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EDITORIAL NOTE

The *Australian Indigenous Law Review* ('*AILR*') is a publication unique for its currency, expert commentary and international perspectives. It draws together legal developments from all areas affecting Indigenous peoples in Australia and around the world.

The *AILR* publishes detailed, peer-reviewed commentary from leading Australian and international experts. Its general editions also include recent and relevant case law, publishing the most prominent cases alongside those that would otherwise go unreported.

Included in the last volume of each edition is a cumulative index.

The *AILR* is designed to complement the Indigenous Law Centre's long-established publication, the *Indigenous Law Bulletin*.

Previous editions of the AILR *are available online at <http://www.austlii.edu.au/au/journals/AILR> and <http://www.informit.com.au>.*

ACKNOWLEDGMENTS

In the opening chapter of the *National Report* of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), Commissioner Elliott Johnston acknowledged that the Royal Commission would not have taken place but for the deaths of the 99 Aboriginal men and women whose deaths were investigated. The RCIADIC recorded its sympathies to the families of the deceased. Since then, Aboriginal men and women have continued to die in custody. This publication is dedicated to them, and to the men and women who have sought reform on this important issue.

The *Australian Indigenous Law Review* ('*AILR*') is prepared at the Indigenous Law Centre at the University of New South Wales, Sydney, Australia, whose in-kind support makes its publication possible. The *AILR* also gratefully acknowledges the support of the Commonwealth Attorney-General's Department in the development of this publication.

We would like to thank Raymond Brazil from the Aboriginal Legal Service (NSW/ACT) for his enormous contribution to this issue, which would never have come together if not for his tireless efforts and vision.

As always, thanks are extended to the members of our Editorial Panel for their generous support and assistance, and to the anonymous referees who gave their time and effort to review the articles presented here. The editors would also like to thank Janette Murdoch, Dylan Lino, April Long, Kyllie Cripps and all of the Indigenous Law Centre staff and volunteers, as well as designer John Hewitt, for their contributions to the creation and production of this edition of the *AILR*. We would also like to thank incoming editor Robert Woods for all of his assistance in finalising this issue. The *AILR* is sure to prosper under his capable management.

Artist's Note

The late Wiradjuri/Kamilaroi artist Michael Riley (1960–2004) is widely considered to have been one of the most important contemporary Australian artists of the past two decades. His contribution to the urban-based Indigenous visual arts industry was substantial. Over the course of his career he created an impressive body of work ranging from black-and-white portraiture to film, video and large-scale digital photography. Throughout, his concern was to celebrate the spirit of his people while also bearing witness to their struggles. He had a deep commitment to the process of reconciliation.

Riley's work draws upon a multiplicity of influences: European and Western (particularly British and North American) Indigenous and non-Indigenous filmmaking; international fashion and design; and Indigenous and European spirituality and its contradictions. His portraits of family and community were the antithesis of the bleak photojournalist studies of contemporary Aboriginal life in towns and cities so often portrayed in print media of the day, with the obvious warmth between subject and photographer evident in the photographs.

Riley's work is represented in various major public and private collections throughout the country, including the National Gallery of Australia. In early 1998, a debilitating illness impacted on his professional and personal life. Riley's last and most significant body of work – *cloud* (2000), from which the cover image for this volume of the *AILR* was drawn – shifted from terra firma to otherworldly locations and concerns.

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FOREWORD

Hal Wootten AC QC*

Reflecting on the Royal Commission more than twenty years after it finished, I realise that many of my readers will have come to political consciousness and lived in a world in which Aboriginals are always in the news, always a source of national anxiety and a challenge to Australia's international credentials. They may assume that the Royal Commission was established as part of this ongoing concern, to find answers to the deepening Aboriginal malaise that still defies solution today. Let me give some perspective.

For nearly fifty years I lived in the Great Australian Silence,[1] and its corollary, the Great Aboriginal Invisibility. Different events brought them to an end for different people. For me they vanished in 1970 when I met a brilliant group of charismatic young Aboriginals and found a niche working with them to establish the first Aboriginal Legal Service.

For many other Australians the Silence and the Invisibility were shattered in 1972 by the magisterial voice of Gough Whitlam, whose Government ushered in what was conceived as a period of self-determination, exemplified in the thousands of government-funded but Aboriginal-controlled organisations that appeared in following years, and the Woodward Report as a first step in the realisation of land rights.

Before long it became apparent that the Great Australian Silence and the Great Aboriginal Invisibility had been only episodes in a more enduring and frequently recurring phenomenon, which I will call the Great Australian Complacency. Once it became clear that the Fraser Government did not intend to dismantle the Whitlam legacy, Aboriginal issues fell out of focus for many people, including myself. Solutions, it seemed, were in hand, and one could focus on other issues – the environment, multiculturalism, the Murdoch takeover, Indonesia or whatever.

What should have been worrying signs, among them the growing campaign stemming from John Pat's death in custody at Roebourne in 1983, went largely unnoticed. In 1987 a confident nation looked forward to celebrating its bicentenary the following year with head held high.

The Complacency was interrupted by Moral Panic as deaths in custody unexpectedly became news. In the first half of the year 11 Aboriginal deaths in custody, five by hanging, set the stage for a horrifying denouement. In just six weeks between 24 June and 6 August 1987 there were five Aboriginal deaths in custody, all by hanging, and four in police cells. As death after inexplicable death hit the headlines, anxiety and bewilderment grew. Was it credible that so many, mostly young, Aboriginal men would hang themselves, and how could they do so unaided with the meagre resources of a prison cells?

Unwilling to accept a growing Aboriginal belief that police were resuming an old policy of killing Aboriginals, but having no explanation of their own, governments sought to clear the air with the knee-jerk appointment of a Royal Commission to inquire into every Aboriginal death in custody since the 1 January 1980, and into the way they had been investigated at the time.

More than 100 families became convinced that they had lost a member in a death covered by the terms of reference, and their expectations of an exhaustive inquiry into those deaths became a governing factor in subsequent events. It was not possible for governments to call off inquiries when it became clear that it was not difficult for an unaided prisoner to hang himself, and that Aboriginal prisoners were not hanging themselves, or otherwise taking their lives, at a greater rate than non-Aboriginal prisoners.

What cried out for investigation was not the likelihood of foul play, but why so many Aboriginals were falling foul of the justice system and spending time in custody. This was not the purpose for which the Commission had been established, and governments were naturally cautious in expanding what was already proving to be a mammoth task: in effect around 100 royal commissions into separate deaths, each occurring in its own peculiar circumstances. Eventually it was accepted that the newly identified central issue could not be ignored, and a grudging amendment to the National Commissioner's terms of reference made clear by implication that it was part of his task to report on 'underlying issues associated with the deaths'.[2] It read more like an afterthought – as indeed it was – than a change in the Commission's focus, but it was the hook on which Commissioner Johnston hung most of his massive five-volume report, published 20 years ago this year.

It was only the National Commissioner's terms of reference that received this modest amendment, and he was provided with a research unit to assist him. The rest of us (apart from Patrick Dodson, a non-lawyer who was later appointed with the specific task of investigating underlying issues in Western Australia) remained focused on meticulous inquiry into individual deaths and their subsequent investigation. When in the course of our inquiries we encountered material that might assist Commissioner Johnston in his additional task, as we inevitably did, we recorded it in our reports to him.

Each Commissioner was free to adopt his own style of reporting. My view was that I could best contribute to a national understanding of what was happening if I presented the death I had investigated as the culmination of a life lived in shaping circumstances, rather than an isolated event. By serendipity my first report, about Malcolm Smith, was released on a day when news was slack and was read by *The Age*'s Canberra reporter. As a result it attracted considerable media attention and commentary, and even became the subject of a popular song and a documentary film. Later reports, released in Spartan format at strategically selected times by governments with no desire to encourage the airing of critical comment, often disappeared with little trace.

Nevertheless, enough filtered out in the Commission's many individual death reports to create some receptivity for the culmination of its work in Commissioner Johnston's monumental *National Report*. Like everyone who worked close to this gentle, kindly man, with his dry wit and passionate dedication to justice, I developed not only affection, but also a deep respect for his courage and dedication. The conception and writing of the *National Report* required both.

Some elements of the *National Report* were given. Drawing on the individual death reports, it had to describe the immediate circumstances and causes of the deaths, and the adequacy of their investigation. While in a small number of cases the cause of death has remained controversial for some people, the findings of the Commission and the recommendations flowing from them have been generally accepted. The great issue confronted by Commissioner Johnston and his latter day critics was how far and in what directions it was appropriate for the *National Report* to go in discussing issues 'underlying' the deaths.

Cultural determinists like Gary Johns argue that the *Report* should have recognised that the Aboriginal condition was due to adherence to an outmoded culture and have been concerned to recommend and facilitate the shedding of that culture in favour of 'the' modern culture.[3] His criticisms naively treat cultures as if they were items of clothing to be donned and doffed at will, and would make assimilation the overriding aim of policy.

The criminologist Don Weatherburn argues that the issue should have been treated as a criminological one within the relatively narrow bounds of practical criminology, and criticises the *National Report* for being more ambitious.[4] Along with Noel Pearson, he has wrongly assumed that the *National Report* failed to highlight alcohol and other issues playing major causal roles in relation to Aboriginal imprisonment.[5]

Noel Pearson, who has been by far the most powerful intellectual contributor to the Aboriginal policy debate in recent years, has varied in his policy emphases, but places priority on the issues of alcohol, welfare dependence, education and economic development. Despite his predilection for disparaging the *National Report*, his priorities do not conflict with its priorities.

I have argued elsewhere that Noel Pearson's real complaint is that instead of headlining his issues of priority, the *National Report* headlined the historic destruction of Aboriginal society by European intrusion, and the continuing disempowerment of Aboriginal people that followed.[6] While he would agree on the importance of this history, Pearson is able to take its recognition for granted in a way the Commission could

not. It was in part the work of the Commission itself, along with the High Court's *Mabo*[7] decision the following year, and the ongoing messages of the 'new historians' and the reconciliation movement, that there is a general recognition that Aboriginal disadvantage is not the result of Aboriginal inferiority and shortcoming, but of a history of dispossession, institutionalisation, and continuing disempowerment. This has cleared the way for a more open and rational discussion of what may be done to change the Aboriginal condition.

Elliott Johnston's strategy was to use the recognition of historical disadvantage as the launching pad for a national call on all Australians, black and white, to join together for a massive and holistic attack on all aspects of Aboriginal disadvantage. He relied neither on guilt nor denigration, but on the sense of justice and fair play he believed to be present in mainstream Australian society, and on the desire and willingness to take control over their own lives that he believed to be present but stifled in Aboriginal communities.

It was not an empty rhetorical call that the *National Report* made. It was backed by a detailed program to tackle every major aspect of the overall disadvantage found in the Aboriginal society that was producing the candidates for deaths in custody. Whether the problem was related to alcohol and drug abuse, unemployment, education, children and youth, health, housing, community infrastructure, policing, the effect of imprisonment, service delivery, community reconciliation, or the fulfilment of international obligations, the *National Report* sought to provide what was in effect a manual of best practice, based on the advice of recognised experts in the various fields, and the lessons of the Commission's own vast inquiry into particular lives and deaths in custody.

The 339 recommendations of the *National Report* were not an unprioritised wish list. They were framed by a five-volume discussion examining each issue, its importance and its relevance to other issues. Two issues come to stand out as one reads the *Report* as a whole. One is the destructive and undermining effect of alcohol abuse, the subject to which two chapters are devoted and which pervades many other chapters.[8] The *Report* does not treat Aboriginals as mere victims of alcohol but as people who must take responsibility for their use of it, and major recommendations relate to giving Aboriginal communities effective control over its availability.[9]

The issue that received the greatest emphasis of all was the importance of delivering the assistance that Aboriginal communities need in ways that did not perpetuate or reinforce the dependence and disempowerment that had characterised government policies in the past. Commissioner Johnston saw an ingrained pattern of white domination in policy-making, service delivery and community relations that had survived the years of so-called self-determination. He targeted this disempowerment, advocating an end of domination and the return of control of their lives and communities to Aboriginal hands.[10] This is reflected in recommendation after recommendation.

Twenty years later people ask what has been the effect of the Royal Commission. There no doubt that in relation to its original and central focus, the Commission has resulted, despite the odd egregious exception,[11] in much better care of all at-risk prisoners, black and white, and much more thorough and transparent investigation of the deaths that do occur.

In relation to the many specific areas of disadvantage on which the *Report* made recommendations, I have no qualification to speak in detail. However over the years I have heard little informed criticism of the specialised recommendations, and have often had Aboriginals volunteer how useful the recommendations have been to them in seeking support for particular programs.

It is common for Aboriginal and other critics to make a broad-brush complaint that the recommendations of the Commission have not been implemented. Establishing how far this is true would require a detailed study of many areas of policy, and so far as I know this has not been done. If the task were to be undertaken, it would require judgments about what was effective implementation, which would likely be exceedingly controversial.

One early study of Commonwealth implementation that I made for the Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted that what was claimed to be implementation was often expensive bureaucratic activity that produced little or no impact on the ground.[12] It is pleasing to find 14 years later that, while the anarchic, unproductive and self-justifying character of bureaucratic activity on which I stumbled in 1994 still marks Aboriginal policy, it is now the subject of serious academic study.[13] It is clearly problematic to argue from the limited success of

its bureaucratic implementation that the *National Report* was itself defective.

Certainly some key messages of the *National Report* have been decisively rejected in practice. Its guiding principle, that Aboriginals should at every point be given as much control as possible over their own lives, has been spectacularly abandoned in the Northern Territory Intervention. The idea that imprisonment should be a punishment of last resort has been negated as Aboriginals have been caught up in wave after wave of vengeful and self-defeating law and order policies that have filled prisons with inmates of all kinds. This has been one, although by no means the sole, reason that figures for Aboriginal imprisonment have gone through the roof.

High rates of imprisonment remain today, as the Commission found 20 years ago, not as an isolated feature of Aboriginal society, but as an integral part of communities characterised by many interacting features that are judged distressingly disadvantageous and dysfunctional by mainstream society. A brief return of the Great Australian Complacency after the Royal Commission and the *Mabo* decision was strongly challenged, particularly by Noel Pearson.[14] It again ended in Moral Panic, notably expressed in the way in which the Northern Territory Intervention has been conceived and implemented.

There are many strongly expressed opinions about the depth of the malaise in Aboriginal society and what is required to remedy it, but apart from a few areas where statistics speak louder than words, remarkably little research-based evidence exists to found these opinions. Like other commentators I am left to speculate. I find myself coming back to the conclusion that Commissioner Johnston reached about what he regarded as the most important pre-requisite for the success of his program.

He nominated three essential prerequisites for success.[15] The second was assistance from the broader society and the third was the delivery of that assistance in a manner that did not create welfare dependence. However the first and the most crucial was the desire and capacity of Aboriginal people to put an end to their disadvantaged situation and to take control of their own lives. He affirmed a passionate conviction that they would do so, based on the number of initiatives they had taken and were taking at the time. He gave many examples.[16]

In other words he proceeded on the assumption that Aboriginals wanted to make, and given the chance would make, substantial efforts to achieve what the mainstream community regards as desirable change or 'progress', that they wanted to embrace modernity, 'to be like us'.

Many of course do, and have gone on to join what we could call a very successful Aboriginal middle class. They are not part of what is conceived as the problem: those who have been left behind in many bounded Aboriginal communities, and in some city and rural town populations.[17] The assumption that these people are willing, indeed anxious, to be 'like us' was not peculiar to Commissioner Johnston, but is shared by his critics and supporters alike. He differed from the rest of us only in feeling the need to give reasons for his assumption; most of us treat the superiority and compelling attractiveness of our way of life as requiring no argument.

However, it is undeniable that, even when opportunities are available, many Aboriginals show little inclination to seek or persist with paid employment, to make the changes to their lifestyles recommended in the interests of achieving a longer and healthy life, to follow medical regimes, to renounce the established rites of passage through conflict with police and imprisonment, to live in nuclear families in unshared houses on unshared incomes, to insist that reluctant children go to school every day, or to forego the pleasures of alcoholic socialising.

Why this is so has been much debated by Australian anthropologists in recent years with no conclusive outcome,[18] and I am not qualified to offer one. I wonder however whether we underestimate and fail to understand how difficult and complex is the transition from an egalitarian hunter-gatherer society, in which one's only capital is social capital in the form of interpersonal relationships, to a modern capitalist society based on individual accumulation. As one observes the continued indifference of many Aboriginal people to what are generally considered benefits of modernity, as well as to its authority, one is reminded of Clastres' view of hunter-gatherer society as a site of resistance to state-formation.[19]

Looking down from the heights of modernity, it is easy to fail to realise the warmth and joys and satisfactions of lives that we see only as distressed and dysfunctional, and that surrendering them may be a price that people may not be willing to pay for the problematic advantages of modernity. Perhaps it is not surprising that many Aboriginals do not

respond to the stifling solicitude or ill-concealed contempt of smug advisers and administrators who patently regard their communities, their way of life, their social bonds, their mutual caring and sharing, their emphasis on personal autonomy, their deep ties to country and much that makes them what they are, as at best valueless or unfortunate handicaps, at worst the stigma of inferiority and depravity. The resistance to progress that mainstream society pathologises may to them be a defence of what they experience as 'havens in a heartless world'.[20]

White Australia has always had difficulty in finding either an ear with which to listen to Aboriginal Australia, or a voice in which to speak to it. One remembers Stanner as a rare example of a person who had an ear to listen and the rarer ability to distil what he heard to a wider white world. It is not easy to listen to Aboriginals, for they have no spokesperson and speak with many voices, and have learnt to be distrustful. It takes time and patience and rapport, things that are hard to muster in bureaucracies, so the listening and interpreting has usually to be done outside government. It is not a fly-in fly-out task on the relatively useless consultation model.

Two of the most successful occasions on which white Australia found a voice to speak to Aboriginal Australia were Paul Keating's Redfern speech and Kevin Rudd's apology. But it is not enough to apologise for past failures. If we want Aboriginals to listen, we must be able to talk about a future, not just an inevitable future on our model, but a future that recognises the value of Aboriginal society for those who live in it, and their view of an acceptable future.

Can Australia offer a future that does not just provide a path for individual Aboriginals to leave their communities and be integrated into mainstream society, but a future for Aboriginal communities in today's world? Jon Altman and his colleagues in the Centre for Aboriginal Economic Policy Research have argued for the viability of hybrid economy, part subsistence and part market-based, to underwrite a future for remote communities.[21] Noel Pearson has sought to build in Cape York the institutional basis for an Aboriginal society that can control alcohol, promote individual responsibility, achieve high educational outcomes and develop an economic base which allows its members to live in both worlds.[22]

Commissioner Johnston would have been happy with either outcome, as long as it was the result of Aboriginal choices. Perhaps both are doomed to failure, as the cultural determinists and neo-con economists would argue. If that is so, it is hard to see a future other than continuing painful disintegration for many Aboriginal communities. If Commissioner Johnston proves to have been wrong when be rejected any 'doubt that Aboriginal people are capable of, determined to and will in fact exercise self-determination',[23] the *National Report* will in retrospect come to be seen as the great swansong of the self-determination era.

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1 This term was coined by W E H Stanner and popularised in his 1968 Boyer Lectures 'After the Dreaming'. Other coinages are my own.

2 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, app A (see amendment to National Commissioner's terms of reference of 6 May 1988).

3 Gary Johns, *Aboriginal Self-Determination: The Whiteman's Dream* (Connor Court, 2011).

4 Don Weatherburn and Jessie Holmes, 'Re-thinking Indigenous Over-representation in Prison' (2010) 45 *Australian Journal of Social Issues* 559.

5 Ibid; Noel Pearson. 'On the Human Right to Misery, Mass Incarceration and Early Death' (Speech delivered at the Dr Charles Perkin Memorial Oration, The University of Sydney, 25 October 2001), reprinted in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009) 175; Noel Pearson, 'Lessons from Palm Island', *The Australian*, 7 October 2006; Noel Pearson, 'The Intervention' in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009) 301.

6 Hal Wootten, 'Reflections on the 20th Anniversary of the Royal Commission into Aboriginal Deaths in Custody' 7(27) *Indigenous Law Bulletin* 3.

7 *Mabo v Queensland (No 2)* (1992) 1 CLR 175.

8 RCIADIC, above n 2, vol 2, ch 15, vol 4, ch 32.

9 Ibid vol 4, 275–9 [32.2.4]–[32.2.12], vol 5, 130–1 recs 272–81. As to personal responsibility, see vol 2, 322 [15.2.52].

10 Ibid vol 1, 15 [1.7.6].

11 For an extraordinary case of lack of care of a prisoner, see Deaths in Custody Watch Committee WA, *Ward Campaign for Justice* <http://www.deathsincustody.org.au/ward>. For a controversial police investigation, see 'CMC Review of the Queensland Police Service's *Palm Island Review*' (Report, Crime and Misconduct

Commission, Queensland, June 2010)". See also 'Report in Response to the "CMC Review of the Queensland Police Service's *Palm Island Review*"' (Report, Queensland Police Service, 2011).

12 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report*, Human Rights and Equal Opportunities Commission (1994) (see 'The Royal Commission into Aboriginal Deaths in Custody: Commonwealth Implementation of Recommendations').

13 Tess Lea 'When Looking for Anarchy, Look to the State: Forces of Disorder within the Australian Indigenous Estate' (2012) *Critique of Anthropology* (forthcoming).

14 See writings collected in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009).

15 RCIADIC, above n 2, vol 1, 15–16 [1.7.1]–[1.7.8].

16 Ibid vol 1, 16–19 [1.7.9]–[1.7.21].

17 Maria Lane distinguished the 'open society population' and the 'embedded welfare population'. See discussion in Noel Pearson, 'Radical Hope: Education and Equality in Australia' (2009) 35 *Quarterly Essay* 1.

18 Recent debate has centred on remote bounded communities: see Diane Austin-Broos, *A Different Inequality* (Allen & Unwin, 2011). However, many of the same problems remain in the embedded welfare community in cities and country towns: see Gillian Cowlishaw, *The City's Outback* (UNSW Press, 2009).

19 Pierre Clastres, *Society Against the State: Essays in Political Anthropology* (Robert Hurley trans, Zone Books, 1989) [trans of: *La société contre l'État* (first published 1974)].

20 This application of Lasch's 1977 phrase to remote Aboriginal communities is from Gillian Cowlishaw, 'Crime and Governance through Culture' (Paper presented at Crime, Justice and Social Democracy, Queensland University of Technology, 27 September 2011).

21 Jon Altman, 'What Future for Remote Indigenous Australia? Economic Hybridity and the Neoliberal Turn' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 259.

22 Pearson, above n 14.

23 RCIADIC, above n 2, vol 1, 16 [1.7.11].

COMMENTARY

PUNISHMENT: TWO DECADES OF PENAL EXPANSIONISM AND ITS EFFECTS ON INDIGENOUS IMPRISONMENT

Chris Cunneen*

I Introduction

There was optimism at the time of the Royal Commission into Aboriginal Deaths in Custody ('RCADIC') that Indigenous imprisonment rates would be reduced. Indeed a core finding of the Commission had been the need to reduce Indigenous custody and imprisonment, and the consequent over-representation of Indigenous people, as a way of addressing the large number of Indigenous deaths in custody. However, over the last two decades Indigenous imprisonment rates have grown significantly rather than declined.

In 2001, I reviewed the first decade after the RCADIC and noted that there was ample evidence to demonstrate that the results of the Royal Commission were not as we might have expected.[1] The first decade post-RCADIC highlighted at least four areas where there was failure to achieve the desired outcomes of the Royal Commission. These included:

- the continued over-representation of Indigenous people in the criminal justice system;
- that Indigenous deaths in custody remained at high levels;
- that the recommendations of the Royal Commission were often ignored; and
- that there had been a drift into a more punitive 'law and order' society.[2]

The failure to solve the problematic relationship between the criminal justice system and Indigenous people was most graphically illustrated in the climbing imprisonment rates throughout the 1990s. In summarising these changes, the Australian Institute of Criminology concluded that in the decade from 1991 the number of Indigenous and non-Indigenous prisoners increased at an average annual rate of eight per cent and three per cent respectively, and the level of Indigenous over-representation within the total prisoner population had steadily increased.[3] Imprisonment levels had risen for everyone in Australia during the 1990s, but for Indigenous people the increase was on top of an already high rate, and had occurred at a time when the major policy thrust of the Royal Commission was to *reduce* imprisonment levels.

During the first decade after the RCADIC, there were three independent national evaluations of government responses to the Royal Commission recommendations. All three reports were critical of implementation processes by government. The *Justice Under Scrutiny* report prepared by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs[4] addressed the issue of diversion from custody and was critical of government implementation of recommendations in this area. It noted a failure to remedy institutional racism in some police forces. The *Indigenous Deaths in Custody 1989–1996* report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner[5] examined 96 Indigenous deaths in custody during the period 1989–1996 and found that on average there were between eight and nine Royal Commission recommendations breached with each death in custody. The most frequent breaches occurred in Queensland and Western Australia.[6] Finally, the *Keeping Aboriginal and Torres Strait Islander People Out of Custody*[7] report focused on those recommendations of the Royal Commission directly designed to reduce custody levels through changes to criminal justice policy. It found a failure on the part of governments to adequately implement specific recommendations and that this failure represented a *massive lost opportunity* to resolve critical issues which lead to the unnecessary incarceration of Indigenous people.[8]

By the end of the first decade post-RCADIC it was apparent there were weaknesses and limitations in the Royal Commission process and it its recommendations. Many of these problems had been highlighted in the reports noted above. Some issues were not dealt with very well, such as the relationship between Indigenous women and the criminal justice system – ironically enough given, as I discuss further below, the way the recent increase in Indigenous women's imprisonment has outstripped the increase for Indigenous men. Some recommendations could have been better drafted: recommendation 92 (that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort)[9] became destined to be breached systematically. The principle of imprisonment as a sanction of last resort has been legislated in most Australian jurisdictions, but has not been seen as inconsistent with the introduction of mandatory sentences of imprisonment and increased restrictions on judicial discretion. Finally it became increasingly clear after the first decade that the process of implementation relied too much on government and not enough on Indigenous people and their organisations, and there was largely an absence of independent monitoring of government implementation processes. Too much had been left to the goodwill and good faith of governments to bring about effective change.

The evaporation of political goodwill around criminal justice reform in the decade following the RCADIC reflected changed political conditions. The political conditions of neoliberalism which had grown during the 1980s, but accelerated in the 1990s were no longer conducive in Australia to effective reform of the criminal justice system nor to the recognition of Indigenous rights. The nation has steadily moved into a more punitive period in relation to criminal justice responses, and whatever impetus there was to reform in the early 1990s evaporated during the ensuing decade. Australian states and territories saw the drift into 'law and order' responses manifested in increased police powers, 'zero tolerance' style laws which increased the use of arrest for minor offences, mandatory sentences of imprisonment for minor offences, increasing controls over judicial discretion and demands for longer terms of imprisonment for a range of offences. More generally there was a significant shift away from the recognition of Indigenous rights, including the right to self-determination.[10]

Since these reflections on the RCADIC at the turn of the century, another decade has now passed, and we have the passage of 20 years since the Royal Commission first tabled its findings and 339 recommendations. The purpose of this article is to revisit Indigenous imprisonment and punishment, and to do so through the prism of the Australian Prisons Project ('APP'). The APP was established in 2008 as a result of an Australian Research Council grant, with a view to understanding developments in penality since the 1970s through to the present, particularly with a focus on the seemingly inexorable rise in imprisonment rates from the mid 1980s. One component of our work has been the consideration of the over-representation of Indigenous people in prison.[11] In the discussion below I use the example of the Northern Territory to highlight some of the more general trends and issues.

II Sentencing, Punishment and Race

The APP has stressed the importance of understanding the multidimensional nature of punishment: punishment is more than a calculative task by sentencers or a technical apparatus administered by experts. The study of punishment extends beyond the effects on a discrete offender to the social meaning and cultural significance of punishment. We see punishment as a communicative and didactic institution. It communicates meaning about power, authority, legitimacy, normality. Penality defines and depicts social, political and legal authority, it defines and constitutes individual subjects and it depicts a range of social relations. How we understand appropriate or acceptable punishment is contextualised within broader social and cultural norms. The way we punish offenders is understood within particular cultural boundaries which define gender, age, race, ethnicity and class. These boundaries are not static. They are constantly being drawn and redrawn, and punishment itself plays a part in constituting these relations.

Our cultural understandings of 'Aboriginality' have permeated the development of penality in Australia with formal and informal differences in punishment existing from the 19th century through to the present. Some historical examples include the continuance of public executions of Aboriginal offenders after their cessation for non-Aboriginal offenders, and similarly the extended use of physical punishments (lashings, floggings) for Aboriginal offenders well into the twentieth century. The segregation of penal institutions along racialised lines has also been commonplace. Historically these different modes of

punishment were justified by (and reproduced) racialised understandings of Aboriginal difference.[12]

Today we understand both sentencing and punishment through concepts of race and culture: witness for example the consideration of the Aboriginality of an offender in sentencing (instantiated in the *Fernando* principles[13]) or the growth in Koori, Nunga, Murri and circle sentencing courts[14] and Indigenous prisons such as Balund-a and Yetta Dhinikal in New South Wales ('NSW'). Contemporary cultural understandings of Indigeneity are not always positive. Discourses speaking to the implied primitiveness of Aboriginality have re-emerged. Witness the Howard Government's *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth). Presented as a response to family violence in Indigenous communities it actually restricts courts taking customary law into consideration in bail applications and when sentencing. In summary, cultural assumptions about Aboriginality within sentencing may be positive (such as in the Koori courts), they may be negative (such as in the Howard government's approach to customary law), or they may reinforce particular boundaries as to who is really Aboriginal (such as in case law which differentiates between traditional and urban Indigenous peoples and applies particular criteria to one group).

Despite the occurrence of positive initiatives like the Koori and other Indigenous courts, we have also seen Indigenous Australians' imprisonment rates rising rapidly. In the 20 years to 2008 Indigenous imprisonment rates have more than doubled from 1,234 to 2,492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at a slower rate from 100 to 169 per 100,000 of population during the same period.[15] By 2010, the Indigenous imprisonment had settled at 2,303 per 100,000.[16]

There has also been a very marked increase in women's imprisonment, and this has particularly impacted on Indigenous women. The proportion of women in the total prison population has doubled over the last two decades[17] and the proportion of Indigenous women in the female prison population increased from 21 per cent of all women prisoners in 1996 to 30 per cent in 2006 and steadied at around that percentage (29.3 per cent in 2010).[18] The rate of Indigenous women's imprisonment in 2010 was 374 per 100,000 of adult Indigenous females compared with 18 per 100,000 for non-Indigenous females.[19] Thus the Indigenous women's rate of imprisonment was 21 times higher than the non-Indigenous women's rate. The Indigenous women's rate of imprisonment is now more than 50 per cent higher than of the non-Indigenous *male* rate.[20]

Despite the RCADIC findings and its recommendations, despite apparent government commitments in the early 1990s to implement the recommendations, despite some positive initiatives such as Indigenous sentencing courts[21] and some comprehensive Indigenous Justice Agreements,[22] Indigenous imprisonment rates are far higher now than they were in 1991.

III Governing through Crime and Punishment

In understanding the use of imprisonment one of the most important points to grasp is that a rising imprisonment rate is not directly or simply related to an increase in crime. The use of prison is a function of government: it reflects government policy and legislation, as well as judicial decision-making. Governments make choices that either directly impact on the use of imprisonment (for example, legislation covering such matters as standard non-parole periods, mandatory sentencing and maximum penalties for particular offences) or less indirectly (for example, availability of non-custodial sentencing options, presumptions in favour of bail and the availability of parole).

In summarising the international literature, Wilkinson and Pickett note that only 12 per cent of the growth in the state prison population in the United States ('US') during the 1980s and 1990s could be associated with increases in criminal offending – the rest was the result of increased use of imprisonment and longer periods of imprisonment.[23] Similarly a comparison between the United Kingdom ('UK') and the Netherlands showed that two thirds of the difference in the higher UK imprisonment rates was a result of the greater use of custodial penalties rather than differences in crime rates.[24] Imprisonment rates in Australia also do not appear to be a function of increased levels of crime, since increases in imprisonment rates have continued, while crime rates have levelled or fallen, in many categories of crime from 2000.[25]

More specifically the increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather more frequent use of imprisonment for longer periods of time.[26] The NSW Bureau of Crime Statistics and Research studied the 48 per cent increase in Indigenous imprisonment

rates in NSW between 2001 and 2008 (which, incidentally, was a greater increase than occurred with the non-Indigenous imprisonment rate). It found that 25 per cent of the increase was caused by more Indigenous people being remanded in custody and for longer periods of time, and 75 per cent of the increase was caused by more Indigenous people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and being sentenced to gaol for longer periods of time. None of the increase was a result of more Indigenous people being convicted of a crime. In other words, the 48 per cent increase was not caused by increased crime levels.

More generally however, the overall environment within which sentencing and punishment occurs has been one of constantly changing criminal law. 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,[27] while Steel[28] has noted the rapidity with which bail legislation has changed in some jurisdictions, usually in response to some politically expedient incident. More broadly, and particularly impacting on Indigenous people, a number of factors appear to have contributed to the increased use of imprisonment including:

- changes in sentencing law and practice;
- restrictions on judicial discretion;
- changes to bail eligibility;
- changes in administrative procedures and practices;
- changes in parole and post-release surveillance;
- the limited availability of non-custodial sentencing options;
- the limited availability of rehabilitative programs; and
- a judicial and political perception of the need for 'tougher' penalties.[29]

While these administrative, legal and technical changes contribute to increased penal severity, they are themselves reflective of less tolerant and more punitive approaches to crime and punishment.

In reflecting on the US growth in imprisonment, Simon argues that criminalisation and imprisonment has become increasingly used as a tool of social policy which has resulted in a process of 'governing through crime'.[30] Increased punishment has been targeted at those defined as high risk, dangerous and marginalised. Furthermore, governance through crime has also focused on reducing the risk of crime and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order which is increasingly structured around 'the problem of crime'. One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms.[31]

Simon's notion of governing through crime is useful for understanding the rise of penal severity and its link to particular political configurations in many western democracies. One aspect of the governing through crime thesis particularly applicable to the Australian context is that weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. This focus has lead to populist political responses to perceived 'popular' opinion about crime: hence a view that the most politically expedient response to crime is the promotion and implementation of the 'toughest' response to crime. While conservative political parties may have traditionally appeared to be 'tougher' on crime and punishment, it is clear that in jurisdictions like NSW and the Northern Territory the most sustained and largest increases in imprisonment rates have occurred under Labour governments. For example the recent decade of the Labour government in the Northern Territory under Claire Martin and later leaders saw imprisonment rates (and particularly Indigenous imprisonment rates) increase at a much faster rate than in the previous decade under the National Liberal Party.[32]

Not all modern democracies have followed the path of countries like Australia, New Zealand, the US or the UK which have relied on exclusionary and punitive approaches to penal policy. According to Lacey,[33] some European jurisdictions have opted instead for criminal justice systems that are relatively moderate and inclusionary. Lacey argues that more social democratic and corporatist forms of government have sustained more moderate criminal justice policies. The governing through crime thesis also needs to be able to account for the profound racialisation of punishment, both in Australia and other liberal democracies like the US. Perhaps in nations like Australia the concept of 'colonising and racialising through crime' is as apt as the more general notion of 'governing through crime'.

IV Colonising Punishment

While the development of crime control as a key form of governance may go some way to explaining the punitiveness which has underpinned developments in penal policy, it is also clear that punishment is highly racialised. The two jurisdictions in Australia, which have the highest imprisonment rates (the Northern Territory and Western Australia), are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are well beyond any meaningful comparison to other rates in Australia: whilst the non-Indigenous imprisonment rate in Western Australia in 2010 was 170 per 100,000, the rate of Indigenous imprisonment was 4,309.6.[34]

I want to consider how the increased focus on risk and danger has been targeted at Indigenous people. In other words, how is it that governing through crime comes to identify specific populations such as Indigenous people as high risk and dangerous. Bail and the use of remand is fundamentally about risk and it provides a useful way of considering how changes in understandings of risk have negatively impacted on Indigenous people. The use of remand has grown significantly in all Australian jurisdictions since the 1970s with an increase in the use of remand as a percentage of imprisoned people rising from 11 per cent in 1978 to 23 per cent in 2008 nationally.[35] This dramatic increase has had a significant impact on overall prison numbers, and has specifically impacted on Indigenous people. As noted previously, 25 per cent of the increase in Indigenous imprisonment rates in NSW between 2001 and 2008 was caused by more Indigenous people being remanded in custody and for longer periods of time.[36]

As we have noted elsewhere[37] remand is a useful prism through which to view penal culture for a number of reasons. First, it is a fundamental principle of criminal law that a person cannot be legally punished unless they have been found guilty of a crime. This means that in order to keep a person in custody on remand, a court must rely on reasons other than those associated with punishment. Historically, the primary justification for remand was a fear that the accused would flee the jurisdiction. The extent to which modern bail legislation provides additional reasons to refuse bail illuminates changes and developments in ideas around risk. Secondly, remand and bail was historically a discretion exercised by courts and the extent to which that discretion has been constrained or re-directed by government provides an insight into the ways in which a changing penal culture has seen increased attempts to directly influence the operation of the courts.

From the late 1970s the law on bail was codified, with most jurisdictions introducing a presumption in favour of bail. Legislative amendment since then has overwhelmingly seen a retreat from that position, with jurisdictions increasingly limiting the discretion of courts to grant bail. Much of the initial focus on restricting bail concentrated on particular offences such as armed robbery, burglary, drug offences and domestic violence. However during the 1990s and more recently restrictions on bail eligibility have particularly focused on types of offenders: specifically repeat offenders. As we noted previously, 'these restrictions on bail provide for simple, strong political statements about "locking up" "offenders" but have the potential to incarcerate large groups of accused without proper analysis of whether such deprivation of liberty achieves any justifiable social ends'.[38] Given the higher recidivism rates of Indigenous people (see below), any focus on repeat offenders is likely to negatively impact on Indigenous offenders.

Theorists such as Ulrich Beck[39] have argued that the politics of insecurity in late modern societies like Australia, Canada, the US and New Zealand has led to a preoccupation with and aversion to risk, uncertainty and dangerousness. One reaction to the 'ontological insecurity' generated by risk aversion is a decline in tolerance and a greater insistence on the policing of moral boundaries.[40] As I have argued elsewhere,[41] criminalisation plays a significant role in creating moral boundaries and constructing Indigenous peoples as a threat to the social order because of their presumed criminality. The criminal justice system constitutes social groups as threats and reproduces a society built on racialised boundaries. Indeed it has been argued that the process of criminalisation itself now constitutes a significant racialising discourse – that is we understand race through discourses about crime and punishment, and we understand crime and punishment through images of race.[42] The Northern Territory Intervention provides a particularly graphic example of the construction of Indigenous men in particular as sexual and physical abusers of women and children. Such abuse was also linked to traditional Aboriginal culture. An increased criminal justice response was seen as appropriate to dealing with the perceived problem and Indigenous imprisonment rates in the Northern Territory have continued to increase dramatically.

There are at least two ways the rise of 'risk' paradigms negatively impact on the assertion of Indigenous authority specifically within the criminal justice area. Firstly, the developments of risk in criminal justice policy has seen a shift in focus towards the utilisation of various risk assessment processes: the development of 'techniques for identifying, classifying and managing groups assorted by dangerousness'.[43] Criminal justice classification, program interventions, supervision and indeed detention itself is increasingly defined through the management of risk. The assessment of risk involves the identification of aggregate populations based on statistically generated characteristics. One result of this is that an understanding of crime and victimisation in Indigenous communities is removed from specific historical and political contexts. Within the risk paradigm any rights of Indigenous peoples (such as self-determination or self-government) are seen as secondary to the membership of a risk-defined group. In other words the group's primary definition is centred on the risk characteristics they are said to possess, and risk is measured through factors such as the incidence of child abuse, domestic homicide, drug and alcohol problems, school absenteeism, juvenile offending and so on.

Secondly, the post-9/11 concerns with security and the war on terror have led to what some commentators have referred to as a 'paranoid' nationalism which emphasises order and conformity over difference.[44] Within this context Indigenous claims to self-determination, the recognition of Indigenous law and greater control over criminal justice, including punishment, can be easily portrayed as a threat to the national fabric. As Megan Davis notes in discussing sovereignty claims, 'it is difficult to comprehend how the patriotic, warlike, race-divided Australia of today can even begin to think in earnest about what principles underpin a liberal democracy or to seriously consider reform of our public institutions'.[45] Indigenous claims to sovereignty and self-government are presented as at best irrelevant to solving the problems of social disorder which are increasingly defined as a threat of criminality from risk-prone populations, or at worst the claims are seen as a threat to national unity and security.

Returning to the Northern Territory for the moment, we can see the changing discourses on punishment which occurred during the period from the 1970s through to the end of the first decade of the twenty first century. In a review of the Northern Territory prison system in 1973, Hawkins and Misner described the functions of existing prisons as being to 'warehouse bodies, prevent escapes and to keep the prison as neat and clean as possible'.[46] The Hawkins and Misner report was the first of a number aimed at improving correctional services.[47] From the 1970s through to the early 1990s there was a period of reform which was clearly focused on lowering prison numbers and in particular reducing Indigenous imprisonment. There was also an approach to decriminalise certain offences and to increase the range of non-custodial sentencing options. The Hawkins and Misner report recommended wide-ranging changes to punishment and imprisonment in the Northern Territory, and set the agenda for correctional services reform in the Territory for the next decade.[48] Their recommendation to decriminalise public drunkenness was quickly enacted by the Territory government. Other key recommendations included a reduction in prison numbers through a wider range of alternatives to imprisonment and the development of mental health services including reform of the Mental Defectives Ordinance. Changes introduced during the later part of the 1970s and 1980s included the decriminalisation of public drunkenness, the introduction of the fine default diversionary program, the introduction of home detention and the establishment of Aboriginal Community Corrections officers.

Yet by the early to mid 1990s the focus of reform in the Northern Territory had shifted from reducing Indigenous imprisonment and over-representation to a retributive rhetoric aimed at making conditions more harsh for offenders. This shift to a more punitive penality occurred at almost the same time that governments were responding to the recommendations of the RCADIC which was advocating for reform which centred around reducing prison numbers. Over the next decade and a half changes in the Northern Territory were to include punitive amendments to juvenile justice legislation, the introduction of mandatory sentencing, the introduction of punitive work orders, changes to parole, changes to public order legislation, government endorsement of zero tolerance policing approaches, and calls by politicians for the judiciary to impose harsher sentences. The increase in the prison population has been particularly marked over the last decade: rising from 469 per 100,000 in 2000 to 663 per 100,000 in 2010,[49] while the specific Indigenous imprisonment rate in the Northern Territory rose by 74 per cent from 1,206 per 100,000 in 2000 to 2,103 per 100,000 in 2010.[50]

V Waste Management

Harsh criminal justice policies and ever increasing prison numbers may be popular among politicians and some voters. Punitive measures can be introduced by government in response to apparent populist demands with relative ease. Governments can be seen to be doing 'something' without much consideration of the longer term impacts. Indeed, increased criminalisation does not require complex bureaucracies or systems of government, although it does require increased budgetary allocations.[51] A result has been what some have called the 'waste management' prison which 'promises no transformation of the prisoner … [i]nstead, it promises to promote security in the community simply by creating a space physically separated from the community'.[52] It functions to hold people who are defined as presenting an unacceptable risk for society.

It is difficult to conceive of anything more removed from the vision of the RCADIC than the idea that prisons have become human warehouses for marginalised peoples. Yet the metaphor of the waste management prison is useful in capturing some of the changes which have occurred as a result of penal expansionism. The size of the prison system has grown to deal with expanding prison numbers, and a significant focus on risk and custody has developed, alongside the physical expansion of the penal estate. How we think about the physical size of prisons has also changed over the last two decades. A medium sized prison in the 1990s was about 300 inmates, and large prison was around 500. Across Australia today new prisons are being built or old prisons expanded to hold around 1,000-plus prisoners. Staffing ratios have fallen, there are more prisoners per prison officer and there is far greater reliance on various technical forms of surveillance and security in the new prisons. Economies of scale are being used to try and push down the average cost per prisoner.

