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## **Indigenous Incarceration: The Violence of Colonial Law and Justice**

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### **Introduction**

This chapter explores the issue of violence in relation to Indigenous people. There are a number of assumptions underpinning the argument and I begin by setting these out below. I have used a broad concept of violence which includes overt physical violence, as well as the use of cruel, inhuman and other forms of ill-treatment. Such an approach is consistent with human rights standards which, in the UN Convention against Torture, prohibit cruel, inhuman and degrading treatment. I have also discussed the failure to exercise a reasonable duty of care to persons in custody within the category of violence. The outcomes which arise when custodial authorities fail to adequately perform their responsibilities are often disastrous. Many Indigenous deaths in custody, and much mistreatment of Indigenous people arises through a failure to exercise a required duty of care. I have termed the results of this failure 'the violence of neglect'.

This chapter is specifically focussed on the violence of incarceration for Indigenous people in Australia. However, the over-representation of Indigenous people in criminal justice systems is an international phenomenon. The social, economic, health and educational status of Indigenous peoples are indicative of the most marginalised groups globally<sup>1</sup>. There is also a particular resonance between the experience of Indigenous people in Australia with those in other 'settler' countries of Canada, New Zealand and the United States. Similarities can be found in the experience of colonisation as well as the contemporary levels of mass imprisonment (see Cunneen 2006). In each country Indigenous people are massively over-represented in local, state and federal prisons. In Australia in 2005 the imprisonment rate per 100,000 of the non-Indigenous population was 125.3. For Indigenous people the comparable rate was 2021.2 (ABS 2005:31).

A further assumption underpinning this chapter is the 'location' of violence: I have taken it to include both police and prison authorities. There is a specific reason for this broader consideration of violence. Many Indigenous people come into contact with the criminal justice system and are locked-up in local police cells (or local jails to use the American terminology). This is an issue for Indigenous people living in rural and remote areas where they are not transported to a major prison for their period of incarceration, particularly in relation to minor offences. In these cases the person is held in custody until the matter is determined by a magistrate, which might take several weeks if it is in a remote area where the court only sits on a monthly schedule.

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<sup>1</sup> See generally, the United Nations *Permanent Forum on Indigenous Issues* for discussion on these issues. <http://www.un.org/esa/socdev/unpfii/>

To properly understand the 'violence of incarceration' as it applies to Indigenous people we need to include police in their role as a custodial authority.

The final assumption underpinning the chapter is the importance of the history colonial dispossession and control. The state claims monopoly over the legitimate use of violence against its own citizenry, largely through the application of the criminal law and its systems of punishment. Yet we can only understand this monopoly of violence in the context of Indigenous peoples when it is symbiotically linked to the historical process of colonisation. Colonisers claimed the moral and political right to impose specific systems of law and punishment over Indigenous peoples – systems which were alien to the colonised. In this sense the original 'violence of incarceration' has its roots in dispossession from land and denial of sovereignty.

### **The Historical Context**

There has been much written concerning colonial violence against Indigenous people in Australia and elsewhere, 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 criminal justice system as an agent of colonial policy and often involved in outright violence, or as an instrument of policies of containment, control and removal (Johnston 1991, HREOC 1991, NISATSIC 1997, Cunneen 2001). In terms of the long term impact of this violence, it has been noted that trauma is greater, more severe and longer lasting when it is caused by human agency, than by those who experience natural disasters. For Indigenous people this trauma has been intergenerational and has its roots in the colonial experience (Atkinson 2002).

Violence was at the foundational core of the *civilising* processes embarked on by state authorities in their efforts to contain native resistance. The history of terror, torture, violence and ill-treatment is intimately bound up with the various stages of warfare across Australia, New Zealand and North America as Indigenous peoples were dispossessed from their land. As Taussig (1987) has argued violence and terror were an essential part of maintaining colonial hegemony. The criminal justice system during the early colonial period was characterised both by its repressiveness and military character. In Australia police actions in 'dispersing' Aboriginal people became an important part of colonial policy in ensuring the removal and control of the traditional landowners. 'Dispersal' became the euphemism for armed conflict, and some 20,000 Aboriginal people were killed during the 'settlement' of an 'unoccupied' land (Reynolds 1987:1).

