THE WESTERN CURFEW

In April 2003 Dr Geoff Gallop, the Labor Premier of Western Australia, announced without warning that his government would enforce an after-dark curfew on all under-18-year-olds, unless they were accompanied by their parents, in the central city entertainment precinct known as Northbridge.

At the same time he released a report of a recent crackdown by police in the area, in which nearly 450 children were taken off the streets over a 12 week period. More than 400 of these children were Aboriginal kids from the outer suburbs, and more than two thirds of those, young girls.

The Curfew was extremely popular with the local tabloid newspaper and most radio and talkback commentary, but it had been a big surprise to the Department for Community Development (responsible for child protection), the Department of Indigenous Affairs, ATSIC, the Police Commissioner, and just about everybody in government, other than the police officer who wrote the internal report and one of the Premier's advisers. The Premier had not consulted non government service providers working with young people in the inner city, the City of Perth or its youth consultative council, or any of the committees that had been working for a considerable time to address the acknowledged and longstanding problem of indigenous children and young people inappropriately visiting, remaining and occasionally even 'misbehaving' in the precinct. Northbridge business proprietors and the local tabloid loved the idea: researchers, policy makers, lawyers, judges and non government agencies working with children were very concerned.

The announcement made anyone working with children, and for Aboriginal and Torres Strait Islander children in particular, very aware of resonances with the Lawrence Labor government's January 1992 announcement that it would enact Australia's first

mandatory sentencing laws. This gem of an idea had been dreamt up at a barbecue among senior politicians while Dr Lawrence, then Premier, was overseas, in response to the fatal consequences of a high-speed chase by young police officers of a brain-damaged Aboriginal boy behind the wheel of a stolen car. Dr Lawrence embraced it upon her return, in face of overwhelming protests.

The purpose of that legislation had been very clear from the bill's original title, which not only identified particular offences of a kind overwhelmingly committed by Aboriginal boys in WA, such as car theft or burglary, and by its title that mentioned 'juvenile' offenders. Protests saw that adjective removed. Its effect was just as 'discriminatory'. Though it appeared to apply to all, it actually affected Aboriginal young people in its list of relevant offences. In removing discretions not to imprison for repeat offences it was also in clear breach of Australia's obligations under the UN Convention on the Rights of the Child, which requires the Australian government to ensure that children are not detained except as a last resort and after a fair hearing. Mandatory sentencing offends that principle. Then Premier Lawrence denied that the UNCRC applied to Western Australia.

Dr Gallop's proposed curfew was immediately criticised by youth and Aboriginal groups as 'discriminatory. Just as the Lawrence government had in 1992, the Gallop government denied it was racially discriminatory to 'crack down' on offenders, or (in this case) children who might be in need of care and protection, even if they happened to be overwhelmingly Aboriginal children.

Perhaps it would be helpful to explain why a 'curfew' might be, though is not necessarily, discriminatory – it is hard to understand that might be the case when a new law is made that applies to 'everyone' but has a hugely and disproportionately adverse impact on one particular racial group.

Discrimination on racial grounds is unlawful under the WA Equal Opportunity Act 1984 and under the Federal Race Discrimination Act 1975. Discrimination on the grounds of

race means being treated less favourably than another person in the same or similar circumstances because of an irrelevant characteristic or attribute such as a person's race (which includes colour, nationality, ethnicity and other characteristics, and qualities or behaviours wrongly attributed to a person because of those reasons.) Discrimination in public life is unlawful.

Discrimination can be **direct,** or indirect**.** Arresting someone because of a prejudice or a rule - 'No Aboriginal people in town after dark,' was in fact a very common practice 'legitimated' by statutes, regulations or local laws - or just plain old-fashioned discretionary practices of police - in many WA towns, fifty years ago. They were rules designed to thrust Aboriginal people out to 'their' space, not to cause a problem in town. Since 1975 the Federal Race Discrimination Act actually not only prohibits States making such directly discriminatory laws, but renders them void without any need for a court order or a complaint, as a matter of constitutional power (the Commonwealth has the power to make 'race' laws: the states inconsistent laws are void to the extent of their inconsistency with the Commonwealth legislation).

