CHAPTER 5
Criminalisation and Policing in Indigenous Communities
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Introduction

There are two broad purposes to this chapter. The first is to build on the analysis provided in the previous chapter and to consider in more depth the processes of criminalisation of Indigenous people in Australia through policing and the criminal law. The second purpose is to reflect on contemporary Indigenous modes of policing and governance.

State policing in Indigenous communities is an important issue on any range of measures. For example, members of the Indigenous community of Palm Island were so impassioned after a death in police custody, they destroyed the local police station and courthouse. This should give us pause to reflect on community attitudes to criminalisation and the volatility of Aboriginal/police relations. In Western Australia Aboriginal people are 12 times more likely to be arrested than non-Aboriginal people, and for Aboriginal women the over-representation in arrests compared to non-Aboriginal women is 47 times more likely (Blagg 2016: 75). Conversely, Indigenous victimisation rates are also high. The Steering Committee for the Report of Government Service Provision (SCROGSP) noted that, nationally, between 2010-2014 the rate of homicides for Indigenous people was 6.4 times the rate found among non-Indigenous people (SCROGSP 2016: 4.103). Further, Indigenous people were more than 2.5 times more likely to report being victims of physical or threatened violence than their non-Indigenous counterparts (SCROGSP 2016: 4.101).

Clearly, policing and the criminal law play a large part in Indigenous people's lives. As the Law Reform Commission of Western Australia (2006: 192) noted:

> Historically Aboriginal people have been subject to oppressive treatment by police. As a consequence, Aboriginal people often distrust and resent police officers. During the Commission's consultations many Aboriginal people complained about their treatment by police. The lack of respect by police for Aboriginal people generally, and for Elders and community leaders, was highlighted. Many Aboriginal people believe there is extensive racism within the police service. Lack of sensitivity by police towards Aboriginal victims and lack of appropriate support for victims of family violence were also mentioned. Many communities commented that young Aboriginal people were treated poorly by police. It is clear that relations between Aboriginal people and the police are still extremely strained.

Indeed, the Law Reform Commission's comments above echoed those of the Federal Race Discrimination Commissioner 15 years earlier when she stated: 'Aboriginal-police relations have never been good, but they have now reached a critical point due to widespread police involvement in acts of racist violence, intimidation and harassment' (Moss 1991: 4). Problems with policing and criminalisation in Indigenous communities are well documented (Blagg 2016, Cunneen 2001a, Johnston 1991, HREOC 1991). A key driver to reform the relationships between Indigenous people, the police and the criminal justice system over the last several decades have been the recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCADIC).

The Royal Commission into Aboriginal Deaths in Custody

The RCADIC was established in 1987 and reported to the federal parliament in 1991. It was generated by the activism from Aboriginal organisations including the Committee to Defend Black Rights and Aboriginal Legal Services, the families of those who had died in custody and their supporters. From the

early 1980s there had been a number of deaths in police and prison custody which caused serious alarm among Aboriginal communities across the country. These included in particular the deaths of John Pat in Western Australia (who was a juvenile at the time and died after a pub brawl involving police), and Eddie Murray in New South Wales (picked up by police for public drunkenness and died from hanging in a police cell).

Two thirds of the 99 deaths investigated by the RCADIC had occurred in police custody. Many of those who had died were in police custody for minor public order offences, or for protective custody arising from intoxication (Johnston 1991: vol 1, 12–13). The Commission found that the high number of Aboriginal deaths in custody was directly relative to the over-representation of Aboriginal people in custody. However, failure by custodial authorities to exercise a proper duty of care was also exposed. The RCADIC found that there was little understanding of the duty of care owed by custodial authorities. There were many system defects and there were many failures to exercise proper care. In some cases, the failure to offer proper care directly contributed to or caused the death in custody (Johnston 1991: vol 1).

Commissioner Wootten in his report on New South Wales, Victoria and Tasmania noted that 'every one of the [18] deaths was potentially avoidable and in a more enlightened and efficient system … might not have occurred. Many of those who died should not or need not have been in custody at all' (Wootten 1991a: 7). He found that 'negligence, lack of care, and/or breach of instructions on the part of custodial authorities was found to have played an important role in the circumstances leading to 13 of the 18 deaths investigated' (Wootten 1991a: 63).

The RCADIC found that the most significant contributing factor to bringing Indigenous people into contact with the criminal justice system was their disadvantaged and unequal position within the wider society. The elimination of Indigenous disadvantage would only be achieved through empowerment, self-determination and reconciliation. The RCADIC also found that in the 99 deaths it investigated, the Aboriginality of the person played a significant and in some cases dominant role in the reason for the person being in custody and dying in custody. In almost half of the cases the person had been removed from their families as a child, and a similar proportion had been arrested for a criminal offence before they were 15 years old. In general, those who died had early and repeated contact with the criminal justice system (Johnston 1991). Understanding racism in the criminal justice system was fundamental to the RCADIC which found that racism was 'institutionalised and systemic, and resides not just in individuals or in individual institutions, but in the relationship between the various institutions' (Johnston, 1991: vol 4, 124).

