, President of the Law Society of NSW warned that the Act can 'be used to effectively create Aboriginal free and child-free zones'.[9] More recently, the Australian Law Reform Commission Report, *Seen And Heard: Priority For Children In The Legal Process*,[10] described preventive apprehension legislation like the CPPR Act as 'problematic. It allows police to monitor youth behaviour that is not criminal. It sanctions preventive apprehension but provides little or no accountability for police actions or judicial supervision. It allows police to act on stereotypes about young people.' The Commission recommended that such legislation be repealed.

The use of such 'preventive apprehension' legislation was also strongly condemned in a Report commissioned in 1994 by the Attorney-General to evaluate the operation of the CPR Act in Gosford and Orange.[11] The Report found that the CPR Act not only breached international law,[12] and the Government's own Charter of Principles for Juvenile Justice,[13] but also recommendations by the Royal Commission Into Aboriginal Deaths in Custody (RCIADIC). Specifically, it breached those recommendations which advised government to put into place policies of consultation and safeguards which will ensure that the representation of Aboriginal youth within the criminal justice system is reduced, and that any legislation affecting Aboriginal youth must recognise and be committed to maintaining the primacy of the Aboriginal family.[14] The Report found that the CPR Act was 'motivated more by racial tensions and the desire to remove Aboriginal young people from the streets, rather than a genuine concern to address juvenile crime or the welfare of Aboriginal young people in the local community'.[15] It also recommended that the Act be repealed.

Ironically, while the NSW Labor Government ignored the report's recommendations, the Attorney-General, Jeff Shaw, publicly admitted that the Act was partly about keeping Aboriginal children off the streets in country towns.[16]

A continuation of the same 'solution': placing the CPPR Act in its context

As noted earlier, the CPPR Act appears to have its origin in law and order campaigns in north-western NSW. In the early 1980s, Paul Coe, Director of the Aboriginal Legal Service, observed how the state and its agents, the police, magistrates and local government, regarded Aboriginal people from within a 'frontier mentality.'[17] Such a mentality treated Aboriginal people as a 'problem' which demanded an interventionist 'solution'. 'A Study of Street Offences By Aborigines',[18] published in 1982, was the first major report into the relationship between policing and Aboriginal people in north-west NSW. It found that the discriminatory police surveillance of Aboriginal people in the public sphere was not simply a matter of enforcing community standards, but rather involved the disciplining of Aboriginal people into their place within the established order.

Relevant to this discussion on the CPPR Act, Chris Cunneen and Tom Robb observed in 1982, that the first formulation of the law and order crisis in Dubbo emerged with the *Public Protection Bill* in the NSW Parliament. The Bill introduced by a private member, was intended to 'give to the police the power they so desperately need to regain control of the streets ...'[19] It was particularly aimed at youth with attention given to youth overturning garbage bins in Walgett. Clause 29 of the Bill gave police the power to

remove from the street any person under the age of 16 years who was loitering in a public place after 11 p.m. According to cl.29, police 'shall be permitted to use such force as may be reasonably necessary to give effect to such direction'. Clause 30 allowed for parents to be convicted for juveniles who are found loitering under cl.29 more than three times within three months. The Bill was never passed.

In revisiting the same country towns in the late 1980s, Cunneen and Robb in their study 'Criminal Justice in North West NSW'[20] likewise found that Aboriginals' use of space and their social visibility were constructed by the police and the populist law and order campaigns supported by local government, as justifying legal responses which in their discriminatory application operated to criminalise a breadth of Aboriginal public behaviour. Cunneen and Robb observed that the links between local councils, the police and magistrates operated to keep Aboriginal people 'invisible'[21] through the over policing of streets and the imposition of curfews. 'There has been an underlying belief that if Aborigines were removed from public places then law and order would be reinstated.'[22]

In the RCIADIC Commissioner Elliott observed that most of the conflict with Aboriginal people arises 'from police endeavours to enforce "street offences" legislation which seeks to impose on Aboriginal people the views of European culture about the appropriate use of public space'.[23] Elliott examined how the routine nature of police involvement with Aboriginal people in their day-to-day practices acted to 'entrench the subordination of Aboriginal people and, with it, racist attitudes in the dominant society'.[24] In country towns in north-western NSW with large Aboriginal populations, Elliott found how the connections between local government law and order campaigns, and discriminatory police practices, resulted in high levels of policing which contributed to the 'criminalisation of Aboriginal people'.[25] The situation was no different with the 'International Commission of Jurists Report on North Western NSW' (ICJ Report) released in 1990.[26] More recently, a report on the relationship between Aboriginal youth and police violence in the Bourke-Enngonia region of north-western NSW, found '90% of Aboriginal people had had contact with the police and that such contact usually had "overtones" of racist violence. Such contact often involved Aboriginal juveniles.'[27]

