

Indigenous Anger and the Criminogenic Effects of the Criminal Justice System

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I heard of rape of small children; of women being laughed at when seeking help at the police station after having been assaulted by their partner. I heard of abuse in police watch houses by law enforcement officers; evidence of escalating suicides and multiple suicide attempts; an increase in offending behaviours in young people, of homicides, of one young man after another being taken away from his community to serve a prison sentence after beating his girlfriend or wife to death (Judy Atkinson, *Trauma Trails*, p.6)

What I intend to argue in this chapter is simple enough: the current direction of the criminal justice system is one that could be regarded as criminogenic to the extent that it fosters and compounds Indigenous anger. Thus what I would like to achieve through the development of this argument is a deeper understanding of the way in which the criminal justice system may be part of the problem (particularly the way it is currently configured) rather than part of the solution to Indigenous anger and consequently Indigenous crime. The criminal justice system is not an 'excuse' for Indigenous anger, however it may well be a part of the explanation.

Day et al (2006) have foreshadowed the importance of understanding the social and political context that provides the emotion of anger with specific meaning for Indigenous offenders. One of the identified themes is the role of authority, particularly police, welfare and prison as part of the discrimination that 'triggers' Indigenous anger. What I propose to do is to flesh this out further through a consideration of a number of factors, beginning with violence and deaths in custody, and then a subsequent discussion on criminal justice policies which might be considered to foster Indigenous anger. Thus the purpose of the chapter is to cast light on the institutional, political and historical factors connected directly to the criminal justice system that cause at least one layer of Indigenous anger.

Institutionalized Violence

There has been much written concerning colonial violence against Indigenous people in Australia, and it is not my purpose here to recount the role of the colonial state in perpetrating that violence, or in turning a blind eye to its occurrence. There is also enough literature to demonstrate the role of the police as an agent of colonial policy often involved in outright violence, and as an instrument of policies of containment, control and removal (Johnston 1991, HREOC 1991, NISATSIC 1997, Cunneen 2001).

In terms of understanding the roots of the current dynamics of Indigenous anger, it is important to understand how the past informs and makes sense of the present. Certainly the historical memory of massacres, forced removal of children and a discriminatory criminal justice system are very much alive in Indigenous histories. There is also a direct link between historical understandings of the past and a 'consciousness' of the present. Certainly, Indigenous people still consciously make the connections between the history of extensive police intervention and contemporary understandings of the role of the justice system. In other words, Indigenous popular memory about the nature of past policing is used as a way of

interpreting and making sense of the contemporary justice system, and in explaining Indigenous reactions to justice agencies.

More than twenty years ago I was asked to undertake research in north west NSW on Indigenous people and the criminal justice system after a riot in Bourke between Aboriginal young people and police in August 1986. In interviews with people in the Indigenous community in Bourke, the common explanation for the riot was a sense of anger and frustration about contemporary racist treatment in the town. However, this anger and frustration was also tied to past events. As one Aboriginal woman interviewed in Bourke stated,

This is why the people feel like they do with the police. For instance, I saw the police come to my house, we used to live in an old shack down the reserve, and drag my father out, and kick and kick and kick him. I saw that. I'd be 32 years of age and that's still on my mind...

Look at my husband... his mother and father were told to move their old tin humpy from where they had it. And they didn't, because my father-in-law was out of town at the time. My mother-in-law was there with eight little kids. So the police came down driving a bull dozer and knocked the house on top of them. It did not happen generations ago. We are still part of what happened. My husband was in that house when it was knocked down by police. And all this is passed onto the kids (Cunneen and Robb 1987:267).

Similarly, the Royal Commission into Aboriginal Deaths in Custody noted in its extensive research into criminal justice issues that the legacy of past violence has remained, and continues to influence Indigenous views of how the criminal justice system operates. The Commission noted that complaints of bashings by police included 'punching, shoving, beating with batons, and the indirect violence of deliberately rough rides in police vans' (Wooten 1991a:278). The Commission felt that the widespread and discriminating nature of the complaints, the depth of feeling about the complaints and the history of violence, 'can leave no doubt that at various times and in many places police "bashing" of Aboriginals has been a serious problem and has left a major barrier to Aboriginal trust of police' (Wooten 1991a:279).