The RCADIC made 339 recommendations to achieve the ends of reducing custody levels, remedying social disadvantage and assuring self-determination. All Australian governments committed themselves to implementing the majority of recommendations. It is now more than 25 years since the RCADIC handed down its final report. Despite its recommendations, Indigenous over-representation in prison has increased. There has been much discussion as to why this happened, including the efficacy of the recommendations and their (lack of) implementation, increased police powers, more punitive approaches to law and order (including access to bail, community-based orders and parole), harsher sentencing by the courts (including greater use of imprisonment) and the failure to respect Indigenous self-determination (Cunneen 2011a; Australian Indigenous Law Review 2011; Royal Commission Special Report 2016).

DISCUSSION QUESTION

What criteria might we use to determine the success or failure of the RCADIC?

Policing and Minor Offences

Many of the recommendations from the RCADIC dealt with diversion from police custody, focusing on, for example, decriminalising public drunkenness, providing sobering-up shelters, and changing practice and procedures relating to arrest and bail (particularly for minor offences).[1] Public order offences and police powers to intervene in public places remain among the most contentious issues in the application of the criminal law and policing of Indigenous people. Criminal behaviour is behaviour which is legally defined as 'wrong'. It is also socially defined behaviour. For example, possession and use of a drug such as heroin by adults is a criminal offence, while possession and use of another drug, alcohol, is legal. Behaviour which is criminal is not fixed, but changes with changing social attitudes. During the period of the late 1970s to the 1990s many states and territories in Australia decriminalised public drunkenness, although police still retain power to detain a person who is seriously intoxicated in public. Legislation abolishing the criminal offence of public drunkenness was passed in the Northern

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[1] Changes to police practice and legislation to enhance diversion from police custody are called for in recommendations 60–61, 79–91 and 214–233 (Johnston 1991: vol 5).

Territory in 1974, New South Wales in 1979, South Australia in 1984, Western Australia in 1989, the ACT in 1994 and in Tasmania in 2000. Public drunkenness remains a criminal offence in Victoria and Queensland.

Despite the decriminalisation of public drunkenness in most jurisdictions, many Indigenous people still come into contact with the criminal justice system because of the public consumption of alcohol. In part these problems are related to the use of protective detention, the use of local council by-laws prohibiting possession and consumption of alcohol and other restrictions. For example, the Northern Territory's laws prohibiting alcohol consumption within two kilometres of licensed premises, the declaration of restricted areas, alcohol mandatory treatment orders and banned drinker orders can all give rise to criminal offences if breached (Buckley 2014). In Queensland criminal penalties apply to breaches of alcohol management plans (Cunneen 2005a). Some alcohol restrictions only apply to Indigenous communities.

Recommendations 80–84 of the RCADIC had called on governments to fund non-custodial alternatives for Indigenous people detained for drunkenness, and to place a statutory duty on police to use alternatives, and to negotiate with Aboriginal communities to find acceptable plans for public drinking.

The Callope decision [CASE STUDY]

Callope pleaded guilty to two offences in the Magistrates Court at Weipa, namely that he had in his possession one can of beer in a public place which was a restricted area (the Napranum DOGIT Lands) declared under s 173H of the *Liquor Act 1992* as amended by the *Indigenous Communities Liquor Licences Act (2002).* The second offence occurred the following day when he had in his possession one cask of red wine. The penalty imposed for the first offence was one month's imprisonment to be followed by probation for 40 weeks. For the second offence the penalty was six weeks' imprisonment with 42 weeks' probation. A special condition on each probation order was that the defendant undertake a substance abuse program. The sentences were to be served concurrently.

The magistrate's decision was appealed (*Callope v Senior Constable B Elsley*, District Court of Queensland, Cairns, 8 March 2005, White DCJ, File 510 of 2004, unreported). White J overturned the magistrate's decision and ordered Callope's immediate release, taking into account the seven days he had served in custody prior to release on bail pending the appeal. Callope's criminal history showed that, prior to the introduction of Alcohol Management Plans, his last appearance in court for any offence was 1988. Between 1988 and 2003 he was not convicted of offences of violence, public disorder, or any other type of offence. The 15-year period of not having contact with the criminal justice system changed with the introduction of the new legislation restricting alcohol possession. Once the legislation was in place, Callope was regularly before the courts. The offences discussed here were his third and fourth against the legislation. As Judge White noted, 'it is difficult to imagine a less serious example of this offence than the possession of one can of beer in circumstances in which there was no potential for the commission of the offence to undermine the purpose of the legislation' [which was to stem violence in Indigenous communities] (at 5).

Move-on powers

Police have powers to request individuals in public places to 'move on' under certain conditions. The laws vary from one jurisdiction to another. In Western Australia move-on powers are found in s 50 of the *Police Act 1892*. The section came into operation in 2005. A police officer can order a person to leave a public place for up to 24 hours if the officer reasonably suspects the person is committing a breach of the peace or intends to commit an offence. Failure to comply with the order, without a reasonable excuse, can lead to a penalty of up to 12 months' imprisonment.

> **Discrimination and the use of move-on powers**
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> There are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances and that Aboriginal people are being disproportionately affected by this law. It appears that in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong …
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> The Commission is very concerned about the apparent discriminatory treatment of Aboriginal people with respect to move-on notices … [B]ecause a move-on notice can be issued when a police officer reasonably suspects that the person is likely to commit an offence there is a large scope for misuse of police discretion (Law Reform Commission of Western Australia 2006: 209).