During the late nineteenth and early twentieth century a period of government 'protection' of Indigenous peoples was introduced. Protection legislation racially segregated Aboriginal people from Australia citizens and then proceeded to criminalise certain types of behaviour. For example, the criminalisation of Indigenous people for alcohol offences and their subsequent incarceration began with the introduction of the Western Australian protection legislation in 1905 (Haebich 1992: 110). Thus, a significant feature of protection legislation was the exercise of criminal sanctions over Indigenous people. Although legislation was couched in the language of protection, essentially the model for administration and maintenance of control utilised the institutions of the criminal justice system through extensive surveillance

and penal sanctions built around the deprivation of liberty. In observing the racially-defined and arbitrary nature of justice for Indigenous people, the Australian anthropologist Charles Rowley remarked in the early 1970s, that it was 'still true that in Queensland one can be incarcerated either for crime or for being an Aboriginal' (Rowley 1972:123). Indigenous writers like Atkinson (2002) have referred to these policies of containment and enforced dependency as the structural violence of colonisation.

The historical memory of massacres, containment on reserves, the forced removal of children and a discriminatory criminal justice system is very much alive in Indigenous histories. This history informs Indigenous understandings of the criminal justice system. It also means that there is a particular structural relationship between Indigenous peoples and criminal justice systems which is quite different from other groups. The legal system is one that is firmly entrenched in a colonial paradigm and built on assumptions and processes that removed for Indigenous people from whatever legal protections may have existed for other groups.

### **Contemporary Accounts of Violence**

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, non-Indigenous racial and 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 criminal justice officials including police and prison officers. 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 in the criminal justice system 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). 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' (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).

### **State Violence and Miscarriages of Justice**

Violence and intimidation against Indigenous people leads to significant miscarriages of justice, including lengthy periods of imprisonment. The case of Kelvin Condren provides an extreme illustration of this point. Condren was sentenced to life imprisonment in 1984 for the murder of Patricia Carlton. Both Condren and Carlton were Aboriginal people living in Mt Isa. The case caused considerable controversy and the conviction was finally set aside by the Queensland Court of Criminal Appeal in June 1990. Condren had, by this time, spent six years in prison.

Condren had always claimed that he was assaulted and 'verballed' by police over the murder he had supposedly confessed to committing. Specifically, Condren claimed that he had been subjected to assault and intimidation prior to making a police record of interview, that the record of interview was largely fabricated by police, and that the oral admissions which police claimed he had made prior to the record of interview were also fabricated. In addition, three Aboriginal witnesses also claimed that the statements they had made to police in the matter were false and had been obtained through intimidation, duress and assault (Criminal Justice Commission 1992).

In the first application to the Queensland Court of Criminal Appeal in 1987 evidence pointing to Condren's innocence had been rejected. The mode of reasoning in that rejection is illuminating. A linguistic expert with particular knowledge concerning Aboriginal English and the legal process, Dr Eades, had presented evidence to the court that the speech patterns in the police record of interview were inconsistent with the type of speech patterns used by Aboriginal people in Queensland. Eades evidence was rejected by the court on a number of grounds including on the basis that Condren was only 'part-Aboriginal' and therefore not within the group described by Dr Eades (see Caruana, 1989). During the first appeal the Court accepted the uncorroborated confession to police despite mounting evidence which cast doubt on its validity. The matter went back to the Queensland Court of Criminal Appeal for a second time in 1989 after intervention by the High Court of Australia and a commitment by the new

Queensland Labor Attorney-General to review the case. Condren was released from gaol in 1990.<sup>2</sup>

Condren's case points to another view or understanding of the violence of incarceration. The deprivation of liberty (itself an implicitly violent act) is an outcome from the actual violence exercised in earlier stages of the criminal justice process.