Directly discriminatory laws are now uncommon, because of the provisions of the RDA, which are based on the UN Convention on the Elimination of All Forms of Racial Discrimination. The most common form of direct discrimination is an act or omission that subjects someone to detrimental treatment because of their race – even if the 'race' element is just one of the reasons they are not being treated 'the same' in similar circumstances as someone of another race. It is unlawful even if the reason for the less favourable treatment is unspoken, hard to prove or even unconscious or 'benevolent' in intention Discrimination does not have to be intentional or malicious.

Another possibility is that the 'Curfew' may be indirectly discriminatory. Indirect discrimination is measured by its effect on a group of people, defined by their membership of a class, in this case 'race'. The broad meaning of indirect discrimination is creating, applying or imposing rules, conditions or requirements that seem 'fair' because they apply to everyone, but which actually have a disproportionately negative

effect on members of a group because they can't comply with them, and they can't meet their demands because of characteristics associated with their race. As well, the rules or requirements must be "unreasonable".

Sometimes that "unreasonableness" is easy to prove - for example, an employer insisting that job applicants have a particularly high educational qualification, which is not objectively necessary for the sort of duties they have to do, such as working in a factory environment, and which excludes a particular racial group because they cannot meet that requirement, because they have been victims of historical discrimination or exclusion from educational attainment, because of their race (or dispossession because of their race and the circumstances of settlement).

The WA government's instructions to police officers are not expressed in terms of race at all, but age (age discrimination is unlawful in most states, but 'child protection' is usually an exception) and 'behaviour'. But anonymous, anecdotal reports of their effect show that, as with the pre-announcement 'crackdown', the majority of young people apprehended have been Aboriginal. The greatest single group apprehended are very young (i.e. 10-14 year old) Aboriginal girls.

It may be that police are merely acting in response to the proportions of Aboriginal and non-Aboriginal young people on Northbridge streets, but since nobody is evaluating the policy, it is impossible to say. The other possibility is worrying. Youth groups have anecdotes of police using their discretion to stop, question and direct young people out of the entertainment precinct who are neither under age nor misbehaving, but apparently 'Aboriginal'. These groups have told reporters that complaints of race discrimination are proposed to be made to the WA Equal Opportunity Commission.

It is likely that such complaints would be very difficult to establish.

Firstly, any complainants would have to establish that they (as Aboriginal people) were being stopped or questioned more often, without any other cause, than similarly

behaving non-Aboriginal young people of a similar age. It would not be enough to rely solely on the disparately huge proportion of Aboriginal young people but either that there were lots of non Aboriginal young people left without contact, or that there was a race-related reason for Aboriginal young people of the relevant ages being on the streets: homelessness? violence? racially different parenting practices? or just a greater degree of freedom?

Secondly, it may be that the 'Curfew' is being interpreted as an instruction diminishing or removing police constables' discretion to act in a particular way to maintain public order, a Common Law constables' discretion of great antiquity. If so, this might be indirectly discriminatory, and possibly also challengeable under the WA Police Act which requires officers to have a reason to demand names and addresses and proof of identity, or to apprehend and question or detain young people, related to the commission of offences or other statutory responsibilities.

A third possibility is that the instruction to police could become a trigger for unconsciously discriminatory assumptions by police. This was what was found in the UK, after a review of a police 'stop and search' practices in the mid 1990s, after the death of Stephen Lawrence, a young Afro-Caribbean man: that police identified 'black' or Afro-Caribbean and Asian young men as suspects to be questioned, not 'white' men. Too much discretion – without training – can result in the acting out of prejudices. I do not know of any evidence of this.