There is anger at this violence, but also fear. Fear to report offences when Indigenous people have been victims of crime because of the possible responses (Aboriginal and Torres Strait Islander Women's Taskforce on Violence 2000: 232), and fear to do common tasks which might involve police such as attending the police station to obtain a driver's licence (Wooten 1991:273).

Perhaps the most extensive documentation regarding Indigenous complaints of violence against criminal justice agencies can be found in the report of the National Inquiry into Racist Violence (HREOC 1991). The Inquiry was established to investigate the incidence of racist violence against all communities in Australia. What is particularly telling about the evidence from Indigenous people was their complaint that the main perpetrator of racist violence was the criminal justice system. By way of contrast, ethnic minority groups tended to see the perpetrators of racist violence as more diffuse including individuals in the community, and organised racist groups.

There were many allegations of physical violence by police officers both in the oral evidence, the written submissions and the research consultancy reports which were presented to the National Inquiry. In some cases there were witnesses, and in a few cases formal complaints were made. In a small number of complaints there was also successful civil litigation. It was clear from all the evidence presented to the Inquiry that the treatment of Indigenous people by police was an issue of national significance.

One study prepared for the National Inquiry into Racist Violence concerned Indigenous juveniles and their relations with police. It found that over 80 per cent of Aboriginal juveniles in detention centres in New South Wales, Queensland and Western Australia alleged that they had been assaulted by police on at least one occasion (Cunneen 1991). Some 81 per cent of the juveniles said they had been subjected to racist abuse, while many also alleged that they had been threatened with hanging or had suggestions made about committing suicide. Aboriginal girls who were interviewed reported similar assaults to the males, as well as the incidence of sexist verbal abuse. Overall, the research found that there were widespread complaints in relation to violence across the three States, that the allegations were geographically widespread within each State, and that there was an internal consistency in the types of complaints which were made across the nation. In addition there was a strong tendency on the part of those interviewed to see the violence as something normal and to be expected. The violence was not seen as unusual, and in some cases the significance of the violence was down-played by the victims. Violence by police officers was found to take a number of forms including verbal abuse, physical assault, provocation and harassment. Less than 10 per cent of Indigenous young people interviewed recollected making any form of complaint about the incidents of violence. In the majority of cases there was simply seen to be 'no point'. The nature of those few complaints which were made was ambiguous and did not necessarily involve the lodging of a formal police complaint (Cunneen 1991).

More recently the Australia Bureau of Statistics (ABS 1995, 2004) national Aboriginal and Torres Strait Islander surveys have provided disturbing data on the contact between Indigenous people and the criminal justice system. The 1994 survey found that approximately 10 per cent of all persons aged 13 years and over reported being 'hassled' by police during the twelve months prior to being interviewed. Some 14 per cent of males and 5 per cent of females said they were hassled. The same survey estimated 22 per cent of males aged between 15 and 19 years reported being hassled. Approximately 3 per cent of persons aged 13 years and over said they were physically assaulted by the police in the twelve months before the interview (ABS 1995:59). The later ABS survey conducted in 2002 did not require information on the nature of contact with police. However 16 per cent of Indigenous people aged 15 or over reported being arrested at least once in the previous five years, and 7 per cent reported being imprisoned during the same time frame (ABS 2004: 14).

Deaths in Custody

Anger at the injustice of the criminal justice system was a primary motivator in Indigenous demands for a Royal Commission into Aboriginal Deaths in Custody. Given the experiences of violence outlined above it is hardly surprising that there was a common view that custodial authorities were directly implicated in the deaths of

Indigenous people in custody. 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 (involved in a pub brawl with off-duty police and later died in the police lock-up), and Eddie Murray in New South Wales (picked-up by police for public drunkenness and died from hanging in a police cell) (Cowlshaw 1991).

The Royal Commission did not find that the deaths it investigated were the result of deliberate violence by police or prison officers. However, the Commission found that there was a significant failure by custodial authorities to exercise a proper duty of care for Indigenous people held in custody. The Commission found that there was little understanding of the duty of care owed by custodial authorities and there were many system defects in relation to exercising care. 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.

Commissioner Wootten in his report on New South Wales, Victoria and Tasmania noted that 'everyone 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).

For the purpose of our current discussion on Indigenous anger, it is important to recognise that the neglect and indifference of the criminal justice system towards Indigenous people is in fact a powerful source of anger. The stories of this neglect and indifference uncovered by the Royal Commission seem barely comprehensible to those non-Indigenous people with little experience of the criminal justice system. Yet the treatment of Indigenous people revealed by the Royal Commission represented the day-to-day experiences of people when they came into contact with non-Indigenous institutions.

Two examples, one from NSW (Quayle) and one from Queensland (Kulla Kulla), illustrate the point, and show a similar pattern of institutional abuse. In these cases the neglect and indifference is exacerbated by both the criminal justice system and the health system and arise when Indigenous people have taken a sick relative to hospital for treatment. Charlie Kulla Kulla was admitted to Coen hospital by members of his family in a seriously ill condition. It was assumed by medical staff that he was drunk and there was no proper diagnosis of his condition - despite his complaints about pain. Although he was not troublesome in any way at the hospital, the police were called; they too assumed that he was drunk and proceeded to arrest him as he lay on a hospital trolley. He was taken and placed in the police watchhouse with 18 other men and women. All but one of these people were incarcerated for public drunkenness. The local sergeant had decided that those arrested over the weekend would not be allowed bail. Charlie Kulla Kulla died in the watchhouse the following day from lobar pneumonia (Wyvill 1990). A similar series of events occurred with Mark Quayle. In this case Commissioner Wootten found that the death of Quayle

resulted from shocking and callous disregard for his welfare on the part of a hospital sister, a doctor of the Royal Flying Doctor Service and two police officers. I find it impossible to believe that so many experienced people could have been so reckless in the care of a seriously ill person dependent on them, were it not for the dehumanised stereotype of Aboriginals so common in Australia and in the small towns of western NSW in particular. In that stereotype a police cell is a natural and proper place for an Aboriginal (Wootten 1991b:2).

Anger and Community Uprisings

At times the anger, frustration and fear arising from deaths in custody results in a level of collective anger that spills over into a riot (which is inevitably directed at the local police). Recent riots in Redfern (2004) and Palm Island (2004) reflect the depth of community anger at perceived injustices. Collective disorder or riots are relatively rare in Australia, so it is significant that Indigenous 'riots' (they could also be called 'demonstrations') almost exclusively arise as a result of perceived injustices caused by the actions of criminal justice agencies.

The Redfern riot of early 2004 is an example. Seventeen year old TJ Hickey had died after impaling himself on a metal fence whilst riding his bicycle in the inner Sydney suburb of Redfern. On the night following his death a serious riot erupted in Redfern between Aboriginal people and police which caused widespread injury.

The death of TJ Hickey sparked a riot, but did so in the context of constant complaints of police harassment, particularly of Aboriginal youth. Part of this harassment derived from a renewed focus on 'zero tolerance' style police operations and the use of public order legislation that clearly targets young people. The fact that TJ was classified as a 'High Risk Offender' by police 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. Indeed on the morning of his death he had been to visit his mother and was subsequently followed by police (although it turned out that this was in relation to a different matter not involving young TJ).

The subsequent riot after TJ's death received widespread publicity, with various 'causes' discussed by media and politicians, including alcohol, drugs and the hot summer weather. Little attention was paid to the long history of volatile conflict between Aboriginal people and the police in Redfern. Instances of police abuse of Aboriginal people, documented by the New South Wales Council for Civil Liberties, date back to the 1960s. In the early 1970s the first Aboriginal Legal Service in Australia was established in Redfern because of police harassment of Aboriginal people in the area. By the mid to late 1980s riots between police and Aboriginal young people were relatively common (Cunneen 1990). An investigation by the Federal Race Discrimination Commission in 1990 over the use of tactical response police in raids around 'The Block' found that the police used excessive force and that the justifications for the raids exhibited institutional racism (Cunneen 1990).

The point to be made in the current discussion on Indigenous anger is that the Redfern riot shows very clearly the multiple links between an historical sense of injustice, a

contemporary view of police harassment, and a depth of collective anger at the way the justice system operates. That sense of anger clearly motivates people towards a type of resistance.

Criminal Justice Policy as Criminogenic

The failure to solve either the problematic relationship between the criminal justice system and Indigenous people, or reduce serious offending levels in Indigenous communities, is most graphically illustrated in the climbing imprisonment rates through the 1990s and 2000s.

In 1991 when the Royal Commission into Aboriginal Deaths in Custody reported to parliament, the general rate of imprisonment in Australia was 117.2 per 100,000, but for Indigenous people it was 1,738.6. By 2005 the general rate had climbed to 162.5 per 100,000. For Indigenous people it had increased to 2021.2. Imprisonment levels rose for everyone in Australia during the 1990s, but for Indigenous people the increase was on top of an already much higher rate, and it occurred at a time when the major policy thrust of the Royal Commission was to *reduce* imprisonment rates for Indigenous peoples. By 2005 some 22 per cent of the total Australian prisoner population were Indigenous people (ABS 2005: 3), compared to 14.4 per cent in 1991 (ABS, 2001: 31).

Further, we know that in general terms any rehabilitative or deterrent effect of the criminal justice system has less efficacy for Indigenous people. At any one time a much larger proportion of Indigenous adult prisoners have had a previous experience of imprisonment (76.8 per cent compared to 53.1 per cent in 2004) (SCRGSP 2005: Table 9A.2.8). A similar picture appears to hold for Indigenous young people in detention (Cunneen 2005:94).

How might we conceive of the criminal justice system itself as being criminogenic? We have already seen that direct violence, neglect, indifference and failure to exercise a proper duty of care argue by the criminal justice agencies can contribute to Indigenous anger. However, it can be argued that the current direction of criminal justice *policy* is criminogenic to the extent that it fosters and compounds Indigenous anger. The examples I want to use to illustrate this point relate to Indigenous young people. The move towards zero tolerance policing has seen increased police powers (such as stop and search) particularly in public places and this is often focussed on young people.

In New South Wales, the *Police and Public Safety Act 1998* gave police specific 'move on' powers. According to the New South Wales Bureau of Crime Statistics and Research, some 10,000 orders were issued in the first 12 months. Refusal to obey such an order resulted in more than a thousand fines being issued (see the *Sydney Morning Herald*, 21 December 1999, p. 11). The same legislation gave police the power to search young people they suspected of being in possession of knives and other prohibited implements (such as scissors, nail files, and so on). Evaluations of the use of the legislation in areas with large Aboriginal populations shows wide disparity in its application compared to other parts of the State (NSW Office of the Ombudsman 2000, Chan and Cunneen 2000). For example, police use of the 'move on' powers in Bourke and Brewarrina was at a rate 30 times higher than the state

average (492.3 compared to 16.5 per 10,000 of population) (Chan & Cunneen 2000:32). Search powers of juveniles were also used more frequently in Aboriginal areas of the state. In Bourke and Brewarrina, nearly 90 per cent, and in Moree 95 per cent of searches were 'unsuccessful', in the sense that the young person was not carrying a prohibited implement at the time of the police search (Chan & Cunneen 2000:39). We should think through the ramifications of these searches in terms of generating Indigenous anger – some nine out of every ten Indigenous youth stopped in public and searched by police were not carrying an illegal weapon or implement. On the face of it, there was nothing unlawful about these searches. Yet it is hardly surprising that this type of policing will generate feelings of resentment, injustice and anger.