### **Killed in Custody**

Perhaps the more obvious way of thinking about the violence of incarceration relates to those cases where individuals are violently assaulted and killed. Deaths in custody have been a major issue for Indigenous people and were the subject of an extensive Royal Commission in the later part of the 1980s and early 1990s. The Royal Commission into Aboriginal Deaths in Custody (RCADIC) was established because 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 (kicked to death by police after a pub brawl), and Eddie Murray in New South Wales (picked-up by police for public drunkenness and died from hanging in a police cell) (see Cunneen 2006).

Situations where Indigenous people are killed by police and correctional authorities *whilst in custody* (as compared to being killed while being taken into or escaping from custody) are undoubtedly the most controversial of deaths. One of the most recent and notorious cases in Australia involved thirty six year old Mulrunji (Cameron Doomadgee) who died in police custody on Palm Island in November 2004. Palm Island is a major Indigenous community near Townsville in Queensland. Mulrunji was arrested for drunk and disorderly behaviour. He was healthy man when arrested, was not known as a trouble-maker, and had not been previously arrested on Palm Island. The post-mortem examination revealed that Mulrunji suffered four broken ribs, a ruptured spleen and that his liver was almost cleaved in two. A riot occurred on the Island after the release of the autopsy results. During the riot the police station and local courthouse were destroyed.

The community's anger over the death of Mulrunji was vindicated by the Coroner's report into the death which was released in September 2006. Coroner Clements found that Mulrunji had punched Sergeant Hurley after being arrested and transported to the police station, and that Hurley had punched Mulrunji in response. Both men fell to the ground and Hurley lost his temper and hit Mulrunji several times after falling to the floor. 'I conclude that these actions of Senior Sergeant Hurley caused the fatal injuries' (Clements 2006:27). After being beaten, Mulrunji was dragged away and deposited in the police cells. According to the Coroner, 'there was no attempt whatsoever to check on Mulrunji's state of health after the fall and its sequelae... No attempt at resuscitation was made by any police officer even when there was a degree of uncertainty about whether Mulrunji had died' (Clements 2006:27).

The Coroner found that the decision to arrest Mulrunji in the first instance for drunk and disorderly was an inappropriate use of police discretion and could easily have

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<sup>2</sup> See *Condren v The Queen* (1987) 28 A Crim R 261; *Condren v The Queen*, appeal, High Court of Australia, 16 November 1989, unreported.

been addressed by means other than arrest. In other words, Mulrunji should never have been in police custody in the first place.

The Coroner was critical of the failure to check on the health of Mulrunji after the fall and the assault.

Mulrunji cried out for help from the cell after being fatally injured, and no help came. The images from the cell video tape of Mulrunji, writhing in pain as he lay dying on the cell floor, were shocking and terribly distressing to family and anyone who sat through that portion of the evidence. The sounds from the cell surveillance tape are unlikely to be forgotten by anyone who was in court and heard that tape played. There is clear evidence that this must have been able to be heard from the police station dayroom where the monitor was running. Indeed the timing of Senior Sergeant Hurley's visit to the cell suggests that the sounds were heard. But the response was completely inadequate and offered no proper review of Mulrunji's condition or call for medical attention. The inspections were cursory and dangerous even had Mulrunji been merely intoxicated. The so called arousal technique of nudging Mulrunji with a foot is not appropriate. It cannot be sanctioned (Clements 2006:32).

The Coroner was highly critical of the investigation which failed to meet the standards of thoroughness, competency or impartiality. One investigating officer was a friend of Sergeant Hurley - the police officer most likely to be under investigation, and both investigating officers visited Hurley's house for dinner after the investigation had begun.

Adding to the community's view of a cover-up over the killing was the fact that Mulrunji's sister had visited the police station bringing lunch for him. At this time he was known by police to be dead. She was simply told to go away. The family were not informed of the death until four hours after it had occurred.