The Aboriginal voice on the Act

The claims by State politicians that the interventionist approach taken by the CPPR Act in dealing with the 'youth problem' was called for and supported by Aboriginal groups, particularly, in north-western NSW, prompted the Community Legal Service for Western NSW (the Service) to undertake an extensive survey of the Aboriginal people in the area.[28]

Considering that the CPPR Act requires a complex consultative process between local governments and their Aboriginal communities, the Service found that in areas where councils intended to implement the Act, 92% of Aboriginal people surveyed had not been approached by their local council. Instead, what alerted many such people to their council's intention was their local media. As to whether they had prior knowledge of the CPPR Act, 79% said they were completely unaware of the legislation and its possible effect on their children.

On the issue of the perceived 'youth problem' (unsupervised youth in public spaces), all agreed, if there was a problem, its cause lay more with the state's intervention into the family life of Aboriginal people. In other words, the solution provided by the Act — additional police intervention — was the source of the problem. As one respondent wrote, 'I'm in the middle of reading "Bringing them Home" and I strongly oppose any interference into the family unit'.

After being provided with an information package on the Act including the issues (as noted above), all but one of the group surveyed disagreed with increasing police powers. Grace Beetson, CEO of the Brewarrina Medical Service, captured the general sentiment in saying that the 'Act is a restoration of the old Protection Acts of 1900 in subtle form'. Greg McKellar, Director of Muda Radio Bourke, warned that the Act would catch more Aboriginal youth within the criminal justice net through what is commonly called the 'trifecta'. McKellar explained that, 'our youth already have strained relationships with the police. If a police officer was to approach an Aboriginal youth believing that he is about to commit a crime, and the young person refuses to cooperate, rightly because he sees himself discriminated against, and swears at the police or refuses to go with the officer, then he could find himself charged for hinder police, assault, and resist arrest: the trifecta'. Instead of being supported, the CPPR Act was therefore condemned as racially motivated.

The Aboriginal women's group in Bourke, which according to Hannaford and other NSW politicians had given the Government the idea and resolve to pursue the legislation, was the Ngardrh Ngarli Aboriginal Women's Group. Yvonne Howarth, an elder and the chairperson of the group was distressed to find how their concerns had been grossly misunderstood. In fact, her group had obtained the use of a bus to collect Aboriginal children and take them home. When approached by government delegations, the group sought funding for their service which they hoped would include a safe way house. The youth issues were related more to welfare than crime prevention solutions. 'The Aboriginal people of Bourke', she said, 'have a long history of suffering at the hands of the police. It makes no sense for us to have supported a greater role for the police into the family life of Aboriginal people. The Stolen Generation Report is a witness to this. When we met the delegates from Sydney we sought more financial assistance not more police power.' To emphasise her point, she directed us to the local court house to see the results of police actions towards Aboriginal youth. 'Every day', she added, 'the court house is filled with Aboriginal young people on charges for minor street offences'.

Considering the abundance of evidence on criminal justice in north-western NSW, Yvonne Howarth's experience once again confirms how the state approaches Aboriginal issues through a 'problem/solution' paradigm which operates to treat Aboriginal society as a social pathology and criminalises it.[29]

The efforts of the Dubbo Aboriginal Community

If the CPPR Act requires consultation with the local community, specifically the Aboriginal community, then it would appear from public statements made by Anthony McGrane, Mayor of Dubbo, that the implementation of the Act was a fait accompli. The *Daily Liberal* on 21 September 1997 reported that McGrane had hosted a meeting of regional may-

ors to discuss the implementation of the legislation. Mr McGrane stated '[W]e all believe the proposed Bill will not only assist in reducing crime, but will also be beneficial to the welfare of children within all our areas'. He assured the Attorney-General representative that his council was well aware of the consultancy requirements under the Act, for the development of a crime prevention plan and safer community compact. He is reported as stating that 'In Dubbo, we already have a youth council and advisory committee, so that most of the requirements are in place here'. What McGrane did not mention was that the youth council had no Aboriginal representative, and that when the Community Legal Service for Western NSW contacted various Aboriginal organisations and representatives in Dubbo, none knew of any such advisory body. Further, if there was such a body the Legal Service had not been invited to join.

