Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System.

September 2005

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ACKNOWLEDGEMENTS

The authors wish to gratefully acknowledge the participation of members of the Victorian Koori community and its representative organisations in the research process. Thanks are owing to Maria Katsabanis for her editing skills on the final report and to staff at the Equal Opportunity Commission for their support and hospitality over the lifetime of the project. Thanks are also due to participants in the Systemic Racism Research Reference Group for their input and to members of the judiciary and workers in government organisations for their assistance.

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CHAPTER 1 THE SYSTEMIC RACISM PROJECT

1. Project Background

The Victorian Aboriginal Justice Agreement (1999) ('VAJA') makes reference to racism and discrimination as factors contributing to the over-representation of Indigenous people in the criminal justice system. The agreement recognises that Indigenous[1] people continue to be over-represented at all levels of the criminal justice system at "unacceptable and disproportionate rates" (VAJA, 1999, 12). Consultations with Indigenous communities undertaken for the VAJA identified a range of factors contributing to this over-representation, including:

- A cluster of underlying issues, such as extreme social and economic disadvantage, dispossession, and alienation from traditional land and culture.
- Vulnerability to crime, linked to high rates of victimisation, social disadvantage, family violence, drug and alcohol abuse.
- Lack of confidence in justice and related institutions due to cultural alienation and the role such institutions played historically, leading to an unwillingness to access services.
- Endemic and entrenched forms of racism, including racial vilification and stereotyping, that operate as a mechanism for excluding Aboriginal people from full participation in the life of the Victorian community.

The VAJA maintains that the criminal justice system reinforces social values that are frequently at odds with those of the Indigenous community. The justice system has played a direct role in imposing an alien set of values on Aboriginal people, then criminalising when they will not, or cannot, conform to them. Notions of "acceptable behaviour" are "defined exclusively for the non-Indigenous community" (VAJA, 1999, 14), while the values, beliefs and practices of Indigenous people are marginalised or treated as forms of anti-social behaviour.

The VAJA goes on to stress the salience of institutional forms of racism in maintaining the dominance of non-Indigenous values and principles and in marginalising those of Indigenous

[1] The term Indigenous people is used throughout this report to include Aboriginal and Torres Strait Islander peoples.

people. Institutional racism is the most insidious form of racism because it is difficult to quantify, indeed those who practice it generally deny its existence.

> Institutional racism is typically initiated by persons of relative power and authority who see themselves as 'just doing their job' in accordance with supposedly fair and universal criteria (VAJA, 1999, 14).

A recent inquiry into institutional racism in the United Kingdoms's Metropolitan Police Service provides an in depth exploration of the terminology.[2] Amongst the most variegated is this offered by Dr Ben Bowling, cited in the report:

> Institutional racism is the **process** by which people from ethnic minorities are systematically discriminated against by a range of public and private bodies. If the result or **outcome** of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred. Although racism is rooted in widely shared attitudes, values and beliefs, discrimination can occur irrespective of the intent of the individuals who carry out the activities of the institution. Thus policing can be discriminatory without this being acknowledged or recognised, and in the face of official policies geared to removal of discrimination. However, some discrimination practices are the product of **uncritical** rather than unconscious racism. That is, practices with a racist outcome are not engaged in without the actor's knowledge; rather, the actor has failed to consider the consequences of his or her actions for people from ethnic minorities. Institutional racism affects the routine ways in which ethnic minorities are treated in their capacity as employees, witnesses, victims, suspects and members of the general public. Violent Racism: Victimisation, Policing and Social Context, July 1998. (Paras 21-22, pp 3-4).

Here Bowling addresses the essential component of the institutional racism concept: the extent to which it focuses attention on the *outcomes* of activities and processes rather than *intentions* and *attitudes*, and the degree to which it reflects an *organisational* failure to understand the impact of policies and procedures on minority groups.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) had previously voiced similar concerns. Innovations since the RCIADIC have been premised on the assumption that Aboriginal people are disadvantaged in their dealings with the criminal justice system. While Indigenous people in Australia are amongst the most imprisoned people in the world, they have remained essentially marginal to a criminal justice system that is essentially structurally Eurocentric in philosophy and practice. The ongoing over-representation of Indigenous Australians in the criminal justice system cannot be accounted

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[2] We discuss the report's findings in detail in Chapter 2.

for solely in terms of the prejudices of individuals within the system, or greater levels of offending by Indigenous people – although these may play an accompanying role. They are, rather, a reflection of the multiply layered patterns of disadvantage and extreme forms of marginalisation experienced by Aboriginal people.

Under the Victorian Aboriginal Justice Agreement there have been a number of valuable initiatives designed to reduce levels of over-representation and enhance Aboriginal people's confidence in the criminal justice system. However, Aboriginal representatives at Aboriginal Justice Forums in Victoria (and other meetings) have continued to express general concern about continuing racism. After extensive discussions, the Equal Opportunity Commission of Victoria commissioned a project with the brief to consider "systemic racism in the criminal justice system as a factor contributing to Aboriginal over-representation."

In October 2003, the project was awarded to the following research team:

- Dr Harry Blagg, Crime Research Centre, University of Western Australia
- Dr Neil Morgan, Crime Research Centre, University of Western Australia
- Dr Chris Cunneen, Sydney University (project consultant)
- Ms Anna Ferrante, Crime Research Centre, University of Western Australia (statistical consultant)

2. The Terms of Reference

The project brief was to

- *Investigate and document the incidence of systemic racism within the criminal justice system;*
- *Document the relationship between systemic racism and the over-representation of Aboriginal people within the system; and*
- *Provide advice to the Aboriginal Justice Forum outlining implications for current strategies as well as issues not addressed in the VAJA.*

In particular it was intended that through detailed case studies across all Victorian regions, the research would identify and document the experience of systemic racism by Aboriginal Victorians in their contact with the various components of the criminal justice system. The analysis of these case studies should include identification of:

- *Issues that are common across Victorian regions and /or the entities that comprise the criminal justice system.*
- *Regional differences in the experiences of Aboriginal Victorians in contact with the criminal justice system.*
- *The impact of systemic racism (both personal and in terms of outcomes) on Aboriginal Victorians in contact with the criminal justice system.*

The research was guided by a Research Reference Group, a sub-committee of the Executive Committee of the Regional Aboriginal Justice Advisory Council (RAJAC). Through discussions with this group it was viewed as unrealistic to conduct qualitative research in every region. Three sites were identified for particular focus: Loddon Mallee; Metropolitan Melbourne and East Gippsland. Research in these regions was, however, supplemented by a number of interviews with RAJAC representatives from other areas conducted in Melbourne, as well as a visit to Shepparton.

The terms of reference are both broad and narrow. They are broad in the sense that they embrace the whole criminal justice system (and cannot involve in-depth research on all areas). They are narrow in that they are limited to forms of systemic racism that contribute to Aboriginal over-representation and not, for example, to other forms of racism or to the over-representation of other ethnic groups. The terms of reference do not extend to broader 'social justice' and socio-economic factors, however, it is obvious that over-representation and any facets of systemic racism within the justice system are likely to reflect wider societal issues.

Moreover, as we shall demonstrate, Aboriginal people interviewed for this project raised factors other than simply those involving the criminal justice system when discussing systemic racism.

Underlying Issues

Those "underlying issues" identified by the RCIADIC continue to influence the life chances and life experiences of Aboriginal people, who remain disadvantaged across a range of crucial indicators, including health, housing, education and employment. As we shall illustrate below, Koori groups in the community believe that racism in the justice system is inextricably connected to broader forms of discrimination. Indeed, many Koori people with whom we discussed these matters, particularly in rural areas, identified issues such as homelessness, unemployment and lack of access to education and training as factors directly contributing to involvement in the system and, particularly, to recidivism. In some respects the notion of "underlying" causes is somewhat misleading, to the extent that it implies forms of causality operating at a stage significantly removed from the immediate causes of involvement in the system. Our discussions would suggest that "underlying" issues such as drug and alcohol use, homelessness, unemployment, marginalisation and family violence, play a very direct and constitutive role in shaping the contexts in which offending occurs. Progress in eliminating structural disadvantage in the criminal justice area, we suggest, would be accelerated if it were allied with the elimination of other forms of disadvantage.

The Research Process

The research process for the systemic racism project has attempted to reflect the weight given in the project's terms of reference to the views and experiences of Koori people. This has not been an evaluation of the justice system per se, but an exploration of the justice process from an Indigenous consumer's perspective and from the perspective of Koori people working within the system. The research, therefore, has been less preoccupied with systematically documenting the policies of Victorian justice agencies.

The research process for the systemic racism project has involved:

- Examining and reviewing the literature on systemic racism in criminal justice systems;
- Collating and analysing statistical data;
- Examining relevant legislation, reports and policy documents
- Holding focus group discussions with Indigenous prisoners, community organisations and others who have been in contact with the justice system;
- Consulting some Regional Aboriginal Justice Advisory Councils (RAJACs);
- Meeting relevant groups, individuals and agencies (government and non-government sector);
- Holding discussions with key decision makers (including Parole Boards, judicial officers and police);
- Observing some relevant initiatives in operation (such as the Koori Court).[3]

Given the time frames and available resources it was agreed with the Research Reference Group that, rather than attempt to cover all of the Regions, there should be a primary focus on the metropolitan region, Gippsland and Loddon-Mallee (a detailed breakdown of site visits and interviews is contained in Appendix 1).

The project is an evaluative exercise in which we seek to identify not merely areas of possible weakness but also areas of good practice. In this respect it has been informed by the notion of a critical, yet "appreciative", inquiry. An appreciative inquiry sets out from the premise that organisations, such as the police, prisons, and the courts, have significant strengths as well as weaknesses: while not glossing over genuine structural inadequacies, appreciative inquiries attempt to identify sources of strength in organisations and identify sites of "energy" and vitality in new initiatives (Elliot 1999, Liebling and Price, 2001).

It is noteworthy, therefore, that Victoria has a much lower overall imprisonment rate than the rest of Australia and a rather lower "over-representation rate". Taking these factors together, fewer Indigenous people per head of the population are imprisoned in Victoria than in Australia at large. Government and community structures, it is safe to conclude, are getting some things right. This, however, does not alter the fact that as in the rest of the country,

[3] Stakeholders were invited to respond in September 2005.

Indigenous people are still over-represented and re-conviction rates (and therefore re-entry to the criminal process) are much higher for Indigenous people.

3. Key Definitions: 'Systemic Racism', 'Institutional Racism' and 'Systemic Bias'.

The most appropriate starting point for a discussion on racism, discrimination and the over-representation of Indigenous people in the criminal justice system is a clarification of the terms. Some reference to terminology is necessary to demonstrate why particular analytical phrases have been employed in the research. There has been considerable disagreement between criminologists as to the veracity of concepts such as systemic racism, and there has also been some lack of conceptual clarity regarding differences between notions such as systemic racism and systemic bias, they tend to be used interchangeably although they in fact refer to different processes.

In this Report, we tend to employ the concept of systemic or institutional racism to describe situations where what appear to be 'facially neutral' laws, policies and practices operate in an uneven or unfair manner that is detrimental to Indigenous people. We believe this definition is close to that forwarded in the VAJA where it refers to "supposedly fair and universal criteria" maintaining asymmetric power relationships. Before discussing the issue in detail (see Section 2) we will briefly sketch some of the main themes.

Systemic racism in this sense is not about whether individuals hold racist views but about the uneven impact of laws, policies or practices. Put another way, systemic racism can to some extent be measured by outcomes and results rather than intentions. Policies might not be racist in intent, but might have racist outcomes. It may be, for example, that innovations that are beneficial to the majority do not meet the needs of the minority. This may be the case when (even well intentioned reforms) are "difference blind" and fail to take account of cultural factors, leading to outcomes that reinforce, rather than reduce inequality: criminologists refer to these as the "unintended consequences" of intervention.

The best way to understand this is, perhaps, through some examples and some questions/ issues:

- **Western Australia's three strikes home burglary laws** prescribe a minimum of 12 months detention / imprisonment for a third home burglary strike. In theory, the laws apply to all offenders but they have the greatest impact on juveniles (as most adults would have faced at least 12 months under normal sentencing principles). 80% of all the children who have been caught are Indigenous; of those aged under 14, 100% are Indigenous; and a disproportionate number are from regional and remote areas. Capturing these groups may not have been the intention – indeed the laws were enacted against a backdrop of concern about urban "home invasion", not stealing for food in remote outback towns. The Northern Territory abolished its Mandatory Sentencing regime in 2001, due, in large part, to concerns about its impact on Indigenous imprisonment. Sentencing practices which remove judicial discretion tend to discriminate against minority, marginal and Indigenous peoples (see Chapter 2 of this report, also Garland, 2001).

- **Bail** is under-researched but is an important area for analysis. Across Australia, imprisonment rates are rising and the remand population is generally rising faster than the sentenced prisoner population. Consideration is needed as to whether tighter bail practices (often prescribed in legislation) and requirements such as sureties operate in a fair and even manner.

- **Prison accommodation levels and security ratings**: there is a pattern in much of Australia of Indigenous prisoners being housed in higher security prisons; of not progressing to minimum security; and of being in lower levels of accommodation and employment within the prison. This may not augur well for parole decisions and does not allow prisoners to undertake work release or home leaves.

- **Parole criteria and treatment programs:** parole authorities and others often place weight on whether a person has 'addressed his/her offending behaviour' by undertaking a 'treatment program' in prison (or, perhaps, that they will undertake a program in the community). Completion of such programs is said to reduce the person's risk of further offending. In many parts of Australia, Indigenous offenders complain that such programs are culturally inappropriate or problematic (especially in the context of sexual offending): they tend to be based on a psychological model and to be delivered in a group / classroom setting, often by white female presenters.

Another issue is the requirement to submit a 'viable parole plan', especially given the issues that surround Aboriginal housing.

- **Supervision of Community Orders**: Indigenous offenders tend to breach community based sentences and parole by non-compliance (as well as by further offending) at a higher rate than non-Indigenous offenders. Indigenous rates of compliance remain a concern, suggesting that cultural / family / contextual reasons for non-compliance should be considered.

- **Policing practices** such as the use of powers to ask people to 'move on' or to request name and address. (And policies around the policing of public space such as Western Australia's 'Northbridge curfew' in which, under a Government initiative, children are removed from the streets of Northbridge after 9.00 pm by the police. Around 90% of the children are Aboriginal). There have been tendencies to criminalise Indigenous people's use of "public space", particularly young people, not because of overt criminal behaviour but because they do not conform to non-Aboriginal notions public propriety. A number of innovations, such the *Children (Parental Responsibility) Act, NSW* have been criticised on the grounds that they target Indigenous youth in public and provide a mechanism for social exclusion. Similarly, Western Australia's "Northbridge curfew" has been criticised because it tends to target Indigenous youth. There are no similar policies in operation in Victoria, although Koori people in country areas expressed concerns that some exclusionary policing strategies operated informally at a local level (see Chapter 4).

- **Drug Courts** are an important innovation and, in theory, provide a diversionary, treatment-oriented approach that is designed to reduce recidivism. However, depending on the model that is adopted, they may not reach Indigenous clients. Western Australia's Drug Court has had only a handful of Indigenous clients. There are many reasons for this, but they include the lack of sufficient Aboriginal-specific programs, and the fact that a major form of monitoring is through urinalysis testing, which is simply not relevant to problems of solvent and alcohol abuse.

- **Cautioning practices:** there is strong evidence in some jurisdictions, and some evidence in Victoria (discussed below), to suggest that Aboriginal people are less likely to be cautioned than non-Aboriginal people are.

- **Prior record:** is a factor that assumes significance at a number of stages, including decisions about cautioning, choice of sentence, length of sentence, eligibility for parole, risk assessments, parole decisions and decisions about supervision requirements upon release. Given that Aboriginal people tend to have greater contact with the justice system, it is worth considering whether the cumulative weight that is placed on prior record is a factor of concern.

- **Fines and Fine Enforcement:** there is clear evidence in some parts of Australia that fines remain problematic for Indigenous people despite the introduction of new forms of enforcement. For example, in New South Wales and Western Australia, the suspension of a driver's licence generates problems; as does the seizure of assets. Thus, whilst Western Australia's new fine enforcement laws in the late-1990s seemed to lead to a drop in short prison sentences, we have more recently seen an increase in the number of Aboriginal women in prison for fine default.

- **Correctional Policies:** there is abundant evidence to suggest that Aboriginal prisoners are often disadvantaged by policies around funeral attendance. Non-Aboriginal definitions of "next of kin" fail to take into account Aboriginal obligations. Aboriginal people have been denied rights to attend funerals of significant people when they cannot demonstrate a next of kin connection.

As we have suggested, systemic racism is a difficult concept to define and a controversial area for analysis. There has also been recent debate on the extent to which it is a significant factor in terms of Aboriginal over-representation (Weatherburn, 2003), an issue we will discuss in more detail below. It is our view that systemic racism is a factor of established significance in many Australian jurisdictions but that the precise nature and extent of the problem differs between jurisdictions.

However, it is necessary to add one caveat before moving on to examine the issues in detail. While systemic racism remains the central focus of the inquiry it needs stressing that the

Aboriginal people we interviewed as part of the process constantly raised issues and experiences relating to direct and overt as well as more subtle and insidious forms of racism. Aboriginal people were clearly, and vocally, outraged by what they saw as racist behaviour, language and attitudes by individuals. The limitation of the focus on structural processes is that it can in some instances absolve individuals from responsibility for their words and deeds.

The Criminal Justice System

Although the concept of the 'criminal justice system' is apparently self-evident it also requires clarification. The criminal justice system covers a broad range of institutions including:

- Government departments including courts administration, the attorney-generals department, the police, corrections (both prison and community corrections), juvenile justice agencies (and, at times child protection agencies).

- Statutory and quasi-independent bodies such as the judiciary, the director of public prosecutions and the legal aid commission.

- Non-government agencies involved in the administration and delivery of justice, such as Aboriginal legal services, community-based service providers and 'for profit' companies engaged in service delivery.

In everyday language we talk about the criminal justice system. The implication is that there is a 'system' that is, to a greater or lesser extent, coherent in terms of policy or practices. In a formal sense, there certainly is a system created by the body of law and regulations which govern interactions between individuals and legal institutions. However, it is important to understand the complexity of the interactions between justice agencies and their competing or contradictory interests and goals.

At one level, the claim that Aboriginal people are over-represented in the criminal justice system may appear transparent and commonsense. However, it is a broad claim that lacks

specificity and connection to the complexity of the criminal justice system. The idea of 'over-representation in the criminal justice system' is often used as a shorthand way of discussing the level of representation of Aboriginal people in arrests and police custody, before the courts and in sentencing decisions, and in adult and juvenile correctional centres.
However, problems arise with the lack of specificity. These problems can have significant implications in terms of:

- *Proof.* For example, what evidence do we use to discuss over-representation and how reliable is it? Some jurisdictions have better data available than others relating to Aboriginality, and some departments within the same jurisdiction have better data available on key decision-making processes.

- *Effects.* How do we understand the inter-relationships between agencies within the criminal justice system and the way decisions at one level effect decisions at another? For example, how do police discretionary decisions affect latter sentencing decisions?

- *Policy development.* Policies designed to decrease over-representation in the criminal justice system are likely to be both multi-faceted and targeted. For example, different strategies are likely to be put in place if the aim is too decrease over-representation in police custody, compared to where the aim is to decrease the over-representation of Aboriginal people in adult prison.

- *Policy evaluation.* The evaluation of policies in relation to their effects on over-representation also needs to be specific. For example, there is little value in evaluating the effects of policies on Aboriginal prison numbers if the main purpose of those policies was to decrease police custody numbers. Given the complexity of the criminal justice system it is unlikely that any single policy, program or change in legislation can positively affect general claims of over-representation in the criminal justice system.

Race – Based Differences

There are three terms which are sometimes used interchangeably:

- Systemic Bias
- Racial Discrimination (and also 'indirect discrimination')
- Institutional Racism

Although these terms are sometimes used interchangeably, they do have different meanings and connotations.

Searches of the Literature

It is instructive to consider the nature of the literature which utilises these various terms. Searching data bases such as APAFT, CINCH and AGIS reveals that in fact the concept of systemic bias is used relatively infrequently in academic and public policy literature in Australia specifically discussing Indigenous people and the criminal justice system. The concepts of racial discrimination (and in particular indirect racial discrimination) and institutional racism are used somewhat more frequently. We discuss the use of the terms below.

Racial Discrimination

Given that racial discrimination is prohibited under Australian law, it useful to consider the way racial discrimination is defined within legislation. The *Commonwealth Racial Discrimination Act* 1975 (RDA) contains the prohibition on racial discrimination and closely follows Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Section 9(1) of the RDA makes it unlawful for a person to:

> Do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

It has been recognised that section 9(1) is an "extremely broad provision" (Race Discrimination Commissioner 1995:56). Sections 11-17 prohibit specific types or forms of discrimination.

- Access to public places and facilities (s11)
- Disposal or acquisition of land, housing, and accommodation (s12)
- Provision of goods and services (s13)
- Joining trade unions (s14)
- Employment (s15)
- Advertisements (s16)
- Inciting or assisting the doing of an act which is unlawful by reason of the foregoing prohibitions (s17)

Discrimination for the purposes of these specific prohibitions occurs when one person is treated less favourably than another by reason of the first person's race (Race Discrimination Commissioner 1995:58). Sections 11-17 do not provide an exhaustive definition of racial discrimination. They are piecemeal definitions of specific forms of racial discrimination. Section 9(4) states that the provisions in sections 11-17 complement, but do not limit the generality of, section 9(1) (Race Discrimination Commissioner 1995:58).

In Victoria, the *Equal Opportunity Act 1995* (Vic) imposes rights and obligations in similar terms to the RDA in that it prohibits discrimination against a person on the basis of race in defined public areas of life. Race includes colour, descent, ancestry, ethnic background or any characteristics associated with a particular race.

The RDA also prohibits racial hatred - that is offensive, insulting, humiliating or intimidating behaviour based on a person's race, colour, or national or ethnic origin. *The Racial and Religious Tolerance Act 2001* (Vic) also seeks to promote racial tolerance in Victoria; proscribing that it is against the law to vilify a person or group of people on the basis of their race. Vilification is behaviour that incites hatred against, serious contempt for, or revulsion, or severe ridicule of, another person or group of people. Incitement means to provoke, stir up, prompt to action, or to urge hatred, contempt, revulsion, or ridicule of, another person or group of people.

Indirect Discrimination

It has been suggested that the distinction between direct discrimination and indirect discrimination can be described as a difference between "disparate treatment" and "disparate impact".[4] Section 9(1A) of the RDA prohibits indirect discrimination. The prohibition on indirect discrimination "attempts to combat practices which appear 'facially neutral' but which adversely affect a person or group of people who share a common attribute such as race" (Tahmindjis 1995:104).

There are four key elements which must be established in demonstrating indirect discrimination under section 9(1A) of the RDA:

1. There must be a term, condition or requirement imposed on the complainant,
2. The requirement must interfere with the recognition, enjoyment or exercise, on an equal footing, by persons of the same race as the complainant of any relevant human right or fundamental freedom,
3. The complainant does not or cannot comply with that term, condition or requirement, and
4. The term, condition or requirement is not reasonable.

In order to establish indirect discrimination it is necessary to show that the term, condition or requirement is not reasonable. This is an objective question which involves weighing the respondent's reasons for the imposition of the requirement against its discriminatory effects. The court must weigh the nature and extent of the discriminatory effect, on the one hand, against the reason advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.[5] One cannot conclude that a requirement is unreasonable because it has a disproportionate or adverse impact on a particular group. Once an adverse impact is established, it is still necessary to establish that the requirement is not reasonable.

There have been studies which suggest that indirect discrimination may impact on Aboriginal people in contact with the criminal justice system. These have involved discretionary decisions in the juvenile justice system (Gale, et al, 1990; Luke and Cunneen 1995), and in

[4] *Griggs v Duke Power Co* (1971) 401 US 424.

the provision of mainstream programs to Aboriginal young people in detention where those programs do not relate to the cultural needs of Indigenous youth (Cunneen 1991). Tahmindjis (1995:121) has suggested that another avenue where indirect discrimination may contribute to Indigenous over-representation in the criminal justice system and high levels of unemployment is where employees seek out employees' conviction records when determining who to hire.

The Royal Commission into Aboriginal Deaths in Custody suggested in Recommendation 212 that the area of indirect discrimination should be examined for the potential to challenge entrenched institutional practices.

> The Human Rights and Equal Opportunity Commission and State Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organisations and Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination and representative actions (Johnston 1991: (4)78).

Tahmindjis (1995:123) concludes his discussion on the topic by noting 'that instances of indirect racial discrimination may be enormous, occurring in areas of employment (and unemployment), education and training, health and justice'.

Systemic Bias

The concept of systemic bias is used less frequently in the Australian literature than either racial discrimination or institutional racism. A search of the relevant Australian databases shows that the *only* use of the term in academic writing specifically in relation to Aboriginal people and the criminal justice system was an article by Weatherburn et al (2003). As discussed further below, the irony of this is that the point of the article was to criticise the use of the model by Australian academics seeking to explain Aboriginal over-representation in prison. The North American literature tends to use concepts of systemic racial discrimination and systemic bias in relation to racial minorities far more frequently than in Australia.

Occasionally reports by the HREOC will discuss systemic racism and systemic racial discrimination, although not necessarily in relation to Aboriginal people and the criminal

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[5] Wilcox, J. in *Styles v Secretary Department of Foreign Affairs and Trade* (1988) 84 ALR 408, 429.

justice system. For example, a report on South Sea Islanders in Australia discusses the history of their treatment in terms of systemic racial discrimination (Race Discrimination Commissioner 1993). Probably the closest to the type of analysis to which Weatherburn et al (2003) are referring is a chapter in the Third Report of the Aboriginal and Torres Strait Islander Social Justice Commission's report which discusses 'systemic racism' as a cause of Aboriginal over-representation in the juvenile justice system – however, it should be noted that the concept is used far more broadly than simply describing bias in decision-making (Aboriginal and Torres Strait Islander Social Justice Commission 1995).

Database searches show that the concepts of systemic bias or systemic discrimination are used far more frequently in the Australian literature when discussing gender, sexuality and hate crime and the law. Systemic bias is also used in discussions on judicial decision-making, although not specifically in relation to Indigenous people. Commonly, systemic bias is associated individual decision-making processes and a frequently canvassed solution is to make the judiciary more representative (Wood 1995). For example, Keith Mason (2001) discusses the idea that judges may display attitudinal prejudices which may lead to systematic error or bias. For Mason, possible solutions to this issue include open discussion of the role of unconscious prejudices and the appointment of a more representative judiciary, including more women judges.

The United States' Literature on System Bias

Issues around bias and discrimination in the criminal justice system continue to be a matter of serious concern in the United States. For example, in 2003 the Chief Justice Deborah Poritz of New Jersey announced an inquiry into whether juveniles of different racial and ethnic backgrounds receive different treatment at the law enforcement level, the prosecutorial level, in the courts or at the point of disposition (Toutant 2003:9). The reason for the inquiry was formulated as a question of equity: the need for the delivery of equal justice.

For a number of years US States have been required to address the issue of 'disproportionate minority confinement' (DMC) as a requirement of federal funding for state juvenile justice programs. In 1992 the *Juvenile Justice and Delinquency Prevention (JJDP) Act* (1974) was amended to include DMC as a core requirement of the JJDP Act Formula Grants Program. Each State must address efforts to reduce the proportion of youth detained in secure detention facilities who are members of minority groups if it exceeds the proportion of such groups in

the general population. States failing to meet the DMC plan requirement are ineligible to receive 25 per cent of their annual formula grant allocation (Hsia and Hamparian 1998:2).

Over the last few years three US states, Oregon, Utah and Washington, have undertaken inquiries into the extent to which minorities are over-represented in the criminal justice system.[6] Each state confirmed that minorities were over-represented and each attempted to determine whether the over-representation was a result of discriminatory processing by decision-makers within the system. Davies (2003) has analysed the three inquiries and has been critical of the analytical processes utilised, both at a methodological and theoretical level.

At a theoretical level she argues that the inquiries reflected current legal assumptions regarding discrimination: that it is the result of individually-based discrete actions. As she states, the inquiries 'reflected the current legal tendency to search for signs of racial and ethnic bias under the pointed white hoods of intentionally racist actions' (Davies 2003:18).

Methodologically, Davies (2003:20-24) identifies a number of flaws common to studies of minority over-representation.

- Analytical models that focus on a single rather than multiple decision-making stages in the justice process. Studying a 'single point' in decision-making masks the substantial cumulative effect of apparently small or insignificant race differentials.
- The construction of false dichotomies between 'legal' and 'extralegal' variables. Some researchers tend to assume that 'legal' variables, such as an offender's prior record, are objective and race-neutral. However, these legal variables may themselves have been tainted by the offender's race, gender or class.

- A related issue is that independent variables may serve as proxies for racial bias or mask earlier racial discrimination. Although variables like 'family composition' or 'family stability' may appear as independent of 'race' they may be indirectly influenced by racial considerations and mask stereotypical decision-making. The unreflective use of such variables can lead to flawed conclusions. Davies cites Pope

[6] The Multnomah County Public Safety Coordinating Council Working Group on Minority Over-Representation in the Criminal Justice System (Oregon) 2000; Washington State Minority and Justice Commission, 1999; Utah Judicial Council's Task Force on Racial and Ethnic Fairness in the Legal System, 2000.

and Feyerherm, "Controlling for such variables *appears* to reduce the difference in treatment accorded to white and minority youth. However, logically, what has occurred in these studies is the identification of the mechanism by which differences between white and minority youths are created".

To find, for example, that young people from single parented families are treated more harshly in bail or sentencing decisions and that this factor has a great influence on decision-making than race, does not lead necessarily to a conclusion that racial discrimination has not occurred. If Indigenous young people are over-represented among this group, it may well be an example of indirect discrimination.

- The failure to incorporate multivariate as well as bivariate analysis. Early research in the area failed to explore the effect and interaction of variables such as offence seriousness, offending history, etc. when considering the effect of race. However, as noted above, care needs to be taken in understanding relationships between apparently independent variables and 'race'.

- The failure to include qualitative data in design models. Davies argues that qualitative data needs to be collected as well as quantitative data. It is through the use of qualitative data that the social and political contexts that give meaning to quantitative data can be understood. For example, data may show that Indigenous offenders are more likely to be breached for bail, probation or parole conditions, and that these 'justice offences' lead to more punitive sentencing outcomes. It is only through qualitative research that we are likely to understand the reasons for the failure to comply with these orders.

Walker et al (1996) provide a useful discussion of terms such as 'disparity' and 'discrimination'. They argue that disparity refers to a difference but that does not necessarily involve discrimination. Discrimination is a difference based on differential treatment of groups and can take different forms and degrees of seriousness. Coming from a social science perspective rather than a legal perspective, they discuss four different types of discrimination:

- Systematic discrimination refers to discrimination at all stages of the criminal justice system, in all places and at all times.

- Institutionalised discrimination refers to racial disparities in outcomes where laws, policies and practices have a race effect. The disparities in outcomes arise from the application of criteria unrelated to race and do not arise from individual prejudice.

- Contextual discrimination refers to discrimination in certain situations and contexts. Walker et al discuss the impact of particular policing strategies such as aggressive patrols, or different sentencing patterns in homicide cases depending on the race of the perpetrator and victim, as examples of contextual discrimination.

- Individual discrimination refers to acts of discrimination by particular functionaries within the criminal justice system.

Debates over the relationship between race and crime have been much more pronounced in the US and are primarily concerned with the over-representation of African Americans in the criminal justice system. Much of this debate is polarised between those who argue that the over-representation of African Americans is the result of the inherent racism of the criminal justice system and those who argue that, given the high victimisation rates in black communities, under-enforcement of the criminal justice system is the problem rather than over-enforcement. According to Wolpert these opposing sides dominate the discussion on "opposite sides of the spectrum without much in between" (1999:266). Broadly speaking this polarity is divided between critical race theorists and neo-conservatives. Neither 'camp' is homogeneous. Among the neo-conservative are Black writers like Randall Kennedy who advocate greater law enforcement, while others, particularly non-Black conservatives like Charles Murray, draw upon socio-biology and the new eugenics to account for Black crime.

A recent special issue of the journal *Law and Contemporary Problems* (vol 66 , no 1, 2003) was devoted to exploring the issue of over-representation of minorities in the criminal justice system in the US. One issue which emerged in the discussion and which shows a significant limitation of specific aspects of the US debate to Australia is the question of US drug laws. Much of the increasing use of imprisonment and growing over-representation of African Americans in the prison population during the 1980s was a result of the 'War on Drugs'. A great deal of the argument about law and discrimination derives from the disparate and foreseeable impact these laws had on the Black American population through the differing mandatory penalties imposed on crack cocaine versus powder cocaine (see generally, Tonry

1995). While the general issue of the foreseeability of discriminatory impact of laws on Indigenous people is important for Australia[7], the specific issue around drugs has not been. Indeed drug offences are one of the areas where Aboriginal over-representation is low.

Another area of particular concern in US discussions has been the question of racial profiling in stops and searches for driving ('driving while Black') and using public places. Harris (2003) argues that racial profiling is not justified on the grounds commonly cited: that it 'works' because police catch more criminals and that minorities commit more crime. Harris (2003) argues that the rate of success is the ratio of arrests to searches, and that this is actually higher with whites than for Blacks or Latinos.

In discussing the US literature on over-representation, both Wolpert (1999) and Davies (2003) make several important points. Firstly, Wolpert argues that much of the adversarial argument between opposing sides creates simple polarities which are antithetical to understanding the complexities of the relationship between race and crime. There is unlikely to be a single answer and reductionist arguments do not assist in understanding complexity.[8] Similarly, Davies (2003:45) discusses 'the allure of such a dichotomous approach' to understanding over-representation. State research tends to conclude that there is insufficient evidence of official wrongdoing (discrimination), therefore the alternative explanation of minority criminality is confirmed. There is little attention to the social, cultural or economic factors underpinning offending behaviour because these are seen to be outside the control of justice agencies. Therefore, if minority over-representation is caused by minority criminality then more punitive law and order approaches towards minorities are justified.

Secondly, the development of policy to address these issues is unlikely to be mutually exclusive of the two opposing explanatory models. According to Wolpert it is not a zero sum game. For example, "recognizing racism in police practice and arrest procedures does not mean victim's interests cannot be adequately addressed" (1999:284). Similarly, recognising the criminogenic effects of economic disadvantage and unemployment are important in understanding offending levels in communities irrespective of their racial composition. The lesson from Wolpert's review of the literature is that the simplistic debates in the US between

[7] See for example, the forseeably discriminatory impact of mandatory sentencing laws in Western Australia and Northern Territory (ATSIC 1999).

[8] For a discussion of the Canadian literature on the disproportionate involvement of Indigenous people in the criminal justice system see McMullen and Jayewardene (1995). The authors discuss the literature as being divided between those who focus on offending levels of Indigenous people and those that focus on the effects of the criminal justice system.

‘racial bias’ and ‘Black offending’ have done little to promote understanding or policy development.

As noted above, Australian literature has tended to be devoid of this type of debate until recently. As discussed further below the majority of scholars seek to develop explanatory models that account for complexity. Such an approach was a hallmark of the 1991 Royal Commission into Aboriginal Deaths in Custody, and has been repeated in major reports, research and writing since then. The exception to this has been Weatherburn et al (2003) who have attempted to import this US-style polarised ideological debate into an Australian framework where it had been largely absent.

A further factor which emerges from a consideration of the US study of bias and discrimination, and which is directly relevant to Australia, is that an interest in these issues often arises from questions of equity and equality before the law. In other words, the elimination of discrimination or bias in decision-making is seen as an important end in itself. This raises the point that there may be multiple reasons why we wish to understand the nature of over-representation. For example:

- it may be through a desire to address equity issues;
- it may be to understand and address the nature of discrimination in decision-making;
- it may be to understand and address the contributory influences of social, cultural and economic factors on offending behaviour, or the contributory influences of those factors on criminal justice responses to behaviour.

US Arrest and Victimisation Data

The crime data show that African-Americans are over-represented as offenders and victims in the criminal justice system. For example, African Americans have higher rates of victimisation than whites and Hispanic Americans for homicide, robbery, violence, burglary and motor vehicle theft (Walker et al 1996:25-36). African Americans are over-represented in arrest, court and correctional data (Walker et al 1996).

It is not the purpose here to comprehensively review this data, but rather to raise some issues as to what the data means in relation to understanding over-representation. The US data is

more comprehensive on ‘race’ issues than Australia to the extent that the Uniform Crime Reports (UCR) provide national information on arrests by race, and the National Crime Victimisation Surveys (NCVS) provide information on the perceived race of the offender by the victim.