The death of Mulrunji is really a 'worst case' example of someone who should not have been in custody in the first place, who is then beaten by custodial authorities and simply left to die. At the time of writing, the matter had been refereed to the Director of Public Prosecutions to make a decision on bringing criminal charges against the police responsible for the death.

### **The Violence of Neglect**

Violence is often associated with the actions of individuals on others. However, it can also be seen in the *inaction* of authorities who have specific responsibilities and duties. At the most extreme these inactions can result in death. The RCADIC 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.

Royal 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).

In Queensland, the Royal Commission found that five of the 27 deaths investigated 'were preventable in that they would not have occurred if the custodial authorities had adequately attended to their responsibilities' (Wyvill 1991: 27). At least two other deaths may have been preventable. In particular, 'a lack of understanding of the duty of care owed to a person in custody; a failure on the part of one or more individuals to perform their custodial duties; [and] entrenched habits of non-compliance' contributed to the deaths (Wyvill 1991: 27).

In Western Australia the Royal Commission reports were equally damning of the indifference to the duty of care demonstrated by custodial authorities. For example, there were five Aboriginal deaths in custody in Kalgoorlie police lock-up during the 1980s. In the last four of these deaths, police ignored procedures relating to cell checks which had been specifically introduced after the first Aboriginal death in custody in the lock-up (O'Dea 1991: 456-457).

The stories of this neglect and indifference to Indigenous people in custody 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 RCADIC represented the day-to-day experiences of people when they came into contact with non-Indigenous institutions. Two cases examined by the Royal Commission, 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).

It might be reasonable to expect an improvement after the completion of the RCADIC and the subsequent release of its findings and recommendations. The most extensive examination of deaths in custody since the Royal Commission has been prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996). It examined 96 Indigenous deaths in custody during the period 1989-1996 and used the findings of coronial inquests as a means of auditing the implementation of Royal Commission recommendations.

The report found that there were numerous breaches of Royal Commission recommendations, including the lack of proper assessment procedures, the lack protocols for dealing with intoxicated persons; insufficient training to distinguish intoxication from injuries; irregular cell observations, 'at risk' information about prisoners was not passed between medical and orison staff or police and custodial authorities, and in some cases there was a lack of awareness of the duty of care to detainees. Health services in prisons were also substantially below community standards (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner 1996: xv-xvii).

The response to minimising Indigenous deaths in custody has been very inconsistent. The RCADIC reported in 1991, made 339 recommendations and showed clearly how deaths could be minimised. When the situation was reviewed in the mid 1990s by the Aboriginal and Torres Strait Islander Social Justice Commissioner, it was still found that major recommendations which could prevent deaths in custody were being ignored. And now a more recent review of Indigenous deaths in custody since 2000 continues to show that basic recommendations to prevent deaths have not been implemented (Cunneen 2006). To demonstrate these current problems, two relatively recent Indigenous deaths in prison are summarised below, that of Trent Lantry in New South Wales and Craig Allen in South Australia.

Trent Lantry committed suicide whilst in prison in March 2000. He was 19 years of age when he hanged himself by using a bed sheet fixed to an obvious hanging point: the vertical bar in front of a grill at the top of the door of the cell. The young man died on the same day he was released from an Acute Crisis Management Unit (ACMU). He had been previously admitted to the ACMU on a number of occasions. On this particular occasion he had been held there as a result of self-inflicted lacerations to his arm and swallowing razor blades. The Unit was described by the Department of Corrective Services as 'a safe and temporary environment for inmates assessed as being highly at-risk or suicidal or who have previous self-harm histories and are currently in crisis' (Smith 2005:10).

