ABORIGINAL MARGINALISATION AND RACISM IN THE JUVENILE JUSTICE SYSTEM

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To Greg Nicholls


**Introduction**

The Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) recognised that Aboriginal youth are the most socially and economically marginalised group of young people in Australia (Dodson 1991:398). It was further acknowledged that their marginalisation was borne out of a complex interrelation of social, economic and cultural factors; the result of which rendered a large number of Aboriginal youth more susceptible to legal processes than their non-Aboriginal counterparts. The most documented manifestation of the marginalisation of Aboriginal youth is their over-representation in custody.

This paper attempts to explain the complex relationship between marginalisation and over-representation. It does so on two fronts. First; the factors associated with marginalisation will be discussed in terms of how they predispose Aboriginal youth to a life of crime and hostility towards society. Second; how those who administer the juvenile justice system - the police and the judiciary - respond to this marginalisation will be analysed, with particular reference to disparity of treatment. After allowing for higher Aboriginal offending, it will be shown that police and, to a lesser degree, judicial assumptions and practices operate to criminalise the marginalisation of Aboriginal youth. Such institutional racism will be shown to be a influential contributing factor to the over-representation of Aboriginal youth in custody.

**The Marginalisation of Aboriginal youth**

Beresford & Omaji (1996) asserted that evidence of the marginalisation of Aboriginal youth was available in the early 1990s and that little attempt was made to address or curtail the situation. Since then, the problem has escalated and become even more compelling. A considerable number of Aboriginal youth have been alienated from mainstream society by the interaction of family poverty and dysfunction, educational failure and labour market exclusion. As a direct result, many young Aboriginals, particularly those in urban and metropolitan settings, have sought refuge in a subcultural lifestyle characterised by crime, drug abuse and hostility. As Beresford & Omaji forcefully state, “If we are ever to understand why crime occurs among Aboriginal youth, we must unravel the structure and dynamics of this subculture” (1996:121).

However, before this analysis can be undertaken a number of points need to be made. First; the factors identified in this paper as being associated with the marginalisation of Aboriginal youth are by no means exhaustive. Second; there is no clear-cut linear progression from one stage in subcultural lifestyle to another. The stronger presence of one identified factor over another does not necessarily result in a greater or lesser degree of marginalisation, or level of criminal involvement. The last, related point is that the complex interrelations between identified factors do not create ‘mappable’ pathways leading directly to marginalisation and criminality.
Poverty

Poverty is an encompassing description of marginalisation which includes a number of factors which will be discussed separately at a later stage. However, the close association between poverty and Aboriginal people in general means that it warrants particular mention.

Commissioner Wryill supported that view of Turrell, Western & Williams (1990) when he quoted them as saying: “The principle social factor impacting on Aboriginal people today is poverty” (1991:70). Those authors specified the extreme marginalisation of Aboriginal people in terms of access to fundamental socio-economic resources such as housing, income, employment and education.

In support, Boss et al (1995:64) noted that child poverty is inextricably linked to the cost of housing, the effects of which isolate and magnify marginalisation as impoverished families congregate on the fringes of main centres of habitation where cheaper accommodation is found. In terms of income, research commissioned by Commissioner Wootten revealed that 60% of parents of Aboriginal juveniles in custody were social security recipients (1991:355).

In terms of the effect of poverty on young Aboriginal people, Boss et al (1995:64) noted that poverty “stamped” marginalised children as different; and fostered their alienation and exclusion from mainstream society through an inherent lack of power and influence. Golstein (1994:21) believed that the identity crisis and poor self-esteem of many urban Aboriginal youth was compounded by the experience of poverty. He described poverty as having broadly oppressive consequences, including ‘a pervasive attitude of hopelessness’ which in turn corroded pride, self worth and esteem (cited in Beresford & Omaji 1996:128).

Poverty as a predictor of crime

An extensive research project undertaken by Weathburn & Lind (1997:42) found that a positive relationship existed between the level of socio-economic stress in an area and its level of juvenile crime participation in crime. More specifically, significant predictors of crime were identified as poverty, single parent families and crowded dwellings.

Unemployment

Unemployment has been identified as one of the major source of marginalisation among Aboriginal youth. The figures for Aboriginal youth unemployment are up to three times the rate of youth unemployment for non-Aborigines (Brady 1992:4). Further to this, Beresford and Omaji (1996:123) stressed that, in real terms, unemployment figures are conceivably higher still given that extremely marginalised Aboriginal youth are unlikely to be enrolled with Commonwealth Employment Services (now Centrelink).

The compounding effects of unemployment on Aboriginal youth cannot be underestimated. Young Aboriginal people have seen long-term unemployment in successive generations of their family and community. Brady (1992:2) asserted that intergenerational unemployment resulted in Aboriginal adult males being unable to display skills to their offspring. The cumulative scars of economic exclusion are passed onto to children through bitterness (Beresford & Omaji 1996:132), and a lack of pride and motivation (Dodson 1991:364). As such, unemployment becomes the dominant role model for Aboriginal youth. This, in turn, corrodes young peoples’ will to work and effects their sense of achievement (Beresford & Omaji 1996:126, 134).
Unemployment as a predictor of crime

Perhaps surprisingly, it is not clear whether or not unemployment has a direct causal effect on juvenile crime. One persistent view is that unemployment for many young people leads to crimes of ‘survival’. However, Bessant & Hill (1997:74) asserted that unemployment cannot and should not be so readily correlated with crime. The authors argued that making such a link explicit or inevitable is damaging for most young unemployed people in that it classifies them as a potential threat to social order, based purely their employment status.

Despite the absence of a direct causal link, the in-direct effects of unemployment on crime were repeatedly acknowledged by the Royal Commission. Commissioner Wyrill (1991:55) noted that the cases of deaths in custody demonstrated the often disastrous consequences of the lack of meaningful employment opportunities on Aboriginal families and communities. He said that “deprived of such opportunities, it appears that young people, particularly young males, often become involved in a cycle of drinking and criminal offending”. Similarly, Commissioner Wootten (1991:355) observed that boredom and lack of self-esteem were commonly seen as predisposing reasons for the abuse of alcohol and drugs and the occurrence of many of the relatively petty offences which commonly brought Aboriginals into custody.

Education

One of the most striking features of Aboriginal youth in custody is their non-attendance at school at the time of their arrest. A survey conducted by Beresford & Omaji (1996:52) found that 84% of Aboriginal detainees were either not attending or were irregular attendance at school. Comparative figures taken from community based Aboriginal youth were only slightly less. In relying on consensus statistics since 1986, Boss et al (1995:248) found that an average of about 10% of Aboriginal and Torres Straight Islander students dropped out of school before July in their Year 9, and a further 16% left between the middle of Year 9 and before the middle of Year 10.

Significant as they are, attendance rates say little about the quality of learning outcomes for Aboriginal children. Boss et al (1995:248) found that, on average, Aboriginal and Torres Straight Islander primary and secondary school children had lower literacy and numeracy levels than non-Aboriginal children. According to Miller (1985) less than 20% of recipients of Abstudy (Aboriginal Study Grants Scheme) were actually undertaking courses which would result in recognised post-school qualifications, and half of the grants were for ‘personal development’ courses (cited in Brady 1992:4).

These low rates of participation and attainment have been attributed to many factors including: parental attitude or lack of control at home; cultural incompatibility in education; peer pressure; the failure of education to cater for certain children; and a repressive school ethos (Beresford & Omaji 1996:61). Whatever the most plausible reason, or combination of reasons, the statistics suggest that Aboriginal youth in particular are alienated from the educational system.
Lower attendance and attainment levels as a predictor of crime

Considerable amounts of research have been conducted on the relationship between failure at school and delinquency. These studies have almost universally proven that pupils who fail at school are more likely to become involved in delinquent activities than those who succeed (Weatherburn & Lind 1997:47). Knight (1995:90) explained that students who were “failing, suspended, marginalised, resistant or disruptive, disengage[d] themselves from the conventional ties of school life” which heightened the potential for ‘drift’ into high risk activities. In particular, he identified marginalised youth as willing to engage in risk-taking behaviour in order to belong to another group.

A second, more specific feature of the relationship between education and crime is the effect of suspension and/or expulsion. Commissioner Dodson (1991:392) heard evidence that Aboriginal children were over-represented in the expulsion and suspension rates within the education system, and there was a strong correlation between those suspension and expulsion rates and the rate of Aboriginal youth in custody.

Beresford & Omaji (1996:131) found that for discouraged, and frequently disillusioned young Aborigines, dropping out of school was a dramatic step towards life at the margins of society. The authors noted that it was common for such youth to seek the company of others in the same situation, where criminal attitudes and activities were reinforced. In such circumstances, crime becomes a realistic alternative.

The Family

Parenting

The manner in which young people are raised by their parent/s has an enormous impact in determining whether or not children develop prosocial or antisocial behaviours (Smith & O’Connor 1997:136). This is true for Aboriginal and non-Aboriginal youth alike. However, the parents of Aboriginal youth have the additional hurdle of cultural dispossession and forced institutionalisation to overcome. Beresford and Omaji (1996:122) observed that:

“[t]he forces driving the marginalisation of Aboriginal youth are the deeper issues of racism, historical oppression and dispossession which have had cumulative effects upon generations of Aboriginals. It is common for young Aborigines to grow up with a hostility to white society, communicated to them by their parents”.

The intergenerational effect of forced institutionalisation were raised by Brady (1992:28) when she drew attention to the fact that many of the parents and grandparents of today’s Aboriginal youth were raised without parental modelling in missions, dormitories and children’s homes. The absence of nurturing and proper behaviour modelling in these settings has led to difficulties in the role of parenting, an inability to resolve interpersonal conflicts, and a pattern of domestic violence (ibid; Beresford & Omaji 1996:122).

In relation to parenting, the most perceived consequence of these difficulties the inability of Aboriginal parents to discipline their own children. Yet this may be an over-simplification of a complex issue. Brady (1992:24) stressed that while many outsiders romanticise the ‘caring and sharing’ of the Aboriginal family, and the strengths of Aboriginal ‘communities’, the reality is that these groups are powerless to deal with the marginalisation of their youth. As a result,
many parents leave their children to their own devices and hope that outside help and programs, or even institutionalisation, will solve the problem. Such characteristics were recognised by both Commissioners Johnson (1991 vol 4:167) and Dodson (1991:392) who noted that parental controls have been undermined by many years of reliance on external controls of the welfare system.

The incidence of the ‘granny syndrome’ (mentioned frequently in the Royal Commission) further highlights the lack of parenting roles for younger women. Commissioner Dodson (1991:385) noted that “[a]lthough the abdication of their parental responsibility, by offloading their children to the grannies, may have been done unconsciously, it is having a negative impact on the community” and places children at a severe disadvantage.

Similar circumstances were reflected upon by Boss et al (1995:175) in respect of the often transient life of Aboriginal youth who move from home to home within their extended family. The authors noted that the homes visited were often not stable homes and, as a consequence, such Aboriginal youth experienced no continuity in caregivers. It was concluded that, while such Aboriginal youth may not be literally homeless, they may suffer from the disadvantages of an uncertain and changing caregiving environment.

Family Violence

Aboriginal women have been found to experience extremely high levels of domestic violence. Stubbs (1995:42) reported that the homicide statistics for 1990-1991 revealed that Aboriginal women were victims at a rate ten times that of non-Aboriginal women. Furthermore, West Australian research found that the rate of spousal violence known to police was 1521 per 100,000 population for Aboriginal women victims as compared with 40.5 per 100,000 for non-Aboriginal victims.

Anthropologist, Morice (1978) asserted that violence was not a foreign concept in traditional Aboriginal culture. However, he and many others, acknowledge that the type of violence that is being witnessed today is qualitatively and quantitatively different from earlier eras. The dominant theory of explanation for the prevalence of family violence in Aboriginal communities relates to cultural domination and dispossession. Commissioner Dodson (1991:369) took particular notice of this theory and stated it as being:

“The active devastation to members of Aboriginal society, the forcing of a new dependency on the non-Aboriginal welfare system, combined with a belittling of the role of Aboriginal men and women, has led to an increased level of both self-destructive behaviour and external destructive behaviour by Aboriginal men in particular. (Dodson 1991, p369).

Child Abuse

A statistical analysis conducted by Boss et al (1995:140) found that the most significant variations in the patterns of reported and substantiated maltreatment occurred when Aboriginal and Torres Straight islander children were considered. In 1991 this group constituted 2.7% of all children in Australia between the ages of 0 - 17 years. However, in 1991-2 they represented some 6.9% of finalised cases and 8.5% of substantiated and at risk cases of maltreatment. The circumstances revealed that Aboriginal and Torres Straight islander children came to the attention of child protection authorities at a much higher rate than other children.
Family circumstances as predictors of crime

A major finding in a study conducted by Sampson & Laub (1993:95) into the family context of juvenile delinquency was that family process variables are strongly and directly related to crime. The most significant of the family variables analysed were supervision, attachment and discipline.

Other factors found to strongly disrupt family processes and in turn increase delinquency were family size and overcrowding, and parental deviance in the form of alcoholism and criminality (ibid:96). In terms of parental deviance, research conducted by Smith & O’Connor (1997:145) suggested an association between family violence, child abuse, and juvenile crime. The authors thought that such abuse exacerbated childhood vulnerabilities and fostered antisocial behaviour, aggressive and criminal tendencies in young people.

Child Removal

The over-representation of Aboriginal children within the ward population is evidenced through both statistical and anecdotal information. Reported statistics for 1995 show that the NSW state ward population aged between 10 and 17 years comprised 133 Aborigines, which was 9% of the total ward population. Projections made by the Australian Bureau of Statistics indicated that there was 17,009 Aboriginal and Torres Straight Islander children between the ages of 10 and 19 years, which was 2% of the total NSW population in that age category.

Anecdotally, the Royal Commission recognised that Aboriginal children were removed from their natural families at a rate higher than the non-Aboriginal population. In attempting to explain such circumstances it was suggested that the juvenile justice and welfare systems construed “Aboriginality as a problem, seeing indigenous communities and families as dysfunctional and culturally deprived” (Dodson 1991).

Effects on crime

Children who are state wards have been found to be fifteen times more likely to enter juvenile justice centres than other members of the juvenile population. A survey conducted by the Office of the Community Services Commissioner (1996) suggested that the circumstances surrounding a ward’s contact with the juvenile justice system lead to a picture of:

* unstable, inappropriate accommodation placements
* high support needs such as ADD and drug and alcohol use
* aggressive behaviours, self-injurious/suicidal tendencies
* history of poor educational experience/achievement
* unresolved behavioural problems arising from abuses suffered before and after wardship. (Community Services Commissioner 1996:48)

From the discussion so far, it is apparent that this picture closely replicates the factors associated with the marginalisation of Aboriginal youth.
Substance Abuse

Alcohol and drug use has been identified as another major feature of the subcultural lifestyle among urban Aborigines. Beresford & Omaji (1996:135) asserted that the use of alcohol, solvents, marijuana, and amphetamines are both a manifestation of a marginalised lifestyle and a significant factor which perpetuates attachment to it. The authors believed that even a cautious interpretation of the extent of substance abuse by young Aboriginal people would indicate that a substantial number are in danger of grave health risks and impaired social competence.

There are many theories of drug use, both sociological and psychological, but when the user of the substances are Aboriginal people a range of other social, historical and cultural influences are perceived to be involved. The social oppression of Aboriginal people is viewed by many to be an overall explanation of the over-use of alcohol and drugs. (Brady 1992:23). Commissioner Wyrill (1991:63) believed that depression, frustration, boredom and a perception of powerlessness were at the heart of explanations as to why so many Aboriginal people resorted to substance abuse. In relation to young Aboriginal people, Beresford & Omaji (1996:136) stated that regular drug use served as a reaction to boredom, unrewarding school experiences, and lack of employment while at the same time providing group entertainment and membership. Brady (ibid) believed that the most compelling social factor in the drug and alcohol use of young Aborigines was the desire to be part of the peer group.

Substance abuse as a predictor of crime

The relationship between crime and substance use has been the subject of many, sometimes contradicting, theories. The ‘substance use causes crime’ theory has attracted mixed support, in that the connection is recognised but only in a minority of cases. (Copeland & Howard 1997:174). The alternate ‘crime leads to substance abuse’ model has little empirical support and is unlikely to be the dominant pattern of the relationship between juvenile substance abuse and crime. The third perspective is the ‘common cause’ model which asserts that there is no causal link between substance abuse and crime but the association is a deceptive one, borne of similar aetiologies. While the theory remains open to question, evidence supports the assertion that drug use and delinquency are behaviours which are highly correlated as a result of adolescent experimentation (ibid:174). As a result of the contrariety of hypotheses, Copeland & Howard (ibid) concluded that there were multiple pathways to the escalation of substance use and delinquent behaviour and that most of the principal variables acted in association with one another rather than in a direct causal or correctional manner.

Copeland & Howard (1997:169-70) and the NSW Parliamentary Standing Committee on Social Issues (1992:175) found significantly higher levels of substance abuse among young offenders. Copeland & Howard commented that the limited available research indicated that 54 - 64% of offenders were drunk at the time of the offence, and that 45 - 59% of offenders reported that the crime related to their incarceration was committed to obtain money for alcohol and/or other drugs (ibid:171). Meanwhile the Standing Committee were told that in 1991, 50% of the boys at Minda Juvenile Justice Centre, 70% at Mt Penang, and 80-90% of the girls at Reiby were in custody for drug related offences, including offences committed to fund drug habits (1992:175).

The effect of alcohol on juvenile crime warrants particular attention. Commissioners Johnson (1991 vol 1:99) and Wyrill (1991:63) took notice of the role of alcohol in predisposing a person to crime. Brady (1992:22) inferred that, as there were proportionally more Aboriginals in custody in the 16 to 19 and 20 to 24 age groups, alcohol among the 16 to 24 year old Aborigines carried with it a high risk of arrest, police custody and imprisonment.
Identity and Self-esteem

Perhaps more so than non-Aboriginal youth, young Aboriginal people grapple with their sense of identity. The effect of cultural dispossession is that many Aboriginal youth do not feel a legitimate connection to their heritage. Beresford & Omaji (1996:126) believed that the marginalisation of Aboriginal youth limited the ways in which they were able to construct alternate identities. Angenet & de Man (1996:80) stated that if “youngsters are not able to create an identity by themselves, there is the danger that they will submit all too easily to group influences, and that they will identify with the identity of the group”.

Related to group acceptance is the concept of high self-esteem. Self-esteem has been found to depend on two closely related criteria: self-respect and social status. Low self-respect and social status leads to defensive behaviour characterised by avoidance and escape behaviour. Behaviours of these kind result in an “alienation from norms and customs, from the institutions, groups, and persons” held responsible for low self-esteem (Angenet & de Man 1996:80). To compensate, Angenet & de Man (ibid) found that young people sought experiences which lead to greater self-esteem, and associated with institutions, groups and persons who augmented self-esteem. In the case of young people, friends, peer groups and subcultures were mentioned. Lund & Salary (1980:82) found that family and school had less of an influence on self-image, whereas relatively greater influence was exerted by friends, appearance and physique.

Lack of identity and low self-esteem as a predictor of crime

The relationship between a lack of identity, low self-esteem and crime is somewhat convoluted. Juvenile delinquents generally exhibit characteristics of identity crises and low high self-esteem. However, research demonstrates that the initial negative relationship between self-esteem and juvenile delinquency will change into a positive one through the respect earned from friends and peers when committing crimes. Angenet & de Man (1996:80) noted that if criminality was important to a person’s self-image then criminal behaviour would assume a relatively important position. As such, the more one rebels against conventional norms and groups and the more one identifies with delinquent friends, the more delinquency will lead to an increase in self-esteem (Angenent & de Man 1996:84).

Summary

Drawing together the separate points already made about the subcultural lifestyle of young Aborigines a predisposition and, indeed, an interconnectedness between marginalisation and involvement in the criminal justice system is evident. The various explanations for crime among this group range from necessity to supplement family income and purchase drugs, through to a lack of respect for private property to extreme social exclusion. Beresford & Omaji (1996:139) asserted that such explanations suggest that “crime is committed to satisfy deep-seated personal needs and, as such, it no longer carries adverse moral connotations”. This represent a value system significantly at odds with mainstream society, and is demonstrative of the extent to which the identified social, economic and cultural factors have pushed these young people to the very edge of society.

The next step in the process is to ascertain how the police and the judiciary respond to such marginalised Aboriginal youth and whether those responses contribute to the over-representation of Aboriginal youth in custody.
The Police response to marginalised Aboriginal youth

Police are the gate-keepers of the juvenile justice system. The NSW Parliamentary Standing Committee on Social Issues (1992:163) stated that: “in their interactions with young people, it is the police who have most influence over a whole series of decisions which will later influence the outcome of the contact with the broader Juvenile Justice system”. Such a position of power justifies a closer look at the assumptions police hold and the procedures they implement.

Informal Interaction: Over-policing, harassment and police violence

Over-policing

While it is not possible to statistically or empirically quantify over-policing, the anecdotal and suggestive evidence is compelling. For example, the Human Rights and Equal Opportunity Commission’s National Inquiry into Racist Violence found that communities with high Aboriginal populations have corresponding high police numbers. The consequence of a high police ratio is the practice of unnecessary surveillance of all aspects of Aboriginal daily life. Nowhere was this more evident than in the Royal Commission Inquiry into the death of John Pat (1991). In that case, Commissioner Johnson heard evidence that police patrolled the town every 15 minutes to an hour particularly around the riverbank and hotel. The circumstances leading up to John Pat’s death demonstrated how surveillance, resentment and provocation can spill over into confrontation (Beresford & Omaji 1995:145).

In commenting on such police practices, Edmunds (1990) described them as a “spectre of indirect racism” (in Smandych 1995:254). Furthermore, the visibility of the indigenous population was identified by her as a means by which police implemented such racist procedures. Beresford & Omaji (1996:73) reported that, as a result of their visibility, Aboriginal youth felt as though they were somehow “marked” and unable to escape from continuous police surveillance and intervention. The authors asserted that such feelings contributed to the marginalisation of Aboriginal youth.

In urban and metropolitan areas, the most common situations which give rise to over-policing relate to the use of public space. Harding (1993) noted that the frequency with which Aboriginal youths, and other disadvantaged youth in general, use public space for meeting and recreation, make them particularly vulnerable to being labelled as ‘wrongdoers’ (in Beresford & Omaji 1996:75). The use of inherently racist terms such as ‘street sweeping’ and ‘social cleansing’ have been associated with police practices of denying young Aboriginal people access to public space. Certain schools of thought contend that, in addition to racist assumptions that Aboriginal youth are ‘up to no good’, over-policing of public space relates to the perceived threat the congregations of young Aborigines pose to police authority (Stephen & Polk 1989 in Beresford & Omaji 1996:75; Cunneen 1994:145).

Police Harassment and Violence

The Human Rights and Equal Opportunity Commission’s National Inquiry into Racist Violence (cited in Cunneen 1994:143-44) provided the most extensive research on the question of police harassment and violence towards Aboriginal young people. The report portrayed a damning picture of the interaction between police officers and young Aborigines. The investigation revealed that of the 171 Aboriginal youths interviewed some 81% said that they had been
subjected to racist abuse by police officers. For girls, the abuse also contained sexist and sexual elements. Twenty one per cent reported police officers making threats or suggestions relating to hanging or suicide. In relation to police violence, 85% reported being hit, punched, kicked or slapped by police. In NSW 82% of juveniles reported being assaulted, while in Queensland and Western Australia the levels were 90% and 94% respectively.

Effect on over-representation of Aboriginal youth

Over-policing, harassment and violence serve to maintain and compound the historically strained relationship between Aborigines and police. In completing its report on Australia, Amnesty International stated that over-policing contributed to “a sense of provocation within the context of the tensions that often characterise Aboriginal-police relations” (Amnesty International 1993:23 in Smandych 1995:255). Law and order campaigns aimed at young Aboriginal people provoke further resistance from the young people themselves. While approaching police in an aggressive manner may constitute a form of resistance by Aboriginal youth; the inevitable result is the exchange of offensive language followed by charges of disorderly conduct, resist arrest and assault police (the colloquial ‘trifecta’). Support for such a scenario can be garnered from statistics which reveal that Aboriginal youth were more likely to be charged with good order offences (assaulting police, hindering police, resisting arrest and offensive behaviour) than non-Aboriginal youth (Cunneen & Robb 1987; Gale et al 1990 in Cunneen 1994:150).

It is suggested that police harassment and violence may be a symptom of the resistance displayed by marginalised Aboriginal youth. In attempting to assert their authority status police resort to harassing hostile Aborigines. Violence is most likely to result when the desired compliance or recognition is not forthcoming, or, conversely, when the young person becomes increasingly confrontational. Support for this can be gained from the evidence which suggests that police are more amenable towards those juveniles who are co-operative (Alder & Sandor 1990; O’Connor & Sweetapple 1988 cited in Cunneen 1991:149). These circumstances would suggest that police harassment and violence related to the exercise of power.

Such circumstances demonstrate that police practices of over-policing, harassment and violence reinforce cultural antipathy towards police among Aboriginal youth and deepen the cycle of hostility between the two groups. The result is that more Aboriginal youth are brought into the juvenile justice system than might otherwise be the case (Beresford & Omaji 1996:75). On this basis it is concluded that the informal interaction of police with Aboriginal youth contribute to the over-representation of Aboriginal juveniles in custody.
Formal Intervention: Police discretions, the decision to charge and the issue of bail

Police discretion to divert

Although it is within police discretion to divert young Aboriginal people from the juvenile justice system, research has shown that Aboriginal youth are overwhelmingly more likely to be arrested than cautioned, referred to a Children’s Panel or Conference, or issued with a summons or court attendance notice (Cunneen 1989, 1993, 1994; Luke & Cunneen 1995; Gale et al 1990; Beresford & Omaji 1996:107). The research of Cunneen (1994:141) indicated that police chose not to divert Aboriginal youth in circumstances where the offence and criminal history were the same as non-Aboriginal youth. In terms of statistics, research from Luke & Cunneen (1995) and figures collated by ATSIC (1991:212) reveal that young Aboriginal people have a 10-15% greater chance of going to court rather than being diverted from the criminal system.

A disturbingly small number of explanations were contained within the reviewed literature as to why police did not exercise their discretion to divert young Aboriginal people away from the formal legal process. The only practical reason offered pertained to the unavailability or unwillingness of Aboriginal parents to participate in caution or conference proceedings (Beresford & Omaji 1996:107). Significantly, the more widely reported reason was the institutionalised bias of police against Aboriginal youth and Aboriginal people in general.

Police decision to arrest and charge

The empirical evidence shows that Aboriginal young people are disproportionately the focus of formal police intervention (Cunneen 1994:135). Recent research into the patterns of criminal behaviour for indigenous people shows that Aboriginal people are arrested at a far greater rate than others in the population (Smandyech et al 1995:250). Luke and Cunneen (1995:81) reported that the apprehension rates for Aboriginal juveniles was around 215 per thousand - approximately 9 times higher than for non-Aborigines. They also stated that this level of apprehension was the chief determinant of Aboriginal juvenile over-representation in New South Wales.

It would be forgivable to assume that such arrest rates reflected the offending rates of Aboriginal youth. However, the previous discussions show that the grounds for intervention, and subsequent arrest, may not, always be based upon appropriate criminal factors. For example, the level of Aboriginal over-representation for criminal charges like assaulting police, hindering arrest, resisting arrest and offensive language can be explained relatively simply through over-policing and the adverse use of police discretion. However, Aboriginal young people are also over-represented in other charges such as property theft and assault (Broadhurst et al 1994). Such over-representation cannot be as easily explained by over-policing. Cunneen (1994:150) asserts, however, that some recognition must be given to the relationship between the over-commission of these offences socio-economic position of Aboriginal youth. Overall, Luke and Cunneen (1995:13) found that it was not possible to say exactly how much higher offending rates were a function of greater commission of offences and how much were a result of institutional police practices. According to Commissioner Johnson (1991:275) the reasons for Aboriginal juvenile offending cannot be explained by a single cause, but the culpability of the criminal justice system itself and the way it defines criminality cannot be excluded.
In relation to the laying of charges, the complaint has frequently been made that young Aboriginals are unnecessarily or deliberately made the subject of multiple and trivial charges (Smandych 1995:252). Beresford & Omaji (1996: 85) asserted that once arrested, Aboriginal youth face, on average, twice the number of charges of non-Aboriginal youths. Such a discrepancy raises the questions as to whether police actions towards Aboriginal youth are frequently and inherently improper, or merely inappropriate to the circumstances. Gale et al (1990) attributed variations in charge patterns between Aboriginal and non-Aboriginal youth as possibly indicative of police discrimination at the pre-arrest stage (in Cunneen 1993).

A last factor of formal police intervention relates to the age at which police first arrest and charge Aboriginal youths. Evidence suggests that intervention with Aboriginal youth occurs at an earlier age that non-Aborigines, and that Aboriginal over-representation is greatest at the earliest age of intervention (Cunneen 1994:135). For example, 66% of boys and 72% of girls who were arrested under the age of 14 in Western Australia in 1991 were Aboriginal (Broadhurst, Ferrante & Susiol 1994).

**Effect on over-representation on Aboriginal youth**

While many authors have criticised the overt disparity in diverting young Aborigines away from the criminal justice system, Cunneen (1989, 1993, 1994; Luke & Cunneen 1995) has been the most vocal. His research demonstrates that the decisions police make in relation to diversion have significant implications for the young person’s later career through the juvenile justice system (1994:135). Of particular importance is the compounding effect that a greater likelihood of being charged has on a young person’s criminal record. Luke and Cunneen (1995:82) hypothesises that if variables in detection practices (ie, over-policing and target law and order campaigns) could be controlled for, “then the compounding effect of this difference in likelihood could explain a large proportion of the significantly longer Aboriginal criminal records found amongst NSW Aboriginal offenders”. Add to this the fact that Aboriginal youth are charged at an earlier age and invariably “loaded-up” with multiple trivial charges and the cumulative effect is further increased as “the appearance of a serious criminal record is built up at an early age” (Wootten 1991:356).

The acquisition and accumulation of a criminal record has numerous adverse effects within the system. Firstly, a criminal record enables and legitimates ongoing police surveillance and intervention. As Edmunds (1989:104) perceptively stated: “[t]o have been noticed by the law is to remain subject to the law’s scrutiny” (quoted in Cunneen 1994:137).

Second, is the effect a criminal record has on the likelihood of being granted bail and, if successful, the conditions of bail. A lengthy criminal record provides a recognised ground for police to refuse bail, that being fear that the young person will reoffend if released. However, if the length of a young person’s record is artificially generated or extended through police practices, then this fear could be unreasonable and the refusal of bail unjustified. Western Australian statistics indicated that between 12-25% of juveniles remanded in custody actually received custodial sentences, indicating that approximately 75% of juveniles are unnecessarily exposed to the juvenile justice system. Such circumstances are of immense concern, given that it is widely accepted that exposure to custody is a predictor of further criminal involvement and the likelihood of receiving a custodial sentence in subsequent court appearances. On the topic of refusing bail, it is worth noting that, over and above the issue of a criminal record, many authors and commentators have noted that young Aboriginal people have a higher likelihood of being refused bail than a non-Aboriginal person in similar circumstances (for example Cunneen 1994:138; Wootten 1991:353).
The conditional grant of bail also warrants discussion as the conditions of liberty may lead to further criminalisation and, in turn, effect over-representation. This issue was subject to recommendations (numbers 90 and 91) made by the Royal Commission. In doing, so the Commission identified numerous problems with bail including that “unreal conditions are regularly broken, meaning that young people are recycled through the courts” (Wootten 1991:353). Cunneen (1994:140) asserted that unrealistic and non-compliable bail conditions may be imposed for the purposes of punishing the defendant and extending surveillance and control over individuals. In some circumstances the grant of bail may also be used as a means of extending power by allowing the defendant freedom at the discretion of police officers. Given the surveillance practice already directed towards Aboriginal youth and the recognised hostility of Aboriginal-police relations, these issues are likely to be particularly pertinent to the police decision in granting bail to young Aborigines.

The last adverse effect of the acquisition of a criminal record is that the record becomes the primary determinant of the court’s decision to sentence a young person to detention (Gale et al 1990:6 cited in Cunneen 1994:137). Commissioner Wootten (1991:356) commented that the existence of a criminal record is a “handicap against defending themselves or seeking mitigation if they are charged again”. This issue is discussed below in relation to disparity in sentencing.

In reviewing formal police intervention with Aboriginal youth, it is concluded they too a contributory to over-representation of Aboriginal juveniles in custody.

The Courts response to marginalised Aboriginal youth.

Sentencing Disparity

A number of issues relating to the sentencing of Aboriginal people were considered by the Royal Commission. Commissioner Johnson (1991 vol 1:217) noted that in certain circumstances Aboriginal people may receive longer sentences for the same offences as non-Aboriginal people. A statistical analysis conducted by Braodhurst, Ferrant and Susilo (1991) revealed that, in Western Australia, Aboriginal male youth were nearly eight times as likely as non-Aboriginal male youth to be sentenced to detention, and Aboriginal female youth were some 21 times more likely to be sentenced to detention than non-Aboriginal young women (in Cunneen 1994:134). Similar statistics were recorded in South Australia by Gale, Bailey-Harris & Wundersitz (1990).

The Judicial Commission of New South Wales (1998) compared, among other things, Aboriginal and Torres Straight Islander juveniles with juveniles from an Anglo-Australian background in terms of severity of sentence. The youths were matched on factors known to influence sentencing, including type of offence, criminal history, age, plea, number of counts and police bail status. In relation to Aboriginal offenders the study found that:

1. there were statistically significant differences in the penalties received by the Aboriginal and Torres Straight Islander group and their Anglo-Australian counterparts, with the former receiving harsher penalties.

2. Aboriginal and Torres Straight Islander offenders received more community service orders and more supervised orders than their Anglo-Australian matches.
Research conducted by Luke & Cunneen (1995) also found that young Aboriginal people are least over-represented in the less punitive interventions (such as dismissals, cautions, fines and unsupervised bonds), and most over-represented in more severe interventions (such as supervised bonds, community service orders and detention). The contributions that these sentencing disparities have on over-representation are obvious.

Gallagher (1998) commented that the judicial decision to detain a young person may be influenced by factors extraneous to the sentencing process. For example, an unemployed young person without a ‘stable’ home environment is likely to be viewed as a poor risk in being able to comply with community based orders (1998:25). As Gale, Bailey-Harris & Wundersitz (1990) point out, while these factors are not race specific, they are features far more common to marginalised Aboriginal youth.

**Judicial Racism**

A strong criticism of the Royal Commission was that it failed to pay sufficient attention to the institutional racism of the criminal justice system (Cunneen 1993:118). This criticism included direct and indirect racism in the structural and routine processes of judiciary. Commissioner Dodson (1991:398) asserted that the present court process “appeared to be deficient in its capacity to take account of cultural factors as they pertain to Aboriginal youth and their presence in the legal system”.

The difficulty of alleging judicial racism is that it is affronting to the ideological concept of the “rule of law”. The rule of law places central importance on equality before the law, due process and the protection of rights, and a system of law which prevents the arbitrary use of power and discretion. In relation to the judiciary the rule of law gives rise to the presumption that sentencing is neutral and outside the realms of discrimination. However, such presumptions may misconstrue the nature of law and the nature of power (Smart 1990 in Cunneen 1993:119). Some researchers have attempted to examine whether this is the case in terms of sentence disparity and the over-representation of Aboriginals.

In statistically analysing sentence outcomes by Aboriginality, Jack Walker (1987) argued that “far from being the result of a blatantly biased system, the over-representation could actually be the result of accumulations of relatively minor disadvantageous selection processes” (1987:110 cited in Cunneen 1993:120). As such, Walker concluded that:

> “the courts cannot be held to blame for the high rates of Aboriginal imprisonment. On the contrary, they appear to be particularly lenient to Aboriginal offenders, especially when one considers that prior imprisonment record is regarded as a key factor in sentencing, tending towards longer sentences. In short the criminal justice system is not likely to be responsible for high Aboriginal rates of imprisonment - it may be merely responding logically and even sympathetically to the offending patterns of Aboriginals” (1987:114).

In criticising this conclusion, Cunneen (1993) asserted that the basis for Walker’s argument was flawed, in that it assumed that rates of imprisonment reflected offending patterns. Cunneen argued that such an assumption “ignores the role of police practices in relation to targeting, arrest, bail conditions, and so on, all of which impact on the crucial question of why Aboriginal people appear before the courts in the first place and how they obtain criminal records” (1993:120-1). The conclusion that Cunneen drew was that it was more accurate to
state that the courts, without displaying any overt bias, were “instrumental in a role which accepts, legitimises and enforces the bias of police intervention”.

Other authors have concurred with Cunneen on that point. For example, Gale et al (1990) argued that there was an accumulation of disadvantage in the system deriving from the original police decision to arrest (in Cunneen 1993:121). O’Connor (1993) pointed out judicial sentencing policy, “focussing as it does on the offence, and succeeding as it does in incarcerating serious repeat offenders, ignores issues like inequitable police practices (including over-policing) and racism” (in Atkinson & Gerull 1994:15). While, Atkinson & Gerull (1994:15) asserted that “[u]nderlying structural factors and racist and otherwise inequitable systems contribute to the selection of groups for entry into the juvenile justice system in the first place” (in Atkinson & Gerull 1994:15).

On these grounds, it is concluded that the response of the judiciary to marginalised Aboriginal youth contributes to their over-representation on two fronts. Firstly, through sentencing disparities which treat Aboriginal youth more harshly; and second, through indirect racism which reinforces the racist procedures of the police.

**Summary**

This paper has demonstrated that, in the world of Aboriginal young people, childhood and adolescence commonly involves a steadily intensified process of marginalisation from society. It begins with an unlinking from the family, hardens into feelings of exclusion from school and the labour market and involves conflict with and hostility towards many authority figures (Beresford & Omaji 1996:125, Brady 1992:2). To varying degrees young Aboriginal people live outside the normal forms of social control - they are not under the regular supervision of social institutions such as the family, school or workplace. While Aboriginal youth are not the only group of young people who have adopted a marginalised subculture, they are the only group who endure the continuing impact of the racial oppression (Beresford & Omaji 1996:121).

In discussing the factors associated with the marginalisation of young Aborigines, a clear connection between marginalisation and a predisposition to crime was established. For Aboriginal youth “life at the margins of society shapes both involvement in criminal activity and the way much of the crime is committed” (Beresford & Omaji 1996:139).

The subcultural lifestyle that marginalisation creates has been described as something more than just delinquent behaviour. Crime is borne out of a number of possible meanings. Economic necessity and a relatively immediate means of gaining peer approval and of enhancing self-esteem have been cited. Further, crime has been presented as a direct challenge to wider society, assuming the character of retaliation against a society in which Aboriginal youth perceive they have no place (ibid). Commissioner Dodson gave this view weighty currency when he said that “it must be considered that criminal activity may be the only form of resistance seen to be available to powerless and frustrated youths who have no real opportunity, nor a desire necessarily, to lead lifestyles based on idealised middle-class models (1991:406).

Whatever the reasons, the marginalisation of Aboriginal youth and their subsequent predisposition to crime has resulted in their being over-represented in offence participation rates. However, the analysis of police practices and assumptions in this paper has demonstrated that the high offending rates associated with Aboriginal youth are not solely the
result of their marginalisation. The complex interaction of police assumptions and practices, such as targeting and over-policing Aboriginal youth; discrimination in discretionary decision making; and the use of minor good order and street offences to arrest Aboriginal young people, all contribute to offending rates and, in turn, to the over-representation of Aboriginal juveniles in custody (Luke & Cunneen 1995:iv). While no conclusions can be easily drawn between the rate of Aboriginal offending and the rate of Aboriginal arrests, the fact that policing plays a fundamental role in determining the extent and the nature of offences and offenders brought before the court cannot be ignored (Cunneen 1994:153).

In the final analysis, it was shown that the processes of sentencing further contributed to the over-representation of Aboriginal juveniles, firstly through a disparity in sentencing, and secondly through the legitimising of discriminatory police practices. Such processes were described and as judicial racism.

Conclusions and Recommendations

Reforms at all levels of the juvenile and criminal justice system are needed to address Aboriginal over-representation. In making recommendations for reform, this paper relies upon and upholds the most common explanation for over-representation, that being the systematic bias in the criminal justice system which discriminates against Aboriginal people. In other words, it is not the law which parliaments have passed to create and define criminal offences which are the source of the problem of over-representation of Aboriginal juveniles. More so, it is the discriminatory, practices and assumptions - direct or indirect - of those people who administer the system which are held to contribution to over-representation. As such, the recommendations for reform primarily target these people and their institutions.

Turning first to the most obvious culprits of discrimination - the police - it is important to recognised that discriminatory practices are not simply a question of some police officers merely reflecting the racism of the wider community. Blagg & Wilke (1995:144) asserted it is important to acknowledge that, “as a consequence of their considerable power and the particular functions that police perform, where racism is present it is reproduced in a increasingly heightened and intensified form”. As the police enjoy the exercise of unparalleled power in our society, it is suggested that they become the immediate target of interventions aimed at improving equality, tolerance and justice. In tackling police racism on an operational and procedural basis, the following two recommendations are made (Luke and Cunneen 1995:81). The first is to reduce the discretion of police by establishing clear legislative rules for the use of cautions, conferences, summonses and court attendance notices. The second is to more closely monitor police actions and to feed this information back to managers so that they can better implement non-discriminatory policies.

At the court level action is also required. In this sphere of the juvenile justice system, the processes of institutional racism are not as immediately apparent. In fact, the dominant ideology of liberalism logically denies that the system itself could be engaged in methodically reproducing racist oppression (Cunneen 1994:136). However, recognition of the compromisation of this ideology can be found in the recommendation of the Royal Commission (number 96) which suggested that judicial officer be trained in Aboriginal issues.

Despite this limited recognition of judicial racism, this recommendation has not been well executed. Among other factors, insufficient resources have resulted in training taking the form of “one-off” presentations on Aboriginal cultural issues. Such training initiatives have dubious instructional value. It is recommended that the training of judicial officers should constitute a
more extensive, on-going process and should include measures which can be taken by Courts to address and mediate the effects of discriminatory police practices. While the issue of self-determination falls outside the ambit of this paper, it is asserted that judicial racism will not be overcome until procedures are introduced into the existing judicial processes which allow Aboriginal people to be judged against societal standards augmented by Aboriginal cultural standards.

Lastly it is asserted that the over-representation of Aboriginal youth within the juvenile justice system can not remedied until the forces which marginalise them are addressed. Racism is clearly one of those forces. If social equality is to become a genuine priority of government then the continued social, economic and cultural disadvantage and oppression of Aboriginal people must be immediately and aggressively addressed.

In making these recommendations, it is acknowledged that racism is a pervasive, systemic social evil that presents formidable difficulties in definition, identification, prevention and ultimate eradication. However, the first step in any healing process is recognition. If the existence of institutionalised racism were acknowledged, the process of eradication and prevention would have begun.
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