Further, we know the significant limitations of prison as a rehabilitative institution and crime control option. And we do have sufficient information to make informed choices on the best results gained for public expenditure. Various Australian and international research has shown that reductions in long term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programs will bring about reductions in re-offending.[53] Yet we see the opposite occurring when it comes to Indigenous people. The Indigenous re-imprisonment rate (58 per cent within 10 years) is much higher than the retention rate for Indigenous students from year 7 to year 12 of high school (46.5 per cent) and higher than the university retention rate for Indigenous students (which is below 50 per cent).[54] As a society we do better at keeping Indigenous people in gaol than in school or university.

Meanwhile, Indigenous participation in university and TAFE decreased across all age groups between 2001 and 2006. For example, Indigenous participation at university for 25- to 34-year-olds fell by 18 per cent between 2001 and 2006.[55] On the basis of the 2006 Census data Indigenous men are 2.4 times more likely to be in gaol than in a tertiary institution at any one time. This estimate is also consistent with the results from the 2002 National Aboriginal and Torres Strait Islander Social Survey which showed that Indigenous people are far more likely to report contact with the criminal justice system, including incarceration, than a tertiary qualification. In the 2002 Survey, some three per cent of Indigenous people reported having a Bachelor degree or above, while seven per cent reported being incarcerated in the previous five years.[56] Given the trends of *decreasing* Indigenous tertiary participation levels and *increasing* Indigenous imprisonment rates it may be that these odds have increased further since 2006.

VI Conclusion: The Politics of Neoliberalism

The central finding of the Royal Commission was Aboriginal people die in custody at a rate relative to their custodial population. However, 'the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often'.[57] The Royal Commission found that there were two ways of tackling the problem of the disproportionate number of Aboriginal people in custody. The first was to reform the criminal justice system; the second approach was to address the problem of the more fundamental social and economic factors which bring Indigenous people into contact with the criminal justice system – the underlying issues relating to over-representation. The Commission argued that the principle of Indigenous self-determination must underlie both areas of reform. In particular the resolution of Aboriginal disadvantage could only be achieved through empowerment and self-determination.

We have done far too little in any of these three areas: reforming the criminal justice system, addressing the

underlying issues, or recognising self-determination. I noted at the beginning of this article that political conditions from the early 1990s were no longer conducive to the type of reforms envisaged by the RCADIC. These changed political conditions were reflective of the growing ascendancy of neoliberalism. In conclusion it is worthwhile exploring why neoliberalism has proved so hostile to the reform of criminal justice systems and recognition of Indigenous rights. Firstly, and as noted previously, among western style democracies it is those who have most strongly adopted neoliberalism which have the highest imprisonment rates (particularly the US, Australia, New Zealand, the UK and South Africa), while social democracies with coordinated market economies have the lowest (Sweden, Norway, Finland and Denmark).[58] The development of neo-liberal state has coincided with a decline in welfarism. The realignment of values and approaches primarily within Anglophone justice systems emphasised deeds over needs. The focus shifted from a welfare-aligned rehabilitative approach to a justice-oriented approach with an emphasis on deterrence and retribution. Individual responsibility and accountability increasingly became the focus of the way justice systems approached offenders. The privatisation of institutions and services, widening social and economic inequality, and new or renewed insecurities around fear of crime, terrorism, 'illegal' immigrants and racial, religious and ethnic minorities have all impacted on the way criminal justice systems operate. All of which have fuelled demands for authoritarian law and order strategies, a focus on pre-crime and risk as much as actual crime,[59] and a push for 'what works' responses to crime and disorder.[60] Within this context Indigenous claims to self-determination increasingly appeared to have no relevance to criminal justice administration and reform.[61]

In his discussion of international criminal justice, Findlay[62] has succinctly summarised the values and principles of neoliberalism to include individualisation of rights and responsibilities; the valorisation of individual autonomy; a belief in free and rational choice which underpins criminal liability and penality; a denial of welfare as central state policy; the valorisation of a free market model and profit motivation as a core social value; and the denial of cultural values which stand outside of, or in opposition to, a market model of social relations. The values of neoliberalism promote individualism and individual responsibility and downplay the need for social and structural responses to crime such as reducing unemployment rates, improving educational outcomes, increasing wages, ensuring proper welfare support, improving housing and urban conditions.[63] Promoting individual responsibility largely became identified with retributivism, incapacitation and just deserts – all of which translated into more frequent use of prison and with longer gaol terms. The requirement for social and structural changes – which formed the basis of the RCADIC's approach to addressing underlying issues – was seen as less relevant to justice systems focused on ensuring individual accountability. And in a social and political milieu which defined individual accountability in terms of imprisonment, the focus of the RCADIC on diminishing the use of imprisonment appeared increasingly insignificant. Certainly from the mid 1990s it was difficult to find a politician in either of the major parties who would publicly advocate for reducing prison numbers. Governments continued to say they were implementing the RCADIC but they conveniently forgot the core values and outcomes the Commission had advocated for: reduce custody levels, address social and economic disadvantage and respect Indigenous self-determination.

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ABORIGINAL IDENTITY – THE LEGAL DIMENSION

Chief Justice Robert French AC

The term 'identity' is used in a variety of discourses about Aboriginal people, their self-perceptions, their cultures, their lands, and their relationships with each other and with non-Indigenous society. Its overbroad deployment risks diffusing its meaning. Nevertheless, it has served, and no doubt continues to serve, a useful purpose as a gateway to reflection upon the complex, multi-dimensional and dynamic character of Australian Aboriginality.

Legal discourse in the courts is probably the least promising field in which to explore concepts of identity. It projects interrelated individual and communal realities on to a pointillist landscape of disputes and 'matters'. Statutory criteria of 'Aboriginality' must find a place somewhere between artificial precision and meaningless generality. Nevertheless, issues of identity and the related concept of 'recognition' have played a significant part in legislation and litigation involving Indigenous people in Australia. 2011 is the 20th anniversary of the Final Report of the Royal Commission into Aboriginal Deaths in Custody. 2012 will be the 20th anniversary of the decision of the High Court in *Mabo v Queensland (No 2)*,[1] when the common law for the first time gave formal recognition to an Indigenous culture and effect to rights derived from it. The statute to which that decision gave rise and the innumerable controversies, negotiations, agreements and judicial decisions which followed, focused the minds of many in the community upon notions of individual and communal Aboriginal identity. The extent, if any, to which the Royal Commission Report and *Mabo* and their sequelae led to a shift in the perceptions of Indigenous Australians by non-Indigenous Australians and vice versa is, no doubt, a suitable topic for inquiry by social scientists. The discussion that follows is not social science. It is a lawyer's largely descriptive reflection upon the interaction between identity and law in relation to Aboriginal people.

The relevant ordinary English meanings of the word 'identity' are 'individuality' and 'personality'.[2] They focus upon the single person. The individual's account of his or her identity, however, is likely to be expressed in terms that are relational. Important elements include name, date and place of birth, occupation, parents, siblings, extended family, nationality and ethnic origin. Membership of, and affiliation with, different communities or groups within the wider society, traditions and beliefs, spiritual, ceremonial and cultural practices, are all elements of self-definition. Many of these elements of identity are involuntary attributes. Some can be disclaimed. Some can be acquired by adoption. Some may be lost or abandoned and rediscovered.

The non-Indigenous comprehension of Aboriginal identity is limited. Complete definition is elusive. It is possible to speak of different kinds of Aboriginal identity representing the diversity of Indigenous histories, lifestyles and relationships of Indigenous people with each other, and with non-Indigenous society. For some, their identities as Aboriginal people will be defined in part by their places of conception and birth, by kinship, by membership of one or more Aboriginal societies, by the land and waters to which they belong, and their knowledge of the stories relating to them, and by their use of traditional language and skills. Some of these elements may be attenuated or missing because of the personal or family history of those who were removed from their parents or because of the disruption of particular Aboriginal societies by the impact of colonisation. The difficulty of pinning down any single concept of Aboriginal identity across this diversity is evident. Nevertheless, common threads of identity lie across it and are frequently expressed by Aboriginal leaders.

In a paper published in August 1993, less than a year after the *Mabo* decision and without reference to it, the Director of

the Aboriginal Research Institute at the University of South Australia wrote:

> An Aboriginal social identity is no longer an aspiration: it is now a reality, relevant to virtually all people of Aboriginal descent. Even though the content varies, there is a sufficient number of elements held in common by Aboriginal people to distinguish it.[3]

Courts of law are not good places to decide whether a particular person or group of people answer the description 'Aboriginal'. From the earliest days in which the question was litigated in Australian courts, there was an emphasis on descent. In *Muramats v Commonwealth Electoral Officer* (WA),[4] Justice Higgins treated the word 'Aboriginal' in the Electoral Act 1907 (WA) as '"aboriginal" in the vernacular meaning of the word as used in an Act addressed to inhabitants of Australia or Western Australia.' He asked the question: 'Whom would Australians treat as aboriginal natives of Australia'? and answered it – 'those are aboriginals (for Australian Acts) who are of the stock that inhabited the land at the time that Europeans came to it.'[5] His approach was endorsed in Ofu-Koloi v The Queen,[6] where the High Court observed that terms such as 'Aboriginal', when used in statutes, 'are used from the point of view of the people to whom they are addressed'.[7] So the Court foreshadowed what might be called statutory Aboriginality as a non-Indigenous social construct, tied to 'objective' concepts of descent.

The interpretation of statutory Aboriginality has varied according to the context and purpose of the statute in question. That proposition reflects an approach taken to the word 'Indian' in United States statutes. In *Vialpando v State of Wyoming,*[8] the Supreme Court of Wyoming said that '[t]he definition of an "Indian" usually depends upon the purpose for which a distinction is made. As regards entitlements the definition of an Indian includes more people than for some other purposes.'[9]

In construing a testamentary gift 'for the benefit of Aboriginal women in Victoria', Lush J in *Re Bryning*[10] had regard to the testator's beneficial intention and rejected a proposition that beneficiaries could only be 'full-blood' Aboriginal women. His Honour said of the word 'Aboriginal': 'In this country it has certainly been used to describe persons in groups or societies irrespective of the question of mixture of blood.'[11]

The need for a flexible approach to statutory Aboriginality was recognised by Toohey J when construing the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*'). His Honour was dealing, in that Act, with a 'descent-based concept' of which he said:

> Membership of a race is something which is determined at birth and cannot, in a sense, be relinquished, nor can it be entered into by someone lacking the necessary racial origin. It is unnecessary and unwise to lay down rigid criteria in advance. As situations arise in which the Aboriginality of claimants is put in issue, these situations can be looked at.[12]

Prior to 1967 the Commonwealth Parliament had power, under section 51(xxvi) of the *Constitution*, to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.' The power was directed to the control, restriction, protection and possible repatriation of people of 'coloured races' living in Australia. The words 'other than the aboriginal race in any State' were deleted by the *Constitution Alteration (Aboriginals) Act 1967* (Cth) following a referendum under section 128 of the *Constitution.* The amendment was based on the assumption that Aboriginal people would fall within the category 'the people of any race'. The Commonwealth's power to legislate for Aboriginal people was thus tied to a constitutional concept of 'race'. There is little dispute that as a scientific or biological term, 'race' is a meaningless category. Genetic differences between so-called races are swamped by differences between individuals within races. Nevertheless, the idea of 'descent' as a criterion of racial membership retains its cultural power in the construction of 'race'.

One of the issues in the *Tasmanian Dam Case*[13] was whether laws for the protection of Aboriginal cultural heritage in Tasmania were within the constitutional meaning of laws with respect to 'the people of any race'. There was some limited discussion of that term in relation to Australian Aborigines. Justice Brennan said:

> Membership of a race imports a biological history or origin which is common to other members of the race … Actual proof of descent from ancestors who were acknowledged members of the race or actual proof of descent from ancestors none of whom were members of the race is admissible to prove or to contradict, as the case may be, an assertion of membership of the race. … [G]enetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage

> are acquired and are susceptible to influences for which a law may provide.[14]

Justice Deane offered a broader concept, albeit still centred on descent:

> The phrase [people of any race] is, in my view, apposite to refer to all Australian Aboriginals collectively. … The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.[15]

Descent also played a part in the interpretation of the term 'Aboriginals and Torres Strait Islanders' in the Letters Patent issued by the Governor-General to constitute the Royal Commission into Aboriginal Deaths in Custody. A question arose whether the Commissioner had authority, under the Letters Patent, to inquire into the death of a young man in Queensland who was partly of Aboriginal descent, but of European appearance. The Full Court, on which I sat, held that the Commissioner did have that authority.[16] Justice Spender said that non-trivial Aboriginal descent would identify a person as an 'Aboriginal' within the ordinary meaning of the word.[17] Neither self-recognition nor recognition by the Aboriginal community was a necessary integer. His Honour went further and said that the presence of either attribute or both was not sufficient to constitute a person an 'Aboriginal'.[18] Justice Jenkinson also held that descent was essential, but not always sufficient.[19] Both Judges held that in cases where Aboriginal descent is uncertain, or where the extent of Aboriginal descent might be regarded as insignificant, factors of self-recognition or recognition by persons who are accepted as being Aboriginals could have an evidentiary value in the resolution of the question.[20]

My view was that, for the purposes of the Letters Patent, Aboriginal descent was a sufficient criterion for classification as Aboriginal. The Commissioner nevertheless had the right to decline to inquire into a case where 'the Aboriginal genetic heritage [was] so small as to be trivial or of no real significance in relation to the overall purpose of the Commission.' It was an open question whether a person with no Aboriginal genetic heritage may be regarded as Aboriginal by reason of self-identification and communal affiliation.[21]

The story of the young man, Darren, the subject of that case, was a tragic reality which lay beneath the legal debate. Darren was born in 1969. His father was Dutch and his mother of Aboriginal descent. His uncle on his mother's side gave evidence that he was of Aboriginal descent, identified as Aboriginal and was accepted as such. Within two months of his birth Darren was placed in the care of welfare authorities in New South Wales. He spent time in and out of what were described as 'welfare homes'. His mother underwent psychiatric treatment from time to time. His father was killed in a motorcycle accident when Darren was two or three years old. His mother attempted to commit suicide on the same day and on a number of other occasions. She took him from a welfare home in New South Wales and went to Queensland for a time. There was evidence that during this time, when he was about four years old, he had extensive bruising on his body. There was also evidence that his mother was addicted to heroin. Eventually, Darren was made the subject of a care and protection order under the Queensland Department of Children's Services. He was then fostered by a family for about two-and-a-half years and, in 1984, placed in Boys Town, an institution operated by the De La Salle Order. He remained there until November 1985.

There was evidence from a social worker at Boys Town that Darren was 'struggling with his identity – with who he was and where he came from, where he fitted in'.[22] She noted he was mixing a lot more with Aboriginal boys at Boys Town and seeking them out. The Director of Boys Town remembered him as 'confused as to his ethnic identity'.[23] Conveying an image that I have never forgotten, the Director said: 'he made a boomerang and left it in his room and on occasions he could be seen standing while adopting a one-legged stance.'[24] He contemplated suicide on a number of occasions. At about age 12 or 13 he walked in front of a train, suffered severe internal injuries and lost a kidney. After leaving Boys Town he obtained casual employment and struck up a friendship with a part-time waitress at a kiosk where he worked. He told her that his mother was Aboriginal and his father Dutch. Her evidence was that she was surprised to hear this as 'he did not look like an Aboriginal'.[25]

Darren's death followed a party at the kiosk at which he worked. He drove away on a motorbike without using a helmet. He was stopped by police and given a breathalyser test. He was over the limit and was taken into custody. He was placed in a cell in the Brisbane Watchhouse. An hour later he was found dead, having apparently hanged himself.

The Royal Commission reported on his death. His story indicated that apart from the many tragic circumstances of his short life, confusion as to his identity must have played a role in the events that led to his death. What is surprising is that his Aboriginality was litigated.

References to genetic heritage in the identification of Aboriginality have been criticised on a number of bases, set out in an interesting paper by de Plevitz and Croft, published in 2003. The authors draw attention to the absence of a genetic concept of race, significant diversity in the Aboriginal population, the difficulty of obtaining access to the genetic material of ancestors and the need to construct a DNA reference group based on '"pure blood" Aboriginal people covering all geographic groups in Australia.'[26]

The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) also threw up a statutory definition of an 'Aboriginal person' as 'a person of the Aboriginal race of Australia'.[27] The importation of the concept of 'race' led Drummond J in *Gibbs v Capewell*[28] to observe that:

> Parliament has used the expression 'Aboriginal race of Australia' to refer to the group of persons in the modern Australian population who are descended from the inhabitants of Australia immediately prior to European settlement. It follows that an 'Aboriginal person' is, for the purposes of this Act, one of those descendants.[29]

Justice Drummond held that some degree of descent was necessary but not of itself a sufficient condition of eligibility to be an Aboriginal person. A degree of Aboriginal descent coupled with genuine self-identification or with communal recognition would be sufficient to bring a person within the definition.[30] On the other hand, communal recognition as an Aboriginal person, given the difficulties of proof of Aboriginal descent, would often be the best evidence available to prove descent.[31] While Justice Drummond's approach allowed Aboriginal communal judgment as a basis for defining a person as Aboriginal, that judgment was not primary proof, but rather offered support for an inference of descent. Justice Merkel in *Shaw v Wolf*[32] was concerned with the same legislation. He held that descent alone was not a sufficient criterion for recognition as an Aboriginal. It was nevertheless a necessary requirement under the Act that an Aboriginal person have some aboriginal descent. Aboriginal descent could be established by genuine self-identification as an Aboriginal and communal recognition. He said: 'in truth, the notion of 'some' descent is a technical rather than a real criterion for identify, which after all in this day and age, is accepted as a social, rather than a genetic, construct.'[33]

Given the cultural significance of the idea of descent in constructing 'race', it is difficult to escape its involvement, directly or indirectly, in statutory provisions that define Aboriginality by reference, either explicitly or implicitly, to race.

In the recent decision of Bromberg J in the Federal Court in *Eatock v Bolt*,[34] a case brought under the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth), the trial judge discussed the question of Aboriginal identity. The applicant had complained that certain newspaper articles conveyed offensive messages about her and people like her by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so that they could access benefits available to Aboriginal people.[35] The judge discussed the concept of Aboriginal identity. He reviewed the cases referred to in this paper and drew attention to the observation of the Australian Law Reform Commission in its 2003 report on the protection of human genetic information 'that there is no meaningful genetic or biological basis for the concept of "race".'[36] His Honour concluded:

> The authorities to which I have referred, make it clear that a person of mixed heritage but with some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, unquestionably satisfies what is conventionally understood to be an 'Aboriginal Australian'. For some legislative purposes and in the understanding of some people, compliance with one or two of the attributes of the three-part test may be regarded as sufficient. To some extent, including within the Aboriginal community, debate or controversy has occurred as to the necessary attributes for the recognition of the person as an Aboriginal. Those controversies have usually occurred in relation to whether a person meets the necessary criteria, rather than as to the criteria itself [sic]. Those controversies have however from time to time focused upon whether a person with no or no significant Aboriginal descent should be accepted as an Aboriginal person.[37]

It is not necessary for the purposes of this paper to make any further comment upon the reasoning and the decision in *Eatock v Bolt*. The case has been the subject of public controversy in relation to the racial vilification provisions of

the *Racial Discrimination Act*. However, insofar as it discussed the concept of Aboriginal identity as explored through the courts, the judgment summed up the relevant authorities.

If one broad conclusion can be drawn from this discussion, it is that statutory concepts of Aboriginality are always going to be troublesome in terms of the challenge they pose to courts interpreting them and the reduction of a complex, multi-dimensional human reality to words on paper in statutes or other legal texts. Nevertheless, words on paper have consequences and the courts must give effect to them as best they can, having regard to the purpose of the text in which the idea of Aboriginality is embedded. The subsuming of that idea in the term 'race' in the *Constitution* is undesirable. If section 51(xxvi) were amended to delete the reference to 'people of any race' and replace it with a reference to 'Aboriginal and Torres Strait Islander people', the problems would not go away, but the dead weight of an outdated concept would no longer burden the power.

The relationship of Aboriginal peoples to their land, which for many persists beyond historical displacement or removal, is a central theme in the affirmation of individual and group Aboriginal identities.

The long-standing campaign, which dates back to the first decade of Federation, to give the Commonwealth Parliament power to legislate with respect to Aborigines was, in part, focussed on civil and human rights and protection against discriminatory State laws. In 1963 however, land rights were thrown into focus with the presentation of the famous Bark Petition to the Commonwealth Parliament by the people of the Yirrkala in protest against the excision of 330 square kilometres of the Gove Peninsular Aboriginal Reserve for the grant of special mining leases for bauxite. The 1967 referendum, which amended section 51(xxvi) of the *Constitution*, paved the way for Commonwealth laws with respect to Aboriginal land. However, nearly a decade was to pass before the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*') which, being limited to the Northern Territory, did not require the support of the amended race power, it being a law authorised by section 122 of the *Constitution*.

The Northern Territory land rights legislation itself followed from litigation brought by the people of the Gove Peninsula seeking to set aside the grant of bauxite mining leases over their land on the basis of their common law native title. The action was dismissed by application of the historical fiction embedded in the common law by the decision of the Privy Council in *Cooper v Stuart*,[38] in which Lord Watson had said:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. [39]

Applying *Cooper v Stuart* to the Northern Territory, Blackburn J in *Milirrpun v Nabalco Pty Ltd*[40] said:

> the question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony.[41]

This followed a finding by his Honour of a 'subtle and elaborate system highly adapted to the country in which the people led their lives' characterised as 'a government of laws and not of men';[42] nonetheless, his Honour concluded that there were no rights arising under traditional laws and customs of the kind that could attract recognition at common law.

The *Milirrpum* case led to the establishment of the Woodward Royal Commission and the recommendations of that Commission and the enactment of the *Land Rights Act*. The importance of Aboriginal identity was embedded in the objectives of the system which Woodward proposed. Those objectives were as follows:

1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.
2. The promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate causes of complaint of an important minority group within that community.
3. The provision of land holdings as a first essential for people who are economically depressed and who have

at present no real opportunity of achieving a normal Australian standard of living.

4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.
5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.[43]

The essential process established by the *Land Rights Act* required an inquiry by an Aboriginal Lands Commissioner appointed under the Act, a recommendation to the relevant Commonwealth Minister, followed by a grant under the statute in fee simple. Although it may be said that the land rights legislation was underpinned by a principle of recognition, the rights granted under it were statutory constructs for which the Act did not create an entitlement. In some respects what it provided were grace and favour grants. As is well known, the *Land Rights Act* generated a significant amount of litigation, much of which found its way to the High Court.[44] The litigation may well have set the scene for a more ready acceptance of the concepts of traditional ownership according to custom and law and the capacity of the common law to recognise it.

Importantly, the decision of the High Court in *Mabo* involved the idea 'recognition' as an informing metaphor for the common law of native title. It was also a support for the expression of Aboriginal identity as a relational concept. In the decision of the Full Federal Court in *Northern Territory v Alyawarr*,[45] the Court said:

> The idea of recognition is central to the common law of native title and of the NT Act. The common law and the NT Act define the circumstances in which recognition will be accorded to native title rights and interests and the conditions upon which it will be withheld or withdrawn. It is a concept which operates in a universe of legal discourse. It derives from the human act by which one people recognises and thereby respects another. By the process, which it names, aspects of an indigenous society's relationship to land and waters are translated into a set of rights and interests existing under non-indigenous laws. The choice of the term 'recognition' links it to the normative framework established by the common law and by the Act itself as evidenced in the preamble. Recognition is not a process which has any transforming effect upon traditional laws and customs or the rights and interests to which, in their own terms, they give rise.[46]

Since the decision in *Mabo*, very many Aboriginal peoples around Australia and people of the Torres Strait have brought claims in which they have asserted their identities as subsisting Aboriginal societies defined by their relationships to each other and to the land and waters with which they maintain in their connexions. The process has been far more burdensome and protracted than many might have anticipated. It has generated divisive debates within Aboriginal communities about identity and history. Despite those burdens and debates, the framework that the common law recognition of native title and the statute have provided for a public assertion of Aboriginal identity at a variety of levels, national, communal and individual, is an overwhelmingly positive outcome. Despite their sometimes formulaic character, the recognition of Aboriginal ownership at the beginning of public functions across Australia has marked something of a cultural shift in the perceptions of Aboriginal cultural heritage by non-Indigenous Australians. Their heritage is part of the heritage of all of us. It also informs our national identity. In the speech which I made upon being sworn in as Chief Justice I referred to the question of national identity in this context:

> The history of Australia's indigenous people dwarfs, in its temporal sweep, the history that gave rise to the Constitution under which this Court was created. Our awareness and recognition of that history is becoming, if it has not already become, part of our national identity.

As we all know, intractable disadvantage persists and 20 years after the Royal Commission Report, deaths in custody still occur. There is controversy in Aboriginal communities and the larger national discourse about the measures which should be taken to deal with these issues. I remain an optimist and believe that in the past 20 years the identity of Australia's Aboriginal and Torres Strait Islander people, defined in part by their cultures and their relationships to the land and waters of Australia, their art and the achievements of their increasingly articulate leaders, gives hope that much of what we lament now will be a distant and unhappy memory in another 20 years.

1 (1992) 175 CLR 1 (‘*Mabo*’).
2 ‘Identity’, *The Shorter Oxford English Dictionary* (Clarendon Press, 3rd ed, 1974) vol I, 1016.
3 Eleanor Bourke, ‘The First Australians: Kinship, Family and Identity’ (1993) 35 *Family Matters* 4, 6.
4 (1923) 32 CLR 500, 506–7.
5 Ibid 507 (emphasis added).
6 (1956) 96 CLR 172.
7 Ibid 175 (Dixon CJ, Fullagar and Taylor JJ).
8 640 P 2d 77 (Wyo, 1982).
9 Ibid 79.
10 [1976] VR 100.
11 Ibid 103.
12 Justice John Toohey, *Finniss River Land Claim: Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory* (1981) [120].
13 *Commonwealth v Tasmania* (1983) 158 CLR 1.
14 Ibid 244.
15 Ibid 274.
16 *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125.
17 Ibid 133.
18 Ibid 132.
19 Ibid 128.
20 Ibid 127 (Jenkinson J), 132–3 (Spender J).
21 Ibid 148.
22 Ibid 137.
23 Ibid.
24 Ibid.
25 Ibid 138.
26 Loretta de Plevitz and Larry Croft, ‘Aboriginality under the Microscope: The Biological Descent Test in Australian Law’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 104, 120.
27 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4(1).
28 (1995) 54 FCR 503.
29 Ibid 506.
30 Ibid 510–12.
31 Ibid 512.
32 (1998) 83 FCR 113.
33 Ibid 137.
34 [2011] FCA 1103.
35 Ibid [3].
36 Ibid [169], quoting Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) 922 [36.41].
37 *Eatock v Bolt* [2011] FCA 1103, [188].
38 [1889] 14 App Cas 286.
39 Ibid 291.
40 (1971) 17 FLR 141.
41 Ibid 244.
42 Ibid 267.
43 Aboriginal Land Rights Commission, *Second Report* (1974) [3] (‘Woodward Report’).
44 See Robert French, ‘The Role of the High Court in the Recognition of Native Title’ (2002) 30 *University of Western Australia Law Review* 129.
45 (2005) 145 FCR 442.
46 Ibid 461–2 [64].

A REFLECTION ON THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY AND ITS CONSIDERATION OF ABORIGINAL WOMEN'S ISSUES

Megan Davis*

Following the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') criticism emerged that it failed to adequately consider Aboriginal women in its inquiry into Aboriginal deaths in custody. On the anniversary of the RCIADIC, this article reflects on that criticism. First, this article will provide a brief overview of the RCIADIC and the feminist critique of its failure to adequately incorporate Aboriginal women's issues in its work. Then, this article will describe in more detail the research of Marchetti into the RCIADIC and gender. Next, this article will analyse the RCIADIC'S reliance on the right to self-determination as a guiding principle through a gender lens. Finally, this article will problematise a stock standard narrative reflected in the RCIADIC report that, women fared better during colonisation. The valid critique made about RCIADIC and its failure to adopt an intersectional approach is a challenge shared today by the state and the Aboriginal and Torres Strait Islander political community: the tendency to essentialise the 'Aboriginal person' skews if not hampers responses to the serious challenges facing the Aboriginal and Torres Strait Islander community. If it is true that RCIADIC failed to adequately incorporate an intersectional approach taking into account the very different experiences of Aboriginal women and Aboriginal men, the question still remains today, how can the state ever adequately gauge what Aboriginal women experience and what Aboriginal women think, when the identity is so politically and legally framed as a collective?

I The Royal Commission into Aboriginal Deaths in Custody

The RCIADIC was established in October 1987 following national outrage over the number of Aboriginal deaths in custody.[1] The RCIADIC investigated 99 deaths that had occurred between 1 January 1980 and 31 May 1989, in prisons, police stations or juvenile detention institutions.[2] According to the RCIADIC, it was a

> revealing commentary on the life experience of Aboriginal people in 1987 and of their history that it would have been assumed by so many Aboriginal people that many, if not most, of the deaths would have been murder committed if not on behalf of the State at least by officers of the State.[3]

One significant finding of the RCIADIC was that the deaths in custody investigated were not the product of deliberate violence or brutality of police or prison officers.[4] Another was that Aboriginal people did not die in custody at a greater rate than non-Aboriginal people; rather they were simply in custody at much higher rates.[5] The RCIADIC did, however, find that there was a lack of regard for the duty of care that is owed to persons in custody by police officers and prison officers.[6] At the time of the *National Report*, the degree of Aboriginal over-representation in custody was 29 times greater than the rate for non-Indigenous people – the 99 who died in custody were victims of that.[7] The report examined the implications of over-representation including the role played by the history of colonisation in that statistic.

Of the 99 deaths investigated, only 11 were of women. After the report was handed down, questions were raised about the failure of the RCIADIC to investigate Aboriginal women's deaths in custody and their interactions with the criminal justice system.[8] These voices challenged the RCIADIC's position that, at the time of the Royal Commission, Indigenous women were in a better position than Indigenous men.[9] Indeed the *National Report* described colonisation as having a lesser impact on Aboriginal women than on Aboriginal men, arguing that women were shielded from the ravages of colonisation because of their role as mothers:

> For women … although not even motherhood is an absolute or unquestioned position, the bearing or raising of children does provide a stable basis from which entry into adulthood and the negotiation of status may be undertaken. Moreover, the division of labour defined in relation to the domestic and public spheres is also related to gender roles. Precisely because of this, the impact of colonisation has been different for men and for women. Despite the enormous changes effected, women's roles in the domestic sphere and their tasks – nurturing, providing food, 'worrying for the 'lations' – have not substantially altered. The public sphere, and hence the context of men's role and status, is precisely the area that has been most under attack in the transformation to a new order. The group most sociably vulnerable in these processes are young men.[10]

Similarly it was observed that

> Aboriginal women have been instrumental in withstanding the enforced cultural indoctrination, ironically, through their role as culture bearers …. While forced cultural change has had substantial impact on the traditional role of Aboriginal men, Aboriginal women even though they have been exposed to the same cultural forces have basically retained the role of gatherer and child carer.[11]

In addition, the report also canvassed the idea that the competition for affection between non-Indigenous men and Indigenous men for Aboriginal women was a possible contributing factor to men committing suicide.[12]

II Marchetti's Gender Analysis of RCIADIC

Elena Marchetti investigated the role of gender in the RCIADIC's work in a doctoral thesis, which is to date the only comprehensive gender analysis of the Royal Commission.[13] In her thesis, Marchetti examined the official RCIADIC reports, comparing them to texts prepared by the Aboriginal issues units ('AIUs'), semi-independent research units that organised meetings and conducted interviews with Aboriginal people and their organisations. These units had to report to each regional commissioner of the RCIADIC, constituting the 'Indigenous voice' in the investigation. The AIU texts were to inform RCIADIC's regional and national reports.

Marchetti found that the AIU texts raised extensive issues regarding the problems of Aboriginal women. These included the prevalence of family violence and alcohol abuse; the violent treatment of Indigenous women by police; the need for victims of violence to be provided with access to legal representation; the need to recognise women's customary law; the problems with accessing appropriate hospital care when giving birth; lack of support from partners; and the need for women to be employed in the criminal justice system.[14] Yet, as Marchetti noted, the final, official RCIADIC texts did not reflect these issues:

> [a]side from the topics of housing, offending patterns of Indigenous women, visiting family members in prison, and informing families of a death in custody and of post-death investigations, other problems which concerned Indigenous women were not reported in the official RCIADIC reports to the same extent as in the AIU texts. This was particularly apparent in relation to the topics of family violence, police treatment of Indigenous women, the importance of employing Indigenous women in various service roles, and birthing facilities. Notably, the official RCIADIC reports lacked a gender specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women.[15]

Marchetti concluded that because the majority of the deaths investigated were men it 'supported the assumption [now embedded in the criminal justice sector] that young Indigenous males were more disadvantaged than Indigenous females'.[16] In her interviews with people who worked on the RCIADIC, Marchetti found that there was no gender analysis applied, because the focus of the inquiry was 'race'.[17] There was no explicit or conscious agreement to ignore Indigenous women; 'instead the oversight had occurred unconsciously'.[18] Even so, Marchetti also found that almost half of the people interviewed understood that the focus of the inquiry was Indigenous males. On this the *National Report* was explicit:

> Aboriginal juveniles particularly males require very particular consideration in this Report … Whilst the increasing involvement of Aboriginal females in the juvenile and adult justice system and the deaths of some of them is a matter of great concern, overwhelmingly the typical portrait of the Aboriginal deaths in custody was that of young males.[19]

According to Marchetti, 'the problems facing Indigenous people were therefore assumed to primarily relate to males'.[20]

Even though empirically the research on which RCIADIC was based found that young Indigenous men did suffer many disadvantages and were 'greatly marginalised', important statistics emerged at the time that the number of deaths of Indigenous women by alcohol-related murders was more than the deaths in custody for the period of RCIADIC. Marchetti found that, in New South Wales between 1968 and 1981, 43 per cent of homicides were within the family and almost 47 per cent of female victims of homicide were killed by their spouse, compared to 10 per cent of male victims.[21] In Queensland the data that was collected from former missions and reserves during the period 1987–89 indicated the death rate of Indigenous women was four times that of all Australian women as compared with Indigenous men whose death rate was three times that of Australian men.[22]

Marchetti concluded that, despite these alarming statistics about the deaths of Aboriginal women at the time – due mainly to interpersonal violence between Aboriginal men and Aboriginal women – the problems concerning Indigenous women were 'overshadowed by the problems facing Indigenous "people", which in reality equated to problems facing Indigenous men'.[23] Audrey Bolger made the same point in her 1991 report *Aboriginal Women and Violence*. Bolger noted that during 1987 and 1988 three Aboriginal men died in custody in the Northern Territory (and no Aboriginal women) yet in 1987 and 1988 of the 39 homicides recorded in the Northern Territory, 17 of them were Aboriginal women.

> When the number of Aboriginal people dying in custody was brought to public attention it caused such consternation that the Royal Commission was set up, and rightly so. Yet the fact that Aboriginal women particularly suffer far greater violence in their own communities and are much more likely to be killed and injured in and around their own homes has caused no similar public outrage.[24]

Even so Marchetti argues that the RCIADIC has been unfairly criticised for ignoring Aboriginal women per se, noting that, in fact, Aboriginal women are mentioned in numerous parts of the report and recommendations and were therefore not 'ignored'.[25] For Marchetti, critics unfairly base their conclusions *only* on the content of the *National Report* and the recommendations. She says that Indigenous people's own reflections on the RCIADIC are informed by conscious and unconscious race and gender bias. According to Marchetti, 'community rights and concerns about male deaths in custody weren't raised by Indigenous women because it was culturally inappropriate for them to discuss individual rights and female deaths'.[26] And because RCIADIC was ignorant of these 'norms', they did not use a methodology that would have allowed female voices to surface.[27] Marchetti cites Aboriginal scholar Moreton-Robinson as evidence of the existence of this cultural norm: 'Indigenous women give priority to the collective rights of Indigenous peoples rather than the individual rights of citizenship'.[28] One of the RCIADIC commissioners interviewed by Marchetti noted that, while Aboriginal women were active participants in the Royal Commission's consultations, they rarely expressed concerns related specifically to women.[29] The non-Indigenous lawyers of RCIADIC said it was up to Indigenous women to raise their own issues and not for non-Indigenous people to force the issues.[30]

For Marchetti, the rationale for her research was to explain why RCIADIC did not take an intersectional approach. She concluded that, among many things, the RCIADIC's Letters Patent were restrictive, Aboriginal women did not want an intersectional approach, and while women were excluded in a sense, 'ultimately [the exclusion] occurred unintentionally'.[31] According to Marchetti, 'the commissioners conducted a predominantly legally directed investigation about "race" without realizing that by doing so, Indigenous males would be favoured'.[32] On this point Marchetti concluded that the absence of an intersectional analysis occurred 'unintentionally', despite the fact that her entire analysis is about how Western legal processes and liberal legal ideology 'erase' the experiences of women.[33] Marchetti also added a personal note:

> [i]t has not been easy to summarise how the RCIADIC considered or portrayed problems relating to Indigenous women. Researching and writing … has made me more sympathetic to the task the RCIADIC was required to undertake. The information and material available for the RCIADIC to use was enormous, and deciding what material to use and how to interpret that material would not have been an easy or enviable task.[34]

Yet was the substantial omission of Aboriginal women unintentional? The absence of due consideration of Aboriginal women in the publicly available text of a national report is arguably equivalent to the state ignoring them, even if they were mentioned in part. Since the RCIADIC, there has been an increase in the overall national Indigenous women's prison population by nearly 50 per cent.[35] Indigenous women

are reported to be the fastest growing prison population and incarceration rates for women have increased more rapidly than for men.[36] According to the Aboriginal and Torres Strait Islander Social Justice Commissioner, in Queensland in 2003, 45.3 per cent of Indigenous female inmates were sentenced for a violent crime, 28.3 per cent for property crime, 24.5 per cent for other crimes.[37] Many of the people interviewed by Marchetti said that, if the inquiry was held today, the focus might have been different given the dramatic increase in the rate of imprisonment of Indigenous females since the late 1980s. Is there a relationship between RCIADIC's failure to consider/profile Aboriginal women and the silent doubling of Aboriginal women's imprisonment since the RCIADIC? Aside from the Social Justice Commissioner's ongoing examination of the escalating crisis of the over-representation of Aboriginal women, there has been little public attention given to this.[38]

III RCIADIC and the Right to Self-Determination

The RCIADIC put the right to self-determination at the forefront of its work, arguing that Aboriginal people must be consulted as a matter of urgency on law and policy decisions made about their lives: 'The thrust of this report is that elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands'.[39] But like all of the discourse surrounding self-determination this needed to be unpacked when reflecting on how RCIADIC dealt with Indigenous women.

Indigenous peoples around the world including Aboriginal and Torres Strait Islander peoples invoke the right to self-determination as the normative basis of their relationship with the state. This has been influenced by the development of international human rights law and Indigenous peoples' engagement with the United Nations. For most Indigenous peoples, the right to self-determination involves exercising control over their own communities and participating in decision-making processes and the design of policies and programs that affect their communities.[40] But how do we understand self-determination in the context of the unique needs and experiences of Aboriginal women, not only those shared with men and children? If we look to international law, it is silent on the position of Aboriginal women, as evidenced by international instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'),[41] and the *International Labour Organization Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* ('*ILO 169*'),[42] which appear to assume that the experiences of Indigenous men and women within the state are equivalent; and where mentioned it pre-empts their discrimination and subjection to violence. Next, if we look to the so-called self-determination era which ostensibly began in 1972 and lasted to 2005 with the repeal of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('*ATSIC Act*'), it is an era dominated by political debates about Aboriginal sovereignty, Aboriginal land rights and political representation.[43] During this period the developing norm of self-determination became state-centric – focused on the state – and less attention was paid to how the right to self-determination should be managed internally within communities, especially in regard to Aboriginal women and gender equality. A picture emerges of a notion of self-determination where women are lost within the male narrative that drives Indigenous politics. It raises important questions then about the capacity of Aboriginal women to enjoy self-determination when the content of Indigenous rights is influenced by a narrative which is calibrated according to the dominant idea of what it means to be Indigenous, and this invariably is male: the male prisoner, the male spiritual custodian of culture, the male victim of colonisation, the male perpetrator as victim.

While Aboriginal women have long been the subject of anthropological study, until recently little attention has been given to the political, economic and social aspirations of Aboriginal women.[44] Still, RCIADIC was established one year after the publication of Women's Business – a report that remains the first and only document to have been commissioned by the Commonwealth Government providing a comprehensive study of Aboriginal women's issues based on consultation with Aboriginal women.[45] It was intended to be a unique contribution to the Commonwealth Government's knowledge of the needs and views of Aboriginal women. It is a moving and comprehensive report that reveals the detail of the daily struggle of Aboriginal women. The authors of the report were Aboriginal women, Phyllis Daylight and Mary Johnstone. The report was ground-breaking in many ways. It found that separating issues of health, housing, education, employment, legal aid, childcare, land rights and culture was impossible because they were interlinked.[46] It also found Aboriginal women viewed themselves as a 'forgotten group' who despaired for the future of their children and felt that they had no control over their lives.[47] And the report revealed for the first time

the profound amount of stress Aboriginal women were enduring within communities:

> Women ensure that clothes, food and sleeping arrangements are provided for all the family members residing with them. Stress and tension are ever present because the struggle is accompanied by low incomes, little education or training, and unemployment. Drug and alcohol abuse, poor health and early deaths are all too often the result for those who cannot cope with the continual pressure which affects all members of the family.[48]

The report confirmed that Aboriginal families revolve around Aboriginal women and 'depend upon them to counter outside influences and maintain the strength and togetherness of their families'.[49] Indeed it had been the case that, while men were acting out the trauma of colonisation through drinking and anti-social behaviour, Aboriginal women's role as the centre of families, of communities and of culture had become even more critical. In this way women were 'heavily relied upon for the continuation of Aboriginal values and practices within their family', placing an enormous burden on Aboriginal women who were also dealing with their own trauma.[50] As the report revealed, the issues Aboriginal women have had to traverse in looking after the wellbeing of their communities, families and selves are diverse. Yet the report was not cross-referenced once.

The state, and indeed Aboriginal organisations themselves, often make mistaken assumptions about the shared experiences of Indigenous men and women within the state. And because of this, the political, economic and social aspirations of Aboriginal women lack precision or definition or the nuance necessary to match the unique challenges they face as women. In the case of self-determination as practiced by and envisioned in the RCIADIC's own work, the 'self' was male. Whether 'unintentional' or not, the RCIADIC was, after all, simply following the state convention of the time and, arguably, Indigenous convention of the time, when it came to the character of self-determination.

IV Did Women Fare Better During Colonisation?

The RCIADIC report was a confirmation of an unquestioned and untested assumption that men have suffered more than women under colonial and post-colonial regimes. According to Marchetti the report reflected the narrative that in the post-colonial era Indigenous women were 'in a better position than Indigenous males'.[51] This view has become consolidated in the narrative of the indigenous political domain. Yet there is no evidence at all to suggest that either sex fared worse than the other as a result of colonisation. Historian Raymond Evans challenges the narrative that women have fared better under colonisation:

> colonialism represented a process of severe loss rather than substantive gain for most Aboriginal women: that the traumas of capture, rape, prostitution, concubinage, venereal disease, institutionalisation and the production (and often forcible removal) of so-called 'half-caste' children substantially outweighed any putative benefits, in relation to promises of European reciprocation, payment for services rendered or better accommodation and survival conditions, provided closer to the rumpled beds of white men. Even without factoring in the many other difficult labour roles, largely in the domestic service arena, which these women were required to perform for little reward, or the generally denigratory way they continued to be regarded and treated in white society, it seems clear that their lot remained an extremely deprived and perilous one.[52]

Of Aboriginal women today, he says that their stoical cultural survival in the face of all of these 'dehumanising' experiences, is all the more remarkable when the 'full quotient of their lengthy endurance under the rigours of colonialism is considered'.[53] Marcia Langton also problematises the dominance of the 'women fared better' narrative by arguing that it is used to 'preserve male dominance in ideology, in structures and relationships'.[54] Langton argues that ultimately 'anomie, poverty and the rigours of the struggle to survive, allow Aboriginal men to use force, arbitrarily, to inhibit and terrorise women, and to cast them as whipping posts for their frustrations'.[55]

The impact of colonisation upon men cannot be compared with the impact of colonisation upon women. The assertion by men that women fared better because they were shielded from the impact of colonisation in their roles as mothers, carers and/or domestic servants is coloured by the fact that domestic work is not afforded the same value as men's work. Caring, nurturing and serving, conventionally female functions are presented as less important than the role of Aboriginal men. Where this devaluing occurs it can be viewed as an inevitable consequence of the influence of the dominant patriarchal society upon Indigenous communities.[56] Scutt has observed that:

> in the dominant culture, white women are unlikely to be seen … as 'landowners', 'business leaders', bearers of (worth-while and significant) traditions … It is therefore hardly surprising if Aboriginal women's views and realities are less likely to be taken into account.[57]

This narrative fails to appreciate the different experiences of men and women today. It is not useful to compare the experiences of Aboriginal men and women. By whose standards should such comparisons be judged? In the past some Aboriginal women have agreed that colonisation has impacted upon men more severely than women because they had 'controlled the society, had been the chief sacred and political figures' and therefore had 'further to fall'.[58] (Although this reveals an inconsistency with the idea that Aboriginal women were equal but separate – if this were the case then surely Aboriginal women would have just as far to fall as a result of colonisation.)