On the day of his release from the Crisis Unit, the young man was placed into a cell on his own with a bed supported by four moveable milk crates. There were various accessible hanging points in the cell. There was little monitoring or supervision by correctional staff, who had not been informed of his circumstances (Smith 2005:10). The mother of Trent Lantry, Mrs Veronica Appleton, brought a negligence action

against the Department of Corrective Services alleging breach of duty of care towards the deceased and breach of a duty of care towards herself. Mrs Appleton was not notified of her son's death by the Department of Corrective Services but through a telephone call from a friend who worked at a juvenile detention centre. She attended the prison to view her son's body. She was unaware that she would be taken to his cell and not warned about the condition of his body (Smith 2005:10).

Despite his young age, Trent Lantry had a long history of incarceration and previous suicide and self-harm attempts, including while detained in juvenile correctional facilities. At the time of his death, Trent had been in the adult correctional system for around six months and had been in the ACMU several times because of self-harm.

In relation to the negligence action regarding Trent Lantry, the court found that

The defendant breached its duty of care in not taking further precautions to prevent impulsive self-harm by Trent after his discharge from the ACMU and in particular by placing him in a cell with easy and immediate access to a hanging point by movable milk crates. By placing Trent in a cell with movable milk crates supporting his bed, the defendant provided him with the opportunity to kill himself. I also find that not monitoring him or assessing him in some fashion and placing him in a cell alone amounted to breaches of its duty (*Veronica Appleton v State of New South Wales*, Unreported, District Court of New South Wales, Quirk, J. 28 July 2005, 26).

The death of Trent Lantry, like many contemporary Indigenous deaths in custody, shows how little has changed in terms of improved procedures following the Royal Commission. In many respects Lantry's death is a carbon copy of the circumstances of deaths investigated by the Royal Commission. As Smith notes:

The circumstances of this case demonstrate fundamental deficiencies in custodial procedures. These include poor standard of cells, inadequate training of correctional staff and an unreliable system of communication for the exchange of relevant information between staff members about inmates that are at high-risk of suicide or self-harm (Smith 2005:11) .

There was a range of recommendations from the Royal Commission precisely designed to remedy these deficiencies. These included some 45 recommendations specifically aimed at improving custodial health and safety (Johnston 1991: (5) 95-107).

Craig Allan was 29 years of age when he died as a result of hanging in Yatala prison in South Australia in October 2000. He had been convicted of assault against his partner Ms Bowden and was serving one month of a seven month prison sentence (with the remainder suspended subject to a bond). He had been placed in cell 211 which was a management cell. The deceased made a noose from bed clothing, attached it to an upper rail of a double bunk and hanged himself. Mr Allan had a long involvement with the criminal justice system, his mother giving evidence that he had been in trouble with the police since he was 8 years old and had been in and out of prison since becoming an adult. Craig Allen had a previous history of amphetamine use and alcohol abuse. He was receiving psychiatric help for depression and had been

proscribed Prozac. Mr Allen also had previous suicide attempts, including one by hanging whilst in police custody some ten years earlier.

On admission to Yatala prison, some eight days before his death, Mr Allan was subject to various assessments. His Clinical Assessment Record and Health Assessment form, completed by nursing staff, noted his psychiatric assessments of personality disorder and depression, his Prozac daily dosage, his heavy alcohol consumption, his history of attempted hangings and his 'active emotional problems'. Under Special Medical Recommendations it was written, 'shared cell recommended'. Correctional staff completed a Prison Stress Screening form designed to assess prisoner risk, where, despite knowledge of the factors identified above, he was assessed as not at risk. The deceased continued on his Prozac medication and in addition was prescribed Valium to combat the affects of alcohol withdrawal.

Cell 211 was used to accommodate 'recalcitrant' prisoners for up to 48 hours, and the deceased was placed there the morning before he committed suicide. Cell 211 is a solitary confinement cell with no television, minimal reading material and only one hour exercise per day (instead of the usual 6-8 hours). The reason Mr Allan was placed in cell 211 was that, contrary to prison regulations, he was wearing two rings on his fingers. A married person was entitled to wear a wedding band only. Prisons staff determined that because the deceased was not married he was not entitled to wear any rings. Mr Allan refused to remove the rings and was thus placed in the management cell. He was then threatened with removal to the maximum security G Division which has a regime of potential long-term solitary confinement. Mr Allan agreed to remove the rings which he did so during the middle of the day. He was left in cell 211.

