

**PAPER FOR THE 12<sup>th</sup> BIENNIAL CONFERENCE OF THE CRIMINAL  
LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY**

**THE STATE AND TERRITORY CROSS BORDER JUSTICE SCHEME:**

**SANUR , BALI , INDONESIA**

**June 29<sup>th</sup> 2009**

Legislative Framework for the Tristate Scheme

The Second Reading Speech for the *SA Cross Border Justice Act 2009*, now enacted, discloses that at meetings in about 2003 the Ngaanyatjarra , Pitjantjatjara and Yankunytjatjara (NPY) Women's Council Aboriginal Corporation had urged upon State and Territory officials the need to consider criminal justice issues in the cross border region encompassing the Nyaanyatjarra , Pitjantjatjara and Yankunytjatjara home lands on a more unified basis.<sup>1</sup> This was consistent with the fact that that Aboriginal corporation operates in the cross border region in order to service all of its constituents from the three language groups. NPY Women's Council was concerned that the interests of the organisation's constituents transcended state boundaries and state boundaries were inhibiting the proper protection of their interests. Also, in about October of 2005 the Solicitors General of the Northern Territory, Western Australia and South Australia agreed in principle that there should be Cross Border Legislation to allow for cross border jurisdictional laws between NT, SA & WA. More or less identical State laws would be enacted in SA, WA & NT and this would be authorized by amendments to the Commonwealth *Service and Execution of Process Act (SEPA Act)*. All of these laws have now been enacted. This paper will pay particular to the South Australian legislation, but we recognise that the WA and NT legislation is very similar and compliments it.

The scheme will cover all of the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands as described in the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1982 (S.A.)*, the Central Reserves of eastern Western Australia and much of the Aboriginal Freehold Land, vested in Aboriginal Land Trusts under the *Land Rights Northern Territory Act*, south of, but not including Alice Springs. The Cross Border region itself is to be defined by mutually agreed regulations under each of the three Acts. Statutory freehold title has been granted to much of the lands in question, as acknowledgement of traditional ownership; it is also land over which native title has not been surrendered, and in the case of the WA Central reserves, has been recognised.

As such, the scheme will apply predominantly to traditional owners and those people who have English as a second language, if it is spoken by them at all. They are often, not sophisticated or fully understanding in their dealings with police and the criminal justice system. It has long been recognised that these people need the assistance of specialist and culturally sensitive Aboriginal and Torres Strait Islander Legal Services

---

<sup>1</sup> Second Reading Speech SA Parliamentary Hansard 20<sup>th</sup> January 2009

(ATSILS). This paper will argue that the ATSILS concerned are under resourced to deal with the scheme effectively.

The cross border laws are a completely new concept in Australian jurisprudence and this paper will attempt to chart where the scheme is going and discuss some of the problems from the perspective of ATSILS service providers.

### Fundamental Concepts

In Division 2 of Part 1 of the South Australian *Cross Border Justice Act 2009*, section 4 states that the Act gives effect to cooperative schemes between the States and Territory “for the purpose of facilitating the administration of justice in the cross-border regions”

Section 5 (1) states that the object of the legislation is to facilitate the administration of justice in the cross- border regions and section 5(2) specifies that the object will be achieved by enabling things to be done, including by paragraphs a to d, set out below:

- (a) police officers , magistrates and other office holders of the State to exercise their powers under the law of the state in another participating jurisdiction;
- (b) police officers, magistrates and other office holders of the State to hold offices and exercise powers under the laws of another participating jurisdiction;
- (c) police officers, magistrates and other office holders of another participating jurisdiction to hold offices and exercise powers under the laws of that other participating jurisdiction in the State
- (d) police officers, magistrates and other office holders of another participating jurisdiction to hold offices and exercise powers under the laws of the State

The following paragraphs (e)to(j) set out corollary transfers of powers to conduct courts of summary jurisdiction and to give effect to their sentences orders and decisions. The scheme is to operate not by cross vesting of interstate jurisdiction between state and territory courts but by cross appointment of public officers and by extraterritorial operation of jurisdictions and powers of those officers, to the extent that the laws of the other participating jurisdictions allow that to occur. That is achieved by the passing of their complementary sets of legislation and by each jurisdiction authorising the other to allow its laws to have this extraterritorial effect. Indeed South Australia’s laws are expressed not to authorise extraterritorial effect unless crossauthorised by complementary legislation.