Indirect discrimination complaints are very hard to establish without a considerable amount of preparation. Aboriginal complainants would have to put into words just what condition or requirement the policy placed on them that they could not (reasonably) fulfil. To stay home at nights? This could raise issues about youth homelessness and disadvantage and the Commissioner for Equal Opportunity has been examining Aboriginal people's access to public housing for over a year (details are on the website:www.equalopportunity.wa.gov.au). It might be no more than that Aboriginal children and young people are concentrated in residential areas without entertainment

or other facilities for young people – but what young person voluntarily stays home on a Saturday night with their parents when they could hang out with their peers? – or there might be cultural reasons for meeting centrally, and very late. Perhaps there is a greater degree of family violence – there is evidence in the Gordon Inquiry (2002) that this might be the case for some of the younger children, and perhaps the high proportion of young girls repeatedly coming into town. But all of this demands research that has not been done. A simpler statement of 'the requirement" which Aboriginal young people cannot meet might be, simply, to avoid attracting police attention to their presence on Northbridge streets, which they cannot do, because of characteristics of their race, such as skin colour, appearance, or business and customer response to groups of 'black' young people who – and the effects of the announcement of the Curfew policy on public perceptions. There have been no reports of misbehaviour, riots or disorder attributable to young people.

Making a complaint of race discrimination, either to the Human Rights and Equal Opportunity Commission in Sydney (www.hreoc.gov.au) under the Race Discrimination Act, or to the WA Commissioner for Equal Opportunity under the WA Equal Opportunity Act, would take a long time; raise a lot of questions – expensive and hard to prove – about young people's disadvantage in Perth, and Aboriginal young people in particular, and complex problems about street culture and police attitudes and practices.

Assuming that the first two conditions required to establish indirect discrimination – less favourable treatment by way of some condition or requirement having a much greater effect on Aboriginal young people than a comparable or 'control' group of young people, because of (at least some way) their race - there would be a further problem with in establishing that the Northbridge Curfew is indirectly discriminatory. Would a Western Australian court view the government's rather endearingly simple, law-and-order response to what is admittedly a long-term problem, as 'unreasonable'?

There is no evidence that the government has any other strategy in mind, nor any funds to commit to, for example, the action research project proposed by a group of agencies

working with particularly vulnerable groups, to establish an alternative or more sophisticated strategy than apprehension and return, that was based on independent assessment of how the apprehension policy was 'working' to prevent returns of those children, and of 'what works' to help keep young people out of dangerous or inappropriate public places, and the risk of interaction with the police, or violence. The proposal, sent to the Premier by the groups on 6th August, has not even been acknowledged by the Premier.

A court's view about 'reasonableness' would depend, as well, on what problem the policy, and its implementation, was meant to address, precisely. Was it, in fact, to protect the business operators and customers of Northbridge or, as the Premier angrily told a local reporter after the President of the Children's Court, Judge Kate O'Brien, predicted that the policy would probably fail because it was not sufficient to protect young children with multiple social disadvantages from the dangers of inner city streets just to pick them up – to protect them? A court would then have to decide whether or not the policy, and its implementation, was likely to achieve its object.

The Curfew is popular. The Northbridge issues are long standing. There is an election due in 2004. Lawrence's 1992 mandatory sentencing law was well-received, too, though it was not enough to save the Lawrence government from electoral defeat in 1993. High speed police chases of stolen cars had caused many accidents for many years, then, too. The great risk is that a 'curfew' could prove as popular a model as the mandatory sentencing law did to other Australian governments. Notoriously, the Northern Territory went two or three degrees better. As we now know, 'tough' responses to youth crime do **not** reduce offending rates, but mandatory sentencing did rocket up the rates of detention of Aboriginal and Torres Strait Islanders, and in the Northern Territory one 14 year old orphan boy from a remote island hanged himself after he was jailed for pinching pencils from his school.