The Coroner noted that, 'the decision to place the deceased within cell 211 was made without regard to the material contained in the Health Assessment form and, in particular, the recommendation regarding shared cell accommodation... The fact that the material set out [in the form] was not referred to before making the decision was taken... was a serious oversight' (State Coroner 2003).

The prison 'Local Operating Procedure No 26' required that prisoners be observed by correctional staff every two hours. The deceased was discovered in his cell at 7.30am. Taking into account the medical examiners approximate time of death and other factors, the Coroner estimated that the deceased took his own life sometime between 1am and 2.50am. Officer observation patrols at 3am, 5am and 7am failed to observe that the deceased had hanged himself from a rung on the top bunk.

The death of Mr Allan highlighted the failure to ensure proper medical assessments are made available and for the assessments to inform decision-making, the failure to remove hanging points (especially in cells where agitated prisoners are likely to be held in solitary confinement) and the failure to properly observe prisoners as required by prison regulations. In South Australia the state and deputy state coroner have consistently recommended that 'safe cells' principles be implemented as a matter of priority in the State's prisons. However, the government's response to this has been that while safe cell design principles are incorporated in new cell accommodation, 'the refurbishment of existing cells to meet safe cell standards is beyond the current

resources of the Department'. The government went on to respond to the Coroner as follows:

The financial priorities of the Government are related to issues of health, education and police. The cost associated with upgrading all prison cells so they are consistent with 'safe cell' principles would be in excess of \$40m. Expenditure of such proportions would reduce the ability of the Government to provide the wider community with better security, education and health related services (State Coroner 2006).

It is hard to imagine a clearer statement from government that the lives of prisoners are unimportant.

Negligence and lack of attention to duty of care obligations are still endemic in custodial settings. This is despite the accepted legal view that authorities have a duty of care for those in their custody. Indeed when an individual loses their liberty there is a heightened responsibility on the State to exercise a duty of care and prevent harm. For this reason negligence on the part of authorities can be legitimately considered as part of the violence of incarceration. It is the violence inflicted by neglect. Yet we see basic failings: hanging points remain common place, medical assessments and other vital information are not communicated or do not impact on decision-making, there is a lack of training in how to respond to vulnerable persons such as the mentally ill, and there is a failure to follow instructions or procedure.

### **Racism, Trauma and Violence**

It is also important to consider the links between violence in the criminal justice system and the psychological impacts of racism. I am thinking here of the impacts of racist abuse, racist taunts and degrading treatment based on race. In the research on violence against Indigenous juveniles in custody referred to previously, some 81 per cent of the Indigenous young people interviewed 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 (Cunneen 1991). The National Inquiry into Racist Violence also documented humiliating treatment. For example, a non-Aboriginal woman who was arrested with Aboriginal people in Western Australia and gave evidence to the Inquiry, stated that Aboriginal detainees were 'humiliated... laughed at, jeered at, enticed to say something wrong so that the punishment would be even greater, threatened with the padded cell, abused with the most insidious remarks... I have never [before] seen this kind of human abuse, this mental torture, never' (HREOC 1991:105-106). Degrading treatment while in custody was also recounted. For instance, it was alleged that in the Pilbara region of Western Australia, Aboriginal men had been forced, through lack of water, to drink from toilet bowls while they were held in police cells (HREOC 1991: 104-105).

This type of treatment reflects what has been referred to as the psycho-social domination that underpins racism and the denigration of Indigenous culture and Indigenous being. As Judy Atkinson writes, 'Aboriginal people would call this the greatest violence, the violence that brings the loss of spirit, the destruction of self, of the soul' (Atkinson 2002: 69). This is the racialized violence of incarceration. It may involve physical violence, racist behaviour or verbal abuse. However, it is aimed at

destroying the sense of self worth through an attack on the person's ethnic or racial background.