So by section 15(1) the laws of South Australia and the interstate authority of SA office holders in relation to SA powers being exercised interstate are subject to this specific limitation of being authorised by the other jurisdiction’s laws to do so.

Correspondingly South Australia’s cross border laws do not authorise another state’s office holders to operate under their interstate powers in SA unless the laws of that other state also authorise that exercise, by section 15(2). Parts 4 and 6 of the SA Act specifically allow this extraterritorial operation of interstate laws and official powers and jurisdictions in SA. The remaining subsections of section 15 clarify the same points in relation to Courts and their jurisdictions, orders and sentences. Part 5 of the SA Act allows specific jurisdictions of the SA Magistrates Court to be exercised

interstate, again on the assumption that it is specifically authorised by interstate laws under section 15.

Division 4, section 13, defines appropriate modifications to the law of the State, as being those which may be prescribed by the regulations and any other modifications of the law that are necessary or convenient to give effect to the Act. Section 14 states that a law of the State must be applied, with any appropriate modifications as if the law had been altered in order to give effect to the Act.

The writer is not aware of any regulations having yet been promulgated, though it is understood that this will be done.

By section 17 the State's cross border justice laws are stated to be intended to provide alternative procedures to those under the *Service and Execution of Process Act 1992(C/W)* and do not purport to exclude or limit the operation of that Act.

#### Connection with Cross Border Region

The fundamental concept of the Scheme is a person's "connection with the Cross Border Region". This is defined by Section 20(2) & (3) of the SA Act to be:

- a. The offence is suspected, alleged or found to have been committed in the cross border region.
- b. If at the time of the person's arrest for the offence, the person was in the Cross Border Region or the person ordinarily resided in the region.
- c. At the time at which the offence is suspected, alleged or found to have been committed, the person ordinarily resides in the region.

Corresponding principles apply to prescribed courts of the other participating jurisdictions in relation to other cross border proceedings. Section 20 subsection (3)

Of itself Section 20 does not extend the territorial operation of South Australian Criminal Laws. That is already defined by Section 5G of the *Criminal Law Consolidation Act*. Subject to that section, South Australian criminal laws only cover the geographical area of South Australia.

An offence being committed in the SA part of the cross border region is a sufficient but not a necessary trigger for the legislation to apply.

#### How the Scheme would work

An SA person, resident in Adelaide, who commits an offence at Indulkana on the eastern edge of the APY Lands, and thus part of the cross border region, has sufficient connection and the laws would apply to his offence. But also a person who resides at Indulkana who commits an offence in Adelaide also has sufficient connection for the laws to apply. In reality their offence would most likely be dealt with in Adelaide in the usual way. We raise the question whether it is really necessary

that the cross border scheme apply to offences committed in and likely to be dealt with, in localities well away from the cross border region.<sup>2</sup>

#### What is the effect of the SA Cross Border Justice Act?

What the SA *Cross Border Act 2009* will do is to give WA&NT Police and Correctional Services powers, and Magistrates jurisdiction to deal with persons who have the relevant connection with the appropriate Cross Border Region. That may or may not enable them to work, in any part of South Australia<sup>3</sup>, and the same effect will be achieved to give SA officials parallel powers in each of the other State and Territory, to the extent that a SA cross border region is involved, to create the relevant connection, and as affected by their corresponding legislation. Significantly Part 10 of the *Cross Border Act 2009* will allow SA Magistrates to issue warrants of commitment authorising SA prisoners with relevant connection to be held on remand and on sentence in another participating jurisdiction. This is likely to be used to send prisoners to Alice Springs, geographically closer to the APY Lands than Pt Augusta.

#### A South Australian person in WA

So if a South Australian person with connection to the region commits an offence in South Australia but flees to Western Australia, provided they have the necessary connection to the Cross Border Region, then a South Australian Police Officer can arrest and charge them under South Australian Law in Western Australia and take them before a Cross Border Magistrate to be dealt with by South Australian Law, in Western Australia. If they are sentenced to imprisonment, they may be imprisoned in a Western Australian prison and Western Australian corrections law would apply with respect to the South Australian warrant of commitment issued by the SA court, constituted by a WA cross border magistrate in WA. If they were to die in SA Police custody in WA, it appears that either or both a South Australian Coroner and a Western Australian Coroner would inquest the death. The South Australian Coroner would appear to have jurisdiction by virtue of section 3 of the *Coroner's Act 2003 SA*. Cross border Magistrates will also be able to deal consecutively, with one offender, under three sets of laws. If a person with the necessary connection with the cross border regions has committed offences in each state, or is arrested on warrants, the cross border Magistrate can exercise each state and territory's jurisdiction over the person, consecutively. That is because of cross appointment of Magistrates under Part 13 of the SA Bill. The effect is likely to be net widening and cumulative sentences. It seems that there may also be a danger of forum shopping.