There have also been significant changes to bail over recent years. For example, the New South Wales *Bail Amendment (Repeat Offenders) Act 2002* removed the presumption in favour of bail for a very wide range of people: anyone on a bond or order who re-offends, anyone who has previously failed to appear, or has previously, been convicted of an indictable offence. This type of legislation adversely affects Indigenous people because of their longer offending histories. Less entitlement to bail has seen significant increases in Indigenous adult and juvenile incarceration for people yet to be found guilty of an offence.

In addition bail conditions have been expanded to include restrictive requirements. For example, the New South Wales *The Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* NSW allows a court to make a 'non-association order', prohibiting the offender from associating with specified person(s). The court may also make a 'place restriction order', prohibiting the offender from visiting a specified place or district. This was the type of restriction placed on TJ Hickey which prevented him from legally visiting his mother who lived in The Block at Redfern. It has been widely reported that Indigenous young people are being picked-up on breach of bail, or being bail refused. Bail restrictions such as curfews and restrictions on movement (for example, not to enter a central business district) mean that Indigenous young people are breached and brought into the justice system early and unnecessarily (Cunneen and Luke 2006:125-126).

It has been acknowledged that a major driver of the increased incarceration and over-representation of Indigenous young people in custody has been the growing Indigenous remand population, and this likely to be the result of changes in the law relating to bail eligibility and conditions (Cunneen and Luke 2006). The imposition of unrealistic and onerous bail conditions on Indigenous people has long been criticized by various bodies including the International Commission of Jurists and the Royal Commission into Aboriginal Deaths in Custody (see Cunneen 2001:139).

What I have been arguing in this section of the chapter is that *lawful* interventions can be perceived and interpreted as unjust and discriminatory. Legislation has greatly increased police powers in recent years, and it is clear from the evidence that those powers are often exercised in a discretionary manner which disadvantages Indigenous people. The use of these powers drag Indigenous people into the criminal justice system in a way that is seen as racially discriminatory. And it is this view that the justice system is discriminatory in the way it operates with Indigenous people that fuels so much anger. What I am suggesting is that the political prioritisation of 'tough

on crime' and 'zero tolerance' is directly leading to further alienation and anger because it translates in law and policing practices that increase the criminalisation of Indigenous people.

Mainstreaming and the Intensification of Indigenous Anger

Part of the way in which the criminal justice system intensifies Indigenous anger is by marginalising and ignoring what Indigenous people have to contribute in relation to policy development. If Indigenous anger contributes to the reasons for Indigenous people being swept up as unwilling 'clients' of the criminal justice system, then most surely Indigenous anger also contributes to why Indigenous people find it very difficult to work with criminal justice agencies in advisory and policy development capacities as well as in service delivery roles.

Criminal justice policy has increasingly reflected the general move towards mainstreaming and assimilationist assumptions underpinning public policy more generally. I want to take just two examples to illustrate the point that Indigenous interests and perspectives have been increasingly marginalised from informing key management decisions and policy developments. The first is the demise of Aboriginal justice advisory bodies, and the second is the demise of Indigenous units with justice agencies.

The Royal Commission into Aboriginal Deaths in Custody recommended that independent Aboriginal Justice Advisory Councils (AJACs) be established to provide advice to government on justice-related matters. The establishment of these bodies was seen as part of establishing a framework for negotiating with Aboriginal communities on justice issues. That is they were conceived within a framework of the importance of Indigenous self-determination. In the years immediately following the Royal Commission, all Australian states and territories established AJACs. If we look around the political landscape today, fifteen years after the Royal Commission, there are two States (New South Wales and Victoria) with functioning AJACs. Throughout the rest of Australia these Indigenous bodies have been allowed to collapse and not be re-appointed (such as in Queensland), have been directly abolished by government (such as in Western Australia) or simply allowed to languish without funding (such as in the Northern Territory).