Move-on powers in New South Wales were introduced in 1998 are now found in Part 14 of the *Law*

Enforcement (Powers and Responsibilities) Act 2002 (hereafter *LEPRA 2002*). They provide police with the power to direct a person to move on if the officer has reasonable grounds to believe that the person's behaviour or presence is causing obstruction, constituting harassment or intimidation, or is causing or likely to cause fear to another person. Failure to comply with the direction can lead to a fine. Importantly they empower police to direct people to move on even in the absence of evidence that the person has committed or was likely to commit a criminal offence (Brown et al 2015: 555).

An Ombudsman's review of move-on powers found that 22 per cent of people given directions in New South Wales were Indigenous people, and just over half of those were aged 17 years or younger (New South Wales Office of the Ombudsman 1999: 230). The Ombudsman noted the following:

> It is not clear why such high numbers of Aboriginal and Torres Strait Islander people are subject to s 28F directions. The impact of the 'move on' power was of particular concern to the Western Aboriginal Legal Service, which argued that the power
> … brings otherwise law abiding persons into contact with the police and criminal justice system. The evil of this increased contact is highlighted in townships of high Aboriginal populations where relations between police and community have historically (and justifiably) been very poor.
> The legal service added that any increased contact may further exacerbate the tensions in police relations with Aboriginal communities (New South Wales Office of the Ombudsman 1999: 232).

An evaluation of the use of the legislation in areas with large Aboriginal populations shows wide disparity in the use of move-on powers. For example, police use of the move-on powers in Bourke and Brewarrina was at a rate 30 times higher than the state average (Chan and Cunneen 2000: 32).

Offensive language and offensive behaviour

Offensive language and offensive behaviour are offences under state and territory law in Australia. For example, ss 4 and 4A of the *Summary Offences Act 1988* (NSW) prohibit offensive conduct and offensive language near or within view or hearing of a public place or school. As Brown et al (2015: 518) note, 'such provisions are inevitably open-ended, with the characterisation of the behaviour left to the discretion of the police in the first instance, and subsequently to the discretion of magistrates'.

In New South Wales, the maximum penalty for offensive conduct is three months' imprisonment and for offensive language a fine. Aboriginal people are significantly over-represented in prosecutions for these types of offences. Research by the New South Wales Aboriginal Justice Advisory Committee found that some 20 per cent of all prosecutions for these offences involved Aboriginal people, and 14.3 per cent of all Aboriginal people appearing in New South Wales Local Courts had at least one charge of offensive language or offensive conduct. In one out of four cases where an Aboriginal person was charged with offensive language or offensive conduct, they were also charged with offences against the police such as resisting arrest or assaulting police (AJAC 1999b; see also Brown et al 2015: 536-540; Jochelson 1997; New South Wales Anti-Discrimination Board 1982).

Commissioner Wootten from the RCADIC made the following observation about police use of and response to offensive language:

> Over and over again during this Commission there has been evidence about Aboriginals using the term 'cunts' in relation to police, usually with the result of a charge of offensive behaviour … I have often been led to wonder how police could continue to remain offended by a term they heard so often and so routinely … The evidence in the Gundy hearing gave several glimpses of the fact that, as one would expect, it is a term in common use amongst police themselves …
> It is surely time that police learnt to ignore mere abuse, let alone simple 'bad language' … Charges about language just become part of an oppressive mechanism of control of Aboriginals. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others—resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if police were not so easily 'offended' (Wootten 1991a: 144–145).

The RCADIC recommended that the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest and charge (Recommendation 86). A review of the implementation of this recommendation found that, 'throughout Australia, Aboriginal people are being arrested, placed in police custody and, in some cases, imprisoned on the basis of behaviour that the police find offensive and which has been precipitated by police actions' (Cunneen and McDonald 1997: 8).

Some magistrates have questioned whether the use of the word 'fuck' in public constituted offensive language given its ubiquitous nature in social discourse. For example, New South Wales Magistrate Heilpern dismissed offensive language charges against an Aboriginal women in *Police v Butler* [2003]

NSWLC at 1 (Moruya Local Court) and against an 18-year-old Aboriginal man in *Police v Dunn* (unreported, 27 August 1999, Dubbo Local Court). For further discussion see Brown et al (2015: 522-523, 525).

The use of arrest for minor offences

Police powers of arrest are found in the various Criminal Codes, Crimes Acts and related legislation in each state and territory in Australia. In New South Wales, for example, the powers of arrest are found in s 99, Pt 8 of the *LEPRA 2002* (NSW). Police have power to arrest a person if the person has committed or is committing an offence, or the police officer suspects on reasonable grounds that the person has committed an offence. Restrictions are placed on the use of arrest in s 99(3). Police should only proceed by way of arrest (instead of summons or court attendance notice) when it is necessary to ensure the person will attend court, to prevent the destruction of, or fabrication of evidence by the alleged offender, to stop the person from further offending, to stop the person from interfering with witnesses, or to preserve the safety or welfare of the person.

The RCADIC recommended that arrest be used as a last resort when deciding to commence criminal proceedings (Recommendation 87). This was a key recommendation to reduce the over-representation of Indigenous people in police custody. The problem for Indigenous people is that police tend to use arrest for minor offences, and they tend to use it more frequently than court attendance notices in their apprehension of Indigenous people than they do with non-Indigenous people.

In a matter involving charges against an Aboriginal man, Lance Carr, for resisting arrest, assaulting police and intimidating police, Magistrate Heilpern ruled that evidence from police should be excluded because it had been obtained as a result of an improper act. The improper act in this case was the arrest of Carr for offensive language in circumstances where the use of summons or court attendance notice would have been more appropriate. The Director of Public Prosecutions appealed the matter to the New South Wales Supreme Court, where the appeal was dismissed. Justice Smart noted that

> This Court … has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger … and an escalation of the situation leading to the person resisting arrest and assaulting the police (*Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151; [2002] NSWSC 194 at 35).

Criminal Infringement Notices (Fines) and Minor Offences

Quilter and Hogg (2017) note that 'the use of the fine has rapidly increased… [and a] crucial development has been the growing reliance on out-of-court, infringement or penalty notice provisions as an alternative to criminal prosecution'. Since 2007 criminal infringement notices (CINs) have been available to police in NSW to use in response to offensive language and offensive conduct. As Brown et al (2015: 238) note, on the face of it, the use of fines might be seen as consistent with the RCADIC recommendation not to proceed by way of arrest for minor offences. However various reports have found a net-widening effect. That is, the use of CINs has significantly broadened police powers and led to greater police intervention for offensive conduct and offensive language. Some 83 per cent of CINs issued to Indigenous people were for offensive language or offensive conduct (Brown et al 2015: 238).

In jurisdictions such as Western Australia non-payment of both court imposed and police imposed fines can lead to imprisonment in police cells where the individual 'cuts out' the fine at $250 per day. The death of Ms Dhu in police cells in Port Headland, Western Australia in 2014 was an example of the way Indigenous people can be imprisoned by police as a result of fine default. She was in custody for unpaid fines arising from, inter alia, disorderly behaviour (see further discussion of her death in custody below).

NT Paperless Arrest Laws

Paperless arrest laws were introduced in 2014 in the NT by way of amendments to the *Police Administration Act*. The legislation allows police to arrest and detain people for up to four hours for committing, or being about to commit, minor offences such as loitering, playing musical instruments annoyingly, or failing to keep a yard tidy, all of which were previously dealt with by infringement notices.

In August 2015, following the death of Indigenous man Kumanjayi Langdon in police custody after he was arrested under the legislation, NT Coroner Greg Cavanagh described the laws as 'manifestly unfair' in their ability to disproportionately target Indigenous people and recommended their repeal (Cavanagh 2015: 32, 34; see discussion below). Detaining a person without charge allows police to impose punishment without court oversight, thereby putting adults at risk of arbitrary detention. In November 2015, the High Court dismissed a constitutional challenge to the paperless arrest laws.

However, the High Court noted that the powers cover a wide class of prescribed offences, most of which were relatively minor. The Court also noted that the vast majority of people detained under the legislation since it was introduced were Indigenous *(North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 (11 November 2015)).

DISCUSSION QUESTION

Why are Indigenous people arrested so frequently for public order offences?

Problems with meeting bail conditions

We discussed in the previous chapter the problems associated with bail and Indigenous young people. Similar problems are evident with adults: bail refusal rates are higher for Indigenous adults and the proportion of the NSW remand population that is Indigenous has more than doubled between 1994 and 2011 (NSW Law Reform Commission 2012: 58-60).

There are a number of reasons why Aboriginal people may not meet bail conditions, including an inability to get to court because of a lack of available transport; communication barriers between Aboriginal defendants and their legal representatives; a lack of understanding of the bail process; unemployment and poverty; physical or cognitive disability; prior offending histories and unnecessarily onerous conditions that conflict with cultural obligations (Aboriginal justice Advisory Committee 2000: 6–7; Australian Law Reform Commission 2017: 39-41).

The Victorian *Bail Act 1977* has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. It has been recommended that other state and territory bail legislation should adopt similar provisions (NSW Bar Association 2017: 4).

From over-policing to zero tolerance policing

The concept of over-policing is often used to refer to the *degree* of police intervention and the *nature* of police intervention in Indigenous communities (HREOC 1991: 90–94). The degree of intervention can be demonstrated through the number of police stationed in areas with large Aboriginal communities. In addition, over-policing can be seen in the nature of intervention through the use of particular policing *practices*—we have referred to some of these practices in relation to arrests for public order offences. In addition over-policing draws attention to the role police have played historically in the extensive regulation and surveillance of the lives of Aboriginal people through control over movement and social and familial relations during the period of protection legislation discussed in earlier chapters of this book. In this sense, the notion of over-policing is grounded in the Indigenous experience of the criminal justice system, articulating an important part of the lived experience of being *policed*. For further discussion of the issue see Cunneen (2001b: 80–105).

However not all Aboriginal communities are 'over-policed'. As Blagg (2016: 36-37) notes:

> Aboriginal people are policed – indeed over-policed – at those points of intersection with the white domain, where they come to represent a source of potential danger to the non-Aboriginal world. They are under-policed – or more precisely, under-serviced by the police – in their own communities, where there are no white interests to safeguard, no white public spaces to protect, and no white sensibilities to be shielded against… Many towns with a high Aboriginal population have rates of police to citizen ratio. While some remote communities have no police presence at all.

A more recent phase in Australian policing, particularly from the late 1990s, has been the promotion of 'zero tolerance policing'. The idea behind zero tolerance policing is that a strong law enforcement approach to minor crime (in particular public order offences) will prevent more serious crime from occurring and will ultimately lead to falling crime rates. The approach relies on an analogy drawn by Wilson and Kelling regarding 'broken windows'. If one broken window is not repaired in a building, then others will be broken and the building vandalised, followed by other buildings, then the street, the neighbourhood, and so on. Similarly, according to Wilson and Kelling, if disorderly behaviour is not dealt with in a particular area, then more serious crime will be the result (Wilson and Kelling 1982). In this sense, zero tolerance policing is directly aimed at increasing arrest rates for minor offences such as public drunkenness, offensive language and behaviour, loitering, public transport offences and other similar offences.

It has been recognised that zero tolerance policing is likely to have an adverse effect on Indigenous communities by further increasing criminalisation for minor offences (Cunneen 1999). We see evidence of this increasing criminalisation through various examples such the growth in the use of police infringement notices, the introduction of move-on powers, paperless arrest laws and the criminalisation of possession and consumption of alcohol.

Police use of excessive force

During the National Inquiry into Racist Violence (HREOC 1991), there were numerous complaints of cruel, inhuman and degrading ill-treatment of Indigenous people while they were in police custody. These included the use of police violence during interrogation, the use of violence as a technique of control (such as the use of fire hoses to 'quieten down' police detainees, a practice which was admitted by police in Queensland) and degrading treatment in custody (such as Indigenous men forced, through lack of water, to drink from toilet bowls in police cells) (HREOC 1991:104-105).

A significant issue to emerge over recent years has been the increasing use of Tasers and OC (Capsicum) spray and their inappropriate and/or excessive use. There have now been numerous reports by various independent authorities on police use of Tasers and OC spray. In Western Australia, the Corruption and Crime Commission (2012) investigated the use of Tasers and OC spray after Indigenous man Kevin Spratt was tasered seven times in a little over a minute by two police officers. The Commission found that the tasering was an 'undue and excessive use of force which was unreasonable and unjustified' (Corruption and Crime Commission 2012: 1). In 2014, the two senior police officers were found guilty of assault and sentenced to suspended gaol terms and fines.

Independent inquiries in Queensland and NSW found that Indigenous people were more likely to be subjected to the use of Tasers and OC spray than other members of the public. In NSW during the later half of 2010 some 29.3 per cent of people tasered were Aboriginal or Torres Strait Islander (New South Wales Office of the Ombudsman 2012: 99). Aboriginal and/or Torres Strait Islander people make up a little over two per cent of the State's population. Indigenous people were also more likely to be subjected to multiple/continued Taser use than other groups. The Queensland Crime and Misconduct Commission (2005: x) noted 'an unusually high rate of use against people who are Aboriginal, Torres Strait Islander or Pacific Islander in appearance'. Twenty-three per cent of OC spray subjects were Aboriginal and a further 10 per cent Torres Strait Islander or Pacific Islander (Crime and Misconduct Commission 2005: 25). Indigenous people comprise around three per cent of the State's population.

Deaths in custody

Indigenous deaths in custody still occur at unacceptably high levels and there is strong evidence over several decades to show that the recommendations of the RCADIC are often ignored or inadequately implemented (Cunneen 2009, 2017; Office of the ATSISJC 1996; Ting 2011). In recent years national monitoring of deaths in custody has ceased to occur. Despite the recommendation from the RCADIC on the need for ongoing national monitoring of deaths in custody, national reporting has become inconsistent. At the time of writing, the latest available information relates to the two year period 2011-2012 and 2012-2013 financial years (Baker and Cussen 2015). Over the two-year period there were 144 deaths in custody (95 in prison custody which included 15 Indigenous deaths, and 49 in police custody which included six Indigenous deaths).

The problems of the adverse use of police discretion, institutional racism and violence show their most concentrated and disastrous effects in cases of Indigenous deaths in police custody. Many Indigenous deaths in police custody arise from people being locked-up for minor offences, and many deaths occur because of a failure to exercise a required duty of care. This failure represents the 'violence of neglect': it can be seen in the *inaction* of authorities who have specific responsibilities and duties towards people held in custody (Cunneen 2009, 2017), and still occurs despite the RCADIC finding more than 25 years ago that significant failures by custodial authorities to exercise a proper duty of care for Indigenous people resulted in unnecessary deaths. We provide some recent examples below.

Twenty-two year old Ms Dhu died in police custody in 2014 in a Western Australian police lock-up after being arrested for unpaid fines relating to public order offences (Fogliani 2016: para 784). Ms Dhu complained to police about severe pain, vomiting, and partial paralysis and was twice taken to hospital but on both occasions was sent back to the police lock-up. On the third occasion when she was taken to hospital, she was dying from septicaemia and pneumonia. Police believed her transfer to hospital was not urgent and reportedly told nursing staff she was 'faking' her illness. The coroner described her treatment by police as 'appalling' and 'unprofessional and inhumane' (Fogliani 2016: paras 880, 883). The Northern Territory coronial inquiry into the death in custody of Cedric Trigger in Alice Springs Police Watch House in 2010 found that Trigger had been arrested by police for intoxication and trespassing. He was dragged inert from the police vehicle, face down and handcuffed, for several metres to the holding cell. He died, still face down, two hours later. The coroner reported that the 'few minutes captured on video demonstrated treatment of the deceased—or any person taken into the custody of the police—which was undignified and inappropriate. [Further] a person in the deceased's condition should not have been in the watch house, much less left in a holding cell with no risk assessment carried out' (Cavanagh 2010: 8–9). The coroner ruled that Trigger died from injuries sustained prior to his arrest (Cavanagh 2010: 14–15). Two years later, in 2012, the Northern Territory

coroner again reported on the death of an Indigenous man, Kwementyaye Briscoe, in Alice Springs Watch House in similar circumstances to Trigger. Kwementyaye was believed by police to be heavily intoxicated and was dragged along the floor by his limbs and left in a cell. He died at around 11:45 p.m. and, although others detained in the cell opposite him attempted to get the attention of police officers, his body was not discovered until 1:45 a.m. The coroner found that 'it is abundantly clear that there were multiple failings on the part of individual police officers and senior management that allowed Kwementyaye's death to take place' (Cavanagh 2012: 4). In 2015, Kumanjayi Langdon died in Northern Territory police custody after being locked-up under the NT 'paperless' arrest laws (see above) for drinking alcohol in a designated area. The maximum penalty for the offence was a $74 fine, which he had already been issued with by the police. In arresting and detaining Kumanjayi, police were following instructions relating to the use of the recently introduced 'paperless' arrest laws (Cavanagh 2015: 5, 12). For CCTV police footage of events in police custody surrounding the deaths of Ms Dhu and Kwementyaye Briscoe, see Graham (2017) and for further discussion of Kwementyaye Briscoe's death in the context of Agamben's notion of 'bare life' see Holcombe (2016).

The sense of injustice generated by Indigenous deaths in custody has led to serious anti-police riots and protests on a number of occasions. Two cases illustrate the point. Seventeen-year-old 'TJ' Hickey died after impaling himself on a metal fence. TJ was classified as a 'high-risk offender' by police, which meant that he was subject to constant scrutiny. His bail requirement not to visit a particular housing area where his mother resided almost certainly imposed a condition that he would constantly breach. On the morning of his death he had been to visit his mother and was subsequently followed by police. There was a widespread belief at the time that TJ was being chased by police when he died. On the night following his death a serious riot erupted in Redfern between Aboriginal people and police, which caused widespread injury (Cunneen 2007a: 24–6; Anthony 2013: 181-184). In 2004, Cameron Doomadgee died in police custody on Palm Island. He had been arrested for a minor public order offence. He was healthy man when arrested. A protest riot occurred after Doomadgee's death, when post-mortem results revealed that he had been violently assaulted, suffering four broken ribs, a ruptured spleen and his liver almost cleaved in two. During the protest, the local police station and courthouse extensively damaged (Cunneen 2007a: 26–28). Aboriginal people involved in the riot were charged and sentenced – with Lex Wotton receiving the most severe penalty of six years imprisonment (Anthony 2013: 184-190).

DISCUSSION QUESTION

Discuss the reasons for the lack of implementation of recommendations designed to reduce Indigenous deaths in custody.

Cultural and communicative differences

We noted briefly in the previous chapter in the context of conferencing, that the legal process can raise particular communicative and cultural difficulties for Indigenous offenders and victims. Communication includes both verbal and non-verbal processes. Likewise, the 'silencing' of Indigenous people can occur through language and through broader cultural processes which misunderstand or fail to recognise the cultural context of Indigenous communication.

Language

There is an ill-founded expectation that Indigenous people speak 'English'. Yet linguists like Diana Eades (2012) have shown that most Indigenous people in Australia speak a dialect of English which she refers to as Aboriginal English. This dialect has a number of varieties on a continuum from one close to standard English to a variety of the dialect which is close to Aboriginal Kriol. Aboriginal Kriol is itself a distinctive language. Speakers of Aboriginal English may also speak Aboriginal Kriol and one or more traditional Aboriginal languages.

The right to speak

Indigenous kinship relations can determine who should speak, and the subject matter about which particular people can speak. These restrictions can affect the giving of evidence or the participation is processes like mediation and conferencing.

Gratuitous concurrence

Gratuitous concurrence refers to the tendency of someone to agree to particular questions when being put by a person in authority, irrespective of whether 'yes' or 'no' is the correct answer, or indeed whether the question is understood.

Eye contact

Direct eye contact can be seen as rude and inappropriate among some Indigenous peoples. It can be misinterpreted as dishonesty or defiance within the mainstream culture.

Temporal and spatial definitions

Indigenous quantifying of time and space can be seen as imprecise in Western terms, with the result that Indigenous witnesses may seem vague or dishonest. Non-Indigenous people tend to be used to

thinking in precise divisions of time, distance and quantity. Indigenous people are more likely to think in terms of social life or natural environment.

Health and Disability Related Issues

There is a range of health and disability related issues, prevalent in some Indigenous communities, that can complicate further the cultural and linguistic differences identified above. These include hearing loss (arising from untreated otitis media), various cognitive impairments (eg, foetal alcohol spectrum disorder, acquired brain injury) and mental health disorders.

For further discussion of these issues see ALRC (2017: 143-158, 188-191, 199-200), Baldry and McCausland (2017), Blagg et al (2016), Eades (2012), House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011: 96-102, 108-112, 205-209), NSWLRC (2000: 221–237), Senate Finance and Public Administration References Committee (2016: 35-37).

Police interviews and the Anunga Rules

After a suspect is apprehended, he or she is usually subjected to questioning by the police. If they make damaging admissions or confessions, then these may be used as evidence against them later, at their trial. It has long been recognised that suspects are particularly vulnerable at this time, and the law (attempting to safeguard the accused while giving the police reasonable scope to carry out their investigations) regulates the circumstances under which questioning may occur. In general police have the right to question a person when investigating a crime, and that person has the right to remain silent (although in certain circumstances the law may require they provide information). To be admissible in court any confession or admission made to the police must be voluntary and not the result of duress, intimidation or violence. Even if a statement is found to be voluntary it may still be excluded in the exercise of the judge's discretion if it is considered that it would be unfair to the accused to receive it in evidence (Findlay et al (2005: 53-62, 198–202).

In 1976, as the culmination of a series of cases dealing with the admissibility of Aboriginal confessional evidence, Forster J enunciated the landmark Anunga Rules in *R v Anunga* (1976) 11 ALR 412 at 414–415. These rules are to provide guidance to police during interviews with Indigenous people. They are not laws, and breach of them does not automatically mean that evidence will be excluded. These rules provide for, inter alia, that an interpreter be available unless the person 'is as fluent in English as the average white man of English descent'; that it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present during the interview; that great care should be taken in administering the caution and in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way; and that should the person seek legal assistance reasonable steps should be taken to obtain such assistance.

Guidelines for interrogating Indigenous witnesses have been incorporated into various police instructions and standing orders. Various commentators have noted that the Anunga Rules, police guidelines and even legislation requiring the presence of a third party during interrogation, are often not complied with and the incentives for encouraging compliance are sparse. For further discussion in relation to Indigenous people, see for example, Bartels (2011), Goldflam (1995: 32–36) and Douglas (1998: 35–46). In addition the failure to provide interpreters for Indigenous people remains a critical issue (ALRC 2017: 188). On a positive note, in NSW there is a legislative duty on police to inform the Aboriginal Legal Service when an Aboriginal or Torres Strait Islander person has been detained. The person in custody is then provided with over-the-phone legal advice through the Custody Notification Service (ALRC 2017: 204-205).

Indigenous policing and social control

Indigenous people can have a number of roles in policing, both within state police services and as part of Indigenous community-controlled forms of policing. Within state police services, the most obvious role is as a fully sworn police officer. Other roles include 'community police' or Aboriginal police/community liaison officers – both under the control of state police. However, what interests us here are the forms of policing that are under Indigenous control. Blagg's (2005) work on Indigenous community justice mechanisms draws a distinction between community-*based* initiatives and community-*owned* initiatives. Community-based initiatives are often seen as extending government initiatives into a community setting (such as Aboriginal community liaison officers). They may involve better service delivery of existing services. On the other hand, community-owned initiatives are ways of doing justice business that are driven by the community. They are essentially Indigenous solutions and extensions of Indigenous control over criminal justice. When properly supported and acknowledged, they are capacity-building and self-governance strategies.

Community patrols

Indigenous community patrols (or sometimes referred to as 'night patrols') are one of the longest running Indigenous community responses to reducing crime and maintaining order, beginning in the

Northern Territory in the 1980s. They now operate extensively throughout Australia. Community patrols work in different ways depending on a range of factors including demographic/geographic (urban, rural and remote); the legislation in place to facilitate community governance; the local relationship with police; and so forth. Most patrols operate through the work of volunteers, and some have a paid coordinator. They receive varied levels of support from state and federal governments. Priorities for the community patrols are largely set by local Indigenous need: in some areas the focus may be on young people, while in other communities it may be homelessness, or problems with alcohol-related violence. Blagg (2008: 107-125) describes the services of community patrols as including dispute resolution, removal from danger and safe transportation, connecting people to services, prevention of family violence, assistance and interventions around homelessness, alcohol and substance misuse and anti-social behaviour, keeping the peace at various events such as sports carnivals, and diversion from contact with the criminal justice system. Community patrols are involved in truancy programs and school breakfast programs and they transport people to places such as sobering-up shelters, safe houses, women's refuges, men's places, clinics, hostels, family healing and justice groups (Anthony and Blagg 2014, Porter 2016).

Patrols operate through developing and maintaining cultural authority. Unlike state police, they do not rely on the threat of force or the authority of western law. Their legitimacy and authority derives from Indigenous law and culture. Significantly, Indigenous women have played a substantial role in developing and operating community patrols. About 50 per cent of people working in community patrols are women. Perhaps as a consequence of the significant involvement of Indigenous women, patrols report 'seeing their work in terms of mediation and persuasion rather than force, and fulfilling a preventative/ welfare role, rather than a reactive/ controlling one' (Blagg 2008: 114). Community patrols represent a different vision of policing to that provided by state agencies: external state authority is replaced by local cultural authority; bureaucratised state-centred methods of crime control are replaced by an organic approach to community needs which focuses on assistance and prevention (see Blagg 2016: 90-107). Indeed Porter's (2016) observational study of night patrols in NSW suggests they are a form of 'counter-policing'.

Aboriginal community justice

Blagg (2016: 155) suggests that across Australia the 'emergence of Aboriginal community justice mechanisms in a variety of forms… may signal a significant long term shift in the way justice "business" is transacted between Aboriginal communities, government and the judiciary'. We highlighted above the role of community patrols. In some states (particularly NSW and Queensland), Indigenous communities have also established community justice groups to deal with law and justice issues, often directly involving work with offenders. The composition of the groups and the type of work they undertake varies. (For further discussion of community justice groups see Cunneen (2005a: 130–141), LRCWA (2006: 97–113). However, both community patrols and community justice groups are only one part of a much broader spectrum of Aboriginal community mechanisms aimed broadly at preventing and responding to criminal offending. These include various diversionary projects (such as culturally-based interventions like Yiriman – see Chapter 4), and different types of Indigenous-run programs addressing matters such as family violence, child protection and drug and alcohol addiction. There are three key themes that emerge in discussions of successful Indigenous approaches. These are the central importance of programs that enhance self-determination, that are holistic in their approach and that result in empowerment rather than dependency (Cunneen 2001b: 26).

Many Indigenous approaches emphasise the importance of healing (for specific examples, see ATSISJC 2008: 167-76). We have noted elsewhere that the 'Indigenous approach to healing is an integral part of Indigenous justice, and lies at the foundation of changing and reforming criminal behaviour among Indigenous people' (Cunneen and Tauri 2016: 128). Indigenous healing approaches start with the collective experience and draw strength from Indigenous culture. Inevitably, that involves an understanding of the collective harms and outcomes of colonisation, the loss of lands, the disruptions of culture, the changing of traditional roles of men and women, the collective loss and sorrow of the removal of children and relocation of communities. Healing is not simply about addressing offending behaviour as an individualised phenomenon. It is tied to Indigenous views of self-identity and relationality which are defined by kinship and cultural relationships and responsibilities – all of which are inseparable from each other (Benning 2013: 130). Healing approaches are far more expansive than a narrow 'criminogenic needs' definition of rehabilitation which sees the individual as a discrete, autonomous being; isolated and responsible for their own decision-making. Indeed, the criminal justice system is often considered as part of the problem rather than as a solution to resolving community dysfunction and disharmony (Cunneen and Tauri 2016: 128-131).

Indigenous Criminal Justice Policy Development

In 1991 the RCADIC recommended that independent Aboriginal Justice Advisory Councils (AJACs) be established in each State and Territory to provide advice to government on justice-related matters, as well as to monitor the implementation of the Royal Commission recommendations. In the period immediately following the Commission, all Australian states and territories established AJACs. However in subsequent years, the majority of AJACs were either abolished or allowed to collapse by government. The Victorian AJAC (established in 1993 and now decentralized into regional and local AJACs) is the only Advisory Committee structure still in existence from the period immediately following the RCADIC. Thus, with the exception of Victoria, there are no independent Indigenous representative bodies specifically focussed on criminal justice issues at a state and territory level. The ACT has the Aboriginal and Torres Strait Islander Elected Body. However, their mandate is much broader than criminal justice. Victoria and the ACT are also the only jurisdictions with current Aboriginal Justice Agreements. The absence of representative bodies and negotiated agreements around justice issues in virtually all states and territories means that there is no established or structured process for Indigenous negotiation or input into strategic planning to address Indigenous justice issues, including over-representation and victimisation (Allison and Cunneen 2010, 2013). Such a profound absence of Indigenous voices within institutional processes has no doubt contributed to the lack of consideration of the impact of various criminal justice laws and policies on Indigenous people.

Conclusion

State policing and criminalisation of Indigenous peoples in Australia remains a highly contested issue. Despite the work of the RCADIC, many recommendations aimed to reduce contact with police and unnecessary criminalisation for minor offences either have not been, or been poorly, implemented. More punitive approaches to law and order have seen increased police powers, ongoing problems with police use of excessive force and greater use of public order offences, including the use of move-on powers, police infringement notices, and arrests for offensive behaviour and offensive language. Meanwhile Indigenous deaths in police custody continue to occur too frequently and in controversial circumstances. Many of those deaths replicate the very problems the RCADIC sought to address, in particular the failure to exercise an appropriate duty of care towards those in custody.

Underpinning high levels of criminalisation are specific problems which Indigenous people face in contact with the criminal justice system including cultural and communicative differences. Addressing these issues through, for example, the greater use of interpreters might go some way to ensuring substantive equality before the law. Other practical initiatives such as the NSW Custody Notification System remain poorly implemented at a national level.

One of the themes that underpins this chapter is the importance of Indigenous activism and agency. The RCADIC would have not have been established without the political activism and demands of Indigenous people and their supporters. Further, Aboriginal community justice initiatives have been at the forefront of establishing and providing alternative ways of approaching the maintenance of social order. The success of these programs has been reliant on the strength of the Aboriginal domain and the struggle for Indigenous autonomy: in this case, the right to define justice problems from an Indigenous standpoint and to develop solutions that are commensurate with Indigenous priorities and cultures. Indigenous assertion of autonomy and the struggle for self-determination have been productive of opening new spaces for the exercise of Indigenous governance over policing and criminal justice issues; they also provide us with the opportunity to re-think the possibilities of a postcolonial relationship between police and community (Cunneen 2005b, Blagg 2016). However, as noted above, through the abolition of AJACs most Australian governments have removed the representative processes that could provide the basis for negotiation and agreements between government and Indigenous people.