#### Powers of interstate officials in SA

Police Officers of WA&NT are given specific powers to exercise their WA & NT powers in South Australia. Specific powers are given to police in respect of arrest, drink driving laws (powers to administer alcohol tests etc), vehicle impounding laws, restraining orders and the like.<sup>4</sup> The interstate cross border Magistrates are given

---

<sup>2</sup> This is acknowledged by the note to Division 2 of Part 1 of the SA Act, which suggests that the proper administration of justice is not facilitated by applying the laws to an Adelaide offence. By section 12 a note is described as being provided to assist understanding and does not form part of the Act.

<sup>3</sup> See note to Division 4 of Part 2 of the SA Act, which assumes 3 different cross border regions, which are NOT mutually interchangeable.

<sup>4</sup> Part 4 of the SA *Cross Border Justice Act 2009*

parallel but quite specific summary jurisdictions to be exercised in SA.<sup>5</sup> There are also corresponding police powers over youths and a corresponding youth court jurisdiction to deal with minor juvenile crime.

#### Major indictable offences

Major indictable offences of all kinds will be dealt with in the usual way by extradition, and it seems likely that committals could be carried out under the cross border procedures. If so, a committal for a SA major indictable offence could be carried out interstate, but would commit the person for trial to a South Australian superior court.<sup>6</sup>

Extraditions, authorised by the *SEP Act*, and which are usually applied to major indictable offences- particularly sexual offences which are reported to be a major cause of concern in the cross border region, are not affected by the cross border justice laws.<sup>7</sup> This would appear to be a corollary of, but is not made in any way explicit by section 2 Section (3A) of Schedule 1 of the *SEP Act* amendments of 2009.

The effect of section (3A) appears to be to confirm that the *SEP Act* does not affect the operation of the cross border laws and that the *SEP Act* does not apply in relation to a matter where the cross border laws would apply, apart from the *SEP Act*.

#### Cross Border Magistrates

Cross Border Magistrates from Western Australia and the Northern Territory would be able to exercise their jurisdiction, as well as South Australian Jurisdiction in South Australia. That would include warrants of commitment upon defendants to serve terms of imprisonment in South Australian Prisons. Courts of participating Jurisdictions would have powers to set up Registries, compel witnesses, administer oaths, punish contempt and issue warrants, summons and other process.<sup>8</sup>

Interstate judicial officers and legal practitioners would also receive the same protection and immunity as is provided for under South Australian legislation, within South Australia.<sup>9</sup>

#### ALRM concerns and comments about the South Australian Act

The Legislation is extraordinarily complex. The SA Act has 147 sections, the Schedules effect 4 other Acts and the whole text covers some 58 pages. It might be described as a sledgehammer to crack a walnut.

Concerns:

1. The Act allows for reversal of the onus of proof in relation to the facts of connection to the Cross Border Region. If there is an arrest, and the arrestee

---

<sup>5</sup> Part6 of the *SACrossBorderJusticeAct2009*- it applies provided the person has a necessary connection with a cross border region. Section 83 allows them to exercise jurisdiction and section 82 authorises the proceedings to be heard in S A.

<sup>6</sup> Power to commit in section 68(2)(g) *Cross Border Act2009* , committal is under the *Summary ProcedureActSA*.

<sup>7</sup> See Report of the SA Children In State Care Inquiry , APY Lands Report 2008.The Mullighan Inquiry , named for its principal Commissioner, the Hon EP Mullighan QC.

<sup>8</sup> Part6 Division 1,section 83 of the of the *SACrossBorderJusticeAct2009*

<sup>9</sup> Part 6 Division 2 Section85 of the *SACrossBorderJusticeAct2009*

disputes they were in the Cross Border Region at the time of the arrest , or that they ordinarily resided in the Cross Border Region at that time , the onus of proof of that matter is upon them. It is not appropriate that there should be any reversal of onus of proof in relation to matters relevant to proof of an arrest. The burden of proof in relation to arrest should always fall upon the public officer who deprives the citizen of their liberty.. Section 27 of the *CrossBorderJustice Act 2009 SA*.