One way to check the accuracy of arrest statistics is to compare it to victimisation data. The research in this area has usually concentrated on crimes of violence. There is a relatively close match between arrest figures for whites and victims’ perceptions of the frequency of white offenders. However, for African American offenders there are discrepancies. For example, with rape there is a 14 per cent gap between the percentage of arrests for rape involving African Americans (42.8 per cent) and the percentage of African Americans identified as offenders in the victimisation data (28.9 per cent). An 11 per cent gap and 8 per cent gap was found in offences of simple assault and aggravated assault, respectively (Walker et al 1996:44-45). This suggests that rapes and assaults by African Americans are more likely to be reported to police (referred to as victim selection bias) and/or more likely to lead to arrest once reported (referred to as criminal justice system selection bias). Hindelang’s research finds that there is differential reporting. When rape and robbery are committed by African Americans, victims are more likely to report than when the offences are committed by whites. However, although there is evidence of both victim selection bias and criminal justice system selection bias, these are outweighed by evidence of differential involvement in crime by African Americans (Walker et al 1996:45).

Thus the results of this research are not an argument that over-representation is simply a function of factors external to offending rates. However, it is an argument that there are complex factors at play that show that arrest rates are not an accurate reflection of either offending levels, nor levels of over-representation of particular racial and ethnic groups.

US Self-Report Data

One caveat before exploring the self-report data. This is a study of Indigenous people and criminal justice rather than an examination of the links between ‘race’, ‘minority status’ and criminal justice, as such. The position of Indigenous people in Australia is unique in a number of crucial respects, being directly the product of colonisation and the theft and appropriation of land rather than one simply of minority status. Historically, the criminal

justice system was employed as an instrument of dispossession, a mechanism for dismantling Indigenous law and replacing it with another. The Royal Commission into Aboriginal Deaths in Custody argued forcefully that the over-representation of Indigenous people is "part of an ongoing conflict between coloniser and colonised" (Johnston, 1991, Vol 4, 4). From an Indigenous perspective, therefore, the issues raised go beyond simple equity and access to the *existing* system, but touches also on the legitimacy of the system as a whole and for the need to decolonise the administration of justice. Solutions to the problem may involve greater steps towards some form of "legal pluralism" where elements of Indigenous customary laws are allowed to flourish in the context of what Fitzgerald has called "a vibrant and decentred Aboriginal law" (Fitzgerald, 2000), where Indigenous people are granted considerable autonomy to develop appropriate devolved justice practices.

Nevetheless the literature on Black people, criminal justice and institutional racism does have relevance to the situation of Aboriginal people. Racism has common features, including a tendency to stereotype particular groups on the basis of physical characteristics, life-style and culture and then target them for greater levels of surveillance and control. Black men in the USA currently experience levels of incarceration similar to Indigenous men in Australia (Garland, 2001).

Self-report data is another way of gauging the level of offending on the basis of an individual reporting their own participation in crime. There are problems with self-report data including respondent's honesty and memory. Overwhelmingly the sample populations used in self-report data are children, young people or youth at school, in correctional institutions or university.

Leaving aside the limitations noted above, self-report data has shown varied reliability and validity between African American and white respondents. Researchers working in the area of self-report studies indicate that racial comparisons should be made with caution (Walker et al 1996:47). Some research shows that African American males report greater serious criminal offending and serious delinquency than white American males. However, Huizinga and Elliot's study of self-reporting over a six year period indicate few consistent racial differences across the period. They suggest that the differential presence of youth in the criminal justice system cannot be explained entirely by differential offending rates (cited in Walker et al 1996:47).

United States Juvenile Justice Literature

The evidence suggests that, once prior record and offence are controlled for, race and ethnicity have small direct influences in juvenile justice in the early stages of processing. However, as Fagan et al (1994) indicate,

> Even small racial effects at the earliest decision points are amplified to larger and significant differences at later stages, where the consequences are more serious and potentially harsher. Farrell and Swigert (1978) and McCarthy and Smith (1986) examine the cumulative effects of individuals' prior offense histories. The earliest, most trivial biases… can begin the process of building a prior record. The accumulation of arrests then results in a greater probability of referral to court, and in turn influences later decisions, especially dispositions. If the prior offense history itself is the product of differential decision-making, then minor or nonsignificant racial differences are masked in their contributions to later decisions (Fagan et al 1994:104).

Fagan et al's own research analysed decision-making at six points in the juvenile justice process from apprehension through to judicial commitment. The results showed disparities at each point with minorities consistently receiving harsher dispositions. Disparities took different forms at different stages, but race was a direct, indirect and interactive influence at various decision-making points (Fagan et al 1994).

Parole

A study by Bynum and Paternoster (1994) analysed frontstage (sentencing) and backstage (release) decisions in relation to Native American and non-Indian offenders. They argue that discrimination is more likely with less visible backstage decisions rather than frontstage decisions such as sentencing. Their research shows that Native American offenders are less likely to be paroled than non-Indian offenders (Bynum and Paternoster 1994:185).

Institutional Racism

The concept of institutional racism has been used more frequently than 'systemic bias' in the Australian literature when discussing the relationship between Indigenous people and the

criminal justice system.[9] In attempting to draw out some of the distinctions, Hollinsworth (1992:39) notes that racism is often confused with prejudice, discrimination and other types of hostility or aggression which are explained in terms of individual pathology. However,

> Racism is not primarily a psychological or person attribute but is much more a relationship of domination and subordination, of inclusion and exclusion. We can identify different forms of racism including interpersonal, institutional, ideological and systemic (Hollinsworth 1992:40).

At times in the literature, institutional racism and indirect discrimination appear almost interchangeable. McRae et al (2003) discuss the findings of the Commonwealth Grants Commission Report on Indigenous Funding (2001) in the context of institutional racism. They refer to Findings 9 and 10.

> Mainstream services are intended to support access by all Australians to a wide range of services. Given the entrenched levels of disadvantage experienced by Indigenous people in all functional areas addressed by our inquiry, it should be expected that their use of mainstream services would be at levels greater than those of non-Indigenous Australians. This is not the case. Indigenous Australians in all regions access mainstream services at very much lower rates than non-Indigenous peoples. (Finding 9)
>
> The mainstream programs provided by the Commonwealth do not adequately meet the needs of Indigenous people because of barriers to access. These barriers include the way programs are designed, how they are funded, how they are presented and their cost to users… (Finding 10) (quoted in McRae et al 2003: 430).

The concept of 'institutional racism' in relation to Indigenous people and the criminal justice system is used in several reports by the Human Rights and Equal Opportunity Commission (HREOC), the Royal Commission into Aboriginal Deaths in Custody, and at most a dozen articles and chapters in books.

The question of racism was fundamental to the Royal Commission in to Aboriginal Deaths in Custody. According to the Royal Commission, racism is "institutionalised and systemic, and resides not just in individuals or in individuals institutions, but in the relationship between the various institutions" (Johnston 1991: vol 4, 29.5.2, 124).

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[9] And, indeed, the relationship between Indigenous people and state bureaucracies more generally. For a discussion on institutional racism and health services for Aboriginal people see Mooney (2003).

In the *National Report* there is a discussion of institutional racism (Johnston 1999: vol 2, 160-162). According to Elliot Johnston, non-Aboriginal people have great difficulty understanding institutional racism, particularly as it has changed over time. The period of protection and assimilation were perhaps more easily identifiable as institutionally racist, however, according to Johnston, institutional racism in the contemporary period is more subtle and not always obvious. He defines institutional racism in the following way:

> An institution, having significant dealings with Aboriginal people, which has rules, practices, habits which systematically discriminate against or in some way disadvantage Aboriginal people, is clearly engaging in institutional discrimination or racism (Johnston 1991: vol 2, 161).

The *Justice Under Scrutiny* Report prepared by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (1994) addressed the implementation of recommendations from the Royal Commission into Aboriginal Deaths in Custody. The report focussed on 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 particularly Queensland. However, there was definition of the term 'institutional racism' in the report.

The United Kingdom: The Stephen Lawrence Inquiry

Perhaps the most well known use of the concept of 'institutional racism' in the UK was by Sir William Macpherson in the findings relating to the Metropolitan police and their inquiry into the death of Stephen Lawrence (Macpherson 1999). This appears to be the first use of the term by a government-appointed judicial inquiry. In discussing the Macpherson report, Bourne (2001) provides an interesting discussion of the evolution of concepts for thinking about race in the UK from the 1950s. Basically this changed from a view of psychological misunderstanding and culture clash as being at the root of race 'problems' to one of focusing on institutional processes which reproduce race, and race-based outcomes. This represented a move away from issues of individual prejudice and discrimination to a consideration of broader state processes and social and economic structures. This change also reflected the interest in prohibiting indirect discrimination where racial discrimination could occur without racial intention or motive.

The Macpherson report devotes a chapter to discussing racism and in particular institutional racism. The report provides some history on the term:

> 6.22 What may be termed collective organisational failure of this kind has come to be labelled by academics and others as institutional racism. This is by no means a new term or concept. In 1967 two black activists, Stokely Carmichael and Charles V Hamilton stated that institutional racism "originates in the operation of established and respected forces in the society. It relies on the active and pervasive operation of anti-black attitudes and practices. A sense of superior group position prevails: whites are 'better' than blacks and therefore blacks should be subordinated to whites. This is a racist attitude and it permeates society on both the individual and institutional level, covertly or overtly". (*Black Power: the Politics of Liberation in America*, Penguin Books, 1967, pp 20-21).
>
> 6.23 Reference to a concept described in a different national and social context over 30 years ago has its dangers; but that concept has been continuously debated and revised since 1968. History shows that "covert" insidious racism is more difficult to detect. Institutions such as Police Services can operate in a racist way without at once recognising their racism (Macpherson 1999: paras 6.22-6.23).

The report does not argue that the policies of the Metropolitan Police Service are racist.

> 6.24 It is vital to stress that neither academic debate nor the evidence presented to us leads us to say or to conclude that an accusation that institutional racism exists in the MPS implies that the policies of the MPS are racist. No such evidence is before us. Indeed the contrary is true. It is in the implementation of policies and in the words and actions of officers acting together that racism may become apparent. Furthermore we say with emphasis that such an accusation does not mean or imply that every police officer is guilty of racism. No such sweeping suggestion can be or should be made. The Commissioner's fears are in this respect wholly unfounded (Macpherson 1999: para 6.24).

The Macpherson Report provides a discussion on the meaning of institutional racism on the basis of the various submissions. These discussions repeatedly note that it is not prejudice or bias by individual officers. Evidence from Inspector Paul Wilson of the Metropolitan Police Service Black Police Association noted the following:

> The term institutional racism should be understood to refer to the way the institution or the organisation may systematically or repeatedly treat, or tend to treat, people differentially because of their race. So, in effect, we are not talking about the individuals within the service who may be unconscious as to the nature of what they are doing, but it is the net effect of what they do…

> A second source of institutional racism is our culture, our culture within the police service. Much has been said about our culture, the canteen culture, the occupational culture. How and why does that impact on individuals, black individuals on the street? Well, we would say the occupational culture within the police service, given the fact that the majority of police officers are white, tends to be the white experience, the white beliefs, the white values (cited in Macpherson 1999: para 6.28).

The Commission for Racial Equality stated in their submission to the Inquiry that:

> Institutional racism has been defined as those established laws, customs, and practices which systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions (cited in Macpherson 1999: para 6.30).

The Macpherson report was clear that terms like racism and institutional racism should not be used as emotive or rhetorical weapons, but rather given clear analytical meaning. The report quotes Dr Robin Oakley:

> The term institutional racism should be understood to refer to the way institutions may systematically treat or tend to treat people differently in respect of race. The addition of the word 'institutional' therefore identifies the source of the differential treatment; this lies in some sense within the organisation rather than simply with the individuals who represent it. The production of differential treatment is 'institutionalised' in the way the organisation operates (cited in Macpherson 1999: para 6.32).

The Macpherson report defined institutional racism as follows:

> The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people (Macpherson 1999: para 6.34).

The definition used by Macpherson has been criticised for its treatment of ‘unwitting’ racism which collapses systemic and subjective racism. Another criticism is its failure to differentiate unintentional effects of procedures from procedures which rely on the exercise of judgment and agency (see Storry 2000:107).

As a result of his finding of institutional racism, Macpherson made 70 recommendations for tackling police racism, investigating and prosecuting racial incidents, liaising with victims’

families and educating young people away from racism (Bourne 2001: 13). Some of the effects of the report have included:

- New ethnic recruitment and retention policies;
- The establishment of equality performance targets;
- New requirements in relation to investigating racial violence;
- Amendments to the Race Relations Act which bring public bodies including the police more fully under the Act, particularly in relation to prohibitions on indirect discrimination (Bourne 2001:13, 17).

The central focus of the Macpherson recommendations was on tackling racist outcomes rather than individual racial prejudice or motivation.

3. Explaining Indigenous Over-Representation

What factors can we draw on to explain the over-representation of Aboriginal people in the criminal justice system? Broad-brushed approaches at explanation have included analysis of different treatment by the criminal justice system, different offending patterns and different frequency in offending. Some explanations have looked to the similarities with non-Indigenous explanations for criminal behaviour and stressed criminogenic factors deriving from socio-economic disadvantage (Walker and McDonald 1995, Weatherburn et al 2003). Some explanations have looked at the effect of cultural conflict and spatiality (Broadhurst 1997), and the differential impact of criminal justice system policies on Aboriginal people because of their socio-economic position (LaPrairie 1997).

There is a need for a multifaceted conceptualisation of Aboriginal over-representation which goes beyond single causal explanations (such as poverty, racism, etc.). An adequate explanation involves analysing interconnecting issues which include historical and structural conditions of colonisation, of social and economic marginalisation, and systemic racism, while at the same time considering the impact of specific (and sometimes quite localised) practices of criminal justice and related agencies (Cunneen 2001a).

Some important and specific factors necessary to explain Aboriginal over-representation include:

- offending patterns (especially over-representation in offences likely to lead to imprisonment such as serious assaults, sexual assaults and property offences)
- the impact of policing (in particular the adverse use of police discretion and 'over-policing' in Aboriginal communities);
- legislation (especially the impact of laws which may give rise to direct and indirect discrimination such as criminal laws and local government laws which regulate the use of public space);
- factors in judicial decision-making (in particular bail conditions, the weight given to prior record, the availability of non-custodial options);
- policy and practice which is facially neutral but has a differential impact on Indigenous people (for example, bail conditions, access to diversionary schemes);
- environmental and locational factors (especially the social and economic effects of living in small rural communities);
- cultural difference (such as different child-rearing practices, the use of Aboriginal English, vulnerability during police interrogation);
- socio-economic factors (in particular high levels of unemployment, poverty, lower educational attainment, poor housing, poor health);
- marginalisation (in particular drug, alcohol and other substance abuse; alienation from family and community);
- resistance (some offences may be responses and resistances to non-Indigenous institutions and authorities);
- the impact of specific colonial policies (especially the forced removal of Aboriginal children).

There is not the space in this report to cover each of these issues and they have been discussed elsewhere (Cunneen 2001a). However, it is clear that by analysing the interconnections between these various factors, debates around simplistic dichotomies (such as police behaviour versus Aboriginal criminal offending) can be avoided. Indeed, the overwhelming emphasis of the academic and official literature has been to consider the complexity and interaction of various factors in explaining Indigenous over-representation.

For example one of the first comprehensive analyses of the interaction of Indigenous people and the criminal justice system found that:

> In essence there is a dual explanation for the over-representation of Aboriginal people. Part of the explanation accepts a higher rate of the commission of offences by Aboriginal people and seeks to explain that through socio-economic factors. The other part of the explanation of over-representation rests on the acceptance of a level of over-policing. That is, Aboriginal people are policed in a way different from, and at a level higher, than that for non-Aboriginal people. Both parts of this explanation rest on a strong historical continuity in the position of Aboriginal people in white society (Cunneen and Robb 1987:220)

The Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody strongly acknowledged the impact of history, and the complexity of the interaction between Indigenous people and the criminal justice system.

> One of the central findings of the Commission is that a multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody and tragically to die there… So much of the Aboriginal people's current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past (Johnston 1991: vol 2, 1).

The Royal Commission into Aboriginal Deaths in Custody was also very clear in its analysis of the approach to dealing with the over-representation of Indigenous people in the criminal justice system. It concluded in 1991 that the over-representation of Indigenous people in the criminal justice system is inextricably linked to their socio-economic status. The Report found that:

> The single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally (Johnston 1991: vol 1, 15).

As the Aboriginal and Torres Strait Islander Social Justice Commissioner has more recently concluded regarding the Royal Commission, "The emphasis on the social, economic and cultural disadvantage underlying incarceration and deaths in custody was a defining characteristic of the Report. It linked the *symptoms* of Indigenous distress, such as the high rate of encounters with the criminal justice system, with the underlying *cause* of systemic

disadvantage suffered by Indigenous Australians" (Aboriginal and Torres Strait Islander Social Justice Commissioner 2003:4).

The central finding of the Royal Commission in relation to deaths in custody was that:

> Aboriginal people die in custody at a rate relevant to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community. But this occurs not because Aboriginal people in custody are more likely to die than others in custody, but because the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often (Johnston 1991: vol 1, 6).

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 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. The Royal Commission always prioritised the question of underlying issues:

> Changes to the operation of the criminal justice system alone will not have a significant impact on the number of a persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant factors in over-representation (Johnston 1991: vol 4, 1).

However, the Royal Commission also found that there was much potential to reform the criminal justice system, and including both increased diversion from the system and reforms for minimising deaths in custody. This overall focus is reflected in the recommendations from the Royal Commission. The 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody can be broadly grouped as follows:

- 126 recommendations dealing with underlying issues
- 106 recommendations dealing with over-representation in the criminal justice system
- 107 recommendations dealing with deaths in custody (Victorian Implementation Review Team 2004:18).

More than a third of recommendations dealt with underlying issues, and slightly less than a third dealt with the changing the criminal justice system to minimise over-representation and another third with deaths in custody issues. That many of the recommendations dealt with diversion from police custody is also hardly surprising given that two thirds of all the deaths which were investigated occurred in police custody rather than prison. Furthermore, most Aboriginal people at the time of the Royal Commission were in police custody for public drunkenness and, to a lesser extent, street offences (Johnston 1991: vol 1, 12-13).

A Critique of Weatherburn, et al (2003).

"They are the living example of a whole race of criminals, and have all the passions and all the vices of criminals"[10]

How we speak, the language and the categories we use construct problems in particular ways. The object of discussion becomes defined and the possible policy responses are circumscribed to address the 'problem'. The language we use also reflects power: who has the power to define the problem in a particular way, who is silenced by a particular representation. Defining crime, criminals and crime problems are susceptible to these issues of construction and representation, and the consequences can be particularly problematic in matters where crime is aligned with notions of 'race'.

Weatherburn's argument is simple enough: the main reason Aboriginal people are over-represented in *prison* is because they commit many more offences than non-Aboriginal people do.[11] From Weatherburn's perspective most other people researching and writing in the area have it all wrong because they have erroneously argued that the main reason Aboriginal people are over-represented in prison is because of 'systemic bias' in the criminal justice system. Weatherburn does not define what he means by 'systemic bias'.

Underlying Issues *vs* Discrimination: An Artificial Argument

A central problem with the Weatherburn approach is that it constructs a simple binary explanation for 'Aboriginal over-representation in prison' as either the result of systemic bias or offending levels among Aboriginal people. This binary approach is simplistic on a number

[10]Cesare Lombroso, *Crime: Its Causes and Remedies* p.39.

of levels, but perhaps most importantly it constructs one explanation, 'systemic bias', to enable the positioning of its own preferred explanation of 'offending levels'. A significant problem is that no-one actually uses the explanation of 'systemic bias' to explain Indigenous over-representation in prison.

The Weatherburn approach seriously distorts the literature on Indigenous issues.

1. Mis-Representation of the Academic Literature

Weatherburn et al misrepresent the literature on over-representation. An example are the references to the Cunneen and McDonald (1997) report *Keeping Aboriginal and Torres Strait Islander People Out of Custody*. Weatherburn et al (2003:66) state, "Cunneen and McDonald acknowledge that Aboriginal offending patterns may explain Aboriginal over-representation in prison but devote most of their discussion to the discriminatory treatment of Aboriginal people by the law, the police and the courts". As a point of fact, *Keeping Aboriginal and Torres Strait Islander People Out of Custody* was a report commissioned by ATSIC with set terms of reference to analyse the implementation of 74 recommendations directly related to reducing custody levels in the criminal justice system. It was never meant to be either a comprehensive explanation of over-representation or an explanation of systemic bias. As noted in the introduction to the report:

> The Royal Commission concluded that a direct link exists between the underlying issues (such as poverty, discrimination, employment, health, education, etc.), offending, criminal justice system responses to Aboriginal people and Aboriginal offending, over-representation in custody, and deaths in custody. This study does not address that totality…
>
>> In restricting our attention to a set of recommendations directly concerned with reducing over-representation, we are not, in any sense, suggesting that the other recommendations (especially those dealing with the underlying issues) are unimportant or less important. Indeed, we are aware that ATSIC has contracted other researchers to undertake parallel studies addressing other groups of recommendations… We stress that, if the national goals of eliminating Aboriginal deaths in custody, over-representation in custody, and Aboriginal disadvantage generally, are to be achieved, action is required in *all* the areas covered by the Royal Commission's recommendations and possibly beyond them [emphasis in the original] (Cunneen and McDonald 1997: 16).

[11] Weatherburn is specifically referring to prison, rather than police. The reason the Royal Commission focused heavily on police is not acknowledged in his paper.

It has not been possible to identify any scholars working in the area who explain Indigenous over-representation as a result of 'systemic bias'. Most take a much more nuanced and complex approach to the problem. Weatherburn et al do not cite the most comprehensive book on Indigenous legal issues which is McRae et al (2003). As with all major writers in the area, the authors note that

> Drawing attention to the complex mix of factors and underlying causes which contribute to Indigenous over-representation does not involve ignoring the need for changes to the operation of the criminal justice system…
>
> In addressing the "intra-system" factors that contribute to over-representation, and associated reform strategies, it is important to recognise the limitations of simply "tinkering" with the existing criminal justice system. The absolute necessity of a fundamental change in the social, economic and political conditions of Indigenous people – including the achievement of meaningful self-determination – must be borne in mind (McRae et al 2003:493-494).

2. Consideration of Economic Factors

Weatherburn's approach ignores the fact that there has been consideration of economic factors associated with Indigenous over-representation. Numerous studies have indicated the links between the socio-economic position of Aboriginal people and the level of offending by Aboriginal people, including Cunneen and Robb (1987), Devery (1991) and Beresford and Omaji (1996). An Australian Institute of Criminology study has also noted the importance of considering the links between offending levels (as measured by imprisonment figures) and employment and educational disadvantage (Walker and McDonald 1995). The authors identify the association of social problems such as crime, with unemployment and income inequalities. They suggest that the reason crime is so problematic in Aboriginal communities is because of the lack of employment, educational and other opportunities. The authors argue that social policies aimed at improving these conditions are likely to have a significant effect on the reduction of imprisonment rates (Walker and McDonald 1995:6).

More recently, Hunter and Borland (1999) found that the high rate of arrest of Aboriginal people, often for non-violent alcohol-related offences, is one of the major factors behind low

rates of employment. Hunter (2001) has argued that improving labour market options for Aboriginal people would markedly reduce arrest rates.

Cunneen (2002) in a recent discussion paper for New South Wales AJAC links specific economic and social disadvantage in ATSIC regions in New South Wales with high levels of court appearances, imprisonment and victimisation for Indigenous people in those ATSIC regions.

3. Aboriginal Organisations and Policy Development

Weatherburn et al completely ignore the developments among Indigenous organisations in relation to identifying and dealing with issues of Indigenous over-representation. Some key developments are referred to below.

Aboriginal Justice Advisory Councils (AJACs)

The establishment of Aboriginal Justice Advisory Committees developed directly from the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Recommendations 2 and 3 of the Royal Commission into Aboriginal Deaths in Custody outline the key points in relation to the structure and function of the Committees.

Victorian AJAC has argued for many years that it needs to address both underlying issues and the more immediate causes of Aboriginal over-representation in the criminal justice system. For instance, the AJAC spokesperson Ms Wanda Braybrook noted in the 1996 AJAC report that the "AJAC's focus is not just on the criminal justice system but we are also concerned about underlying issues such as land and community development/ self-determination as high priority" (AJAC 1996: 2). Indeed, two of the 15 recommendations in 1996 AJAC report dealt with land needs and health.

Most of the AJACs have read the initial Royal Commission terms of reference broadly, and commented upon recommendations relating to criminal justice system issues and underlying

issues. As noted previously, the Victorian AJAC is in line with virtually all other AJACs in looking at wider underlying issues.

Indigenous and Ministerial Summits 1997

The Indigenous Summit was held in Canberra in February 1997 and focussed on four issues: juvenile justice, coronial investigations, policing, and prisons. Concern was raised at the Indigenous Summit about underlying issues and it was recommended that these be discussed at the Ministerial Summit (ATSIC 1997: vol 2, 4). The Indigenous Summit recommended the development of Justice Agreements for each jurisdiction as a way of improving the delivery of justice programs and services to Aboriginal people.

The Ministerial Summit was held in Canberra on 4 July 1997. Twenty Commonwealth, State and Territory Ministers were there, as well as Indigenous representatives. The discussion at the Ministerial Summit focussed on underlying issues of why Indigenous people are over-represented in the criminal justice system. The main outcome of the Summit was that the States and Territories (except the Northern Territory) agreed to develop strategic plans for the coordination, funding and delivery of Indigenous programs and services. The strategic plans include "working towards the development of multi-lateral agreements between Commonwealth, State and Territory Governments and Indigenous peoples and organisations to further develop and deliver programs" (Ministerial Summit Resolution, cited in Dodson 1997:153). The Outcomes Statement from the Ministerial Summit was signed by Commonwealth, State and Territory Governments (except the Northern Territory).

Aboriginal Justice Plans

The development of strategic plans and multi-lateral agreements recommended by the Ministerial Summit are variously referred to as Aboriginal Justice Plans or Justice Agreements. The focus of these plans has been to address underlying social, economic and cultural issues; justice issues; customary law; law reform and funding levels. The plans may include jurisdictional targets for reducing the rate of Indigenous over-representation in the criminal justice system; planning mechanisms; methods of service delivery; and monitoring and evaluation (ATSIC 1997: (2)4-5).

Victorian Aboriginal Justice Agreement (VAJA)

The Victorian Aboriginal Justice Agreement (VAJA) discusses a number of issues that contribute to Indigenous over-representation in the criminal justice system. The first that is highlighted is underlying issues. The VAJA states

- The over-representation of Aboriginals within the criminal justice system cannot be considered in isolation from their social environment. Factors such as extreme social and economic disadvantage experienced by Aboriginal people (originally identified by the Royal Commission) remain largely unchanged and continue to place enormous stress in families and communities. The factors include high unemployment levels, poor education outcomes, poor health and low life expectancy, inadequate housing, and widespread welfare dependency (*Victorian Aboriginal Justice Agreement*: 12-13).

The further specific factors which are identified and discussed include (in order):

- community vulnerability to crime
- access to services
- racism and discrimination
- citizenship rights
- police discretion
- sentencing options
- early contact with the justice system, and
- family and community stress (*Victorian Aboriginal Justice Agreement*: 13-15).

Indigenous organisations and policy development has clearly acknowledged the need for balanced approaches to dealing with Indigenous over-representation in the criminal justice system. It is simply not the case that "diversion schemes of one kind or another have been the dominant means by which most State and Territory governments have sought to reduce Aboriginal over-representation in prison" (Weatherburn et al 2003:69).

Absence of Reference to the Literature on Aboriginal Victimisation or Indigenous Programs

The Weatherburn approach provides no acknowledgement or reference to the academic work which has been conducted on issues of victimisation or crime prevention. Over the last decade there has been a particular concentration on the level of violent crime in Aboriginal and Torres Strait Islander communities in Australia. Perhaps the most comprehensive report in regard to this issue is *Violence in Aboriginal Communities* (Memmott et al 2001).

There has also been a series of studies on dealing with domestic (or family) violence in Aboriginal communities (Blagg 2000a, 2000b, 2001), the review of crime prevention programs in Aboriginal communities (Cunneen 2001b) and the work of night patrols (Blagg and Valuri 2003, 2004). In fact if one was to characterise the literature on Aboriginal people and the criminal justice system over last five years or so it is dominated, not by concerns about systemic bias, but rather with the development of effective programs for dealing with crime in Aboriginal communities that are cognisant with Aboriginal demands for self-determination.

The connections between offending and abuse of alcohol and other drugs have not been neglected by policy makers or lawyers. The Race Discrimination Commissioner (1995) argued that there was a direct link between alcoholism and unemployment, poverty, education and high rates of imprisonment. The Weatherburn article simply glosses over the complex regulatory issues around alcohol use and abuse. It is clear that the proportion of Indigenous people who *do not consume alcohol* is twice as great as the proportion among non-Indigenous people (32 per cent compared to 16 per cent). However, among those who do drink there are twice the proportion of Indigenous people who drink at harmful levels than non-Indigenous people (22 per cent compared to 10 per cent), and harmful drinking starts at an earlier age among Indigenous people (Race Discrimination Commissioner 1995:12).

Alcohol consumption also varies significantly depending on the kind of community in which people reside. We do not have good national information on these issues. However, Northern Territory data suggests that alcohol consumption is greater in camps around larger towns and least among people living in remote communities (Race Discrimination Commissioner 1995:13).

Reports by the Race Discrimination Commissioner on Mornington Island during the early 1990s clearly indicated the problems where local Aboriginal councils have an economic

dependency on the sale of alcohol, and on the problems associated with prohibition where communities are often evenly split over whether the sale of alcohol should be regulated according to mainstream standards or prohibited. If there is insufficient community support for prohibition, then the consequent development of an illicit market in alcohol can lead to great social harm with few benefits.

In dry communities there may be still significant drug problems. The Pitjantjatjara lands are an example where alcohol is prohibited but there has been a long-running and very serious issue of petrol sniffing, and this is despite criminalisation through by-laws and heavy restrictions on access.

To argue as Weatherburn et al (2003:65) that 'the dominant focus of scholarly attention… has been on systemic bias' is, at best, a gross misrepresentation of a broad-ranging literature that is both theoretical and policy-directed in its focus.

A related point is the absence by Weatherburn of any serious discussion on the development and evaluation of Indigenous programs. The authors state that the *only* diversion program shown to reduce Indigenous crime and recidivism is youth justice conferencing (Weatherburn et al 2003:70). Such a statement is parochial (presumably the authors are thinking of New South Wales) and shows a lack of engagement with what has been happening in the area of Indigenous justice. There have been positive evaluations of, for example, community justice groups in Queensland dating back to the 1990s (Cunneen 2001b). It also ignores the development of widespread initiatives such as Aboriginal Courts in South Australia, Victoria and Queensland; community supervision in Western Australia; community patrols throughout Australia (Blagg and Valuri, 2003, identified 100 such patrols); and anti-violence programs (Memmot et al, 2001, identified 131 such programs). Many of these are Indigenous community initiatives providing both community capacity building and localised responses to crime problems. These programs will never be evaluated to the statistical standards of a government-funded research body. Indeed in many cases their operating budgets are less than the cost of a professional evaluation. More importantly, often the strength of these community-based programs is their localised capacity to operate in the margins of state regulation and control.

4. Data on Offending and Victimisation

A small section of the Weatherburn et al paper presents some data on Indigenous arrest rates and self-reports of offending for New South Wales. The data on arrest is unproblematic as long as it is recognised that these are measures of police activity by way of arrest rather than measures of offending. The NSW arrest data reflects similar findings to what the Crime Research Centre in Western Australia has been producing for a decade. There is also the presentation of data on prior convictions – again material which has been available for some jurisdictions and as a result of particular studies for many years (for an overview see Cunneen 2001a:28). What is new in the Weatherburn article is that the data is provided for adults in New South Wales.

The Weatherburn argument attempts to pre-empt criticism on the limit of arrest data as a true reflection of actual offending levels by arguing that a self-report study of high school students in New South Wales also shows that Aboriginal young people report higher levels of offending than non-Indigenous youth. There is no reference to any of the problems associated with self-report data, and in particular the limitations of the data with minority groups. In particular the US literature discussed earlier raises important issues, and the value of unreported and reported crime surveys. We would also question the size of the sample for some of the conclusions drawn.[12]

The authors draw the conclusion that differences in arrest rates "are reflective of real differences and patterns of involvement in crime among Aboriginal and non-Aboriginal people" (Weatherburn et al 2003:69). This ambiguous statement side-steps the critical issue. If all Weatherburn is arguing is that Indigenous people commit more offences than non-Indigenous people then there will be little argument. We are not aware of anyone researching, writing or developing policy in the area who would argue against that proposition. However, the proposition that Indigenous people commit more offences than non-Indigenous people does not sustain the broader argument that "the leading current cause of Aboriginal over-representation in prison is… high rates of Aboriginal involvement in serious crime" (Weatherburn et al 2003:65). It is our argument that we simply do not know the 'real' of

[12] In particular the discussion on 'active' offenders is based on very small numbers – the total number in some offence categories is around 100 or less. Given that Indigenous young people are less than 2 per cent of the population, we could expect that the number of Indigenous young people in the sample is quite small. Unfortunately the complete data is not public (see Table 3, Weatherburn et al 2003:68).

offending by Indigenous people. Epistemologically, we would question whether this is indeed 'knowable' separate from the agencies that identify and process crime.

There is a further problem: neither the arrest data nor the self-report data presented by Weatherburn come near to matching the rate of over-representation of Indigenous people in prison. Indigenous people are around *17 times* over-represented in New South Wales prisons on census data (and higher still on reception data when that is available) (SCRGSP 2004). Yet Weatherburn et al's arrest data show much lower levels of over-representation and particularly so for serious offences (5.7 times for murder, 3.8 times for sexual assault, 3.4 times for child sexual assault). The highest rate of over-representation in the list of offences provided by Weatherburn is for break and enter (9.9 times) and assault (11.1 times).

Similarly, the self-report data by young people at school shows for most offences an over-representation of Indigenous youth in reported offences by a factor of 2 or less. In other words, Indigenous young people report committing offences at around twice the rate of non-Indigenous youth, yet they are *15.6 times* over-represented in juvenile detention (SCRGSP 2004).

The evidence presented by Weatherburn et al does not sustain the authors' key argument on offending levels. By stating this we are not suggesting that the level of offending among Indigenous people is not a problem. We are, however, arguing against simplistic propositions concerning the relationship between the volume of Indigenous offending and their level of over-representation in adult and juvenile prisons. The relationship is complex and mediated by a range of factors other than offending. For example the Weatherburn thesis gives us little scope to understand why, for example, the imprisonment rate of Indigenous people in New South Wales is roughly double that of Victoria (1,970.9 compared to 1,060.3 per 100,000 at the 2001 prison census (ABS 2002:3)).

Distortion of Facts on Commonwealth Funding After the Royal Commission into Aboriginal Deaths in Custody

Weatherburn et al's discussion of the issue of Commonwealth funding in response to the Royal Commission displays either an attempt to deliberatively mislead readers or, at the very

least, a reckless disregard for the truth. It further undermines a central tenet of their argument. Weatherburn et al (2003:69) claimed that

> Much of the money allocated by the federal government to state and territory governments in response to the RCIADIC recommendations has been directed at programs designed to alter police procedure or the operation of the criminal justice system.

The authors then cite Cunneen and McDonald (1997:224) as the source. The material in the Cunneen and McDonald report is reproduced below in Table 1. The columns showing percentages have been added.

The $400 million allocated by the Commonwealth as a response to the Royal Commission was developed in two stages in March 1992 and June 1992. The one thing that is immediately apparent from Table 1 is how little of the money was allocated to the criminal justice system. Some $7.52 million was allocated to "reforms to policing, custodial arrangements, criminal law, judicial proceedings and coronial inquiries". This amount represented 5 per cent of the first stage allocation, and 1.9 per cent of the total $400 million. A further $6.94 million was allocated to 'youth bail services'. This amount represented 4.6 per cent of the first stage allocation, and 1.7 per cent of the total $400 million package. Even if the allocation of funds to the Aboriginal Legal Services is included in this amount it still represents less than 16 per cent of the total Federal allocation to Royal Commission recommendations. For reasons made explicit below it is not accurate to see the allocation to the Aboriginal Legal Services as simply connected to the operation of the criminal justice system.