A *Daily Liberal* follow-up story re-enforced the necessity for the Act. Reporter Jodie O'Sullivan amplified her findings on 'late night kid-fact-finding-mission'. The story began with a sobering vignette, 'It's 11 o'clock on a Friday night in Dubbo's main street and a 15-year-old girl staggers drunkenly before stopping to vomit in a gutter'. O'Sullivan went on to state how police 'are powerless to address the growing problem of children out and about'.[30] This was followed by a series of articles where youth lawlessness and youth drug addiction were outlined and the merits of the CPPR Act were discussed.[31] Superintendent of Police for the north-west region of NSW, Ron Bender, assuaged concerns about the legislation saying 'the Act is not about sweeping the Aboriginals off the streets'.[32]

From this media-magnified perception of the 'Aboriginal crime problem', Dubbo council arranged its public consultation. However, council staff advice indicated there was a general belief that such consultation need not be extensive. The Community Legal Service for Western NSW arranged to workshop the Act with representatives from significant Aboriginal organisations. They felt it was appropriate to consider the CPPR Act in the light of what RCIADIC Commissioner Elliott Johnston described as 'consultation by agreement' where the consultative process between Aboriginal people and public officials is nothing more than a gloss to obtain agreement to predetermined policies and programs.

Over 22 representatives met to receive advice and discuss the implementation of the Act. An 'Impact Statement' was drafted which clearly communicated the group's opposition to the CPPR Act for reasons that the Act 'intends to handle welfare and social problems with criminal sanctions' and that it 'violates the United Nations Charter of Children's Rights'. Furthermore, the statement recommended that 'other alternatives to this Act must be thoroughly explored and introduced into the Dubbo community.' Finally, it implored council to approach the Attorney-General's Office for funds for the strategies it recommended. These strategies included:

- a study of the effect that the CPPR Act will have on Aboriginal and non-Aboriginal youth within the community;
- appropriate arrangements to cater for the needs of youth, such as a youth worker's unit, to be on-call 24 hours a day, with at least six Aboriginal youth workers;
- safe and appropriate recreation amenities;
- the extension of hours of public transport; and
- proper ongoing consultation and monitoring with the council monitoring committee having at least 50% Aboriginal participation.

Regarding local concerns, the Statement adopted by the representatives listed the following matters:

- the Act will discriminate against racial minorities and youth from socially disadvantaged backgrounds;
- there has been a lack of full consultation with the Aboriginal community;
- the Act would have a negative impact on relations between police and Aboriginals;
- the Act provides police with powers which are beyond judicial review; and
- the Act contravenes the recommendations made by the Royal Commission into Aboriginal Deaths in Custody, and Australia's treaty obligations to both youth and indigenous people.

The 'Impact Statement' was later presented from the floor at a public meeting. The *Daily Liberal* in its coverage of the meeting reported the strong opposition by 'more than 100 residents including a strong contingent from Dubbo's Aboriginal community'.[33] One Aboriginal woman told the audience how her son was recently picked up by the police while innocently walking with his grandmother. She said, 'just because he was Aboriginal the police thought he was going to commit a crime but he has never been involved with the police in his life. Now if this is happening before the Act, just what is going to happen to our children if this Act comes into force?'

In the days following the meeting there was the suggestion by the mayor, Mr McGrane, that the public meeting was not truly representative of the community because the 'silent majority' had not been present and represented.[34] He further commented that the concerns raised were coloured by emotion and that 'a lot of what was brought out in the meeting was irrelevant to the topic'.

However, because the Aboriginal community was prepared to act collectively on the council's proposal to implement the Act and express a view that was oppositional and sceptical of the council's manner, the whole issue was deferred by the council. At the time of writing, a decision from council is still pending.

Conclusion

The CPPR Act is a contemporary expression of the historical role played by the state with its agents — the police, magistrates and local government — in the disciplining of Aboriginal communities. The legislation not only disempowers Aboriginal parents in decisions about their children, but also, in allowing police arbitrary and non-reviewable discretion over a young person's public behaviour, has the potential to create and perpetuate racial discrimination. The so-called safeguards set down by the Act, and the extensive community consultative requirements with which a local council must comply, provide only limited protection and are open to being politicised by law and order campaigns. Significantly, the inception of the Act by NSW parliamentarians, despite consultations with Aboriginal communities in north-western NSW, highlights the way white society treats Aboriginals' use of public space and public behaviour as problematic and therefore meriting ever greater state intervention.

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