Another example of its contemporary use is a public apology issued by Aboriginal men following the intense media scrutiny of violence in Aboriginal communities as a result of the Northern Territory Emergency Response ('NTER') in 2007. Aboriginal men met in Alice Springs and issued a public apology to Aboriginal women and children for the violence men have perpetrated against them.[59] The apology included a reminder of the impact of colonisation on Aboriginal male behaviours and reinforced the standard narrative about how Aboriginal men have suffered greater than Aboriginal women:

> When you add to this the rapid changes in the role of males within that colonising society and the consequent dislocation of Aboriginal males and their struggle to define new self-images, it is no wonder that Aboriginal males may struggle to make sense of the contemporary world. And if those critical views of us as Aboriginal males are expressed with no effort to understand our cultural values, or the pressures caused by the colonial relationships and contemporary social transformations, then we become alienated from this society. This alienation is at the core of the struggle for male health and wellbeing, as it acts to debase men, stripping away their dignity and the meaning in their lives.[60]

A corollary to this narrative is the enduring notion that Aboriginal women are doing better today than Aboriginal men because of the mode of colonisation. As already discussed, in the RCIADIC it was suggested that, for Aboriginal women, 'the bearing or raising of children does provide a stable basis from which entry into adulthood and the negotiation of status may be undertaken'.[61] RCIADIC argued that Aboriginal women benefited because their historical and contemporary roles in the private sphere concerned provision of food, nurturing and looking after family, in contrast to men, whose roles and status were the most 'under attack in the transformation to a new order'.[62] Indeed the high rates of young Indigenous pregnancy have been deemed as 'protective' of Aboriginal women in that pregnancy is said to provide 'economic resources of maternal benefits denied to males' as well as 'access to motherhood, an ego-ideal valued by the majority culture'.[63] Thus Paul Memmott et al, in *Violence in Indigenous Communities*, assert that, in contrast to men's declining status, the status of women in post-traditional communities is increasing.[64] In particular the authors refer to the ability of women to receive welfare:

> In some cases, men's helplessness is perpetuated by their reliance on women for access into a cash economy. In the 1970s, Indigenous women as mothers and invalids were the first to receive welfare benefits and thus brought significant economic resources into their communities. For Indigenous men dispossessed of their own roles … access to and reliance on women continues to be of significant importance.[65]

Thus Aboriginal women have been shielded from the ravages of colonisation because of their role as mothers and nurturers. The introduction of social security meant that they had more independence whereas Aboriginal men were diminished because they had to rely on Aboriginal women for income support. This reliance on Aboriginal women is viewed in the literature as deleterious to Aboriginal men's self-esteem.[66] Of course, less attention is given to how this 'reliance on women' has transformed into a situation of intimidation, harassment and often violence against Aboriginal women, known as 'humbugging'.[67] Humbugging – which means putting pressure on relatives or friends for money in Aboriginal Australian patois – has been categorised by some senior Aboriginal women as another form of 'family' violence with its genesis in colonisation.[68] The problem of humbugging identified by the *Little Children Are Sacred* report was one of the reasons given by former Prime Minister John Howard for the welfare quarantining that was introduced with the NTER in 2007.[69] He gave the following example: a responsible carer for her grandchild faces intimidation and threats of violence from intoxicated young men if she does not go to an automatic teller and hand over money.[70] Although

generosity and sharing is recognised as being integral to Aboriginal culture, the proclivity toward humbugging in both urban and remote Aboriginal communities, for example as identified in the *Little Children Are Sacred* report, has been detrimental to Aboriginal women and is known to result in violence against Aboriginal women, especially Aboriginal grandmothers.[71]

V Conclusion

One of RCIADIC's legacies is to give prominence to the image of the Aboriginal prisoner as male when today the prison population is increasingly female. This puts stress on communities because of the responsibilities women have in maintaining not only their own families but also entire communities. If mothers are incarcerated, then it is grandmothers who are looking after the children. The RCIADIC has had far reaching influence in the criminal justice system and the Aboriginal political domain. Its failure to adequately consider the challenges of Aboriginal women has been well-rehearsed as has the fierce defence of the work of RCIADIC. The challenge for the Aboriginal community and Aboriginal women is to conceive of more effective ways to unhitch Aboriginal women's experiences and issues from the collective identity in a way that does not undermine self-determination as a collective right but also in a way that does not threaten men. It is true that many Aboriginal women's beliefs and lives are aligned with Aboriginal men. Still, it may be that adopting a more nuanced and textured approach to understanding Aboriginal disadvantage likely to elicit results than the status quo.

The criticism of RCIADIC's approach to gender and Marchetti's interviews with RCIADIC employees reminds me of what Amartya Sen has written about in regard to the tendency of groups to muzzle 'many-sided human beings into one dimension' through the 'ascription of singular identities'.[72] The problem with the reductionist approach is that it disregards the importance of autonomy. It may be that, in prescribing a universal project in which Indigenous women's aims and objectives are aligned automatically with men's, as that which occurred during the RCIADIC, a 'neglect of autonomy' is socialised.[73] As Sen argues, communitarian thinkers tend to argue a dominant communal identity as 'only a matter of self-realization, not of choice'.[74] This is salient when reflecting on the legacy of the RCIADIC.

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4 Ibid.
5 Ibid vol 1, 6 [1.3.2].
6 Ibid vol 1, 3 [1.2.3].
7 Ibid.
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17 Marchetti, *Missing Subjects*, above n 8, 215.
18 Marchetti, above n 14, 7.
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25 Elena Marchetti, 'Intersectional Race and Gender Analyses: Why

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27 Ibid 167.

28 Ibid 161.

29 Ibid 162.

30 Ibid.

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33 Ibid.

34 Marchetti, *Women and Gender in the Royal Commission*, above n 8, 210.

35 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2008) 304; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, Human Rights and Equal Opportunity Commission (2005) 15.

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37 Ibid 17. These 'other' crimes include: social security fraud, procedures offences, unlawful possession of weapons, driving-related offences and drug offences.

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63 E M Hunter, 'A Question of Power: Contemporary Self-Mutilation Among Aborigines in the Kimberley' (1990) 25 *Australian Journal of Social Issues* 261, 272.

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65 Ibid. See also Hunter, above n 46, 272.

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67 Simon Kearney, 'Bar Humbug' *The Australian* (online), 10 August 2007 <http://www.theaustralian.news.com.au/story/0,25197,22217832-28737,00.html>.

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69 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle – 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of*

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70 John Howard, cited in Kearney, above n 50.

71 Blagg, above n 68; *Little Children Are Sacred*, above n 69, 201.

72 Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Allen Lane, 2006) 8.

73 Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 38.

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POLICE OFFICERS' EXPERIENCE OF INDIGENOUS 'CAPACITY'*

Margaret Mitchell** and Tim Rowse***

I Introduction

What do the police think they are doing with or to Indigenous Australians?

We decided to ask them. The paper examines police officers' beliefs and perceptions about Indigenous 'self-determination' and 'capacity' and the implications of these concepts for their work in Indigenous communities. Before describing interviews conducted in the Kimberley region of Western Australia in late 2009, we will provide context for the concepts of 'self determination' and 'capacity' by reviewing relevant parts of two major inquiries influential on the way that Western Australia Police ('WAPol') intends to work with Indigenous communities. The first is the Royal Commission into Aboriginal Deaths in Custody, which issued its *National Report* in 1991, and the second the July 2002 report by the Gordon Inquiry.[1] Using our interview material, we are able to present, from the practitioners' points of view, the implications for police work of some of the concepts issuing from these inquiries.

II The Royal Commission's Policing Recommendations

In 1991 the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') endorsed the principle of 'self-determination'. Recommendation 188 was:

> 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.[2]

Applying this principle to policing services, recommendation 88 outlined four issues to be considered in negotiating a new congruence between the service that police were performing and the policing services that Aboriginal communities desired. These issues were: whether 'there is sufficient emphasis on community policing'; whether 'there is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town'; whether '[t]he policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities'; and whether '[t]here is sufficient emphasis on crime prevention and liaison work and training directed to such work.'[3]

The passage in which recommendation 88 occurred did not include a definition of 'community policing' although it is a common term in contemporary policing. Throughout the 1980s, in an attempt to provide the language and concepts to 'demilitarise' and 'professionalise' policing, criminologists and sociologists sought to define the main characteristics of 'community policing'. Skolnick and Bayley's fundamental definition of community policing as 'police-community reciprocity' is useful, explaining that reciprocity 'means that police must genuinely feel, and genuinely communicate a feeling that the public they serve has something to contribute' to policing.[4] Further the 'new professionalism implies that the police serve, learn from and are accountable to the community'.[5] Cunneen has acknowledged that 'community policing' is 'difficult to define'.[6] For Cunneen 'community policing' implies 'greater attention to crime prevention and multi-agency approaches to problem solving, as

well as decentralisation and devolution of power.'[7] Thus 'community policing' covers both the first and the fourth issues mentioned in recommendation 88, and some process of liaison, engagement or consultation between 'police' and 'community' is implied. In this way, 'community policing' would seem to be a particular application of what the Royal Commission called 'self-determination'.

How are the other two issues mentioned in recommendation 88 – over-policing and attention to the needs of women in remote Aboriginal communities – related to 'self-determination'? The concept 'over-policing' was prominent both in the campaign for the government to mount a Royal Commission and in the findings of the Royal Commission itself. Cunneen has traced the currency of this concept back to articles written by such legally-trained Aborigines as Pat O'Shane and Paul Coe.[8] Cunneen urged that we take the concept seriously because it 'expresses something simply and directly about the way Aboriginal people experience the criminal justice system'.[9]

However, Cunneen also warned that if 'over-policing' were operationally defined simply in terms of police/population ratios the concept would effectively desensitise policy-makers to the local nuances of police-Aboriginal relationships.[10] He detected this simplification in some of the work of the Royal Commission.[11] His discussion of the concept 'over-policing' thus laid bare a possible tension within Aboriginal and critical criminological discourse: to the extent that 'over-policing' was understood in terms of a statistical ratio, the solutions to 'over-policing' could be presented also in statistical terms; to formulate a norm in this way would be the basis of a new kind of deafness and blindness to local conditions – including to the views and wishes expressed by local Aboriginal people.

It follows that the way we understand and use the concept 'over-policing' will have an impact on the way we consider whether '[t]he policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities'.[12] As our close examination of the Royal Commission's 88th recommendation shows, the Commissioners were not being so crude as to assume that the quality of policing could be captured in a single concept ('over-policing') statistically understood. Like Cunneen in his 1992 paper, the Commissioners entertained criteria of policing that were qualitative; the words 'adequate and appropriate' allowed for the possibility that Aboriginal communities might even need and want *more* police and *different* kinds of policing.

The Royal Commission was indeed aware of the possibility that some Aboriginal people would consider themselves to be 'under-policed': 'there is a very widespread perception by Aboriginal women of the indifference of police to acts of violence against them.'[13]

To refer in qualitative terms to policing implies judgment, not just measurement, and the necessity for judgment raises the question of 'whose judgment?' The Royal Commission had an answer to this question, following the principle of 'self determination' enunciated in ecommendation 188. Recommendation 214 referred to 'the involvement of Aboriginal communities, organisations and groups in devising appropriate procedures for the sensitive policing of public and private locations where it is known that substantial numbers of Aboriginal people gather or live'.[14] As well, recommendation 215 advocated consultation and negotiation with local Aboriginal organisations: 'Such negotiations must be with representative community organisations, not Aboriginal people selected by Police, and must be frank and open, and with a willingness to discuss issues notwithstanding the absence of formal complaints.'[15] Clearly, for the Commissioners, to improve the quality of policing required attention to two relationships: between the police (at local level and above) and Aborigines, and among Aborigines themselves (to assure that those speaking for them were 'representative').

III Capacity: A Term of Disputed Meaning

A 2001 coronial inquiry into the death of an Aboriginal teenage girl in the Swan Valley Nyoongah community criticised the WAPol investigation of the death. This triggered the Gordon Inquiry and the July 2002 report. While many other deficiencies in servicing figured in the Gordon Report's account of the genesis of such risks to children – inadequate housing, education and training, employment services, for example – the problem of child security was conceived to include the problem of surveillance. Some of the Gordon Report's recommendations were accordingly directed to extending police and child welfare services to under-serviced regions and to enabling information to be shared between police and child protection workers. The extension of police and child protection services into previously

under-serviced regions of Western Australia was among the Western Australian government's many constructive responses to the 2002 Gordon Inquiry, the practical outcome of which was the implementation of 'Multi-Functional Police Facilities' (MFPFs) in Aboriginal communities in the Kimberley. This brought police officers and child protection officers together in one prominent and accessible building, in several previously under-policed remote regions of the State. The Western Australia Police had conceded in its official response to the Gordon recommendations that policing in remote regions 'is still insufficient to ensure a safe community environment' and that more was needed than 'patrol activities moving through the communities or responding to requests for assistance'.[16] The challenges of better detecting children at risk, and then protecting them, loomed large in the WAPol response to the Gordon Report and appeared to colour the way the WAPol leadership used the term 'capacity'.

'Capacity' has become a central term in public policy directed at Indigenous Australians; yet its operational meaning is far from being settled. One sense of Aboriginal 'capacity' emerged when the WAPol committed to reducing 'the level of [Aborigines'] distrust' and to encouraging Aborigines to report offences, including misconduct by police themselves. The WAPol referred to this as 'the capacity or inability for Aboriginal people to make complaints.'[17] However, the WAPol response to other recommendations conveyed ambivalence in the thinking about the more formal, organised 'capacities' of Aboriginal communities. For example, when the Gordon Inquiry referred favourably in recommendation 48 to Memoranda of Understanding ('MOUs') with Aboriginal communities, the WAPol requested that 'additional consideration be given to MOUs … due to considerations concerning the total communities [sic] understanding of the MOUs and appropriate identified community authorities' – hinting that it entertained doubts that MOUs were understood and supported by all who were nominally committed to them.[18] WAPol argued that a MOU covering 'access and service delivery to communities creates a precedent, which has the potential to further empower certain people in the community whilst restricting access to support and justice to others'. With some badly led communities – such as the Swan Valley Nyoongah Community – the WAPol did not wish to have a MOU at all, arguing that 'the people in positions of power are alleged to be or are implicated in abuses' and so can 'obscure access to investigation'.[19]

The WAPol voiced further misgivings about received meanings of 'capacity' in response to Gordon's recommendation 52 in which Gordon endorsed 'capacity building in Aboriginal Communities' and supported 'programs … which foster capacity building.' This recommendation elicited one of the WAPol's longer and more carefully argued responses:

> It has been accepted that in order for Aboriginal communities to become sustainable and reach their full capabilities, the basics for their survival must first exist. These include food, water, shelter and security. People need to feel secure and safe in their environment in order to achieve their full potential. This has been borne out recently by calls from several of the larger remote Aboriginal communities for a permanent policing presence. However, not only is it essential for community members to attain a level of security, but it has also become a more pressing concern for support agency staff in recent times. Health and Education workers have left Aboriginal communities following threats to their safety. This has meant that these essential services have become unavailable or, at least, less accessible in the immediate to short term. The provision of more appropriate policing services will enable a level of security to exist which, in turn, will help facilitate healthy community growth and development. Importantly, if these communities are to be brought to the threshold of sustainability, it will be necessary for not only the Police Service, but also Government generally, to ensure that the basic framework of services are in place. *For it is through the convergence of these basic services with broader capacity building strategies that any real shift towards sustainability will be achieved.* Given the current focus on sustainability and capacity building across government, it is recommended that *a consistent and appropriate interpretation of these terms* be determined and applied within the Government framework.[20]

The WAPol, in this passage, treated Aboriginal 'capacity' as a dependent variable, its existence contingent on various actions that the State must take as provider of other essential services - in particular policing services. The WAPol also recognised – perceptively, we would suggest – that 'capacity' has become a policy keyword whose operational meanings are in need of clarification.

This tendency for the WAPol response to Gordon to refer to government action when referring to the building of Aboriginal community capacity was evident also when

Gordon's mention of 'capacity' triggered WAPol to extol inter-agency collaboration. The WAPol expressed enthusiasm for more collaboration, including information sharing, between State agencies, particularly between agencies relevant to child protection such as the WA Department for Child Protection and the WA Department of Health. When Gordon's recommendation 27 mentioned 'building capacities and strengths of individuals, families and communities', the WAPol response referred to relationships among agencies of the State ('a concerted collaborative approach with all Agencies') rather than to the building of relationships between the State and Aboriginal groups and organisations.[21]

Undoubtedly, the problems of family violence and child security are exacerbated by weaknesses in the provision of State services and in State surveillance; so it is not surprising that when Gordon referred to 'capacity-building', the WAPol response dwelled on three factors affecting surveillance: Aborigines' willingness to report breaches or threats to community safety; the security of State employees servicing remote communities; and information sharing between State agencies. While at times talking around the problem of Aboriginal *political* capacity, the WAPol saw the potential value of negotiating with an Aboriginal collective agent of some kind. The WAPol professed 'a common sense approach that supports whatever successful local mechanism is in place and which will result in the most effective and efficient outcome. In this sense it is the policy of the Police Service to support local initiatives and to be guided by the local demands.'[22]

Our examination of the 'high level' of Western Australian police policy thus points to both a tendency to treat Aboriginal capacity as a contingent effect of public agency actions and a wariness about assuming the integrity and effectiveness of community representative bodies. What did the men and women working on the ground think?

IV The Interviews with Police Officers

We conducted interviews with 23 police working across 10 communities and towns in the Kimberley region of Western Australia in late 2009; our aim was to understand how the concepts discussed in these significant inquiries are experienced and applied. Included in the sample were officers at both managerial and 'front-line' level. Ethics permission was obtained from Western Australia Police to conduct interviews with officers working in remote Indigenous communities and their managers, and informed consent was obtained from each individual interviewed. No individual who was approached declined to be interviewed. Interviewees were enthusiastic, and the interviews lasted 35–90 minutes. In only one police office did the officer in charge not allow our interviews. We engaged an independent commercial transcription company, and we drew themes from the transcripts; the material used in this paper is verbatim from the transcripts.

Our semi-structured interview included sections on: officer's role; their Indigenous clients; policies and practices; the effect of large scale government programs on their work; and inter-agency work. Questions and prompts sought observations on: prescribed agency 'outcome measures' with reference to service delivery in remote areas; government inter-agency work; the indigenous client, 'culture' and adjustments to practice; problems in communities and solutions provided by services; discussion of agency's policy approach; and reflections on role and 'purpose'. The interview prompts reflected the aims of the study while encouraging free talk, and we encouraged interviewees fully to explore the themes about which they wished to speak.

Our choice of methodology and participants was based on Lipsky's perception that the 'the decisions of street level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively become the public policies they carry out.'[23] The character of any service, initiative or policy depends partly on how it is implemented by the individual service provider. Service providers interact daily with community members, and their perspectives and practices are informed and potentially adapted and shaped by day-to-day experiences. In the present sample, police officers are the mediators between police policy and the work that is actually performed in remote Indigenous communities.

Our approach can be situated within a small number of studies that have examined the self-reported experiences of service providers working with remote Australian Indigenous communities. For example, Finlayson interviewed non-Indigenous service providers in a remote northern Queensland Aboriginal Community. Culturally estranged from Aboriginal service users, they saw Aborigines as incorrigibly dependent. Finlayson made recommendations about recruitment, training and performance measurement.[24] In a participant-observation study Lea has explored the

culture of a Northern Territory bureaucracy whose officials, while responsible for improving Indigenous health, are constantly aware of their failure. In order to keep going, she found, officials engaged in work practices that collectively produced and validated certain ways of characterising themselves and the Aboriginal service users.[25]

That their own work generates ways for police to understand themselves and their clients identifies the topic of our research: police working culture. Cunneen and McDonald pointed to police 'ways of seeing' as a crucial topic when they evaluated, in 1997, government responses to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Cunneen and McDonald spelled out the change in police ways of seeing that acceptance of the recommendations had implied.

> For many police at the local level [the development of community policing which involves Aboriginal and Torres Strait Islander people] involves a transformation from seeing Aboriginal and Torres Strait Islander people as a problem to be policed, to seeing Aboriginal and Torres Strait Islander people as important and valued members of the broader society who have a role and a desire to formulate effective law and order policies for their communities.[26]

At the time, they expressed disappointment in the slow pace of this change in police outlook.

> There has been inadequate regard to a key recommendation on the need for negotiation and self-determination in relation to the design and delivery of services. A failure to comprehend the centrality of this recommendation [R188] has negatively impacted on the implementation of a range of other recommendations.[27]

The centrality of 'Aboriginal capacity' to contemporary policing policy should be obvious from our introductory remarks about the recommendations of the RCIADIC and the Western Australia Police response to the Gordon Inquiry. Drawing on interviews with twenty-three police officers in the Kimberley conducted in 2009, we present police understandings of 'Aboriginal capacity'. For the shift in police outlook – hopefully evoked by Cunneen and McDonald in 1997 – to occur, the practical experience of police must generate a conviction that Aboriginal people have political capacity and that the Aboriginal exercise of that capacity is congruent with and complementary to mandated objectives of police work. In analysing our interview data, we inquire into the possibility and difficulties of incorporating the concepts of 'self-determination' and 'Indigenous capacity' within policing practice – that is, the possibility of policing in which Aboriginal communities are taken seriously as the interlocutors of police in formulating and executing 'effective law and order policies for their communities'. To the extent that police were not *experiencing for themselves* the helpful exercise of Aboriginal political capacity, then neither training in 'cultural respect' nor directives from superior officers will establish 'Aboriginal capacity' as a practical concept.

V What Police Told Us

In their interviews, Kimberley police pointed to much that is positive and improving in Aboriginal communities, but also to the factors inhibiting Aboriginal capacity to engage fully with policing services and to be taken seriously as partners in formulating and executing effective law and order policies for their communities. Three kinds of inhibitors featured in what they said: the accessibility of alcohol, dependence on service providers and particular aspects of Aboriginal political culture itself.

A Accessibility of Alcohol as Inhibitor

One interviewee said:

> I have a huge amount of optimism about their future. But we really need to be looking at the alcohol issue. That is central to the whole thing. And we can run around and treat all the symptoms we want about support services and having more DCP [Department for Child Protection] and having all this. It's ridiculous. We need to treat the cause not the symptoms. (Interviewee 18)

Another said:

> you need someone in the community that's going to lead them and show them how to do it … if you get rid of the alcohol problem I think that everything else will flow on from that. (24)

In the context of discussing changes in the approach of the police to working within Indigenous communities, a further officer commented on the restrictions recently applied to the sale and availability of alcohol in the Kimberley; in his view this had brought about radical change.

> As I said to you, I was a constable 25 years ago in [name of community] where I saw a high level of social dysfunction and intoxication and violence amongst the Indigenous population. I suppose the only thing I can say now, coming back to the Kimberley 25 years later, is in many ways what's changed. In my view we still see unacceptably high levels of violence, and to me it's all alcohol-fuelled. Now the only thing that has really changed my perspective is the introduction of liquor restrictions into the Fitzroy Valley and now Halls Creek. They have absolutely altered my perspective on how we should be managing these communities … But there's been remarkable turnaround in those communities with liquor restrictions compared to everywhere else. (1)

B Dependency as Inhibitor

Interviewees obtained a great deal of satisfaction from fully participating in the community and mixing with their communities in a friendly, informal way.

> It's just living here within the community and being part of the community. Then being accepted by the community by your interaction. Don't get me wrong. If I came to work, all I did was arrest people, come to the office, did my paperwork and went home, I wouldn't be accepted. But because I'm not afraid to go out and walk around off duty with my dogs and involve myself with the community, that respect then works twofold. Then when I go to my job, whether they're drunk or they're sober, I'm accepted. (12)

> … you can't just come up here and do your eight hours a day policing and then go home, 'cause it just doesn't work. You've got to be part of that community, whether it be sporting or some other community groups. You've got to get in and mix. (21)

Others saw initiating community sport and social activities as a central part of their role in remote communities; however, when being part of the community includes doing things for the locals, there is a perceived danger that community members will take police efforts for granted and become dependent. As one interviewee recalled of his activities with the children in the community:

> historically it's been the police turn up, set everything up, play the music that they want, they walk out the door, we clean up and we do everything there. So it was a case of I'll help you and do everything I can but I'm not going to do everything from picking up the papers to plugging in the leads to playing the music, which I've done a hundred times for them. My little bit of trying to say well you can actually do it yourself with some guidance, and they pulled it off perfectly. The mentality there was that you're the government, you're getting paid, you do it. (28)

Another spoke of her affection for the children in one community, and then said:

> but if I were to give them, because I feel sorry for them, you know I will give them a packet of crackers one day and the following day they come to the fence and they won't be grateful for what you gave them yesterday they are just annoyed that you don't have any more for them today. I think we keep giving them everything in services and us going out there and things that we do for them as well as their free health so there is no motivation for that generation to like you say, to have any level of self determination. (29)

New approaches to policing may sometimes experiment with models of 'community' responsiveness and involvement. The results of such an exercise disappointed one interviewee.

> We had a march against domestic violence one year, and that was pretty good. It had just about the whole community. The kids made banners at the school, and we marched from the big crop down to the footy oval. But we did get community involvement. But when like you say, you try and get community, to try and put things together, it's hard for them. *Facilitator: Right. Why do you think that is?* I don't know, eh, I really don't know. You might get the odd one or two, but it's just hard to try and get them actually involved with a lot of the things that are happening. We had a family fun day out at the oval again, you know, same as the domestic violence. That day was huge, but just only about three weeks ago we had that family fun day, and you might get all the kids down there, but you don't hardly see the parents. *Facilitator: Really?* Mmm. Parents will say, that's kids' thing, because it's alcohol and drug-free down there. No alcohol allowed down there. You'll see some families there with their kids, which is good, but not the ones that we spoke about earlier, you know, you see their kids down there, but the parents are up on the grass lawn or back home, gambling or doing something. *Facilitator: Do you find it frustrating that families don't get more involved?* I do, I do find it. (30)

The problem of how to encourage participation while 'modelling' how to set up sports or recreational activities is a significant issue for police working with Indigenous communities. To sympathise with the underpinning ideas of self-determination and capacity building does not answer for police the question of how much they need to do to build up the involvement of residents: 'the perception from some community people is that you're the government, why don't you do things like that, you're getting paid, so it's you that should be doing that.'(28)

A wider context for this perception of dependency may be the concept '*welfare* dependency', although only one of our interviewees actually used this phrase.

> There needs to be an incentive to work, and if we're simply going to start, keep throwing money at them and say: 'Here's your money, here's your money, here's your money.' They don't need to work. They get enough money coming in that they don't need to work. So they're becoming too welfare-dependent and they're too used to people doing everything for them. And every time they want something, they just ask for it and they get it, without actually getting off their butts and doing the work themselves. (31)

C Aspects of Aboriginal Political Culture as Inhibitor

Some see tendencies within Aboriginal culture that inhibit their capacity to represent themselves to outsiders. Several interviewees mentioned the notion of a community factionalised by family solidarities as an inhibitor to implementing the Gordon Recommendations.

> But the issue we have here in the community is we've got five family groups. So depending on what family group you're from, you may not get on with another family group. It's not so cut and fine lines drawn in the sand as such as that, but to a degree it can be that where well, this group doesn't get on with that group. So even though [name] might be a member of group four, because group two won't speak to her, even though she's the role of domestic violence liaison, well I'm not going to go and speak to her because she's from such and such a family mob. (12)

Another interviewee referred to the vulnerability of community leaders to criticism because of the politics of family patronage.

> But my perception of some of those communities, if someone from that community is operating that level, there's their own politics in their own pecking order as well. There are particular family members in control of money and if they're perceived to be perhaps assisting their own family group because they're maintaining the road near their premises more so than the one on the other side of the community and it's perceived that that person's doing it not right, then there's automatic tension and that becomes, from our perspective, family feuding and it becomes a bit of a Ben Hur. (28)

> A lot of the different communities have got different language groups, so I try and get some idea on who those language groups are, who are the main ones and who aren't, that sort of thing. But from the policing side of things, just be careful, just watch your back and – yeah, it sometimes can be fairly daunting, fairly difficult. (33)

Internal politics were also seen as an inhibitor in implementing the Recommendations, for example, the setting up of the Multi-Functional Police Facilities in one community:

> We sat down with them and we said – it was a little bit icy because I don't suppose they particularly knew what we were there for. We sat down with them and we said look, we're here to talk about putting a police complex in [name of town]. And you could almost see the weight off of these women's shoulders, whew, melt away. Now unfortunately because of internal politics with one group who were talking with – this power base strength that unfortunately happens within indigenous environments, whether it be family based or agency based or simply fighting against one another. It's taken over 2 years to get to a sign-off. Now those people have been waiting for a police complex. We're ready to go. We're ready to put people in there but we're still waiting for sign-off by these groups. That is extremely frustrating. Clearly these communities want it but there are others that continually throw up barriers to keep police out … (6)

VI The Individual Basis of Aboriginal 'Capacity'

Notwithstanding the currency of cultural models that imply political incapacity, most of our interviewees had experienced the political capacities of Aboriginal communities. This echoes the point made by WAPol in their

response to recommendation 70 of the Gordon Inquiry that police would be flexible in their engagement and would support and use 'whatever successful local mechanism is in place and which will result in the most effective and efficient outcome'.[28]

One interviewee pointed out the value of police staff specifically deployed to engage with the community:

> They [the Aboriginal Police Liaison Officer positions being phased out by WAPol] who haven't transitioned, they're allowed to stay in their role until they retire or resign. So when I got here they were used more for enforcement sort of purposes. And the community has indicated quite strongly that they like the community intervention and liaison community policing aspects of what [names of APLOs] did from time to time and they wanted that strengthened. So effectively they have now been fully deployed into liaison, intervention and community policing roles. And that was a fairly easy fix, you know, that was in response to what the community wanted. (25)

Asked how the police had ascertained this community's wishes, the interviewee replied 'just talking':

> I think in the Indigenous community if you bring everyone together in one big forum and sit down there's a lot of, until people get to know you, a lot of reluctance with opening up and discussing issues that are concerning them. So my view is that's a pointless exercise. If you go to the individual family groups, you know, whether it's the key leaders or whether it's informal leaders like some of the young bucks in amongst these groups, they'll tell you what they think once they get to know you once they decide that you're okay. (25)

Having an 'educated person' in authority made a difference, according to one interviewee:

> these communities rely on either funding or some sort of body to be providing assistance and there needs to be people appropriately qualified to manage that. Your studies, no doubt, will reveal that the more successful Aboriginal communities are the ones that are being fairly well managed particularly with assistance of, I guess, the educated person. This is only what I've seen, it's only in a small area, but the ones that I've seen that don't have that sort of, I guess, educational assistance find it very difficult and come unstuck in more ways than one. (28)

Another interviewee recalled his blunt words of advice to a person who, in the interviewee's opinion, could be a leader.

> One woman I actually said to her that she was a vindictive bitch and I said – she looked at me and I said the thing is that every time you open your mouth it's poison; if you shut your mouth and listen to the people around you and then put forward a perspective on a balance you could be a very strong community leader because you are a powerful, confident person. But that's the issue is that they get [lost]. Every time she opened her trap people turned away and don't listen and if she shuts up they go back to their business. So if you can get people with that passion and that strength but with a bit more balance to their view of life they can achieve a lot. (6)

In discussing the governance structures with whom the police could work, other interviewees emphasised the Council.

> I don't know of any community where that council is not the central point that when they're consulting with particular issues. It could be the wearing of seatbelt issues, it could be going to school issues. Often it's all into that council first … The council virtually drives everything that happens in that community. If the council is not on board through – you know, if you can't negotiate their cooperation well it can really affect things. (15)

One interviewee explained how he was building up 'rapport' with the council and Chief Executive Officer ('CEO') of the community to which he had recently been transferred.

> Yeah, just with regular phone calls and meetings with the CEO to start with, and then being invited to go along to the council meeting and give them an idea of your agenda in the community and what you could for them and what you expected from the council. But mostly sort of just try to cut down some of those barriers. (33)

Another recalled working effectively with a Council by helping it to use its by-law powers to expel trouble-makers.

> Working closely with the council, developing the bylaws that if they weren't a traditional [language group] person, the council had the authority to remove them from the community. So anyone that was constantly belting up his missus or constantly breaching the by-laws by bringing alcohol into the community and all that, we'd approach the

> council and say look this person's been charged so many times over the last couple of months. We've got statements from people that he's bringing alcohol into the community. He's not a local person. If you want your community to stay sober and you want your people turning up to work in the morning, this bloke needs to go. Yep, no worries. The CEO will call a council meeting. This is the information that the police have got, blah blah blah. And someone will say oh yeah he was living next door to me, he kept us awake all last night with his parties. So they just draft a letter, the council signs it. The CEO calls me up, [name of interviewee], there's the letter. Go around to see him, mate you've got a couple of hours to get out of the community. If you come back you'll be charged with trespassing. (20)

As this interviewee elaborated his story, however, it became clear that his real ally had been a 'strong CEO'.

> The previous CEO that was at [community name] three years ago was just dominated by the council. The council just said to him we're doing this, we're doing that. Yep, alright. And it was just mayhem and anarchy in the town. They basically did what they wanted. They've got a new strong CEO now who's come over from the NT. And he's actually said no, you can't do this, you can't do that. (20)

For some, local political capacity varied with the quality of the CEO:

> and I have seen it happen in communities, where they become stagnated because of the pressures or the people that are the governors in your community as such, you know, your council and also your administration people, who your CEO is, if they have got good positive attitudes and they are involved in the community and getting people moving. Then you can have someone who comes and stagnates the system and all of a sudden they go back ten years and then they have got to turn around and actually try and move forward again. (11)

In short, a theme emerging from our interviews is the contingent variability of Aboriginal authority – the sheer chanciness, in police experience, of finding an effective individual and/or council in one's field of operations. One of the ways that police have learned to think about Aboriginal political capacity is that it rests on the shoulders of effective individuals. The supply of such effective individuals is not assured; it is subject to variation that is - if not completely random - beyond police prediction and control. In this experienced notion of Aboriginal capacity, the key concept is that such capacity occurs randomly; it is weakly determined, subject to chance variation and may not yet reside in the community members themselves, as the accounts of the role of CEOs attest.

VII The Capacity of Indigenous Women

In contrast to this individualist and indeterminate way of thinking about the possibility of Aboriginal capacity, there was among our interviewees an emergent experience of women's capacity that could be the basis of a more structural or sociological way of thinking about 'capacity'. Many of our interviewees were becoming aware of the awakening of female power. The instance informing this view was the prominence of women in the Fitzroy Futures Forum and in the local political agitation to ban the sale of take-away alcohol. Our interviewees were generally in favour of the liquor restrictions – some vehemently so – and in praising the local agitators they saluted strong women. Indeed, one interviewee admitted that until the mobilisation over the Fitzroy liquor restrictions, the latent political power of women had not been evident to him.

> I didn't know them from a bar of soap; I knew they existed in that they were a support group working within Fitzroy Crossing – who stood up and said, 'We've had enough of the grog'. And they took it and throttled it, both politically and vocally, and got government to sit up and look and say, Righto, we hear what you're saying, we'll put a liquor restriction into Fitzroy Crossing. And the consequence of that has been – my perception – the healing of that community literally. So the lesson for me was policies and inquiries and procedures that come out of centrally-based, both Perth and here, are absolutely worth diddlysquat if you're not aware of the fact that an obscure group of people within your own backyard have the ability to stand up and politically influence Parliament House in Perth. So I suppose that's the irony of what I'm saying. I'm so important sitting here managing volume crime; the reality was they've got a damn site more influence and impact than I could ever hope to have. So it was a very humbling lesson for me, to think, 'Well, there you go'. (5)

To the extent that the police understood that the success of their work in remote communities, after the Gordon Report, rested on improved surveillance of family violence and child

predation, they were attuned to the potential of women to effect change.

> For us to help support with domestic violence we have to show that we're prepared to stand on the front foot. Now if an Aboriginal woman came in with her head split open and was full of booze, many a times it was come back tomorrow and see us. Now that's not an approach that I promote or I expect my officers to take. Whilst she is drunk she is still capable of being assaulted and brutalised by even another drunken person. Whilst we might go to all the effort and take a statement off her there and then and never see her again, at the very least we've got a complaint at the time of the offence, we provide medical support. But what that does I think is bit-by-bit-by-bit is build a platform where there is some confidence developing that we are prepared to stand up and support them. That then strengthens their resolve to then come and report those matters to us. (6)

One interviewee told how it had taken him 'about six months to gain the trust of the women':

> The women were being assaulted basically and nothing was happening. So I said look, if you're assaulted, you come and see me, I will do something. Then when I started arresting and charging a few of the people for assaulting their partners, word soon got around to the community that if you do get assaulted, go and see this bloke because he will do something. I was of the philosophy that you can't just go in and say you've got to do this, this and this. Actions speak a lot louder than words. So actually go in there, follow up on what you've said. Gain their trust by saying yes this is what I'm going to do, then you do it. (20)

Another interviewee from a different community warned that it could take time for women to lose their fear.

> But domestic violence is a sort of thing that is probably widely accepted still and I think a lot of that goes unreported, perhaps not so much the children but … (*Facilitator: Do you think people are more vigilant generally?*) I think they are on notice now in terms of the children and what is appropriate and what is not. I think certainly there are women out there who are petrified of their partners. (29)

One officer reported what he saw as a change in 'the older women in the community'

> because I think they may have been through knowing they have got that little bit of security in the community. They can come to someone, you know, especially if they have had family violence issues in the past and especially if you respond in the right way to it that if they ring or make contact you will go and help sort the problem out whereas before they have had to do it in family and a lot of things get shoved under the carpet because of those issues. So there are the more mature women who have had problems. (11)

An interviewee told a story of cooperation with women in the community where he was posted.

> Some of the women there were getting annoyed with the amount of grog coming into their houses and the anti-social behaviour from the relatives coming to the door with grog and then fighting. They approached the police and they were asked to try and do something to help them try and fight what was going on. We said well, what about a sign – you know, as an example – and what would you like to put on the sign? So as a result of a number of discussions – and that was through the women's group and through DCP – we came up with this slogan – 'no grog, no humbug, no guns or the police will be called' – and our phone number underneath. We got a large sign, we had it cemented into the ground and they selected where they wanted to put it. And as well as that we got these A4 stickers, the same signage and slogan, and it had a fish with a beer can and that with a cross in the back of it. And they were actually stickered to the doors of a number of houses in the [name] community. So that was a strategy, I suppose, where we reduced some grog and anti-social behaviour happening, through the co-operation of the women themselves. (33)

What effect does the police work with women have on crime statistics and the incidence of crime? One officer talked about statistical reports of crime compared with more 'qualitative' measures of how police work is assessed by the community.

> Yeah, I mean obviously, predominantly it's the corporate measurements that are used, and they're reported crimes, the clearance rate for those reported crimes, the types of crimes that are being reported. They're the measurables that we use on a day-to-day basis. They're obviously corporately measured. I think that when you actually live in the communities there's feedback that you get from the community that you use to measure your performance in particular, that obviously there's no real way of measuring,

> and it's just how you're accepted by the community, how they respond to you when you're attending jobs. So they're not really measurables but they're pretty important when you're working and living in the communities. (16)

Another interviewee (33) also pointed to an often-reported artefact of crime reporting: in statistical reports of domestic violence, as victims of crime develop trust in police services they are more likely to report to police in the belief that something will be done. In the case of the Indigenous communities where police have a permanent presence there is evidence from our interviews that women are less fearful of reporting violence and that the officers will respond - as our interviewee (above, #20) described.

The rise in this particular reported crime featured in the recent evaluations of the impact of restriction on the sale and availability of liquor at Fitzroy Crossing. Since 2 October 2007 the WA Director of Liquor Licensing has prohibited the take-away purchase of liquor (above a specified strength) in Fitzroy Crossing. The Director has also required that the impact of this restriction on health and well-being be measured. Researchers at the University of Notre Dame have presented impact reports in February 2008, May 2008, March 2009 and December 2010. The December 2010 report said that:

> When comparing the period of October 2006 to September 2007 (pre-restriction) with October 2007 to September 2008 (period 1 post-restriction) and October 2008 to September 2009 (period 2 post-restriction): There was a 21% increase in reported alcohol related DV incidents during period 1 post-restrictions (73 incidents pre-restriction and 93 incidents period 1 post-restriction). There was a further 37% increase in reported alcohol related DV during period 2 post-restriction when comparing to period 1 post-restriction (and 51% increase when compared to the 12 month period pre-restriction).[29]

The authors commented:

> Police and other local service providers have attributed the increase in reported DV cases and reported offences to a number of circumstances. Services are finding that with the higher levels of sobriety within the community, people are becoming less tolerant of domestic violence and other incidents. They are now more prepared to make a report. Community members who would previously not access services, including police, are now doing so. … Police also believe that the current level of reporting is a more accurate reflection of the extent of the problem within the community than the under-reporting of offences that occurred prior to the restriction.[30]

This evaluation echoes the views of one of our interviewees.

> But I think by providing that support [to the women of Fitzroy Crossing] which is basically just doing our job, I think that encourages people to gather strength and stand up. Now Fitzroy Crossing with liquor restrictions in town, people are expecting to see a big downturn in domestic violence. Now there was. There was a huge downturn. All of a sudden there's this increase. What brought about that increase? Sober people were seeing other people being hit. More sober people were prepared to stand up and support the person being hit. The person being hit was sober so was able to report it. So there was – even though there may have been a balancing or an evening out of the amount of offences of domestic violence and that, we were then able to – the clearance rate I think has been 98 per cent. So we get a report and lock the person up. (6)

That is, the apparent calming effect of the liquor control allows the community to become less tolerant of the violence that still occurs, and the community find police more accessible and responsive; police and community members work together more rationally to deal with reports of crime.

As one interviewee graphically described:

> And we need to allow these people to get up off their knees and to stop poisoning them, so that they can have a look around. And you feel the town just, phew, has a ... breathes a relief when the grog's turned off. (18)

Recommendation 88 of the RCIADIC was that 'the policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities'.[31] It would appear that through a combination of police policy, changed police practice and the greater political capacity of women – expressed in both their collective and their individual actions - the needs of women in remote communities are being met to a far greater degree than they were.

VIII Conclusion

The Kimberley police who spoke to us in 2009 knew that their deployment was an historic extension of state capacity into remote Aboriginal Australia. As one of them, typically, put it,

> I think it came out of the Gordon Inquiry that one of the recommendations was to have police there full time and I think a lot of that came down to developing a rapport with them. You see a lot of suicide and sexual abuse of children as main issues and a lot of the problems that they had at the time was an inability to disclose that to anybody so I think they wanted police there permanently to develop some sort of rapport with the people rather than just have people fly in. I think a lot of things went unreported. (29)

We argue that this novel deployment is contributing to fulfilling the vision expressed in recommendations 88 and 188 of the Royal Commission into Aboriginal Deaths in Custody.

In 1997, Cunneen and McDonald had concluded that 'police culture' was still an obstacle to the realisation of the potential of those recommendations in 'community policing'. The dreadful events in one Nyoongah camp and the governmental self-scrutiny that they triggered seem to have promoted the developments in policing for which Cunneen and McDonald hoped.