2. The laws will operate retrospectively and can be used with respect to offences committed before the commencement of the legislation. Section 18 of the *CrossBorderJustice Act 2009 SA*..
3. By section 20(2)(b) and (c) of the *CrossBorderJustice Act 2009 SA*, a person having the necessary connection includes a person who “ordinarily resides or resided in the region” The legal concept of residence is a very elastic concept, particularly when the English common law principles are to be applied to nomadic people who go to ceremonies, live, spend time with family, work, go to funerals and sorry camp and also seek entertainment both within and without the defined Cross Border Regions. Consider the concept of residence being applied to remote bush people. Fred Myers in his book *Pintupi Country, Pintupi Self*<sup>10</sup> refers to the concept of the “geography of emotion” .At page 104 he writes,  
“The fragile associations of residence involve complementary organisations of feeling .Thus a full understanding of the Pintupi experience of life must grasp the cultural meaning of those emotions. My argument is that by defining shared identity with others as a primary feature of selfhood, the Pintupi formulation of the emotions establishes the moral order of kinship in subjective terms”  
In his text this point is elaborated into discussion of emotional, cultural and geographical links and also distance between people.
4. We suggest that a nuanced view of residence will be required which takes into account native title and the ‘geography of emotion’.
5. There is the potential for real incongruity in applying English common law concepts of residence to traditional people. Anangu do not live behind picket fences. In addition , applying English common law under a reversed onus of proof will impose on Aboriginal people a degree of surveillance and legal rational accountability and control which is intrusive and unreasonable. It will also put extra strain upon under resourced ATSILS to take legal points about applying the concept of residence to their clients. There needs to be a nuanced but conceptually uniform understanding of residence, applied in the cross border region, otherwise it is likely that different common law interpretations could be applied by each of the Superior Courts of the States and Territory, to the operation of essentially the same legislation.
6. It is entirely conceivable that a cross border matter dealt with by a cross border Magistrate exercising SAWA&NT jurisdiction over a single defendant could give

---

<sup>10</sup> *Pintupi Country , Pintupi Self. Sentiment, Place and Politics among Western Desert Aborigines.* 1986 Smithsonian Institution and AIAS. At page 104 Myers writes

rise to three different appeals to three different Supreme Courts. This raises a further point that effectively the only Court that can exercise uniform jurisdiction over cross border appeals is the High Court of Australia, since it is the only Court of Appeal superior to each of the State and Territory Supreme Courts in the judicial hierarchy. Whether the High Court will be able to develop uniformity between the State and Territory Supreme Courts remains to be seen. There needs to be some uniformity of interpretation and we argue below, a kind of cross border common law needs to be developed also. How will the High Court be able to do this, if cases do not merit Special Leave?

7. It is unclear, for example whether WA Magistrates, sitting in SA, exercising WA and SA jurisdiction consecutively over the same defendant, would be obliged to apply *Frank v Police*,<sup>11</sup> in determining a matter concerning a breach of WA law. That case establishes that, where a defendant's command of English is so poor that they cannot understand the criminal proceedings in which they are appearing, the Court is obliged to stay those proceedings and grant immediate bail, until such time as a competent interpreter is made available. But the South Australian case of *Frank v Police* is not binding authority on WA or NT Magistrates Courts. Would there be different results for consecutive WA and SA matters before a cross border Magistrate if no interpreter was provided? There is the potential that major Constitutional questions could arise, if the same human rights standards for defendants were not applied, as apply under the South Australian common law, as a result of *Frank v Police*. Section 8(2)(d) of the SA Act has a definition of WA law, impliedly this includes WA common law "with any appropriate modifications."
8. We recommend that a cross border Appellate Jurisdiction be set up with Supreme Court Judges from each participating State and Territory to hear cross border appeal cases and thus encourage the development of a common law for the cross border region.. Consistency is essential to the scheme if it is to succeed; all defendants are entitled to equal treatment before the law and this will be difficult if the fiction of absolute separation is maintained.
9. ALRM has also expressed major concerns about the resource implications of the Cross Border Legislation for its services. ALRM and the Legal Services Commission of SA provide legal services on the APY Lands. As such ALRM lawyers would potentially be appearing in Cross Border Courts sitting on the APY Lands from Western Australia and the Northern Territory. It would be necessary that the ALRM Legal Practitioners and the Field Officers concerned receive training in the relevant substantive, procedural and evidential law of Western Australia and the Northern Territory. It should be noted that Section 73 of the SA Act also enables interstate practitioners to work in SA.
10. The same considerations would apply to CAALAS and ALSWA and the corresponding Legal Aid Commissions if they work in the cross border regions. The cost of providing and maintaining adequate and properly accredited training in these fields and the time and effort required for the practitioners concerned

---

<sup>11</sup> [2007]SASC288, confirmed by the Full Court of the Supreme Court [2007]SASC418, appeal refused

would be enormous. There may also be implications in terms of Professional Indemnity insurance.

11. At the time of writing the Commonwealth Attorney General's Department has provided \$10,000 to each ATSILS for cross border legal training.
12. On going and properly accredited legal training for ATSILS lawyers and field staff, is likely to impose further significant financial burdens upon the Commonwealth, since due to low aggregate funding ATSILS have a high turnover of staff, particularly in remote areas. New staff will all need cross border legal training on an ongoing basis .
13. We also raise questions about the appropriate extension of Cross Border principles to Guardianship Boards and Mental Health Legislation. We recommend to State and Territory officials that there be consultation with Nganampa Health Council and other Aboriginal Health Services in the cross border region. That should be done to find out from its Medical Practitioners, whether they consider it desirable that they be given authority to exercise detention powers that would apply in the NT and WA, should a person be detained under the South Australian *Mental Health Act*, but be required to be detained, from the APY Lands cross border region to the Alice Springs Hospital rather than to Adelaide Mental Hospitals. Corresponding considerations would apply to the other jurisdictions. This is also important for police who are obliged to transport detained persons for long distances and in distressed mental states.
14. Similar considerations would apply to Guardianship Orders for persons with mental handicaps from acquired brain injury, being extended to the cross border region. This should apply in circumstances where a guardian such as the Public Advocate of SA might need to seek parallel orders in WA and NT in respect of a person under South Australian Guardianship orders and who lives within the Cross Border Region. Logically it would be useful to allow for a cross border scheme of mutual recognition and registration of Guardianship orders. This is particularly relevant to cases of brain damaged petrol sniffers who reside in the cross border region. We hope this impulse will be taken up. since it would be an appropriate response to the South Australian Coronial inquests into the deaths of petrol sniffers from 2002 and 2005.<sup>12</sup>
15. We are concerned that this complex criminal justice legislation is being enacted to cover the cross border region. In SA it will have the effect of singling out the people who live on the APY Lands. The South Australian citizens to whom the legislation would apply are predominantly the Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara people and although the SA legislation is expressed in terms of geographical operation, its effects will be primarily be felt by them, because the

---

<sup>12</sup> [www.courts.sa.gov.au/coroner/findings/2002](http://www.courts.sa.gov.au/coroner/findings/2002) Kunmanara Hunt , Ken and Thompson, but see also 2005 Petrol inquests , where the same recommendations were repeated word for word. [www.court.sa.coroner/findings/2005](http://www.court.sa.coroner/findings/2005) Kunmanara Cooper, Ward, Ken and Ryan.

Cross Border Region of SA is to be defined by regulations in terms of the lands, over which they have been granted Land Rights.<sup>13</sup>

16. The effect of allowing Magistrates sitting in the cross border regions to deal with matters from each of the three Jurisdictions (provided the person has connection with each of the three cross border regions) will be that many criminal files may be aggregated and dealt with at the same time. It will be entirely possible for a South Australian Magistrate sitting in Western Australia to deal with NT, SA & WA offences in relation to the same individual.<sup>14</sup> It is acknowledged that this will have the potential advantage of allowing an individual to have all of his or her outstanding criminal matters dealt with at once, but the individual can also be coerced into such aggregation of files by the strategic execution of first instance warrants. The possibility of custodial sentences being imposed is inevitably increased by aggregation of interstate matters. There is also a danger of forum shopping.
17. Also, because a cross border Magistrate would be wearing 'three different hats' consecutively, there is no basis in law to apply the principle of totality in sentencing to the total of sentences, though it would apply to each of the individual state and territory sentences imposed. Each sentence would presumably commence consecutively at the expiration of the previous one. We recommend that there be specific legislative provision to allow for such accumulated state and territory sentences to be made concurrent or partly concurrent with each other. This issue is not dealt with in Part 11 Division 1 of the *CrossBorderJustice Act2009 SA*, though arguably it could be dealt with by complementary amendments to the State and Territory Sentencing Acts.<sup>15</sup>
18. SA police are required to notify the Aboriginal Legal Rights Movement (ALRM) whenever there has been an arrest of an Aboriginal person in SA. SA Police General Order 3015 requires this in SA. Such notifications were acknowledged in SA pursuant to judicial decision<sup>16</sup> and are consistent with implementation, through police General Orders, of the 1991 *Royal Commission into Aboriginal Deaths in Custody* ('RCIADIC').<sup>17</sup>
19. It is unclear at this stage what effect the Cross-Border legislation will have on compulsory custody notifications, since none of the Acts comprising the scheme

---

<sup>13</sup> *Pitjantjatjara Yankunytjatjara Land Rights Act 1981 SA*. See also *Gerhardy v Brown* (1985) 159 CLR 70, wherein the High Court held that that Act was a Special Measure for the purposes of the *Racial Discrimination Act 1975*

<sup>14</sup> Part 13 of the SA Act—cross appointments.

<sup>15</sup> Section 68(2)(d) *Cross Border Justice Act 2009* refers to the Sentencing Act, which could conceivably be amended to this effect.

<sup>16</sup> *R v Williams* [1976] 14 SASR 1.

<sup>17</sup> RCIADIC 224. (infra para 27)

have made mention of it. Yet it is essential feature of Aboriginal legal representation.

20. Ideally, and it is proposed that SA police would advise the ALRM of interstate arrests of Cross-Border persons who are arrested by SA Police. There is no indication as to who is responsible for notification to an interstate ATSILS when an interstate arrest occurs in SA or where multiple jurisdiction arrests occur. Clearly, it would be desirable for the legislative scheme to impose a uniform standard in that regard. Further, there will be cases where an arrest requires more than simple phone advice from the local ATSILS. Some matters will require either a Field/Court Officer or a legal practitioner to be present at the police interview or for a bail application.<sup>18</sup> ATSILS may need to consider inter-jurisdictional resource sharing. These practical considerations need to be the subject of proper consultation with affected ATSILS as a group. There is a clear need for appropriate protocols to be arranged.
21. In the case of multiple state and territory arrests of the one person, the police and the ATSILS concerned will have to arrange between them selves questions of responsibility for persons in custody. This will apply to persons in custody in their jurisdiction on interstate charges, as well as their own jurisdiction charges and for persons in other jurisdictions, arrested on charges flowing from their jurisdictions. All of these considerations bespeak the need for an interstate ATSILS consultation to discuss the full implications of the legislation .
22. The Commonwealth *Crimes Act 1914* provides an appropriate model for a statutory scheme of custody notifications. *Section 23H and J* imposes a very detailed obligation upon Commonwealth officers investigating Commonwealth offences to notify ATSILS of the arrest of an Aboriginal or Torres Strait Islander person. It is a clear and unambiguous statutory obligation to notify. Section 23H(1) imposes on the investigating official a reasonable suspicion test in relation to the question of Aboriginal identity. This is a well known test and in order to satisfy it, the official has to advert their mind to the question of ATSI identity and make due inquiry in order to inform him or herself. The onus is on the official to do so. Upon satisfying the test, the official is under an immediate obligation to inform the person that they are notifying the nearest ATSILS of the arrest and to actually notify that ATSILS. Section 23H(1)(a)&(b).
23. The Commonwealth model should be a benchmark for the States and Territories. We suggest that the States and Territories should enact similar provisions to the *Crimes Act* in relation to custody notifications, albeit that we recommend the repeal of section Section 23H subsection (8), which specifies that the investigating official is not obliged to comply to notify if the investigating official does not believe that the ATSI suspect is disadvantaged in comparison with members of the Australian community generally.<sup>19</sup> Correspondingly ATSILS

---

<sup>18</sup>Record of Investigation into the Death of Mr Ward. Ref No 9/09 WACoroner .A.N.Hope State Coroner 12 June 2009 This is a necessary implication for the implementation of the Ward inquest recommendations.

<sup>19</sup> Section 23H Subsection (8) is contrary to RCIADIC 224; it should not matter whether the ATSI person is well educated, that their arrest is notified to the ATSILS. It is the fact of an ATSI person's arrest that is the gravamen of the RCIADIC recommendation, not the arrestee's education status and

should be funded sufficiently to enable them to respond properly to custody notifications from remote locations.

24. Notwithstanding these concerns, ALRM is greatly encouraged by correspondence recently from South Australian Police (SAPOL), to the effect that ALRM will be notified of the arrest of an Aboriginal person in the Cross Border Region when arrested by a SAPOL officer in South Australia or in a participating jurisdiction, WA or NT. ALRM was also advised that “similar undertakings will operate with your NT and WA counterparts, but that is a matter for those jurisdictions to address”.<sup>20</sup>
25. These custody notifications are very important for effective ATSIL Services. They enable them to engage with clients on legal issues arising from arrest as well as the possibility of engaging with the arrestee’s relatives. This is a highly desirable ideal, in fact ATSILS are rarely resourced to do this work adequately. In the case of tribal people for whom English is a second language, who may suffer from disabilities and mental illnesses and live in very remote localities proper consultation with relatives about an Aboriginal person in custody may be very important. Inquests, unfortunately are the forums where these things are revealed.<sup>21</sup>
26. The case of Kunmanara Cooper, is a distressing case study. Having been arrested in the very remote NorthWest of SA on SA offences, he was remanded in custody for psychiatric assessment, and he eventually appeared ex custody in the Holden Hill suburban Adelaide Magistrates Court. There he was represented by ALRM and having been placed on a bond he was released to his Mother in the regional centre of Whyalla. He was transported there by bus, but the bond having failed, he was put on another bond order at Pt Augusta Court and again transported by bus, this time to Indulkana on the eastern edge of the APY Lands, but still some 500km from home. The inquest revealed that he had contacted his family at Irrunytju in WA upon his arrival at Indulkana, and they were organising transport to that place when they found out that he had died at Mimili, on the way west. Significantly the State Coroner recommended that Corrections be responsible for transporting persons released on bonds all the way back to their home communities, not just as far as the Stateliner bus goes. In hindsight, it can be observed that it would have been desirable( for a number of reasons) for ALRM to have been able to contact the family in WA from Holden Hill Magistrates Court, but without adequate resources this was a difficult ideal to

---

ability to withstand questioning. Subsection (8) should be repealed. The right to be advised by police of the availability of a prisoner’s friend, or the right to have a solicitor present at interview is now regarded as a universal right for arrested or suspect persons, and it does not depend upon the relative disadvantage of the Aboriginal or Torres Strait Islander person or their level of education and understanding. See for example section 79A *Summary Offences Act SA*.

<sup>20</sup> Correspondence to the author from SAPOL dated 22<sup>nd</sup> May2009

<sup>21</sup> See [www.court.sa.coroner/findings/2005\\_Kunmanara\\_Cooper](http://www.court.sa.coroner/findings/2005_Kunmanara_Cooper). The findings in that inquest disclose just how complete the disruption flowing from imprisonment and detention in an alien and far away environment was, and that the relatives either did not know or could do little about it. Significantly ALRM did not have communications with Kunmanara’s relatives when appearing for him.

realise in practice. At all events effective notification of his being taken into custody took place upon court appearance. Effective representation of persons from the cross border region needs effective ATSILS presence or effective communication with the cross border regions, a point also made clear in the Ward case.

27. Custody notifications represent recognition of RCIADIC recommendation 224 by police services. RCIADIC recommendation 224 states:

That pending the negotiation of protocols referred to in Recommendation 223, in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required. (4:111)

28. On the topic of custody notifications ATSILS need to be further consulted:
- What is the present status of development of police Service Level Agreements and Protocols which deal with notification when a prisoner is to be moved across state borders?
  - What are the circumstances in which cross border police stations may be used as charging stations when an arrest is made interstate.
  - Is it contemplated that any particular cross border police stations will regularly be used for that purpose, and what effect will that have on custody notifications and ATSILS service delivery?
  - What arrangements are contemplated for facilitating the provision of ATSILS legal assistance when police may make applications to Justices of the Peace in very remote locations, for an Aboriginal person to be remanded in custody from that remote location to another place. This latter point is very important in light of the findings and recommendations of the recent Ward Inquest in WA.<sup>22</sup>
29. The operation of the Coroner's Jurisdiction under the cross border Legislation is unclear in relation to the Coroner's Jurisdiction on Deaths in Custody. It appears the State Coroner may have interstate jurisdiction over deaths of SA people in SA Police custody interstate, by virtue of section 3 of the *Coroner's Act 2003*, as well as geographical jurisdiction over all deaths in custody that physically occur in South Australia, regardless of whose custody the person was in. Section 139 of the *SA Cross Border Justice Act* states that it does not affect the operation of the *Coroners Act 2003* in relation to the investigation of the death of a person.
30. A further concern is that persons remanded in custody or imprisoned as a result of the scheme could be imprisoned a long way from home. So a West Australian cross border resident could be sentenced to imprisonment under SA and WA Law in SA and prior to sentence could be held in a prison in Adelaide. Correctional authorities, not Magistrates decide where a particular prisoner will be held, during remand and after sentence.<sup>23</sup> This tendency toward imprisonment at a place

---

<sup>22</sup> Record of Investigation into the Death of Mr Ward. Ref No 9/09 WACoroner .A.N.Hope State Coroner 12 June 2009.