Perth has not, however, remained completely unchanged since 1992. For one thing, youth policy advocates in Perth, in and out of government, responded immediately to

'shape' the policy between its announcement, and its implementation. When the Premier's second press release came out at the end of June, what was still a "Curfew" had been defined as instructions to police (working with a welfare worker):

> (i) to apprehend, keep safe and return to family 'pre-teenage children who are not under the immediate care of a parent or responsible adult,' out on Northbridge streets after dark;
> (ii) to do the same for 'unsupervised children between 13 and 15' out after 10 pm, and
> (iii) to crack down on poorly behaved young people in the area, generally.

This was a considerable improvement on the Premier's original promise of 'all youth off the streets', which WA Police Minister Michelle Roberts had then enthusiastically suggested might be expanded upon and be applied to Fremantle or any other appropriate area in the State. To his considerable credit Premier Gallop immediately clarified the government's proposal as definitely limited to Perth's inner-city entertainment precinct.

The Premier's press release of 26 June 2003 also made it clear that the Curfew was to be limited to instructions to police under existing discretions. It was not a new law at all.

So why was a Curfew announced? It seems that WA police are simply to rely on the existing provisions of Section 29 of the 1947 *Child Welfare Act* which empowers departmental workers and police to apprehend a child apparently in need of care and protection and place them in a safe place, including with a relative, pending a care and protection application. Presumably they will also rely on the powers of a constable to keep the peace. The answer appears to be, to satisfy a need to be seen to do something decisive to deal with problems in Northbridge that business operators and the West Australian newspaper that various committees had failed to address for years
If the policy was simply meant to eliminate the presence of young people on the streets in Northbridge, a government would probably be expected to demonstrate it had

undertaken research on why they were coming in and returning, and had other plans afoot, especially if very young Aboriginal children were repeatedly put at risk.

Since June 2003, businesses have reported a considerable drop in young people's street presence, which workers with youth claim is seasonal. The same workers also report that innocent and over-age "young people' have complained to them of being hounded, while other agencies say they have gone back to 'business as usual'.

There is no known plan to evaluate the effectiveness of the policy. There is no evidence of young people's motivations for coming into the city, though City of Perth video cameras had previously recorded evidence of some seemingly ritualistic fights in the area in the early hours of Saturdays and Sundays: without this, none can predict how effective police apprehensions and warehousing of young people could be, long-term. Nor has additional funding been allocated to police for surveillance, apprehension and supervision, nor for the development of targeted services for very young people 'inappropriately' coming into town alone.

There is now a real concern about what will happen when the young people return, as they are expected to do, in greater numbers at the end of the school term. Dr Gallop hailed the first few weeks of the application of the policy as 'a success', because of the drop in numbers of young people. Politically, the only option – unless some more sophisticated and credible policy is being developed – is for more draconian measures.

The human rights of vulnerable and relatively powerless people depend on the skills, competence and integrity of adults. Western Australia is currently considering whether or not it should appoint a Children's Commissioner – which is not government policy. Perhaps the mere existence of that office would have meant that a considered, researched and effective pilot program could have been implemented this year which would have had results, quietly, before the election, because he or she would have been consulted by the Premier.

The rights of young people under the age of 18 are complex. All children and young people (under the age of 18) have special rights: to **participation** in the decisions that affect them (nobody consulted the young people): the **provision** of the necessities of a decent quality of life including the best possible quality and level of services for themselves their parents and their families (is this the issue with the Northbridge children?); and to **protection** from all forms of violence, exploitation and maltreatment whether on the streets of Northbridge or other public places, or in their own homes. These three categories of rights are created by and equally protected under the UN Convention on the Rights of the Child, ratified by the Australian government in 1990.

Non government youth workers did offer to work with government to develop a more thoughtful approach to the issue, which does not so fundamentally offend against the UNCRC promises to respect all of the rights of children. A detailed proposal was forwarded to the Premier on 6th August 2003, on behalf of a group of direct service providers to these children. So far, the proposal has not been acknowledged. [It never was]