The important point here is that the possibility of providing Indigenous input into policy development and Indigenous understanding into the effects of the criminal justice system on Indigenous people has been systematically removed at a statewide level (and this has coincided with the Federal abolition of ATSIC). This may not make much difference to the 16 year Aboriginal boy in Bourke wrongly searched (again) in public by police, nor to the anger generated by that search. However, the absence of an Indigenous voice at a senior level of government means that government policy in the area of criminal justice occurs in a vacuum. There is no bridge between policy makers and those affected by policy. There is no way of understanding why in another situation the same 16 year old boy in Bourke is so willing to light a Molotov cocktail and throw it at police.

The second example I want to use involves the abolition of Indigenous Units with justice agencies. The Queensland Corrective Services abolished the Indigenous Unit

in 2005 as a result of a Business Model Review (Department of Corrective Services 2004). The argument proposed that ‘special interest groups’ did not work and that all staff need to consider the needs of, and impact on Indigenous offenders of the Department’s policies, procedures and practices.

The review team has proposed that, rather than specific target group entities such as the Women’s Unit and the Aboriginal and Torres Strait Islander Unit which currently exist, the issues now dealt with by these units would be dealt with more effectively when the policies relating to these areas are embedded within a Departmental policy framework (Department of Corrective Services 2004:ix)

The Business Model Review Team went on:

‘The review team does not accept that target groups are best served in a policy sense by identifying discrete units to serve only their strategic policy needs. A likely outcome of such an organisational arrangement is that other relevant target groups are seen to be excluded... For instance the review team has been made aware of emerging target groups in the offender population (eg the aged, the intellectually disabled, the psychologically disturbed, and various ethnic groups)’ (Department of Corrective Services 2004:42)

Yet the criticism of this approach is that it leads to a form of mainstreaming where Indigenous interests are ignored. There is no process for developing an understanding of Indigenous issues. There is no formal process for Indigenous input. There is no particular Indigenous Strategic Plan or Policy that spells out the Department’s goals for Indigenous people. There is no evidence to support the argument that general policies will meet the desired outcomes for Indigenous people.

It is important to recognise then that the loss of an effective Indigenous voice in senior management and policy development among some criminal justice agencies fits within a broader change towards mainstreaming. Indigenous interests are reduced to ‘special interests’ and then placed as one among many seeking recognition. The broader commitments to self-determination and to understanding the distinct and unique position of Indigenous peoples is silenced and lost in the process.

Conclusion

Understanding the roots of Indigenous anger is important at both an individual and collective level. Understanding at the individual levels opens the opportunity for personal change, understanding at the collective levels offers the possibilities political change. The argument presented here is that one dimension to an understanding of Indigenous anger requires a critical look at the role of the criminal justice system itself. Criminal justice agencies, their policies and practices and the laws under which they operate may well directly contribute to Indigenous anger.

Part of the argument means coming to terms with the historical role of, for example, the police. However, this is very clearly not just about history. Contemporary law, policy and practice is also implicated in fostering a very deep sense of discrimination and injustice. A ‘zero tolerance’ approach in policing will directly impact on the most

marginalised groups in society, and the research demonstrates that Indigenous people will be most adversely affected.

At the back-end of the criminal justice system there appears to be an increasing reliance on the greater warehousing of offenders with decreasing access to prisoner programs as the remand population grows, and fewer resources generally as the requirements of detaining the expanding prison population require ongoing capital works expenditure. In this context the dominant rhetoric that argues against Indigenous rights and privileges 'mainstreaming' fits with the loss of specific understandings (and corresponding programs) for Indigenous 'clients' of the criminal justice system. To counteract this trend there needs to be clear exposition of why specific understandings of Indigenous anger are important for change – at both the individual level as well as the broader political level, and why criminal justice institutions themselves need to change if they are ever to respond or work in any way effectively for Indigenous people.

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