<sup>23</sup> Sections 22 and 23 *Correctional Services Act SA* 1984, though it is significant that in the Cooper case a remand for psychiatric assessment had resulted in the deceased being held in a prison psychiatric institution James Nash House pending a report. Other cases of which ALRM lawyers are aware do not

remote from the prisoner's home is contrary to RCIADIC Recommendation 168, but is an inevitable consequence of the scheme being brought into operation.

31. Recommendation 168 of RCIADIC states :- That Corrective Services effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family. Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the right to appeal that decision. (3:310)
32. We also note the findings and recommendations of the WA State Coroner in the inquest upon the death of Mr Ward, an Aboriginal person who died in transit between a remote cross border police station and Kalgoorlie.<sup>24</sup>
33. Correspondence from the Northern Territory Attorney General and Minister for Justice to the Law Society of the Northern Territory<sup>25</sup> discloses that consideration is being given Regulations of the three jurisdictions having the effect that a warrant may include a recommendation about where the person is to be imprisoned .
34. Under existing SA law the disposition of a remand prisoner is exclusively in the discretion of the Department for Correctional Services, not the Magistrate . See section 22 *Correctional Services Act 1984 SA*), so we are keen to see how this process of Magistrates' recommendation as to disposition of a prisoner would work in practice. We note that the context of Corrections Departments' practice is serious prison overcrowding, not only in SA but also in each of the other State and Territory affected.
35. ALRM solicitors are aware of a case from the APY Lands where a Magistrate's recommendation as to the safe custody of a severely handicapped prisoner had not been acted upon, not through malice but through iron necessity due to overcrowding and lack of beds in the institution recommended for. This had serious consequences for the prisoner in question, in another SA correctional institution.
36. In this context it is also a matter of concern that the State of South Australia has not yet implemented the 2002 and 2005 recommendation of former State Coroner Mr Chivell that a small scale correctional institution be built on or near the APY Lands.<sup>26</sup> Recommendation 10 from those inquests was :- *10 Planning for the establishment of secure care facilities on the Anangu Pitjantjatjara Lands should commence immediately. These facilities must be reasonably accessible from all communities on the Anangu Pitjantjatjara Lands, and have a multi-*

---

result in remands to such institutions, notwithstanding specific recommendations or court orders .See below para 35.

<sup>24</sup> Ibid footnote 19.

<sup>25</sup> Correspondence dated 4<sup>th</sup> March 2009 to the Hon Attorney General and reply dated 27<sup>th</sup> April 2009 , made available to the author.

<sup>26</sup> [www.courts.sa.gov.au/coroner/findings/2002](http://www.courts.sa.gov.au/coroner/findings/2002) Kunmanara Hunt , Ken and Thompson, but see also 2005 Petrol inquests , where the same recommendations were repeated word for word. Recommendation 8.10, attached to the findings made by the Coroner in 2002 is reproduced above .

*functional role to provide facilities for detention, detoxification, treatment and rehabilitation as outlined in these findings;*

37. There is cause to fear that the cross border legislation could and will increase the imprisonment rate from the APY Lands. Imprisonment away from the lands causes significant social and family disruption to prisoners and to family members in those communities.<sup>27</sup> This paper recommends that each of the cross border jurisdictions concerned give urgent reconsideration to the implementation of former State Coroner Mr Chivell's recommendation<sup>10</sup>.

C.J.Charles

© ALRM 13<sup>th</sup> July 2009.

---

<sup>27</sup> [www.court.sa.coroner/findings/2005\\_Kunmanara\\_Cooper](http://www.court.sa.coroner/findings/2005_Kunmanara_Cooper). The findings in that inquest disclose just how complete the disruption flowing from imprisonment and detention in an alien environment in Adelaide, was for that Anangu person. Also that his family were unable to respond in time to look after him, upon his release, when he was transported by bus from Pt Augusta to Indulkana, a community still 500 Km remote from his home at Irrunytju.