An extreme incident of this type of racist psychological violence against Indigenous (both Aboriginal and Maori) inmates was exhibited in the Victorian prison system in the later part of the 19080s. There was a persistent campaign of violence and intimidation against Maori and Aboriginal prisoners in Pentridge prison which involved Ku Klux Klan (KKK)-type activities.

Some of these activities were found to have occurred by internal prison investigations, including those involving KKK activities. However prison activists also alleged that the investigations were inadequate and aimed at covering up the existence of violence and intimidation. The major allegations included 'cross-burning' by a prison officers and prison officers appearing in cell doors at night wearing Ku Klux Klan hoods. There was also photographic evidence that showed prison officers wearing a hood, as well as standing beside a prisoner wearing the Ku Klux Klan hood. Seven prison officers were charged with internal disciplinary matters under the *Public Service Act*. The charges were determined by the Director of Prisons. Three prison officers were found guilty of disciplinary offences. One officer was charged with misconduct for 'the construction and burning of a wooden cross while on duty in 'H' Division in 1986 and during the let out procedure of [a] Maori prisoner'. A chief prison officer was charged with misconduct for taking a photo of two prison officers with a prisoner wearing a KKK hood. Another chief prison officer was charged with misconduct for allowing himself to be photographed wearing a KKK hood. The officers were 'reprimanded' for their behaviour (Cunneen 1997: 145-147).

## **Conclusion**

This chapter has considered the violence of incarceration in the specific context of Indigenous people. The focus has been on Australian Indigenous experiences, however there are similarities internationally, particularly in the other 'settler' countries of New Zealand and North America. The first point in understanding the violence of incarceration for Indigenous people is to draw the link to the original violence of invasion, occupation and dispossession. Law was a foundational tool in this original violence, and the criminal justice system has continued to operate in a structural context which criminalises Indigenous people in a highly disproportionate manner. Criminalisation is an endemic problem in Indigenous communities. While it remains such an extensive problem the Indigenous people will continue to bare the brunt of the violence of the system..

State violence through the criminal justice system and against Indigenous people has been widely documented. There is no doubt that violence or the threat of violence is an integral part of the way the criminal justice system operates. Indeed incarceration is built on an act of violence – the deprivation of liberty, and the criminal justice system lays claim to moral and legal authority for the legitimate use of violence. The massive over-representation of Indigenous people in prison means that they are more susceptible to the use of routine violence. However, beyond the routine violence of incarceration, there is also racialised violence which is specific to the experiences of Indigenous people in the criminal justice system. In more extreme cases, the prison may be home to organised racist groups who victimise Indigenous inmates.

This chapter has identified the type of overt violence used against Indigenous people, where in cases like Condren it leads to gross miscarriages of justice. In Condren's case the six years of incarceration was directly the result of earlier violence by police, and unquestioning racial stereotypes used by the judiciary. In cases like Mulrunji, the violence is palpable - he was beaten to death by police whilst in their custody. However, the type of violence which is far more pervasive and probably more damaging in terms of loss of life is the violence of neglect and indifference. Despite the need for basic safeguards which have been identified time and time again over the last couple of decades Indigenous people continue to die in custody in circumstances that could be easily avoided. They die in custody for very simple reasons: safe cells are not available, proper health facilities are not available, proper procedures are not followed.

The type of solutions which flow from this analysis are evident. They partly relate to changing the way the justice system operates – and there have been enough inquiries and recommendations to clearly indicate how some of the more overt failings of the system could be avoided. However, there is also the deeper need to fundamentally change the relationship of Indigenous people with the criminal justice system – and this is basically a question of decolonising that relationship. The decolonising of criminal justice will involve both the recognition of a rights-based agenda (primarily Indigenous self-determination rights and other political and legal rights) and a process of practically developing alternatives to the current modes of intervention. These alternatives in policing, sentencing and punishment processes are likely to be organic to the particular needs of communities. However, we see examples in a range of initiatives like women's night patrols, elders groups, and community justice groups.