It is quite clear the overwhelming bulk of Commonwealth money after the Royal Commission went to addressing the underlying issues. The largest single allocation was to drug and alcohol services. More money was allocated to Aboriginal pre-school places than to reforms to policing, etc. Much of the second stage allocation went to economic development including land acquisition, employment programs and other economic initiatives. Weatherburn et al misrepresent the allocation of Commonwealth monies in an attempt to demonstrate that money was (mis-spent) on reforming the criminal justice system rather than attacking the underlying issues. Not only is this wrong, it also diverts attention away from a more important question: if so much of the Commonwealth allocation was directed at underlying issues, why haven't we seen a marked improvement in the socio-economic situation of Indigenous people and a lessening in over-representation in prison?

TABLE 1. COMMONWEALTH EXPENDITURE RELATED TO THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

The Commonwealth Response to the Royal Commission into Aboriginal Deaths in Custody	**$ Million**	**% Each Stage**	**% Total**
First Stage Response Announced 31 March 1992: $150million over five years			
Aboriginal drug and alcohol services	71.6	47.7	17.9
Aboriginal legal services	50.4	33.5	12.6
Reforms to policing, custodial arrangements, criminal law, judicial proceedings and coronial inquiries	7.52	5.0	1.9
Youth bail hostels	6.94	4.6	1.7
Link Up services	1.9	1.3	0.5
National Aboriginal & TSI Survey	4.4	2.9	1.1
ATSIC Monitoring Unit	4.3	2.9	1.1
Monitoring and reporting on the human rights of Aboriginal and TSI people by the Commonwealth Human Rights& Equal Opportunity Commission	3.14	2.1	0.8
Subtotal	150.2	100.0	
Second Stage Response Announced 24 June 1992: $250 million over five years			
Land acquisition and development program	60.0	24.0	15.0
Aboriginal Rural Resources program	6.6	2.6	1.7
Community Economic Initiate Scheme	23.3	9.3	5.8
Australian National Parks and Wildlife Service contract employment program for managing natural & cultural resources	10.6	4.2	2.6
Aboriginal industry strategies in the pastoral, arts and tourism areas	15.0	6.0	3.7
Community Development Employment Program	43.9	17.5	11.0
Young Peoples' Employment Program	21.9	8.7	5.5
Young Peoples' Development Program	23.0	9.2	5.7
Aboriginal Youth Sport & Recreation Development Program	9.0	3.6	2.2
Additional Aboriginal Education Workers	20.0	8.0	5.0
600 more pre school places for Aboriginal children	10.0	4.0	2.5
Improved co-operation between the Commonwealth & the States/Territories; assist them to monitoring initiatives arising from the RCIADIC	6.9	2.7	1.7
Subtotal	250.2	99.8	
Total	400.4		100.0

Source: Cunneen and McDonald 1997: 224-225

Aboriginal and Torres Strait Islander Legal Services (ATSILS)

In the first round of Commonwealth government funding after the completion of the Royal Commission into Aboriginal Deaths in Custody report, Aboriginal Legal Services (ATSILS) received the second largest allocation ($50.4 million). In the second, larger round of funding three months later they received nothing.

The Royal Commission into Aboriginal Deaths in Custody emphasised the important work of ATSILS in safeguarding and promoting the legal rights of Indigenous people as well as providing competent legal representation. Promoting Indigenous legal rights was seen in all areas of the law both civil and criminal, and included the ability to provide community legal education, engage in policy development and advocate for law reform. A specific area discussed by the Royal Commission was the need to ensure that Aboriginal women's interests were represented by ATSILS. These issues were reflected in the recommendations of the Royal Commission (Recommendations 105-108).

In terms of the current discussion there are two main issues. Firstly, Weatherburn et al are simply wrong on the assumption that funding to ATSILS was exclusively associated with criminal matters. Funding was also allocated to increase the capacity of ATSILS to deal with the broad spectrum of legal needs of Indigenous people particularly around issues relating to family law and other civil law matters. There was also a significant allocation to improve the research and law reform capacities of ATSILS, again in all areas of law.

The second point is that some of the funding was allocated to improve representation in criminal matters. This funding was considered within the context of providing equity in legal representation, particularly by acknowledging the problems faced in legal representation in remote communities. It continues to be an issue that current funding levels to ATSILS provide a cheap form of legal representation for Indigenous people.

A recent report by the Office of Evaluation and Audit found that

> ATSILS are providing legal services at a cost that is significantly lower than that paid by mainstream LACs [Legal Aid Commissions] for legal work undertaken on a referral basis by private practitioners, and that this is achieved at a level of client satisfaction no different from that reported by LAC clients (2003:1).

There are very important questions about equity which arise from the apparent 'cost effectiveness' of the ATSILS. Three further points noted in the Executive Summary of the Office of Evaluation and Audit highlight this issue:

- The demonstrated cost effectiveness of ATSILS is achieved at a high cost of low morale and high staff turnover among ATSILS practitioners. ATSILS staff are demonstrated to work in a demanding work environment without adequate financial and logistic support and remuneration (2003:2).

- There is also evidence that ATSILS clients as a whole are more likely to put in guilty pleas and less likely to put in not-guilty pleas than mainstream offenders (2003:3).

- The vast majority (83 per cent) of Indigenous prisoners interviewed in the surveys did not have anyone present to support them or advise them when they were interviewed by the police after their arrest (2003:3).

The issue of the adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law. It represents the ability of Indigenous people to use the legal system (both criminal and civil) to a level enjoyed by other Australians.

5. Human Rights, Racial Discrimination and Over-representation

The study of potential racial discrimination in the criminal justice system is an important human rights and public policy issue, *irrespective* of whether it has any connection to explaining the over-representation of Indigenous people. There are a number of reasons for this:

- Australia is a signatory to international human rights conventions which prohibit racial discrimination and Australia has a system of federal and state anti-discrimination laws.

- Equity is a fundamental principle in the provision of government services.

- Equality before the law is a fundamental principle to the rule of law.

- There is a small but important tradition in criminology which regards the abuse of human rights as a crime, and a fundamental area for theory and research.

It is interesting that when lawyers study issues of discrimination they are not questioned as to the relevance of the work they undertake, and this is probably because principles of fairness, equality and non-discrimination are seen as foundational principles to the rule of law. Yet it is a very different situation when criminologists undertake this type of work, perhaps because the vast bulk of criminological research sees crime within the narrow confines of the criminal law, and state responses as the more or less technical application of laws, policies and procedures to control crime. Most government-employed 'administrative' criminologists steer as far as possible away from the issue of human rights. Yet, criminologists can make a significant contribution to the study of human rights and it is a study that can be justified on political, moral and disciplinary grounds. To study and understand issues of human rights abuses and Indigenous people in Australia is an important task in itself, and one which should help guide public policy development.

Although the study of racial discrimination would be justified even if there was *no* connection to Aboriginal over-representation in the criminal justice system, it can be argued that such a connection exists very strongly. The connection is not one that is only related to discretionary decisions, but rather to broader socio-economic and political conditions. These are what are referred to as second and third generation human rights: the right to economic, social and cultural rights and collective rights, respectively. Although there is not the space here to elaborate, a human rights perspective can bring together the problems associated with three distinct but inter-related issues: individual discrimination on the basis of race, the underlying issues of socio-economic disadvantage of Indigenous people and Indigenous claims to autonomy and rights.

CHAPTER 2 DEVELOPMENTS, POLICIES AND PROGRAMMES

1. Juvenile Justice Group Conference

Group conferencing has become a favoured option for diversion of young people from the courts in recent years. Various schemes exist in all Australian jurisdictions, although they are not as prevalent in Victoria. It is important to consider whether conferencing has provided Aboriginal young people with an effective diversionary option.

Group conferencing is now a feature of the juvenile justice systems operating in most Australia jurisdictions. Introduced initially in New Zealand as part of a raft of measures intended to extend Maori family participation in the justice and welfare systems, conferencing has become particularly associated with restorative forms of justice. Restorative justice strategies attempt to shift the focus of attention away from infractions of the criminal law towards the repair of the harms caused to individuals and groups by a criminal event – including the victims.

The conferencing system in Victoria is court based, and has expanded to all Metropolitan Courts as well as pilots in the Hume and Gippsland Regions. The Group Conference takes place pre-sentence, and tends to be offered where there are chances of the young person receiving a probation order. The system in Victoria is different from most other states and territories where they tend to be based at the "front-end" of the system. In essence, front-end systems can be said to enhance police cautioning with court-based referrals also being possible in some systems. However, the criticism usually levelled at police-led conferencing is that it can disadvantage groups who traditionally have poor relationships with police, such as Aboriginal people; and that there can be an element of net widening in such systems.

Questions have also been raised in a number of jurisdictions about whether conferencing systems are culturally appropriate to Indigenous people. We found that Juvenile Justice clearly acknowledges that the system needs to be culturally appropriate. Trained Koori Juvenile Justice workers convene conferences in the various places and encourage elders to participate. Significantly, the police are welcome to attend but do not run the conferences.

However, a rather mixed picture emerged with respect to levels of Koori referrals. In Gippsland 4 out of 13 referrals were of Kooris but at the time of our fieldwork, we were categorically told that the Metropolitan scheme had not had any Koori referrals. In Hume, out of 20 conferences completed, six were Koori referrals. This picture is similar to NSW and Western Australia where Aboriginal involvement has required painstaking work and has evolved slowly.

Given the relatively low numbers of Koori people involved in conferencing to date, we did not receive many comments about the process. However, the general view was that it is an initiative that should be expanded.

Generally, the evidence shows that Indigenous young people are not being referred as frequently to conferences as non-Indigenous youth. A Perth survey in the first nine months of the scheme in Western Australia concluded that "only a small percentage of Aboriginal young people are being referred to the Teams [conferences] and ... this percentage is gradually decreasing" (quoted in NISATSIC 1997:524). In 2000, Aboriginal young people were less likely to be referred to a Juvenile Justice Team (for a conference) than non-Aboriginal youth. Aboriginal youth comprised 24 per cent of police referrals to a Juvenile Justice Team. However, they comprised 35 per cent of young people appearing in court and 36 per cent of young people who were arrested (Ferrante et al 2001: 44,111,122).

In the first few years of the *Young Offenders Act* (1997) in New South Wales there were around 5,000 referrals to conferences and about 20 per cent of these were Aboriginal young offenders. This is a slight improvement over the first year of operation of the Act when Indigenous young people made up 14 per cent of referrals to conferences. The percentage of Indigenous young people diverted by police to either a police caution or a conference is significantly lower than the overall rate (24 per cent for Indigenous youth compared to a general rate of 37 per cent) (Hennessy 1999).

Referral to conferences were lower for Aboriginal youth, but generally low overall (Hennessy 1999). A further report by Trimboli (2000) surveyed victims, offenders and offender's support persons – these included 24 per cent of offenders who were Aboriginal. Around 90 per cent of those interviewed expressed satisfaction with the process. Further research shows that Aboriginal young people are less likely to re-offend if brought before a Group

Conference than the Children's Court. One third (31.3 per cent) re-offended within one year of a conference; half (52.4 per cent) within two years. Re-offending rates were higher for Aboriginal young people than non-Aboriginal young people. However, they were lower than those who went to court (Luke and Lind 2002).

In South Australia some 15 per cent of interventions involving Aboriginal youth were referred to a conference, compared to 19.4 per cent of interventions involving non-Aboriginal youth (Office of Crime Statistics 2001:25). Aboriginal youth were also less likely to have a 'successful' conference than non-Aboriginal youth (Office of Crime Statistics 2001:33)

Significantly in States where there is the possibility of the courts, 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 to a conference and this is reflected in higher proportions of Aboriginal youth among court referrals to conferences in Western Australia (Ferrante et al 2001:122), and New South Wales (Hennessy 1999).

The New South Wales research shows that once Aboriginal young people get into a conference then there is likely to be both satisfaction with the process and a lower re-offending rate. However, one cannot assume that this will necessarily be the case with conferencing in other jurisdictions. There are significant differences between states in terms of the law, policies and practices surrounding conferences. (Marchetti et al, 2004).

There have also been concerns raised in some quarters as to whether current models of conferencing are culturally appropriate. Proponents of restorative justice have argued that conferencing is an Indigenous practice and reflects traditional dispute resolution methods, while critics have argued that many current schemes are too heavily influenced by state agencies (particularly the police) to be a genuine Indigenous practice (Blagg, 1997, Cunneen, 1997).

The Victorian approach has been rather more cautious than other states in regards to establishing conferencing linked to diversion from the criminal justice system for juveniles. One reason for this may be that Victoria already has a better record than most other states in diverting young people away from contact with the criminal justice system without requiring additional mechanisms at the front end. Workers involved in the court based system in

Victoria did not make claims that the conferencing system was essentially 'Indigenous'; although there was a belief that the practice was more appropriate for Koori people because of the more informal style and the space it offers for participation by elders (similar sentiments, in fact, to those put forward in support of the Koori Court). While there is no policy statement to this effect, judging by the comments made to the researchers by workers involved in the conferencing system, the Victorian approach appears to focus on restorative justice and community reintegration, rather than on the deliberate 'shaming' of offenders. This latter practice has been strongly associated with the Canberra RISE programme and Wagga Wagga police cautioning system and has been criticised as inappropriate for Indigenous communities (Blagg, 1997).

Police Discretionary Decisions: Bail

Issues of bail affect both Indigenous adults and young people. Because Aboriginal young people are more likely to be proceeded with by way of arrest, they are more likely to face a bail determination. The failure to proceed by way of summons for adults, particularly in relation to public order offences is also an issue. Two factors are important: firstly, whether bail will be refused and the person will be held in custody; secondly, if bail is granted what conditions will be attached.

There is little data on the issue of bail and Indigenous young people. However, it appears, Aboriginal young people are more likely than non-Aboriginal young people to be refused bail by police. In New South Wales Aboriginal young people are nearly 40 per cent more likely to be refused bail. However, the difference is not significant when prior criminal record is controlled for, that is bail refusal is more likely for young people who are prior offenders and Aboriginal young people are more likely to fall into this category. An important exception, however, is in rural areas where Aboriginal first offenders are still twice as likely to be refused bail as non-Aboriginal first offenders (Luke and Cunneen 1995:23-24).

We need to remain cautious when assessing the relevance of data gathered in another jurisdiction to the situation in Victoria. Nevertheless, while there is no concrete empirical evidence, there was a perception amongst some Kooris working involved in the justice area

that young Kooris are more likely to be refused bail. There clearly needs to be some specific data collected on bail decision making in Victoria in light of these concerns.

The second issue of importance with bail is the nature of the conditions which will be imposed when bail is granted. This issue affects both adults and juveniles. The Royal Commission into Aboriginal Deaths in Custody was particularly concerned with "unreal conditions", which are imposed and then regularly broken. The result is that young people are recycled through the courts (Wootten 1991:353). Onerous and oppressive bail conditions may include curfews and residential requirements amounting to banishment (Cunneen 1994:139-141). Such conditions place enormous pressures on the young person and his or her family. In the end they may simply set up the young person for failure and further intervention.

The International Commission of Jurists (1990:38) has also expressed concern over bail conditions placed on Indigenous people, particularly for pubic order offences.

Research conducted by the NSW AJAC found that Australia-wide, Aboriginal people were generally less likely to receive bail than the general population, and when granted bail, conditions were often unrealistic or difficult to accept, and therefore breached at a high rate. One in ten Aboriginal people who were refused bail were either found not guilty or had their cases dismissed; 45 per cent of Aboriginal people who were refused bail did not receive a custodial sentence.

The same research found that some 70 per cent of Aboriginal women interviewed in New South Wales prisons said they had been refused bail. Of the 30 per cent of Aboriginal women in custody who had been granted bail at some stage, 67 per cent said that they had breached their bail conditions. Placing sureties of money appears unreasonable for many of the Aboriginal women seeking bail, who are either unemployed, mothers and may not be receiving a Centrelink benefit (Lawrie 2002:27).

There has been recent discussion in Victoria on the need for bail reform (Victorian Law Reform Commission 2002). Section 4(2)(c) of the *Bail Act 1977* relates to the consideration of bail for defendants who have previously been released on bail and failed to appear in court. The relevant section only allows the decision-maker to release the defendant on bail again, if the defendant satisfies the requirement that their previous failure to appear was due to causes

beyond their control (Victorian Law Reform Commission 2002:29). The Victorian Law Reform Commission accepted that there were numerous environmental and cultural reasons why Indigenous people might fail to answer bail, other than through an intention to defy the court (Victorian Law Reform Commission 2002:22-23). The Commission has recommended amendments to Section 4(2)(c) to allow amore full consideration of the factors leading to a failure to appear in court. The Recommendations of the Commission in relation to bail have been implemented through amendments contained in the *Justice Legislation* (*Sexual Offences and Bail*) *Act 2004* (Vic).

Koori Bail Justices

Koori bail justices hear applications for bail, applications for interim accommodation orders for children, as well as witnessing documents. The program has only been recently established, with 19 Koori bail Justices appointed in Victoria.

Aboriginal Community Justice Panels (ACJPs)

In Victoria the main policing initiative run by Aboriginal people are the Aboriginal Community Justice Panels. These panels exist in 17 locations throughout Victoria and are staffed by volunteers who are rostered on-call to provide a 24 hour service. Panel members attend police stations when Aboriginal people are arrested and may assist in taking that person to a sobering-up centre or other service. Panel members also provide support when individuals are held in police custody, and may also provide advice when the court is considering a sentence. The Community Justice Panels receive a small operational budget from Victoria Police, however the budget expenditure for each service and membership of the panel are not determined by the police. The budget allocation to each service ($16,000) has remained unchanged since the the1980s (Aboriginal Community Justice Panel Review Team, undated).

There are also seven sobering-up centres across Victoria which are run by various Aboriginal co-operatives. These are funded by the State Government. Much of the work of Indigenous community-based interventions in the area of policing in Victoria rely on the voluntary input of Aboriginal people.

A recent review of the ACJPs (Aboriginal Community Justice Panel Review Team, undated) found that a crucial factor impacting on the operation of the local CJP as the support of the police Aboriginal Liaison Officer and that this support varied across the state. The review also found that there were several unserviced areas in Victoria where the establishment of ACJPs would be of assistance.

Police Service Strategic Plans

In line with new management ideologies police services are now moving towards the development of Aboriginal Strategic Plans which make explicit guiding principles, objectives, key result areas and performance indicators. Both the Victorian and the New South Wales police introduced similar plans in the late 1990s. The focus of the plans is to reduce the number of Aboriginal people entering the criminal justice system as either victims or offenders. The key result areas include police discretion, appropriate services including victim support, education and training, improved communication and cross-cultural understanding, and safety in custody. The objectives and strategies are identified for both the corporate level and local command level.

Court Decision-Making: (1) Children's Court

Aboriginal young people have a greater chance of being sent to an institution than do non-Aboriginal offenders who appear in court. Similar evidence is available from most jurisdictions in Australia. For instance, in Western Australia in 2000, 18.3 per cent of Aboriginal court outcomes resulted in detention compared to 9.1 per cent of non-Aboriginal court outcomes (Ferrante et al 2001:114). In Queensland Indigenous young people accounted for 31 per cent of court outcomes, but 56 per cent of detention orders (NISATSIC 1997:527). An earlier New South Wales study found that in 1990 twice the proportion of Aboriginal court outcomes resulted in detention compared to non-Aboriginal youth (Luke and Cunneen 1995:25). Victoria's court system has only recently started collecting data on Indigenous status and the process is in its infancy with only 50% of cases being entered into the COURTLINK system. However, given that Koori youth are over-represented in the custodial population, it is safe to suggest that they are more likely to receive a custodial sentence.

The key question then is why does the Children's Court sentence proportionately more Aboriginal young people to detention centres? The most simple explanation would be that Aboriginal young people commit more serious offences or offences which are more likely to attract a custodial penalty. There is some evidence to support this in that Aboriginal young people have a greater proportion of matters relating to break and enter, and offences against the person than non-Aboriginal youth, and these offence categories tend to be more likely to result in custodial sentences (Ferrante et al 2001:116).

However, South Australian research showed that differences in penalties remained even when specific charges were analysed. Thus twice as many Aboriginal young people compared to non-Indigenous young people received a court outcome of detention for break, enter and steal, for assault, etc. It was not the specific offence which determined the penalty (Gale et al 1990:109). The major determinant influencing penalty was the young person's prior offending record. However, unemployment and family structure were also relevant with those who were unemployed and living in non-nuclear family situations being more likely to receive a custodial sentence. Research in New South Wales has reached similar conclusions in relation to the importance of prior criminal record. When differences in criminal record were controlled for there were no significant differences in the percentage of Aboriginal and non-Aboriginal young people given a detention order (Luke and Cunneen 1995:27). A report by the New South Wales Judicial Commission confirmed that Indigenous and non-Indigenous youth received the same number and length of detention orders when factors such as offence, prior record, bail, employment, family structure, etc were controlled for (Gallagher and Poletti 1998:17). However, Indigenous young people were also more likely to receive sentences at the harsher end of the sentencing scale, including community service orders. It remains unclear, given the lack of empirical research on the issue, whether this is a problem in Victoria.

At the other end of the sentencing scale it has also been shown that Aboriginal young people are more likely to have their cases discharged. In South Australia during 2000 some 25.7 per cent of Aboriginal cases were dismissed without penalty compared to 10.4 per cent of non-Aboriginal juvenile cases (Office of Crime Statistics 2001:54). The large number of cases dismissed without penalty by the court suggests that many of these young people should not have been sent to court in the first place but rather should have been given some diversionary option. A further issue of importance is that although a young person has an offence

dismissed by the court, the matter is still regarded as proven and the young person obtains a criminal record for the offence (Gale et al 1990:107). Ironically, what may appear as a lenient court outcome still contributes to the overall process of criminalisation particularly when we have identified prior record as such a key determinant in the decision of the court to incarcerate.

Rural Areas

One factor that may assist in explaining disparities in sentencing is different sentencing patterns between specialist Children's Courts (primarily in the large cities) and rural courts staffed by non-specialist magistrates. The majority of Indigenous young people appear in non-specialist country courts, so any sentencing disparity between courts disproportionately affects Indigenous children. For example, in Western Australia in 2000, two fifths of Indigenous court appearances were in the Perth Children's Court compared to three quarters of all non-Indigenous court appearances. The New South Wales Senior Children's Magistrate supplied data to the Stolen Generations Inquiry which indicated that non-specialist country courts impose longer minimum terms and shorter additional terms of detention than specialist magistrates, and that in some country circuits young people are about two and a half times more likely to receive a custodial sentence than in specialist Children's Courts (NISATIC 1997:532). An additional issue relevant to this point is whether community-based sentencing options are available in rural areas (see below). While there is no specific information in Victoria there are grounds to suggest that the problem may exist. Half of the Victorian Indigenous population lives in rural areas and are likely to face trial in a country court.

Social Background Reports

Children's Court magistrates are also guided when sentencing by the social background reports on young offenders which are prepared by welfare and juvenile justice officers. Research indicates that social background reports are more likely to be ordered when the young person is Indigenous (Gale et al 1990:101). From the late 1970s there has been considerable criticism of the ethnocentric nature of the reports and the psychological tests which were administered (Milne and Munro 1981). The reports gave free rein to express prejudices in relation to Aboriginal culture, family life and child rearing practices through

descriptions of `dysfunctional families' and `bad home environment' (Gale et al 1990:102, Carrington 1993:48).

This research on social background reports is now quite old, and we are not aware of any newer research. However, the issue may still continue to be relevant.

Court Decision-Making: (2) Adult Sentencing

There is only limited and inconclusive information on the number of Indigenous offenders before the courts in Victoria. The Victorian Aboriginal Legal Service has data on those Koori people whom it represents at various county, magistrate's and children's courts. In order of frequency the courts with the greatest number of Koori matters represented by VALS are:

- Melbourne Magistrates' Court
- Shepparton Magistrates' Court
- Mildura Magistrates' Court
- Moe Magistrates' Court
- Preston Magistrates' Court
- Swan Hill Magistrates' Court
- Echuca Magistrates' Court
- Bairnsdale Magistrates' Court
- Warrnambool Magistrates' Court (cited in Cunneen 2001c)

Koori Courts

Aboriginal courts (Koori Courts, Murri Courts and Nunga Courts) have been established in Victoria, Queensland and South Australia over the last few years. In Victoria, the courts involve an Aboriginal Elder and a Koori Court Officer sitting on the bench with a magistrate. The Elder can provide advice to the magistrate on the offender to be sentenced and about cultural and community issues.

Eligibility for the Victorian Koori Court is dependant on the offence being one which can be heard by the Magistrates' Court and is not a matter involving sexual or certain family violence offences. The offender must plead guilty and consent to the matter being referred to the Koori Court.

The Koori Court seeks to provide a forum where the Aboriginal community has input into the sentencing process through the role played by an Aboriginal elder or respected person and Aboriginal Justice Worker. Family members or others associated with the offence or offender, and where appropriate the victim, may address the Court.

The matter may be adjourned while the Aboriginal Justice Worker determines in consultation with other appropriate people a case management plan. The case management plan may be attached to orders such as Community Based Orders or Intensive Corrections Orders. 'The establishment of the Koori Justice Panel will assist in the management, and supervision, of offenders through the duration of a non-custodial order. In this way members of the Aboriginal community are involved in supervising the offender' (Koori Court Discussion Paper 2002:1)

The magistrate makes the final decision in relation to the sentence. According to the Victorian Attorney-General,

> Input by the offender's community is both a more appropriate and more effective method of decision-making than traditional judicial decision-making… more creative uses of he sentencing process are needed to enable Indigenous communities to exercise greater ownership and control over sentencing outcomes…
>
> The Koori Court is about creating a fair accessible and understandable justice system. It is about making the justice system more responsive to the needs of Aboriginal people in order to address the discrimination and disadvantage experienced by Indigenous Victorians (Hulls 2002:188).

The Koori Court has both criminal justice aims and community capacity-building aims. Criminal justice aims include:

- To divert Koori offenders away from prison
- To reduce the rate of fail to appears

- To reduce breaches of court orders, and
- To deter crime

Community building aims include:

- Increase Indigenous community ownership of the administration of the law
- Increase positive participation by Koori offenders and community
- Increase accountability of the Koori community and families for Koori offenders
- Promote awareness of community codes of conduct, and
- Promote awareness of the Koori Court generally (Koori Court Discussion Paper 2002:2-3).

The Port Adelaide Nunga Court has increased the rate of attendance by Aboriginal people (80 per cent) as compared to attendance in other courts (less than 50 per cent) (Welsh 2002.) The Koori Court in Victoria is currently being evaluated.

Court Decision-Making (3): Prior Record

There is considerable research to show that Aboriginal people are more likely to have a criminal history than non-Aboriginal people when appearing before the courts (for an overview see Cunneen 2001a:28). For example, the data suggests that over half non-Aboriginal young people (55.6 per cent) appearing in the Children's Court in any one year have no previous criminal record. By way of contrast 70 per cent of Aboriginal kids have at least one prior proven court appearance (Luke and Cunneen 1990:14-15).

> Interviews with Aboriginal women in prison showed that the majority of Aboriginal women (98%) in custody had a prior conviction as an adult, and 60% had prior convictions as children. Three quarters of the female Aboriginal prison population has previously spent time in gaol (Lawrie 2002:32).

New South Wales local court data suggests that Aboriginal people appearing in court for violent or serious theft offences are significantly more likely to have a prior record for such offences than non-Aboriginal people. This difference increases the likelihood of sentences for imprisonment rather than the use of alternatives (Baker 2001; Weatherburn et al 2003).

While prior record influences the court's decision to impose a custodial sentence, it is not known whether imprisonment is imposed at the same stage of offending history for Aboriginal and non-Aboriginal offenders. Some research from the Northern Territory suggests that shorter periods of imprisonment may be imposed on Aboriginal people at an earlier stage in their offending history (Luke and Cunneen 1998).

Corrections (1) Community Corrections

Indigenous Offenders under Community Corrections Orders

At 30 September 2000 there were 229 Australian Indigenous people serving community corrections orders in Victoria. This figure comprised 4 per cent of all offenders on orders. Of the 229 Indigenous people on orders, 185 were male and were 44 female. Indigenous offenders are far more likely to be supervised by Community Correctional Services (CCS) in country Victoria than in metropolitan Melbourne. The proportion of Indigenous offenders reporting to country CCS is around 70 per cent and has been consistently at this level (Office of the Correctional Services Commissioner 2001b).

The most serious offences relating to community corrections orders for Indigenous offenders are as follows:

- Property offences 33 per cent
- Offences against the person 20 per cent
- Traffic offences 18 per cent
- Good order offences15 per cent
- Drug offences 7 per cent
- Other offences 6 per cent
- Robbery and extortion 1 per cent (Office of the Correctional Services Commissioner 2001b).

TABLE 2: COMMUNITY-CORRECTIONS ORDERS 2002/03

Jurisdiction	Indigenous		Non-Indigenous		Unknown	Over-representation
	No	Rate*	No	Rate*	No	
Victoria	328	2230.9	6595	173.7	484	12.8
New South Wales	2230	3261.8	12253	245.4	2793	13.3
Northern Territory	640	1894.5	290	278.6	5	6.8
Queensland	1467	2089.2	10511	376.6	Na	5.5
Western Australia	1270	3565.6	3931	276.7	15	12.9
South Australia	758	5398.1	5488	473.3	675	11.4
Tasmania	74	766.5	620	178.9	193	4.3
ACT	104	4742.4	1205	497.5	-	9.5
Australia	6871	2764.1	40893	275.3	4165	10.0

*Rate per 100,000 adults.

Source: Adapted from SCRGSP (2004), Tables 7A.3 and 7A.4.

In 2002/03 the Victorian rate of Indigenous people on community corrections orders (2230.9) was slightly below the national rate (2764.1) (SCRGSP 2004: 7.8). The level of over-representation of Indigenous people on community corrections orders in Victoria was 12.8. In Victoria, as in several other States, there was a significant number of people on community corrections orders where Indigenous status was not identified

According to the Victorian Implementation Review Team report (2004:14-15) the daily average of 328 Indigenous people serving community corrections orders in 2002-03 was a 44 per cent increase over the previous year (the non-Indigenous increase had been 12 per cent).

Recidivism

Indigenous offenders are more likely, after completing their CCO, to return to community corrections supervision within two years than non-Indigenous offenders. The proportion of Indigenous offenders returning to community corrections is on average 7 per cent higher than non-Indigenous offenders (Office of the Correctional Services Commissioner 2001b).

Corrections (2): Characteristics of Indigenous Prisoners in Victoria

Other data of relevance at the time of the 2000 prison census includes the following:

Age

- the average age was 29 years (six years younger than the general prison population).

Marital Status

- about 70 per cent of Indigenous prisoners had never been married (compared to 55 per cent of non-Indigenous prisoners).

Education

- 93 per cent of Indigenous prisoners had attained only part secondary education (compared to 83 per cent of non-Indigenous prisoners).

Employment

- Indigenous prisoners were more likely to be unemployed at the time of imprisonment than non-Indigenous prisoners. 87 per cent of female Indigenous prisoners and 77 per cent of male Indigenous prisoners were recorded as unemployed.

Sentence Status

- 23.4 per cent of Indigenous prisoners were unsentenced, compared to 13.8 per cent of the non-Indigenous prisoner population. More than one in three Indigenous women prisoners were unsentenced.

Involvement in Violence-Related Offences

- Indigenous offenders were more likely to have been convicted or remand for at least one violent offence than non-Indigenous offenders.

Drug and Alcohol Issues

- Indigenous prisoners were slightly more likely than non-Indigenous prisoners to report that they were under the influence of drugs at the time of their offence, or committed the offence to support a drug habit.

- Indigenous prisoners were far more likely than non-Indigenous prisoners to report that they were under the influence of alcohol at the time of their offence, or committed the offence to support an alcohol habit.

Prior Imprisonment

- 78.1 per cent of Indigenous prisoners had been previously imprisoned as an adult, compared to 60 per cent of non-Indigenous prisoners.

Recidivism

- Indigenous prisoners are more likely after release to return to either prison or community corrections within two years than non-Indigenous prisoners. The proportion of Indigenous prisoners returning is on average about 10 per cent higher than non-Indigenous prisoners.

Further details on the above characteristics can be found in Office of the Correctional Services Commissioner (2001a; 2001b).

2. Corrections: Case Management Issues

Risk and Needs Assessment

A major development in adult corrections and juvenile justice has been the growth is risk assessment tools. These are 'objective' tools for the measurement of the likelihood of re-offending and assessing particular needs. They form the basis for a range of correctional activities including release decisions, institutional placements and security classification, levels of and access to community supervision, and eligibility for and placement in particular programs. Thus they play a role both in offender management as well as rehabilitation.

Bonta, LaPrairie and Wallace-Capretta (1997) analysed the Manitoba Risk-Needs Assessment Scale and established that the predictive capacity of the tool was valid for Aboriginal and non-Aboriginal offenders. They argue that the 'risk-needs factors' are the same for both groups and are valid regardless of culture and race. This is perhaps not surprising given the emphasis in risk assessment on prior offending history, criminal associates, attitudes supportive of crime and anti-social personality traits.

The concern in relation to equity issues is not whether the tools accurately predict relative risk for Aboriginal and non-Aboriginal offenders, but what the *outcomes* of these assessments mean. Given the correlates associated with offending it is not surprising that Aboriginal offenders will consistently score higher among those likely to re-offend. There are at least two issues that flow from this. Firstly, how will the use of tools lead to indirect discrimination in relation to classification and access to mainstream and specialist programs? Secondly, will the specific needs of Aboriginal offenders as *Aboriginal* people be met? According to Bonta et al, "many of these correlates are dynamic and indicative of criminogenic needs which may function as treatment goals. Race and cultural factors enter into the picture as a responsivity issue" (1997:131). In other words, although the needs may be common across Aboriginal and non-Aboriginal groups, success in treatment will be influenced by the cultural context of programs and therapy.

CHAPTER 3 A STATISTICAL EXAMINATION OF ABORIGINAL INVOLVEMENT IN THE VICTORIAN JUSTICE SYSTEM

1. Introduction

The following Chapter provides statistical information about the extent and nature of Aboriginal involvement in the criminal justice system in Victoria. It has been compiled for the Equal Opportunity Commission of Victoria as part of a project to examine systemic racism as a factor in the over-representation of Aboriginal people in the Victorian criminal justice system.

The statistical information presented here has been compiled from the computerised administrative records of the Victorian Police Service and Department of Justice and from published data from the Australian Bureau of Statistics and the Australian Institute of Criminology.

The principle sources of data about the level of contact between police & Indigenous persons are the ABS National Aboriginal and Torres Strait Islander (NATSI) Survey (ABS, 1995) and the Victorian Police LEAP (Police Law Enforcement Assistance Program) system. The NATSI survey is somewhat dated, having been conducted almost a decade ago. However, it remains an extremely useful *alternative* data source to police recorded crime figures, since it describes the ***full*** extent of Aboriginal victimisation and not just those crimes reported to and recorded by the police. In addition to providing some measure of the quality and extent of Aboriginal-police relations, that data also provides antecedence to arrest and justice statistics obtained from other sources for subsequent years.

Comprehensive surveys of Aboriginal people in Australia are rare. The 1994 NATSI survey was pioneering and covered areas such as health, education, culture and labour force participation. The survey also included a number of law/crime questions, including:

- whether a victim of assault
- access to legal services

- type of legal services used in past 12 months
- age first formally charged by police
- whether arrested in past 5 years
- number of times arrested in past 5 years
- imprisonment in past 5 years

In more recent times, the ABS has conducted a subsequent Indigenous Social Survey (ISS, September 2002) and, though methodologically different to NATSI, included many of the same law and justice questions. The results of the survey will become available in late June 2004 and, in addition to providing important information about current conditions, will provide researchers with an opportunity to assess changes in victimisation levels and dealings with the police since 1994.

The quality of data presented in this report as well as data generated by other relevant agencies in Victoria is critically reviewed in the final sections of this report. The review assesses current trends and highlights any flaws and inadequacies in data quality and availability. This review provides some recommendations designed to improve the quality and availability of data and provide continuous, fundamental measures of the extent of involvement of Koori people in the Victorian justice system.

2. Review of statistical literature on Indigenous over-representation

While a number of organisations routinely publish statistics about the operation of various aspects of the Victorian criminal justice system (see, for example, ABS 2003, 2004; AIC 2003; Department of Justice 1999, 2000, 2002; OCSC 2003; Victoria Police 2003), few focus specifically on Indigenous issues and on the level of Indigenous over-representation in the system. Publications in the mid-1990s by researchers at the Koori Research Centre (eg Mackay 1996a, 1996b; Mackay and Munro 1996; Mackay & Smallcombe 1996) and later the Centre for Australian Indigenous Studies (Gardiner & Mackay 1998; Gardiner 2001) provided some exceptions, however.

Arrests

Quantitative works by Mackay, Gardiner and colleagues focussed on policing and the over-representation of Indigenous offenders in arrest statistics. In hist most recent publication, Gardiner (2001) compared arrest rates from 1993/4 with those from 1996/7 and found that:

- In 1996/7, Indigenous people in Victoria were 5.2 times more likely than non-Indigenous people to have been arrested for an offence (compared to a factor of 5.1 in 1993/4)
- Indigenous adult men in Victoria were 6.4 times more likely than non-Indigenous men to have been arrested for an offence (compared to 6.1 in 1993/4)
- Indigenous male juveniles were 4.6 times more likely than their non-Indigenous counterparts to have been arrested for an offence (compared to 4.2 in 1993/4)
- Indigenous adult women in Victoria were 4.9 times more likely than non-Indigenous women to have been arrested for an offence (6.3 in 1993/4)
- Indigenous juvenile females were 3.5 times more likely than their non-Indigenous counterparts to have been arrested for an offence (2.9 in 1993/4).

In earlier works, Mackay (1996a) and Mackay and Munro (1996) showed how the level of Aboriginal contact with police was geographically skewed, with significantly high levels of contact experienced in a number of rural police districts.

Arrests for drunkenness

Gardiner (2001) reported that since the early 1990s, the Statistical Services Division of Victoria Police maintained a separate database on Indigenous people processed for offences relating to public drunkenness. (Offenders processed for these offences are not normally entered in the LEAP system.) No corresponding database has been kept for non-Aborigines arrested for similar offences, thus no comparisons are possible.

His review of public drunkenness statistics between 1993/4 and 1996/7 found that arrests for drunkenness rose by 24.2% over the three-year period (Gardiner 2001). As a proportion of total arrests (that is, total alleged offenders recorded in the LEAP system plus total arrests for drunkenness), drunkenness accounted for almost one quarter (23%) of all Indigenous arrests.

Gardiner also found that rates of arrest for drunkenness varied greatly from district to district. Mackay (1996) also found that certain rural Police districts had extremely high levels of Indigenous arrests for drunkenness over a number of years.

Courts

Statistics describing the activities of various levels of Victorian criminal courts (Higher Courts, Magistrate's Court and the Children's Court) have been routinely published by Court Services, Department of Justice (formerly the Case Flow Analysis Section). However, although these publications are detailed, they do not provide breakdowns of the ethnic appearance or Indigenous status of defendants. Thus, little is known about the impact of legal processes on Indigenous offenders or about other factors affecting sentencing decisions by the courts.

Custody

In contrast to the courts, the status of Indigenous Victorians in custody is much more comprehensively reported. The ABS produces annual and quarterly sourcebook publications describing the Australian prison population (eg ABS 2003 & 2004), while the Australian Institute of Criminology (AIC) publishes data on juveniles in detention (AIC 2003). Differences between Indigenous and non-Indigenous prisoners (or juvenile detainees), by jurisdiction, are included in each of these series.

Data from these publications are subsequently used by state-based agencies in their own statistical reporting. For example, the Office of the Correctional Services Commissioner includes ABS data in its statistical publication on offenders in prisons (OCSC 2003), while the Department of Justice uses the data in ad-hoc statistical papers (Department of Justice Stats Flash series). A number of these Stats Flash papers have focussed on Indigenous issues (eg Stats Flash No. 39, 72,101, 123 &128).

Community-based orders

Although information about offenders serving community orders is included in the ABS Corrective Services series (ABS Cat No. 4512.0), the data is limited (excludes Victorian data) and provides no further breakdown by Indigenous status.

Other Aboriginal justice publications

Various ad hoc publications have, at times, described Indigenous involvement in some or all of the Victorian criminal justice system (eg Department of Justice 2003). However, the data included in these publications are typically patchy and of limited utility.

The following section describes the results of law and justice questions from the 1994 NATSI survey. The results are important in that they describe the underlying victimisation level of Aboriginal people and the extent of their dealings with police and the justice system. Comparisons between Victoria and all of Australia are made throughout; however, regional differences were not readily available and are presented in Table 5 only.

Table 3 describes the extent of Indigenous victimisation in the 12 months prior to the survey. As the table shows, Victorian Aborigines experienced significant levels of violence: one-quarter of all Victorian Aborigines had experienced a physical attack or verbal threat (compared to a much lower proportion (12.9%) of Aborigines across Australia). A greater proportion of males than females experienced violence (compare 28.7% with 21.8%), however, females were more likely to report the incident to the police (compare 32.3% with 26.8%). Victorian Aborigines also experienced slightly higher levels of burglary than other Australians (compare 13.3% to 11.2%).

Almost two in every five Victorian Aborigines (38.6%) considered family violence to be a common local problem, however, this varied by location. For those living in rural and remote areas, the problem was significantly more severe. The pattern of these findings accord with those found elsewhere in the literature.

TABLE 3: EXTENT OF CRIMINAL VICTIMISATION OF ABORIGINAL PERSONS, NATSIS 1994.

Criminal victimisation	Victoria	Australia
	- per cent -	
Physically attacked or verbally threatened in last 12 months	25.2	12.9
Male	28.7	13.6
Female	21.8	12.2
Physical attack reported to police	45.5	43.6
Verbal threat reported to police	**13.7	30.6
Either attack or threat reported to police	29.2	37.2
Male	**26.8	26.3
Female	**32.3	49.3
Family violence a common local problem	38.6	45.1
Male	39.5	42.4
Female	37.7	47.7
Capital city	30.2	31.5
Other	46.3	50.2
Capital city	30.2	31.5
Other urban	45.4	50.8
Rural	50.0	36.2
Victim of burglary in last 12 mths	13.3	11.2
Reported to police	**47.7	53.1

Arrests of Indigenous Victorians in the five years preceding the NATSI survey are described in Table 4. Almost one-quarter (22.6%) of Indigenous Victorians had been arrested: males in Victoria were slightly more likely to be arrested than their counterparts across Australia (compare 36.0% with 31.6%). However, a further breakdown of these figures shows that *re-arrest* is much more prevalent in Victoria than elsewhere in Australia (compare 26.5% v 19.4% for males of all ages). Also of note is the greater prevalence of arrests in Victoria if they occurred outside Melbourne, if the person was unemployed and if the person had been taken away as a child.

TABLE 4: POLICE ARRESTS OF ABORIGINAL PERSONS, NATSIS 1994.

Police arrests	Victoria	Australia
	- per cent -	
Arrested in last 5 years	22.6	20.4
Male	36.0	31.6
Female	9.4	9.4
Males arrested in last 5 years		
Arrested once	9.5	11.6
Arrested more than once	26.5	19.4
18-24 years		
Arrested once	3.0	14.5
Arrested more than once	44.0	32.0
25-44 years		
Arrested once	**13.3	13.7
Arrested more than once	29.9	24.3
Females arrested in last 5 years		
Arrested once	**4.4	5.3
Arrested more than once	**5.0	4.0
18-24 years		
Arrested once	**6.1	8.4
Arrested more than once	**21.9	7.7
25-44 years		
Arrested once	**5.6	6.5
Arrested more than once	**1.7	4.8
Arrested in last 5 years		
Capital city	19.7	21.9
Other	25.3	19.9
Taken away as a child	**38.3	32.5
Employed (including CDEP)	15.9	17.8
Unemployed	44.0	36.6
Not in labour force	14.5	14.0

Table 5 describes a number of policing issues faced by Indigenous Victorians, which were addressed by the NATSI survey. In terms of their dealings with the police, Indigenous people in Victoria reported much higher levels of being 'hassled' or assaulted by the police than counterparts across Australia (compare 21.2% with 9.6% and 7.5% with 2.6%, respectively). Males generally reported higher levels of being hassled or assaulted than females.

TABLE 5: POLICING ISSUES FACED BY ABORIGINAL PERSONS, NATSIS 1994.

Policing issues	Victoria	Australia
	- per cent -	
Hassled by police in last year	21.2	9.6
Male	28.4	14.2
Female	14.1	5.1
Assaulted by police in last year	7.5	2.6
Male	11.1	4.0
Female	**4.0	1.2
Relations with police compared with 5 years ago		
Better	21.1	21.5
Same	38.6	38.6
Worse	22.2	19.0
Don't know/not stated	18.1	20.9
Treated fairly by police		
Fair	68.0	56.4
Not treated fairly	1.1	7.5
Sometimes treated fairly	7.1	9.6
Other	14.0	26.6
Perceptions of police performance [Do a good job or sometimes do good]		
Good job dealing with crime	50.6	53.3
Male	47.6	53.5
Female	53.5	53.2
Good job dealing with violence	51.2	52.4
Male	58.0	53.9
Female	44.7	50.9
Good job dealing with family violence	35.2	43.3
Male	40.8	44.4
Female	29.9	42.2
Perceptions of police handling family violence		
Too slow to respond	4.1	7.6
Don't respond at all	4.7	5.0
Don't fully investigate	4.8	7.2
Not enough police or patrol cars	1.5	1.7
Don't understand people/culture	7.2	8.4
Other	10.5	4.9

Given these findings, it is perhaps surprisingly that a higher proportion of Indigenous Victorians reported fair treatment by police (compare 68.0% with 56.4% for Australia) and that many held perceptions that the police were doing a good job of dealing with crime and violence. However, in terms of the police dealing with *domestic* violence, the proportion of Indigenous Victorians (and Australians) who considered they were doing a good job was

lowest (just over one-third), with females being much more critical of the police on this issue than males.

Table 6 describes the level of access to legal services by Indigenous Victorians. Compared with all Indigenous Australians, those in Victoria were more likely to need *and use* legal services (compare need: 25.3% v 16.9% and usage: 21.0% v 15.4%). Almost half of those arrested in the 12 months preceding the survey used legal services. The Aboriginal Legal Service was most commonly used service.

TABLE 6: ACCESS TO LEGAL SERVICES BY ABORIGINAL PERSONS, NATSIS 1994.

Access to legal services	Victoria	Australia
	- per cent -	
Needed legal services in last 12 mths	25.3	16.9
Male	30.5	21.3
Female	20.3	12.5
Used legal services in last 12 mths	21.0	15.4
Male	23.0	19.4
Female	19.1	11.5
Use of legal services by those arrested	45.4	40.5
Male	46.8	41.7
Female	40.0	36.5

Table 7 provides a breakdown of survey responses by ATSIC region (only two ATSIC regions are defined for Victoria: Wangaratta and Ballarat). As the table shows, there was significant regional variability - specifically, Indigenous people in the Ballarat region were significantly more likely to:

- experience violence,
- be arrested,
- need legal service, and
- have poorer (deteriorating) relations with the police

than counterparts in the Wangaratta region.

The NATSI survey found that young people generally had higher levels of victimisation, higher arrest rates and poorer quality dealings with the police than older Aborigines. Findings for Victoria accord with these patterns (see lower portion of Table 5). As the table

goes on to show, the experiences of Indigenous youth in the Ballarat region were also more extreme and negative than those in the Wangaratta region.

TABLE 7: KEY LAW AND JUSTICE ISSUES FACED BY ABORIGINAL PERSONS, BROKEN DOWN BY ATSIC REGION, NATSIS 1994.

Law & justice issues	Victorian ATSIC Regions			Australia
	Whole state	Wangaratta	Ballarat	
	- per cent -			
Physically attacked or verbally threatened in last 12 months	25.2	19.0	32.4	12.9
Needed legal services in last 12 mths	25.3	19.6	29.6	16.9
Arrested in last 5 years	22.6	19.4	24.0	20.4
Improved relations with police compared with 5 years ago	21.1	27.2	15.3	21.5
Indigenous youth (15-24 years)				
Hassled by police	36.2	19.1	47.7	14.2
Arrested in last 5 years	33.8	21.2	39.3	25.3
Needed legal services	26.6	10.1	35.3	16.0

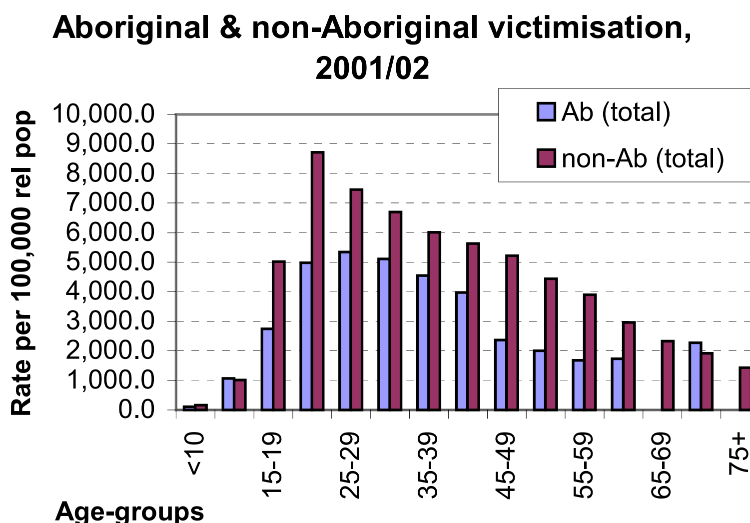
3. Reported Victimisation

In this section we describe the level of Aboriginal victimisation in Victoria based on crimes reported to and recorded by Victoria Police in the LEAP system for 2001/2. Our analysis will tend to focus on violent ('against person') offences as these are the most serious crimes committed in the community and those for which the 'racial appearance' of the victim (and the offender) has been most comprehensively recorded by the police.[13] Overall, in the data supplied by Victoria Police for 2001/2, 18.5% of offences did not have the racial appearance of the victim recorded.

Figure 1 presents victimisation levels for Aborigines and non-Aborigines in Victoria for 2001/2 **for all reported offences**. As Figure 1 shows, non-Aboriginal victimisation levels (rates per 100,000 relevant population) exceeded Aboriginal victimisation rates in almost every age category. Only in the very young and very old age groups (10-14 and 70-74 year groupings) did Aboriginal victimisation rates marginally exceed non-Aboriginal rates. Overall, the non-Aboriginal victimisation rate was 1.7 times greater than the Aboriginal rate. Greatest differences between non-Aboriginal and Aboriginal rates were in the older age-groups (45 to 59 years) – by a factor of about 2.2.

[13] In the police LEAP system, 'racial appearance' is a term used to describe the visual appearance of victims and offenders. The field is completed on the basis of the attending police officer's subjective assessment of the person's appearance, and is recorded for operational purposes only. Care should be exercised in the interpretation of these statistics, as a subjective assessment means it is possible that a person attributed to a particular group does not belong to that group.

FIGURE 1: ALL OFFENCES REPORTED TO AND RECORDED BY POLICE, BY INDIGENOUS STATUS OF THE VICTIM, LEAP 2001/02



Differences between male and female victimisation patterns can be observed in Figures 2a & 2b. While the victimisation rate of male non-Aborigines exceeded that of male Aborigines in all age groups for all reported offences, the same was not the case for females. For females, Aboriginal rates of victimisation exceeded non-Aboriginal rates in a number of age-categories, most significantly in the 25–39 year age range.

FIGURE 2A & 2B: ALL OFFENCES REPORTED TO AND RECORDED BY POLICE, BY INDIGENOUS STATUS AND SEX OF THE VICTIM, LEAP 2001/02

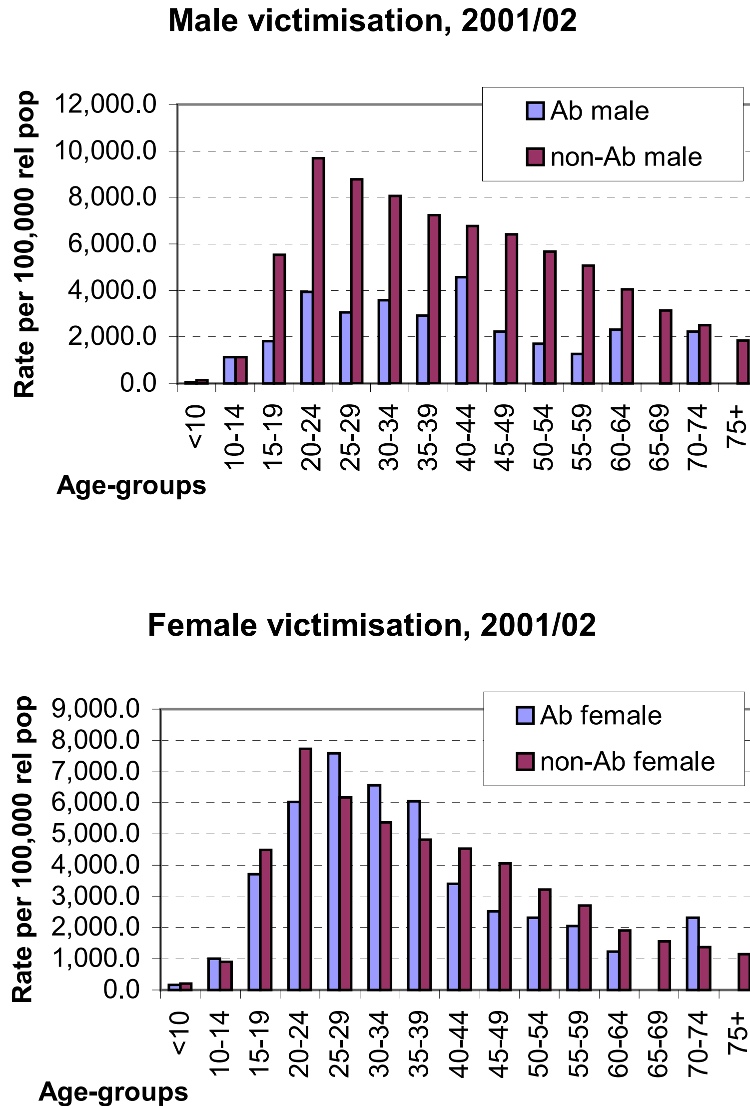


Figure 3 and Table 8 present victimisation rates for reported violent (against the person) offences. As the data show, Aboriginal rates of victimisation exceeded non-Aboriginal rates in almost all age categories. The greatest differences between Aboriginal and non-Aboriginal rates were observed in the 30-34, 35-39 and 40-44 year age groups. In these categories, the Aboriginal rate of victimisation for violent offences was greater than the non-Aboriginal rate by a factor of 2.3, 3.3 and 3.4 respectively. Across all age groups, the Aboriginal rate of victimisation for reported violent offences was greater than the non-Aboriginal rate by a factor of two.

FIGURE 3: REPORTED OFFENCES AGAINST THE PERSON, BY INDIGENOUS STATUS AND AGE, LEAP 2002/03

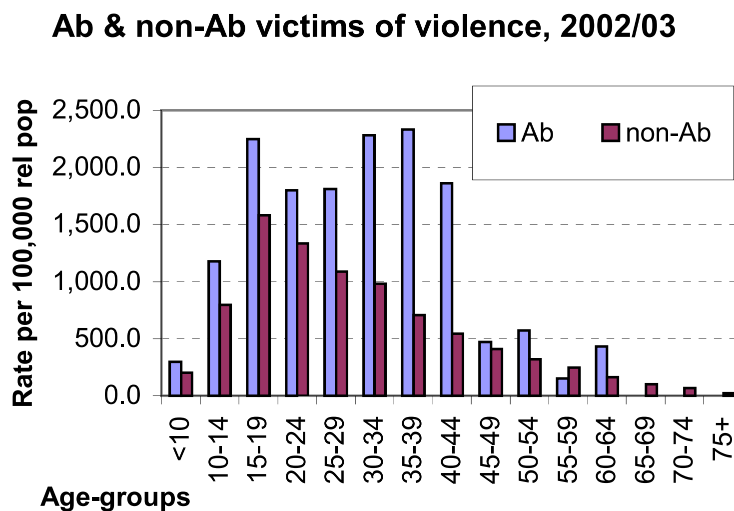


TABLE 8: REPORTED OFFENCES AGAINST THE PERSON, BY INDIGENOUS STATUS AND AGE, LEAP 2002/03

Age	Ab	non-Ab	Ab:non-Ab ratio
	rate per 100,000 relevant pop		
<10	298.8	201.3	1.5
10-14	1,176.5	794.5	1.5
15-19	2,249.2	1,583.0	1.4
20-24	1,796.9	1,334.3	1.3
25-29	1,810.2	1,089.7	1.7
30-34	2,279.1	980.5	2.3
35-39	2,333.3	708.7	3.3
40-44	1,859.0	542.0	3.4
45-49	473.6	411.7	1.2
50-54	574.2	316.9	1.8
55-59	152.4	245.6	0.6
60-64	433.8	164.0	2.6
65-69	0.0	101.5	0.0
70-74	0.0	68.4	0.0
75+	0.0	23.3	0.0
Total	1,224.6	607.0	2.0

4. Contact with the Police

In this section, we describe the level of contact between the police and Aboriginal people as ‘offenders’, that is, as persons processed by the police either via arrest or through summons or via cautioning. Data about ‘processed persons’ have been derived from the Victoria Police Law Enforcement Assistance Program (LEAP). An offender or processed person is counted each occasion that they are processed within the year. If an offender is processed for more than one offence on the one occasion, only the most serious offence is described. Offenders include those who were processed by police but not actually charged with an offence (eg those cautioned).

In the sections that follow, ‘arrest’ rate refers to the number of offenders processed by police per 1,000 relevant (Indigenous or non-Indigenous) residents of Victoria. Persons aged less than 10 years have been excluded from these population estimates, as such persons are below the legal arrest/cautioning age. Also note that offenders arrested for public order offences are not registered in the LEAP system. Hence, the ‘arrest’ rates presented here will underestimate the true arrest levels of Indigenous and non-Indigenous persons.

5. Processed persons

Trends in the arrest rates of Aboriginal and non-Aboriginal persons in Victoria since 1993 are shown numerically in Table 9 and figuratively in Figure 4 below. As the table and figure show, the arrest rate of non-Aborigines has remained relatively static (at approximately 33 arrests per 1,000 arrestable population) since the mid-1990s. The Aboriginal arrest rate has tended to increase slightly over the same period (increasing from 186.7 per 1,000 to 229.2 per 1,000 between 1994 and 2003). Of most significance, however, is that the Aboriginal arrest rate far exceeds the non-Aboriginal rate – by a factor of about seven.

TABLE 9: ANNUAL ARREST RATES OF ABORIGINAL AND NON-ABORIGINAL PERSONS BY OFFENCE TYPE, LEAP-BASED, 1993 – 2003

	93/94	94/95	95/96	96/97	97/98	98/99	99/00	00/01	01/02	02/03
Aboriginal arrest rate per 1,000 arrestable population										
Against the person	*38.1*	*39.9*	*41.5*	*45.5*	*43.4*	*53.9*	*45.9*	*49.6*	*52.2*	*49.2*
Property	*99.2*	*125.2*	*110.4*	*123.1*	*117.5*	*143.3*	*138.1*	*133.8*	*128.8*	*119.0*
Drugs	*10.1*	*11.0*	*14.3*	*10.8*	*11.6*	*13.3*	*10.2*	*9.1*	*8.7*	*8.6*
Other indictable or summary	*39.3*	*48.5*	*47.8*	*36.0*	*45.5*	*53.8*	*45.3*	*49.0*	*51.0*	*52.5*
Total	*186.7*	*224.6*	*213.9*	*215.4*	*217.9*	*264.3*	*239.5*	*241.5*	*240.6*	*229.2*
Non-Aboriginal arrest rate per 1,000 arrestable pop										
Against the person	*3.7*	*4.4*	*4.5*	*4.5*	*4.4*	*5.2*	*4.7*	*4.8*	*5.6*	*5.5*
Property	*18.9*	*19.5*	*19.2*	*19.2*	*18.3*	*20.9*	*20.1*	*20.1*	*19.7*	*19.4*
Drugs	*1.8*	*2.1*	*3.5*	*3.2*	*3.5*	*4.0*	*3.5*	*2.9*	*2.7*	*2.8*
Other indictable or summary	*5.1*	*7.0*	*6.2*	*5.0*	*5.2*	*6.2*	*5.3*	*5.4*	*6.2*	*6.4*
Total	*31.3*	*34.9*	*33.4*	*32.0*	*31.5*	*36.3*	*33.6*	*33.2*	*34.2*	*34.1*
Over-representation ratio (Ab:non-Ab)										
Against the person	*10.3*	*9.0*	*9.2*	*10.2*	*9.8*	*10.4*	*9.7*	*10.3*	*9.3*	*8.9*
Property	*5.2*	*6.4*	*5.7*	*6.4*	*6.4*	*6.9*	*6.9*	*6.7*	*6.5*	*6.1*
Drugs	*5.6*	*5.3*	*4.1*	*3.3*	*3.3*	*3.3*	*2.9*	*3.1*	*3.2*	*3.1*
Other indictable or summary	*7.8*	*6.9*	*7.7*	*7.2*	*8.7*	*8.6*	*8.5*	*9.1*	*8.3*	*8.2*
Total	*6.0*	*6.4*	*6.4*	*6.7*	*6.9*	*7.3*	*7.1*	*7.3*	*7.0*	*6.7*

FIGURE 4: ARREST RATE OF INDIGENOUS AND NON-INDIGENOUS OFFENDERS (ALL OFFENCES), 1993/4 TO 2002/3

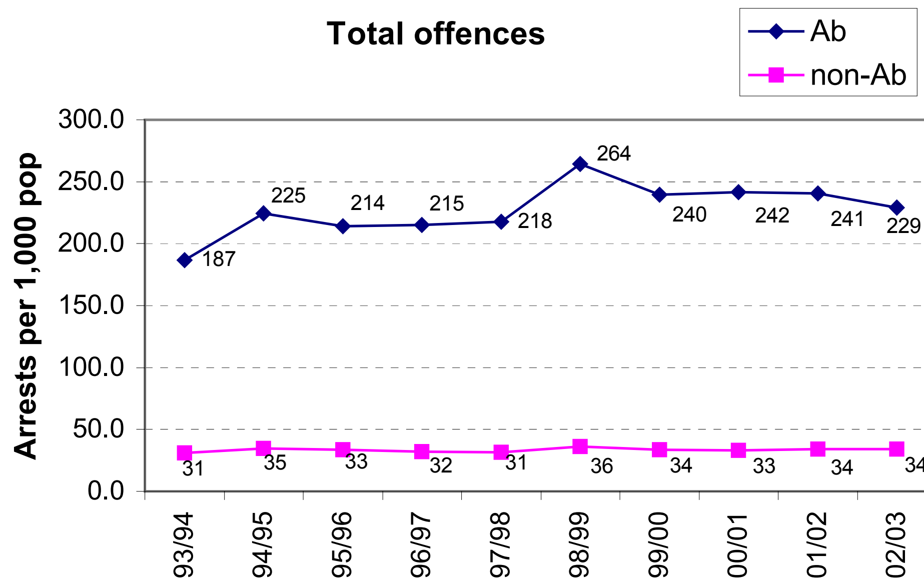


FIGURE 5: ARREST RATE OF INDIGENOUS AND NON-INDIGENOUS OFFENDERS BY MOST SERIOUS OFFENCE, 1993/4 TO 2002/3

Differences between Aboriginal and non-Aboriginal arrest rates, by offence type, are displayed in Figure 5. The greatest difference between rates was observed in the category of violent (against person) offences – the annual Aboriginal arrest rate was nine to ten times greater than non-Aboriginal arrest rates during the study period. The smallest difference between rates was observed in the drug offence category. In this category, the Aboriginal arrest rate exceeded the non-Aboriginal rate by a factor of three in 2002/3, having declined from a factor of five in the earlier years. For property offences, the Aboriginal arrest rate was approximately six times greater than the non-Aboriginal rate over the study period, and for other summary offences, the Aboriginal arrest rate was about eight times greater than the non-Aboriginal arrest rate over the nine-year period.

It is worth noting that the category of 'other summary offences' includes many street offences such as indecent language, hindering police, resisting arrest and offensive behaviour, all of which come under the Summary Offences Act (s. 17(1) & s. 52).

Figure 6 and Table 10 present arrest rates for Indigenous and non-Indigenous offenders, by age, for 2002/3 only. As the data show, Aboriginal arrest rates were substantially higher than non-Aboriginal rates, particularly in the younger age groups. The greatest difference between rates was observed in the 10-14 year age group, where the Aboriginal rate was 7.2 times greater than the non-Aboriginal rate. Both Aboriginal and non-Aboriginal arrest rates peaked in the 15-19 year age group; however, as Figure 6 shows, the Aboriginal arrest rate remained high through early adulthood to middle-age.

FIGURE 6: ARREST RATES OF INDIGENOUS AND NON-INDIGENOUS OFFENDERS, BY AGE, 2002/3

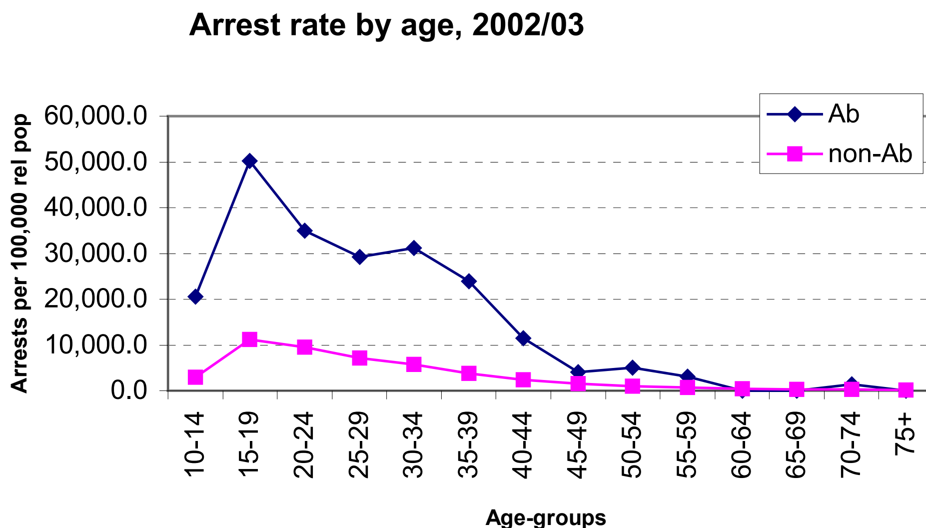


TABLE 10: ARREST RATES OF INDIGENOUS AND NON-INDIGENOUS OFFENDERS, BY AGE, 2002/3

Age	Ab	non-Ab	Ab:non-Ab ratio
	rate per 100,000 relevant pop		
10-14	20,529.4	2,870.2	7.2
15-19	50,267.8	11,167.3	4.5
20-24	34,950.6	9,488.3	3.7
25-29	29,227.4	7,116.1	4.1
30-34	31,255.8	5,680.2	5.5
35-39	23,888.9	3,778.7	6.3
40-44	11,538.5	2,440.8	4.7
45-49	4,025.3	1,506.9	2.7
50-54	5,071.8	933.4	5.4
55-59	3,048.8	667.6	4.6
60-64	0.0	449.8	0.0
65-69	0.0	292.4	0.0
70-74	1,369.9	234.3	5.8
75+	0.0	117.0	0.0
Total	24,190.8	3,779.4	6.4

A breakdown of the manner by which the police 'process' offenders, by Indigenous and juvenile status, is provided in Figure 7.[14] As the figure shows, the total juvenile 'arrest' rate (including all forms of processing), for both Indigenous and non-Indigenous groups, was greater than that for adults. However, juveniles were much more likely than adults to be cautioned or summonsed, but less likely than adults to be physically arrested by the police.

The differences in juvenile arrest rates between racial groups can also be seen in Figure 7, and additionally in Table 11. As the data show, compared with non-Aborigines, Aboriginal juveniles were:

- 9 times more likely to be physically arrested by the police,
- 8 times more likely to be summonsed,
- 2.7 times more likely to be cautioned, and
- 5.7 times more likely to be dealt with in other ways.[15]

In total, Aboriginal juveniles were over-represented in their formal contact with police by a factor of 6.4. Aboriginal adults were also over-represented in formal processing by police by the same factor (6.4).

Other differences in the processing of offenders by the police can also be observed from the data. For example, Indigenous juveniles were twice more likely to be physically arrested by police than issued with a caution (compare arrest rate of 93.8 with cautioning rate of 40.5). However, for non-Indigenous the situation was reversed: juveniles were 1.5 times more likely to be cautioned than physically arrested (compare arrest rate of 10.4 with cautioning rate of 15.1). This suggests differing utilisation patterns of diversionary schemes for the two racial groups.

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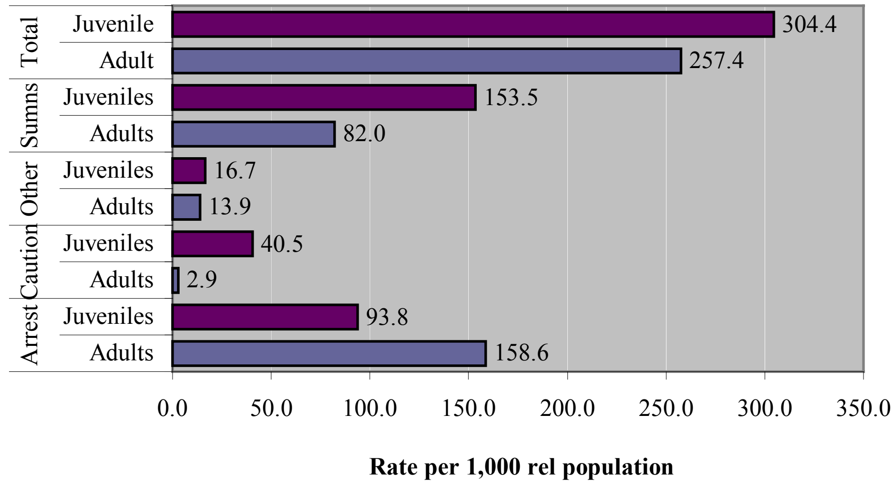
[14] Recall that the term 'arrest rate' has been used in a broad sense and includes those processed via summons and those formally cautioned by police.

[15] The 'other' method of processing by police includes dealing with under-aged offenders, those mentally unfit, those subsequently deceased, those subject to a warrant or where the complaint is later withdrawn. The arrest category includes those remanded in custody or bailed.

Figure 7a & 7b: Arrest rates of Indigenous and non-Indigenous offenders, by type of processing, 2002/3



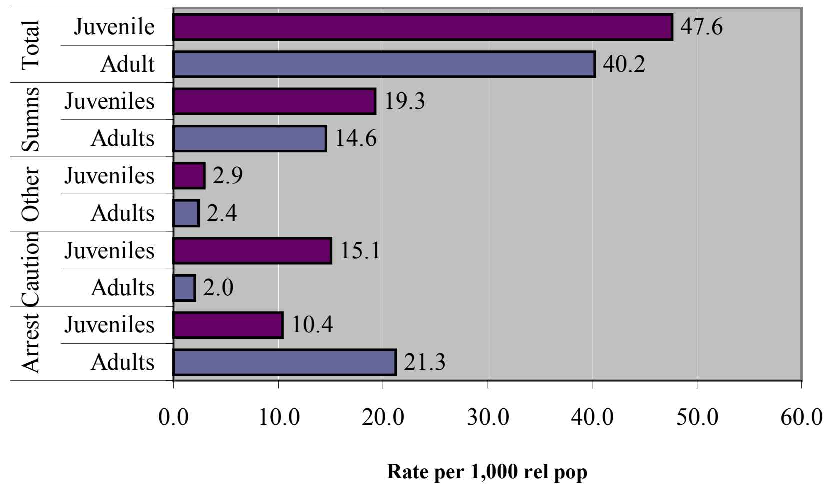


TABLE 11: ARREST RATES AND OVER-REPRESENTATION RATIOS OF INDIGENOUS AND NON-INDIGENOUS OFFENDERS, BY TYPE OF PROCESSING, 2002/3

6. Court Activity

To date, our scan of available data and statistics on the outcome of court appearances by Indigenous and non-Indigenous defendants has not been successful. Although a number of statistical publications on criminal court activity have been produced by the Department of Justice, these provide no further breakdowns by Indigenous status or ethnic appearance.

7. Community Based Orders

To date, our scan of available data and statistics on the number of community based orders served by Indigenous and non-Indigenous offenders has not been fruitful. Statistical publications on the utilisation of non-custodial orders in Victoria are scarce and none have been located which provide breakdowns by Indigenous status.

8. Indigenous people in Custody

Adult Imprisonment

According to latest National Prison Census figures (NPC, 30 June 2003, ABS Cat No. 4517.0), Indigenous offenders accounted for 4.6% of all Victorian prisoners (compared with 20.5% for all of Australia). Since 1996, the proportion of adult prisoners in Victoria who are Indigenous has not exceeded 5%.

The 2003 NPC also found that, nationally, Indigenous prisoners were more likely to serve shorter sentences than the overall prison population, with 42% of Indigenous prisoners expected to serve less than 12 months, compared with 31% of all prisoners. Separate Victorian figures from the 2003 NPC were not available, however, Victorian figures from the 2001 NPC show similar though less pronounced patterns: 44% of Indigenous prisoners served sentences of less than 12 months, compared with 39% of all prisoners. Since 1998, the proportion of Indigenous sentences of less than 12 months has decreased, while the proportion of sentences of 2 to less than 10 years has increased.

The 2003 NPC also found that nationally the age profile for Indigenous prisoners was younger than for the overall prisoner population, with the median age for Indigenous prisoners of 29.5 years being 2.2 years less than the 31.7 years for all prisoners. Nearly 6% of all Indigenous males aged 25-29 years were in prison at 30 June 2003 (compared with 0.7% of all males aged 25-29 years). Separate age disaggregations by jurisdiction (including Victoria) were not available.

Table 12: Rates of Indigenous Imprisonment (adult) by Australian Jurisdiction – June 2003 quarter

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Australia
Indigenous Prisoners - rates based on first day of month counts, averaged over the quarter									
Total	2,127.7	1,119.5	1,709.9	1,699.7	2,845.9	n.p.	1,768.2	n.a.	1,907.3
Males	3,993.9	2,087.3	3,311.8	3,428.5	5,369.9	n.p.	3,507.4	n.p.	3,654.3
Females	404.2	166.4	236.1	203.7	480.4	n.p.	98.6	n.p.	284.8
Unsentenced	501.2	256.1	310.9	624.3	467.0	n.p.	341.4	n.p.	396.1
Sentenced	1,626.5	863.4	1,399.0	1,075.3	2,378.9	435.1	1,426.8	n.p.	1,511.2
Male:Female	*9.9*	*12.5*	*14.0*	*16.8*	*11.2*	-	*35.6*	-	*12.8*
Sent:Unsent	*3.2*	*3.4*	*4.5*	*1.7*	*5.1*	-	*4.2*	-	*3.8*
Ab:Non-Ab ratio	*16.6*	*12.0*	*11.8*	*16.0*	*21.6*	*5.4*	*11.1*	-	*16.0*
Male Ab:Non-Ab ratio	*16.3*	*11.8*	*12.1*	*16.8*	*21.6*	-	*12.5*	-	*16.1*
Female Ab:non-Ab ratio	*27.6*	*12.2*	*12.9*	*16.5*	*27.6*	-	*6.2*	-	*19.0*

Source: Compiled from figures in Tables 5 & 6 in *Corrective Services Australia, June Quarter 2003,* ABS Catalogue No. 4512.0, December 2003.

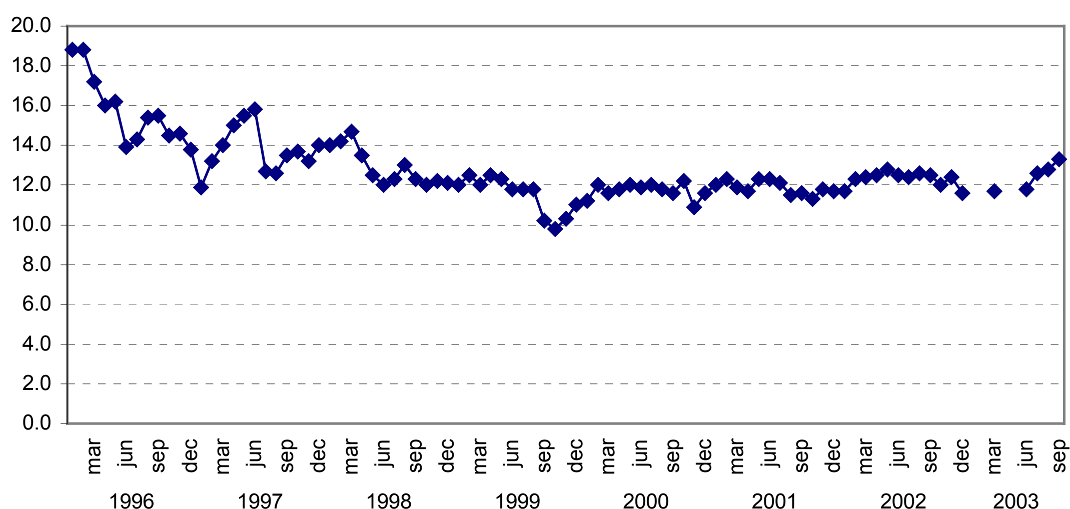
Overall rates of Indigenous imprisonment, by Australian jurisdiction, are presented in Table 12 for the June 2003 quarter. These rates are based on first day of month counts, which are then averaged over the quarter. This method of counting differs from that of the NPC, which counts prisoners only on a single day of the year – 30 June).[16] As the table shows, the Victorian Indigenous rate of imprisonment in 2003 was less than the national rate (compare 1,119.5 per 100,000 adult population to 1,907.3). Victorian male and female Indigenous rates were both lower than national rates, as were Victorian sentence and unsentenced Indigenous prisoner rates.

Various ratios of Indigenous to non-Indigenous rates are also presented in the table. Overall, Indigenous prisoners in Victoria were over-represented by a factor of 12 (11.8 for Indigenous males and 12.2 for Indigenous females).

Trends over time show that Indigenous offenders are consistently and significantly over-represented in Victorian prison statistics (Figure 8). Since 1996, the ratio of Indigenous to non-Indigenous prisoners has declined; however, since 2000, the Indigenous rate of imprisonment has remained approximately 12 times greater than the non-Indigenous rate.

[16] For further information about the differences in counting methods, refer to the Explanatory Notes of *Corrective Services Australia*, ABS Catalogue No. 4512.0 and *Prisoners in Australia*, ABS Catalogue No. 4517.0)

FIGURE 8. OVER-REPRESENTATION OF INDIGENOUS OFFENDERS IN ADULT PRISONS, 1996-2003



Source: Corrective Services Australia, *ABS Catalogue No. 4512.0*

Imprisonment statistics presented thus far have been based on census data. Statistics based on prison census figures tend to be biased towards counting the 'stock' of a prison (ie those prisoners serving longer sentences) and tend to under-count prisoners on short stays (ie those who arrive and then exit a prison before a nominated census day). Statistics based on prison receptions and exits will tend to do the opposite, providing a more accurate measure of the 'flow' through a prison rather than its 'stock'. However, both measures are important in describing the prison population in a jurisdiction.

Prison reception statistics for Victoria are less accessible and less detailed than census data. Table 13 presents trend data of Victorian prison receptions from 1995 to 2000. As the table shows, Indigenous prisoners accounted for over 5% of receptions over this period. This a slightly higher proportion than that observed in census data, indicating that Indigenous offenders tend to have shorter sentences and are, thus, under-counted in 'stock' statistics. Data in the lower section of the table (re: sentences of less than 12 months) also support this assertion. That is, in any year, the proportion of Indigenous prisoners serving sentences of less than 12 months is greater than the proportion of all prison receptions serving such sentences (eg in *1998/9,* compare 82.7% with 76.7%). The table also shows that Indigenous receptions are

generally younger than all prison receptions – a finding also observed in census statistics.

TABLE 13: TRENDS IN THE NUMBER OF PRISON RECEPTIONS IN VICTORIA, 1995-2000

	1995/6	1996/7	1997/8	1998/9	1999/2000	2000/1
Number						
Total	4,135	4,232	4,918	4,879	4,959	4,878
Indigenous	207	255	247	258	283	272
% Indigenous	5.0	6.0	5.0	5.3	5.7	5.6
Mean age						
Total	30.1	29.7	29.8	29.8	29.8	29.6
Indigenous	27.0	27.0	26.7	26.7	27.1	27.9
Sentences < 12 mths						
Total	na	na	na	76.7	81.2	82.7
Indigenous	na	na	na	82.7	84.0	85.2

Source: *Statistical Profile of the Victorian Prison System 1995/96 to 2000/01*, Office of the Correctional Services Commissioner, 2003.

Police lockup

Published statistics on the number of Indigenous and non-Indigenous offenders admitted into police lockups (cells) are scarce. The figures reported in Table 12 are a snapshot, having been obtained from Victoria Police for the 2002 financial year. As the table shows, Indigenous offenders comprised approximately 6.1% of all admissions to police lockups throughout Victoria. The police stations in Swan Hill and Mildura recorded the highest proportion of Indigenous admissions – 39% and 30% respectively. Using these figures and the 2001 census population estimates, the police lockup rates were estimated at 75.6 per 1,000 arrestable population for Indigenous offenders and 5.6 per 1,000 arrestable population for non-Indigenous offenders. Thus, Indigenous offenders were over-represented in admissions to police lockups by a factor of 13.5

TABLE 14: NUMBER AND PROPORTION OF OFFENDERS ADMITTED TO POLICE LOCKUPS, BY INDIGENOUS STATUS

Police station	Indigenous	Other	Unknown	Total	% Indigenous
Swan Hill	112	175	7	294	39.0
Mildura	150	350	16	516	30.0
Shepparton	111	465	1	577	19.3
Echuca	32	138	0	170	18.8
Warragul	16	83	0	99	16.2
Fitzroy	93	542	4	639	14.6
Horsham	21	142	7	170	12.9
Portland	15	105	4	124	12.5
Morwell	24	174	2	200	12.1
Moe	40	320	4	364	11.1
Warnambool	34	274	8	316	11.0
Sale	19	155	4	178	10.9
Carlton	6	50	1	57	10.7
Hamilton	8	72	0	80	10.0
Traralgon	21	205	0	226	9.3
Preston	32	404	25	461	7.3
Bendigo	37	502	20	559	6.9
Melbourne CC	339	4,678	339	5,356	6.8
Narre Warren	15	251	1	267	5.6
St Kilda	35	624	13	672	5.3
Hastings	1	18	0	19	5.3
Box Hill	1	22	1	24	4.3
Wangaratta	12	326	2	340	3.6
Mill Park	12	336	10	358	3.4
Mansfield	1	33	0	34	2.9
Moonee Ponds	14	467	13	494	2.9
South Melbourne	11	376	9	396	2.8
Mooroolbark	5	172	12	189	2.8
Werribee	5	176	9	190	2.8
Maryborough	2	74	5	81	2.6
Ballarat	18	671	22	711	2.6
Dandenong	35	1,311	36	1,382	2.6
Heidleberg	9	348	28	385	2.5
Keilor downs	6	238	0	244	2.5
Geelong	24	1,021	48	1,093	2.3
Broadmeadows	14	624	17	655	2.2
Ararat	2	92	6	100	2.1
Seymour	4	188	0	192	2.1
Cranbourne	2	113	3	118	1.7
Williamstown	11	630	30	671	1.7
Melton	4	245	2	251	1.6
Sunshine	5	318	9	332	1.5
Prahan	16	1,021	7	1,044	1.5
Corio	2	145	0	147	1.4
Stawell	1	92	1	94	1.1
Nunuwading	2	190	5	197	1.0
Frankston	8	929	50	987	0.9
Knox	4	535	5	544	0.7
Glen Waverly	1	148	1	150	0.7
Moorabbin	3	492	35	530	0.6
Cheltenham	0	1	0	1	0.0
Malvern	0	2	2	4	0.0
Greensborough	0	33	1	34	0.0
Footscray	0	6	39	45	0.0
Lilydale	0	35	0	35	0.0
Wonthaggi	0	92	4	96	0.0
Altona North	0	9	0	9	0.0
Benalla	0	93	4	97	0.0
Brunswick	0	2	0	2	0.0
Kyneton	0	34	81	115	0.0
Mornington	0	23	0	23	0.0
Sunbury	0	0	27	27	-
TOTAL	1,395	21,390	980	23,765	6.1

Indigenous Juveniles in Detention[17]

Table 15 presents national data on the number of juveniles held in detention centres at June 30, 2002. As the table shows, the juvenile detention rate in Victoria was 10.8 per 100,000 juveniles – lower than all other jurisdictions. However, as with the adult prison population, Indigenous juveniles are over-represented in Victorian detention centres. At 30 June 2002, Indigenous juveniles were detained at a rate of 137.2 per 100,000 relevant population, compared with a rate of 9.6 per 100,000 relevant population for non-Indigenous juveniles – a differential of 14.3. This was slightly below the national over-representation ratio of 17.3.

In Victoria, the over-representation ratio has fluctuated considerably since 1994. At its highest Indigenous juveniles were almost 35 times more likely to be detained than their non-indigenous counterparts. Refer to Figure 10.

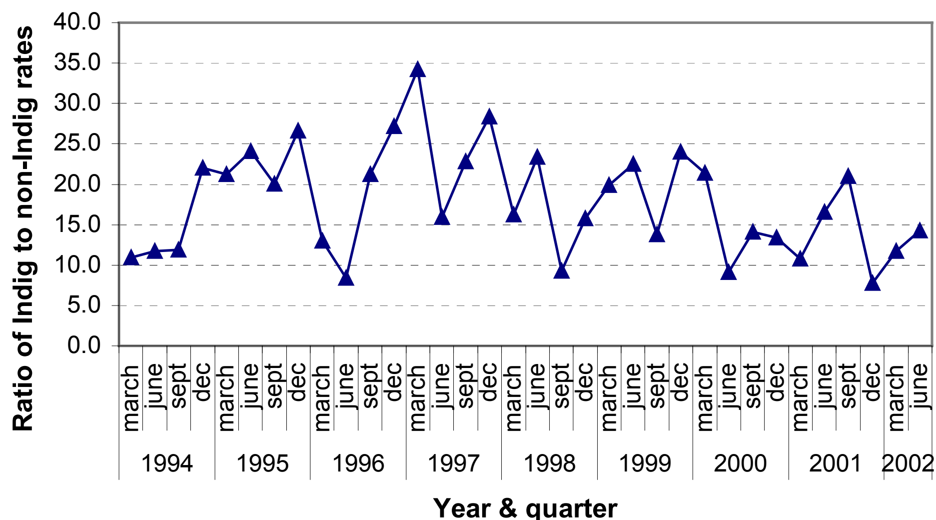
TABLE 15: CENSUS OF PERSONS AGED 10-17 ON 30 JUNE 2002 IN JUVENILE DETENTION BY JURISDICTION

Juvenile detention	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Australia
As at 30 June 2002									
N	203	57	97	79	47	26	21	15	545
Rate per 100,000 pop	27.9	10.8	22.7	35.0	28.9	47.3	83.6	41.2	24.9
Male rate	50.2	19.8	37.5	61.4	47.9	89.1	160.4	64.6	43.9
Female rate	4.5	1.6	7.2	7.3	8.8	3.7	0.0	16.8	5.1
Aboriginal rate	267.4	137.2	225.5	410.3	372.8	n.a.	141.8	306.7	256.7
Non-Aboriginal rate	17.1	9.6	9.7	10.8	17.2	n.a.	41.2	33.8	14.8
Ab'l:Non-Ab'l ratio	15.6	14.3	23.2	38.0	21.7	n.a.	3.4	9.1	17.3

Source: *Statistics on Juvenile Detention in Australia: 1981-2002* - Australian Institute of Criminology.

17 Note that Victoria has a dual-track system whereby people aged 17-20 may be sentenced to serve detention in either an adult prison or Juvenile Justice detention. While this Report only examines people aged 10 to 17 years, at 30 June 2002 there were 113 people aged 18 and over in juvenile detention centres.

FIGURE 9. OVER-REPRESENTATION OF INDIGENOUS JUVENILES IN DETENTION, 1994-2002



Source: *Statistics on Juvenile Detention in Australia: 1981-2002* – Australian Institute of Criminology

Synthesis of Findings

The preceding sections have attempted to gauge the level of Indigenous over-representation at various stages of the criminal justice system, based on available statistics. This section attempts to synthesise some of the major findings.

Table 16: Summary of over-representation of Indigenous people in Victorian justice system

Contact point with the Victoria criminal justice system	Ab:non-Ab ratio
Victim of violence (2001/2)	2.0
Processed by police (2002/3)	
juvenile	6.4
adult	6.4
Physical arrest or summons (2002/03)	
juvenile	8.3
adult	6.7
Physical arrest only (2002/03)	
juvenile	9.0
adult	7.5
Admitted to police lockups	13.5
Court convictions	
juvenile	n.a.
adult	n.a.
Juvenile detention *(30 June 2002)*	14.3
Adult imprisonment	
census 30 June 2003	12.6
June quarter 2003	12.0

As Table 16 shows, over-representation of Indigenous people is experienced at the earliest points of contact with the system – both as victims (where they are over-represented in official police statistics by a factor of 2.0) and as offenders (where they are over-represented in formal police contact rates by a factor of 6.4). The table also shows that the level of over-representation tends to increase the deeper one proceeds into the system. Although data on the over-representation of Indigenous defendants in court outcomes was not at hand, data from the custodial sector (including police custody) suggest that the over-representation of Indigenous people in the Victorian criminal justice system *at least doubles* from point of entry to point of imprisonment.

9. Deficiencies in the quality and availability of data

In the course of collating data on the level of Aboriginal involvement in the Victorian criminal justice system, a number of deficiencies were identified in the quality and availability of data.

Survey data

There is a complete deficiency of survey-based data relating to Aboriginal victimisation levels. Mainstream crime and safety surveys that have been run in most jurisdictions have tended to overlook Aboriginal victims, despite their overwhelming presence in crime statistics and, in particular, violent crime statistics.[18] Other ad-hoc but significant surveys, such as those exploring women's safety and family violence issues, have also overlooked the plight of Aboriginal people.[19] This has ensured that the 'dark figure of crime' (that is, the amount of crime which does **not** come to the attention of the police) remains much more hidden for Aboriginal people than other sections of the Australian community. The scarcity of survey-based data that facilitates comparison of Aboriginal and non-Aboriginal victimisation levels inhibits prioritisation and evidence-based targeting of intervention strategies and resources.

The 1994 NATSI survey, an outcome of recommendations of the RCIADIC, was pioneering and provided invaluable information to a variety of government agencies and service providers. However, it and the subsequent Indigenous Social Survey (ISS) were limited in the amount of information extracted from respondents about other crime and safety issues. For example, there were no questions asked about experiences of sexual assault, robbery and other property crimes; no questions regarding victim-offender relationships, repeat victimisation or general perceptions of safety/fear of crime. Such questions are routinely incorporated into other mainstream victimisation surveys.

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[18] For cost reasons, these surveys tend to be administered to metropolitan areas only. The number of Indigenous victims who respond is usually too small to produce reliable estimates of Indigenous victimisation.

[19] The number of Indigenous women included in the 1996 ABS Women's Safety survey and the Women's Health Australia study were too small for estimates to be made of incidence and prevalence of domestic and sexual violence.

Moreover, other researchers have argued that the NATSIS approach to gathering law and justice information has been too conservative (Carcach and Mukherjee 1996, as cited in Hunter 2001). For example, there were no explicit links between the issues of culture, victimisation and offending. Carcach and Mukherjee have concluded that future data collections need to focus on issues of crime, violence and family violence.

ABS plans for the future include re-runs of the ISS every 6 years. It is hoped that these issues will be addressed on these occasions.

10. Arrests for public drunkenness

While the Victoria Police LEAP system records many offences, public drunkenness offences and consequently those persons processed for such offences, are **not**. Thus, LEAP-based arrest statistics fall considerably short of describing the true 'arrest' rate of Indigenous people.

Although Victoria Police maintain a separate database of Indigenous persons arrested for public drunkenness offences, statistics from this database have not been routinely published. Moreover, arrests of non-Indigenous offenders for similar offences have not been registered in this system, thus inhibiting the production of comparable statistics.

Other data not routinely published by Victoria Police include reports of persons detained in police lockups (cells).

11. Court statistics

Our scan of available court statistics found no data that disaggregated case flow or outcome statistics by Indigenous status. Thus, it has not been possible to determine the extent of over-representation of Indigenous defendants in convictions or the type of sanctions issued by the courts. There are indications that the relevant data may be collected by the Department of Justice but is not in accessible form.

In addition, information about the number of persons or nature of offences dealt with by Koori Courts has not been readily accessible.

12. Access to bail

Like court outcome statistics, publicly available data on Indigenous access to bail could not be located.

13. Rural/regional analysis

There is an absence of robust measures of Indigenous victimization and offending levels in regional or rural areas of Victoria. Published official statistics tend to focus on dis-aggregation by other factors (e.g. offence type) rather than region. Available data was found to be both limited (e.g. metro versus the remainder of state) and patchy.

14. Domestic/family violence

Despite the acknowledged high incidence of domestic and family violence in Aboriginal communities throughout Australia, little is known about the prevalence of or trends in different forms of domestic/family violence in Victoria. Although a Family Violence Database has been established by government, the database is still in its infancy and improvements are still required, particularly in the identification and reporting of the Indigenous status of victims/offenders; the identification of repeat victims and offenders; and in establishing appropriate linkages between data sources. If supported over the longer term, the database should become a useful analytical and policy-relevant tool with rich, longitudinal data.

15. Community Orders and Parole Board

There is an absence of information about Indigenous offenders serving community orders and those released on parole. Parole decisions by the Adult Parole Board of Victoria are not currently disaggregated by ethnic appearance or Indigenous status. In addition, there is little available information about the extent to which Indigenous offenders complete such orders (successfully or otherwise).

16. 'Flow' of Indigenous offenders in prison

Both the Australian Bureau of Statistics and the Office of the Correctional Services Commissioner publish comprehensive statistics about the composition of the Victorian prison system (see, for example, ABS *Prisoners in Australia 2001* and OCSC's *Statistical Profile of the Victorian Prison System 1995/96 to 2000/2001).* However, many of these statistics are based on census figures obtained on 30 June or derived from averaged census counts obtained on the first day of each month. Statistics based on census counts will tend to describe the 'stock' of a prison, rather than its 'flow' and will be biased towards prisoners serving longer prison terms. This may affect overall measures of the over-representation of Indigenous offenders in prison. To avert this, both census-based (stock) and reception-based (flow) measures of the extent of Indigenous over-representation in the prison system should be routinely reported.

17. General recording of Indigenous status in administrative records

The ability of any organisation to report on the Indigenous involvement in the criminal justice will depend largely on the quality of data recorded in administrative systems. Central to any efforts to report on over-representation is the quality of data on Indigenous status. Our scan of data from the police LEAP system found that 18.5% of victim records and 8.0% of offender records had unknown racial appearance. There are indications that the recording of the Indigenous status in other systems, such as in court databases, is significantly poorer.

18. General availability of published data

For this report, data about the extent of Aboriginal involvement in the Victorian justice system needed to be gleaned from a variety of publications and sources. In some instances, published data was insufficient and additional tables were required from relevant agencies. This made the overall task of compiling statistics considerably more difficult and time-consuming. As one researcher has previously noted:

> The purpose of published statistics is to fulfil government reporting requirements, not necessarily to provide details useful for policy-making or to increase knowledge of a problem. With the severe cut backs over the years there has to be greater reliance on outside research findings to supplement statistical analysis. However the expense involved in having to purchase agency data to conduct such research may be a deterrent for some researchers (Beyer, 2003).

Given these considerations, a more integrated, 'whole of government' approach to measuring and reporting on the level of Indigenous over-representation in the Victorian criminal justice system would better serve the needs of all agencies tasked with implementing and monitoring the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

CHAPTER 4 QUALITATIVE RESEARCH, SITE VISITS AND KOORI ……………….PERSPECTIVES

I POLICING, COURTS AND DIVERSION

1. Introduction

The quantitative research in Chapter 3 reveals a considerable level of Indigenous over-representation in the criminal justice system, and also a greater likelihood of Koori people becoming victims of violent crime. These findings are consistent with previous research in other states, demonstrating that Indigenous over-representation, both as victims and as offenders, is a national phenomenon. On the other hand, the statistical presentation also indicates that levels of over-representation in Victoria, in terms of arrests, remands and imprisonment tend to be generally lower than the national average.

However, quantitative research alone cannot untangle the complex web of factors underpinning Aboriginal over-representation; nor, for that matter, can it explain why levels of over-representation are lower in Victoria than in comparable states. Crucially, quantitative research also gives no insight into Indigenous people's own perceptions of where particular problems arise and the genesis of those problems. It was therefore essential for this research to examine and reflect these perceptions – a point that was consistently made by Aboriginal people and by members of the judiciary and a number of other key respondents. In this and the next chapter, we therefore explore the experiences and views of a number of Koori people who have had, or continue to have, contact with the criminal justice system, whether as suspects, defendants, prisoners or workers (see Appendix 1). These consultations were supplemented by in-depth discussions with a number of relevant Koori organisations, particularly those linked with the RAJACs, Aboriginal affairs and other agencies (see Appendix 1).

The consultations revealed a strongly held belief by Koori people that they are victims of structural racism, particularly in their dealings with the police and the correctional system. Kooris also spoke of experiencing racism in their interactions with a wide

array of government organisations, including those dealing with housing, social welfare, the family, employment and training, health and mental health. Although they did not utilise such terms, their reported experiences fit into scholarly / conceptual categories such as direct and indirect racism, systemic racism, institutional racism and systemic bias (see Chapter 1).

Crucially, such racism was frequently experienced at critical junctures and in extreme crisis situations, where sensitive, timely support was required to prevent re-engagement with the criminal justice system. For example, we heard frequent accounts of newly released offenders being unable to access accommodation and welfare / mental health support services and of being unable to adapt to life on the outside – resulting in an almost inevitable return to the criminal justice system

We have presented the material from the consultations under three broad headings. This chapter discusses a range of issues relating to policing and courts much of its content is drawn from the community consultations. The following chapters then discuss issues with respect to juvenile justice and adult corrections. Much of this discussion is based on our consultations in adult correctional and juvenile justice settings.

2. Interviewing Koori People and Reporting on those Interviews

In reporting on the consultations, we have taken care to ensure that individual Aboriginal people are not readily identifiable. This has been a precondition for involvement in some instances. Young people in regional areas, in particular, were concerned that their comments, particularly about the police, would make them vulnerable to intimidation. A number of young people conveyed comments to us through a third party, while others changed their minds about participating because they either felt that it would make no difference, or felt it would make them a target for police reprisals. It is also important to record that in one instance, a number of Koori girls walked out of a meeting in one country town, when issues relating to the police were aired. It emerged later that they feared that their participation would re-ignite “interest” in them by police. Similar sentiments were expressed by a number of

other respondents. Arguably, such actions are at least as important as words in gauging the state of police / Koori youth relations.

Interviews of young people in detention had to be handled with particular sensitivity, as the small numbers involved raised concerns that they might be identifiable from their statements. We have taken care to include only general statements, rather than any that might identify a particular child or family.

Moreover, the research design was rigorously scrutinised by the Ethics Committees of both the Department of Justice and the Department of Human Services before given approval. The consent forms that were used are annexed in Appendix 2. Throughout the consultations, it was made clear that participation was voluntary; that people did not have to speak unless they wanted to; that they could leave at any time; and that they would not be identified in the report or to staff of relevant departments. Where there was any issue of vulnerability on the part of respondents, departmental support staff were present and / or available. The people to whom we introduced ourselves were generally willing to speak to us; and we thank them for their trust, honesty and insights.

3. General Context

Of the Koori people to whom we spoke, those in country sites expressed a significantly greater sense of exclusion and marginalisation from mainstream society compared to those in metropolitan areas. Koori people in small country towns are more visible, more recognisable and often 'known to police'. Country towns also appear more likely to generate local moral panics about anti-social behaviour, often attributed to Aboriginal youth [20]– a phenomenon that is common in other states (Blagg, 2001; Cunneen, 2001a).

[20] The concept of the "moral panic" has a long history in the sociology of deviance. It was coined by Stanley Cohen in the early 1970s to describe social and official over-reaction to minor delinquency, often taken up by the media – for example, presenting local communities as "under siege" by lawless gangs of youth . Cohen argued that periodically "[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests." (Cohen, S 1972, 7). This group becomes demonised and labelled as a major problem. Aboriginal youth are frequently represented as a crime problem in local media (Sercombe, 1995) pressure is placed upon the police to clean up the streets and remove the source of the problem (Blagg & Wilkie, 1996).

Aboriginal people from rural regions felt that they are at a significant disadvantage in regard to contact with support services (across issues such as family violence, drug and alcohol services, housing, employment and access to health and legal services) whilst also being in greater danger of having negative interaction with the criminal justice system. It is likely that these two factors are mutually reinforcing and self perpetuating. Exclusion from important social institutions enhances the likelihood of enmeshment in the criminal justice system; and enmeshment in the criminal justice system reinforces and amplifies social exclusion. Social exclusion of this kind tends to be "multidimensional" and to include economic, social and spatial forms of exclusion. In its extreme forms, it pushes particular social groups beyond the bounds of citizenship (Young 1999).

The Koori population in the Metropolitan area appears to be more dispersed, fluid and mobile than in country areas. It also seems that the metropolitan population tends to be less connected with Koori organisations. Many Koori people told us that they do not associate with mainstream Koori organisations, and some of the organisations themselves referred to difficulties in communicating with a fluid population and in relaying information to them. Respondents spoke of Koori youth as living a hybridised life-style where elements of Koori identity co-existed with a modern, "urban black" culture. This was expressed, for example, in a rejection of cultural forms associated with their parent culture, such as country and western music, and a preference for hip hop and rap, along with the argot and style that tends to accompany this musical form: many older Kooris expressed anger and frustration at what they termed the "niggerisation" of their culture and viewed it as symptom of it's decline. A number of Kooris we spoke to in detention, in particular, had very strong views on this issue.

Koori organisations in the metropolitan area described an array of family based problems, resulting in an unacceptably high number of Koori children in out of home care. Concern was expressed about unaddressed mental health issues in the community, particularly those emanating from unhealed trauma associated with family violence, often leading to drug and alcohol dependency.

There was concern, too, that the emotional and mental health needs of adolescent Kooris, in particular, were ignored by government, and that Koori child-care agencies were not properly resourced to deal with this particular client group (many of whom were disengaged from school, homeless and not linked with Koori community structures). The lack of early therapeutic intervention leads to problems remaining unidentified until adulthood, by which time they are more embedded and resistant to treatment – a phenomenon identified in previous studies (Human Rights & Equal Opportunity Commission, 1993). Moreover, they may only come into clear focus in situations that are not necessarily conducive to therapeutic interventions – such as prisons. There were also concerns expressed by Koori organisations that problems such as para-suicide and self-harm by young people in detention were symptomatic of family violence related issues and that these were not being adequately addressed.

Many Koori girls and young women, it was argued, are vulnerable to poly-substance abuse, extending from chroming through to heroin and also including alcohol. They were also at risk of early pregnancy and extreme vulnerability to sexual and other forms of violence in relationships. This confirms the findings of other recent research on young people and family violence (Blagg 2000a, 2001: Crime Research Centre/Donovan Research, 2001) which showed that Aboriginal youth are particularly at risk of becoming involved in violent relationships in adolescence. These relationships then form the pattern for future marital and de facto relationships. Concerns were also expressed about a "culture of violence" amongst some male Koori youths.

There were a number of variables influencing the extent to which Indigenous people felt that the system was responding positively to their concerns. These included: instances where particular local police had worked to improve relationships; where there were functioning Aboriginal community justice mechanisms (this is particularly the case in relation to Community Justice Panels, but also includes Community Patrols and Sobering Up / Withdrawal facilities); the level and quality of government services; the availability of culturally appropriate programs (such as the Koori Court); the quality of support for Aboriginal workers in government organisations. These factors greatly influence the extent which Koori people experience the system as acting fairly towards them.

In summary, it can be said that there is a general, and firmly held, belief amongst most of the Koori people interviewed that the criminal justice system is inherently racist in operation; and that this reflects broader socio-economic and historical factors. However, on a more optimistic note, there was also a belief, grounded in some positive recent trials and developments (including the establishment of the RAJACs and the Koori Court), that there is room for structural and system-wide improvement.

4. Relations with the Police

Relations between Aboriginal people and the police are an ongoing source of concern across Australia. Research strongly suggests that Indigenous people are disadvantaged in their dealings with the police and are likely to be over-policed in public space. Government policies since the Royal Commission into Aboriginal Deaths in Custody have attempted to reduce levels of contact between Indigenous people and the criminal justice system and to create more diversionary pathways, whilst ensuring that suspects' legal and due process rights are respected. The earlier chapters of this report and the statistical overview have identified a number of underpinning issues with respect to these matters.

The police are arguably the criminal justice system's most significant decision makers. It is they who provide the first interface with the system and who are, in effect, its "gate-keepers." Police decisions - such as whether to intervene in a particular situation, whether to deal with a matter formally or informally, which charges to lay, and whether to proceed by way of arrest and charge or by summons – can have far reaching implications (Blagg & Wilkie, 1997). Courts can only deal (and must deal) with matters that are not filtered out in some other way. There is an abundant national and international literature on the crucial role police discretion plays in configuring the criminal justice system (Ashworth, 1994). Further, police relations will often dictate people's attitudes to the whole criminal justice system.

It is not surprising, therefore, that relations with the police emerged as a key concern in the community consultations, especially in relation to the treatment of young people. While taking pains to acknowledge the good work done by many police

officers, many respondents from Koori organisations and RAJACs spoke of some police harassment, racism and violence against Kooris. One RAJAC respondent reported "strong anecdotal evidence that some violence is normalised", based on discussions with young people in the Loddon Mallee Region and, in particular, on their experiences of being approached and detained by the police. Incidents of this nature included reports of the police "bashing kids", harassing them and denying them access to public space.

Another RAJAC interviewee argued that the "police culture is biased against Koori kids" and that "things always come out worse when it's a Koori, it just turns to shit and escalates". Furthermore Koori youth "don't respect cops and cops resent this": both sides are alert to the potential for things to get bad and are often on the defensive when dealing with each other. Respondents also reported significant regional variations. Some areas appear to enjoy relatively good relations with police, but places that consistently emerged with a bad reputation were Fitzroy, Collingwood & Preston in the Metropolitan area and Mildura, Swan Hill and Robinvale in the country.

5. Police Aboriginal Liaison Officers (PALOs)

Across Victoria, there are 43 Police Aboriginal Liaison Officers (PALOs), (who are largely non-Indigenous) and the negative assessments from respondents refer only to some of these officers. Typical comments included "mixed success rate round here" and "it doesn't work properly". There was a belief that PALOs are often told they must do the work on top of other duties, and that they lack "Aboriginal cultural knowledge" as well as "appropriate training" for the task. One interviewee, who had served with the police, said many police do not want to do liaison work and feel little commitment to doing the job: "we rarely see them around the Co-op - only when they want something from us". Another said,

> *Here we have a white Aboriginal Liaison Officer: what use is that? They think they know us, but they don't…we are the ones qualified to work with Aboriginal people, because we are Aboriginal. That is our certificate.*

At the time of research, the police are hoping to establish new Aboriginal Community Liaison Officers (ACLOs). They will be unsworn, with no police powers, and their roles will include improving communication between the police and Koori people. There was some confidence that the new ACLO system will be an improvement, although there were concerns that ACLOs will have difficulty working within and around current police culture.

6. Identifying Kooris

One general criticism in all research sites involved the identification of Koori people. Sometimes, it was claimed, police do not check whether a person is Koori before interviews take place, that they go on superficial physical appearance alone and that they do not seek clarification from suspects.

It was hoped that a new regulation, introduced in November 2003, stipulating that police ask detainees about ethnicity would reduce the risk of misidentification, as the determination of Aboriginality or otherwise is made by the respondent, not by police. However, some respondents expressed lingering concern about police attitudes and about their power to determine Aboriginality notwithstanding. Comments included the following:

> *Should the police be allowed to be the ones defining who is an Aboriginal person? There have been cases where police have denied that the youth is an Aboriginal person. Some kids from mixed backgrounds do not look Aboriginal. But police refuse to believe kids when they say they are.*

> *The police should not have complete control – for example, Elders should have a say about who is an acceptable "third party" for police interviews. Police definitions of Aboriginality should be open to challenge.*

7. Police and Aboriginal Community Justice Panels

As we have already noted, Aboriginal Community Justice Panels (ACJPs) are the main initiative developed to improve the treatment of Aboriginal people – principally

youth – at the point of contact with the police. ACJP's directly involve Aboriginal community representatives at the key decision making point of the criminal justice system and provide both support and reassurance to Koori people detained and questioned by the police. The service they provide as independent adults during police interrogations of juveniles is particularly important. This is, of course, one of the reasons why proper identification is so important and one person said:

> *Police will often make their own judgment whether a young person is of Aboriginal descent and deny them access to the CJP when it suits them.*

Consultations found a widely held belief that ACJPs are extremely valuable when they are working properly, but that they often lack community support and are under-resourced. We were told that the current budget is around $16,000 and that there has been no funding increase for over a decade. There were also suggestions that ACJPs only function well when the police take them seriously and maintain a dialogue with relevant community organisations and individuals.[21]

Concerns were expressed about increasing the scope of ACJP operations on the basis that too much is expected of too few people. Koori people become involved as volunteers and have only limited time, yet new responsibilities are constantly being imposed on them (whether through the ACJP or other initiatives). For example, many volunteers are becoming involved in attending court and in advocacy for Kooris requiring health and welfare services, as well as sitting in on police interviews and ensuring intoxicated people are diverted to sobering-up facilities.

There was very broad agreement amongst Koori interviewees that the ACJPs need to become a Koori community resource and that the Police should "let go" of them. While it was generally acknowledged that good working relations with the police were essential for the process to work, it was also maintained that this could also be achieved if the ACJPs were controlled by Koori community organisations. One observed that the Police have "taken out a mortgage on the CJS" in the town, but it should belong to the community. If ' "remodelled" in this way, it was also suggested

that the ACJPs could become a mechanism for monitoring police practice on a local level (as we report later, there is general cynicism about existing formal accountability mechanisms); as one volunteer said, "(the) CJP is too limited in scope, it should make police activities more transparent." The model being sketched out here closely resembles that of Community Justice Groups, currently being developed in New South Wales and Queensland, which provide local mechanisms for ensuring Aboriginal involvement in a diversity of issues – including developing diversionary strategies, liaising with courts and establishing community based prevention programmes.

Discussion about the role of ACJPs raised many concerns about poor police practice and attempts to circumvent guidelines covering the detention and questioning of suspects. Several said that, despite clear guidelines on the issue, the Police sometimes interview suspects who are intoxicated. There were also complaints that coercion, threats and violence have been used on suspects when detained, before the CJP was contacted. One woman interviewed in prison reported having been "given a belting" by police before they contacted the CJP. Another woman said that the police sometimes delay contacting the ACJP by fudging the time that detainees are first brought into custody, thus keeping them isolated for a longer period of time than is permitted under regulations.

It should also be recorded that there were some negative comments about the ACJP's from Koori young people in detention:

> *The CJP don't stand up for you. They sit in interviews but don't challenge police, even when treating you badly. They do what coppers say - even family just let police get on with it.*

Although there were some negatives, we heard very some positive accounts of police/Aboriginal relations in some areas; and it became clear that well run Aboriginal Community Justice Panels can be a significant factor in improving police – Koori relations. One senior man said:

> *The CJP has been a good innovation. Police more on side, calm things down when there is an issue. Some kids do 'start it', wind cops up. Some problems*

started by Kooris - police shouldn't respond, but they do. The sergeant is in charge of the CJP and is really good. If we have problems with cops we go to him. He was involved in getting a racist bouncer sacked, supported our demand on this. Bouncers, private security can be really racist.

A senior Aboriginal woman in Mildura said:

> *The CJP works very well. You have to stand your ground. It took years to get to this position. We had to fight to get recognition. (The) CJP meeting's a good forum for sorting out problems with police.*
>
> *Most kids tell us that the police are usually pretty good now. We had a camp some time back when we got kids and cops together, including senior police. The police were told that kids were 'sick and tired of being pulled up' and police must have financial incentives to lock people up. In recent times they have stopped pulling kids up so much.*

8. Policing and Mental Health Issues

In the metropolitan area, we heard some positive accounts of police practice in relation to willingness to consult with Aboriginal organisations and sensitive handling of cases involving offenders with a mental illness and drug/alcohol related problems.

Koori organisations involved in mental health related issues said that police generally dealt with situations involving the mental health problems of Kooris very professionally and were willing to look at diversionary alternatives in most instances.

The picture in country areas was more varied. Koori organisations reported that the police did not always pick up on indicators of mental illness or seek alternatives to the lock-up. One respondent said:

> *In one instance recently, a young man with a mental health condition was picked up by police who interpreted his behaviour as drunkenness. He was detained all night then just released onto the street. Police mistook psychosis for drunkenness. The man couldn't even recognise his own mother and the experience tipped him right over the edge.*

9. Police and Young Koori Women

The researchers were told some disturbing stories in a number of country towns regarding the treatment of Koori girls by some Police. This is a difficult matter upon which to report. First, it was not our role to 'investigate' the claims; secondly, we gave undertakings that we would not make it possible to identify specific towns, as young women and their supporters were anxious that it should not be possible to identify particular cases. As we have said, some of the material was passed on to us through a third party as the young women in question did not want to speak to us directly. However, it is our responsibility to report in general terms upon what was said; and to direct attention towards the comments.

Young women said that some police think that, "Koori women are just sluts anyway", "they are easy game", "it doesn't matter as much if they are black". Other comments included:

> *Some Police humiliate Aboriginal girls, (it) borders on sexual assault.*
>
> *Girls are more afraid of the police than boys, they fear being raped, it has happened around here.*
>
> *Sometimes its not what they do, it's the way they just look at you, it's a power thing.*

It seems clear, on the basis of what we were told, that some unacceptable stereotypes of Aboriginal women survive in the police culture in some areas of the state. Given the enormous powers wielded by the police, to stop, interrogate, detain, lay criminal charges, and isolate suspects from the outside world, such allegations are particularly unsettling. It is certainly the case that sexism and racism are present throughout society; however, because of the particular nature of police powers in society, when such practices are present in the police culture they tend to be reproduced in an especially destructive manner (Pearson et al 1989).

1. "Jan's" Story

One young Koori woman interviewed in a country town said she had been constantly harassed by the police since she first came to their attention in her early teens. She reported that the police would identify particular troublemakers and mark them out for persistent attention.

> *Some kids get harassed, some get labelled as trouble-makers and then police harass them continuously. It's changed from the days of police going after all Kooris, now ones who they dislike come in for all the shit.*
>
> *Once this happens then they feel they can do anything they want. You're nothing but shit. I got bashed by a man, they thought it was funny when I reported it. Nothing happened.*
>
> *In the pub, this white girl calls me a black cunt, in front of everyone. Everyone heard including an off-duty cop. I was upset and offended. The police officer grabbed me cos I reacted to her saying this. The police threw me out, even though he heard what she called me and it was racist.*
>
> *I was told to leave and went outside to the phone box and called for a taxi. While I was waiting the police came along and arrested me, even though I was trying to go home.*
>
> *They use force. When they arrested me they had my head in a head-lock, I was forced into the gutter and had his knee in my back. This is not uncommon, the knee in the back, aggressive arrest. They try to bait the kids so they will react and they have them. Some of our kids go crazy, get depressed, suicidal about this treatment.*

10. Mixed Views on the Police

The situation in relation to the police tends to be very mixed. Police in the Metropolitan area seem generally to be considered more professional in dealings with Koori people, while an element of "small town prejudice" still seems to taint policing in some rural areas. There was a strong belief by Koori agencies that the Police culture is resistant to change and the process of improving relationships with the police is a long-term process. However, a revamped ACJP model was seen to offer opportunities for improvement.

Typical comments included:

> *There are some really good ones, but we have had some shockers here.*
>
> *Police verballing, still goes on.*
>
> *Aboriginal youth have no one to advocate for them, they plead guilty because of the pressure on them.*
>
> *People won't report police misconduct because of the fear factor. They fear reprisals on themselves and family.*
>
> *Police turn a blind eye to drunkenness by whites, when they are drunk and disorderly.*

11. Police Targeting of Kooris

We heard persistent claims that young Kooris in some country areas are targeted by the Police and labelled as troublemakers; and that police in small towns are often under pressure to clean the streets of Aboriginal youth, who are considered to be responsible for much anti-social behaviour. Young people were very reticent about sharing experiences, as we explained in our introduction. Those who did speak to us from country areas recalled instances of being continuously harassed by the police and fearful of being in public. Young people with a history of contact with the criminal justice system said they were routinely stopped and searched by the Police: once applied, the label of young offender was difficult to remove. Youths we spoke to in detention said that police harassment and violence is common in rural towns, against those who had been involved with the system, or had a reputation as troublemakers:

> *They say, empty your pockets, or we'll strip search you - in front of your mates.*
>
> *They don't want you on the street at all, they say, fuck off home, or you're in the paddy wagon.*
>
> *They just want you locked up all the time - keep using the same charges. They stack them up on you, and they store them up as well. They make up charges, Police are corrupt.*

Kooris are denied bail all the time.

Young adults interviewed in prison supported these views and argued that capricious police - instigated contact with Koori juveniles leads to early involvement in the system:

Koori youth are picked out. For example, on the tram with no ticket, others might not have one either but the Koori is the one picked out. They (kids) get asked all the time for name and address. This is how the criminal record starts.

Police in [Regional Victorian Town] came up & said to me 'another black dog on the street'. They don't give you a second chance if you are black,

Police said, 'shut up or I'll put a fucking bullet in your head", It's worse in Swan Hill, Bendigo and Mildura. They ignore white crime, just on at street drinking. Heavy intervention by police.

(The) Ombudsman system takes too long, would never complain the police, no trust in them, also no trust in the prison complaints system – they all look after themselves.

Consistent with these concerns, many respondents told the researchers that more needs to be done to inform Koori people (particularly the young) about their legal rights:

Kooris don't know what there rights are. They have literacy problems so can't understand what they are given to read. Need more education on their rights.

12. Victims

The statistical section of this report has identified that Koori people are over-represented as victims of violence. Victoria has developed a comprehensive Indigenous Family Violence Strategy, analysis of which lies outside the scope of this study. However, the issues of victimisation, including family violence, emerged during community consultations.

Aboriginal women in particular saw family violence as a serious problem within the community, and a major factor in the development of problems such as alcohol and drug abuse. Reflecting some of the comments in the previous section, there was also a belief that agencies such as the police are not as interested when Kooris are victims of crime: "The police are not here to serve the Koori community" was one view. There were claims that police downplay the seriousness of offences against Kooris, but play up offences committed by Kooris. This was especially the case in situations of sexual violence against Indigenous women. One senior Koori woman who works in the family violence area in the Loddon Mallee region told us that:

> *Police have failed to prosecute when it involves sexual assault against Aboriginal women, they drop charges, so has the DPP. They just don't go all out when it's a Koori woman. It's just not taken as seriously.*

Other women at the same forum said that sexual abuse of Aboriginal children and Aboriginal women is a serious problem but "the system is not interested in them as victims".

On a more positive note, Aboriginal women expressed enthusiasm regarding the Koori specific focus of the **Indigenous Family Violence Strategy** (as opposed to generic domestic violence strategies). However there was concern that the new strategy was doomed to fail unless adequate funds are made available to resource local initiatives.

13. Koori Courts

The Koori Court featured very prominently – and without prompting - in our consultations. The Broadmeadows area (where one of the Koori courts is located) fell in one of the main target areas of the research. We visited the Broadmeadows court and, for comparative purposes, the court at Shepparton, and had detailed discussions with magistrates and Aboriginal court staff. Shepparton has received favorable attention from a number of researchers Marchetti and Daly 2004). It was not our role to conduct a formal evaluation of any of these courts but we soon became aware of a number of issues. Whilst the Shepparton court appears to have 'bedded down' well,

our visit to Broadmeadows sharply illustrated the extent to which initiatives of this kind take time to embed themselves in new localities and the significance of local differences. Some of the elements that apparently make the court successful in Shepparton were developing more slowly in Broadmeadows.

Briefly, the intention of the Court has been to reduce Aboriginal over-representation in the prison system, to provide credible alternatives to imprisonment and to promote Aboriginal involvement in the criminal justice system. The system rests on close partnership between the presiding magistrate and elders. It is recognised (and in our view this is crucial) that active participation by elders is essential if the court is to be an Aboriginal Court – as opposed to simply being a court with Aboriginal elders' present but playing a minor role.

Within a properly developed Aboriginal court system, elders play a prominent role and introduce an additional dimension to the proceedings, articulating a set of Aboriginal values and principles. The offender may well be guilty not only of an infraction of the general criminal law, but also of an offence against these Aboriginal values and principles. It was clear from our discussions with Koori prisoners and workers that, while some offenders may successfully 'neutralise' censure by 'white-fella' law, they may be less successful in neutralising the 'big shame' of censure by Indigenous elders.

It also became very clear that Aboriginal Justice Workers play a pivotal role in the process, acting as the link with the Koori community and giving advice to the Magistrate. In many respects they are the linchpin of the process, bringing local knowledge of offenders and their families to the table.

14. Broadmeadows Koori Court

The basic structure of the court at Broadmeadows is similar to Shepparton. However, there are important contextual differences. Broadmeadows is an urban community and the Koori community is less cohesive than Shepparton. It has taken time for the court to gel with the local community and with the court administration. In our

interim report, we identified a number of issues relating to the marginalisation of the Aboriginal Justice Workers from the general court administration. It is pleasing to report that these problems appear to have been resolved.

The court process is firmly geared towards involving Koori people. There is a focus on reintegration with the Koori community and family support as the key to change. Considerable time is spent on each case, often including rich detail (of a nature and degree that would not normally emerge in court) of the life and family history of the defendant. This contextual material can place a different framework around dealing with the person. Emphasis is placed on linking Aboriginal offenders with Aboriginal community programs, employment services and drug and alcohol services, such as those brokered through Enmaraleek Community Association.

Aboriginal people were extremely positive about the fundamental philosophy and underlying principles of the Koori court, and criticisms were reserved for what some perceived as limitations in the scope of the court (see below). A representative from the Enmaraleek Aboriginal Corporation, who regularly attends court to offer support services to Indigenous offenders observed that:

> *It has credibility because it is taken seriously, we don't feel we are being patronised by it. Sentences are worked out carefully. More information about individuals and their circumstances are available then in court. A person's true circumstances come out (and this) can influence sentencing in both directions.*

> *Many Kooris never had a chance before, because they had been sent straight to jail. Aboriginal people with long records never had a chance. Things need to be addressed such as homelessness and violence before some can move forward.*

Prisoners also reflected such views:

> *It's not a soft option, should be in every area, you have more respect for the court, seeing elders.*

15. Criticisms and Limitations of the Koori Courts

Some respondents expressed concern that the Koori Court might have a net widening effect; and that its processes may end up being more punitive and intrusive than the general courts. One (non-Koori) observer with many years experience in the justice area believed that, on the day he had observed the Shepparton court, some offenders had been sentenced to intrusive supervisory orders for offences that might generally have been fined. This view did not appear to be shared by the Kooris to whom we spoke. However, it has been an issue with the introduction of alternative to imprisonment in many jurisdictions; and has also emerged as an issue with respect to 'specialist courts' in other jurisdictions (see Indermaur, Morgan and Roberts (2003) on Western Australia's Drug Court). It is therefore a matter that requires careful monitoring.

Criticisms about the Court (especially by Kooris) otherwise revolved around geographical, legal, and service delivery limitations. Geographical limitations arise inevitably from the fact that the Koori Court has been trialled in selected locations. Some Koori respondents (especially in prisons) felt that this was unfair as they had been unable to access such an approach. We were also told, on many occasions, of people pretending to be from a Koori Court catchment area, in an effort to have their cases dealt with through that process.

There are two main legal limitations around the Koori Court's operations: it only applies to Magistrates Court matters and can only be accessed on a guilty plea. The jurisdictional limitation was accepted as inevitable at the current time; but the necessity to plead guilty was a major source of dissatisfaction. Koori people, it was said, want to go to a Koori court because they want to be judged by their elders and to have access to culturally appropriate treatment options – there is a wide belief that the court is not a soft option but is willing to address the cultural, health and welfare needs of offenders. We were told on many occasions and by different sources, that this has led to some Koori offenders pleading guilty to charges they might otherwise have challenged (or which they said they had not committed), in order to gain access to the court. As one expressed it: "I wanted to turn my life around, only my own people could help me do that".

Below are some typical comments from male and female prisoners:

> *Why do people need to plead guilty first, what is wrong with having elders involved in trials as well?*
>
> *Some people plead guilty just to get there. They can get access to services that way - also they get contact with elders and with Aboriginal law.*
>
> *The Koori court is good idea, but can't plead not guilty, some plead guilty to charges because they can see justice when elders are sitting round the table. They might not have done that crime but have numerous problems in their lives, elders might help and they might get the proper help for getting off drugs.*
>
> *They give you lots of support at the court, but people are pleading guilty to gain access, others give a false name and address. It just puts them on the carousel.*

Last but not least, some of the cases at both Broadmeadows and Shepparton revealed the inadequacy of some services. As one observer said: "the Koori Courts lay bear the inadequacies of current drug and alcohol services". One noteworthy new development is that, in light of this criticism, Community Health Service Drug and Alcohol Workers are to be attached to Koori Courts.

16. Future Development

There was a strong belief amongst Kooris that the Koori Court model should be extended to other regions of the state, including Children's Courts; and that it should no longer be restricted to guilty pleas.

It was also felt that, although the Koori Court is an important step in the right direction, it should be taken further. Many prisoners suggested, for example, that the elders who are involved in the Court should be given the necessary resources to extend their work into other parts of the criminal process, including coming into prison to talk to prisoners. Also Indigenous support workers who develop good

relationships with prisoners should be allowed to support them when they go to court, for example after remands:

> *They can fully explain women's issues better than anyone else (particularly) for country women, they find it hard talking to people in the court.*

Although issues of 'Aboriginal Customary Law' were not as dominant as they would be in some parts of Australia, many also believed that the court should hear evidence, and introduce Aboriginal customary law principles: "Need to have black law as an option. Like to see more tribal law practiced".

17. Non-Koori Courts

Given the limitations on the Koori Court's operations, it is obvious that 'mainstream' courts will continue to deal with the majority of Koori offenders and especially the more serious offences, many of which are likely to result in imprisonment. We therefore canvassed views about current and potential Koori community involvement in the mainstream courts. A number of issues and suggestions emerged from these discussions.

First, Aboriginal people strongly emphasised that where Koori style courts are not a feasible option, there should be a stronger Koori presence in the courts to provide the judiciary, lawyers and court staff with greater understanding and to reduce the sense of alienation felt by Kooris. One respondent observed that: "Koori courts are serviced - for their catchment areas - but mainstream courts miss out." There is a Koori Liaison Officer in the Magistrate's Court and she seems to play a valuable role; both in terms of support and advocacy for Aboriginal people in contact with the system; and in providing information to the courts about Koori issues and the cultural / family backgrounds of offenders (especially, she said, in relation to people who are on remand). Many legal professionals (including judicial officers) indicated that they would welcome greater provision of such information when dealing with Koori defendants. However, the service seems very limited. We were informed that there is only one Koori Liaison Officer for all the Magistrates' courts in the State; and that there are no equivalent positions in the County Court or the Supreme Court.

A second suggestion was that Community Justice Panels could play a greater role in courts in country areas. In this model the ACJPs would extend their role and become more like Community Justice Groups in New South Wales and Queensland, who play a direct role not just at the point of first contact with the system, but in the court itself as advisors and advocates for Aboriginal offenders. They also play a part in devising diversionary options. Some ACJPs argued that the courts are largely, "unaware of community justice panels - their potential is overlooked once a matter ends up in court". Prosecutors, it was said, are ignorant of cultural issues and rarely seek advice from ACJPs (or other support services). It was suggested that this could be addressed by having greater ACJP involvement. ACJP members felt that this was important because offenders would eventually come back to the community and the community should continue to be involved with them when they were in the criminal justice system. As one ACJP workers said:

> *The community's perspective gets lost in the court, court overrules community. Kooris need advocacy at every stage of the system. Once they are in the system, they are lost to us, they then just re-appear from nowhere.*
>
> *A third option involves the RAJACs. It was suggested that RAJACs should be kept informed of court decisions and also the subsequent movement of prisoners in the correctional system (see below).*

In summary, we were impressed with the structures that are in place, albeit generally in their infancy. There appears to be much to be said in favour of appointing Koori Court Liaison staff across the whole court system; and for considering how best to develop the potential for both the ACJPs and RAJACs to play an enhanced role.

18. Legal Representation

A number of respondents expressed concern about the quality of legal representation for Koori people, especially in regional areas. Whilst acknowledging issues of limited funding, many said that VALS is too Melbourne-based and that services need to be expanded and regionalised. VALS has nine client service officers. Five are based in

regional areas (Shepparton, Morwell, Mildura, Bairnsdale, Heywood). The other four are based in Melbourne. (www.vals.org.au). There were also some demands for VALS to work more at the community level and provide advice to communities on legal rights.

Prisoners and youths in detention expressed some strong criticisms of VALS. The following are some typical remarks:

> *We don't use VALS.*
>
> *We have no time for VALS. It disadvantages you - you have to plead guilty. We get our own solicitors through Legal Aid.*

The assertion that VALS encourages Kooris to plead guilty is in stark contrast to the views promulgated by other organisations, who promote an image of VALS encouraging suspects to plead not guilty at every turn. Clearly, the picture is more complex than these comments suggest; and we have encountered similar differences of opinion about Aboriginal Legal Services in our work in other parts of Australia.

It is important, too, that debates should not be sidetracked by a focus on a particular service. There was considerable concern expressed that Kooris are at a disadvantage when dealing with what many still perceive to be an alien criminal justice system and that overcoming the structural bias in the system required considerable reform.

The overriding message from our consultations with Koori people – especially those in custody – is that they do not feel that sufficient resources are put into educating Kooris about their rights and into general advocacy, court support services and legal representation. Developments such as the Koori Court and the increasing – although still insufficient – employment of Koori people as liaison officers in the Courts are important steps that enjoyed considerable support from interviewees. The issues raised in relation to the Aboriginal Community Justice Groups are complex and require further discussions between RAJACs, the Aboriginal Justice Forum and the police. From the Koori perspective, the issue had less to do with how effective the structures currently were but whether they should be part of an expanded sphere of

Aboriginal community justice. The argument was not about efficiency but the principle of self determination.

CHAPTER 5 QUALITATIVE RESEARCH, SITE VISITS AND KOORI PERSPECTIVES

II ABORIGINAL YOUTH IN DETENTION

1. Introduction

A report of this sort cannot delve in depth into all the issues surrounding juvenile justice and Aboriginal youth in Victoria. Nor can we quantify and validate all of the issues that are raised in this chapter. However, we will seek to provide a snapshot of the position and perceptions of Aboriginal youth in detention and to identify a number of areas of concern. The observations are drawn from discussions with young people in custody and with juvenile justice management and staff, community based agencies and the juvenile Parole Board.

Measured as a proportion of the incarcerated population, Aboriginal youth in Australia are generally over-represented at a significantly higher rate than adults. Victoria is no exception; on the day we visited the Malmsbury Justice Centre and the Parkville Youth Residential Centre, (the 'Parkville Precinct') 10 out of 47 young people were Kooris. The proportion can reach as high as one third and the general perception is that the proportion of Kooris is steadily rising. The number of non-Metropolitan Kooris in detention was a particular source of concern (see below).

We were made vividly aware by the young people themselves of embedded issues of homelessness, dislocation from family / community, substance abuse and mental health issues as well as related criminal justice system issues, including policing and post-release supports.

2. Metropolitan and Regional Youth

Most of the young people we spoke to were from country areas. We were told that the majority of Koori detainees (around ¾) come from such areas and that numbers are increasing.
Many (including juvenile justice staff, RAJACs and young people themselves) attributed at least some of the rise to local moral panics in country towns such as Mildura, Robinvale and Swan Hill. For example, changes in policing practices in Mildura (fluctuating between 'street sweeping' and less punitive approaches) were said to have caused noticeable fluctuations in the detention population. It is well established by research that youths who become enmeshed in the system tend to have had early involvement with the criminal justice system. As Harding and Maller (1997) put it: "the data lend presumptive support to the notion that early entry into the criminal justice system is itself a factor which exacerbates persistence, and that the longer that formal entry into the criminal justice system cane be deferred, the fewer will be the subsequent contacts." Policing in regional areas was a matter to which we also drew attention in the previous chapter.

Some respondents also suggested that, judging by the penalties imposed on people received into custody, country courts tend to more punitive.

3. Homelessness and Dislocation

The young people we saw had been highly mobile and generally, by their own definition, homeless. Workers made the further important point that there is a considerable amount of "hidden homelessness", with the true picture being disguised as youths move between different aunties, cousins and other relatives.

In some instances, connections with family had been severed, and the young people had moved from accommodation to accommodation, cut off from the Koori community. We also heard many stories of estrangement from the Koori community. The following comments were typical:

> *No one helps kids in education. Co-ops just doing things for their own family, Co-ops don't help kids like us.*

The RAJACs should do something for us.

This helps to make some sense of the anger, negativity and extreme ambivalence of young people regarding detention. Their frustration and rage at being confined had to be set against factors such as poverty, hunger and homelessness in the outside world:

> *Most kids are homeless. This is the only place you can get three meals and a bed. No support outside. Us foster kids kept being moved around.*

And:

> *Our community has been ripped off: second-class citizens.*

The young people were also critical of advocacy and support services. They said there was not enough contact with Aboriginal organisations as a whole ("nobody comes to see us") and that they would like to see more community people coming into the Centre. Some said that the Victorian Aboriginal Legal Service had "not done anything" for them and that field officers should come out to the detention facilities more frequently to be more aware of the details of their cases. Repeating a view we heard from some adults, they also said that VALS insisted young people pleaded guilty when in court. As noted in earlier sections this does not fit easily with other agencies' perceptions of VALS.

One worker suggested that the biggest deficiency is in support for those in the 15 to 17 age group; it was suggested that better services are available for children up to 14 and then again for adults – but that the 'difficult' 15-17 year old group is not so well serviced.

4. Drugs, Alcohol, Mental Health and Self Harm

Many young people had serious drug related problems: mainly alcohol, ganja and chroming, but also petrol if they can't get hold of paint. On young people's accounts, there is a fluid drug hierarchy depending on age, money and region. Heroin is

(probably still) at the top, followed by powders (amphetamines and cocaine), ecstasy (linked to the club scene), then ganja and alcohol and finally paint and petrol. In this hierarchy, it tends to be the younger people who inhale solvents and petrol:

> *Dope, chroming, petrol when young – then bigger and better drugs.*

Not surprisingly, many of the young people in detention had mental health related problems, as a consequence of their life experiences and life-styles.

There was widespread concern about the risk-taking behaviour of some Koori youth, particularly those with long-term contact with the system. It was suggested several times during consultations with Aboriginal organisations that deaths in custody statistics are not a good barometer of the health of Kooris in the justice system. This is because, in custody, there is significantly less opportunity and greater surveillance, "but the intent is often still there." Suicide, it was argued, may be displaced into other contexts and settings. In the words of one prisoner:

> *Aboriginal people still die in custody but it's hidden - they suicide before they get to court, or in the mental health system. Either that or they just become mentally and psychologically dead, by dying inside.*

Several Koori respondents therefore argued that it is too restrictive to look at deaths in correctional facilities. Self-harm in "kindred institutions of forced confinement" (Wacquant 2001) such as the mental health system, as well as correctional facilities, should also be considered as they are part of an overall context shaped by extreme marginalisation. It follows that post-release suicide should also be counted; a view supported by research showing a significant death rate amongst people serving community sentences in Victoria (Biles, Harding and Walker, 1999). These views were coupled with a deeply held conviction that society itself is a kind of prison.

> *Whites don't see that society is a prison for some Koori kids.*

There was a sombre and fatalistic recognition by some youths of the consequences of their life-styles:

> *It goes like this: paint – ganja – petrol – speed – pills - heroin – dead.*

5. Children's Protection and Juvenile Justice

Many young Kooris are subject to child protection as well as juvenile justice orders. There was some criticism that child protection workers "de-allocated" cases as soon as there was involvement with juvenile justice. Juvenile Justice staff suggested to us that may be due, in part at least, to caseload pressures generated by mandatory reporting. This might be a matter for debate, and the 'blow out' created by mandatory reporting was said to have stabilised. However, it did seem clear that there are areas that need better case management and coordination when there are overlapping children's protection and juvenile justice issues. Young people in the detention remain vulnerable and are often victims of severe neglect and abuse.

Some specific areas were identified as needing attention. These included; examining the extent of "de-allocation"; improving communication between different parts of the Department of Human Services, such as Youth Training Centre Staff, other Juvenile Justice staff and those involved in child protection; and more consistent case management from regional level agencies.

6. Remands

Victoria has the lowest rate of remands in custody for young people in Australia. This appears to be attributable to the general juvenile justice culture within the State and also to the parameters of relevant legislation. For example, section 128 of the Children and Young Persons Act 1989 (CYPA) requires cases to proceed by way of summons "except in exceptional circumstances"; and section 129 limits remands in custody to 21 days at any court appearance.

However, it is central to the notion of systemic racism that even where general figures may appear positive, they can obscure specific areas of concern (Morgan, 2002). During our consultations, several people raised concerns that remands are sometimes still being used as a form of "back door sentencing"; and that this seems to be more

prevalent with rural (and Koori) youth than with metropolitan youth. We were told that whilst some spent the 3 weeks contemplated by the CYPA, others had served six or nine weeks on remand. Interviewees stated that they believed that this was a form of punitive remand to "give the community a break". If bail is being used in this way, it is an improper use (Freiberg and Morgan 2004).

7. Juvenile Koori Courts

We were told that there are plans for a juvenile Koori Court, to be trialled in the metropolitan region and based at the Melbourne Children's Court. Aboriginal organisations and individuals expressed support in principle for such an initiative. However, as in the case of adults (see previous chapter), there was a strong view that defendants should not have to plead guilty to gain access; and that there was a danger young people would plead guilty to be referred there and "cop other people's charges".

In our view, the adult Koori Court should not be restricted to guilty pleas (see previous chapter). In the case of juveniles, this appears all the more important.

8. Overt Racism

The main focus of this research was to try to understand forms and levels of systemic racism as opposed to overt or direct racism. However, when we began to explain the project to the young people in detention, they immediately complained that they had been subject to direct racism in the system. This included racist language from police (see also the previous chapter). They also said that there had been instances where staff in detention facilities had used racist language to them and gave examples of racially insensitive attitudes and behaviour. They said that more Koori workers were needed – one per unit – to improve understanding and to reduce such incidents.

9. Reintegration

A primary objective of modern correctional services is to work towards the 'reintegration' of offenders. This is especially true of juvenile justice, which has always placed a stronger focus on rehabilitation rather than punishment. However, talk of reintegration assumes that the people were 'integrated' beforehand and that it is a question of building on pre-existing resources. This is highly questionable when dealing with young people who are as dislocated as the group we saw.

This helps to explain their cynicism about the programs they are offered in detention, feeling that they do not meet their needs and are generally "boring".

They claimed that juvenile justice workers didn't give enough support when they were detained in prison, or on release and they felt that programs they were offered did not always fit their specific needs.

Juvenile Justice staff complained about the inadequacies of support services post-release, particularly in the country where services are thin on the ground and highly dispersed. Reintegration was particularly hampered by the shortage of educational opportunities for these groups of youths.

There were suggestions also that some Koori youths were so cut off from the Koori community that it was not always possible to reintegrate them. They get stigmatised in their local community, and they had also been involved (if not completed) local programmes and they run out of options. Furthermore, some Koori youth don't want too much Koori involvement: many from the city were involved in street subcultures and don't want Koori specific services. They don't self-identify as Aboriginal.

10. New Anti Chroming Laws

Background

Drug use, and the sniffing of solvents (or 'chroming') has been a long-standing concern in Victoria (Parliament of Victoria: Drugs and Crime Prevention Committee, 2002). Following a number of incidents, including the tragic death in Gippsland of a young Aboriginal man who was run over when under the influence of solvents, an Interdepartmental Committee was established. By all accounts, the Committee worked to a short timeframe and in mid-2003, Parliament enacted the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act*.

This legislation was not in force at the time of our consultations, but came into force on 1 July 2004. Although it is too early to comment on its use, there are a number of issues of relevance to this research.

The New Laws

The new legislation, introduced on July 1, 2004, gives the police powers with respect to searching for and seizing volatile substances, and to apprehend and detain young people under 18 to "protect them from the effects of inhaling volatile substances." The pre-existing *Children and Young Person's Act* already contained a number of powers with respect to the protection of children but the legislation provides a 'code' for dealing with the specific context of solvent abuse. For our purposes, the main facets of the legislation are as follows:

- The aim is to "protect the health and welfare of persons under 18' and the police must 'take account of the best interests of the person." (sections 60A and B)

- It is not an offence to possess volatile substances (or items used for inhalation) or to inhale them (section 60A). But possession or inhalation can trigger police powers and action
- The police may search a person without warrant in public (or in private premises with the owner or occupier's consent) provided there are reasonable grounds for suspicion regarding volatile substances (sections 60C and E to H). Reasonable force may be used in a search (section 60D)
- The police may seize volatile substances (or items used for inhalation) if they reasonably suspect the person to be under 18 and to be inhaling, intending to inhale, or intending to supply to others (sections 60I to K)
- The police may apprehend and detain a person if there are reasonable grounds to believe the person is under 18; is inhaling or has recently inhaled a volatile substance; and 'is likely by act or neglect to cause immediate serious bodily harm to himself or herself or to some other person (section 60L).
- Such an apprehension is not an 'arrest' (section 60L) but allows the person to be detained as long as there is a reasonable suspicion that the person has inhaled a substance and poses a risk of 'immediate serious bodily harm' to themselves or another person (section 60M).
- As soon as practicable, the police must release the person into the care of a 'suitable person' (which may include family members or an 'appropriate health or welfare agency.') If such a person cannot be found, the detainee can be further detained or simply released (Section 60M).

Issues and Concerns

We found that the new legislation was not as widely known as we had expected amongst some agencies. However, we heard a range of views, especially from the police and substance abuse service providers. Some representatives of service providers intimated that the police had driven the new legislation in a "grab for more powers". The police hierarchy strongly rejected this view. They stated that the legislation had been driven by broader factors and that the new powers had inevitably come their way because they provide the "only 24/7 service". They also referred to

some reticence on the part of the Department of Human Services to become involved for philosophical and practical reasons.

In terms of this project, a number of issues need to be canvassed; and it should be stressed that senior police were well aware of many of these.

- The laws are facially neutral but may have an uneven impact. It is well established that Aboriginal youth are over-represented amongst solvent abusers. They are also generally more visible 'public space' users. Thus, they seem likely to provide a large proportion of those caught under the new laws.

- We have already pointed to some significant issues in terms of police/ Koori youth relations. Unless carefully monitored, the new laws are open to abuse and net widening. It is also important that they are applied according to their letter; they do not give 'carte blanche' for the apprehension and detention of 'chromers'; only when there is a risk of "serious bodily harm". The legislation is being monitored by Department of Human Services and Victoria Police as well as a DHS convened Volatile Substances Abuse Protocols Advisory Committee.

- Although the laws are intended to be driven by 'welfare' concerns, they are likely to generate negative interactions between the police and Koori youth. Even though chroming is not an offence in itself, searches and questioning under the new Act are destined to generate other possible offences such as assaulting police or resisting arrest. This is all the more so where young people may be affected by substances and know that they are to be taken into detention.

- Given what we have already said about the fluid hierarchy of substance abuse, the new laws are likely to have a particular impact on those in the younger age group.

- At the time of our consultations, the issue of placement of detainees had yet to be resolved. The legislation does not allow placement within a "police gaol … cell or lockup". There are both issues of principle with this (the person has not been

arrested) and duty of care issues. However, we were told that DHS was also opposed to undertaking the detention role.

- The police are obliged to try to release the person into the care of a "suitable person" who agrees to this and whom the police 'reasonably believe capable' of the task. We have already noted that many of the youths to whom we spoke are very dislocated; it is hard to see, therefore, that release into the care of a responsible person will be feasible.

- We were left with the impression that welfare services for young people with substance abuse problems may not reach a significant proportion of Koori chromers. First, the services of groups such as the Youth Substance Abuse Service (YSAS) seem mainly to target drug use; and they do not necessarily have the resources for a 24/7 'hands on' service (though there is a 24 hour telephone helpline). Secondly, there appears to be a paucity of relevant services in the country areas where there is a clear problem with solvent abuse; and from where many of the young people serving sentences in detention have come.

11. Summary

The new anti-chroming laws have their origins in providing a means to protect young people from the harmful effects of chroming. However, the laws will require very careful monitoring and evaluation, especially in terms of their impact on Aboriginal youth. The Act itself requires the Chief Commissioner to report to the Minister on various factual matters such as the number of searches conducted under the Act; the type and amount of substances seized; and the number of persons apprehended and detained. However, in order to evaluate whether there is a problem of systemic racism, there should also be reference to:

- Aboriginal status
- Age
- Region

- Whether criminal charges were laid
- Period of detention; and
- Place of detention

CHAPTER 6 QUALITATIVE RESEARCH, SITE VISITS AND KOORI PERSPECTIVES

III ADULT CORRECTIONS

1. Introduction

As with juveniles, this report cannot provide an in depth analysis of all the issues that face Indigenous prisoners in Victoria. Nor can we quantify and validate all of the issues that are raised in this chapter (and Indigenous / Non-Indigenous data are not available with respect to many of the issues we raise). Again, we seek to provide a snapshot of the views of Aboriginal prisoners and other respondents, and to identify a number of areas of concern. The observations reflect discussions with men and women in custody, management and staff (including Aboriginal workers), community based agencies and the Parole Board.

Over recent years, a number of jurisdictions have introduced Prison Inspectorates which review the operations of individual prisons and also conduct comprehensive thematic reviews of issues of specific concern. One benefit of this has been a clearer enunciation of the 'tests' by which individual prison and system-wide performance is to be based. Perhaps the best known of these is the 'Healthy Prisons Test' developed by Her Majesty's Inspector of Prisons in the UK (HM Inspector of Prisons, 1999). Under this test, the 'key constituents' of a healthy prison are:

- A safe environment;
- Treating people with respect as individuals;
- A full, constructive and purposeful regime; and
- Resettlement (prisoners can strengthen links with families and prepare themselves for release).

Notions of respect, relevant and purposeful activities in prison and release preparation all provide a valuable framework for thinking about the issues that were raised.

Victoria has a corrections Inspectorate which has jurisdiction over both prisons and community corrections (though we understand it has yet to exercise the latter power).

Unfortunately, in our view, the Inspectorate's reports are not publicly available and we are therefore unable to consider whether issues relating specifically to Indigenous prisoners have been analysed by the Inspectorate. However, we were told that "the prison reviews have not picked up on Indigenous issues." By marked contrast, the reports of the Inspector of Custodial Services in Western Australia regularly examine issues of systemic racism. Some aspects of the Western Australian system do not appear relevant in Victoria. For example, in Victoria, there are no poorly serviced 'Aboriginal Prisons' (prisons where 75% or more of the population is Aboriginal). However, the Western Australian Inspector's reports have revealed some more subtle manifestations of systemic racism that are likely to have resonance in all Australian jurisdictions. The *Report of An Announced Inspection of Acacia Prison* (2003) contains the most sustained discussion of this, raising questions about prisoner placements and security levels; access to work, education and relevant programs; and issues of culture (including food and funeral attendance). Although the problems may be of a lesser degree in Victoria, all of these issues emerged forcefully in our consultations.

2. Men and Women in Prison

Consultations in the Metropolitan Assessment Prison and Port Phillip Prison (men) and Dame Phyllis Frost (women) revealed that there are both similarities and differences in terms of the issues facing men and women in prison. In preparing this report we decided generally to address the issues thematically rather than by gender. However, some preliminary points should be made.

Koori women constitute only a small number of prisoners (we were told varying figures of between 5 and 11 around the dates of our visit in late June 2004. We were able to meet with 8 women. This means that we actually spoke with the majority of women prisoners in the State. Small numbers can pose obvious problems for service provision and as one experienced respondent in head office said: "there is a danger that they are in such a minority that they get left out." A Parole Board member expressed similar views.

We were made vividly aware of the problems facing both men and women in terms of life in the 'outside world'. However, in some respects, the women's issues were more complex, including higher mental health needs (see below), child-care issues and problems of victimisation (sexual abuse and family violence). The women also felt more isolated from external agency services.

The male population is higher in numerical terms (we were told around 170 when we conducted the consultations) and more dispersed through the system. Some respondents in head office said it would be a "mistake" to talk in terms of a 'Koori community' in male prisons. Certainly, there is no uniformity amongst male Koori prisoners (or with other prisoner groups) but there was a shared view about many of the issues and there appeared to be a mutually supportive culture amongst many of the prisoners. There was an even stronger sense of this amongst the women at Dame Phyllis Frost.

We encountered understandable cynicism about the justice system and about projects such as this and the review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody:

> *What's changed since the Royal Commission? More Kooris in prison and numbers going up.*
>
> *We don't need more studies on racism – it's there.*

Finally, it is important to acknowledge the problems that incarceration creates for the families and communities of offenders. Community groups such as RAJACs expressed some concern that they do not receive good quality information from corrections about numbers of Koori people in custody. Offenders and their families spoke of the isolation of many prisons (something we confirmed when we naively attempted to reach Dame Phyllis Frost by public transport), the stigma of having a partner or family member in prison, the lack of social support, the humiliation of being searched before and/or after visits, and racist attitudes on the part of some prison officers.

3. Racism and Respect

Respect is seen as a hallmark of a healthy prison system. However, allegations of racism and lack of respect were consistent themes in the consultations. Interviewees in all three prisons mentioned racism as an issue, stretching from overtly racist attitudes through to structural features of the regimes. Lack of understanding of Aboriginal culture and an inability to understand the link between incarceration and broader forms of marginalisation endured by Koori people were also identified as forms of racism.

Overt Racism

Prisoners at Port Phillip made disturbing claims of racist attitudes, both at that prison and in other prisons. One commented:

> *Most screws [at Port Phillip] are pretty racist and pretty up-front about it. It's worse than other prisons.*

Others considered that some old regional prisons, such as Bendigo, were worse and that the newer prisons such as Port Phillip were better because many of the prison officers are younger and are not from the old prison officer culture. Fulham Prison was described by one Koori worker as having a "very racist" reputation and Barwon also came in for criticism. We were told that, at one prison, staff who had been searching a cell for contraband had pulled a Koori flag from the wall and had stamped and spat on it. A number of Aboriginal people mentioned Loddon as being more "Koori-friendly."

During our community consultations, some respondents mentioned concerns about racist attitudes towards them as visitors and Koori prison workers mentioned difficulties that had encountered (see below).

In terms of staff-prisoner relationships, it is also worth recording the following comment from a Port Phillip inmate:

You need good social skills to deal with screws, most of us don't have the confidence or self-esteem to talk to authority. We have had it knocked out of us over the years.

As stated earlier, it is not our task to investigate and seek to 'validate' the details of these stories. The point is that significant and consistent issues of racism were raised by inmates, workers and visitors. It must also be acknowledged that Corrections Victoria does have a complaints system, with procedures in place for Indigenous prisoners to report any overt racist incidents, and mechanisms in place for independent investigations through the Corrections Inspectorate as well as Ombudsman Victoria. On the other hand, these complaints mechanisms were not always viewed as impartial structures by Indigenous prisoners and, clearly, more needs to be done to make these structures more accessible.

Funerals

Two issues arose with respect to funeral attendance: whether people are permitted to attend and, if so, the security arrangements that surround such attendance.

Prisoners said that policies regarding funerals did not always recognise the specific cultural obligations to attend funerals of significant people who may not be next of kin in the Eurocentric sense. For Kooris, family include "all those you grew up with but whites don't understand Kooris – think cos not same name, not family." Staff in head office indicated that, in their view, there are relatively few problems with respect to funeral attendance within the State (subject to resources) but acknowledged that there can be difficulties with inter-state funerals.

Both prisoners and community members commented on practices such as shackling prisoners when they are granted permission to attend funerals. Corrections Victoria advises, however, that "precautionary measures such as this are a requirement and relates to all prisoners if considered a necessary part of external security from outside the prison environment" and that these stipulations are "necessary to ensure security

at such an emotional event."[22] However, this was considered to be unnecessarily degrading to prevent people mourning in an appropriate way and showing respect to the deceased:

> *You can't cuddle and mourn in cuffs.*
>
> *They don't understand we won't fuck up at a funeral. It's called respect.*

It is obvious that funeral attendance is a culturally significant issue and that Koori prisoners do not feel that the system adequately understands and respects this. It is an area, which, in our view, requires further, more detailed consideration. In particular, those charged with responsibility for security during funeral leave need to be given cultural awareness training, to understand the specific demands placed upon attendees at such events. Moreover, correctional workers generally (including those involved in policy) should be reminded of the relevant sections of the RCIADIC on this matter (see Johnston, 1991, Volume, 3 *The Prison Experience).* The Commission established links between refusal to attend funerals and deaths in custody, and, what's more, viewed attendance at funerals as an important element in rehabilitation through re-connection with culture. It bears repetition that in order to be fully reintegrated into Aboriginal culture attendees should be able to participate in the process, rather than just be observers.

Food

Although Victorian prisons do not house many 'traditional' men and women, there were calls for the provision of more culturally appropriate foods. It was suggested, for example, that 'native foods are rare – only 4 or 5 times a year" and that there is better provision for the food requirements and preferences of other cultures (including Asian and Muslim).

Again, this is an issue that seems to merit further review in conjunction with broader issues of cultural (re)-engagement (see below).

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[22] Corrections Victoria, response to the draft Report.

4. Visits

Visits were a major issue. Since we did not speak to non-Koori inmates, it is difficult to assess how far the concerns that we heard are Koori-specific. However, there is no doubt that the Koori prisoners we spoke to felt that they and their visitors were unfairly treated:

> *You do all the right things and no IDU status but your visitors get targeted.*

There were claims that visitors were "treated like prisoners" and humiliated. Searches of family were seen as particularly degrading. Coupled with problems relating to the accessibility of prisons and allegations of racist attitudes towards visitors, it was said that that this was deterring some people from visiting. A woman prisoner at Dame Phyllis Frost summarised the views of Koori women:

> *Women feel extremely isolated, it's a long way out of the city, no accessible transport. Visits are 2 per week for 2 hours but they are often cut short. Invasive searches including strip searches are common; they use sniffer dogs on children; it's easy to have people wiped off the list without informing why. Why search visitors when you do searches on prisoners too?*

While there may be policies in place to encourage visits from Indigenous family, the policies of the prison itself, and the cultures of these institutions, play a powerful role in shaping the experience of prison visitors. These are issues that need to be taken up by Aboriginal representative structures and fully aired with government.

5. Mental Health and Cultural Well Being

Men

Mental health emerged as an important issue for prisoners. A significant underlying theme in their comments was the degree to which medical and psychological services

were perceived to be instruments of prison management, part of the repertoire of classification and control, rather than therapeutic tools.

This view was combined with a belief that more could be done to introduce forms of treatment which are not only client centred but which also recognise prisoners as cultural beings. Prisoners pointed to a lack of culturally of appropriate counselling inside prison (see also below). This was needed, for example, when prisoners experienced bereavement and loss and were unable to fulfil their cultural obligations by attending the funeral. A number of interviewees complained that prison services did not understand the trauma and, frequently, the deep sense of self-blame this caused for Kooris: they were given medication instead of an opportunity to talk through the issues with appropriate people. The following comments were typical:

> *Why not get elders in to settle things down? If someone's upset or 'hears things', the white doctors just use pills.*
>
> *We need cultural health programs, we are used as guinea pigs by white doctors, to fuck our brains up.*
>
> *We are constantly psycho-medicated.*
>
> *We should have Aboriginal Health services coming into the prisons.*

Women

Women interviewed saw mental health as being the single biggest issue they faced in prison, and saw mental health as inextricably linked with other issues such as family violence, sexual abuse and addiction. They raised concerns about assessment processes, drug treatment and continuity in services.

One woman said she was admitted to prison during a severe psychotic episode but that she had spent two weeks at the prison before this was identified and she was transferred to a mental health facility. She spent three months at that facility before returning to prison. However, it then, apparently, took a further six months before there was a detailed follow up assessment.

There were disturbing accounts of the use of medication in the women's facility. It was said, for example that women (even with no history of heroin or methadone use) have sometimes been registered and put on methadone when they are admitted – or before a full assessment has been completed. It was claimed that they are given methadone to keep them quiet when they play up and that underlying mental health issues go untreated:

> *The prison runs on medicated people. They don't explain what's involved or the consequences in terms of addiction.*

These are serious allegations and we were obviously not in a position to examine medical files or to discuss the issues with doctors. It is far more important to recognise the messages that emerge from the women's stories. Their sense of the over-use of medication reinforced their belief that existing services were being used as prison management tools, to keep inmates docile and compliant. Like the men, the women wanted to see a far more holistic approach taken to their treatment. In the case of the women, this needed to include more active work around issues of sexual assault and other forms of victimisation. They said that most Koori women in prison women have experienced sexual violence and have had serious mental health and addiction issues. In their view, these are not adequately addressed, if addressed at all. They stressed that greater contact with community people, as part of a total "healing" approach was required, rather than medication.

6. Treatment Programs and Cultural (Re)-engagement

Similar themes emerged in the context of treatment programs in prison. Many interviewees believed that cultural regeneration is the only solution for many Kooris who have extensive experience of prisons:

The younger generation need to be given access to their culture, it's their only hope.

However, it was recognised that the Koori community has been damaged and traumatised, leading to patterns of self-destructive and community-destructive behaviour. As Port Phillip prisoners said:

We are committing cultural genocide on our own people.

The kids look at us and think we're hard. They don't realise we're fucked.

There was interesting – and often heated – discussion of current prison-based programs. One Port Phillip prisoner acknowledged that 'programs for Kooris have improved' but there was a unanimous view that more needs to be done: first, to ensure that existing programs are delivered within a timeframe that meets Parole Board expectations (see below); secondly, to reconsider the nature and scope of program provision.

Papers on the Department of Justice website (www.justice.vic.gov.au) reveal that the primary focus in Victoria, as it is across Australia, is on programs to address sexual and violent behaviour and substance abuse (Birgden and McLachlan, 2004). At present, these programs are based mainly within the parameters indicated by the so-called "what works literature" (Maguire, 2002). In the words of Howells and Day (1999), this reflects "well-grounded … psychological theory and research."

However, whilst such programs may be based on 'international best practice' (and are often modelled on or purchased from overseas), Koori prisoners expressed significant disquiet and we were left in serious doubt about the extent to which some of the programs are relevant to and 'reaching' some Koori prisoners. One prisoner at Port Phillip said, for example, that:

There are 150 psychs here, what do they all do? They bring in all these programs from America. They make no sense to us.

Comments concerning program relevance were strongly voiced elsewhere too. Some male prisoners said they found it difficult to relate the highly abstract language of 'the program' to the realities of their lives and to their crimes as they saw them:

> *It's no good looking at that victim empathy stuff in a non-Koori way.*
>
> *Nothing is working, most are inside for drug related crimes but there is no Koori alcohol or drug worker, and no Koori place for Kooris to talk about their experiences.*

Women interviewed at Dame Phyllis Frost voiced similar concerns. They found that some family violence workshops (the Maru Mali cultural healing program) had been very useful in explaining violence issues within Aboriginal terms of reference, but felt that the system privileges other programs that have been put together by 'overseas experts' and which are devoid of any 'cultural content'. They described the Maru Mali program as "intense" and "emotional" but said they had been told that 'the system' (including the Parole Board) places little weight on this program.

Aboriginal prisoners are therefore in no doubt that, in order to have greater meaning, programs on issues such as violence, anger and victim empathy need to be related to Aboriginal culture and to their experiences.

Other people to whom we spoke expressed similar sentiments. Parole Board members, for example, emphasised the need for practical and culturally grounded approaches. One commented:

> *In terms of systemic issues, the problem is the nature of the custodial exercise. Cultural re-engagement is more important than talk. And prisoners need life skills and social skills. This shows up worse with Koori prisoners and even worse with Koori women.*

The Department of Justice has commented that "work is underway to scope the adaptation of a range of treatment programs for non-English speaking and indigenous prisoners (eg. Cognitive Behaviour Skills Programs and Drug and Alcohol Treatment Programs)." Although we welcome the idea of modifying existing programs, this process appears to be in its early days and has inherent limitations. We recommend

that consideration also be given to the development of new programs, grounded from the outset in Aboriginal perspectives. Programs in New South Wales such as the Koori Mend Program and the Rekindling the Spirit Program (although not specifically corrections based) which set out to reconnect Aboriginal men with their spirituality were viewed as a better alternative by many of the men we interviewed. In terms of the 'healthy prison' test, initiatives of this sort may help to generate a more meaningful and purposeful regime.

7. Prisoner Placement and Security Ratings

The term 'prisoner placement' has a number of angles. In superficial terms, security ratings affect decisions about the prison in which a person is placed and a range of factors (such as behaviour, work and general attitude) affect the level of accommodation within the institution. Movement through different levels of the prison system can be seen as an important part of the resettlement process to which the healthy prison test refers; with, ideally, the capacity for many prisoners to serve time in minimum security before release.

Almost everyone to whom we spoke expressed concern that relatively few Aboriginal prisoners reach minimum security facilities. Aboriginal prisoners themselves are convinced that classification processes operate in a profoundly discriminatory manner. The following interchange between Koori prisoners at Port Phillip was typical:

> *Minimum security is white security*
>
> *You can't get into minimum for many offences blacks come in for – can't get it for car theft. But you can for drug dealing cos that's a white offence.*
>
> *That's right, maximum is for drug users. Minimum is for drug dealers.*

There was a deeply held belief that Kooris are "at the bottom of the food chain" in prison; that their views, needs and demands are granted less status than non-Kooris and that this tends to push them into maximum security facilities, lower levels of accommodation and special management units. The men were scathing:

Whites get easier units, if blacks get in the whites complain "He scares me". They don't have to prove anything, just say we are standover merchants. Just get "Shanghaied" back here.

Blacks get ignored altogether or tagged as trouble makers.

Whites and screws see us Kooris as intimidating, so don't like to see us in groups, so we are all stuck in Scarp North Management Unit. The punishment unit's all full of blacks.

If you're black, you're out the back (and on your back).

Kooris don't get into the 'motel style' accommodation that is supposed to prepare inmates for the outside world. This is reserved for whites.

When whitefellas come here from Fulham, they get into higher levels. Kooris go to the bottom

It was said that Kooris are discriminated against inside in a number of ways that can affect placement and the extent to which they can work their way through the system. In employment for example: "blacks don't get the good jobs inside."

Koori women also made complaints about security classification. Dame Phyllis Frost is a maximum security prison and there is very limited capacity (around 50) in the women's open prison. This means that most stay in Dame Phyllis Frost, under maximum security conditions. This can be the case even when they have actually achieved a minimum security classification.

Department of Justice staff at all levels acknowledged that further statistical and qualitative analysis is required into the question of why relatively few Aboriginal inmates reach minimum security. There was a suggestion that some of the reason may be that Kooris prefer to stay together and issues also arise with respect to the nature of the offences for which people are imprisoned. However, there did appear to be other possible factors at play; and although Kooris may want to stay together, it does not follow that they want to stay together in the lower levels of accommodation.

It is also important to recognise that security ratings and actual placements can now do more than just determine a person's place of custody: the new Home Detention

early release scheme (see below) only applies to those who are 'being held under minimum security conditions.'

8. Reintegration and Community Links

As we have seen 'healthy prisons' focus on resettlement. However, many prisoners spoke of the difficulties associated with reintegration and of the consequences such as a rapid return to prison. As one worker put it:

> *Aboriginal parolees face problems. Some can't access benefits because they don't have a fixed address. This makes them high risk in terms of re-offending.*

> *Kooris have their own space in prison. Release is the big problem, housing and reintegration are major issues. There is a lack of support structures. They go back to drinking and drugs, go back to stealing. Kooris are on their own.*

We have previously spoken of the profound dislocation of Koori youth in detention. Adult prisoners did not appear to suffer from the same intense level of dislocation but they still described significant problems. Some of these involve perceptions of disadvantage in dealing with mainstream organisations such as Centrelink and welfare and housing agencies.

> *Housing is a major issue – why so many return to prison. Can't get housing when released, you might be on the list at the bottom, don't get a house, prisoners and their families become homeless.*

> *Lots of brothers come back cos they don't get help with housing, health and Centrelink. Also employment. CDEP is only a short-term solution.*

> *Many Koori are institutionalised, you can't cope with just normal living when you're used to places like this.*

Many prisoners seemed to regard these as intractable structural problems. However, structures such as the RAJACs do provide a possible forum in which the issues can potentially be better addressed. For example, at a RAJAC meeting we attended in Warragul, many parties were represented (including Centrelink, DHS, Department of Justice, Fulham Prison and a number of Indigenous organisations). The discussions

showed a genuine commitment to develop practical supports around housing, services and employment (such as improved Centrelink liaison prior to release and exploratory discussions to link prisoners who have undertaken horticulture training in prison into employment on release).

However, it is clearly a slow building process. RAJACs have inevitably, to date, been focused mainly on 'macro' policy issues and on building their position. Members said that the next challenge is to translate their discussions into action, including concrete 'micro' initiatives.

It was said at a number of sites that that one difficulty the RAJACs face is that they do not have "systematic and accurate data on how many Kooris are involved." It was suggested that the RAJACs should have a "paper-trail" to identify where Koori prisoners are at any one time, and to have some involvement in post-release planning. As one RAJAC member put it:

> *After all, they are going to return here, we need to be prepared and help families as well. Some reoffend quickly when they don't get support from within the community. We can advocate on their behalf with things like accommodation, drug and alcohol and Centrelink*

RAJACs are particularly well positioned to advocate for newly released prisoners, and their families. A concerted effort is required to improve the collection and dissemination of information on Indigenous prisoners. Post-release support is crucial if we are to break the cycle of re-offending and re-incarceration. There needs to be dialogue between Aboriginal representative structures, the Indigenous Issues Unit and Corrections Victoria on how such data could be collected and disseminated to RAJACs, and RAJACs need to be involved in any pre-release planning phase.

As well as the RAJACs possibly playing an enhanced role, some prisoners believed that the ACJPs could be expanded:

> *CJPs could be a good vehicle for doing reintegration work with ex-offenders. They should be involved pre-release and link the offender back with his community, offer support.*

In addition to feeling disadvantaged in dealings with mainstream services, many prisoners felt that they have insufficient contact with the Koori community and there was some scepticism about access to Koori services:

> *Sometimes we prefer to go to white agencies. Aboriginal bureaucracies and co-ops are the property of one family, they spend it all on them, don't want to fucking know you.*

Some expressed the view that elders needed to have more of a presence in prison and that they could be involved with prisoners experiencing loss and bereavement and in talking about culture and law. This could be linked in with introducing correct bush foods into the prison diet (see above).

There were suggestions that Koori ex-prisoners should work with Koori youth and that youths who were at risk of involvement in crime should come into the prison to listen to older men. This was to challenge the belief that it was cool and respectable to go to gaol: *The kids look at us and think we're hard. They don't realise we're fucked.*

In summary, there appears to be considerable scope for promoting stronger links between agencies and organisations (both Koori and non-Koori) both as a means of practical support on release and to promote cultural re-engagement.

9. Indigenous Justice Staff

Over recent years, Corrections has appointed a number of Aboriginal people, both in Head Office (Indigenous Policy and Services) and on the ground (a number of Indigenous Community Corrections Officers and prison Aboriginal Wellbeing Officers (AWOs). Both Port Phillip and Dame Phyllis Frost prisons have a full-time Aboriginal support person but we were told that this is unusual, with Wellbeing Officers generally servicing a number of facilities. In some prisons, non-Indigenous staff still play the core liaison role – a situation that Kooris across the spectrum regarded as generally unsuitable.

We were left in no doubt that the Aboriginal Liaison Officers (ALOs) at the prisons play a crucial role and are appreciated by prisoners. We observed, in particular, the high regard in which the liaison staff at Port Phillip and Dame Phillip Frost were held. There were calls for more of them to be appointed:

> *[An ALO is] working for us but he's not a fucking octopus.*

When first appointed, the prison based liaison officers workers told us that they had to combat some negative attitudes from within the prison culture (including racist remarks and stories of staff seeking to undermine their position with Koori prisoners). However, they said that these issues had largely settled down. Certainly, at higher levels of management, we formed the impression that the liaison officers were increasingly seen as an indispensable part of the system.

In addition to the prison-based staff, there is an Official Visitors Scheme that operates under the Corrections Inspectorate. The Inspectorate told us that there are some Koori official visitors under a joint funding arrangement between the Department of Justice and the RAJACs.

The Indigenous Community Corrections Officer (ICCOs) we spoke to were highly committed and made a number of interesting observations about the difficulties that can arise in managing the expectations of their employers and the expectations of the community. They expressed some frustration at their ability to address their concerns:

> *The Department people think they're doing the right thing but we tend to be suppressed*

Concerns that were raised included the following:

- Too much focus on the 'Koori Court';
- A lack of understanding that the job extends to the 'need to build community linkages;'

- Allocation of files to specific offices creates false barriers – especially given Koori family obligations (eg being told by the manager that they could not visit a family outside the boundaries of the office).
- Feel stretched – difficult to balance a caseload of Kooris and non-Kooris and what the Koori Court expects.
- A need for more discretion in enforcing community based sentences and parole. (see below)

In summary, the appointment of Indigenous Liaison Officers across prisons and community corrections has been an important initiative – a view forcefully affirmed by the Parole Board and people associated with the Koori Court. Prison based officers appear to play an important role in settling down potential management problems as well as supporting prisoners (see also under parole below). However, consideration may need to be given to the operations of the Official Visitors scheme (building on the RAJACs) to enhance its relevance to prisoners. The issues raised by the ICCOs appear to be matters deserving of further consideration so that positive momentum is not lost.

10. Managing Community Based Sentences

Our discussions with Indigenous CCOs and the Parole Board raised some interesting issues about the nature of case management and the role of discretion in the enforcement of orders requiring community supervision.

Members of the Parole Board suggested that with all clients – but especially Kooris – there is much to be said for an 'outreach' approach and for practical supports:

> *We need to have CCOs going out rather than people reporting in. If it's approached from an outreach point of view, we can also help with family, life skills.*

ICCOs expressed the same sentiments:

We need to be proactive and get out to the offender and family – not just expect them to report in. Very important to get family involved and to change the perception that CCOs are the same as police.

The exercise and regulation of discretion in the management of community supervision raises complex issues (Auditor General for Western Australia, 2001). It was generally acknowledged that many Koori people face particular hurdles in terms of compliance with orders. The Parole Board, for example, mentioned the issue of transience (and the allocation of files to specific offices) and even the general notion of parole:

It's all very middle class – expecting people to turn up for meetings, reporting and so on. Do we teach people to keep diaries – or given them diaries? But lots have phones. Centrelink in New South Wales has a system of sending an SMS to people three hours before and attendance has improved greatly.

There have been cases where we've lost contact with people and breached them: it's a special problem with Kooris who go off to see Auntie and don't bother to tell anyone. They're not necessarily doing wrong.

It is common practice in Australia for community corrections orders to start with a heavier set of obligations on an offender and for the obligations to ease off as the order proceeds. The Indigenous CCO's identified this as a problem, especially with parole orders. They said that such orders tend to be "loaded up" with conditions in the early months – "at the very time people are trying to readjust". They suggested that obligations should be more evenly spread throughout the order. More generally the Indigenous CCO's wanted more discretion and authority:

We've been appointed but we're not given enough discretion.

Judged by comments from a range of key people, there appear, therefore, to be a number of points that merit consideration with respect to the enforcement of community based orders on Koori offenders. These include a system of reminders about appointments (perhaps by SMS) and, more fundamentally, consideration of a proactive 'outreach' based philosophy, rather than the more reactive model that relies on people reporting.

11. Parole and Home Detention

Parole

The appointment some years ago of a leading member of the Koori community (Jim Berg) to the Parole Board was seen by many respondents (including prisoners, RAJACs and other Parole Board members) as of enormous symbolic and practical significance. However, Board members commented that they would often like more cultural and family information, not unlike the Koori Court:

> *I'm frustrated that we have no specialist assistance to help with family – especially when stolen. We judge the individual out of context and it would help to express a decision if we had access to that material*

As noted earlier, Parole Board members identified a number of issues with respect to post-release supervision and were concerned about whether Koori parolees have higher breaching rates on parole. However, they said that they do not have a statistical breakdown of breach rates by Aboriginal / Non-Aboriginal status.

Prisoners identified a number of areas of concern:

- Program delivery was an issue. At Port Phillip, for example, Indigenous prisoners said:

> *The Board makes programs an issue and then it's impossible for us to get on them.*
>
> *Get knocked back when programs not delivered.*

At Dame Phyllis Frost, women spoke of the stress in trying to access programs and not knowing if they will be done by the parole date.

- ◊ As already noted, Koori prisoners have concerns about the relevance of some programs and whether the Parole Board places sufficient weight on 'non-

standard' programs such as the Maru Mali cultural program. To the women at Dame Phyllis Frost this was obviously a program of enormous significance but they were under the impression (rightly or wrongly) that it is not given great weight.

- Parole interviews: The Parole Board interviews prisoners at some stage before release. We were informed that this is often around 6 weeks prior to their parole release date but that some prisoners are also seen earlier in their sentence. Prisoners' perceptions of these interviews were mixed. Some said that they found the process intimidating but we were also told that this was less of a problem than it had been some years ago (and " [ALO] is good – breaks the ice"). Aboriginal Liaison Officers are sometimes present in a supportive role and it was generally thought that this is a good idea, and one that should be expanded.

- The women at Dame Phyllis Frost said it would be helpful if somebody from the Parole Board (perhaps a Koori member) could come to the prison and talk more generally about the parole system and the Board's expectations – not just to interview prisoners.

Home Detention

The *Corrections and Sentencing Acts (Home Detention) Act* 2003 introduced Home Detention as both a front end option (an alternative to a sentence of imprisonment of up to 12 months) and as a back end option (early release for up to 6 months before the person would otherwise be released). The Parole Board has jurisdiction over decisions with respect to 'back end' Home Detention.

The aim of the legislation is laudable enough – to reduce the unnecessary use of imprisonment - and it is 'facially neutral' in the sense that it can in theory apply to all prisoners. However, it has all the hallmarks of legislation which will be discriminatory in impact; in other words, it will favour certain groups of offenders (such as social security fraudsters and white collar offenders) rather than others. It

seems most unlikely to have any relevance to most Koori prisoners for the following reasons:

- It is limited to people who are 'being held under minimum security conditions' (section 59(1)). As we have seen, few Kooris are in minimum security and we were told that some women who have minimum status are still in a maximum security facility.
- The scheme does not apply to people with any convictions (prior as well as current) for a range of offences involving violence (section 60A). This will count out many Kooris even where recent offences involve no violence.
- The concept of home detention with electronic monitoring seems quite incompatible with the stories of homelessness and transience that we encountered.
- The program has commenced as a three year pilot in Melbourne alone. Since many Kooris are from the regions, the pilot will have no application to them.

12. Summary

This chapter has revealed a number of areas where it should be possible to improve the position on Aboriginal prisoners and some significant legislative and policy issues:

- There appear still to be some issues of overt racism (of concern to prisoners, worker and visitors) in the prison system
- There should be further consideration of the operation of the funeral leave program and dietary provisions.
- In several respects, mental health services and offender treatment programs do not appear to be reaching or meeting the expectations of Koori inmates. Consideration should be given to refocusing some services and programs so that they are better grounded in Aboriginal terms of reference; and reflect Koori culture and life experience.
- Security ratings (and related issues such as levels of accommodation, work and gratuities) require further evaluation.

- Consideration should be given to ways to enhance cultural re-engagement.
- Linkages with support services may be enhanced through an energetic resourcing of the RAJACs.
- The introduction of Indigenous support staff in prisons and of Indigenous CCOs has been a success and merits expansion.
- Consideration should be given to the benefits of a proactive ‘outreach’ focus in managing community orders.
- The new Home Detention Scheme is profoundly discriminatory in impact.

CHAPTER 7 MOVING ON: CONCLUDING REMARKS

As we argued in the introduction to this report, systemic racism is a complex process to untangle. It is not a simple task to maintain with certainty that particular outcomes are a result of systemic racism, as opposed to a host of other contingent factors. Moreover, the research process has not involved an attempt to validate or invalidate systemic racism as a theoretical construct – this would have required an entirely different research deign and process, perhaps involving controlled comparisons of different ethnic and cultural groups to establish differences of experience and treatment in the system. Systemic racism was assumed, *a priori*, to be a factor influencing Koori experience in the criminal justice system and the focus of this inquiry was on identifying the extent to which it influenced the operation of the system and areas of policy and practice where systemic racism appeared most marked.

What was clear from the research process was that the overwhelming majority of Koori people consulted, which included workers in government and non-government agencies and the law, prisoners, clients etc. were strongly of the view that discrimination on the basis of Aboriginality was institutionalised within the system. This in itself is a worrying phenomenon, and illustrates the degree to which Aboriginal people with intimate experience of the criminal justice system continue to perceive the system as fundamentally discriminatory.

There was also a strongly held belief that racism within the criminal justice system feeds off, and in turn feeds, racism within other parts of the social system. This view is supported by some compelling statistical evidence demonstrating that continued over-representation of Koori people in the criminal justice system occurs at every stage, and on a scale not explicable simply by reference to criminogenic factors alone.

The research was undertaken at a particular moment in time and, as such, represents a snap-shot of the system at work: it reflects the particular views and experiences of interviewees available at the time. Taken in isolation, there may be grounds for minimising or playing down the significance of these experiences as isolated phenomenon or 'one off' events and not necessarily representative of general experience. However, triangulated with a wealth of accumulated research, and

including the findings of the parallel Victorian inquiry into the implementation of the Royal Commission into Aboriginal Deaths in Custody, the information tends to confirm that the criminal justice system is weighted against Aboriginal people.

1. Systemic Racism

Systemic racism, we have argued, is different from individual racism because it describes the *outcomes* of activities and processes rather than *intentions* and *attitudes*, and reflects organisational, rather than individual, failure to understand the impact of policies and procedures on Aboriginal people. Because it is concerned with outcomes and processes, the systemic racism construct does provide a valuable tool for evaluating performance in key areas. Systemic discrimination can occur “irrespective of the *intent* of the individuals who carry out the activities of the institution” (Bowling, in Macpherson, 1999). It focuses attention, therefore, on in the negative unintended consequences of policies that are imagined, designed and implemented without full realisation of their potential impact on Aboriginal people: or made on the basis of stereotyped images of Indigenous people, circulating within the cultures of organisations as well as within society at large. The difficulty in interpreting some of information garnered through this research process lies in the fact that the qualitative data tends to be anecdotal and reflects the personal experience of individuals who believe themselves to be the victims of racism.

The systemic racism construct focuses attention on institutional processes and outcomes: where racism is the product but not necessarily the intention of behaviours, policies and practices. Many Koori people we spoke to, however, described instances where they believed there was clear racist intent. They believed they were deliberately picked on or picked out on the basis of their Aboriginality, and the harm caused was deliberately inflicted, rather then being an unintended consequence of action. However, racist attitudes may be underpinned by systemic factors, individual racist attitudes do not exist in a vacuum: they may draw upon collective or culturally embedded images, stereotypes and representations of Aboriginal people. Individuals may feel empowered in their racism because that may feel that their behaviour is implicitly, if not officially, sanctioned within their organisation. Tackling systemic

racism requires a *cultural shift* in the approach agencies take to Indigenous clients, one where Aboriginality identity is not denied, ignored as irrelevant, or – worse still - viewed as the *problem* when agencies deal with Aboriginal clients.

We have gone to some lengths in this report to acknowledge the considerable successes achieved in Victoria in relation to Indigenous affairs. Victoria does have mechanisms in place to monitor practice and has created a reform environment. Rates of over-representation are lower than other jurisdictions and considerable efforts are being made both to change agency practice and empower Aboriginal communities. The Aboriginal Justice Forum, the RAJAC system and linked process under the Aboriginal Justice Agreement, are a model for both Indigenous involvement and inter-agency cooperation; as such they constitute models of best practice for other jurisdictions to follow. Similarly, the Indigenous Issues Unit in the Department of Justice plays an invaluable role in sustaining the RAJAC process while ensuring that there is coordination between community initiatives and broader justice policy. This linkage is extremely important. So too is the linkage between justice policy and the 'underlying issues' which have such a profound influence on life chances of Indigenous people.

2. Underlying Issues

The current situation in relation to Indigenous over-representation is a result of an array of historical and social factors, rooted in the unique experience of Indigenous people in Australia. There is a dynamic inter-play between criminal justice and social-structural factors. Informants were keen to point out that the underlying causes – which included health, housing and employment – simply had to be addressed before there would be any far-reaching and sustainable reductions in rates of over-representation in the criminal justice system. These can only be tackled through improved forms of partnership between Indigenous communities and levels of government.

Victoria is already participating in a Council of Australian Government-sponsored whole-of-government initiative based at Shepparton. One of eight trials nationally, the

objective is to "test new ways of doing business with Indigenous communities in an attempt to overcome long-standing issues with community wellbeing". The Shepparton trial has new has three principle elements:

- Increased Indigenous community ability to plan and act on its own behalf;
- Stronger partnership between all levels of Government and between governments and the Indigenous community;
- Changing the way governments work so they can respond holistically to community issues.

Like other initiatives, the Shepparton model takes into account the need to ensure that there is agreement between principle players. The key focus is on strengthening family wellbeing and there is recognition of the need to build community capacity:

> The interest in community capacity reflects the fundamental shift the community would like to see through the Shepparton trial. The shift involves the community having the central role in direction setting, policy development, program design and evaluation. This will require a different approach from governments such as a willingness to support community solutions, flexible ways of working and taking a long-term approach to issues rather than quick service fixes. It also requires a significant increase in the skills, resources and information within the community to carry out these tasks effectively.

Hitherto, there has a tendency for government departments across Australia to think of capacity building and governance in extremely narrow terms and equate them simply with improved service delivery (Social Justice Commissioner, 2004). The new approach involves a focus on achieving sustainability, durability and resilience in structures, processes and programmes; being committed to nurturing the necessary governance structures; and being willing to participate in capacity building processes both in Aboriginal communities and in government agencies (Blagg, 2004).

Other developments worth noting include the commitment to funding ten new Indigenous Community Patrols, following on from successful schemes such as the Bacchus Patrol (Mildura) and Rumbalara (Shepparton), and the various local strategies evolving under the Victorian Indigenous Family Violence Strategy. The

latter process may provide a habitus for nurturing initiatives around family violence which will help reduce the rates of victimisation identified in statistical section. These initiatives are important because they move the debate beyond service delivery to Aboriginal people by individual agencies, to discussions of how Aboriginal communities can be active – and equal – partners in the development of initiatives in which they play an active role.

3. Feedback from Agencies Involved in the Research

As we mentioned, the report was produced in the light of accessible material and available data. Agencies involved in the process have provided some useful feedback on the report, filling in some gaps in the data and providing an update on initiatives. It is not our intention to cover every new development in what is a rapidly changing field or rewrite the statistical section – which we believe, in any case, to be of significant value as it stands. We will, however, present some of the key concerns expressed by agencies and provide a brief update where appropriate.

Corrections Victoria

This report has been critical of the lack of available data on some issues. Corrections Victoria maintains that some available but unpublished data was not included in the report, this includes data on issues such as access to parole, breaches of community based sentences, drug courts and security ratings. Our point throughout the research process, including an interim report which set out our concerns about access and availability of data, has been that key data has been difficult to access and is not readily accessible, not that the data did not exist. We maintained that key information should not be hoarded by agencies as their exclusive property, but be widely available. If the data provides a more nuanced and positive outlook than that presented in our research then all the more reason to make this information more easy to access.

Data

Data supplied by Corrections Victoria reveals a significant rise in the number of Koori prisoners completing community based orders – from 57.3% in 2000/1 to 72.2% in 2003/4. There has also been a reported decline in the breach rate, linked to a more flexible approach to evaluating breaches. In relation to parole, the data reveals that the breach rate is still significantly higher for Aboriginal offenders than for non-Aboriginal offenders. Successful completions have increased from just over 47% in 2000/01 to just over 54% in 2003/4, however this has to be set against a general improvement completions, non-Indigenous offenders have a success rate of rising from just over 61% 2000/01 to just over 73% in 2003/04. Meaning that the *rate* of under-representation has actually increased despite this improvement.

Funeral Attendance

In regards to funeral attendance, which was identified as a serious issue by prisoners, Corrections Victoria maintains that its approach is sensitive to Indigenous culture, its policy on the issues states:

> (W)hen assessing applications for leave of this type from Aboriginal prisoners, prison management will recognise the nature of extended family relationships in the Aboriginal community and an assessment to determine eligibility will be made by the relevant Indigenous Services or Aboriginal Liaison Officer. That relevant Officer will provide advice to the Prison Manager.

Corrections Victoria also maintains that decisions about funeral attendance are based on sound advice and input from relevant sources such as the Indigenous Policy and Services Unit (IPSU) within Corrections Victoria. Additionally, Corrections Victoria argues that its own data indicates there has been a significant level of prisoners applying for and being granted leave to attend funerals in accordance with the policy.

> A co-ordinated approach between the prisons, Sentence Management Unit (CV) and the IPSU is taken to address the needs of prisoners to attend funerals of family members and be taken to meet a Funeral request.

Over the past twelve month period thirty-two (32) Indigenous prisoners have been granted funeral leave to attend funerals. It should be noted CV has provided leave for Indigenous prisoners to attend funerals interstate at Cummeragunja, in New South Wales. During the previous twelve months funeral Leave has been granted twice for interstate locations.

(R)egarding the shackling of prisoners at funerals. Precautionary measures such as this are a requirement and relates to all prisoners if considered a necessary part of external security from outside the prison environment. These stipulations are necessary to ensure security at such an emotional event. This sensitivity is acknowledged by CV staff who conduct these escorts as they are, on most occasions, in plain clothes. There can be factors which necessitate the level of restraint and these can include the prisoner's escape history and other security concerns.

Drugs and mental health

The report also raised some concerns regarding mental health issues in prison and about the use inappropriate use of medication in the women's correctional facility. Once again, we were not in a position to validate these concerns. We recognise that mental health and drug related matters are amongst the most sensitive and complex issues facing correctional facilities and are an ongoing problem across Australia. Corrections Victoria has stringent policy guidelines regarding the administration of methadone[23]. However, gaps occasionally open between policy and practice. We felt that, as on other contentious issues, the voices of Indigenous women needed to be heard and it was not our role either to validate these claims or censor these voices. At the very least, we feel it is necessary for practice to be constantly reviewed – including external review - in the light of such claims. Similarly, issues relating to mental health practices, while controversial, require further scrutiny rather than being swept under the carpet. Prisoners made claims regarding over-prescription and a tendency for drugs to be used as a management tool. However, we are also aware of the constant pressures in correctional facilities generally from prisoners themselves for drugs of various descriptions. We recognise that this is a complex issue and, once again, one requiring a deeper and more variegated analysis than we were able to provide in this project.

Indigenous liaison

As we have taken great pains to acknowledge, Corrections Victoria has innovated to meet the demands made by Indigenous prisoners in culturally appropriate fashion and already has some high quality and deeply committed Indigenous workers in correctional facilities. Information supplied by Corrections Victoria notes:

> Dame Phyllis Frost Centre (for female prisoners) has secured the services of an Indigenous nurse/midwife to attend the female prisoners on a fortnightly basis. Also, a female counsellor from an Indigenous community based organisation attends the prison on a weekly basis to visit Indigenous prisoners seeking assistance.
>
> Both these initiatives have gained strong support from the Indigenous female prisoners who now readily access the services. Reports from the Indigenous Wellbeing Officer servicing the prison indicate that the initiatives are effective in meeting the needs of prisoners.
>
> A male Aboriginal Health Worker attends Indigenous Prisoners at Port Phillip Prison on matters of health. He is employed through St Vincent's Hospital and visits once a fortnight to encourage prisoners to visit medical staff and provide a support mechanism from a health perspective.

These developments do provide a balance to the viewpoint we were given within the prison system. Naturally, the quality and availability of these initiatives require constant monitoring.

Aboriginal people we interviewed in prison expressed considerable support for initiatives designed to enhance links with Indigenous culture. This was one of the key issues for many prisoners. Aboriginal prisoners had anxieties about loss of culture (including some deep anxieties by older men and women that the young were losing even the most tenuous connection with their cultural heritage) and expressed a belief that re-connection with culture offered the best option for positive change, and there concerns raised about the lack of suitable, culturally relevant programmes. It is noteworthy, therefore that an 'Aboriginal Cultural Immersion Program (ACIP)' is due for state-wide rollout in January 2004. The ACIP is aimed at addressing the

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[23] See: Victorian Prison Opioid Substitution Therapy Program, available from Corrections Victoria, setting out the principles of the program, the first of which states that the program is only available to opiod dependent prisoners.

offending behaviour of Indigenous prisoners and offenders by reinforcing their spirituality and cultural identity. Corrections Victoria notes that:

> This initiative has recently been re-developed in conjunction with the Regional Aboriginal Justice Advisory Committees (RAJAC). The cultural content of the program is now solely based on Victorian Koori culture and Indigenous facilitators will be engaged to delivery the program in prison and community correctional facilities.
>
> The program also aims to increase Indigenous prisoners understanding of their cultural identity, with the aim of reducing re-offending, and to address their emotional and spiritual well being.

Corrections also notes that it employs three Aboriginal Wellbeing Officers (AWOs) to deliver services to Aboriginal prisoners across Victoria. One of these officers is located at Dame Phyllis Frost Centre to provide a service to the Indigenous women. It also notes that the two private prisons (Fulham and Port Phillip) administer services to Indigenous prisoners through arrangements with external Indigenous service providers.[24]

Security Ratings

Corrections Victoria makes a number of statements in response to the claims made that limited access for Kooris to minimum security: noting, for example, that previous offending history and behaviour in prison impacts on these decisions, but also that Koori's may prefer this environment, to stay with other Kooris and their support networks. A snapshot of the system on 22 November 2004, supplied by corrections, reveals that Indigenous prisoners are under-represented in minimum security (15% of sentenced Indigenous prisoners are rated minimum security as opposed to 25% of sentenced non-Indigenous prisoners): on the other hand 8% of sentenced Indigenous prisoners are rated maximum security as opposed to 11% of non-Indigenous prisoners. Corrections also acknowledges that female prisoners do not have the same range of options open to them as male prisoners and that many women who might be

[24] Space precludes listing all Corrections initiatives, a list can be obtained by contacting the Indigenous Policy and Services Unit.

eligible for minimum security prefer to stay at Dame Phyllis Frost to be close to Melbourne.

The Police

We shall now turn to the feedback from the Victorian police. They have expressed a number of reservations, notably that the research does not fully explore the impact of systemic racism on policies and procedures, and that a number of important initiatives are neglected. We do not intend to respond to these assertions in detail, other than to say that were somewhat surprised by the assertion that we did not explore policies and procedures. Chapters 1 to 5 of the research explores the systemic racism construct and its strengths and limitations, and goes on to examine a range of initiatives in Victoria and elsewhere through the lens of systemic racism. We concluded, based upon a wealth of existing works, that Aboriginal involvement in the design, management ad implementation of programs offers the best strategy for eliminating systemic bias. Important initiatives such as juvenile diversionary conferencing, are critiqued from this perspective – vital lessons given planned expansions of Victoria's conferencing system – so too are police bail policies, bail justices, community justice panels, police strategic plans, court decision making, disparities in sentencing between rural and urban areas, the evolution of Koori Courts and other initiatives.

Victoria Police also question why there is considerable discussion in the report on Indigenous people's relations with a diversity of agencies, rather than just criminal justice agencies. Systemic racism in the criminal justice system, we have maintained, cannot be simply decoupled from discussions about the overall relationship between Indigenous people and white society. This has been an acknowledged since the Royal Commission into Aboriginal Deaths in Custody. As we noted in Chapter 1, the Commission was clear that reforming the criminal justice system would not, in itself, eliminate over-representation, unless such reforms are paralleled by strategies designed to effect the "social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them." (Johnson, 1991: vol 4,1). This means that we are compelled to

take into account the relationships between Indigenous people and a host of agencies when attempting to develop strategies for reform.

In our sections on the police we reported that some Koori people believed that the Community Justice Panels should become 'owned' by local communities and we suggested that they could evolve along the lines of community justice groups. We added the caveat, however, that CJPs, as presently constructed, did enjoy wide support in the Koori community. Victoria police have responded that, in a practical sense, CJPs already are community initiatives, with the police only providing the secretarial and administrative support. The police have conducted a comprehensive review of the CJPs, covering issues such as funding, recruitment and training of volunteers, objectives and aims, and the suitable location of services. The whole question of appropriate community justice mechanisms is one currently being debated across Australia and views on the issue will certainly evolve and develop over time. There needs to be continuing and sustained discussions between the police, local communities and representative bodies on the management and scope of these initiatives.

Department of Human Service, Juvenile Justice Section

In our report we made reference to some problems regarding a perceived 'deallocation' of dual order clients. Juvenile Justice, while acknowledging that this is an issue, does have a client assessment and planning process in place requiring that coordinated case management. This involves juvenile justice and child protection workers and custodial and community services working together, particularly on pre-release plans, and preparation for Youth Parole. Juvenile Justice is also developing a new risk and needs assessment tool intended to improve client assessment and planning and is beginning a Rehabilitation Review with the aim of assessing the needs of clients and designing more culturally appropriate services. In relation to diversionary options, there are a number of initiatives, including:

- the Koori Juvenile Justice program, employing 12 Koori workers, which offers culturally based programs for at risk young people, young people when in contact with police or courts; and
- the Community After Hours Bail and Placement Service (CAHABPS) which offers a state-wide after hours service to young people, courts and police to try to find alternatives to custodial remand. Juvenile Justice is also involved with the Victoria Aboriginal Legal Service in the development of a Police Diversion pilot program for Aboriginal young people in two rural locations. As a postscript to our discussion of the Koori Court, the Department of Justice and the Department of Human Services are involved in the development of a pilot Children's Koori Court which will be able to hear sentencing matters on findings of guilt cases as well as guilty plea cases.

We can conclude from this discussion that the picture in relation to Victoria is, in many respects, better then in many other jurisdiction and that more has been done to eliminate racist practices in the police and other agencies than in many other states and territories. The quality of juvenile diversionary work – resting on good cooperation between the Victoria Police and the Department of Human Services - ensures that far fewer juveniles are processed through the juvenile justice system than in comparable jurisdictions. The 'dual track' system provides a diversionary option from adult prison for young people aged 17 to 21 years. The network of community justice panels (irrespective of some reservations about current funding levels, the current scope of their activities and some suggestions that they should be entirely community owned) were viewed very positively by respondents. We also found considerable evidence of good working relationships between local Aboriginal people in urban and rural areas and local police. There were exceptions to this and, once again, we must stress that we were not in a position to validate, or invalidate, claims of racism and sexism made during a number of interviews. Our intent was to relay the information and allow marginal voices to be heard.

4. Recommendations

It is the finding of this report that continuing over-representation in the criminal justice system is a product of multiple and interacting patterns of disadvantage. The report was commissioned to specifically to capture how Aboriginal people experience the criminal justice system, and to capture the views of Aboriginal people in their raw and unedited state. While reforms to the criminal justice system are essential in reducing levels of over-representation, these must be complemented by broader reforms focusing on employment, education and the strengthening of Indigenous cultural and family life. The research firmly reinforces the key message of the RCIADIC and the VAJA, that the resolution of Aboriginal disadvantage can only be achieved through empowerment and self-determination. This report aims to challenge the invisibility of Indigenous people in research of this type.

There are specific recommendations that arise from the research that related o building on existing initiatives to try and address systemic discrimination, but which are specific to Indigenous Australians. These are summarised below.

1. Statistics

Statistics provide an indispensable mechanism for ensuring that the workings of the criminal justice system are visible to outside scrutiny. Monitoring the system, and through monitoring ensuring accountability, is impossible without adequate data.

1.1 Measures should be taken to rectify deficiencies with respect to survey-based data relating to Aboriginal victimisation levels. The scarcity of survey-based data that facilitates comparison of Aboriginal and non-Aboriginal victimisation levels inhibits prioritisation and evidence-based targeting of intervention strategies and resources.

1.2 Currently it is impossible to adequately monitor police management of drunken detainees. The Royal Commission into Aboriginal Deaths in Custody maintained that the incarceration of Aboriginal people on drink related issues was an 'indirect means of arrest' (Johnston, 1991, vol 3, 2) and recommended that diversionary alternatives be found. The 2001 Parliament of Victoria Drugs and Crime Prevention Committee's *Inquiry into Public Drunkenness,* was critical of the very limited statistical data regarding the management of public drunkenness. Currently, police statistics for those processed for public drunkenness offences and numbers in police lock-ups are not readily accessible. The police should make this information available so that the system can be adequately monitored.

1.3 Our scan of available court statistics found no data that disaggregated case flow or outcome statistics by Indigenous status. Thus, it has not been possible to determine the extent of over-representation of Indigenous defendants in convictions or the type of sanctions issued by the courts. There are indications that the relevant data may be collected by the Department of Justice but is not in accessible form. This data should be made accessible.

1.4 Information about the number of persons and the nature of offences dealt with by Koori Courts has not been readily accessible. This data should be collected and made available.

1.5 Like court outcome statistics, publicly available data on Indigenous access to bail could not be located. This should be rectified.

1.6 Despite the acknowledged high incidence of domestic and family violence in Aboriginal communities throughout Australia, little is known about the prevalence of or trends in different forms of domestic/family violence in Victoria. Although a Family Violence Database has been established by government, the database is still in its infancy and improvements are still required, particularly in the identification and reporting of the Indigenous status of victims/offenders; the identification of repeat victims and offenders; and in

establishing appropriate linkages between data sources. These improvements require attention.

1.7 There is an absence of information about Indigenous offenders serving community orders and those released on parole. Parole decisions by the Adult Parole Board of Victoria are not currently disaggregated by ethnic appearance or Indigenous status. In addition, there is little available information about the extent to which Indigenous offenders complete such orders (successfully or otherwise). This information should be made available.

1.8 Both census-based (stock) and reception-based (flow) measures of the extent of Indigenous over-representation in the prison system should be routinely reported, to provide a true measure of Indigenous involvement in the correctional system.

1.9 Better statistics are required on the placement of prisoners within the prison system, including security ratings, and levels of accommodation and work.

1.10 The recording the Indigenous status across the criminal justice system is generally patchy and inadequate. This issue needs to be addressed at government level. The Aboriginal Justice Forum should discuss with government establishing an independent "warehouse" for data collection, storage and dissemination along the lines of the Crime Research Centre (Western Australia).

2. Crisis Intervention Strategies

2.1 Kooris reported being victims of what they perceived as racist treatment at critical moments and in extreme crisis situations by a range of organisations. These often occurred in the immediate period following release from prison (and other institutions such as psychiatric facilities) when there were problems of re-integration and re-entry in to communal and family life: issues such as such as family violence, accommodation, drug and alcohol and mental health issues were

highlighted as areas where ex-offenders and their families found it difficult to attract the support of government agencies. There needs to be further focused research on the immediate post-release period and the needs of newly released offenders and their families, and the differing needs of Aboriginal male and female offenders. There should be a particular emphasis in this research on developing culturally appropriate post-release crisis intervention services, particularly in rural areas. These crisis intervention services must be integrated, work on a multi-disciplinary basis and liaise closely with RAJACs and bodies such as Aboriginal Community Justice Panels.

2.2 There needs to be a new initiative directed at preventing family violence (and related issues) by working with young people. This initiative should be community based and link with the Indigenous Family Violence Strategy.

2.3 The Parole Board needs to be educated and informed about 'non-standard' programs such as the Maru Mali cultural program, and that involvement in these programs be taken into account when looking at issues of parole.

3. Young People: Drugs, Mental Health and Family Violence

3.1 Many Koori adolescents are at risk of involvement in the criminal justice system due to a range of problems (drugs, alcohol, relationship and family violence, marginalisation and disengagement from the eduction system). Yet, few services focus –holistically- on this issue. Government, in collaboration with VACCA and other relevant Koori agencies, should urgently review this issue and devise appropriate strategies.

4. Community Patrols

4.1 Aboriginal Community Patrols play a valuable role in diverting young people at risk from contact with the criminal justice system and enjoy widespread support from Aboriginal organisations. The expansion of the Patrol's initiative

by the Department of Justice is extremely welcome. The Department should ensure RAJACs and organisations such as Community Justice Panels are closely involved in the management of Patrol initiatives. There should also be a commitment to reviewing the work of Patrols, with a strong emphasis on seeking the views and opinions of young people.

Sobering Up/Withdrawal Services

4.2 Similarly, Sobering Up facilities play a vital role in reducing negative contact with the system. They need to be adequately resourced and expanded across the state. Our research supports the general thrust of the recommendations (Recs 10 to 25) made by the 2001 Parliament of Victoria Drugs and Crime Prevention Committee's *Inquiry into Public Drunkenness.* In particular, attention should be paid to recommendation 11, which calls for the expansion of these facilities in rural areas and in Melbourne, recommendation 13, which calls for centres to be linked in with holistic 'healing centres', and recommendations 14 & 15, which call for Indigenous Night Patrols linked to sobering-up centres, funded by DHS.

5. Community Justice Panels

5.1 Community Justice Panels fulfill an important role and have strong support in the community. Consideration should be given to expanding their role, with adequate resourcing.

We recommend that:

- Community Justice Panels be renamed Community Justice Groups;
- Further consultations with Aboriginal communities be undertaken to assess the potential for them to be managed solely by Aboriginal organisations;

- Their role be enhanced to include – in consultation with relevant agencies – developing diversionary options, working with courts, instituting post-release programmes.

To fulfil these roles the Community Justice Groups need to be adequately resourced.

6. Policing

The research highlighted concerns by Aboriginal people regarding police behaviour and attitudes towards Aboriginal people – particularly in rural areas. These included concerns about over-policing, lack of adherence to protocols governing the detention and interrogation of suspects, and racist and sexist behaviour. Of particular concern was the widespread lack of faith in, and outright cynicism about, existing complaints mechanisms. This is a serious matter because credible complaints mechanisms represent a crucial means of both redressing individual grievances and highlighting unacceptable cultural practices in organisation.

6.1 The police service needs to rigorously monitor adherence by officers to guidelines governing interviewing of suspects –particularly juveniles. The police should review, in consultation with RAJACs, appropriate agencies and the Aboriginal Justice Forum, policies and procedures regarding racist and sexist language and behaviour by officers. Thought needs to be given to changing police culture through improved gender and cultural awareness training.

6.2 Police practice in some country towns – including intimidation and harassment, over-policing of Koori people, discriminatory behaviour, targeting of Koori juveniles – was strongly criticised in the consultations. There is a strong perception amongst the Koori community that such practices still exist. The police should address these concerns in consultation with the RAJACs and the Aboriginal Justice Forum.

7. Complaints Mechanisms

7.1 Existing Complaints mechanisms in relation to both police and prisons were held in little esteem throughout our consultations. Interviewees favoured external forms of review rather than internal processes. The increased powers and resources granted to the Ombudsman in recent months may go some way to reducing these concerns, however, the situation requires careful attention. The findings of this report and the outcome of the AJF deliberations should be forwarded to the Ombudsman particularly in light of his recent announcement to conduct an investigation into the conditions for persons held in custody.[25] The Ombudsman needs to be proactive in engaging closely with Aboriginal people – particularly young people in rural areas – and inform them of complaints process. Allied to this, resources need to be made available to organisations concerned with the legal rights of young people to conduct workshops with young people about their legal rights.

8. Koori and Other Courts

8.1 There was a strong belief amongst Kooris that the Koori Court was an important innovation. It should be extended to other regions of the state, and the Children's Courts. Also, it should no longer be restricted to guilty pleas.

8.2 The Koori Liaison Officer in the Magistrates' Court in Melbourne plays a vital role. Where Koori Courts are not an option, greater resources should be invested in Koori liaison staff.

9. Legal Representation

9.1 The variable quality of legal representation for Kooris is a serious issue. VALS is seriously under-resourced to meet the needs of the Koori community,

[25] Letter from Ombudsman dated 8 July 2005 to Equal Opportunity Commission of Victoria.

particularly in the regions. Properly resourced, VALS should play a role in legal education as well as legal representation. VALS should be provided with adequate funds to enhance its existing regional services to meet the current demand for representation of Indigenous people.

10. Chroming

10.1 The new anti-chroming laws require very careful monitoring and evaluation, especially in terms of their impact on Aboriginal youth. The Act requires the Chief Commissioner to report to the Minister on various factual matters such as the number of searches conducted under the Act; the type and amount of substances seized; and the number of persons apprehended and detained. However, in order to evaluate whether there is a problem of systemic racism, there should also be reference to:

- Aboriginal status
- Age
- Region
- Whether criminal charges were laid
- Period of detention; and
- Place of detention

11. Child Protection & Juvenile Justice

11.1 Many young Kooris are subject to child protection as well as juvenile justice orders. However, it did seem clear that there are areas that need better case management and coordination when there are overlapping children's protection and juvenile justice issues. There are a number of issues for DHS to review, including:

- the extent of "de-allocation";

- the quality of communication between different parts of the Department of Human Services, such as Youth Training Centre Staff, other Juvenile Justice staff and those involved in child protection ;
- the quality and consistency of case management from regional level agencies.

12. Youth Detention Centres

12.1 DHS should also review policies and the quality of training and management around racist language and behaviour in youth detention centres

13. Youth Remands

13.1 Concerns were raised that youth remands are sometimes still being used as a form of "back door sentencing"- and that this seems to be more prevalent with rural (and Koori) youth than with metropolitan youth. Data should reflect whether this observation is true and if so then this is unacceptable and the practice must be changed.

14. Bail

14.1 The Victorian Law Reform Commission's recommendations in relation to Bail, that s4(2)(c) be repealed should be implemented. This matter well researched in their report and the findings of the report need to be revisited in the context of this research.

15. Racism and Culturally Appropriate Policies in Prisons

15.1 There appear still to be some issues of overt racism (of concern to prisoners, worker and visitors) in the prison system. This needs to be the subject of further inquiry and measures adopted to reduce the problem. At the very least there needs to be a through review of existing forms of cultural awareness training and some ongoing process of monitoring prison officer behaviour instituted. As in recommendation 7.1, mechanisms need to be devised to increase prisoner confidence in complaints procedures. Once again a proactive stance by the Ombudsman

15.2 Notwithstanding existing policies and the real strides taken by Corrections Victoria to ensure that culturally appropriate polices are developed to meet Aboriginal concerns. There should be further consideration of the operation of the funeral leave program and dietary provisions in prison. At the very least, prisoners need to be regularly informed of policies in relation to funerals in consultation with Indigenous support staff.

15.3 In several respects, mental health services and offender treatment programs do not appear to be reaching or meeting the expectations of some Koori inmates. Consideration should be given to refocusing some services and programs so that they are better grounded in Aboriginal terms of reference; and reflect Koori culture and life experience.

15.4 Security ratings (and related issues such as levels of accommodation, work and gratuities) require further evaluation.

15.5 It is recommended that consistent with the views of the women at Dame Phyllis Frost said it would be helpful if somebody from the Parole Board (perhaps a Koori member) could come to the prison and talk more generally about the parole system and the Board's expectations – not just to interview prisoners

15. Connecting to Culture

16.1 Consideration should be given to ways to enhance cultural re-engagement. Prisoners experience loss of contact with the Koori community as well as family. Linkages with support services may be enhanced through an energetic resourcing of the RAJACs, finding out what prisoners want and in a sense brokering what they need to ensure continued engagement with their own culture.

16. Koori Support Workers

17.1 The introduction of Indigenous support staff in prisons and of Indigenous CCO's has been a success and merits expansion. Aboriginal Liaison Officers are sometimes present in a supportive role and it was generally thought that this is a good idea, and one that should be expanded.

18. Community Orders and Home Detention

18.1 Consideration should be given to the benefits of a proactive 'outreach' focus in managing community orders.

18.2 The new Home Detention Scheme is profoundly discriminatory in impact. It needs to be redesigned to accommodate the needs and life patterns of Indigenous people and its redesign should accommodate the views of Indigenous people.

APPENDIX 1 INTERVIEWS, FOCUS GROUPS AND MEETINGS

Courts/Judiciary

Youth Parole Board

Adult Parole Board

Law Reform Commission of Victoria

Judges and Magistrates assembled by the Judicial College

Magistrate Shepparton Koori Court

Elders at Shepparton Koori Court

Aboriginal workers attached to the Shepparton Koori Court, Broadmeadows Koori Court and the Melbourne Magistrates Court

There were also observation visits to the Shepparton and Broadmeadows Koori Courts

Legal Services

Victorian Aboriginal Legal Service

Fitzroy Legal Services

Police

Assistant Commissioner (Operations) Simon Overland

Staff in the Aboriginal Advisory Unit

Community Based Organisations (non-Aboriginal)

Youth Affairs Council of Victoria

Jesuit Social Services / Brosnan Centre

Government Organisations/Agencies

Youth Substance Abuse Services
Indigenous Policy and Services Unit, Corrections Victoria
Indigenous staff, Corrections Victoria
Director, Policy and Projects, Department of Human Services
Corrections Inspectorate
Indigenous Issues Unit, Department of Justice
Aboriginal Affairs Victoria
RCIADIC review Committee
Department of Human Services – Juvenile Justice Section
Department of Justice, Law and Policy Unit

Academics

Professor Arie Frieberg
Professor Ken Polk
Assoc Professor Christine Alder (also on Parole Board)

RAJAC

There were interviews and meetings with members of the following RAJACs:
Metropolitan
Loddon Mallee
Gippsland
Grampian

Aboriginal Community Based

Enmaraleek Community Association

Ngwala Willumbong Cooperative
VACSAL
Thornbury Aboriginal Advancement League,
Bert Williams Centre
Preston Community Health Centre
Victorian Aboriginal Child Care Agency
Dulin Incorporated
Elizabeth Hoffman House

Through these organisations were able to interview 29 Koori clients along with staff.

Community focus groups Loddon Mallee Region

Bendigo Two focus groups, 25 young people plus local Aboriginal staff
Karayama Focus group of 9 Aboriginal women
Echuca Focus of 12 Aboriginal adults
Mildurah Meeting with workers from Community Patrol and Safe House

Prison and Detention Centres

Parkville Group interview, 5 Koori youth
Plus 2 staff group meetings comprising Parkville staff and juvenile justice workers

Melbourne Assessment Prison: group of 18 prisoners and remandees
Dame Phyllis Frost Centre: group of 8 women and Aboriginal staff
Port Phillip Prison: group of 11 men and Aboriginal staff

Aside from those interviewees in government and community organisations we were able to interview 117 Koori people as part of the process.

APPENDIX 2 CONSENT FORMS

I

INFORMATION SHEET (CORRECTIONS)

PROJECT: “Is the System Fair to Koori People?” Systemic Racism in the Criminal Justice System as a Factor Contributing to Aboriginal Over-Representation.

RESEARCHERS: Dr Harry Blagg, Crime Research Centre, 089 380 1578
Dr Neil Morgan, Crime research Centre, 089 380 3441

Would you like to be part of this research?

This sheet tells you what taking part in the research would involve. Please read the sheet and ask any questions you might have. You can talk about it with a friend, relative or health worker if you want to.

Why are we doing this research?

We want to know if there is **systemic racism** against Aboriginal people in the criminal justice system. Systemic racism is where policies or operations of the criminal justice system result in Aboriginal people being treated worse than other Australians.

What would I have to do?

A researcher would ask you some questions. We would like to know whether you feel you have been treated fairly by the system. You would be asked questions about:

- contact with the police
- contact with courts
- whether you have understood what was going on

This interview might be in a group, with a friend or by yourself. The researcher would take notes about what you said. It would take about half an hour.

Don't want to be interviewed but want to tell your story? You can write your story down, or tell it to a relative or Elder.

What's in it for me?

By taking part you can help in highlighting any bias in the system. This may lead to changes that will help Aboriginal youth in the future.

You will not be paid for taking part in this research.

What can go wrong?

Sometimes, talking about past events can be painful. You can stop the interview at any time. If you are upset we have Cultural Support Workers that you can talk to.

What will happen to what I say?

The answers you give will be shared by the researchers only. No one else will have access to them. Your name will not be on the notes.

What you and other young Aboriginal people say will be used to write a report. You will not be identified in the report. This report will be given to the Equal Opportunity Commission Victoria. This is a government organisation that works to make sure that all Victorians get a fair go. They will write a report for the Victorian Aboriginal Justice Forum. This is a group of Aboriginal organisations and government

Please do not tell us about any illegal things you may have done. We may not be able to protect this information. We may also have to report self-harm and abuse if we are made aware of it.

Got a problem?

If you have a problem or complaint about this project, please contact: Dr Donna Cohen of the Department of Human Services: 9637 4239

This project has been approved by the Human Research Ethics Committee of the Department of Human Services.

Where to from here?

It is your choice whether you take part in this research. You do not have to. If you choose to take part you can stop at any time. Please ask us any questions you want to.

If you want to take part you need to sign the Consent form. You will be given a copy of this sheet and the consent form to keep.

CONSENT FORM (CORRECTIONS)

Project: Systemic Racism in the Criminal Justice System as a Factor Contributing to Aboriginal Over-Representation

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I have read and I understand the Information Sheet.

I agree to take part in this project.

I will be given a copy of the Information Sheet and Consent Form to keep.

The researcher will not identify me in any report or public presentation.

Participant's Name (printed) ……………………………………………………

Signature Date

Name of Witness to Participant's Signature (printed)

……………………………………………

Signature Date

Researcher's Name (printed) ……………………………………………………

Signature Date

Note: All parties signing the Consent Form must date their own signature.

CONSENT FORM (CORRECTIONS)

Project: Systemic Racism in the Criminal Justice System as a Factor Contributing to Aboriginal Over-Representation

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I have read, or have had read to me and I understand the Information Sheet, dated…….

I give my permission for**…………** to participate in this project according to the conditions in the Information Sheet.

I will be given a copy of the Information Sheet and Consent Form to keep.

The researcher has agreed not to reveal the participant's identity and personal details if information about this project is published or presented in any public form.

Participant's Name (printed) ……………………………………………………

Name of Person giving Consent (printed)

……………………………………………………

Relationship to Participant: ……………………………………………………

Signature   Date

Name of Witness to Parent/Guardian Signature (printed) ……………………………

Signature   Date

Researcher's Name (printed) ……………………………………………………

Signature   Date

Note: All parties signing the Consent Form must date their own signature.

INFORMATION SHEET (JUVENILE JUSTICE)

PROJECT: Systemic Racism in the Criminal Justice System as a Factor Contributing to Aboriginal Over-Representation.

RESEARCHERS: Dr Harry Blagg, Crime Research Centre, 089 380 1578
Dr Neil Morgan, Crime research Centre, 089 380 3441

Would you like to be part of this research?

This sheet tells you what taking part in the research would involve. Please read the sheet and ask any questions you might have. You can talk about it with a friend, relative or health worker if you want to.

Why are we doing this research?

We want to know if there is **systemic racism** against Aboriginal people in the criminal justice system. Systemic racism is where policies or operations of the criminal justice system result in Aboriginal people being treated worse than other Australians.

What would I have to do?

A researcher would ask you some questions. We would like to know whether you feel you have been treated fairly by the system. You would be asked questions about:

- contact with the police
- contact with courts
- whether you have understood what was going on

This interview might be in a group, with a friend or by yourself. The researcher would take notes about what you said. It would take about half an hour.

Don't want to be interviewed but want to tell your story? You can write your story down, or tell it to a relative or Elder.

What's in it for me?

By taking part you can help in highlighting any bias in the system. This may lead to changes that will help Aboriginal youth in the future.

You will not be paid for taking part in this research.

What can go wrong?

Sometimes, talking about past events can be painful. You can stop the interview at any time. If you are upset we have counsellors that you can talk to.

What will happen to what I say?

The answers you give will be shared by the researchers only. No one else will have access to them. Your name will not be on the notes.

What you and other young Aboriginal people say will be used to write a report. You will not be identified in the report. This report will be given to the Equal Opportunity Commission Victoria. This is a government organisation that works to make sure that all Victorians get a fair go. They will write a report for the Victorian Aboriginal Justice Forum. This is a group of Aboriginal organisations and government

Please do not tell us about any illegal things you may have done. We may not be able to protect this information. We may also have to report self-harm and abuse if we are made aware of it.

Got a problem?

If you have a problem or complaint about this project, please contact: Dr Donna Cohen of the Department of Human Services: 9637 4239

This project has been approved by the Human Research Ethics Committee of the Department of Human Services.

Where to from here?

It is your choice whether you take part in this research. You do not have to. If you choose to take part you can stop at any time. Please ask us any questions you want to.

If you want to take part you need to sign the Consent form. You will be given a copy of this sheet and the consent form to keep.

CONSENT FORM

Project: Systemic Racism in the Criminal Justice System as a Factor Contributing to Aboriginal Over-Representation

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I have read and I understand the Information Sheet.

I agree to take part in this project.

I will be given a copy of the Information Sheet and Consent Form to keep.

The researcher will not identify me in any report or public presentation.

Participant's Name (printed) ……………………………………………………

Signature Date

Name of Witness to Participant's Signature (printed) ……………………………………………

Signature Date

Researcher's Name (printed) ……………………………………………………

Signature Date

Note: All parties signing the Consent Form must date their own signature.

CONSENT FORM

Project: Systemic Racism in the Criminal Justice System as a Factor Contributing to Aboriginal Over-Representation

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I have read, or have had read to me and I understand the Information Sheet dated…………

I give my permission for……………to participate in this project according to the conditions in the Information Sheet.

I will be given a copy of the Information Sheet and Consent Form to keep.

The researcher has agreed not to reveal the participant's identity and personal details if information about this project is published or presented in any public form.

Participant's Name (printed) ……………………………………………………

Name of Person giving Consent (printed)

……………………………………………………

Relationship to Participant: ……………………………………………………

Signature Date

Name of Witness to Parent/Guardian Signature (printed) ……………………………

Signature Date

Researcher's Name (printed) ……………………………………………………

Signature Date

Note: All parties signing the Consent Form must date their own signature.

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