We began by tracing a lineage for the Gordon Inquiry concept 'Aboriginal capacity'. The RCIADIC, by endorsing and sketching an operational definition of the concept 'self-determination', created a conceptual space for this succeeding policy keyword 'capacity'. However, as we pointed out, the operational meaning of Aboriginal 'capacity' for police has not settled and unambiguous: the WAPol response to the 2002 Gordon inquiry included some articulate probing of possible meanings – some with more appeal than others, from the WAPol point of view. Having provisionally endorsed some notions of Aboriginal capacity that were inflected towards the ideal of improved 'surveillance', the WAPol and other agencies then deployed personnel more intensively in regions where surveillance had been weak. Our paper has been animated by the question of whether – and if so, in what terms - the agents of that new surveillance were actually experiencing Aboriginal 'capacity'. To the extent that police were not *experiencing for themselves* the helpful exercise of Aboriginal capacity, then neither training in 'cultural respect' nor directives from superior officers would establish 'Aboriginal capacity' as a practical concept.

What determines the police experience of 'capacity'? As we have shown through our interviews, there were several different kinds of experience available to state employees deployed in locations previously without permanent police presence, including: the weakness or absence of 'capacity', the near random occurrence of 'capacity' (contingent on the distribution of effective individuals in their field of operational responsibility), and the emergence of an articulate constituency of women. In their narration of this third experience we can discern in our interviewees a non-random explanatory model of the occurrence of female-led capacity: it is said to arise at least partly *from the new ways that police do their work*, their new or intensified commitment to hearing women and acting on what they say. This commitment at the 'street' level has been happily paralleled at the level of State policy-making in the way that the Fitzroy Futures Forum – in which Aboriginal women have been prominent – has gained sufficient influence in Perth to effect a change in the regulation of liquor retailing in parts of the Kimberley. Thus, through a combination of four interlocking elements - changed police practices, community agitation around liquor retailing, self-interested behaviour by bashed women and new developments in liquor licensing policy – a new model of Aboriginal capacity has begun to emerge, credibly, in the minds of those street-level state officials whose working convictions form so large a part of public policy. The lasting impression from the interviews was that service providers were fully engaged with communities, intellectually stimulated by the challenges presented and seeking creative and 'culturally sensitive' ways to manage complex (and often 'heartbreaking') human situations. There was also a clear impression from the interviews that community members were seen not as passive recipients of services but rather as active 'consumers' or 'clients'. There is reason to think that this post-Gordon deployment is changing police culture by giving police concrete experience of the phenomenon named in policy documents as 'Aboriginal capacity'.

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INDIGENOUS WOMEN IN AUSTRALIAN CRIMINAL JUSTICE: OVER-REPRESENTED BUT RARELY ACKNOWLEDGED

Julie Stubbs*

I Introduction

It is now two decades since the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') delivered its final report, which documented the substantial over-representation of Indigenous people in prisons and police custody, and provided detailed analysis of the underlying factors that contributed to that over-representation and to deaths in custody. That work was, of course, of enormous significance, and was intended to lay the groundwork for wholesale change, both within the criminal justice system and beyond it, to redress those factors. As we know, those aims have not been met, and in fact, as documented by numerous studies and reports, the situation of Indigenous over-representation in the criminal justice system and especially in prisons has been heightened. For instance, in its *Overcoming Indigenous Disadvantage* report the Productivity Commission noted that in relation to 'social indicators such as criminal justice, outcomes [for Indigenous people] have actually deteriorated.'[1]

It is well known too, that concerns have been raised about the limitations of RCIADIC in its consideration of Indigenous women.[2] As Marchetti stated, 'the official RCIADIC reports lacked a gender-specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women.'[3] The failure to attend sufficiently to the ways in which racialised and gendered social relations intersect with criminal justice means that the specific positioning and experiences of Indigenous women is overlooked or assumed within a universalising approach to Indigenous experience based largely, in fact, on the experiences of men.[4]

As examined in Part II of this paper, the failure to attend to the criminalisation and incarceration of Indigenous women[5] continues today in policy, criminal justice practices, service delivery and research. I also document activist efforts to redress this neglect by challenging authorities on the basis of systemic discrimination experienced by women in prison and Indigenous women in particular.

In Part III, I provide some data on the current position of Indigenous women in the criminal justice system. This is not a straightforward task as standard sources rarely report data for Indigenous women. The paucity of data concerning Indigenous women continues notwithstanding the many reports that have criticised this failure, and specific recommendations that have been made to redress the problem.[6] However, while this picture is partial, it is clear that the level of over-representation has become worse since RCIADIC, that patterns are uneven across jurisdictions, and that the needs and interests of Indigenous women are too rarely recognised.

In Part IV, I turn to two examples of initiatives that have been taken in New South Wales ('NSW') intended to reduce offending rates and to make the criminal justice system more responsive to Indigenous people. The first is the Magistrates Early Referral into Treatment Program ('MERIT'), which is a diversion program tied to bail for defendants with substance abuse problems. A similar program exists in Queensland. It draws in part on therapeutic jurisprudence, and its objectives include providing access to treatment at an early stage as a condition of bail in order to prevent reoffending and to improve health and other outcomes. The second is the adoption of sentencing principles that are to be considered in relevant circumstances involving Indigenous offenders; the so-called *Fernando* principles.[7] In considering these, I review the available evidence to consider the implications of these

developments for Indigenous women and the limitations inherent in their use.

I have chosen these examples because they operate at two different stages of the criminal justice process: pre-trial diversion and sentencing. MERIT is not an Indigenous-specific program, but given its focus on local courts and its wide availability across NSW, it has been seen as having great promise in responding to Indigenous offenders.[8] Reforms to sentencing are commonly considered to have a key contribution to make in reducing over-representation. The *Fernando* principles are specific to Indigenous offenders, but contrast significantly from the approach to sentencing Indigenous people adopted in Canada. I draw on Canadian experience to examine the extent to which Indigenous women have benefited from such sentencing developments.

II Failing to Attend to the Needs of Indigenous Women: A Recurring Theme

While belated attention has begun to be paid to research and programs directed towards the victimisation of Indigenous women – some of which recognise the overlap between victimisation and offending – there has been little attention given to the criminalisation of Indigenous women and their needs and interests within criminal justice. For instance, a recent review of diversion programs for Indigenous women notes a dearth of specific programs for Indigenous women and little data on women's participation in Indigenous programs, or in generic ones. Of the few specific programs that had been developed, some were short-term and lacked ongoing funding, and few had been evaluated.[9] An examination of effective treatment programs for Indigenous people charged with violent offences concludes that there is insufficient published research to allow conclusions to be drawn about programs for Indigenous women.[10] A positive review of the Boronia Pre-release Centre for Women in Western Australia ('WA'), designed to be 'women-centred', notes that 'areas for improvement include the needs of Aboriginal women', and expresses 'regrets that good women-centred practices have not spread into the rest of the custodial system, particularly for Aboriginal women, whose conditions and services are of a particularly low standard'.[11] The development of post release programs has also failed to recognise the needs of Indigenous women.[12]

The observations by successive Social Justice Commissioners Dr William Jonas and Tom Calma, in their reports of 2002 and 2004, remain apposite: there is an 'apparent invisibility of Indigenous women to policy makers and program designers in a criminal justice context, with very little attention devoted to their specific needs and circumstances'.[13]

A Intersectional and Systemic Discrimination

Indigenous women are vulnerable to intersectional discrimination; that is, a compounding of discrimination in specific ways brought about by race and gender (and other social categories), within the criminal justice system. Social Justice Commissioners Jonas and Calma have noted that Indigenous women are not served by programs designed for Indigenous men, or for women generally.[14]

Concerns about the treatment of Indigenous women within the criminal justice system and the failure to recognise their needs and circumstances have not been confined to Australia. In Canada, in 2001, a complaint was lodged to the Canadian Human Rights Commission ('CHRC') by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada, in coalition with other activists, on the basis of discrimination against women prisoners. The grounds for the complaint included. inter alia, the inadequacy of community based release options, including those for Aboriginal women, the inappropriate classification system used, and inadequate and inappropriate placements of women with cognitive and mental disabilities.[15] The CHRC undertook a systemic review with reference to federally sentenced women[16] and found that 'the Canadian government is breaching the human rights of women prisoners by discrimination on the basis of sex, race and disability'.[17] Nineteen recommendations were made, which were directed towards bringing Correctional Services Canada into compliance with the *Canadian Human Rights Act*.[18]

Australian activist group Sisters Inside followed the Canadian lead and lodged a formal complaint with the Anti-Discrimination Commission Queensland ('ADCQ'), seeking a review on the basis 'that "women prisoners experience direct and indirect discrimination on the grounds of sex, race, religion and impairment"'.[19] The ADCQ reported in 2006 with 68 recommendations and noted both 'a strong possibility of systemic discrimination occurring in the classification of female prisoners, particularly, those who are Indigenous'[20] and that the 'absence of a community custody facility in North Queensland … is a *prima facie* instance of

direct discrimination'.[21] Among other concerns, the report questioned the validity of a risk assessment tool in use, and found that Indigenous women were among those likely to be assessed as high-risk using such measures.[22] Indigenous women were commonly in prison for shorter sentences, but they were over-represented in secure custody, and were less likely to receive release-to-work, home detention or parole, and had higher recidivism rates.[23]

A similar complaint lodged in the Northern Territory ('NT') resulted in a report by the NT Ombudsman, who also raised concerns about systemic discrimination and made 67 recommendations. Notwithstanding the requirement in the *Standard Guidelines for Corrections in Australia* that '[t]he management and placement of female prisoners should reflect their generally lower security needs but their higher needs for health and welfare services and for contact with their children',[24] the Ombudsman found

> a lack of resources, poor planning, outdated and inappropriate procedures and a failure to consider women as a distinct group with specific needs. This had resulted in a profound lack of services, discriminatory practices, inadequate safeguards against abuse and very little in the way of opportunities to assist women to escape cycles of crime, poverty, substance abuse and family violence.[25]

Both reports emphasise the need to attend to *substantive* equality, rather than formal equality:

> Preventing discrimination requires addressing differences rather than treating all people the same. Indigenous women need equal opportunities to benefit from safe and secure custody, rehabilitation and reintegration back to their community. This requires the provision of correctional services that address their unique needs. A proactive approach is required by correctional services to look at new models and programs. Equality of outcomes for Indigenous women will not occur if they are simply expected to fit into and try to benefit from existing correctional services and programs that mostly have been developed for non-Indigenous male prisoners.[26]

Anti-discrimination actions have been lodged in other Australian jurisdictions,[27] but Kilroy and Pate report that there have been few outcomes for criminalised women.[28]
Recent reports to United Nations ('UN') bodies have also taken up concerns about women in the Australian criminal justice system, especially Indigenous women. The non-governmental organisation submission to the UN Committee on the Elimination of Racial Discrimination noted the substantial growth in the Indigenous women's prison population and expressed concerns about the inadequacy of health and other services for women in prison.[29] It also highlighted unsafe prisoner transport practices, and the damaging effects of mandatory sentencing in the NT and WA. The Australian Human Rights Commission ('AHRC') submission to the Universal Periodic Review at the UN Human Rights Council also noted the growth in the number of Indigenous people in custody,[30] and the distinct human rights issues affecting women in prison, who are subject to strip-searching.[31] The report's recommendations include that Australia 'expedite ratification of the Optional Protocol to [the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[32]] and the establishment of a National Preventive Mechanism for places of detention'.[33]

In 2010, the UN Special Rapporteur on the Rights of Indigenous Peoples advised that the government fully implement the recommendations of RCIADIC,[34] and, importantly, also made a separate recommendation that '[t]he Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and *women* in custody'.[35] The separate recognition of Indigenous women is important, because while RCIADIC continues to provide a significant, unrealised, foundation for reform, it does not provide an adequate basis for addressing the criminalisation of Indigenous women.

III The Criminalisation and Incarceration of Indigenous Women

Data on the involvement of Indigenous women in the criminal justice system is limited, since criminal justice sources typically report with respect to women *or* Indigenous people, but not Indigenous women per se. Data is particularly poor concerning police and prosecutorial practices, which underpin criminalisation.

A Policing and Indigenous Women

(i) Arrest

The most recent National Aboriginal and Torres Strait Islander Social Survey data (2008) indicate that more than

one-third of Indigenous women (35.2 per cent) and men (40.7 per cent) reported having been arrested in the past five years. While percentages fell in 2008 in almost every jurisdiction compared to earlier surveys in 1994 and 2004, they continue to be substantial.[36] The figures were similar for NSW (30.6 per cent of women, 37 per cent of men) and Queensland (30.1 per cent women, 40 per cent men) but higher in WA (45.6 per cent of women, 44.1 per cent of men).

There is scant data on incidents recorded by police that involve offending by Indigenous women, but the evidence indicates that patterns differ markedly for Indigenous women as compared to non-Indigenous women. Bartels presents data from three jurisdictions comparing offence rates per 100,000 for Indigenous and non-Indigenous women; rates for Indigenous women in NSW, South Australia ('SA') and the NT were 9.3, 16.3 and 11.2 times higher respectively. In each state the disparity been Indigenous and non-Indigenous rates was greater for women than for men.[37]

In WA, police arrests of Indigenous women over the period 1996 to 2006 *increased*, while the arrests of non-Indigenous women *declined*.[38] Among women arrested, 'the Indigenous proportion increased from 29.4 per cent in 1996 to 44.5 per cent in 2006'; the proportion of Indigenous men among those arrested increased to a lesser extent over that period from 18 per cent in 1996 to 26 per cent in 2006. The Indigenous proportions for all female arrestees were 'consistently and significantly higher than for all male arrestees'.[39] Increases in Indigenous arrests were attributed to 'increases in offences against the person and justice and good order offences, especially since 1999'.[40] Indigenous women were most likely to be arrested for disorderly conduct (19 per cent), breach of a justice order (14 per cent) or assault (19 per cent).

Court data available from two jurisdictions confirms that Indigenous women are commonly charged with offences of disorderly conduct, assault and, in WA, breach of a justice order. Bartels cites court data for NSW (from 2001) and WA (from 2008), and in both jurisdictions, Indigenous women were particularly over-represented for the categories 'acts intended to cause injury' and 'public order', and in WA were also over-represented for 'offences against justice procedures'.[41] Recent NSW research intended to identify ways of reducing Indigenous contact with the court does not report separately for women. However, findings indicated that road traffic and motor vehicle regulatory offences accounted for a quarter of all Indigenous appearances in the NSW Local Courts, and that 11 per cent were for breaches of justice orders such as bail, apprehended violence orders, or parole. The study noted the need for further examination of the rates of breach of orders, and for assistance to be provided to aid compliance with orders.[42]

Changing police practices can have a substantial impact on the custodial system; one of the first studies to quantify this effect was recently undertaken in NSW. Researchers found that a 10 per cent increase in police arrests results in an estimated 4.57 per cent increase in the full-time prison numbers for women one month later, with ongoing effects at a cost of $2.2 million.[43] And of course, this does not begin to account for the human costs to the individuals involved, or to their families and communities.

(ii) Police Custody

Data reported by RCIADIC demonstrated that Aboriginal women were 'massively disproportionately detained by police compared to non-Aboriginal women'.[44] However, there is little recent data to consider current levels of police custody. The last police custody survey was in 2002; it indicated that levels of Indigenous over-representation in police custody had declined somewhat, but remained high. The authors noted that 'strategies to reduce Indigenous incidents of police custody are meeting with varying degrees of success in each jurisdiction'.[45] It is thus significant to note that in NSW, a reduction in over-representation rates resulted from the increased use of custody for non-Indigenous people and was *not* the result of fewer Indigenous people in custody, since Indigenous custody levels had remained stable.[46]

Nationally, Indigenous women accounted for 23 per cent of Indigenous people in police custody in 2002, but the report provided no further detail.[47] For Indigenous people, public drunkenness accounted for one-in-five custody incidents, either on the basis of an arrest, or in jurisdictions where public drunkenness has been decriminalised on the basis of 'protective custody'.[48] The most common offence categories for Indigenous people in custody were assault, and public order (which includes public drunkenness and other offences). A report by the Social Justice Commissioner in 2002 had raised particular concern that Indigenous women comprised nearly 80 per cent of all cases where women were detained in police custody for public drunkenness, but it is not possible to determine whether this pattern has continued.

B Patterns in Women's Incarceration

The limited data available differs in the way in which trends in Indigenous women's imprisonment are measured and described, for instance, by reference to the number, percentages and population rates over differing time frames. However, whatever measure is used, it is clear that the level of over-representation of Indigenous women in prison is markedly greater now than in 1991 at the time of the RCIADIC final report.

In 1991, there were 104 Indigenous women incarcerated in Australia,[49] but by 2010 the average daily number had risen to 643.[50] The Productivity Commission notes that the Indigenous women's imprisonment rate has increased at a greater rate than other groups; from 2000–2010 there was a 58.6 per cent increase in Indigenous women's imprisonment as compared to 35.2 per cent for Indigenous men,[51] 3.6 per cent for non-Indigenous men and 22.4 per cent for non-Indigenous women.[52] The growth since 2000 builds on a substantial increase in Indigenous women's imprisonment throughout the 1990s.[53] Based on national figures, at June 2010 Indigenous women were 21.5 times more likely to be imprisoned than non-Indigenous women, while Indigenous men were 17.7 times more likely to be imprisoned than non-Indigenous men.[54]

Table 1 demonstrates that growth in the number of Indigenous women imprisoned has continued over the past five years in most jurisdictions, with marked variations across jurisdictions. The three states with the highest number of Indigenous women in custody are NSW, Queensland and WA. Together they account for approximately 83 per cent of Indigenous women in custody in Australia. The proportion of women in prison constituted by Indigenous women ranges from a low of 6.3 per cent in Victoria to a high of 82 per cent in the NT; for NSW it is 28.8 per cent, Queensland 27.1 per cent, and WA 51.5 per cent.[55]

The very marked differences in rates of imprisonment between Indigenous and non-Indigenous women in each jurisdiction are evident from Figure 1 (as at 2010) (see over), with WA demonstrating the greatest disparity.

As evident from Table 2 (see over), there has been some fluctuation in rates over the past five years, but the overall national pattern is one of increase. NSW and WA are notable for having imprisonment rates for Indigenous women that are consistently above the national rate, and while the most recent NSW data departs from the trend in showing a decline from 2009 to 2010, the NSW rate remains substantially above the national level. Tables 1 and 2 also demonstrate substantial increases in the numbers and rates of Indigenous women incarcerated in recent times in Queensland, SA and the NT.

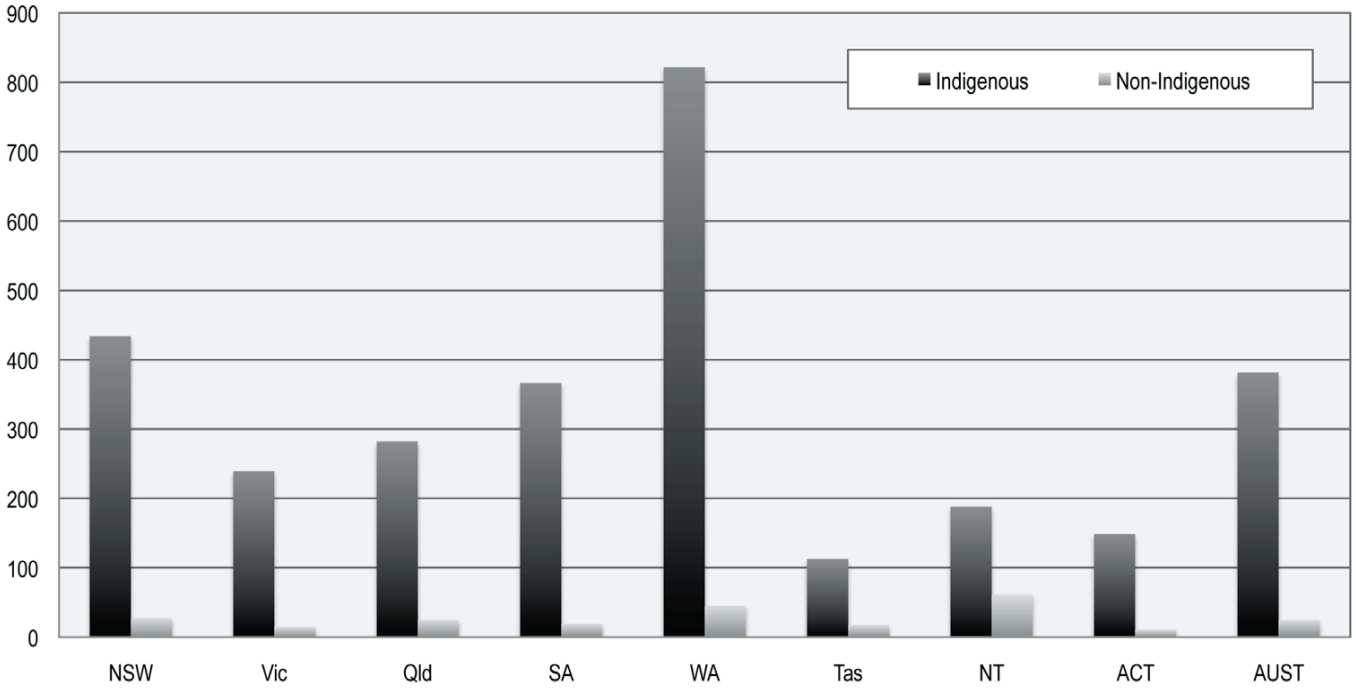
The substantial variations in incarceration rates and penal practices across Australia indicate the need for specific attention to jurisdictional differences and localised practices.[56] The available data are considered in more detail with specific reference to NSW.

TABLE 1: AVERAGE DAILY NUMBER OF INDIGENOUS WOMEN IN FULL-TIME CUSTODY, 2006–2010

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	194	13	114	24	134	8	23	1	512
2007	209	15	115	29	175	7	32	1	584
2008	213	17	115	28	143	8	36	3	561
2009	226	19	123	31	165	7	39	2	612
2010	210	26	136	34	187	7	41	2	643
Per cent change 2006-2010	8.2	100.0	19.3	41.7	39.6	-12.5	78.3	100.0	25.6

Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011).

FIGURE 1: FULL-TIME CUTSODY RATES 2010:
INDIGENOUS AND NON-INDIGENOUS WOMEN (RATES PER 100,000)



Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011).

TABLE 2: INDIGENOUS WOMEN IN FULL-TIME CUSTODY, 2006–2010 (RATE PER 100,000 ADULT INDIGENOUS POPULATION)

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	463.9	145.0	270.8	291.3	628.1	149.4	124.9	78.3	346.2
2007	473.2	150.1	265.9	343.9	836.9	137.9	159.1	71.4	380.1
2008	466.9	163.1	254.6	316.1	666.7	137.1	177.8	235.4	354.8
2009	492.1	186.9	266.2	343.5	731.4	121.2	189.4	198.2	379.2
2010	434.1	239.4	281.9	366.0	821.7	112.8	191.1	148.8	381.6
Non-Indigenous rate 2010	27.0	14.5	24.7	19.2	45.4	61.1	62.4	10.5	24.4

Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011); data for 2007 and 2008 were updated by the ABS in this publication to take the 2006 census into account.

C Characteristics of Indigenous Women in Custody

Women prisoners in general have been described as 'victims as well as offenders', who 'pose little risk to public safety'.[57] Compared with other women inmates, Indigenous women are more likely to be victims of violent crime[58], and they 'almost universally have been subjected to social and economic hardship'.[59] The majority are mothers.[60] They commonly have poorer physical and mental health than other inmates and are over-represented among those considered 'at risk'.[61]

In most Australian jurisdictions Indigenous women serve much *shorter* sentences than non-Indigenous women. For instance, as measured by median sentences, Indigenous women's sentences nationally were around half as long as those for non-Indigenous women; they were around one-third in NSW, SA and the NT.[62] Bartels suggests this may indicate that they are being incarcerated for 'more trivial' offences.[63] Evidence indicates that the profile of offences for which Aboriginal women are incarcerated differs from that of non-Aboriginal women. For instance, a WA study of women in prison also indicates that Aboriginal women were serving sentences for *less* serious offences than non-Aboriginal women, and were more than twice as likely to be serving a sentence of 12 months or less; by contrast, non-Aboriginal women were over-represented in the more serious offence categories.[64]

Based on national data for 2007–08 and as measured by their 'most serious offence', of all women imprisoned Indigenous women constituted:

- 55 per cent for acts intended to cause injury;
- 40.3 per cent for road traffic and motor vehicle regulatory offences;
- 37.9 per cent for break and enter;
- 36 per cent for robbery and extortion;
- 33.5 per cent for offences against justice and good order;
- 28.2 per cent for theft; and
- 27.3 per cent for public order (although the overall numbers were small).[65]

The substantial over-representation of Indigenous women for offences related to 'acts intended to cause injury' has been noted in several reports, and deserves greater attention. Links with alcohol have been identified,[66] and concerns have been raised that some of these offences are committed in response to domestic violence.[67] A recent WA report found that approximately 60 per cent of assaults for which Aboriginal women were in custody involved partners, family, friends or acquaintances as victims, and that most were committed while intoxicated.[68] Given evidence suggesting that increasing Indigenous imprisonment levels in part reflect greater law enforcement activity,[69] it is possible that some of these remaining matters relate to charges of assault police.[70] It is also notable that Bartel's study indicates that 67 women (20 of whom were Indigenous) were incarcerated for 'road traffic and motor vehicle regulatory offences'; the use of imprisonment for these offences is troubling and needs further investigation.

Data also indicate that Indigenous women are much more likely than other women in prison to have been imprisoned previously. National figures indicate that 65 per cent of Indigenous women had prior adult imprisonment as compared with 35 per cent for non-Indigenous women.[71] A WA study found that a staggering 91 per cent of all Aboriginal women in prison had served a prior sentence and that 48 per cent of Aboriginal women in custody in WA had served more than five previous terms of imprisonment.[72] This WA study also sheds some light on the offence of breach of order; over two-thirds of Aboriginal women had as a current offence a breach of an order, most commonly bail, and the breaches were typically due to re-offending rather than non-compliance.[73] NSW research on Indigenous recidivism does not address gender, but recommends investing in drug and alcohol treatment programs and vocational training, and investigating further the circumstances in which orders are breached as strategies towards reducing recidivism.[74]

Researchers have also begun analysing sentencing patterns in order to determine whether the increasing over-representation of Indigenous women within prison is attributable to harsher sentencing. In a study of sentencing in the *higher* courts of WA, Bond and Jeffries found that Indigenous women were *less* likely to be sentenced to imprisonment than non-Indigenous women.[75] However, their recent research in Queensland, which analyses results for Indigenous people and not women specifically, found differences between sentencing in the higher and lower courts. Once other relevant sentencing factors were controlled, there were no differences in the likelihood of a prison sentence for Indigenous and non-Indigenous people in the higher courts; however, in the lower courts Indigenous people were *more* likely to be sentenced to imprisonment.[76]

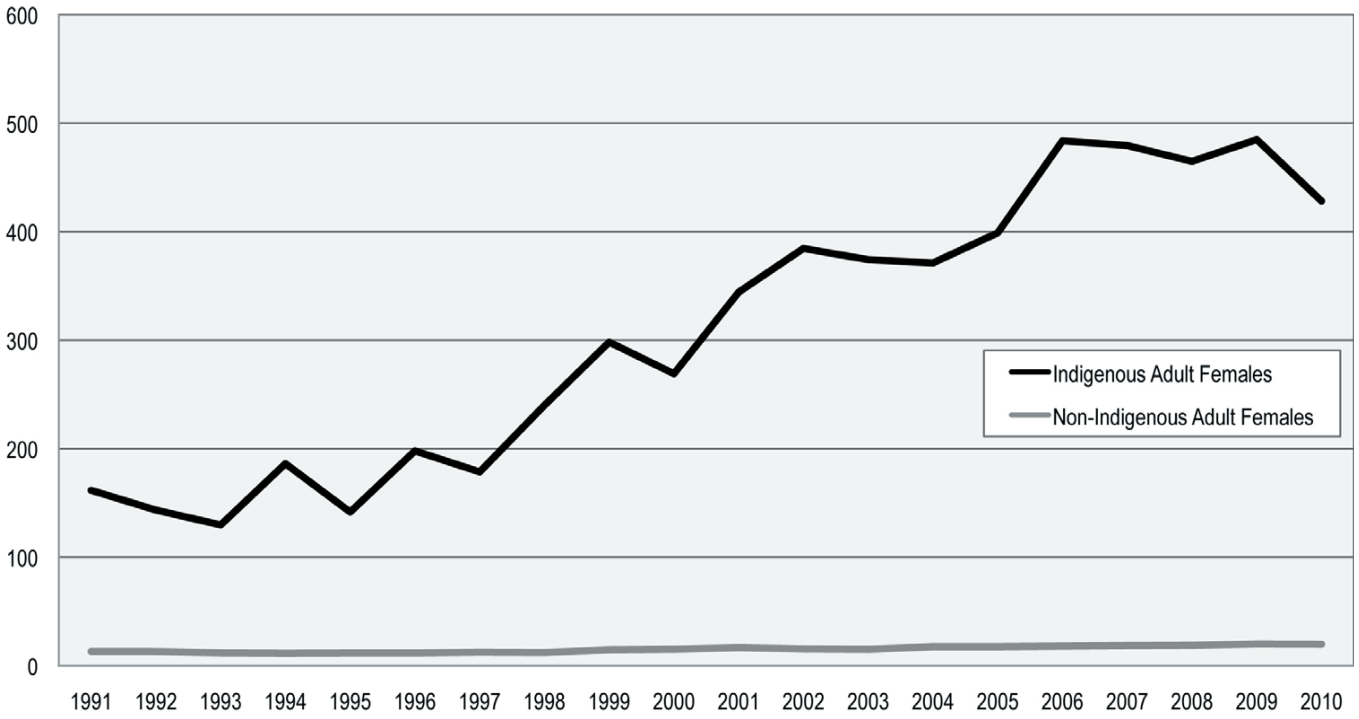
The authors suggest that one interpretation of their findings is that because time-poor magistrates in the lower courts are 'required to make sentencing decisions quickly with minimal information about defendants … there may be greater judicial reliance on stereotypical attributions about offenders.'[77] In both higher and lower courts being on remand and having a prior record increased the likelihood of imprisonment.

More work is needed to understand the sentencing of Indigenous women, especially in the lower courts, which incarcerate the majority of people, particularly those given lesser sentences. However, these findings, together with the different offence profiles of Aboriginal and non-Aboriginal women, suggest that in addition to sentencing we also need to understand better police practices and bail decision-making that bring Indigenous women before the courts and into custody.

D Bail and Remand for Indigenous Women

The data presented above do not distinguish between sentenced and unsentenced inmates, and again there is little data specific to unsentenced Indigenous women. The Australian Bureau of Statistics ('ABS') reports that at 30 June 2010, 22 per cent of Indigenous offenders were unsentenced compared with 21 per cent for non-Indigenous offenders, but does not provide data for Indigenous women.[78] However, several sources have noted that increases in the remand population have been significant in driving the increase in prison populations generally. The NSW Select Committee into the Increase in Prison Population found in 2001 that the increase in the remand population was '*the* most significant contributing factor'.[79] A more recent study by Fitzgerald notes that the growth in the number of Indigenous women remanded in custody in NSW has been greater than that of

FIGURE 2: NSW WOMEN'S CRUDE FULL-TIME CUSTODY RATES: 1991–2010, (PER 100,000 ADULTS)



Source: Corrective Services NSW, data provided to the author.

those who are sentenced.[80] Since 2002, Indigenous women have constituted between 20 and 30 per cent of the women's remand population in NSW.[81]

E Indigenous Women in Custody in NSW

At the time of the final RCIADIC report, there were 47 Aboriginal women in full-time custody in NSW; by June 2010 that number had risen to 209.[82] Figure 2 shows the growth in the NSW Indigenous women's imprisonment rate per 100,000 from 161.6 in 1991 to 428.3 in 2010, as compared to that for non-Indigenous women (13.1 in 1991 to 19.8 in 2010).[83] In 1998, the Indigenous women's imprisonment rate surpassed the rate for non-Indigenous men for the first time; by 2010, the Indigenous women's imprisonment rate had grown to more than one-and-a-half times that for non-Indigenous men (276.0 per 100 000).

At June 2009 the rate of remand in NSW was:

- 111 per 100,000 for Aboriginal women; and
- six per 100,000 for non-Aboriginal women.

For sentenced inmates the NSW imprisonment rate was:

- 379 per 100,000 for Aboriginal women; and
- 14 per 100,000 for non-Aboriginal women.

While Aboriginal men's remand and custodial rates were 16.5 times those on non-Aboriginal men, the remand rates for Aboriginal women were 19.5 times, and sentenced rates 27.2 times, those of non-Aboriginal women.[84]

In 1991, the number of Aboriginal women on remand in NSW prisons was eight; by 2007, this had increased to 61, although it declined somewhat to 43 by 2010. The number of non-Aboriginal women on remand also grew over the same period, although to a lesser degree.[85]

Fitzgerald examined the growth in the number of Indigenous prisoners over the period 2001 to 2008, which was greater for remandees than for sentenced prisoners (72 per cent compared to 56 per cent); no details were provided by gender.[86] She found that the increase in the remand population was due to *an increase in the proportion of people remanded in custody overall* (from 12.3 per cent in 2001 to 15.4 per cent in 2007), and for each of the offence categories that were most common for remandees; that is, the increase did not reflect a change in the offence profile to more serious offences, but rather *harsher bail decisions*. The mean time in custody also increased from 3.3 months in 2001 to 4.2 months in 2008.[87]

Steel's research has demonstrated that NSW has tightened bail laws substantially over the last two decades, and that the NSW Parliament has introduced many more punitive amendments to the *Bail Act* than have been put in place in any other jurisdiction.[88] Such approaches are clearly at odds with the recommendations of RCIADIC and other strategies intended to reduce Indigenous incarceration, since they not only contribute to higher numbers on remand, but also may make conviction and incarceration more likely.[89]

In considering the increasing rate of Indigenous women's incarceration over time depicted in Figure 2, it is striking to note that in fact *fewer* Indigenous people appeared in NSW courts in 2007 than in 2001. However, the percentage found guilty was higher, especially for those charged with offences against justice procedures which increased by 33 per cent. The percentage of those convicted who received a custodial sentence also increased, especially for offences against justice procedures (from 17.7 per cent to 27.6 per cent). However, while the mean length of sentence increased for some offences, for offences against justice procedures it actually went down,[90] which suggests perhaps that more offences of lesser seriousness were resulting in incarceration. Fitzgerald found that 'the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself.'[91]

F Deaths in Custody

The last comprehensive analysis of the deaths in custody of women was undertaken by Collins and Mouzos, who examined the period of 1980–2000.[92] They found that the deaths of Indigenous women were distinctive in several respects. Deaths of Indigenous women accounted for 32 per cent of all female deaths in custody as compared with Indigenous men, who accounted for 18 per cent male deaths in custody.[93] Half of Indigenous women were found to have died of natural causes as compared with 20 per cent of non-Indigenous women and 38 per cent of Indigenous men, and the most common cause of death for both of the latter groups was self inflicted.[94] Indigenous women were much more likely to be in custody for good order offences as their most serious offence (54 per cent); this was almost double

the percentage for non-Indigenous women (28 per cent) and much higher than the percentage for Indigenous men (19 per cent).[95] Most Indigenous women died in police custody (79 per cent); this was not the case for non- Indigenous women (37 per cent) or Indigenous men (42 per cent) the majority of whose deaths occurred in prisons. They note that the final report of the RCIADIC also found that the Indigenous women whose deaths they had investigated had a 'high incidence of good-order offences in [their] criminal histories'.[96]

Indigenous deaths in custody have decreased over time, and despite increases recorded in the last five years, remain lower than they were in the mid-1990s.[97] However, a recent series of articles written by Inga Ting for *Crikey* has documented increases of 'nearly 50%' in deaths in prisons in NSW and Queensland over the past decade.[98] Ting also documents ongoing concerns about failures by correctional authorities to implement recommendations from the RCIADIC and from subsequent coronial inquiries. According to Ting, in the nine years to 2009 'NSW Coroners documented more than 60 cases in which bureaucratic bungling, a failure or absence of policy, breaches of procedure or lack of communication between government agencies contributed to the death' and that 'deaths could have been avoided had custodial and health authorities exercised proper duty of care and adhered to policies implemented as a result of Royal Commission recommendations.' Numerous breaches of RCIADIC recommendations were identified.[99]

Due to the lack of available data, it is difficult to track trends in the deaths of Indigenous women. However, Ting has identified three deaths of Aboriginal women in recent years in NSW prisons (in 2004, 2005 and 2009), one of whom was an Aboriginal transgender (male-to-female) inmate.[100] All three were on remand and two were known to have made previous suicide attempts.[101] The remand period is known to be a time of risk: the RCIADIC found that 30 per cent of deaths were of people who were unsentenced.[102] As Cunneen has noted, '[t]he current tragedy is that so many of the circumstances leading to deaths in custody identified by the RCADIC are still routine occurrences.'[103]

IV Redressing Over-representation?

The data reviewed above indicate that there are notable differences in trends in the criminalisation and incarceration of Indigenous women between jurisdictions, and point to the role of harsher laws, policies and practices as exacerbating the levels of over-representation of Indigenous women in custody. Fitzgerald's research indicates that in NSW harsher bail decisions, higher conviction rates and longer sentences have been driving trends. In this part of the paper I examine two recent developments in NSW. The first, MERIT, is a mainstream program operating in local courts, designed to divert offenders into treatment programs with the reduction of re-offending as one of its objectives. The second, the *Fernando* principles, are an Indigenous specific set of sentencing principles intended to assist judges in relevant cases.

A Bail-based Diversion: The MERIT Program

The Magistrates Early Referral into Treatment program operates in more than 60 courts across NSW and offers eligible adults charged with an offence who have a substance abuse problem access to drug treatment prior to entering a plea and while on bail. A small number of courts also offer treatment for alcohol abuse. Magistrates are provided with a report on the defendant's participation, which may be taken into account at sentencing. It is 'the largest mainstream program that diverts adult defendants into treatment' and has been described as a 'highly appropriate intervention program for Aboriginal defendants'.[104] It has been found to be associated with 'improvements in dependence and psychological distress as well as general and mental health'.[105]

MERIT was reviewed by the NSW Auditor-General in a report which considered whether eligible Aboriginal people were getting access to the program, and whether the program was meeting their needs (although the review did not specifically deal with the needs of Aboriginal women). While referrals of Aboriginal people to the program have increased somewhat over time, they remain low: in 2007–08 only 427 of an estimated 19,000 Aboriginal defendants were referred, and only 273 participated.[106] An evaluation of the program found that over time the rate of Aboriginal people being *accepted* into the program decreased, while the rate for non-Aboriginal people remained the same. This decrease was found to coincide with a change to the *Bail Act*, which made it more difficult for repeat offenders or those who had previously breached bail to be released to bail. It was also said that some Aboriginal people were not accepted into the program because they were charged with assault, as the program excludes those who have committed serious violent offences.[107]

Other barriers to Aboriginal defendants gaining access to the program identified by the Auditor-General were: the paucity of alcohol-specific programs;[108] the fact that while solicitors were a key point of referral, many defendants did not have legal representation;[109] the 'disproportionate impact' of eligibility criteria and the location of courts on Aboriginal defendants;[110] and 'the generally poor level of engagement and communication with Aboriginal defendants'.[111] For instance, '[a] standard, case plan approach is used by MERIT teams to develop the treatment program for clients.' However, it was found that 'this approach did not recognise any special needs Aboriginal participants may have or recognise alternative treatment models that may be more suitable for Aboriginal clients.'[112] These issues may also underlie the finding that one-in-three Aboriginal people referred to the program do not accept.[113]

The evaluation found that completion rates for Aboriginal people (50 per cent) were less than for non-Aboriginal people (60 per cent), and that the most common reason for non-completion for both groups was being breached by the staff for non-compliance.[114] Outcome data was not reported by gender.[115] One hopeful finding reported by the Auditor-General was that after an 'Aboriginal Practice Checklist' was trialled at several locations, completion rates for Aboriginal clients had increased to approximately 64 per cent.[116]

A further evaluation of MERIT focused on women, and found that at entry to and exit from the program, 'women had significantly poorer general and mental health scores than men'.[117] A higher proportion of women (22 per cent) than men (13 per cent) in the program were Aboriginal, but the findings did not otherwise distinguish between Aboriginal and other women.[118] However, women were reported to be less willing than men to participate in the program due to family responsibilities and concerns about 'the mandatory child protection obligations' of staff, and were less likely to complete the program than men often due to a failure to attend. They were reported to have more complex commitments and higher rates of 'co-morbid chronic mental health disorders and trauma' than men, which constituted 'a significant barrier to female participation.'[119] The authors noted the need for such programs to be more responsive women's needs.

These reports demonstrate that the potential benefits of the programs are diminished or unavailable to Aboriginal women because standardised, mainstream programs have not anticipated their needs. The development of the Aboriginal Practice Checklist for MERIT seems to offer promise, but it too may prove to be inadequate if it does not explicitly consider the additional barriers that Aboriginal women face in accessing and completing the program.[120] The high levels of victimisation among Aboriginal women are likely to affect some women's capacity to participate and will require attention to their safety. The competing demands of child care and other familial responsibilities also mean that location and transport are very significant considerations and make regular attendance difficult. Together with the fear of mandatory child protection reporting, these are formidable obstacles to Aboriginal women's participation. Further, a checklist is not an adequate substitute for the involvement of Aboriginal people in developing and delivering appropriate programs and services.

B Sentencing: The *Fernando* Principles

Several reports in NSW have recommended the trial of the abolition of short-term sentences, especially for Indigenous women, in recognition of the damaging effects of imprisonment, the evidence reviewed above that Indigenous women commonly serve shorter sentences, lack of access to programs for short-term inmates and the likelihood that short sentences serve little rehabilitative purpose, and the need to overcome Indigenous over-representation.[121] However, these recommendations have not been acted on. The sole Indigenous-specific sentencing initiative has been the development of common law principles guiding the sentencing of Indigenous offenders.[122]

The so-called *Fernando* principles were articulated by Wood J in *R v Fernando*. The decision sets out sentencing principles that may be relevant to Aboriginal offenders in certain circumstances, with particular reference to alcohol abuse and violence, while not establishing Aboriginality as a mitigating factor per se. A thorough review was undertaken by Janet Manuell SC for the NSW Sentencing Council, but did not address gender specifically.

Manuell found that the principles were not always applied and were seen as applicable in only a very narrow range of circumstances.[123] The potential ambit of the principles has been read down in subsequent appellate decisions. For instance, other commentary points to decisions that seem to turn narrowly on questions of whether a person is 'Aboriginal enough', and whether the principles might

apply to Aboriginal people in urban settings.[124] Research undertaken for this paper identified six cases in which the *Fernando* principles had been considered or applied to women defendants, and no real elaboration of how the principles might relate to women.[125] In two of these cases the *Fernando* principles were found not to apply.[126]

An interesting point of contrast has been the Canadian statutory provision, *Criminal Code* Part XXIII section 718.2, which provides that in sentencing 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*.' This was considered in *R v Gladue*,[127] in which the Supreme Court of Canada described the over-representation of Indigenous people in Canada as a crisis, and recognised systemic discrimination in the criminal justice system. The Court found that

> [t]he remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.[128]

The provision 'amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders.'[129] Canadian governments have subsequently developed a system of community-based justice programs including the Aboriginal Justice Strategy.

The Canadian approach to sentencing demonstrates a focus on substantive equality,[130] which is not limited to redressing any evidence of discriminatory sentencing. Indeed, in a manner consistent with the approach adopted in the RCIADIC, Aboriginal over-representation in the Canadian criminal justice system is understood to have complex roots arising from the legacy of colonisation, factors that are seen as relevant in sentencing.[131] However, the Canadian developments have been somewhat controversial. For instance, Stenning and Roberts criticise the approach on several grounds, including that they find no evidence of discrimination in sentencing, and, they argue, because it 'violates a cardinal principle of sentencing (equity) relevant to all'.[132] In reply, Rudin and Roach argue, inter alia, that the intent of the provision is to reduce over-representation in prison and is not to limited to redressing any discrimination in sentencing, that Aboriginal defendants are distinguishable from other disadvantaged defendants by reference to the impact of colonisation, and that Stenning and Roberts mistakenly adhere to formal equality when Canadian law instead favours substantive equality.[133]

An approach founded on substantive equality has not been endorsed in the NSW context, where the clear preference lies with formal equality.[134] For instance, the NSW Law Reform Commission (NSWLRC) specifically rejected 'legislative prescription' of sentencing principles on the basis that it 'would add nothing to the existing common law'. By contrast with the recognition by the Canadian Supreme Court of systemic discrimination in the criminal justice system, the NSWLRC commission noted only that 'the *potential* for discrimination against Aboriginal offenders still exists,' but at the same time rejected 'the notion that this would be overcome by a legislative statement of sentencing principles.'[135] The Sentencing Council also dismissed the Canadian approach, stating a preference for the present Australian position which 'does not offend the basic principle that the same sentencing principle apply irrespective of the offender's identity or membership of an ethnic or racial group'.[136]

The rejection of an approach founded on substantive equality by two eminent NSW bodies is regrettable, since, as in Canada, there are clear policy reasons for endorsing such an approach.[137] However, as in Canada, it may require legislative action to bring it about, perhaps an unlikely outcome in an era of punitive populism.

The explicit adoption of a substantive equality approach offers a way forward for Indigenous women since it has the potential to bring a more contextual understanding to their experiences as both Indigenous people *and* as women. In 1994, the Australian Law Reform Commission ('ALRC') promoted reforms based on substantive equality, recognising the need to '[place] inequality in the context of disadvantage'. However their recommendations, which included an Equality Act, were not adopted.[138]

While there remain compelling reasons why questions of justice need to be approached through a concern for substantive equality, Canadian experience indicates that this is unlikely to be a sufficient means of redressing Indigenous women's over-representation within the criminal justice

system. Ten years on from *Gladue* the capacity of courts to reduce over-representation of Aboriginal people in the prison system in Canada has been described as 'dismal'.[139] The growth in the percentage of Aboriginal women in the prison system from 2004/2005 to 2008/2009 outstripped that for men, and in '2008/2009, Aboriginal women represented 28 per cent of all women remanded and 37 per cent of women admitted to sentenced custody'.[140]

Toni Williams has argued with respect to the Canadian situation that although the legal principles require that offences by Aboriginal people be considered in context, this contextualisation does not necessarily produce lesser sentences, since those factors can be interpreted differentially, including as indicating that the offender is risky or dangerous.[141] As she goes on to say, 'the *Gladue* decision essentially requires judges to consider the social context of an Aboriginal defendant when passing sentence and assumes that such consideration makes it less likely that an Aboriginal defendant will receive a prison sentence.'[142] There is a tension in that these factors can be seen as reasons for lesser punishment and as markers of risk; 'an individual's experience of hardship or needs may be subordinated to the perceived demands of social protection if that hardship or need is constituted as a risk, as in effect situating the individual among the "dangerous classes"'.[143] For Aboriginal women, she sees a danger that a contextual analysis may see them portrayed 'as over-determined by ancestry, identity and circumstances, thereby feeding stereotypes about criminality that render the stereotyped group more vulnerable to criminalization.'[144]

One possible implication of William's research is that justice practices that have Indigenous legal actors, including circle sentencing and specialist Indigenous courts, may be better placed to undertake such contextual analysis and sentencing. Indigenous justice practices are now well established in some settings in Australia. Several such initiatives have been endorsed by the Productivity Commission as examples of 'things that work'; these include Aboriginal sentencing within the South Australian magistrates courts, the South Australian Aboriginal conferencing initiative in Port Lincoln, and Aboriginal courts such as the Murri court in Queensland and the Koori court in Victoria.[145] However, here too, the need for explicit attention to the intersection of race and gender will arise if Indigenous women's needs are to be met.

V Conclusion

This paper has documented enduring and repeated failures to pay sufficient regard to Aboriginal women. An intersectional analysis that recognises the specific circumstances that contribute to Aboriginal women's criminalisation and incarceration, coupled with an approach to the provision of services and support that focuses on substantive equality is crucial. But it is also not enough. As William's work suggests, an intersectional analysis provides a vital first step in bringing recognition to Indigenous women but does not determine how that recognition is given expression within criminal justice practices. Indigenous women need to be fully involved in shaping the meanings that emerge.

Several recent reports and initiatives have given emphasis to the need to return to RCIADIC as guiding future developments.[146] It is vital that Indigenous women have a voice in determining how best the blueprint provided by RCIADIC can be reconfigured so as to adequately represent their interests.

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125 *R v Croaker* [2004] NSWCCA 470 (14 December 2009); *R v Kelly* [2005] NSWCCA 280 (11 August 2005); *R v Trindall* [2005] NSWCCA 446 (14 December 2005); *R v Jukes* [2006] NSWSC 1065 (13 October 2006); *R v Lawrence* [2005] NSWCCA 91 (11 March 2005); *R v Melrose* [2001] NSWSC 847 (31 August 2001).

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127 [1999] 1 SCR 688; see also *R* v *Wells* [2000] 1 SCR 207.

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130 Jonathan Rudin and Kent Roach, 'Broken Promises: A Reply to Stenning and Roberts' "Empty Promises"' (2002) 65 *Saskatchewan Law Review* 3.

131 Ibid 19 ff.

132 Robert Stenning and Julian V Roberts, 'Empty Promises: Parliament, the Supreme Court and the Sentencing of Aboriginal Offenders' (2001) 64 *Saskatchewan Law Review* 137, 168.

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135 NSWLRC, above n 6, [2.47] (my emphasis).

136 The NSW Sentencing Council argued:

> The Sentencing Council acknowledges the approach in Canada of special consideration of alternatives to imprisonment for Aboriginal offenders … The Sentencing Council prefers the present common law position in Australia … The common law position in NSW acknowledges the relevance of Aboriginality in sentencing, but does not offend the basic principle that the same sentencing principle apply irrespective of the offenders identity or membership of an ethnic or racial group: 'Abolishing Prison Sentences of 6 Months or Less', above n 121, 16 n 49.

137 Research such as that by Bond and Jeffries in WA (above n 75), which found that higher courts in that jurisdiction may sentence Indigenous women *less* harshly, suggest that some courts may take a more contextual approach to sentencing Indigenous women. However, their mixed findings for Queensland, including harsher sentencing in the local courts, may suggest the need for more explicit consideration of sentencing principles aligned with substantive equality. Moreover, their findings do not negate the argument offered by Rudin and Roach for sentencing provisions explicitly focused on reducing Indigenous over-representation (above n 130).

138 The Australian Law Reform Commission recommended an Equality Act based on substantive equality: Australian Law Reform Commission, *Equality Before the Law: Women's Equaltiy*, Report No 69 (1994) pt II [4.29]; also see generally chs 3, 4.

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145 Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009) 28.

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TWENTY YEARS OF MONITORING SINCE THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY: AN OVERVIEW BY THE AUSTRALIAN INSTITUTE OF CRIMINOLOGY

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I Introduction

The Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') was established in 1987 by the Australian Parliament in response to concerns over the deaths of Indigenous people in custody. It examined the circumstances surrounding the deaths in prison or police custody of 99 Indigenous people between 1 January 1980 and 31 May 1989. The RCIADIC found the rate of death in custody was not higher among Indigenous people in custody than among non-Indigenous people in custody. Rather, the fundamental issue was the extent to which Indigenous Australians were over-represented in their contact with the criminal justice system, the Royal Commission concluding that '[t]oo many Aboriginal people are in custody too often.'[1]

Among the concerns expressed by the Royal Commission was that statistics on both deaths in custody and the related issue of the numbers of persons in police custody were at best poor, if not simply unavailable. The final report of the RCIADIC therefore recommended a number of initiatives to improve statistical monitoring. These included the establishment of an ongoing program to monitor Indigenous and non-Indigenous deaths in custody. The Royal Commission recommended that the Australian Institute of Criminology ('AIC') be tasked with establishing and maintaining this program.[2]

A deaths in custody monitoring program, building on the data collection and reporting conducted to inform the RCIADIC, was commenced at the AIC in 1992, together with a complementary Police Custody Survey program. The AIC released the first deaths in custody report in 1992, covering deaths from 1980 to 1992, and has since produced annual reports on deaths under what is now known as the National Deaths in Custody Program ('NDICP'). Following a meeting between the Australian Police Ministers' Council and the AIC in 1994, the definition of a death occurring in police custody was broadened to include deaths occurring during police operations. The Police Custody Survey was first undertaken in 1988, to inform the work of the RCIADIC, then again in 1992 and every five years since.

This paper provides an overview of trends and issues emerging from analysis of this unique dataset compiled from more than 30 years of statistics on deaths in custody. The analysis includes data up to and including 2008. While data from 2009 had been collected through the NDICP, it was not ready for publication at the time of writing and will be reported in the next NDICP monitoring report. In keeping with the terms of the Royal Commission, the paper will focus particularly on the deaths of Indigenous persons.

II The NDICP

The AIC's NDICP examines the incidence and circumstances of deaths in the criminal justice system, but does not monitor deaths in all institutions where persons may be in custody, such as those occurring in immigration detention centres and mental health institutions that are not managed by prison authorities. The scope of the NDICP's monitoring is consistent with the recommendations of the RCIADIC.[3] Using nationally-agreed definitions and collection arrangements, all deaths in prison, juvenile custody and police custody - including deaths occurring in the process of a person being detained - are independently monitored, collectively analysed and reported annually.

The information held in the NDICP database is based on two main data sources:

- state and territory police services, correctional agencies and juvenile justice agencies; and
- coronial records.

Following a death in custody, data collection forms are completed by custodial agencies and submitted to the AIC, together with any additional information such as offence records and police narratives. The collection process includes data on 'borderline' cases that do not clearly fall within the definition of a death in custody. The AIC is advised of such cases, but they are excluded from analysis until coronial findings determine whether they fall within the definitions. Coronial records such as transcripts of proceedings, coronial findings, pathology, toxicology and post-mortem reports are held in the National Coronial Information System ('NCIS'), maintained by the Victorian Institute of Forensic Medicine. The AIC also draws upon media reports as a way of monitoring deaths in custody, using these as a trigger for following up reports from custodial authorities and liaising with authorities on 'borderline' cases, but media reports are not relied on to inform the NDICP database.

The NDICP database covers 63 fields of information (variables) for each individual dying in custody. Validation of the data is undertaken as coronial findings become available, which can at times be some years after a death has occurred. NDICP monitoring reports document any changes to previously reported information resulting from coronial outcomes – for instance when the cause of a death is medically determined to be different from that originally reported.

The Human Research Ethics Committee of the Victorian Department of Justice supervises the ethics of the NDICP, with secondary supervision by the AIC's independent Human Research Ethics Committee. The AIC renews its ethics practices periodically. Requests for unpublished information by interested parties are subject to ethics review and agreement by the data providers: state and territory custodial authorities and the NCIS.

A Definitions

The definitions used to determine whether a case is a 'death in custody' are drawn from the recommendations of the RCIADIC.[4] The working definitions used for inclusion in the NDICP are:

(i) Death in Prison Custody

Deaths in prison custody include those deaths that occur in prison. This also includes deaths that occur during transfer to or from prison, or in medical facilities following transfer from prison. The NDICP does not include individuals who are on parole or who are serving community-based orders.

(ii) Death in Juvenile Custody

Deaths in juvenile custody are those deaths that occur in a juvenile detention facility or in any circumstance where a juvenile is under the custodial control of a juvenile justice agency. This also includes deaths that occur during transfer to or from detention, or in medical facilities following transfer from detention. The NDICP does not include children placed into foster care.

(iii) Death in Police Custody

Deaths in police custody are divided into two main categories:

Category 1

(a) Deaths in institutional settings (for example, police stations or lockups, police vehicles, during transfer to or from such an institution, or in hospitals, following transfer from an institution).
(b) Other deaths in police operations where officers were in close contact with the deceased. This would include most raids and shootings by police. However, it would not include most sieges where a perimeter was established around a premise but officers did not have such close contact with the person to significantly influence or control the person's behaviour (see Category 2).

Category 2

Other deaths during custody-related police operations. This would cover situations where officers did not have such close contact with the person to be able to significantly influence or control the person's behaviour. It would include most sieges, as described above, and most cases where officers were attempting to detain a person, for example, during a pursuit.

B A Note on Indigenous Status

An ongoing issue in maintaining deaths in custody data, and other criminal justice data more generally, is the determination of an individual's Indigenous status. The manner in which Indigenous status is determined varies between different states and territories and sometimes between agencies within a state or territory. While most agencies use self-reporting of Indigenous status based on a standard question developed by the Australian Bureau of Statistics ('ABS'),[5] others rely on an officer's educated, but still subjective judgment of physical appearance. While there are no cases in the NDICP dataset where an individual's Indigenous status is not recorded, criminal justice data often contain a relatively large proportion of records with 'unknown' Indigenous status. This can be a confounding factor in data on broader custodial populations[6] and should be kept in mind when interpreting data in this report that use these broader populations as a base.

III Assessing Progress in Reducing Deaths in Custody

The NDICP reports on a range of high-level indicators for monitoring deaths in custody, including for Indigenous persons. These indicators provide a way of analysing changes over time, which in turn can inform the extent to which changes in policy and procedures have contributed to reductions in the number of deaths in custody. Key indicators used in monitoring reports, and in this paper, include:

1. Trends in numbers of deaths in prisons, police and juvenile detention, and the proportion of total deaths in each setting involving Indigenous persons.
2. Trends in the rate of death per 1,000 relevant adult prisoners.
3. Trends in causes of death, both natural and not natural causes.

IV Key Trends in Deaths in Custody – 1980 to 2008

A Broad Trends

Since 1980, a total of 2,056 deaths in custody have occurred, with 1,260 of these deaths (61 per cent) occurring in prison. There have been 779 deaths (38 per cent) in police custody and custody-related operations and 17 deaths (< one per cent) in juvenile justice custody. Of the total deaths since 1980, 392 (19 per cent) have been of Indigenous persons, with 209 of these (53 per cent) occurring in prison, 176 (45 per cent) in police custody and custody-related operations and seven (two per cent) in juvenile justice agencies. In other words, 17 per cent of all deaths in prison have been of Indigenous persons and 23 per cent of all deaths in police custody and custody-related operations have been of Indigenous persons. There have been 17 deaths in juvenile justice custody. Due to the relatively small number of juvenile deaths, this paper focuses on deaths in prison and police custody. Forty-one per cent of those who died in juvenile justice custody have been Indigenous, which is in the context of the very high levels of Indigenous over-representation in juvenile detention.[7]

There has been considerable annual fluctuation in the proportion of people dying in custody who were Indigenous (see Table 1 over). While 26 per cent of all people dying in custody in 2005 were Indigenous, this fell to 12 per cent in 2007 and 15 per cent in 2008. Since 1980, the highest proportions of Indigenous deaths were in 1980, 1986 and 2005 (26 per cent in each year), while the lowest proportions were in 1981 (11 per cent), 1993 (12 per cent) and 2007 (12 per cent).

Caution should be taken in interpreting fluctuations in the per centage of deaths involving Indigenous persons each year as slight variations in the relatively small numbers concerned can have a significant effect on per centages. The largest number of Indigenous deaths in a single year was 22 in 1995, while the lowest was five deaths in 1981. For the 29 years for which data can be reported, there was an average of 13.5 deaths of Indigenous persons each year, compared with an average of 57.3 deaths of non-Indigenous persons each year.

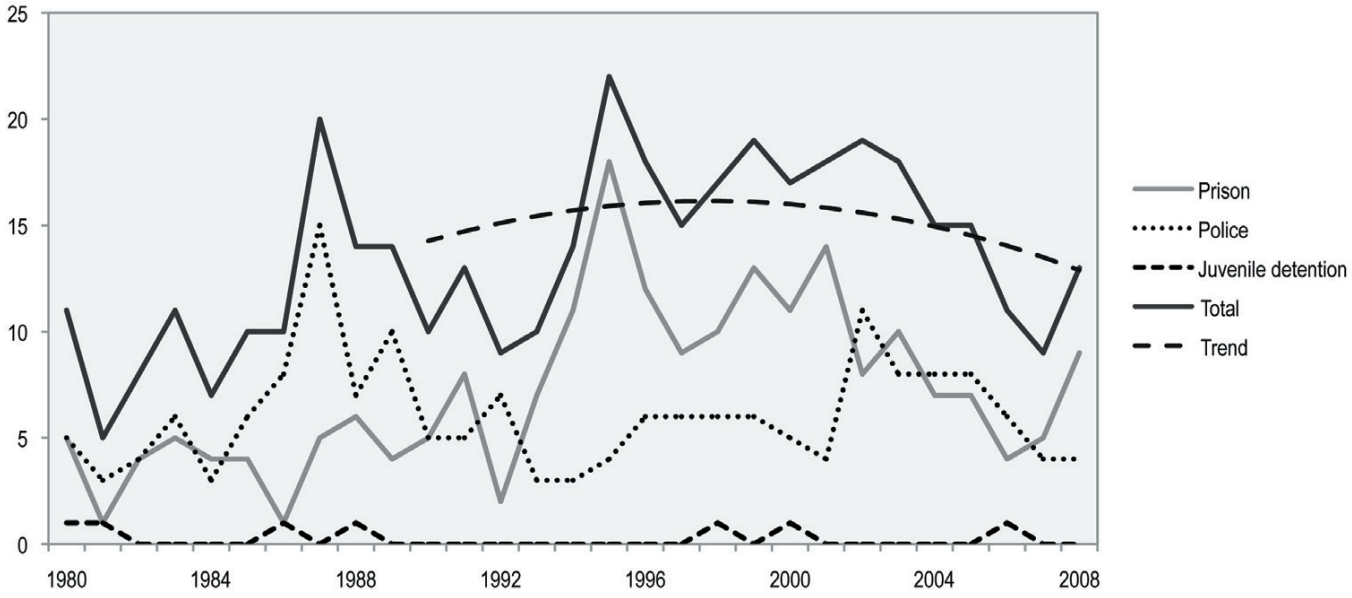
Overall, the numbers of Indigenous deaths in custody increased from the late-1980s to the late-1990s and then began to decline. The full time series was fitted with a trend line which shows a statistically significant decrease in deaths since 1998 ($p<0.001$; see Figure 1 trend line). However, since 2006 there has been a noticeable rise in the numbers of deaths each year for both prison and police custody. It remains to be seen whether this represents the beginning of a trend towards increasing numbers of deaths, or whether it is a short-term aberration against the longer trend of decreasing deaths. While Figure 1 only shows Indigenous deaths, non-Indigenous deaths have followed a similar pattern.

TABLE 1: DEATHS IN CUSTODY BY CUSTODIAL AUTHORITY AND INDIGENOUS STATUS, 1980–2008 (NUMBER)

Year	Prison				Police				Juvenile				Total			
	Indigenous No.	Non-Indigenous No.	Total No.	Proportion (%) Indigenous	Indigenous No.	Non-Indigenous No.	Total No.	Proportion (%) Indigenous	Indigenous No.	Non-Indigenous No.	Total No.	Proportion (%) Indigenous	Indigenous No.	Non-Indigenous No.	Total No.	Proportion (%) Indigenous
1980	5	25	30	16.7	5	7	12	41.7	1	0	1	100.0	11	32	43	25.6
1981	1	27	28	3.6	3	12	15	20.0	1	0	1	100.0	5	39	44	11.4
1982	4	21	25	16.0	4	15	19	21.1	0	0	0	N/A	8	36	44	18.2
1983	5	26	31	16.1	6	10	16	37.5	0	1	1	0.0	11	37	48	22.9
1984	4	27	31	12.9	3	12	15	20.0	0	0	0	N/A	7	39	46	15.2
1985	4	22	26	15.4	6	16	22	27.3	0	0	0	N/A	10	38	48	20.8
1986	1	16	17	5.9	8	13	21	38.1	1	0	1	100.0	10	29	39	25.6
1987	5	48	53	9.4	15	28	43	34.9	0	1	1	0.0	20	77	97	20.6
1988	6	36	42	14.3	7	20	27	25.9	1	0	1	100.0	14	56	70	20.0
1989	4	36	40	10.0	10	13	23	43.5	0	1	1	0.0	14	50	64	21.9
1990	5	28	33	15.2	5	26	31	16.1	0	1	1	0.0	10	55	65	15.4
1991	8	31	39	20.5	5	26	31	16.1	0	0	0	N/A	13	57	70	18.6
1992	2	34	36	5.6	7	24	31	22.6	0	0	0	N/A	9	58	67	13.4
1993	7	42	49	14.3	3	30	33	9.1	0	1	1	0.0	10	73	83	12.0
1994	11	42	53	20.8	3	25	28	10.7	0	1	1	0.0	14	68	82	17.1
1995	18	41	59	30.5	4	22	26	15.4	0	2	2	0.0	22	65	87	25.3
1996	12	40	52	23.1	6	23	29	20.7	0	1	1	0.0	18	64	82	22.0
1997	9	67	76	11.8	6	23	29	20.7	0	0	0	N/A	15	90	105	14.3
1998	10	59	69	14.5	6	21	27	22.2	1	0	1	100.0	17	80	97	17.5
1999	13	46	59	22.0	6	21	27	22.2	0	0	0	N/A	19	67	86	22.1
2000	11	51	62	17.7	5	21	26	19.2	1	1	2	50.0	17	73	90	18.9
2001	14	43	57	24.6	4	31	35	11.4	0	0	0	N/A	18	74	92	19.6
2002	8	42	50	16.0	11	26	37	29.7	0	0	0	N/A	19	68	87	21.8
2003	10	30	40	25.0	8	28	36	22.2	0	0	0	N/A	18	58	76	23.7
2004	7	32	39	17.9	8	23	31	25.8	0	0	0	N/A	15	55	70	21.4
2005	7	27	34	20.6	8	16	24	33.3	0	0	0	N/A	15	43	58	25.9
2006	4	27	31	12.9	6	18	24	25.0	1	0	1	100.0	11	45	56	19.6
2007	5	40	45	11.1	4	25	29	13.8	0	0	0	N/A	9	65	74	12.2
2008	9	45	54	16.7	4	28	32	12.5	0	0	0	N/A	13	73	86	15.1
Total	**209**	**1051**	**1260**	**16.6**	**176**	**603**	**779**	**22.6**	**7**	**10**	**17**	**41.2**	**392**	**1664**	**2056**	**19.1**

Source: AIC NDICP 1980– 2008

FIGURE 1: INDIGENOUS DEATHS IN CUSTODY BY TYPE OF CUSTODY, 1980–2008 (NUMBER)



Source: AIC NDICP 1980–2008
Significant to $p<0.01$
Note: 'Police' includes deaths in both police custody (Category 1) and during custody-related operations (Category 2). Category 2 deaths have been included since 1990.

As is apparent in Figure 1, most deaths each year occur in prison. Considering people are generally held in prison for longer than they would be in other custodial settings, it is not surprising that more deaths occur in prison custody than in other settings. As outlined in the next section, high-level trends in deaths in custody therefore tend to be largely shaped by trends in prison deaths and the factors driving these trends. A close examination of deaths in prison will be followed by a close examination of deaths in police custody and custody-related operations. As few deaths have occurred in juvenile custody, these deaths will not be examined in the same detail as those in other custody settings.

B Trends in Prison Deaths

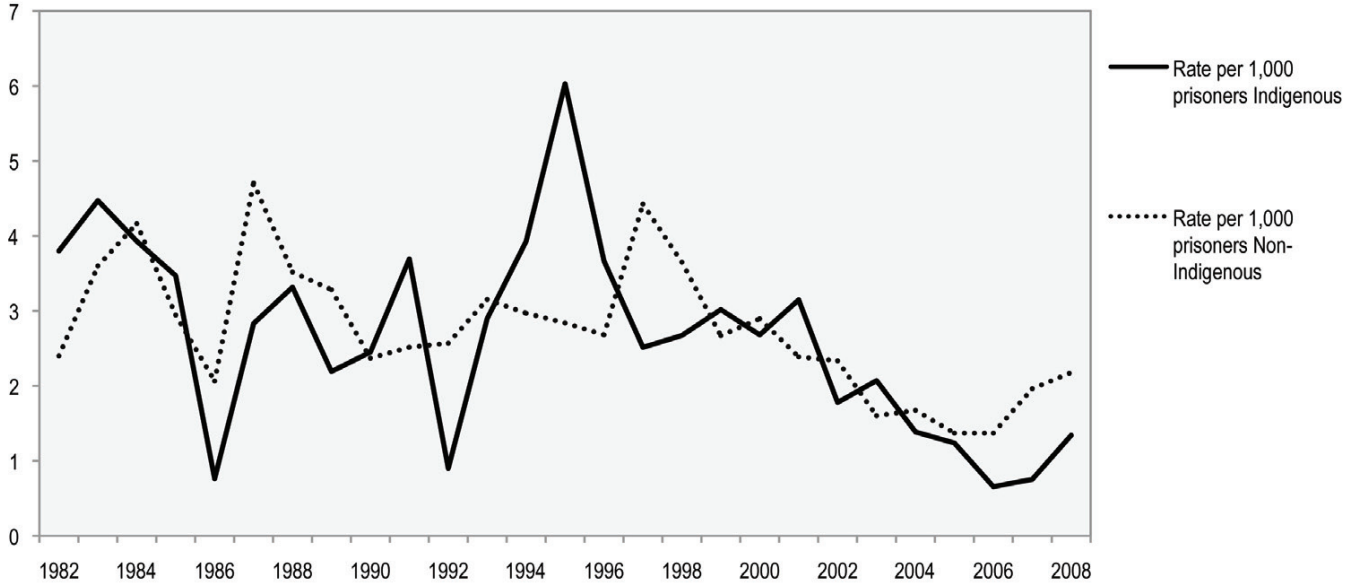
The rate of death in prison per 1,000 adult prisoners (for both Indigenous and non-Indigenous prisoners) has fluctuated since the early 1980s (Figure 2). Between 1986 and 1988 the annual rate increased from 1.5 to 4.4 deaths per 1,000 prisoners. In the 1990s rates dropped, ranging between 2.3 and 4 deaths per 1,000 prisoners each year. Since 1998, there has been a decrease in the rate of prison deaths, with the lowest rate for the recording period (1.2 deaths per 1,000 prisoners) identified in 2006. In recent years, there has been a noticeable increase in the rate, with the national rate being two deaths per 1,000 prisoners in 2008.

From the late 1980s until the early 2000s, deaths resulting from self-inflicted injuries, such as hangings, were generally the most frequent cause of death in prison for both Indigenous and non-Indigenous prisoners. However, over the past decade this pattern has changed, with natural causes now the most common cause of death in prison each year (see Figure 3). The recent increase in rate of death in prison for both Indigenous and non-Indigenous prisoners is therefore partly explained by increasing numbers of older prisoners (Indigenous and non-Indigenous) dying in prison from natural causes such as heart attack and cancer.

(i) Deaths Due to Natural Causes – Prison

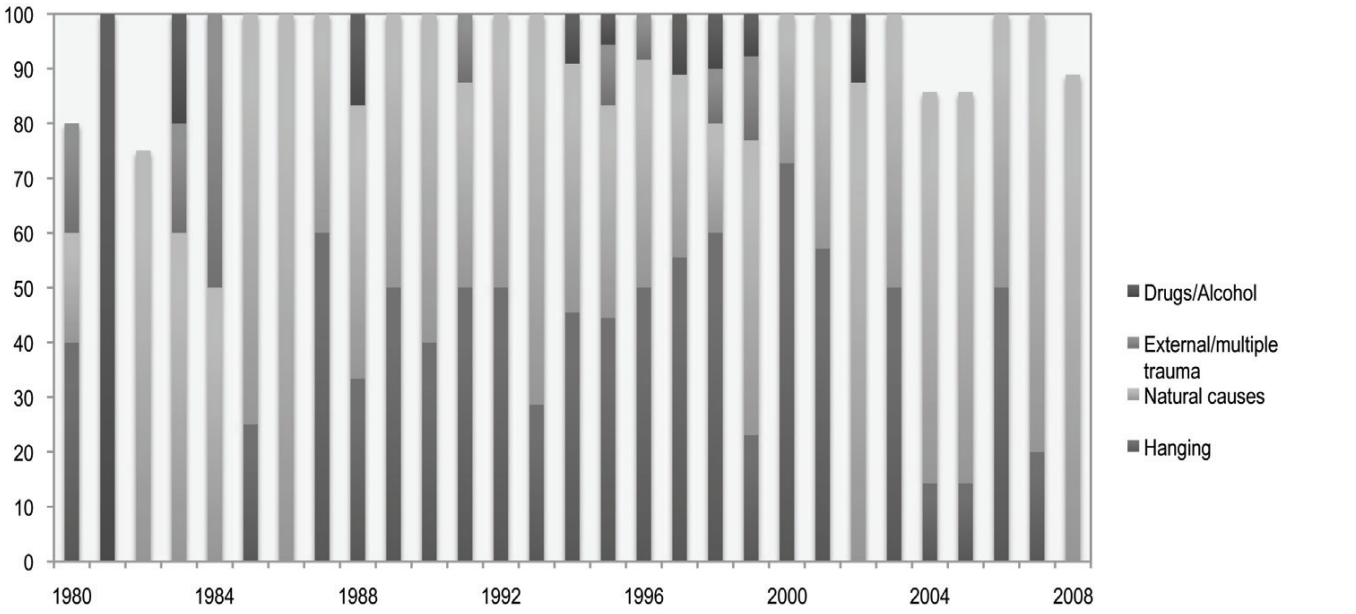
Since 1980, just over one-half (51 per cent) of all Indigenous

FIGURE 2: PRISON CUSTODY DEATHS BY INDIGENOUS STATUS (RATE PER 1,000 ADULT PRISONERS*), 1982–2008



* Rate per 1,000 relevant adult prisoners (see Part VI (A) below)
Source: AIC NDICP 1980–2008
Note: Indigenous status for the general prison population is not available before 1982.

FIGURE 3: MAIN CAUSES OF INDIGENOUS DEATHS IN PRISON CUSTODY, 1980–2008 (PERCENTAGE)



Source: AIC NDICP 1980–2008.

prisoner deaths in custody were due to natural causes, compared with 37 per cent for non-Indigenous prisoners (see Table A2 in Appendix A). In 2008 the number of natural cause deaths in prison (n=37) was the highest ever recorded. In 2008 eight of the nine Indigenous deaths were due to natural causes.

The increasing incidence of deaths due to natural causes suggests the need for appropriate responses from correctional agencies. These responses will depend on a better understanding of prisoner health and the associated care required for prisoners. The definition of a natural cause death in the NDICP is quite broad and is currently under review. Under the present definition there are ten different classifications of natural cause deaths. These classifications cover major bodily systems and disease types, and allow for cross-classification for multiple causes as well as undetermined cases where a Coroner cannot give an unequivocal determination as to cause of death.

Since 1980 there have been a total of 490 deaths in prison attributed to natural causes, with 441 (90 per cent) being further classified under one of the ten specific classifications of natural cause. The remaining cases had insufficient information to allow classification. Of the 441 natural cause deaths that have been categorised, 208 (47 per cent) were due to heart disease, 80 (18 per cent) were due to cancer, 46 (10 per cent) were due to respiratory disease and 23 (five per cent) were strokes. A total of 29 deaths (seven per cent) were due to multiple medical conditions and the remainder due to various other conditions.

Of the 490 natural cause deaths occurring in prison custody, 106 were of Indigenous people and 99 cases had sufficient information to classify under one of the natural cause classifications. Of these, 60 (61 per cent) were due to heart disease, eight (eight per cent) resulted from cancer, seven (seven per cent) resulted from respiratory disease and two (two per cent) occurred as the result of strokes. The remainder were due to multiple medical conditions and various other conditions.

It can be seen that a large proportion of natural cause deaths in prison since 1980 were the result of ongoing serious health conditions, particularly heart disease. A recent study completed by the Australian Institute of Health and Welfare[8] on the health of Australia's prisoners sampled a total of 9,149 prisoners, covering almost one-third of all persons in custody at the time of the survey. It found that a higher proportion of 35- to 44- year- old prisoners had asthma, cardiovascular disease and diabetes than persons of this age in the general population.[9] In addition, findings from this study showed that '[r]ates of hepatitis B and C are significantly higher among prison entrants than the wider community, as well as high levels of smoking, alcohol consumption and illicit drug use.'[10]

(ii) Age at Death – Prison Custody

People who die in custody tend to do so at much younger ages than the general population. In 2008 the median age at death in the general population was 78.1 years for males and 84.0 years for females.[11] For prisoners in 2008, the median age at death was 43 years for males and 53 years for females, differences of 31.5 and 31.0 years respectively. There are some substantial difficulties with directly comparing the life expectances of prison and non-prison populations due to differences between the populations such as age profiles, histories of socio-economic disadvantage and substance use. Nonetheless, this points to the seriousness of the health and wellbeing issues facing prisoners and correctional agencies.

Indigenous prisoners, like the Indigenous population as a whole, experience poorer average health than non-Indigenous people. Indigenous Australians experience higher rates of long-term health conditions such as asthma, diabetes and kidney failure than non-Indigenous Australians.[12] The most recent ABS statistics show that the average life expectancy for Indigenous males is 11.5 years less than for their non-Indigenous counterparts. Indigenous women have a mean life expectancy 9.7 years less than non-Indigenous women.[13] This recognised gap in health outcomes at least partly explains why greater proportions of Indigenous prisoners die of natural causes, and at younger ages, than non-Indigenous prisoners. Data from the NDICP show that since 1980, 83 per cent of Indigenous deaths in prison of persons aged between 40 and 54 years were due to natural causes. All Indigenous deaths in prison since 1980 of persons aged over 55 years were attributable to natural causes.

As the prison population ages, health issues associated with aging impact on deaths in custody. The median age at death for all prisoners, including Indigenous prisoners, has been increasing over the past decade. By way of explanation, median age is the middle age out of all persons dying within a group of people, such that half the ages in the list are less

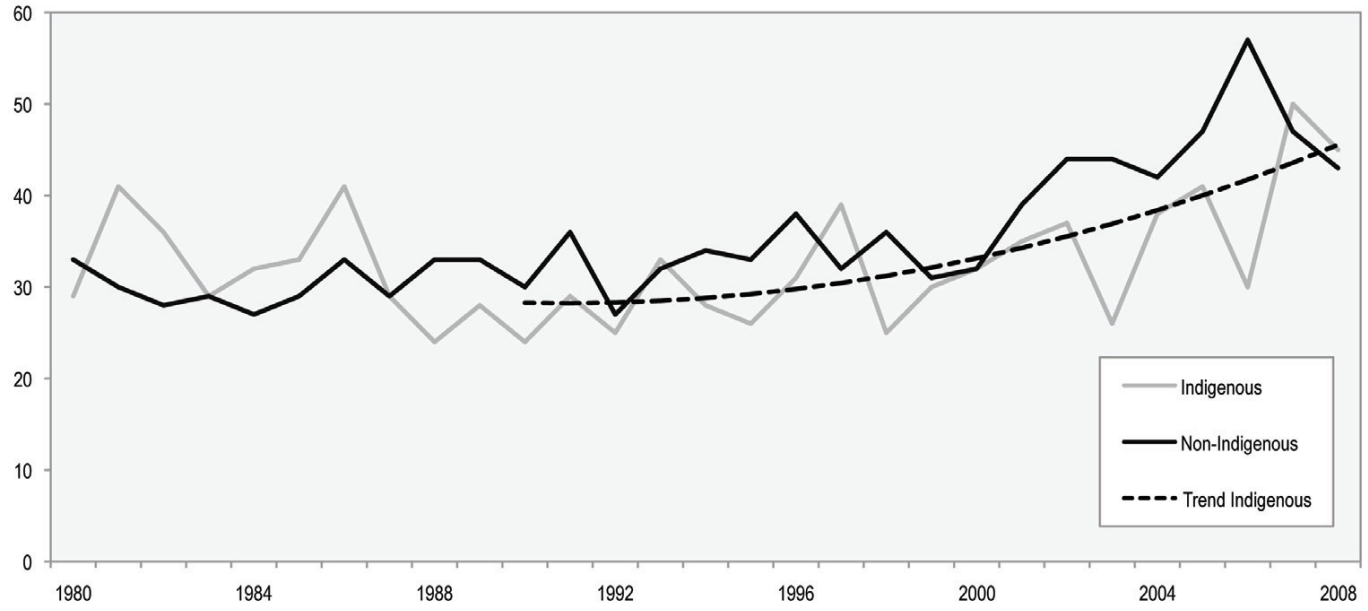
than the median, and half the ages are greater. Median age is a more reliable measure of central tendency than average age in the context of these data. Figure 4 shows that the median age of Indigenous and non-Indigenous prisoners dying in custody has risen, particularly over the last decade. For Indigenous prisoners, median age at death has risen from a low of 24 years in 1990 to a high of 50 years in 2007. More generally, of the 37 people who died from natural causes in 2008, 30 were persons aged 40 years or older and the median age for all persons dying of natural causes in prison in 2008 was 52 years. In other words, those persons dying of natural causes in prison are much older than the median age of the prison population.

(iii) Over-representation – Prison

It is well documented that Indigenous Australians are significantly over-represented in all areas of the criminal justice system, particularly in juvenile detention,[14] police custody incidents[15] and prison.[16] Figure 5 (see over) shows fluctuations in the ratio of Indigenous to non-Indigenous rates of death in prison custody. That is, Figure 5 illustrates the likelihood of Indigenous persons dying in prison compared with their non-Indigenous counterparts. The over-representation ratio is a well-recognised indicator where, in this case, a result over one indicates over-representation of Indigenous persons in prison deaths. Indigenous over-representation was at its highest in 1995 (where for every one non-Indigenous death in prison there were 2.1 Indigenous deaths). However, it is encouraging to note that since this peak in the mid-1990s there has been a steady decline in the over-representation ratio, with levels recorded in recent years being some of the lowest seen since 1980. In 2008 the over-representation ratio was 0.6, representing one of the lower ratios ever seen.

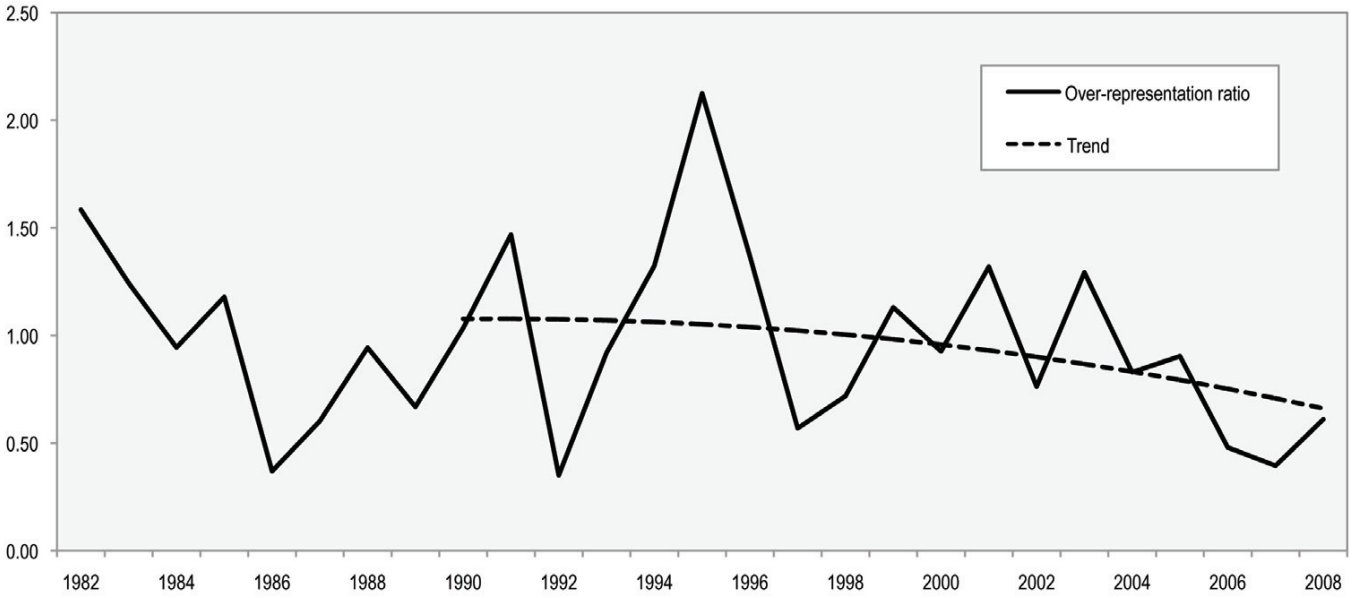
Furthermore, in 2008 the nine Indigenous deaths in prisons (17 per cent of total prison deaths in 2008) were lower than would be expected based on the per centage of Indigenous people imprisoned (26 per cent). The rate for Indigenous deaths in custody in 2008 was 1.3 per 1,000 Indigenous prisoners, compared with the higher rate of 2.2 per 1,000 non-Indigenous prisoners.

FIGURE 4: MEDIAN AGE AT DEATH IN PRISON, BY INDIGENOUS STATUS AND YEAR, 1980–2008



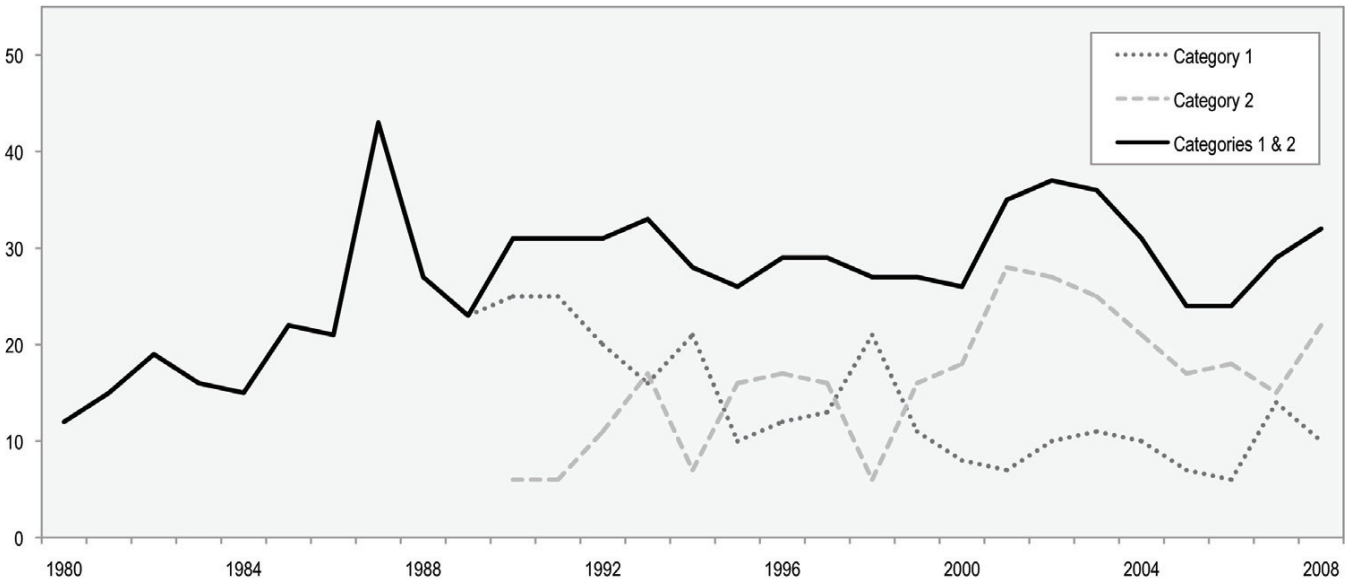
Source: AIC NDICP 1980–2008
Note: Indigenous status for the general prison population is not available before 1982.

FIGURE 5: OVER-REPRESENTATION RATIO* OF INDIGENOUS DEATHS IN CUSTODY, 1982–2008



*Rate per 1,000 relevant adult prisoners
Source: AIC NDICP 1980– 2008
Note: Indigenous status for the general prison population is not available before 1982.

FIGURE 6: TRENDS IN DEATHS IN POLICE CUSTODY AND CUSTODY-RELATED OPERATIONS, 1980–2008 (NUMBER)



Source: AIC NDICP 1980–2008

C Trends in Police Custody Deaths

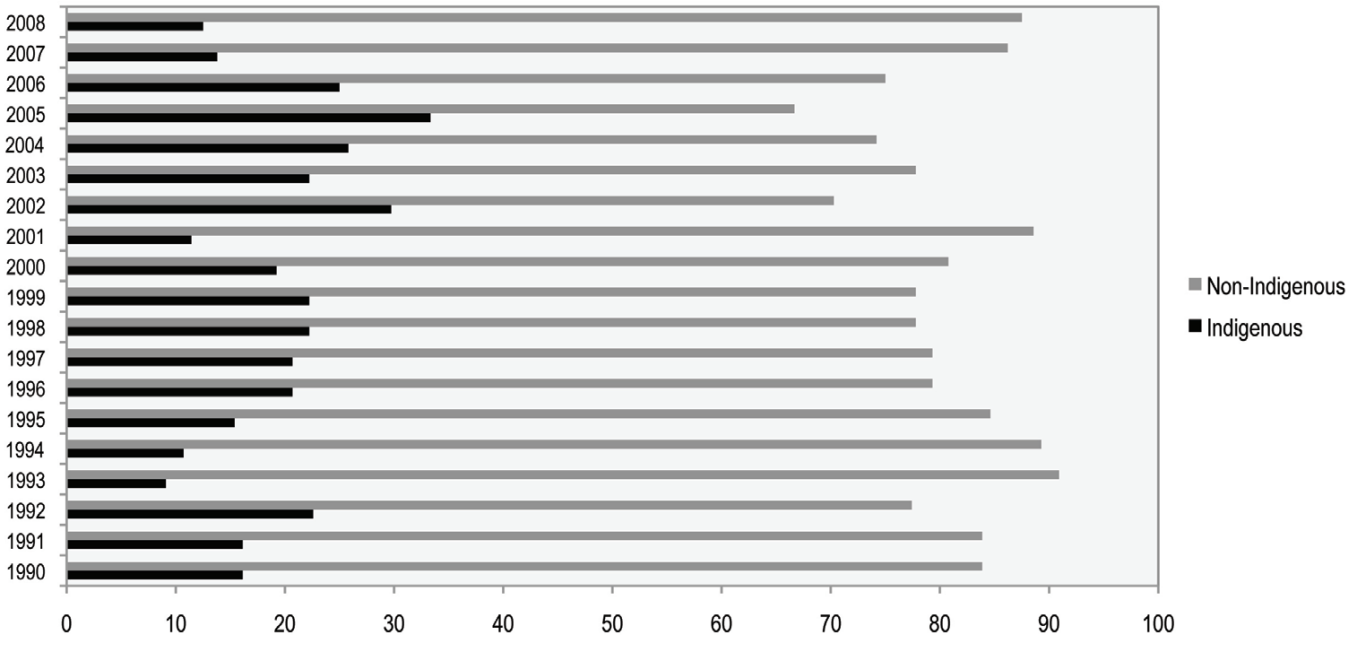
Before 1990 only deaths occurring in institutional settings, such as police cells and watch-houses, were included in the NDICP database. Although data is available on some police custody deaths since 1980, the analyses and trends discussed here are based on data from 1990 onwards, when data on deaths in police operations as well as police institutional settings began being collected. However, for the purposes of transparency, data from 1980 is included in tables/figures and appendixes as applicable.

The annual number of Indigenous and non-Indigenous deaths in police custody has been largely stable since 1990, with a peak of deaths in 2002 and then a decline to 2006, after which it rose to levels similar to those recorded throughout the 1990s (Figure 6). This generally stable trend in police custody deaths obscures changes in the circumstances of deaths occurring in police custody. As noted previously, the circumstances of police custody deaths are either Category 1 deaths (in institutional settings, such as police cells, raids, shootings) or Category 2 deaths (during sieges and police pursuits). These two categories exhibit different trends. Looking more closely (see Figure 6), it is apparent that since 1990 Category 1 deaths have declined, while Category 2 deaths increased between 1990 and 2001 but have since decreased markedly. Overall, Category 2 deaths have consistently been more prevalent than Category 1 deaths each year since 1999.

The trend for deaths in police custody involving Indigenous persons is similar to the trend for all deaths in police custody, with Category 2 deaths accounting for the majority of Indigenous deaths in police custody. However, the trend for Indigenous deaths involves a less dramatic rise in Category 2 deaths and little change in Category 1 deaths.

For deaths in police custody, the proportion of those dying who were Indigenous is used as an indicator of over-representation (Figure 7). At this time reliable rates for deaths in police custody cannot be calculated as consistent data on the population basis (the total number of people in police custody) is not available; the AIC has reviewed its Police Custody Survey to consider ways to improve its utility in overcoming this gap (see methodology note two). Of all deaths in police custody recorded in the NDICP since

FIGURE 7: DEATHS IN POLICE CUSTODY AND CUSTODY-RELATED OPERATIONS BY INDIGENOUS STATUS, 1990–2008 (PERCENTAGE)



Source: AIC NDICP 1980–2008

1980, 23 per cent involved Indigenous persons (n=176). While the numbers of deaths of Indigenous persons has remained relatively stable over the last two decades, the proportion of all police custody deaths that involve Indigenous persons has dropped recently. In 2007 and 2008 some of the lowest historical proportions of deaths involving Indigenous persons were recorded (14 per cent and 13 per cent respectively). This drop is in part due to higher numbers of non-Indigenous persons dying, mostly in the process of being detained, Category 2 deaths.

(i) Deaths Due to Natural Causes – Police Custody

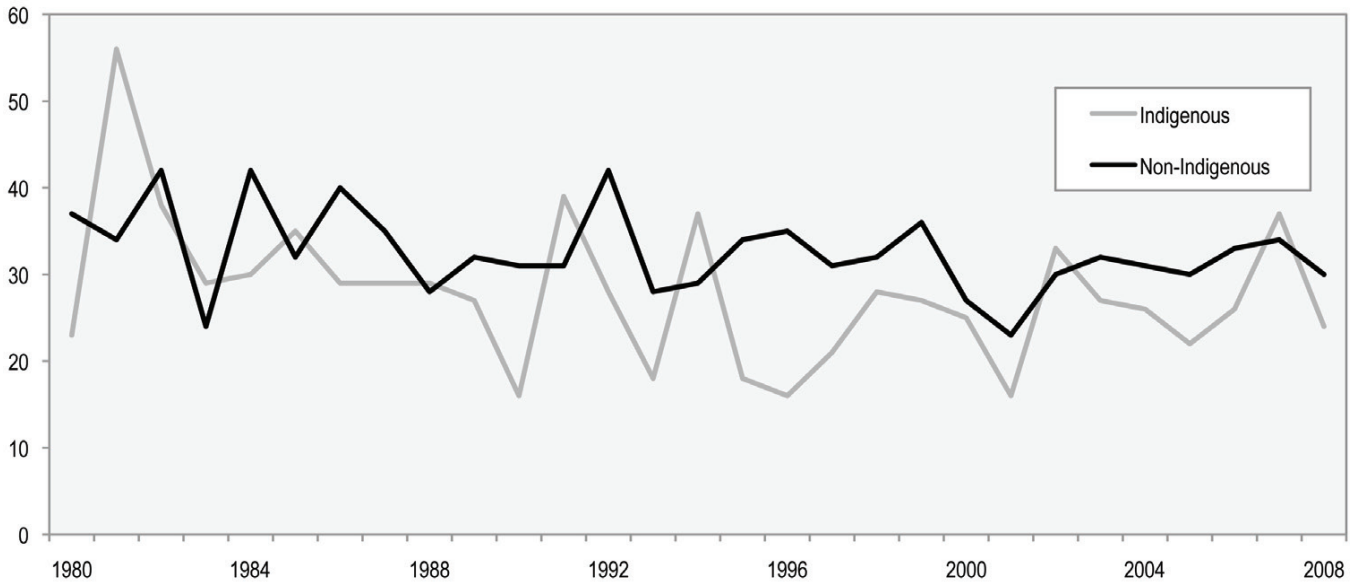
Since 1990, when deaths in police custody-related operations began to be collected, there have been 53 deaths in police custody due to natural causes (nine per cent of all police custody deaths since 1990). Twenty-one of these deaths (40 per cent) were of Indigenous persons and 32 (60 per cent) were non-Indigenous. Further details of the cause of death is recorded for 48 of these cases, with the majority of these (60 per cent; n=29) being due to heart disease, six (13 per cent) due to multiple conditions and four (eight per cent) due to respiratory illness. Another form of disease or illness accounted for the remaining cases (refer to Appendix Table A3).

(ii) Age at Death – Police Custody

Those who die in police custody tend to be younger than those who die in prison. For all deaths since 1980, the median age at death in police custody is 30 years, compared with 34 years for deaths in prison custody (Figure 8). However, when comparing the longer term trends in median age at death between police and prison custody deaths, it can be seen that median age at time of death has risen for those in prison custody, while for police custody the median age has remained fairly stable. For example, in 2008 the median age at death for police custody was 29 years, much younger than the median age at death of 43 years in prison custody. This younger age profile of persons dying in police custody reflects the broader literature which shows that persons aged under 30 years, predominantly younger males, are more likely than other groups to engage in offending and as a result are more likely to come into contact with police.[17]

The younger age profile for deaths in police custody is more pronounced for Indigenous persons than it is for non-Indigenous persons. Of the 109 total Indigenous deaths in police custody since 1990, the median age at death was 27 years, which compares with the median age for non-Indigenous persons over the same period of 30 years. Some

FIGURE 8: MEDIAN AGE AT DEATH OF POLICE CUSTODY DEATHS, BY INDIGENOUS STATUS, 1980–2008 (YEARS)



Source: AIC NDICP 1980–2008

44 per cent of Indigenous people who have died in police custody were less than 25 years of age at the time of death, compared with 25 per cent of non-Indigenous persons. When comparing the other age categories, it can be seen that 36 per cent of Indigenous deaths in police custody were of persons aged 25 to 39 years, compared with 44 per cent for non-Indigenous persons. Indigenous persons aged 40 to 54 years comprised 17 per cent of all Indigenous deaths, compared with 21 per cent for non-Indigenous persons in the same age category. Finally, for persons aged 55 years or older, four per cent of all Indigenous police custody deaths were of persons aged 55 years or over, compared with eight per cent for non-Indigenous persons (see Figure 8).

The greater proportion of deaths in police custody of Indigenous persons in the younger age categories compared with non-Indigenous persons in part reflects the younger age profile of the overall Indigenous population.[18] This potentially leads to a greater relative proportion of the Indigenous population coming into contact with the criminal justice system, including being placed in custody, compared with the non-Indigenous population. Indeed, a recent longitudinal cohort study of persons born in Queensland in 1990 and their contact with the criminal justice system found that

> when gender and Indigenous status were examined it was found that two in three (n=934, 62.6%) of all Indigenous males and one in four (n=429, 27.8%) Indigenous females had a record of offending by the age of 17 years compared to one in 10 (n=3,611, 12.8%) non-Indigenous males and one in 20 (n=1,823, 6.9%) non-Indigenous females.[19]

Research also indicates that young people aged 15 to 19 years are responsible for a much greater proportion of offences and have greater contact with the criminal justice system than those in other age groups.[20] Juveniles' increased risk of offending can be attributed to factors including a lack of maturity, propensity for risk-taking behaviours and susceptibility to peer influences. This is particularly so when these factors coincide with intellectual disability or mental illness and when coupled with juveniles' increased risk of victimisation, compared with other age groups.[21]

That is, available evidence suggests that the younger age profile of the Indigenous population generally compared to the non-Indigenous population, combined with a greater proportion of Indigenous young people coming in contact with the criminal justice system, contributes to the continuing over-representation of Indigenous persons in custody. Reducing the numbers and frequency with which Indigenous persons come into contact with the criminal justice system was one of the key recommendations put forward by the RCIADIC, and this remains an ongoing challenge now.

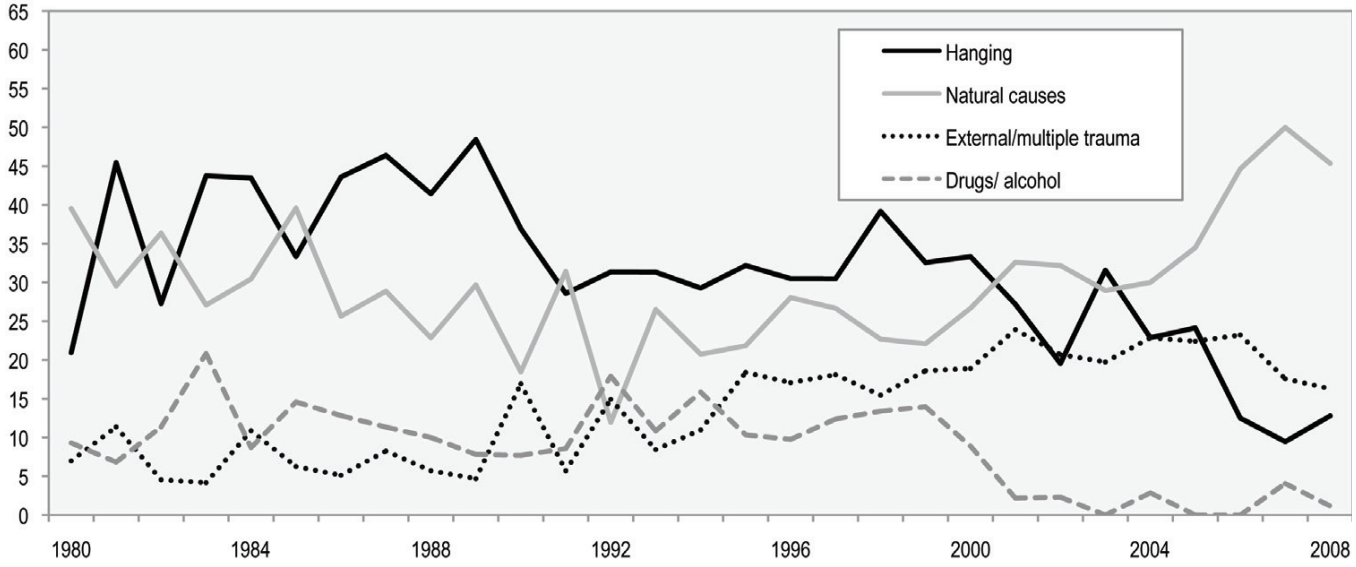
D Deaths Not Due to Natural Causes – All Custody Settings

The RCIADC was established 'in response to a growing public concern that deaths in custody of Aboriginal people were too common and public explanations were too evasive to discount the possibility that foul play was a factor in many of them.'[22] For this reason, the focus of this section is on deaths attributable to causes other than natural causes. In particular, trends for self-inflicted hangings, and also deaths that were caused by the actions of another person, are considered.

Hanging as a cause of death in all forms of custody (prison, police and juvenile custody) has been generally decreasing since the late 1990s, with the lowest recorded numbers occurring in 2006 and 2007, for both Indigenous and non-Indigenous persons (Figure 9 and 10). The majority of hangings occur in prisons; hanging as a cause of death in prison has been decreasing since the early 2000s for both Indigenous and non-Indigenous persons (see Appendix Table A2). Hanging deaths in police custody and custody-related operations have also declined for both Indigenous and non-Indigenous persons, from an average of 8.6 deaths per year from 1980 to 1989 to an average of 2.4 deaths per year from 1990 to 2008 (see Appendix Table A3). While conclusions cannot be drawn about hanging deaths in juvenile justice custody due to the small numbers, as explained above, in the interests of full reporting it is noted that hanging deaths in juvenile custody occur very infrequently, with the last recorded hanging death being in 2000; since 1980, only two per cent of all hanging deaths have occurred in juvenile custody.

The decrease in hanging deaths is due in part to efforts to remove hanging points and other materials that could be used in a hanging from prisons and police cells, a prevention strategy that has been informed by specific analysis of these matters in the NDICP. Of the 340 hanging deaths in prison custody between 1990 and 2008 for which the information is available (seven per cent have missing information), cell

FIGURE 9 - DEATHS IN ALL FORMS OF CUSTODY BY CAUSE OF DEATH, 1980–2008 (PERCENTAGE)



Note: Includes prison and police custody, police operations, and juvenile custody.
Source: AIC NDICP 1980–2008

FIGURE 10 - DEATHS OF INDIGENOUS PERSONS IN ALL FORMS OF CUSTODY BY CAUSE OF DEATH, 1980–2008 (PERCENTAGE)

Note: Includes prison and police custody, police operations, and juvenile custody.
Source: AIC NDICP 1980–2008

bars accounted for 39 per cent (n=134) of hanging points, other fittings inside cells comprised 36 per cent (n=121) and shower fixtures comprised 13 per cent (n=44). Bed sheets have consistently been the most commonly used object in hanging deaths each year (61 per cent).

Liability for a death in custody is not well captured in the NDICP database and is currently under review. However, there is information in the NDICP that provides an indication of deaths that were caused by the actions of another person; such deaths are not necessarily of a criminal nature since the data has not been checked against any court proceedings that might have followed the coronial findings. There have been 190 deaths in custody where the death was associated with the actions of another person (such as an inmate fatally wounding another inmate or a police shooting during a police operation), which represent nine per cent of all deaths in custody recorded since 1980. Forty-two per cent (n=80) occurred in prison custody and 58 per cent (n=110) occurred in police custody. There have been no deaths resulting from the actions of another person recorded in juvenile custody. Deaths in prison custody resulting from the actions of another person almost exclusively involved some form of trauma inflicted by another prisoner, whereas those in police custody almost exclusively resulted from shootings during police operations. Of the 80 cases of deaths resulting from the acts of another person in prison custody, 10 per cent (n=8) involved Indigenous victims, and for police custody and custody-related operations, nine per cent (n=10) involved an Indigenous victim.

These indicative findings suggest mental illness and the misuse of drugs and alcohol as cross-cutting issues for deaths in custody. There are many challenges that police face when seeking to detain people affected by mental illness or intoxication, as well as for correctional services in working with mentally unwell prisoners and protecting prisoners from other inmates. Responding to these challenges requires the continuing development of appropriate policies, processes and operating procedures that help to safeguard the wellbeing of police detainees, prisoners and officers. The presence of mental illness issues among persons in custody is an issue for all custodial authorities. Research has found that prisoners in Australia had higher rates of schizophrenia and psychotic disorders than the wider community and the per centage of the prison population with these mental illnesses was much higher in Australia than in New Zealand, Canada or other comparable countries.[23]

V Achieving Further Progress in Reducing Indigenous Deaths in Custody

Twenty years ago the RCIADIC concluded that the fundamental issue was not that Indigenous people in custody were more likely to die than non-Indigenous people in custody, but that Indigenous people were far more likely to be in custody in the first place. While the numbers and rates have changed since the time of the Royal Commission, the essential problem that was identified remains the same now: today Indigenous people comprise less than 2.5 per cent of the total Australian population[24] yet account for over a quarter (28 per cent) of young people in juvenile detention,[25] one-third (33 per cent) of people involved in police custody incidents[26] and more than one-quarter (26 per cent) of the total prison population.[27] It is a deceptively simple, but undeniably cogent fact that Indigenous Australians get locked up more often than other Australians.

At one level, there is some faint comfort in knowing that Indigenous people in custody are no more likely to die than non-Indigenous people in custody. Indigenous Australians are certainly over-represented among deaths in custody compared with their representation in the general Australian population, but they are not over-represented in comparison with the extent to which they appear in custodial populations. Custodial authorities have responded to the issues raised through the RCIADIC and subsequently through the NDICP, with operational, procedural and policy changes contributing to a reduction in self-inflicted deaths to the point where they now represent both the smallest number and smallest proportion of deaths since monitoring began. While any self-inflicted death is a tragedy, the scale of this tragedy has been declining.

Alongside the reduction in self-inflicted deaths, deaths from natural causes have been increasing. While more research is needed, it appears that ageing of the general population is leading to a relatively older prison population, with resulting implications for the nature of deaths in custody. The gap in health and mortality between Indigenous and non-Indigenous Australians is large and well-documented.[28] Coupled with the health disadvantages experienced by those entering the prison system more generally, the physical wellbeing of Indigenous prisoners is a continuing challenge for custodial authorities.

As the RCIADIC established so clearly, further efforts to reduce Indigenous deaths in custody must focus on reducing the number of Indigenous people who come into contact with the criminal justice system. There are many reasons why the rates of Indigenous over-representation remain high, despite the efforts of government and other agencies and Indigenous Australians themselves to close the gap on Indigenous disadvantage in the criminal justice system. There are many factors that contribute to high rates of offending among Indigenous Australians, leading to their over-representation in prison and police custody. These include the impacts of colonisation, the policies and practices of past governments, socio-economic disadvantage, alcohol misuse, the intergenerational transmission of violence and the younger age profile of the Indigenous population.

Recent research provides some insights into why Indigenous over-representation in the criminal justice system remains such a problem. Research conducted by the NSW Bureau of Crime Statistics and Research showed that rising Indigenous imprisonment rates in that state between 2001 and 2008 were largely due to increased severity by the criminal justice system in bail and sentencing decisions.[29] Indigenous offenders were found to have been more likely to be refused bail, to spend more time on remand, to be sentenced to imprisonment and to receive longer sentences than previously was the case, although these sentences were not necessarily longer than those given to non-Indigenous offenders. Importantly, the research showed that increased imprisonment rates were not the result of increased offending. Due to differences between the criminal justice systems across the states and territories, further research would be needed to show whether similar factors caused increased Indigenous imprisonment in the other states and territories.

A separate recent study by the NSW Bureau of Crime Statistics and Research examined why the imprisonment rate in New South Wales ('NSW') is much higher than in Victoria.[30] The study concluded that the higher NSW imprisonment rate is attributable to the combination of a higher rate of court appearance, a slightly higher conviction rate and higher likelihoods of both remand in custody and imprisonment.

A study into sentencing outcomes found that Indigenous and non-Indigenous offenders tend to receive equal sentences for similar offences.[31] By examining judges' sentencing remarks and controlling for the effects of offenders' social backgrounds and criminal histories, the study found similar results to a number of earlier studies that looked at possible sentencing disparities. South Australia was the one state where Indigenous offenders tended to receive more lenient sentences, with judges' remarks showing they understood the issues faced by Indigenous offenders and took their social circumstances into account, recognising situations where offenders were motivated by necessity and survival rather than greed.

There are many different ways of seeking to reduce Indigenous contact with the criminal justice system, but perhaps the greatest value can be achieved through programs and services aimed at reducing levels of recidivism. A recent NSW study found that reducing the rate of Indigenous re-appearance in court by 20 per cent almost halved the ratio of Indigenous to non-Indigenous Local Court appearances.[32] The study concluded that offender rehabilitation and assistance with improving compliance with court orders should be the focus of efforts to reduce over-representation. While correctional authorities are making progress in offender rehabilitation programs for Indigenous offenders, there remains a need for more culturally appropriate programs that better meet the needs of Indigenous offenders, including measures to help them deal with the grief and trauma issues that can impede their capacity to fully engage with programs and services.[33]

While deaths in juvenile detention are rare, this does not obviate the need for measures designed to reduce the involvement of Indigenous young people with the criminal justice system. Over-representation in juvenile detention remains unacceptably high, and as long as this continues to be the case, there will continue to be a heightened risk of Indigenous young people entering adult custody. Efforts to reduce Indigenous contact with the criminal justice system must include early interventions to reduce juvenile offending.

There is also no doubt that the misuse of alcohol is a major risk factor for offending, including Indigenous offending.[34] Interventions aimed at limiting the harms associated with alcohol use through a combination of demand and supply reduction approaches have great potential for achieving substantial and lasting benefits for Indigenous Australians and further reducing their representation in deaths in custody statistics.

Although it may never be possible to completely prevent Indigenous Australians dying in custody especially given the trend of prisoners being older, as long as Indigenous persons

remain over-represented at all stages of the criminal justice system the number of Indigenous people dying in custody will remain unacceptably high. It is only through continued, concerted and informed efforts to reduce Indigenous contact with the criminal justice system that this problem can be appropriately managed.

VI Notes on Analytical Methodology

A Rate of Death Per 1,000 Relevant Adult Prisoners

Rates are calculated by dividing the number of deaths in prison by the relevant prison population and then multiplying the result by 1,000; the relevant population is the total population of adult prisoners for overall rates, the total population of Indigenous prisoners for Indigenous rates of death and the total population of non-Indigenous prisoners for non-Indigenous rates of death. The population numbers used as the denominator are taken from the annual prisoner census conducted by the ABS.[35] The ABS census counts all prisoners in corrective services custody in each state and territory as at midnight on 30 June. Rates are only calculated back to 1982 as comparable prison census data are not available prior to 1982. Comparison of rates indicate whether there is over-representation by Indigenous persons in deaths, and 'rate ratios' are used for this purpose; a rate ratio is calculated by dividing the Indigenous rate of death by the non-Indigenous rate.

B Proportion of All Deaths in Police Custody That Involve Indigenous Persons

Proportions are used because it is not currently possible to calculate rates of death in police custody; there is no reliable data available on the number of people who are placed into police custody each year or the number of people who come into contact with police in custody-related operations. This information is not available through the AIC's Police Custody Survey, because this survey only captures data for persons held in police cells and watch-houses over a one month period, approximately every five years. While it is indicative of the numbers of people being held in police custody, it does not cover all types of police custody or custody-related operations, for example custody that does not involve being held in a police cell, and it would be unreliable to extrapolate custody populations from the survey data and to draw conclusions for periods other than those directly covered by the survey. The possibility of gaining better police custody data for the NDICP is an issue the AIC is pursuing with police agencies.

C Other Notes

Analyses in this paper have been conducted for the total number of cases known to the AIC at the time of writing and for which the relevant information is available. The AIC is reviewing its data on total numbers of deaths in custody cases following advances in electronic processes for this task, for reporting in future monitoring reports. The total numbers of cases reported in this paper should be treated as a minimum, particularly for non-Indigenous deaths and deaths in motor vehicle pursuits. The next NDICP monitoring report, covering data to 30 June 2011, is due to be released shortly. Also, some cases have incomplete data where some variables are missing or unknown until a coronial finding is available. As a result, there are differences in the number of cases used for the various analyses. Finally, some column and row percentages may not total to 100 due to rounding.

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1 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 6 [1.3.3].
2 Ibid vol 5, 78–9 recs 40–7.
3 Ibid.
4 Ibid 78 recs 41(c)(i)–(iv).
5 Australian Bureau of Statistics (ABS), *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006,* Report No 4713 (2010) 172.
6 See Boyd Hunter and Aarthi Ayyar, 'Some Reflections on the Quality of Administrative Data for Indigenous Australians: The Importance of Knowing Something about the Unknown(s)' (Working Paper No 51, Centre for Aboriginal Economic Policy Research, The Australian National University, 2009).
7 For an overview of trends in juvenile detention in Australia, see Kelly Richards and Mathew Lyneham, 'Juveniles in Detention in Australia, 1981–2008' (Monitoring Report No 12, Australian Institute of Criminology, 2010).
8 'The Health of Australia's Prisoners 2009' (Report, Australian Institute of Health and Welfare, 2010).

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Appendix A: Detailed Findings from the National Deaths in Custody Program

TABLE A1: RATE OF DEATH IN PRISON CUSTODY, BY YEAR, JURISDICTION, AND INDIGENOUS STATUS, 1990–2008 (RATE PER 1,000 RELEVANT ADULT PRISONERS)

	NSW		Vic		Qld		WA		SA		Tas		NT		ACT		Total	
	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous
1990	3.45	2.25	0.00	0.90	5.44	3.11	0.00	2.64	8.08	2.48	0.00	4.45	0.00	7.75	0.00	0.00	2.45	2.28
1991	4.54	1.86	0.00	1.80	5.79	2.29	3.47	5.22	0.00	4.48	99.30	3.92	0.00	0.00	0.00	0.00	3.70	2.41
1992	1.54	1.76	0.00	1.38	2.71	5.46	0.00	2.27	0.00	4.14	0.00	7.81	0.00	7.99	0.00	0.00	0.90	2.55
1993	5.46	2.75	19.14	2.77	2.35	4.26	0.00	2.16	0.00	6.13	0.00	3.98	0.00	0.00	0.00	0.00	2.89	3.12
1994	3.64	3.49	0.00	1.26	7.23	3.61	2.91	2.76	4.34	1.79	0.00	8.62	3.02	0.00	0.00	0.00	3.93	2.97
1995	6.73	2.33	0.00	2.57	6.28	4.03	1.40	2.68	23.28	4.37	0.00	4.35	2.92	0.00	0.00	0.00	6.02	2.84
1996	3.15	2.52	0.00	3.00	6.19	2.21	2.66	2.66	3.85	3.29	0.00	3.89	2.78	0.00	0.00	29.40	3.67	2.68
1997	2.97	4.75	0.00	3.19	1.06	3.80	4.00	5.35	0.00	3.27	0.00	8.73	4.56	5.98	0.00	0.00	2.51	4.31
1998	2.74	2.83	7.95	4.39	1.94	3.79	3.96	6.27	4.13	2.63	0.00	3.50	0.00	0.00	0.00	13.33	2.67	3.65
1999	5.53	2.65	0.00	1.79	2.71	3.05	1.93	2.98	0.00	0.88	0.00	13.03	2.10	0.00	0.00	0.00	3.02	2.67
2000	2.40	1.92	7.21	2.32	1.91	3.79	3.99	4.71	4.45	5.59	0.00	2.85	0.00	0.00	0.00	0.00	2.69	2.89
2001	3.74	2.00	0.00	1.54	1.74	3.86	3.73	2.86	4.34	2.59	0.00	0.00	4.39	3.83	0.00	0.00	3.15	2.39
2002	1.33	2.48	0.00	2.96	1.69	1.41	3.45	2.59	0.00	1.64	0.00	5.47	2.18	0.00	0.00	0.00	1.78	2.33
2003	0.64	1.91	0.00	0.28	4.20	1.73	1.97	2.66	4.09	2.48	0.00	0.00	1.75	0.00	0.00	0.00	2.08	1.60
2004	1.27	1.55	0.00	1.16	1.67	1.24	1.64	3.07	0.00	3.24	0.00	2.58	1.80	0.00	0.00	0.00	1.39	1.67
2005	1.19	1.35	4.51	1.15	0.00	0.75	1.42	0.96	0.00	4.97	0.00	2.08	3.01	0.00	0.00	0.00	1.24	1.37
2006	1.02	1.53	0.00	1.08	0.00	0.99	0.71	1.88	0.00	1.58	0.00	2.18	1.53	0.00	0.00	0.00	0.66	1.37
2007	0.97	1.94	0.00	2.28	0.69	1.46	1.21	0.91	0.00	2.90	0.00	6.51	0.00	0.00	0.00	0.00	0.75	1.94
2008	0.47	2.03	0.00	2.77	1.34	1.98	3.87	1.35	0.00	3.24	0.00	0.00	0.00	0.00	0.00	6.85	1.34	2.15

Source: AIC NDICP 1980–2008

TABLE A2: CAUSE OF DEATHS IN PRISON CUSTODY BY INDIGENOUS STATUS AND YEAR 1980–2008

	Hanging		Natural Causes		Head Injury		Gunshot		External/ Multiple Trauma		Drugs/ Alcohol		Other/ Multiple		Missing		Total	
	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous
1980	2	5	1	15	1	1	0	0	1	2	0	1	0	0	0	1	5	25
1981	0	13	0	6	0	0	0	1	0	5	1	1	0	0	0	1	1	27
1982	0	6	3	7	0	0	1	0	0	1	0	2	0	3	0	2	4	21
1983	0	15	3	3	0	0	0	0	1	1	1	6	0	1	0	0	5	26
1984	0	13	2	7	0	0	0	1	2	3	0	2	0	1	0	0	4	27
1985	1	9	3	9	0	0	0	0	0	2	0	2	0	0	0	0	4	22
1986	0	6	1	7	0	1	0	0	0	1	0	1	0	0	0	0	1	16
1987	3	19	2	12	0	0	0	0	0	8	0	8	0	0	0	1	5	48
1988	2	15	3	10	0	1	0	0	0	2	1	3	0	2	0	3	6	36
1989	2	19	2	10	0	0	0	1	0	2	0	4	0	0	0	0	4	36
1990	2	15	3	8	0	0	0	0	0	4	0	0	0	1	0	0	5	28
1991	4	10	3	12	0	3	0	0	1	1	0	3	0	2	0	0	8	31
1992	1	16	1	6	0	0	0	2	0	4	0	5	0	1	0	0	2	34
1993	2	19	5	14	0	1	0	0	0	1	0	6	0	1	0	0	7	42
1994	5	17	5	11	0	0	0	0	0	6	1	7	0	1	0	0	11	42
1995	8	18	7	10	0	0	0	0	2	5	1	7	0	1	0	0	18	41
1996	6	15	5	15	0	2	0	0	1	3	0	5	0	0	0	0	12	40
1997	5	26	3	23	0	0	0	0	0	9	1	9	0	0	0	0	9	67
1998	6	28	2	14	0	0	0	0	1	7	1	10	0	0	0	0	10	59
1999	3	22	7	9	0	0	0	0	2	5	1	10	0	0	0	0	13	46
2000	8	21	3	17	0	2	0	0	0	3	0	7	0	0	0	1	11	51
2001	8	17	6	23	0	0	0	0	0	1	0	1	0	1	0	0	14	43
2002	0	16	7	18	0	0	0	1	0	4	1	1	0	2	0	0	8	42
2003	5	13	5	13	0	0	0	0	0	3	0	0	0	1	0	0	10	30
2004	1	13	5	15	0	1	0	0	0	1	0	1	0	0	1	1	7	32
2005	1	9	5	14	0	1	0	0	0	2	0	0	0	0	1	1	7	27
2006	2	5	2	19	0	0	0	0	0	3	0	0	0	0	0	0	4	27
2007	1	6	4	28	0	0	0	0	0	1	0	1	0	1	0	3	5	40
2008	0	10	8	29	0	0	0	0	0	3	0	0	1	3	0	0	9	45
Total	**78**	**416**	**106**	**384**	**1**	**13**	**1**	**6**	**11**	**93**	**9**	**103**	**1**	**22**	**2**	**14**	**209**	**1051**

Source: AIC NDICP 1980–2008

TABLE A3: CAUSE OF DEATHS IN POLICE CUSTODY AND CUSTODY-RELATED OPERATIONS, BY INDIGENOUS STATUS AND YEAR 1980–2008

	Hanging		Natural Causes		Head Injury		Gunshot		External/ Multiple Trauma		Drugs/ Alcohol		Other/ Multiple		Missing		Total	
	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous
1980	1	1	0	1	2	2	1	0	0	0	1	2	0	0	0	1	5	7
1981	1	6	1	5	1	0	0	0	0	0	0	1	0	0	0	0	3	12
1982	0	6	2	4	1	2	0	0	1	0	0	3	0	0	0	0	4	15
1983	1	5	4	2	1	0	0	0	0	0	0	3	0	0	0	0	6	10
1984	1	6	1	4	0	1	0	0	0	0	1	1	0	0	0	0	3	12
1985	0	6	4	3	1	1	0	1	0	1	1	4	0	0	0	0	6	16
1986	4	6	1	1	2	1	0	0	0	1	1	3	0	0	0	1	8	13
1987	9	13	6	8	0	0	0	2	0	0	0	3	0	0	0	2	15	28
1988	2	9	2	1	0	0	0	6	2	0	1	2	0	1	0	1	7	20
1989	3	6	5	2	0	1	1	2	0	1	1	0	0	0	0	1	10	13
1990	0	6	0	1	2	2	1	3	2	5	0	5	0	4	0	0	5	26
1991	1	5	2	5	1	3	0	9	1	1	0	3	0	0	0	0	5	26
1992	1	3	1	0	0	3	0	9	2	4	2	5	1	0	0	0	7	24
1993	0	4	2	1	0	4	1	8	0	6	0	3	0	4	0	0	3	30
1994	0	1	1	0	0	0	2	15	0	3	0	5	0	1	0	0	3	25
1995	0	1	0	2	0	2	0	10	4	5	0	1	0	1	0	0	4	22
1996	1	2	0	3	1	0	1	7	3	7	0	3	0	1	0	0	6	23
1997	1	0	1	1	1	1	0	11	2	8	1	2	0	0	0	0	6	23
1998	1	2	2	4	0	0	1	6	1	6	0	2	1	0	0	1	6	21
1999	3	0	1	2	0	1	0	9	2	7	0	1	0	1	0	0	6	21
2000	0	0	1	2	0	0	0	7	4	10	0	1	0	1	0	0	5	21
2001	0	0	0	1	1	2	1	4	2	19	0	1	0	3	0	1	4	31
2002	0	1	2	1	2	6	2	8	4	10	0	0	1	0	0	0	11	26
2003	1	5	2	2	0	3	0	7	4	8	0	0	1	2	0	1	8	28
2004	1	1	1	0	0	1	0	11	6	9	0	1	0	0	0	0	8	23
2005	2	2	1	0	0	1	0	6	4	7	0	0	1	0	0	0	8	16
2006	0	0	1	3	0	1	0	4	3	7	0	0	1	2	1	1	6	18
2007	0	0	2	3	0	0	1	7	1	11	0	2	0	1	0	1	4	25
2008	0	1	1	1	1	0	1	13	0	11	0	1	1	1	0	0	4	28
Total	**34**	**98**	**47**	**63**	**17**	**38**	**13**	**165**	**48**	**147**	**9**	**58**	**7**	**23**	**1**	**11**	**176**	**603**

Source: AIC NDICP 1980–2008

TABLE A4 - DEATHS IN CUSTODY BY AGE-GROUP AND INDIGENOUS STATUS, 1980–2008 (NUMBER)

	Less than 25 years			25–39 years			40–54 years			55 years and older			Total		
	Indigenous	Non-Indigenous	Total	Indigenous	Non-Indigenous	Total	Indigenous	Non-Indigenous	Total	Indigenous	Non-Indigenous	Total	Indigenous	Non-Indigenous	Total
1980	5	8	13	3	11	14	3	8	11	0	5	5	11	32	43
1981	2	9	11	0	15	15	1	12	13	2	3	5	5	39	44
1982	1	10	11	3	13	16	3	9	12	1	4	5	8	36	44
1983	2	14	16	6	12	18	2	6	8	1	5	6	11	37	48
1984	0	11	11	5	16	21	2	5	7	0	7	7	7	39	46
1985	0	10	10	7	13	20	2	4	6	1	11	12	10	38	48
1986	4	3	7	4	13	17	2	10	12	0	3	3	10	29	39
1987	7	25	32	8	33	41	5	12	17	0	7	7	20	77	97
1988	5	17	22	6	23	29	1	11	12	2	5	7	14	56	70
1989	4	12	16	9	25	34	1	9	10	0	4	4	14	50	64
1990	7	14	21	2	24	26	1	8	9	0	9	9	10	55	65
1991	4	15	19	7	23	30	2	9	11	0	10	10	13	57	70
1992	4	17	21	3	18	21	1	15	16	1	8	9	9	58	67
1993	5	16	21	2	33	35	2	18	20	1	6	7	10	73	83
1994	5	20	25	7	26	33	1	14	15	1	8	9	14	68	82
1995	11	16	27	7	30	37	4	13	17	0	6	6	22	65	87
1996	7	15	22	9	22	31	2	18	20	0	9	9	18	64	82
1997	6	22	28	6	37	43	3	21	24	0	10	10	15	90	105
1998	9	16	25	5	40	45	3	13	16	0	11	11	17	80	97
1999	4	16	20	9	33	42	5	8	13	1	10	11	19	67	86
2000	7	14	21	8	37	45	2	10	12	0	12	12	17	73	90
2001	5	21	26	9	25	34	3	12	15	1	16	17	18	74	92
2002	2	15	17	11	22	33	4	20	24	2	11	13	19	68	87
2003	8	6	14	4	25	29	5	19	24	1	8	9	18	58	76
2004	3	9	12	9	23	32	3	14	17	0	9	9	15	55	70
2005	5	5	10	5	16	21	4	13	17	1	9	10	15	43	58
2006	5	7	12	5	14	19	1	9	10	0	15	15	11	45	56
2007	1	6	7	2	24	26	4	18	22	2	17	19	9	65	74
2008	2	6	8	4	25	29	5	21	26	2	21	23	13	73	86
Total	**130**	**375**	**505**	**165**	**671**	**836**	**77**	**359**	**436**	**20**	**259**	**279**	**392**	**1664**	**2056**

Source: AIC NDICP 1980–2008

PRACTICE

EDITORIAL INTRODUCTION

In order to address the gross overrepresentation of Aboriginal people in custody – the rates of which have worsened over the past 20 years – the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') identified 339 recommendations. In recommendation 105, the RCIADIC identified the critical role that research and the advocacy of law reform could play in supporting Aboriginal and Torres Strait Islander Legal Services and Aboriginal communities:

> That in providing funding to Aboriginal Legal Services governments should recognize that Aboriginal Legal Services have a wider role to perform than their immediate task of ensuring the representation and provision of legal advice to Aboriginal persons. The role of the Aboriginal Legal Services includes investigation and research into areas of law reform in both criminal and civil fields which relate to the involvement of Aboriginal people in the system of justice in Australia. In fulfilling this role Aboriginal Legal Services require access to, and the opportunity to conduct, research.[1]

The Commonwealth Attorney-General's Department now provides funding to Aboriginal and Torres Strait Islander Legal Services ('ATSILS') in each state and territory to provide legal aid services to Aboriginal and Torres Strait Islander people and communities. This includes an allocation to each ATSILS to deliver a law and justice advocacy program, conducting law and policy reform and research initiatives.

These ATSILS have prepared a series of case studies, compiled here, from their particular perspectives, on issues identified by the RCIADIC, which are of special concern to their respective states and territories.

In the Northern Territory, among the many challenges experienced by the North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, those of young people in the justice system and the abuse of alcohol continue to remain unsolved. In New South Wales, the Aboriginal Legal Service (NSW/ACT) has monitored the use of the coroner's recommendatory power, and in Queensland, the Aboriginal and Torres Strait Islander Legal Service (Qld) has played a central role in public scrutiny of the investigation into the death on Palm Island of Mulrunji Doomadgee. The Victorian Aboriginal Legal Service has collaborated with other community legal services within the State to monitor the competency of cultural training programs for justice agencies, while in South Australia, the Aboriginal Legal Rights Movement has been prominent in its advocacy of the recognition of a duty of care owed by custodial authorities.

1 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, 92.

A CONTEMPORARY SNAPSHOT OF TWO ISSUES UPON WHICH THE RCIADIC REPORT COMMENTED: YOUTH JUSTICE AND THE OVER-INCARCERATION OF ABORIGINAL YOUNG PEOPLE, AND ALCOHOL-RELATED OFFENCES AND OFFENDING

Shanna Satya and Ruth Bella Barson*

I Introduction

In 2001, a Northern Territory ('NT') Magistrates Court sentenced a man to 14 days imprisonment for possessing a five litre cask of moselle in the Aboriginal community of Hermannsburg. The sentencing Magistrate remarked: 'On 18 June, when I was last here at Hermannsburg, I said that anyone who was found to have liquor in their possession in a restricted area of Hermannsburg would be sentenced to a term of imprisonment, and so it will be in this case.'[1]

The NT's culture of mass imprisonment is evidenced in both the judicial propensity to overlook community based dispositions in favour of incarceration, and in the 'lock 'em up' ethos underpinning mandatory sentencing and other punitive laws in the NT.[2] Against this backdrop, it is unsurprising that incarceration statistics emerging from the NT are alarming.

The NT has the highest incarceration rate in the country, and the third highest in the world.[3] The NT imprisons approximately 748 adults for every 100,000.[4] By comparison, Western Australia has the second highest incarceration rate: 262 people for every 100,000.[5] The NT has seen a 41 per cent increase in incarceration rates over the last decade,[6] the largest percentage increase in the country. Of the people incarcerated in the NT, over 81 per cent are Aboriginal,[7] despite Aboriginal people representing only 32 per cent of the population.[8]

Reducing Aboriginal incarceration rates was the central theme of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') report. Incarceration rates in the NT have more than tripled in the 20 years since the tabling of the RCIADIC.

This article provides a contemporary snapshot of two issues upon which the RCIADIC report commented: youth justice and the over incarceration of Aboriginal young people, and alcohol related offences and offending. Both issues have come under recent policy and legislative scrutiny in the NT. Twenty years on, consideration of the RCIADIC report provides a platform from which to analyse whether NT Government practices in these areas are effective in engaging with the ongoing issue of Aboriginal people being incarcerated at exponential and disproportionate rates.

II Youth

The RCIADIC told us unequivocally that '[i]ncarceration as a deterrent has been shown to be an ineffective means of dealing with the issue of Aboriginal juvenile offending'.[9] The RCIADIC went on to conclude that prison may actually be crime producing, rather than crime preventing.[10] This notion that contact with the criminal justice system may result in entrenchment within it is a significant finding. It is also in contrast to the finding that young people diverted are less likely to have further involvement in the criminal justice system.[11]

The NT currently has the highest youth incarceration rate in the country: 101 per 100,000 people.[12] Although statistics were not as readily available at the time of the RCIADIC, the report concluded that approximately 55 per cent of young people incarcerated in the NT were of Aboriginal descent.[13] Now, Aboriginal young people represent 97 per cent of the NT youth detention population,[14] and only 47 per cent of the general youth population.[15]

The NT has traditionally responded to youth offending with a 'tough on crime' approach. This is in obvious contrast to the

emphasis the RCIADIC attached to early intervention and diversionary strategies. The importance of early intervention and diversionary strategies in reducing youth incarceration rates was also later reiterated in the 1997 *Bringing Them Home* report,[16] the National Indigenous Law and Justice Framework,[17] and most recently in the *Doing Time – Time for Doing* report.[18]

A The Promise of Diversion

Diversion is an essential ingredient of an effective youth justice system. The philosophy of diversion recognises the negative consequences of exposing young people to the criminal justice system, and offers young people a pathway out of crime, without exposing them to the stigma and alienation of the criminal justice system. Diversion also recognises the reality that most young people 'grow out of crime' when exposed to positive interventions.[19]

The NT Government of the times' attitude towards diversionary strategies was illuminated in the final Government Implementation Report for the RCIADIC.[20] The report lamented that public debate in relation to mandatory sentencing had 'misleadingly characterised the NT Government's approach to juvenile justice',[21] explaining that mandatory sentencing was 'essentially a diversionary strategy with a strong orientation towards the social needs of Aboriginal youth'.[22] Although mandatory sentencing no longer features in the NT youth justice system, it is interesting that it was against the backdrop of the 'stop mandatory sentencing' campaign that youth diversion was introduced.[23]

B The Decision to Divert a Young Person

The decision to divert a young person is a loaded one. The RCIADIC articulates this point: 'The police decision to arrest a juvenile marks the point of entry into the juvenile justice system from whence it is often difficult to disentangle oneself'.[24] Research consistently tells us that Aboriginal young people are less likely to be diverted compared with non-Aboriginal young people.[25] The consequence of this is Aboriginal young people have a higher rate of entrenchment in the more punitive aspects of the criminal justice system.[26]

Police have an unfettered power to administer all aspects of diversion in the NT. Section 44 of the *Youth Justice Act 2005* (NT) gives police an absolute and unappealable discretion over both the decision to divert a young person, and to determine whether they have successfully completed diversion. The court only has a referral power through section 64, and the prosecution (an arm of police in summary jurisdiction proceedings) must consent for a court referral to be valid. This gives police a veto power over the magistrate's decision to refer a young person to diversion. Police power over the diversion process, from start to finish, is accordingly absolute.

Police should not be the gate-keepers of whether or not a young person enters into the criminal justice system. The North Australian Aboriginal Justice Agency ('NAAJA') and Central Australian Aboriginal Legal Aid Service ('CAALAS') advocate for both police and the judiciary to have diversion referral and decision making powers.

> The evidence suggests that the greater the police control of the referral process the less likely it is that Indigenous young people will benefit from [diversionary] conferencing. In states where there is the possibility of the Children's Court, as well as police, referring young people to a conference, there is less adverse discrimination. Courts appear more willing than police to refer Aboriginal youth …[27]

The reasons for this inequity are complex, a full discussion of which is beyond the scope of this paper. Academics such as Chris Cunneen and Harry Blagg have long argued against police being the sole institution invested with diversion referral and decision making powers.[28]

For diversion to be effective in the NT, it needs to take into account the fraught relationship many Aboriginal people have with both the police and the criminal justice system. It also needs to be culturally relevant and accessible for Aboriginal young people.

C 'Youth Justice' in the NT?

Currently, youth justice in the NT can be characterised by its deficiencies. Many Aboriginal young people are alienated by the youth justice system because it ignores, rather than actively engages with, their sociocultural identity and reality.

There are no youth specific magistrates in the NT. The same magistrates sit in both adult and youth jurisdictions, putting on and taking off their youth justice hat when appropriate. Whilst some magistrates may have a specific interest in the youth jurisdiction; and a concurrent commitment to

maintaining a youth friendly court, other magistrates choose to hold the youth justice court in the same fashion as the adult jurisdiction, treating youth court users as 'mini-adults', as opposed to a category of offenders who have independent and specific needs.

There is, similarly, no specific youth justice division of NT Community Corrections. This means that young people are assessed, treated, and supervised by Community Corrections officers who may not have any youth specific training or an appreciation for the specific criminogenic and developmental needs of young people in the criminal justice system.

NAAJA and CAALAS maintain that youth offending requires a unique and specialised criminal justice response. This is because young offenders are distinct from adult offenders criminogenically, psychologically, sociologically, and biologically.[29] Having a specialist youth justice system in the NT would allow for practices and practitioners who are responsive to young people and their sociocultural needs. It would go some distance to rectifying current patterns of Aboriginal young people cycling through a system tailored towards adult offenders, which fails to meaningfully address the underlying causes of offending.

D Policy Promises

Current NT youth justice policy direction is multifaceted. On the one hand, it appears that policy is attempting to address rising incarceration rates, on the other, the only recent legislative reform impacting young people has been punitive: making breach of bail a criminal offence.[30]

(i) Bail

The implications of making breach of bail a criminal offence are worrying. Most notable is the increased criminalisation of young people and the potential for significant increases in remand rates. Most young people in custody in the NT are held on remand.[31]

The long term consequences of remanding young people include: social isolation and alienation; family and community disharmony; stigmatisation; reduced opportunities to form pro-social, community-based friendships; increased disruption to education and employment prospects; reduced opportunities to participate in important cultural initiations and ceremonies; and reduced opportunities for rehabilitation.

The New South Wales Youth Justice Review recently commented that:

> Evidence indicates that the remanding of youth is often associated with a range of negative consequences including increased recidivism, poor conditions in remand facilities as a result of overcrowding and far greater costs in comparison with alternatives such as bail and community supervision.[32]

Most importantly, there is no evidence to suggest that high remand rates correlate to a reduction in crime rates. Conversely, research indicates that remand is a significant recidivism risk factor.[33]

NAAJA and CAALAS support the insertion of pro-bail considerations into either the *Youth Justice Act 2005* (NT), or the *Bail Act 1982* (NT). Exposing young people to the risk factor of remand should be avoided, except in rare and exceptional circumstances. Bail and community based supervision should *always* be preferred over remand and this should be explicitly legislated. We suggest that the option for courts to remand a young person be removed where the young person is unlikely to receive a term of imprisonment, unless exceptional circumstances apply.

(ii) A Review

In a more positive direction, the NT Government is undertaking a review of the Youth Justice system. NAAJA and CAALAS are stakeholders in the review process and have provided submissions in support of a youth justice system which focuses on early intervention and diversionary strategies, and which is rehabilitative rather than punitive.

Similar to the RCIADIC recommendations, we espouse initiatives which are culturally relevant, and developed within a 'community-up' approach. In particular, we support the development of Youth Community Courts, Youth Camps, and the increased involvement of Elders and Aboriginal Communities in the dispensation of youth justice.

NAAJA and CAALAS remain optimistic that the current Youth Justice review will herald a change for youth justice in the NT. Certainly, we will be recommending that, 20 years later, the NT Government re-engage with the discussion and recommendations contained in the RCIADIC report.

III Alcohol

The NT has the highest rate of alcohol consumption in Australia.[34] The NT consumes 50 per cent more than the national average.[35] The RCIADIC commented on alcohol as an underlying social dysfunction in Aboriginal communities: 'What has occurred, it appears, is that drinking as itself a meaningful activity has been incorporated into the broader culture of some Aboriginal groups – again, young men are easily identifiable – and carries within itself, therefore, the processes of its own reproduction.'[36]

The RCIADIC considered the interrelated relationship between alcohol and high Aboriginal incarceration rates. This section of the article explores two features of this relationship: punitive alcohol related laws which disproportionately impact Aboriginal people, and the intersection between alcohol, violent offending, and incarceration rates.

A Protective Custody

Most of the deaths which the RCIADIC investigated occurred in police custody, as opposed to prison. This is in contrast to non-Aboriginal deaths in custody, which predominately occur in prisons. It is for this reason that the RCIADIC report urged the governments to reduce the over-exposure of Aboriginal people to police custody.

Section 128 of the *Police Administration Act 1991* (NT) provides for protective custody–apprehension without arrest or warrant–where police have reasonable grounds for believing a person is seriously and apparently substance affected, and the person is in a public place or trespassing on private property. Police can hold a person in custody until police reasonably believe the person is no longer intoxicated.[37]

The RCIADIC considered the operation of protective custody provisions. It concluded that '[a] reasonable belief that a person is intoxicated should not, of itself, be sufficient to warrant police intervention',[38] as it unnecessarily escalates custody numbers. Instead, the RCIADIC proposed that legislation governing protective custody be amended to only enable apprehension and detention of people intoxicated to the extent that they are incapable of taking proper care of themselves, or if they are likely to cause harm to others or damage to property.[39]

The RCIADIC recommended the establishment of alternative, non-custodial facilities for the care and treatment of persons apprehended solely due to intoxication.[40] Moreover, the RCIADIC report recommended there be a statutory duty on police to utilise alternatives to protective custody, such as sobering up shelters, or taking a person home.[41]

Despite the RCIADIC report's analysis and recommendations, legislation and practice in the NT remain unchanged. In 2002, the NT retained a significantly higher proportion of police custody incidents due to public drunkenness (nearly 70 per cent) than any other Australian jurisdiction. In 2007–08, Aboriginal people accounted for 93.4 per cent of NT protective custody incidents.[42]

B Public Consumption of Alcohol

The use of public space by Aboriginal people often results in Aboriginal people having increased contact with the police.

Section 45D of the *Summary Offences Act 1978* (NT) introduced in 1983 what is commonly referred to as the 'two kilometre law'. The two kilometre law prohibits alcohol consumption in a public place or on unoccupied private land within two kilometres of licensed premises, unless the owner or occupier of the private land gives express permission. The RCIADIC report, along with later reports such as the Race Discrimination Commissioner's 1995 *Alcohol Report*,[43] recommended the two kilometre law be reviewed[44] and repealed.[45] Section 45D remains, and a recent review of the *Summary Offences Act 1978* (NT) by the NT Department of Justice recommended that the section continue.[46]

The declaration of town camps in the NT, and other locations heavily populated by Aboriginal people, as restricted and prescribed areas,[47] where alcohol is not permitted, has effectively prohibited many Aboriginal people from consuming alcohol in their private homes.

For Aboriginal people living within restricted or prescribed areas, the effect of prohibiting consumption of alcohol in certain places has been to 'force many Aboriginal drinkers to drink on the outskirts of town in improvised, hidden, unsupervised, unserviced, and, most importantly, unsafe locations'.[48] Importantly, restricting the places people can consume alcohol has not been shown to reduce alcohol consumption.[49]

C Alcohol Consumption and Crime

Alcohol consumption is a significant factor in criminal offending in the NT. According to the *Little Children are Sacred* report, between 2001 and 2004 there were an average of 2000 assaults and 110 sexual assaults per year known to involve alcohol and, for each year, an average of 65 per cent of the prison population were serving sentences for alcohol related offences.[50]

NT Police statistics indicate that alcohol is often involved in the most harmful and violent offending. Alcohol is associated with 52 per cent of family violence offences and in 2008–09, 96 per cent of all homicide related offences were associated with alcohol.[51]

In light of this, CAALAS and NAAJA support constructive NT Government efforts to address dangerous levels of alcohol consumption, reduce alcohol-related harm, and deliver safer communities.

D Policy Promises

The NT Government has recently sought to address alcohol related offending with the introduction of the 'Enough is Enough' alcohol legislation, and 'New Era in Corrections' policy framework. Given the rise in violent offending and its role in exponential increases in incarceration in the NT, NAAJA and CAALAS recognise the importance of taking action to address the problem.

Amongst other initiatives, the 'Enough is Enough' alcohol reforms create a new, therapeutic court program: the SMART Court. Based on therapeutic jurisprudence, and successful drug court models in other jurisdictions, the Court's aim is to deal with offenders' underlying issues through case management and therapeutic court processes. The SMART Court regime has some promise, but its potential has been undermined by the NT Government's decision to exclude violent offenders from it.

The NT Government's 'New Era in Corrections' promises to reduce the NT's incarceration rates to the national bench mark. One method of achieving this is through the introduction of two new community-based, rehabilitative sentencing dispositions: community-based orders and intensive treatment orders. But again, violent offenders are excluded from eligibility for both of these dispositions.

Rehabilitation options whilst incarcerated are also minimal. The Darwin and Alice Springs Correctional Centres provide limited rehabilitative opportunities for prisoners, requiring a prisoner to be sentenced for at least 12 months to qualify for participation in most programs. Moreover, courses support very limited numbers and are offered sporadically. Compounding this, few Aboriginal prisoners are given the opportunity of a supported release through being granted parole.

Excluding violent offenders from policy initiatives and rehabilitation opportunities designed to reduce alcohol related harm, results in violent offenders continuing to escalate already high recidivism rates. 'Tough on Crime' approaches to the complex issue of alcohol related violent offending is not the answer. In advocating for supply reduction and minimum floor prices as a means of 'damming the rivers of grog', Russell Goldflam comments:

> In dealing with offenders who have committed crimes of violence in a haze of alcohol, our courts often say they're applying the principle of general deterrence, that a tough punishment must be imposed to put off other people from committing similar crimes. Sentences have been ratcheted up accordingly. But there does not appear to be any evidentiary basis that general deterrence does in fact generally deter. On the contrary, our levels of incarceration are so high that it is, I would argue, readily apparent that we are imposing further costs and causing further harm by gaoling more offenders, more frequently, for longer periods.[52]

CAALAS and NAAJA welcome policy responses which focus on reducing alcohol related crime through supply reduction, the introduction of floor prices,[53] and increasing community based rehabilitation for offenders with alcohol misuse issues. We applaud the recent allocation of additional funds for drug and alcohol rehabilitation services. We also reiterate recommendation 287 of the RCIADIC report: that provision of alcohol and other drug prevention, early intervention and treatment programs for Aboriginal people should remain a high priority.[54] More funding of rehabilitation is needed to address the current alcohol related problems in the NT.

IV Conclusion

Twenty years on from the RCIADIC report, it appears that successive NT Governments have done little to address

the ultimate RCIADIC report finding that '[t]oo many Aboriginal people are in custody too often'.[55]

Addressing high Aboriginal incarceration rates will require the NT Government to meaningfully grapple with the two issues discussed in this article: the over-exposure of Aboriginal young people to the criminal justice system, and alcohol fuelled offending. The RCIADIC report should inform policy development in these areas.

NAAJA and CAALAS support policy approaches which include Aboriginal people and Aboriginal communities in discussions and solutions. The NT needs to move away from traditional 'tough-on-crime', generalised responses. Rather, we need to embrace effective justice initiatives which engage with the underlying causes of offending, and in doing so, achieve a reduction in Aboriginal incarceration rates.

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THE CORONER'S RECOMMENDATION: FULFILLING ITS POTENTIAL? A PERSPECTIVE FROM THE ABORIGINAL LEGAL SERVICE (NSW/ACT)

Raymond Brazil*

I The Coroner's Inquest

Coroners Acts in New South Wales ('NSW') and the Australian Capital Territory ('ACT') confer on coroners jurisdiction to conduct inquests into certain kinds of death.[1] As the outcome of a hearing, a coroner is tasked by their legislation to reach and record prescribed findings relating to the deceased, their death, and its manner and cause.[2] These determinations enable that death to be registered under the relevant Birth, Deaths and Marriages legislation.[3] If, though, this information can be established from preliminary investigations,[4] a coroner has the discretion to dispense with an inquest hearing, unless the death investigated is of a category for which the legislation specifically requires one to be held.[5] One such category is the death of a person in custody.[6]

In the course of an inquest, a coroner will receive a range of information relating to that death, its cause and the circumstances surrounding it.[7] A coroner's inquest may often not be the only investigation into a death, but a coroner brings to it the perspective of an independent officer[8] conducting an inquiry into the facts[9] in an open forum,[10] and has the opportunity to identify those factors which contributed to the death's occurrence and which could, in the future, be avoided. And while the determination of certain particulars may be the coroner's primary function,[11] other purposes have been recognised as valid to pursue.[12] Of these, the promotion of public health and safety and, specifically, the prevention of death may be the most vital.[13] Twenty years ago, the Royal Commission into Aboriginal Deaths in Custody ('RCIADC') noted this capability, observing that '[i]n the final analysis adequate post death investigations have the potential to save lives.'[14]

In contributing to the prevention of death, the principal strategy available to a coroner is their power to make recommendations at the conclusion of an inquest.[15] These recommendations 'represent the distillation of the preventive potential of the coronial process. The action taken in response to such recommendations carries the promise of lives saved and injury averted.'[16] Utilising the evidence as to the circumstances surrounding the death, the expertise of the coroner, and, perhaps, the submissions of those appearing at an inquest, such recommendations can offer possible 'remedies' to avoid future deaths.[17] It is this potential that underpins the frequently quoted motto of the coroner: 'We speak for the Dead to protect the Living.'[18]

II The Coroner's Recommendatory Power

A Common Law

As a part of English law in the late 18th century, the coronial jurisdiction was received by the colony of NSW upon its establishment.[19] At common law, a coroner – or the jury in a coroner's court – was entitled to attach a recommendation to their findings, although this was by way of a 'rider' only, and did not form a part of the record of their formal findings.[20]

B The Proposals of the Royal Commission

While the RCIADC identified the potential of the coroner's recommendatory power, it also recognised its vulnerability under common law.[21] In its *National Report*, the Commission proposed not only that coroners consistently be empowered to make recommendations, but that consideration be given to a more positive duty to do so.[22] Towards this, recommendation 13 proposed that all Coroners Acts be amended to *require* coroners to make recommendations

at inquests into a death in custody and, also, that they be enabled to make recommendations generally, on 'other matters'.[23]

To support a coroner's exercise of this power, the RCIADC also stressed the necessity of an effective process for the communication of any recommendation made to the relevant Minister or agency.[24] In addition, it proposed that governments and their departments be required to respond to these recommendations within an appropriate timeframe.[25]

III Implementing the Royal Commission's Proposals

A NSW and the ACT

In 1993, section 22A was inserted into the *Coroners Act 1980* (NSW), empowering coroners to make recommendations on 'any matter connected with the death' investigated.[26] However, no further provision was included requiring a coroner to make them at an inquest into a death in custody (or any other category of death). Nor was amendment made for their communication to the relevant authority[27] or their response.

In 1997, the ACT received a new *Coroners Act*, which does require a coroner conducting an inquest into a death in custody to record a finding on the 'quality of care, treatment and supervision of the deceased' that contributed to their death.[28] Importantly, it also makes provision both for the communication of these findings and for a response by agencies to whom such communications are directed.[29] The Act further empowers a coroner to make recommendations at any inquest, although no provision is included requiring a response.[30]

B Other Jurisdictions

This piecemeal and uneven approach to the RCIADIC's proposals regarding the coroner's recommendation has been replicated in other States. In all Australian jurisdictions, a coroner now has a statutory power to make recommendations on matters connected with the death at an inquest held into any category of death.[31]

But although coroners in each jurisdiction carry a statutory responsibility to reach certain findings relating to the specific death, they are not consistently under any statutory duty to identify those remedies as coronial recommendations to avoid future similar deaths. In 2011, with some exceptions, the exercise of this power remains, as the RCIADIC noted it to be in 1991, discretionary.[32]

State and territory coronial legislation has, until recently, afforded desultory support to any coroner in robust pursuit of the prevention of death. While empowering a coroner to comment or make recommendations, the legislation has offered little to either clarify or facilitate the effective exercise of this capability. Added to this lack of statutory direction, the relatively small number of appellate decisions on the coroner's recommendatory power provide limited guidance beyond establishing boundaries for its application, and offer scant encouragement of its potential.[33]

As a result, the impression conveyed to date by both the legislature and the judiciary is one that has effectively marginalised the coroner's recommendation, appearing to deprecate its use other than in narrowly defined, and occasional, circumstances.

IV The Exercise of the Recommendatory Power

A Current Provisions

Across jurisdictions, legislative provisions relating to the coroner's recommendatory power are marked by an inconsistency as to whether, and when, the coroner's use of it is mandatory or discretionary, together with an absence of direction as to the correct manner of its application. A resulting uncertainty is underscored by the lack of consistent statutory recognition of its use as a proper function of the coroner.[34]

In NSW, the ACT, the Northern Territory, Victoria and Western Australia, a coroner 'may' make recommendations on any matter connected with the death investigated.[35] Similarly, in South Australia, the Coroner's Court 'may' add to its findings any recommendation contributing to the prevention of a death similar to that investigated;[36] and in Queensland, a coroner 'may' comment on any matter connected with the death.[37] In Tasmania, however, a coroner is directed by legislation to exercise this power and 'must' make recommendations in every case, although only 'whenever appropriate'.[38]

B Inquests into Deaths 'In the Hands of the State'

Special provisions in some jurisdictions address the exercise of this power in the case of inquests into a death that has occurred in custody – 'in the hands of the state'.[39] In the Northern Territory, a coroner 'must' make recommendations towards the prevention of death if the death investigated occurred in custody.[40] In Tasmania and Western Australia, if the death being investigated occurred while in custody, a coroner 'must' report on the care, supervision or treatment of the deceased.[41] As already noted, in the ACT, a coroner conducting an inquest into a death in custody 'must' record findings on this issue as it contributed to the death of the deceased.[42] Under the Queensland *Coroners Act*, special provisions relate to the communication of any comments made by a coroner at an inquest into a death in custody, although there is no statutory direction to a coroner to make such comments.[43]

Imprisoned, acutely vulnerable, isolated from family and other supports and mostly invisible to the community, a person in custody has long been recognised as owed a special responsibility by the state while in its control.[44] These special provisions in some – if not all – jurisdictions continue to mark the impact and contribution of the RCIADIC.

V Responses to Coronial Recommendations

But, as the RCIADC noted, to realise any meaningful part of its potential a coronial recommendation must be considered and receive a response.[45] An appropriate response will not necessarily require full compliance with, or even partial implementation of, the measures proposed.[46] However, what is required is their proper consideration and a written response outlining what, if any, action is to be taken, and the reasons for it.

A NSW and the ACT

In NSW, the departmental review of the *Coroners Act 1980* (NSW) acknowledged that an adequate framework for both the communication of, and response to, coronial recommendations, was required.[47] But while the *Coroners Act 2009* (NSW) provided a process of communication for coronial recommendations, no provision was included for their response.[48] As set out above, the *Coroners Act 1997* (ACT) requires responses to be provided by government agencies only to comments made at an inquest into a death in custody.[49]

B Other Jurisdictions

In South Australia, the *Coroners Act 2003* (SA) requires responses only to recommendations made in inquests into deaths that occurred in custody.[50] At present, only the Northern Territory and the new Victorian Acts require responses to *all* recommendations made by a coroner.[51] All other Coroners Acts – those of NSW, Queensland, Tasmania and Western Australia – while empowering coroners to make recommendations, are silent on the issue of responses to them.

This chequered pattern of provisions only supports – if not encourages – an attitude that, in the absence of any legislative direction, a comment or recommendation by a coroner can be disregarded by the relevant agency.

VI Coroners' Use of their Recommendatory Power

In 1991, the RCIADIC also noted a general reluctance on the part of coroners to make recommendations, despite circumstances in some cases suggesting that a coronial recommendation – as a remedy to avoid future deaths – would be appropriate and beneficial.[52] Over the 20 years since the Commission, this pattern has persisted.

Recent studies have indicated that recommendations are made by coroners in a low proportion of inquests. In a survey of cases from 2000 to 2004 reported on the National Coroners Information System,[53] Bugeja has reported that only 1.4 per cent of coronial investigations in Victoria produced recommendations.[54] She identified a similar rate in other jurisdictions: for example, in Tasmania, where coroners are required, whenever appropriate, to make recommendations, they were produced in only 1.3 per cent of investigations.[55]

Charting inquests during the 2004 and 2005 calendar years, Watterson, Brown and McKenzie also noted a low number of inquests in which recommendations were made.[56] Similarly, in his report on coronial recommendations, the Queensland Ombudsman had only a relatively small amount of cases to consider.[57] And in Victoria, the Parliamentary Law Reform Committee, in its inquiry into the *Coroners Act 1985* (Vic), recorded evidence that some coroners do not consider making recommendations to be a part of their function.[58]

This cautious use of the recommendatory power has served to entrench current practice, rather than contributing to its development and a change in culture. A paucity and inconsistency of exercise by coroners of their power continues to marginalise the coronial recommendation and restrain its potential to contribute to the prevention of death. It promotes the above noted perception that recommendations are of lesser importance to the coroner's function, to be made sparingly, rather than as Waller – a former NSW State Coroner – has suggested 'fearlessly'.[59]

Such a view could be argued persuasively if it was dictated by the legislation or even accepted as good practice by coroners across jurisdictions. But Buegeja's study suggests that the formulation of recommendations in a particular case will be driven less by the circumstances of the death than by the identity of the coroner presiding.[60]

VII New Coroners Acts: A Shift in Coronial Law

The *Coroners Act 2008* (Vic) introduced significant reforms to the Victorian jurisdiction, in particular enhancing the coroner's role in the prevention of death. Both in a Preamble and an objects provision, the Act specifically recognises this potential contribution.[61] It not only restates the coroner's power to make recommendations,[62] but requires public authorities to respond to them in *all* cases.[63]

The following year, the NSW Parliament passed its *Coroners Act 2009* (NSW). This Act also includes an objects provision, identifying the enabling of coroners to make recommendations at an inquest as one of its purposes.[64] However, unlike the Victorian statute, it does not include a requirement for government agencies to submit a response.[65]

Whether other states and territories will introduce similar legislative reform is not known.[66] And whether a clear statutory recognition in these two jurisdictions of the coroner's recommendatory power as a legislative object results in its increased exercise can only be measured at a future date.[67]

VIII Conclusion

Over the past 20 years, the RCIADIC's proposals for the coroner's recommendation have received incomplete and disparate implementation. The current legislative framework surrounding the coroner's recommendatory power in each Australian jurisdiction contains important advances since 1991 and offers significant opportunities to coroners to contribute to the prevention of death. But the pursuit of this potential will continue to falter and be discounted while provisions across state and territory Coroners Acts regarding a coroner's duty to make recommendations and the responsibility of governments to respond to them remain inconsistent, disconnected and unclear.

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1 *Coroners Act 2009* (NSW) ss 21, 35; *Coroners Act 1997* (ACT) s 52. Both the NSW and the ACT Coroners Acts are silent on the issue of whether a coroner's common law powers are preserved, although *Coroners Act 1997* (ACT) s 12 confirms 'all the functions and jurisdiction' vested in the coroner immediately prior to the *Coroners Act 1956* (ACT). In South Australia, the *Coroners Act 2003* (SA) is also silent on the issue. In the Northern Territory, they are specifically preserved: *Coroners Act* 1993 (NT) s 6(2)(b). In other jurisdictions, coroners' common law powers are specifically abolished by legislation: *Coroners Act 2003* (Qld) s 104; *Coroners Act 1995* (Tas) s 4; *Coroners Act 1985* (Vic) s 4 (while under this provision, common law rules relating to the coroner ceased to have effect, the *Coroners Act 2008* (Vic) is silent on the subject of common law powers): *Coroners Act 1996* (WA) s 4. In his commentary on the *Coroners Act 2009* (NSW), Kevin Waller considered that in the absence of an express statutory removal, the coroner's common law powers remain: John Abernethy et al, *Waller's Coronial Law and Practice in New South Wales* (LexisNexis Butterworths, 4th ed, 2010) 13–14. Waller also refers to *Maksimovich v Walsh* [1983] 2 NSWLR 656, 662 in which Clarke J agreed with Waller's view in an earlier edition of the work (K Waller, *Coronial Law and Practice in New South Wales* (Law Book Co, 2nd ed, 1982)): John Abernethy et al, *Waller's Coronial Law and Practice in New South Wales* (LexisNexis Butterworths, 4th ed, 2010) 13.

2 *Coroners Act 2009* (NSW) s 81(1); *Coroners Act 1997* (ACT) s 52.

3 *Coroners Act 2009* (NSW) s 34: *Birth, Deaths and Marriages Registration Act 1995* (NSW); *Coroners Act 1997* (ACT) s 56: *Birth, Deaths and Marriages Registration Act 1997* (ACT).

4 In contrast to Coroners Acts in other jurisdictions, which specifically empower a coroner 'to investigate' a reportable death, Coroners Acts in New South Wales and the Australian Capital Territory provide coroners with jurisdiction 'to hold an inquest

into' a death: *Coroners Act 2009* (NSW) s 17(1); *Coroners Act 1997* (ACT) s 13. Coroners Acts in both jurisdictions, however, provide a coroner with powers of investigation: *Coroners Act 2009* (NSW) ch 6, pt 6.1; *Coroners Act 1997* (ACT) Part 5, Division 5.6. The NSW legislation also acknowledges that the investigation of deaths is one of the objects of the Act: *Coroners Act 2009* (NSW) s 3(c); and that ensuring that deaths are properly investigated is a function of the State Coroner: *Coroners Act 2009* (NSW) s 10(1)(b).

5 *Coroners Act 2009* (NSW) s 25(1); *Coroners Act 1997* (ACT) s 14.

6 *Coroners Act 2009* (NSW) ss 23, 27; *Coroners Act 1997* (ACT) s 14(2)(a).

7 The scope of the phrase 'manner of death' was considered by the Supreme Courts of NSW and the ACT: *Conway v Jerram* [2010] NSWSC 371, [52] (Barr AJ); *Coroner Doogan; Ex parte Lucas-Smith* (2005) 158 ACTR 1, 9–10 [28]–[29] (Higgins CJ, Crispin and Bennett JJ).

8 Under the *Coroners Act 2009* (NSW), a coroner is required to have legal qualifications (s 12(2)). and the State Coroner and a Deputy State Coroner must be a Magistrate (s 7(2)). Only the State Coroner or a Deputy State Coroner may conduct an inquest into a death in custody: *Coroners Act 2009* (NSW) s 22. Under the *Coroners Act 1997* (ACT), the Executive may appoint a person to be a Deputy Coroner (s 8(1)), but a Deputy Coroner is not permitted to conduct an inquest into a death in custody (s 9(2)).

9 Courts have stressed that a coroner's inquest is 'a fact finding exercise and not a method of apportioning guilt. … It is an inquisitorial process, a process of investigation quite unlike a trial': *R v South London Coroner; Ex parte Thompson* (1982) 126 Sol J 625 (Lord Lane CJ), cited in *Annetts v McCann* (1990) 170 CLR 596, 616 (Toohey J), referring to a citation of the case in *Jervis on the Office and Duties of Coroners* (10th ed) (Sweet & Maxwell, 1986) 6.

10 A coroner has the power to clear their court and prevent publication of evidence if in the public interest: *Coroners Act 2009* (NSW) s 74; *Coroners Act 1997* (ACT) s 40.

11 *Harmsworth v State Coroner* [1989] VR 989, 996 (Nathan J); *Conway v Jerram* [2010] NSWSC 371 [6] (Barr AJ).

12 John Norris, *The Coroners Act 1958: A General Review* (Law Department, 1981) 134, quoted in Law Reform Committee, Parliament of Victoria, *Coroners Act 1985: Final Report* (2006) 322. Objects provisions in the new NSW and Victorian Acts, as well as the Queensland Acts identify several further purposes: *Coroners Act 2009* (NSW) s 3; *Coroners Act 2008* (Vic) s 1; *Coroners Act 2003* (Qld) s 3.

13 New South Wales, *Parliamentary Debates,* Legislative Council, 4 June 2009, 6–7 (John Hatzistergos).

14 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 170 [4.7.4].

15 Lyndal Bugeja and David Ranson, 'Coroners' Recommendations: A Lost Opportunity' (2005) 13 *Journal of Law and Medicine* 173; see also Ian Freckelton and David Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, 2006) ch 18.

16 Boronia Halstead, 'Coroners Recommendations Following Deaths in Custody' in Hugh Selby (ed), *The Inquest Handbook* (Federation Press, 1998) 186, 187.

17 Bugeja and Ranson, above n 15, 174.

18 The words are attributed to Thomas D'arcy McGee, a 17th Century Irish-Canadian politician: see Law Reform Committee above n 12, 321. In his Second Reading Speech for the Coroners Bill 2009 (NSW), the then Attorney-General, while not quoting this motto specifically, acknowledged this duality of the coroner's function: New South Wales, *Parliamentary Debates*, Legislative Council, 4 June 2009, 6 (John Hatzistergos).

19 *Australian Courts Act 1828* (Imp) 9 Geo 4 c 83 was a declaratory Act. In *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Deane and Gaudron JJ considered that the colony of NSW received English law, as far as it was applicable, on 7 February 1788, on the colony's establishment with the reading and publication by Captain Arthur Phillip of his second Commission as Governor of the new colony: at 78–9. In *Attorney-General v Maksimovich*, (1985) 4 NSWLR 300, Kirby P noted that the office of Coroner for NSW was created by Letters Patent of 1787: at 305.

20 *R v Harding* (1908) 1 Cr App R 219, 225 (Darling J). In England and Wales, the power of the coroner to add a rider was removed by the *Coroners Amendment Rules 1980* (UK) r 11. However, under the *Coroners Rules 1984* (UK) r 44, a coroner may announce their intention to report a matter to the relevant person or authority to take action.

21 The Commission noted that Coroners Acts in neither NSW nor Tasmania empowered a coroner to make recommendations: RCIADIC, above n 14, vol 1, 154 [4.5.86].

22 Ibid vol 1, 154 [4.5.89].

23 Ibid vol 1, 172 [4.7.4] (rec 13). The *Report* was referring to inquests into any category of death: at 153–4 [4.5.85]–[4.5.86].

24 Ibid 172 [4.7.4] (rec 14), 155–6 [4.5.92]–[4.5.94].

25 Ibid 172–3 [4.7.4] (rec 15).

26 *Coroners (Amendment) Act 1993* (NSW) sch 1(27). Section 22A is restated in the *Coroners Act 2009* (NSW) s 82(1).

27 This gap was only addressed in 2009 with the new *Coroners Act 2009* (NSW). A study by Ray Watterson, Penny Brown and John McKenzie identified that even in cases in which a coroner had made recommendations, many had not been communicated to the relevant Minister or government agency: Ray Watterson, Penny Brown and John McKenzie, 'Coronial Recommendations and the Prevention of Indigenous Death'

(2008) 12(2) *Australian Indigenous Law Review* 4. Referring to this report in his Second Reading Speech for the new Act, the then Attorney-General acknowledged this absence of an effective process of communication and stated that it received remedy in the new Act: New South Wales, *Parliamentary Debates,* Legislative Council, 4 June 2009, 6–7 (John Hatzistergos). Reporting on his investigation into practices surrounding coronial recommendations, the Queensland Ombudsman also identified serious systemic problems in this regard: David Bevan, 'The Coronial Recommendations Project: An Investigation into the Administrative Practice of Queensland Public Sector Agencies in Assisting Coronial Inquiries and Responding to Coronial Recommendations' (Report, Queensland Ombudsman, 19 December 2006) 21 <http://www.ombudsman.qld.gov.au/Portals/0/docs/Publications/Inv_reports/Coronial_Recommendations_Project.pdf>.

28 *Coroners Act 1997* (ACT) s 74.

29 *Coroners Act 1997* (ACT) ss 75–6.

30 *Coroners Act 1997* (ACT) s 57; such recommendations are made to the Attorney-General of the Australian Capital Territory.

31 *Coroners Act 1997* (ACT) s 57; *Coroners Act 2009* (NSW) s 82(1); *Coroners Act 1993* (NT) s 35(2); *Coroners Act 2003* (Qld) s 46(1) (the Queensland Act refers to 'comments' by a coroner); *Coroners Act 2003* (SA) s 25(2); *Coroners Act 1995* (Tas) s 28(2); *Coroners Act 2008* (Vic) s 72(2); *Coroners Act 1996* (WA) ss 25(2), 27(3) (under the Western Australian provisions, while 'comments' may be made by a coroner (under s 25(2)), 'recommendations' may be made by the State Coroner (s 27(3)).

32 RCIADIC, above n 14, vol 1, 154 [4.5.89]. Although in investigating certain categories of death, a coroner is required, in some jurisdictions, to make recommendations. These are further considered below: see text accompanying nn 39–44.

33 See eg, *Harmsworth v State Coroner* [1989] VR 989; *Coroner Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74; *Keown v Khan* [1999] 1 VR 69; *Perre v Chivell* (2000) 77 SASR 282. Although *Doomadgee v Deputy State Coroner Clements* [2005] QSC 357 indicated a possible shift in judicial attitude, *Saraf v Johns* (2008) 101 SASR 87 has not continued an expansive reading of the power.

34 Only under the Queensland and the new Victorian and NSW Acts does it receive recognition as an object of each statute: *Coroners Act 2003* (Qld) s 3(d); *Coroners Act 2008* (Vic) s 1(c); *Coroners Act 2009* (NSW) s 3(e).

35 *Coroners Act 2009* (NSW) s 82(1); *Coroners Act 1997* (ACT) s 57(3); *Coroners Act 1993* (NT) s 35(2); *Coroners Act 2008* (Vic) s 72(2); *Coroners Act 1996* (WA) s 27(3). In addition, in the ACT, Northern Territory, Queensland, Tasmania, Victoria and Western Australia, a coroner 'may' comment on any matter connected with the death or event under investigation: *Coroners Act 1997* (ACT) s 52(4); *Coroners Act 1993* (NT) s 34(2); *Coroners Act 2003* (Qld) s 46(1); *Coroners Act 1995* (Tas) s 28(3); *Coroners Act 2008* (Vic) s 67(3); *Coroners Act 1996* (WA) s 25(2).

36 *Coroners Act 2003* (SA) s 25(2).

37 *Coroners Act 2003* (Qld) s 46(1).

38 *Coroners Act 1995* (Tas) s 28(2).

39 See Michael Hogan, Dave Brown and Russell Hogg, *Death in the Hands of the State* (Redfern Legal Centre Publishing, 1988).

40 *Coroners Act 1993* (NT) s 26(2).

41 *Coroners Act 1995* (Tas) s 28(5); *Coroners Act 1996* (WA) s 25(3).

42 *Coroners Act 1997* (ACT) s 74.

43 *Coroners Act 2003* (Qld) s 47.

44 This special responsibility to prisoners was recognised as a duty owed by the state as early as 1276 in the statute *De Officio Coronatoris*: Freckelton and Ranson, above n 15, 10; Waller, above n 1, 2.

45 RCIADIC, above n 14, vol 1, 155 [4.5.91], 157 [4.5.98].

46 Ibid vol 1, 156 [4.5.97].

47 New South Wales, *Parliamentary Debates,* Legislative Council, 4 June 2009, 6–7 (John Hatzistergos).

48 However, in his Second Reading Speech, the then Attorney-General announced that the Premier had issued a Memorandum to all Ministers and government agencies, directing them to provide responses to coronial recommendations within six months of their issue: Ibid 7; see also Nathan Rees, 'M2009-12 Responding to Coronial Recommendations' (Memo, NSW Department of Premier and Cabinet 4 June 2009) <http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/2009/m2009-12_responding_to_coronial_recommendations>.

49 *Coroners Act 1997* (ACT) s 76(1).

50 *Coroners Act 2003* (SA) s 25(5).

51 *Coroners Act 1993* (NT) s 46B; *Coroners Act 2008* (Vic) s 72(3)–(4).

52 RCIADIC*,* above n 14, vol 1, 154 [4.5.86]–[4.5.88].

53 A database established July 2000 and under the management of the Victorian Institute of Forensic Medicine since 2005: <http://www.vifp.monash.edu.au/ncis/web_pages/data_elements_coding_schemes_and_guidelines.htm>.

54 Bugeja and Ranson, above n 15, 174–5.

55 Ibid. However, Bugeja and Ranson refer to investigations, as opposed to inquests.

56 Watterson, Brown and McKenzie, above n 27. The focus of their study was the rate of response by government agencies to coronial recommendations, as opposed to coroners' use of the recommendatory power, and so the proportion of inquests in which recommendations were made was not recorded.

57 Bevan, above n 27, xi.

58 Law Reform Committee, above n 12, 377–80.

59 Kevin Waller, *Coronial Law and Practice in New South Wales* (Butterworths, 3rd ed, 1994) 95.

60 Bugeja and Ranson, above n 15, 174.

61 *Coroners Act 2008* (Vic) preamble, s 1.

62 *Coroners Act 2008* (Vic) s 72(2).

63 *Coroners Act 2008* (Vic) s 72(3)–(4). There was no provision requiring government agencies to respond to coronial recommendations under the previous *Coroners Act 1985* (Vic).

64 *Coroners Act 2009* (NSW) s 3(e).

65 In his Second Reading Speech to the *Coroners Bill 2009* (NSW), the then New South Wales Attorney-General advised that provisions under the new Act would ensure that such recommendations would reach the responsible Minister. His speech also referred to the New South Wales Premier's Memorandum (of 4 June 2009) requiring government agencies to respond to coronial recommendations and its aim of ensuring coronial recommendations receive serious consideration by Ministers: New South Wales, *Parliamentary Debates,* Legislative Council, 4 June 2009, 7 (John Hatzistergos); see also Rees, above n 48.

66 At present, the Western Australian Law Reform Commission is engaged in a Review of Coronial Practice (Project 100) and has released a Background Paper (September 2010) <http://www.lrc.justice.wa.gov.au/2publications/reports/P100-BP.pdf>, and a Discussion Paper (June 2011) <http://www.lrc.justice.wa.gov.au/2publications/reports/P100-DP.pdf>.

67 These two new pieces of legislation have been accompanied by a new initiative in the reporting of coroners' inquest reports and recommendations. In Victoria, the State Coroner's website now publishes all coroners' inquest reports, as required by the *Coroners Act 2008* (Vic) s 73. In NSW, the new *Coroners Act 2009* (NSW) does not require this publication, although the State Coroner's website publishes a selection of these reports: Coroner's Court, *Coronial Findings and Recommendations,* Lawlink: Attorney General and Justice <http://www.lawlink.nsw.gov.au/lawlink/coroners_court/ll_coroners.nsf/pages/coroners_findings>.

'JUSTICE MUST BE SEEN TO BE DONE': THE INVESTIGATION OF MULRUNJI DOOMADGEE'S DEATH

Fiona Campbell*

I Introduction

Recommendations from the Royal Commission into Aboriginal Deaths in Custody[1] ('RCIADIC') have influenced the structural response to complaints against the Police and investigations into deaths in custody. However the recommendations are not always adhered to by those investigating. Some of the reasons for this are examined in this article.

The Crime and Misconduct Commission ('CMC') is the regulatory body in Queensland responsible for investigating complaints against police, generally referring complaints pertaining to misconduct to the Commissioner of Police while monitoring investigations; itself investigating the more serious matters involving 'official misconduct'.[2] The CMC also has broader functions of combating major crime, ensuring public sector integrity and protecting witnesses. Some of these functions require working relationships between the CMC and the police. This relationship and the investigation of police by their own have acted to erode public confidence in both the CMC as a regulatory organisation and the police as protectors of all.

The case study of the death in custody of Mulrunji Doomadgee is examined to illustrate the issues of the present regulatory and investigation system in Queensland.

II Background: The Initial Investigation Process

On 19 November 2004, Mulrunji Doomadgee died in the custody of the Queensland Police Service ('QPS') in the Palm Island watch house. Mulrunji was arrested for an alleged public nuisance offence. A violent altercation occurred between the arresting officer, Senior Sergeant Christopher Hurley, and Mulrunji when Mulrunji was taken into the watch house. Mulrunji died within an hour.

A notification was made internally in regard to the death,[3] and a QPS investigation team was sent to Palm Island from Townsville, located 65 km south of Palm Island.

Initially the investigation into the death was handled by local police, including Detective Sergeant Robinson, who was in charge of the Criminal Investigation Branch ('CIB') on Palm Island and was a friend of Senior Sergeant Hurley. There was also a personal relationship between the officer in charge of the investigation[4] and Senior Sergeant Hurley. Inspector Mark Williams, an Inspector with Ethical Standards Command ('ESC'),[5] was also informed.

Senior Sergeant Hurley, Sergeant Leafe and Police Liaison Officer Benagroo[6] discussed between themselves the events leading up to Mulrunji's death. Senior Sergeant Hurley also viewed the video footage of Mulrunji in the watch house before being interviewed.

When the investigation team arrived at Palm Island they were met by Senior Sergeant Hurley, who drove them to the police barracks. After concluding their interviews for the day at 10:30 pm Detective Inspector Webber, Detective Senior Sergeant Kitching, and Detective Sergeant Robinson also ate a meal with Senior Sergeant Hurley at his house.

It was not until 24 November 2004 that Detective Inspector Bemis of the CMC took over the investigation, with Detective Senior Sergeant Kitching and Detective Inspector Webber playing no role after this point.

III Royal Commission into Aboriginal Deaths in Custody Recommendations

The above mentioned events contravene the relevant recommendations from the RCIADIC. RCIADIC recommendation 32 requires the appointment of an officer in charge of the investigation into a death in custody to be made by an officer at the rank of Chief Commissioner, Deputy Commissioner, or Assistant Commissioner, not a Regional Crime Coordinator, as occurred.[7] However, the QPS Operational Procedures Manual 1.17 provides for the Regional Crime Coordinator to provide direction in relation to investigations of police related incidents, unless they are directed otherwise by the Internal Investigations Branch, ESC, or the CMC. This was also in contrast to recommendation 33 which requires independence in terms of investigators being selected from a QPS Internal Affairs Unit or from another Station.[8] Palm Island being a small police station meant that police in that station were answerable to those in charge of the Townsville Station and the staff from both stations were generally quite well known to each other.

Recommendation 34 of the RCIADIC provides that officers who are highly qualified as investigators should conduct investigations and be responsible to one senior officer.[9] It is clear from the above that this was not the case and that those chosen to investigate were chosen because of their proximity to Palm Island.

RCIADIC recommendation 35 provides guidance in regard to considerations for investigating officers, in particular taking the approach that the death may be a homicide.[10]

These recommendations are crucial for the preservation of evidence in the earliest stages of an investigation, as well as to assist in portraying independence in the process. At no time was Mulrunji's death treated as a homicide and the credibility of the investigation was undermined from its commencement due to the blatant disregard for any independence or impartiality in terms of those recruited and their actions.

IV The Coronial Inquiries

A post mortem report of 24 November 2004 concluded that Mulrunji died as a result of intra-abdominal haemorrhage due to, or as a consequence of, a ruptured liver and portal vein.[11]

Two separate coronial inquiries occurred, although they differed in regard to their findings as to how Mulrunji died. Both coroners voiced a number of criticisms in regard to the police investigation, particularly in regard to the choice of investigative officers, the lack of independence that resulted from this, and their behaviour.[12]

The two coroners agreed that the CMC should play an active role in investigating deaths in police custody from the outset.[13] This was viewed as essential to the integrity of investigations in the early phases and the immediate preservation of the crime scene.[14]

Due to its role as a specialist misconduct and anti-corruption body, Deputy Chief Magistrate Hine concluded that the CMC is in a position to deal with deaths in police custody, such as that of Mulrunji, which may have resulted from police misconduct. Deputy Chief Magistrate Hine made a recommendation to this effect, and that the CMC be resourced and empowered to conduct this role.[15]

Deputy Chief Magistrate Hine noted the greatest difficulty in investigating a death in custody as being that the only witnesses are likely to be police officers, who he said may be instilled with the 'Police Code' as labelled by the Honourable Gerald Edward Fitzgerald QC in his landmark report into police and public sector corruption in Queensland.[16]

V Queensland Police Service and Crime and Misconduct Commission Reports

Both the QPS and the CMC produced voluminous detailed reports, with the QPS explaining its investigating officers' actions (through investigations by an Internal Review Team ('IRT')) and the CMC responding, damning the QPS reports.[17] The CMC recommended that the QPS provide consideration to disciplinary proceedings against four of the original investigating officers[18] and the members of the IRT and QPS.[19] Deputy Commissioner Kathy Rynders refused to do so.

In their public statement on 17 June 2010, the CMC were scathing of the QPS investigation into Mulrunji's death and the review of that process.[20] The comments were reminiscent of those made by Fitzgerald in his investigations into police misconduct in the late 1980s.[21]

VI Investigating Complaints of Police and Deaths in Police Custody

The failure of all the investigations, reports, and legal proceedings to bring about anything that may resemble justice for the family, friends, and community of Mulrunji brings into question the entire process regarding investigations into police conduct/misconduct where a person has died in their custody. Critiques of the QPS and the CMC by the other were unproductive, resulting in blame shifting and defensiveness. However the coronial inquiries, in particular a recommendation by Deputy Chief Magistrate Hine that the CMC take charge of deaths in police custody, were influential. This recommendation prompted a statement from CMC Chairman Martin Moynihan that the CMC would take on primary responsibility for investigating all deaths in police custody under its official misconduct jurisdiction, while assisting the State Coroner who has ultimate responsibility for investigating the deaths. Yet the practical reality of the situation at present is that the CMC has a small investigative staff base. A spokesperson of the CMC acknowledged the capacity issue in carrying out the investigations, saying that the police will probably need to be called upon to conduct the investigations and that someone from the CMC will travel to the scene of the death as soon as possible to supervise the investigation.[22]

Fitzgerald identified that police cannot be tasked with the responsibility of investigating each other in regard to complaints.[23] This could extend to include deaths in police custody, where suspicions are raised as to the cause of the death. It is clear that this is how the CMC and many others felt in regard to the initial investigation by the police, including their choice of an investigative team, the IRT, and then QPS Deputy Commissioner Kathy Rynders' failure to acknowledge these issues and to recommend disciplinary proceedings.

The RCIADIC recommendations were salient in their content, and some[24] were incorporated into the QPS Operations Procedural Manual and the State Coroner's Guidelines. Despite this and the CMC's role of monitoring investigations, there has been a lack of intent to implement the recommendations, seemingly due to the protective culture of police. It might in fact be impossible for the QPS to effectively implement the recommendations where police behaviour is in question, due to the long identified 'chronic inability of police to investigate colleagues'.[25] Fitzgerald explained that:

> An important element of police culture is the unwritten police code, which effectively makes police immune from the law. In conflicts between the code and the law, the code prevails.
>
> Under the code:
>
> - loyalty to fellow police officers is paramount;
> - it is impermissible to criticise fellow police, particularly to outsiders;
> - critical activities of police, including contact with informants, are exempt from scrutiny;
> - police do not enforce the law against, or carry out surveillance on other police; and
> - those who breach the code can be punished and ostracised.[26]

The process in Queensland relies on the involvement of the QPS in investigations. The CMC receives complaints against the police. In deciding whether to refer to the police service or investigate the matter itself, the CMC is required to consider the following principles:

- cooperation;
- capacity building;
- devolution; and
- the public interest.[27]

The CMC has an overriding responsibility to promote public confidence under this last principle.[28] This principle will often be in conflict with the first three principles, which lean strongly toward complaints being referred to the police. The CMC has discretion to refer even the more serious complaints of official misconduct to the QPS for investigation and this seems to be its general approach,[29] while retaining the responsibility of monitoring the investigations. RCIADIC recommendation 226(a) states that 'complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of Police Services'.[30] The approach of the CMC essentially appears to be administrative and delegatory.

It is difficult, if not impossible to comprehend how the public interest can be served by referring complaints (excepting minor complaints) to the police to investigate, even though the CMC retains the responsibility of monitoring all complaints against the police.

Two issues that arise in regard to the success of a regulatory organisation set up to investigate complaints are independence and adequate resourcing. The broad functions of the CMC[31] require the CMC to work in partnership with the police, in particular in fighting organised crime. This partnership enables the CMC to delegate (devolve) some of its work in terms of police complaint investigations, saving its limited resources for other functions. These functions are not conducive to the level of separation and independence required for a regulatory body to conduct its work.[32] It is this structure, relationship, and lack of resources that inhibit the CMC from being able to take responsibility for investigating deaths in police custody and complaints against police.

Prenzler describes the often poor performance of regulatory organisations as 'capture theory', that is, the impartiality and pursuit of the regulator being undermined by techniques emanating from police culture.[33] Capture can occur in numerous ways, from outright improper dealings (bribery, blackmail, etc) to institutional arrangements, such as a police culture, which tend to support more subtle forms of inappropriate influence. This can also include the development of survival mechanisms to maintain the status quo, whether it be for rank and file, the Union, or the Minister.[34]

Secondment of police to regulatory organisations, such as the CMC, has been identified as an important aspect that favours capture. This form of capture is indirect through structural influences. In Queensland, secondment has occurred notwithstanding the Fitzgerald Inquiry finding against police investigating police, as well as a Criminal Justice Commission[35] survey which showed that 87 per cent of Queenslanders were of the view that complaints against the police should be investigated by an independent body, not the police.[36]

A review by the Australian Law Reform Commission ('ALRC') concluded that police investigators tended to be sceptical of those who complained about police and were likely to be softer on police.[37] Clearly there might be a reluctance to conduct the investigation in the same manner as would occur with criminal suspects, due to the position and relationship of police officers. This is particularly so, where the conduct under investigation has occurred in the conduct of an officer's duties. The ALRC said that the model most likely to instil confidence in regard to investigations of police was an external agency which retained as much power and responsibility as possible.[38]

As a result of concerns regarding police delays in conducting investigations and deficient penalties handed out by police, a former Magistrate was employed in 1993 to review these processes. The former Magistrate reviewed 30 complaints and found that 23 were substantiated, in comparison to the four that the police accepted. Out of these four complaints found to be substantiated by the police, the former Magistrate found that two of the resultant penalties decided by the police were insufficient.[39] In another review, a retired Supreme Court Judge examined 180 QPS disciplinary investigations, reporting that 30 had been inadequately investigated. The Judge also said that the police used a protective style of questioning and failed to follow all potential leads or to secure exhibits in a secure manner.[40]

Similar to the above, many of these issues were identified by the CMC[41] in regard to the investigation into Murunji's death. These included the failure of Detective Inspector Webber and Inspector Williams to question Police Liaison Officer Benagroo with any vigour, having off the record discussions with Senior Sergeant Hurley, failure to pursue other lines of questioning with witnesses, as well as huge deficiencies in regard to the IRT questioning processes.[42]

Western Australia's next Governor, Malcolm McCusker QC, warned that their regulatory body, the Corruption and Crime Commission ('CCC'), being required to work with the police on organised crime creates a danger of a real conflict of interest due to the CCC's role of investigating the police. McCusker's view was that the police should investigate organised crime and he went so far as saying that the CCC should only investigate complaints against the police and not other public servants.[43] Presently the CMC is required to conduct all of these functions, including investigating organised crime alongside the police.

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1 Commonwealth , Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, 67–146.

2 *Crime and Misconduct Act 2001* (Qld) ss 45–6 ('*CM Act*'). Official misconduct is defined as a criminal offence or a disciplinary breach which may result in termination of a person's employment, if proved: *CM Act* s 15.

3 The notification was made to Senior Sergeant Hurley's direct supervisor (District Inspector Gregory Strohfeldt) who then advised the Regional Crime Coordinator for the Townsville District, Detective Inspector Webber.

4 Senior Sergeant Kitching who was in charge of Townsville CIB and was appointed as the officer in charge of the investigation by Detective Inspector Webber, who was the Regional Crime Coordinator.

5 The Ethical Standards Command is part of the Queensland Police Service.

6 These were the officers on duty at the time of Mulrunji's arrest and death.

7 RCIADIC, above n 1, 76.

8 Ibid.

9 Ibid.

10 Ibid, 76–7.

11 *Inquest into the death of Mulrunji* (Queensland Coroners Court, Acting State Coroner Clements, 27 September 2006) 25.

12 The Acting State Coroner stated that the fatal injuries suffered by Mulrunji were caused by Senior Sergeant Hurley punching Mulrunji after they fell: ibid 25–7, 31–2. On 4 May 2010, in the second Coronial Inquest, Deputy Chief Magistrate Hine found that Mulrunji died of fatal injuries resulting either accidentally as Mulrunji and Senior Sergeant Hurley fell into the Palm Island watch house, or by deliberate actions of Senior Sergeant Hurley in the few seconds after they landed: *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010). The criticisms included:

- the involvement of officers from Townsville and Palm Island in the investigations was inappropriate and undermined the integrity of the investigation;
- officers investigating the deaths in custody should be selected from a region other than that in which the death occurred;
- officers who knew Senior Sergeant Hurley personally, or were friends with him, being involved in the investigation of Mulrunji's death, was inappropriate and compromised the integrity of the investigation; and
- the conduct of officers meeting and liaising both during and after work hours with Senior Sergeant Hurley while conducting the investigations undermined the investigation's appearance of impartiality (comment 33), as did the discussion by Senior Sergeant Hurley with Sergeant Leafe and Police Liaison Officer Bengaroo of the death of Mulrunji prior to being interviewed.

Inquest into the death of Mulrunji (Queensland Coroners Court, Acting State Coroner Clements, 27 September 2006) 31; *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010) 122.

13 Due to its role of a specialist misconduct and anti-corruption body, Deputy Chief Magistrate Hine concluded that the CMC is in a position to deal with deaths in Police custody: *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010) 149 [29]; *Inquest into the death of Mulrunji* (Queensland Coroners Court, Acting State Coroner Clements, 27 September 2006) 32 [38].

14 *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010) 146 [16].

15 Ibid 149–50 [29], [31].

16 Ibid 149 [30].

17 In December 2006, the Commissioner of Police formed the IRT to examine criticisms of the QPS and its members arising from the first inquest and its findings, providing a three-volume report to the CMC in November 2008 (*Palm Island Review*). This report was not released to the public. The CMC responded with its own report damning the *Palm Island Review*: Crime and Misconduct Commission Queensland, 'CMC Review of Queensland Police Service's *Palm Island Review',* (June 2010) ('CMC Review'). The QPS then produced a response, which was over 400 pages, responding to the CMC report that disciplinary proceedings would not occur against the IRT officers: Queensland Police Service, 'Report in Response to the *CMC Review of the Queensland Police Services Palm Island Review*' 405 [652].

18 These investigating officers being Detective Senior Sergeant Raymond Kitching, Detective Inspector Warren Webber, Inspector Mark Williams, and Detective Sergeant Darren Robinson.

19 Martin Moynihan, 'CMC Chairperson's Public Statement on the CMC's Review of the Queensland Police Service's Palm Island Review' (Media Release, 17 June 2010) <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10814&cid=5201&id=1293>.

20 Ibid.

21 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (1989) ('*Fitzgerald Report*').

22 Jeff Waters, 'CMC No Escape From Police Investigating Police', *The Drum* (online), 19 May 2010 <http://www.abc.net.au/news/2010-05-19/cmc-no-escape-from-police-investigating-police/832254>.

23 *Fitzgerald Report*, above n 20, 202.

24 That is, in relation to investigating deaths in custody.

25 Tim Prenzler, 'Civilian Oversight of Police: A Test of Capture Theory' (2000) 40 *British Journal of Criminology* 659, 660.

26 *Fitzgerald Report*, above n 20, 362.

27 *CM Act* s 34.

28 Other than the importance placed upon this last principle, there is no indication as to the weight to be provided to each of the first three principles.

29 *CM Act* s 31(1). On 27 March 2007 the Aboriginal and Torres Strait Islander Legal Service ('ATSILS') complained to the Queensland Attorney-General in relation to the initial police investigation. This complaint was forwarded to the CMC who then forwarded it to the QPS Investigation Review Team, while monitoring the investigation.

30 RCIADIC, above n 1, 119.

31 These include combating major crime, ensuring public sector integrity and protecting witnesses: CMC, *Our Jurisdiction* (30 November 2011) Crime and Misconduct Commission Queensland <http://www.cmc.qld.gov.au/about-us/our-jurisdiction>.

32 Prenzler, above n 24, 672–3.

33 Ibid 662.

34 Ibid.

35 The predecessor to the Crime and Misconduct Commission, which was combined with the Crime Commission to form the Crime and Misconduct Commission.

36 Prenzler, above n 24, 664.

37 Australian Law Reform Commission, *Under the Spotlight: Complaints Against the AFP and the NCA,* Issues Paper No 16 (1995) 149–50.

38 Ibid 149.

39 Prenzler, above n 24, 666.

40 Ibid 667.

41 As well as in both Coronial Inquiries.

42 CMC Review, above n 16, 58–9, 90–100, 142–6.

43 Debbie Guest, 'Keep Cops and Watchdog Apart, Says Western Australia's Next Governor', *The Australian* (Sydney), 24 June 2011, 34.

SUBSTANDARD: CULTURAL AWARENESS TRAINING OF POLICE IN VICTORIA

Victorian Aboriginal Legal Service Co-operative Ltd*

I Introduction

The relationship between police and the Aboriginal[1] community has been a tenuous one since first encounters. Since the days of invasion, Aboriginal communities' interactions with police have been largely negative. This problematic relationship was highlighted by the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), which noted that the 'circumstances which gave rise to this Commission illustrate starkly the extent to which Aboriginal people regard police as enemies'.[2] To address the need for change in relations between Aboriginal peoples and police, the RCIADIC made a suite of recommendations, revealing just how entrenched the problem was.

One method of effecting positive change, as asserted by the RCIADIC, was through the education of police about Aboriginal people and communities. This article will evaluate the implementation status of RCIADIC recommendation 228 concerning Aboriginal cultural awareness training of police.[3] This recommendation requires cultural awareness training to constitute a substantial component of recruit and in-service police training, involving local communities and organisations.[4]

Recommendation 228 states:

> That police training courses be reviewed to ensure that a substantial component of police training both for recruits and as in-service training relates to interaction between police and Aboriginal people … Furthermore, such training should incorporate information as to:
>
> a. the social and historical factors which have contributed to the disadvantaged position in society of many Aboriginal people;
> b. The social and historical factors which explain the nature of contemporary Aboriginal and non-Aboriginal relations in society today; and
> c. The history of Aboriginal police relations and the role of police as enforcement agents of previous policies of expropriation, protection and assimilation.[5]

According to the most recent review of the implementation of the RCIADIC recommendations in Victoria, recommendation 228 was recorded as having been fully implemented.[6] However, we argue that recommendation 228 has been only partially implemented at best. Our assessment is based on the findings of the most recent evaluation of RCIADIC recommendation status in Victoria, 2011 findings reported by the Office of Police Integrity ('OPI'), and the current nature and extent of recruit and in-service police training.

In order to implement said recommendations, cultural awareness training should be:

1. two days in length;
2. delivered by authorised Aboriginal people (local where possible);
3. universal and ongoing; and
4. based upon models of best practice.

Presently, these requirements are not being met, and therefore Victoria Police continue to fail to provide cultural awareness training as a substantial component of police training. This failure is evident from the recruitment stage.

II Recruit Training

The cultural awareness training of recruits has in fact *reduced* since the 2005 *Implementation Review*, when recruits undertook

training for over half a day.[7] From June 2008 to October 2009, cultural awareness training was reduced to two hours, and from October 2009 it was further reduced to one hour and 37 minutes. In this time, the following was provided:

- a 65-minute session facilitated by a member of the Victoria Police Aboriginal Advisory Unit; and
- a 32-minute session devoted to Community Encounters where recruits informally engage with representatives from the Aboriginal and/or Torres Strait Islander community.[8]

There are numerous aspects of this training that are problematic. Chief among them is that the majority of the training is being delivered by a person who is a member of Victoria Police. It is our belief that meaningful cultural awareness training can only be delivered by an Aboriginal person who is independent from the police. Independence is crucial if honest and uncensored dialogue about the relationship between police and the community is to be achieved.

Other modules within recruit training that discuss Aboriginal people include a 65-minute introductory session on cultural diversity, and a 65-minute session about duty of care that utilises a case study of an Aboriginal man. We do not consider this to be cultural awareness training. The session on cultural diversity does not educate recruits about the Aboriginal community itself, but rather about the diversity of the broader Australian community of which Aboriginal peoples are a part. The second aspect of the training regarding duty of care is again not about Aboriginal culture or history, but is rather about policing itself.

In light of the apparent reduction in recruit cultural awareness training since 2005, it is not surprising that the OPI recently found that most people they interviewed 'agreed that a greater level of understanding and awareness of Aboriginal and Torres Strait islander traditional and contemporary cultures was needed'.[9] In line with this, the *Implementation Review* found that '[a]lmost unanimously the Aboriginal respondents were of the strong option that the training offered at the Academy was insufficient'.[10]

We believe that cultural awareness training is indeed insufficient, and that a central reason for this is the lack of time devoted to police training in its entirety. Police recruit training, whether Operational Safety Tactics Training or otherwise, must balance incident and restraint equipment curriculum with other operational police fundamentals, such as conflict resolution and tactical communication techniques designed to defuse violent or dangerous situations. The latter cannot be achieved in the absence of the context that cultural awareness training could provide. As the most recent authority on the over-representation of Aboriginal young people in the justice system – the *Doing Time: Time for Doing* report – notes, '[g]iven the extensive and expert training provided to police officers in other areas, it is essential that sufficient cultural training is included.'[11]

III In-service Cultural Awareness Training

Last year, the OPI reported that only five out of eight managers stationed in a location with a high Aboriginal population indicated that they had received cultural awareness training.[12] At the time of the 2005 *Implementation Review*, in-service cultural awareness training had occurred at four locations where Police Aboriginal Liaison Officers ('PALOs') facilitated cultural familiarisation courses.[13] Furthermore, the OPI report reveals that there has been no progress in addressing the ad-hoc nature of in-service cultural awareness training, as 50 per cent of PALOs did not facilitate in-service cultural awareness training.[14] This was because over 85 per cent of PALOs themselves did not have the appropriate training to do so.[15] It is our position that substantial cultural awareness training should be a precursor to selection into the role of a PALO. Though recommendation 228 was marked by the 2005 *Implementation Review* as having been implemented, the same review inconsistently reports that 'typically … no additional cultural awareness training was reported as taking place at the local level.'[16] Therefore, by our measures and by theirs, these recommendations remain unimplemented as they apply to in-service training.

We maintain that comprehensive in-service cultural awareness training that satisfies recommendation 228 should be universal, ongoing and based on best practice. For cultural awareness training to be universal, it should apply across all Victoria Police staff and should not be restricted to locations where there is a high Aboriginal population. Cultural awareness training cannot be considered a substantial component of police training if it is provided on a once-off basis, especially as recruit training as according to the OPI, this only 'sets the scene'.[17] We believe that ongoing cultural awareness training should also involve opportunities for reflection on experiences, and should be tailored to each

police ranking. An officer promoted to sergeant, for example, who is more likely to deal with complaints about police, should receive tailored cultural awareness training.

For cultural awareness training to be based on best practice models, there needs to be a genuine partnership between local Aboriginal communities and Victoria Police members. For this to occur, there needs to be meaningful dialogue and exchange. One of the ways that this could be facilitated is if Victoria Police would relinquish some control over the process, and be open to being approached by the local community to deliver cultural awareness training.

IV Conclusions

RCIADIC recommendation 228 concerning the cultural awareness training of police remains unimplemented. Whilst progress has been made in the relations between Aboriginal communities and Victoria Police, there are many areas that can be identified as needing more work. To achieve systemic change within the culture of policing in Victoria, and therefore improve justice outcomes for people, it is imperative that these changes happen now. It is unacceptable that more than 20 years since the RCIADIC appropriate cultural awareness training of police has not been achieved beyond that which provides 'little to properly prepare a recruit for the realities of police work in dealing with Koori people or policing Koori communities.'[18] The recent findings of the OPI strongly echo what was uncovered by the RCIADIC, where most agree that 'a greater level of understanding and awareness of Aboriginal and Torres Strait Islander traditional and contemporary cultures was needed to improve relationships, and ensure better outcomes for Koori people from the criminal justice system.[19] We continue to work towards an informed and collaborative relationship with Victoria Police for cultural awareness training that will see better policing and more positive justice outcomes for Aboriginal communities.

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* Special thanks to VALS intern Tessa Hilt, from the University of Melbourne, for her assistance with research for this article.

1 The term 'Aboriginal' has been used in this article to refer to both Aboriginal and Torres Strait Islander peoples.

2 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 207, cited in House of Representatives Standing committee on Aboriginal and Torres Strait Islander Affairs, *Justice Under Scrutiny: Report of the Inquiry into Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Australian Government Publishing Service, 1994) 250.

3 RCIADIC, above n 1, vol 5, 116, 120.

4 Ibid vol 5, 120. We are aware of nine recommendations relevant to cultural awareness training. We have focused on two in this article. The remaining seven recommendations are 60a, 60b, 87b, 133a, 133b, 133c, 177: RCIADIC, above n 1, vol 5, 82, 88, 98, 109. A 2005 review by the Victorian Department of Justice found that all had been implemented but for rec 133c: Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005). We question whether an overwhelming majority of the recommendations relating to cultural awareness training have in fact been implemented, given the argument made here that cultural awareness training has yet to be made a substantial component of police training.

5 Victorian Department of Justice, above n 3,vol 1, 397.

6 Ibid vol 1, 397.

7 Ibid vol 1, 336.

8 This figure is calculated on the basis that there are up to four community groups (including Aboriginal and/or Torres Strait Islander peoples) that share a one hour and 10 minute session.

9 Office of Police Integrity Victoria, *Talking Together – Relations Between Police and Aboriginal and Torres Strait Islanders in Victoria: A Review of the Victoria Police Aboriginal Strategic Plan 2003–2008* (2011) 38.

10 Victorian Department of Justice, above n 3, vol 1, 418.

11 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 198.

12 Office of Police Integrity Victoria, above n 8, 14, 76.

13 Victorian Department of Justice, above n 3, vol 1, 336.

14 Office of Police Integrity Victoria, above n 8, 39.

15 Ibid 66.

16 Victorian Department of Justice, above n 3, 419.

17 Office of Police Integrity Victoria, above n 8, 38.

18 Ibid 38.

19 Ibid.

THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY AND THE DUTY OF CARE OWED TO PRISONERS IN SOUTH AUSTRALIA

Chris Charles*

I Introduction

Twenty years ago, the *National Report* of the Royal Commission into Aboriginal Deaths in Custody[1] ('RCIADIC') was released. The RCIADIC investigated the excessively high numbers of deaths of Aboriginal people in custody. The conclusion was that, although per capita Aboriginal people in custody were not dying at a significantly higher rate than non-Aboriginal people, the rate of death in custody was excessively high and the incarceration rate of Aboriginal people was much higher than for non-Aboriginal people. The National Report spanned five volumes and included 339 recommendations to state, federal and territory governments. The purpose of the recommendations was to reduce both the rate of incarceration and the number of deaths in custody. This paper examines the duty and standard of care owed to prisoners, an important aspect of the *National Report*.

One of the important aspects of the RCIADIC report was to remind prison authorities of their duty of care *to* prisoners. In the *National Report*, the Commissioners stated that '[o]n general principles, the duty of care would appear to extend to protection against risks which are reasonably foreseeable and the standard of care to be that which the reasonable person would regard as reasonable in all the circumstances of the particular case.'[2] The Commissioners' fundamental position on duty of care was laid down in RCIADIC recommendation 122:

> That Governments ensure that:
>
> a. Police Services, Corrective Services, and authorities in charge of juvenile centres recognise that they owe a legal duty of care to persons in their custody;
> b. That the standing instructions to the officers of these authorities specify that each officer involved in the arrest, incarceration or supervision of a person in custody has a legal duty of care to that person, and may be held legally responsible for the death or injury of the person caused or contributed to by a breach of that duty; and
> c. That these authorities ensure that such officers are aware of their responsibilities and trained appropriately to meet them, both on recruitment and during their service.[3]

In practical terms, the Commissioners were particularly concerned with the duty of care manifesting in emergency response training, including giving immediate first aid assistance and resuscitation to injured prisoners.[4] Also, the *National Report* and recommendations were directed to ensuring that prison officers were made aware that Aboriginal prisoners are vulnerable to harm whilst in custody in specific ways and for specific reasons. Training is vital to ensure that officers understand the reasons Aboriginal prisoners are vulnerable, the nature of that vulnerability and the means to address it.[5] Another of the impulses flowing from the release of the RCIADIC *National Report* was the provision of cultural awareness training for prison officers. Training in all these fields was found to be defective for both police and correctional officers.

RCIADIC recommendations 155 and 158–66 were specifically directed to improving officer's training, emergency responses, resuscitation and the training of prison officers in understanding the unique health problems faced by Aboriginal peoples and in risk assessment on that basis. Elaborating on the need for such improvements, the Commissioners stated that deficiencies were noted in emergency response procedures generally resulting in

delays in the provision of medical assistance once it was determined that such was necessary.[6]

The above recommendations were thus directed to prison officers achieving and maintaining an enhanced standard of care not only to Aboriginal prisoners, but prisoners generally.

In relation to individual deaths in custody, the reports highlighted the faults within custody systems and their effects on Aboriginal prisoners. The Commissioners also made practical recommendations on ways to improve prison health services and safety systems.[7]

Additionally, a series of recommendations dealt with the duty to provide adequate health services to prisoners. These recommendations are highlighted below.

Recommendation 150 states that the standard of healthcare is to be equivalent to that in the general community. Recommendation 151 deals with the improvement of psychiatric care, while recommendation 152 deals with the provision of health services to Aboriginal prisoners. Recommendation 154 discusses training of prison health service staff on issues relevant to Aboriginal prisoner's health, and recommendations 156 and 157 deal with improved initial medical assessments of prisoners, including gaining access to medical notes from other sources. These were all general recommendations directed to improving the standard of medical care of prisoners. Whether individual prisons or police watch houses implemented the recommendations will be a relevant factor under consideration when a court decides whether a standard of care has been met.

Two other focuses of the RCIADIC recommendations were the improvement of prison conditions and the improvement of the lives of prisoners generally, and particularly Aboriginal prisoners. These focuses are reflected in volume three of the RCIADIC *National Report*, and specifically recommendations 168–87 which are directed at improving the prison experience generally. For example, recommendations 168–70 urge the placement of prisoners in prisons close to their families, granting families financial assistance to visit relatives in prison, and the provision of improved visitation facilities. Similarly, recommendation 172 recommends periodic visits from Aboriginal organisations and recommendation 173, a more humane living environment in prison, with shared accommodation for community living. Recommendations 174, 177, and 178 deal with the need for employment of Aboriginal welfare officers, the screening out of racist correctional officers and enhanced employment opportunities for Aboriginal people in corrections generally. Finally, recommendations 176 and 179, cover improved and enhanced requests and complaints procedures for prisoners.

There are limited court decisions which deal directly with the consequences of a failure to comply with RCIADIC recommendations. However in the criminal case of *Robinett v Police*,[8] the court held that a failure to comply with RCIADIC recommendations in providing medical assistance to an intoxicated prisoner in distress gave rise to a discretion to exclude certain police evidence. In his judgment, Bleby J said:

> So much is clear from a brief perusal of the *Report of the Royal Commission Into Aboriginal Deaths in Custody* (1991). Whilst the recommendations of the Royal Commission cannot be binding on this Court as prescribing essential standards of police conduct towards Aboriginal people, recommendations 122–167 of the *Report* provide a wide range of recommendations concerning desirable measures to be implemented in respect of the health and safety of persons in police custody. Whilst they are obviously not prescriptive, they are indicative of changing community standards and expectations of conduct to be exhibited by police custodians, in particular in respect of Aboriginal people.
>
> In my opinion, it was inappropriate in the present state of community understanding of and insight into the effect of neglect of possible medical needs and requirements of persons in custody to ignore requests of the type that were made in this case, and in the circumstances in which they were made. I am reinforced in that view by the fact that an ordinary common law duty of care is owed by police to persons in their custody in such circumstances. Breach of such a duty, if it results in loss or damage, will render the authority liable in damages to the person injured.[9]

II The Duty of Care to Prisoners

The Department for Correctional Services has a responsibility for prisoners' welfare. In South Australia, a duty of care arises from the fact that the Chief Executive Officer ('CEO') has accepted lawful custody of the prisoner and has assumed control of their person.[10]

Section 24(1) of the *Correctional Services Act 1982* (SA) ('*Correctional Services Act*') states that '[t]he Chief Executive Officer has the custody of a prisoner, whether the prisoner is within, or outside, the precincts of the place in which he or she is being detained, or is to be detained.' Other sections which cover the responsibility for a prisoner's welfare include: section 23, their assessment for rehabilitation and health programs; section 24, their subjection to regimes of privileges and discipline; section 25, transfer between prisons; and section 37A, their release on home detention.

The special relationship of gaoler to prisoner that gives rise to a duty of care also extends to providing a safe prison environment. In *New South Wales v Bujdoso* ('*Bujdoso*')[11] the High Court said:

> It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community.[12]

It would seem from the case law on the subject that the duty of prison authorities has been subsumed into the general category of non-delegable duties, arising from the prisoner's relationship of dependency upon the CEO, who has custody of all prisoners within that jurisdiction. In *Burnie Port Authority v General Jones Pty Ltd*[13] the High Court summarised recent authorities on non-delegable duties:

> It has long been recognised that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken'. Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken. … Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the common 'element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken' is that 'the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised'. It will be convenient to refer to that common element as 'the central element of control'. Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person.[14]

The CEO's duty of care to a prisoner is a non-delegable one in the sense that it is a duty that cannot be passed down to individual officers, to whom the CEO generally makes delegations under section 7 of the *Correctional Services Act 1982* (SA). Rather, the CEO is responsible for ensuring that his officers observe the duty of care and that appropriate decisions are made with regards to that duty. It can be argued that, having regard to the potential danger presented by other inmates, the duty of care to a prisoner includes a duty to provide properly trained officers, which must necessarily incorporate relevant RCIADIC recommendations as to enhanced training, referred to above.[15]

Under existing law, the Department for Correctional Services owes a duty of care to ensure that a prisoner is adequately fed, clothed, and sheltered and that health care is provided.[16] The duty extends to protecting particular classes of prisoners from dangers to which imprisonment renders them uniquely vulnerable.[17] Any statutory powers and discretions must be exercised in such a way that the duty is adhered to.[18] It extends to protecting a prisoner from another prisoner where it ought to have been known that the second prisoner was prone to violence.[19]

III Prisoners at Work

Aspects of work done by, and training for prisoners had been the subject of RCIADIC recommendations, but they did not cover the requisite duty or standard of care.[20] The law in relation to duty and standard of care for prisoners at work, and the circumstances where a prisoner can or cannot sue for negligence is complex and developing. Apart from the general common law duty of care, section 29 of the *Correctional Services Act* regulates the duty of care imposed upon Prison Managers in relation to systems of work for prisoners:

> (1) A prisoner (other than a remand prisoner) is, while in a correctional institution, required to perform such work, whether within or outside the precincts of the correctional institution, as the manager directs.
>
> ...
>
> (4) A manager must, in directing a prisoner to perform any particular work, have regard to the age and the physical and mental health of the prisoner, and any skills or work experience of the prisoner.[21]

This section was considered in detail by the Full Court of the Supreme Court in the recent decision of *Haseldine*. The Full Court concluded that although prisoners have rights which can be enforced in court, those rights are less than those of ordinary citizen, specifically those of an employee. The Full Court considered that the Department's duty of care to a prisoner had not been breached when a prisoner on a mobile work gang injured his back whilst helping to dig a hole with a crow bar and shovel. Justice Gray noted that South Australia asserted and the plaintiff conceded that their relationship was that of prisoner and State and not employer and employee.[22] That meant that the duty of care owed was less than applies between employer and employee, on that point however, Justice Gray said that '[t]he State accepted that it could not avoid liability in the following circumstances: where the State knowingly exposed a prisoner to a risk of injury through an unsafe system of work directed to be undertaken when the risk that eventuated was reasonably foreseeable.'[23]

Justice White considered the Department's general duty of care against the statutory regime of prisoners work in section 29(4) of the *Correctional Services Act*, and decided that because the officers had made due inquiry as to the prisoner's suitability and fitness to attend the work camp and based on his answers had concluded he was fit to do the work, there had been no breach of the section 29(4) duty of care.[24]

III Duty of Care and the Use of Reasonable Force

In addition to immunity for actions taken in good faith, the Department for Correctional Services and individual officers are allowed and indeed required on occasions to use 'reasonable force' against prisoners. This is confirmed by section 86 of the *Correctional Services Act*:

> Subject to this Act, an officer or employee of the Department or a member of the police force employed in a correctional institution may, for the purposes of exercising powers or discharging duties under this Act, use such force against any person as is reasonably necessary in the circumstances of the particular case.[25]

The use of reasonable force in carrying out a lawful duty will be regarded as an action in good faith, whereas gratuitous, unprovoked and unauthorised violence against a prisoner, who was not disobeying a lawful order, will not be so regarded and may give rise to personal liability of the officer, and potentially liability of the state for failure to properly train the officers who abuse their powers.

This is the approach taken by the Canadian courts in *Peeters v Canada* ('*Peeters*'):

> A staff member shall use as much force as he believes, in good-faith and on reasonable and probable grounds, is necessary to carry out his legal duties. He shall use force in good judgment, considering the protection of inmates, and refrain from personal abuse, corporal punishment and personal injury. Inmates will be protected from injury, harassment and damage to personal property. If the force used is excessive, he is criminally responsible for such excess, and he may also be liable for civil action where the use of excessive force is claimed.
>
> The theory was excellent, but the CSC members clearly had not been trained to the point where reasonable restraint was second nature to them, as they should have been, as employees expected to use force. Instead, at the first temptation they succumbed to what the Trial Judge rightly called 'goon-squad machismo'.[26]

Peeters is also authority for the proposition that punitive damages can be awarded against the state if the decision making giving rise to the improper conduct by the officers concerned involved inappropriate deployment of the officers and a lack of proper training of the officers concerned. It was that inappropriate deployment and improper of training which gave rise to a liability for punitive damages against the state.

This approach to damages has received support from the High Court of Australia in *New South Wales v Ibbett*[27] ('*Ibbett*') in the context of New South Wales police legislation. Whether the *Ibbett* approach to liability of the State to prisoners, when officers have abused their powers and have not received adequate training, will be adopted in relation to the *Correctional Services Act* remains to be seen. Certainly RCIADIC recommendations 162, 163, 177 and 182 provide a strong proposal for recognition of an enhanced duty and standard of care in relation to the use of force, particularly lethal force by correctional officers. The following dicta from the High Court in *Ibbett* may be equally relevant to the changed constitutional position of correctional officers, as to that of police. The High Court said:

> The approach taken in cases such as *Adams* and *Peeters* should be accepted. It is supported by the observations of Lord Devlin and Lord Hutton to which reference has been made earlier in these reasons. The submissions by counsel for the State should be rejected.
>
> First, the course of development over the last two and a half centuries of the law respecting Crown liability in tort does not support attention to the financial means of the miscreant public officers as a significant and limiting determinant of the quantum of liability. Reference has been made earlier in these reasons to what was said on the subject in *The Commonwealth v Mewett*.
>
> Secondly, the New South Wales legislative reforms do not require, in obedience to a "master's tort" theory, determination solely of what would be an appropriate award of exemplary damages against the police officers to the exclusion of considerations affecting the state itself.
>
> The doctrine, associated in Australia with *Enever v The King*, which excepted the exercise of independent discretions from the legislative changes otherwise providing for the vicarious tort liability of the Crown, would have denied any award of exemplary or other damages against the State in the present case.[28]

There is little established case law on what constitutes reasonable force being used by prison officers with the exception of forced that may be used in body searches, and to prevent escapes. [29] Additionally, the use of force will be regarded as an action in good faith, in circumstances such as the suppression of violence or property damage by prisoners, in which cases the use of reasonable force is the duty of the officers. This begs the question – what is reasonable force? The dicta from *Peeters* quoted above provides some guidance, but the general test relates to the proportionality of the actual force used against an objective test of what a reasonable officer in the actual situation of the officer in question, would have done, having regard to the prisoner's conduct.[30]

IV Conclusion

Apart from the common law duty of care to prisoners, there are few legal duties imposed on correctional authorities, as to their behaviour towards prisoners or objective standards against which the treatment of prisoners can be judged. Thus, although the common law duty of care to a prisoner is quite extensive, the prisoner still has few rights in relation to officers whose tasks it is to supervise and control their day to day lives and to exercise the numerous statutory discretions delegated to them under the *Correctional Services Act* .To summarise the position, the author Professor Richard Harding, comments:

> Prisoners do not in the common law jurisprudential model possess rights in relation to their conditions and treatment. Rather the imprisoning authority possesses non-enforceable obligations. These may seem to be reasonably comprehensive, as for example in relation to the … Standard Guidelines for Corrections in Australia - but they are not legally binding in the sense of giving prisoners a right of action against prison authorities in a court of law.[31]

It may be observed that sections 29 and 86 of the *Correctional Services Act* are important exceptions to the general position outlined by Harding and that the enactment of those sections is at least a partial acknowledgement of the criticisms of the *Correctional Services Act* made by Commissioner Gresley Clarkson in his 1981 Royal Commission and by Commissioner Johnston QC in the Semmens case.[32] In the RCIADIC report, Commissioner Johnston QC said:

The Clarkson Commission was a very important catalyst for important changes in the law relating to penal institutions in South Australia. The recommendation by Commissioner Clarkson that the Act or the Regulations there under should establish and set out the responsibilities of prison officers in relation to care of prisoners has not been but should be put into effect. [33]

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* General Counsel, Aboriginal Legal Rights Movement.

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

2 Ibid vol 1, 78–9 [3.3.7].

3 Ibid vol 5, 95 rec 122.

4 Ibid vol 5, 105–6 recs 159–61.

5 Ibid vol 5, 104–5 rec 155. The recruit and in-service training of prison officers should include information as to the general health status of Aboriginal people and be designed to alert such officers to the foreseeable risk of Aboriginal people in their care suffering from those illnesses and conditions endemic to the Aboriginal population. Officers should also be trained to better enable them to identify persons in distress or at risk of death or harm through illness, injury or self-harm. Such training should also include training in the specific action to be taken in relation to the matters which are to be the subject of protocols referred to in rec 152(g): at 103–4.

6 Ibid vol 1, 96 [3.3.81].

7 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Kingsley Richard Dixon* (1989); Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Gordon Michael Semmens* (1990) ('*Semmens*'); Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Malcolm Buzzacott* (1990).

8 (2000) 116 A Crim R 492.

9 Ibid 507.

10 *Howard v Jarvis* (1958) 98 CLR 177, concerned the duty of care to a prisoner in police custody after arrest. The High Court stated that:

> Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody. He had deprived Jarvis of his personal liberty, and assumed control of his person. In arresting and detaining Jarvis he was no doubt acting lawfully and properly and in the due execution of his duty, but he was depriving Jarvis of his liberty, and he was assuming control for the time being of his person, and it necessarily followed, in our opinion, that he came under a duty to exercise reasonable care for the safety of his person during the detention: at 183.

11 (2005) 227 CLR 1.

12 Ibid 13–14.

13 (1994) 179 CLR 520.

14 Ibid 550–1 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

15 *Peeters v Canada* (1993) 108 DLR (4th) 471 (Federal Court of Appeal) ('*Peeters*').

16 *L v Commonwealth* (1976) 10 ALR 269.

17 See *Bujdoso* (2005) 227 CLR 1, 13–14, 16–17, where the plaintiff had not simply relied upon the fact that prisoners convicted of sexual offences against minors are at greater risk than other offenders: he proved that the Appellant knew that he had been threatened and taunted by other prisoners. There was more than a mere foreseeable risk. There was a risk that had been expressly threatened. Such a risk, once known, called for the adoption of measures to prevent it.

18 *Haseldine v South Australia* (2007) 96 SASR 530, 553 (White J) ('*Haseldine*').

19 *L v Commonwealth* (1976) 10 ALR 269.

20 RCIADIC, above n 1, vol 5, 110 recs 184–6.

21 *Correctional Services Act 1982* (SA).

22 *Haseldine* (2007) 96 SASR 530, 537 (Gray J).

23 Ibid 541–2 (Gray J).

24 Ibid 553 (White J).

25 *Correctional Services Act 1982* (SA).

26 *Peeters* (1993) 108 DLR (4th) 471, [28]–[29].

27 (2006) 229 CLR 638.

28 Ibid 653–4.

29 *Correctional Services Act* s 37(2) (reasonable force can lawfully be used by an officer in carrying out an arrest of an escaping prisoner under s 52).

30 *R v McKay* [1957] VR 560, 573.

31 Richard Harding, 'Inspecting Prisons' in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan Publishing, 2007) 545.

32 Commonwealth, Royal Commission on Allegations in Relation to Prisons Under the Charge, Care and Direction of the Director of the Department of Correctional Services and Certain Related Matters, *National Report* (1981).

33 RCIADIC, *Semmens*, above n 7, 45 (Commissioner Elliott Johnston).