## **Bibliography**

Atkinson, J. (2002) *Trauma Trails. Recreating Songlines*, North Melbourne: Spinifex.

Australian Bureau of Statistics (ABS) (1995) *National Aboriginal and Torres Strait Islander Survey 1994. Detailed Findings*. Catalogue No. 4190.0. Canberra: ABS.

Australian Bureau of Statistics (ABS) 2001 *Prisoners in Australia*. Catalogue No. 4517.0 Canberra: ABS.

Australian Bureau of Statistics (ABS) (2004) *National Aboriginal and Torres Strait Islander Survey 2002*. Catalogue No. 4714.0. Canberra: ABS.

Australian Bureau of Statistics (ABS) 2005 *Prisoners in Australia*. Catalogue No. 4517.0 Canberra: ABS.

Caruana, C. (1989) 'Trial by Endurance', *Aboriginal Law Bulletin*, 2(41): 4-6.

Clements, C. (2006) *Inquest into the Death of Mulrunji*, Office of the State Coroner. Brisbane. <http://www.justice.qld.gov.au/courts/coroner/findings/mulrunji270906.doc>

Criminal Justice Commission 1992, *Report on the Investigation into the Complaints of Kelvin Ronald Condren and Others*, Brisbane: Goprint.

Cunneen, C. (1991) *A Study of Aboriginal Juveniles and Police Violence*, Report Commissioned by the National Inquiry into Racist Violence, Sydney: Human Rights and Equal Opportunity Commission.

Cunneen, C. (1997) 'Hate and Hysteria: The Vilification of Aboriginal and Torres Strait Islander People' In Cunneen, C., Fraser, D. and S. Tomsen (eds) *Faces of Hate*, Annandale: Federation Press.

Cunneen, C. (2001) *Conflict, Politics and Crime*, St Leonards: Allen and Unwin,

Cunneen, C. (2006) 'Aboriginal Deaths in Custody: A Continuing Systematic Abuse', *Social Justice* 33 (4):

Haebich, A. (1992) *For Their Own Good*, Nedlands: University of Western Australia Press.

Human Rights and Equal Opportunity Commission (HREOC) (1991) *Racist Violence*, Report of the National Inquiry into Racist Violence, AGPS, Canberra.

Johnston, E. (1991) *National Report, 5 Vols*, Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra.

NISATSIC (1997) *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC, Sydney.

O'Dea, D. (1991) *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia, Vol.1*, Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra.

Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) *Indigenous deaths in custody 1989-1996* Sydney: Human Rights and Equal Opportunity Commission.

Reynolds, H. (1987) *Frontier. Aborigines, Settlers and Land*, Allen and Unwin, Sydney.

Smith, C. (2005) 'Broken Beds and Broken Lives: Veronica Appleton v State of New South Wales' *Indigenous Law Bulletin*, 6(14):10-11, October 2005.

State Coroner, South Australia (2003) *Finding of Inquest Craig Mark Allan*. Inquest No. 17/2002 (2689/2000) <http://www.courts.sa.gov.au/courts/coroner/> Accessed 5/7/06

State Coroner, South Australia (2006) *Finding of Inquest Troy Michael Glennie*. Inquest No. 17/2006 (0397/04 & 2943/04) <http://www.courts.sa.gov.au/courts/coroner/> Accessed 10/11/06

Taussig, M. (1987) *Shamanism, Colonialism and the Wild Man. A Study in Terror and Healing*, University of Chicago Press, Chicago.

Wootten, H. (1991a) *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra.

Wootten, H. (1991b) *Report of Inquiry into the Death of Mark Anthony Quayle*, Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra.

Wyvill, L. (1990) *Report of the Inquiry into the Death of Charlie Kulla Kulla*, Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra.