

PROCEEDINGS - Training Project No 27/1/5

ABORIGINES & CRIMINAL JUSTICE

Edited by Bruce Swanton



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Preface

During the period 12-16 September 1983, a seminar was conducted under the auspices of the Australian Institute of Criminology on the broad theme of Aborigines and Criminal Justice.

The Institute provided premises for the undertaking and established the boundaries of deliberation. Otherwise it was as undirective as possible, consistent with the need to expend public funds responsibly, leaving presentation, discussion and resolution entirely to the discretion of participants.

The seminar aimed to:

- * present a forum for speakers interested in the themes assigned the seminar
- * identify areas of less than optimal fit between Aborigines generally and the various criminal justice systems, with a view to producing a list of resolutions aimed at ameliorating problem areas so identified.

Thus, the seminar's product is of two kinds: (1) presentations, and (2) resolutions. Both kinds of product are reproduced here not only for the sake of the record but, also for the benefit of those who did not attend. Only those presentations submitted in written form are included. Resolutions were broadly determined at a plenary session of participants, with final drafting delegated to a nominated group.

Seminar participants represented a diverse range of skills and experience. The racial mix was such that prevalent white attitudes did not go unchallenged. It was also evident that no group of participants was unanimous in its views, which is indicative of the complexity of many of the issues raised. Some participants at least found the experience valuable.

The papers contained in the following pages vary greatly in terms of perspective and volume. Some clearly contribute more to the sum of knowledge than others, some are generally phrased and at least one contains a touch of humor. All of them provide valuable reading for those concerned with the disadvantages experienced by Aborigines in our society.

The seminar resolutions are for the most part broadly phrased so as to make allowance for differences across the Federation. Seminar participants were self selected and it is not claimed the resolutions represent an optimal statement accurately reflecting the views of all interested persons and institutions in all locations. Despite this deficiency, they are nevertheless the product of a concerned and experienced group of citizens who devoted a week of their lives to expressing their views on matters of great concern to society. As such, they warrant our attention. It is hoped politicians, public administrators, social/welfare

workers, criminal justice officials of various types, lawyers, church people and, indeed, concerned persons everywhere will read the list of resolutions positively and act to implement them where relevant within their own spheres of responsibility and personal commitment.

No single initiative, of course, will overturn decades of disadvantage. Reform is at best incremental. This publication is produced by the Institute in the hope it will in some small way assist in that reform.

In presenting this record it is necessary to make particular reference to the efforts of those who volunteered to lead the various discussion groups. The four persons concerned: (1) Bill Galvin, NSW Police, (2) Angela Gorta, NSW Corrective Services, (3) Trevor Milne, NSW Bureau of Crime Statistics & Research, and (4) John McCorquodale, Federal Attorney-General's Department, not only had to prepare discussion outlines for their respective groups and chair the resultant discussions but, also had the chore of compiling group resolutions. The support of Jeff Sutton in assisting with early organisation and making Trevor Milne available also requires acknowledgment. Owen Revan, SA Police, kindly recorded brief descriptions of plenary resolutions. Pat O'Shane, Secretary, NSW Ministry of Aboriginal Affairs, undertook the daunting task of directing the plenary sessions and achieving substance and consensus from a myriad of overlapping and sometimes competing draft proposals. Pat also co-ordinated the framing of the draft of the final resolutions. To all these persons the Institute expresses its gratitude.

Finally, the dedication and exceptionally hard work of Trish Psaila, Kay Barralet and Evelyn Jacobsen in placing the written contributions to this publication on word processor warrants special mention.

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RESOLUTIONS

PREAMBLE

THIS CONFERENCE expresses its concern at the disproportionate representation of Aborigines in the various criminal justice systems and calls upon all governments - Territorial, State and Federal - to improve those systems insofar as they disadvantage Aborigines.

THIS CONFERENCE accepts that the causes of the high level of Aboriginal involvement in the criminal justice systems are complex. Further research must be undertaken into those causes. However, this Conference recommends certain measures for immediate implementation in order to reduce the level of disadvantage currently incurred by Aborigines within the criminal justice system.

THIS CONFERENCE recognises that although financial and policy responsibilities for reform primarily attach to governments, Aboriginal involvement in relevant decision making is crucial to sound policy development and implementation.

EDUCATION

THIS CONFERENCE considers the lack of knowledge presently existing at all levels of the community concerning Aboriginal culture and customs is cause for concern and recommends:

School children

- * THAT all school children receive comprehensive instruction concerning the culture and customs of Aborigines.

Criminal justice personnel

- * THAT all judicial officers attend training courses concerning the culture and customs of Aborigines.
- * THAT all court officers, solicitors employed by Aboriginal Legal Aid organisations, custodial officers and other appropriate staff receive similar instruction.
- * THAT all police officers receive examinable instruction concerning Aboriginal culture and customs in the normal course of their career training.
- * THAT existing educational resources possessing expertise in Aboriginal culture and customs, eg, Aboriginal Task Force, South Australian Institute of Technology, should be consulted on the preparation of material.

Funding

- * THAT the Federal Government provide additional funds in order to permit the education of school children and criminal justice employees concerning Aboriginal culture and customs.

COMMUNICATION

THIS CONFERENCE notes the continuing need for Aborigines to be informed concerning their rights and obligations with regard to criminal justice matters generally and recommends:

Rights & obligations

- * THAT information be made available to Aboriginal groups concerning their rights and obligations in the sphere of criminal justice, eg, tape recordings, videotapes, etc.

Aboriginal media systems

- * THAT the greatest possible use be made of Aboriginal media systems in disseminating such information.

DANGEROUS SUBSTANCE ABUSE

THIS CONFERENCE expresses its concern about the rate of alcoholism and petrol sniffing in Aboriginal communities and recommends:

Assistance

- * THAT appropriate assistance and support be provided Aboriginal communities so as to enable them to better cope with such problems.

ABORIGINAL-POLICE RELATIONS

THIS CONFERENCE notes the importance of good relations existing between Aborigines and officers serving in the various State and Territory agencies throughout the Federation and recommends:

Police selection & training

- * THAT special consideration be given to the selection of suitable officers for assignment to Aboriginal Reserves (or similar areas) and other places possessing large Aboriginal populations.
- * THAT police officers assigned to Aboriginal communities be suitably prepared for such postings.

ABORIGINAL EMPLOYMENT IN CORRECTIONS

THIS CONFERENCE expresses the view that all prison and probation and parole agencies should undertake a firm commitment to the principles of equal employment opportunity and affirmative action in respect of Aboriginal employment and recommends:

Recruitment

- * THAT every effort be made to ensure the professional and administrative staffs of all prison and probation and parole agencies comprise at least two per cent Aborigines by the year 1990.
- * THAT advertisements for Aboriginal corrections workers make maximum use of Aboriginal networks.

Development

- * THAT consideration be given to exchanging Aboriginal correctional officers between States, for six to 12 months, as part of their occupational development.

Aboriginal field officers

- * THAT greater use be made of Aboriginal field officers to assist communication between Aboriginal prisoners and professional support staff.

Criminal history

- * THAT a criminal record not be an automatic disqualification for employment of Aborigines in the correctional area.

Work release

- * THAT correctional authorities employ Aborigines to be responsible for placing Aboriginal prisoners in work release schemes.

Halfway houses/bail hostels

- * THAT Aborigine-controlled halfway houses be established (where not already available) to assist Aborigines in settling back into society upon their release from gaol.
- * THAT Aborigine-controlled bail hostels be provided (where not already available) for Aborigines on remand as well as their families, where removal from normal place of residence occurs.

Resources

- * THAT consideration be given by correctional authorities to the establishment of Aboriginal Resource Units within their respective agencies (where not already implemented) with a view to promoting Aborigine-specific initiatives.

- * THAT Aboriginal community organisations be identified and utilised in expanding community service order schemes.
- * THAT Aboriginal fine defaulters be permitted to work their fines out through community service.

Drug & alcohol problems

- * THAT gaol sentences NOT be seen as treatment for alcoholism or other addiction.
- * THAT awareness programs (where not already available) be instituted in respect of Aborigines in correctional establishments so as to:
 - . promote knowledge concerning drug and alcohol problems
 - . facilitate contact between Aborigines and relevant treatment agencies.

Placement

- * THAT particular care be taken in the placement of Aboriginal prisoners within the various correctional systems so as to optimise the effects of imprisonment.

Aboriginal advice on decision making bodies

- * THAT parole boards, classification committees and indeterminate sentence committees, as well as other decision making bodies, have either Aboriginal representation or access to Aboriginal advice when reviewing Aboriginal cases.

Assessment

- * THAT consideration be given to evaluating the efficacy of psychiatric, psychological and other forms of assessment of Aboriginal prisoners.

Prisoner education

- * THAT in order to utilise time spent in gaol by Aborigines to the best advantage, industrial training be expanded. It is desirable the Aboriginal section of the federal Department of Employment and Industrial Relations as well as local Aboriginal organisations assist in this regard.
- * THAT community resources be utilised for the education of Aboriginal prisoners and that they be permitted day leave for study on exactly the same basis as other prisoners.

Remission

- * THAT current remission systems be reviewed so as to remove any possibility of disadvantage being experienced by Aboriginal prisoners.

JUSTICES OF THE PEACE

THIS CONFERENCE recommends:

Appointment of stipendiary magistrates

- * THAT stipendiary and other magistrates be appointed as a matter of urgency to serve in those locations at which justices currently exercise judicial functions.

SENTENCING DATA

THIS CONFERENCE recommends:

Funding of sentencing decision database

- * THAT the Federal Government fund the placing on computer file of reasons given for judgment of all cases heard, initially in the various Supreme Courts and, subsequently, in other courts.

Sentencing data for judicial officers

- * THAT sentencing data be made available to holders of judicial office in all jurisdictions.

Crime statistics

- * THAT detailed and current uniform crime statistics be made available to the judiciary, crown prosecutors and legal aid organisations.

ABORIGINES UNDER SENTENCE

THIS CONFERENCE recognises that Aborigines in Australia are among the most imprisoned people in the world and expresses concern regarding the likely or actual effectiveness of prison dispositions and recommends:

Alternatives to imprisonment

- * THAT whenever imprisonment or fine (default of payment of which could result in imprisonment) is considered by a judge or magistrate, alternatives to imprisonment, such as community service orders and probation, be specifically considered in respect of Aborigines.
- * THAT, whenever possible, Aborigines sentenced under community service order schemes work for Aboriginal organisations and interests.

P A P E R S

ALCOHOL & CRIME

Aboriginal Alcohol Abuse & Crime In Queensland

Cliff Fua & Laurie Lumsden
Alcohol & Drug Dependence Services
Brisbane

Brady (1983) attempted to lay to rest a number of myths held by whites concerning Aboriginal drinking. She described as 'untenable' causal arguments based on assumptions about decay of traditional life, breakdowns in social structures and kinship responsibilities, attempts to numb the effects of some unpleasant reality etc. Rather, she concludes 'that far from being the chaotic acts of a despairing group, drinking was an activity governed by an internal set of rules and procedures, and pursued with the same vigour and skills as "traditional" activities such as ceremony, travel and hunting.' (p.8) Causative models of drinking such as those presented by Downing (1977) need to be assessed with great care. It is thus important to approach the issue of Aboriginal drinking and crime with considerable caution. With respect to theories about drinking and the nature of dependency itself, considerable research has occurred recently. This research needs to be applied in the context of Aboriginal drinking and, in particular, with respect to the crime link.

Wilson (1982) contends that there are four sets of reasons for 'the enormously high rate of imprisonment among Aboriginal people ...' (p.67)

- * bias in the criminal justice system
- * racism and discrimination among criminal justice personnel
- * Aborigines have social problems which bring them directly into conflict with the law
- * conflict between Aboriginal customs and white law.

This paper aims to address the third set of reasons, believing that within the general context of 'discriminated against and stigmatised sub-groups' (Pittman 1980), the four 'explanations' become integrated aspects of the one complex system. It is held that social aspects, with a major representing problem of alcohol abuse, are by far the largest and most complex of the problems facing Aboriginal communities. As with change programs in any social system, a choice has to be made on the points of intervention. The authors hold that comprehensive programs with one specific objective concerning reduction in alcohol abuse rates (among other objectives) can reduce crime rates.

Wilson (p.69) states that there 'can be no doubt that problems such as drunkenness, high unemployment rates, and cultural conflict worsen police-black contacts, as can be seen in the case of public drinking. Despite the arguments suggesting that whites drink just as much as blacks, there is abundant evidence to suggest that Aborigines have a major alcoholism problem, possibly unparalleled in industrialised countries.

Moreover much Aboriginal drinking is public, on the streets or in parks, and so more likely to attract police attention'.

A number of authors (McCorquodale 1980, 1982, Clifford 1981, Kingshott et al. 1981, Worral 1981), have noted the unmistakable major causal connection between intoxication and violence as an outstanding feature of Aboriginal 'criminality'. There is little disagreement on the extent to which offences are committed, or on convictions, imprisonment, parole etc. (Kingshott et al. 1981), Clifford 1981, Walton 1981).

The connection between high alcohol consumption and violent crime is not unique to Aboriginals. The correlations are so strong that they can be demonstrated in Australian and overseas studies. Smith (1983) convincingly demonstrated this connection and made suggestions for social policy directions in Australia.

Lumsden (1983) demonstrated significant correlations in Statistical Divisions of Queensland, and drink driving offences and court appearances for assault and drunkenness. Clearly proper demographic information in crime and imprisonment statistics would provide precision in identifying the size and local of problem areas or groups, but with Aboriginal imprisonment rates as high as ten times those of white Australians such precision might be regarded, at this time, as a desirable but an almost unnecessary luxury.

Given the significant role of alcohol dependence in Aboriginal 'criminality' there is a noticeable absence of comment from alcohol dependence workers in the literature. Wilson (1982) misses the point concerning prevention and treatment programs. He states 'Solutions to the vicious cycle linking alcohol and violence do not ultimately lie with specific education or alcohol prevention programs. They will be found in a more comprehensive approach which brings back to Aboriginal people a sense of self-worth and community esteem' (p.63) Wilson goes on to stress the need for community autonomy on health, housing, nutrition and education programs.

It is not surprising that there has been a general lack of appreciation of the nature of Aboriginal alcohol dependence, since there is currently a significant gap between knowledge about dependence generally and application of this knowledge in practical, academic or research situations. Jaffe (1980) has stated 'to the extent that the lag is greater in the field of alcoholism than in other areas involving human service, there is cause for concern' (p.45).

The term 'alcoholism' has not been used by the World Health Organisation since 1975. The term failed to describe the process of dependence and related disabilities, and had itself become a stigmatised word. The term 'Alcohol dependence syndrome' has been used as an alternative and is defined in the 1975 Revision of the International Classification of Diseases, World Health Organisation, p.198 as follows:

303 Alcohol dependence syndrome

A state, psychic and usually also physical, resulting from taking alcohol, characterized by behavioural and other responses that always include a compulsion to take alcohol on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence; tolerance may or may not be present. A person may be dependent on alcohol and other drugs; if so also make the appropriate 304 coding. If dependence is associated with alcoholic psychosis or with physical complications, both should be coded.

Acute drunkenness in alcoholism - Dipsomania
Chronic alcoholism

Excludes: alcoholic psychoses (291.-)
drunkenness NOS (305.0)
physical complications of alcohol,
such as:
 cirrhosis of liver (571.2)
 epilepsy (345.-)
 gastritis (535.3)

304 Drug dependence

A state, psychic and sometimes also physical, resulting from taking a drug, characterized by behavioural and other responses that always include a compulsion to take a drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence. Tolerance may or may not be present. A person may be dependent on more than one drug.

Excludes: nondependent abuse of drugs (305.-)

Edwards et al. (1980) described the process of the development of dependence as follows. If availability in terms of hours and prices is great, and if pressure to drink is high, then those psychologically dependent may raise their level of quantity and frequency of consumption until physical dependence is established and the experience of withdrawal symptoms begins.

Psychological dependence is initially manifest on withdrawal or during abstinence by some awareness of not being quite oneself. It is equivalent to the feeling of the habitual smoker that he needs another cigarette. It is at this stage that it is hypothesised that as people begin to drink to avoid, or in response to, withdrawal symptoms that a secondary, or at least a raised psychological dependence appears which has been generated by the learning processes resulting from repeated relief or avoidance of withdrawal drinking. In a later WHO document it is stated that the syndrome is to be seen as a simple translation of

the concept of a system in which both physical and psychological forces play a part in maintaining its existence. There are not necessary underlying psychopathology or trigger events required. Reactive drinking could result in dependence but once established, dependence remains after the initial events have become irrelevant or have been overcome (landrights will not cure Aboriginal drinking problems). At a time when neither the drug using behaviour nor withdrawal symptoms are manifest, the continued presence of the dependence syndrome may be established in the degree to which drug-related cues may elicit a desire for the drug, and the effort that must be extended in order to resist the urge to continue or reinstate drug use.

Davies (1980) defines a drug of dependence as one that 'on repeated use, induces some change in the individual so that he responds to it later in a different way from that in which he did initially' (p.288). He then goes on to outline the difference between the habit factor and the drug factor in the process of the development of dependence. He places the above as points on a continuum where 'below a certain quantity/frequency of intake no dependence will develop', but that after a point (he cites 6 centilitres of absolute alcohol daily) a threshold is reached where psychological dependence sets in and then as quantity and frequency increase another threshold is reached (15 centilitres of absolute alcohol daily) after which tissue damage will result with both social and psychological consequences. Six centilitres equates to 60 ml or 48 gm or approximately 5 standard drinks. Fifteen centilitres equates to 150 ml or 120 gm or approximately 12 standard drinks daily.

Levels of alcohol consumption

Outside the metropolitan areas and rural townships the Aboriginal communities consist mainly of tribal Aboriginals. In all of these areas alcohol dependence and its related problems is a considerable concern for governments, health workers and many of the local people themselves.

The following is an extract from a letter to the Editor of the Aurukun Community Newspaper, Wik Inana, August, 1983:

'We have been watching the effects of grog on the community over the last week, following Council's decision to fly in forty cartons of beer every Monday, Wednesday and Friday. The effects are not good. There has been a lot of fighting and drunkenness. Guns and knives have been used in fights and arguments. Some children have stayed away from school. "Hot stuff" is still coming in. So is grog by road and boat. There is a lot of unhappiness, especially amongst those who have to suffer other people's drunkenness ... from what we have seen in the past, it seems unlikely that things are going to get better... Do we want to become like the other communities? Is this the kind of Aurukun we want to leave to our children?'

Some of these communities prohibit alcohol as a means of preventing its related problems. However 'sly grog' and access to alcohol in nearby towns still takes its toll, and when monetary gain is the motive behind the 'sly grog racket' then policing prohibition becomes difficult.

Some communities even allow eligible members to 'fly' in their own limited supply of beer three to five times a week, but the majority of the communities are served by beer canteens established under the Queensland Aborigines Act 1977 and the Torres Strait Islanders Act 1977. In many of these canteens there are no limits to the quantity of beer one is allowed to drink. In others, a limit of four cans, six cans or a certain number of kegs per night.

In 1981, figures obtained from one community revealed that each drinker consumes an average of seven jugs or 27 seven ounce glasses of beer per night, over twice the level at which Davies, 1980, has concluded that physical tissue damage occurs, high levels of physical and psychological dependence develop and high levels of alcohol related disabilities occur. There is no doubt whatsoever that some Aborigines just drink too much.

In 1980 the canteen in one community was closed for three weeks. During these three weeks eleven people presented at the hospital for medical attention. During the first three weeks following the reopening of the canteen, 178 people sought medical attention. It has been observed that violence in the form of brawling, destruction of properties, wife bashing, etc., occurs mainly during and immediately after canteen hours.

Studies such as the one by Hunt (1981) provided data showing a much greater rate of hospitalisation for alcohol related problems for Aborigines than whites. A survey of Supreme Court records in a provincial city in 1976 showed that 49 per cent of indictments that year were Aborigines and Islanders. Alcohol was mentioned in practically every case.

Of the many forms of social and psychological disorders associated with alcohol dependence, violation of the law and felonious behaviour is one of the most prominent. Walton (1981) found that 14 per cent of males in Queensland prisons were Aborigines and Torres Strait Islanders, while their population proportion in Queensland is only two per cent. Thus these people are imprisoned at a rate seven times that for whites. For female prisoners the discrepancy is greater. They represent almost 30 per cent of female prisoners - 15 times greater than their white counterparts.

Alcohol is certainly associated with this high rate of Aboriginal imprisonment. In a study in New South Wales by Kamien (1978), fifty per cent of Aboriginal males 15 years and over had come into conflict with the law and all but one were related to alcohol. It is not surprising then that the Waltons (1981) survey revealed that 81.5 per cent of prisoners interviewed were drinking at the time of the offence.

This is supported by statistics at the Aboriginal and Torres Strait Islanders Legal Service (Q.E.A.) where in one week, ending 16 March 1983, it was found that of 48 clients who appeared in court 41 (85 per cent) were drunk when they committed their offences.

Aboriginal health, welfare and legal issues cannot be divorced from treatment and prevention programs for alcohol dependence. Neither can any significant advance to Aboriginal health, welfare, legal or any other status be made without addressing alcohol issues.

Alcohol dependence programs

Pittman (1980) summarised the comprehensive nature of alcohol dependence change programs compared with more simplistic control of consumption solutions. He draws his alternatives from 'sociological, anthropological and social, psychological theories that attitudes, beliefs, and values concerning the use of alcoholic beverages are embedded in the social fabric of the society and the various subcultural groups within that society'. Pittman stresses the controversial nature of change programs involving value and belief systems, particularly when they involve 'stigmatised and discriminated against sub-groups such as native Americans, Blacks, male homosexuals, and children of alcoholics'.

Moser (1980) has a similarly comprehensive framework for social change programs involving dependence. It is within such a comprehensive framework, that the Queensland Aboriginal Alcohol Programs were developed.

The formation of a separate alcohol program developed by the Queensland Alcohol and Drug Dependence Services for Aboriginal people, originated from a concept expressed in the "White Paper", 1985. A separate Aboriginal Project Team was to be arranged to deal with the alcohol related problems of Aboriginal people because of the 'cultural barriers which exist, which add to the difficulties encountered in helping Aboriginals affected by alcohol'. Based on this concept Mr C. Fua discussed the possibility of setting up a network of community based Aboriginal Alcohol Programs, with the Directors of the State Health Department's Alcohol and Drug Dependence Services and the State Government's Aboriginal Health Project, and with the Federal Department of Aboriginal Affairs.

These programs were to be organised on the following lines:

- (a) managed by the communities themselves;
- (b) funded by Department of Aboriginal Affairs (D.A.A.);
- (c) assisted by staff from Biala - for training counsellors in the field of alcoholism counselling, establishing programs, supervising on-going treatment and prevention projects. Regular visits were to be made to these communities to assess needs and evaluate programs.

In 1977, funds were made available by D.A.A. (\$19,000) for such a program. Mr Fua called a meeting of the Aboriginal community in the Brisbane metropolitan area to discuss this project.

Consequently, the first Aboriginal Rehabilitation Centre was set up at Warrington Street, Paddington in 1977. This centre had only a ten bed capacity which proved to be quite inadequate for the growing demand. In response to this need, the Jodaro Alcohol Rehabilitation program was established in 1978 with in-patient facilities for 23 people.

In December 1977, the D.A.A. Health Section, Canberra, released a further funding of \$750,000 for the Aboriginal Alcohol Programs, the bulk of which came to Queensland. Mr Fua visited the various communities, held general meetings at each place within the Queensland state, to discuss these proposals and to assist the people in formulating submissions for funding programs. He contacted the D.A.A. and Dr Hawes of the Aboriginal Health Project and discussed these proposals with them. General meetings were held at Rockhampton, Mackay, Townsville, Cairns, Mt Isa, Brisbane. New committees were formed at all these centres, and submissions were prepared. Soon after, funding was made available for the Mt Isa, Cairns, Townsville, Rockhampton and Brisbane programs.

In 1977, the first Aboriginal Alcoholism Counsellor Training program was conducted with eleven Aboriginal people, at P.F.C. House, Herschel Street, Brisbane. The following year, a three month course was introduced for trainees. Since then, a regular three month initial course, followed by a two month refresher course the following year, has been organised.

On request from communities, officers from the Alcohol and Drug Dependence Services visit and help establish self help programs. Communities are visited a number of times both before and after programs are established. Communities establish a committee which incorporates as a society. To qualify for funds from D.A.A. the constitution of the society must follow the rules of an Aboriginal and Torres Strait Islander Incorporation (which is actually a guide to writing a constitution). As part of the constitution the objectives must be specified which in itself is an important community activity. Assistance is given by both D.A.A. and the Aboriginal Project Team in writing constitutions. Once funding has been achieved, management of the program is the responsibility of the local committee, including the employment of staff. D.A.A. exercises an auditing role and can (and has) intervened in management matters if the Department sees fit.

Staff, once employed, complete a training program with Alcohol and Drug Dependence Services at Biala. Participants on the training program are selected by the local community leaders, the criteria for selection being: ability to absorb the training; acceptance and respect of their own people; ability to relate to others; freedom from major personal problems and mental or physical disorders.

The underlying theory behind the training program, in addition to alcohol specific material, emanates from the work in mental health by Marvin Kahn with the Papago Indians in Arizona (Karn, Henry and Cawte, 1976).

The initial course takes three months and covers such topics as: alcohol dependence syndrome (its definitions and effects), skills in interviewing, communication, and counselling, Aboriginal culture and its role in the solution of the alcohol and health problems, intervention techniques, family and marriage counselling, health and hygiene, and diet and nutrition.

It is necessary that opportunity be provided for these counsellors to consolidate their initial training with the field experience they have gained subsequently by means of an advanced course. Not only does this course enable the counsellors to continue their training, but the feedback from them enables program staff to re-appraise and where necessary, modify the course to better suit the community needs. The advanced course covers such topics as personal growth, counselling skills, group therapy, social assessment, mental health, community development and administration.

Outcomes

On the 3rd March, 1983, 54 people graduated from the Aboriginal Alcohol Dependence Counsellors Course conducted at Biala. Each graduate had completed a three month basic course (Stage I) followed by 12-18 months of placement or work experience in their home communities, before returning to Biala for a final two months advance course (Stage II). Certificates were issued only to people regarded by the Project Team Manager and the Director as being employable in the area of alcohol dependence.

Nineteen of these graduates are currently employed in the ten Aboriginal self-help programs established throughout Queensland. Eleven are employed in nine community run outpatient programs. Eight are employed in other Government Departments, including the Aboriginal Health Programs. Twelve are working as volunteers in community programs, including Biala. Two are housewives and two are not involved in anything much.

These trained counsellors are now spread out over 29 communities where their presence is beginning to produce very positive results. They are assisting in in-patient and outpatient treatment programs. They also run seminars, cultural programs and youth activities and are involved in family and individual counselling. Severely dependent people are referred to the nearest rehabilitation centre, while the counsellor treats the family, relatives and drinking mates, preparing them for his or her return. They then come home to a people who understand their dependence and are able to offer support and encouragement.

We are now seeing some communities reducing the quantity of beer sold in the canteens with a resultant decrease in disturbance and violence and of course a welcome relief for the law enforcement officers and nursing sisters. Children's health and school attendance has improved and there has been a general upturn in the quality of community life.

On Monday 5 September, 1983, 28 new trainee counsellors commence their Stage I course and by December will swell the army of concerned people who have dedicated their lives to 'helping their people'.

'The Aborigines have social problems which bring them directly into conflict with the laws', of this there is no doubt. We at Biala believe we have developed a program that will bring about a change. This program is working. It is reducing alcohol abuse - the most significant contributor to the crime rate of our nation. It is helping to restore some dignity and hope to the Aboriginal people. But we must have more funds to continue this program successfully. Progress is impeded because of understaffing and competition for Government financial support.

Funding arrangements for Aboriginal Alcohol Dependence Programs are complex. The Federal Government has accepted responsibility in this area and State Governments also exercise roles in different ways. Government's receive advice on the role of alcohol in health, welfare, legal, and other issues, from a range of bodies (both Aboriginal and non-Aboriginal). Advice is conflicting, the facts are not.

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Alcohol & Anomie:
The Nature Of Aboriginal Crime

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The celebrated case of Alwyn Peter¹ focused the attention not only of lawyers and criminologists, but of a far greater spectrum of disciplines on what, for Aborigines, has become a key symptom of their plight in Australia today, viz the disruptive, divisive and ruinous effects on their cultural identity and cohesion of alcohol.

It is for sociologists, political scientists and anthropologists more than for lawyers to suggest possible cures or remedies for the underlying causes of excessive recourse to alcohol. The social manifestation of alcoholism results in a peculiar form of social deviance which all too often brings Aborigines under notice of the police and into the Court system.

In this paper I wish to examine a number of key issues which affect Aborigines as participants, however involuntarily, in the administration of the criminal justice system in Australia. The case law material is derived from my research shortly to be published, and which may for convenience be referred to simply as 'Bibliography'. The page references given correspond to those held in manuscript form by the Australian Institute of Aboriginal Studies, who are publishing my work.

Preliminary analysis of criminal cases

In another paper I shall consider the nature, function and role of those - particularly those holding judicial office - administering criminal justice in Australia. It is important, however, first to determine how critical alcohol is as a factor in Aboriginal crime or Aboriginal social deviance. Beyond that what does Aboriginal crime comprise?

Clifford and other criminologists have reminded us that Aborigines are 'the most imprisoned race in the world'. Certainly, in her seminal research, Eggleston graphically demonstrated the grossly disproportionate representation of Aborigines in Australian gaols². Accordingly, I have tabulated from the 452 civil and criminal cases comprising Part I of my Bibliography, 326 cases in which an Aborigine was a party, whether as plaintiff, defendant, appellant, respondent or relator, 95 per cent being in courts the status of a Supreme Court of higher.

The remaining cases do not directly involve an Aboriginal party, but do concern Aborigines either directly (as in wage cases undertaken by unions against employers to extend award rates to

* The opinions expressed are those of the author and not necessarily those of the (Commonwealth) Attorney-General's Department.

them) or indirectly (as in civil or criminal cases where the value of Aboriginal testimony has been judicially considered) or the 21 appeals taken by those (whites, publicans) convicted of supplying alcohol to Aborigines in contravention of relevant law.

Tables A-F have broken down chronologically and by jurisdiction all of the cases, which are then tabulated for the whole of Australia since the time of white settlement.³ Tables A, B and C each cover 50 years of white settlement; Table D, the next 25 years and Tables E and F the next 10 years each. The last Table, F, is particularly significant, not merely for the accelerated volume of case material it contains, but for the full flowering of the several Aboriginal legal services, and equally importantly in my view, the passage, commencement, and development of Land Rights legislation.

Tables A-D are not, and cannot pretend to be, anywhere near complete. Table A shows only three murders by Aborigines in the first 50 years of the infant colony, one in the next 50, and none in the next 75, a total of four murders by named Aboriginal defendants in 175 years! Reece⁴, Bridges⁵, and McGonigal⁶, to name but a few, have cited far greater numbers of Aborigines tried, convicted, and either executed or transported. Bridges, for example, whose article as cited spans the greatest number of years (77, from 1788 to 1855), records the trial of 65 blacks in the superior courts for crimes of violence other than rape. Of that number, 46 were convicted, 26 for murder or attempted murder: 25 of the 26 were executed⁷.

In South Australia, for the period to 1963, only one named Aborigine is cited, yet Griffiths records that in the same period, 22 were executed⁸. For Western Australia, not one homicide by an Aborigine is cited to 1963, but in the period 1830-1855, Judith Fall has estimated that 66 offences of murder by Aborigines alone were tried in the Supreme Court, Perth.⁹ Of that number, only four of the murder victims were white.¹⁰ Two hundred and forty other trials of Aborigines were conducted by that court during that period¹¹.

In 1883, the colonial surgeon of Western Australia, Dr Waylen, inquiring into conditions of the principal place of imprisonment for Aborigines, Rottnest Island, reported that the prison could hold 106 prisoners at the most. In May of that year, there were 179, but an outbreak of influenza resulted in 60 deaths, a diminution of over a third of the total population of the prison.¹²

It should be remembered that much of the data available to researchers, especially legal researchers, is often poorly collated, difficult to access, unco-ordinated, and dubious as to its authority. The isolation of the colonies from England and from each other, the pervading sense of isolation which the early white arrivals from the British Isles must have felt within a colony, and the harsh (to European eyes) and forbidding landscape magnified the sense of unease which a black, and unaccustomed, presence imposed on a white consciousness. Hence, when the misfortune which the 'tyranny of distance' imposed was compounded

by the outrages of the barbarous, uncivilised, ungrateful and brooding blacks, it was a newsworthy item, and frequently published as such.

Hence, the compilation of even anonymous trials of blacks seems to have been as industrious as it was egregious when compared with those of similar outrages by white on black.¹³

Again, for purposes of analysis, further research, or simply ease of citation, it is far more useful to have access to a law report, containing the actual reasons for judgment, rather than simply a court record, comprising the names of the parties, the number and year of the matter, the issues, and the result.

However great the paucity of statistical data may be, as shown in Tables A-F, their value is seen from a comparative viewpoint according to jurisdiction and subject matter, and also from a sociological appreciation underpinning the growth of certain crimes and the decline of others. The sheer bulk of raw data again provides for greater definition and a narrowing of focus on species or sub-species of crime. Finally, and to give some conspectus to the exercise, I have included civil matters, again to illuminate areas of interest, or neglect, and to highlight where further research efforts could profitably be concentrated.

Even when sources are extracted, it is not always appropriate to classify the results other than very generally, or in such a way as will result in the least distortion. For example, the very basis upon which I have collated and presented the data has assumed that alcohol played a major part in the offence, be it a 'crime' relating to the supply, consumption, or receipt of alcohol, a drunken altercation between spouses, family, or group resulting in violence, injury or death, or an alcohol-related offence against what euphemistically is called 'public order'.

Murder by a 'non-drunk male of a non-drunk male', however clumsily expressed, is the neutral territory in which, if the law report contains no other relevant details as to the circumstances of the person's death (the sex of both parties being known), I have placed the offence as tried in the appropriate jurisdiction.

Table G indicates the results of that approach. Thus of 87 homicides by Aborigines, no less than 40 (46 per cent) fell into that neutral category. As at the time of compilation, and of writing, I had no access, for example, to that most recent and useful publication by the Australian Government Publishing Service of Northern Territory Judgments 1951-1976: A Selection of the Judgments of the Supreme Courts of the Northern Territory of Australia.¹⁴ The selection period coincides with elevation to the Bench of that Court of the late Mr Justice Kriewaldt, 23 of whose judgments on Aborigines are reported. By way of contrast, my own Bibliography includes 52 judgments by Kriewaldt J, 47 concerning Aborigines.

From the judgments cited, it is possible to analyse

critically not only judicial attitudes, but community expectations. Even so, the underlying socio-economic and socio-political factors would require a greater knowledge of factors not always adverted to in the judgments, if at all.

Table G provides an overview for all Australian jurisdictions.

Supply, consumption, receipt of alcohol

The first, and most striking feature of this statistic is the miniscule figure represented. The one reported decision, in which the party was of Aboriginal descent, is that of Namatjira-v-Raabe, a matter taken on appeal ultimately to the High Court of Australia.¹⁵

The matter originated in a court of summary jurisdiction, being seized of the matter under the Licensing Ordinance 1939 (NT). Sub-section (1) of s.141, which created the offence, said that a person shall not sell, give or supply or permit to be sold or supplied, liquor to a person who was a ward within the meaning of the Welfare Ordinance, 1953. Sub-section (1) further provided that where the offence is a first offence imprisonment for not less than six months and not more than one year shall be imposed.

The section further provided that on an appeal from a conviction the Supreme Court of the Northern Territory should have a wider discretion, having regard to the youth of the person or other extenuating circumstances, to mitigate the sentence, either by substituting a sentence for a lesser term of imprisonment or imposing a fine in a minimum amount. Having thus appealed to the Supreme Court, which substituted for the mandatory term of 6 months imposed by the Court at first instance its own sentence of 3 months, a further appeal was taken to the High Court on a number of grounds. For reasons that are not germane to the topic under discussion, the High Court was unanimous in dismissing the appeal in a judgment delivered ex tempore.

Twenty similar appeals (to the Supreme Court) were taken in five jurisdictions, as follows:

NSW	NT	Q	SA	WA
1903	1952	1891	1925	1947
1910	1958	1904	1928	
1910	1958	1906	1943	
1912	1959			
1923	1959			
	1960			
	1962			
	1962			

These figures represent white crime, but they also symbolise in a remarkable way the extent of white supervision and control of a white-introduced, white-developed, and white-maintained social disease. The nature of appeal disguises the great number of prosecutions in courts exercising original jurisdiction which did not go to an appellate court. The absence of appeals in Victoria, and in New South Wales after 1923, may represent the more enlightened legislation obtaining in those States, or the greater absorption of the black population of those States into the community mainstream. It could also represent the greater preponderance of white 'blood' and a correspondingly greater dilution of black 'blood' in situations where the legislative sanctions were based on 'blood'.¹⁶

What is striking is that appeals against convictions are not recorded for the Northern Territory until well after those for all other States had ceased, even though in those States which recorded the more recent appeals, South Australia in 1943 and Western Australia in 1947, the blanket prohibition on the supply of liquor to Aborigines was not removed until 1967 in the case of South Australia and in 1964 in Western Australia, the latter State preserving the restriction for 'proclaimed areas'.¹⁷ The latter restriction was not removed until 1972.¹⁸

In another paper, I shall refer to those expressions of judicial despair on the pervasive and destructive effects of alcohol in Aboriginal communities, and how the sanctions and processes of law were inappropriate to actions not criminal per se but symptomatic of a social illness or social disease. As the Full Court of the Supreme Court of Western Australia held in Murphy, Davidson and Ward-v-Watson (1975) WAR 23, in allowing an appeal against a sentence of imprisonment imposed on three Aboriginal women, each addicted to alcohol:

Each case is a tip of a deep and serious social problem, the solution to which must be found outside the criminal law.

In each case, the addiction to alcohol resulted in intoxication which manifested itself in the screaming of obscenities at friends and at any other person in the vicinity. On some occasions this led to fighting or, as their Honours put it, 'drunken brawling'. The picture presented was one of habitual intoxication made manifest and not of crime nor of substantive offences committed in drink. Accordingly, the Court held that there existed 'no basis for the application of the generally accepted principles of sentencing'.

Their Honours in each case allowed the appeals, set aside the custodial sentence, and substituted for six months imprisonment a fine of \$10.00.

Most, if not all, States now have removed drunkenness as a crime from the statute books, and replaced custodial sentence as a punitive measure with protective custody as a curative measure. In New South Wales, for example, the Intoxicated Persons Act, 1979 and in the Northern Territory, the Police Administration Act 1978

(s.128) provide for such custody where, by reason of his intoxication, the person to be detained appears unlikely or unable adequately to care for himself or is unlikely to have another care for him.

Offences against property

Again, practices and procedures vary from State to State. But the last 10 years, as shown by Table G, account for no less than 78 per cent of cited break, enter and steal matters heard since 1939 by the superior courts. Of the 29 cases falling in that category, Table F shows that 20 came from the Northern Territory. Eight of that number, 40 per cent of the Territory total were committed by persons intoxicated. One of the defendants was female; most offences were committed by individuals, but at least three of my Northern Territory cases show that they were committed in company.

It would be misleading to suggest that there is greater respect for property than for human life or integrity simply because offences against property constituted only 20% of all criminal matters determined by superior courts. For one thing, it ignores the part played by juveniles or young offenders, whose offences may more often than not be tried in a Children's Court at summary level. Secondly, the nature of the offence itself may take it out of the superior court level, and provide for trial other than an indictment. Next, offences of this nature, particularly those committed by persons intoxicated at the time, may be minor if committed 'with intent' to commit a major offence, such as assault, rape, or murder, or attempts thereat. In case of the latter, a prosecution may opt to press charges and proceed to trial on the greater offence, and to drop or not proceed with the lesser, particularly when mitigating circumstances (intoxication, confession, contrition, co-operation, antecedents, compensation, customary punishment, community acceptance) are taken into account.

Larceny, embezzlement, and receiving present different problems. Embezzlement in particular is often associated with a more sophisticated requirement of criminal activity, that of so-called 'white-collar' crime, where the offence, to be successful, requires a person in regular employ to possess knowledge of accounting or administrative procedures, at one remove from the cruder version of stick-'em-up crime. The one case of embezzlement came from the Northern Territory and was committed by a female Aborigine against an Aboriginal employer. The same person also committed larceny, but having made full restitution and pleaded guilty, and with strong character references, was given on each of four counts a recognizance in the sum of \$500 to be of good behaviour for three years. One other case of larceny is cited; it was committed by a male aged 24, who pleaded guilty. A conviction was recorded but the offender was released upon his own recognizance in the sum of \$2,000 to be of good behaviour for 3 1/2 years, and his accepting the supervision of the Director of Correctional Services.

Again, 90 per cent of such matters were committed in the

past 10 years, and 70 per cent of the total were committed during that time in the Northern Territory.

Offences against the person

Homicides account for no less than 59 per cent of all serious crimes against the person cited in my Bibliography - totalling 148. These are the offences in which death, whether intended or not, resulted. Sexual assaults, 30 of the 148, accounted for another 20 per cent; non-sexual assaults which, because of their aggravated nature, were tried in the superior courts, for another 31 (21 per cent). Offences against public order, in which I included vagrancy, assaulting police, offensive behaviour, being drunk and disorderly, breach of parole, being an unlicensed driver to the extent requiring penal sanctions, accounted for 38 (or 16 per cent) of the total.

Offences against property therefore totalled 49 (or 21 per cent) of the 235 criminal matters; offences against the person, 63 per cent and those against public order, 16 per cent.

Eggleston, by contrast, writing almost 20 years ago, found in respect of convictions in Western Australian in 1965 for each of those categories 48 per cent, 52 per cent and nil.

The most telling statistic is that, in the nature of Aboriginal crime of any serious (that is, indictable) nature, violence is an ever-present factor. Worse, not only is it non-constant, but increasing. The last ten years, in particular, account for 50 of the 87 homicides cited. A caveat needs to be lodged, reflecting as much the availability of the more recent cases as the corresponding paucity of earlier cases. The law reporters can be forgiven, at least in jurisdictions other than the three northern States (Western Australia, Northern Territory and Queensland), for ignoring either those cases that involved a member of a distinct minority of the population; further, for ignoring those cases - as the work of Reece, Griffiths and Fall demonstrate - in which the victim as well as the assailant was black.

Generally, only those crimes where the victim was white and the offender black could be considered sufficiently inflammatory of (white) sensibilities and moral outrage as to warrant reportage of the trial and the subsequent execution or incarceration. The same sensibilities could hardly be expected in respect of white persons who, for retaliation - so often considered 'protection' or 'teaching-the-natives-a-lesson' - killed blacks; therefore a certain ethno centric bias determined the reporting of cases.

Further, as it became obvious to the white population, but particularly to the white administration, that the blacks were becoming of less consequence as their numbers dwindled under the twin onslaughts of European disease and European alcohol, there seemed little merit in reporting any but the more sensational of their trials.

What is an interesting feature of the total figures thrown

up by Table G is the virtual quiescent stage of Aboriginal criminality in the third period shown, viz. 1888-1937. To a large extent, this reflected the period during which official policy was to 'soothe the pillow of the dying race', inspiring policies of increased government intervention and control, in concert with or opposition to the missions and other Church-run institutions. In general terms, this called for a removal of the native population to the reserves, for protection as much as control, increasing oversight and direction of the minutiae of their daily lives, and the isolation of their plight and demise from white communities.²⁰

In the next quarter-century, that is 1938-63, when the restrictions and prohibitions were still largely intact, not least in the Northern Territory, homicides as cited accounted for only 13 or (15 per cent) of the total; the number actually declined in the next ten years (1964-1973) during the period of liberalisation of the drinking laws in relating to the Aborigine. The ratio, however, increased over the preceding quarter-century from 1 death almost every 2 years, to 1 a year. In terms of the population increase among Aborigines, however, the ratios were fairly constant.²¹

A dramatic increase, however, occurred in 1974-83, when homicide offences by Aborigines increased from 10 to 50. Table F reveals the extent of the increase. Queensland and South Australia each recorded 3 homicides by Aborigines; New South Wales and Western Australia 7 each; but the Northern Territory recorded 30, more than for the rest of Australia. In every category of homicide except the last (by non-drunk parent of child), the Northern Territory had by far the worst record.

Examining the comparisons of non-drunk homicides to drunk-homicides over the entire period 1788-1983, the ratio is 52:35; however, this ratio is distorted for reason already given, namely the inability precisely to determine the state of sobriety of the victim and his offender.²²

However, no such problem exists in respect of family-related deaths. In the case of death where each partner was drunk, the total of 9 is 50 per cent higher than for the case where neither was drunk. The number of homicides involving a family member was 26 or 87 (or 30 per cent); those where the parent murdered a sibling was 3, but those where a child murdered a parent was 4, all of them where the child was drunk, all in the last ten years, and all in the Northern Territory.

Homicides by Aborigines were committed overwhelmingly by males: 81, including the four children, and only 6 by females, 1 by a wife or her husband, 3 by a drunk female of a (drunk) male, and only 2 by non-drunk females of non-drunk females. That figure does not include, for example, the manslaughter of a father by his son at the instigation and with the encouragement of his mother, all being drunk at the time. As a result, the mother was to face likely punishment by the community (ritual facing of spears), and the son banishment for a period.²³

These homicides represent a malaise deep within especially

the traditional communities, as the numbers and cases cited for the Northern Territory attest. But, as the case of Alwyn Peter reminds us, the communities of the Northern Territory are not isolated from the phenomenon of a gradual alcohol-inspired disintegration of the traditional society. The Queensland communities of Weipa and Mapoon (prior to the latter's demolition by authorities at the behest of various institutions, including according to Wilson, the Churches), suffered, and continue to suffer, domestic/marital violence, fragmentation and disintegration, which in turn, within a societal framework of community response and reaction, affects the web of relationships binding those communities.

The violence manifested in those of Alwyn Peter's background has been self-inflicted (mutilation), but in the cases extracted by me, it is external. In non-sexual matters, of the 31 matters there cited, 22 (71 per cent) occurred in the past decade, 48 per cent in the Northern Territory alone. Attacks against males by males accounted for 16 or 52 per cent of the total. Male offenders numbered no less than 30 (97 per cent) of the total.

Thus, the male is by far the greater aggressor, whether in homicides or assaults; and the likelihood of attack is greater where drink is a factor: 48 per cent where the assailant was drunk, another 16 per cent where the victim was drunk. Of that total of 64 per cent, only 6 per cent occurred where both parties were drunk.

Curiously, however, a drunken assailant is more likely to succeed against a non-drunken victim than in the case of a drunken victim and a non-drunken assailant, 9 cases as opposed to 5. And why should this be so? The answer must include the inhibiting effect which sobriety has on individual conduct, the regulatory mechanisms which are allowed freely to function and are not checked, discounted or discarded by inebriety.

Sexual assaults again illustrate the effect of drink as a demonic influence on criminal behaviour amongst Aborigines. Of 30 matters cited, 19 (63 per cent) were by a drunken male assailant. Males were the victims in only 2 cases, and white females appear only to have been victims in 6 cases, representing 50 per cent of the non-drunk female victims.

Again, the dominant role played by the Northern Territory is disturbingly evident. As Table F shows, 20 of the 26 cases in the past decade - 77 per cent occurred in the Northern Territory. A feature of those assaults was the prevalence of carnal knowledge matters. Four of the 8 matters where a drunk male sexually assaulted a non-drunken female in the Northern Territory fell within that category; the reports do not say how the victim was chosen nor where the offence took place. But the continuance of tribal traditions, the dispersal of men and women on traditional tasks and the occupation of trusted roles by persons of the same skin group, combine to make possible such an attack.

A distressing aspect of drink-and-sex-related crimes is the extent of participation in the crime by the family of the victim. One of the homicides of wife by husband occurred because of the

wife's incestuous relationship with her brother; another instance of incest was of father with his mature-age daughter, from the evidence with her presumed consent, over a period of some months; the most grotesque example, however, is that of a father who joined a conspiracy of six other men (five young, one his age) to rape his daughter, the conspirators being intoxicated.²⁴

Non-sexual assaults, numbering 31 in the cases extracted, only just exceeded - by one - the number of sexual assaults. Here men were very much the victim (24) and women not only in the minority as victims (7) but also as aggressors (1). That attack took place, as shown by Table G in the period 1938-63, and has not recurred, at least at the Supreme Court level.

As Table D indicates, that attack took place in the Northern Territory.

Drink was a factor in 20 cases; the surprising factor is the relatively high percentage of assaults where drink was totally absent (35 per cent). Again, as Table F shows, every assault on a female in the past decade and tried in the Supreme Court, occurred in the Northern Territory; indeed, it accounted for 48 per cent of all non-sexual assaults so tried, the rest of Australia for 52 per cent. Even the much-maligned State of Queensland had not one assault falling within this category, whilst of the other States with a significant Aboriginal population, South Australia had just one such case, and Western Australia, four.

Finally, offences against 'public order' provided 31 case studies, equal in number to the category of non-sexual assaults. In terms of seriousness, the offences shown are very slight, and most were taken on appeal from lower courts. Thus, 'assault police', 'vagrancy', 'offensive behaviour', 'drunk and disorderly', 'breach of parole' and 'unlicensed driver', are not crimes which rent the fabric of society, nor are the penalties attaching to them of great moment. With the exception of the offences of vagrancy and breach of parole, the cases extracted showed a high correlation between ingestion of alcohol and the commission of the offence. Again, the number of offences recorded show a dramatic increase in the past decade, accounting for 82 per cent of the total.

I ascribe this less to a disintegration in social cohesion and more to the increasing availability of legal aid, and the effectiveness of legal presentation for the Aborigine. The Northern Territory this time does not dominate the statistical tabulation. As shown in Table F, South Australia with six offences, and Western Australia with eight, rank with the Northern Territory's eleven.

Conclusions

A number of broad themes emerge from the analysis given above. The first is that of the intense physical nature of serious crime. Of 235 criminal matters extracted, only 49 (21 per cent) involved crimes against inanimate objects. Offences against

public order (16 per cent) did not, per se, require physical violence, although assaulting police, being drunk and disorderly, and engaging in offensive behaviour necessarily required physical action sufficient to alarm or affront. The three drunk and disorderly matters arose in the Northern Territory between 1978 and 1980.

Homicides far greatly outnumbered each other category of serious crime. As in all categories, men were the greater offenders, accounting for 216 of the 235 cases involving homicide, other offences against the person, offences against property and against public order.

Next, the element of drink, which was present, on the most optimistic basis, in 36 per cent of all criminal matters, but in respect of all offences against the person, in at least 40 per cent of those matters. The effect of alcohol has been not merely to inflict some physiological damage on the inebriate, but to overflow into the personal arena of conflict and recourse to violence as a result. The level of violence has been sufficiently great to invest the Supreme Courts with jurisdiction.

The violence has been specific, rather than random, and the means of inflicting it has more often than not reflected the primitive living conditions of the offender.

Thus, a firearm was used in only 2 of the cases; most weapons were of a primitive nature being the most readily available weapon available. From nulla nullas to knives, from sharpened sticks to tomahawks, generally the weapons were crude, but crudely effective.

Apart from domestic disputes, most of the deaths and assaults occurred within a community relationship, in which the victim knew the assailant. Indeed, many of the non-sexual assaults, for example, arose in the course of a drinking session when camaraderie gave way under the influence of alcohol to aggressive action.

In a number of cases to which I shall advert in another paper, judicial comment was directed at the degree of provocation which a black man could endure without recourse to retaliation, and a clear suggestion of differences in the level of provocation, or of tolerance, between the white man and the black.²⁵

The clear emergence of the Northern Territory as a problem area of great dimension also is seen in the statistical breakdowns. Table H cogently demonstrates the dominance of that State. Of 210 criminal matters heard at first instance or on appeal for Australia, the Northern Territory accounted for 120 (appeals from a single Justice going to a full court of the Federal Court of Australia). This figure is even more impressive when it is realised that the Northern Territory came into being as a separate judicial polity only in 1911. Thus, in the course of 72 years it has accounted for 57 per cent of Aboriginal crime.

It is for an anthropologist to suggest why there has been

such an increase in Aboriginal crime in the Northern Territory. The removal of restrictions on drinking, coupled with the restoration of full civil rights, including those of wage equality, gave to Northern Territory Aborigines both the legal and the financial capacity to satisfy their demand for drink.

Lee Sackett has identified in South Australia some of the great societal pressures and conflicts which divide, fragment, and ultimately destroy so much of the cultural fabric of traditional Aboriginal society, in particular.²⁶ The legislative response within the Northern Territory has derived from the community clamour for a measure of self-protection from the ravages of alcohol. The move appears to derive in part from an awareness among the tribal elders of an erosion of their traditional roles, hence their traditional authority, and a demand by the women of greater protection which the elimination, or strict control, of alcohol consumption within a given community may provide.²⁷

Thus, Part II inserted by the Local Government Act (No 4) 1978 (NT) created a community government scheme operating at local level within the Territory and empowered the community government council to make laws for that community in relation to, inter alia, the sale, purchase, possession, presence and consumption of liquor. Further, under the Liquor Act, 1978 (NT) the Liquor Commission was authorised under Part VIII, upon the application of the community government council and after considering the views or advice they proffered, to declare Restricted Areas where liquor was not to be brought, consumed, sold or possessed except under permit.

Such measures address themselves to the secondary nature of alcohol-induced crime; but the underlying social ills which create the conditions in which alcohol abuse is not simply a sufficient but a necessary ingredient appear to have been overlooked by the legislators or insufficiently acknowledged by them.

Finally, one must ask: what is meant by 'crime'? A white lawyer, a white judge, a white jury may easily answer that question by reference to a whole host of factors, influences, criteria, all of them reflecting the cultural bias and experiences of the respondent. But what of those actions, criminal in a white or Caucasoid milieu, but part of traditional Aboriginal society, ritual or custom and so sanctioned as such?

The High Court of Australia recognized the inherent difficulties of ignorance of the substantive - rather than the procedural - criminal law in Ngatayi-v-R (1980)54 ALJR 401, 30 ALR 27.

Ngatayi, a full-blooded tribal Aborigine who resided at a mission in North-West Australia, was convicted of the wilful murder of another man whom he stabbed four times with a knife after consuming six bottles of beer. His reasons for stabbing the deceased were obscure and, as recorded in the transcript, partly unintelligible. Although the trial judge ignored Ngatayi's plea of guilty, and recorded a plea of not guilty (presumably for the purposes of s 49(1) of the Aboriginal Affairs Planning Authority

Act, 1972 (WA)) and notwithstanding that the trial judge also put to the jury Ngatayi's defence that he was drunk and lacked the requisite intent to kill the deceased, the jury returned a verdict of wilful murder and Ngatayi was sentenced to death.

The Court of Criminal Appeal (WA) dismissed Ngatayi's appeal against his conviction; Ngatayi sought special leave from the High Court to appeal against the latter judgment on the sole ground that the trial judge should have followed the procedure laid down by s.631 of the Criminal Code (WA). That section provides for a jury to be empanelled to determine if an accused is capable of understanding the proceedings at the trial, and so capable of preparing and presenting a proper defence.

The High Court granted special leave, and, by majority, dismissed the appeal. Gibbs, Mason and Wilson JJ placed great emphasis on the legal representation (by counsel) for the defence with whose assistance, notwithstanding that he does not know and cannot understand the law, he will usually be able to make a proper defence.²⁸

Further, their Honours agreed that it is 'a question of high legislative policy whether tribal Aborigines, who are unable to understand the concepts of the ordinary law, ought to be tried under that law'.

The Australian Law Reform Commission currently has a Reference:

Whether it would be desirable to apply either in whole or part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only.

In a paper of this nature, it is not possible to do justice even to attempt to canvass all the issues, let alone suggest with any degree of confidence, policy solutions to the question already posed. Further, so many of these have been canvassed in a series of Research Papers disseminated by the ALRC: perhaps that which is most germane to the topic presently under discussion is Research Paper No 6 'Aboriginal Customary Law and the Substantive Criminal Law', co-authored by Professor J.R. Crawford and Mr C.J. Kirkbright, which should be considered in conjunction with Research Paper No 8 'Aboriginal Customary Law: A General Regime for Recognition' prepared by Professor Crawford.

If it is accepted that in denying even procedural equality to Aborigines the law is creating antinomies, in failing to provide substantive criminal justice is it not creating antinomies of a higher order?

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2. Elizabeth Moulton Eggleston 'Aborigines and the administration of justice: a critical analysis of the application of criminal law to Aborigines', Monash University, 1970. Ph.D. thesis. This was subsequently published as Fear Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia, Australian National University Press, Canberra, 1976.
3. I am conscious of ethnocentric bias in using 'settlement' rather than 'conquest' or 'colonization'. Perhaps a convoluted phrase such as 'from the time of the first permanent European presence/habitation' will offend fewer sensibilities, but economy of expression dictates 'settlement' as popularly vs. legally understood.
4. R.H.W. Reece Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s, Sydney University Press, Sydney, 1974. See appendices for homicides by, and of, Aborigines, and of Aborigines tried and convicted by Supreme Court of New South Wales 1923-1843.
5. Barry Bridges 'The Aborigines and the Law: New South Wales 1788-1855', Teaching History Vol 4 Part 3 (December, 1970), pp. 40-70.
6. Peter G. McGonigal 'The Role of the Law in the Foundation and Settlement of the Colony of New South Wales prior to 1828, in relation to the aboriginal inhabitants', University of Sydney, 1975. LL.M. thesis.
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8. A.R.G. Griffiths 'Capital Punishment in South Australia, 1836-1964' Australian and New Zealand Journal of Criminology 3 (4) (December 1970) pp. 214-222.
9. Judith Fall 'Crime and Criminal Records in Western Australia 1830-1855', Studies in Western Australian History, Vol. 3 (November, 1978), pp. 18-29. Table 4, p. 27.
10. Ibid.
11. Ibid.

12. Hansard, 6 August, 1883, Vol 8 p. 158, Col 2; cited in J.E. Thomas and Alex Stuart Imprisonment in Western Australia: Evolution, Theory and Practice, University of Western Australia Press, Nedlands, 1978, p. 135.
13. Bridges, loc.cit., p. 47.
14. Canberra, 1982.
15. (1959) 100 CLR 664.
16. Licensing Act, 1928 (Vic), s.177(a) 'any aboriginal native'; repealed by Aborigines Act, 1957, s.11(2); Liquor Act, 1912 (NSW), s.49(1),(2) 'any aboriginal native of Australia', repealed by Liquor (Amendment) Act, 1946. The Aborigines Acts of the several States in turn defined the meaning to be ascribed to those expressions in terms of blood.
17. Licensing Act, 1967 (No. 41 of 1967)(SA); Licensing Act Amendment Act (No. 4) 1963, (No. 87 of 1963)(WA).
18. Liquor Act Amendment Act, 1972 (No. 76 of 1972)(WA).
19. Her Fear Favour and Affection, although published in 1976, was based on her Ph.D. research: her thesis, presented in 1970, in turn was based on her field work in the years 1965-7. Her book acknowledges the effluxion of time but, as she stated in the preface:

'Though there have been considerable changes in Aboriginal affairs since this study was carried out, it still has contemporary relevance'.

The figures were extrapolated from Table 4.1; Table 4.2 shows the ratio of offences against the person to those against property as being 3:1.
20. The many writings of Elkin illuminate his role in the development of government, particularly Commonwealth government, policy. See eg, 'Australian Aboriginal and White Relations: a Personal Record' Journal of the Royal Australian Historical Society 48, 3 (July, 1952)pp 208-30: 'Citizenship for the Aborigines: A National Aboriginal Policy' Australasian Publishing Co. Pty. Ltd., Sydney, 1944.
21. LR Smith cites the Aboriginal population at 77,269 in 1939 and 155,300 in 1971; op.cit., pp.63 and 204 respectively.
22. I used 'drunk' in the sense of inebriated/intoxicated; it is accepted that there are many shades of meaning of, or degrees ascribed to, that condition.
23. R-V-James Yulidjirri (Supreme Court of the Northern Territory, Forster C.J., S.C.C. No. 151 of 1981, 7 September, 1981, unreported). See Bibliography: Cases p.125.

24. R-v-Nadigi Tjalpaltjari (Supreme Court of Northern Territory, No. 3223 of 1969, Blackburn J. 17-18 September, 1969, unreported); Bibliography: Cases, p. 118. R-v-Allan Kunoth (1957) NT11; Bibliography: Cases p. 98. R-v-Banjo Anglitchi, Major Mickimin Raymond, Nicholas Anglitchi, Rollo Berry, Jabiru Lewin, Billy Raymond, Rupert Wodidjic (Supreme Court of the Northern Territory, S.C.C. Nos. 316-322 of 1980, Muirhead J., unreported). Bibliography: Cases, p. 70.
25. See also Colin Howard's 'What Colour is the "Reasonable Man"?' The Criminal Law Review (1961) 41-48.
26. 'Liquor and the Law: Wiluna, South Australia' in R.M. Berndt (ed.) Aborigines and change: Australia in the '70s. Humanities Press Inc., New Jersey, 1977, pp. 90-99.
27. See Diane Bell and Pam Ditton Law: the old and the new: Aboriginal women in Central Australia speak out. Central Australian Aboriginal Legal Aid Service, 1980.
28. Emphases added.

Table A1788-1838CriminalMurder/manslaughter by:N.S.W.

Non-drunk male of non-drunk male

3

Table B
1839-1887

<u>Criminal</u>	<u>NSW</u>	<u>V</u>	<u>Q</u>	<u>Total</u>
<u>Offences against property</u>				
Break, enter and steal		2		2
<u>Murder/Manslaughter by</u>				
Non-drunk H of non-drunk W	1	1		2
Non-drunk male of non-drunk male		4	1	5
<u>Non-sexual assault</u>				
Drunk male of non-drunk male	1			1
Non-drunk male of drunk male		1		1

	Total Criminal			11

<u>Civil</u>				
Administrative law prerogative writ	1*			1*
Family law/custody	1*			1*

(* same matter)	Total Civil			1

	Total			12

Table C1888-1927

<u>Criminal</u>	<u>Q</u>	<u>SA</u>	<u>NT</u>	<u>Total</u>
<u>Murder/Manslaughter by:</u>				
Non-drunk male of non-drunk male	1		2	3
<u>Offences against public order</u>		1		1
				—
		Total Criminal		4
				—
<u>Civil</u>				
Administrative law/prerogative writ		1		1
Conciliation and Arbitration/ employment	1			1
Equity	1			1
				—
		Total Civil		3
				—
		Total		7
				—

Table D

1938-1963

<u>Criminal</u>	NSW	Q	SA	NT	WA	Total
<u>Offences against property</u>						
Break, enter and steal		2		1	1	4
<u>Murder/Manslaughter by:</u>						
Drunk W of drunk H	1					1
Drunk female of drunk male				1		1
Drunk male of drunk male				1		1
Drunk male of non-drunk male				1		1
Non-drunk male of non-drunk male			1	5		6
Non-drunk H of non-drunk W		1				1
Non-drunk parent of child		1		1		2
Non-drunk female of non-drunk female				1		1
<u>Sexual assault</u>						
Drunk male of non-drunk female				1		1
Male of female				1		1
<u>Non-sexual assault</u>						
Drunk male of non-drunk male				1		1
Non-drunk male of drunk male				1		1
Non-drunk male of drunk female				2	1	3
Non-drunk male of non-drunk female				1		1
Female of male				1		1
<u>Offences against public order</u>				2		2
						—
						Total Criminal
						28
						—
<u>Civil</u>						
Common law				1	1	2
Administrative law/prerogative writs				2*		2*
Conciliation and arbitration/employment					1	1
Equity				1*		1*
Family law/custody					1	1
Ejectment/electoral/legal status	1			1		2
						—
						Total Civil
						8
						—
						Total
						36

(* the equity matter also involved application for prerogative writs)

Table E
1964-1973

<u>Criminal</u>	NSW	V	Q	SA	NT	WA	Total
<u>Offences against property</u>							
Break, enter and steal			1			1	2
Larceny, embezzlement, receiving						1	1
<u>Murder/Manslaughter by:</u>							
Drunk H of drunk W						1	1
Drunk male of drunk male			1				1
Non-drunk male of drunk male		1	1		1	1	4
Non-drunk H of non-drunk W					2		2
Non-drunk female of non-drunk female			1				1
<u>Sexual assault by:</u>							
Male of male			1				1
Male of female			1				1
<u>Offences against public order</u>				1	2	1	4
							—
							Total Criminal
							19
							—
<u>Civil</u>							
Common Law				1			1
Statutory					2		2
Administrative law/prerogative writs					1*		1*
Conciliation and arbitration/ employment						1	2
Equity	1				1		1
Family law/custody					3*		3*
							—
							Total Civil
							9
							—
							Total
							28
							—

(* the administrative law matter also concerned custody)

Table F
1974-1983

<u>Criminal</u>	NSW	ACT	V	Q	SA	NT	WA	Total
<u>Offences against property</u>								
Break, enter and steal	1		1		2	20	5	29
Larceny, embezzlement, receiving	2					7		9
Arson						1		1
<u>Murder/Manslaughter by:</u>								
Drunk H of drunk W	1			1		4	1	7
Drunk child of drunk parent ¹								4
Drunk male of drunk female				1				1
Drunk female of drunk male						2		2
Drunk male of drunk male	1					2	1	4
Drunk male of non-drunk male						6	1	7
Drunk H of non-drunk W						4		4
Non-drunk male of non-drunk male	5			1	3	7	3	19
Non-drunk parent of child						1		1
							1	1
<u>Sexual assault by:</u>								
Drunk male of drunk female						6		6
Drunk male of non-drunk female	3					8		11
Drunk male of male						1		1
Male of female	1			1		5	1	8
<u>Non-sexual assault by:</u>								
Drunk male of drunk female						1		1
Drunk male of drunk male						1		1
Drunk male of non-drunk female						4		4
Non-drunk male of drunk male	1				1		1	3
Non-drunk male of non-drunk male						2	3	5
Drunk male of non-drunk male	1					6		7
Non-drunk male of non-drunk female						1		1
<u>Offences against public order</u>	2	1		3	6	11	8	31
<u>Total Criminal</u>								<u>168</u>

('Parent' includes step-parent or person in loco parentis)

Table F

1974-1983

<u>Civil</u>	NSW	ACT	V	Q	SA	NT	WA	Total
Common Law	3				3	6	2	14
Statutory	1					22	1	20
Administrative law/prerogative writs	3			2	1	6	2	14
Conciliation and arbitration/employment				1	1	1	1	4
Equity	1		2	2		3	1	8
Family law/custody	1		1		2		1	5
Ejectment/electoral/legal status						2	1	3
								—
								Total Civil
								68
								—

- 2 4 of the Statutory cases also sought prerogative or equitable remedies and are included in the latter's total.
- 3 3 of the prerogative cases also dealt with land rights claims.
- 4 2 of the Injunctive cases dealt with land rights or prerogative writ matters; one of these is included in the statutory cases' total.

Table G

Chronological Tabulation of Aboriginal Superior Court Actions

	1788- 1838	1839- 1887	1888- 1937	1938- 1963	1964- 1973	1974- 1983	Total 1788- 1983
<u>Supply, consume, receive alcohol</u>				1			1
<u>Offences against property</u>							
Break, enter and steal		2		4	2	29	37
Larceny, embezzlement, receiving					1	9	10
Arson						1	1
<u>Offences against person:</u>							
<u>Murder/Manslaughter by:</u>							
Drunk H of drunk W					1	7	8
Drunk W of drunk H				1			1
Drunk child of drunk parents						4	4
Drunk male of drunk female						1	1
Drunk female of drunk male				1		2	3
Drunk male of drunk male				1	1	4	6
Drunk male of non-drunk male				1		7	8
Drunk H of non-drunk W						4	4
Non-drunk male of drunk male					1		1
Non-drunk male of non-drunk male	3	5	3	6	4	19	40
Non-drunk H of non-drunk W		2		1	2	1	6
Non-drunk parent of child				2		1	3
Non-drunk female of non-drunk female				1	1		2
<u>Sexual assault by:</u>							
Drunk male of drunk female						6	6
Drunk male of non-drunk female				1		11	12
Drunk male of male						1	1
Male of female				1	1	8	10
Male of male					1		1
<u>Non-sexual assault by:</u>							
Drunk male of drunk female						1	1
Drunk male of drunk male						1	1
Drunk male of non-drunk male		1		1		7	9
Non-drunk male of drunk male		1		1		3	5
Non-drunk male of non-drunk male				3		5	8
Non-drunk male of non-drunk female				1		1	2
Female of male				1			1
Drunk male of non-drunk female						4	4
<u>Offences against public order</u>			1	2	4	31	38
TOTAL CRIMINAL	3	11	4	30	19	168	235

Table G

Chronological Tabulation of Aboriginal Superior Court Actions

	1788- 1838	1839- 1887	1888- 1937	1938- 1963	1964- 1973	1974- 1983	Total 1788- 1983
Common Law				2	1	14	17
Statutory					2	24	26
Administrative Law		1	1	2*	1	14	18*
Conciliation and Arbitration			1	1	2	4	8
Equity			1	1	1	9	12
Family		1*		1	3	5	19*
Ejectment, electoral, legal status				2		3	5
 TOTAL CIVIL		1	3	8	9	68	89
 <u>TOTAL</u>	3	12	7	38	28	238	326

*Two civil matters included in more than one category; excluded from 1788-1983 totals.

Table H
Courts In Which Aboriginal Suits Heard

	Children's Court; Court of PS	Worker's Comp. Common/ Ind G	District Court Civ. Crim.		Supreme Court Orig. Civ. Crim.		App.	Court of Appeal Civ. Crim.		Cth Crt of C+Arb,Con Arb Comm CAC CCA		Family Court of Aust. Org App		Federal Court of Aust.	High Cr of Aust. (+PC) Civ. Crim.	TOTAL	
ACT					1	1										2	
NSW		1	1	2	3	8	4	4	17	2	1				2	3	48
NT					16	116	20			2	2			4	8	4	172
Q		2		5	1	5	6		13			1			3+1	2	39
SA	2	1			3	8	9	1	6							1	31
V					3	8	1	1	4						1		18
WA	2	1		1	5	11	16	1	13	1	2	1			1	3	58
Total	4	5	1	8	32	157	56	7	53	5	5	1	1	4	16	13	368

A Comparison Of Appearances By Aboriginal & Non-Aboriginal
Children Before The Children's Court & Children's Aid Panels
In South Australia

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Introduction

This paper presents an analysis of statistics¹ on the first six months operation of the Children's Protection & Young Offenders Act 1979 (SA). The sample taken is that of appearances in South Australia before the Children's Court and Children's Aid Panels from 1 July 1979 to 31 December 1979. The major purpose of the exercise is to compare the rates of appearances by Aboriginal children with those of appearances by non-Aboriginal children. Hence the variable of ethnic origin was employed throughout the cross-tabulations extracted from the available statistical data. Other variables were selected for the purpose of examining aspects of the criminal justice system as it operates in relation to young offenders.

This paper attempts to suggest some reasons why the statistics appear as they do, by considering both the operation of the organs of the criminal justice system (Court, Panels, police, etc.) and the interrelation between the various selected variables. In other words, an attempt is made to suggest why young offenders are classified and defined in a particular way by the official statistics. The paper confines its consideration to the abovementioned factors;² at this stage social background factors have not been considered.

The analysis in this paper is offered subject to the proviso that the statistics are a record only of such cases as appear before the Court or Panels. Hence they may not be a reliable indicator of actual rates of criminal behaviour, much of which never reaches the stage of official contact with the criminal justice system. Many crimes go undetected, and in many other instances the police may decide not to proceed. Two additional points must be made. The statistics herein analyzed record the number of appearances before the Court and Panels, and not the case histories of individual offenders. Hence the form of the statistics does not distinguish between one appearance by a child in the six month period, and ten appearances by a child in the same period. Secondly, the small number of Aboriginal children in the sample must necessarily make any deductions tentative.

The Children's Protection & Young Offenders Act 1979 (SA) came into operation on 1 July 1979, replacing the Juvenile Courts Act 1971-1974 (SA). The earlier Act was an example of a strongly welfare orientated and positivist approach to the treatment of young offenders. Children under 16 brought before the Juvenile Court were not charged with the commission of an offence, but rather an allegation was made that the child was in need of care and control, of which the offence provided evidence.³ No conviction was recorded, and a common result of

the Court finding the allegation proved was that the child was placed under the care and control of the Minister for Community Welfare.⁴ Thus the outcome of proceedings relating to young offenders could appear identical to that of proceedings involving neglected or uncontrolled children. Criticism of the operation of the 1971 Act led to the establishment in 1976 of a Royal Commission and the Report of Mohr J. in 1977.⁵

Mohr J. took as his starting points:

...the basic fact that I was dealing with a system of criminal justice, albeit a specialised one in the sense that after the guilt of an accused person had been established a different system of sentencing or disposal would follow from that operating in the adult world. However, I was determined that in providing this special system of Juvenile Justice for young people there was to be no erosion of fundamental rights of accused persons nor indeed of convicted persons under the guise of 'helping the child' or putting the interests of the child 'as of paramount importance'....

It is fashionable in some quarters to see juvenile crime as, in effect, an illness with the sick person to be treated in one way or another to cure the sickness. That is to place the emphasis on remedial work in the child's environment and on his personality without much regard to the nature of his offence. There is much to be said for this approach, and I do not deny it, but to use as a selective process for diagnosing the illness a system of criminal justice seems to me to be a perversion of what is normally thought to be a function of such a system. That there are children in the community who need help, encouragement and guidance is undoubted and programmes designed to provide this sort of assistance are properly the province of a department such as Community Welfare. However, to use a system of criminal justice, modified at the disposal stage, and disregard the seriousness of the offence and prefer the social circumstances of the offender in deciding what course to follow after conviction is not to give the child more rights than an adult, it is to deny them.

A child because of youth and immaturity needs more protection from the processes of the criminal law rather than less than that offered to an adult. A child needs to be protected at all stages from unfair and arbitrary treatment, whether it be at the level of police investigation or in the decision as to what is to follow conviction and how that decision is to be implemented. The guarantee afforded to an adult that he receive such treatment if involved in the processes of the criminal law

comes from his access to courts of law and the availability of independent legal advice. The foregoing sentences set out a concept of justice which I take to be axiomatic.⁶

The detailed recommendations of the Mohr Report formed the basis of the Children's Protection & Young Offenders Act 1979. That Act separated the criminal and civil jurisdictions of the Children's Court. Henceforth, offenders under 18 years are charged with the actual offence, and a conviction may be recorded. The outcome of criminal proceedings will be detention (to which fixed sentencing by the Court now applies), fine, bond or discharge. Successful civil proceedings in relation to a child in need of care will result in the child being placed under the guardianship of the Minister for Community Welfare, or under the control of the Director General, or directed to reside with a particular person. Hence the criminal and civil jurisdictions of the Children's Court are now distinguished both as to procedure and form of order. If the Department for Community Welfare is of the opinion that an offender should be placed under a guardianship or control order, then separate civil proceedings must be taken.

Gross number of appearances

Table 1

Ethnic Origin	Children's Court		Children's Aid Panels		Total	
	No.	%	No.	%	No.	%
Aboriginals	179	10.6	85	4.1	264	7.0
Non-Aboriginals	1513	89.4	1978	95.9	3491	93.0
Total	1692	100.0	2063	100.0	3755	100.0

During the specified period, July 1979 - December 1979, there were a total of 1692 appearances before the Children's Court and 2063 appearances before Children's Aid Panels. Table 1 shows that Aborigines made up 10.6 per cent and 4.1 per cent of all appearances before the Children's Courts and Children's Aid Panels respectively. Taking Court appearances and Panel appearances together, the total number of appearances for this period was 3755, of which 264 (7.0 per cent) were Aboriginal appearances.

It thus appears incontrovertible that young Aboriginals are grossly over represented in their contact with the criminal justice system, if these figures are seen in the context of the proportion of Aboriginals within the population of South Australia generally. According to 1982 census figures, Aboriginals represented 0.76% (9825/1,285,033) of the population of South Australia. However, given the high proportion of young persons

within the Aboriginal population compared with the general community it may be more appropriate to take for comparison only the age group to which the Children's Protection & Young Offenders Act applies, ie, those between 10 and 18. Age-specific data for the Aboriginal population as measured by the 1982 census are not yet available, and so 1976 census data must be used. These data do not distinguish those too young to be covered by the Act. In South Australia in 1976, there were 4,214 Aboriginals aged 5-18. This represented 1.3% (4212/323861) of the total population in that age category. Using this as a relevant comparison, the number of Aboriginals coming in contact with the criminal justice system is still disproportionately high.

The other important aspect of the figure in Table 1 is the variation in the numbers of Aborigines appearing before Children's Aid Panels compared with the Children's Court. 10.6% of all appearances before the Court are by Aboriginals. In comparison, the percentage of Children's Aid Panel appearances which are appearances by Aboriginals (4.1%), whilst still very high in relation to overall population statistics, is substantially less than half the relevant percentage of Court appearances. In fact, as shown in Table 2, the majority (67.8) of all appearances by Aboriginals were before the Court, compared with only 43.3% of all appearances by non-Aboriginals.

Table 2

	Aboriginals		Non-Aboriginals	
	No.	%	No.	%
Children's Court	179	67.8	1513	43.3
Children's Aid Panels	85	32.2	1978	56.7
Total	264	100.0	3491	100.0

Any suggested explanation of this difference demands some examination of the system through which young offenders in South Australia pass. Under the 1979 Act, one must consider the operation of: (1) Screening Panels, (2) Children's Aid Panels, and (3) the Children's Court. The Screening Panel is a novel creation of the 1979 Act (ss. 25-30). These Panels act as "first-level filters", and determine which matters are to be dealt with by a Children's Aid Panel and which are to be brought before the Children's Court. The Screening Panel's decision is final and not subject to appeal. No legal representation is permitted. Nor is any person entitled to appear before, or make representations to, a Screening Panel. The members of a Screening Panel are: (1) a member of the police force, and (2) an officer of the Department for Community Welfare.

The Screening Panel's function is important; it

determines into which "stream" (Court or Children's Aid Panel) of the system a child who has been alleged to have committed an offence passes. Upon what criteria does the Screening Panel make that decision? It must be remembered that it is a sine qua non of appearance before a Children's Aid Panel that the child admit the allegation made against him. If he does not admit it, the case must go to the Children's Court (ss. 33(2), 36(1)). The Children's Aid Panel hearing is informal. Once again, the members will be: (1) a police officer, and (2) an officer of the Department for Community Welfare. The child and a parent normally attend. A Children's Aid Panel is not a judicial body. No legal representation is permitted; it does not find the child guilty and convict him as a court may. The most common outcome of a Children's Aid Panel hearing is the Panel warning and counselling the child. Moreover, a Children's Aid Panel will frequently require the child to enter into a written undertaking as to future conduct. Sections 31-41 of the Act cover the composition and operation of Children's Aid Panels. In summary, a Children's Aid Panel is a non-judicial statutory body which deals in an informal manner with matters which the child is prepared to admit having committed. The rationale of the existence of Children's Aid Panels is that they are a diversionary measure for dealing with cases which do not need (in the child's or the public interest) to go to the Court and are better dealt with in any informal manner. The assumption underlying the existence of a diversionary measure such as this is that cases should not unnecessarily be brought before the Court. Under the 1979 Act Children's Aid Panels may deal with youths up to 18 years of age, whereas under the Juvenile Courts Act 1971, Juvenile Aid Panels could deal only with youths up to 16. This change will bring an increase in the number of Panel appearances.

"Hard cases" will tend to be referred to the Court rather than dealt with by Children's Aid Panels. The decision lies with the Screening Panel. A Screening Panel may decide that a case should go to court because of the seriousness of the offence alleged, or because of the circumstances surrounding the commission of the offence, or because of prior convictions or appearances, or because of factors which suggest that the child would benefit from the formality of a court appearance, or because of any combination of these.

In the light of the abovementioned considerations, can explanations be suggested for the disproportionately high representation of young Aborigines before the Children's Court in comparison to Children's Aid Panels? The obvious answer is: because Screening Panels have decided so. But why have they so decided? It would seem obvious that allegations of the more serious types of offences would tend to be brought before the Court rather than a Children's Aid Panel. Can it therefore be said that Aborigines tend to appear before the Court rather than a Panel because of the nature and type of offences they are commonly charged with? The analysis of offences commonly appearing as the major change (infra) shows that the five offences charges occurring most frequently are the same for both ethnic groups, although some variation in the rank ordering of these five is apparent. This is discussed in some detail infra.

Do a large proportion of Aboriginals appear before the Court rather than Children's Aid Panels because they commonly have a record of previous Court or Panel appearances? To answer this, it is necessary to look at the figures infra under the variables of Number of Previous Court Appearances, Total Number of Panel Appearances and Total Number of Court Appearances. From these figures it appears that a disproportionately high number of those with a history of previous appearances are Aboriginals rather than non-Aboriginals. Also relevant may be the child being subject to an existing order at the time of appearance in Court for the alleged offence. Figures on this can be seen under the variable Appearance Whilst Under Order infra. Once again, Aboriginals are over-represented. It is important not to draw from these figures the simplistic conclusion that Aboriginals tend to demonstrate more markedly recidivist tendencies than their non-Aboriginal counterparts. It may simply be that those who have already come to some form of official notice are more likely to be the subjects of subsequent detection and prosecution.

Admission of the allegation is an essential pre-requisite to appearance before a Children's Aid Panel. Perhaps a disproportionately large number of Aboriginals appear before the Court rather than before Panels because they are unwilling to admit the allegation. One might consider this a possible consequence of the ready availability of legal representation provided through the Aboriginal Legal Rights Movement. But this idea is not easily reconciled with the fact of the overwhelming proportion of "guilty" pleas entered by Aboriginal children appearing before the Children's Court: see the figures on guilty pleas infra. However, a possible explanation is that Aboriginal children show a tendency initially to refuse to admit the allegation, and then subsequently plead guilty when the case comes to court. But there is no reason to suppose that they should be more likely to do this than non-Aboriginal children.

What other possible explanations are there for the distribution of Aboriginals between the Court and Panels? Do Screening Panels decide frequently in the case of Aboriginals that the nature of the offence committed and the social background and personality of the child in combination make the deterrence value of a formal court appearance necessary? Again, are there any problems of communication and cooperation, with either child or parent, which make a Children's Aid Panel appearance inappropriate. It is difficult to move beyond speculation.

Mode of appearance before a court

Table 3

Mode of Appearance	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
Arrest	100	55.9	552	36.5	652	38.5
Summons	75	41.9	902	59.6	977	57.7
Application	4	2.2	53	3.5	57	3.4
Progress Report	0	0	6	0.4	6	0.4

Taking appearances overall, irrespective of ethnic origin, the most common mode of appearances before the court is by way of summons. However, as Table 3 shows, a disproportionately high number of Aboriginals appear by way of arrest. 55.9% of all court appearances by Aboriginals are by way of arrest, as compared to only 36.5% of all court appearances by non-Aboriginals. The position is reversed in relation to summons. 41.9% of all court appearances by Aboriginals are by way of summons, as compared with 59.6% of all court appearances by non-Aboriginals.

Table 4 presents the same data in a different way.

Mode of appearance

Table 4

	Arrest		Summons		Application		Progress Report	
	No.	%	No.	%	No.	%	No.	%
Abs	100	15.3	75	7.7	4	7.0	0	0
Non-Abs	552	84.7	902	92.3	53	93.0	6	100.0
Total	652	100.0	977	100.0	57	100.0	6	100.0

Again, these figures show that a disproportionately high number of Aboriginal appearances result from arrest. In fact, 15.3% of appearances by Aboriginals compared with 7.7% and 7.0% for summons and application respectively. These figures reflect the nature of the offence, police procedures, or both.

Incidence of legal representation

Table 5

	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
Legal Rep.	105	58.7	403	26.6	508	30.0
No Legal Rep.	74	41.3	1110	73.4	1184	70.0
Total	179	100.0	1513	100.0	1692	100.0

Until comparatively recently it was rare for children to be legally represented before the Children's Court. The number of court appearances in which legal representation occurs has greatly increased in recent years, no doubt due in part to the availability of government funded legal aid services. The present figures in this sample show that slightly less than one-third of all appearances before the Children's Court are with legal representation. However, Table 5 shows that a far greater

proportion of Aboriginal appearances are with legal representation than are non-Aboriginal appearances: 58.7% as compared with 26.6%. Shown differently in Table 6, of the 508 appearances where legal representation was present, 20.7% were Aboriginal appearances. In contrast, only 6.2% of the 1,184 appearances where no legal representation was present were by Aboriginals.

Table 6

	Legal Representation		No Legal Representation	
	No.	%	No.	%
Aboriginals	105	20.7	74	6.2
Non-Aboriginals	403	79.3	1110	93.8
Total	508	100.0	1184	100.0

A possible explanation for this difference is the existence of the Aboriginal Legal Rights Movement, the services of which may be better publicised within the Aboriginal community than those of the South Australian Legal Services Commission in the general community. Moreover the latter body has limited funding available for Children's Court work. Of course young offenders from both ethnic groups can employ lawyers privately, but this may be impracticable financially. Thus given that many young offenders, irrespective of ethnic origin, come from economically disadvantaged backgrounds, the existence of the Aboriginal Legal Rights movement may well explain why more Aboriginal children than non-Aboriginal children are legally represented. It might have been suggested that the type of offence alleged makes legal representation more desirable (eg, because of the seriousness of the offence). But there would seem to be little in this suggestion, given the similarity of offences commonly appearing as the major change between the two groups (infra).

In view of the relatively high proportion of Aboriginal children who receive legal representation before the Children's Court, can any effect of representation on the outcome of the Court appearance be discerned? It has already been pointed out that the figures infra show an overwhelming proportion of guilty pleas in the Children's Court: in the small sample considered, no Aboriginal appearances in which a not guilty plea was made are recorded, and only a handful of non-Aboriginal appearances. This suggests that the effect of legal representation must be felt (if at all) in the sphere of penalties, and not at the fact determining stage. The penalties imposed on the two ethnic groups during the period of the sample are discussed infra.

Incidence of offender being State child

State children are those who have been placed under some degree of legal control of either the Minister or the Director

General of Community Welfare, as a consequence of earlier proceedings. They are those, whether offenders or not, who have been considered to be in need of care, justifying the partial or total transfer of guardianship rights, for a short or long-term period, from the parents or guardians to the State. The statutory procedures whereby children become State children have undergone important changes with the coming into operation of the Children's Protection & Young Offenders Act 1979, and these changes require explanation.

There are two distinct types of procedures whereby a child can be made a State child: an administrative procedure and a judicial procedure. The former is provided for in the Community Welfare Act. The relevant sections of the Act in its 1972-1979 form are ss.39 (long-term) and 40 (short-term). These are replaced by ss.27 and 28 under the 1981 amendment. If the Minister is satisfied that a child is in need of care by reason of maltreatment, neglect or uncontrollability, etc., he may make an order placing that child under his care and control ("guardianship" after the 1981 amendment). This effects a complete transfer of guardianship rights from the parents/guardians to the Minister. Such an order cannot be made with long-term effect without the consent of both parents. The only form of order which can be made under this administrative procedure is an order which effect complete transfer of guardianship rights. These administrative orders with long-term effect are relatively uncommon.

The other type of procedure is judicial, and it is here that important changes were introduced by the Children's Protection & Young Offenders Act 1979. The pre-1979 system (under the Juvenile Courts Act 1971), in outline, was as follows. Under that Act the distinction between criminal and civil proceedings was somewhat blurred. A child could be placed under the care and control of the Minister for Community Welfare by order of the Juvenile Court either following proceedings related to the commission of an offence or upon proof of a complaint that the child was in need of care (civil). Thus the same order could result from either type of proceedings. In fact, under s.42 of the 1971 Act offenders under 16 were not charged with the commission of an offence, but rather a complaint was laid that they were in need of care and control, of which the alleged offence provided evidence. In these "criminal" proceedings the courts would not record a conviction, but could make an order placing the child under the care and control of the Minister, or place the child on a bond, or order attendance at a Youth Project Centre, or a fine. If a care and control order was made, the court under the 1971 Act could order only a 21 day period of detention (a holding order); the power to detain for a longer period stemmed from the transfer to the Minister of legal guardianship effected by the care and control order, and hence the actual period of detention was determined as a matter of administrative discretion. Under the 1971 Act, youths between 16 and 18 were charged with the commission of the offence, and a conviction could be recorded. Non-criminal proceedings under s.56 of the Juvenile Courts Act in respect of neglected and uncontrolled children also resulted in the making of a care and control order.

The Children's Protection & Young Offenders Act 1979 changed these procedures. A sharp distinction is now drawn between civil and criminal proceedings in the Children's Court, the underlying notion being that the commission of an offence is not to be used as a pretext for long-term welfare intervention. The structure and details of the new Act reflect the philosophy expressed in the Mohr Report.

There is a shift away from a highly "welfare-orientated" approach, towards more "classical" notions of due process, responsibility for criminal action, and the separation of the roles of the executive and the judiciary. No longer can the court make a care and control order (or any order effecting transfer of guardianship rights) as a result of offence related proceedings. A child is now actually charged with the commission of the offence; the powers of the court to make orders, upon finding the allegation proved, are found in s.51, and are: detention, bond, fine, discharge. If the Department for Community Welfare considers that an offender is in need of care, "civil" proceedings must be taken under s.12 of the Act. If the Court finds a child to be in need of care, it now has a wider range of options as to the orders it can make (under s.14) than it had under the 1971 Act. It may place the child under the guardianship of the Minister of Community Welfare, which effects a total transfer of guardianship rights. Or it may make a control order (partial transfer of rights) "in respect of such matters relating to the care or welfare of the child [it] specifies". Or it can make an order as to the child's place of residence, or direct a guardian to secure proper care and control for the child. The philosophy of the new control order (which is, in effect, a "half-way house") is presumably to encourage the maintenance of the parent/child relationship, as conducive to the future welfare of the family unit. Of course, non-offenders in need of care may be the subject of s.12 proceedings under the 1979 Act, as they could under s.56 of the Juvenile Courts Act 1971 if they were neglected or uncontrolled.

What will be the practical effect of these changes? One would assume that there will be fewer children in future, who are made "State children", either under a guardianship or a control order. This follows from the fact that the Children's Court can no longer make such an order merely upon proof of the commission of an offence. Moreover, complete transfer of guardianship rights from parents to the State will not hereafter occur in every case where an order is made; the new "control order" effects only a partial transfer of rights from the parents to the State.

The statistical sample used here is that which covers the first six months of operation of the Children's Protection & Young Offenders Act 1979, ie, July - December 1979. Hence the transitional provisions of that Act (s.6) are relevant. S.6(5) and (6) provide for the continuing effect of "care and control" orders made under the repealed act prior to July 1st 1979. A "care and control" order made by the Court under the repealed Act is to be deemed to be a "guardianship order" made under the new Act. When such an order was made pursuant to s.42 of the repealed Act (criminal proceedings), that order should expire either 2 years after it was made or three months are (after?) the

commencement of the new Act, whichever last occurs. Hence the present statistical sample will contain a number of children who have been made "State children" by pre-1979 care and control orders, and a number of these will have been offenders. The pre-1979 system differed markedly from the present one, and the following comments must be read in the light of that proviso.

The variable employed in the cross-tabulations does not distinguish between those who, prior to July 1979, were made State children as a result of civil proceedings, ie, because they were in need of care and protection. Any children who became "State children" between July 1979 and December 1979 and who are represented in the present statistical sample will have to have been the subject of "civil" proceedings under ss.12-14 of the new Act.

The number of appearances by children who are "State children" reflects the proportion of those who have had contact with "the system" prior to the present appearances, whether they have been offenders who were made the subjects of care and control orders under s.42 of the repealed Act, or non-offenders who were felt to be generally "at risk" and therefore to need welfare intervention.

Table 7

State Child	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
Yes	68	38.0	154	10.2	222	13.1
No	111	62.0	1359	79.8	1470	86.9
Total	179	100.0	1513	100.0	1692	100.0

The figures in Table 7 show that 38.0% of appearances by Aboriginals before the Children's Court are appearances in which the child is a State child. This compares with 10.2% of appearances by non-Aboriginal children, and 13.1% of appearances overall. Shown differently in Table 8, of the 222 appearances by State children, 30.6% were Aboriginal. In contrast, of the 1,470 appearances by Non-State children, only 7.6% were Aboriginal.

Table 8

	State Child		Not State Child	
	No.	%	No.	%
Aboriginals	68	30.6	111	7.6
Non-Aboriginals	154	69.4	1359	92.4
Total	222	100.0	1470	100.0

Clearly the proportion of appearances by Aboriginals who are State children is high.

This means that a greater proportion of Aboriginals than of non-Aboriginals have had previous contact with either the criminal or the "protective" jurisdiction. Why is this so? A simplistic answer would be that they commit more crimes and are generally more in need of care and protection than non-Aboriginal children. But other explanations might be suggested. The fear amongst Aboriginals that "the welfare" will intervene and remove their children from them is an old one. It could still be the case that the authorities are more ready to intervene when there is a suggestion that an Aboriginal child may be in need of care than they are in the case of non-Aboriginal children.

It is essential to note that these figures are very probably distorted by the presence of offenders who were made the subject of care and control orders under s.42 of the repealed Act prior to July 1979. Hence the present sample may show little more than the large number of Aboriginal children who have a record of previous offences. A more reliable impression of the relative proportions of Aboriginal and other children who have been found to be in need of care and protection (civil jurisdiction) at least under the new Act may be found under the analysis of care applications, *infra*. There it can be seen that of the 41 applications between July and December 1979 which resulted in the Court declaring the child to be in need of care, 4 (9.8%) were applications in relation to Aboriginal children. This is a smaller percentage than that of Aboriginal appearances before the court generally (10.6%). It stands in sharp contrast to the 38.0% under the present variable. Yet the care applications variable may itself be unreliable since the present sample shows only the first six months of the new Act's operation, *ie*, the first six months of the operation of a novel system in relation to care orders. Samples from a later date need to be taken.

Children appearing before the Children's Court whilst subject to an existing order

This variable shows one aspect of children who have had previous contact with "the system" in this case those who have had contact with the criminal system. The orders mentioned in this variable are all made by the Court in the exercise of its jurisdiction over offenders.

It should be noted that at the outset that, as shown in Table 9, a large proportion (77.9%) of court appearances were by children not subject to an existing order. This does not necessarily mean, however, that all these had no previous contact with the criminal justice system. This particular variable shows only those subject to existing (continuing) orders: absconders, those under supervision orders, those under INC placements, and those on leave or release from detention. The court had, under the 1971 Act, and has, under the 1979 Act, power to make orders other than these, upon finding proved an allegation that a child has committed an offence (e.g. fine). Hence children with

previous contact with the criminal jurisdiction who were made the subject of other orders will not appear under this variable. Moreover, the orders here listed were all made by the Court. The variable does not show previous contact with Children's Aid Panels (formerly Juvenile Aid Panels).

Table 9

Subject to an existing order	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
Yes	72	40.2	302	20.0	374	22.1
No	107	59.8	1211	80.0	1318	77.9
Total	179	100.0	1513	100.0	1692	100.0

With these provisos in mind, it is nevertheless clear that Aboriginals are once again over represented in these statistics. In fact, of the 179 appearances by Aboriginals, 40.2% were made by individuals who were subject to an existing order. In contrast, only 20.0% of the 1,513 appearances by non-Aboriginals involved persons subject to an existing order.

Table 10 presents the same statistics in a different format.

Table 10

	Subject to an existing order		Not subject to an existing order	
	No.	%	No.	%
Aboriginals	72	19.3	107	8.1
Non-Aboriginals	302	80.7	1211	91.9
Total	374	100.0	1318	100.0

As shown, 19.3% of all court appearance by children subject to an existing order were appearances by Aboriginals. This is particularly true in the case of those appearing whilst under a supervision order. Table 11 shows that 22.0% of the appearances by children subject to an existing supervision order were appearances by Aboriginal children.

Table 11

	Absconders		Those under supervision (bond)		Those under INC placement		Those on unsupervised leave from detention		Those on unconditional release from detention	
	No.	%	No.	%	No.	%	No.	%	No.	%
Aboriginals	5	100.0	69	22.0	1	4.0	2	9.1	0	0
Non-Aboriginals	0	0	245	78.0	24	96.0	20	90.9	8	100.0
Total	5	100.0	314	100.0	25	100.0	22	100.0	8	100.0

Again, the evidence that a larger proportion, comparatively, of Aboriginal children than non-Aboriginal children have had this particular type of previous contact with the criminal jurisdiction is incontrovertible. But once again, simple assertions of recidivism should be avoided. These figures indicate no criminal behaviour as such but, rather, only adjudicated cases, and within that, only such as have resulted in certain types of orders. For the frequency with which Aboriginals (and others) are placed under a supervision order, see the discussion of penalties, *infra*.

Before leaving this variable, it should be noted that the number of Aboriginals appearing whilst under an INC placement is very low in comparison to that of non-Aboriginal children. Does this suggest that few Aboriginals have been placed under this scheme? In other words, that suitable families could not be found for them?

Number of previous court appearances

This variable, like the previous two, shows one aspect of previous contact with the criminal justice system. It shows the number of previous Court appearances which children coming before the Court and Panels have. This variable does not distinguish "civil" appearances from criminal appearances, *ie*, does not distinguish those previous appearances which were offence-related from those which were instituted on the ground that the child was in need of care and protection. Nor, within those appearances which were offence-related, does it distinguish initial appearances from consequential appearances, *ie*, the initial appearance from appearances related to breach of bond, application for review of order, progress report etc. Hence the figures must be read as indicating all categories and types of previous appearances.

Table 12

No. of previous Appearances	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
0	141	53.4	2735	78.3	2876	76.6
1	21	8.0	269	7.7	290	7.7
2-4	42	15.9	321	9.2	363	9.7
5-9	30	11.4	133	3.8	163	4.3
10-14	15	5.7	26	0.7	41	1.1
15-19	10	3.8	3	0.1	13	0.3
20 and over	5	1.9	4	0.1	9	0.2
Total	264	100.1	3941	99.9	3755	99.9

Once again, a disproportionately high percentage of Aboriginal appearances before the Court and Panels were appearances by those with a record of previous Court appearances. Table 12 shows that only 53.4% of Aboriginal appearances before the Court and Panels were appearances by those with no record of

previous court appearances, as compared with 78.3% of appearances by non-Aboriginals. Conversely, 11.4% of Aboriginal appearances were appearances by persons with 10 or more previous appearances, as compared with 0.9% for the non-Aboriginal group.

Table 13
NUMBER OF PREVIOUS APPEARANCES

	0		1		2-4		5-9		10-14		15 and over	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Aboriginals	141	4.9	21	7.2	42	11.6	30	18.4	15	36.6	10	76.9
Non-Aboriginals	2735	95.1	269	92.8	321	88.4	133	81.6	26	63.4	3	23.1
Total	2876	100.0	290	100.0	363	100.0	163	100.0	41	100.0	13	100.0

In interpreting Table 13, it should be remembered that appearances by Aboriginals represent 7.0% of the total number of appearances before courts and Panels. If 7.0% is taken as the point of comparison (even though this figure, in itself, represents a gross over representation of Aboriginals in relation to their numbers within the general community), it is apparent that Aboriginals are clearly under represented in the figures relating to "0" previous court appearances. In fact, of the 2876 appearances in this category, only 4.9% were appearances by Aboriginals. Aboriginals are only slightly over represented in the figures relating to "1 previous court appearances". However, from this point on, the relative proportion of Aboriginals per category rises sharply as the number of previous court appearances increase, until they comprise over 3/4 of those who have recorded 15 or more previous appearances.

How does one explain the dramatic over representation of Aboriginals amongst those with a large number of previous court appearances? Remember that this variable does not distinguish criminal from civil matters, nor initial appearances from consequential ones. Only a general picture of any previous contact with the court is provided. One could make the following suggestions:

- * Aboriginals show recidivist tendencies. This may or may not be so, but in any event is simplistic.
- * Aboriginals tend, more than non-Aboriginals, to come to the notice of the police and the Department for Community Welfare. In other words, they are more likely to be apprehended for the suspected commission of an offence, and more likely to be the subject of welfare intervention, than are (proportionately) their non-Aboriginal counterparts.

- * Previous contact with the system (civil or criminal) marks an individual as more likely to be apprehended on a subsequent occasion: cause and effect. The authorities (police or welfare) are more likely to apprehend a child already known to them. This occurs irrespective of race, but more Aboriginals (proportionately) have previous records and therefore are more likely to be known and thus to be apprehended on subsequent occasions.

Number of offence charges per appearance

This variable shows the number of offence charges brought in each appearance before the Children's Court. Charges not amounting to a fresh offence charge, and "civil" matter such as care applications, appear in these figures as "0 charge". The number of offence charges brought in each appearance varied from 0-7.

Looking at offence charges properly so called, once again the proportion of Aboriginal appearances rises rapidly with the increase in the number offence charges per appearance.

Table 14

No. of Charges per Appearance	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
0	8	4.5	76	5.0	84	5.0
1	71	39.7	817	54.0	888	52.5
2	46	25.7	365	24.1	411	24.3
3	27	15.1	178	11.8	205	12.1
4	13	7.3	50	3.3	63	3.7
5	18	4.5	19	1.3	27	1.6
6	4	2.2	6	0.4	10	0.6
7	2	1.1	2	0.1	4	0.2
Total	179	100.1	1513	100.0	1692	100.0

Table 14 shows that the proportions per ethnic group with "0" charges brought against them are similar (4.5% for Aboriginal and 5.0% for non-Aboriginals). However, there are proportionately more non-Aboriginals charged with one offence only (54.0% compared with 39.7% of the Aboriginals) and proportionately fewer non-Aboriginals charged with 4 or more offences (.51% compared with 15.1% for Aborigines).

Table 15
NUMBER OF OFFENCE CHARGES PER APPEARANCE

	0		1		2		3		4	
	No.	%	No.	%	No.	%	No.	%	No.	%
Aboriginals	8	9.5	71	8.0	46	11.2	27	13.2	27	26.0
Non-Aboriginals	76	90.5	817	92.0	365	88.8	178	86.8	77	74.0
Total	84	100.0	888	100.0	411	100.0	205	100.0	104	100.0

A similar pattern is shown in Table 15. As the number of offence charges per appearance increases, so does the proportionate number of Aboriginals in each category. Of the 84 appearances recorded as "0" charges, only 9.5% were Aboriginal. In contrast, of the 104 appearances recording 4 or more charges, over 1/4 (26.0%) were Aboriginal.

How can we explain the high proportion of Aboriginals charged with more than one offence per appearance? The following suggestions could be made:

- * Aboriginals simply commit more offences.
- * Aboriginals tend to commit more than one offence contemporaneously or at least commit a number of offences while acting in a group, with the result that all the members of the group individually can be charged with all the offences committed by that group.
- * Do police procedures result in Aboriginals being charged with more offences, proportionately speaking, per appearance, than non-Aboriginals? If so, why? Is there less willingness on the part of the police to drop charges against Aboriginals than against non-Aboriginals? What bargaining goes on between lawyers and police?
- * Note that this variable shows court appearances only. In many instances, "offenders" are not charged at all before the Court, but rather are dealt with by Children's Aid Panels. An earlier variable (*supra*) has shown that, proportionately, Aboriginal children are more likely to appear before the Court rather than a Panel, than are non-Aboriginal children. Roughly speaking, an Aboriginal child is less likely to be diverted away from the Court (to a Children's Aid Panel) than is a non-Aboriginal child. Does this mean that more offence charges are likely to be brought against those appearing in court (because of the gravity of

the circumstances of offending, etc.)? Conversely, it is possible that the greater the number of offence charges, the more likely that the individual will appear before the court, rather than a Children's Aid Panel.

Offence charges appearing as major charge

This variable shows what offences commonly appear as the Major Charge. "Major Charge" means what it says. Only the most serious offence charge per appearance is selected to appear in this variable, seriousness being determined by the provisions of the general criminal law governing offences and their penalties.

The offences appearing most commonly as the Major Charge fall into three main categories, that is:

- * Offences against person or property, with or without violence
 - Common Assault
 - Larceny
 - Break, Enter, Steal
 - Wilful Damage
 - Break, Enter with Intent
- * Offences arising from "anti-social" behaviour
 - Disorderly, Offensive Behaviour
 - Assault, Hinder Police
- * Motor vehicle and traffic-related offences
 - Illegal Use
 - Due care

Table 16 shows the distribution of offences for Aborigines and non-Aborigines. A superficial examination of this table seems to indicate some differences between the two groups as regards the relative frequency of distribution of the various offences. Thus, break, enter and steal (32.4% for Aborigines compared with 17.6% for non-Aborigines), illegal use, interference (19.6% compared with 11.8%) and common assault (11.2% compared with 5.8%) are, in relative terms, more commonly brought as the major charge in Aboriginal appearances, while larceny appears more frequently as a major charge amongst non-Aborigines (17.6% compared with 8.4% for Aborigines).

One surprising aspect of Table 16 is the figures on illegal consumption of alcohol by minors and on use or possession of drugs. No instances of either occurring as the Major Charge against an Aboriginal is recorded. Why should these offences be relatively common within one ethnic group (ranked equal seventh for non-Aborigines in terms of frequency of occurrence) yet totally absent from the other? It would be surprising if

Table 16

Offence Charge	Act*	Aboriginals		Non-Aboriginals	
		No.	%	No.	%
1. Common assault	CLCA	20	(3) 11.2	88	(5) 5.8
2. Assault occasion harm	"	0	0	11	0.7
3. Larceny	"	15	(4) 8.4	266	(2) 17.6
4. Robbery with violence	"	2	1.1	10	0.7
5. Break/enter/steal	"	58	(1) 32.4	267	(1) 17.6
6. Break/enter/with intent	"	6	(6) 3.4	26	1.7
7. False pretences	"	0	0	27	1.8
8. Receiving	"	1	0.6	16	1.1
9. Forge & Utter	"	0	0	11	0.7
10. Minor consuming/ obtaining liquor	LA	0	0	44	(7) 2.9
11. No license	MVA	1	0.6	17	1.1
12. Use/possess drugs	NPDA	0	0	44	(7) 2.9
13. Assault/hinder police	POA	3	1.7	24	1.6
14. Disorderly/offensive behaviour	"	10	(5) 5.6	90	(4) 5.9
15. Drunk in public place	"	2	1.1	20	1.3
16. Carrying offensive weapon	"	1	0.6	13	0.9
17. Unlawfully on premises	"	1	0.6	19	1.3
18. Loitering	"	0	0	11	0.7
19. Wilful damage	"	4	(7) 2.2	69	(6) 4.6
20. Illegal use/interference	RTA	35	(2) 19.6	179	(3) 11.8
21. Failure to drive with due care	"	1	0.6	27	1.8
22. Dangerous driving	"	0	0	10	0.7
23. Exceeding 0.08, DUI	"	0	0	16	1.1
24. Declaration of Neglect	CPYOA	4	(4) 2.2	33	2.2
25. Breach of Recognizance; non-detention	"	1	0.6	20	1.3
26. Other: less than 10 appearances	-	14	7.8	155	10.2
		179	100.3	1513	100.0

* CLCA	=	<u>Criminal Law Consolidation Act 1935</u>
LA	=	<u>Licensing Act 1967</u>
MVA	=	<u>Motor Vehicles Act 1959</u>
N&PDA	=	<u>Narcotic & Psychotropic Drugs Act 1934</u>
POA	=	<u>Police Offences Act 1953</u>
RTA	=	<u>Road Traffic Act 1961</u>
CP&YCA	=	<u>Children's Protection & Young Offenders Act 1979</u>

Aboriginal youths simply do not engage in these types of criminal behaviour. But assuming, for argument's sake, that these statistics could be taken as a reasonably accurate reflection of actual criminal behaviour, what explanation could there be for Aboriginals not committing these offences while non-Aboriginals do? Do economic circumstances deprive Aboriginals (but not non-Aboriginals) children of access to these goods and consequently of access to the criminal sanctions attached to obtaining these goods? Are there other activities to which Aboriginal children resort, in substitution for obtaining liquor or drugs? Or it may simply be that for reasons not immediately apparent, Aboriginal children are not charged in court with these two particular offences.

The data depicted in Table 16 are presented in a different format in Table 17. Assuming 10.6% as the baseline

(since this is the proportion of Aborigines appearing before the Children's Court), Table 17 depicts those offences where Aborigines are over represented. The offences omitted from this table are those where Aborigines are proportionately under-represented, according to the 10.6% baseline. Clearly, in proportionate terms, Aborigines are over represented in the categories of common assault, break, enter with intent, break, enter and steal, robbery with violence, and illegal use. It should, however, be noted that the numbers in some of these categories, eg, robbery with violence, are quite small, which makes interpretation difficult.

Table 17

	Common Assault		Robbery with violence		Break, enter steal		Break, enter with intent		Assault hinder police		Illegal use interference		Declaration of neglect	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Aborigines	20	18.5	2	16.7	58	17.8	6	18.7	3	11.1	35	16.4	4	10.8
Non-Aborigines	88	81.5	10	83.3	267	82.2	26	81.3	24	88.9	179	83.6	33	89.2
Total	108	100.0	12	100.0	325	100.0	32	100.0	27	100.0	214	100.0	37	100.0

Despite obvious variations between Aborigines and non-Aborigines in the frequency of occurrence of those offences appearing as the major charge, a rank ordering of those offences appearing most often for each group reveals definite similarities. In the following table, the five offences appearing most commonly for each group are ranked in descending order:

Table 18

Rank Order	Aborigines		Non-Aborigines	
	Offence	%	Offence	%
1.	Break, enter, steal	32.4	Break, enter, steal	17.6
2.	Illegal use, interference	19.6	Larceny	17.6
3.	Illegal use, interference	11.2	Illegal use, interference	11.8
4.	Larceny	8.4	Disorderly, offensive beh'r	5.9
5.	Disorderly, offensive beh'r	5.6	Common Assault	5.8
Total %		77.2		58.7

It seems then, two conclusions can be drawn from Tables 16, 17 and 18;

- * there are differences between the two groups with respect to the relative frequency of distribution of the various offences, but
- * of all possible offences, the five offences which appear most frequently as the major charge are the same for each group.

It appears that although break, enter, steal, illegal use, interference, common assault, larceny and disorderly behaviour are the most common charges brought against both Aborigines and non-Aborigines alike, overall few non-Aborigines are brought before the Children's Court on these charges as the major charge. In fact, of the 1513 non-Aborigines appearances before the Children's Court in the first six months of operation of the new Act, 58.7% had, as the major charge one of the five offences listed above. In contrast, a much higher proportion (77.2%) of the 179 Aborigine appearances were charged with one of the same five offences. It seems then, that a smaller range of charges are laid as the major charge against Aborigines than against non-Aborigines. In fact, as Table 16 shows, of the 25 offences listed, all were brought as major charges in at least 10 non-Aborigine appearances. In contrast, only 17 of the 25 appeared as major charges for Aborigines.

One further comparison, which points to similarities, rather than differences in the major offence charges recorded for each group is contained in Table 19. Here, the major charges are grouped according to the Act under which they operate.

Table 19

Act	Aborigines		Non-Aborigines	
	No.	%	No.	%
Criminal Law Consolidation Act	102	57.0	722	47.7
Licensing Act	0	0	44	2.9
Motor Vehicles Act	1	0.6	17	1.1
Narcotic & Psychotropic Drugs Act	0	0	44	2.9
Police Offences Act	21	11.7	246	16.3
Road Traffic Act	36	20.2	232	15.3
Children's Protection & Young Offences Act	5	2.8	53	3.5
Other: less than 10 appearances	14	7.8	155	10.2
Total	179	100.1	1513	99.9

As shown, the Act under which most of the Major Charges for both Aborigines and non-Aborigines are brought in the Criminal Law Consolidation Act, with the Road Traffic Act and Police Offences Act also prominent for both groups.

Pleas to major charge

The figures on Table 20 show how children appearing before the Children's Court pleaded to the Major Charge.

The striking feature, is the overwhelming number of guilty pleas. This is particularly so amongst Aborigines. All Aborigines pleaded guilty to the major charge. As regards non-Aborigines, the percentage of guilty pleas to the major charge is a very high 98.5% with a mere handful of not guilty pleas recorded, together

Table 20

	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
Guilty	179	100.0	1491	98.5	1670	98.7
Not Guilty	0	0	3	0.2	3	0.2
No Plea	0	0	19	1.3	19	1.1
Total	179	100.0	1513	100.0	1692	100.0

with some instances where no plea was entered. The same pattern was evident for Charges 1 to 7. Although the data are not presented here, the figures showed that no Aboriginal pleaded not guilty to any charge and there was only one recorded instance of an Aboriginal appearance in which no plea was entered. This was to be a third charge. With respect to non-Aboriginal appearances, more than 97% pleaded guilty to Charges 1 for 4, while for Charges 5-7 (where laid), 100% guilty pleas were recorded. Taking appearances overall, without distinction as to ethnic group, the impression is one of an overwhelming proportion of guilty pleas.

How can these figures be explained? It has been seen that, of this sample, 30.0% of all appearances before the Children's Court were with legal representation, and that proportionately more Aboriginals than non-Aboriginals received legal representation: 58.7% as compared to 26.6%. It may be that the role of the legal representative in the Children's Court consists principally in addressing the court on the most appropriate penalty, rather than on the determination of guilt or innocence.

Moreover, the very large number of guilty pleas for both ethnic groups be seen in the wider contexts of the nature of the Children's Court, and indeed of the whole system of juvenile justice. By no means all young offenders appear before the Children's Court. The existence of a highly developed system of diversionary measures means that only such cases as cannot appropriately be dealt with by less formal means go to Court. In many instances diversion occurs at police level. The next stage of diversion occurs at the Panel level. (Panels exist only in South Australia and Western Australia). The operations of Panels has already been explained *supra*. A screening Panel determines whether a case goes to the Children's Court or to a Children's Aid Panel. The Children's Aid Panel can itself refer cases to the Court. So in practice, a very large number of offence cases are dealt with by Children's Aid Panels rather than by the Court. In this sample, it will be recalled, 54.9% of all appearances were before Children's Aid Panels, with 45.1% being appearances before the Court. This might lead to the suggestion that the only cases which go to Court will be those involving serious offences and/or persistent offenders. It might be said, further that in such cases as do go to Court, it is unlikely that

there will be much dispute as to the factual evidence. These points would explain, at least in part, the overwhelming proportion of guilty pleas.

An admission of the allegation is an essential condition of a matter being dealt with by a Children's Aid Panel. Does this have some hidden effect on the reaction of children to the Court? Does it lead to an assumption amongst young offenders that the Court expects them to plead guilty? Or the assumption of young offenders and their legal representatives may be that the child is better off and more likely to be treated leniently by the court if he pleads guilty. These figures show, above all, that not guilty pleas are the exception before the Children's Court. This indicates the special nature of the court process in the area of juvenile justice. This emphasis is on the disposition, rather than the adjudication stage. Apparently the appropriate measure to be imposed receives far greater argument than issues of fact or law.

Orders made by Children's Court following
proof of offence charges

The power of the Court to make various orders is contained in s.51 of the Children's Protection & Young Offenders Act 1979, part of which is reproduced below:

51. (1) Subject to this Act, where the Children's Court finds a charge (other than a charge of truancy) proved against a child, the Court may, by order -
- (a) upon convicting the child, sentence him to a period of detention of not less than two months nor more than two years in a training centre, but no period of detention may be ordered unless the Court has first obtained a report on the child and his circumstances from an assessment panel;
 - (b) upon convicting the child, or without convicting the child, discharge the child upon his entering into a recognizance with or without sureties upon condition that he will be of good behaviour and will appear before the Court for sentence if he fails during the term of the recognizance to observe any of its conditions, and upon any one or more of the following conditions that the Court may think fit to include in the recognizance -
 - (i) that he will be under the supervision of an officer of the Department or other person nominated by the Director-General and will obey the directions of that officer or person;
 - (ii) that he will attend a youth project centre at such times as may be stipulated in the recognizance or required of him by the Director-General and will obey any directions that may be given to him by or on

behalf of the person in charge of that centre;

- (iii) that he will participate in such project or programme as the Director-General may require;
- (iv) that he will reside with such person, or in such place, as may be stipulated in the recognizance;
- (v) that he will attend before the Court at such times as may be specified in the recognizance for the purpose of reviewing his progress or circumstances;

and

- (vi) any other condition that the Court may think necessary or desirable;
- (c) upon convicting the child, or without convicting the child, discharge the child without penalty.

(11) Subject to this Act, the Court shall, before dealing with a child under this section have regard to all the facts and circumstances relating to the child and the offence that are known to the Court, and the Court may exercise its discretion on the question of penalty as provided by this section without being bound by a minimum penalty (if any) prescribed in any Act for the offence proved against the child.

(12) Where the Court has found a charge of a group I or Group II offence proved against a child, the Court shall record a conviction unless there are, in the opinion of the Court, special reasons for not recording a conviction against the child, and the Court states those reasons in its judgment.

The 1979 Act has effected various changes in the orders a Court can make. There is now no distinction drawn between children under 16 years of age and those aged between 16-18 years, as formerly there was under the Juvenile Courts Act 1971. The recording of convictions is now possible; under the 1971 Act, no child aged under 16 years could be convicted. The Children's Court may now record a conviction against a child when it orders a bond and/or a fine, and it must convict a child if detention is ordered. Further, in the case of proof of commission of a Group I or Group II offence, the Court must record a conviction unless there are special reasons for not doing so (s.51(12)). Considering a detention order, a further charge introduced by the 1979 Act is that the Court itself now fixes the period of detention (within the statutory limits) whereas under the repealed Act the actual length of detention in a Training Centre was determined as a matter of administrative (departmental) discretion. These detailed changes all reflect the philosophy of the Mohr Report (supra).

The figures produced by this variable show the wide variety of orders the Court can make. In several instances, combined orders are made. Under s.51(4), the Court may order both a bond (under any conditions) and a fine in respect of the one offence. A suspended sentence is only ordered on condition that the offender enters into a recognizance: s.51(6). Moreover, under s.51(1)(b) the Court has a wide range of options as to conditions of a bond.

The figures in Table 21 show what penalties the court imposed upon finding the major charge proved in the 1692 appearances which occurred during the period July - December 1979. (Measure imposed by Children's Aid Panels are shown separately, infra as over the results of the Care Applications in the Children's Court (civil matters) under s.14 of the Act.

Differences between the two groups with respect to the frequency of distribution of the various penalties are evident. Thus, fine (31.6% for non-Aboriginals compared with 18.9% for Aboriginals) and bond (14.4% of 8.0%) are more commonly used as penalties for non-Aboriginal appearances. In contrast, discharges (33.7% for Aboriginals, 25.2% for non-Aboriginals), detention (6.3% of 1.8%), bond with supervision (21.2% of 16.9%) and suspended sentence and bond with supervision (5.7% of 1.6%) are more commonly imposed penalties for Aboriginal appearances.

Table 21

Penalties	Aboriginals		Non-Aboriginals	
	No.	%	No.	%
Detention (in a training centre)	11	6.3(5)	26	1.8
Detention, suspended sentence	0	0	2	0.1
Bond	14	8.0(4)	213	14.4(4)
Bond plus Fine	1	0.6	23	1.6
Bond with supervision	37	21.1(2)	250	16.9(3)
Bond with supervision plus Fine	0	0	24	1.6
Bond plus direction to reside	2	1.1	2	0.1
Fine	33	18.9(3)	467	31.6(1)
Discharge	59	33.7	372	25.2(2)
Bond with supervision & attendance at YPC	2	1.1	19	1.3
Detention/Suspended sentence & Bond	4	2.3	14	0.9
Suspended sentence & bond with supervision	10	5.7(6)	24	1.6
Suspended sentence & bond with attendance at YPC	0	0	3	0.2
Suspended sentence & bond with direction to reside	0	0	1	0.1
Reconsideration of previous order	0	0	14	0.9
Breach of bond; recognizance forfeited	2	1.1	21	1.4
Breach of bond; recognizance varied	0	0	1	0.1
Total	175	99.9	1476	99.8

Given that 10.6% of all court appearances in this six months sample are appearances by Aborigines, Table 22 details those penalties where Aborigines are proportionately over-represented according to this baseline. Greatest over-representation occurs in the category "bond and direction to reside". However, the significance of this is questionable because of the small numbers involved. The next category is that of "detention". Looking at detention, it can be seen that, whilst this is by no means the commonest form of order overall, Aborigines are over represented in the numbers of those appearances which result in the making of a detention order. Aborigines represented 29.7% of appearances in which detention resulted from proof of the Major Charge. So, the commonly held view that Aborigines are over represented in the numbers detained in Training Centres is, to some extent, borne out by these figures.

Table 22

	Detention		Bond with supervision		Bond & direction to reside		Discharge		Detention/sue sentence & bond		Suspended sentence and bond with supervision	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Aborigines	11	29.7	37	12.9	2	50.0	59	13.7	4	22.2	10	29.4
Non-Aborigines	26	70.3	250	87.1	2	50.0	372	86.3	14	77.8	24	70.6
Total	37	100.0	287	100.0	4	100.0	431	100.0	18	100.0	34	100.0

In Table 23, the five most commonly occurring penalties for Aborigines and non-Aborigines are ranked in descending order according to their frequency of occurrence.

Table 23

Rank Order	Aborigines		Non-Aborigines	
	Offence	%	Offence	%
1.	Discharge	33.0	Fine	30.9
2.	Bond with supervision	20.7	Discharge	24.6
3.	Fine	18.4	Bond with supervision	16.5
4.	Bond	7.8	Bond	14.1
5.	Detention	6.1	Detention	1.7

Most noticeable in relation to the major charge is that discharge was the order most commonly made in Aboriginal appearances, whereas fine was the most common in non-Aboriginal appearances. Is there any explanation for these apparent differences?

The orders made by the Children's Court must be seen in the context of Section 7 of the Children's Protection & Young Offenders Act 1979:

7. In any proceedings under this Act, any court, panel or other body or person, in the exercise of its or his powers in relation to the child the subject of the proceedings, shall seek to secure for the child such care, correction, control or guidance as will best lead to the proper development of his personality and to his development in a responsible, and useful member of the community, and in so doing, shall consider the following factors:
- (a) the need to preserve and strengthen the relationship between the child and his parents and other members of his family;
 - (b) the desirability of leaving the child within his own home;
 - (c) the desirability of allowing the education or employment of the child to continue without interruption;
 - (d) where appropriate, the need to ensure that the child is aware that he must bear responsibility for any action of his against the law;
- and
- (e) where appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child."

The role of the Children's Court in determining the appropriate penalty was considered (in the context of an appeal against the terms of a detention sentence) by King C.J. in Hallam v. O'Dea:⁸

The purpose of the Court therefore must be to "seek to secure for the child such care, correction, control or guidance as will best lead to the proper development of his personality and to his development into a responsible and useful member of the community", and it is in doing that that it is to take into account the enumerated factors. The Court should therefore, if detention is indicated, impose on the child the period of detention which "will best lead to the proper development of his personality and to his development into a responsible and useful member of the community", taking into consideration the enumerated factors or such of them as may be relevant and appropriate. The criterion for determining the length of the period of detention is therefore quite different from the criteria appropriate to determining the length of

imprisonment for an adult offender. In the case of an adult offender, the starting point will generally be the observance of a proper proportion between the gravity of the crime and the severity of the punishment. This fundamental principle of adult sentencing obviously has no place in fixing the period of detention under the Children's Protection and Young Offenders Act, even where the protection of the community becomes the dominant consideration. The proper approach for Children's Court, where a sentence of detention must be imposed, is to consider what period of detention, within the statutory limit of two years, will best achieve the objects proposed to the Court by s.7. This approach is inconsistent with reserving the maximum period of detention for the most serious type of crime and of relating periods of detention for less serious offences to the maximum."

Thus the penalty imposed on a particular child will be that considered by the Court to be most likely to achieve the objects stated in s.7, having regard to all the facts and circumstances relating to the child as well as to the offence. Hence the penalty is tailored to the individual offenders. Officers of the Department for Community Welfare appear before the Children's Court and make recommendations as to the appropriate order in the light of the child's background. Legal representatives may also offer suggestions.

Given that the disposition stage of the Children's Court process is thus "individualized", it is not easy to make generalized observations on the apparent differences between the two ethnic groups in Tables 21, 22 and 23. The figures show that discharge is the order most commonly made in relation to the major charge in the case of Aboriginals, whereas fine is the most common in the case of non-Aboriginals. Obviously, fines will only be imposed on those who can afford to pay them; however, these orders may reflect no more than the economic circumstances of the particular individuals appearing in the sample. The comparatively large proportion of discharges, without penalty or conviction, calls for some comment. The figures on subsequent charges (which are not given here) showed a similar pattern. The comparative frequency of discharges resulting from proof of both major and minor charges (and the proportion is higher in relation to Aboriginals) may dispel any fears that the 1979 Act was a highly punitive enactment.

The discussion so far has emphasised the differences between Aboriginals and non-Aboriginals with respect to the orders made upon proof of the major charge. However, Table 23 also highlights some points of similarity. First, although there is variation in the actual frequency of occurrence for orders listed, nevertheless, the five orders most frequently made in Aboriginal appearances are the same as the five most frequently made in non-Aboriginal appearances. This is despite a wide range of orders available to the Court under Section 51. Second, although variation between the two groups is evident in those orders ranked

1-3, the orders ranked fourth and fifth for Aboriginals and non-Aboriginals are the same - namely, bond (fourth) and detention (fifth). Given the limited numbers in the sample, the overall figures may reveal as many similarities as differences in the way the Children's Court deals with young offenders in the two ethnic groups.

Measures imposed by Children's Aid Panels

As noted earlier, there were 2063 appearances before Children's Aid Panels during the specified period. Only 4.1% of all appearances before Children's Aid Panels were appearances of Aboriginal children, as compared with 10.6% of appearances before the Court (see Tables 1 and 2, supra). Given the over representation of Aboriginal children in terms of contact with the whole criminal justice system, it appears that they appear more frequently before the Court than before Panels. In the case of non-Aboriginal children, the proportions are reversed (see Table 2, supra).

The range of powers available to a Children's Aid Panel are contained in ss.35 and 36 of the Children's Protection & Young Offenders Act 1979:

S.35 (2) A children's aid panel shall have the following powers in dealing with a child under this Part:-

- (a) the panel may warn or counsel the child and his guardians;
 - (b) the panel may request the child to undertake, in writing, to comply with such directions as may be given by the panel, including directions as to any training or rehabilitative programme to be undergone by the child;
 - (c) the panel may request a guardian of the child to undertake, in writing, to comply with such directions as may be given by the panel to assist or supervise the child in any training or rehabilitative programme to be undergone by the child;
 - (d) the panel may vary the terms of any undertaking on the application of the child or a guardian of the child, but not so as to extend the period of the undertaking;
- and
- (e) the panel may, at any time within the period of an undertaking, request the child to give a fresh undertaking in substitution for that existing undertaking, but not so as to extend the period of that undertaking.

(3) A children's aid panel may require that an undertaking be given for such period of time, not exceeding six months, as it thinks fit.

(4) No undertaking shall require a child to change his place of residence.

36. (1) A children's aid panel shall refer a matter before the panel to the Children's Court where -

(a) the child, at any stage of the proceedings, requests that the matter be heard and determined by the Court;

or

(b) the offence is not admitted by the child.

(2) A children's aid panel may refer a matter before it to the Children's Court where -

(a) the child, or a guardian of the child, does not appear before the panel in accordance with a requirement of the panel;

(b) the child, or a guardian of the child, refuses to give an undertaking requested by the panel;

or

(c) the child breaches an undertaking within the period of the undertaking.

(3) Where a matter is referred by a children's aid panel to the Court, the panel shall notify the Court in writing of the reasons for so referring the matter and shall also cause written notification to be given to the child and a guardian of the child of the decision of the panel to refer the matter.

Detailed figures on the results of Panel appearances are shown in Table 24.

Table 24

Measures Imposed	Aboriginals		Non-Aboriginals	
	No.	%	No.	%
Warning and Counselling	76	89.4(1)	1751	88.5(1)
Undertaking by Child	5	5.9(2)	112	5.7(2)
Undertaking by Guardian	0	0	0	0
Referral to Children's Courts				
at Child's request	0	0	8	0.4
Because offence not admitted	0	0	38	1.9(4)
Because child or guardian failed to appear before panel	2	2.4(3)	14	0.7
Because child or guardian refused to give undertaking	0	0	2	0.1
Because child breached undertaking	0	0	7	0.4
Undertaking completed	2	2.4(3)	46	2.3(3)
Total	85	100.1	1978	100.0

By far the most common result of Children's Aid Panel appearances, taking overall appearances irrespective of ethnic origin, is the Panel warning and counselling the child: 88.6% of all Panel appearances have this result. This is the mildest measure which a Panel can impose. Appearances before Panels with this result represented 89.4% and 88.5% of the total number of Panel appearances by Aboriginal and other children respectively. Hence there is no real difference between the two ethnic groups in this context.

The Children's Aid Panel requiring the child to enter into an undertaking as to future conduct was the next most common result. 5.9% of the total number of Panel appearances by Aboriginals produced this result, as did 5.7% of non-Aboriginal appearances. Here again, there is parity between the Panel's treatment of each ethnic group.

The third most common type of Panel appearances were appearances where an undertaking has been completed. This represented 2.3% of all Panel appearances. The percentages of the total number of Panel appearances by each ethnic group represented by appearances of this type were 2.4% of Aboriginal appearances and 2.3% of non-Aboriginal appearances. Here again, there is parity between the two ethnic groups.

So these figures show no real difference between the two ethnic groups in the measures imposed by the panels, where those measures are: (1) warning and counselling, (2) requiring an undertaking by the child, and (3) undertaking completed. The conclusion is reinforced by Table 25. Since 4.1% represents the percentage of Children's Aid Panel appearances which were appearances by Aboriginal children, that figure may be used as a base-line for assessing, in proportionate terms, the penalty areas in which Aboriginals are over- or under represented.

Table 25

	Warning, Counselling	Undertaking by Child Guardian		Childs request	Referral to Children's Court			Undertaking Is breached	Undertaking completed
		Child	Guardian		Offence not admitted	Failure to appear	Undertaking refused		
Aboriginals	4.2	4.3	0	0	0	12.5	0	0	4.2
Non-Aboriginals	95.8	95.7	0	100.0	100.0	87.5	100.0	100.0	95.8
Total	100.0 no.=1827	100.0 no.=117	0 no.=0	100.0 no.=8	100.0 no.=38	100.0 no.=6	100.0 no.=2	100.0 no.=7	100.0 no.=48

For the three most frequently imposed measures of warning and counselling, undertaking by the child and undertaking completed, the percentages of Aboriginal appearances are roughly proportionate to the overall percentage of Aboriginal appearances before the Children's Aid Panels. In other words, Aboriginals are neither over- nor under represented in these three categories.

However, they were definitely under represented in the category referred to Children's Court because the offence was not admitted. A Children's Aid Panel must refer a matter to the Children's Court where the child does not admit the allegation.

In only 1.8% of all Panel appearances did this result occur, but all those were appearances by non-Aboriginals (38 appearances in all). Why is this so? Why should non-Aboriginal children be less willing to admit the allegation than Aboriginal children? It might be suggested that a child needs to be more socialized, more confident, more conscious of his rights in order not to admit the allegation. Are Aboriginal children more intimidated by "authority" than their non-Aboriginal counterparts? However, the relatively small numbers involved may limit their significance.⁹

Finally, considering Children's Aid Panel appearances which resulted in the matter being referred to the Children's Court because the child failed to appear, there is a disparity here between the two ethnic groups. As Table 25 shows, 12.5% of the Panel appearances in which failure to appear occurred were appearances by Aboriginals, with 87.5% being appearances by non-Aboriginals. The percentages of the total number of Panel appearances by each ethnic group represented by appearances in which this occurred were 2.4% for Aboriginals and 0.7% for non-Aboriginals. Hence Aboriginal children are over-represented amongst those who fail to appear before Children's Aid Panels.

Apart from instances in which Children's Aid Panels referred the matter to Court because the child did not admit the offence or because the child did not appear, the conclusion on Panel appearances in general is that there is little difference in Panels' treatment of the two ethnic groups. There may be particular explanations for these two exceptions. One might suggest that the two exceptions indicate that Aboriginal children are less willing to comply with "the system" than are non-Aboriginal children. But perhaps such an explanation is simplistic.

Care applications: measures imposed by the Children's Court

During the specified period there were 41 applications by the Minister for Community Welfare which resulted in the Court declaring the child to be in need of care and making consequential orders. Of these 41, 4 (9.8%) were applications in relation to Aboriginal children, with 37 (90.2%) being applications in relation to non-Aboriginal children.

Table 26

	Aboriginals		Non-Aboriginals		Total	
	No.	%	No.	%	No.	%
Guardianship order	4	100.0	25	67.5	29	70.7
Control order: welfare matter	0	0	2	5.4	2	4.9
Control order: education matter	0	0	1	2.7	1	2.4
Control order: health matter	0	0	1	2.7	1	2.4
Control order: combination	0	0	6	16.2	6	14.6
Control order: simple	0	0	1	2.7	1	2.4
Direction to reside	0	0	1	2.7	1	2.4
Total	4	100.0	37	100.0	41	99.8

Table 26 shows the results of (successful) care applications before the Children's Court. The sample shows the first six months' operation of the Children's Protection & Young Offenders Act 1979, which introduced a novel system as regards this "protective" jurisdiction. The main characteristic of the new system is that no longer can the Court make a child the subject of a care and control order on the mere allegation of an offence. The Act has effected a separation of the civil and criminal jurisdictions, and if it is felt that an offender is in need of care, separate and distinct civil proceedings must be taken under s.12 of the Act. Of course, non offenders may also be the subject of s.12 proceedings if it is felt that they are in care. The grounds on which an application is founded as specified in s.12.:

12. (1) Where the Minister is of the opinion that a child is in need of care by reason that -

- (a) a guardian of the child has maltreated or neglected the child to the extent that the child has suffered, or is likely to suffer, physical or mental injury, or to the extent that his physical, mental or emotional development is in jeopardy;
 - (b) the guardians of the child are unable or unwilling to exercise adequate supervision and control over the child;
 - (c) the guardians of the child are unable or unwilling to maintain the child;
- or
- (d) the guardians of the child are dead, have abandoned the child, or cannot, after reasonable enquiries, be found,

the Minister may apply to the Children's Court for a declaration that the child is in need of care.

(2) The child the subject of an application under this section, and each guardian of the child, shall be parties to the application.

If the Court is satisfied that a child is in need of care, it may make one of the orders specified in s.14:

14. (1) Upon finding that a child the subject of an application under this Part is a child in need of care within the meaning of section 12 of this Act, the Court shall declare accordingly and -

- (a) may, by order, place the child under the guardianship of the Minister for such period of time as the Court thinks fit;

(b) may, by order -

- (i) place the child under the control of the Director-General in respect of such matters relating to the care or welfare of the child as the Court specifies in the order, for such period of time as the Court thinks fit;
- (ii) direct that the child shall reside with such period as the Court thinks fit;
- (iii) direct any guardian who is a party to the proceedings to take such steps to secure proper care and control of the child as the Court thinks fit.

As stated earlier, the new Act gives the Court a wider range of options as to the type of order it can make than did the repealed Act. Most important is the novel "control order", which does not totally deprive parents of their rights over the child, and hence should be more conducive to a continuing parent/child relationship. What the relative distribution between guardianship orders and control orders will be remains to be seen. In any event, the separation of the "civil" jurisdiction from the criminal should result in fewer children being made "State children".

The guardianship order is the most drastic type of order which a Court can make under s.14. Table 26 shows that 70.7% of the total number of care applications in which an order was made resulted in a guardianship order. This may show that the Children's Court was at least cautious in its use of the novel type of order during the first six months of the Act's operation.

Note that Aboriginal children are slightly over represented in the numbers of guardianship orders made: 13.8% of all guardianship orders were orders in respect of Aboriginal children. Moreover, all care orders made in respect of Aboriginal children were guardianship orders, that is, in all cases in which the Court found an Aboriginal child to be in need of care, the most drastic of the orders available was made. Was this because the circumstances of each case in fact required this type of order? It could be that the parents of Aboriginal children found to be in need of care were not prepared, or considered suitable, to continue to be involved in the determination of the child's future. Or the novelty of the control order may mean that the Court was prepared to make them only in "easy" cases, and no cases of Aboriginal children were felt to fall into this category.

This sample is taken from the first six months of operation of the new Act. Probably it is unrepresentative as to this particular variable, involving as it does novel procedures and forms of order. It may well be that as time goes on, the Court will make an increasing number of control orders. Hence a different, ie, later, sample will have to be used to gain a reliable impression of the operation of s.14.

Conclusion

The analysis presented in this paper represents the preliminary stage in a continuing study of the operation of the Children's Protection & Young Offenders Act 1979 in South Australia, with particular reference to that Act's operation in relation to two ethnic groups. The sample selected (appearances in the first six months of the Act's operation) has its limitations: the relatively small numbers (particularly of Aborigines) involved, and the novelty of the statutory provisions. Moreover official statistics show only such criminal behaviour as has come to official notice; the "dark face of crime" necessarily remains hidden. With these obvious provisos in mind, several points nevertheless emerge from the statistics.

Aboriginal children are clearly over represented at the point of entry into the criminal justice system in South Australia, and relatively more over represented before the Children's Court than before the diversionary institution of Children's Aid Panels. The statistics show, moreover, that those Aboriginal children appearing before the Court in this sample are more likely than their non-Aboriginal counterparts to have had previous contact with either the criminal or the welfare jurisdiction. One must be cautious of interpreting those features of the statistics in terms of recidivism. The data may simply show that those who have once come to official notice are more likely to do so on subsequent occasions than those who have not - not necessarily because of "criminal tendencies" but because they are more likely to be apprehended if already known by some of the authorities concerned. Thus the process may create its own momentum. In addition police discretion may play a large part in moulding the official statistics.

In relation to the types of offences with which children are charged, and the measures imposed by Courts and Panels, the statistics reveal as many similarities as differences between the two ethnic groups. In other words, at the disposition stage there does not appear to be a great deal of difference in the way in which the criminal justice system deals with those two groups of young offenders once they have come before it. Generalisations about sentencing practices of the Children's Court are admittedly difficult to make, given the duty imposed on it by S.7 of the Act.

This paper may well appear to raise more questions than it attempts to answer. It is essentially a preliminary analysis. In the next stage of the project a larger sample of appearances will be analyzed in greater detail, considering subsequent years of the Act's operation. It is hoped that further light will be shed on the issues raised in this initial analysis.

References

1. Computer printed Crosstabulations were kindly provided by the South Australian Department for Community Welfare. Without such assistance from the Department, and in particular its Research Branch, this analysis would not have been possible. Such assistance is gratefully acknowledged. The assistance of Joy Wundersitz, research officer in the Department of Geography at the University of Adelaide, is also gratefully acknowledged. Ms Wundersitz translated the statistical data into tab form for presentation in this paper.
2. This paper is the first stage of an ongoing project funded by the Australian Research Grants Scheme. In subsequent analyses social background factors will be considered.
3. Those between 16 and 18 years were charged with the offence.
4. Other measures were bond and discharge.
5. 1977. Report Of The Royal Commission Into The Administration Of The Juvenile Courts Act 1971-1974 & Other Associated Matters (Mohr).
6. Ibid, Part II, 7-8.
7. These totals do not correspond exactly with those of total court appearances. The total disparity may be explained by the small number of children who appear initially before the Children's Court but who are subsequently referred elsewhere.
8. 1979. 22 SASR 133, 136.
9. The figures on other measures imposed by Children's Aid Panels are too small to be significant.

JUVENILE CARE & TREATMENT

Aboriginal Children & Youth In Care

Stewart Murray
Aboriginal Advancement League
Melbourne

Introduction

Before colonisation and the fragmentation that led to the destruction of Aboriginal life-styles, traditional Aboriginal child care methods reflected the social order of the tribes and were supported by same. If a mother was unable to care for a child, the solution was to place the child more or less permanently with a relative or other member of the group. Unofficial "fostering", just as sharing of accommodation, was common practice.

Child Welfare Legislation was introduced into England at a time when it appeared to be necessary to prevent exploitation of children. In Australia, these same concepts were imposed on a completely different culture in which our children were not the property of a particular set of parents, but were the joint responsibility of kinship groups. The two methods of child care required, and still require, a very different kind of substructure in terms of the people and nature of the institutions involved.

Whilst all Aboriginal communities have suffered, those in the South-East most in contact with the dominant culture have suffered severe psychological dysfunction, added to by the pressures of just being "Aboriginal". Natural support systems have been broken down and social dislocation has been the result. Housing, education and welfare programs that have been insensitive to the needs of our people have produced suspicion of, and alienation from non-Aboriginal programs.

Removal policies

Although Victorian Aboriginal communities no longer live traditional life styles, unofficial 'fostering' and sharing of accommodation has always remained common practice. Up until the mid-seventies, removal policies had been responsible for wholesale, and often unwarranted separation of our children from their families and kinship groups. During the earlier part of the 20th century, removal policies had been established to enable our children to be "taken away and educated". Education generally consisted of domestic training for girls whilst the boys were trained to "conform" to perform the most menial of tasks. Those children, more often than not, were put into service so far away from their family and area of origin, ongoing contact with family was impossible. Some died, some were never again seen by their families.

Our people began to voice their concerns and efforts were made to abolish those removal policies. The result of campaigning over a decade was to a degree, successful, but unfortunately a more subtle form of removal followed - that of "removal by filing a Care and Protection Application" under which an Aboriginal child was in the main, made a Ward of State.

Care & protection

The Victoria Police were largely responsible for the detection of 'neglect' cases and the filing of Care and Protection Applications before the Children's Courts.

The grounds most commonly used to file a Care and Protection Application involving Aboriginal children were -

- * abandonment (children left with relatives while their parents were away seeking seasonal work, were considered to be "abandoned". No pensions or Supporting Parents' Benefits were available to Aborigines at that time).
- * no visible means of support or no settled home (Aboriginal families without an income, sharing accommodation with kin were considered to have "no visible means of support etc.,")
- * living or in company with known vagrants or criminals (all too many Aboriginal people had been charged and convicted of "vagrancy" thus totting up a criminal record.)
- * under unfit guardianship (Aboriginal parents would have to prove they were fit guardians - all too often, value judgement of the charging officer decided Aboriginal parents were "unfit".)
- * likely to lapse into vice or crime: exposed to moral danger (these two charges were frequently used to remove children from parents who had been previously charged with vagrancy, or in instances where an unmarried mother was living in a de-facto relationship and was considered to be a prostitute.)

(Note: It is ironic when the end result of institutionalisation and separation from kin on the above grounds is examined and we find that in 90 per cent of cases, those children removed from those situations, have been far more disadvantaged and prone to anti-social behaviour than if they had been left in their families.)

It is fair to state here, however, that in some circumstances, charges laid against our people did have some validity. On the other hand, all too many were not justified. Following is an incident that occurred in about 1969/70 -

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It is fair to state here, however, that in some circumstances, charges laid against our people did have some validity. On the other hand, all too many were not justified. Following is an incident that occurred in about 1969/70 -

Two sisters who lived in Melbourne decided to visit their mother who lived in the Western District. On the way, they agreed to stop over and visit a cousin who lived in a neighbouring town. While they were there, a local policewoman called to investigate a report that cousin was neglecting her children and that there was an ongoing over-abuse of alcohol.

Cousin offered no objection when police removed her four children and advised they would be placed on a Care and Protection Application on the grounds of "unfit guardianship".

A little later, policewomen returned to the house and questioned the two sisters in respect of their presence. Refusing to accept any explanation, three children were removed from one sister, one child from the other. The grounds for the Care and Protection Application in that instance were "no settled home".

The sister who had one child removed, appeared at the Court the following day and had to "prove" that she in fact, had a home in Melbourne and actually was on her way to visit her mother. Her child was returned to her care.

The second sister and the cousin, intimidated by police and court processes, did not attend, thus seven children were committed to the care of the State and became Wards.

(That instance was prior to the establishment of the Aboriginal Legal Service.)

Until 1972, no consideration had been given to identifying our children as being Aboriginal when statistics were being recorded. At that time, there was increasing pressure being placed on the State welfare to recognize the value of Aboriginal involvement in the area of child and family welfare as it had become evident that the rate of disruption and breakdown in instances in which our children had been placed outside their family and kinship structure, was grossly disproportionate when compared with that of non-Aboriginal children.

In 1973, the Family Welfare section of the Department was able to identify 173 Aboriginal Wards, although it was generally agreed that that was far from being an accurate figure. However, by 1974 a further effort by the Social Welfare Department produced some alarming statistics. The number of Aboriginal children in Victoria aged 0-18 years recorded in the 1971 Census was 3107. Of those children, 323 were State Wards at August 1974 - representing 9.6 per cent of the total Aboriginal population aged 0-18 - a rate 16-20 times higher than that of non-Aboriginal children. Two-thirds of Aboriginal Wards (209) were in children's homes at that time.

(Note: Whilst it is generally accepted there have been many changes in State Welfare policies and practices since 1974, and that the number of Care and Protection Applications involving our children has considerably decreased, it is important to document those 1974 statistics as the June 1981 survey by the Department of Community Welfare Services identify that 221 Aboriginal children are currently Wards of State.

Once institutionalised, Aboriginal children quickly found themselves in conflict with their Aboriginal identity, having been removed from their families who were living in one culture at home, into an environment that reinforced a totally different culture. Furthermore, they were given to understand that Aborigines had no culture worth discussing. The child, being the centre of conflict of a period of years became confused, not knowing which culture he/she belonged to and quite often, rejected both and turned to truancy, absconding, alcoholism, drug abuse and juvenile delinquency.

Alternatives to institutionalisation

Over the past 15-20 years, recognition was given to the fact that children removed from family links would develop stability far more effectively if placed into a situation that was more like their own home was or could be. Here again, Aboriginal children became confused as the home from which they had been removed, bore no resemblance to the family group homes (or others) into which they were placed. The same confusions became evident when our children were placed into white foster and adoptive families. The reader may question those statements as very real attempts had been made to give Aboriginal children a stable, healthy upbringing.

If one looks at the results of those very real attempts, accepts statistical information recorded by Statutory and voluntary welfare agencies, later confirmed by Aboriginal Legal Services that there had been a 90 per cent disruption and breakdown rate stemming from those placements, and that 90 per cent of the clientele seeking services from Aboriginal Legal Services are children/young people who are 'victims' of removal policies, or adults who had been removed from family when they were children.

During International Year of the Child, the writer was given a paper which unfortunately did not identify the author. However one paragraph is relevant to this submission -

...By and large society must use each child's placement as an occasion for protecting future generations of children by increasing the number of adults-to-be who are likely to become adequate parents. Only in the implementation of this policy does there lie a real opportunity for beginning to

break the cycle of sickness and hardship bequeathed from one generation to the next by adults, who as children, were denied the least detrimental alternative.

Since the establishment of the Aborigines Advancement League during the 60s, we have been consistent in demanding the right to establish caring facilities for our children and families in times of crises. We do not see our children's development in isolation, but as an integral part of the family's total development.

Following the establishment of Aboriginal Legal Services, children appearing in courts on Care and Protection Applications were represented by a lawyer. Parent/s were encouraged to be present in court and from 1973, most of our children appearing for the first, second and sometimes the third time, were released into the custody of their parent/s or relatives. However the major problem was a lack of family supportive resources existing within our own communities. Our families remained suspicious and hesitated to use 'white' support resources, thus it was inevitable that our children would continue to become Wards of State.

Children in care

Whilst there is a genuine attempt currently being made by the Department of Community Welfare Services to ensure that in the event it becomes necessary to remove a child or children from parent/s, those children remain at all times in a situation that is accessible to their families. In placing Aboriginal Wards, the Department now makes recognition of Aboriginality and maintains close contact with the Aboriginal Child Care Agency. However, despite every effort by staff of the Aboriginal Child Care Agency to locate appropriate alternatives to institutionalisation, there are still too few options available.

Welfare authorities generally provide services to Wards by placing them initially into Government children's homes and reception centres. In most instances, they are considerable distances from the families of our children and their areas of origin.

From those initial placements, our children were consistently placed into a non-Aboriginal environment. Despite the good intentions of the foster and adoptive parents and those running group homes, etc., experience has shown that such placements had a high incidence of breakdown. Whilst such placement practices may have been appropriate for non-Aboriginal children, the resultant identity conflict and dysfunctional impact on Aboriginal families suggest it had been significantly inappropriate for Aboriginal children and their families. Such options have existed simply because there had been no recognition of appropriate Aboriginal resources that existed - namely, the extended family of our Aboriginal child.

South Eastern Aborigines very quickly became 'members of a culturally disadvantaged' group during the 20th century insofar

as their knowledge, beliefs, art, morals, customs, law, etc., had gradually been eroded. Aborigines had been rendered incapable of fulfilling their human potential and so it is not difficult to understand how children, once removed and alienated from their traditional cultural environment eventually became 'non-coping' parents - hence the birth of the stereotyped images which still exist today.

Aboriginal children in institutions, family group homes, foster care, etc., that are not 'controlled' by Aboriginal workers have the least degree of parent/kin contact. Statistics recorded by the Department of Community Welfare Services at 30 June 1981, indicate that 49 per cent of our children in substitute care now have parent/kin contact. Whilst that percentage is at the highest level since removal policies were introduced, it does not compare favourably when the same statistics show that 65 per cent of children overall, in substitute care, have parent/kin contact. Furthermore, it is of interest to note that -

- * 28 per cent of Aboriginal Wards, compared with 16 per cent overall, are in substitute care.
- * 13 per cent of Aboriginal Wards are aged 3-5 years.
- * 66 per cent of Aboriginal Wards are aged 6-15 years.
- * 17 per cent aged 3-5 years are female.
- * 9 per cent aged 3-5 years are male.

The difference becomes significant when one observes that -

- * 36 per cent of school age Aboriginal Wards are male.
- * 30 per cent of school age Aboriginal Wards are female.

Mentioned earlier was the fact that in 1974 the estimated rate of Aboriginal juvenile admission to State care was 16-20 times greater than non-Aboriginal. By 1977, that rate had increased to 26 when 504 Aboriginal children and youth were recorded as being Wards of State.

To emphasize the urgency that substitute care resources be established by Aborigines for Aboriginal children and young people, the following is worth noting. In 1974, the Victorian Aboriginal Legal Service was funded to operate a hostel for its users who were in need of emergency/crises/temporary accommodation for various reasons. Whilst the hostel catered for the needs of our people regardless of age, sex, etc., towards the end of 1975 it became obvious that it was catering basically for the needs of children and youth. The hostel acted as a diversionary resource for courts and reception centres in the placement and support of our children. This explains the reduction in the number of admissions during the period 1975/76. Between June and December 1976, Aboriginal admissions to Care numbered five. Following the closure of the hostel in December 1976, admission of our children to Care between January and June 30 1977 numbered 19.

Aboriginal youth in care

As at 30 June 1981, Community Welfare Department statistics indicate that of the 221 Aboriginal State wards, 21 per cent are aged 16 years and over. The majority of these young persons are in institutions, Youth Training Centres or in hostels. Also recorded is the fact that 9 per cent of Aboriginal Wards generally those in Youth Training Centres - had 'diagnosed' mental disability, whilst 10 per cent had 'diagnosed' small suspected mental disability.

Aboriginal youth do not have access to the means necessary to obtain separate accommodation and so it is usually the responsibility of our own community organisations to find resources and facilities to meet the ever-increasing need. A number of hostels have been established by Aboriginal Hostels Limited, but it is a concern that many of our youth do not fit the category that meets the eligibility criteria.

Aboriginal youth 'at risk' present the greatest problem. It is inevitable that these young people will continue to be victims of a system that perpetuates itself in the over-representation of Aboriginal juveniles in the legal/social welfare system unless adequate provision is established to -

- * ensure that there is a continuing Aboriginal supportive network.
- * ensure that appropriate alternatives to institutional care are available in the event a young person is required to move from his/her area or origin for any reason, or alternatively has been discharged from an institution, family group home, Youth Training Centre, etc.
- * prevent a situation occurring in which the young person is not able to cope with social stresses, and thus turns to alcohol and/or drugs for support.
- * ensure that in the event the young person is unable to cope with family stresses, he/she is offered an appropriate alternative in a non-alient, supportive environment until such time as that young person can establish him/herself and able to function independently in the broader community.

Referring back to our mention of the Aboriginal Legal Service Hostel, we believe that Aboriginal community based substitute care facilities must be established to ensure that the emotional growth and development of our children and young persons is not inhibited. Limited statistics kept by the Aboriginal Legal Service Hostel prompted a submission for funds to re-establish that facility in an effort to once again, reduce the numbers of our children and young persons being admitted to care. Accommodation of children and young persons at the hostel was more often than not because there was no suitable alternative. Of the 52 children and young persons accommodated, 31 were so as an alternative to institutional care. (It is noteworthy that only 33 were Wards of State.) These children and young persons fell

into four categories -

- * offenders: Numbering 17, these kids were incorrigible offenders who were referred to the hostel either by the Social Welfare Department or the Children's Court as an alternative to being returned to care or sentenced to a Youth Training Centre. 10 of those kids had a long history of institutionalisation and 7 had a short history (less than six months).
- * in need of care and protection: Numbering 7, those were children who were not offenders but who had come to the notice of the authorities as products of broken or unsatisfactory homes. All of them were Wards of State and were referred to the hostel by the Social Welfare Department. All were subsequently home-released on the recommendation of their Social Workers after their home environment had sufficiently stabilized.
- * at risk: Numbering 10, those kids would have come to the attention of the authorities as a result of broken homes, inability of parents to cope temporarily or broken foster placements. Some of these kids were starting on a course of offending and although not classified as incorrigible, would have been made Wards of State because investigations revealed an unsatisfactory home environment.
- * homeless: Numbering 5, those kids could be classified in the 'at risk' category, however they were not kids who had recently suffered a broken home or referred from an institution. They were kids who had been living on the streets for a number of years existing on the fringe of the law. They were at the hostel not because they came to the attention of authorities, but because they felt they wanted to stay as a respite from life. These kids represented the most tragic section of Aboriginal youth. Too experienced in life to be affected by programming at an institution and yet far too young to be permitted to live the lives of derelicts. Although it was beyond the capacity of the hostel to contain those kids for long periods, it was its major achievement that they would come voluntarily when they felt the necessity.

It is worth noting that during 1976 when the hostel was in operation the number of aboriginal children admitted to the Care of the Social Welfare Department was 1.5 per cent of the total number of admissions. In the previous year, the number was 3.17 per cent and subsequent year, 3.95 per cent of total admissions.

These figures may again not be conclusive of the impact of the hostel, however it is highly coincidental. Furthermore, the grossly disproportionate representation of our children and young people in the welfare system points up a dramatic need for effective Aboriginal intervention.

During a National Symposium convened by the Department of Aboriginal Affairs in 1977 on "The Care and Treatment of Aboriginal Juvenile Delinquents" the questions raised seemed not to differ from State to State, but were of a more universal nature. that reinforced conclusions that it was not a question of region, area, tradition or social condition that had so much bearing on the actions or reaction of delinquents generally, but the central ill was institutionalisation and the processes that it generated.

ABORIGINES, POLICE & POLICING

Policing In Some Aboriginal Communities -
A Commentary On Experiences In Central Australia
& In The Kimberleys In 1978 With Particular Reference
to Juveniles

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I should like today to bring to your attention some submissions made to me by Aboriginal people in Central Australia and in the Kimberleys when I toured that area on behalf of the Australian Law Reform Commission in relation to the Customary Law Reference and to discuss some aspects of policing, or the lack of it, in certain Aboriginal areas. The experience of my survey led me to ask:

- * To what extent does policing and the provision of law and order by the white legal system prevent breaches of order within the Aboriginal communities?
- * To what extent does policing by the white legal system support the internal cohesiveness of particular communities?
- * Can the Aboriginal system be examined to establish whether they could provide some solution?
- * Perhaps some modification is required to both systems in order to achieve the desired result.

I take it as axiomatic that the Aboriginal communities wish to be peaceful and to have a good order.

Restriction on effective action with Aboriginal communities

It became clear during my enquiries that Aboriginal communities have grave doubts about the extent to which they are able to take any action at all in the legal area in view of the existence of white legal rules and legal institutions. The fact that some or all of the action taken within the Aboriginal community to deal with an offender may result in criminal sanctions from within the white administration or action by the white police can, in some circumstances, have a strongly deterrent effect on Aboriginal action to deter or control. I presume that the conference is aware that Aboriginal communities, in the absence of the police and the white system of justice, have always and currently do rely upon the willingness and ability of appropriate members of the community to take action to prevent disorder. The enforcement of law, now largely done in our white society by the police, is in such Aboriginal communities the responsibility of the members of that community. Accordingly, any doubts about the legality or propriety of taking action can strongly inhibit effective intervention.

Another matter of concern in Aboriginal communities is that a drunk person may not be responsible, within the terms of the Aboriginal culture, for his actions. Thus in a common enough situation, an Aboriginal person who is drunk may be causing severe disturbance including assaults. But individual members of the community may be loathe to take action partly because of general

doubt about the propriety of doing so and partly because the Aboriginal community may not support the individual attempting to control the situation where the other person is drunk. The drunk is considered to not have his "spirit" with him and therefore not to be responsible. It would be improper to interfere with him and a person doing so would risk community disfavour and possible subsequent physical or moral action against him for his trouble.

A third reason for inhibition is that in a situation where young Aboriginal men come into an Aboriginal camp drunk and drive around in a vehicle, they may be simply too terrifying a prospect for anyone to deal with especially as they may also be armed with either knives, guns or sticks. It would require in some circumstances considerable solidarity amongst those members of the community willing to take on the role of interfering with the wrongdoers.

It is precisely this type of situation namely wrong conduct by young (18 to 22 year old) men driving vehicles to the terror of the neighbourhood that was the subject of most complaints to me during my enquiries on the Customary Law Reference in the Kimberleys and in Central Australia. Other matters were also raised but these situations represent such an affront to the good order of the community and are so difficult to deal with as to represent one of the major causes of concern. And this is so even though they may not be an everyday occurrence.

So, to repeat, doubt about the propriety of action, doubt about the social support of the action and the potential violent situation are all features which commonly inhibit effective policing within the Aboriginal community.

Naturally the situation is greatly affected by the homogeneity of the community, its distance from the white hotels and the size of the community. A small socially cohesive group on an outstation would usually be in a better position to enforce its code of behaviour than an Aboriginal group made up of members of several tribes living "off their own land" and without acknowledged leadership in the community.

Limitations on white policing

White policing is also subject to a number of problems which greatly limit its effectiveness. An Aboriginal community geographically remote from a white police station may have to wait up to two weeks for a police visit. Such is regularly the situation in many of the remote communities. Although they may be visited on a regular basis by police patrols, the visits may be widely spaced. Many Aboriginal communities would not have any facility to communicate to the police for emergency intervention and where those facilities do exist and a radio call is sent out the response may still involve a long delay. Virtually all the communities said that there needed to be two laws and that the black and white laws should support one another. What differed of course was the particular circumstances in the community and the sort of problems that they saw as needing attention. However, similar problems emerged. How to deal with drunken adults and

the violence that came with them and how to deal with juvenile petrol sniffing. There were other problems: how to protect people going on sacred journeys from police interference on the road, how to interface with the white police over the theft of a community vehicle are two examples.

Discussion on policing & some solutions with the Pitjantjatjara

My discussions in this area took place in May 1978. I attempted to establish the types of problems that are currently occurring in the communities and to obtain some guidance from the communities about the extent to which their own systems could be modified to improve the overall administration of the law. Several solutions were discussed with the communities in broad terms. The discussion was aimed at exploring the sort of difficulties that might arise in Aboriginal communities. I saw this discussion as the beginning of a process of consultation on possible solutions to the problems.

In some communities, there was a very ready response to these inquiries and I was impressed with the strong motivation exhibited, especially in the eastern Pitjantjatjara communities, to achieving some balance with the common law system. One of the themes which emerged from the discussion is that the Aboriginal communities view themselves as communities with a distinct culture. They were horrified and incredulous that white society might have any doubts about the strength, integrity and pervasiveness of their own legal system. The points of conflict with the common law system seemed to arise where that system viewed problems of a legal nature in the community as being individual and without a community connection. Thus, police may wish to take action against an individual who has committed an offence without consultation with the Aboriginal council, although that council itself wishes action to be taken and has specific views about the punishment or rehabilitation of the offender which ought to be known to and could be helpful to the administration of the common law system.

There thus appeared to be, in general terms, a lack of recognition by the common law system of the group identity and of the existence of an Aboriginal customary law system. By contrast, the Aboriginal communities all seemed to have some basic idea about the forms of the common law system, although they were very often confused about the procedures and the type of matters which would be regarded as offences within the common law system.

The situation of the police is crucial as the success or failure of the policing operation is basic to the operation of the system as a whole. It is also that aspect of the system with which the Aboriginal communities have the most acquaintance and so much of their consideration focuses on the actions and situation of the police. The situation of the other branches of the criminal justice system are also very important but, the knowledge of the communities on these subjects, and consequently, their views about modifications in the relationship with those sections were more limited.

The police organisation

The subject area straddles three State administrations and three police forces who have slightly different policies and systems for policing. The Western Australian Police have their nearest police station at Laverton, a minimum of seven hours by road from the fairly major community at Warburton, but they make regular visits throughout the study communities within Western Australia and they respond to emergencies. A similar situation applies to the Northern Territory Police based at Alice Springs, although their nearest officer is at Ayres Rock, which is some two hours distant by road from their most remote community at Docker River. The South Australian Police, who are responsible for the majority of the communities in the subject area, use an aerial police system. Their police are based at Oodnadatta and fly in on a regular system to the communities. They are also available on short notice for emergency action. Their system is backed-up on the ground by Aboriginal wardens who wear a special hat and hatband and who take action in the absence of the police.

Access to police

Access to the radio-telephone facility is usually through a white staff member, and in most communities the facility is within white homes or offices run by white staff. The decision to call the police is therefore in most cases one that is made by white staff, or "filtered" in some way by them. There are two possible results arising from this situation:

- * police are only likely to be called for visible emergencies. These appear to include breaches of the social order of a very public and riotous nature, offences against white staff house, or white staff themselves.
- * there could be a tendency to accentuate criminal law problems between whites and the Aborigines and to exclude all but the most violent problems occurring in the Aboriginal community providing less support and control in the community from the white law.

Regular police visits

The regular visits of police were said by all the groups to be related to inspection of motor vehicle licences and registration, gun licences (in some areas) and the execution of warrants for non-payment of fines. The police would be accessible at these visits for discussions between the council and the police over current problems. The quality of communication would depend very much on the relationship between the council and the policemen and some complaints were made about this.

Police administration: appointment of Aboriginals as community policemen

Each of the communities was asked to indicate whether some improvement in policing would follow the appointment of Aboriginals as police. The communities were quite definite. They said that they wanted "real Aboriginal police". They said they needed an Aboriginal person who was tribal, who understood their clan situation and their tribal responsibilities, and who was appointed by the council, to carry out the police function in a way that would be "recognised" by the European community and the common law system. Such person, they said, must have the "real" right to arrest. They wished the "police function" to be carried out by a member of their community sensitive to their needs but who also had the power to transcend those community rules which prevented effective action. I understood these to be the rules about clan obligations and payback. Some eastern communities saw this problem as the major hurdle preventing proper law enforcement in the community.

Other Aboriginal solutions

Many communities raised the possibility of Aboriginals being employed as State police. In the subject area, no Aboriginals are employed as fulltime members of the police force. Generally, attempts to recruit and keep Aboriginals as full-time members of the police forces have been unsuccessful. Western Australia and the Northern Territory use Aboriginals as trained, but subordinate, members of the police force and the South Australian authorities have established the Aboriginal police warden system. Generally, the communities were not keen to comment on matters of police administration and I understood their reference to training of Aboriginals as police to mean Aboriginals who are responsible to the council but who are trained in police systems.

Summary: community police

The composite picture presented by the communities appears to be that some of them, at least, favour a community appointment of an Aboriginal fully initiated into the community who is responsible to the council and who has full authority by the common law system to arrest people. Such a person is to have, in their view, proper training and full support from the police. He should also wear a uniform and have a badge which signifies his authority within the common law system. It was also felt in some communities that the Aboriginal community police should have the power to arrest and hold people in a lock-up until they had quietened down or, until the established police arrive.

The Kimberleys

In June and July 1978 I travelled throughout the Kimberleys discussing with those communities the same matters that had been raised in my earlier tour. My itinerary included Halls Creek, Fitzroy Crossing and the communities around those centres, Turkey

Creek, Dunham River and the major town areas and associated Aboriginal communities at Kununurra, Wyndham, Derby, Broome and I also visited two communities in the Northern Territory at Hooker Creek and Wattie Creek. I found communities of differing social cohesion but despite such differences there was a great similarity of problem. Naturally some problems were more pronounced and serious in some communities. Again I found a strongly stated desire to have a cooperative arrangement with the white legal system.

Overview

The most serious problems raised for discussion related to alcohol and its effect on the community, the care and development of the youth, and the care and protection of the women. Many of the communities regarded their current predicament as being brought about by the European incursion and expressed the wish that the Europeans could take away the problems that they had brought and leave the Aboriginals to deal with the problems that they understood. The communities indicated that the ending of access to alcohol, the proper development of children within the Aboriginal traditional framework and the protection of women by traditional Aboriginal means would provide the best solution. Most communities were prepared to go beyond this view and examine their problems within the terms of the European culture. They sought solutions which drew upon the traditions and resources of the Aboriginal community and the traditions and resources of the European community.

Co-operation between the "laws"

The most common statement was the "the two laws" should "stand together", and "the two laws" should assist one another. The question they posed was how this result could be achieved. It was very widely considered that the cooperation of the two systems was not strong: they said the European system had taken away the strength of the Aboriginal system but had put nothing in its place. By withdrawing the power of punishment, they said the European system had often been particularly insensitive in attempting to come to grips with the real problems within the Aboriginal communities.

What follows is a report on those solutions which were considered by the communities and are based on the proposition that there should be co-operation between the two systems of law.

Policing

Each of the communities was asked to comment on the question of policing. The communities were almost unanimous in indicating that they preferred to have their "local policing" carried out by members of the community who had the authority of the community council. The view was taken that such men, properly clothed with authority, could arrest or detain any person within the Aboriginal community who breached the social order. I described such people as "Peace Officers".

Authority of peace officers

The sort of problems envisaged in the communities that would fall within the competence of the officer were acts of violence, drunkenness, especially if associated with violence or likely to lead to violence, and stealing. The communities took the view that the peace officers should be appointed by the council and should have the power to both arrest and detain. If necessary they said, a small lock up could be created on the reserve for such detention for minimum periods of time. The authority to act would be supported by the power of the council, which in terms relied upon the consensus of the community (including the elders) for its power.

Cooperation with police

Most communities felt that such peace officers should be able to relate directly to the council and also to the State police. The view taken was that the council through the officer should determine whether a breach of the social order was significant enough to require intervention by the officer and, in cases of doubt, a council meeting could be called or significant members of the council could be spoken to. If the intervention was not successful or, if the situation was too serious for the peace officer to deal with, reference could be made to the European police who should take action according to the desires of the community.

Training

Most communities felt that it was necessary for the peace officer to be trained in some way to make him more effective in dealing with the situations. None of the communities seemed to have developed suggestions on how this training could be carried out.

Peace Officer & traditional systems

The communities generally indicated that the peace officer, being chosen from the community and responsible to the council would not cut across other established lines of authority exercised in the community. Thus they claimed that the peace officer would be able to arrest across kin lines but would not otherwise interfere with the authority of the community. This was in strong contrast to the situation of the police whose action it was said, often cut across traditional lines of authority. Some of the communities felt that their own traditional systems were strong enough to deal with all problems and they did not need this additional assistance. The community at Christmas Creek which has a very strong law and is a religious centre for the Walmadjari indicated it did not need any peace officer, and that the Aboriginal system was sufficient.

Police Aides

The Western Australian Police have instituted a system of Aboriginal "police aides". These operate as part of the regular police force, assist in the administration of the police station, and carry out arrests in the Aboriginal community. They also operate in general liaison with the community. These police aides were being used in the major centres of Kununurra, Wyndham, Hall's Creek, Fitzroy Crossing, Derby and Broome. None of the communities expressed major complaints about the police aides, but they all indicated the police aide was quite distinct from their concept of "peace officer". The police aide, they explained worked for the "police" and was not part of their "community". He could therefore not be entrusted with the responsibility which normally fell to the council.

In the Northern Territory the police at Wave Hill and Hooker Creek were assisted with a "police tracker". The "police tracker" wears a uniform (without badges or numbers) and is employed on a full time basis in the police station. He seems to have similar functions to that of the Western Australian police aides and the communities expressed similar views about the police tracker as were expressed in Western Australia in relation to the police aides.

Additional comments

Whilst there was diversity amongst the communities in terms of size, distance from European settlements, social cohesiveness and leadership there was a surprising uniformity of view in the communities stretching from the Stuart Highway in South Australia to Broome in Western Australia. I consider that such uniformity of view may well be found in a large number of other communities in the Northern Territory and in other parts of Western Australia. Whilst I have not personally visited the area, I rather suspect that similar views would be held in some parts of New South Wales. The diversity of situations, however, calls for consultation with the particular community on the type of system that they may wish to have. It is essentially an Aboriginal solution not a white solution, although it bears some similarity to the white system. Indeed the similarity can cause confusion for, although depending on the circumstances, some respect was shown by the Aboriginal communities to Aboriginal police appointed by the State Police Forces, such officers were seen as the police system and not part of the Aboriginal system. For a number of reasons such officers do not form an effective link in the liaison between the Aboriginal communities and the police.

Juveniles & policing

Perhaps the most painful problem in all the communities was the delinquency of the juveniles. Painful because it disturbed the order of the communities but also the hopes of the senior members of the communities about the continued existence or cohesion of the communities. The communities envisaged that the policing

system I have described above should extend to juveniles. The classification of juveniles and adults is in itself a product of western, rather than Aboriginal, thought. The first initiation for males at about 14 years of age will be the division between childhood and adulthood for many purposes. I have commented on this below but it is an example of the cultural difference which can have major ramifications in the administration of either Aboriginal law or the white law.

In some communities additional steps had been taken to deal with the delinquency situation. Some of the measures were purely Aboriginal drawing largely on traditional systems, others were an amalgam of Aboriginal and white but, to my mind, they indicate the high degree of flexibility shown by the Aboriginal community to deal with these problems. A flexibility that ought to be shown by the white lawyers in considering solutions to these problems.

The Pitjantjatjara

I should now like to turn to an examination of some of the juvenile problems and their solution which were indicated to me during my tour in this area in 1978. Juvenile control depends on the European legal controls, the police and effective policing and on the continued existence of Aboriginal law and social control. I will go into more detail in this part of the paper.

Definition of Aboriginal children & juveniles

The Aboriginals have a different system of classification of children and juveniles to that used in the common law system. The Aboriginal view is that a male becomes an adult or a "man" following the first ceremony. In the subject area this took place when the young men were about 14. Following this ceremony, the young "man" has certain additional rights and responsibilities which do not include the right to marry until he has gone through the second ceremony which takes place when he is about 22. Prior to the first ceremony, the Aboriginal male child is expected to comply with a number of social pressures, particularly as he approaches the age for initiation, when he is expected to withdraw his attachment to women. Subject to this, he leads a reasonably free life, although he is expected to attend school. The common law system places varying limits on criminal responsibility but, until the Aboriginal child turns 16-18 (there are State variations), he is subject to the juvenile system of justice. This cuts across the Aboriginal concepts of adulthood.

The Aboriginal female child has a free life in her younger years but, from her 12th or 13th year is expected to become a more sedate and responsible member of the society. She is also expected to attend school. The change from child to adult is less clearly marked, but it seems that there is for females, also, a conflict in the classification used by the common law system.

Some of the conflicts implicit in this classification distinction were raised within the field study. The young

Aboriginal men who have been to their first ceremony do not expect and do not receive close supervision from their parents and elder kin but the common law system assumes that such responsibility and support exists. In fact, there are other members of the community who have equally strong obligations to ensure that the young man complies with his legal and social requirements. The situation of the younger man who is about to enter into his first ceremony is slightly better known in the common law system as this group is nominated as being "at risk" and likely to commit offences to "avoid" the first ceremony.

Education and control of children

The Aboriginal customary system envisages that the Aboriginal child will learn certain social rules during early childhood from his or her parents. This system operates with direct instruction but also Aboriginal stories are told to reinforce the system. For young males, the first ceremony and from then on in their adult life the subsequent ceremonies are used to further the education and also reinforce the Aboriginal system. A similar purpose is achieved, I was informed, for women, in subsequent ceremonies. But information on this point was very scant.

Some aspects of the European culture had cut across this system of education and socialisation. A striking example was that in some communities the weekend was taken off and the families left the community to hunt and travel around. Often the elder sons who had been through their first ceremony were left behind in the community without any social supports and it was this group that was said to be causing a great deal of problem in the community.

The existence of the European education system caused problems for the Aboriginal education system. The authority of the schoolteacher to a certain extent cut across the authority of the parent and where children were required to leave the community to go to secondary education, the parental authority and ability to supervise were both interfered with. The content of the education courses further affected the authority system in that the courses did not relate to traditional Aboriginal instruction.

The Aboriginal communities indicated that they strongly supported the need for education, certainly in relation to mathematics and literacy in English. In one or two communities, strong views were expressed that the structure of the education system, its content and its administration, interfered with the proper development of the children, even against the express wishes of the community leaders. Strong efforts had been made in some communities to deal with these apparent problems. In several small communities, bush schools had been created where the Aboriginal community had physically built a structure and had adapted the Aboriginal administration of the community to ensure that the Aboriginal children attended school regularly. In another community, the Aboriginals had adapted their own authority structure to ensure full attendance at the school and used

important elders of the community as "truancy officers" and also to patrol the playground to prevent damage to the property of the school. In other communities where this authority structure of the Aboriginal community had not been available or had been rejected by the education authorities, there was extensive truancy and great problems for the teachers in controlling their classes and providing an effective education.

It was not my purpose to extensively examine the education system, but there are clear and strong legal implications for the current situation. The ability of the traditional Aboriginal system to control its own children and to provide a socialising education is quite basic to the maintenance of law and the provision of order within the community. If the breakdown in authority and order is not remedied, then there is a risk that the Aboriginal juvenile will become an adult without having accepted a socialising system and the maintenance of order could become a much greater problem, even in the remote communities. Another current legal implication is that where some the children proceed to secondary school, which is physically removed from the community, then they are at risk in the community to which they are removed because of the absence of total control. The children who remain in the remote Aboriginal community are also at risk because they are said to perceive themselves as being failures within the education system and it is this group which is blamed for the majority of delinquent acts within the remote communities, unless those communities have taken strong social action themselves to deal with the problem.

The future of Aboriginal children

The introduction of the European culture, whether through the education system or by the presence of white communities or white advisers, is a fact of life in all of the communities visited. Naturally, the more remote communities had less effect from the white culture and the larger communities had the greater knowledge of the white system. The question was therefore raised whether the juveniles wished to move further into the European system and whether there was any conflict for them. My own discussions did not establish any clear preference amongst the Aboriginal juveniles for the outside culture but, it clearly had its effect on them. They tended to wear European clothes, they spoke reasonably fluent English, and looked to Alice Springs (in the East) and to Perth (in the West) as important areas and places for future visits. Many children in the eastern settlements attended secondary schools in Alice Springs and from the western areas the children attended secondary school at Norseman, Western Australia.

White informants indicated that the children liked to go away to European institutions, even those associated with the law because of the excitement of a plane trip, television and European food. I did not get satisfactory explanations from the Aboriginal children about this for much the same reasons as the information on women was scant. The Aboriginal adults did not confirm the views of the white informants about the pleasant expectations of

the white institutions. In one of the communities there had been a reduction in juvenile offending since a form of secondary technical education has been established within the community and it appeared that there was certain tension in the communities over the applicability of the education from the European system within the Aboriginal framework.

Aboriginal children & juveniles: petrol sniffing

It will be helpful to discuss the problem of petrol sniffing as experienced in the communities of the subject area because it illustrates a number of the complex social and legal questions involved in the effective legal control of Aboriginal juveniles.

Extent of petrol sniffing

Petrol sniffing is quite widespread. Most of the groups reported that they knew of the practice and that it was indulged in by young juveniles from 7 to 16 with some indulgence in later years up to 22. Each community considered that some of the youths involved in the practice were leaders and others were identified as being followers. The communities tended to focus their attention on the leaders in order to reduce the social damage.

Health concerns

The principal concern expressed in the communities was that petrol sniffing would affect the health of the young people. They felt that petrol sniffing was likely to inhibit growth, affect mental stability and be permanently debilitating. One child had recently died in one of the communities whilst in the act of sniffing petrol. The communities generally felt that death was a possible outcome of the practice.

Legal problems

The communities seemed to express some confusion over whether the children were more likely to commit offences whilst under the influence of petrol. They all agreed that the children committed offences in attempting to get the petrol, usually by breaking into white property and, that the presence of small gangs of youths who associated for the purpose of petrol sniffing was socially undesirable because they tended to challenge the authority of the adults.

The common law position

Proceedings have been brought in some communities by the common law authorities to deal with children who are petrol sniffing. Presumably they are charged with being in need of care and protection. Where the charges are brought, the magistrate has

a difficult choice between sending the child away to an institution, which has its own undesirable effects, and returning the child to the community. Unless the community has developed its own form of control which the magistrate can, by his actions, lend support, the magistrate may not be able to provide an effective remedy for the practice. In some communities the adult Aboriginal view is that children who indulge in petrol sniffing should be dealt with within the community and recourse to the common law system should only be used where the Aboriginal system is definitely ineffective. In other communities, where there appeared to be less social order, there was greater reliance on the common law system.

The Aboriginal system of control

The nature of the problem, from the Aboriginal viewpoint, presents some interesting light on the Aboriginal system itself. In some communities the Aboriginal council had, by taking a number of strong steps, reduced the problem very effectively. Where community condemnation could be followed up by community action, the problem was very limited or non-existent. Where, for one reason or another, the community council felt unable to enforce its views, the problem persisted or grew. One community council indicated that as each adult had responsibility for his own children, it would not be possible to control a group of children where the leadership was that of a child whose own parent would not control it. Further, some communities indicated that young men who had been to initiation were under very limited supervision by the adults.

Some Aboriginal initiatives

It is interesting to note some of the actions taken by the Aboriginal communities. The solutions which had been tried were:

- * Isolating the Source - This was claimed to be successful in one community where all the petrol was locked and all the cars were put together in a line, the areas being controlled by wardens who visited the area in the evening and in the morning. Most communities indicated that this was not a practical proposition as there were so many cars and so many sources of petrol.
- * Community Condemnation - This had been attempted in all communities. It has been successful in three. Each of these three indicated that a meeting of the community had been held to discuss the problem, that agreement has been reached that children were not to sniff petrol and action had been taken to put the community decision into effect. Three communities where this had been successful were either small or remote and had strong councils. The communities where this condemnation had not been successful blamed their failure on some parents who they said did not properly control their own children or their inability to control or prevent access to the sources of petrol.

- * Removal to a Bush Camp - The communities all expressed interest in the notion of taking the children to "bush camps" for some periods of time for supervision and to be reminded of their traditional roles and expectations. They indicated that such isolation need only be for a limited period until the child has had an opportunity for "drying out" and has come to his senses about his proper situation in the society. It was also indicated that it would be necessary to split up the leaders and the followers.
- * Removal to White Institutions - The removal of the children from the community, by virtue of a court order, to a white institution was seen as a useful adjunct to the traditional system.
- * Redirection of Interest - Several communities indicated that by re-directing the interests of their children into acceptable projects, they had reduced the level of petrol sniffing. At Jameson, a trampoline was vigorously used and some people indicated it had reduced the problems with their children. Similar results had been achieved where the problem children had been taken away for hunting or had been involved in greater social interaction with the adults of the community. This redirection and involvement depended a great deal on the ability of the community to organise itself in this way. This itself related to the strength of the Community Council. Clearly, many of these problems of authority are circular.

Summary

The traditional education of Aboriginal children and juveniles involved the development of positive standards and a system of supervision and control which was partly dealt with in the community in daily life and partly at the ceremonies. The system depends upon the continuation of the authority of the adults and actions taken to reduce that authority have a direct and sometimes negative effect on the situation and orderliness of the children. Education and introduction of the white culture have also had direct effects on the attitudes and expectations of the children. The Aboriginal system for control of children has broken down quite severely in some communities, but the common law system is often not able to supply any legal answer to the complex social and legal problems presented by the current actions of the juveniles which include petrol sniffing and other minor offences. The Aboriginal communities have attempted some solutions to the current problems within their own traditional framework, but these solutions have only been marginally successful in most communities.

The Kimberleys

My survey in the Kimberleys of June/July 1978 revealed many similarities with the earlier survey.

Juveniles: nature & extent of Aboriginal juvenile problems

The communities expressed concern about the extent of problems caused by juveniles. These problems included offences relating to motor cars, alcohol, stealing, assault and property damage. In some communities both the young men and women had a problem with alcohol, but in most communities the young men were the subject of the major complaints. Juvenile sexual misconduct was often referred to. The problem here is that the liaisons cut across promised marriage arrangements, or interfered with an existing marriage. The children from the irregular unions were not always cared for by the young mothers and the burden of caring for the infant children was placed on an elder relative usually the infant's grandmother. Petrol sniffing was rare in the subject area.

Authority over juveniles

The juvenile problems seemed most severe in those communities which were part of white townships. This applied particularly to Wyndham, Hall's Creek and in Kununurra. Authority and control over juveniles in those communities which were remote from major white townships seemed to be stronger but presented a variety of situations. The community at Hooker Creek, which is strongly traditional has had a high degree of juvenile offending, but the traditional community at Christmas Creek reported a very low incidence. At Hooker Creek the authority of the Aboriginal community appeared to have been greatly affected by the impact of the education system and I was informed that the authority of the school had, over a period of time, interfered with the authority of the elders. I was informed in the same community that the young men and women were rejecting many aspects of the traditional culture and were putting up opposition to the traditional enforcement of marriage arrangements. The community at Christmas Creek was constantly referred to as being a very strong provider of traditional authority, and many of the neighbouring communities had arranged to send either all of their juveniles or a large proportion of the more troublesome juveniles to Christmas Creek, in order to reinforce Aboriginal authority. The community at Hall's Creek indicated that the situation was so bad that they could not effectively pass on the traditional values because of the weakness in their own authority over the juveniles.

The social, cultural and emotional problems of juveniles were evident and the changes in the Aboriginal culture and the presence of the European society had brought major changes in their education, their culture and their expectations.

Aboriginal responses

The Aboriginal community had adopted a number of approaches in dealing with the problems. The major responses were:

- * Traditionally oriented communities sought to re-introduce traditional systems and traditional values.

Thus there was a strong pressure to continue initiation and subsequent ceremonies. This pressure seemed to have succeeded in all of the communities that were remote from white towns. In all of these, initiations and subsequent ceremonies proceed, although the close involvement with ceremonial life, did not seem to be so strong. The community at Hall's Creek had not succeeded in doing this. By contrast the small community at Moongong Darwung, Kununurra, had succeeded in continuing its initiations and ceremonies.

- * The influencing of European authorities was attempted in some communities. It has been successful for the Moongong Darwung community at Kununurra and was showing some success at Hooker Creek, where the headmaster and the council held regular fortnightly meetings to discuss problems. This is a recent innovation in that community. The elders at Hall's Creek indicated that they wished to be part of the education system but were not successful in achieving this. The communities with Homemaker services had succeeded in dealing with pre-existing truancy problems and had arranged a system so that the children could get to school and brought home. Some of the communities, particularly those in towns had a major truancy problem so that neither the traditional nor the European authority systems were fully effective.

Patterns in juvenile offending

My discussions with common law authorities indicated that there was a strong pattern in juvenile offending. The wet season and the school holidays brought steep increases in delinquent behaviour of all types. During this period the white townspeople complained, at least in Kununurra, of the continual misbehaviour of the children. Some places indicated a much greater frequency of offending and these seemed to be the communities which were closely associated with white communities. There were some communities in which additional factors were apparent. In Kununurra the Moongong Darwung association had been completely successful in providing alternative activities for the children in the school holidays in the wet season. In Fitzroy Crossing the indications were of a much higher degree of both juvenile and adult violence and delinquency in the community which had the greatest adherence to European values as well as the least traditional structure. It appears that there is a close correlation between communities which have been able to reorganise their social arrangements and reduce delinquency. Such communities appeared to be those furthest removed both geographically or culturally from the European communities. The major exception to this is the community at Beagle Bay which reported very little juvenile problem. This community had arranged a fairly close control over their juveniles and had sporting and recreational systems.

Solutions involving European & Aboriginal systems

There were a number of examples of success using a combination of European and Aboriginal systems. These occurred in a variety of situations:

- * At Hooker Creek there has been a great decline in the juvenile offending in the past 12 months. This was attributed to the police involving the Aboriginal community in consultation before making any decision to charge juveniles for offences, on the Aboriginal community extending the "law camps" to involve more juveniles for longer periods of time, and the consultation now taking place between the school and the community and the development of extensive sporting arrangements by an officer of the YMCA.
- * At Broome the magistrate has on a number of occasions ordered children who had been repetitive offenders to be handed over to the custody of an elderly Aboriginal. This arrangement has been successful and none of the youths has since reoffended. The Aboriginal elder indicated that he took the children to his own land (some 30 kms distant) and told them Aboriginal stories and provided food for them during a period of 6 weeks. He said that the stories all had a strong moral or cautionary content. He felt the reason for his success was that the children were so interested in their Aboriginal heritage that their interest in doing non-Aboriginal things was greatly reduced. It seems that by removing the children from the immediate source of "temptation" and, placing them in a safe and caring environment he had settled them down and reintroduced them to their strong culture. The magistrate indicated that this system had been more effective than using white institutions or any of the other measures he had previously adopted with these particular children.
- * The magistracy has been adopting a procedure of "bonding" delinquent children over to the Aboriginal councils or significant elders for their control and reported that this system had been effective.
- * The Aboriginal communities also used the European system as a support for their own. They preferred, wherever possible, to deal with their juvenile problems within their own cultural framework but, to use the European system where they needed strengthening. The Aboriginal system of punishment and prevention by the use of ceremonies was strongly advocated in many of the traditional communities.

Summary

The situation of Aboriginal juveniles in all of the communities is serious. There is a degree of violence and general

law breaking which is of concern to the Aboriginal communities and to the white communities where they are affected. The Aboriginal communities indicated also that they are very concerned at the loss of culture amongst their youth and were adopting a number of systems to reduce the law breaking and to increase the cultural content of their education. These systems involved the use of traditional ceremonies for education and punishment. The support of the common law system is sought. Some of the magistracy and the welfare authorities had provided some systems which appeared to be successful in reducing the juvenile offending.

General considerations

Self determination is the policy in Australia in relation to Aborigines. Many of the communities I visited are doing just this. They are determining what needs to be done and doing it. But for the majority of communities the impact of the European system and the presence of European settlements, whether it be up the road or many kilometres away, has affected the power of the communities to solve their own problems. They are calling for co-operation with, and the support of, the white legal system. This almost unanimous expression by Aboriginal communities should be taken with total seriousness. It is consistent with the policies currently being adopted in Australia and, with the reality of the strength and integrity of the Aboriginal social and legal environment, to respect the wishes of the Aboriginal communities and to seriously consider the implementation of the system sought by the communities. Possible difficulties and objections to the system have been briefly discussed above. They can do with greater elucidation, but this can be achieved during the consultation process. The system being suggested by the communities is not new to the western legal system. We are used to shop detectives, university security, internal company security officers and bouncers at clubs. All deal with situations under the protection of the law and with the right to, and the expectation of, respect and support by the police. The fact that the system is not new and is simple should not be a reason for overlooking it, dismissing it or, failing to provide full legal and statutory recognition for it.

The call is for effective legal responses with the Aboriginal community. They are prepared to be flexible and to draw for their solutions from many sources. They call for a balanced collaboration. It is not sufficient to say that the Aboriginal communities can have their system and that it need not have proper recognition and support from the white system. It is indeed precisely this recognition support that the Aboriginal community is seeking.

I urge this conference to recommend that the appropriate authorities commence consultation with the Aboriginal communities to discuss the matters I have outlined above and to establish:

- * appropriate forms of appointment, recognition and support of Aboriginal community police, however called, and

- * flexible responses involving the police, education authority and the magistracy in dealing with the situation of juveniles.

Current measures

Much has been done in the field of Aboriginal-police liaison, and in Western Australia certain measures have been taken since the calamitous Skull Creek incident and the recommendations which flowed from the Royal Commission into that incident. I have not attempted to deal with these in this paper but I wish to acknowledge that certain positive action has been taken by the police forces to improve the quality of policing available to Aborigines. I should also like to acknowledge the careful work being done by the Australian Law Reform Commission on the Customary Law reference. I look forward to seeing their recommendation, which will reflect upon the changing nature of Customary Law and the solutions which, as was put so strongly to me by the Aboriginal community, rely on a mutual support of the two systems of law.

Aborigines & Police - Hostility, Harmony Or Hopelessness?

Chief Inspector Owen Bevan
South Australia Police
Adelaide

The stated aim of this seminar is to identify areas in which the fit between Aborigines and criminal justice institutions can be improved. Participants have been advised that the perspectives of both Aborigines and criminal justice professionals must be considered in this regard.

I therefore pose this question - "Aborigines and Police - hostility, harmony or hopeless?" There can be little dispute that hostility has too often emerged as a most unwelcome feature of the inter-relationships of Aborigines and police throughout Australia. These occasions have placed considerable pressure upon both Aboriginal communities and upon police organisations.

Racial tensions have existed since the time of first European contact and are still an area of concern today. As far back as 1838 when the event described by some observers as the watershed in Aboriginal-European relations, the Myall Creek massacre on the Liverpool Plains, occurred, great difficulties have arisen in coping with the merging of two vastly different cultures. Despite these difficulties and differences there have been numerous encouraging examples of harmony.

Some people have suggested that the fit between Aborigines and the law enforcement arm of the criminal justice system is virtually hopeless. I do not subscribe to that proposition for one moment.

At the risk of being described as a little idealistic I am firmly of the opinion that notwithstanding the inevitable hostility which will occur from time to time, a real atmosphere and environment of harmony is entirely possible if there is sufficient effort and goodwill exercised by both parties.

In this short paper I wish to provide some tangible evidence of past successes on the one hand and on the other, to put forward one or two personal viewpoints about theories which I believe could be pursued to advantage.

It is now more than 10 years since the South Australian Police Force set up a semi-formal liaison structure designed to ensure a regular and open forum in which Aborigines and police across the State could meet and discuss mutual concerns. By way of explanation I must ask you to excuse me if I concentrate on South Australia. I do so, of course, because that is my own area of work and I am not properly qualified to speak for other States although I do believe that Aboriginal-police relations are very much similar throughout the country, both needs and techniques.

The foundation of the South Australian system has been the Police-Aboriginal Liaison Committee. This consists primarily of representatives of the Aboriginal Legal Rights Movement of S.A. and of the South Australian Police Force. However, all interested and concerned parties or individuals are free to attend and do so. Meetings are held alternately at the Adelaide Aboriginal Community Centre and at the central office of the Police Aboriginal Affairs Unit and are conducted monthly. At the Aboriginal Centre meetings are chaired by an officer or member of the Aboriginal community or the Legal Rights Movement and at the Police Department by a member of the Force. Within this forum the agenda and discussion is virtually open and the entire range of mutual concerns are raised, examined and explained as required.

While some dissatisfaction is expressed at times that there is "too much talk and not enough action" this regular contact and interchange of information and concerns has proved its worth and continues to do so. Among its greatest benefits is the opportunity provided for people to get to know each other, sometimes on a quite personal basis. Amicable contacts thus established make for the swift resolution of sensitivities, problems or misunderstandings which, if left unexplained or festering, can grow into major conflicts. Participants are in complete accord that regardless of the occasional frustrations the system has much value and there is a clear desire to continue.

This principal liaison body endeavours to extend its influence beyond the metropolitan area out into the entire State. It does so through the agency of members of Aboriginal departments, particularly field officers, and nominated members of the Police Force identified by the positions they occupy. For example, at Port Augusta where there is a significant Aboriginal population, the Divisional Inspector is charged with the responsibility for maintaining the necessary lines of communication and contact. So far as the police are concerned there are in addition two full-time field officers continuously moving around the State on regular contact visits and who are always available to attend in cases of urgency or of special need. A number of police officers have also undertaken a Pitjantjatjara language course to assist in language difficulties and as a means of broadening their own understanding of Aboriginal culture as well as raising their credibility among Aboriginal people especially in the tribal and semi-tribal areas.

On a more general basis in so far as police-community relations are concerned, there is one particular success story in South Australia very much worthy of mention at this point.

In the Yorke Peninsula area there is a consultative body which calls itself the "Central Yorke Peninsula Liaison Committee". It operates regularly and very productively. Made up of various people with community and civic responsibilities in an area with a high Aboriginal population and in which there have been serious disturbances and racial unrest in the past, over the time of its existence only a few relatively minor incidents have caused concern. The contributory role of Aborigines and police is a vital component. The committee is not exclusively devoted to

either Aboriginal or police concerns but it proves the worth of such representative groups making a determined effort to bridge gaps and promote harmony. Its influence extends frequently, however, into Aboriginal affairs.

It is this sort of function which leads me into the second part of this submission. Existing methods have done, and continue to play an important part in improving the fit between Aborigines and the criminal justice system. Can things be improved even more?

I am aware of positive initiatives in New South Wales and the Northern Territory in the realm of Aboriginal-police relations and in relation to the broad sweep of community relations although, as I have already acknowledged, I cannot speak authoritatively for the police operations in those places. I would hasten to add, also, that I mean no disrespect for other authorities by not mentioning them. There may well be similar activities in those places of which I am not aware.

The Northern Territory Police have for some time now made use of Aboriginal Aides, whereby Aborigines themselves take a direct part in the policing system, usually with close oversight and guidance from the white police. I have observed the system in operation at Finke in the southern part of the Territory where the Aide is directed from Kulgera Police Station some 130 kilometres to the West. I was most impressed with what I saw there as were the residents of that distant outpost, both black and white, with whom I spoke. It appears to me that methods such as this in which there is combined input and participation have much to commend them and are worthy of pursuit. The technique has evidently worked well in the tribal and semi-tribal environment which perhaps raises the question as to its possibilities in the urban scene. A very small number of Aborigines have found their way into Australian Police forces but have not had an easy time by any stretch of the imagination, primarily because of the intense cultural pressures brought to bear upon them and the almost unique role they have to play. If it were possible to insert several hundred Aborigines into the various forces instantly these intensive individual pressures may be able to be reduced somewhat thereby giving people a chance to cope but so far the prospects have not been bright. This has been a fact of life and no blame can be attached to any party for what so far has been an insoluble factor.

In the densely populated areas of Sydney such as Redfern, the New South Wales Police are making efforts to enhance the police-Aboriginal rapport and I understand with some positive results. Their Aborigine Liaison Unit is the guiding influence and I sure other forces will followed developments with interest.

Over the past two years approximately, the Victoria Police have introduced Police Community Involvement Programmes in certain districts with clear and encouragingly positive results. Tactics such as this must surely have considerable potential benefits in the arena of Aboriginal affairs and should be conscientiously explored. I would point out, in passing, that I trust my use of

the word "tactic" is not misinterpreted as having any sinister connotation. I use it in its most positive sense. These programmes are designed to have specialised police personnel gain deep insights, understandings and perspectives of their particular communities thus enabling them to advise police much more accurately upon policing needs as well as bringing the police and society generally into close co-operation.

In my own State we are presently conducting a pilot scheme along similar lines with a selected member researching and exploring the validity of a decentralised crime prevention role in a defined urban area. It is hoped that, subject to the ever present constraints of efficient money and manpower allocations and the identified value of this type of exercise, the role may be expanded so as to embrace the broad community relations function as well together with the obvious Aboriginal aspects wherever appropriate. I am of the opinion that the appointment of competent specialists in such roles could have highly productive effects. They should act as advisors to their respective District, Regional or Divisional police commanders and act as the catalyst for advising, stimulating and encouraging healthy attitudes and work styles by all their colleagues.

Again from a personal point of view and subject to individual willingness on the part of those concerned I offer this suggestion.

Particularly for the specialist Aboriginal affairs police officer who has State-wide responsibilities, but for divisional community relations officers in relevant areas as well, a sound appreciation of Aboriginal lifestyle, culture, history, and legal systems is most desirable. In States where there are significant populations of Aborigines living in tribal or semi-tribal circumstances such police specialists could perhaps be given the opportunity to actually live among these people for a time. Taking South Australia as an illustration, although Western Australia and the Northern Territory in particular have quite similar situations, the Pitjantjatjara Lands are the ideal example. Specialist officers might live and work for a nominated period in those lands in an "attachment" type role with a set of broad objectives which could include these as examples:

- * To gain the confidence of the occupiers of the Lands both as professional police personnel and as persons having a genuine interest in the welfare of the communities concerned.
- * Acquire as comprehensive an understanding as is possible of the cultural life-style of the Aborigines and that of the white people living and working in the area.
- * Obtain a thorough understanding of the types of offences being committed, the problems and contributory factors of alcohol and petrol sniffing, and the impact of those phenomena on the community.

- * Identify possible solutions for coping with those problems.

Exposure such as this would have two particular benefits and possibly others. Firstly, the possible identification of an improved policing system in the areas concerned where two widely different cultures are trying to ride in tandem. Secondly, and perhaps more importantly, it would greatly enhance the officers' comprehension of the entire Aboriginal scene, the components of which are so very different from their Western counterparts. The capacity to then extend such improved understanding throughout their organisations by way of education and advice would be similarly adjusted.

I do not presume to have the ultimate answers in these complicated and sensitive areas of the criminal justice system and its relevance and application to Aborigines but I am convinced by past and present experience that any possible suggestions of hopelessness can be rejected. Hostility will undoubtedly be a factor with which we will have to deal as time passes but harmony is a real possibility.

Before I conclude I wish to make one last point. If we are to attain the harmony objective, Aborigines themselves and their white mentors must be equally prepared to play their parts. Police have a profoundly difficult role. They need every assistance. They need the good-will and understanding of both Aboriginal people and the community at large.

The utmost caution should be exercised when suggesting any further diminution of police powers. I would urge Aborigines and their sympathisers to understand and accept that. It has been said that you cannot strengthen the weak by weakening the strong. The analogy can be drawn that you cannot improve police performance by pruning their powers and authority. Australian society, Aborigines included, needs to make sure that police have adequate powers, authority and practical support. That will not be achieved by unjust or ill-founded criticism, anonymous innuendo, or the undermining of confidence and esteem.

The police in turn, must accept such entrusted authority with great care. They must operate with identical care and skill.

Hostility, harmony or hopeless? Time will tell and Aborigines, police and the entire criminal justice system should leave no stone unturned to vigorously pursue the harmonious climate.

Police/Aboriginal Relations: A Tasmanian Perspective

Mike Mansell
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Introduction

Throughout the Commonwealth of Australia, there are good laws and bad laws. The infamous Queensland Acts provide a good illustration of bad statute laws and one with which we are most familiar. But beyond the notoriety of particular pieces of well-publicised legislation lie many other laws which are detrimental to particular groups in their application. Alcohol related laws, laws which over protect private property rights and the general social control laws through the country have had a devastating impact on Aboriginal people.

A common theme runs right across these laws: a view that the law is to be applied evenly to all people and that to make exceptions about to whom these laws will apply is to undermine our "fair" and our "magnificent" legal system.

This theme has spilled over into other facets of law enforcement, especially into the thinking of the law enforcers themselves, the police. Laws may stand on the statutes, or the judges may bring down decision after decision, but without the enforcement of those laws and those orders, both the legislature and the judges waste their breath. And so it cannot be emphasized enough how important a part the police play in reordering and rearranging the lives of Aboriginal people living under an unjust and harsh legal system.

Initial contact with the law for most Aborigines is via the police. It is in this early contact period where the police have a large discretion to charge, interview, arrest or ignore the many Aborigines attracting their attention. We all know how important at this crucial contact stage is the seriousness of the crime, the background and status of the offender, how familiar the police are with the offender and in which way, and so on. A middle class youth committing an offence against social order, eg, drunk and incapable, is unlikely to receive the same police treatment as an Aborigine committing the same offence.

And in one sense, the police have a great deal to gain by exercising their discretion in a way different from that which they have taken to date. The fewer the arrests, the fewer must be the complaints against the use of police verbals, police bashings, manipulation of interview records and so on.

That there does exist a major problem with police attitudes towards Aborigines is a factor which has not gone unnoticed. In its 1980 Report on Aboriginal Legal Aid the House of Representatives Standing Committee on Aboriginal Affairs noted:-

"The unsatisfactory nature of relations between police and Aborigines has contributed significantly to the disadvantages and injustices suffered by Aborigines in their contact with the law and the legal process!"

In its report, the Committee cited other reports which show that discriminatory police practices aimed at Aborigines form part of 'systematic patterns of behaviour' that lead to improper treatment of Aborigines. The Australian Law Reform Commission, the Lucas Inquiry into Law Enforcement in Queensland, the Murray Report on Police Interrogation in Victoria and the Sackville Report on Law and Poverty in Australia were some of the available reports which highlight the fact that police do discriminate against Aborigines.

Clearly, current police attitudes and practices are unsatisfactory.

And yet, despite the widespread condemnation of biased police attitudes towards Aborigines, little has changed. That is not to say however, that there have been no positive changes at all. Police interview procedures for Aborigines were theoretically improved in the Northern Territory after Mr Justice Forster rejected the typewritten records of interview in Annunga's case and put on record general guidelines for subsequent police interviews. We say theoretically because we have no evidence that police do or do not in fact follow those guidelines or the subsequent circular memorandum distributed by the Northern Territory Commissioner of Police. We further understand that in some other States, the practice of a "prisoner's friend" during interrogation has been adopted. It certainly does not happen in Tasmania and we would be pleasantly surprised if it did occur in the majority of the States. A second significant change which has benefited Aborigines is the impact the Aboriginal Legal Services have had on blatant police malpractices towards Aborigines. The cautionary warning sounded by the Redfern Aboriginal Legal Service on this point should, however, be noted. They point out that the arrival of the "watchdog" legal services has merely encouraged many police officers to plan in advance their acts of discrimination and organise themselves more efficiently when making arrests. No doubt the increased discussion of Aboriginal/police relations in recent years has had the spin off effect of making many reasonably minded police officers more aware of their relationship with the Aboriginal community, consequently this too must be seen as a gain. These abovementioned changes are meant to be selective and not exhaustive of some of the better changes which have taken place.

Notwithstanding these changes, Aborigines still remain over represented within the criminal justice system. The police continue to over arrest Aborigines and too many complaints still come from within the Aboriginal community about police handling of Aboriginal people.

Response to this state of affairs has been less than uniform: attempts to overcome the many problems associated with Aboriginal/police contact vary from attempts to increase

communications between the two groups, encouraging Aboriginals to join the police force, improving police complaint procedures, to procedural reforms relating to the detention and interrogation of Aboriginals. These reforms can direct us to the real solutions needed to bridge the gulf between Aboriginals and the police. Contrasted with the less than stimulating response from the authorities in States such as Queensland and Tasmania they seem most progressive and indeed encourage optimism for the future.

But negative and unimaginative responses from backward States must not be used as a yardstick for reform of Aboriginal/police relations. They will eventually follow suit once the thinking is done for them. The well hackneyed phrase voiced within these backward jurisdictions that 'we treat everybody alike' should be recognised for what they really are: an expression of political choice to maintain the status quo and to justify the unequal treatment of Aboriginals within that particular legal system.

Official police response in Tasmania

Approaches were made as early as 1975 by the Tasmanian Aboriginal Centre to set up an official liaison structure between the police force and the Centre. There were proposals made that when requested, police notify the Centre's field officer, or a legal officer when Aboriginal suspects were arrested or detained for questioning; that identification cards be issued to field officers; and that where no parents or guardians were available when juvenile suspects were being interviewed, a field officer or legal officer would be called to attend.

These matters were again raised with the Commissioner and the Minister for Police at a meeting in 1980 by representatives of the Centre following an incident at the Aboriginal Hostel where police raided the Hostel at midnight on a Friday night to execute a warrant for unpaid fines against a 58-year old Aboriginal. The Aboriginal Legal Service had already made arrangements with the prosecution section to have the warrants held over until the Monday. The Commissioner's response was typically negative. He raised the hoary old problem: 'How do you recognise an Aboriginal?'.

In our experience police in Tasmania have had little problem with this in most cases. Aboriginal names such as Maynard, Mansell, Brown, Everett, Beeton are well known in the general white community. There was a fear that changes in procedure might have to be applied to ethnic communities in this State without apparently considering whether or not this might be desirable. In response to an expression of no confidence in the Commissioner's investigation of complaints against his officers, he said that this did not "worry" him.

This indifference to the need for a better relationship between the Tasmanian Police and the Aboriginal community was noted recently by the Commissioner for Community Relations. In response to a letter requesting details of training programmes and

special administrative structures formed in police forces at State and Federal level, the Police Commissioner is reported to have said that he saw no need for such measures in his State. The Tasmanian Police Force is the only one which has taken no initiatives whatsoever in this area.

There is some reason to believe that attitudes at the training level go beyond indifference.

From information available to us it seems that at the Police Training Academy at Hobart, Aborigines have been named as persons 'likely to give you trouble on the average night on the beat'. They were often referred to as "the boongs" or "the black bastards". It seems the Commissioner has a different criterion than his training academy for determining who is or is not an Aboriginal! Presumably, as part of the preparation for police handling of the criminal elements, the academy invariably uses a fictional character whose surname would be Maynard or Mansell, names synonymous with Aborigines in Tasmania.

The aim of reform

Better relations between Aborigines and police can be improved by virtue of schemes already mentioned and adopted in some jurisdictions. To make a serious attack to provide better relations, however, means establishing a fairer legal system generally. The whole approach of reform should be based upon the notion of positive discrimination within the legal system so as to balance out the harsher elements of the legal system which have, and will continue to, affect Aboriginal people.

The aim of reform should be, initially at least, to show that the net effect of the application of the legal system to Aborigines is no worse than it is for whites. Major changes to laws having particularly harsh effects on Aborigines must be achieved. A balance also must be struck in relation to police dealings with Aborigines. It should be compulsory for police to notify the Aboriginal Legal Services or a next friend whenever they arrest or wish to interview an Aborigine. Failure to do so should result in any record of interview or statement being inadmissible in court. Complaints against the police should be heard by an independent body. An Aboriginal representative should be present on that body.

Attitudinal changes amongst police officers brought about by review of the curriculum at police training courses is also important but, not as important as correcting current police procedures in order to protect Aborigines at the crucial pre-trial stage. Good to have a cop who speaks nicely to you, but better to have established procedures which he must follow to gain a lawful conviction.

Finally, a reservation about some suggestions for reform. We do not believe that recruitment of Aborigines into the police force would have the intended beneficial effect for Aborigines. Aboriginal police officers could easily find themselves in the middle of conflict between Aborigines and the dominant culture

group and be expected to "uphold the law" and thereby alienate themselves from their own people. Additionally, unless police procedures are amended, what difference does it make if it is a black or a white police officer who enforces unjust laws and procedures against Aborigines? We also express reservation about structured liaison schemes, especially those between Aboriginal Legal Services and the police. Quite often the delegates become over familiar with each other, matters and issues take on a personal characteristic making it difficult for both sides to remain objective, and often the higher ups within the police force (who have not been privy to the meetings) have the final say over any recommendations arising from these discussions which undermines the whole purpose for these liaison arrangements. We believe it is better for the Aboriginal Legal Service delegates to maintain an impersonal relationship with the police hierarchy than to get bogged down in what may cynically be called window-dressing liaison groups or, at least have such a relationship in addition to being part of "liaison arrangements".

Conclusion

The Tasmanian Aboriginal Centre supports all moves to reform the Australian criminal justice system so that the net effect is to gain equal treatment of Aborigines within it. Police/Aboriginal relations will play a crucial part in any changes towards this end. In the context of improving these relations we support:

- * formalisation of police procedures relating to the detention and interrogation of Aborigines;
- * legislation amending the various Evidence Acts to declare inadmissible in proceedings any confession or statement gained by police but not obtained in accordance with the police regulations;
- * the setting up of an independent body to deal with complaints against the police;
- * reviewing curriculum of police training academies;
- * continued Aboriginal Legal Service access to Police Commissioners and Ministers of Police to discuss police matters.

We have reservations about plans to:

- * Recruit Aborigines into the police force;
- * structure liaison between Aboriginal Legal Services and the lower levels of police administration.

ABORIGINES & COURTS

The Struggle For Law: Aboriginal-Police Relations & The Role
Of The Magistrate's Court - North West New South Wales

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We are the ministers of pain and fear
And disappointment, and mistrust, and hate
And clinging crime; and as lean dogs pursue
Through wood and lake some struck and sobbing fawn
We track all things that weep, and bleed, and live
When the great Kings betray them to our will

(The Eumenides, in Aechylus's play, First Furies)

In July 1983 a 40 year old Aboriginal man was struck by a semi-trailer on the outskirts of a town called Moree in north west New South Wales. Mutilated beyond recognition, his body was removed from between the front wheels of the vehicles. And as the rescue squad, ambulance officers and firemen performed their duties one attending policeman was heard to outline what was, to him, the extent of this human loss:

Well, it could've been worse, it
could've been a white fella...

Such is the overt racism which exists in this particular town and in towns just like it throughout the north west of New South Wales. And such is the explicit reference and relegation to the status of 'non-human' which is accorded to just one more of the town's Aboriginal population. The policeman, of course, is not alone in his condemnation. The greater percentage of white residents would readily agree with him. My purpose in relating this particular incident is to focus attention on the manifest attitudes and assumptions which are often held by and shared among members of the NSW police force who find themselves stationed in 'Aboriginal' towns throughout the north west of the State. This paper focuses on two such towns, namely Moree and Wee Waa.

History reveals that mankind has a socialized penchant or predisposition to engage in atrocities - in the name of race of anti-race - in an a-human way without shame, disgust, like, dislike or disguise. The rational, philosophic, political underpinnings of race policies 'are coldly enshrined in law and are practiced both within and without the law with efficiency and with no moral repugnance'.¹ But these underpinnings do not exist in vacuo. They are planted, grow and flourish in a political, cultural, social and legal configuration of sympathy for what they do - or fail to do. The socio-legal configuration is what concerns us here. To attempt an understanding of the prevailing relationship between Aborigines and police it is necessary to examine the situation from an historical perspective. In doing so it becomes possible to submit that past policies and practices have heavily influenced the events and activities occurring in the 1980s.²

With the arrival of the first white people in 1788, all land was declared British territory. There was no treaty or agreement between invaders and invaded. The Aborigines were simply relegated to the status of 'non-residents'. With their right to the land ignored, and all land deemed to be vested in the Crown, a well concentrated - and British orchestrated - process of dispossession continued as 'settlement' extended. Massacres by soldiers, settlers and police are well recorded and while Aborigines fought a strong war of resistance, by 1860 the ongoing process and pattern of dispossession had been virtually completed.³ The establishment of the mounted police in 1825 marked a new era in Aboriginal/police relations. Assembled as a protecting force against escaped convicts, they were soon to become involved in violent confrontation with the Aboriginal population while performing tasks undertaken by the army in other frontier situations.⁴ The dual - yet entirely contradictory - roles of the police became those of 'protection' and 'prosecution'. Under the rule of law and in the guise of authority they became the force of dispossession, the dispensers of summary justice and, on many occasions, the instigators of massacre.⁵ The 1870s marked the beginning of the 'protectionist' era in NSW and the Government began supplying rations, blankets and clothing. In country areas, these were distributed to the Aborigines by the police.⁶ But perceived 'protection' was to become, in many instances, very real 'persecution'. In 1909 the Aborigines Protection Act was invoked and one of its major effects was to greatly increase the powers of police over Aborigines. While the Act vested control of and access to all reserves in the Board, it was the police who controlled such access. At the same time, police were duly empowered to remove an Aboriginal person from a reserve who was guilty of misconduct or who, according to the opinion of the Board, should be earning a living away from such reserve. It became an offence to sell or supply alcohol to Aborigines and for non-Aborigines to lodge or wander 'in company with any Aborigine'. Section 14 provided:

The Board may cause any Aborigines or any persons apparently having an admixture of Aboriginal blood in their veins, who are camped or are about to camp within or near any reserve, town or township to remove to such distance from the reserve, town or township as they may direct.⁸

Now, fully within the confines of an Act enshrined in law, the police could move Aborigines on and off reserves at will. They - and not the individual Aborigine - became the judge as to whether that person was, in fact, an Aboriginal person. According to the quantum of 'black' blood coursing through the veins of an Aborigine, he/she would be moved out of town and indeed out of the district. In addition, the police had the power to remove Aboriginal children from their parents if, in their opinion such children were seen to be in need of 'white' care and protection.

Some may wish to argue that such policies and practices belong firmly in our history. After all, our Government now condemns the apartheid policies of South Africa and prohibits sporting ties with that nation on the basis of its race policies. We now have the benefit of 'enlightened' policies such as the (Federal) Racial Discrimination Act (1975) and the NSW Anti-Discrimination Act (1977). But such 'advances' are of an essentially superficial nature; the reforms are piecemeal and the ground has been surrendered only insofar as it served the ends of respective Governments. The stance adopted by the framers of the Anti-Discrimination Acts was one of a private co-operation, non-confrontationist, anti-litigationist nature. The numerically - and financially - small wins have been fewer by far than the emotionally damaging losses. (*) In 1982, the NSW Aboriginal Legal Service reported that a return to the repressive, blatant abuses of police power was evident. Intensive 'sector policing' (purportedly pursuant to the provisions of yet another 'enlightened' Act, the (NSW) Intoxicated Persons Act, 1979) was still occurring around two of Sydney's inner city hotels.⁹ As for the practice of removing Aboriginal children from their parents, the NSW Department of Youth and Community Services has assumed the role once occupied by police in deciding if and when an Aboriginal child is in need of institutionalized care. As at November 1982, Aboriginal children comprised 80 per cent of all north west NSW children who were resident in State controlled institutions. Little wonder that Aboriginal people often regard police and welfare authorities with suspicion, and, at times, outright hostility. Generations of massacre and interventionist control have etched themselves deeply into the Aboriginal psyche.

In 1982, a Moree Aboriginal man, who now works with the NSW Drug and Alcohol Authority Detoxification Unit, spoke to me of the tactics employed by some Aborigines in that town:

We just used to sit and drink. We'd wait until we saw the bull wagon coming then we knew it was on. When the coppers got out and started to come for us we'd let them have it - tell them to 'fuck off', throw glasses at them and kick like hell. We'd have to make it worth their while. No Aboriginal drunk I ever knew went in without a fight. That's half the fun.¹⁰

The stance taken by two positionally known enemies is further reflected in the results of a survey conducted by the NSW Ethnic Affairs Commission in 1979. The survey included a question on police attitudes to Aborigines. When asked what special problems

* On 8 July 1983, two Aboriginal women were awarded damages of \$750 each when the Equal Opportunity Tribunal found that they had been refused hotel service on the grounds of their race. This case and its decision is the first time in Australia that a Tribunal has awarded compensation to Aborigines for Racial Discrimination.

were experienced by police in dealing with Aborigines, 64 per cent of respondents indicated that difficulties arose in relation to alcohol-affected Aborigines:

Many did make the comment that Aborigines affected by alcohol became extremely hostile and physically aggressive and thus difficult to reason with or control.¹¹

Let us take this theme - the perception Aborigines have of police, and the preconceptions police have of Aborigines - and apply it to our two towns in the racially troubled north west of NSW.

Moree

Moree has a long and abiding history of race relations problems in general and of Aboriginal/police relations in particular. The Moree Plains Shire has the largest Aboriginal population in NSW outside of the Sydney metropolitan area. In 1981, a Department of Aboriginal Affairs community profile put the Aboriginal population at 1,760 or 16.7 per cent of the total population.¹² Until the late 1960s, Moree's Aboriginal people were prohibited, by council ordinance, from attending the picture theatre, sitting in certain cafes, swimming in the town's pool or being admitted as patients to the public hospital. In 1957, political commentator and journalist, Allan Ashbolt, travelled to the town to interview both black and white members of the community in an attempt to come to grips with the degree of discrimination in the town and the racial tension which resulted from discriminatory practices. Almost to a man and a woman, the white people interviewed believed Aborigines were inferior, happy on the reserve, did not want to join clubs, be admitted to hospital, sit in the cinema, swim in the pool or even go to the local schools.¹³ 'I don't blame anyone for not wanting unclean people to sit in their cafes or taxis', said the Baptist preacher. 'They are useful as shearers', said a local shopkeeper. 'They should drown them at birth', commented one man. The white people were happy with the status of legally enforced teetotalism and since only two Aborigines had applied for the system of exemption which would give them 'citizen's rights', all were content with their lot.

A number of Aboriginal people voiced their hostility to the system and expressed a view that there were limits to just how much human indignity Aborigines could endure in this particular town. 'When my grand-daughter's class was asked who was going to the baths, she put up her hand. The teacher said to put it down because she was not allowed to go. It's just the skin that's all and it hurts', commented one woman.¹⁴

Almost 30 years later the rhetoric dictates that, in principle, such facilities as pools, cinemas, cafes, hotels and hospitals are now open to all. It is true that Aboriginal people are no longer hospitalized in a separate building, nursed only by inadequately trained Aboriginal nurses aides. Aboriginal people

do now swim in the town's pool - but only after the pool manager is satisfied they do not have head lice, ear, nose or throat infections or worse: 'You know, those diseases blacks get from sleeping around'. Such practices may be discriminatory or selective. Head lice and venereal disease are certainly not. But as the white manager would have it, only Aboriginal people catch such things. Drive-in picture theatres have eliminated the need to rope off a section for Aboriginal patrons. Take-away food bars have put an end to table service. But the last bastion of white supremacy is the country 'pub'. And it is here that the gap between rhetoric and reality is at its widest. But it is also here, in the bars of country pubs that Aboriginal political muscle - at the grass-roots level - has begun to show itself.

In 1979, three Aboriginal men were tried, convicted and sentenced for bombing the Imperial hotel in Moree. The front section of the building was reduced to rubble when these men decided they had experienced enough of the overt discriminatory practices of the publican and bar staff. No, they would not be served from the public bar. No, they could not enter the lounge bar. Yes, they could buy their grog from a door in the back laneway. Their money, it seemed, was good. Their personal patronage was certainly not. A strategically placed petrol bomb was their method of protest and considerable jail terms their punishment. The publican retained his licence and although Aborigines are now permitted in the public bar he also retains - and frequently exercises - his right to exclude them on the grounds that they are 'potential troublemakers' or 'southern stirrers.'

In 1981, a young Moree Aboriginal man determined to further demonstrate that discrimination abounded in Moree's hotels. Together with a Sydney television news crew he visited the Post Office Hotel. The Aboriginal man, together with his friends, approached the main bar. They were refused service. Again they asked to be served and again they were told to leave. This time the publican was supported by a band of white drinkers. The punches flew. The police came. Arrests were made, but not of a single white man. Many of the attending policemen sought hospital treatment as a result of the affray. And, on a charge of 'Inciting a Riot' the Aboriginal man and his 'accomplice' were banned - by order of a Moree Magistrate's Court - from re-entering their home town for a period of four years excepting for the purpose of attending a family funeral.

In 1981, David Brown of the Australian Legal Workers Group had this to say about Australia's criminal justice system - a system which could expediently, callously, 'legally' ignore the wider politico-social conditions which led to this particular incident:

A major feature of our existing criminal justice system is precisely to individuate defendants, to depoliticize illegality, to deny the wider social, political and economic context, to locate pathology in the individual, to suppress

appeals to wider class interests and assist the break-up of broader currents of opposition and discontent.¹⁵

For almost two centuries Aboriginal Australians have been denied, and in turn have often denied their own identity. But now, it seems, a revolutionary consciousness has been borne of the oppression. Black Australians are becoming increasingly politicized. But what happens when the societally recognized and approved avenues of access to politico-social and legal reform are continually blocked for the powerless? In the north west of NSW and elsewhere throughout Australia, the result is violence - violence against what Aborigines perceive to be a repressive legal power structure, the enforcement officers of which act with extra-legal impunity against 16.7 per cent of the population. Violence, however, begets violence.

In October 1982, President of the NSW Police Association, John Greaves, described the situation in towns throughout the north west of the State as 'violently explosive'.¹⁶ Policemen stationed in these towns, he said, were walking into explosive situations with only a pistol at their side and in fear of their lives.¹⁷ When one considers the weaponry employed by Aborigines, Mr Greave's comments are ludicrous:

It is police who are being harrassed, not Aborigines. Our members are being kicked, punched and bottles and stones thrown at them.¹⁸

Police, he added, were not issued with long batons to protect themselves from 'rioting Aborigines'. He seriously entertained the idea of sending up the Tactical Response Group - a high-powered, highly trained squad of militarily efficient policement. Mr Greaves again:

I know from my own experience of talking to a lot of whites, they won't go into those towns themselves because they're fearful. A blood bath will ensue if it's not stopped.¹⁹

Exactly one week after the NSW Police Association President spoke of an impending 'blood bath', one happened. But it was not a policeman or a white person who suffered verbal abuse, punching or kicking. It was an Aborigine who suffered. On 4 November 1982, a 19 year old youth was shot dead in a Moree laneway. Two of his companions were shot and seriously wounded. the national media called it a 'race riot'. A spokesman for the Aboriginal people of Moree challenged the label:

Don't argue semantics with me ... In Moree and everywhere else in Australia a race riot means the blacks were at fault. That's the way it's been portrayed in the media. That's why I'm telling you to get it right this time.²⁰

On Friday, 5 November 1972, NSW Police Minister, Peter Anderson was confronted by a bewildered, bereaved, angry gathering of Moree's Aboriginal community.²¹ Why had 18 Aboriginal men and only one white man been arrested following the melee? Could he guarantee them protection against the white youths who engaged in the nightly activity of randomly shooting at their homes on the reserve? Why had a police officer savagely bashed an Aboriginal man about the face with a torch? A 17 year old Aboriginal youth was brought to the front of the room. He had 28 shotgun pellets in his back - put there, it was said, by the publican at least two hours after the 'pub brawl'. The minister expressed his sorrow, his shock and his disbelief: Why hadn't he been told about this state of affairs in Moree before? He would send additional police to the town - that would 'solve the problem'.²² Moree does not need additional police. Nor does it need the militaristic Tactical Response Group. It does need those police already stationed in the town to perform their duties in a competent, compassionate, unbiased way. Fifty white drinkers were involved in this Moree version of "High Noon". One was arrested. Not one white man alleged to have been bashed by a policeman. Not one white man carried shotgun pellets in his back. In a January sitting of Moree Magistrate's Court, three white youths were charged with murder and malicious wounding. Their Supreme Court trial has subsequently been postponed on three occasions and they are now scheduled to appear in the Sydney Supreme Court on 7 November 1983.

William Clifford, director of the Australian Institute of Criminology, says that the law is 'at the cutting edge of the contact between black and white communities in this country'.²³ The case study which follows is but one stark example of just how sharp that edge can be.

Unexplained deaths and inconclusive inquiries usually evoke notions of Pretoria or Ulster, of security police and totalitarian regimes. In 1979, the African poet and philosopher of 'negritude', Aime Cesaire, commented bitterly on the mounting death toll of prisoners detained in the custody of South African security police:

When I turn on my radio, when I hear that
someone in jail slipped off a piece of
soap, fell and died, I say that we been
lied to: Hitler is not dead, he is
likely to be found in Pretoria.²⁴

And in 1980, Rona Fields wrote of the violent methods employed by the Royal Ulster Constabulary:

In the encounter between police and
policed there are no ambiguities of
recognition; it is a meeting not between
strangers, but positionally known enemies.
25

This particular police station was not located in apartheid-ridden South Africa; nor was it to be found within the riot-torn districts of Northern Ireland. Eddie Murray was neither a political detainee nor a suspected terrorist. He was an exceedingly drunk Aboriginal man and he died in the custody of those who are most often seen to uphold and to enforce the basic tenets of the rule of law. The script may be all too familiar; the actors and factors are of the same genre; the responsibility and accountability are equally onerous. But the stage this time was an Australian one.

Wee Waa

On 12 June 1981, Edward Murray, a 21 year old Aboriginal man, was found hanged in a Wee Waa police station cell. A five inch wide strip, torn from his cell blanket, had been deftly folded and threaded through the bars of the ventilation window above his cell door. The blanket had been knotted twice: once in order to secure it to the bars, and again to fashion the noose around his neck. His knees were bent, his feet were on the floor.

Barely over an hour before his body was discovered, Murray had been detained as an intoxicated person. He had been searched, and placed in the cells to 'sleep it off'. Under the provisions of the NSW Intoxicated Persons Act (1979) he could be detained for a period of up to eight hours and then released without charge. In contravention of those provisions he was detained in a police cell under lock and key.

This was the seventeenth occasion on which he had been either arrested or detained. All of his charges were connected with drunkenness, street fighting or abusive language and he was known to Wee Waa police as a 'multiple offender'.

There is no doubt that on this particular occasion Eddie Murray was extremely drunk. The full extent of intoxication was established by a post-mortem conducted the following morning. Murray had a blood alcohol level of 0.3g/100ml, or 0.3 per cent - six times greater than the level at which the law permits drinkers to drive.

In evidence to a coronial inquiry which began in the Narrabri Court of Petty Sessions on 9 November 1981 before L.R. McDermid SM, Professor D.I. McCloskey of the Physiology Department at the University of New South Wales submitted that Murray's blood alcohol level was such that:

simple motor acts such as fastening buttons, threading a belt, or locating a key on a ring and using it in a lock would be grossly impaired or impossible.²⁶

He added:

it is unlikely that an individual with a blood alcohol level of 0.3g/100ml could tear a strip from a blanket and/or devise a fashion a noose with a running or slip knot and attach same to a bar.²⁷

Regarding Murray's ability to perform the functions necessary to contrive the conditions by which to hang himself, opinions were conflicting. Other medical and forensic experts were of the view that while a blood alcohol level of 0.3g/100ml would render a 'normal' person comatose, it was possible that someone with established hard-drinking habits would, over time, develop an increased level of tolerance.²⁸ Murray had drunk to excess, but he was 21 years old - hardly of age to have established the increased tolerance level indicated by one particular pharmacologist.

On 18 December 1981, the Inquest Touching The Death of Edward James Murray ended in the City Coroner's Court. Mr McDermid concluded that:

... I can find no evidence on which I could be satisfied that the deceased committed suicide. It is the opinion of the police officers that the deceased took his own life. I am satisfied that the deceased was detained in police cells ... if he did it himself or if some other person did so ... that other person would have to have been a police officer ... There has been no evidence put before me as to a motive for one or all of the police called to enter into collusion with civilian witnesses to depose to such a monstrous lie ... On the evidence before me I feel that I must bring in an open verdict ...²⁹

And so an 'official seal' was placed on the life - and death - of Edward James Murray. For 21 years he had known what it was to be an Aborigine in a country town. For ten of those years he had lived in a tent on an Aboriginal reserve devoid of the most basic of human requirements. He was a 'problem student', as happy to leave school as was the school to see him go. It was said that he drank too much, used abusive language, fought with others and that he fought with himself. Eddie Murray had been reduced and rendered dependent long before a five inch wide strip of cell blanket went around his neck.

We do not know who killed Eddie Murray. The coroner does not know who killed him. What killed Eddie Murray is perhaps an easier question to answer - bearing in mind that 'who' involves, in this instance, only two possibilities. 'What' embraces a great many factors and variables. Murray's case must be seen as one of doubtless many of this kind, namely that the 'system' was responsible. His death is not simply another curious Aboriginal

'horror story'. What killed him was an elaborate equation, one with factors which have no place in a modern democratic society that either boasts of, or pledges itself to, a scale of human rights enshrined in liberal democratic theory.

The coronial inquest into the death of Murray failed to establish the manner and cause of his death. It failed not because the two barristers - instructed by ALS solicitors - were either personally deficient or professionally negligent. It failed because of the inadequacies inherent in a criminal justice system; one which does not represent the expression of society's common interests and needs.

When the inquest convened it required the services of a magistrate and coroner, a police prosecutor, legal counsel representing the family of the deceased, police and civilian witnesses, and expert medical and scientific opinion. Some would argue that such apparatus is indicative of an efficient, fair, unbiased legal system: that Murray's hearing was a triumph of an open, honest, democratically based criminal justice system. While it is true to say that a grossly deficient system would have literally buried Murray without care or caution, it is equally true that by virtue of its composition the same legal apparatus reinforces the remote, hierarchical, bureaucratic nature of the law as it affects the powerless.

Four main facets of this powerful/powerless dichotomy are both readily identifiable and indeed questionable. They are: the suitability of an inquest as a means of establishing the conduct of various actors; the position of the police prosecutor (and person assisting the coroner) in assembling the evidence for presentation at the inquest; the role of the magistrate in determining the outcome of such an inquiry; and the nature and function of those most closely associated with inquisitorial proceedings - the police as an occupational group.

The Inquest

Inquest procedure is the primary device for testing conduct and establishing the manner and cause of death. But its numerous defects can be - as indeed they have been - abundantly illustrated. In 1970, criminologist R.W. Harding saw the major defect as that 'the police themselves gather and sift the information that eventually goes into the Inquest Brief'. This procedure 'provides an opportunity for information to be censored or re-arranged at source, before even the Coroner or the person assisting the Coroner gets to it'.³⁰ Applied to Murray's death, Harding's criticism finds a secure base.

Records of telexes, telephone calls and correspondence reveal that the police assembled - and sifted - opinion on whether a person could, in fact, hang while their feet were still on ground. They also sought proof that an individual with a blood alcohol level of 0.3 per cent would be capable of performing other than basic motor functions. The coroner was even presented with an injudiciously prepared and sloppily produced document which indicated that Aborigines in custody had a propensity to commit

suicide. We may never know whether the positive responses gathered by police and presented to the Coroner were the only ones received. As Harding says, 'when the Inquest Brief has been prepared, not all that appears in it necessarily comes out at the Inquest. The Coroner himself, or more realistically, the person assisting him, decides what part of it shall be publicly revealed, and counsel for the relatives is steadfastly denied access to the rest of the brief'.³¹ Perhaps an open trial in the matter, in the true sense of an adversary proceeding, can produce a better balance of fact and opinion.

The Prosecutor

In most cases, the 'person assisting the coroner' is a policeman. One might reflect for a moment on the logic and the need for impartiality in appointing a police prosecutor, for there is strong evidence to suggest that the 'brotherhood syndrome' among police is not confined to one town, region or state. It is not, therefore, unfair to suggest that the findings of Mr Barry Beach QC, during his investigations into allegations of misconduct by members of the Victoria Police Department, have relevance and applicability here. Beach recorded adverse findings against 55 officers. By the time police prosecutors had done their job, not one police officer had been convicted.³² It matters not that these 55 officers are considered 'rotten apples', to use the common apologetic parlance of departmental officials. It matters much that the person assisting the Coroner belongs to the same occupational group. The entire system of police investigating police, of police assisting police, and police disciplining themselves - the exclusion of the world - is under severe attack and the appointment of Ombudsmen in each State can be seen as an attempt to at least partly overcome some of these problems.

The Magistrate

Contrary to the normal procedure in country towns, the inquiry into Murray's death was not heard before a travelling circuit magistrate. This fact alone should have assured counsel representing the Murray family of at least a modicum of impartiality. A circuit magistrate is, after all, part of the very society upon whom he dispenses the criminal justice system. He is usually resident in one of the larger towns covered by his area and he is, by virtue of his position, in constant contact with the police in that area. Given the dominant social ideology in towns throughout the north west of NSW it would be most unlikely that he would escape the pressures applied to other professional white residents by the permanent white populations. The implied threat of social ostracism was seen, by Anti-Discrimination Board researchers in 1982, to influence the decisions made in court.³³ Harding has launched a vitriolic attack on the suitability of coroners as a group to hear inquests which involve, in particular, the suggestion of police misconduct:

The failure of many Coroners to perceive their proper role (is) their spinelessness ... this is probably because their normal daily work

brings them into such close contact with the police that they are bound to share, more readily than they should, many police standards and to resolve doubts in favour of the police. Except with the most unusual Coroner, the mentally tough spirit of inquiry which should be a primary quality for his job inevitably softens when he is investigating a killing by a policeman.³⁴

It is true that Mr L.R. McDermid SM and Coroner, who travelled to Narrabri court of Petty Sessions from the City Coroner's Court at Glebe, was not commissioned to investigate a killing by a policeman. But as the inquiry progressed he was faced with barrage of conflicting scientific, medical opinion. He was forced to discredit the self-contradictory perjured testimony of one particular police officer. Yet his verdict was an 'open' one and only that by dint of his extraordinary ability to withstand societal pressures and to escape in part the relationship and ethos inherent in his position. This hearing, and an open finding, cannot be considered a plus for the legal system. Nevertheless, Mr McDermid was, as Harding described, a most 'unusual' coroner.

The Police

Because Murray died in 'protective' custody and because he may well not be the last to do so, there appears a need to address the effects which stem from the organizational structure and social role of the police force itself. In doing so we find an occupational group - which has been invested with the institutionalized use of society's discretionary powers - eminently capable of effecting what the political philosopher Rousseau has termed the transformation of 'strength' into 'right' and 'obedience' into 'duty'.³⁵

There are many operative factors which consistently impinge upon the working lives and social relationships of policemen in country towns. The appointment of police to 'Aboriginal' towns further complicates their occupational status and reinforces the 'group' tendency to represent the desires of an hypothesized 'normal' decent citizen.³⁶ The genesis and function of institutionalized power by the police is predicated on three main principles of 'group' conduct. The first concerns the fact that police accept and morally justify their use of power, force and at times both psychological and physical violence. Secondly, their predisposition to do so arises out of their occupational experience. Thirdly, employment of 'para-military' style tactics is functionally related to the collective occupational, as well as to the legal ends, of the police.³⁷

In country towns policemen do not form part of the local core status system and a consequence of their status marginality is that they turn 'inwards' for emotional and social support. Throughout the inquiry into Murray's death the police exemplified

this 'group' support. Tacit obstructionism went further than the boundaries of local police officers as district and regional officers reinforced the accepted - and acceptable - notion that police see themselves as the 'official pariahs' or small, insular and parochial country communities.

A level of frustration accompanies the position of a policeman in a town with a significantly high Aboriginal population. There are repeated confrontations with the 'too-smart' characters, the drunk and disorderly, the multiple offenders who, it appears, have little or no respect for the law or its enforcement officers. Eddie Murray was but one example of the 'provocation' given to country policemen.

Inevitably, if one of their members assaults a prisoner, the greater majority of police can well imagine how they themselves might have been tempted to have done the same ... Why, therefore, should one of their members be offered as a scapegoat to the rest of society ... ³⁸

The solution is to engage in group solidarity, to simply - and swiftly - close ranks.

The inquiry into Murray's death raised many, if not more issues than were resolved. The contested facts remain: could a man who weighed only eight stone and stood five feet four inches tall, with a blood alcohol level of 0.3 per cent tear a strip of cell blanket, fashion it into a noose, thread it between the bars above his cell door (at a height of six feet six inches) and hang himself within the space of fifty minutes? The Murray family remain committed to agitating for a police inquiry into Eddie's death. But, irrespective of the fact that the subject of a departmental inquiry was one of the first items on the agenda when Police Minister, Peter Anderson, assumed his new portfolio in February 1982, sources in the NSW Premier's Department say it has been permanently - one might add conveniently - 'shelved'.

Even if it is determined to conduct a police inquiry, what likelihood is there that it will reach an unbiased conclusion? A criminal trial decides whether the standards of society have been transgressed. A policeman who faces only a departmental inquiry - implemented and conducted by his peers who share the same idiosyncratic 'group' values - is not judged in the same way as the other members of society 'who seem prima facie to have transgressed society's standards'. ³⁸

Conclusion

One might well ask whether this pattern of Aboriginal/police relations is destined to continue. Some would have us believe that incidents like those in Moree and Wee Waa - and on a grander scale those of Watts, Brixton, Sharpeville and Soweto - were sporadic outbursts: the product of too much alcohol, not enough police and even adverse climatic conditions.

But there is more to it than this. There is a very real history of indifference, intolerance and ineptitude on the part of the 'the system'. Again and again the principle of 'equality before the law' gives way to the pressure of institutionalized adversity. Members of the Aboriginal Liaison Unit - established within the NSW police department - were present within hours of the Moree shooting. Doubtless those who comprise this unit are motivated by noble sentiments. But it is not enough that government is 'seen to be done'. The creation of an Aboriginal Liaison Unit did not stop the shooting of an Aboriginal youth in Moree. It did not save the life of another in a Wee Waa police cell. One wonders how many more young Aboriginal people will die in outbursts of violence before this country - viewed by the majority as an egalitarian, liberal, democratic society - does enter the arena of race reprisals on the scale of Soweto, Watts or Brixton. The guilt, then, may be equally enormous and diffuse. The actors and factors are, now, readily identifiable, answerable, accountable and responsible.

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29. C.I.T. (S) p. 8.
30. R.W. Harding, Police Killings in Australia, Ringwood, 1970, p. 220.
31. loc.cit.
32. See Peter Sallmann, 'The Beach Report resurrected: Reasons for hope or despair', in J. Basten et.al. (eds.) The Criminal Injustice System, op.cit, pp. 249-271.
33. ADB Study, op.cit.
34. Harding, op.cit., p. 221.
35. J.J. Rousseau, cited in S.P. Huntington, Political Order In Changing Societies, USA, 1971, p. 9.
36. Stuart Hall, Chas. Critcher, Tony Jefferson, John Clarke & Brian Roberts (eds.), Policing The Crisis: Mugging, The State & Law and Order. London, 1978, p. 38.
37. Wm. A. Westley, 'Violence and the Police', in S. Endleman (ed.) Violence In The Streets, USA, 1968, p. 452.
38. Harding, op.cit, pp. 227-228.

Aborigines & The Courts I

Terence Syddall
Stipendary Magistrate
Perth

I was born in a Lancashire mining town of good mining stock and grew up with my nine brothers and sisters in a "two up and two down" cottage familiar to those of you who have watched "Coronation Street". I believed that I was destined for the life of a coal miner and the thought that I might one day be something else never occurred to me. I have fond and vivid memories of listening to my father and other miners debating social, political and work matters and of pronouncing judgments on important community issues with a conviction born of a familiar understanding of the rules which controlled the behaviour of all who lived in the locality. From them I learned the strict moral code of the working class, the rules of behaviour which had given direction to generations of all our tribe. They were not idle rules and related to such diverse matters as pit safety, questions of honour and etiquette, the difference between the sanction of haranguing and the offence of scolding; how to handle the upper class and how to despise foreigners from other towns or even other streets in the same town. Most of these lessons were learned in the front street after the evening meal when the men sat on the heels of their clogs, belted and braced with their backs settled against the wall of a continuous row of houses meandering towards the moors. I learned without knowing I was learning and at fourteen became a miner complete with lace-up clogs, snap-tin and water bottle. There were no surprises underground - I knew the roadways, the dangers, the language and the rules and the skills came to me with the ease of an inherited ability. I was a pit lad at home, unlike the conscripted eighteen year-old "Bevin Boys" from London and other strange places whose education had fitted them for different things.

Many years later, in 1970 when, after practising as a lawyer, I was appointed Magistrate for the Kimberley region of Western Australia, the lessons of my formative years in that close-knit fraternity which was my locality once again stood me in good stead for they facilitated empathy with Aborigines, their culture, their social means of control and the mechanisms used by them to minimise outside interference. This did not, however, happen immediately.

My first contact with them left me with a feeling of total inadequacy - I wanted to leave the place and get away from the violence, poverty, degradation, immorality and sickness which was everywhere - I'd seen the effects of the 1930's depression but nothing like this.

The Broome Regional Prison was always filled to capacity with Aborigines, as were the Police Lock-ups in all the other Kimberley towns, and I was at a loss to know what could be done. I wasted a lot of time talking to white people about the problem - each was an expert, delivering simplistic answers in the most profound manner. Of course, I was new to the region and hadn't

met the many dedicated people who have devoted their lives to the mitigation of some of the hardships experienced by Aboriginal people in the Kimberley. Although Europeans had been unable to provide satisfactory answers to my problem it was clear something had to be done - too many Aborigines were coming before the courts and, many were sentenced to imprisonment for the most trivial of offences. The Department of Corrections informed me that although Aborigines in Western Australia were less than 3 per cent of the population, they outnumbered considerably the white prison population of persons serving six months or less. There simply had to be an explanation other than those expressed by my European contacts.

I decided, therefore, to visit the Prisons and Lock-ups to speak to the inmates themselves.

Upon being questioned, the vast majority of Aboriginal inmates said they had been imprisoned for drunkenness whereas records indicated that they had been sentenced for such offences as assault, disorderly conduct, resisting arrest, stealing, unlawful use of motor vehicles and non-payment of fines. Of course, a check of Police files indicated that most of the offences were alcohol induced or related.

From these discussions and discussions with other Aborigines it became clear that Aboriginal knowledge of European society was as abysmal as the knowledge whites had exhibited about Aboriginal matters. It seemed to the Aborigines that Europeans were never punished when they got drunk whereas Aborigines were. In this, of course, they were close to the truth because it was unusual ever to find a European charged with simple drunkenness, but whether this was explicable only on the grounds of discrimination or because Aborigines are much more obvious when drunk it is hard to say - perhaps a bit of both. Certainly domestic fights between spouses usually had different consequences depending upon race. Europeans fought behind closed doors whereas Aborigines gave vent to their feelings in open camps and their public show of violence led invariably to arrest for disorderly conduct or assault. To them of course their offences was being "full drunk".

Speaking of alcohol, it never ceased to amaze me how quickly Aborigines would sober up upon the appearance of a police officer or other figures of authority and I often wondered how much of their drunken comportment was a sham and how much was real. I believe that Aborigines learned their drunken comportment from white stockmen and miners from out of town. They would hit the towns intending to have a good time and the risk of arrest was part of the deal. They wanted to get drunk, have a fight and a woman and they did their drinking in bars frequented by Aborigines. After the first beer the back-slapping, singing, shouting and boisterous behaviour begins - no question of drunkenness at this stage, just a determination to have a good time and to show everyone else that they are enjoying themselves. They have donned the mantle of drunkenness to afford them the opportunity of having a "time out" period - a period when normal rules may be broken in the knowledge that breaches will be excused

or tolerated because he's "drunk" and after all he's been in the bush for a while. But even the drunken comportment game has its rules and these are learned from peer groups. A man might slap a girl's bottom and get away with it but going further may bring trouble - not only from the Police, but also from his mates. Aborigines observing this behaviour copy it as far as they can but because they are never completely accepted into white society, the WHOLE lesson is not learned. They do not know what is acceptable drunken comportment within the whiteman's code and they are dumbfounded upon being arrested for assault or disorderly conduct when all they have done is copy the white fellows.

If you think I am exaggerating, and are not inclined to accept what I have just said consider the office Christmas party where, after the first drink, all sorts of remarkable things happen. The Manager receives advice from the junior office boy. The typist may change from a shy retiring miss to a seductress and all sorts of "out of character" things occur. Yet these same people will act quite normally if they gather in the local pub for a few beers at other times during the year. It is food for thought.

Because many town-dwelling Aborigines have little or no opportunity of practising their traditional customs they frequently use alcohol as a substitute. They sit in groups and pass bottles of fortified wines from one to another in a ritualistic way. From it they derive a feeling of bon ami, warmth and sharing which they miss because these things are central to their character. Naturally, the wine takes effect, and when they become a nuisance by European standards, they are arrested for disorderly conduct or something similar.

As you are probably aware, the common sanction in most unsophisticated societies is the public harangue and Aboriginal people use it frequently. If a person feels aggrieved he will "growl" his victim in the presence of other members of the community and cut him down to size. The pub, is the obvious place to do this especially when alcohol has raised memories of hurts - real or imaginary. Quarrelsome behaviour is, of course, in European terms disorderly conduct and arrest and imprisonment often follows for doing what, in his eyes, is his right.

When two people of the same skin group fight it is not uncommon to see a woman, whom they are required by their law to avoid, to divest herself of her clothing and stand naked between them. Naturally, the men cannot look at each other without looking also at her and the fight ceases. Unfortunately, if the woman is seen by police she will be arrested for disorderly conduct or offensive haviour and yet another Aboriginal method of social control takes a beating. Criticism was often levelled at Aborigines for spending pension and welfare cheques on grog. Many Aboriginal men in receipt of unemployment benefits believed that no obligation existed in them to support their families with monies received from that source. However, their attitude changed when it was pointed out that cheques received by them were indelibly marked with the names of the persons for whose benefit they were drawn in exactly the same way as a animal caught in the

hunt is earmarked for consumption by traditionally designated kin. Government agencies must, I believe, be made aware of the nature and importance of the rules of kinship and Government rules should be modified by them to take into account Aboriginal customary rules.

Another matter which I found puzzling was the lack of discipline amongst Aboriginal children in the Kimberley towns as compared with their counterparts in traditionally oriented communities. What I did not know was that women played an indispensable role in the education of all members of traditional Aboriginal societies. During hunting and gathering expeditions, the women taught children most of the skills required for survival as well as most of the customs and laws. The commonly held view that boys received all their training and discipline immediately prior to initiation is patent nonsense and pays no regard to the years of education given by women. The advent of the community store has, to a large extent deprived children of the benefits of education and discipline formerly afforded to their predecessors during foraging expeditions and this, it is conceived, is a major contributing factor in the breakdown of traditional law and child delinquency.

One of the matters which was a source of major difficulty for Aborigines charged with the commission of offences as well as for me in my endeavours to administer justice concerned language and concepts. There is, for example, no equivalent in Aboriginal languages for the word "either" or the word "or" therefore, to take a plea in the form "are you guilty or not guilty" does not make sense to them. The matter, moreover, is not resolved simply by saying "did you do it?" because a man may have done the act and yet not have broken the law because the element of intention may not have been present. I had a case where a man struck his wife and was charged with aggravated assault - a serious offence. I explained the charge to him in simple English and told him it was against the law to hit anyone but much more serious to hit a woman. He said that he understood and pleaded "guilty". The facts given by the Police were that the wife was found wandering down the street on her way to the Hospital with a head wound. The husband was questioned and admitted having struck her with his stick. When I asked the defendant what he had to say he said something to the effect that he had hit her with his own stick after she had pulled her pants up. I then directed a plea of not guilty be entered and the case went to trial. He was acquitted on the grounds of provocation, having caught his wife in the act of adultery.

Language often created difficulties and so sometimes did cultural differences. I was on my way to Halls Creek one day and a radio message diverted the plane to Balgo Hills Mission. When I arrived there the place was in turmoil because the headmaster had been assaulted. It appeared that the teacher had been standing at the blackboard in front of his class when an Aboriginal man entered the room and, without speaking a word, knocked the teacher unconscious with a blow from his clenched fist. The assailant immediately left the room. Naturally enough, the teacher laid a charge of assault against the Aborigine and to this charge the

defendant pleaded guilty. After the facts had been given by the Headmaster the defendant was asked for an explanation but refused to give one and I sentenced him to a short period of imprisonment. Sometime later, it came to my knowledge that the defendant's son, whilst walking to school, had, on a number of occasions, been assaulted by another schoolboy from the same camp. The son complained to the Headmaster who, in European fashion, told the boy not to worry him over his schoolboy squabbles. The boy then told his father who was a very traditional man. It appeared that the father had equated the teacher's role with that of an "uncle" preparing novices for manhood and whose duty included arbitration on disputes between novices, default of which rendered him liable to punishment by the natural father of the injured novice. As the Headmaster ("uncle") had refused to arbitrate between the schoolboys ("novices") it followed that the father had to punish him in accordance with the law. Had the teacher been aware of the role assigned to him by members of the community the assault might have never occurred.

Avoidance rules make courts difficult to run when a witness is not permitted to look at a defendant and, unless one is aware of this, a man's credit may be doubted. Again, the name of a deceased person cannot be mentioned and a witness may refuse to look at a photograph of a deceased. Sometimes people will plead guilty rather than have a matter go to trial and run the risk of revealing tribal secrets or of repeating words which provoked an assault. For example, the names of male and female sex organs, the names of dead persons, and sacred objects.

It is not easy getting information from Aboriginal people, their confidence in Europeans has been shattered many times and they guard their secrets jealously. I was tested on numerous occasions and had my leg pulled more times than I care to remember, but once they were sure that I was dinkum and really wanted to help, they were generous and patient teachers.

After a while, I understood some of the problems facing Aborigines and naturally they understood a great deal more about my law and the problems I faced in administering it to a multi-cultural society. From January 1971, I invited Aboriginal people to sit with me in Court and to advise me on matters Aboriginal. In turn, I advised them of the requirements of the white law and this information was disseminated by them. In addition, in defended cases I explained to the defendant, the advisers, and others present in Court, the substantive law and procedures as they arose. In consequence, less mistakes were made, Aborigines began to feel less like victims of white society, and best of all, the prison population was reduced. Aborigines started to draw analogies between the white law and their own rules of social control. It was a very useful experiment which ended when I returned to Perth in 1974.

Whilst in the South my contact with Aborigines was maintained because of reports I did for the Commonwealth and State Governments on the iniquitous Skull Creek incident and other events which had occurred in the Goldfields and Central Reserve and, in 1976, I asked if I might return to the Kimberley to enable

me, in my spare time, to do a comparative study of Aboriginal and European systems of social control. Sometime after my return the then Attorney-General Mr Medcalf, asked me to conduct an official enquiry into the question of Aborigines and the law, with particular emphasis on the development of greater understanding and harmony between races. At the same time I was to continue functioning as a Stipendiary Magistrate holding courts in situ with as much community involvement as possible. First, I went into the remote communities of the Kimberley to places like La Grange, Beagle Bay, One-Arm-Point, Limbadina, Christmas Creek, Fitzroy Crossing, Looma, Balga Hills, Forest River and Turkey Creek. I did not make suggestions but told them of my task and the problems I had. They, in turn, told me of their problems. After many many visits extending over a period of many months a greater understanding resulted. What was said at these meetings was passed on from community to community by traditional means and by the use of cassette-recorders which I supplied to group representatives.

At Fitzroy Crossing during a meeting of about 1,000 Aborigines it was suggested that many more advisers be appointed to assist me in Courts in the Kimberley. But this of course raised serious difficulties because although both the Police and Aboriginal Legal Service had cooperated in the experiments thus far the legal status of advisers was questionable to say the least. What advice should the Court accept or reject? What difficulties would be involved in-so-far as defence and prosecution were concerned if advice were given to the court contrary to the wishes of the parties. Then it was suggested that Aboriginal Justices of the Peace be appointed, but this raised problems. In traditional Aboriginal Societies there is a division of the entire population into sections. Everybody at La Grange for example is affiliated from birth with four named sections - Barrunga, Banaga, Baljarri and Karimba. Membership of any particular section is an element in the determination of status viz a viz; other Aborigines. These relationships, which display the relative status of people to one another, are reflected by kin terms. Use of these terms is not limited to situations where consanguinial and affinal lines occur, but extends on a classificatory basis throughout Aboriginal Society. Avoidance and other relationships are based on and derived from status. Implications of this situation are, that in order to meet the difficulty presented by the status position inherent in the kinship and section system in communities, it was recognised that there would be a need for the appointment of at least one justice to represent each section. In this way those, by virtue of their status, having a role traditionally in the imposition of discipline according to Aboriginal law to those standing in appropriate classificatory relationships to them (and correct sections) would always be available as justices to fulfil an analogous function.

Of course, there is, in the appointment of officials in Aboriginal Communities by Europeans, the temptation to appoint literate and articulate community members in order to facilitate training needs and administrative requirements. Governments do this all the time and wonder why the practice so often results in

social disruption and non-achievement of desired goals and waste. A further problem was that if Aboriginal Justices were to be appointed they would be so only after their selection by the communities and they would come moreover from the largely illiterate community power base.

We were aware that the appointment of illiterate Justices of the Peace would raise eyebrows in many quarters particularly when it is remembered that Justices are required to read and write complaints, take notes of evidence, read statutes and perform other administrative functions. However, we were determined to resist any move which cut across the right of communities to appoint the justices of their choice. Moreover, I was conscious that illiterate Justices are not something new - in fact the majority of justices in the Merrie England of the Middle Ages were unable to read or write and relied on clerks to perform their administrative tasks.

It occurred to me, therefore, that if I were to train bench clerks drawn from the ranks of the educated young, they could do the reading and writing for the Justices and, if this were to happen, it would have the added advantage of partly satisfying the complaints of the old people that the young were not helping them with their problem of coming to terms with the twentieth century. Further, if a pamphlet on court procedure were to be written and translated into language and simple English it could be learned in much the same way as traditional rules are learned. This was done and a copy of the English version is provided for your information in the other paper I have provided for your information.

One of the things which intrigued me was not so much the difference between the substantive (as opposed to procedural) Aboriginal law and the Common law but their many points of similarity especially when the common law was viewed from an historical perspective. Newly created rights, duties and obligations were invariably accompanied by ceremony so that all community members were immediately seized of the knowledge in exactly the same way as feudal incidents of tenure were publicly acknowledged. Moreover, whilst it is clear that strict liability exists in Aboriginal law it is also clear that the concepts of carelessness, negligence, recklessness and intention also exist. In discussions with Aboriginal men on the subject of culpability, distinctions were drawn by them concerning acts which occur by chance and those which are intentionally brought about. It is not known whether these distinctions are recent developments resulting from acculturation or otherwise but informants indicated that such distinctions have always existed in some areas of their law. Certainly the traditional men who administer the European laws have no difficulty in understanding the difference between negligence and intention indeed, it is precisely because, to their minds drunkenness often renders a person incapable of forming an intent to commit acts or bring about events which led them to believe that they could not, under their own code, punish breaches of traditional law committed whilst under the influence of alcohol.

But what of traditional law? What, I was asked, does the white fellow law say about a man singing sacred songs in the wrong

place? My answer was that if such conduct resulted in a breach of the peace it would be disorderly conduct and would be punishable by fine or imprisonment. Complaints of that nature were in fact dealt with and people were convicted for offences relating to abuses of secret sacred matters done in public. Questions were then raised about traditional violent punishment and I had to tell them that I did not think such punishment would be allowed by the Government. Much publicity has been given to these aspects of traditional law but I can honestly say that such sanctions are rarely used. It seems to me though, that the principles of diversion could be looked to as a possible answer to this problem. At times traditional sanctions are used to save face because a man does not know of any other way. One day, I was asked to go to La Grange to hold court as I usually did, in a bush setting. The police had charged a man with assault by sticking a spear into another man's leg, - the wound was only about half an inch deep. I read the charge and he pleaded guilty. After the facts had been read he told me that he'd been lying as if asleep on the verandah of his house at night when the man whom he subsequently speared crept in and stole his young wife away. After a while he brought her back. Next morning, he had punished the man by spearing him - but not properly, only symbolically. He said that he was sorry he had to do it that way, but white fellow law couldn't help. I placed him on a bond in the sum of \$50.00 to be of Good Behaviour for three months. He was pleased and surprised when I received a verbal complaint from him about the conduct of the wife stealer who was charged and convicted of being on the curtilage of the husband's house without lawful excuse. I am convinced that Aborigines know that violence in the form of self help more often than not begets violence and would prefer to settle matters in other ways. This, I believe is particularly so in communities which are made up of disparate groups. I was asked what my law offered in the way of preserving traditional matters and again we had long discussions.

The use of probation orders seemed to be an answer. By this means, a consenting person could be given to an honorary Aboriginal probation officer to be "grown-up" again and "made to think straight" about the customs and usages of his people. Conditions as to residence could be made which gives power to banish for a period. Hunting, tracking and other bush skills could be taught and the stories, songs and other cultural matters could be learned or relearned. Community Service Orders seemed appropriate particularly in communities where the elderly and infirm needed help. Of course, if a man chose not to go on probation, he would be treated in the white way by fine or imprisonment.

Can we make our own laws? We want laws about grog, motor cars, vandalism, humbug offences, breaking up property - we want peace in our communities. I was, of course, able to explain that by-laws could be made if the Government passed an Act to allow it.

What about Police? Contrary to popular belief Aboriginal communities asked for police protection. After discussions it was their wish that police aides be appointed from their number to help keep the peace. They wanted aides who knew the aboriginal

law as well as the white law. Recommendations were made to the Government and Justices of the Peace, bench clerks and probation officers were appointed for La Grange and One-Arm-Point and Police Aides were sent to Port Hedland for training. The Aboriginal Communities Act was passed to enable by-laws to be made by Aboriginal Communities and the two communities I have just mentioned embarked upon a pilot scheme.

The pilot scheme was so successful that a number of other communities have adopted it with success. La Grange has now moved towards a synthesis of the customary law and by-laws referring to them as the "Bidyadanga Law." It is the view of that community that they should, as soon as possible, have total control of the Bidyadanga law without interference from Europeans unless called upon to assist. Legal representation should not be allowed in the case of breaches of the Bidyadanga law because this inhibits the synthesis process.

Without wishing to exaggerate, a great deal has been achieved in the past three or four years as Aborigines are striving to achieve a great deal more. It is heartening to see the signs of optimism growing in people as they realise their potential for the first time in generations. This seminal concept must be nurtured by Europeans taking part in its development as equals and not taking over with authoritarian or paternalistic attitudes. Aboriginal communities, must I believe, be seen as discrete communities with every right, subject to the general law, to control and regulate their own destinies. To argue against the right of an Aboriginal community to exclude European interference from its domestic affairs is to impose upon them European values at best, or, at worst, to infer that they cannot be trusted to regulate their own affairs. Individual rights in an Aboriginal community are not defined so strictly in isolation from its members as they are in European communities. That is to say, the balance between the rights of the individual and those of the community as a whole, are drawn less favourably for an individual in Aboriginal communities than in European communities. An Aborigine, therefore, who becomes part of an Aboriginal community does so with the full knowledge of that community's Aboriginality and must be taken to have accepted restrictions on his individual rights, just as a monk who enters a discrete order would be stopped from pleading his individuality in the face of monastery rules.

Differing standards and levels of acculturation of Aborigines make it difficult presently to conceive of the precise needs of every community in Western Australia. As each community becomes more experienced in the field of social control, its particular needs will become apparent and action can be taken to enable them to achieve their desired goals.

Greater mobility and contact between Aboriginal Communities suggests a possibility that from their exchange of ideas and concurrent operation of their by-laws a common standard in the application of the law by justices will develop across the State and ultimately result in a "common law" in much the same way as the common law of England developed.

Any doubts in the minds of Aboriginal people as to the advisability of exercising control over the administration of European law has been dispelled. It seems likely that their involvement will continue towards a harmonisation on a much wider scale by reducing resentment felt when a law alien to their culture is administered by Europeans. Moreover, by administering European law to their own people, traditional constraints such as "shame" are automatically involved against offenders. This gloss is absent where proceedings are administered by Europeans. Further, it is likely that non-traditional offences contained in by-laws such as those relating to alcoholic liquor will become "Aboriginalised."

The educative process goes on and it is a two-way thing. The more we learn about each other's needs and expectations, the more likely it is that the law will be used as an instrument of social justice than of oppression as heretofore has been the case.

But more effort must be made in the field of education so far as the administration of the law in all its aspects is concerned. Special courses need to be conducted for the benefit of Aboriginal people in subjects relating to the duties of justices, clerks of court, legal officers, police duties, probation officer's duties, alcohol counselling and prison officer's duties. Such courses could, I believe, be conducted without too much administrative difficulty at the Task Force in Adelaide. Perhaps David Hope could tell us whether that is possible or not. What is equally important is the education of Europeans in the customs and usages of Aboriginal people. It is important in the extreme that those of us who come into daily contact with Aboriginal people be made fully aware of the implications of the Kinship system and of the consequences of status in Aboriginal society. I swear that if anyone again says to me that Aborigines share things because they are communists, I shall scream and if, at the same time, that person takes on the visage of a sage, I'll kill him!

So much for what has been done. May I now spend a few moments on the subject of urban Aborigines and the problems faced by some of them in the South of Western Australia. At a meeting of the Australian Law Reform Commission in Perth, Ken Colbung, a well-known Aboriginal leader in the West remarked that much money, time and labour had been invested by Governments into questions relating to traditional Aboriginal Customary Law but nothing has been done concerning the customs and rules which affect every Aboriginal who lives in the urban areas of Western Australia. He is right. There is a tendency amongst non-Aboriginal Australians to believe that part Aborigines are (a) not really Aborigines at all and, (b) that they are not affected by traditional rules. Moreover, if those part Aborigines live in Urban areas then the belief is that they are simply dark skinned Europeans with no vestige of Aboriginality left. I have never understood this attitude particularly when those self same Europeans almost invariably distinguish themselves and, indeed, separate themselves from part Aborigines and will refer to them in the same derogatory terms used by them about traditionally oriented Aborigines.

In recent years there have been a large number of violent and ferocious clashes between Aboriginal families in the urban areas of WA and these disputes are occurring at increasingly frequent intervals. According to community leaders these feuds have their bases in traditional payback procedures. What is needed is a complete investigation into the matter with a view to providing solutions involving something other than violence. Perhaps the Institute can help in that regard - and if it did, it would certainly receive the blessings of a large number of Aboriginal people who have no desire to be involved in these brutal and heartbreaking clashes. A positive measure which has been recommended by family leaders, and which appeals to me, is the appointment of them as Justices of the Peace with the object of adjudicating with a Magistrate in cases where their customary laws are involved. Decisions handed down by such tribunals would, it is believed, be more effective than courts constituted in the usual way. Perhaps a pilot scheme is worth trying - I think it would be.

We need Aboriginal Probation Officers, alcohol counsellors, police officers and social workers in the urban areas as well as bail hostels and refuges - particularly for women who bear the blunt of alcohol induced violence and we need all these things now. Again, may I ask the Task Force whether they can assist in the training of these people?

Aborigines & The Courts II

Terence Syddall
Stipendiary Magistrate
Perth

The tragic influence of European settlement on Aborigines and their culture over the past two hundred years has been well documented and even the most heartless of men could not help but pity their present plight. Almost without exception Aborigines have abandoned their traditional lands for areas surrounding towns created to support a European economy. Many groups, displaced in the late nineteenth and early twentieth centuries, have totally disappeared whilst others have been decimated by disease, sub-standard living conditions and miscegenation. Tribal identity amongst urban and fringe-dwelling aborigines is lost or only tenuously held. Those groups which are traditionally oriented and have maintained some "tribal" identity are few and far between and, in Western Australia, are to be found only in the isolated and semi-isolated parts of the State.

Appreciation of the effects of this disintegration in terms of social control was described by Daisy Bates in her "Passing of the Aborigines" when she wrote;

There was no more happy wandering in the interchange of hospitality. Sources of food supply slowly but surely disappeared, and they were sent to unfamiliar places, compelled to change their mode of life, to clothe themselves in the attire of strangers, to eat food unfitted for them to live within walls. Their age-old law were laid aside for the laws they could not understand. The young generation, always wilful, now openly flouted the old, and defied them and haunted the white-man's homes, protected by his policemen. A little while and they resorted to thieving - where theft had been unknown - and sycophancy, and they sold their young wives to the depraved and foreign elements. Half-castes amongst them, being neither black nor white, whom they detested.

Years later, Strehlow foresaw and warned against the breakdown of Aboriginal law with the resultant disregard for and breach of white law by the Aborigines. He wrote -

Responsible authorities should ... cease undermining the last traces of Aboriginal authority. Once the latter has gone completely, the white authorities will have to expect much lawlessness, even criminal behaviour on their settlements, coupled with complete shiftlessness and general apathy towards all schemes of social progress.

Strehlow's predictions were accurate. Removal and lapsing of Aboriginal legal sanctions for one reason or another - illegality, changing ideas, incompatibility with missionary and

other intruding alien standards, coupled with failure to replace them led inevitably to a reduction in internal Aboriginal authority which would have restrained or perhaps prevented some of the behaviour anticipated by Strehlow. With limited resources at his disposal, the Attorney General, the Hon. Ian Medcalf, QC MLC., selected the Kimberley region of Western Australia as the area in which investigation would be conducted to ascertain whether anything could be done to alleviate this misery, restore social control in Aboriginal communities and to foster and encourage racial harmony. The Kimberley region is vast, being one sixth of the area of Western Australia comprising 421,451 square kilometres. The total Aboriginal population at that time (1976) was estimated 6,349 persons.

Because of my six years close involvement with traditional Aborigines in the Kimberley, the Goldfields and the Central Desert and because of my position as Kimberley Magistrate I was appointed to conduct the enquiries. What I found was by no means a traditional society but a number of displaced minority groups with vestiges of traditional structures and authorities seriously threatened and, in most cases - significantly altered. The capitalist economy based on consumption operated as an irresistible magnet to many Aborigines resulting in a polarised society - the advantaged whites and the disadvantaged blacks.

The Europeans lived to a very large degree in a familiar, subsidised, and somewhat unreal world, their prosperity increasing in proportion to their regular, rising, income. Aborigines meanwhile, remained unemployed or unemployable and existed at sometimes less than subsistence level of income based primarily on pensions, child endowment, and social security payments. The bulk of Aboriginal adults maintained an incorrect and much restricted world view and a set of values based on a limited understanding of the culture and institutions which had come to dominate their lives.

With the introduction of the Pastoral Award in 1969 most Aboriginal station workers were retrenched and only a select few were spasmodically employed during the mustering seasons. The downturn in exports due to the general recession, particularly in the beef industry exacerbated the already critical employment situation.

In 1971 universal citizenship rights introduced open and easy access to alcohol which, coupled with the pre-existing social problems alluded to be Strehlow and others, led to even further decay and disruption. Alcohol-related offences increased and the courts became clogged with problems for which there was no effective answer. Fines, imprisonment and probation proved costly and ineffective as was made manifest by recidivism figures.

At about the same time, and often in a most spectacular way, both State and Federal Governments, with the very best of intentions, injected substantial sums of money into upgrading facilities provided for Aborigines. The State Housing Commission began its "village housing" plan with the development of One Arm Point, Looma, Fitzroy Crossing and La Grange. Thus, in a short

space of time the Kimberley Aborigines had thrice had their hopes dashed. Their land tenure on cattle station had proved illusory, the Federal purse was not bottomless and prosperity was only fleeting.

Both the insecurity and dissatisfaction resulting from these and similar events had procured a "back to the land" movement and a resurgence of interest in imposing traditional controls. Many examples of brutal punishments were reported including mutilation and the use of traditional initiation procedures as punishments. It was, however, doubtful whether the re-introduction of such a conservative methodology, was, from either the point of view of the Aborigines or of the government effective, considering the gulf which had developed between those who were the proponents of the "law" and the generation to whom they wished it to apply.

In a less esoteric sense, the physical manifestation of the "back to the land" movements was found in places like One Arm Point, Looma, and Oombullgurri amongst others. However, these "communities" were not entirely successful in their approach. They were certainly better off than they had been as residents of town reserves for life was healthier, access to alcohol was much more limited, and European interference less evident.

The remaining town reserves, control of which was vested in the hands of the Department of Community Welfare, were problematic. They represented to most Europeans a forced containment of people and, to the great majority of Europeans in the North, such measures were necessary and acceptable. Although in the view of sympathetic Europeans reserve conditions were totally unacceptable, Aborigines feared their closure for they represented the only form of security left to them. Department of Community Welfare officers reported that strong recommendations were made to their Department in the hope that reserve lands could be developed into standard housing estates for use by reserve dwellers. This, it was hoped, would significantly reduce the incidence of social disorder amongst fringe-dwellers.

The field work continued into 1978 and the groundwork was laid for what was hoped would be a thorough and objective analysis of the problems upon which the recommendations could be made to the Government.

In the interest of time and for logistic reasons, efforts were concentrated upon readily identifiable community groups and problematic subject matters relating to the Western Kimberley; that is to say, no further east than Fitzroy Crossing. The idea was that a way could be found to increase both the responsibility for and control over Aboriginal people by their chosen representatives utilising the services and institutions which were currently available to all Australians whilst, at the same time, fostering and preserving the traditional laws in so far as they were not inconsistent with the general law and universally accepted standards of humanity. This idea met with enthusiastic approval by the vast majority of Aboriginal people.

A great number of meetings at community level were held at One Arm Point, Lombadina, La Grange, Looma, Mowanjum, Beagle Bay, and the five groups resident in the Fitzroy Crossing area - as well as at the Broome and Derby reserves. Aboriginal leaders, in every case, concerned for obvious reasons about their own generation, recognised the difficulties in extending control over the younger elements in their communities. They expressed not only interest, but made suggestions as to community laws, the mode of policing such laws, and the training necessary for full implementation of whatever scheme was made available to them.

One of the main considerations in this approach, based on the assumption that there should be one law which would adequately serve the needs of all Australians irrespective of the uniqueness of their cultural origins, was the suggestion that Justices should be appointed in predominantly Aboriginal communities, from those communities. These Aboriginal Justices of the Peace had to be chosen from the recognised authority structures in the communities with due regard to the classificatory system and that provisions should be made for them to hold courts on location.

Proposals of this nature raised far more difficulties than would appear, for -

- * There was little understanding of the processes of the law and its various related aspects;
- * There were a great number of differences between the groups of people to be dealt with and few similarities;
- * The extent to which Aboriginal leadership or traditional controls were effective had yet to be assessed and was highly problematic;
- * The polarisation in most northern communities was extreme and few Europeans were sympathetic to suggestions which would give Aborigines control in the sense suggested.

At that point in time, it was difficult to see how any scheme of general application could be devised. This was because statements from Aborigines tended to highlight, mainly for ethnocentric reasons, the differences between their own and other groups. To give effect to the proposal that a different scheme for each plan should be created seemed ludicrous and impossible to implement.

Further analysis of the situation led to the assumption that there were a number of common factors relating to the needs of three types of "community".

- * "Independent" theoretically Aboriginal controlled communities, usually isolated from Kimberley towns and not identifying with them;
- * Missions - mostly operated by the Roman Catholic Church; and

- * Town reserve dwellers with their special problems, located in or on the fringes of most Kimberley town.

Because what was being was so intrinsically tied to a much broader range of issues, a programme of education was required to explain more clearly what was meant by "white fellow law" and then, it was conceived, Aborigines would be in a better position to make an informed judgement on the issues.

It was clear that Kimberley Aborigines generally, and those who came before the courts specifically, had little or no appreciation of the legal processes. The extent of this lack of understanding was gained from Aborigines in prisons, from field work, from information contained in literature on the subject, and from my experiences in court.

Apart from experiments by me with Court advisers in the early 1970's, the only roles Aborigines had played in the European system of law had been as defendants or witnesses. They had no part in the judicial process and felt that law enforcement agencies collaborated against them. They were unable to distinguish between charge, arrest, trial and conviction and the high rate of recidivism reduced motivation to fight the system which seemed to, and very often did, oppress them. It is axiomatic that effective operation of law within any community requires a broad appreciation of its principles functioning and objectives by the community which may then reasonably be expected to support it. Clearly, Kimberley Aborigines did not approach these criteria. Egglestone made the same point when she wrote:

In my view, any attempt to hand over more responsibility to Aborigines in relation to the whole legal process is to be encouraged. Aboriginal defendants are more likely to feel that they have been accorded justice after trial by their peers than when they have been judged by members of the alien white society. To ensure trial by peers it would be necessary to provide courts staffed by Aborigines, who are genuinely representative of the Aboriginal community, not of white administration. If this is considered impracticable or inadvisable, an alternative would be mixed tribunals of white judges or magistrates sitting with Aboriginal assessors. In this way, Aborigines would be able to express their views and become involved in the legal system in a role other than that of passive defendants.

It seemed clear that it was not so much the law which caused difficulties but rather the problems derived from its administration and the atmosphere of that administration. The task, therefore, was to diminish many of the apparent injustices in the eyes of Aborigines by their involvement in the administration of justice. Technical complexities of procedure could, it was conceived, be removed from the law without altering its basic structure. It was believed that by doing that, a reduction of fear and puzzlement by the Aborigines would follow.

Moreover, flowing from their participation in, and greater understanding of the law, it was felt that they themselves would co-operate in maintaining and upholding the law without resentment at its imposition on them.

Fears were expressed - almost exclusively by Europeans - that participation in the European system of law would result in diminution or total abandonment by the Aborigines of their traditional law. No such fears were held by either the Aboriginal leaders or by me. On the contrary I envisaged fortification of their law within the wider ambit of the general Australian law.

With the knowledge that most European introduced experiments often result in failure, I determined to intensify my efforts to further familiarise Aboriginal communities as far as possible with the basic principles of European law and administrative procedures. I was not prepared to recommend the introduction of changes in the law or its administration until I was completely satisfied that there was a desire on the part of Aborigines for such changes and a strong probability of success. It must not be assumed that this inaction was caused by timidity, it was rather because I knew that failure would have deep social ramifications. The "failure syndrome", so prevalent amongst Aborigines, would be re-inforced; disruptive elements within the communities would be encouraged to continue their anti-social activities; traditional law would suffer, and the scepticism of some Europeans as to the ability of Aborigines to control their own destinies would receive further confirmation.

Accordingly, research was intensified and the maximum possible consultation was conducted with every representative section of the Kimberley Aborigines. With the above assistance of two linguists at the United Aboriginal Mission at Fitzroy Crossing a pamphlet was prepared which simplified court procedures and explained some of the most common charges heard in courts of summary jurisdiction. The plan of the linguists was to -

- * Limit the density of ideas. That is, to say more about each point than would be said for a person whose first language is English;
- * Keep chronology simple. English frequently incorporates extra information by reference, and indicates this by grammatical markers. These are often not understood but the difficulties, can be overcome by introducing events in the sequence in which they occur.
- * Develop a back-ground for each point before making it. References to new terms with explanations following would be changed to give the explanation first. Where a new concept is involved, it would be introduced by using known vocabulary and followed by an explanation of the new term.
- * Avoid the use of grammatical structures known to be difficult for Aborigines. The English passive is an example of this. Most Aboriginal languages have no passive mood and, therefore, confusion results when it is found in English.

More court advisers were recruited and, with the co-operation of Department of Community Welfare Officers, Aboriginal Legal Service officers, Police and Department of Aboriginal Affairs officers, efforts were intensified to encourage greater community participation at court hearings. Prior to hearing, I would, whenever possible, explain to observers the nature of the complaints listed for hearing, possible defences and the social utility of the laws in question. During trials I explained procedures, evidentiary provisions and advocacy techniques. Reasons for decisions were also given in language appropriate for the audiences.

Advice as to penalties was sought not only from advisers but also from representatives of the community to which defendants belonged. In the case of fines, community representatives would often volunteer to ensure that weekly payment were made to the Court by the offender, thus minimising administrative work and reducing the incidence of imprisonment in default of payment. Where, in the case of assaults, fines seemed to be the appropriate penalties they were often awarded to complainants by way of "sorry money", a procedure analagous to a traditional Aboriginal sanction. Sometimes defendants were released on good behaviour bonds on condition that they returned to their communities under the supervision of nominated persons, that is, persons who, according to custom, and the section system possessed the authority to guide and educate.

The granting of bail to Aboriginal people charged with serious crimes has always raised difficulties. In the first place, Aborigines are not time oriented and failure to appear at an appointed time was often attributable to this fact. This difficulty was, in most cases, overcome with the assistance of community advisers or councils. The problem of finding approved sureties, however, was not so easily resolved. The law requires that a surety be a property owner so that, in the event of an offender failing to answer his bail forfeiture action can be taken against the surety. Most Aborigines in community situations are not property owners, and consequently, could not, in the normal sense, be approved as sureties. This dilemma was discussed on many occasions and finally I began the practice of releasing defendants on bail with communities acting as sureties. Only in one case did this break down and it is worth relating the incident to show how seriously communities took their responsibilities as sureties and how determined one community at least was to incorporate European law into its own. The defendant has been released on bail to the Christmas Creek Community on condition that he remained on community land until his next appearance at Fitzroy Crossing Court. He did not appear on the return date and enquiries revealed that he was at Christmas Creek having been returned there by elders after escaping from their custody. The elders, it appeared, had placed the defendant under traditional restrictions for having broken the condition that he remain on community land until the return date and also because he had caused the community to break its promise (contract) to me (white law carrier). I was invited to hold Court at Christmas Creek and on arrival there was met by a large number of men and taken to a sacred place where to the accompaniment of ritual chanting, sacred

objects were exposed to my view. I was then taken to another previously prepared place where further ceremonial chanting occurred and speeches made in "language". The defendant was then summoned. He appeared, his body oiled and decorated, looking wonderfully healthy and bearing no resemblance to the man who, a few weeks earlier, had appeared in the Fitzroy Crossing Court. I was then asked to begin court and make whatever orders were necessary. The defendant was again released into the custody of the community to appear for trial at the Supreme Court in its criminal jurisdiction to be held at Derby on a particular date. The chanting then resumed and my order repeated in "language" after which, the defendant was despatched by an elder to a designated area. The elders then explained to me that by "bending" my law in holding court at that special place I had shown respect for and recognition of their law and saved embarrassment. The defendant's escape from Christmas Creek had been met with a sanction which involved banishment from the camp to a restricted area, dietary restrictions and board making. Moreover, during his period of punishment he was not permitted to look upon women. In imposing the penalty, however, the elders had overlooked the fact that the defendant was to appear at the Fitzroy Crossing Court on a date prior to the completion of his punishment. Their dilemma was profound - they could not by their law, revoke the sentence and yet they felt they could not let me down. My action, in holding Court at the sacred site demonstrated to them a respect by a European law man for their law which they had not previously experienced. Further, it opened the way to discussions concerning the synthesisation of both laws.

Greater involvement in the judicial process by Aborigines had another effect. Defendants were made aware of the corporate disgrace their transgressions brought upon their communities. Women, in particular, invoked the traditional "shaming" sanction by haranguing defendants upon their return to community campsites.

Some lectures on European law and procedures were given in schools and visits to courts by school children revealed an interest by children in the subject. However my lack of experience in the field of education, precludes any expert assessment of the success or otherwise of my efforts in that regard. Teachers, however, were in favour of continuing this form of education and began the practice of visiting courts with school children.

The development of the mutual respect for the two laws was exemplified on many occasions when Aborigines sought my assistance to conciliate and arbitrate on disputes between Aboriginal groups and people. My opinions were often received by remarks such as "it is the same in our law." More and more it became clear to each of us that there were many similarities between the two laws and that sanctions and procedures were the two major differences.

In addition to regular visits to La Grange, Lombardina, Beagle Bay, One Arm Point, Looma, Fitzroy Crossing (including Go Go, Christmas Creek and the Pinnacles) Balgo, Halls Creek, Derby (including Mowanjum) and Broome, bush meetings were held and from

them, the following points were distilled:

- * As hunters and gatherers Aborigines had lived in small groups whose members' rights, duties and obligations were fixed by the kinship system and reinforced by pre-determined religious-mythological forces. Any breach of the rules discovered by those in control was dealt with on the spot by either violence or magic as no alternative punishment was available.
- * As there were no motor vehicles, no proprietary interests, no alcohol or complex technology, the rules formulated for a hunting and gathering society were useless in situations resulting from twentieth century life as it affected Aborigines.
- * Aboriginal leaders recognised and confirmed the inability of traditional law to come to terms with behaviour stemming from the presence of an alien culture. This inadequacy was bringing their traditional law into disrepute, particularly amongst the younger element. It was, therefore, imperative that an auxiliary jurisdiction based on the "white law" be made available to them to preserve peace and enhance the survival of their traditional ways. Their desires seemed to be a synthesis of the two laws - "the two must work together". They realised that without acceptance of European law administered by them, Aboriginal culture in adopted life styles in isolated settlements would disintegrate after a lengthy period of anarchy.
- * Community leaders recognised that abuse of alcohol was the root cause of many of the social problems within their communities and attempts to control those problems took two forms. The first of these was the imposition of severe sanctions in the form of corporal punishment for possession of alcohol on community sites and for alcohol induced transgressions. Needless to say, leaders were aware that this practice is not only dangerous but also contrary to the general law. The other method was to control the consumption of alcohol within their communities by sale from community stores of a small ration of beer per day to each adult person and to punish by fine any person found in possession of alcohol obtained from any other source.
- * The majority of communities in remote areas favoured the introduction and adoption by them of a set of legally binding laws designed to proscribe anti-social conduct and, thereby, to facilitate improved living standards free from annoyance by disruptive minorities. These laws would be administered by Aboriginal Justices of the Peace, bench clerks, honorary probation officers and rangers selected from the communities having due regard to the classificatory systems in relation to each appointment.
- * With the exception of justices, the jurisdiction of the person appointed to these offices would be limited to

the areas inhabited by the communities and relate only to offences committed within community boundaries.

These, and other points were made to the Attorney General during his visits to Kimberley Aboriginal communities which he made to satisfy himself as to their needs and desires. Following prolonged discussions with me, the Attorney General and his Government colleagues concluded that legislation be passed to permit Aboriginal communities to make rules to apply within community lands, with respect to:

- * the taking of proceedings for breaches of community rules;
- * the prohibition of nuisances or any offensive, indecent or improper act, conduct, language or behaviour;
- * the prohibition, restriction or regulation of the possession or supply of alcohol;
- * the apprehension of persons guilty of a breach of any community rule by any police officer; the removal of such persons from community lands, and the enforcement of community rules;
- * the prohibition or regulation of the admission to community lands of persons, vehicles or animals;
- * the prohibition or regulation of vehicles including provisions as to speed, manner of driving, class of vehicles, routes, entrances and exits, one-way traffic, noise, parking or standing, the removal of vehicles by persons authorised under that rule and for the regulation of traffic generally;
- * the use, safety and preservation of buildings, structures, erections, fixtures, fittings and chattels;
- * the regulation of the conduct of meetings and interruption of meetings by noise, unseemly behaviour or other means;
- * the prohibition or regulations of the possession or use of firearms or other offensive weapons or of dangerous materials;
- * the depositing of rubbish and the leaving of litter on community lands;
- * the prohibition of the obstruction of any person acting in the execution of his duty under the rules or in the exercise and enjoyment by him of any lawful activity on the community lands;
- * the prescribing of any other matter that it is necessary or convenient to prescribe for the purpose of securing decency, order and good conduct on community lands;
- * the imposition of fines not exceeding one hundred

dollars or imprisonment not exceeding three months upon conviction by a court of summary jurisdiction for any breach of the rules and compensation not exceeding two hundred and fifty dollars payable to the community or any person whose property has been damaged as a result of an offence;

- * the payment of any pecuniary penalty exacted in respect of any breach of a rule to be paid into community funds.

The Aboriginal Communities Act was passed and assented to on 17th May, 1979. It was decided that its implementation be restricted to two Kimberley communities, namely, the Bidjadanga Aboriginal community La Grange and the Bardi Aborigines Association Inc. at One Arm Point. In this way, the effect of the Act and by-laws made pursuant thereto could be monitored and any defects remedied with a minimum of risk. Further, when and if the scheme proved to be successful it could, with safety, be applied throughout the Kimberley and, indeed, throughout Western Australia.

Prior to the passing of the Act, the Government gave consideration to the following:

- * the appointment of Justices of the Peace;
- * the appointment of Bench Clerks;
- * the appointment of community rangers;
- * the appointment of honorary probation officers.

Appointments of Justices of the Peace

The selection of the right persons for appointment to the office of Justices of the Peace was crucial to the success of the scheme. At La Grange (and in traditional Aboriginal societies generally), there is a division of the entire population into sections. Everybody at La Grange is affiliated from birth to one of four named sections - Barrungu, Banaga, Baljarri or Karimba. Membership of any particular section is an element in the determination of status viz a viz other Aborigines. These relationships, which display the relative status of people to one another, are reflected by kin terms. Use of these terms is not limited to situations where consanguinal and affinal lines occur, but extends on a classificatory basis throughout Aboriginal society. Avoidance and other relationships are all based on and derived from status. Implications of this situation are, that in order to meet the difficulty presented by the status position inherent in the kinship and four section system operating at La Grange, requirement was recognised for the need of one justice to represent each section. In this way those, by virtue of their status, having a role traditionally in the imposition of discipline according to Aboriginal law to those standing in appropriate classificatory relationships to them (and correct sections) should normally be available as justices to fulfil an analogous function. For these reasons, I felt that it was proper to accept the commissioning of four justices at La Grange. At One Arm Point,

the position was not so complex and, upon the recommendation of the Bardi people, two justices, a man and a woman were appointed. The temptation to appoint literate and articulate community members to the office of justice of the peace in order to facilitate training needs and administrative requirements was totally resisted. It had been the habit of government bodies to encourage the selection of young educated Aborigines to hold office in community councils and similar institutions for the sake of convenience. Experience had, however, shown that this practice often resulted in social disruption, non-achievement of desired goals, and waste, precisely because such people had no authority to act within community structures. The fact that some of the nominees for the office of justice of the peace were illiterate did not inhibit me in recommending the granting of commissioners after all it is not really so long ago that Magistrates in England were illiterate. The translation of rules relating to court offences referred previously was available for use in an educative programme. Moreover, I was available to support and assist justices in the conduct of all matters which came before them. Indeed, it was, and still is the practice for the Kimberley Magistrate to pay frequent and regular visits to isolated Kimberley communities to assist at court hearings and to continue the educative process.

Appointment of bench clerks

One of the common complaints from older members of Aboriginal communities was that there was an ever widening gulf between the old and the young. This, it was thought, was brought about for two reasons. The first was that in former times, the young had, from infancy, received their training in community responsibility from the women whom they accompanied on foraging expeditions. However, with the advent of the community store, this practice fell into desuetude, and the young were deprived of much of the valuable training and discipline afforded to their predecessors. The second was that education was left almost entirely in the hands of European schools where little or no regard was paid to Aboriginal tradition and community responsibility. The appointment of bench clerks from the ranks of the young educated members of communities was made and justified on the grounds that it would service, in some small way, to narrow the gulf between the old and the young and would put to good use the education they had received. Training of bench clerks was undertaken by me and the Broome Clerk of Courts and involved such matters as drawing up complaints, summonses, warrants and orders; receiving money paid by way of fines and costs, and generally acting as a conduit between the bench and the parties. They were also instructed in the basic principles of law and procedure so as to be able to assist illiterate justices at court hearings.

Appointment of community rangers

Consideration was given to the appointment of Community Rangers to act in much the same role as police officers. Their duties were to have been to enforce community rules, effect arrests of persons found offending against community rules or the general law, and to launch prosecutions against the offenders. The

rangers were to have jurisdiction within the confines of community territory only and to have been selected by the community from their authority structures. In the event the Government decided that for the time being no such appointment should be made and that the State Police should carry out the functions which might otherwise have been given to rangers. This was because both communities selected for the pilot scheme wanted it that way, and because logistically it was impossible at that time to train rangers in their duties. It must be remembered that not only would rangers have had the responsibility of policing the law with all the difficulties inherent in those duties, but they would have been required to launch and conduct prosecutions which is difficult enough even for trained and experienced police officers.

Appointment of honorary probation officers

I envisaged that great use would be made of the provisions of the Offenders Probation and Parole Act by Aboriginal justices of the peace because both probation and community service orders are ideally suited to the needs of Aboriginal Community groups. By the use of honorary probation officers, drawn from the community structure along similar lines to the one described in relation to the justices of the peace, delinquents could be "grown up" again and made to understand and accept responsibilities to their own and the wider Australian community. No fears were held that violence would be used against probationers as it was believed that probation would involve education (or re-education) in traditional culture amongst other things. This, it was conceived, would imbue in probationers a greater understanding and respect for their culture and instil in them a sense of self discipline. Community Service Orders too, it was felt, would be used to require offenders to perform both traditional functions and other utilitarian duties within communities.

As previously stated, an ever-widening gulf between the old and the young in Aboriginal society was a source of constantly expressed concern by Aboriginal people. Community leaders felt powerless to deal with recalcitrant children the majority of whom, because of European influences, were no longer restrained by traditional methods and were undeterred by punishments imposed upon them by white-staffed children's courts. These courts were, because of the provisions of the Child Welfare Act, conducted away from settlements and were not open to the public. Serious offences against property were visited with such sanctions as committal to the Department of Community Welfare for a period, fine or committal to an institution in the south of the State. Committal to the Department usually resulted in a child being returned to its community within a very short period whilst fines were paid by their parents and thus there was no deterrent value in sentences. Committal to an institution was looked upon by many children as a holiday because of the travel involved and the television and other facilities afforded to them at institutions. Indeed, children had openly confessed in court that they had committed offences in order that they could be sent to institutions. Realizing the impotence of Aboriginal leaders, and

having no fear of the children's courts, many child delinquents adopted an attitude of deliberate and total disregard for the rights of their own community members and those of the wider Australian community.

Leaders believed that were children's courts to be held in situ in the presence of community members, that offenders and their parents would be influenced for the good by the application of the traditional "shaming" procedure. Moreover, it was thought that penalties such as probation and community service orders when applied by Aboriginal justices would encourage an awareness in offending children and their parents of their mutual responsibilities to the general community. Accordingly at the instigation of the Attorney-General, the Child Welfare Act was amended to permit children's courts to be held in community settings and in places other than buildings. Justices of the Peace at One Arm Point and La Grange were appointed Children's Court members.

With regard to Aborigines who, for one reason or another, had chosen to reside in or on the outskirts of Kimberley towns, the Government did what it could to increase Aboriginal involvement in the administration of the law including the appointment of justices of the peace, police aides and honorary probation officers. The Attorney-General has made it known that he is anxious to appoint as many Aboriginal justices as possible but few suitable persons who are prepared to take on the responsibilities of the office have been found.

Many of the criticisms heretofore levelled against the administration of justice by white justices of the peace with regard to Aborigines have disappeared with advent of the Aboriginal Legal Service. Indeed, Aboriginal people in remote areas are much better off, in terms of legal representation and advice, than are Europeans. Nevertheless, there is still much to be done by way of education and support before perfect equality for Aborigines is attained.

The question whether, or the extent to which, Aboriginal customary law should be recognised in European courts has been the subject of much controversy amongst those interested in the cause of Aboriginal advancement. My view was that whilst this question was of extreme importance, its complexity would involve lengthy research and would delay unnecessarily the resolution of more pressing sociological problems which faced Aborigines in their day to day contact with an alien culture. The effects of the precipitation of Aborigines into the twentieth century could not wholly be dealt with by the use of a system of rules designed for a hunting and gathering lifestyle, and, even if it were possible to adapt that system (which must be doubted) the result would be the creation of a new system bearing little or no resemblance to the old.

As said elsewhere in this paper, I believed that as soon as Aboriginal leaders were involved in the administration of white law, beneficial effects would accrue to the customary law. The nature and structure of Aboriginal society through the idiom of

the kinship system provided for control against eruption and spread of uncontrolled violence. Avoidance rules, forbidding direct contact with people in defined relationship with one another have this function. In their most emphatic form they exist between a man and the mother of his wife or potential wife, a relationship generally speaking, also seen by white society as a point of tension.

These rules operate internally, as opposed to being enforced by an independent body such as the police, and remain the norm in certain communities such as La Grange. Sight of such control mechanisms is lost by Aborigines when they are confused by prior indulgence in liquor. Breaches of obligation occur, avoidance rules are disregarded and, when those having status to regulate the situation are themselves affected by liquor, the system breaks down. Removal of traditional sanctions from Aborigines to the extent that their legitimate application under Aboriginal law may be an offence under the wider Australian law, contributes to the disarray and collapse of authority.

Replacement of these sanctions by those contained in the general law was calculated to provide enforcement of traditional law through sentences imposed by Aboriginal justices on members of their own communities for offences falling within the ambit of jurisdiction of those justices qua justices. Thus, breach of an avoidance rule which resulted, or was likely to result, in a breach of the peace would render a person liable to punishment under a by-law relating to disorderly conduct or under the provisions of the Police Act.

Many of the problems relating to the recognition of traditional law are more apparent than real. The substance of the laws are often the same, only procedures and sanctions are different. The common law, which is itself based on custom is frequently relevant to custom in the Aboriginal sense and may be used to sanction conduct which results in a breach of Aboriginal law. Knowledge by Aborigines of the flexibility of the common law will, it is conceived, reduce the necessity for face-saving self help in the form of violence and, at the same time, keep the peace. Europeans too, whose duties bring them into day to day contact with Aboriginal people, must receive instruction in Aboriginal traditional ways so that they do not, inadvertently, offend the norms which regulate conduct in Aboriginal communities.

An example of an Aboriginal man who felt constrained to break the white law to redress a wrong because he thought the white law inadequate was the case of B.C. at La Grange. B.C., who had three wives was disturbed one night whilst asleep on the verandah of his house. He played "possum" and observed a youth stealing into his house and emerge, shortly after with B.C.'s youngest wife. B.C. called out and the youth decamped. Next morning, in the full view of the community B.C. symbolically speared the youth in the leg inflicting a minor wound of less than half an inch. B.C. was charged with assault and pleaded guilty adding that he was sorry for what he had done but that the white law would have left him without remedy. After the facts had been

stated B.C. was placed on a bond in the sum of fifty dollars to be of good behaviour for three months. It was then explained to him that there was a remedy in the white law to redress his wrong and he then asked that the remedy be invoked. B.C. was asked to make verbal complaint which he did and the complaint was reduced to writing in accordance with the law. The youth, who was present was charged with having, at La Grange on the particular date, been without lawful excuse on the curtilage of the premises occupied by B.C. He pleaded guilty and was fined for the offence after B.C. had stated the facts. Discussions with the community indicated that all were satisfied with the adequacy of the white law in that case.

Two examples which indicate the need for the training of Europeans whose duties bring them in close contact with Aboriginal people may be of use. The first relates to an assault upon a school teacher. The teacher was standing at the blackboard in front of his class one day when an Aboriginal man entered the room and, without speaking a word, knocked the teacher unconscious with a blow from his clenched fist. The assailant immediately left the room. Naturally enough, the teacher laid a charge of assault against the Aborigine and to this charge the defendant pleaded guilty. After the facts had been given the defendant was asked for an explanation but he refused to give any and was sentenced to fourteen days imprisonment. Sometime later, it came to my knowledge that the defendant's son, whilst walking to school, had, on a number of occasions been assaulted by another school boy from the same camp. The son complained to the school teacher who, in European fashion told the boy not to worry him over schoolboy squabbles. The boy then told his father who was a very traditional man. It appeared that the father had equated the teacher's role with that of an "uncle" preparing novices for manhood and whose duty included arbitration on disputes between novices, default of which rendered him liable to punishment by the natural father of the injured novice. As the teacher ("uncle") had refused to arbitrate between the schoolboys ("novices") it followed that the father must punish him according to law. Had the teacher been aware of the role assigned to him by members of the community and what was required of him, the assault would never have occurred.

The second example concerned a young police officer. The constable was on a reserve enquiring into the death of an Aboriginal man. He was in the process of interviewing a reluctant female witness who had vital information when he was threatened by one of the old men and menaced by a large number of angry young men. The police officer left the area and reported the occurrence to me as coroner. I visited the reserve and spoke to the old man who informed me that there was no need for any investigation into the death because ceremonies had been held to determine the cause of death, and the person responsible. I advised the old man that the police officer was required by white fellow law to make enquiries in a special way and that whilst he respected the ceremonies held by the community, the policeman would get into trouble himself if he did not obey his law. The old man agreed to allow the investigation to continue but asked that in future, whenever a woman had to be spoken to on such matters, her husband

or some other man should first be consulted. Moreover, that it was not right to use a dead man's name. No experienced police officer would have made the mistakes of the young constable. Fortunately, no harm was done but the incident could have had serious consequences.

Many of the conflict of law problems result from "promised marriages." After having presided on a case of aggravated assault on a female in which the question of promised marriage was raised, I requested that in future it might, in cases where the prospective bride was opposed to marriage, be useful to discuss the problem before anything was done which would result in court proceedings. Thereafter, he was called upon on many occasions but none was strictly a problem of a traditional promised marriage but rather the use of the system as a sanction to punish promiscuity or to put an end to a relationship with persons of the wrong skin group. Each problem was resolved without the necessity of court proceedings. Sometimes the girl promised to mend her ways, sometimes compensation was agreed to and, on one occasion the girl and her boyfriend left the community to live in a nearby town.

Research into the question of recognition of customary law is continuing in the hope that a satisfactory solution may be found. It is anticipated, however, that the more Aborigines and Europeans are jointly involved in the administration of the law, that solutions will be found to problems as they present themselves and before any real conflict occurs. Sympathetically understanding and patience on both sides is, unquestionably, the key to success.

The pilot scheme at La Grange and One Arm Point was successful and similar schemes have now been introduced at Beagle Bay, Lombadina and Balgo Hills. Many other Aboriginal communities in Western Australia have requested permission to be involved but with limited man-power resources it is now possible at the moment to accede to those requests. It is clear that the La Grange and One Arm Point communities have had a reduction in the incidence of anti-social behaviour and, in consequence, at La Grange at least, people have returned there from fringe reserves. There has been a marked improvement in Aboriginal and police relations due, in no small part, to the co-operation of the District Superintendents. Cases of by-law breaches have been dealt with in community settings by the Aboriginal justices under the supervision of the Magistrate. Whenever called upon, the Aboriginal Legal Aid officers have appeared for defendants.

However, as foreseen, the La Grange community is now moving towards synthesis of the customary law and by-laws and referring to them as the "Bidyadanga law". It is the view of the community that they should, as soon as possible, have total control of the Bidyadanga law without interference of Europeans unless called upon to assist. Instead of police officers enforcing the law they wish to have power to appoint "witirr" or traditional policemen - two from each section to fulfil that role. The training of these witirr to be conducted, if possible by a suitable police officer who should visit the community at regular intervals. The Magistrate should continue to attend at regular intervals and act

in an advisory capacity until the justices are able to handle the law without assistance.

They have said that there should be no legal representation for persons who breach by-laws because this inhibits the synthesisation process. In cases relating to the general law, legal assistance should always be available but such cases would be heard and determined in Broome.

Without wishing to exaggerate, the La Grange Community has achieved a great deal in the past four years and the majority of its members are striving to achieve much more. It is the policy of the Roman Catholic Church in the Kimberley to hand over control of the Mission lands to the Aborigines as soon as possible and Father McKelson, the Mission Priest at La Grange is fostering and encouraging an attitude of independence in that community. Transition from a state of total dependence upon European organisation and control to total autonomy would, a few years ago, have been considered a pipe dream by anyone connected with the La Grange community. However, now that the traditional social control methods have been supplemented by the by-laws administered very largely by themselves, community autonomy in the not too distant future is a distinct possibility. It is heartening to see the signs of optimism growing in a people as they realise their potential for the first time in generations. This seminal concept must be nurtured by Europeans taking part in its development as equals and not taking over with authoritarian or paternalistic attitudes. Communities like La Grange must, it is believed, be seen as discrete communities with every right, subject to the general law, to control and regulate their own destinies. To argue against the right of an Aboriginal community to exclude European interference from its domestic affairs, is to impose upon them European value judgements at best, or, at worst, infer that they cannot be trusted to handle their own affairs. Individual rights in an Aboriginal community are not defined so strictly in isolation from its members as they are in European communities. That is to say, the balance between the rights of the individual and those of the community as a whole, are drawn less favourably for an individual in Aboriginal communities than they are in European communities. An Aborigine, therefore, who becomes part of an Aboriginal community does so with full knowledge of that community's Aboriginality and must be taken to have accepted restrictions on his individual rights, just as a monk who enters a discrete order would be estopped from pleading his individuality in the face of monastery rules. It must be kept in mind that no argument is being made for the exclusion of the general law or its administration, the plea is for the recognition of the right of a community, in its private not public place, to regulate the behaviour of its members free from uninvited external interference.

Differing standards and levels of acculturation of Aborigines make it difficult presently to conceive of the precise needs of every community in the Kimberley. As each community becomes more experienced in the field of social control, its particular needs will become apparent and action can then be taken to enable them to achieve their desired goals.

Greater mobility and contact between Aboriginal Communities suggests a possibility that from their exchange of ideas and concurrent operations of similar by-laws a common standard in the application of the law by justices will develop across the Kimberley and ultimately result in a "common law" in much the same way as the common law of England developed.

Any doubts in the minds of Aboriginal people as to the advisability of their exercising control over the administration of European law seems to have been dispelled. It seems likely that their involvement will contribute towards a harmonisation or relationships on a much wider scale by reducing resentment felt when a law alien to their culture is administered by Europeans. Moreover, by administering European law to their own people, traditional constraints such as "shame" are automatically invoked against offenders. This gloss is absent where proceedings are administered by Europeans. Further, it is likely that non traditional offences contained in by laws such as those relating to alcoholic liquor will become "Aboriginalized".

Agencies directed towards aiding Aborigines such as Community Welfare, Aboriginal Affairs, Prisons, Police, Legal Aid, Community Advisers Education, and Mission Authorities have a most important role to play in the scheme. Problems that contribute to social disintegration in communities are created, to some extent, by the lack of overall direction and the absence of any co-ordinated policy by government and other agencies involved in Aboriginal affairs. It is common to see agencies and individuals following their own perceived views as to what is best for Aborigines without any fixed policy or guidelines to direct their well-intentioned actions.

From observations and discussions with European personnel, it is apparent that each individual seems to be concerned about achieving his own particular ends to the exclusion of all else and is certainly not guided or bonded in effect by an overall policy designed to bring about peace, order and good government. No one doubts the sincerity and industry of officers and organisations; however, the effect of unco-ordinated efforts on Aboriginal communities is both damaging and destructive.

The hierarchical divisions of European agencies involved at community level only creates barriers to better co-operation and open communication so essential for the proper administration of services and the sustained participation of community members. Moreover, it creates and fosters an "asylum" mentality in Aborigines similar to that found amongst prison inmates whereby the sport of "beating the system" is played for no other reason than self gratification and amusement.

The community decision making process, which ideally should involve close Aboriginal-European dialogue and consultation, is invariably left to individuals in crisis situations and as a result action taken is often inappropriate and tends to cause disruption and disintegration.

The talent and expertise available in this Country in the

field of Aboriginal affairs is tremendous but, without co-ordinated effort based upon a policy acceptable to all concerned, achievements will always fall far short of excellence. The creation of such a policy can best be realized by bringing together those who control the personnel and resources in the area of Aboriginal advancement. Who knows perhaps this Seminar will provide the ideas, recommendations and impetus which will spur Governments, both State and Federal, into healthy concerted action free from rivalry and self interest.

Court procedures

This is the story of what happens in Court and what JPs do in a Court. The full name for a JP is Justice of the Peace. When a person says he is guilty, that means he has broken the law and the JPs listen to the story in Court. If the JPs decide the person has broken the law they give the punishment. If they decide the person didn't break the law they must stop the case and wait for the Magistrate to come.

When the policeman thinks someone has broken the law he might take that person to the lockup. The policeman writes on a piece of paper which law he has broken. This is called a Complaint. If the person is charged with being drunk, the policeman might write, "The complainant says that on the 14th day of January, 1978 at Derby, Albert Jones was found drunk in a public place, to wit, the bar of the Derby Boab Inn. Contrary to section 53 of the Police Act."

Sometimes the policeman keeps the person in the lockup until the Court is ready. Sometimes the policeman will let him go on bail and tell him which day to come to Court. That person who has broken the law is called the defendant.

When the Court is ready the people gather together to wait for the JPs. When the two JPs walk into the Court the Bench Clerk or the policeman calls out in a loud voice to the people in the Court. He says, "Silence in Court. All stand please." the JPs walk to their places at the table. The table they sit at is called the Bench. It is a special name for the table the JPs use. When they get to the Bench they bow to all the people then they sit down. They tell the other people to sit down. Some of these people have just come to watch. It is good for people to come and watch the Court so they can see what happens and learn about the law. Two men sit facing the JPs. One man sits on one side of the JPs. He is called the Police Prosecutor. He tells the policeman's story about the defendant. The other man sits on the other side of the JPs. He is the lawyer or Community Welfare Officer. He helps the defendant. Sometimes there is no one there to help the defendant.

Then the Bench Clerk tells the people that the Court is ready. If the Court is at Fitzroy Crossing he says, "Fitzroy Crossing Court of Petty Sessions is now open." If the Court is in Derby, he says, "Derby Court of Petty Sessions is now open." After that the Court is ready to see the people who have broken

the law. Next the Bench Clerk reads out the name of one of the defendants. The Bench Clerk might say, "Charge number 27 of 1978 - Albert Jones."

The policeman brings the defendant Albert Jones into the Court and takes him to a chair to sit down. The place where he sits is a special place like a box. If someone is there to help him, is it good for the defendant to sit next to that person. He does not have to sit in the dock but can sit near his helper. (Maybe he has a lawyer or a Community Welfare Officer to help him.)

After the defendant sits down, one policeman stands up to speak to the JPs. He is the Police Prosecutor. The Police Prosecutor calls the JPs by a special name. People in the Court always call them by the name "Your Worship". The policeman says to the JPs, "May it please your Worships, I appear as prosecutor in this matter." This means the policeman will say what the defendant has done wrong.

After that the lawyer stands up and says, "If it please your Worships I appear for the defendant." This means the lawyer will help the defendant and take his part.

The defendant must stand up whenever the JPs speak to him and if he speaks to the JPs. If the boss JP can read English he asks the defendant who he is. He says, "Is your name Albert Jones?" If the defendant says "Yes" the JP reads out what the policeman has written on the Complaint sheet. If the JP cannot read, the Bench Clerk reads it.

The JPs should explain the complaint to the defendant in easy words. If the defendant understands, the JPs should ask him if it is true. They must warn the defendant, "If you say guilty, that means the policeman has written the truth about you breaking the law. You might be punished for breaking the law." The JPs must also say to the defendant, "The policeman will tell his story first and after that you can tell your story." After the JPs have said this they ask the defendant, "Do you plead 'not guilty' or 'guilty'?"

If the defendant says he is not guilty he means he did not break the law the way the policeman wrote it down. Because he says 'not guilty' the JPs cannot listen to the case on their own. They will have to wait for the Magistrate to come and help them. When the Magistrate comes to help, the defendant will come back to the Court again and the JPs and the Magistrate will listen to the case together. The JPs must tell the defendant to wait for the Magistrate. If it is possible they should let the man go on bail while they wait for the Magistrate.

If the defendant says he is guilty he means that he did break the law the way the policeman wrote it down. The JPs write down on the complaint sheet what the defendant said, then they write down the name of the Police Prosecutor. If the JPs cannot write the Bench Clerk writes it down.

Next the JPs says to the policeman, "Please tell us the story." Then the policeman reads the story about what the defendant did and how he broke the law. He might tell the JPs what the defendant said. The JPs must listen carefully to the policeman. If the policeman uses hard words, the JPs should ask him to use easy words for everyone to understand. The JPs must listen to what the policeman says and make sure that the defendant really did break the law.

Maybe the defendant has been punished before for breaking the law. The policeman must tell the JPs about the defendant. If he has been to Court before, the policeman has a piece of paper. The paper shows all the times when the defendant has been to Court. This paper is called a Record Card. The policeman gives the Record Card to the Bench Clerk. Then the Bench Clerk shows it to the defendant. Sometimes there is no Record Card for the defendant because he has not been to Court before. If the defendant can't read the Record Card the Bench Clerk reads it to him. Then the Bench Clerk asks the defendant, "Is this true?" If the defendant says it is true, the JPs should read it. If they can't read the Bench Clerk reads it to them.

When someone comes to Court it costs money to write out the Complaint sheet and other things. The policeman must tell the JPs how much money it cost to write out the Complaint sheet and also how much it cost for food while the defendant was in the lockup. The JPs or Bench Clerk must write on the Complaint sheet how much money it was. This is called the Costs of Court.

Then the policeman tells the JPs about the punishment for the defendant. He tells them where the law is written in the Law Book. Also he tells them how much punishment a person can have for breaking that law. The Law Book says how much punishment a person can get for breaking each law. It says what is the smallest punishment and it also says what is the hardest punishment. The JPs have to decide how much punishment the defendant will get. The smallest punishment for breaking the law is called the "minimum penalty". The hardest punishment is called the "maximum penalty". After the policeman has told the JPs about the punishment, he has finished telling his story so he sits down.

After that the JPs tell the defendant, "If you want to, you can stand up and tell your story now." Maybe his story will be the same as the policeman's. If the defendant says the policeman's story is not true, the JPs cannot finish the case for this person. They must say to the defendant, "We will not go on hearing this case, we will send for the Magistrate to help us." Then the JPs must write a plea of "not guilty" on the complaint sheet. The JPs must decide what to do with the defendant while they wait for the Magistrate. If it is possible they should let the defendant go on bail. If the JPs think the defendant is a bad person and might run away they should keep him in the lockup to wait for the Magistrate. He must not wait in the lockup for a long time. If the JPs tell the defendant to stay in the lockup they must tell the Bench Clerk to get the Magistrate quickly. If the Magistrate takes a long time to come the JPs must see the

defendant again after 8 days. They must decide whether to keep him in the lockup or let him go.

If the defendant's story is the same as the policeman's story, the JPs finish the case for this person. Next the JPs should talk together about what punishment to give the defendant.

It is hard to decide what punishment to give. The punishment must not be too hard and not too easy. It must be hard enough to stop the person from breaking the law again. It must be hard enough to frighten other people so they won't break the law. The JPs must learn what the Law Books say, so they can give the right punishment. If people from the Community come to Court to watch, they will learn what the punishment is for breaking the law. Then they will be careful not to break the law themselves.

These are the things the JPs ought to think about before they decide what punishment to give:

- * The punishment must always be right for the person who broke the law. The Law Book tells about the laws and what the punishment should be for people who break the laws. The punishment in the book is nearly always the hardest punishment. Only people who have done a very bad thing should get the hardest punishment. The JPs should make up their own minds about how much punishment to give.
- * JPs must remember that the reason for punishment is to keep everyone in the Community living straight. It must stop the person who broke the law from doing that thing again and it must be a lesson to other people in the Community not to break the law.
- * When the JPs are making up their minds about the punishment, they must think whether it was a very bad thing that the person did. They must also think about why the defendant broke the law. Maybe he was angry and worried. Maybe he wasn't thinking straight and so he broke the law without thinking. Maybe he thought about breaking the law and made a plan, then he broke the law but he knew it was wrong.
- * The JPs must think about whether the person was a good person or a bad person before he broke the law. They must also think about the other people in the Community and how many people have been breaking the same law. After thinking about these things they must decide whether the defendant should get a hard punishment or an easy punishment.
- * If the JPs want to know more about the defendant before they decide about the punishment, they can ask another man to help. He is called the Probation Officer. The JP should tell the Bench Clerk to get the Probation Officer. Then the Probation Officer will find out about the defendant and what made him break the law. Maybe his wife is playing up. Maybe he has a lot of

- * problems. Maybe he is drinking too much. The Probation Officer might be able to find out about these things for the JPs. He might need time to find out so the JPs might stop the case to give him time, maybe up to 21 days. While the JPs are waiting, they can let the defendant go on bail or they can tell the police to keep him in the lockup. Later on when the defendant comes back to Court, the Probation Officer tells the JPs about him. Then the JPs must think about the problems and decide what punishment to give.

There are 4 kinds of punishment for a person who has broken the law. The JPs may give any of these punishments. They are; fines, gaol, probation and good behaviour bond.

Fines

When the JPs fine a person who breaks the law, that means he tells the person to pay money for his punishment. The defendant must pay the money then he can go free. The Law Book gives the biggest fine for each law. The biggest fine is called the maximum. The JPs can only fine a person the same as the Law Book says, no more than that. If the Law Book says maximum fine \$100, the JPs can charge a small fine or they can charge a big fine, \$100.

The Law Book might also say what the smallest fine is. That is called the minimum. The JPs cannot fine a person a smaller amount than the minimum. If the Law Book says minimum fine \$10, the JPs must make the fine \$10 or more.

If the JPs decide they will fine a person, they must think about how much the fine should be. The fine must be a proper punishment for breaking that law. It must not be too big or too small. It must be just right. The defendant must pay the fine. He must also pay the Costs of the Court.

If the defendant has enough money he must pay the whole fine straight away. If he doesn't have any money the JPs might give him time to get the money to pay the fine. Again they might let him pay a little bit each week until the fine is paid. The JPs must tell the defendant, "You must pay the fine. If you do not pay the fine you must go to gaol. If you owe a little bit of money you must go to gaol for a little while. If you owe a lot of money you must go to gaol for a long time." If the defendant owes \$10 he must stay in gaol 2 days. If he owes \$20 he must stay in gaol for 4 days. He must stay one day for every \$5 he owes.

Gaol

Sometimes the Law Book says the punishment may be to go to gaol. JPs should not send people to gaol straight away. They should think carefully about it. There might be some very bad people in gaol and they might teach the defendant bad things. If young people go to gaol they might learn bad ways from people there and grow up to be bad men and bad women. Young people learn

very quickly so JPs should try not to send them to gaol. They should give them a different punishment.

Most people who go to gaol have to do hard work. This is called hard labour. If a person is sick or a pensioner he may not be able to do hard labour. The JPs must say if the defendant will do hard work in gaol. If a person is not very strong or if he is old or sick the JPs should say not to give him hard labour. They should send him to gaol without hard labour.

If a person is sent to gaol for more than 12 months he might be let out after a little while to see if he can live straight. The JPs say how long the person must stay in gaol before they let him out to see if he can live straight. Then the policeman cannot let him out before that time. If JPs give a man a punishment of 12 months in gaol they might say, "Three months is the shortest time, then they can let him out to see if he can live straight." They can't let the defendant out before 3 months. When he comes out of gaol he must live like a good man and not break the law for 9 months. If he does break the law during that time he will be sent back to gaol and will have to stay there for 9 months to finish the 12 months punishment.

If a person is guilty of breaking two laws, the JPs might send him to gaol for breaking both laws. The JPs might give him a punishment of 3 months for breaking one law and another 3 months for breaking the other law. The JPs must tell the defendant how much time he will spend in gaol altogether. Maybe they will tell him to take half the punishment time. That means he will only stay in gaol for 3 months. Maybe the JPs will tell the defendant to take both punishments. He will stay in gaol for one punishment first then the other after that. That means he will be kept in gaol for 6 months.

Probation

Sometimes when the Law Book says the punishment is gaol, the JPs might decide not to send the person to gaol. He might have a different punishment. They might give the defendant to another man who will teach him how to live straight. The man is called a Probation Officer. When a person is on probation he is free but the Probation Officer keeps an eye on him while he is learning to live straight. The JPs must think about whether the person can learn to live straight. Maybe the Probation Officer can teach the defendant and he will be a good man again. Maybe the defendant is a bad man and cannot learn. If the JPs think the defendant can learn to be good they can give him to the Probation Officer. The JPs say how long the Probation Officer will look after the defendant. One year or two years is enough time for probation. The JPs must give him one year, no shorter. They can give him as much as 5 years but no more than that.

Before the JPs put a person on probation they must tell him these things:

- * The Defendant must go and see the Probation Officer the same day he leaves the Court.

- * The defendant must obey the Probation Officer.
- * If the defendant breaks the law again while he is on probation, he will be punished for two things. He will be punished for breaking the law twice and he will get two punishments.
- * The defendant must go and see the Probation Officer anywhere and any time when the Probation Officer calls him. He must do this all the time while he is learning to live straight.
- * If the defendant moves to live at a different place or changes to a different job he must tell the Probation Officer within 2 days.
- * If he wants to move out of WA he must go to Court and ask the JPs. If the JPs say he can go then that's alright. If the JPs say "no" then he must stay in WA.

Those are the six things the JPs must tell someone before they put him on probation.

There are other things the JPs might tell the defendant, and when a person is on probation, he must do as they say. They might say, "You must not drink liquor and you must not go to a hotel." They might tell this person to go and live at some other place. If there are some bad people who might get the person into trouble again the JPs might say, "Don't go around with these bad people, stay away from them."

After the JPs have told the defendant all the things he must do and all the things he must not do, they must ask the defendant if he is happy to go on probation for punishment. If the defendant says "yes" then that's alright. If the defendant says "no" then the JPs must give him a different punishment. Maybe they will send him to gaol or fine him.

Good behaviour bond

Sometimes the JPs might not give the defendant to a Probation Officer. They might put him on a Good Behaviour Bond. That means the defendant must promise not to break the law for the time the JPs say. If the defendant doesn't keep his promise he will have to come back to Court and the JPs might make him pay some money. The JPs say how long the defendant must go without breaking the law and they also say how much money he will pay if he doesn't keep his promise. If the defendant promises to be a good person and not break the law the JPs might say to the defendant, "We will let you go free now but don't break the law for 12 months. If you break the law before 12 months you will have to pay a fine." Then the JPs tell him how much money it will be. This is a Good Behaviour Bond. It is like probation but the person does not have a Probation Officer to teach him to live straight. He is free. If the JPs think a person needs to learn to live straight they should give him to a Probation Officer, they should not let him go on a Good Behaviour Bond.

Bail

Sometimes JPs cannot listen straight away to a case against a person who has broken the law. Maybe they want the Magistrate to help them or maybe they want a Probation Officer to tell them more about the defendant. If they have to wait for these things the JPs must say what the defendant will do. Maybe they will tell the policeman to keep the defendant in the lockup or maybe they will let the defendant go on bail.

Bail means the defendant must promise to come back to Court when the JPs tell him to. If he does not come to Court that day he will have to pay money for not keeping his promise. The JPs say how much bail money the defendant must pay if he doesn't keep his promise. If a case is put off for 7 days, the JPs might decide to let the defendant go on bail. They might say to him, "You can go on bail for 7 days if you promise to come back to Court at 10 o'clock in 7 days time. If you do not come back the police will pick you up again and you will have to pay money, maybe \$100 for not keeping your promise."

If the JPs want to let someone go on bail they must first think hard about these things.

- * They must think if the defendant is likely to run away and not come back to Court.
- * They must think about what the defendant did wrong. If he did a very bad thing or just a little thing.
- * Maybe the defendant lives in the Community near the Court or maybe he comes from somewhere else.
- * The JPs must think whether the defendant will cause trouble and hurt someone in the Community if he goes out on bail. Maybe someone else in the Community will hurt the defendant if he goes out on bail.
- * Maybe the person will break the law again if he goes on bail. These are the things JPs must think about before they let anyone go on bail.

Laws

Here are 4 laws from the Law Book. JPs will often listen to cases charged with breaking these laws.

Drunk - Section 53 Police Act

The law says that a person must not be found drunk in places like hotels, hospitals, roads, streets, parks, police stations and race courses. These are called public places. If the police find a person drunk in a public place they might take him to the lockup and charge him with being drunk.

The law says that a person is drunk when he cannot look

after himself properly because he has been drinking beer, wine, brandy or any other sort of liquor. Maybe he can't walk straight and is falling all over the place. Maybe he is waving his arms and shouting out in a loud voice or doing other stupid things that people do when they are full drunk.

When a person is charged with being drunk this is what the policeman might write on the Complaint sheet, "The complainant says that on the 14th day of January, 1978 at Derby, Albert Jones was found drunk in a public place, to wit, the bar of the Derby Boab Inn, contrary to Section 53 of the Police Act."

When the JPs listen to a charge like this they must think about two things so they can make sure the defendant really broke the law. The JPs must make sure the defendant was truly drunk. The JPs must make sure that the policeman picked up the defendant in a public place, not somewhere else.

Habitual Drunk - Section 65(b) of the Police Act

The law says that a person is a habitual drunk if he gets drunk all the time. Maybe the person gets drunk so often that people know he might be drunk anytime they see him. Maybe he gets drunk so often he doesn't look after his family and he doesn't look after himself. Maybe he is always drunk and does not help the Community or take notice of other people.

If a person is always drunk and has been to Court the Record Card will show how many times that person has been found guilty and punished for being drunk and breaking the law. If the defendant has been to Court and been found guilty of being drunk 3 times or more in the last 12 months, he is a habitual drunkard and has broken the law.

When a person is charged with being a habitual drunk this is what the policeman might write on the Complaint sheet, "The Complainant says that on the 14th day of January, 1978 at Derby, Albert Jones is a habitual and has thrice been convicted of drunkenness within the preceding 12 months."

Disorderly Conduct - Section 54 of the Police Act

The law says that a person must not carry on in a public place in a way that will frighten other people. Maybe the other people were quietly enjoying themselves and the defendant did things to frighten them or make them ashamed and go away.

The law says it is wrong to fight in a public place. Sometimes a person growls at others and waves a stick then other people come to look and soon they all start fighting. The person who started the trouble is breaking the law by being disorderly.

The law says it is wrong for people to use dirty bad words in a public place if the people there don't like to listen to them. When the JPs listen to a charge of disorderly conduct they must think about what the defendant did. They must think if the defendant used bad language or did bad things to shame other

people and make them want to walk away.

When a person is charged with disorderly conduct this is what the policeman might write on the Complaint sheet, "The complainant says that on the 14th day of January, 1978 at Derby, Albert Jones was disorderly by fighting and using obscene or indecent language in a public place, to wit, outside the Boab Inn."

Assault - Section 313 of the Criminal Code

The law says that a person must not hit anyone with his fist or a stick. He must not kick anyone or push them about. If anyone does this it is called assault. If a person tries to frighten another person and says, "I'll punch you" he is still breaking the law. It is still called assault.

If JPs listen to a case of assault they should think about whether the defendant had a good reason to do it. If the JPs think it was a good reason they should ask the Magistrate to come and help them. The JPs must not hear the case on their own. Maybe the defendant hit or kicked or pushed a woman, then the JPs must call the Magistrate. Maybe it was a young boy under 17 years or maybe it was a policeman. If the defendant hit any of these the JPs must not hear the case. They must send for the Magistrate.

'The Voice Of The People': Aborigines, Judicial
Determinism & The Criminal Justice System In Australia

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'Society is entitled to expect from its sentencing tribunals detachment and objectivity and that its courts will refrain from exhibiting savagery while at the same time purporting to condemn it. And towering over even those considerations there is the voice of the people ...'¹

The case of Eric James Murray was, quite simply, of horrifying proportions. He pleaded guilty to charges that, after escaping from the Kirkconnell Afforestation Camp near Bathurst NSW, he stole a shotgun and, in his own words: 'it now seems stupid to kill a man to get sex'; however, he 'was probably so sexed up he could not stop'. These latter being quoted by the trial judge from the report of the defence psychiatrist. After walking up to the kitchen window of the isolated farmhouse where the deceased lived, Murray pointed the gun at the deceased who was standing facing the window with his pregnant wife washing up the dishes after an evening meal, and fired. The victim died instantly.

The murderer then forced the victim's wife at gunpoint and upon threat of injury to herself and her two infant children to drive the family vehicle away from the farmhouse to a place where Murray intended to have 'sexual intercourse without consent' - being the euphemistic statutory expression replacing 'rape' - at a later stage. By means of considerable daring and courage, the woman was able to attract the attention of a garage attendant after making the car appear to be in need of mechanical attention and at a subsequent police roadblock Murray was captured.

The issue before the trial judge, on the evidence of the defence psychiatrist, from whose report the judge liberally quoted prior to passing sentence, was whether in the circumstances of the case S.19 of the Crimes Act, 1900 (NSW) as amended by the Crimes (Homicide) Amendment Act 1982 (NSW) was appropriate.

That section, as amended, provides for a mandatory life sentence for murder:

unless it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances whether disclosed by the evidence in the trial or otherwise.

* The opinions expressed are those of the author, and not necessarily those of the (Commonwealth) Attorney-General's Department.

His Honour found that such circumstances existed. Murray, he found, was a psychopathic personality with an intellectual level no better than a border line defective, a dangerous man - at the mercy of his impulses - driven by instinct and lacking in forethought or concern about the consequences of his behaviour. Rehabilitation was unlikely and psychiatric therapy could not assist.

Accordingly, the judge felt bound to hold that the accused's impaired mental condition was a mitigating circumstance which significantly diminished his culpability for the crime. Whilst imposing a sentence less than life, his Honour also had regard to the likely parole period of twelve years, and accordingly, set a non-parole of ten.

His Honour imposed sentences of two years with hard labour on the charge of escaping from lawful custody, to commence at the expiration of sentences the accused was then serving; on the charge of murder, fourteen years, cumulative with the first sentence; on the charge of threatening to inflict grievous bodily harm with intent to have sexual intercourse without consent, eight years concurrent with the sentence for murder. On the charge of kidnapping, penal servitude for five years concurrent with the sentence for murder. Of the total effective period of sixteen years, the prisoner was to serve a non-parole period of ten.²

His Honour did not define, nor expound, what he meant by 'the voice of the people'. But in the context of the Murray case, the expression derives meaning from the judicial balance between the expectations of the community in the way that justice, particularly criminal justice, is administered and the 'merits' of any individual case to which that system is to be addressed. The expectations are those of an objective and reasonable group, on the one hand, and those of the transgressor on the other.

Thus, in the application of the system of criminal justice, a number of disparate factors, and their relationship, need to be assessed and given due weight. First, what is the identity of the 'group'? Is it society en bloc, meaning the juridical sovereign sometimes called 'the people' whose will is most commonly expressed in lawful commands given effect by sanctions attaching to their infraction? The disciples of Austinian positivism would have us so believe.³ There is, however, a fundamental distinction between the collective expressions of 'the people' and the organs of government, which latter comprise the State. As R. Durkheim, writing on civic morals, put it:

It is not accurate to say that the State embodies the collective consciousness, for that goes beyond the State at every point. In the main, that consciousness is diffused: there is at all times a vast number of social sentiments and social states of mind (etats) of all kinds, of which the State hears only a faint echo. The State is the center only of a particular kind of consciousness, of one that is limited but higher, clearer and with a more vivid sense of itself. There is nothing so obscure

and so indefinite as those collective representations that are spread throughout all societies - myths, religious or moral legends, and so on... The representations that derive from the State... are distinguished from the other collective representations by their higher degree of consciousness and reflection.⁴

Secondly, is there a discernible group within society at large whose standards of behaviour or rules of conduct are apposite as a litmus against which individuals within that group will be charged, tried, and punished? Thirdly, are there offences more commonly committed either by that group, or a sub-group, for which societal norms are inapposite, such that the code of behaviour for that sub-group or group is transposed for that of the wider society? Fourthly, is the cultural position of any group in society so different, or at such variance, to that of society at large, that a lesser standard of behaviour is expected? If that is so, are the penalties attaching to that kind of behaviour unequally applied depending upon the cultural milieu of the offender? Or are they fully applied and then mitigated by application of extraneous, or additional, matters as provided by law, as applied by judicial officers in the exercise of their discretion and as deemed appropriate by recourse to matters necessitating judicial notice or formal evidence?

Finally, what kind of justice is administered? That is, what objects, results, or consequences were in the mind of the judicial officer when determining the penalty for offence upon conviction of the delinquent?

This analysis derives from a consideration of 235 reported and unreported criminal Court decisions, mostly but not exclusively at Supreme Court (or higher) level, contained in my Bibliography.⁵ To the extent that they shed light on judicial attitudes or judicial bias in respect of Aborigines, civil cases - particularly those of the (then) Commonwealth Court of Conciliation and Arbitration or of the (Commonwealth) Conciliation and Arbitration Commission - are also included. For ease of analysis, and of further study or research, I have considered them under the following subject headings:

- * aborigines as subject of white man's criminal justice
- * aborigines as subjects in need of protection or welfare
- * equality of black and white legal treatment: 'community standards'
- * judicial awareness of cultural differences
- * Supervision of magistrates by superior courts
- * aborigines and alcohol, drunkenness, and drink - related crime
- * aboriginal testimony
- * interrogation of, or confessions by, Aborigines
- * legal defences: the test of provocation
- * tribal punishment as a mitigating factor in determining penalties for offences against white man's law

- * Principles and objects of sentencing
- * Effect of imprisonment

Aborigines as subjects of white man's criminal justice

I The Common Law Tradition

The Vattelian exposition of natural law, principally in the celebrated 'Le Droit des Gens ou Principes de la Loi Naturelle' (1758), justified the claim of English sovereignty to, and subsequent English colonization of, so much of Australia as was then known on the philosophy:

that the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced.⁶

And of course not only such peoples. Blackstone in his celebrated Commentaries, first published in 1765, stated as clearly settled the doctrine of the application of English law to the overseas possessions of the Crown.⁷

There is a distinction between settled colonies, where the land, being desert and uncultivated, or terra nullius, is claimed by right of occupancy, and conquered or ceded colonies. The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered.⁸

II The Colony Of New South Wales

There is little doubt that the English colonists regarded themselves as bound by English law in their dealings with one another, and were so bound in their dealings with the Aborigines. King George III's instructions to Captain Arthur Phillip, for example, enjoined the latter to

cause such offenders to be brought to punishment according to the degree of the offence

in circumstances where any colonist should 'wantonly destroy' the 'natives' 'or give them any unnecessary interruption in the exercise of their several occupations.'⁹

During the first twelve years of the colony, that is, between 1788 and 1800, eight white men were tried for the murder of Aborigines. Of these, three were acquitted and five convicted of an offence of uncertain nature. Only one had been punished, and then for vagrancy. The five persons convicted all received pardons.¹⁰ As late as 1799 a number of white settlers were tried for the murder of two Aboriginal youths, and found guilty,

but released on bail pending the outcome of a reference by the trial Court to English authorities as to the appropriate penalty.¹¹

In the same period, another twenty four persons had been tried for the murder of whites; eight were convicted of murder and sentenced to death; six were convicted of manslaughter and ten were acquitted. Of those convicted of manslaughter, five were sentenced to corporal punishment, and one to be burnt in the hand and to serve twelve months' imprisonment.¹²

These results, juxtaposed, indicate a degree of inconsistent application of the law where the victim was black. First, there was less likelihood that the offender would be found guilty of the offence as charged, which was of a capital nature and so required the death penalty. Secondly, a verdict of guilt on a lesser charge was more likely in the case of charges where the victim was black; thirdly, a pardon was more likely to follow trial and conviction for the death of a black than for a white.

The earliest application of legal process to an Aborigine seems to be that of Moowattin (Daniel), who was hung for the rape of a white woman in 1812.¹³

However, the status in law of the Aborigines was still largely undetermined, George III's instructions to Captain Phillip and the natural legal philosophy of de Vattel notwithstanding. Even Governor Macquarie's celebrated Proclamation to the Aborigines in 1816 does not put the matter beyond doubt.¹⁴ In return for undertaking peaceful pursuits and renewing a passport each month, Aborigines could place themselves 'under the Protection of the British Government' and earn the reward of assistance in establishing, and cultivating, farms. The native practice of 'inflicting Punishments on Transgressors of their own Customs and Manners' was abolished 'as a barbarous Customs repugnant to the British Laws.' Any continuance of which would be considered as a disturbance of the 'Public Peace' and punishable summarily.¹⁵

It will be noted that the Proclamation was addressed to the Aborigines exclusively, although specific parts of it required consequential administrative action, whether of a judicial or bureaucratic nature. Next, clause 3 of the Proclamation specifically acknowledged the existence, if not the extent, of native custom, and of native penalty appropriate to a transgression of that custom. Thirdly, the Proclamation of its own force sought to modify the application amongst Aborigines of a custom or practice on the grounds of its barbarity and its vitiating influence on the 'Civilization of the natives'. The Proclamation did not, in other words, purport expressly to extend English law and the sanctions of English criminal justice to actions committed by Aborigines inter se. Indeed, the fourth preamble to the Proclamation contrasts the rights of 'His Majesty's British Subjects residing in the several Settlements of this Territory' with the obligations of the 'Natives' in respect of those rights. Finally, the fourth clause, obliged such Aborigines

....As may wish to be considered under the Protection of the British Government...

to apply for, and obtain from the Governor, a passport renewable each month on proof of good behaviour during the preceding month.

The common law of England, in other words, was given a restricted application, first, in the types of criminal offences which attracted its operation where the actor was Aboriginal, and secondly, in the extension of protection which required a subjective assessment and choice by those seeking to avail themselves of it.

Too much ought not to be made of the deficiencies in Macquarie's Proclamation: it may be a question more of semantics than sophistry. A little over two months later, Macquarie, again by Proclamation, outlawed certain named Aborigines, ten in number, for 'Acts of Barbarity on the unoffending and unprotected Settlers and their Families'.¹⁶

The second sentence, immediately following the proclamation of a 'State of Outlawry', calls upon

All and every of His Majesty's Subjects, whether Free Men, Prisoners of the Crown, or Friendly Natives...and to deliver them up to the nearest Magistrate to be dealt with according to Justice.¹⁷

A proclamation of out-lawry a priori assumes that those subject to it are already within the law, from whose benefit and protection they are henceforth excluded. Again, an express assumption is made, or recognition given, that 'Friendly Natives' (which in the context predicates those not outlawed and their followers) are 'His Majesty's Subjects.' The proclamation did not fully and finally determine the extent to which the full weight and authority of English law - civil or criminal - and procedures were applicable to, and binding on, Aborigines as subjects of the Crown.

If Aborigines were not subjects of the Crown, they were still subject to the King's justice whilst under his dominion and protection. Accordingly, ignorance of the law could not be pleaded in bar as a complete defence to any criminal (or civil) action. If Aborigines were subjects of the Crown, ignorance was even less of an excuse. However, this restatement of the common law requires modification in several respects.

First, there is no way in which, realistically, a race which had had no history of continuous white contact could possibly hope to acquire even a modicum of knowledge of English legal concepts. Even Blackstone's Commentaries on the Laws of England in four volumes was not published until 1765-70. English law itself was undergoing profound changes with the synthesizing of commercial law under Lord Mansfield during his tenure of the office of Chief Justice of the Court of King's Bench 1756-88; the

restatement of the principles of equity during his tenure as Lord Chancellor 1737-57 by Lord Hardwicke, the influence on the development of law and changes in its direction of the industrial revolution, the rise of commerce in importance as a source of wealth, increasing the emphasis the law was to play more on partnerships, joint-stock companies, contract, banking, and employment, and less on land.

The post-enlightenment period, especially in France, the French Revolution and the wars against Napoleon, and their aftermath, coinciding with Lord Ellenborough's conservative tenure as Chief Justice of the Court of King's Bench 1801-18 and that of Lord Eldon as Lord Chancellor 1801-6, 1807-27, delayed essential reform such that the law of England brought to Australia reflected none of the emancipation and liberal attitudes which pervade so much of nineteenth century English judicial administration.

How totally unsuited to the conditions of an infant colony so much of the substantive English law must have been. It was, first and foremost, a penal colony, run on institutional lines, with compelling emphasis on harsh punishment for even minor transgressions. It was run on military lines, with exceptional powers reposed in the Governor as Commander-in Chief.¹⁸ Its population initially and for many years thereafter comprised mainly prisoners and their guards. The populace contained a strong number of rebellious Irish and recalcitrant Scots, neither of which groups could be expected to be versed in the niceties of a legal system still evolving in England. The struggle for survival in the absence of cultivated fields and arable crops would have made the wholesale importation of the commercial laws of an industrialising England absurd and out-of-place. Even a formal (Supreme) Court structure was not created until the third Charter of Justice 1823 being letters patent issued pursuant to authority under the Imperial Act 4 Geo IV c.96 (the New South Wales Act) that same year.

The Aborigines to whom the provisions of English law were to apply had been observed by Captain Cook in August 1770 as

...more happier than we Europeans, being wholly unacquainted not only with the superfluous, but with the necessary conveniences so much sought after in Europe; they are happy in not knowing the use of them. They live in a Tranquility which is not disturbed by the inequality of Condition. The Earth and Sea of their own accord furnishes them with all things necessary for life. They covet not Magnificent Houses, Household stuff, etc.; they live in a Warm and fine Climate, and enjoy every Wholesome Air... they seemed to set no value upon anything of their own nor any one Article we could offer them.¹⁹

This 'noble savage' of Rousseau-esque proportions nevertheless by the tenets of public international law as then understood fell within the King's dominium and was, accordingly, subject to the King's laws. It is somewhat arguable that the

white colonists and administrators were properly ignorant of the existence of a body of laws developed by Aborigines in accord with their cultures and traditions, and, of course, ignorantia iuris neminem excusat ('Ignorance of the law excuses no one'). Further, with the benefit of modern anthropology it is open to argue that, at the time of colonization, there also were 'highly settled inhabitants', with a recognizable form of governance among them, capable of entering into and concluding binding agreements.²⁰

If it is considered that the substance of English law should apply to Aborigines, what could be said as to the procedural difficulties which the application of the law posed? This matter was raised in 1805 by Judge-Advocate Atkins. In an 'Opinion on the Treatment of Natives', dated 8 July 1805, Atkins was of the view that Aborigines would be unable to plead to a criminal charge on indictment

the meaning and tendency of which they must be totally ignorant of.²¹

To bring such Natives before a Court of law in these circumstances

would be a mocking of Judicial Procedure and a Solecism in Law; and that the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit.²²

Atkins' advice was not followed. Indeed, Macquarie's Proclamations of 1816, particularly that of Outlawry, clearly predicate an opposite view.

Nevertheless, sufficient doubts appear to have persisted in the minds of the judiciary, not only as to the exact legal status of the white settlements in the several Colonies, but as to the proper application of judicial procedures and criminal sanctions to Aborigines qua Aborigines, or in the case of criminal offences committed by Aborigines against each other.

III Judicial treatment of Aborigines as subjects of (English) criminal justice

Although McGonigal in his Thesis notes that, in the forty-one years of white colonisation to 1828, ten Aborigines were charged with offences cognizable by the highest courts exercising criminal jurisdiction in New South Wales, only seven were tried and four convicted.

The sentences of three, two of death and one of imprisonment, were put into effect.²³ During that same time four Aborigines were tried by the Supreme Court of Tasmania, two of whom, Musquito (a mainland Aborigine) and Black Jack (a Tasmanian Aborigine) were tried for the murder of a white stockman and a Tahitian native in 1823.²⁴

The first trial of an Aborigine as reported is that of

Jack Congo Murrell in 1836.²⁵ The accused was charged with the murder of one Definger, another Aborigine. The defence filed a demurrer, asserting that, even if the facts as alleged were true there was nevertheless no action answerable in law as the Supreme Court lacked the jurisdiction to try offences committed by one Aborigine upon another.

Serjeant Stephen, the equivalent of a Queen's Counsel, appeared in support of the demurrer. Two principal arguments were advanced. The first is that seeking to refute the Vattelien justification for the claim and exercise of sovereignty by the whites over the blacks. The country, so Stephen argued, was not originally desert, or peopled from the mother country, having had a population far more numerous than those that had since arrived from the mother country. Nor could it be called a conquered country, as Great Britain was never at war with the natives; nor could it be regarded as a ceded country. It was, in fact, none of these, but was a country with a population having manners and customs of their own. The British had come to reside among them; accordingly, in point of strictness and analogy to English law, the white settlers were bound to obey their laws, not the Aborigines white man's law.

Of the three judges comprising the Court of Appeal hearing the demurrer, Forbes CJ, Dowling J, and Burton J, only Burton J dealt with this aspect and then in a somewhat evasive manner. His Honour acknowledged that although on the first taking possession of the colony the Aborigines were entitled to be recognized as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They therefore had no sovereignty. In other words, his Honour was denying to the Aborigines a legal status independent of that which the occupying Power might seek to confer. His Honour, it will be noted, did not deny the existence of a populace prior to the arrival of the whites, nor to their initial position vis-à-vis English settlers as free and independent. His Honour's third observation, viz. that the British Government had entered and exercised rights over the country for a long time, seems to found the conclusion of his first, that the Aborigines had no sovereignty. By effluxion of time, and the devastating effect which white disease, white alcohol, white dispossession of traditional hunting grounds, and white depredations, had on Aboriginal numbers, will, and therefore capacity to resist, the Aborigines by 1836 had lost whatever sovereignty they may once have had. By means of judicial realpolitik, therefore, what was once de facto had become accepted as de iure.

Serjeant Stephen's second argument was a more moving and eloquent expression of the pitiable status of the Aborigines as lawful subjects of the King. 'The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.'

The Attorney-General in response asserted that the laws of Great Britain did not recognize any independent power to exist in a British territory. The Colony was held by occupation, not by conquest or cession. The law was bound to protect every person who comes to the Colony, and to the law such person is amenable.

The first proposition is undoubtedly correct as a general statement of principle. In sovereign territory, there can only be one sovereign whose lawful commands the subject is bound to obey. But it does not derogate from a sovereign's dominium or suzerainty to acknowledge and confirm the existence and efficacy of a body of rules, conventions, or practices having binding effect on his subjects, or a group of them.

The Court after due deliberation rejected Stephen's arguments. The second argument was met by Burton J, with whose reasons both the Chief Justice and Mr Justice Dowling agreed, in a somewhat utilitarian fashion. Offences committed in the Colony against a party were liable to punishment as a protection to the civil rights of that party. If the offence had been committed on a white, the accused would be answerable. However, the Court could see no distinction between that case and one where the offence had been committed upon one of his own tribe. Serious causes might arise if Aborigines were allowed to murder one another with impunity, as English law would afford them no sanctuary.

The Court, therefore, determined that offences committed by one black upon another were within the Court's jurisdiction. The primary foundation for the Court's assumption of jurisdiction was clearly that of public policy, that of affording a 'sanctuary' and protection. The law was thus perceived by the early judges as beneficial to the Aborigines, ameliorating the harshness of their own laws, customs and practices, affording a system for the maintenance and enforcement of civil rights.

The Court, in its published reasons, did not advert to the substance of Stephen's second submission. Those several components of his submission contained a fundamental denial of any such protection, of the efficacy of the substantive body of English law, and of the discriminatory application of procedures and rules which effectively denied Aborigines legal recourse or legal redress.

What the report in Legge fails to show is that another of the grounds of the demurrer to the indictment was that conviction on the charge would not be a bar to proceedings under tribal law.²⁶ This ground indicates a degree of sensitivity based upon an understanding of a different culture and tradition, and the need for a white (judicial) response tempered to the realities of the situation but finding an expression within English jurisprudence, such as the concept of double jeopardy.

The official file on the case, in the archives of the State of New South Wales, shows also that the case was not one where the accused and his victim were totally out of contact with civilization; the murder took place on the Richmond Road at

Windsor, New South Wales.

On a number of other occasions a judicial attitude was adopted consistent with the idea that Aborigines, or those not in contact with white civilization, had some law other than that of a colony as being applicable to them, or otherwise were not amenable to the common law at least on criminal charges.

In 1840, the Chief Justice of South Australia (Cooper) expressed the opinion in advice to the executive that the murder of one tribal Aborigine by another (neither being in de facto contact with civilization) was not a crime against the law of South Australia, on the ground that, claiming no protection from the law, they owed it no allegiance. The same view was expressed more elaborately, and with much learning and passionate feeling, by Willis J in Port Phillip Bay (Victoria) in 1841. He also expressed the opinion that New South Wales was neither occupied, nor conquered, nor ceded, but in a special position.²⁷

In R -v- Bon Jon, the accused was charged with killing one of his own race.²⁸ His Honour considered that the Aborigines were not in the unqualified condition of British subjects in respect of the application of European law to disputes amongst themselves. He based his view on the words of Chancellor Kent in regard to the American Indians that they were

dependent allies (rather than subjects) under such constraint and qualified control in their national capacity, as is considered by the whites to be indispensable to their own safety, and the requisite discharge of the duty of protection.

Willis J also received evidence that the Aborigines had a complete system of punishment amongst themselves appropriate for every sort of offence committed.

In Bon Jon's case, the jury were not satisfied that the prisoner appreciated the nature of the offence with which he was charged, or was of sufficient intelligence to plead. The Crown Prosecutor decided not to proceed further with the case. His Honour's opinion was considered by the Supreme Court of New South Wales in response to a request by Governor Gipps. The Chief Justice, Sir James Dowling, by letter to the Governor, was highly critical of Willis J's opinion, which the Supreme Court disavowed.²⁹

The opinions of Cooper CJ and Willis J, can be criticized for the emphasis each seemed to place on the subjective element. The Court in Jack Congo Murrell assumed that protection under the law derived automatically from the status of the subject as British. It was not open to the subject to opt for, or eschew, such protection; conversely, amenability to such law was automatic, indeed axiomatic, reflecting the objective status in law of the individual. This accorded with the law as obtaining in England at that time: in 1838, for example, the Queen's Advocate, the Attorney-General and the Solicitor-General presented their united opinions that an alien, of a country at peace with England, owed

allegiance to the Queen within her dominions.³⁰

The matter, however, clearly did not allay judicial doubts until the Supreme Court of Victoria, sitting in banco, that is, as a court of appeal, and comprising two different benches, decided R -v- Peter and R -v-Jemmy in 1860.³¹

Peter was a half-caste, tried and convicted at the Criminal Sittings of the Court of an unstated offence, but one cognizable by the Court.³² For the purpose of argument it was assumed that he was a pure Aborigine of a still-existing tribe, having a local residence apart from the white inhabitants of the Colony, and therefore 'uncivilized'. It was argued that the accused was not amenable to British laws but only those laws, customs and tribunals of his tribe.

The Court cursorily dismissed the special case, not even requiring the Crown to reply. It held that the Queen's writ ran throughout the Colony and that British law was binding on all peoples within it. Peter's conviction therefore stood.

The report of the decision is somewhat scanty, occupying but two paragraphs of a daily newspaper. Jemmy's case, however, occupies nine paragraphs in the same paper, and includes the substance of argument put to the Court on behalf of the accused. As in Peter, the Crown were not called upon to reply.

Jemmy was tried for the murder of his 'lubra', found guilty of manslaughter, and sentenced to one year's imprisonment. The trial judge was Molesworth J who was one of the Court sitting in banco on Peter.

His Honour reserved, as a special case reserved for the decision of the Full Court on a point of law (as in Peter), the question whether, in the absence of any evidence that either the accused or the victim had become 'civilized' or had changed their habits or modes of life so as to be supposed voluntarily to have submitted themselves to British laws, the accused was amenable to the Court's jurisdiction.

For the accused, counsel submitted a number of propositions. The first was one of fact, distinguishing the present case, from that of Peter, on the ground that, in the present case, both the deceased and her assailant were 'natives', whereas Peter was half-caste.

Secondly, argument was put forward that if the sovereign de facto should impose laws upon a territory held by conquest or occupation, those laws would be binding, and would supersede the laws previously in force. However such a sovereign could tacitly condone or sanction the continuance of pre-existing laws, and confine their operation to the race which was subject to them before the change of sovereignty. Counsel cited the classic American cases and authorities dealing in that fashion with the native Indians.³³ These show that in cases of dependence of qualified subjection, the subject or dependent race may retain their immunity from the jurisdiction of the courts of the dominant

race. The onus lay on the Crown to show that this did not apply in the present instance, and this it could not do on the evidence before the Court.

Another counsel, appearing as amicus curiae, argued by analogy of the Normans who subsided under the Anglo-Saxon law, following the Norman conquest and subsequent occupation of England. The Court held it was governed by the decision in Peter. It made no difference whether the victim were an Englishwoman or a native. The jurisdiction of the Court was supreme, in fact, throughout the Colony, and with regard to all persons in it. The Court, however, did not assert this entirely without qualification. It further stated that it was not intended to decide that in no case there might be a concession to a subject race of immunity from the laws of the conquerors living among them.

Sir Redmond Barry added that Jemmy's plea was one virtually to the jurisdiction, as indeed it was. His Honour noted, in that context, that no other suggestions were made as to what other jurisdiction could be named so as to 'give a better writ' ie exercise more effectual jurisdiction. He seems to have been moved as much by the prospect of a legal lacuna as by a forum competing with his own.

That case seems to have settled, once and for all, the question of amenability of non-civilized, ie tribal, Aborigines to the common law, especially the criminal law.

The New South Wales cases next reported after Jemmy seem to support this. In 1863, the Full Court of the Supreme Court was asked to determine its jurisdiction to try an Aborigine for the murder of an Aboriginal woman with whom he cohabited. In R -v- Black Peter the prisoner was tried and convicted before Wise J at the Spring Assizes at Goulburn of the murder of 'Kitty' otherwise called 'Wahgunyah Kate'.³⁴

The question of the Court's jurisdiction arose because the wounds were received in New South Wales, but death occurred on the Victorian side of the Murray. The Court held, as a matter of law, that a relevant imperial statute, by which the Court was seised of jurisdiction, was received into New South Wales as being applicable to the conditions of the Colony. In other words, New South Wales was treated as a settled, rather than a conquered or ceded, country.

No objection was raised as to the prisoner's amenability to English justice.

In the case of R -v- Black Bob six years later, no challenge to jurisdiction to try an Aborigine at the Wagga Wagga Summer Assizes for assault with intent to commit a rape was raised.³⁵ The matter of a special case being stated for consideration turned purely upon a procedural point (the trial judge's directions to the jury), and not the amenability of the prisoner to English criminal justice.

Just one month after Jemmy was decided, four Aborigines in

Victoria were charged with the murder of another Aborigine called 'Sydney Bob'. One of the witnesses, Sally, in her evidence given by statement not under oath, described herself as 'Neddy the prisoner's lubra. I have been married to him more than a year.'³⁶

No objection was raised as to the jurisdiction of the Circuit Court at Portland to hear and determine the matter. The accuseds were convicted of manslaughter, and sentenced, the execution of the sentence on Neddy Monkey being respited until the Full Court could rule on the admissibility of evidence given by a woman married in accordance with tribal law but not English law.

The Court refused to hold that her evidence was inadmissible. Barry J asserted that

The Court cannot take judicial notice of the religious ceremonies and rites of these people.³⁷

In other words, evidence or explanation sufficient to prove the existence of her marriage was required; further, her assertion to be the accused's 'lubra' was also not to be understood by the Court without explanation or evidence.

...it is not by the use of unexplained terms, or by the assertion of vague rites and ceremonies, that the general rules of evidence are to be broken down.³⁸

The Full Court of the Victorian Supreme Court left open the prospect of having evidence adduced in support of a claim to marriage made by a woman required to give evidence in a criminal trial against her husband. This prospect, however, was effectively thwarted by a decision of the Full Court of the Supreme Court of New South Wales in the 1883 case of R -v- Cobby.³⁹

An Aborigine was tried before Mr Justice Windeyer at the Assize Court at Grafton and convicted of manslaughter.

One of the witnesses for the Crown was a half-caste Aboriginal woman, who was living with the prisoner as his wife. She stated that the prisoner had another wife who was living with him before she cohabited with him, that there was no marriage ceremony of any kind amongst the Aborigines, and that polygamy was usual amongst the Clarence River blacks. Cobby's counsel objected to the reception of her evidence, and Windeyer J reserved its admissibility for the consideration of the Full Court.

The Court held that the evidence was admissible, as given by a person not recognized as lawfully married to the accused. Sir John Martin, with whose judgment Windeyer and Innes JJ agreed, distinguished marriages contracted or solemnised in accordance with the common law or statutes prevailing in England and those in Scotland, based on the old common law of Europe, which was sufficient throughout all Christendom, and those not so contracted.

We may recognize a marriage in a civilized country, but we can hardly do the same in the case of the marriages of those Aborigines, who have no laws of which we can take cognizance. We cannot recognize the customs of those Aborigines so as to aid us in the determination as to whether the relationship exists of husband and wife.⁴⁰

In concurring, Windeyer J also said

...No Aboriginal woman is incompetent to give her evidence as a witness because she may say that, by the laws of the Aborigines, she is the prisoner's wife.⁴¹

The judgment of the Chief Justice is a stark illustration of the feeling of social grandeur and moral superiority which enveloped imperial England in the nineteenth century and particularly in the aftermath of what is called 'Social Darwinism'. The ethno-centric views of the Full Court echoed that of the same Court in 1867 in *R -v- Byrne*.⁴² A native Fijian woman living and carrying on business in Sydney as a feme sole (unmarried woman) was convicted of stealing goods described as her property. In evidence, she claimed that she was married in Fiji to a half-caste native, the ceremony being conducted by the British consul there. The Court was asked to rule on the validity of the marriage to determine, in part, if the property by virtue of marriage had vested in the husband. The Court accepted the submissions on behalf of the Crown that the ceremony was 'performed in a foreign and savage country; outside the jurisdiction of British law'.

Authority was cited to the effect that the Court would 'not recognize the validity of a Mormon marriage; much less that of a savage people', which the Chief Justice, with admirable judicial restraint, referred to as 'an uncivilised country.' The conviction was therefore sustained.

The early judges therefore asserted that in the English possessions in Australia English law not only supplanted all other laws then in force, but that there were no other laws of which they could take cognizance. And why was this so? The latter is, perhaps, easier to answer than the former. The laws, customs, precepts, conventions and usages of 'civilized' people could be recognized; those of 'uncivilized' people could not; and the Aborigines of Australia, by assumption or by necessary implication, were included in the latter. It was further assumed that no Englishman could be required to submit, in an English possession, to laws which were inferior to his own.

As to the status of the possessions as English, to which would accrue English law and customs, the observance of the King's Peace, and the acquisition of the rights of British subjects, the early judgments are not totally consistent.

Cooper CJ, and Wills J, in South Australia and what is now Victoria respectively, queried the extent of reception of English

law e converso the ouster of native law. Murrell's case in 1836 did not specifically conclude the nature, along Vattelian lines, of the English acquisition.

Even in Jemmy as reported in 1860 the Chief Justice alluded to 'the laws of the conquerors', immunity from which might be conceded to a subject race.

The opinions of Cooper in 1840, and of Willis J in Bon Jon (1841), proceeded along the lines of the involuntary subjection of the Aborigines to English law, at least in respect of offences committed inter se. Two further references, albeit obiter, testify to a degree of judicial sensitivity, even compassion, in the dilemma in which Aborigines were placed.

In ex parte West, a squatter who had custody of an Aboriginal boy 'Tommy' was ordered by the Full Court of the Supreme Court of New South Wales, upon application for a writ of habeas corpus, to produce the boy to the Court.⁴³ The application was based upon an affidavit of a Mr David Russell, to the effect that he had heard Collins say he had 'rushed' the boy from among his tribe, and that the boy would never see his tribe again. Although much of the subsequent legal argument turned on the truth of Collin's response to the allegations against him, the boy was indeed produced to the Court in answer to the writ.

Stephen CJ, in the course of his judgment, again adverted to the notion of 'protection' under (English) law which had been the hallmark of judicial assertions in favour of English law since 1836.

These people are British subjects, and if held responsible for crime on the one hand should be protected from outrage on the other.

According to the judge, even if the boy had been kindly treated, no end would justify an act such as was alleged to have been committed. It was a moral wrong - an outrage - an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation. Looking at the natural results of such acts, it might be that the best interests of the country would suffer. Suppose it was true that these boys were run down like wild animals, and stolen from their parents and relatives, it was a natural result that the latter should pursue with vengeance the people of the same race as the offender. Such would be probably the case with the whites in the event of any corresponding outrage by the blacks.

His Honour's first prescription - that of the status of Aborigines as British subjects - was adumbrated by Wise J who concurred with his judicial brethren. It was a first principle of justice that the liberty of the subject should be protected, and Aborigines who were held to be British subjects, even without their concurrence, and as such amenable to punishment, were fully entitled with the whites to this protection.

There is an element of judicial equation in this concept,

namely that protection = amenability; but it goes further, by cancelling out, or ignoring, the unwillingness of the individual to have conferred on him the legal status of 'subject' with its attendant responsibilities. In the judicial view as thus far enunciated there seems little doubt that what was being offered to, indeed thrust upon, the Aborigines were the advantages both of English law and of civilization. With civilization would come an understanding of its concepts and procedures by which to take advantage of its positive aspects.

One judgment, however, seems fully to expose the reality behind judicial rhetoric and hyperbole.

In M'Hugh -v- Robertson; Benn -v-Symes, two businessmen were sued for presenting Sunday entertainment for gain in alleged breach of the Lords Day Observance Act 21 Geo III c.40.⁴⁴ The defence raised the question whether this or any other Imperial Act was in force in the State of Victoria, introduced by the Australian Courts Act 1828 (9 Geo IV c.83) as being reasonably applicable to the circumstances of the then Colony. This in turn raised the Vattelian notions of conquered, ceded, or settled possession. In holding the Act to be applicable, as expressing religious feelings presumably common to all British subjects in 1828, the Full Court of the Supreme Court of Victoria addressed itself en passant, and therefore obiter, to the position of the Aborigines.

Molesworth ACJ in the course of argument noted, first, that in 1828 the population of New South Wales consisted of Europeans and Aborigines. Secondly, that 'we assumed jurisdiction over the aborigines' (sic). 'I cannot tell what proportion the aborigines were to the white population. Assuming that they were all treated as British subjects, was the European proportion of it so large that the state of community in reference to this question was to be considered the same as that of the mother country in 1781? So far as the aborigines are concerned, the Crown argued in reply, Sunday may be considered a day of rest; but it was submitted by the Crown that they should not form an element in deciding the question'.

Holroyd J posited that the English Government assumed jurisdiction over them, and punished them for offences against English law. The response on behalf of the Crown was that this was a British community, and, no matter what the Aborigines were, England had assumed jurisdiction over the continent, and the English law had to be enforced here.

The Court in this case betrayed a certain anxiety, perplexed as it was by the de facto assumption of jurisdiction on an uncertain juridical base. The Crown's dismissal of the Aborigines as a factor worthy of judicial consideration was an attempt to isolate from the case its weakest aspect, namely, how could Aborigines be said to be British subjects, therefore members of the community for some purposes, but not be counted as members for others? Holroyd J was surely right when he linked the assumption of jurisdiction with its punitive consequences.

In his formal judgment, Holroyd J again returned to the theme of selective application of English justice so far as relating to the Aborigines. Their uncertain legal status de facto ridiculed the notion of the equality of their status as British subjects vis-a-vis the white inhabitants.

In words reminiscent of Willis J in Bon Jon's case forty-four years previously, his Honour concluded:

...From the first the English have occupied Australia as if it were an uninhabited and desert country. The native population were not conquered, but the English government and afterwards the colonial authorities, assumed jurisdiction over them as if they were strangers who had immigrated into British territory, and punished them for disobeying laws which they could hardly understand, and which were palpably inapplicable to their condition.⁴⁵

M'Hugh -v- Robertson; Benn -v- Symes (supra) raised in issue the applicability of Imperial statutes, and therefore the juridical status of the Colonies as determined by the manner of their acquisition. Despite judicial comment in Bon Jon (1841) and Jemmy (1860) that the continent had been conquered, M'Hugh and other cases, starting as early as Murrell in (1836) and R -v- Knatchbull in 1844 had expressly stated that

...This is an English colony, governed either by English laws, passed before the 9 Geo IV, c.83, or which have since been adopted by the local Legislature, or by local laws ordained for local purposes.⁴⁶

The doubts and difficulties entertained by the Courts of several Colonies as to the nature in law of the assumption of sovereignty by the British Crown were authoritatively resolved by the Judicial Committee of the Privy Council, on appeal from the Supreme Court of New South Wales, in 1889.⁴⁷ Cooper -v- Stuart did not directly concern Aboriginal interests. In issue was a reservation by the Crown in a Crown Grant of a right to resume a parcel of land for public purposes, and whether, in 1889, the ancient law of England known as the rule against perpetuities operated to avoid a reservation made in the 1823 grant as being an exception repugnant to the grant. Their Lordships upheld the reservation, hence the subsequent resumption of the land for a public park, on the principal ground that the rule of perpetuities was inapplicable in 1823 to Crown grants of land in the Colony (of New South Wales).

The judgment of their Lordships was delivered by Lord Watson. At page 291 of the report, the following passage appears:

...The extent to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between

the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.

This bald assertion by such eminent and (up to 1978 at least) binding authority is quite puzzling. Neither the report of the Privy Council's decision, nor that of the Supreme Court (on appeal from the Primary Judge in Equity) indicate the precise legal foundation for their Lordships' conclusion in the terms stated above. Much of the legal debate centred on the nature of a defeasance in a Crown grant, and the application of the rule against perpetuities to such grants.

But the status of the Colony seems to have been subsumed. At page 292, Lord Watson said:

Their Lordships have not been referred to any Act or Ordinance declaring that the laws of England, or any portion of them, are applicable to New South Wales. There was no land law or tenure existing in the Colony at the time of its annexation to the Crown;..

Again, this extraordinary judicial pronouncement is made without reference to the evidence or authority upon which it is based; indeed, it was made despite the express lack of reference to relevant statutes.

Unsatisfactory though this aspect of the Privy Council's judgment was, it nevertheless remains the most authoritative source of authority as to the juridical status of the original Colony, hence of the amenability of residents within it to English justice.

Moreover it remains binding until the High Court of Australia decides otherwise. Blackburn J in Milirrpum (1971) had no hesitation in accepting the Court's finding on this point as binding.⁴⁸ Two subsequent decisions by New South Wales Courts likewise have accepted that they were bound by the decision in Cooper -v- Stuart.

In R -v- Wedge, an Aborigine charged with murder, pleaded that the Supreme Court of New South Wales had no jurisdiction because he was a member of the Aboriginal race of Australia.⁴⁹ It was argued, firstly, that the Aboriginal people were and still are a sovereign people, and as such are not subject to English law. Secondly, it was argued that, even if the Aborigines are not a sovereign people, the English colonists brought with them only so much of English law as was applicable to their circumstances, and this law affected only British settlers inter se.

Rath J held, following Cooper -v- Stuart, that the colony of New South Wales was founded by settlement, not conquest or

cession. Upon settlement there was, in the colony, only one sovereign, namely the King of England, and only one law, namely English law; and, upon settlement, in consequence of instructions from the King to Governor Phillip, the Aboriginal people in the colony became the subjects of the King and, as such, were not only entitled to the protection of the law, but became liable for breach of the King's peace in accordance with the law.

It therefore followed, in his Honour's judgment, that the Aboriginal people of Australia are not a sovereign people, but are subject, in New South Wales, to New South Wales law; further, that the English law brought to Australia, including New South Wales, applied to all residents of New South Wales, and not only to British settlers.

Following Murrell, the Court had jurisdiction to try the accused on the indictment preferred against him, whether he was an Aborigine or not, and whether the deceased named in the indictment was an Aborigine or not.

One more recent attempt was made in a criminal prosecution of two Aborigines charged with breaking and entering into an Art Gallery, and stealing certain items of Aboriginal art.⁵⁰ In the course of his summing up Judge Bell rejected one defence raised by the accused's, namely that they were acting in accordance with Aboriginal custom. As his Honour put it to the jury:

The law that we have to consider here is the law of New South Wales administered in the District Court of New South Wales. I do not administer the customs of the aboriginal inhabitants of Australia, and I do not direct you as to those customs. You are charged to determine the case according to law, and that means the law of New South Wales.⁵¹

The decision of the Privy Council in Cooper -v- Stuart was applied by the High Court of Australia in Coe -v-Commonwealth.⁵²

For present purposes, the plaintiff filed a statement of claim in the High Court of Australia seeking declarations and relief on behalf of the Aboriginal people of Australia in respect of the occupation, settlement and continuing dealing in the lands comprising the Australian continent by the defendant governments. He subsequently sought leave to amend substantially his statement of claim. Mason J dismissed his application, and the present action was by way of appeal against his Honour's judgment.

Gibbs and Aickin JJ applied Cooper -v- Stuart in holding that it was fundamental to the Australian legal system that the Australian colonies became British possessions by settlement, and not by conquest, thereby introducing the common law into the continent. Jacobs and Murphy JJ dissented, Jacobs J on the ground that there was no actual decision of the High Court to the contrary, and Murphy J on the basis that there was material available which supported the allegation. Accordingly, their Honours were of opinion that the claim based on the allegation

that the colony of New South Wales was conquered territory rather than a settled colony of the Crown ought not to be struck out.

With typical forthrightness, Murphy J citing Viro's case, held that the decision of the Privy Council in Cooper -v- Stuart was not binding on the High Court.⁵³ Further, his Honour attacked that part of Cooper -v- Stuart referring to peaceful annexation:

The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.⁵⁴

I agree in at least the former part of his Honour's observation. The opinion of Gibbs J prevailed, as provided by s.23(2)(b) of the Judiciary Act 1903 (C'th) (where Court divided in opinion, opinion of senior Justice present prevails). Accordingly, until such time as the matter is once more raised for consideration, the reason in Murrell (1836) and Cooper -v- Stuart (1889) must be taken to be the law of the land binding all those subject to it, including Aborigines.

Aborigines as subjects in need of protection or welfare

As the cases of Neddy Monkey (1861, Victoria) and Cobby (1883, New South Wales) demonstrate, the nineteenth century spawned a judicial view as to the supremacy, the superiority, of English law and the English system of justice which admitted, at least in the several Australian Colonies, of no other body of law. That is not to say, of course, that the judges were unaware of the existence of such law. Rather was it that they should not need it, apply, treat it as having cognizable force and effect in their Courts, or their administration of the substantive law. And it was particularly so with Aboriginal law, as applying to 'a tract of Territory practically unoccupied, without settled inhabitants' and itself regarded by the then highest judicial tribunal, the Judicial Committee of the Privy Council, in Cooper -v- Stuart (1889) as being not 'settled'.⁵⁵

The early cases indicate a judicial compulsion to regard the Aborigines as a class peculiarly in need of protection. Certainly, the Myall Creek Massacre of 1839, the systematic and official depredations of the Aborigines in New South Wales, Queensland, in Victoria to a lesser extent, but refined to its fullest in Tasmania, were within public memory and public conscience. No evidence would be required to prove the generality of the savaging of the Aboriginal population.

Accordingly, judicial sympathy for the wrongs done to the Aborigines can be seen as early as 1841 in Bon Jon, pointing out the hopelessly unequal application of English law, particularly criminal justice, to a people for which it was particularly inapposite. The legislative treatment of the indigenous inhabitants as being separate and unequal subjects of the Crown were again matters within presumed judicial knowledge, not

requiring proof in accordance with the normal rules of evidence.

Six 'modern' cases may be cited in support of this thesis. Two were criminal appeals (from Western Australia and the Northern Territory respectively), two were matters of a purely civil nature (both from Victoria) and two essentially of an administrative nature, (one taken on appeal in the Northern Territory and the other initiated by New South Wales graziers). The cases thus traverse not only both branches of the law, but those jurisdictions having a substantial Aboriginal population or a long history of white-black contact.

Bolton and Others -v- Neilson was an appeal heard by the Chief Justice of the Supreme Court of Western Australia in 1951.⁵⁶ The appellants pleaded guilty to charges of stealing and receiving (a car battery) and were each sentenced by Justices (ie of the Peace) sitting as a Court of Petty Sessions at Narrogin to six month's imprisonment. They appealed on a number of grounds, including one that the protector of Aborigines whose prior consent was required to such plea had failed to perform his statutory duty of being satisfied of the actual guilt and as to the existence of admissible evidence to establish such guilty, as provided by s.60 of the (then) Native Administration Act 1905 (WA).

The Chief Justice held that the procedures required by the Act had not been followed, and ordered that the pleas, the findings and the sentences be quashed. Wolff CJ in his reasons for judgment made a general plea remarkable as much for its compassion as for its enlightenment, or possibly his awareness of the overall Aboriginal plight:

...I hope it is for Judges of the Supreme Court in this State to see that these disinherited and dishonoured people receive the benefit of the provisions made by the Legislature for their protection in courts of justice...⁵⁷

The next case, Namatjira -v- Raabe was decided in 1959.⁵⁸ The applicant sought leave to appeal to the High Court of Australia from an order of the Supreme Court of the Northern Territory dismissing an appeal from conviction and sentence by a magistrate for supplying liquor to a ward, contrary to the (then) Licensing Ordinance 1939. The Full High Court unanimously refused the application, judgment being given ex tempore by the Chief Justice, Sir Owen Dixon.

A block declaration by the Administrator of, inter alia, the person supplied as a ward under the Welfare Ordinance was challenged as being void. As found by the High Court, over 15,000 persons had been declared wards at the same time. Persons so declared were given a statutory right, on an individual basis, to contest its propriety, the existence of conditions necessary to its validity and the present need for its declaration.

The Court displayed sensitivity in construing the purpose of s.14 under which a person could be declared a ward:

...it is the claim of the Crown that the real purpose of s.14 and the provisions that follow it is beneficial and not adverse. It is easy however to understand that a person who is regarded as a ward might not so view the matter ...it is a special status of pupillage...

...To sum the matter up, the legislation...confers a power to give a similar status to persons who stand in need of special care and assistance...aboriginals ...might be regarded as being a class in such need...⁵⁹

Although the Court's understanding demonstrated its acknowledgement of the present condition of Aborigines, its judicial concern was directed more to the unique status of Aborigines-as-wards, being that legally subordinated to those not in pupillage.

The general condition of the Australian Aborigine was fully considered by the Supreme Court of Victoria in In re Mathew, deceased; The Trustees Executors & Agency Co. Ltd -v- Mathew in 1950.⁶⁰ A deceased testator by his will directed that his residuary estate be transferred to a named person 'to be used by him...for the benefit of the Australian aborigines'. The Court was asked to determine the validity of the gift, because the trust for which the fund could be used could only be upheld as a valid charitable trust, otherwise it would be void for uncertainty.

To constitute a charity, it had to fall within the common law concept which the Court found satisfied as being a 'trust for other purposes beneficial to the community.' The Court then considered the charitable purpose of the gift within the common law, based upon a statute of Elizabeth I referring to such purposes as relief of 'the aged, impotent and poor people; support aid and help of people decayed; education and preferment of orphans.'

O'Bryan J found that the gift was a valid charitable trust.

...Australian aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance...Australian aborigines comprise a class of persons analogous to those which the statutory preamble enumerates...⁶¹

A similar point arose twenty-four years later when the Supreme Court of Victoria in Re Bryning, deceased was asked to construe a testamentary disposition 'for the benefit of the aboriginal women in Victoria.'⁶²

Lush J upheld the gift as a charitable gift, following Re Mathew. This aspect of his Honour's decision was not in dispute and was, indeed, conceded by counsel for the deceased's next-of-kin. However, Lush J did agree in the correctness of the

concession. After quoting O'Bryan J's decision in Re Matthew, Lush J continued:

That decision does not lead to the result that aborigines are to be classified perpetually as in need of protection and assistance. It is a decision that they were so in 1949 or 1951.⁶³

It should be noted that O'Brien J was obviously influenced by the words of Victorian legislation providing for such protection and assistance. However, of equal significance is the perception by Lush J - in 1976 - that Aborigines as a class were still proper objects for, ie in need of, charity, and was prepared to accept this as a fact of 'notoriety' not requiring formal proof or other evidence.

The administrative appeal was taken by Arthur Dingle for an order revoking a declaration under s.14 of the Welfare Ordinance made en bloc by the then Administrator on 13 May 1957 that the appellant, with many thousands of other Aborigines, was a ward.⁶⁴

Citing the observations of Dixon CJ in Namatjira -v- Raabe, Bridge J, sitting as the (NT) Wards Appeal Tribunal, in allowing the appeal and revoking the declaration of wardship, noted:

The legislature has recognized that, however beneficial and desirable wardship status may be for one so backward as to need its accompanying protection, it would be unjustifiably humiliating and oppressive for one advanced beyond that need. That status was never designed to be applied or continued indiscriminately in respect of all aborigines or all persons of any other class, but only if and when and for so long as justified by the needs of particular individuals.⁶⁵

His Honour must be considered as indulging in fanciful legalism. He had nothing condemnatory to say of the en bloc declaration, sanctioned as it was by appropriate legislation. In fairness, neither did the High Court in Namatjira's case. But his Honour displayed some equanimity at the consequences of the declaration of wardship over the 15,000 Aborigines. If the legislation were intended to operate at an individual level, why was there a reverse onus provided, as an escape clause, so to speak, for revoking a declaration? If white residents of the poorest suburb of a metropolis, or those identifiably receiving regular or continuous assistance from both public and private relief agencies, had been subjected to similar status, would the judicial comment have been so sanguine?

The declaration of wardship was simply an administrative device continuing similar government policy in the Northern Territory, but with different labels. Accordingly, the reality and the substance were unchanged.

One final example of judicial acknowledgement of the

special status of Aborigines qua Aborigines is that of Kelly J in The Australian Workers' Union -v- EA Abbey and Others.⁶⁶ In the Commonwealth Court of Conciliation and Arbitration, the union sought to vary an award which excluded full-blooded Aborigines from the definition of 'Station hand'. In refusing the union's request, his Honour following the (Australian) tradition of eschewing judicial activism⁶⁷, declared:

I take the view that we are under a moral obligation not to hasten the extinction of these people. Deprived of their hunting grounds they are entitled to look to us for food and such clothing and shelter as they require.⁶⁸

It is difficult to determine where sensitive concern ends and condescension begins. Much of his Honour's judgment as dealing with the employment of Aborigines acknowledges differences in their communities from State to State, and of differing legislative treatment accordingly. But Kelly J was also disposed to contrast Aboriginal standards and expectations with those of what he called 'civilized' employees. His judgment was also couched in curiously negative terms. Surely the moral obligation was to retard and reverse what was commonly anticipated extinction of the Aborigine (at least, the full-blood). Were they not entitled to more than charity or largesse as an act of white patronage, white condescension, white conscience? As subjects of the King, were they not entitled to expect of the King's justices the rights commonly enjoyed by other subjects?

Equality of black and white legal treatment:
'community standards'

Clauses 39 and 40 of the original Magna Carta of 1215 provided a touchstone for the foundation and development of English justice. In the ninth year of his reign, in 1225, Henry III re-issued Magna Carta and it was in that final form that it was confirmed 37 times down to the time of Henry VI.⁶⁹

Shorn of the mystique and mythology, clauses 39 and 40 are worth reciting in full:

(39) 'No freeman shall be taken, or imprisoned, or be forfeited of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgment of <u>his peers, or by the law of the land.</u>'	'Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero tenemento suo vel liberatibus vel liberis consuetudinibus suis aut utlagetur aut exulet aut aliquo modo delibruatur nec super eum ibimus nec super eum mittemus nisi per <u>legale iudicium parium suorum vel per legem terrae</u>'
(40) 'We will sell to no man, we will not deny or defer to any man either justice or right.'	'Nulli vendemus nulli negabimus aut differemus rectum vel justitiam'

Equality before the law was one of those concepts or ideals to which the judiciary in their administration of justice tend to subscribe. But equality has many facets of application in a legal context. The most general application is the principle that rules of law should apply equally to all members of the community engaging in the relevant activity, and that nobody should be exempt or treated differently save for good and obvious reasons.

The idea of equality has increasingly come to be used to secure equal rights and protection for members of ethnic and other minorities. But there are many respects in which legal means cannot secure equality eg equality of hereditary endowments, intellectual and physical capacities.

Nor does equality of rights require or justify that all should have the same quantity of rights; all should have equal rights, but not right to equal things; all should have equal rights to own property, but no right to an equal amount of property. Equality, moreover, is not a standard to be rigidly applied, but deviations from equality require rational justification. Equality in all respects would, in many cases, effect what many would consider injustice, rather than justice. Thus minors and persons of unsound mind have different legal capacity from that of adults, and young children have restricted legal liabilities.

The punishment for different crimes varies according to their presumed gravity, and the punishments inflicted on different individuals for the same, or the same kind of, crime, may vary according to age, degree and mode of participation, previous record, the impact of the punishment, and other circumstances.

Different amounts of damages must be awarded to different plaintiffs, having regard to their different losses. Taxation is unequally imposed on different people.

Equality before the law accordingly means that all persons, save for obvious and special reasons, must be treated as having an equal capacity for acquiring and enjoying rights, and equal liability for becoming subject to legal duties and liabilities, but the actual quality and extent of the rights depend on the individual, his capacities in other respects, and his conduct. This principle was formerly mainly a procedural one, and only more recently has it become, in relation to substantive law and rights, a principle of legislation.⁷⁰

But what if the legislation itself confers on an individual a status either at variance with, or less than, that of the majority of the community, and deriving from no factor other than 'blood'? The legislation of the several States prior to federation, and of the Commonwealth, the States, and the Territories after federation with regard to Aborigines (and Torres Strait Islanders) was predicated on the admixture of blood which the individual possessed.

The lesser the quantum of blood, the 'whiter' he became, and the fewer the legal restraints imposed upon him. The greater

the proportion of 'dark' blood, the greater the legal constraints in almost every aspect of human existence: the capacity to marry, or to have intercourse, the custody and guardianship of infant children, the right to work, and in what industries, and for what amount and kind of remuneration, the place and kind of residence, and conduct permitted therein, the right to social security, education, to move from one State to another or within one part to another part of the same State, the liability to routine, unannounced and uninvited medical inspections, the right to acquire, hold, and dispose of any form of property, real or personal, to commence, continue, compromise, settle or defend any action in law, to vote, to drink, to fight for one's country in time of peace or war, to give evidence in any Court of law, to refuse to testify against a tribal or de facto spouse; and to continue not only to suffer these disabilities but to transmit them by blood to one's progeny: these were factors which, altogether apart from the degree of individual acculturation, perforce made 'equality before the law' a mockery.

The law reports, moreover, are replete with judicial perceptions of Aborigines, perhaps deriving from the consequences of decades of official control, apathy, or neglect, as differing according to blood, or in need of special protection or legislation simply because they were Aboriginal.

In ex parte Willan, for example, the Full Court of the Supreme Court of New South Wales made a clear distinction between the worth of a white man, 'half-castes' or other persons with a less admixture of Aboriginal blood, and pure blood Aborigines.⁷¹

'Half-castes' were characterised by the Chief Justice, Cullen, with whom Cohen and Gordon JJ concurred, as being

often of a superior class, as industrious and law-abiding as the white man...⁷²

The temporal nature of their similarities to the white man was, moreover, of a class removed from that of the 'pure blooded aboriginals' to whom the 'half-castes', or persons of less admixture, were 'superior'. The case involved the prosecution of a licensee, whose wife, supplied liquor to an 'aboriginal' in contravention of the Liquor Act, 1905 (NSW). One of the grounds of appeal was that there was before the magistrate insufficient evidence that the person supplied was an 'aboriginal' within the meaning of the Act. One of the major grounds for the magistrate's belief on that point was evidence, indirectly showing, that the person was supplied with a blanket at 'Aborigine Home'. As the supplying of blankets was usually done by the Aborigines Board, the Full Court concluded that the magistrate had sufficient evidence to convict.

The Supreme Court of Western Australia, and the High Court in a matter heard on appeal from the Western Australian Court of Criminal Appeal, have referred to Aborigines, in criminal matters, as 'these disinherited and dishonoured people'⁷³ and 'unsophisticated',⁷⁴ the whole question of whose apprehension, interrogation, arrest, committal, arraignment and trial 'reflects

a growing and serious social problem which is not solved by sweeping (the particular case) under the carpet'.⁷⁵

The issue in the latter case, relating to the arraignment of the accused on an indictment of murder, was as to the capacity of a 'full-blood' Aboriginal native who could not understand English to plead to the indictment by saying whether he was guilty or not guilty to the charge. In deciding that a plea should not be entered under the circumstances where it was apparent that even with the aid of an interpreter it was not possible adequately to communicate with him, or to convey to him in his own language the meaning of 'unlawful', 'guilty' and 'not guilty', Wickham J also said, at p 163,

Upon the court... being told the obvious, that he was a full-blood Aboriginal native...,

indicating, although without evidence to support his observation, an understanding of physiognomy sufficient to invoke various sections of the Criminal Code designed to assist the proper trial procedure of such a person. But not only physiognomy. The section of the Criminal Code in issue dealt with the capacity of an accused person to understand the trial proceedings so as to be able to make a proper defence. An incapacity may arise 'for any reason', not necessarily due to any physical or mental condition. An incapacity to speak English, and the absence of an interpreter capable of translating the proceedings into his tongue, would be sufficient, as Wickham J found, to invoke the section.

The degree of 'sophistication' displayed by an accused has been treated by some Courts as the litmus for determining the measure of punishment. Mr Justice Kriewaldt, in the Northern Territory Supreme Court, was quite explicit on this point. In R - v- Anderson, decided in 1954, his Honour stated

...I think that the extent to which the native has adopted white ways and manners, perhaps, rather, the extent to which he has not yet done so, is a very material factor in arriving at a just sentence. The nearer his mode of life and general behaviour approaches that of a white person, the closer should punishment on a native approximate punishment proper to a white person convicted of a similar crime.⁷⁶

In that case, the first in living memory (within the Northern Territory) where a native made an assault with sexual intent on a white woman, the prisoner was 'about 21 years old' and throughout his life had 'been in touch with white people and subject to the influences of white civilization.' He was described in evidence by the Acting Superintendent of Native Affairs as 'sophisticated' and as 'substantially civilized'. He had had some education and was fairly well conversant with the English language.⁷⁷

One gains the impression from his Honour's remarks on passing sentence that a measure of civilization accrues, almost by osmosis, through contact with whites. Further, that

sophistication varies in some proportion, at a fairly constant level or rate, to knowledge of English. Presumably education and the acquisition of English were correlatives.

Kriewaldt J, an unusually perceptive and sympathetic judge in his dealings with Aborigines, in Anderson considered failure to adopt white ways as a material factor in arriving at a just sentence. His Honour in Hayes -v- Fay adopted a similar test, although in that case, no sexual crimes were alleged; the appellant in that case, a part-coloured, appealed against a conviction for supplying liquor to wards in contravention of s 141 of the Licensing Ordinance, 1939.⁷⁸

More recently, Mr Justice Wells in the Supreme Court of South Australia, has referred to the process of acculturation in terms echoing those of Kriewaldt J:

...where an Aboriginal native has established himself in the more general community and intends to remain there and work side by side with other members of that community, he must accept the ordinary standards of behaviour expected of his fellow-citizens. If he inhabits and uses the cities and towns of our country, then he must expect to abide by the ordinary rules by which law and order are there maintained. He cannot expect that special exceptions will be made for him. No doubt his personal characteristics and background and history will be taken into account by a court in the ordinary way; but he cannot expect special treatment just because he is an Aboriginal native... In such a case, he comes as a citizen of Australia and must be treated just like any other citizen who lives in a town or city, and who makes use of the various facilities provided there.⁷⁹

In each case, the dominant white society provided the ethos ('industrious'), the behavioural standards, the criteria of sophistication and criminality, against which those found wanting could be measured in determining an appropriate lesser degree of punishment.

Kriewaldt J was, perhaps, a product of his time and, as will be seen, scrupulous in his adherence to the law. Accordingly, it was most likely reasonable for him to adjudicate on the basis that an equation based on white = civilization, applied negatively to benefit those not so endowed, was consistent with the notion of equality.

In non-criminal case, where neither the life of liberty of the individual were at stake, nor where a higher standard of proof obtained, the Courts were less inhibited in making remarks disparaging of Aborigines. Further, where the relative skills of black were contrasted with white in cases where a monetary calculation was dependent on the outcome, much of the comment seems patronizing, dismissive or contemptuous. Not even the effluxion of time lessens the impact which these judgments convey.

All were wage cases conducted either in the Commonwealth Court of Conciliation and Arbitration (CCA) or the (Commonwealth) Conciliation and Arbitration Commission (CAC).

In 1924, the Court, sitting at Darwin and subsequently at Melbourne, heard a claim by the North Australian Industrial Union for rates of pay and conditions of work from the respondents including most, if not all, of the owners of important pastoral holdings in the Northern Territory from Darwin to the South Australian boundary, and from the Queensland boundary to the boundary of South Australia.⁸⁰ Appearances were made separately for Vestey and Connor, Doherty and Durack.

It emerges from the judgment of Powers J in the NAIU case that one of the union's claims, as presented in the log of claims served on the pastoralist employers, was that the Court should direct all employers, whether they employed members of the union or not, not to employ more than three blacks to every white man getting the minimum rate fixed by the award and other conditions claimed.⁸¹

This the Court had no power to do, in line with the doctrine enunciated by the High Court of Australia in Australian Boot Trade Employees' Federation -v- Whybrow & Co.⁸² It is, moreover, beyond the scope of this examination to consider union bias against Aborigines, although this, and the whole spectrum of employment or industrial relations between black employees and whites -- both as employer and as employee, particularly unionist - employee -- has been the subject of extensive research and publication.⁸³

What the Court was empowered to determine was to make an award against employers in dispute with the union about the rates and conditions of any member of the union employed by them. The question of employment of whites proportional to blacks of necessity raised not only the question of capacity to pay, but of the respective value of the labour and other work-related services provided by a black vis-a-vis those provided by a white.

The Court noted the existence of such an agreement made in 1917 outside the award, and the absence of a further agreement that the pastoralists should not employ black labour either where white labour left or where 'capable white men' could not practicably be obtained in the agreed proportion.

His Honour found, on the evidence available to him, that the requirements of the Ordinance as to the employment of Aborigines, (in respect of licensing of employees, submission of a copy of work agreements to the Protector, and payment of stipulated weekly sums to, and for the benefit of, Aborigines)

...is honoured in the breach - not in the observance of it - possibly because it is impossible to enforce it or because of the state of the industry.⁸⁴

Further, in respect of the stations about which his Honour had received evidence, wages in money were not paid at all. Notwithstanding his Honour's observations that

the stations could not at present be carried on in the Northern Territory without aboriginal labour and that thousands are employed who could not be displaced by any competent white labour at present

his Honour nevertheless fixed the rates for cooks on the basis that 'two aboriginals shall be counted as one' person, although in calculating supervisor's rates the ratios were equal. His Honour further equated black stockmen with white for the purposes of the rate applicable to a head stockman. Aborigines, however, were excluded from the award (clause 21); notwithstanding that they were 'useful employees and necessary for the industry in the Northern Territory', they were considered 'restless', liable to 'go bush' when so inclined, thus requiring greater supervision than whites.⁸⁵

Cooking for such 'necessary' employees was not as skilled or careful as for the whites:

I hope not for the sake of the white employees⁸⁶

Black camps were to be kept segregated ('a reasonable distance away') from the (white) men's sleeping and dining quarters.

Four years later, in the North Australian Workers Union -v- Northern Territory Pastoral Lessees Association case, the union sought repeal of clause 21 of the present award excluding Aborigines from its operation.⁸⁷ Chief Judge Dethbridge in the CCA refused the Union's application mainly on the social and economic consequences which would flow if he were to grant it. His Honour, however, perceived that

...the ultimate purpose of the union... is to exclude aboriginals from employment upon cattle stations ^{so} as to make work for white employees...⁸⁸

Dethbridge CJ in two subsequent applications refused to include Aborigines in the award definition of 'Station hand' on three main grounds, viz their fewness in that occupation, their supposed inefficiency, and the necessity to supervise them.⁸⁹ Kelly J in 1944, referring to Dethbridge CJ's earlier judgments that 'award conditions are not applicable' refused the Union's request to extend the award based on his Honour's perception of Aborigines-as-workers and what he considered persuaded Dethbridge CJ.

First, he considered that 'the natives' (meaning 'full bloods') have, because of their traditions and habits and their disinclination to compete with the descendants of European and Asiatic races in the struggles of our economic life, been accorded special legislative protection. This was administered according to, inter alia, the 'degree of civilization' of the native inhabitants of the several States. Secondly, it could not be assumed that the natives as a whole either needed or desired the so-called standard of living claimed or enjoyed by Australians of

European origin. Thirdly the payment of money wages, particularly to the natives of northern Western Australia, would prove a cause of embarrassment both to the native and his employer. In most other cases, the receipt of award rates and conditions would add to the bewilderment of the 'full blood' concerning the ways and customs of the 'whites'. It would be 'foolish', 'inadvisable' and even 'cruel' to pay them for the work they can do at the wage standards found to be appropriate for civilized 'whites'.

Accordingly, the Court should not attempt to impose its rules and standards in the field of the employment of native labour, but should intervene only where there is a clear case of injustice or likely injustice to either the native workers or the 'whites' concerned.⁹⁰

Not until 1966 was equality of wage justice secured for station hands, and then only in respect of the Northern Territory.⁹¹ South Australia and Western Australia were covered by separate determination made in 1967, as subsequently extended to all States covered by the award.⁹² However, in order to 'give everyone concerned time to adjust and rearrange their activities so that the introduction of the award will occur as smoothly as possible and with as little dislocation, social and economic, to everyone concerned and in particular to the aborigines themselves', the award was to come into operation on 1 December 1968.⁹³ The order was made on 7 March 1966.

Prior to the making of the 1966 award, the anomalous situation existed whereby 'full bloods' were covered by the award if union members and employed only in shearing or crutching activities; 'mixed bloods', being union members, were also covered whether employed as station hands or in shearing or crutching operations.

All other Aboriginal employees were, at least in the Northern Territory, employed under terms and conditions regulated by Ordinance.⁹⁴ The opposition of the employers was, they emphasized, based not on race, but on comparative work value. In support of their claim to a 'slow workers' clause, providing for partial award payments to 75-80 per cent of their Aboriginal employees, the pastoralists asserted that cultural reasons and lack of education rendered the worth of Aboriginal employees less than that of whites. The Commission disclaimed any role of social welfare arbiter or policy maker ('we are not social engineers nor can we deal with the whole spectrum of aboriginal life').⁹⁵ It regarded with concern the proposition by the employers that the work value test should be applied even to the basic wage, rather than, as was normally the case, only to margins for skill.

A wealth of material both oral and documentary, including expert anthropological and ethnopsychiatric material, was provided to the Commission. However, as neither the union nor the Commonwealth Government produced any evidence to equate the value of Aboriginal labour with white, nor contradicted the pastoralists' evidence as to the work ability of the Aborigines, the Full Bench of the Commission accepted the latter, supported as it was by what the Bench themselves saw and by the anthropological and other material.⁹⁶

And what was the pastoralists' evidence which, 'generally speaking' the Commission accepted? First, as to work performance: cultural and tribal factors precluded a capacity to work as well as whites. In summary form, the factors which induced this condition were:

- (a) in the pastoralists' submission they are 'semi-tribalised; even in the union's submission they are not fully part of the white community';⁹⁷
- (b) Aborigines do not understand the meaning of work in our sense, because they were a hunting race, living off the land; 'they had no agricultural skills and no domesticated pastoral animals and the discipline and understanding of work which agriculture and pastoral activities involve were foreign to them';⁹⁸
- (c) Aboriginal society was not competitive in an economic sense;⁹⁹
- (d) it was not an individualistic society in which the individual had ambitions and worked for himself.¹⁰⁰

Secondly, the absence of any real concept of work was due to a number of factors:

- (a) in tribal society the idea of cause and effect was not known;
- (b) time, in the Western sense, and the significance of time were also unknown; they had no idea of forward planning, of working out a long term enterprise based on predictions of future planned occurrences;
- (c) the notions of number, precise distance, and mathematical accuracy were unknown;
- (d) their culture excluded the idea of disciplined, reliable and responsible endeavour under a contract of employment.

For these reasons, it was concluded that 'Aborigines do not work as well or as consistently as whites and... require much more supervision'.¹⁰¹

Thirdly, the anthropological material put to the Commission by the pastoralists and not contradicted by either the Commonwealth or the union was, in the main, damaging to Aboriginal interests. From Elkin's 'The Australian Aborigines' his writing on 'Aboriginal Adaptation - Intelligent Parasitism' was extensively quoted.

Ethnopsychiatric material on the problems Aborigines were having in adjusting to a white society was put. The material comprised mainly the writings of Cawte, and concluded 'that too

great a speed in effecting change from a nomad way of life to a Western economic society would aggravate problems for the Aborigines.¹⁰²

Acknowledging that, particularly since World War II, dramatic changes had occurred in the way of life of tribal Aborigines, the Commission, again citing Elkin, concluded that

at least a significant proportion of the Aborigines employed on cattle stations in the Northern Territory is retarded by tribal and cultural reasons from appreciating in full the concept of work. The great majority are unable to work in a way which employers would expect of white employees.¹⁰³

However, more compelling to the Commission was its view that

there must be one industrial law, similarly applied, to all Australians, aboriginal or not.¹⁰⁴

Therefore, overwhelming industrial justice required the Commission to put Aboriginal employees in the Northern Territory on the same basis as white employees. However, sufficient time was needed to educate the Aborigines in their responsibilities, particularly deriving from higher income, to give employers an opportunity to 'sort out their labour problems' and particularly to minimise the extent and impact of Aboriginal disemployment.

This case neatly encapsulates much of the dilemma facing judicial bodies. In their resort to legalism, to the substance of the law and of legal procedures, they have endeavoured to divorce themselves from the general consequences of their decisions. The Commission, of course, is in a position somewhat dissimilar to other, non-wage-fixing, tribunals. The fundamental premise from which to approach the problem they are called upon to resolve is that of the supremacy of (white) law, secondly, equality of the law, meaning application of the law equally.

The unequal consequences or results which flow from the equal application is not within their purview as being legal, and not social, engineers: the latter is more properly the proper role and function of the legislature or the executive.

But the general tenor of the employment and the other - mainly criminal - cases thus far cited has been the judicial awareness of the profound cultural differences between white and black; the differences of culture and 'civilization' within and between the groups and strata comprising Aboriginal society: an awareness of their historical treatment, coupled with a notion, at times expressed in terms of judicial disdain, scorn, or contempt, of ineffable white, particularly Christian - European, superiority.

The paradox between equality of legal application and inequality of legal effect has tested legal ingenuity. One legal artifice, in the employment arena, was to introduce a 'slow

workers' clause, by which, in the case of Aborigines, even the basic wage was to be denied to them; sub-standard food and accommodation, de iure segregation, were written into their awards. And all this without judicial protest, even when flagrant breaches of the law were noted, with an expression almost of judicial helplessness.¹⁰⁵

The idea of a 'slow workers' award was appropriate to those who, 'by reason of age, infirmity, or any other reason' were unable to earn the minimum wage prescribed by an award. An example of this, inserted at the behest of the employers pursuant to s 48 of the Conciliation & Arbitration Act 1904 (C'th), and with the potential Aboriginal work-force clearly in mind, is given in the Aluminium Industry Award, 1963 case, where Clause 13 of the award ('Aged or infirm workers') was applicable only in the State of Queensland (viz. Weipa).¹⁰⁶

One is left to speculate how, if the legislation itself displayed partiality, bias or prejudice, those administering it should be any less susceptible to the same influences.

The early criminal trials of Aborigines proceeded on lines of 'equal protection - equal responsibility', requiring that, irrespective of the colour either of the accused or the victim and irrespective of the nature of the offence, the same trial procedures, the same laws of evidence, corroboration, the same consideration by the judge and jury, if there were one, and the same measure of punishment should obtain.

But the law distinguished against black accused by applying concepts of legal criminality (and innocence) not only alien to Aboriginal culture, but incomprehensible to an Aboriginal accused. Thus, a killing was not excused, or any the less culpable, if committed as an act of self-defence or as a result of provocation; it was excused by black (but not white) law if committed in accordance with, and pursuant to, tribal law for revelation of tribal secrets, as 'pay-back' or for some other cause which white law, in turn, could not comprehend or admit.

The laws of matrimony did not admit a tribal marriage, such that a tribal wife (unlike a European wife 'lawfully' married to an accused) was a compellable witness against her tribal husband. Evidence initially could not be given at all, and then not under oath, rendering its worth considerably less than evidence whose strength was secured by a belief in God, the product of a Judaeo-Christian ethic.

Yet the assertion of equality before the criminal law persisted. In an unreported decision by Burt CJ in the Supreme Court of Western Australia in 1872, his Honour on the trial of a white man charged with wounding with intent to kill a 'native' who had stolen a saddle and forcefully resisted apprehension, declaimed that so long as he presided in that Court he would have it recognized that the law must be administered in like manner to rich and poor, to the black man and the white man.¹⁰⁷

More recently, the Supreme Court of New South Wales, in

1975, in a case concerning Aboriginal juveniles, declared (per Yeldham J):

...my decision is in no way related to the fact that the plaintiffs are aboriginal boys. They are entitled to the same treatment at the hands of the police, and to the same measure of justice from the Court, as are boys who are not of aboriginal descent, no more and no less.¹⁰⁸

However, it is in the Supreme Court of the Northern Territory, in trials of murder, manslaughter, rape or other serious crime, that one finds the egalitarian ideal commonly, and constantly, stated. Altogether apart from the sheer numerical preponderance of Aboriginal criminal trials in that jurisdiction, compared with those of all others in Australia, contained in the Bibliography - approximately 60 per cent - the Northern Territory still has a substantial number of Aborigines pursuing a tribal or semi-tribal existence.¹⁰⁹ The operation of white man's law in respect of their criminality therefore assumes greater significance, and provides substantial material for analysis and research, particularly of a comparative nature. The 'criminal' decisions of Mr Justice Kriewaldt, for example, during his tenure of judicial office (1951-1960) total 56; those of Muirhead J (1975-1983) 49, Forster CJ (1974-1983) 35, Gallop J (1978-1981) 22, and Blackburn J (1966-1969) 11.

I have adverted already to Kriewaldt J's sympathy and humanity as a judge. His Honour undertook a thorough analysis of the application of the criminal law to the Northern Territory Aborigines, his paper being delivered just one month after his sudden death in July 1960.¹¹⁰ Therefore, I shall not repeat what was there written, but shall confine myself to those facets of trials over which he, and subsequent, judges in the Northern Territory presided as illustrate my theme that the application of the substantive rules of law may not necessarily result in the realization of justice, the devotion to the egalitarian ideal notwithstanding.

As an Acting Justice in May 1951, and even as late as November 1959, Kriewaldt J felt constrained or compelled in the exercise of his judicial function in presiding over a jury trial of an Aborigine to assert, state, or simply remind the jurors that the law to be applied was the same for black as for white. That such a direction was appropriate in 1951, substantially more than a century after its official enunciation and subsequent application, is surprising. That it should be repeated three times in 1953, once in 1955, three times in 1956, once in 1958, and again thrice in 1959, is remarkable.¹¹¹ The official policy of assimilation, after all, was agreed at the Native Welfare Conference held in September 1951, and native welfare measures were thereafter to be directed to that end.¹¹²

In summing up to the same jury in two separate trials of Aborigines for murder of another, Kriewaldt J stated

The law is the same for the coloured people of Australia as it is for the white people...

and shortly after that

The law is the same for natives as it is for white people.¹¹³

Accordingly, the task of the jury was to help the Court administer justice in this country.

By July 1953, his Honour directed the jury

...to approach the case and the evidence in this case as if the accused were a white person - he is entitled to the same protection as every man in this country...¹¹⁴

and in November 1953,

The law in this Territory is... that wherever white people impose their civilization upon a native race, that native race is subject to the same laws as the white man is.¹¹⁵

It received its most eloquent expression in 1959 in R -v- Aboriginal Timmy where his Honour, in summing up during the trial of the accused on a charge of murder, said:

Of the rules of law... perhaps the most important is that an Aboriginal native is tried in the Northern Territory, and elsewhere in Australia also, exactly according to the same rules, and under the same safeguards, and by the same system as a white person.¹¹⁶

A number of factors suggest themselves for this repetition of legal equality. The first clearly is that of protection under the law, that is the recourse to the procedural safeguards of evidence and the onus of proof afforded to every accused. Secondly, the proper role of the trial judge in directing the jury as to the law to be applied to the facts as found by them.¹¹⁷ Thirdly, the right of each accused to separate consideration by a jury of the issues. All of which properly form part of the standard procedures of trial.

But of the cases cited, no less than nine also contained a direction by Kriewaldt J that they should forget his or their own private opinions on what the law, as relating to Aboriginal crime and criminal trials, should be. Accordingly, their opinions on the policy of the law must be disregarded.

You may think - many people do - that it is unethical for us to ask the Aboriginal inhabitants of this country to abide by our laws,¹¹⁸ or that ... we have no right to inflict punishment for crimes Aboriginals may commit.¹¹⁹

However, as representatives of the community, they were obliged by their oaths as jurors to administer the law as it stands.¹²⁰

More pertinently, however, was the reference by Kriewaldt J in seven of those cases, and in one other, to jury partiality or bias towards Aboriginal defendants. His Honour referred to comments he had heard that many jurors had pre-judged Aboriginal defendants,¹²¹ whether through apathy or indifference,¹²² prejudice against,¹²³ or in favour of,¹²⁴ the defendant. Certainly the statistics of acquittals by (white) jurors in trials of Aborigines for murder as presented by Kriewaldt J in his paper may have given substance to his considered view that juries in such cases be dispensed with.¹²⁵

Since Kriewaldt's time, there has been a massive awakening of the political, social, medical and economic problems faced by the Aborigines. However, despite legislative programmes and government policies designed to reduce their socio-economic inequalities, the criminal law appears to be one area where the substantive laws and procedural rules continue to be applied equally to people of unequal skills and strength.

In R -v- Old Barney Jungala in 1978, Muirhead J, for example, in the trial of the accused for the manslaughter with spears of a man wanting to sleep with the accused's wife, stated

It is not that I countenance one law for the white man and one law for the black man

However, his Honour continued,

...But the white man's law in dealing with the black man must take full cognizance of his difficulties, his beliefs and his conditions...¹²⁶

The following year, in the trial of a man for the manslaughter of another by striking the victim with a didgeridoo whilst intoxicated, Muirhead J stated

...the law of the land must be applied...

tempered by the Court's awareness of differing customs and values.¹²⁷

Judicial awareness of cultural differences

The cases to be analysed under this heading may conveniently be classified under several headings within the criminal law, but for comparison I shall first deal with a number of civil actions in which cultural differences featured prominently or, indeed, were of the essence in founding the cause of action itself.

I. Civil actions

A. Claims in Tort

In Jabanardi -v- AMP Fire & General Insurance Co Ltd the Chief Justice of the Supreme Court of the Northern Territory awarded a 9 1/2 year old full blood tribal Aboriginal boy \$362,238 damages for massive head injuries causing serious brain damage.¹²⁸ Of the total, \$25,000 was awarded under the compendious head of 'pain and suffering, loss of amenities and enjoyment of life', and \$2,500 for 'loss of expectation of life.' His Honour noted the

...unhappy fact that living in a tribal state the life expectancy of such a person is less than that of a white man...

Nevertheless, his situation was such that 'he would not be permitted to starve nor would he be required to live entirely in the open'.

'Loss of amenity' was considered as a separate claim by Zelling J of the Supreme Court of South Australia in Napaluma -v- Baker.¹²⁹ As a result of injuries sustained as a passenger in a motor vehicle accident, a full-blood Pitjantjatjara Aborigine then aged 22, although having been made a man and undergone traditional ceremonies, was unlikely to be advanced to further degrees in Aboriginal lore.

His mental condition was such that he might not keep secret what was entrusted to him; secondly, he had lost the ability to pass on accurately those secrets to others. Further, and as a consequence of these two factors,

he is left out of some ceremonies and... plays a merely minor passive role in others and he is therefore less than a full member of the Aboriginal community. He will not play the part in relation to reciprocal relationships with other Aborigines of his own peer group, nor will he be consulted, at least not as much as others, in making tribal decisions¹³⁰

As a result, his Honour considered that 'loss of amenities' was

...basically a loss of position in the Aboriginal community¹³¹

and was compensable. A sum of \$10,000 was awarded in damages on that head alone, and a further \$55,000 on others.

This is the first case I have been able to discover where an Australian court has awarded civil damages for this type of claim, although Zelling J did note a decision of the Supreme Court of Papua-New Guinea including an award under a composite head which included loss of ability to take part in the village activities of the plaintiff's community.

Following that decision were two judgments of the Supreme Court of the Northern Territory, both in 1982, which followed that decision in terms of compensation for 'loss of ceremonial function' in the sum of \$1,000 which was included as 'loss of enjoyment of life' and 'loss of cultural fulfillment' in the sum of \$20,000 which was included in damages of \$45,000 awarded for 'pain and suffering and loss of amenities'.

In the first case, Roberts -v- Devereux, Forster CJ found that as a result of injuries sustained by the plaintiff, the plaintiff felt unable to play his full part in ceremonies involving loud singing because of the limitation of his jaw movement.¹³² In Dixon -v- Davies, a 5 year old boy, a full blood of the Amoonguna tribe was struck and severely injured by a motor vehicle, leaving him with a 'moderately serious deformity of the left leg', future pain and suffering, and reduced prospects of employment.¹³³

O'Leary J took into account

...that Aborigines as a rule have a shorter working life than other members of the community...

that the best the plaintiff could have expected in employment was as a jackeroo, or involving light labouring or semi-skilled work. No reasons were adduced by his Honour in observing the duration of such working life, and must be taken to have been a product of judicial notice, ie, assumed knowledge of a state of facts or circumstances so generally understood as requiring no proof to verify them.

However, the loss of amenities provides the more interesting judicial acceptance of cultural difference to the extent that this difference is sufficient in degree and kind to substantiate a claim. A claim, moreover, denied to non-members of that community. Anthropological evidence was given on behalf of the plaintiff. The plaintiff, although he would undergo the earlier stages of initiation, involving passive revelation of secrets, would be unlikely to achieve full responsible adult status gained by participation in ceremonies and strenuous rituals which were an essential part of subsequent initiation. As a result, he would remain a 'wiyai' ('young boy'), used in its most pejorative sense, the butt of community jokes and ridicule, resulting in a lowered position in the eyes of his people, loss of actual formal rights, and diminished marriage prospects. His Honour distinguished the present case from Napaluma not only because the plaintiff in the latter case had attained manhood, which the plaintiff in the present case never would, but also because the injuries sustained were substantially greater. Damages totalling \$134,500 were awarded, although those for loss of cultural fulfillment were substantially greater than in Napaluma.

Solatium, a compensable notional loss or item of damages to the close family of a deceased, was the subject of a statutory claim in Cook -v- Cavenagh, heard in the Supreme Court of the Northern Territory before Muirhead J.¹³⁴ The parents and two

brothers of a young girl killed by a motor vehicle on her way home from school sued for damages by way of solatium. The girl's mother, an Aboriginal of the Aranda people, was brought up on the Hermannsburg Mission; she and her husband were practising Christians enjoying a happy and stable marriage.

The Court painted a vivid picture of the depth and influence of traditional culture in the circumstances of the girl's death.

Although a practising Christian it was inevitable, at a time such as this, that the culture of her (ie mother's) people should to some extent be imposed upon her... the child's clothing and belongings were taken from the house and destroyed. (The mother) underwent traditional chastisement. Photos of her daughter were destroyed. Pressures were brought to bear by her people to persuade her and her husband to leave the home - again in the custom of the Aranda people... the husband... repainted the child's bedroom and... sold his motor vehicle to satisfy these pressures. For a considerable period Mrs Cook's tribal relatives stayed away from her home... The deceased child's name is seldom mentioned, again in conformity with Aranda tradition. When spoken of, the deceased appears to be referred to by the other children as the 'little angel'...¹³⁵

B. Claims in contract: terms & conditions of employment

I have referred already to a succession of cases culminating in the granting of equality of wage justice, over an extended period, under Cattle Station Industry (Northern Territory) Award decision in 1966. Even in Dixon -v- Davies (supra) the trial judge commented on the plaintiff's lack of motivation and employment prospects by reference to his parent's employment, or lack of it, and his father's 'lifestyle'. Although his Honour's comments in Dixon's case could be taken to refer to the immediate home environment, their generality seemed to assume the wider socio-economic influences affecting Aborigines.

C. Equity suits

In three cases, groups of Aborigines undertook representative actions on behalf of a wider Aboriginal community by seeking interlocutory injunctions. In Foster & Others -v- Mountford & Another,¹³⁶ Mr Justice Muirhead in the Supreme Court of the Northern Territory granted such an injunction to members of the Pitjantjara (sic) Council restraining publication of tribal secrets of deep religious and cultural significance; in Noonkanbah Pastoral Co Pty Ltd -v- Amax Iron Ore Corporation¹³⁷ an incorporated association of Aborigines living in a traditional style sought to restrain breach of the Aboriginal Heritage Act 1972 (WA); and in Onus & Another -v- Alcoa of Australia Ltd¹³⁸

the High Court granted leave to two representatives of the 'Gournditch - Jmara' Aboriginal people to appeal against a decision of the Full Court of the Victorian Supreme Court which had upheld the decision of Brooking J that the appellants lacked sufficient standing to seek an injunction to restrain threatened breaches of the Archaeological & Aboriginal Relics Preservation Act 1972 (Vic).

Whilst the last two cases were brought pursuant to statutory provisions, all three proceeded on the acceptance of a continuance of cultural or spiritual beliefs still significant and held by a group, the potential loss to whom and to the petitioners was sufficient to endow the petitioners-appellants with legal standing to seek the relief.

D. Family Law: custody application

One case starkly presented differences between material advantages vastly superior to those likely to accrue to the subject infant, and differences in culture. In McMillen & Anor -v- Larcombe, the applicants, both American citizens, sought an order dispensing with the consent of the mother of the child to his adoption by them, and for an order for adoption.¹³⁹

The applicants intended to raise the child as their son in the United States, and the son's prospects of returning to his people were remote. Apart from certain procedures adopted by the authorities which Forster J criticized in trenchant fashion, his Honour compared the material advantages of the applicants with the cultural endowments which his natural mother and his tribal community could confer. It was likely that the child, although slightly retarded, would have the love of an extended family in which he would feel more at home than with a white family; secondly, he would be treated as an Aborigine by the Pitjantjatjara and become fully initiated; and thirdly, 'there are less pressures upon people living in an Aboriginal community than a white community', therefore no identity crisis he would suffer if raised in white society.¹⁴⁰

The mother of that child was a full-blood, and the father white. In a custody case in the Family Court of Western Australia, the natural (white) father sought the custody of his two ex-nuptial children by an Aboriginal mother.¹⁴¹ McCall J in that case raised the question as to whether anything turned on the different racial background of the parties. His Honour, in awarding custody to the father, with access to the mother, stated

...No evidence was led, nor was any submission made that there were any particular cultural links that should be maintained by these children, or that the maintenance of such cultural links was an important factor that should be taken into account in determining the question of their custody.¹⁴²

II Criminal actions

The civil actions, including those of recent origin, demonstrate both a judicial awareness of, and sensitivity to, the cultural strength, tradition, and divergences between white and black, and a corresponding judicial capacity, in taking account of those factors, to accommodate them within the dominant legal system. The law in civil cases, it is plain, has been used in a positive manner, to assert and achieve the recognition of right; to obtain redress for breach or other violation of those rights; or to restrain a threatened breach of them. As such, civil procedures and remedies, whether founded in statute - as in Aboriginal Land Rights Claims - or in the common law, have utilised the law-as-sword.

In the criminal processes of the law, cultural divergences and judicial acknowledgement of their existence and strength have seen the law used largely as a shield to curb, mitigate or otherwise dilute the application either of substantive criminal law or of criminal - especially trial - procedures.

As in my consideration of the civil law, most, but not all, case law references derive from judgments delivered in the Supreme Court of the Northern Territory. Kriewaldt J, in particular, was conscious of the peculiar status in law of the Aborigines in the Northern Territory. Part of his judgment in Ross -v- Chambers is worth quoting in full.¹⁴³ The case was a civil action by an Aborigine claiming damages for injuries received in an assault, as a result of which his white assailants were charged and convicted in the Supreme Court also before Kriewaldt J.¹⁴⁴

An application was made by the defendant Chambers to set aside the writ issued by Ross on the principal ground that, as an Aborigine, Ross, although of full age, was not sui iuris, that is was under such a legal disability that he could not sue in his own name but, as in the case of other legal incompetents such as infants and lunatics, only by a 'next friend'.

His Honour, in the course of finding that the Aboriginals Ordinance 1918-1953 did not repose in the Director, being the Director of Native Affairs, (as appointed under the Aboriginals Ordinance 1939, i.e. second, (No 4)),¹⁴⁵ the powers a committee of a mental defective or the guardian of an infant ward might possess, held:

...Prima facie, an aboriginal of full age living in this Territory is subject to the same laws and entitled to the same rights and privileges as any other person living in the Territory. The law has never regarded an aboriginal as deprived of rights or relieved of obligations merely because of his ancestry. This general principle has, however, been substantially modified by legislation so that, in fact, an aboriginal today has some rights and privileges denied to white persons but, conversely, he is subject to some restrictions which do not apply to the white inhabitants of the Territory or, there are some privileges and benefits conferred by

law which are enjoyed by white persons but which are denied to aboriginals, but again, some privileges and benefits conferred on aboriginals are denied to white persons.¹⁴⁶

Kriewaldt J characterised the effect of s7 of the Ordinance ('The Director is the legal guardian of all aboriginals') as enacted in 1953 as, *prima facie*, creating a species of perpetual tutelage.

Three years later in Namatjira -v- Raabe, Kriewaldt J referred to the provisions of the Welfare Ordinance 1953-55 as

...designed to extend help and guidance to the Aboriginals of the Northern Territory.¹⁴⁷

His Honour seems to have been impressed by the extent of legislation for Aborigines:

..That nearly all Australian Aboriginals stand in need of some special care and attention would seem to be the unanimous opinion of five out of six State legislatures. The exception of Tasmania rests on reasons most people aware of them do not regard with complacency. Even the State of Victoria with only some twenty full-blood Aboriginals (sic).¹⁴⁸

Kriewaldt J then volunteered, in a somewhat unconventional aside,

Those of us who have lived for more than a year or two in the Territory realise that legislation for the protection and advancement of Aboriginals is essential if they are to escape extinction.¹⁴⁹

Accordingly, and having regard to realities, the Welfare Ordinance as a whole applied to Aborigines exclusively, and it was 'not the business of the Courts to inquire into the wisdom of individual sections of the law'.¹⁵⁰

Perhaps not, yet that is precisely what his Honour did in interpreting s7 of the Aboriginals Ordinance in Ross -v- Chambers (supra). What Kriewaldt J did in that latter case was to apply a liberal interpretation of the kind mentioned by the Chief Justice of Western Australia in Bolton & Others -v- Neilson where, in referring to 'the provisions for the protection of natives' contained in the Native Administration Act (WA), Dwyer CJ said:

...where there is any doubt as to the interpretation of a section enacted for their protection it is my opinion that a liberal interpretation should be given to those provisions.¹⁵¹

What Kriewaldt J described as 'perpetual tutelage' within the provisions of the Aboriginals Ordinance 1918-53 was described as 'a special status of pupillage' by that illustrious and most precise Chief Justice of the High Court of Australia, Sir Owen

Dixon, in Namatjira -v- Raabe, taken by way of application for leave to appeal against Mr Justice Kriewaldt's judgment.¹⁵²

In the latter judgment, Kriewaldt J also referred to Namatjira's position as 'an Aboriginal who has not completely adopted the ways and manners of a white community' and that 'he has lived in a community where the sharing of possessions is commonly practised'.¹⁵³

Subsequent to the High Court's decision in Namatjira, Kriewaldt J approximated the status of an Aborigine before the Welfare Ordinance with that of a 'ward' as it was legislation 'which dealt in terms with the protection of Aborigines'.¹⁵⁴ Later that same year, in November 1959, the particular legal consequence of the status of pupilage was considered by him in R -v- Aboriginal Kenny Jungarai and Aboriginal Hector Galway.¹⁵⁵ His Honour left open the capacity of a police tracker who had been declared a 'ward', and therefore subjected to that status, to effect a citizen's arrest. More explicitly, his Honour questioned if the conferring of that status had deprived the person subject to it of that power 'the ordinary citizen possesses'.¹⁵⁶

Accordingly, even in respect of the criminal law judicial awareness or consideration of a subordinate legal status, with its attendant consequences, is manifest. Statutory considerations apart, even the interpretative function of the judiciary is influenced by predispositions or conceptions of a distinct group as needing requiring or properly the subject of 'protection', 'care' and 'assistance' in the same way as children or mental defectives. Even where, as an act of policy, such legal disabilities have been removed, judicial attitudes still derive from the particular problems encountered by, or unique in their intensity to, Aborigines.

Thus, the Supreme Court of New South Wales entertained a plea for leniency by counsel of an Aboriginal accused due to 'factors of Aboriginality' in a case of rape and buggery of a 20 year old woman by a 26 year old man described as of 'unfortunate early and deprived background'.¹⁵⁷

In R -v- James Andrew Gordon, a 19 year old Aborigine pleaded guilty to two charges of having sexual intercourse of a 15 year old girl without her consent and to maliciously inflicting bodily harm on her and, on the same day with intent to rape, a 42 year old woman, whilst intoxicated.¹⁵⁸ In setting a non-parole period of five years, Lee J said

As an Aboriginal you are at a disadvantage in our society...¹⁵⁹

In R -v- Alwyn William Peter, the trial judge, Dunn J, in passing sentence, said

...The inclination of my brother Judges and myself to recommend such offenders as you for consideration for parole results I think from the fact that without the assistance of expert evidence we have

perceived and made allowance for the fact that special problems exist in Aboriginal communities.¹⁶⁰

Peter was tried for the manslaughter, whilst intoxicated, of his de facto wife. A massive amount of sociological evidence was collated and presented to the Court to explain the endemic nature of violence in the accused's family and community in mitigation of his offence. Whilst the Court was prepared to receive and take into consideration such expert evidence, its receptiveness is markedly less in crimes of a sexual nature. Moreover, the judicial perception of sexual mores prevailing in Aboriginal communities is markedly at variance with their perception of white sexual behaviour.

In R -v- Kelly, for example, a 16 year old Aborigine of 'dull normal intellect' pleaded guilty before Mr Justice Cantor in the Supreme Court of New South Wales, to a charge of carnal knowledge of a 5 year old girl. He was sentenced to 12 years imprisonment with a now parole period of 3 years 10 months. His appeal against severity to the Court of Criminal Appeal (Street CJ, Lee and Lusher JJ) was successful, the sentence being reduced to 5 years and the non-parole period to 1 year 10 months.¹⁶¹

Both the trial judge and the Court of Criminal Appeal laid emphasis on the accused's background and his environment (the Bourke, far-western NSW, Aboriginal Reserve). Cantor J noted the accused's lack of awareness of criminality as

...a product of an ethnic background coupled with a form of life within a community which has standards of sexual conduct very different from the standards accepted by the general public and the laws of this State.¹⁶²

The Chief Justice's opinion was as eloquent as it was elegant:

As I see the problem it was one which involved an attempt to balance two almost unbalanceable considerations, that is to say an even-handedness in the administration of the criminal law... and... a need to give full understanding and weight to the particular circumstances of this appellant and of the immediate society within which he had grown up and which provided the context in which this encounter with the child took place.¹⁶³

In 1979, the Chief Justice of the Supreme Court of the Northern Territory, Sir William Forster, in sentencing an Aborigine for the rape, whilst intoxicated, of a white nursing sister at a settlement, made the following remarks

... I have no doubt it is my duty to do what I can to deter you, and people like you, from acting in this way, and to offer such protection as the law can provide for white women in remote places. Your

crime would, I should think, be disapproved by Aboriginal people as well as by white, no matter how tolerant the Aboriginal attitude towards rape may be.¹⁶⁴

In light of previous judicial protestations as to the equality of liability under law for black and white, which, a priori confers equal protection, it is interesting both to contrast the protection which his Honour was promoting for pioneering white females and the clearly expressed judicial disapproval of an alleged Aboriginal tolerance of rape. Whether his Honour intended to infer sexual promiscuity in general amongst Aborigines, or violent sexual behaviour (rape) resulting from intoxication in particular can be but a matter of speculation.

Less than a year later, on 29 May 1980, the Supreme Court of the Northern Territory again was the venue for the trial of three Aborigines, two of whom were aged 28 years and 26 years respectively, for the drunken rape of an Aboriginal woman in the Todd River, an area described by one of the defence counsel as

...an area of complete anarchy and lawlessness, where Aboriginal culture has no influence, and where traditional culture has no influence and where a European culture has no influence...¹⁶⁵

Expert evidence led before the trial judge on behalf of the accused, in mitigation of the offence, apart from the lawlessness of the area around the Todd River, was in respect of rape in traditional Aboriginal culture.

First, discussions with Dianne Bell (sic), an anthropologist, led defence counsel to a quite firmly held belief, and he so submitted,

... that rape is considered significantly a lesser crime than the way European people view the crime of rape...

Defence Counsel submitted, in the light of his conversation with Diane Bell, that

...when a man rapes a woman it is regarded as a transgression, as an assault, on her sexual character and there is no doubt that punishment against a person who does commit this crime is carried out and it is usually very severe... rape is punished by the use of sticks and bars against the person who commits the crime and such punishment is often carried about around their genital areas. However, ... when alcohol is involved different rules apply insofar as there is regarded of the transgressor who is drunk that he has a huge responsibility and Aboriginal people often see dearly held values violated when a person is drunk. Nevertheless that does not excuse him from punishment ... In Aboriginal culture ... the word

used to describe a person being drunk is the same word that is used to say someone is deaf or someone is mad, and in a non-literate society ... this is similar to saying someone is outside of that society and here lies this sense of belief that the transgressor has a reduced responsibility because of his intake of alcohol.¹⁶⁶

Contrast this representation of Diane Bell's anthropological view with what she wrote, with Pam Ditton, in 'Law: the Old & the New: Aboriginal women in Central Australia speak out', published in the same year (1980):¹⁶⁷

4.110. The new law, women stated, was lighter than the old law on sexual offenders. Under the old law, sexual violence was punishable by death, but today, in the opinion of women, rapists and the like get off lightly. These women have seen Aboriginal men they believe to be guilty of rape, either acquitted or convicted on a lesser charge, usually indecent assault, with only short periods of imprisonment or non-custodial sentences. By contrast in Alice Springs, several Aboriginal men have been convicted of rape and given sentences of imprisonment commensurate with manslaughter. In the men's view, this has been unduly harsh. Women say they fear more trouble from the new law if they intervene and punish sexual offenders.¹⁶⁸

Although that section of the work dealt with the situation at Murray Downs as a European-managed cattle station, the traditional ethos regarding rape and the traditional chastisement for its incidence as an offence should dispel the notion of moral laxity or sexual promiscuity amongst Aborigines generally. However, as against the view of one anthropologist, albeit a person recognised in her field, defence counsel submitted further expert evidence as to a cultural factor which, whilst not tolerant of rape in current society, demonstrated a cultural justification for such ambivalence as trial judges could assume existed in one portion of Aboriginal society. Although it is not clear from my transcript where the accused lived, or were brought up, it may have been in the western desert region. Defence counsel was permitted to adduce the expert evidence of Noel Wallace and his wife as to the view of rape within traditional Aboriginal society. A number of areas of community attitudes were discerned. The first, in general terms, was that rape was not considered the cardinal sin in Aboriginal society that it is considered in European society, except where incest is involved. Secondly, in the western desert people, there are some ceremonies where sexual intercourse takes a very prominent role, and far from being an involuntary act was considered to be an enjoyable experience. Finally, the actual mythology of the western desert people was the most important factor: a consistent thread is the male spirit ancestor's chasing the female spirit ancestor with intent to rape.¹⁶⁹

Notwithstanding the cultural diversity and vibrancy of

Aboriginal acculturation, such that the view of rape might be regarded as falling within some part of a continuum accomodating such acculturation, Gallop J in a further trial for rape and murder heard that year, being a pack rape by men aged between 21 and 26, received and seems to have acted upon evidence that rape was not as seriously regarded in the Aboriginal community as it is in the European community.¹⁷⁰ Evidence was also given as to the likelihood of 'pay-back' but whether for the murder alone, or for the murder and rape, is unclear.

In 1981, Muirhead J, in R -v- Pat Edwards, the trial of a Warlpiri Aborigine for the drunken assault of his drunken wife, whom he suspected of infidelity, in sentencing the accused said:

...Sitting as a judge of this Court, I am just not prepared to regard assaults of Aboriginal women as a lesser evil to assaults committed on other Australian women, because of customary practices or life-styles, or because of what at times appears to be the almost hopeless tolerance or acceptance by some Aboriginal people to drunken assaults of this nature...¹⁷¹

His Honour nevertheless took into consideration various mitigating factors associated with cultural aspects of traditional society, particularly pay-back.

One might, finally, note the lofty moral indignation of Mr Justice Maxwell, of the New South Wales Supreme Court, in the trial of an 18 year old Aborigine from Wallaga Lake on charges of maliciously inflicting actual bodily harm on the 24 year old women with intent to have sexual intercourse, and having sexual intercourse with her without her consent.¹⁷²

His Honour is reported as describing the atmosphere in which the accused had grown up as one of 'idleness and perversion'.¹⁷³ These expressions of moral disdain and disgust apart, there is a clear acknowledgment by the judiciary not only of the social and economic deprivation which attend most Aborigines, but of gradations of status, intelligence, and 'civilization' between groups of Aborigines according to their lifestyle and proximity to permanent European influence.

Hence the observations, eg, of Wells J in Wanganeen's case (supra) and of Kriewaldt J in Namatjira's case (supra). Judicial notice is also taken of the extent of exposure to European influence as a determinant of acquisition of European ways of thinking and acting, although the judges seem to feel, as illustrated by Namatjira and Cook, that deep-rooted cultural influences and traditions cannot be eradicated by the adoption of white ways or the profession of Christianity. Thus, Wolff CJ in the full Court of the Supreme Court of Western Australia in Jackie Jamieson -v- R, on appeal by a full-blood against severity of sentence for manslaughter of his pregnant wife, the husband and wife both being intoxicated at the time, said

...the sentence does not give weight to the appellant's make-up and the effect of liquor on a man who up to 1934 was a bush native...¹⁷⁴

The appeal was heard in 1965, 31 years later.

In R -v- Wayne Ashley, Forster J in the Supreme Court of the Northern Territory, in passing sentence upon an Aboriginal male for the indecent assault, whilst intoxicated, of a 4 year old boy, said

...It is apparent that you were considerably under the influence of liquor when the offence was committed, which in the case of Aboriginal people I regard as something more of an excuse than I do with white people...¹⁷⁵

A difference in life styles may work to the advantage of an Aborigine which, under the same factual circumstances, would confer no benefit by way of mitigation of a criminal offence on a white. In Dixon -v- Sears, Muirhead ACJ heard an appeal against conviction by an Aboriginal man over 60 years of age, who, being drunk, was found armed with an offensive weapon, a Bowie knife and was unable to give a valid and satisfactory reason. In upholding the conviction and dismissing the appeal, his Honour said

...One must take judicial notice of the fact that such a knife may have many uses, especially, I suppose, to an Aboriginal man whose life is largely spent in a bush environment.¹⁷⁶

By far the greatest judicial vexation, however, is the application of substantive rules of law to people who have no concept of English law or trial procedures, the various meanings ascribed in law to 'guilt' and the various defences, eg, open to a charge of homicide.

As already noted, the early Courts had few qualms in asserting the majesty and the ineffable superiority of English law and English justice to the subject blacks.

Although a notable exception noteworthy for reason that judgment was delivered long after the law in this regard could be regarded as settled, Cooper J in the Supreme Court of Queensland discharged four Aborigines on trial for murder because no interpreter competent to communicate the charge to the accused could be found.¹⁷⁷

In the trial of six Aborigines for rape and attempted rape held before the enunciation of the Anunga guidelines, the Rev Jim Downing in explaining to the court that he had interpreted for police officers and had tried to administer the caution in Pitjantjatjara said:

...I am fairly certain that I have not been able to interpret it adequately. I am convinced that the people to whom I have tried to interpret have not

understood the concept at all ... Though some of the people do understand English, the majority of them do not understand English concepts. Those concepts are very difficult, there is no equivalent in their experience...¹⁷⁸

More recently, the High Court of Australia by a strong majority in an appeal by a full blood tribal Aborigine from the north west of Western Australia, has held that if a person, with the assistance of defence counsel, is able to make a proper defence to a criminal charge, it is not necessary that he be capable of understanding the law governing his case before he can be tried provided he is able to understand the evidence and instruct his counsel as to the facts.¹⁷⁹

This, of course, begs the question, in the light of Anunga, whether it is possible either to comprehend the evidence, itself the product of technical English rules and concepts, or to formulate a proper response in the absence of concepts approximating either the English concept or an English expression.¹⁸⁰ Whilst the Australian Law Reform Commission in its customary law reference has addressed itself to the issues in 'balancing the almost unbalanceable', to borrow from Street CJ in R -v- Kelly (supra), the High Court preferred to resort to the principle of non-intervention in matters it categorized as 'high legislative policy' in querying whether tribal Aborigines, unable to understand the concepts of the ordinary (criminal) law, ought to be tried under that law.¹⁸¹

Supervision of Magistrates by superior courts

In the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.

Thus, the Lord Chancellor as to the binding effect of precedent in Broome -v- Cassell & Co.¹⁸² cited in Coulthard -v- Steer.¹⁸³ In the latter case, Muirhead J, in upholding an appeal against conviction by a Stipendiary Magistrate on the principal ground that the Anunga Rules had not been followed, was highly critical of remarks attributed to that Magistrate during the original proceedings as to sociological consequences which might follow strict compliance with those rules in lieu of what the Magistrate was advocating as a return to the principles of the common law.

In the course of describing the Magistrate's views as indicating 'a lack of understanding of the Anunga Rules, their background and the reason for their enunciation,' as being 'erroneous', 'unfortunate', 'inaccurate', 'unusual', misconceived, and tending 'only to cause confusion and to undermine respect for the law,' Muirhead J categorically, and correctly, stated that

...in the exercise of his functions he is required to follow and be guided by relevant principles of

law, practice and procedure enunciated by superior courts.¹⁸⁴

The superior Courts, particularly the Supreme Courts, have been ever vigilant in the proper discharge of the ordinary rules of justice by the lower courts, particularly when dealing with Aboriginal parties, whether in criminal or in civil trials.

In McMillen -v- Larcombe, Forster J castigated the Children's Court for proceeding to hear an application for the adoption of an Aboriginal infant in circumstances in which, the mother being in hospital with a broken leg, and being illiterate, she was unable in any way to attend the hearing and to oppose the application.¹⁸⁵ His Honour concluded that the procedure adopted

seems to me to constitute a denial of justice of a particularly serious kind.¹⁸⁶

In criminal matters, the overriding principle adopted by the superior Courts in their supervision of the Magistracy has been to ensure that the defendant is 'apprised of his rights and his duties at all times', and to require the Magistracy to 'be vigilant, to keep proceedings free of error or understanding (sic)'.¹⁸⁷ But a higher degree of vigilance is expected of the Magistracy where the defendants are Aborigines. The superior Courts have generally expected the Magistrates, in dealing with unrepresented Aboriginal defendants, to ask an Aborigine if he wants an adjournment to obtain legal advice. Further, a full explanation of the availability of that advice, of the steps the defendant ought to take to obtain it, and a real satisfaction by the Magistrate that the defendant understands what is said to him is also required.¹⁸⁸

In Western Australia, even where, pursuant to s49 of the (then) Aboriginal Affairs Planning Authority Act, 1972 an Aborigine pleaded guilty, it has been considered appropriate that that plea not be accepted if there were any substantial doubt in the justices that the defendant did not understand the nature of the proceedings.¹⁸⁹

In at least three cases, the Supreme Courts of Western Australia (in 1970), the Northern Territory (in 1974), and South Australia (in 1980) have acknowledged the difficulties encountered by local courts of summary jurisdiction, particularly in remote areas dealing with serious offences. The case of Green -v- Josey was not particularly serious in respect of the original offence dealt with summarily, namely drunkenness, and being idle and disorderly.¹⁹⁰ The appellant, a semi-tribal 'full blood' Aborigine, had a record of drunkenness and other offences connected with liquor: he was an habitual drunkard. As a person deemed to be idle and disorderly, he was sentenced to six months' imprisonment. On appeal, Wickham J considered that the police and the local justices had acted humanely and conscientiously and in a manner which they considered to be in the best interests of the community and of the appellant, who was becoming a problem. Notwithstanding his sympathy for the police, the justices and the

local community in the apparently insoluble predicament in which they were placed by behaviour of the kind exhibited by the appellant, his Honour concluded that:

...in the administration of justice and in the sentencing of offenders principle cannot be allowed to give way to expediency.¹⁹¹

A sentence of six weeks was substituted in lieu of six months.

Jacobs J in Grantham -v- Thomas (supra) whilst satisfied that the local court had observed the 'conventional formula', that is, the procedural aspects of explaining to an Aborigine his legal entitlements, held it had not complied with the substantive requirements and so inadequately dealt with the defender under law.

The Supreme Court of the Northern Territory has been more vocal in respect of the proper observance of substantial justice. In the 1974 case of Tex -v- Smith, Forster J in dismissing an appeal against conviction for breaking, entering and stealing, and driving a motor vehicle without the consent of the owner, served notice on the Magistracy that the Magistrate or justice or their clerks should keep brief notes of what takes place in court on the hearing of each charge and that a copy of those notes verified by the Magistrate or justice be transmitted to the Supreme Court together with the notice of appeal and other papers.¹⁹² Further, that when dealing with juveniles, particularly Aboriginal juveniles, a court of summary jurisdiction should make every effort to obtain the assistance of a welfare officer as to the background and history of the defendant, whether represented or not. This general pronouncement was supported by Muirhead J.

The latter judge, in Putti -v- Simpson, placed an equal obligation on those representing defendants or accused thoroughly to prepare their cases in order to be able to place before the Courts, especially courts of summary jurisdiction, all necessary submissions and evidence in mitigation of penalty.¹⁹³ In that present case, his Honour was critical of defence counsel who, he said, 'was not in a position to make a single submission of relevance'; 'Half-baked instructions which may come from unreliable sources are, as a rule, just not good enough. The practice of appearing armed only with hurriedly gained instructions, especially where language or cultural differences jeopardize understanding, may result in substantial injustice to individuals'.¹⁹⁴ Further, counsel should not proceed until he understands his client's instructions, and should be in a position, if wishing the court to obtain a pre-sentence report, to suggest to the court the most likely source to which it might direct its request. For their part, legal aid clients should fully understand that they were under no obligation to accept representation offered by the legal aid agency and that they could, like any other Australian, seek advice from solicitors or other counsel of their choice.¹⁹⁵

Finally, whilst his Honour was not unaware of the difficulties faced by all involved in the administration of

justice in remote areas, of poor communications, of the problems encountered in obtaining instructions, in arranging legal representation, of arranging for interpreters, for attendance of witnesses, of problems of weather and distance in jeopardizing transport arrangements:

...neither these matters, nor crowded lists to be coped with on hurried court itineraries should be allowed to jeopardize an individual's right to the most careful presentation and consideration of his case.¹⁹⁶

There have been few reported cases of overt bias or discrimination brought on appeal before superior Courts. In Neal -v- R, an Aboriginal leader of the Yarrabah community in Northern Queensland was convicted of assault and unlawful entry: for the assault, he was sentenced to two month's imprisonment with hard labour.¹⁹⁷ He applied to the Court of Criminal Appeal for leave, but on appeal it increased the sentence to six months. The appellant then applied to the High Court for leave to appeal against that sentence. In the course of giving their judgments by which the sentence of six months was quashed and the original sentence allowed to remain, two of the four Justices constituting the Court, Murphy J and Brennan J, made remarks critical of the Magistrate's attitude.

Murphy J in particular regarded the Magistrate's remarks on sentencing as 'patronising and insulting' as making it clear that anyone who agitated for change 'in any shape or form' in the Aboriginal communities would be under a disadvantage in that Magistrate's Court

In its supervision of the criminal justice system of the State, the Court of Criminal Appeal has a duty to see that racism is not allowed to operate within the judicial system. It should have disapproved of the unjudicial manner in which the magistrate dealt with sentence.¹⁹⁸

Brennan J criticized as wrong the Magistrate's condemnation of the appellant's 'legitimate exercise of political rights'; further, he stated in his judgment

Legitimate advocacy of change is no matter of aggravation affecting the exercise of the sentencing discretion.¹⁹⁹

Finally, his Honour stated that

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.

So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the Court exercising the sentencing discretion at first instance or for the Court of Criminal Appeal.²⁰⁰

The reason for the High Court's preferred non-interference is that those courts have contemporary knowledge of sentences imposed in comparable cases and of local factors affecting the level of sentences.²⁰¹

One other case of apparent overt discrimination was that of R -v- Justices of Rankine River; Ex parte Sydney; Ex parte Pluto taken on appeal to the Supreme Court of the Northern Territory, Bridge J.²⁰² The applicants, two Aborigines, sought a writ of certiorari to quash a conviction recorded against them by a justice exercising summary jurisdiction on the ground of bias. Each Aborigine was tried for assault. During a break in proceedings after the conclusion of Sydney's case, and before Pluto's, one of the justice was heard to say

Natives must be kept under the thumb.²⁰³

During Pluto's trial, he is also alleged to have said 'Welfare Branch is to blame for the attitude of the blacks. One minute they are feted and lauded, the next minute they are being kicked around'; 'being called a black bastard is not sufficient cause to strike a white man'; 'calling each other bastards does not mean a thing in Australia.'

As Bridge J considered it,

The form in which Mr Richardson chose to couch his comments was, to say the least of it, beneath the dignity of a court of justice, and, further, as hinting at a discrimination between black and white.²⁰⁴

His Honour quashed the convictions, but, as even the justice against whom bias was found was considered to have acted honestly, declined to make an order that the justices also pay the applicants' costs.

Thus, such intervention as the superior Courts have demonstrated in their supervision of the Magistracy is for procedures which have been a direct denial of natural justice, or have resulted in the same, where the particular Magistrate has been swayed by extra-legal considerations or has failed to give proper weight to special factors in mitigation as deriving from material factors existing 'only by reason of the offenders' membership of a particular group. In the case of Aborigines in South Australia, Western Australia, Northern Queensland, but particularly the Northern Territory, these factors have included want of comprehension of the offence, or of the proceedings, either because of an inadequate grasp or complete lack of

comprehension of the English language, or of the particular concepts of law referable to a particular case.

In the remainder of this examination, I shall refer to particular instances of judicial consideration and concern in matters unique or peculiar to a degree to Aborigines.

(f) Aborigines and alcohol, drunkenness, and drink-related crime

There seems little doubt, either on the part of the legislative bodies, or by the judiciary, that alcohol is an endemic social problem, or the symptom of one, in Aboriginal communities.²⁰⁵ The judicial approach to the problem however has distinguished drunkenness per se, on the one hand, and drink-related crime, particularly crimes of violence the result of alcohol, on the other. At the same time, and on a different level, the judicial approach has been tempered by the community problems for which it conceives of alcohol as a prime cause, and the over-zealous espousal of the perceived community revulsion of alcohol-induced excess.

The broader, more enlightened view of excessive consumption of alcohol as a disease for which punitive measures were inappropriate was taken by the Supreme Court of South Australia, Bright J, on appeal in 1973, and by the Full Court of the Supreme Court of Western Australia 1975.

In Gollan -v- Samuels, Bright J heard an appeal against sentence by an Aborigine who had 386 convictions, mainly for the same offence.²⁰⁶ After referring to two recent reports on drunkenness to the State Government, his Honour referred to changes in widespread public opinion that a particular form of punishment hitherto thought to be in the interests of the public could no longer be so regarded, nor likely to be reformatory in nature. Whatever the sociological views of the judges, however, the courts perforce had to continue to impose a sentence of some sort. Evidence of addiction, or of a long history of convictions, without aggravation was not contumacy, nor should be punished as such. Therefore, it was inappropriate to fix a monetary fine at such a level that imprisonment in default would almost certainly follow. His Honour quashed the sentence of six weeks imprisonment and substituted a fine of \$15.

Similar considerations obtained in Green -v- Josey, a decision on appeal by the Supreme Court of Western Australia (Wickham J) and in Moore -v- Moulds an appeal against sentence for vagrancy heard by the District Court of Queensland (Judge Shanahan).

In Green's case, a person found drunk in a public place, having been convicted on three previous occasions of the same offence within the preceding 12 months, was deemed to be an idle and disorderly person and sentenced to six month's imprisonment on the second charge.²⁰⁷ Wickham J quashed the sentence and substituted one of six weeks. In so doing, his Honour found that the appellant was 'a comparatively harmless and amiable drunk' who

had not aggravated the offence. Therefore, although the police and the justices acted humanely and conscientiously and in a manner which they considered to be in the best interests of the community in which they lived and of the appellant, who was becoming a nuisance, a maximum term of imprisonment was not merited. Nor could principle be allowed to give way to expediency.

In Moore's case, the appellant successfully appealed against a conviction for vagrancy.²⁰⁸ Although acknowledging the meticulous and thorough manner in which the Stipendiary Magistrate dealt with the case, his Honour opined that the section of the Vagrants, Gaming and Other Offences Act 1931 under which the appellant was convicted was not directed to the punishment of poverty nor was it a criminal offence per se to adopt a lifestyle which differs from that of the majority.

In language appropriate to Gollan, his Honour observed

I have no doubt that on many occasions Stipendiary Magistrates, moved by Christian charity or humanitarian motive sent people to prison "for their own good". This applies to men who are addicted to alcohol and who had a nomadic existence. They do not, as a rule, commit criminal offences but are regarded as 'nuisances' and their appearance is an affront to the susceptibilities of those members of the public who do not suffer from their disabilities, whether they are self-inflicted or otherwise...²⁰⁹

The case of Murphy, Davidson & Ward -v- Watson, heard by the Full Court of the Supreme Court of Western Australia, was an appeal by the three female Aborigines against conviction for disorderly conduct and sentence to six months imprisonment. In each case the defendant had been shouting obscenities in a street near an hotel while affected by liquor and having been warned by police concerning her conduct, had continued with it. The three appellants had records for numerous offences associated with the excessive consumption of alcohol. The Court considered that no sentence would lead to the rehabilitation of the offender, nor deter her from drinking. Gaol was inappropriate. Further, 'each case is a tip of a deep and serious social problem, the solution to which must be found outside the criminal law'.²¹⁰

The judicial view of alcohol per se is one which, at least in the Northern Territory, is replete with acknowledgement of its sociological effect. In part, this derives from the incidence of alcohol-related crimes of violence which are heard at first instances by the Supreme Court itself; it also is a product of judicial notice or observation not only as to community concern but the very nature of Aboriginal alcoholism which, as Bright J in Gollan -v- Samuels observed,

usually occurs in a public place

whereas white drunkenness or alcoholism occurs in the more controlled environment of the home, clubs, or hotels.

Finally, the Court is aware of the legislative support for both the outstation movement and for local restrictions on the possession or consumption of alcohol imposed under the Local Government Act at the request of communities themselves.²¹¹

Not until 1964 was it lawful for Aborigines, being former wards and not otherwise exempted from the legislation, to possess, buy, or consume liquor: the Licensing Ordinance 1964 removed such restrictions but forbade drinking in a 'public place,' defined in such a way that, operatively, its reach embraced most forms of Aboriginal consumption of alcohol.²¹²

In his remarks on passing sentence on accused Aborigine found guilty of the attempted rape of a white woman whilst intoxicated, Kriewaldt J commented

...I have no hesitation in saying publicly that I regard the supplier of liquor to a native as a disgrace to the community and as a person entitled to no consideration.²¹³

His Honour's remarks were obiter, but reflected his judicial concern at the part which he found liquor played in the crime, that being the only factor in mitigation he could discern. The restrictions imposed by law in respect of liquor were still in force when the same judge, almost five years later, lamented to the jury in his summing up at the trial of an Aborigine charged with the murder of another

With this case, I begin my ninth year as Judge of the Northern Territory. Each year with a murder case. This year is no exception. So many of the murder cases I have heard, both in this Court Room and in Alice Springs, have been cases where an Aboriginal has been killed by another Aboriginal, and nearly always because liquor had been consumed by the parties that figured in the incident.²¹⁴

His Honour viewed with particular concern the violence deriving from, or induced by, consumption of liquor, and exercised his judicial discretion accordingly. In R -v- Aboriginal Roy Pananka, his remarks on sentencing an Aborigine convicted of assault and bodily harm - whether actual or grievous is not clear - committed whilst intoxicated concluded with the following remonstrations:

...I think the Aborigines concerned in this affray have reached a sufficient stage of civilisation that they can be made to understand that the use of knives or other instrument which may cause wounds in a fight will merit punishment, especially if they have previously taken enough liquor to be affected thereby...²¹⁵

Forster CJ in two judgments has taken a view of Aboriginal intoxication as a factor in mitigation, rather than aggravation. In R -v- Kevin Corby, the accused was charged with break and

enter with intent to rape, unlawful wounding, and attempted rape, whilst intoxicated.²¹⁶ In passing sentence, his Honour remarked

...Your people, unaccustomed to intoxicants, have learned the abuse of alcohol from the white man...

Possibly as a result of this, his Honour was minded to treat the offence as less grave than he would in the case of the same offence committed by a white. In R -v- Wayne Ashley, a case of indecent assault upon a four year old boy, his Honour said:

It is apparent that you were considerably under the influence of liquor when the offence was committed, which in the case of Aboriginal people I regard as something more of an excuse than I do with white people.²¹⁷

Muirhead J, on the other hand, has stressed the sociological effect, the cure for which seems to lie less in the exercise of his judicial discretion or sentencing, and more in community efforts, whether through legislative action or otherwise, to tackle the problem at its source. A sense of ennui, almost despair, pervades his remarks on sentencing in R -v- Douglas Wheeler Jabanunga charged with the manslaughter, whilst intoxicated, of his wife:

...The Courts cannot effect a cure of diminution of the incidence of alcohol-induced violence, but the situation calls out for community concern, intelligently planned programs and action rather than words. All the Courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil.²¹⁸

In Jabanunga -v- Williams the appellant was charged before a court of summary jurisdiction, pursuant to s75 of the Liquor Act 1975, with being in possession of two cans of beer within an area declared restricted under the Act. He was convicted and fined \$500. His appeal to the Supreme Court on the grounds that the penalty was excessive was dismissed.²¹⁹ Mr Justice Muirhead noted that the legislation was designed 'to combat a grave social evil' to

...assist the Aborigines in this Territory to combat one of the greatest threats to their dignity and existence, the continuing disruption of their social structure caused by consumption of alcohol.

Any person who lives in this area would be aware of the problem and none more so than the magistrates whose duties are to a large extent performed amongst the Aboriginal people in the centre of Australia. It is not legislation which has just been foisted on the people by a white society. The declaration of a restricted area is made by the Liquor Commission and it is made only after appropriate application and

inquiry and under circumstances which are designed to give those who may be interested, or prejudiced, the right to be heard. Therefore it is pertinent to observe that once a declaration has been made, the law should be energetic to support the restrictions relating to alcohol in the particular area, which represent in this case the wishes of the people living in the Warrabri area.²²⁰

His Honour, reiterating the 'special character' and the 'special objectives' of the legislation, decline to interfere with the Special Magistrate's discretion, particularly as the latter's work took him to the area, whose problems, geographical features, prevalence of offences and difficulties of maintaining surveillance, all factors in the operation of the legislation, would be well known to him.

In a negative way, one can see that factors of intoxication influence judicial discretion in a manner favourable to a defendant, except where violence accompanied the consumption of alcohol. The divisive and disruptive effects are so clearly observed as not to require proof. The law, particularly the sanctions of the criminal law, is particularly inapposite as a deterrent or curative for alcoholism, but when directed as a preventative measure touching upon a whole community rather than individuals, should be energetically promoted.

The limits and potential of judicial discretion thus assume greater significance if criminal violence is absent. The element of deterrence, retribution and rehabilitation in sentencing will be discussed below.

Aboriginal testimony

Aborigines historically laboured under a twin legal disability in respect of evidence, whether in criminal or civil trials. The first was that the ordinary common law rules obtained, until supplanted by legislation in substantially similar terms, denying to Aborigines the right to give evidence on oath. Where legislation permitted them to appear as witnesses, it was to make unsworn statements, the effect of which was somewhat less than sworn evidence. The second was that, even where Aboriginal testimony was admissible, the effect could operate more harshly against Aboriginal accused in that their tribal marriages were given no recognition in the common law: hence one tribal spouse could be compelled to give evidence against the other, a disability which did not attach to Christian and other lawfully married witnesses.²²¹

Further, the trial judge in his summing up could sway a jury with observations as to the weight to be attached to Aboriginal witnesses, depending on his consideration of their innate truthfulness, their propensity to exaggeration, or the degree of their acculturation, hence their capacity to comprehend questions, and the nuances and concepts of English and English law, and their corresponding capacity to articulate a proper and relevant response.

New South Wales, in 1839, by Act of Council 3 Vic No 16 tried to have evidence not on oath admissible in Courts of law.²²² The Act was disallowed by the Crown on the recommendation of the Home Government because its promulgation would be 'contrary to the principles of British jurisprudence.'²²³ The principles derived from the Judaeo-Christian ethic of the law and, as stated (in the converse) in the preamble to the New South Wales Act above, required 'a distinct idea of religion or a fixed belief in a future state of rewards and punishments,' as well as a belief in God and therefore an understanding of the obligations attaching to an oath.

The Imperial Act The (Colonies) Evidence Act, 1843 (6 & 7 Vic c22) subsequently empowered colonial legislatures to deal with the matter but reserved the relevant statute for the Royal Assent. New South Wales in 1876 dispensed with the requirement of oath by permitting declarations obliging the declarant to tell the truth - s3 of the Evidence Further Amendment Act, 1876 (40 Vic No 8). In R -v- Paddy (1876) an Aborigine was tried and condemned for the murder of another Aborigine, the principal evidence against him being given under oath by two Aboriginal witnesses.²²⁴ The trial judge reserved for the decision of the Full Court of the Supreme Court the question whether he had properly admitted the evidence of those two witnesses. The first appeared to have little idea of a Supreme Being except that he had once heard of a Spirit that lives in Heaven. The second was the tribal wife of the accused. Upon examination, the trial judge was satisfied that she understood that if she spoke falsely in her evidence she would be punished, but he could not determine if she connected her being sworn on 'god's book' or in the existence of a Supreme Being with her obligation as a witness.

The Full Court by majority disallowed the evidence and quashed the conviction, mainly by restating the common law requirements. The Chief Justice also referred to the capacity of 'a Mahomedan ...Buddhists and Chinamen... to give evidence after performing some ceremony which they state is binding on their conscience, such as being sworn on the Koran, blowing out a light, cutting off a cock's head, or breaking a plate'.²²⁵

In the absence of any such demonstration by the two material witnesses their evidence was inadmissible; notwithstanding his reservations on receiving evidence from a witness under the 1876 Act because so to do, from a person not believing in a Deity 'would ...alter the whole of the law relating to the qualification of witnesses'.²²⁶ Sir John Martin was in the Full Court which next year upheld a conviction largely dependent upon evidence given by an unsworn Kanaka pursuant to the 1876 Act.²²⁷ The binding effect and validity of such evidence was upheld in R -v- Peters, an 1882 decision of the Full Court of the Supreme Court of New South Wales, where by a 2/1 majority (Sir John Martin dissenting) the Court held that if an Aborigine is called as a witness and the trial judge sees reason to doubt that he understands the nature of the oath, such that it would not bind him, but would understand the nature of a promise to speak the truth, he may be permitted to give evidence after a voir dire (examination to determine the same) to test any objection to his giving evidence on oath.²²⁸

Western Australia in 1841 (by 4 & 5 Vic No 22), South Australia in 1848 (by No 3 of 1848), and Victoria in 1854 (by 17 Vic No 11) passed special legislation enabling Aborigines to give unsworn evidence. Queensland by Oaths Act Amendment Act 1884 (48 Vic No 19) achieved the same result. Although South Australian legislation continued in force in the Northern Territory on 1 January 1911, when the latter was established, the Queensland legislation seems to have become the model for the Evidence Ordinance (No 2), 1939, s9A, providing for the reception of unsworn testimony by an Aborigine; that section in turn was repealed by the Evidence Ordinance 1967. However, the Oaths Ordinance 1967 inserted s25A into the Oaths Ordinance 1939, providing for a prior determination upon examination by the trial judge whether, as a preliminary question of fact, the potential witness is capable of comprehending the nature of an oath or of understanding the meaning of an affirmation, and the punishments for giving false witness.

In South Australia, for example, that punishment included not only imprisonment for a maximum of two years, but for Aborigines also a whipping-in private or public - up to three times.²²⁹ The special legislative provisions as to Aboriginal testimony was continued in Victoria, for example, until 1961,²³⁰ and in South Australia until 1972.²³¹

Sub-section 9A(5) of the Evidence Ordinance 1939 (NT) provided that the effect of unsworn Aboriginal testimony should be accorded such weight and credibility which, in the opinion of the Court or, if there were a jury (who thereby became sole judges of the facts), of the jury under the direction of the Court, ought to be attached thereto as evidence given without the sanction of an oath.

A number of judgments, all by Kriewaldt J in the Supreme Court of the Northern Territory, are (historically) illustrative of the judicial perception of such Aboriginal testimony in recent times.

In R -v- Doyle his Honour, in referring to the unsworn evidence of two Aboriginal witnesses, stated in his judgment:

...If Paddy and Timothy had been white witnesses who gave evidence on oath I would not have had the slightest hesitation in believing their evidence in full²³²

Several reasons were given and yet others were implicit for what, on its face, was a highly derogatory reference.

In the first place, Kriewaldt J seems, in a cynical and non-believing world, to have placed unduly idealistic emphasis on the importance Christians attach to their oath and, equally, the divine sanctions for breaching that oath. In his summing up in R -v- Aboriginals Activity & Peter, for example, his Honour referred to the Christian's knowledge not only of imprisonment for perjury, but also

...the knowledge that he will have to answer to another and a higher court after his death regarding that particular false swearing.²³³

A white person, that is, 'has a belief God will punish him if he tells a lie...(whereas) so far as the Aborigines are concerned, we know they have not that type of belief in the hereafter...'²³⁴ Alternatively, as put to the jury in his summing up in R -v- Aboriginal Dulcie Dumaia 'many, nearly all, white people have some respect for the Bible and are less likely to tell an untruth after having taken an oath.'²³⁵

Secondly, the degree of comprehension of Aboriginal witnesses presented great problems. His Honour ascribed this want of comprehension in R -v- Doyle (supra) to the fact that

...the mental processes of the Australian native may not run according to the pattern with which one has become familiar in dealing with white persons..²³⁶

That problem was compounded, in Kriewaldt J's opinion, by their intellect which, generally speaking,

...is of a comparatively low standard...²³⁷

Therefore, they have a very limited vocabulary.

In R -v- Chambers, he was vociferous in complaining of the difficulties in taking evidence from Aboriginal witnesses, referring to 'the sounds that were uttered in the witness box', which 'might as well have been uttered in a foreign language' leading anyone not present in Court to gain an impression from the evidence in fact given by them.²³⁸

Thirdly,

one should approach native evidence as one approaches the evidence of children; but one should remember that although there is a childlike mind, it is an adult, and sometimes a cunning adult, who is giving evidence.²³⁹

Fourthly, the very process of question and answer which is the basis of the extraction of evidence, might not fully extract what he knows, what he tried to say, nor what his intent was. An answer in the affirmative could indicate that the Aboriginal witness is trying to understand the question, that he has understood it, that he has understood part of it, that he may not have understood it at all, or that he does not want the question to go unanswered, or that he thinks an affirmative answer is more likely to be acceptable to the questioner than a negative answer.²⁴⁰

Lest his Honour's comments, with the benefit of post-referendum hindsight, be considered patronizing and contemptuous of Aboriginal evidence, and the thought processes behind it, it should be remembered that other Northern Territory judges, such as

Forster J in R -v- Anunga,²⁴¹ and judges in other States, such as Wickham J in Western Australia in R -v- Grant²⁴² and Shanahan J in Queensland in R -v- Henry & Others,²⁴³ even the High Court in Ngatayi -v- R,²⁴⁴ have referred to the problem in similar terms, albeit in language less insensitive.

Fifthly, it was his Honour's experience that an Aboriginal witness, when giving evidence on oath, despite the warning that he is to speak only of what he has seen "along your own eye", will recount something as being within his own experience when in fact relating only what he has been told by another Aborigine:

It seems to me that if a native believes a story to be true he will recount it as having been personally witnessed by him.²⁴⁵ I could give you dozens of examples where that has happened.²⁴⁶

Further,

The decrease in the nature of evidence on successive repetition has been a common experience of mine where Aboriginal witnesses are concerned. I cannot readily call to mind any case where the evidence given by an Aboriginal witness in the Supreme Court has been anything as like as full as the evidence recorded in the depositions, or in the statements taken by a police officer, and I have had many cases where I have had access to all three.²⁴⁷

In weighing such evidence, therefore, and having regard to his statutory obligations under s9A of the Evidence Ordinance Kriewaldt J took into account any help he received from the witnesses demeanour in the box,²⁴⁸ the probabilities of the case, the fact that the evidence was not on oath, and the difficulties confronting any person attempting 'to follow the processes of the native mind.'²⁴⁹

For these reasons, and independently of the provisions of the Evidence Ordinance, Kriewaldt J concluded

...I would normally regard evidence given by natives as not of the same value as evidence given by white witnesses. There have been but few cases in my experience where I would not have scrutinised native evidence with some degree of judicial mistrust. The Evidence Ordinance draws my attention to the fact that the evidence of natives is not sworn and, by implication, if not expressly, states that such evidence shall have less value than sworn evidence.²⁵⁰

It would seem, therefore, that to the twin disabilities of common law and statutory prescription in respect of Aboriginal testimony, there should, regrettably, be added a third, namely, judicial bias. The judicial disparagement of vital trial mechanisms on the grounds of poor education, want of the same religious beliefs as the judicial officer, inability of the

'native mind' to think in the same way as that of the officer and to express itself similarly, tend to mock the very exposition by those same persons of the equality of the law for black and white.

(h) Interrogations of, or confessions by, Aborigines

The celebrated Anunga Rules, enunciated by Forster J (as he then was) with the concurrence of Muirhead J and Ward J of the Supreme Court of the Northern Territory, were not the most recent, but certainly the most celebrated, attempt by a superior Court to determine guidelines for the police interrogation of Aborigines in custody.²⁵¹

In R -v- Gibson, Mr Justice Bright in the South Australian Supreme Court made certain observations on the trial of a tribal Aborigine which subsequently led to the formulation and introduction in South Australia of PCO Circular No 354, dated 24 March 1975 issued by the Police Commissioner's Office.²⁵³

His Honour said that 'assistance should be arranged for indigenous persons who not only have a limited command of English but whose culture differs radically from the white culture.' He said that assistance should be provided by a 'prisoner's friend', ie 'somebody who can act as the friend of the person being accused, somebody familiar with Australian legal principles, able to converse with the person questioned in that person's own language and able to ensure that if he makes a statement that statement is made with a full realisation of the possible consequences.'

The full import of his Honour's comments would predicate a person either a lawyer or someone engaged in para-legal duties who had a sufficient grasp of the accused's culture to transcend cultural boundaries. These qualifications were somewhat circumscribed in paragraph 8 of PCO Circular No 354. It refers rather to 'an independent third party' preferably a solicitor or field officer (of the South Australian Legal Rights Movement). Further, it refers to a tribal or semi-tribal Aborigine with an imperfect grasp of English, such that the Circular is clearly intended not to have general application. Moreover the interview is referred to in terms of 'a serious crime.' 'Every effort' should be made to have present such independent third party, or some other person 'preferably' with 'some understanding of the prisoner's language'.

Wells J in the subsequent case of R -v- Williams, after a hearing on the voir dire (a preliminary examination as to admissibility based on the relevance of a disputed item of evidence to a fact in issue or to credibility) excluded certain admissions alleged to have been made by the accused in conversations with a police officer.²⁵⁴

His Honour was of opinion that the Circular should be regarded as similar to the Judges' Rules, and that a breach of them

forms... part of the material upon which, first, the trial judge resolves the issue of voluntariness, and, secondly, ... the trial judge determines whether, in the exercise of his discretion, he will exclude the confessional material tendered.²⁵⁴

His Honour held that, in the impugned conversation, the accused may have been left with the impression that he was required rather than requested to do something.

Wells J's ruling in Williams was approved and applied in Walker -v- Marklew a decision of the Full Court of the Supreme Court of South Australia given two months later.²⁵⁵ There, the Chief Justice used language somewhat stronger than did Williams J in ascribing to breaches of the Circular the same footing as breaches of the Judges' Rules. There, a confession was found to have been obtained from 'an exhausted and probably apprehensive juvenile of aboriginal race who had been and was being illegally detained and in disregard of the Commissioner's instructions, and without the presence of any parent, guardian, solicitor or officer of the various bodies which exist for the protection and guidance of aborigines, and while those with a legitimate interest in protecting him had been asking that he be not interrogated in the absence of their solicitor or representative'.

That was a clear breach of the standing orders. In R -v- Ajax and Davey, White AJ in the Supreme Court of South Australia likewise excluded confessions of two 'full-blood' Aborigines obtained in breach of the Circular in that, in one case, no independent third party had been present at the interview, the crime being of a serious nature, and no caution had been given until after the person had made certain admissions; in the case of the other, because the third party present during the interview, far from being independent, was hostile to the prisoner.²⁵⁶

In Ajax and Davey, the Judge described the combined presence of the two tall police interrogators on a small primitive Aborigine in a rather confining interviewing room as 'awesome'.²⁵⁷ The confessions were excluded.

Williams emphasized the customary submission or deference of Aborigines to established authority, and to see police officers, inter alios, as the embodiment of that authority; therefore inducing in them 'an irresistible compulsion to answer questions even when they comprehend intellectually that they do not have to answer.' That being so, it is incumbent upon the trial judge to see if 'there is any ground for supposing that the (Aborigine) was overawed by authority.' If there is, impugned evidence which, of its own accord, would not justify his decision would be fairly excluded if the product of marked submissiveness to authority.²⁵⁸

Three New South Wales cases involving Aboriginal juveniles proceeded on somewhat different lines. Not only was Aboriginality not a factor, but in one of the cases, Dixon -v- McCarthy Mr Justice Yeldham at the end of a long and authoritative judgment on the admissibility of written statements involuntarily made by

children (as then defined by the Child Welfare Act, 1939) specifically excluded from his decision the factor of Aboriginality.²⁵⁹

His Honour, in reviewing the facts on appeal, found that the four appellants had witnessed an assault by police on another child, who was acquitted in the Children's Court, at the police station; that the police interview of three of the appellants and the child acquitted was conducted in breach of the standing instructions issued by the Commissioner of Police in relation to the interrogation of persons under sixteen years of age; that in striking one child aged 14 in the presence of others, a policeman had called him 'Black bastard'; and that the Magistrate's refusal to permit an examination on the voir dire to determine the admissibility of the statements of three of the appellants not only deprived them of a proper trial but amounted to a fundamental departure from fair and proper practice.

The appeal was successful. It should be noted that the events giving rise to the trial occurred in Bourke, in the far west of the State. Miles J in McKellar -v- Smith: Booth -v- Smith rejected as involuntary statements made by two Aboriginal 'children' (ie aged less than sixteen years) and put in evidence against them in the Children's Court at Wilcannia, again in the far west of New South Wales.²⁶⁰

The statements were given in breach of s81C of the Child Welfare Act, requiring that the parents, guardian, or other independent person be present during a police interrogation of 'children'. The failure of the police to have the Aboriginal Legal Service Solicitor, who lived in the town, attend the interrogation in lieu of another person whose presence did not satisfy the statutory requirement was sufficient to base a finding of error by the Magistrate in admitting the confessions.

His Honour's remarks in respect of confessions by New South Wales Aborigines are succinct

While the position of the Aboriginal people in New South Wales has not been regarded as such that it requires the formulation of a particular body of guidelines, like those enunciated in Anunga, the history of relations between Aborigines and the law enforcement authorities, particularly in the western parts of the State, should put a tribunal on notice that an Aboriginal person may be at a substantial disadvantage in the interrogation process.

Citing Brennan J in Collins -v- R (1980) 31ALR257, at p311, his Honour instanced as factors conducing to such disadvantage 'a different strength of will, or of understanding or of sophistication from that exhibited by a non-Aboriginal'.

The rule as to admissibility, while the same for black as for white, might have variable consequences when applied to individual Aborigines exhibiting those criteria. But surely the converse is equally true. However, the judicial assessment

appears to have equated Aboriginality with disadvantage in the judicial process to a degree requiring the exercise of judicial discretion such that, by application of legal procedures, and the substantive notions of equality and fairness, equality of justice will be achieved.

Miles J, interestingly, also put lawyers and courts on notice of the existence of both municipal ie domestic, and international requirements in the field of substantive legal equality of civil, racial, and personal rights, as exemplified in the Koowarta case.²⁶¹

In at least one case in the Australian Capital Territory, the Anunga guidelines were adopted and followed in a successful challenge to the admissibility of evidence as being involuntary. In R -v- Clevens, the accused, aged approximately 16 years and 9 months, was charged with a number of sex-related offences.²⁶² He was held in custody for approximately two hours on a rainy winters' night in Canberra clad only in wet jeans. The Supreme Court rejected the police view that the accused's appearance was non-Aboriginal. Moreover, the Court considered that the failure to supply dry clothes to the accused at an early stage, to make appropriate inquiry as to his birth date and racial origin, hence to comply with standing orders concerning police interrogation of young persons and Aborigines, the accused's state of intoxication and the general unreliability of his answers were factors sufficient to reject the evidence sought to be led by the Crown. His Honour was not persuaded that the Anunga guidelines had to be followed strictly in the present case, in that the accused's awareness of his right to seek a solicitor when being interrogated or when arrested 'indicated a degree of relative sophistication' which took him outside the purview of Anunga.²⁶³ However, his Honour also was of opinion that those guidelines 'need not be confined to aboriginals resident in the Northern Territory', and indeed applied the seventh rule laid down by Forster J concerning the interrogation of Aborigines 'disabled by illness, drunkenness, or tiredness'.²⁶⁴

Aboriginality per se was considered a factor in the Queensland case of R -v- Henry & Others, a decision of the District Court at Rockhampton (Judge Shanahan).²⁶⁵ His Honour was critical of the failure of police efforts to obtain independent adults to be present at the interrogation of Aboriginal juveniles, and of the failure of the police to ask any accused if such an adult were required. However, the trial judge in excluding all statements of a confessional nature made by the accused stated as a 'notorious fact' that persons of an Aboriginal background '...are at a serious disadvantage in dealing with persons in authority than would be their counterparts of similar age drawn from a European culture'.²⁶⁶

The Courts, therefore, seem to have accepted as a uniform or consistent factor in the exercise of judicial discretion that Aborigines suffer cultural disabilities of a kind, or to a degree, not suffered by Europeans. While making due allowance for levels of sophistication amongst Aborigines there seems an implied recognition that no such gradations are required for those of

'European' background, whatever that may mean. 'Aboriginality', in other words, at least so far as it operates on Aboriginal youth, is yet another negative feature or trait calling for a procedural response to achieve the substance, if not the reality, of justice. Certainly, the response has been within a continuum which advances, but does not overwhelm, the spectacle of acceptable judicial innovation.

Western Australia affords two illustrations of what might be called the 'innovative' approach, reflecting judicial notice of cultural differences, and the 'statutory' approach, in which legislation has recognized, and provided a response to, these differences. In Police -v- J, a decision of the Perth Children's Court, the failure of police, who in any event were alleged to have misconducted themselves, to obtain a suitable independent adult during the interrogation and confession of an Aboriginal juvenile, led to the rejection of the confession as involuntary.²⁶⁷ As the Court observed, echoing Anunga

...where an Aboriginal... is being questioned it is essential that a person independent of the inquiry, a parent or another person be present.²⁶⁸

That case, although it concerned a juvenile, did not distinguish Aborigines by age or degrees of sophistication, but seems to have predicted a situation applicable to Aborigines qua Aborigines. The statutory response, on the other hand, as seen in s49(1) of the Aboriginal Affairs Planning Authority Act, 1972 (WA), required a subjective determination by the tribunal of the comprehension of an Aboriginal accused as to the nature of the circumstances or of the trial proceedings, hence his capacity either to confess or plead guilty to a criminal charge. In Smith -v- Grieve, Burt J (as he then was) held that a confession ought not to be accepted if the tribunal at first instance receives such a confession or a plea of guilt, from a person of Aboriginal descent who, it reasonably appears, may lack the sufficiency of understanding.²⁶⁹ In such a case, it is incumbent on the tribunal, to examine the accused on the voir dire, by which procedure the competency of the person examined, or admissibility of his statements during interrogation, is established.²⁷⁰

The Northern Territory, as might be expected from the relative magnitude of available cases, has provided numerous illustrations of the adaptability of judicial procedures in receiving and weighing Aboriginal confessions in criminal trials. The Anunga case is the most celebrated example, although it is noteworthy that Forster J, (as he then was) prefaced his enunciation of the 'Anunga guidelines' with the observation that

Much of what is said applied equally to the interrogation of migrants whether European or Asiatic.²⁷¹

Anunga did not involve the trial of juveniles. Moreover, as his Honour pointed out, the guidelines were not absolute rules, nor were they intended either to be unduly paternal, and therefore offensive to Aborigines, or unduly favourable to them. Rather

were they designed to remove or obviate some of the disadvantages from which, as the Supreme Court in the Northern Territory saw it, Aborigines suffer in their dealings with police. The police were therefore put on notice that material departure from the guidelines would probably lead to the evidence of the interrogation, oral or in the form of a written record of interview, being rejected.

And what were the disadvantages which the guidelines were intended to overcome? First, was the lack of comprehension of English. Secondly, lack of understanding of concepts expressed by phrases and sentences in English. Thirdly, an inability readily and accurately to translate 'police and legal English' into Aboriginal languages, if at all. Fourthly, difficulties in conveying or translating nuances and concepts of time, number and distance. Fifthly, the innate courtesy and politeness of an Aboriginal listener who will answer a question in the way it is assumed a white person may want. Finally, the response of the traditionally powerless to authority, the instant embodiment of which, at least in the system of criminal justice, are the police.

What was not mentioned in this recitation of cultural dissimilarities was the identification of an accused not merely by race and language, but by clan or past association. That factor is particularly relevant in considering the appropriateness not only of the interpreter, but of the 'prisoner's friend'.

The Full Court of the Federal Court of Australia had occasion to consider this latter aspect in hearing the appeal against conviction for murder by three Aboriginal juveniles and one Aboriginal adult in Collins & Others -v- R.²⁷² In that case, otherwise known as the 'Huckitta murder' case, the appellants, one aged 12, two aged 14, and one 24 at the time of appeal, appealed on grounds, inter alia, that material obtained during a re-enactment of the murder was inadmissible as being involuntary; alternatively, that, if voluntary, it was obtained by unfair and improper methods, otherwise than in accordance with the Anunga guidelines, and should therefore have been rejected in the exercise of the Court's discretion.

The material comprised photographs and admissions taken during a demonstration of the re-enactment; each accused in the sight of the others and some civilians, after being in custody for a considerable period, under trying climatic conditions (January) in the presence of another Aborigine who acted as 'prisoner's friend' although not identified with them by clan or past association, in the absence of parents and of an Aboriginal legal aid lawyer, despite the inadequacy of cautions, all having been illegally removed from the place of their original detention, each accused was considered by the majority judges (Bowen CJ and Muirhead J) to have made a voluntary confession. Muirhead J, himself a Northern Territory judge of some standing, stated that

...It is well known to the judges in the Northern Territory that unsophisticated Aborigines who have had little contact with white society are, by

upbringing, inclined to be not only polite, but co-operative and frank with authority...²⁷³

However, his Honour found that the appellants did not fall into that category. Nor was he persuaded that the Police Standing Orders requiring interrogation of children at home in the presence of a parent were breached: they were appropriate in most situations relating to juvenile offenders in towns 'but not when they have been arrested in the bush, a long way from home, being questioned about the killing of a man at his lonely station homestead'.²⁷⁴ His Honour was equally sanguine about the utility of the prisoner's friend in the present case 'when an Aboriginal is questioned for a serious offence far from his own country, the investigation cannot be expected to cease until a friend or relative or tribal kinsman can be summoned'.²⁷⁵

Brennan J, dissenting, held that the confessions were involuntary; whilst recognizing the exigencies of distance, time, communication, possible shortage of police personnel, and difficulties in finding and speaking to the appellants' community and lawyers on a public holiday (New Years' Day), all of which determined the manner of the police investigation, the basic tenet of the common law tradition was

Nemo tenebatur prodere seipsum

that is, that no one can be compelled to incriminate himself.

In all the circumstances, but particularly the police failure 'to observe the Anunga rules, and the rules with respect to the interrogation of children, and the effect of unlawfully taking the prisoners to Huckitta', his Honour concluded that the confessions were involuntary.²⁷⁶

In so doing, Brennan J was at pains to emphasize that rejection of involuntary confessions, far from depending upon the exercise of a discretion, is required by the application of a rule of law. A rule of law, moreover, which applies to all confessions made by persons prosecuted in the Northern Territory.

...The rule of law does not distinguish between black and white, educated and illiterate, sophisticated and simple. The rule applies uniformly, but its operation depends upon the circumstances of each case, and confessions made by those whose wills are more easily overborne - whether because of social condition, environment, natural timidity or subservience - will find reciprocally greater difficulty in being admitted into evidence... The rule is the same for the Aboriginal and for the non-Aboriginal, but the consequence of applying the rule may vary if a particular Aboriginal exhibits, in given circumstances, a different strength of will, or of understanding or of sophistication from that exhibited by a non-Aboriginal....²⁷⁷

Brennan J's logic is, with respect, surely as correct as it is compelling. The concept of equality before the law, in other words, refers to the equal operation of the same law: the effect, or the consequences, of the application of substantive rules may produce distortions, variations, inequalities but surely far greater inequalities would flow if the rules were unequally applied? Law, in other words, the concepts of justice and of the capacity of its administrators impartially to administer it would be seen to mirror the degree of power of those subject to it: were that so, law as an expression of popular will would be in danger of reduction to a cipher.

The substantive law therefore contains safeguards, not merely for the individual, but for the perceived good of the wider community. Sir Edward Coke, Chief Justice of the Court of King's Bench in the reigns of James I and Charles I expressed it thus:

Salus populi est suprema lex

that is, 'the welfare of the people is the paramount law'.

Brennan J referred to this in an oblique way in Collins by referring to the residual judicial discretion, in criminal trials, to reject even admissible evidence where the Courts consider that the attainment of objects which are perceived to be desirable might not be attained in a particular case by the strict application of the rules of evidence. Thus even voluntary confessions may be rejected if their admission might otherwise result in unfairness to the accused; or where its admission might have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value. A third object, the serving of the public interest in the observance of the law by the agencies of law enforcement, accounts for a discretion to reject evidence unlawfully obtained.

In the ultimate, Brennan J was in the minority, and the appeals by the convicted accused failed. But his judgment and the reasoning which gave it expression, is compelling in its restatement of the concept of equality in the administration of justice, and of the role of law both as an expression of the popular will and as a protector-enforcer.

Mr Justice Muirhead, who was in the majority in Collins, subsequently had occasion judicially to castigate a Magistrate for failure properly to understand, let alone apply, the Anunga Rules in admitting evidence obtained in breach of them, for comments going beyond the proper function or role of a judicial officer, for inadequate recognition of the hierarchical system of Courts in the Northern Territory, as elsewhere in Australia, and for undermining respect for the law itself. Coulthard -v- Steer²⁷⁸ has already been discussed above, but what is of interest both in that case, and in Collins, was Muirhead J's reference to his prior judgment in Stevens -v- Lewis where his Honour, referring to the Anunga guidelines said:

...Slavish or unnecessary adherence to the guidelines, technical adherence for the sake of form or apparent compliance, was never, in my opinion, intended...²⁷⁹

Nevertheless, his Honour found in Coulthard that the third Anunga Rule (the caution) had not carefully or properly been administered, the resulting admissions should not therefore have been received in evidence, hence the appeal against conviction was allowed and the sentence set aside.

Muirhead J in Coulthard confirmed that the rationale of the Rules would apply to others of different ethnic backgrounds with language difficulties or other disadvantages.²⁸⁰

In another case, R -v- Banjo Anglitchi, Major Mickimin Raymond, Nicholas Anglitchi, Rollo Berry, Jabiru Lewin, Billy Raymond, Rupert Wodidjic, Mr Justice Muirhead after sentencing the various accused charged with conspiracy to rape, directed the Crown Prosecutor to refer the depositions given by the victim to the Solicitor-General of the Northern Territory.²⁸¹

They illustrate graphically what has been known for so long, namely that without the aid of trained and skilled court interpreters in Aboriginal languages, the administration of justice in this Territory remains sadly impeded.²⁸²

This judicial cri de coeur reinforces the view that, no matter how alert, or sympathetic, the judicial officers might be in their administration of justice, there must be limits for which not even they can make due allowance.

To suggest, as did the High Court in Ngatayi, (*supra*) that the ends of justice would be served if the accused possessed a sufficient comprehension of English to instruct defence Counsel properly seems to beg the question: for that same reason, a judicial query was raised as to the appropriateness of English criminal justice, including trial procedures, to a tribal Aborigine. That query was considered to call for an executive - not a judicial - response, and is clearly right, so far as it relates to the substantive law. But the mechanisms, procedures and rules of the criminal justice are capable of being so applied that the 'voice of the people' and the rights of the individual within the law may both be served, and not be seen as mutually exclusive.

Legal defences: the test of provocation

Provocation, at common law, generally comprises an act or series of acts done by a one person to another which could cause in a reasonable person, and actually causes in another, a sudden and temporary loss of self-control, rendering him so subject to passion as to make him for the moment not master of his conduct. Killing subject to provocation by the deceased and done in the heat of the moment is not murder but manslaughter. Provocation accordingly is not a defence, the language of the Privy Council in Lee Chun-Chuen -v- R²⁸³ and Attorney-General for Ceylon -v- Perera (Kumarasinghe Don John)²⁸⁴ otherwise notwithstanding.

Provocation does not mean that malice, as the formation of

an intention to kill or inflict grievous bodily harm, is not present, but that the formation of that intent in the particular circumstances is excusable to the extent that the killing, though criminal, should not be regarded as punishable by death.²⁸⁵ Provocation therefore does not provide an accused with a defence stricto sensu nor even an excuse. What it does provide is an extenuation of the offence, a diminution in the quality of the crime, hence a mitigation of penalty which he would suffer but for the factor of provocation.

Provocation may consist of acts, gestures, a series of affronts and words which are violently 'provocative' or grossly insulting. In those States of Australia which have not codified the criminal law, for example, New South Wales, Victoria, or South Australia 'mere' words would not suffice; New South Wales has statutory provision in the Crimes Act, 1900, s23(1) that the language be 'grossly insulting'.

The law as to provocation embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life.²⁸⁶ An ordinary man in a civilized community would regard it as absurd, and as an affront to his notions of justice, if some trivial provocation, such as mild abuse or a light blow, were regarded as extenuating the use of savage violence. On the other hand, the law does not require that there should be an exact correspondence between the provocation and the force which it provoked.

As was said in East's Pleas of the Crown (1803) Vol 1, p238.

In those cases where the mercy of the law interposes in pity to human frailty, it will not try the culprit by the rigid rule of justice, and examine with the most scrupulous nicety whether he cut off the exact pound of flesh.²⁸⁷

Substantial difficulties occur in formulating and applying an appropriate test of 'reasonableness' in respect of accused particularly, but not exclusively, tribal Aborigines. The common law standard has been, and is, an objective one, that of the 'reasonable' man, one capable of experience and exposure or otherwise within the comprehension of an ordinary trial jury. Barwick CJ in Johnson -v- R (supra) preferred the 'ordinary' man for reason that the objective test is related to human nature rather than to reason and thus to the ordinary man. The primary objection to the objective test is, as Samuels points out, that it is 'based upon an unreal hypothetical non-existent person and disregards human afflictions...To apply a single universal objective criterion is a misapplication of the concept of equality'.²⁸⁸

Samuels was attacking the continuance of such a test in a superficially homogeneous society: how much more inappropriate is it to an increasingly heterogeneous one with strong cultural sub-groups? Moreover, behaviour is influenced by a multiplicity of

factors such as age, sex, ethnic origin, climatic and other living conditions, education, occupation, individual differences. How reasonable, then, it is to apply a 'reasonable' test to Aborigines?

Kriewaldt J in a number of murder trials over which he presided in the Supreme Court of the Northern Territory refused or declined to follow the test, although his Honour somewhat disingenuously asserted in at least one of them that he had to apply the law equally, but that the jury might adopt a different standard. It is not clear if his remarks also extended to those trials where he was both judge and jury. The latter aspect of his Honour's observation gain greater currency when considered in light of the Privy Council decision in Kwaku Mensah -v- R (1946) AC83, at p93, that the test for provocation was that of 'the ordinary West African villager' and that 'on just such questions...the knowledge and commonsense of a local jury are invaluable'.²⁸⁹

Kriewaldt J postulated not one variation but three variations of the 'reasonable man' test. Those three were:

- (I) the 'local Aboriginal community' test (1951,1956),
- (II) the 'average native of the northern parts of the Northern Territory' test (1956); and
- (III) the 'reasonable native inhabitant of Australia' test (1953,1959).

In yet another case (in 1959) his Honour appears to have put to the jury the 'reasonable man' test, unqualified by reference to Aboriginality.

(I) Local community test

In R -v- Aboriginal Patipatu, the accused was tried for the murder of his deceased's wife sister.²⁹⁰ The victim, after her sister's death, had assumed responsibility for the care of the accused's young son. During a hunting expedition she left the child unattended by the roadside. The accused threw a spear at her and killed her.

Even though counsel for the accused did not rely on provocation, Kriewaldt, then (May, 1951) an Acting Justice, felt obliged to raise the aspect of provocation in his summing up to the jury. After instructing the jury that there was, in the Territory, no distinction in its laws 'between white and coloured', such that they were to consider the facts 'as if the act of throwing the spear had been performed by a white man', his Honour referred to the 'normal ordinary reasonable person' test.

Remarkably, his Honour then went on to assert that 'no Court has yet said what acts and what acts alone will amount to provocation'. If by that his Honour referred to a test of universal application, fixed and immutable, and not subject, as was the Northern Territory, to common law standards, then he was undoubtedly right. But not otherwise. His Honour then formulated as the appropriate test

...If you think that, in the circumstances prevailing in that particular locality, the abandonment of a young child - we do not know how old the child was - by the person appointed to look after it, if you think so, it is not for me to say so - that that would cause an ordinary reasonable person in that vicinity and of that description so to lose control of his emotions so as to retaliate with a spear, then you would be entitled in this case to find a verdict of manslaughter.²⁹¹

A verdict of manslaughter was returned. Although the law report does not identify the locality where the offence was committed, the accused and the tribe lived in a traditional manner, not only as regards hunting-gathering, but also as regards traditional punishment. The trial, moreover, was held at Alice Springs, so it is reasonable to assume that the 'condition' and 'vicinity' referred to Aborigines living in a tribal state.

In R -v- Aboriginal Muddarubba, Kriewaldt J again distinguished the 'reasonable man' test by reference to a specific community standard.²⁹² The accused speared an Aboriginal woman to death after she had seriously insulted him by gestures and words. In his summing up, Kriewaldt J reiterated the common law that 'for a white person...mere words are not provocations...'. That, of course, is a distortion.

Moreover, his Honour confessed to his 'worry' on the issue of provocation in 'native trials', which he had, after due deliberation, resolved by departing somewhat from the strict rule applied in trials of a white person. In his Honour's opinion in any discussion of provocation the general principle of law is to create a standard which would be observed by the average person in the community in which the accused person live. Moreover, what was once regarded in white communities a century ago as sufficient provocation would not be so regarded today. This suggested to Kriewaldt J that the standard is not fixed and unchanging

...it leaves it open, ...to regard the Pitjinjara (sic) tribe as a separate community for the purpose of considering the reaction of the average man. I tell you that if you think the average member of the Pitjinjara tribe (and you must remember these are 'Myall' blacks) would have retaliated to the words and actions of the woman by spearing her, then the act of spearing is not murder but manslaughter...I may be wrong but until put right by a higher court I shall continue to tell juries that the members of the Pitjinjara tribe are to be considered as a separate community for the purposes of the rules relating to provocation. I shall not apply to them the standard applied to the white citizens of the Northern Territory.²⁹³

Kriewaldt J was thus enunciating for a group identifiable only by affinity to a social sub-stratum a legal protection or, as the High Court put it in Parker -v- R (supra), 'a line of defence'

not available to the rest and residue of the society of which that sub-stratum formed part. And not only that. Within the rule, as relaxed, was to be entertained an extension of provocation resulting from words, the knowledge, degree of insult, and likely black reaction to which were to be assumed within the compass of an all-white jury. The artificiality of reasonableness deriving from assumed knowledge of a community regarded as separate, and to be separately treated, vis-a-vis not only white communities but other black communities is seen as itself creating the very divisions and inequalities which elsewhere in his judgment Kriewaldt J eschewed.

(II) The 'average native of the northern parts of the Northern Territory' test

Muddarubba was the subject of summing up on 2 February, 1956. Perhaps its features were so unique that a unique solution was necessary. The law report is unavailing, although Kriewaldt J prefaced the specific rule for the Pitjantjatjara by a general reference to 'native' trials, and his relaxation of the rules otherwise applicable to whites.

The next month, on 21 March, 1956, he summed up to the jury in R -v- Aboriginal Nelson.²⁹⁴ At the end of a drinking party an elderly white man hit the accused with a piece of iron to stop him from further beating an Aboriginal woman to whom the accused was married. A few minutes later the accused, who had left the house, heard his wife scream from inside the house. He returned and saw the white man outside. The accused then hit the victim with a boomerang: the victim fell down and shortly after died.

In his summing up to the jury on what his Honour referred to as 'a partial defence, the defence of provocation', Kriewaldt J stated that the inflicting of such a wound on the accused would, in law, amount to sufficient provocation entitling the wounded person to retaliate in the heat or passion of the moment. But were the accused a white man, his Honour would have disallowed provocation because in Kriewaldt's opinion an average reasonable white man would have had time to cool down between the inflicting of the wound on him and his retaliation. However, the accused was not a white man. Although the rules are the same for native persons as for white persons, the rules relating to provocation and time for cooling off could be applied by the jury to give effect to the defence.

If the 'ordinary, average native' would have cooled down by the time the fatal retaliatory blow was inflicted, the defence of provocation was not open

...But if you believe the average native of the northern parts of this Territory would still have been smarting from the effects of that wound and would have been likely to retaliate, then that defence is open. To that extent the law must be regarded as more favourable to native than white people. Although I must lay down the law exactly the same for white people as for natives, the

application of the rules of law by you may well be different...In the case of a native you may think it right to say the effect of provocation lasts longer than in the case of a white person...²⁹⁵

Although Kriewaldt J twice mentioned 'native' without geographical or other limit, the critical part of his summing up clearly confined the test of reasonableness in the present case to 'northern parts' of the Northern Territory. Whereas Muddarubba was tried at Alice Springs, Nelson was tried at Darwin, and was taken into custody at Pine Creek.

His Honour's dilution of the rules to accommodate a separate group was not accompanied by any rigorous examination of the degree of sophistication, or the disadvantages, suffered by the accused in particular, his community or the wider community of Aborigines in the 'northern part' of the Northern Territory. Earlier in his summing up, Kriewaldt J told the jurors that they twelve were thought of in law as

...twelve ordinary, common citizens, selected at random, who are here to hold the scales of justice between the accused on one hand and what is generally called the Queen but really means the community as a whole, on the other hand.²⁹⁶

Nevertheless, the trial judge and jury could have been under no misapprehension as to the rule to be applied in Nelson. Why it should have been expanded beyond the standards of the accused's immediate community to embrace a broader stratum identified only by colour, but clearly within the purview, in 1956, of a whole host of legislative and other restrictions,²⁹⁷ is not instantly clear. But a degree of consistent, favourable, amendment of the common law rules was considered and applied by Kriewaldt J to an extent not elsewhere applied in Australia.

(III) The 'reasonable native inhabitant of Australia' test

In July 1953, more than two years after his 'local community' test in Patipatu, Kriewaldt's third variation of the provocation defence was put to a trial jury in R -v- Aboriginal Johnny Scott MacDonald.²⁹⁸ The accused and deceased having consumed an amount of liquor became argumentative, and in an ensuing fight the deceased struck a blow causing a wound above one of the eyes of the accused. The accused went some distance to collect two boomerangs and resumed the argument, in the course of which at least one boomerang was thrown or used, inflicting a fatal blow on the deceased. The summing up also indicates that subsequent to inflicting the wound, the deceased at the time of the second, fatal, argument also threw a nulla nulla at the accused.

In his summing up to the trial jury on the test of provocation, Kriewaldt J reiterated 'the strict statement of the rule...that a reasonable man has to be deprived of his self-control'. His Honour then stated

...You may use these words, reasonable man, as meaning a reasonable native inhabitant of Australia. You may draw a distinction between the amount of provocation which is needed before the ordinary reasonable human being, such as you are, would lose his self-control, and the lesser, if you think it applies,...needed before an Aboriginal native of Australia loses his self-control....You will apply as the law in this case that you may adopt a lesser standard as amounting to provocation where a native is charged with murder than you would be entitled to where a white person is charged with murder...²⁹⁹

His Honour reinforced this test also by referring to the distance the accused had to traverse to obtain the weapons of retaliation. In such a situation, there has been sufficient time to cool off such that 'the average person', necessarily implying non-Aborigine, does not retaliate. A verdict of manslaughter was returned.

In R -v- Aboriginal Jimmy Balir Balir, Kriewaldt J summed up on 10 March, 1959, in the trial of an accused for the murder of another Aborigine.³⁰⁰ The accused and the deceased, with others, had been drinking when they had an argument. The deceased struck the accused a number of blows with a large stick. The accused obtained a knife and struck the deceased inflicting a wound which, although treated by surgery, resulted in paralysis from which the deceased died.

Following his usual preface of the application of identical law to black as for white, Kriewaldt J after referring to the blows inflicted by the deceased on the accused's head and arm as sufficient to be regarded as provocation, the question then to be considered was whether, the time which elapsed between that provocation, the obtaining of the knife, and the inflicting of the fatal wound, was sufficient for the accused to have cooled down.

On this aspect, the trial judge considered that the law may be applied more leniently to Aborigines than to whites. Even though a judge could not apply the law differently, he saw no reason why a jury ought not to do so. Thus, based on their own knowledge of Aborigines, a white jury might take the view that a white man recovers more quickly from provocation than a black, or, conversely, that an Aborigine might not. Similarly, a jury might not consider as provocation in the case of a white man something which, in the case of an Aborigine, would be so. Finally, in the same circumstance, a white might not retaliate with a knife whereas, from their knowledge, an Aborigine might. A verdict of manslaughter was returned.

Kriewaldt J, therefore, towards the end of his judicial career, whilst adhering to the concept of legal equality, in practice was so instructing a jury as almost to ensure the unequal application not of the same concepts or tests, but of 'lesser standards' based on a broader definition, viz. knowledge of an entire sub-stratum.

In one of the last judgments in which provocation was an issue, his Honour seems to have abandoned the differential tests altogether, and reverted to the common law standard. In R -v- Aboriginal Timmy, the accused was charged with the murder of another, by spearing him three times, one of the blows severing an artery causing death. The accused had had an argument with a third person whom he speared twice; the deceased then struck the accused a hard blow to the head with a nulla nulla. Subsequently, the fatal wounding took place.

In describing the blow to the head as sufficient provocation to 'the average reasonable person', Kriewaldt J's emphasis shifted not only the test of reasonableness, in which the locality, tribal affinity, or racial identification of the accused was irrelevant, but also the consideration to the reasonableness of the response. The use of a 'shovel-nosed spear' was, perforce, inextricably wound up with every-day Aboriginal use, but, unlike Jimmy Balir Balir, this seems to have been left for the jury to imply.

The jury returned a verdict of not guilty.

I have located only one other, non-Northern Territory non-Kriewaldt J case, where Aboriginality, provocation, and the test of reasonableness were in issue.

In R -v- Rankin, Campbell J in the Supreme Court of Queensland tried an Aborigine for wilful murder.³⁰¹ A question arose as to the manner in which the trial jury should be directed on s304 of the Criminal Code, the question of provocation, which had been raised by the defence.

The accused was a person to whom The Aboriginals Preservation and Protection Acts, 1939 to 1946 applied, and lived in an Aboriginal settlement. Counsel for the accused submitted that to equate a protected Aborigine domiciled in a settlement set aside for the welfare of Aborigines under the Acts with the rational reasonable man in the general community for the purpose of determining whether, in the case of an indictment for wilful murder allegedly committed against a fellow Aborigine on the settlement, there is sufficient evidence of provocation fit for the consideration of the jury, would deprive the Aborigine of an effective defence: because the standard of behaviour which would induce an Aborigine so placed to lose his power of self-control is different from the standard applicable in the general community.

For the Crown, it was submitted that the common law authorities speak of the passion and loss of self-control of an ordinary person or a reasonable person who is such a person in the community at large, and the jury has not to determine the characteristics of an ordinary person of a particular class, eg, Aborigines on a settlement, within the community at large. In principle, in assessing the ordinary man, the position of an Aborigine on a settlement is no different from that of a person of another class such as one with an excitable or pugnacious disposition. Any protection given by law to Aborigines as a class

is given specifically in the Acts. Subject thereto, the law applies to an Aborigine in the same manner and to the same extent as it does to any other person in the community.

Mr Justice Campbell was influenced by the accused's life-long association with the Woorabinda settlement, where the alleged crime was committed. Accordingly, his Honour proposed to direct the jury that the question they must consider was whether the provocation was sufficient to deprive an ordinary Aborigine living on a settlement of his power of self-control. The jury was aided in their deliberation by a cross section of such Aborigines who appeared before them and gave evidence.

Unfortunately, the Report does not indicate either the manner of their selection nor the nature of their evidence.

Rankin's case is distinguishable from another Queensland murder trial where an Aboriginal accused knifed to death a victim, whose racial origin was not stated, but is presumed to be white. In R -v- Callope, the accused, aged 23, had been born and bred 'in the Gulf', where he worked for four years before going to Charters Towers where he worked droving on a number of stations before getting a job on the railways.³⁰²

There was thus little of the antecedent association with an Aboriginal settlement such as characterized Rankin. On appeal, the Court of Criminal Appeal cited the 'ordinary person' test, making no allowance for the accused's 'Aboriginal extraction'.

The most recent authoritative case involving homicide, an Aboriginal accused, and provocation is that of Veen -v- R, a decision of the High Court of Australia on appeal against severity from the New South Wales Court of Criminal Appeal.³⁰³

The appellant was an Aboriginal homosexual prostitute, aged 20, who had been brought up and educated until 15 by a white family, who found him difficult to handle by the time he was 11. He had had a series of convictions for malicious wounding and stealing.

He was invited by the deceased to the deceased's flat, where a weekend was spent in homosexual activities. On Sunday night, after both men had been drinking heavily, the accused asked the deceased for payment, but the deceased refused, saying

No, you black bastards are all the same, always wanting hand-outs.

The accused took a sharp pointed knife from a rack and stabbed the deceased repeatedly with it until the victim died.

The trial judge instructed the jury that they might, if they thought it proper to do so, treat the deceased's reference to the accused's race in the circumstances such provocation as would reduce the charge of murder to manslaughter.

Jacobs J in the High Court was clearly of opinion that the

case was not one of provocation: what inflamed the accused, who in any event had a history of brain damage, was not the reference to his race or colour, however derogatory, but the refusal of payment. Nevertheless, Jacobs J, with whom Murphy J agreed, found that the jury could have found manslaughter upon the ground of provocation.³⁰⁴

There appears, however, to be a reversion by the Courts to the objective or 'reasonable man' test in cases involving Aborigines. Even the reference in Veen to the derogatory remarks would accord with the common law requirement that words, to be a provocation, must go beyond a 'mere' effect and be grossly insulting. Here there is, on the objective test, an insult which may not be particularly inflammatory to the average person, but to a person of a given ethnic, racial or religious background could be held to be so. The social cohesion of a community, the need to avoid divisiveness in favour of a constant, the uniform application of the (common) law, has tended to downgrade the extra-ordinary application of procedural rules which Kriewaldt J introduced in varying forms more than twenty years ago.

As the Peter case³⁰⁵ reminds us, perhaps some Aboriginal communities, and their members, retain a sufficiency of identity and display a degree of similarity of response to provocation deriving from a common or shared environment that special rules are required. But I would accept, and argue, that those rules must emanate as a legislative expression, and not as an expression of judicial goodwill, patronage, or eccentricity.

(j) Tribal punishment as a mitigating factor in determining penalties for offences against white man's law

The Crimes Ordinance 1934 (No 10) of the Northern Territory amended s6 of the Criminal Law Consolidation Act and Ordinance by inserting the following proviso

...Where an aboriginal native is convicted of murder, the Court shall not be obliged to pronounce sentence of death but, in lieu thereof, may impose such penalty as, having regard to all the circumstances of the case, appears to the Court to be just and proper.

That same Ordinance also inserted a new section 6A

For the purpose of determining the nature and extent of the penalty to be imposed where an aboriginal native is convicted of murder, the Court shall receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty.

That Ordinance was gazetted in Commonwealth Gazette No 26 of 3 May 1934, and commenced the same day. It remained in force

until repealed by the Criminal Law Amendment Ordinance 1939 (No 17) which re-enacted the above amendments. The 1939 Ordinance was gazetted in Commonwealth Gazette No 49 of 27 July, 1939 and commenced that same day. It would thus appear that both Kriewaldt J and Cranston are respectively in error, the former for implying that the substitute for death was not given statutory effect prior to 1939,³⁰⁶ and the latter for stating that the 1939 Ordinance was never proclaimed.³⁰⁷

Section 6A has remained unchanged (to 1982), but the proviso to s6 was subject to changes in 1968 and 1973 when, as s6 (1C) it provided

Where an aboriginal is convicted of murder, the judge may impose such penalty as, having regard to all the circumstances of the case, appears to him to be just and proper.

South Australian legislation, from which that of the Northern Territory was drawn, originally provided in the Aborigines Offences Act, 1853 s1, that offences committed by Aborigines were not punishable by death. However, the 1853 Act was repealed by the Criminal Law Consolidation Act 1876, s14 of which even provided for the public execution of Aborigines. That section continued in force until repealed in 1971, 95 years later. A similar provision was contained in the Capital Punishment Amendment Act 1871 Amendment Act 1875 of Western Australia, and repeated in the Criminal Code Act 1901-1902, s663, of that State and continued by s678 of the Criminal Code Act Compilation Act 1913. Upon the establishment of Courts of Native Affairs by s59D of the Aborigines Act Amendment Act, 1936 (itself repealed by the Native Welfare Act, 1963) the Court in certain circumstances was empowered to take into account in mitigation of punishment any tribal custom which provided the reason for the commission of the offence.

Thus, it would seem that only in the Northern Territory and, to a far lesser extent, Western Australia was native custom or law taken into account, in the Northern Territory in mitigation of a penalty only for murder and in Western Australia only in mitigation of penalty for those matters of which the Native Court was seised.

In his early judgments, Kriewaldt J seems to have emphasized to juries in murder trials the aspect of liability of black (equally with white) to the sanctions of the criminal law, and to have down-played, ignored or overlooked the aspect of mitigation. The former, of course, is properly the purview of the jury; the latter, solely that of the Judge. Yet if, in the case, for example, of considering the several tests of provocation formulated by his Honour, the members of the jury were to apply their individual knowledge of Aboriginal custom, to form a collective view of the 'reasonable Aborigine', how realistic was it to expect or require that the jury set aside their knowledge of an actual or likely tribal response in reaching a verdict?

In one of his first murder trials, that of Patipatu (supra),

Kriewaldt J in his summing up to the jury on 15 May, 1951 said

...The law makes no distinction between white and coloured, therefore the fact that this accused has already suffered some punishment from his tribe - if you think that is so - that is immaterial in the same way that it is immaterial that the accused person may be liable to suffer further punishment from his tribe. These are the matters the law says you must disregard.³⁰⁸

The jury, yes; the trial judge, no.

His Honour returned to the same theme the next day in summing up to the jury in R -v- Aboriginal Wally.³⁰⁹ But then in enjoining the jury to disregard tribal punishment, realised or potential, of the accused, who had killed another Aborigine during the course of a tribal fight, Kriewaldt J said

...That is a matter which is quite outside this Court Room. It has nothing to do with this case and you must disregard it.³¹⁰

That cannot be a correct statement of the law. Certainly, the jury properly were to disregard the effect of tribal custom, but the provisions of statute made such customs very much a relevant factor in the case, not least in mitigation of penalty upon conviction.

Nor was tribal law permitted to excuse or condone conduct made criminal by white man's law. In R -v- Tiger & Captain, the two accused were of a group of elders who, because the deceased victim had broken a tribal law, ordered a younger Aborigine to kill the offender.³¹¹ They were acquitted. The man ordered to kill the offender was also tried, separately, for murder in R -v- Aboriginal Charlie Mulparinga.³¹² He was found guilty and sentenced to eighteen months imprisonment with hard labour. In the course of summing up, Kriewaldt J adverted, and dismissed the effect on the accused of adherence, to tribal law in terms which strike the modern reader as peremptory

...If you believe it to be a fact that the accused acted in accordance with his tribal law, in accordance with a law which, if he broke it, might mean his own death, that is no excuse in this Court for his act. It does not come into the question of whether he is guilty or not...³¹³

However, his Honour continued,

...It is only relevant on an entirely different question, namely, as to what punishment should be inflicted upon him.³¹⁴

In a revealing indicator of his feelings concerning Charlie, Kriewaldt J later wrote of these two Areyonga murder trials

In my opinion it was a difficult decision to make whether there should be a prosecution of the aborigine (sic) Charlie in that case. At the time I had some doubts as to the prosecution of that aborigine because of the extremely limited extent to which he had been in contact with whites, but I realised that failure to prosecute would be misunderstood by the aborigines at Areyonga.³¹⁵

As will later be seen, the educative role of the criminal justice system seems to have been a permanent fixture of his Honour's judicial mentality.

Kriewaldt J in trials conducted in 1953 and 1956 again reminded the jury in his summing up that

It is no excuse for a native that he acts in accordance with his tribal law (1953)³¹⁶

and

A tribal custom or tribal law permitting the accused to inflict punishment on the woman is not regarded by the law as an excuse (1956)³¹⁷

The relevance of tribal law or custom as a determinant of punishment was not mentioned in either case. It had been in R -v- Aboriginal Charlie Mulparinga (supra) and then only en passant and without further explanation. In R -v- Aboriginal Roy Pananka, Kriewaldt J's remarks on sentence, delivered on 4 September, 1957, included an acknowledgement of the statutory criteria for flexibility in these terms

I can see in this case no relevant aspect of Aboriginal custom sufficient to justify any substantial remission of sentence.³¹⁸

That case, however, did not concern a murder, or conviction therefor, and so would not ordinarily invoke the provisions of the Ordinance. The accused had engaged in a drunken brawl with two other Aborigines, one of whom thrust at him with a spear inflicting a wound in the thigh. The accused thereupon took his knife and cut the assailant across the cheek and across the shoulders, inflicting serious wounds. Upon that crime he was convicted.

Only in one murder trial have I found Kriewaldt J summing up to a jury both in terms of their duty to apply the law and his duty as trial judge to apply the statutory provisions. That was R -v- Aboriginal Timmy, held in the last year of his judicial tenure and life.³¹⁹

The accused was charged with the murder of another Aborigine whom he speared to death. There were elements of provocation and of self-defence. In summing up, the trial judge linked the elements of customary law, conviction and punishment thus

...if an Aboriginal native is convicted of murder it is then my duty to hear evidence as to the tribal laws and tribal customs that may have influenced him and to take those laws and customs into account when I fix the penalty. I have an unfettered discretion to impose any penalty I think proper, from one minute to hanging. Native laws and customs are relevant on the question of punishment, but they are quite irrelevant on the question of whether a person is guilty of a crime or not.³²⁰

The jury returned a verdict of not guilty.

The judgments and remarks of Kriewaldt J in the decade of the 1950's may be contrasted with those of the Supreme Court of the Northern Territory, and of judgments of the Full Court of the Federal Court of Australia on appeal from that Supreme Court in the last decade.

Although the statutory provisions appear to have remained basically unchanged, the Courts have become less inhibited and restrained than was Mr Justice Kriewaldt in taking into account evidence of tribal laws and customs, but, more pertinently, what may be called 'community attitudes', the community in this case being the local Aboriginal community to which the accused belongs or with which he was, at the time of the offence, generally associated. The cases, moreover, while including murder or other homicide, have gone far beyond the trials for murder or (grievous) bodily harm over which Kriewaldt J presided. This attitude and recourse to extra-statutory requirements seems also to have been adopted by the lower courts in the Northern Territory.

Muirhead J, in particular, seems to have been to the fore in seeking out, or receiving, anthropological and other evidence as an aid for the more effectual administration of criminal justice. But in Putti -v- Simpson his Honour was at pains to emphasize that he was not acting alone, but in concert with his judicial colleagues.³²¹

Hearing an appeal against severity on conviction on two counts of unlawful assault upon a female with a sickle and pointed stick, respectively, his Honour in giving judgment on 15 April, 1975 said

Where offences involve an Aboriginal community, I and my brother judges agree that it is right and proper (subject to evidentiary procedures being followed in the case of dispute) that we should obtain the views of the defendant's own community to which he will probably return. We have found, on most occasions, that those views have been helpful particularly in cases where custom may be relevant or where conditional release is under consideration.³²²

This comment was made in the course of observations as to the responsibility of solicitors and counsel to ensure that all

necessary submissions and evidence in mitigation of penalty are placed before the court. The submissions in question would reflect as well any pre-sentence report or psychiatric opinion. In other words, the kind of sociological data which was used to such devastating effect in Peter was now acceptable, indeed desirable, and, as such, represents a considerable advance on the strict application of evidentiary rules to which Kriewaldt J confined himself.

The views and attitude of the accused's community, particularly as to pay-back (retribution³²³) were also sought by Muirhead J in order to arrive at a penalty appropriate to the crime and the circumstances. In R -v- Harry Gilmiri the accused pleaded guilty to the manslaughter of the deceased whom he killed with a blow struck by a didgeridoo whilst intoxicated³²⁴

His Honour then asserted the application of 'the law of the land' but also said

...The Courts of this Territory, in finding an appropriate penalty when Aborigines and Aboriginal customs and emotions become involved, endeavour to pay regard to these factors and to the views of the Aboriginal communities.³²⁵

Accordingly, his Honour received anthropological evidence as to resolution of a conflict along traditional lines in R -v- Samuel Duncan where the accused pleaded guilty to the manslaughter by gunshot of a non-tribal wife taken in defiance of custom.³²⁶ It is curious that, whereas a Judge as prudent and conforming to the traditionalist view as Kriewaldt J would allow, even encourage, jurors to apply their own knowledge of Aboriginal culture and custom in a consideration of the innocence or guilt of an accused on trial, he and Muirhead J seemed reticent in applying their personal knowledge of such culture and custom in determining penalty.

Partly, no doubt, this derives from a conscious judicial attempt to ameliorate the strict standards of proof required for conviction to the greater benefit or advantage of an Aboriginal accused; partly, it can be seen as an abrogation to the jury whose decision, unless perverse, was unlikely to be upset on any appeal and for whom, therefore, greater flexibility could be found. Again, it may reflect that judicial conservatism, trained to accept only evidence proved by the standards and formulae familiar to them; equally could it reflect their awareness of the great cultural differences and barriers between them as pillars of established authority and Aborigines as the subjects of it. Kriewaldt J certainly lamented his lack of anthropological training and of facilities to acquire such knowledge.³²⁷ For that reason, as Muirhead J remarked in R -v- Banjo Anglitchi, Major Mickimin Raymond, Nicholas Anglitchi, Rollo Berry, Jabiru Lewin, Billy Raymond, Rupert Wodidjic

In its work involving Aborigines, this court has sought to understand and respect not only the difficulties, but the true traditions and lores of

the Aboriginal. The custom of your people, and their traditions, still play a vital part in your lives, and in your dealings one with the other. This court makes allowance for what, in this case, has loosely been called tribal law, but the law we apply must be careful to ensure that such old customs or laws are not falsely applied or utilised in exploitation of other people³²⁸

His Honour therefore seems to distinguish the true laws, customs and traditions and their false application. The distinction may be a fine one in any given case, thus admitting of, or otherwise requiring or necessitating, anthropological evidence to explain it.

Gallop J in R -v- Andy Mamarika,³²⁹ and Nader J in R -v- David Moongi³³⁰ both took into account the community's attitude, in Mamarika's case being construed by his Honour as 'a very significant matter for a sentencing power' and in Moongi's case as being accorded 'due weight'.

Mamarika pleaded guilty to the drunken manslaughter with a spear of another Aborigine. Gallop J received 'abundant evidence' of the community's attitude, namely that the accused had a nonviolent nature, was of good standing, and had already undergone the traditional punishment of trial by spear, such that imprisonment was expected by the community neither in relation to the offence nor the particular accused. The accused was sentenced to three years imprisonment with a non-parole period of twelve months, but discharged upon entering into his own recognizance in the sum of \$500 to be of good behaviour for three years.

Moongi stabbed and killed his step-father after an argument and fight over alcohol, instigated and provoked by the deceased. Evidence was led as to tribal punishment inflicted by the Pt Keat's outstation community, comprising the burning off over a fire of all the hair on his body, his banishment to a sacred place for a period to be determined by the elders and his isolation from his wife. The trial judge nevertheless sentenced Moongi to seven years' imprisonment, with a three year non-parole period.

The Full Court of the Federal Court of Australia, in hearing appeals against severity of sentence imposed by the Supreme Court of the Northern Territory, likewise has had occasion to express itself on the recourse to traditional punishment. Toohey J, a judge of great experience of Aborigines in the Northern Territory, and the first Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 (C'th), sat on both appeals.

In Jungarai -v- R a full blood Aborigine with a substantial record of convictions, including crimes of violence (although none since 1972) and offences relating to alcohol, pleaded guilty to manslaughter.³³¹

While on bail, the appellant returned to his community where he was beaten with nulla nullas and boomerangs until he was

unconscious. For the appellant at his trial, it was submitted that the tribal punishment had assuaged the community's feelings and that the offender was unlikely to offend again. The Crown did not oppose that submission; the appeal therefore depended on the fact whether the trial judge had indeed given due weight to the expression of community feeling as widened by the infliction of tribal punishment. The Full Court were unable to say that the trial judge had not so given; accordingly, the appeal was dismissed.

In Jacky Anzac Jadurin -v- R a husband and wife, having consumed a quantity of alcohol, had an argument which led to the husband's striking his wife with a piece of wood, breaking her left arm. He later drove her back to their camp and subsequently struck her a number of times on the back with a piece of polythene piping, rupturing her liver and causing severe internal haemorrhaging from which she died.³³²

The Court on appeal rejected the suggestion that in Aboriginal society it is not unusual for women to be beaten if they disobey their husbands, principally on the ground that the appellant and his wife were both drunk it being within judicial experience that such beatings usually take place after a great deal of alcohol has been consumed. Next it considered the aspect of traditional punishment. Contrasting Jungarai, the beating of Jadurin with the same instruments, 'may have been largely symbolic'. Future traditional punishment, including potential crippling or other permanent injury at the hands of the deceased's relatives, further punishment and close supervision by the community for a period of years, and even the punishment of his own family were all considered by the appeal Court to have been given due weight by the trial judge. The Court acknowledged, but felt it unnecessary to resolve, the problem of giving due regard to certain facts which exist only by reason of that offender's membership of a particular group, echoing the judgment of Brennan J in Neal -v- R (supra). Acknowledgement of some form of that community's retribution was not a sanction of it. The appeal was dismissed.

Nevertheless, it is clear that, in dealing at least with tribal or semi-tribal Aborigines, the Courts in the Northern Territory are not only willing but anxious to receive evidence of community attitudes, causal influences of custom and tradition, and similar factors even beyond their statutory obligations.

At the level of summary justice, a similar awareness is entertained. In two 1977 cases heard by two different Courts, on the Bench of one of which an Aboriginal Stipendiary Magistrate sat, the sentence imposed was substantially mitigated by an appreciation of community attitudes.

In Police -v- Melville Wurrumurra the accused pleaded guilty to stabbing his wife with a bayonet for her suspected infidelity, occasioning grievous bodily harm.³³³ His Worship's view was that the matter essentially was of a family or customary tribal nature; the defendant's conduct and punishment were dictated and performed in accordance with custom; the defendant

and his wife were reconciled; and their community regarded the matter as at an end.

Accordingly, although convicted, the defendant was discharged upon entering into his own recognizance in the sum of \$100 to be of good behaviour for twelve months.

The Court in Police -v- Eric Jackson went even further.³³⁴

The defendant pleaded guilty to a charge of indecent assault committed whilst drunk. He had already been punished by the women, but had yet to be speared through the leg in accordance with tribal law. The Magistrate was influenced by the decision of the elders so to punish the offender, and by the two months he had already spent in gaol. Accordingly, no sentence was passed, but

the defendant will be released for punishment by his tribal elders.³³⁵

While the Courts of the Northern Territory have expressly taken into account tribal punishment - actual or potential - in determining penalties, the Courts in other States have been reluctant to do so.

The celebrated case of R -v- Williams³³⁶ in South Australia, and the Western Australia decisions of Burt J in R -v- Ferguson³³⁷, Wallace J in R -v- Fazeldean³³⁸ and Smith J in R -v- Felton³³⁹ given in 1976 (Williams), 1970 (Ferguson), 1973 (Fazeldean) and 1980 (Felton) merely symbolize an awareness of a distinct cultural difference deriving from membership of a sub-cultural group within the dominant society. The paradox for the Courts is to weigh the need for individual justice against the reasonable expectations of the wider community, and yet arrive at a conclusion which will be more readily comprehended and approved by a sub-stratum within the community to which the individual belongs.

Is it suggesting too much that what is required in the administration of justice is less a willingness for the judiciary to be flexible in applying procedural rules to the substantive law, and more of an executive or legislative willingness to accommodate the substantive law to the cultural realities of contemporary Australia?

Principles & Objects of Sentencing

'Retributive justice was all the savage could understand'

Thus Wells J in the Caledon Bay Natives case, reported in the Sydney Morning Herald of 31 May 1934.³⁴⁰ It is rare to have a judicial viewpoint expressed with such vehement succinctness. His Honour presided at the trial of eight Aborigines, seven of whom had had no prior contact with white civilization, for the murder of two white prospectors. He refused defence Counsel's request for an interpreter to translate the evidence and is

further reported to have remarked when so doing that 'the evidence could be reported to the prisoners later, when they are in a better mood to hear and understand it'. The judge also refused to hear factors in mitigation of the death penalty.

The tenor of his Honour's sympathies may be gauged from two other trials over which he presided, and from the statistical analysis of his trial record in homicides undertaken by his successor, Mr Justice Kriewaldt.

In R -v- Stott, Wells J presided over two trials of a white policeman in what is known as the Boroloola Case, where 15 Aborigines were arrested for allegedly killing cattle and they with 12 Aboriginal witnesses (including women) were taken under custody on a lengthy trek to trial.³⁴¹ During the trek a number of instances of cruelty, resulting in the death and burial of at least one Aborigine were alleged to have been inflicted by Constable Stott. The Associations for the Protection of Native Races briefed Counsel to watch the case in the interest of Aborigines. Wells J ordered Counsel out of Court, describing his brief as 'meddlesome, impertinent, and mischievous'. His Honour at the first and a subsequent trial, said that he was satisfied that the evidence of the 12 Aboriginal witnesses was untrue, and acquitted Stott, at the second trial with an expression of sympathy.

In Tuckiar -v- R an 'uncivilized' ie tribal, Aborigine was found guilty of the murder of a white policeman and sentenced by Wells J to death. His Honour, despite a legislative provision precluding this, commented to the jury on the failure of the accused to give evidence.³⁴² On appeal, the High Court quashed the conviction and discharged the appellant using language rare for that august tribunal in its criticisms of Wells J. The trial judge's observations upon the failure of the prisoner to give evidence 'amounted to a clear misdirection and one which in the circumstances was calculated gravely to prejudice the prisoner'.³⁴³ Stark J was acidic in his comments on the handling of the trial by Wells J.³⁴⁴

Kriewaldt J's analysis of 24 murder trials presided over by Wells J in six years, and 23 by him in five, shows 16 acquittals of Wells J's cases, and only 8 for Kriewaldt J.³⁴⁵ Whilst Kriewaldt J attributed this marked variation to several factors, including the extent to which the views of the trial judge as to the proper verdict might be put to the jury, it is not stretching credulity to suppose that the jury verdicts were a countervailing balance to clear bias towards the 'savages' exhibited by his Honour.

Nevertheless, his Honour's view of the objects of the criminal justice system are salutary in considering the many and different approaches taken by the judiciary recently, and in the recent past, where the accused are Aboriginal.

A. General Principles in Sentencing

The fundamental starting point, I would suggest, is to be found in the High Court decision in Neal -v- R, particularly the judgment of Brennan J, who although in dissent on critical issues, restated what seems not only good law but common sense as well

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.³⁴⁶

In a previous decision, in Channon -v- R his Honour spoke of the necessary and ultimate justification for criminal sanctions as 'the protection of society from conduct which the law proscribes'.³⁴⁷ This aspect, that of 'the protection of society' invokes the shield of the law; once the law is broken, the sword of justice descends. Accordingly, the protection of society involves many aspects of punishment. But that in turn requires the society, particularly in the case of Aborigines, more precisely to be identified. In the case of a dispute between purely tribal Aborigines, is society there to comprehend 'sophisticated' 'civilized' white urban dwellers? Whose interest are put at risk or otherwise prejudiced? The Australian Law Reform Commission has been considering this aspect for a number of years, the answer to which may well lie in particular matters outside the criminal law and more in the field of social anthropology.

Be that as it may, the sanctions of the law in turn are required to strike an appropriate balance, meeting punishment appropriate to an offence sufficient both to expiate the impugned conduct and prevent its repetition by the individual offender, and to deter similar conduct by others within that community. This is not meant to be a paper on penology, but it is clear from an examination of the available case law that a number of paradoxes emerge in the judicial approach to the sentencing of Aborigines.

In Channon's case, Brennan J adverted to the deterrent aspect in these terms

Deterrence (whether of the offender or others) from committing other kinds of crime, reformation in respect of other failures, or retribution for other kinds of social misconduct, are not purposes to which the judicial discretion in sentencing is directed. But a sentence which is imposed with the object of deterring the offender from committing offences of the same kind again, and with the object of rehabilitating him by reducing or eliminating the factors which contributed to the conduct for which

he is sentenced serves the appropriate purpose, provide the sentence is apt to secure those objects.

Sometimes the perceived general moral sense of the community, reflecting what the community would see as well-deserved punishment, may be given greater weight than the rehabilitative aspects. In R -v- Diamond Turner, for example, heard before Gallop J in the Northern Territory Supreme Court in 1979, the accused, while heavily intoxicated, attacked his wife with a tomahawk, inflicting fatal wounds.³⁴⁸ The accused had 58 convictions for alcohol-related offences between 1962 and 1978.

Gallop J considered that although the accused was not a danger to the community, alcohol for him was a major problem, and that apart from alcohol he had a good background; nevertheless he felt that the deterrent aspect should be given greater weight in arriving at a penalty 'which others like him will recognize as being the sure consequence of this sort of behaviour'. His Honour laid some emphasis on the 'community' which, in the sense of moral reprobation and deterrence 'includes other fringe-dwelling Aborigines in and around Alice Springs'.³⁴⁹

The 'interests of the community' in R -v- Darryl James McLeod on the other hand, were the community in its general sense of the dominant society.³⁵⁰ That New South Wales trial, and that of R -v- Robert Michael Simpson, involved sexual offences by urban or town dwelling Aboriginal youths committed on white women.³⁵¹ But, in both, factors of 'Aboriginality' were pleaded in mitigation: factors, in other words, within the purview of what Brennan J incorporated in Neal.

Superimposed on sentencing tribunals is the requirement of detachment and objectivity such that they 'will refrain from exhibiting savagery while at the same time purporting to condemn it'.³⁵² And towering over those considerations is 'the voice of the people'.³⁵³

Thus, the judges in the Northern Territory have been strongly supportive of legislative attempts to restrict alcohol where a community, under legislative provisions, has sought to ban or severely limit its availability in a given area³⁵⁴ and equally supportive of legislative attempts to prevent drunken use of knives or broken bottles.³⁵⁵ Both judgments were pronounced by Muirhead J, who seems to be more outspoken on the limitations and effectiveness of the Northern Territory criminal justice system.

His Honour seems consistently to have queried the effectiveness both of imprisonment and of suspended sentences in the case of Aboriginal offenders.

In R -v- Wesley Nganjmirra, for example, where the accused and the victim, both being intoxicated, had an argument as a result of which the accused struck the victim a hard blow with a piece of sharp metal, causing the victim to become blind, his Honour said

...Prison is seldom constructive, but the law provides imprisonment as a punishment for crime and courts, by whose authority I am bound, have emphasized very strongly that where crimes of violence are concerned the deterrent aspect of punishment becomes a powerful consideration, the law accepting that punishment by imprisonment may deter.³⁵⁶

That view contrasts strikingly with another trial over which His Honour presided, R -v- Douglas Wheeler Jabanunga where the accused, while intoxicated, struck his young wife with stones killing her. Whilst acknowledging that the Courts could not effect a cure or diminution of the incidence of alcohol-induced violence, his Honour said:

...All the Courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil.³⁵⁷

B. Negation of Court process utilised to advance social ends indirectly or achieve indirectly what could not be achieved directly

Both Jabanunga -v- Williams and Dixon -v- Seears were instances of strong curial support for legislation clearly intended to advance directly a social end. In Green -v- Josey, however, Mr Justice Wickham in the Supreme Court of Western Australia allowed an appeal against conviction imposed on a town 'nuisance' whom the police and justices, although acting humanely and conscientiously, considered was becoming a 'problem' to himself and the community.³⁵⁸ While sympathizing with the justices and townspeople, Wickham J also held that 'in the administration of the law and the sentencing of offenders principle cannot be allowed to give way to expedience.'³⁵⁹

In Murphy, Davidson & Ward -v- Watson, the Full Court of the Supreme Court of Western Australia heard appeals against severity of sentence imposed on the appellants for disorderly conduct.³⁶⁰ Each was an alcoholic, and no criminal activities were associated with such conduct. The Court considered that rehabilitation and retribution did not arise, nor would deterrence. Probation would be 'pointless'. Custodial sentences without the availability of treatment would be inappropriate for what was 'the tip of a deep and serious social problem, the solution to which must be found outside the criminal law'. A fine of \$10 was substituted for the sentences of six month's imprisonment.

In the District Court of Queensland, Judge Shanahan upheld an appeal against severity of sentences imposed on an Aboriginal woman convicted of vagrancy.³⁶¹ His Honour noted that the legislation as such was not directed to the punishment of poverty. He noted also that on many occasions, Stipendiary Magistrates, moved by Christian charity or humanitarian motive, sent people to

prison 'for their own good': such people not, as a rule, committing criminal offences but being considered as 'nuisances' whose appearance was an affront to the susceptibilities of the community not subject to the same disability. The sentence was reduced, and the appellant freed.

In Matthews -v- Stokes the appellant was charged with the sale of liquor to an Aborigine, and with a further charge of the supply of such liquor.³⁶² He was convicted and sentenced to cumulative terms of imprisonment. Kriewaldt J held, inter alia, that the more serious charge should, as a general rule, be dealt with first, that sentences imposed for convictions arising out of the one incident should normally be concurrent, and that the power to impose cumulative sentences should normally not be used so as to increase a sentence beyond the maximum permitted by law for the offence in respect of which the cumulative sentence is imposed.

Finally, in Taylor -v- Beames, Mitchell J in the Supreme Court of South Australia upheld an appeal against conviction in circumstances where a young Aborigine was arrested on a charge of being drunk in a public place and, upon being found unfit to plead, was remanded without bail to a sitting of the Court five days thence.³⁶³ No appeal was taken on that aspect, therefore the judge's remarks are obiter. Nevertheless, they are a reminder of the vigilance of superior courts in this regard

...it would be a matter of deep concern if any Court were to use a remand without bail as an indirect means of imposing a penalty.³⁶⁴

C. Aboriginal Children

In the leading case of Jabaltjari -v- Hammerseley, Muirhead J with the authority of the other members of the Court laid down general guidelines on the sentencing of Aboriginal juvenile offenders in the Northern Territory.³⁶⁵ The appellant, a 14 year old, was convicted in the Children's Court at Alice Springs of the illegal use of a motor vehicle, driving while unlicensed, and driving without due care. He was sentenced to concurrent terms of imprisonment of three months, seven days and one month, designed, according to the Magistrate, to protect the public. The appellant was represented and the proceedings lasted six minutes. On appeal, evidence was given that, since the appellant had been released pending the appeal, he had been returned to his people and was undergoing traditional punishment. He would soon be initiated into manhood. It was probably that the appellant had seen going to gaol as a way of escaping his initiation ceremonies.

The appeal as to sentence was allowed, and the sentences set aside. The appellant was to enter into a bond, with the condition, inter alios, that he be subject to the discipline and training of his own community.

Muirhead J considered, first, the detention of the child in an adult prison for 26 days following an earlier court appearance as

...an appalling indictment of the system of justice as applied to aboriginal children in the Territory.³⁶⁶

Secondly, his Honour considered that for many Aboriginal children a term of imprisonment tended to be regarded as a sign of manhood, and much more comfortable than the initiation ceremonies. Thirdly, imprisonment can provide practically nothing of value or training for prisoners, young or old, black or white. Fourthly, the imposition of custodial penalties on restless children might turn them into recidivists and was against the expression of legal policy both in Australia and elsewhere. Fifthly, Aboriginal children face tremendous social problems: alcohol, conflicts between the strict but community based cultural traditions of their people and the more tempting short-term inducements of white society. Sixthly, facilities for the treatment of young offenders in the Northern Territory were either woefully deficient or totally non-existent, thus making the tasks of magistrates in dealing with juvenile offenders almost impossible of successful performance.

Therefore, only in grave and exceptional circumstances and for very serious offences should children of 14 to 16 years be imprisoned and then only when the sentencing tribunal has carefully examined and for good reason discarded the available alternatives. With children in that age group whose understanding might be limited, sentences of imprisonment might be 'suspended' subject to an appropriate recognizance, as judicial experience shows that the offences of young Aborigines tends to occur in repetitive waves, sometimes associated with petrol sniffing, sometimes associated with other sociological causes peculiar to tribal or geographic group.

Courts should not sentence under a sense of urgency, nor without a pre-sentence report and a thorough background knowledge, obtained from parents or relatives who should attend the hearing and from Aboriginal legal aid and other organizations, particularly Child Welfare officials in lieu of police.

This judgment acknowledges the strengths and problems posed for contemporary Aboriginal youth by a still-vibrant and relevant culture. Two years later, the Chief Justice, Sir William Forster, in R -v- Jacob Ah Won declined to imprison a 13 year old Aboriginal boy who had engaged in a knife fight with another, whom he wounded.³⁶⁷ His Honour recorded a conviction, and committed the defendant to the care of the Director of Child Welfare, but recommended that he be allowed to return to his own people so that he might receive the support of his extended family and undergo the initiating process.

In a similar case, but where the accused was aged 25 and intoxicated, namely R -v- Raymond Bigfoot, Muirhead J suspended sentence without supervision 'hoping that the constraints of your tribal situation will suffice'.³⁶⁸

D. Additional factors of 'Aboriginality'

Kriewaldt J was consistent in considering that the extent to which an Aborigine had adopted white ways was a very material factor in arriving at a just sentence.³⁶⁹ The nearer the mode of life and general behaviour approximated that of a white, the closer should punishment approximate that of a white convicted of a similar crime.³⁷⁰

However as the High Court itself observed in Namatjira, and as did Muirhead J himself, sitting in the Full Court of the Federal Court of Australia in R -v- Davey, an appeal by the Crown against leniency of sentences imposed for manslaughter

...association with white people does not necessarily erase deep-rooted customary fears or beliefs, nor does it eradicate the sense of what is, or what is not, acceptable or appropriate,³⁷¹

The lower Courts appear to have accepted, as hierarchically they were bound to do, the decisions and guidelines of the superior Courts. In Police -v- Melville Wurrumurra, decided in July, 1977, T Pauling SM in binding over a man who bayoneted his wife for suspected infidelity noted Muirhead J's observations 'that suspended sentences of imprisonment are irrelevant so far as most aboriginal persons are concerned'. Such observations are, of course, qualified, in respect of Aboriginal juveniles, by Jabaltjari -v- Hammersely (supra).

Kriewaldt J also adopted what might be called a 'deterrent-educative' approach in sentencing Aborigines, again adopting as a factor of significance the test of 'sophistication' or 'civilization'. In R -v- Aboriginal Roy Pananka, for instance, on the trial of an Aborigine for an act of drunken violence visited upon another, he was of the opinion that

...the Aborigines concerned in this affray have reached a sufficient stage of civilisation that they can be made to understand that the use of knives or other instrument which may cause wounds in a fight will merit punishment, especially if they have previously taken enough liquor to be affected thereby.³⁷²

In not a few cases Kriewaldt J seems to have been dissuaded from releasing the accused upon conviction by a consideration of the effect of such a release on the (Aboriginal) community. His Honour, unfortunately for the accused, also ventilated his opinion, thus inflicting on the prisoner the double punishment of imprisonment and the aborted prospect that, but for the trial judge's broader perspective, he would in fact have been released. Thus, in R -v- Aboriginal Nelson the remarks on passing sentence on 27 March 1956, include

My inclination would be to release you having regard to the circumstances, but my duty requires me to consider what effect that might have on other

persons...It seems to me I must let it be known that the use of weapons, even under provocation, will result in punishment being inflicted.³⁷³

For 'other persons' substitute 'the native community in Alice Springs' and a similar result obtains in R -v- Aboriginal Sambo Djungla; ³⁷⁴ and in R -v- Aboriginal Barney, only in that latter case it was 'the defendant's community'.³⁷⁵ I am not suggesting that Kriewaldt J should not have paid close regard to the likely effect on the community from which an Aboriginal accused came. As Muirhead J in the Full Court of the Federal Court, on appeal from the Supreme Court of the Northern Territory, put it in R -v- Davey

...When dealing with offences which take place within Aboriginal communities, and involving only those people...

it is relevant and proper to have 'consultation with aboriginal communities in remote areas' and to pay close regard to what the community thought and to treat as important the community's view that the accused 'should come back into that community'.³⁷⁶ Although the trial judge in Mamarika -v- R was not identified, his sentiments are very much in tune with those of Muirhead J:

I doubt whether imprisonment has ever made much sense to your people...but imprisonment is now well understood as a punishment handed out by the courts of this Territory...³⁷⁷

In that case the trial judge recognized that traditional punishment methods, for example temporary banishment from the accused's homeland, were far more effective, if salutary, but the Full Court in Jacky Anzac Jadurin -v- R,³⁷⁸ and Forster CJ in Jungarai -v- R³⁷⁹ have emphasized that acknowledgement of certain traditional punishment, whether it accord with the law of the land or not, is not sanction of that punishment. It is rather recognition of certain facts existing only by reason of the accused's membership of a particular 'ethnic or other' group.

Thus extraordinary factors evoke extraordinary responses. In the latter case the accused, a full blood tribal Aborigine, was charged with the murder of another member of this tribe. After committal proceedings the accused applied for bail pending trial. This was refused by the committing magistrate. He then applied for bail to the Supreme Court.

Evidence in support of this application for bail established that, according to Aboriginal law and custom, the accused would be held responsible for the death of the deceased and would have to be punished accordingly. Such punishment would consist of a single ceremonial spearing in the leg followed by banishment into the bush for a period to be fixed in order to remove from the community a possible focus for trouble. The extended families of the deceased and the accused were in a state of mutual hostility which would only cease when the appropriate tribal punishment was inflicted. The accused was willing and

anxious to undergo the punishment. In granting the application, Forster CJ noted the relevant circumstances as above, and that Aboriginal customs in the Northern Territory vary from place to place. So, too, must the circumstances of killings.

The proposed punishment had been endorsed by 'the community' but his Honour expressed neither approval nor disapproval of it, simply taking it as important fact to be considered.

Effect of imprisonment

In R -v- Nadigi Tjalpaltjari, Blackburn J presided over the trial of a tribal Aborigine who pleaded guilty to the manslaughter by spearing of his incestuous wife.³⁸⁰ Counsel for the accused, in his submissions on the question of sentence, put it to the trial judge that for a member of the Tintubi tribe at Waruwiya, any gaol sentence would impose on the accused virtually a term of solitary confinement. Not only would he be unable to communicate, but he would be confined to a place so far removed from his (ordinary) environment that it would be the equivalent of banishment to a foreign country.

In a similar situation in Western Australia the next year, Burt J (as he then was) in R -v- Ferguson indirectly made a recommendation that in the event that the Parole Board did not quickly release the defendant he should be detained in one of the country prisons where other Aborigines constituted the majority of the population.³⁸¹

A Perth (Conventional) gaol venue would be for him, on account of want of communications, virtually solitary confinement liable to inflict extreme physical and psychological harm, and potentially fatal to the prisoner.

Not that such a recommendation would necessarily advance the prisoner. Norman Ngatayi was transferred to Broome Prison on similar grounds and for the same broad humanitarian reasons. He was, however, ostracized by his own people, and was subsequently transferred to Fremantle Prison.³⁸² Generally, however, Broome Regional Prison, with an Aboriginal prison population of 75-80 per cent regarded Aborigines there as generally 'more peaceful than the whites'.³⁸³

As in nearly every other category dealt with, so too in respect of imprisonment is there judicial acknowledgement of marked and variable cultural differences, and some judicial endeavour to accommodate such differences within the mainstream of the dominant system of white criminal justice.

Conclusions

From the very earliest time of white settlement in Australia, the judiciary has, with but few notable exceptions, effortlessly and without question, considered Aborigines as

'sub Deo et lege' 'beneath (ie subject to) God and the law'. The God was, of course the Christian God; the law was white man's law, and as both were understood and extended to the Aborigine, he was inferior in the eyes of both. Even when the one was embraced, as Cook -v- Cavenagh reminds us, the old cultures, traditions, and beliefs were ever ready to emerge, to manifest themselves in the legal behaviour of the subject.

A sub-culture of Aboriginal subjects thus existed within the legal mainstream who were imperfectly understood, or, when understood, contemptuously dismissed or disparaged. Consider, for example, the names by which they were tried: 'Long Jack' (1838), 'Jackey Jackey' (1844). 'Old Billy' (1845), 'Neddy Monkey' (1861), 'Black Peter' (1863), 'Black Bob' (1867). Were the subject races elsewhere in the imperial possessions denied even the dignity of a proper title? Did the prefix 'Aboriginal', often abbreviated in the distributed reports of judgment as 'Abo', used in the Northern Territory in the 1950's conduce to a proper judicial or even legal regard for the rights of the subject? Where did equality of procedural treatment begin if the individual were shown in the title under which proceedings began as possessed of a name which at best was unconsciously pejorative and at worst dismissive, condescending, patronising, but always negative?³⁸⁴

From the very beginning of judicial consideration of Aborigines as subjects of white law, there seems to have been an acknowledgement of differences which the substantive law, except where changed by legislation, was unable to accommodate. Thus, a tribal wife could be compelled to testify against her tribal husband, for an acknowledgement of another system of law would undermine confidence in, and respect for, 'the law'; yet other minorities, races, cultures and beliefs were accorded due recognition by the 1860's. But not the Aborigines.

How, then, could the law show its majesty, the qualities of mercy and compassion which in the 19th Century were invoked as explanation and assertion of moral superiority and justification? The only clear, legally justifiable, way was in the use of those legal discretions reposed by convention and statute in the judges.

Yet an examination of the judgments cited by me suggests that there still persists in judicial minds a stereotyped impression of Aborigines as being not-quite-civilized, of being lesser persons in terms of inability to hold or resist drink, sexual morality, domestic abuse or neglect, capacity to seek out, obtain, and continue in responsible employment, and of public conduct. To that extent, the judges may simply be reflecting what is seen as a societal perspective, from which they could hardly be immune.³⁸⁵ It would be both fanciful and trite to expect of our sentencing tribunals that they ignore the historical legislative treatment of Aborigines as persons peculiarly in need of care and protection, of the same class and category as children or lunatics.

The concept of legal equality therefore proceeds on a false premise, namely, that substantive legal equality had been

conferred on or otherwise enjoyed by the Aborigine, but that certain procedural remedies and relief were denied to Aborigines on account of a condition of legal disability deriving from their membership of a group. In fairness to the judiciary, there is an acknowledgement by them of the breadth and variety of Aboriginal society which both displaces the notion of homogeneity and requires an equivalent treatment of a given sub-stratum corresponding in broad terms to the larger, dominant society.

Within the last ten years as Davey, Neal and Ngatayi attest, a significant body of judicial opinion is giving express recognition to the pluralist factor in our society and, in so doing, is questioning the proper role of the system of criminal justice to those who, by acculturation, are even now on the fringes of that society. But judicial self-denial has been preferred to judicial innovation except in procedural matters. There, the judges in the Northern Territory are seen to be far more creative than their colleagues in other Aboriginally-populous States, such as Western Australia, South Australia and Queensland.

Their creativity seems to derive from an acute realization of the vitality and centrality of Aboriginal culture in modern Aboriginal life, of the interplay between 'lore' and 'law', and of the need for accommodation by the dominant legal system of another system sustained by quite dissimilar values and beliefs. But the degree of accommodation is also seen as an act of judicial magnanimity, of a demonstration of power in relinquishing or modifying some of its external features.

The detailed examination of the judgments of Kriewaldt J and Muirhead J reveals a degree of bias based on an awareness not of alienation from the white society but of 'other-ness'. Granted the application of the law to a singular entity, component parts of it have been accepted as being so dissimilar as to call for a variable response. Kriewaldt J's several tests of provocation are a striking example of his endeavour to compromise in order to do justice; so, too, was his acceptance of a differing standard of 'civilization', meaning white civilization. But that, all too often, was a two-edged weapon which subjected those who might be advantaged by it to a disability. Thus, juries could be, and were, directed to give a greater or lesser weight to the unsworn evidence of (non-Christian) Aborigines in criminal trials. The legislation of the Northern Territory required no less. Yet in so directing the jury, the trial judge is reinforcing the negative equation of 'colour' with worth.

In sentencing, the bias of Muirhead J is seen to work to the advantage of Aboriginal accused not least because of its acceptance of the ineluctable nature of imprisonment as a deterrent to Aborigines. His Honour's awareness of tradition, culture, belief and its potential for good is best seen in his treatment of juvenile offenders and his willingness to subject an offender to (potential or actual) tribal constraints. Where imprisonment is used, it is as a measurement of punishment, of the sanctions of society at large for proscribed conduct, and not with the rehabilitation of the offender in mind. Both Kriewaldt J and

later members of the Supreme Court of the Northern Territory were consistent in their exercise of judicial discretion to deter the drunken resort to violence, and particularly the use of knives.

There has also been concrete evidence of judicial attempts to curb the use of alcohol for the ruinous and destructive part it plays in Aboriginal society, although there has been at the same time an admission of the proper role, and the limitations imposed on the role, of the criminal law in respect of alcoholism per se.³⁸⁶ The variable judicial response to tribal punishment as a mitigating factor in Aboriginal crime again demonstrates the limitations of judicial activism. On the one hand, the ethno-centric basis of the dominant legal system and its administration require a universal subjection and an equal application. But as against that is the paradox of people for whom the law, and its processes, either are meaningless or irrelevant. The reconciliation of the one with the other not merely supports, but requires, some element of judicial determinism.³⁸⁷ This, in turn, leads to a higher paradox, namely that in the exercise of determinist method, the sentencing tribunal perforce must pay due regard to sociological and anthropological evidence, viewed, tested, and weighed according to legal standards of proof, themselves of greater or lesser degree depending on the civil or criminal nature of the trial.

Thus Aborigines whose 'arithmetic of colour' so often in the past predisposed their legislative treatment, are now also required to undergo, in the Northern Territory and, to a lesser extent, in Queensland the lottery of judicial bias. A ready judicial acceptance of a paradigm of disadvantage, discrimination and dispossession must needs be also be accompanied by a corresponding judicial commitment to their solution in law. But the mechanics of conflict-resolution in an ethno-centric system whose hallmarks are conservatism, caution, adherence to hierarchy, consistency, tradition and technicality ill equip its administrators to deal with problems whose causes quite often are outside the compass of the law itself. The traditionalist strand of legal philosophy based on Austinian positivist commands - sanctioned - by - force and the 'natural' disinclination of the judiciary to depart from the legal mainstream conduce to a narrow judicial self-perception. That role which the judiciary eschews, namely that of 'social engineer' as was so aptly put by the Full Bench of the Commonwealth Conciliation and Arbitration Commission in the 1966 landmark decision in Re Cattle Station Industry Award (1951) (supra) is the very role which legislation and social reality increasingly demands of them.

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78. Matter No. 88 of 1958, unreported; Bibliography, Case No. 83, p.38A.
79. Wanganeen -v- Smith (1977) ACL:DT54, 73 LSJS 139 (Supreme Court of South Australia, No. 1037 of 1976, 28 January 1977); Bibliography, Case No. 423, p. 143.
80. North Australian Industrial Union -v- J.A. Ambrose and Others (1924) 20 CAR 507; Bibliography, Case No 139a, pp.63A-B
81. (1924) 20 CAR 507, at p. 509
82. (1910) 11 CLR 311.
83. See Bibliography for theses by, inter alios, Frank Stevens, M.C. Hartwig, Jeffrey Hilliker; books or articles by Altman & Nieuwenhuysen, Diane Bell, Christophers and McGuinness, Curthoys and Markus, Francesca Merlan, Bruce Shaw, Sharp and Tatz, Doolan, McMath.
84. (1924) 20 CAR 507, at p. 512.
85. Ibid., at p.516
86. Ibid.
87. (1928) 26 CAR 607; Bibliography, Case 139 (b), pp. 63B-C
88. (1928) 26 CAR 607, at p. 623.
89. The Australian Worker's Union -v- The Graziers' Association of New South Wales & Others (1932) 31 CAR 710; Bibliography, Case No. 14, p.4: The Australian Workers' Union -v- E.A. Abbey and Others (1938) 39 CAR 607; Bibliography, Case No. 15, p.4.
90. (1944) 53 CAR 212; Bibliography, Case No. 16, pp.4-5.
91. Re Cattle Station Industry (Northern Territory) Award, 1951 (1966) 113 CAR 8, 8 ILR 36, AILR 36; Bibliography, Case No. 38, pp.12-14

92. Re Pastoral Industry Award (1967) 9 AILR No. 415, P. 2; Bibliography Case No. 145, p. 64; The Australian Worker's Union -v- The Graziers' Association of New South Wales and Others (1967) 121 CAR 454; Bibliography, Case No. 18 pp. 6-7.
93. (1966) 113 CAR 651, at p. 670
94. e.g. Aboriginals Ordinance 1933 (Bibliography, Legislation, Act No. 182) 1947 (Ibid., No. 205), Wards' Employment Ordinance 1953 (Ibid., No. 214), 1958 (Ibid., No. 226), 1959 (Ibid., No. 228) 1960 (Ibid., No 232), 1962 (Ibid., No 240), 1961 (sic.,Ibid. No 241), 1964 (Ibid., No. 262), 1965 (Ibid., No. 271); repealed by Wards' Employment Ordinance Repeal Ordinance 1971 (Ibid., No. 295). And not also Part IV of Aboriginals Ordinance 1918 (Ibid., No. 159)
95. (1966) 113 CAR 651, at p. 656.
96. Ibid., at p.661
97. Ibid., at p.658
98. Ibid.
99. Ibid.
100. Ibid.
101. Ibid., p. 659
102. Ibid., at p.660
103. Ibid., at p.663
104. Ibid., at p.669
105. By Powers J. in North Australian Industrial Union -v- J.A. Ambrose and Others (1924) 20 CAR 507, at p.512.
106. Australian Workers' Union and Others -v- Alcoa of Australia Pty Ltd and Others (1963) 104 CAR 626 (CAC; Senior Commissioner Taylor).
107. R -v- Burges; Bibliography, Case No. 199, p.74A
108. Dixon and Others -v- McCarthy and Another (1975) 1 NSWLR 617, at p.641; Bibliography, Case No. 58, pp.23-6
109. L.R. Smith in his 'The Aboriginal Population of Australia' Australian National University Press, Canberra, 1980, showed the 1971 'full-blood' population as 22,500, 'others' as 6,000, a total of 28,500; but the 1973 total, based on N.T. Medical service estimates, using essentially the same criteria, gives a total of 24,192. Table 7.7.2,p. 188; the Report of the House of Representatives Standing Committee on Aboriginal Affairs 'Aboriginal Legal Aid', Australian

Government Publishing Service, Canberra, 1980, on the other hand shows the population for the second half of 1978 as 24,400, comprising 1,800 urban, 3,900 pastoral property, 3,300 outstations, and 15,400 elsewhere, in predominantly Aboriginal communities: Appendix 4, p.216. Kriewaldt J. in his article 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' University of Western Australia Law Rev. Vol. 5 (1960) at p.24 claimed that Western Australia had more full-bloods than the Northern Territory. A comparison of Tables 7.5.2 at pp.165 and 188 respectively, of L.R. Smith, op. cit., shows that his Honour was in error in this belief.

110. Op. cit.

111. R -v- Aboriginal Patipatu (1951) NTJ 18; Bibliography, Case No. 324 (sub. nom. R -v- Patipatu), p. 108; R -v- Aboriginal Wally (1951) NTJ 21; Bibliography, Case No 173, p. 68; R -v- Aboriginal Charlie Mulparinga (1953) NT 290; NTJ 205; Bibliography Case No. 207 (Sub. nom. R -v- Charlie), pp. 76, 76D-E; R -v- Aboriginal Johnny Scott MacDonald (1953) NTJ 186; Bibliography, Case No. 167 pp. 68, 68D; R -v- Tiger and Captain (1953) NTJ 211; Bibliography, Case No. 350, pp. 118, 118A; R -v- Willie (1955) NT 67; Bibliography, Case No, 367, p. 123, R -v- Aboriginal Muddarubba (1956) NTJ 317; Bibliography, Case No. 169 (sub. nom. R -v- Aboriginal Louie Barry Muddarubba), pp.68, 68F; R -v- Aboriginal Nelson (1956) NTJ 327; Bibliography Case No 312 (sub. nom. R -v-Nelson), pp. 106, 106A-B; R -v- Aboriginal Toby Jangala (Alice Springs, Book No. 5 Folio 98, No. 16 of 1956, unreported); Bibliography, Case No. 166, pp. 68, 68C; R -v-Aboriginal Wadderwarri (1958) NT 53; NTJ 516; Bibliography, Case No. 357 (sub. nom. R -v- Wadderwarri), p. 121; R -v- Aboriginal Timmy (1959) NTJ 676; Bibliography, Case No. 172, p. 68; R -v- Aboriginal Jimmy Balir Balir (1959) NTJ 633; Bibliography Case No. 163, p. 68; 68H-J R -v- Aboriginal Dulcie Dumaia (1959) NT 274; NTJ 694; Bibliography, Case No. 219 (sub. nom. R -v- Dumaia), p. 81.

112. Report by Mr. (as he then was) Hasluck to the House of Representatives on the Native Welfare Conference, 18 October 1951, extracted by Sharman N. Stone, op. cit., pp. 193-7.

113. R -v- Aboriginal Wally (1951) NTJ 21, at p.27;

114. R -v- Aboriginal Johnny Scott MacDonald (1953) NTJ 186, at p. 187

115. R -v- Aboriginal Charlie Mulparinga (1953) NTJ 205, at p. 209.

116. (1959) NTJ 676.

117. Thus, in R -v- Aboriginal Nelson (1956) NTJ 327, at p.329, Kriewaldt J. relected that he had presided at 31 of 32 murder cases - well over half of Aboriginal accused - in the preceding five years, and had told the jury in every case that the same rules of law applied.

118. R -v- Aboriginal Wally (1951) NTJ 21, at p. 27
119. R -v- Aboriginal Dulcie Dumaia (1959) NTJ 694, at p. 696.
120. Ibid.
121. R -v- Aboriginal Muddarubba (1956) NTJ 317, at p. 318
122. R -v- Aboriginal Wally (1951) NTJ 21, at p.27; 'Oh well, he's only a blackfellow, we'll convict him'; R -v- Aboriginal Nelson (1956) NTJ 327, at p.329.
123. On account of colour: R -v- Aboriginal Toby Jangala (Alice Springs, Book No. 5 Folio 98, No. 16 of 1956, unreported); 'The sooner they kill each other off the better': R -v- Aboriginal Jimmy Balir Balir (1959) NTJ 633.
124. 'Natives should not be tried according to white laws so we'll acquit him': R -v- Aboriginal Nelson (1956) NTJ 327, at p. 329.
125. Op. cit. pp. 40-2
126. Supreme Court of the Northern Territory, SCC No. 97 of 1977, 8 February 1978, unreported; Bibliography, Case No. 264, p.91
127. R -v- Harry Gilmiri, (Supreme Court of the Northern Territory, SCC No. 23 of 1979, 21 March 1979, unreported); Bibliography, Case No. 233, p.83
128. 19 November 1980, unreported; Bibliography, Case No. 90, pp. 42-3
129. (1982) 29 SASR 192; Bibliography, Case No. 133, p. 60A.
130. (1982) 29 SASR 192, at p. 194
131. Ibid.
132. (1982) 4 ALB 10; Bibliography, Case No. 381, p. 125A.
133. (1982) 17 NTR 31; (1983) 7 ALB 9; Bibliography, Case No. 57, pp. 23A-K.
134. (1981) 10 NTR 35; Bibliography, Case No. 46, p. 19A
135. (1981) 10 NTR 35, at p.36
136. (1976) 29 FLR 233; 14 ALR 71; Bibliography, Case No. 69, p. 29
137. Supreme Court of Western Australia, No. 1558/79 Brinsden J.; 27 June 1979, unreported; Bibliography, Case No. 138, pp. 62-3.
138. (1981) 55 ALJR 631, 36 ALR 425; Bibliography, Case No. 142, pp.64, 64 A-B.

139. (1976) NTJ 1001 (Supreme Court of the Northern Territory, Forster J.); Bibliography, Case No. 71, pp. 30-31. See also discussion by Tatz in (1979) 4 Legal Service Bulletin 198
140. (1976) NTJ 1001, at pp. 1005-6
141. (1981) 1 SR (WA) 264; Bibliography, Case No. 52, pp. 21A-B
142. (1981) 1 SR (WA) 264, at p. 269
143. (1956) NT 43; Bibliography, Case No. 385, pp. 127, 127A-B
144. R -v- Chambers (1955) NT 326; Bibliography, Case No. 206, pp. 76, 76A-C
145. Bibliography, Northern Territory, Legislation, item No. 193
146. Pp. 2 and 3 of judgment.
147. (1958) NTJ 608, at p. 618, Bibliography, Case No. 132, pp. 59-60
148. (1958) NTJ 608, at p. 618.
149. Ibid.
150. Ibid.
151. 53 WALR 48, at p. 50; Bibliography, Case No. 22, pp. 7-8.
152. (1959) 100 CLR 664, at p. 669; LXVI ALR 690 at p. 693; (1959-60) 33 ALJR 24, at p. 26; Bibliography, Case No. 132, pp. 59-60
153. (1958) NTJ 608, at p. 631.
154. Eric Grosvenor Lewis -v- Alan Frederick Metcalfe (1959) NT 24; NTJ 639, at p. 642; Bibliography, Case No. 104, p. 46.
155. (1959) NTJ 700.
156. (1959) NTJ 700, at p. 704.
157. R -v- Robert Michael Simpson (Nagle J., 15 December 1981, unreported); Bibliography, Case No. 341, p. 115A.
158. Supreme Court of New South Wales, Criminal Division, Lee J., 5 August 1983, unreported.
159. Sydney Morning Herald, 6 August 1983.
160. (1983) 8 ALB7; Supreme Court of Queensland, 8-19 September 1981; Bibliography, Case No. 326, p. 109
161. Appeal No. 28 of 1978, 22 June 1978, unreported; Bibliography, Case No 271, p. 96
162. Ibid.

163. Ibid.
164. R -v- Norman Jabarula (SCC No. 104 of 1979, 23 August 1978, unreported). Bibliography, Case No. 252, p. 88.
165. R -v- Burt Lane, Ronald Hunt and Reggie Smith (SCC No's 16-17, 18-19, and 20-21 of 1980, Gallop J., 29 May 1980, unreported); Bibliography, Case No. 280, p. 98 Transcript of Proceedings, 29 May 1981, p. 91
166. Ibid., Transcript, pp. 88-9
167. Published for Central Australian Aboriginal Legal Aid Service by Aboriginal History, Canberra, A.C.T.
168. Ibid., p.66
169. Ibid., pp. 94-5
170. R -v- Gus Forbes and Others, (Supreme Court of the Northern Territory, SCC No's 22-23 of 1980, 29 August 1980, unreported); Bibliography, Case No 228, p. 82.
171. (SCC No's 155 and 156 of 1981, 16 October 1981, unreported); Bibliography, Case No. 223, p.81B
172. R -v- Darryl James McLeod, (Criminal Division, No. 82/9/231, 21 March 1983, unreported). Bibliography, Case No. 192, pp. 101A-B.
173. Sydney Morning Herald, 22 March 1983.
174. 7 April 1965, unreported; Bibliography, Case No. 94, p. 44.
175. (SCC No's 84 and 85 of 1978; 12 June 1978, unreported); Bibliography, Case No. 184, p.72.
176. (1982) 16 NTR 20, at p. 21; Bibliography, Case No 59, pp. 26B-D
177. R -v- Willie (1885) 7 QLJ (NC) 108; Brisbane Courier Reports 6 November 1885, 336; Bibliography, Case No. 366, p. 123.
178. R -v- Buller and Others (SCC No's 170-176 of 1975, Muirhead J., 2 July 1975, unreported); Transcript of No. 170-176 of 1975, pp. 162-3; Bibliography, Case No 197, pp. 74-74A.
179. (1980) 30 ALR 27; 54 ALJR 401; 4 A Crim. R. 433; Bibliography, Case No. 135, pp. 60-1
180. R -v- Anunga and Others; Wheeler and Another (1976) 11 ALR 412; Bibliography, Case No. 183, pp. 70-2.
181. (1980) 30 ALR 27, at p. 34.
182. (1972) AC 1027, at 1054.
183. (1982) 12 NTR 13, at p.17; Bibliography, Case No. 48, pp. 20A-B

184. (1982) 12 NTR 13, at p. 15.
185. William Francis McMillen and Sheryl Anne McMillen -v- Jack Robert Larcombe, Director of Child Welfare (1976) NTJ 1001; Bibliography, Case No. 71 (sub nom. 'In the matter of Freddie; McMillen -v- Larcombe'), pp. 30-1
186. (1976) NTJ 1001, at p. 1004.
187. Jones -v- Holmwood (1974) WAR 33, at p. 34; Bibliography, Case No. 98, p. 45A.
188. Grantham -v- Thomas (Supreme Court of South Australia, No. 2808 of 1980, Jacobs J., 28 October 1980, unreported); Bibliography, Case No. 79, pp. 80-1.
189. Munro -v- Sefton (Supreme Court of Western Australia, Appeal No. 38 of 1974, Jones J., 14 June 1974, unreported); Bibliography, Case No. 127, pp. 57-8.
190. (1970) WAR 70; Bibliography, Case No. 80, p. 37.
191. (1970) WAR 70, at p. 72.
192. (1974) 4 ALR 401.
193. (1975) 6 ALR 47
194. Ibid., at p. 50
195. Ibid.
196. Ibid., at p. 51
197. (1982) 42 ALR 609
198. Ibid., at p. 618.
199. Ibid., at p. 626.
200. Ibid.
201. Ibid., at p. 623.
202. (1962) 3 FLR 215; Bibliography, Case No. 268, pp. 93-5.
203. (1962) 3 FLR 215, at p. 218.
204. Ibid., at p. 224.
205. See, e.g. the Final Report of the House of Representatives Standing Committee on Aboriginal Affairs 'Alcohol Problems of Aboriginals', Australian Government Publishing Service, Canberra, 1977.
206. (1973) 6 SASR 452; Bibliography, Case No. 76. pp. 34-5
207. (1970) WAR 70; Bibliography, Case No. 80, p.37.

208. (1982) 3 ALB 10; Bibliography, Case No 124, p. 57A-B.
209. Ibid.
210. (1975) WAR 23, at p. 26.
211. Local Government Act (No. 4) 1978 (No. 7 of 1979) inserting Part XX in Act; Bibliography, Legislation (NT) Item No 326, p. 56; and Liquor Act 1978 (No. 10 of 1979) inserting Part VIII re Restricted Areas; Bibliography, Legislation (NT) Item No. 328, pp. 56-7
212. No. 35 of 1964; Bibliography, Legislation (NT) Item No. 251, pp. 33-4
213. R -v- Anderson (1954) NT 43; NTJ 240, at p. 249; Bibliography, Case No. 181, pp.70, 70A-B
214. R -v- Aboriginal Jimmy Balir Balir (1959) NTJ 633; Bibliography, Case No. 163, pp. 68, 68H-J
215. (1957) NTJ 453, at p. 454; Bibliography, Case No. 170, pp. 68, 68M-N
216. (SCC No's 184-186 of 1979; 23 August 1979; unreported); Bibliography, Case No. 213, pp. 78-9.
217. (SCC No's 84-85 of 1978; 12 June 1978, unreported); Bibliography, Case No. 184, p. 72.
218. (SCC No. 45 of 1980, 16 October 1980, unreported); Bibliography, Case No. 250, p. 87.
219. (1981) 6 NTR 19; Bibliography, Case No. 92, pp. 43-4.
220. (1981) 6 NTR 19, at p. 20
221. R -v- Neddy Monkey and Others (1861) 1 Wyatt and Webb Reports (L) 40; R -v- Byrne (1867) 6 SCR (NSW) 302; R -v- Paddy (1876) 14 SCR (NSW) 440; R -v- Cobby (1883) 4 LR (NSW) 355, Tarleton's Term Reports 179; Bibliography, Cases No. 311, 201, 321, 209 respectively.
222. 'An Act to allow the Aboriginal Natives of New South Wales to be received as competent Witnesses in Criminal Cases'; Bibliography, Legislation (NSW) Item No. 114, p. 2.
223. HRA, Series I, Vol. 20, p. 756. A similar Act of Western Australia, 4 Vic. No. 8 (1840) was also refused.
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225. (1876) 14 SCR (NSW) 440, at p. 443.
226. Ibid., at p.444
227. R -v- Mary Ann Lewis (1877) Knox 8; Bibliography, Case No. 284, p.99

228. R -v- Peters (1882) III NSW 455; Bibliography, Case No. 327, pp. 109-10
229. Evidence Act, 1929 (No. 1907), s.14. The section was not deleted, as to whipping, until 1968. Bibliography, Legislation (SA), Item No. 455, p.13.
230. Evidence (Children) Act 1961 (No. 6758); Bibliography, Legislation (Vic.), Item No. 563, p. 16
231. Evidence Act Amendment Act, 1972 (No. 53); Bibliography, Legislation, (SA), Item No. 483, p. 27.
232. (1953) NTJ 202, at p. 203; Bibliography, Case No. 219, pp.81,81A.
233. (1955) NT 82; NTJ 312; Bibliography, Case No. 174, p. 68.
234. R -v- Aboriginal Wadderwarri (1958) NT 53; NTJ 516; Bibliography, Case No. 357, p. 121.
235. (1959) NTJ 694, at p. 695.
236. (1953) NTJ 202, at p. 203.
237. R -v- Aboriginal Wally (1951) NTJ 21, at p. 23; Bibliography, Case No. 173, p. 68.
238. R -v- Chambers (1955) NT 326, at pp. 327-8; Bibliography, Case No. 206, pp. 76, 76A-C
239. Ibid., at p. 331
240. Ibid., and R -v- Aboriginal Dulcie Dumaia (1959) NT 274; NTJ 694, at p. 695; Bibliography, Case No. 220 (sub nom. R -v- Dumaia), p. 81.
241. (1976) 11 ALR 412, at pp. 413-4
242. (1975) WAR 163.
243. (District Court, Rockhampton, 22 August 1979, unreported); Bibliography, Case No. 244, p. 86.
244. (1980) 30 ALR 27; 54 ALJR 401; 4 A Crim. R. 433.
245. R -v- Chambers (1955) NT 326, at p. 330
246. R -v- Aboriginal Dulcie Dumaia (1959) NT 274; NTJ 694, at p. 695.
247. R -v- Allan Kunoth (1957) NT 111; NTJ 420, at p. 425; Bibliography, Case No. 278, p.98
248. Sic, e.g. an example of histrionics by such a witness in R -v- Allan Kunoth (1957) NT 111, NTJ 420, and his Honour's comments thereon, NTJ 420 at pp. 423 and 426.

249. R -v- Doyle (1953) NTJ 202, at p.203.
250. R -v- Chambers, (1955) NT 326, at p. 330
251. R -v- Anunga and Others; R -v- Wheeler and Another (1976) 11 ALR 412; Bibliography, Case No. 183, pp. 70, 70C, 71-2.
252. 12 November 1973, unreported; Bibliography, Case No. 231, p.83
253. The circular is reproduced in toto in R -v- Williams (1976) 14 SASR 1, at pp. 9-12.
254. (1976) 14 SASR 1; Bibliography, Case No. 365, p.122
255. (1976) 14 SASR 463; Bibliography, Case No. 421, p. 142.
256. (1977) 17 SASR 88; Bibliography, Case No. 178, p. 69
257. (1977) 17 SASR 88, at p. 90
258. R -v- Williams (1976) 14 SASR 1, at pp. 7-8; 1NSWLR 617, at p. 641
259. (1975) 1 NSWLR 617, at p. 641
260. (1983) 7 ALB 8; Bibliography, Case No.110, pp. 48E-F.
261. Koowarta -v- Bjelke-Petersen (1982) 56ALJR625, supra.
262. (1981) 37 ACTR 57; (1982) 6 Crim.L.J.54; Bibliography, Case No. 208, p. 76F
263. (1981) 37 ACTR 57, at p. 63.
264. Ibid.
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267. 15 February, 1980; unreported; Bibliography, Case No. 150, p.65.
268. Ibid
269. (1974) WAR 193; Bibliography, Case No. 394, pp. 129-130.
270. David Buchanan and John Terry 'Challenging Admissibility: The Voir Dire', Criminal Injustice System Conference, Sydney, 28 February and 1 March, 1981, p.1.
271. R -v- Anunga and Others : R -v- Wheeler and Another (1976) 11 ALR 412, at p.413; Bibliography, Case No. 183, pp. 70, 70C, 71-72.

272. (1980) 31 ALR 257 on appeal from Supreme Court of the Northern Territory, Gallop J. (1979) 4 NTR 1; Bibliography, Case No. 211, pp. 77-8
273. (1980) 31 ALR 257, at p.275
274. Ibid, at p.281
275. Ibid.
276. Ibid at p.325
277. Ibid, at pp.310-311
278. (1982) 12 NTR 13; Bibliography, Case No. 48, pp. 20A-B
279. No. 872 of 1979, 31 October, 1979, unreported; Bibliography, Case No. 399, p. 133.
280. (1982) 12 NTR 13, at p.16
281. SCC No's 316-322 of 1980, 1 December 1980, unreported; Bibliography, Case No. 182, p.70.
282. Ibid. And see, e.g., Wurm 'Aboriginal Languages and the Law' (1963-64) 6 University of Western Australia Law Review 1-10; Elkin 'Aboriginal Evidence and Justice in North Australia' (1947) Oceania 17 (3) 173-210; Strehlow 'Notes on Native Evidence and Its Value' (1936) Oceania 6 (3) 323-335; Dickinson 'The Testimony of Aborigines in Law Courts in the N.T.' (1958) South Pacific X(1) 17-20; and Kriewaldt 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) University of Western Australia Law Review Vol.5 (1) 1-50
283. (1962) 3 WLR 1461, at p.1464, per Lord Devlin
284. (1953) AC 200, at p.206, per Lord Goddard
285. Mr. Justice Barry 'The Defence of Provocation' 4 Res Judicatae 129, at p.133
286. Per Gibbs J. in Johnson -v- R (1976) 11 ALR 23
287. Cited by Dixon C. J. in Parker -v- R (1963) 111 CLR 610 at p.627
288. 'Mental Illness and Criminal Liability' (1975) 15 Med Science and the Law (No. 3) 198, at p.200
289. See also discussion by Colin Howard 'What Colour is the 'Reasonable Man'?' in (1961) Crim. LR 41; see also B. Brown 'The Ordinary man in Provocation : Anglo-Saxon Attitudes and Unreasonable Non-Englishmen' (1964) 13 ICLQ 203; and Glanville Williams 'Provocation and the Reasonable Man' (1954) Crim. LR 740
290. (1951) NTJ 18; Bibliography, Case No. 324, p. 108

291. (1951) NTJ 18; at p.20
292. (1956) NTJ 317; Bibliography, Case No. 169, p. 68F
293. (1956) NTJ 317; at p.322
294. (1956) NTJ 327; Bibliography, Case No. 312, pp. 106, 106 A-B
(sub nom. R -v- Nelson)
295. (1956) NTJ 327, at p.335
296. Ibid, at p. 329
297. See especially, Colin Tatz's seminal PH.D.Thesis 'Aboriginal Administration in the Northern Territory of Australia', Australian National University, Canberra, 1964, unpublished.
298. (1953) NTJ 186; Bibliography, Case No. 167, p. 68D
299. (1953) NTJ 186; at pp. 189-90
300. (1959) NTJ 633; Bibliography, Case No. 163, p. 68
301. (1966) Qld. WN 10; Bibliography, Case No. 335, p. 113
302. (1965) Qd.R 456; Bibliography, Case No. 203, p.75
303. (1978-1979) 143 CLR 458; (1979) 23 ALR 281; Bibliography, Case No. 417, pp. 139-40
304. (1979) 23 ALR 281, at pp. 304 (Jacobs J.), and 311 (Murphy J.)
305. R -v- Alwyn Willian Peter (Supreme Court of Queensland, Dunn J., 8-19 September, 1981, unreported); Bibliography, Case No. 326, p. 109
306. (1960) 5 University of Western Australia Law Review 1, at p.47
307. (1973) 8 University of Queensland Law Journal 60 at p.65, f.n. 43
308. (1951) NTJ 18, at p.19.
309. (1951) NTJ 21; Bibliography, Case No. 173, p. 68
310. (1951) NTJ 21; at p.27
311. (1953) NTJ 211; Bibliography, Case No. 350, p. 118, 118A
312. (1953) NT 290; NTJ 205; Bibliography, Case No. 207, pp. 76, 76D-E (Sub nom R -v- Charlie)
313. (1953) NTJ 205, at p. 209
314. Ibid.

315. (1960) 5 University of Western Australia Law Review 1, at p.27
316. R -v- Tiger and Captain (*supra*, n.311)
317. R -v- Aboriginal Muddarubba (1956) NTJ 317, at p.321
318. (1957) NTJ 453; Bibliography, Case No. 170, p.68
319. (1959) NTJ 676; Bibliography, Case No. 172, p.68
320. (1959) NTJ 676; at p. 677
321. (1975) 6 ALR 47; Bibliography, Addenda
322. (1975) 6 ALR 47; at p.51
323. e.g. R -v- Bullen and Ward (No's 127-130 of 1975, unreported); Bibliography, Case No. 196 p.74
324. SCC No. 23 of 1979, 21 March 1979, unreported; Bibliography, Case No. 233, p.83
325. *Ibid.*
326. SCC No. 441 of 1979, 18 April 1980, unreported; Bibliography, Case No. 221, p.81
327. (1960) 5 University of Western Australia Law Review 1, at p.48
328. SCC No's. 316-322 of 1980, 1 December, 1980, unreported; Bibliography, Case No. 182, p.70
329. 1980, unreported; Bibliography, Case No. 295, p. 102
330. SCC No's. 1 and 2 of 1982, 20 April, 1982, Bibliography, Case No. 301, p. 103A
331. (1981) 5 A. Crim.R.319; (1982) 10 ALB 10; Bibliography, Case No. 99, pp. 45C-D
332. (1982) 6 ALB 11; Bibliography, Case No. 93, pp. 44A-E.
333. Court of Summary Jurisdiction, T. Pauling S.M. and N. Amagula, S.M.: No. G.E. 439 of 1977, 27 July, 1977, unreported; Bibliography, Case No. 154, p.66
334. W.J.P. Towers, S.M. ; No. 2678 of 1977, 22 November, 1977, unreported; Bibliography, Case No. 151, p.65
335. *Ibid.*
336. (1976) 14 SASR 1; Bibliography, Case No. 365, pp. 122-23
337. 8 April, 1970, unreported; Bibliography, Case No. 226, pp. 82, 82A.

338. 21 December, 1973, unreported; Bibliography, Case No. 224, p. 81
339. No. 96 of 1980, 5 November, 1980, unreported; Bibliography, Case No. 225, p.82
340. May, 1934, unreported; Bibliography, Case No. 33, p.11A
341. 1933, unreported, Bibliography, Case No. 347, p.118A
342. (1934) 52 CLR 335; Bibliography, Case No. 412, p.137
343. (1934) 52 CLR 335; at p.344
344. Ibid, at pp. 351, 352 and esp. 355
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382. Ngatayi -v- R (1980) 30 ALR 27; 54 ALJR 401; Bibliography, Case No. 135, pp. 60-61, footnote
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384. Yet Kriewaldt, as an acting Justice in P -v- Aboriginal Wally (1951) NTJ 21, could describe such names to the jury as 'amusing'. This may, in retrospect, be considered as much an expression of judicial innocence as judicial condescension.
385. As Kriewaldt J. said in R -v- Aboriginal Kenny Jungarai and Aboriginal Hector Galway (1959) NTJ 700 'the holder of a judicial position is not obliged to live the life of a hermit'.
386. Although a judicial disavowal of comment on the social policy in relevant legislation was entered by Kriewaldt J. in R -v- Aboriginal Johnny Scott MacDonald (1953) NTJ 186
387. Kriewaldt J. made a significant, and revealing, comment on what utility he saw in trials; they were having a 'civilising effect', in not permitting the Aborigines to 'carry on in their old tribal ways' of conflict resolution and punishment: R -v- Aboriginal Timmey (1959) NTJ 676. This comment was made towards the end of his Honour's judicial career. Super-added to criminal justice, it seems, was the role of promoting civilization. That, in itself, betrays a feeling of superiority ('my system is better than yours, which it should replace') and a functionalist philosophy at odds with the traditional view of criminal trials not as imposers of civilization so much as arbitrators between the demands of society and the rights of the individual arising out of a certain act or pattern of behaviour by that individual.

Aborigines In Summary Courts In Western Australia,
A Regional Study: Preliminary Report On Selected Findings

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This research into Aboriginal involvement in Criminal Courts of Summary Jurisdiction was designed to examine the dynamics of court processes in contributing to the over-representation of Aborigines in the West Australian Criminal Justice system. The fact of excessive Aboriginal involvement in criminal law in Australia is well known; in WA the issue is particularly acute, with approximately a third of prison inmates and a fifth of court charges in any one year being drawn from an Aboriginal minority of 2.5% of the state population. The study was initiated by the West Australian Aboriginal Legal Service in conjunction with the authors, and sponsored by the Australian Institute of Aboriginal Studies. Its objective was to examine the processes whereby summary courts dealt with Aboriginal and non-Aboriginal defendants, with a particular focus on comparing justice administration in different types of regional settings and as dispensed by different types of courts. The ALS was also concerned to evaluate the impact of providing legal services for Aborigines over the last decade, by comparing the results of this research with the picture in WA, 15 years ago when the Eggleston study was carried out.

Seven towns were selected from three kinds of areas with relatively high Aboriginal populations. Regions were categorised as urban, settled "fringe dwelling" rural, and isolated rural. Table 1 sets out the courts included in the study, and identifies the key organisational components which distinguished one court from another. These were:

- * degree of access to free legal advice and representation
- * whether the judicial officers presiding were lay Justices of the Peace or professional Magistrates
- * administration of the court independently of the police or not.

Methodology

The study was divided into two major components:

- * analysis of statistical information available from court charge sheets for a 12 month period ending 30 June 1981
- * qualitative data on decision making processes and interaction within the court room setting based on observation of court hearings for a two week period in

Table 1
RESEARCH SETTING

Region & town	Justice administration	Court location & administration	Legal representation
<u>Metropolitan</u> Midland	Resident Magistrate	Separate Courthouse Clerk of Courts	Private Solicitor, LAC, ALS
<u>North West</u> Broom	Resident Magistrate	Separate Courthouse Clerk of Courts	ALS, FO
Kununurra	JPs. Magistrate visits once per fortnight	Separate Courthouse Clerk of Courts	ALS, FO
Wyndham	JPs. Magistrate visits once per fortnight	Separate Courthouse Clerk of Courts	ALS, FO visiting
Halls Creek	JPs. Magistrate visits once per fortnight	Courthouse attached to Police Station. Police administered.	ALS, FO visiting
<u>South West</u> Narrogin	Resident Magistrate	Separate Courthouse Clerk of Courts	ALS, Solicitor, Private Solicitor
Gnowangerup	JPs. Magistrate visits once per fortnight	Courthouse attached to Police Station. Police administered.	ALS, Solicitor visiting
<u>Key</u> - LAC : Legal Aid Commission Duty Counsel			
ALS : Aboriginal Legal Service			
FO : Field Officer			
JP : Justice of the Peace			

each town. This was supplemented by interviews with court personnel, defendants and members of local communities about their perceptions of the operation of the system.

The research was able to identify the following variables from charge sheets : the composition of the court (magistrate or

JP), whether the defendant was represented, offence(s) charged, plea, and disposition.*

This paper presents some preliminary findings from statistical analysis of these data. Our objective is to identify broad comparative patterns along the dimensions of race, regional variation and court composition in the processing of cases. The information obtained from the second more qualitative stage of the study will later be used to "flesh out" those statistical patterns by examination of some of the complex interplay of variables and processes within the court setting that contribute to the disproportionate numbers of Aboriginal people within the penal system.

1. Charge numbers x race x town

Table 2

ABORIGINAL CHARGES X TOWN

Town	Total number of charges in court sample	Percentage of Aboriginal charges in court	Estimated Aboriginal percentage of the total district population§
<u>Metropolitan</u>			
Midland	1536†	(286) 18.6%	Approx. 1%
<u>North West</u>			
Broom	1585	(1152) 72.7%	29-35%
Kununurra	814	(517) 63.5%	20-30%
Wyndham	726	(602) 82.9%	40-47%
Halls Creek	1873	(1762) 94.1%	40-44%
<u>South West</u>			
Narrogin	539	(150) 27.8%	4-5%
Gnowangerup	239	(157) 65.7%	5-6%
Total	7312	(4626) 63.3%	-

§ These figures are taken from Australian Bureau of Statistics, Census 30 June 1981 and from DAA population estimates published in AAPA Annual Report, WA, 30 June 1981.

† In Midland, a sample of every fourth charge on the charge sheet was taken, so this figure represents 25% of total charges for 1980/81. For all other Towns the figure is the total number of charges for the 12 month period.

* The race of a defendant is not generally identified in court records. Therefore most court studies are unable to examine the race component when they rely on recorded data. In this study we

The figures in Table 2 indicate that Aborigines are still grossly overrepresented at the court level of the criminal justice system. 63.3% of all charges in the sample were against Aboriginal defendants. Although the results are not necessarily representative of the state as a whole, the towns they are drawn from are each typical of a particular kind of context in which Aborigines live in West Australia. There is also a marked degree of regional variation between levels of Aboriginal involvement as compared to population levels. The two courts most readily identifiable as having the greatest disproportion of Aborigines in charging patterns are the two police run courts, where legal representation is not always available, and the court adjudicator is likely to be a Justice of the Peace.

2. Offences charged

a. Race x offence category

Table 3 indicates that offence charging patterns are quite different from Aborigines and non-Aborigines.

Table 3
OFFENCE TYPE X RACE

Offence type (by charge)	Race	
	Aborigines	Non-Aborigines
Offences against the person	(189) 4.1%	(65) 2.4%
Offences against property	(329) 7.1%	(328) 12.2%
Offences against good order	(3106) 67.1%	(412) 15.3%
Traffic	(518) 11.2%	(1643) 61.2%
Other	(484) 10.5%	(238) 8.9%
Total	(4626) 100.0%	(2686) 100.0%

were able to identify Aboriginal defendants because of the nature of local Aboriginal communities in the town studied, where members are well known to each other and Aboriginal charges were identified by name from the record sheets by locally recruited Aboriginal assistants. Any error will under rather than over-estimate the degree of Aboriginal involvement.

The most significant categories in the study were Traffic and Good Order offences. These two account overall for 78% of all charges. However, the proportionate involvement of Aborigines and non-Aborigines in each category are almost directly inversely related. 78.3% of Aboriginal offences and 76.5% of white charges are for Traffic or Good Order. However, within these categories, Good Order offences predominate (85.7% of Traffic and Good Order totals) among Aboriginal charges, while for whites Good Order is not significant (20%) compared to Traffic offending (80%). It is clear that a pattern of charging for "petty nuisance" offences - breaches of "good order" followed by summary arrest - still constitutes (as it did 10-15 years ago), the major vehicle whereby Aborigines are introduced into the criminal justice system; whereas whites are most likely to enter via the more regulatory summons-oriented medium of traffic offences.

b. Town x specific offence

Table 4

TOWN X SPECIFIC OFFENCE CHARGES

Town	Charges for Specific Offences			
	Drunkenness (as a per- centage of all charges in town)	Assault (as a per- centage of all charges in town)	Breaking & Entering (as a per- centage of all charges in town)	Disorderly Conduct (as a per- centage of all charges in town)
<u>Metropolitan</u>				
Midland	(143) 9.3%	(29) 1.9%	(46) 3.0%	(61) 4.0%
<u>North West</u>				
Broom	(576) 35.8%	(64) 4.0%	(27) 1.7%	(173) 10.9%
Kununurra	(203) 24.9%	(33) 4.1%	(7) 0.9%	(99) 12.2%
Wyndham	(320) 44.0%	(21) 2.9%	(24) 3.3%	(92) 12.7%
Halls Creek	(1088) 58.1%	(55) 2.9%	(15) 0.8%	(195) 10.4%
<u>South West</u>				
Narrogin	(32) 5.9%	(12) 2.2%	(5) 0.9%	(17) 3.2%
Gnowangerup	(81) 33.9%	(14) 5.9%	(4) 1.7%	(18) 7.6%
Total	(2434) 33.3%	(228) 3.1%	(128) 1.8%	(655) 9.0%

Table 4 indicates great disparities in the offence charging patterns as between the towns studied. In the North West of the State drunkenness charges accounted for between a quarter and a half of all charges. In Halls Creek nearly 60% of offences were for drunkenness. This is significant in a town which has an

anomalously high number of charges; it is the smallest rural centre in the sample but it produces by far the greatest number of charges of the non-metropolitan courts (see Table 2). 92% of the drunkenness charges in the study, and 87% of disorderly conduct charges were against Aborigines, re-inforcing the suggestion that they are the principal recipients of legal action by the police against petty "nuisance" conduct.

3. Court constitution & race

The study was interested to examine the operation of lay justices courts as compared to those of professional magistrates. Our results indicate Aborigines were far more likely to appear before Justices of the Peace than where white defendants. (see Table 5)

Table 5
COURT CONSTITUTION X RACE OF THOSE APPEARING IN COURT
(per charge)

Court Constitution	Race	
	Aborigines	Non-Aborigines
1 JP	(1482) 32.0%	(115) 4.3%
2 JPs	(1140) 24.6%	(354) 13.2%
Magistrate	(2004) 43.4%	(2217) 82.5%
Total	(4626) 100.0%	(2686) 100.0%

Eighty-six decimal six per cent of Aboriginal defendants were in Justices Courts, compared to only 17.5% of non-Aborigines. 32% were in a court consisting of one Justice only; however this is accounted for almost entirely by the Halls Creek court, which both processed more Aboriginal defendants than any other, and routinely sat with only one Justice even though this practice is technically illegal except in certain limited circumstances where another Justice is unavailable.

4. Legal representation

a. Representation x race

Legal representation is often treated as a key to improving the position of defendants in criminal court hearings. The Aboriginal Legal Service (theoretically at least) was designed to provide access to legal advice and representation for all

Aborigines charged with offences. In fact the majority of Aborigines were not represented, and although a great proportion than whites did obtain some legal or para-legal help, our study showed that most criminal defendants (64%) faced summary court charges without legal assistance at all. (see Table 6)

Table 6
REPRESENTATION X RACE

Representation of persons (ie, not charges)	Race	
	Aborigines	Non-Aborigines
NON-APPEARANCE	(218) 5.3%	(755) 36.1%
NOT REPRESENTED	(2823) 69.0%	(1094) 52.3%
REPRESENTED		
Private Solicitor or LAC	(69) 1.7%	(243) 11.6%
ALS Solicitor	(221) 5.4%	
ALS Field Officer	(756) 18.5%	
CWD Officer	(2) 0.1%	
Total REPRESENTED	(1048) 25.5%	(243) 11.6%
Total	(4089) 100.0%	(2092) 100.0%

The importance of the Field Officer system is emphasised by these results; 72.1% of represented Aborigines were represented by para-legal Aboriginal Field Officers.

b. Representation x court constitution

Non-representation correlates highly with appearance before a non-professional court. This is significant for defendants who are less likely to have access to or utilise professional assistance in courts where they are most likely to need it, ie where they do not have the legal expertise of a magistrate to supervise court procedures. As a greater proportion of Aboriginal than white defendants also are charged in Justices Courts (see Table 5), Aboriginal defendants are doubly at a disadvantage compared to most non-Aborigines charged with criminal offences.

Table 7
REPRESENTATION X COURT CONSTITUTION

Representation of persons (ie, not charges)	Court Constitution			
	JP		Magistrate	
Non-appearance	(130)	4.6%	(843)	25.0%
Not represented	(2404)	85.7%	(1513)	44.8%
Represented	(273)	9.7%	(1018)	30.2%
Total	(2807)	100.0%	(3374)	100.0%

Sentencing Outcomes

a. Sentences x race

Table 8
SENTENCE X RACE OF DEFENDANT

Sentence (by charge)	Race			
	Aborigines		Non-Aborigines	
Imprisonment	(574)	12.5%	(105)	4.3%
Fine	(3373)	73.5%	(1972)	80.6%
Other*	(645)	14.0%	(369)	15.1%
Total	(4592)	100.0%	(2446)	100.0%

* "Other" includes good behaviour bonds, probation, dismissal of charges without penalty, community service orders, acquittals, transfers to other courts, withdrawals, etc.

Table 8 examines patterns of sentencing of Aboriginal and non-Aboriginal offenders. Obviously gross comparison of sentencing outcomes without controlling for offence type, offender record and all the other court process variables which affect decisions as to penalty, cannot provide any conclusive indicators. However it can pinpoint the existence of major differences in

overall treatment of court cases in our sample. More Aboriginal charges were likely to result in imprisonment than those against non-Aboriginals. Therefore, because of the proportionately larger number of Aboriginal charges overall, in absolute terms five and a half times as many Aboriginal charges as white resulted in gaol sentences in the courts studied.

A further complicating factor in increasing the relative proportions of Aborigines as compared to whites going to prison, was the greater number of Aborigines serving time in default when they were fined in the first instance. (see Table 9)

Table 9

TOWN X PERCENTAGE OF ABORIGINES & WHITES IMPRISONED
IN DEFAULT OF PAYMENT OF FINE
(by person not charge)

Town	Race					
	Aborigines			Non-Aborigines		
	Total fined	% imprisoned in default (part or total)		Total fined	% imprisoned in default (part or total)	
<u>Metropolitan</u>						
Midland	(180)	(52) 28.9%		(776)	(61) 7.9%	
<u>North West</u>						
Broom	(730)	(281) 38.5%		(229)	(28) 12.2%	
Kununurra	(360)	(102) 28.3%		(162)	(14) 8.6%	
Wyndham	(439)	(249) 56.7%		(70)	(5) 7.1%	
Halls Creek	(1132)	(518) 45.8%		(63)	(13) 20.6%	
<u>South West</u>						
Narrogin	(102)	(21) 20.6%		(233)	(7) 0.8%	
Gnowangerup	(117)	(45) 38.5%		(54)	(2) 3.7%	
Total	(3060)	(1268) 41.4%		(1587)	(125) 7.9%	

The proportion of Aborigines serving prison sentences instead of paying their fines in each centre ranges from 20% - 57%. The comparable range for whites is less than 1% - 20%, with most courts falling below 10%. Clearly this is a tremendous disparity, and inflates still further the already excessive proportion of imprisoned Aborigines.

b. Sentence x court constitution

Our study also indicated Justices of the Peace were more likely to use imprisonment as a penalty than Magistrates, and less

likely to utilise other non-pecuniary community based penalties (Table 10). The reasons for this may be complex; however the net affect, as Aborigines appear in Justices Courts in greater proportions than whites, is to increase their likelihood of incarceration.

Table 10
SENTENCE X COURT CONSTITUTION

Sentence (per charge)	Court Constitution			
	JP		Magistrate	
Imprisonment	(389)	12.6%	(290)	7.3%
Fine	(2413)	78.1%	(1932)	74.3%
Other*	(286)	9.3%	(728)	18.4%
Total	(3088)	100.0%	(3950)	100.0%

* This includes good behaviour bonds, probation, dismissal of charges without penalty, community service orders, acquittals, transfers to other courts, withdrawals, etc.

Conclusion

In this paper we have presented some of the preliminary statistical results from our research. The variations evident in charging patterns, provision of legal representation, and sentencing patterns according to court type, race of defendant and the town or region in which the case is heard, indicate that the criminal justice process is characterised by lack of uniformity and inconsistency which tends overall to produce a more detrimental impact on Aboriginal than white defendants.

The regional differences in patterns of charging and sentencing are apparent from the data presented within each region. In addition the nature of the justice administration differs between individual towns. For example, there are major differences between courts in Narrogin and Gnowangerup though geographically they are in the same area, and comparatively close to each other.

Proportionately more Aborigines live in isolated areas. Organisationally the administration of justice in these areas differs from more densely populated regions. In the latter, administration of the courts and policing are quite separate functions. In less populated areas both roles are performed by the one agency - the police. In addition, in the remote courts

justice is administered by lay judicial officers, and representation is rarely available. Aborigines are more likely to be charged in these courts; as a result the character and style of the justice process to which they are subject is generally quite different from that experienced by white defendants. Aborigines were more likely to be charged than whites and when convicted they are more likely to be imprisoned.

Our results indicate variations in court processes involve a complex interplay of variables whose cumulative influence produce a more negative impact on Aborigines than on other Australians. They were:

- * more likely to be charged
- * more likely to be charged with a nuisance offence against "good order"
- * more likely to have their cases heard by Justices of the Peace

Justices Courts were associated with:

- * less likelihood of legal representation
- * more sentences of imprisonment

In addition, Aborigines are more likely to default on fine payments and further accentuate their imprisonment figures.

Policies directed towards ameliorating the disproportionate impact of the Criminal Justice System on Aboriginal communities must take account of the multiplicity of factors contributing to the present situation and allow for the wide regional differences and the reasons behind these if they are to genuinely have an impact on improving the situation.

ABORIGINES, CORRECTIONS, PROBATIONS & PAROLE

Aboriginals & The Supervision Process

Correctional Services Division Darwin

Probation and Parole provides a setting within a complex criminal justice system for casework intervention. That form of intervention is well established and has developed out of an Anglo-European culture. Its ultimate aim is to stop an individual's anti-social/criminal behaviour for at least a limited period of time by assisting individual offenders to enter or re-enter the mainstream of their community. Thus, the established aim of supervision has been the habilitation or rehabilitation of offenders by helping them towards stability of accommodation, employment and associates, working with a broader conceptual framework of punishment.

Having provided the setting for casework intervention it is possible to promote casework goals (eg, employment, family reconciliation, stable accommodation). Thus the Probation and Parole Officer has a yardstick against which it is possible to measure success or failure.

Applying supervision to clients on Aboriginal communities presents some problems not common to those experienced in European communities. This paper is not meant to be definitive in this area, nor is it the writer's intention to encompass all areas that may be experienced in the supervision of Aboriginals. Its aim is rather to suggest a more useful approach to the supervision of clients in remote Aboriginal communities by noting weaknesses via the use of examples and one case study.

The question of "fit" between Aboriginals and the criminal justice system has specific relevance to the Northern Territory Probation and Parole Service. We are, or should be, regarded as post court criminal justice professionals. A significant proportion of our work, particularly away from Darwin, involves the supervision of clients in remote Aboriginal communities. The fit between a European based criminal justice institution (in this case a Probation and Parole Service) and a significant proportion of its clientele (Aboriginals) is not a snug one. Problems can and often do arise. The fact, however, that problems arise does not necessitate the abandonment of the institution. Rather, they point to a need for innovation with a Service that may be regarded as unique in Australia.

The following sorts of problems can arise:

1. Supervision in Aboriginal communities is limited mainly by the amount of time the individual officer is able to spend within that community. As communities are normally remote from departmental offices it is normal procedure to see a large number of clients over a very short time period. Nominally supervision in Aboriginal communities normally involves:

- * informal personal contact with the client (usually brief).

- * informal report from members of the Community Council and interested community members.
- * informal report from resident Police officers.

The important part of supervision, contact with the client, serves as:

- * a reminder to the client of his or her past criminal behaviour.
- * a reminder to the client of his or her promise not to cause or be involved in further trouble.
- * an opportunity to confront the client in the event of receiving any adverse reports about his or her behaviour.

Clearly, the normal practice of supervision of Aborigines in remote communities lacks the casework goals usually involved in probation and parole practice. Thus, unfortunately a positive yardstick is unavailable as a measure of effectiveness.

2. Conflicts can arise between the obligations of this Service on one hand to carry out the expectations of other criminal justice institutions (eg, police and courts) and on the other hand its obligation to promote community involvement in supervision. The imposition of well established forms of conditional release on Aborigines indicates implicitly the courts' expectations of the management of specific casework goals (eg, accommodation, employment and associates). The expectation is that by providing stability of these factors clients will be eased back into the mainstream of their community. In fact the mainstream of many Aboriginal communities would not include a majority of people in full time employment. Further accommodation is generally not as static as the case with European communities and in reality our Service has very little influence over the association between individuals on remote communities.

In many cases obligations of responsiveness to other criminal justice institutions must be weighed against responsiveness to community attitude. This Service must be responsive to community attitude as representative of traditional or customary values and also in the hope that some community responsibility in the supervision process will follow. For example: the expectation of a Magistrate when placing an offender on a Good Behaviour Bond may be that the offender will return to his community and take up some specific employment. The sentencing authority may in fact state that he hopes efforts will be made to see that the employment is maintained. However, community reaction to the offence may be so strong that the client is told he must go to an outstation for the period of the bond. Then a dilemma exists.

Failure to enlist community or family responsibility in supervision will serve to lessen the effectiveness of that supervision. A major cause of problems in this area emanates

from ignorance of Aboriginal Law and Kinship relationships. Social organisation through complex kinship structures in the past provided strict social control and severe and well defined punishment for breaches of customary law in Aboriginal societies. Thus, specific people, depending on their relationship to the individual are responsible for supervising or punishing him or her. The static nature of Aboriginal society has been undermined over a lengthy period of time and the situation varies from place to place. The right person however, must be enlisted for the right job.

The undermining of traditional authority by reliance on European criminal justice institutions (police, courts, probation and parole service) to sort out the community problems must eventually work against the aims of the criminal justice system. Community responsibility plays an important role in social control.

Probation and Parole Officers tend not to promote community involvement merely by their ignorance of who is responsible for individual offenders. Thus an important variable in supervision may be missed.

3. Conflict between our Service and Aboriginal Customary Law can also work against the supervision process. For example - the young offender who is placed on a Good Behaviour Bond for fighting would be warned that should he again come before the court for a similar offence, he will almost certainly go to prison. During the period of the bond however, kinship obligations can be such that demands are placed on that same person to fight with or on behalf of another person. Should the police again be called it is likely that the individual will later be convicted for failure to abide by conditional release.

Along the same lines formal directions in accordance with bonds or parole orders to individuals not to associate with specific others or warnings not to become involved in specific activities are likely to be either ineffectual (as an individual's obligation towards others are well established) or detrimental to traditional structures.

4. Criminal justice institutions are not a part of Aboriginal culture. They are not seen as authority figures in the traditional sense. Moreover Probation and Parole Officers whose major work takes them into the community, lack the formal paraphernalia of other figures of criminal justice authority (eg, no uniform, no courtroom situations). Given the language restraints often incurred between supervisor and client the brief contact between them is likely to be superficial.

Other problems not noted here obviously exist. However, some perspective may be gained by a closer look at a case study. The following is the dual case study of an Aboriginal couple from Groote Eylandt. Both are individual clients. However, the intertwined nature of their offences would make individual case studies impossible. The case study demonstrates some of the problems noted above. Although not a typical case, it is of

interest in that it highlights the difficulties in applying supervised conditional release in an Aboriginal situation.

Case study - Re: Helen and John

Helen and John have, within the past 18 months, been under the supervision of this Service on a permanent basis. However, within that period they have been to court on a number of occasions and have breached Good Behaviour Bonds.

Helen and John are first cousins. Helen is John's father's sister's daughter. John is unmarried and Helen has been a widow since 13 July 1981. Helen and John have been consorting since almost immediately following the death of Helen's husband. In mid-July 1981, brothers of the deceased set upon John for his involvement with Helen. Helen was at that stage wearing a special necklace to depict widowhood and which also restricted her from having any involvement with men. The brothers of the deceased began throwing spears at John, fortunately he was able to avoid them. Another Aboriginal, Claude, joined the effray, armed with an axe (Claude has an extensive criminal history, particularly in relation to violence and has a history of psychiatric treatment). Alarmed by the fight, Claude's father, armed with spears, chased John and began throwing spears at him. John was able to again avoid the spears, fell over and armed himself with a spear. He managed to spear Claude's father who subsequently died two weeks later. John was later acquitted on a charge of murder as it was felt he was acting in fear of his life.

Due to the events of July 1981 and Helen and John's ongoing relationship, a great deal of animosity from the Aboriginal community at Angurugu was directed towards the couple. Helen's family, John's family and the family of Helen's deceased husband in particular have made efforts to discourage the relationship. In 1981, Helen's mother took her to Elcho Island in an effort to break up the relationship. On her return to Groote Eylandt Helen again took up with John. Since then both families, but particularly Helen's, have sought to break up the couple by direct and violent punishment. In December 1981, Helen received a broken arm in a fight with her mother and sisters. Other skirmishes have resulted in serious cuts and bruising. Preferring to risk family animosity the couple maintained their contact, often preferring to "go bush" and avoid the populated areas of Angurugu and Mulkulla Creek Outstation where they were likely to be antagonised.

On 16 February 1982, Helen appeared in Groote Eylandt Court of Summary Jurisdiction having been charged with a total of six offences (including Break, Enter and Steal and Larceny, etc.). The offences were in relation to food and alcohol in December 1981 and January 1982 around the Alyangula and Bartalumba Bay areas, areas of almost exclusively European residents, and that both have liquor outlets.

Following her court appearance Helen again consorted with John. No formal direction in regard to the Bonds was given to Helen to not associate with John.

During March, April and May 1982, Helen and John committed a spate of offences including Break, Enter and Steal, Larceny, Being Unlawfully on Premises at Alyangula, Bartalumba Bay and Mulkulla Creek. Both were subsequently imprisoned. Helen was released in July 1982 on a second supervised Good Behaviour Bond, bolstered by suspended prison term of two months.

John was later released in February 1983, having signed a Good Behaviour Bond also bolstered by a significant suspended prison term of 18 months and bearing a condition of supervision by this Service.

John remained in prison from June 1982 until February 1983. Having been released in July 1982, Helen returned to Angurugu. The court hoped that Helen would be able to maintain the Bond whilst John was in prison.

Helen, with her sister, moved to Umbakumba (a second Aboriginal community on Groote Eylandt), approximately 60km from Angurugu on the eastern side of Groote Eylandt. There she lived with her uncle, Claude, the President of the Umbakumba Council. Helen returned to Angurugu in October 1982.

Following her return to Angurugu Claude again began hassling Helen. Helen was at one time promised as a wife to Claude and in fact he is in the right line for marriage to her. further, Claude bore animosity towards Helen, particularly as the death of his father was indirectly related to the relationship between Helen and John. Subsequently, Claude felt hostility towards Helen for two reasons. Reports from Angurugu at that time indicated Claude was demanding that Helen begin consorting with him. Being obviously reluctant, Helen escaped by spending vast amounts of time in Alyangula.

In November 1982, Helen re-offended by stealing wine and beer from houses in Alyangula and by chasing Claude at Alyangula with a rake. Helen's lifestyle at that time included promiscuity and severe alcoholism. This behaviour served to deepen the animosity felt towards Helen by her own family.

In December 1982, Helen was convicted of the above offences and her Bond breached. She was sentenced to a term of imprisonment for 7 months, but a further order was that she be released after serving three months upon entering into another Good Behaviour Bond with a suspended prison term and a condition of supervision by this Service. The hope of the sentencing Magistrate was that this Service would assist Helen to re-establish herself away from Groote Eylandt, preferably at Galiwinku, Elcho Island. It was felt that Helen would have a much better chance of remaining out of trouble if she was geographically distant from John and Claude. The community at Elcho Island was prepared to accept Helen there.

John was released onto a Good Behaviour Bond on 11 February 1983 and returned to Groote Eylandt. On 20 February 1983, John re-offended by being party to the Illegal Use of a Motor Vehicle at Bartalumba Bay. John had been drinking around the Bartalumba Bay area and had tried to break up a fight between some of his

relatives there. He arranged with a European woman resident of the area to drive to the police station for fear that one of his relatives would be seriously injured. Prior to leaving for Alyangula the woman alighted the car to inform a friend that she would be going to Alyangula. As she did so, another Aboriginal jumped in the car and he and John drove to Umbakumba.

Considering the mitigating circumstances surrounding the offence and the fact that John had not yet had any benefit of supervision, the Magistrate chose to fine John and his Bond was not breached. Following his court appearance, and in accordance with his Good Behaviour Bond he signed on 11 February 1983, John was given formal written direction not to go to the Alyangula or Bartalumba Bay areas without the permission of his supervising officer.

On 8 April 1983, Helen was released from prison. She had been provided with an airfare to travel to Elcho Island and a booking had been made for a flight to coincide with the date of her release. Whilst Helen was in prison, contact between this Service and Helen's family had been ongoing. Helen's sister and mother had promised to move to Elcho Island with Helen but at no stage made concrete effort to do so. Word was received from Darwin to indicate that Helen had not travelled to Elcho Island as planned but had attempted to cash her ticket in at the airport. She had been unable to do so and the booking had been cancelled.

Word received from Groote Eylandt indicated that whilst Helen was in prison Claude had placed a curse on her to ensure her return to the Eylandt. It was learned from a number of people at Angurugu that it was necessary for Helen to return to Groote Eylandt to have the curse lifted. Three Mala (clan) leaders were nominated as the ones responsible for the lifting of the curse. I spoke to one of these men prior to Helen's return to Groote Eylandt and was informed that the process required was short and could be done within the week. I informed this person that Helen would be returning to Groote Eylandt on 13 April 1983 but that she would have permission to remain on the Eylandt only until 20 April 1983.

Helen's sister had travelled to Darwin and arrangements were made for Helen to return to Groote Eylandt on 13 April 1983.

Prior to Helen's return to Groote Eylandt, I spoke to John and warned him against associating with Helen. No formal direction was given as such as it was felt that this would have been ineffectual, more direct attempts had failed in the past.

Soon after this, Helen and John again began associating with each other. Both families remain strongly opposed to the relationship. The two were again forced to live in a crude camp in the Bartalumba Bay area. No efforts were made by Helen to ensure the lifting of the curse. Subsequently, Helen and John were arrested by the police in May 1983 for failing to comply with the conditions of the Recognizance to be of Good Behaviour. John was arrested for being found in the Bartalumba Bay area, without permission. Helen was arrested for failing to depart Groote Eylandt in the allotted time period.

The matters of Breach of Recognizance for both Helen and John were dealt with in court at Groote Eylandt on 8 June 1983. Submissions on behalf of John were that his failure to abide by the former Good Behaviour Bond were directly related to family antagonism of his relationship with Helen. He stated finally that he wished to be released on a further Good Behaviour Bond but there be a residential condition that he live away from Groote Eylandt, at Baniyala, a small mainland outstation of Yirrkala. The Baniyala community had, in August 1982, refused permission for John to live at the outstation. No concerted attempt was made by the Court to see if John would be welcome in the community.

Submissions on behalf of Helen were similar to John's except that she stated she wished to go to live at Elcho Island, away from Groote and John. The Chief Magistrate made it clear prior to sentencing that should Helen and John wish to live together it was their own business. In relation to the curse, the Chief Magistrate took submissions that the curse still had to be lifted prior to Helen's departure from Groote Eylandt. He made subsequent demands that the curse be lifted in the police cells at Groote Eylandt. Following this demand, word was received from community leaders at Angurugu that there was no need to lift the curse and that Helen could go.

In sentencing Helen and John, the Chief Magistrate ordered that they could enter into a Good Behaviour Bond with a condition of supervision and with an added condition that they leave Groote Eylandt. No direct alternative place of residence was nominated. Arrangements were made for the release of Helen and John upon confirmation by members of the Northern Territory Police Force of travel arrangements for both individuals. A clear direction was given to John by his supervising officer that he was to live at Baniyala and under no circumstances associate with Helen. A clear direction was given to Helen that she was to travel to and live at Elcho Island and under no circumstances associate with John.

Helen's family again failed to initiate any plans for a plane charter to Elcho Island. Subsequently the Police, who had been ordered to keep the two in custody until arrangements were made for them to depart the Eylandt, placed both Helen and John on a chartered plane (paid by John's family) to Baniyala. This was despite a clear direction to both that under no circumstances were they to live together.

A trip to Baniyala in July 1983 revealed that Helen and John are still living together at Baniyala. Although initially reluctant to allow the two to live together at the outstation, the Baniyala community leader stated they refused to be separated and subsequently would be allowed to stay. The writer subsequently revoked the earlier direction placed on them now allowing them to live together. Helen's Good Behaviour Bond terminates on 16 December 1983. John's Good Behaviour Bond terminates on 16 June 1984.

At present, reports from Groote Eylandt indicate both families are still unhappy with arrangements. Both Helen and John have made it clear to the writer that they would ignore any direction given to them not to associate.

Discussion

Points worth highlighting in the case of Helen and John include:

- * The close relationship between Helen and John would not have attracted a similar hostile family reaction had they been Europeans (even though the relationship may have been frowned upon). The continuing family reaction, it should be noted, is an obligation on behalf of the family and one that has had important bearing on their numerous appearances in Court.

Further, Helen and John are presently only tenuously protected from ostracism by geographical distance. The writer has been informed that there has been no change in community attitude. In fact, the writer has been criticised by some members of the Angurugu community for allowing the relationship to continue. Yet a direction forbidding the clients to associate would be unreasonable given their refusal to live apart and would undoubtedly result in a breach of their Good Behaviour Bonds and their likely return to prison. A dilemma thus exists whether the unyielding individual clients should be protected at the expense of a strict customary law.

- * The curse placed on Helen by Claude deserves particular mention. Curses at Groote Eylandt are not uncommon and can be costly to the community to have lifted (especially in the instance of a cursed building). As a result of the curse, Helen was forced to return to Groote Eylandt thus destroying a good chance of a solution to the case. Although efforts were made to prompt the lifting of the curse within a specific time period, it remains unknown as to whether those efforts were directed at the correct individuals. The demands of the Court in June 1983 to have the curse lifted in the police cells probably were a major factor in subsequent claims that the procedure required for the lifting of the curse would be unnecessary.
- * In retrospect, the formal direction placed on John in February 1983 restricting him from the Alyangula, Bartalumba Bay area may have been an unreasonable one. Aboriginal relationship with land has an important significance. Each clan on Groote Eylandt has areas of land with specific importance either on the Eylandt or on the mainland. The lands belonging to John's clan includes the Bartalumba Bay area. Thus it is likely that John was restricted from visiting areas of significance to him. Given the pressure

that John came under after he again took up with Helen, it is highly likely that he would seek refuge in his homeland. It could well be argued that a direction restraining an Aboriginal from going to his homeland (and sites of particular importance) would be an unreasonable one.

This factor is particularly important when considering that John's failure to abide by that direction resulted in breach of a previous Good Behaviour Bond.

Conclusion

Problems obviously exist in the application of forms of conditional release to Aboriginal clients. The highlighting of some problems however should not mean the abandonment of probation and parole for Aboriginals in remote communities. Rather, this Service should attempt innovations specifically aimed at increasing the relevance and significance of the Service we provide.

A major difference between supervision of clients in European communities and Aboriginals on remote communities lies in the difference between community responsibility. In European communities institutions like employers have covert responsibility in providing assistance while probation and parole officers provide overt assistance. In remote communities responsibility is more overt. Remote communities are smaller and a high proportion of the population are inter-related. The confidentiality and stigma normally attached to punishment in European communities is missing. A high number of people in remote communities are interested in an offender's performance whilst on conditional release. Community and family responsibility should play a major part in the supervision process.

Community responsibility is undoubtedly an asset for our Service and should be promoted by this Service in a number of ways:

- * formalised training of a field officer from each major community. This field officer would serve to extend the supervision process to a "resident" supervisor with a closer liaison between clients and community attitude.
- * providing funds to community councils for the employment of a field officer (directly responsible to the council with accountability to this Service). This would not necessarily be a full time job nor would it replace or degrade the position of probation or parole officer presently held.

Such a position would have advantages of:

- locating the focus of responsibility back into the community.
- placing supervision within the cultural context of the client.
- providing more comprehensive monitoring of the client's behaviour.
- providing a formalised point of liaison between probation and parole officers and the community.
- helping to educate the community of the meaning of probation and parole and therefore hopefully improving community responsibility and the supervision process.

- * by promoting the collation of up-to-date anthropological works in an attempt to educate field officers in the understanding of important "behind the scenes" network of social organisation. This would promote an awareness of the pressures that are or could be brought to bear on individual clients.

The comments listed above do not break new ground and in fact have been seriously considered in the past. The main aim of this paper has been to express the belief that through community responsibility in the criminal justice system, here in the supervision process, an important variable in social control will be strengthened.

However, serious questions exist in regard to the "fit" between Aboriginals and the whole criminal justice system. Should we promote community responsibility for the supervision of offenders when:

- * the community has no say in sentencing those offenders?
- * offences occur away from communities?
- * offences are not breaches of Aboriginal custom?

Consideration of the need for community responsibility should be taken into account by all institutions of the criminal justice system. Without community input the imposition of alien punishment measures will serve to continue the devolution of customary authority structures, in turn limiting a strong possible source of social control. This has specific relevance to a probation and parole service.

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Proposal To Establish An Aboriginal Resource Unit

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Introduction

The idea of establishing an Aboriginal Resource Unit within the Department of Corrective Services came about in response to the many and diverse problems experienced both by the Department's Aboriginal client population and by Aboriginal staff, including NESA trainees, working in the Department.

The aims and objectives of the Unit were formulated to provide a co-ordinated effective support service for Aboriginal prisoners, probationers and parolees and their families. The guiding principle of the Unit will be the recognition of the specific needs and rights of Aborigines in custody and on conditional liberty. The Unit will also function as an advisory body to the Corrective Services Commission on Aboriginal matters and as a link to increase the understanding of and information available to Aboriginal and non-Aboriginal staff, Aboriginal clients of the Department and the general community on all aspects of Aborigines and imprisonment.

The aims and proposed functions of the Unit were presented in draft form at the Aborigines and Criminal Justice Seminar, Woden, ACT, 12-16 September 1983. They demonstrated the Corrective Services Commission's commitment, at that time, to improving the relationship between the administration and both the Aboriginal client population and Aboriginal staff in the Department.

Currently, the proposal has been approved by the Corrective Services Commission, and approaches have been made to the State Minister for Aboriginal Affairs for funding and support.

The establishment of the Unit, once it is fully operational, will be a positive indication of the practical application of resources to overcoming many of the problems raised at the Seminar in relation to the post court area.

Background

The National Prison Census, 30 June 1982, reveals that Aborigines, both male and female, constitute 5.8% of the prison population. However, when this figure is considered in the context of the percentage of Aborigines in the population of NSW, approximately 0.8%, the rate of imprisonment of Aboriginal people in relation to their numbers in the general population assumes its full significance.

William Clifford in his article, 'An Approach to Aboriginal Criminology' (ANZ Journal of Criminology, Mar 82) states:

In March 1981, NSW had 217 of its 3,670 prisoners Aboriginals, ie just under 6%. If the ACT and NSW populations be combined ... [given that NSW institutions accommodate ACT offenders] the Aboriginal imprisonment rate was 600, compared with 72 for non-Aboriginals. [Per 100,000.]

Clifford goes on to say:

... You have to believe either that Aboriginals are the most criminal of minorities in the world or that there is something inherently wrong with a system which uses imprisonment so liberally.

Liberal imprisonment and discrimination on the scale as is currently the case has been heavily influenced by an historical legacy of oppression which has systematically denied Aboriginal people their rightful place in Australian society.

Any attempt to introduce change that addresses this question would need to take into account the impact such a history has had on successive generations of Aboriginal people and the manner in which it has influenced the operations of the criminal justice system as evidenced in the statistical data.

An important first step in understanding how individual Aborigines fare in contemporary social systems, is an awareness of the nature of systemic discrimination and how it operates. It is common practice, for example, to interpret isolated incidents where an Aborigine does not "fit" the dominant culture, as individual failures rather than the failure of the system that does not in general recognize the specific needs of Aboriginal people.

There is a growing social consciousness of the difficulties of Aboriginal people trying both to integrate into the Australian multicultural society and at the same time retain their cultural identity. For Aborigines to have a rightful sense of identity and pride in their own culture would go a long way to overcome "antisocial" attitudes and lack of motivation, and would develop a sense of self worth - the first step in achieving a productive life.

A coordinated approach to the difficulties experienced by Aborigines in many diverse situations and one that operates in accord with the needs of Aborigines themselves, would have more chance of overall success in many areas in which now are areas of conflict.

This is a broad canvas and touches on areas outside the responsibility of this Department. However, it needs to be stated to get an overall picture and an understanding of the situation on a wider scale so that clear objectives can be identified and realistic strategies that can achieve these objectives can be put into practice.

There are government bodies that have addressed these issues and recognized the need at this point in time for

alternative Aboriginal organizations that can offer support to their people. Youth and Community Services "Gullama" is one such example. TAFE, the Housing Commission, Department of Health, NSW Police and the Department of Education all have identifiably Aboriginal services.

Department of Corrective Services

Departmental research (Gorta, Hunter & Gordon, 1982) has suggested that Aborigines were more likely to "re-offend or breach" than non-Aborigines, have less access to Work Release programmes, have a lower level of education (and "returning to prison is more likely where education is lacking"), a higher incidence of commitments to juvenile institutions and have less contact whilst in prison with professional staff.

Currently, individual difficulties experienced by Aborigines in prison have been considered and to some extent resolved on an ad hoc basis. Complaints received in relation to, for example, access to support staff, decisions taken by committees and boards concerning classification, location and parole, harassment and discriminatory treatment, need to be considered within a broader cultural context and carefully researched from that understanding.

As far as Aborigines in prison are concerned, they have consistently wished to have access to Aboriginal welfare workers and information from and contact with people of their own culture within various Aboriginal organizations.

Problems too have been experienced in various sections of the Department with the employment of Aboriginal staff. The number of NESA trainees and welfare workers that have encountered difficulties is significant in that it supports the fact that the problems are greater than can be accounted for by "personality clashes" or "ineffective workers". The indication is that it is the result of a clash of cultures more than anything else. There is an obvious need for support and advice for both Aboriginal workers and for staff in the Branches and other areas who employ Aboriginal people so that good working relationships can be established which is the essential basis of our major concern, that of the maintenance and development of a viable service to Aborigines within the prison system.

Given that this Department has the responsibility for both Aboriginal offenders and for Aboriginal staff, and problems have emerged for these two groups, it would seem timely to establish an Aboriginal service for Aboriginal people.

An Aboriginal Resource Unit could fulfil both these conditions:

- * firstly, it could upgrade service to Aborigines in the prison system by maintaining and developing networks already established, providing information, helping sensitise staff by input into training courses on the

nature of prejudice and creating a specific identity for Aborigines in the system

- * secondly, the Unit would offer employment opportunities for Aboriginal people, which would be in accord with the EEO Management Plan to increase the percentage of Aboriginal staff in the Department in the 83/84 period. It would also offer support to Aboriginal staff and trainees already in the Department.

The Resource Unit would not operate as an elite Aboriginal group that loses grass roots contact with the people it is servicing but its responsibility would be to keep the interests of Aboriginal prisoners within the overall context of subsequent productive community living in focus at all times. This would mean, for example, coordination of realistic training and education programs closely linked to available job opportunities or alternative options, after-care support and counselling through contact with Aboriginal community organizations and ongoing contact with this network to prevent recidivism.

It is therefore proposed that the Corrective Services Commission considers the establishment of an Aboriginal Resource Unit.

Aboriginal Resource Unit

The overall aim of the Unit will be the coordination of needs and problems being experienced by Aboriginal people and specific services that can remedy these needs and problems. It will provide assistance to the Commission in the formulation and development of policy initiatives relating to Aboriginal staff and to Aboriginal offenders within the prison system.

The Unit will be based on the principle of the recognition of the specific needs and rights of Aborigines in custody and on conditional liberty and the needs of Aboriginal families and the general satisfactory settlement of offenders back into the community.

Proposed functions of the unit

- * identifying needs and problems of Aboriginal people under the Department's care
- * developing policies and practices to overcome deficiencies in the administration and its handling of Aborigines in prison and on conditional liberty
- * integrating Aboriginal policies and practices into the main administrative procedures of the prison system
- * providing back-up services and advice in the training and placement of Aboriginal workers and NESA trainees in the Department

- * Providing cultural awareness training input into training and staff development courses for all staff.
- * Liaising with Aboriginal community organizations, to provide a support resource to Aborigines in prison and on conditional liberty, and to facilitate ex-offenders' return to the community. This liaison work could be directed towards
 - assisting in the expansion of the Community Services Orders scheme in respect of Aboriginal inmates, especially in towns where there is a major Aboriginal population
 - complementing the work of the Probation & Parole Service and improving the provision of support services to Aborigines on parole
 - provide an Aboriginal Studies program in institutions
 - further identifying Aboriginal organizations that could offer assistance to probationers and parolees and ex-offenders, in the form of counselling, accommodation, budgeting, provision of information on educational options, apprenticeship schemes and employment opportunities
- * The major Aboriginal organizations involved are:
 - Aboriginal Legal Service (Metropolitan and Regional Offices)
 - Aboriginal Christian Fellowship (Llandillo)
 - Aboriginal Housing Company
 - Aboriginal Education Consultative Group
 - TAFE and Aboriginal Education Unit, Department of Education
 - Youth and Community Services - Gullama Centre
 - Aboriginal Employment and Training Branch, Department of Employment and Industrial Relations
 - Aboriginal Community Health Centre
 - Department of Social Security (Redfern Office)
 - Aboriginal Hostels
 - Aboriginal Children's Services and the
 - Ministry of Aboriginal Affairs
- * Functioning as a link to:
 - increase the understanding of, and information available to Aboriginal staff, prisoners and ex-prisoners
 - increase the understanding of, and information available to staff in the Department about the special circumstances surrounding Aboriginal offenders in the prison system and Aboriginal staff in the Department

- increase the understanding of, and information available to the general community about Aborigines and imprisonment.

Location of unit

The Unit could be partially located within the Department to have on-the-spot access to the Commission and Departmental facilities, and partially community based to accommodate the needs of ex-prisoners and the families of prisoners who would feel perhaps reluctant to come into the Department. This is an issue, however, that needs further discussion.

Staffing structure

It is considered that the Unit's staffing structure consist of:

- * 1 Coordinator to administer the Unit
- * 1 Assistant Coordinator who would also have research responsibilities
- * 1 Staff/Liaison Officer (Training)
- * 5 Field Officers
- * 1 Stenographer/Typist
- * 1 Clerical Assistant.

Duties and responsibilities of unit's staff

There is a need initially to make provision for Resource Unit Officers to familiarize themselves with problems encountered by Aborigines within the prison system - problems which are not only difficult to define but also are often not seen as problems by non-Aboriginal staff already working in the area.

It is not envisaged Resource Officers would take the place of professional staff, for example, Welfare Officers. Rather, they would provide a much needed link between these staff and Aboriginal offenders in view of the lack of "fit" currently experienced.

After this analysis of the areas of difficulty, clearer guidelines will be established as to the more specific role and duty of the Resource Officers. This procedure would ensure the effective operation of the Unit both short and long term.

The specific duties of the Unit's staff which can be stated at this stage are as follows:

Coordinator

The overall responsibility for the effective management of the Unit and fulfilling the operations of the Unit, as identified above under the heading Functions of the unit.

Assistant Coordinator/Research

To assist Coordinator in fulfilling the operations of the Unit as identified under Functions of the Unit above. To be responsible for research programs as directed by Coordinator. (This research should provide grounds for more informed action to ensure the protection of Aboriginal inmates, basic human rights and to promote more effective prison management). To collate reports taken from Area Officers. To report monthly to Coordinator on field activities of Area Officers.

Area Officers

(Identified locations see below)

To establish network of contacts within their areas. To visit all institutions within their areas as frequently as possible. To ensure all Aboriginal inmates are interviewed as soon as possible upon arrival at institutions. To discuss and identify all problems that inmates or families of inmates may have and refer to appropriate bodies, or if possible to pursue themselves. To assist educational and vocational group/bodies in setting up and maintaining programmes that are and will be beneficial to the people concerned. To work and maintain a good relationship with Custodial and Professional officers and other outside professional support groups. To keep daily records of all activities and duties and report to Assistant Coordinator on a weekly basis. To meet and report to Coordinator once a month to discuss programs and all problems arising from such. An arrangement to be set up amongst Area Officers for there to be a 24 hour phone contact.

Monthly recall meetings will be held at regular intervals. The purpose of these meetings would be:

- * to identify deficiencies in the operations of the Unit
- * to discuss areas of dissatisfaction
- * to develop strategies to overcome both the above
- * to set deadlines for improvement
- * to concentrate on areas of weakness and build on strengths.

A month prior to setting up the Unit the Coordinator and Assistant Coordinator to:

- * visit all institutions
- * introduction to Superintendents, Officers and other professional staff in the institutions

- * be informed of and to familiarize themselves with the policy, practices and general operations of the Department, and the same concerning Government agencies and Community organizations that have contact with this Department
- * to participate in orientation training, other appropriate Staff Development activities, for example, EEO Training, Assertion Techniques, etc
- * introduction to Branch/Division head and professional staff, etc
- * plan ARU staff positions, duty statements itinerary.

Location of Area Officers

<u>Metropolitan</u> 1 officer	Malabar Prison Complex
<u>Western District</u> 1 officer	(Parramatta (Parklea (Silverwater (Mulawa (Norma Parker (Emu Plains
Above officers to rotate	(Cessnock (Maitland
<u>Northern Region</u> 1 officer	(Grafton (Glen Innes
<u>Western Region</u> 1 officer	(Bathurst (Newnes (Oberon (Kirkconnell (Broken Hill - 1 x month if necessary
<u>Southern Region</u> 1 officer	(Goulburn (Berrima (Mannus (Cooma (Laurel Hill

Staff recruitment & selection

Aboriginality will be one of the essential criteria in the selection of staff. Procedures for the recruitment of staff would follow Departmental guidelines. An outreach advertising program would be followed to encourage a large pool of applicants to apply.

It would be essential for the proper functioning of the Unit to have staff who have the appropriate experience and

qualifications. Also, staff members will be selected on the basis of personal stability, knowledge of inherited culture and willingness to co-operate with others involved in the criminal justice system.

Close attention will be paid to the recommendation of the local Aboriginal community in the selection of regional staff.

Staff salaries

Approximate salaries per annum to be as follows:

<u>Staff</u>	<u>Salary Range</u>
Coordinator	\$ 27,693 - \$ 28,474
Assistant Coordinator	\$ 24,105 - \$ 24,894
Staff Liaison Officer (Training)	\$ 21,688 - \$ 22,320
Five (5) Area Officers	\$ 19,103 - \$ 19,636
Stenographer/Typist	\$ 13,528 - \$ 16,807
Clerical Assistant	\$ 14,374 - \$ 15,954
	<u>\$196,903 - \$206,629</u>

Salary award increases -

10%		<u>\$ 19,600</u>
	Total	<u>\$216,593</u>

Transport - the use of

5 vehicles	\$ 15,000

Travelling expenses

Subsistence Allowance	\$ 4,200
Air Fares	\$ 2,200
TOTAL	<u>\$237,993</u>

These figures are based on operation and salary costs for a period of 12 months, when the amount will be subjected to review.

Office space

It is considered that if the Unit is to be centrally located within the Department, the Department would allocate office space and fund equipment. Since the Area Officers would be out in the field for the most part, the office space required for the administration of the Unit would not exceed two offices.

Funding

Application for funding the Unit should be made to the State and Federal Ministers of Aboriginal Affairs.

Evaluation of the unit

It is expected that a periodic evaluation of the Unit will be made by the Department of Aboriginal Affairs, the Ministry of Aboriginal Affairs and community based Aboriginal organizations.

An annual report would be submitted to the Commission. Any research done would be also submitted before publication.

Recommendation

- * That the Corrective Services Commission support the proposal to establish an Aboriginal Resource Unit
- * That the Ministry of Aboriginal Affairs cooperate in making appropriate approaches for funds, and assist in the establishment and development of the unit
- * That an approach be made to both the Federal and State Ministers of Aboriginal Affairs to consider funding the proposal.

MISFITS: ABORIGINAL CULTURE & PRISON

Patricia Lowe
Regional Prison
Broome

Introduction

I joined the Western Australian Prisons Department in 1976, and spent my first two and a half years working at Fremantle Prison, then the main maximum security prison in this State. Here I developed an interest in Aboriginal prisoners, and persuaded my Director to transfer me to Broome, in the far North. Broome is a much smaller prison rated Medium Security, which holds between forty and eighty prisoners, depending on the season. Our catchment area extends from Fitzroy Crossing to La Grange. The next nearest prisons are at Wyndham and at Roebourne, both of which I visit at intervals.

I am employed as a Clinical Psychologist, though much of what I do would hardly be recognised as psychology by most of my colleagues.

In Broome, as in Wyndham and Roebourne Prisons, the great majority of prisoners are Aboriginal. However, we do not hold all prisoners who come from the North. Those rated Maximum Security, because of the length of their sentence, seriousness of offence, or history of escapes are initially transferred South, to either Fremantle or Canning Vale Prison in the Metropolitan area. From there they normally make their way North again later in their sentence. Thus at Broome we hold prisoners serving sentences from a few days to Life, their offences ranging from drunkenness or non-payment of a fine to Wilful Murder. Most of my customers are, of course, Aboriginal and most of them male.

The population

The term Aboriginal, which legally may be applied to anyone so identifying him or herself, regardless of degree of racial mix, misleadingly implies a homogeneity amongst people who are actually very diverse. People defining themselves as Aboriginal range from tribal full-bloods living in remote traditional communities in Northern and Central Australia, through full-blood and mixed-descent mission, reserve, and city-fringe inhabitants, to middle-class townspeople.

It is impossible to make valid generalizations about such a heterogeneous assortment of people, and I shall restrict my discussion to those people I know best: Aborigines from the Kimberleys and North-west of Western Australia. Even here, however, there are differences between town, mission and community; between coast and desert; between one community and another. To give a single illustration: Fitzroy Crossing and the surrounding district, having an Aboriginal population of around 1,500, comprises ten distinct communities. Some of these have come under heavy missionary influence, shedding many of their tribal customs and beliefs as a consequence. Others remain strongly traditional in outlook. There are noticeable differences

in command of the English language and in level of confidence in dealings with white people, between prisoners coming from different communities even within the same broad area.

What follows is an account of some features of the culture and customs of Aborigines from the more traditional tribal communities in the North and North-West of Western Australia, their relevance to imprisonment and the problems and misunderstandings they may generate.

Names

Aboriginal people, unlike Europeans, have a number of names. Besides several personal names, including nick- and ritual names, they may also be referred to by their section or subsection name, their 'skin' name or their totemic name, depending on who is referring to them, and under what circumstances. In addition, they usually have a 'white-feller' name, for the purpose of their transactions with white society.

The question of names is further complicated by the taboo that is placed on the use of names of recently deceased persons, or even names similar to these. A living person having the same name as that of a deceased person is thus obliged to use an alternative. This practice may cause embarrassment in interactions with the police and prison officers, who may know a person by his taboo name. He will be addressed by his former, taboo name in unwitting violation of Aboriginal custom or, if he offers an alternative, is liable to be charged with giving a false name. At the least, he will be recorded as having an alias.

In addition to this, it is not customary, and considered impolite, for Aboriginal people to ask someone his name directly, or to say one's own name. They more often address one another by a relationship name, such as Cousin or Uncle. One need scarcely point out that the European custom of prefacing every transaction with: "Name and date of birth?" is out of kilter with Aboriginal practice.

Kinship

Kinship is the single most important factor in the organisation of Aboriginal society. How each person relates to and behaves towards everyone else is defined by his or her place in the kinship system. Kinship defines people's obligations to one another, as well as their manner of address and approach.

Because behaviour is almost wholly prescribed by kinship, strangers from other areas are assigned a position within the kinship system, whether or not a blood tie can be established. In that way, everyone knows how to relate to the newcomer who now has classificatory fathers, mothers, brothers, cousins and so forth, and is expected to behave towards each of them in the appropriate manner. White people well-known to the community are sometimes assigned a place in the kinship system in the same way.

The converse of this is that because most white people remain outside the kinship system their relationship is undefined, and there is no prescribed manner of behaving towards them. This is probably one reason for the awkwardness of many interactions between black people and white.

Kinship customs may affect prisoners in various ways:

- * AVOIDANCE RELATIONSHIPS are observed between certain kin, notably in-laws, including all classificatory members of those categories. People having an avoidance relationship may not normally speak to or even look at one another. Prisoners having this sort of relationship may inadvertently be placed together in a cell or on a work party. Because of their reticence and fear of ridicule in explaining such taboos to uncomprehending white people, they make no complaint, but may find themselves being charged for failing to work, or for disobeying an order. Requests for a change of cell or job may be misunderstood and refused.
- * OBLIGATION RELATIONSHIPS may cause problems if an Aboriginal person is placed in a position of authority over other Aborigines. Such a position does not override kinship requirements, and may conflict with obligations and respect owed to particular kin. Police Aides or Aboriginal prison officers may find themselves under strain in this way.
- * SIGNIFICANT RELATIONSHIPS are not always defined in the same way as for Europeans. Thus, in some tribal groups a boy's father usually has little say in his upbringing and discipline, which is more often the province of his maternal uncle, who may also have the responsibility of putting him through the Law. This is the basis of an important lifelong attachment.

Aboriginal people make less distinction between siblings and cousins, hence the use of the term "cousin-brother" or "cousin-sister" as an attempt to clarify such relationships for the benefit of Europeans. The recognition of classificatory kin without actual blood ties has already been mentioned.

The practice of polygamy means, not only that one man may have several wives, but that his offspring have several mothers, all of whom they address as Mother.

Some appreciation of the complexity of Aboriginal relationships becomes necessary when, for example, decisions are being made about compassionate leave for prisoners to visit someone in hospital or to attend a funeral. The Western Australian Prisons Department has defined close relatives as those composing the nuclear family; however we are currently drawing up a policy to take account of Aboriginal practices. It will be interesting to see how we accommodate them.

Language & speech

White officials often assume, perhaps as a result of their experience in towns and cities, that all Aboriginal people speak English. While most Aborigines today, even in the North, understand some English, for many it remains only a second language in which skills range from rudimentary to fluent. Kriol, a type of pidgin, rather than English is the lingua franca. Many problems derive from the assumption that everyone speaks English, failure to understand often being interpreted as stupidity. I have several times read in reports by prison officers on Aboriginal prisoners I know quite well the confident statement that X is "of low intelligence", and in one case "hard of hearing", when I, who ought to be better qualified to make such a statement, have found the prisoner quite normal in both respects.

Traditional Aboriginal people tend to be both polite, and shy of white people. This shyness is hard to over-estimate, and often amounts to fear. When faced with a barrage of questions they do not understand, they either say nothing or, if pressed, offer the answer they think is expected. Even the question: Do you understand? is likely to be answered affirmatively. Anything to avoid compounding their embarrassment and to escape the painful situation. There are obvious implications here for the Police and Courts as well as prisons.

In Western Australia prisoners are interviewed from an "Admissions Check List" when they first arrive. This includes such questions as the following:

"Does your wife require cash assistance?"

"Do you require legal assistance?"

"Do you have any property that needs safeguarding?"

I have had prison officers fresh from Perth asking tribal Aborigines these questions in this form. A blank response was met with a repetition of the same questions in a louder voice.

Even where Aborigines are reasonably fluent in English, communication with white people may be hampered by differences in style and sentence construction. Aborigines tend to converse, at least on serious matters, at a much slower speed than Europeans. When asked a question they may deliberate in silence for some time before answering, giving no clue as to what, if anything, is going on in their heads. (A European will either answer immediately or fill the gap with talk, perhaps "thinking aloud".) When an Aboriginal person fails to respond at once, we assume either that the person had not understood (is stupid), has not heard (is deaf), or is refusing to answer (is obstinate). Our own anxiety level rises. We either become impatient and try to prompt, or fill the gap with further questions, which only serve to confuse. It is surprisingly difficult for us to overcome this habit and simply wait in silence and without staring at the person or twitching until the answer comes. Even eye contact has different significance, and to look long and piercingly at someone may be construed as anger. I have cultivated the ability to relax, look at the ceiling or out of the window, and think my own thoughts

during this "wait" period. An answer usually does come, though on occasion I have had to wait for as long as five minutes. In authoritarian situations such as prison, this European tendency to expect quick-fire answers is further exaggerated, and the anxiety of the Aboriginal person heightened.

Particular sentence constructions which do not occur in Aboriginal languages may also cause confusion. Both the construction "either...or", and negative questions, common in English, such "Didn't you do it?" or "You're not married?" are likely to elicit "Yes" responses: in the first instance because one or other of the "either...or" options was correct; in the second in the sense of agreeing: "Yes, I didn't do it; Yes, I'm not married". Such linguistic practices are more than mere curiosities; they can make an important difference to the meaning of statements given to the police, of interviews with lawyers, of answers to cross-examination in Court, as well as of day-to-day communications within the prison system.

Time concepts

Time concepts are notoriously different amongst Aborigines from amongst watch-conscious white people. Tribal Aborigines seldom refer to clocks or calendars. They are unlikely to know their dates of birth. (White officialdom, unable to tolerate such uncertainty, has designated a sort of Aboriginal birthday, after the style of the race horses' birthday: 1 July of the year in which a person is thought to have been born.) Neither do the dates associated with their prison term have much meaning for them. E.E.D. (Earliest Eligible Date for parole), E.D.R. (Earliest Date of Release) and Two-thirds-time (allowing one-third for remission) are mysterious terms, little understood. Few prisoners except those serving very short sentences are aware of their date of release, or what it means in terms of passing time.

Nevertheless, they are as anxious as anyone else to know when they get out, and frequently ask for their release date, which they promptly forget.

One old man, serving several years for manslaughter, understood his sentence only in terms of the seasons, and was happy when he finally grasped that he would be released "not this dry season, but after the next one". Trying to explain concepts such as indeterminate sentences and conditional release stretches the ingenuity even further, particularly when it also has to be explained that a decision on these matters rests with a nebulous body of people known as the Parole Board, never to be encountered by the prisoner, and residing in Perth.

This sort of incomprehension is not, of course, limited to prison settings. Court procedures and language are hard to follow even for many unsophisticated white people; for most Aborigines they are mumbo-jumbo. To give but two examples:

One old man, Fred, charged with murder but pleading guilty to manslaughter, was interviewed and primed at the prison by his Counsel. In court the next day, he was clearly nonplussed, despite his Counsel's efforts to reassure and explain. It wasn't

until the trial was over, and his Counsel removed his wig, that Fred's face lit up as he recognised "that old feller that came to see me yesterday!".

Another older man, fluent in several languages not including English, went through his trial for Wilful Murder, was convicted and condemned to death. This he understood through his interpreter. It was some time after the trial that his solicitor thought to visit him at the prison to explain that, although the judge had said he must be hanged, he didn't really mean it, and the old man would actually remain in prison for a long time instead. Nevertheless, the same old man was held in the death cells in Fremantle Prison for several months pending a reprieve, and the Prison Regulations require that "nothing which would lead a prisoner under sentence of death to believe that his sentence might be varied in any way is to be ... communicated to him in any way".

Attitudes to imprisonment

Tribal communities often recognise as valid only their own system of crime and punishment. This may mean either that a person facing the white law is not considered to have committed a crime, in which case his punishment is seen as irrelevant or unjust, or if he is deemed guilty of a serious offence against tribal law, imprisonment is not regarded as an appropriate or "real" punishment. Retribution belongs to the community and may merely be postponed until the prisoner is released. In some cases known to me, prison has even served as a refuge from tribal justice. In other cases prisoners have worried about the possibility of relatives being obliged to accept punishment on their behalf.

While frequent imprisonment for drunkenness or dishonesty may lead an Aboriginal to lose status and the approval of his people, prison may also be seen as an unwarranted interference with tribal life. Young men may miss important tribal initiation ceremonies through being in prison. Since an uninitiated man is considered immature and therefore irresponsible, tribal elders are thus frustrated in their own endeavour to "make a man of him". Lengthy postponement of the initiation process may lead to sexual problems and social ostracism since uninitiated men are not permitted to take a wife or engage in sexual activity.

I should like to give one or two illustrations of this perceived irrelevance of the white system of justice.

ALFRED - forfeited bail because he failed to turn up for his court appearance in Derby. At the time he was in bush, engaged as a functionary in tribal business. Ironically, his role was to assist in administering a tribal punishment to two young men from his own community. Although Alfred was anxious to fulfil the bail requirements, his father, a tribal elder, took the view that white-feller law was of secondary importance and could wait. He refused to allow his son to leave the bush proceedings which occupied several days, and Alfred was obliged to abide by his father's wishes. He thus forfeited bail, and was

rearrested when he returned to town.

CYRIL is serving a life sentence for murder. He has always maintained, in a low-key way, that he is innocent. This in itself is unusual. However, all his fellow countrymen say the same thing. Not only have many of them told me categorically that Cyril is innocent, but also that another man is known to be responsible for the killing. His guilt was established by divination, and he has already been dealt with by tribal justice. He is even said to have made a death-bed confession. Yet the Aboriginal Legal Service tells me there are no grounds for appeal. One version of the story, and I have heard several slight variations, is that the victim, an elderly man, had been hexed or "sung" by the allegedly guilty party. He was there "already dead" in tribal law when the blow that actually killed him was struck. Whoever struck that blow, and it may have been Cyril, was merely the unwitting instrument of a death for which sorcery was responsible. But try telling that to a jury.

Notwithstanding the perceived irrelevance of prison to many Aborigines, at the same time it is often seen in a favourable light for what sentencers would consider the wrong reasons. Long sentences are unpopular, and prisoners do chafe at them, particularly when they are sent to metropolitan prisons for extensive periods. But shorter sentences of three or six months are often welcomed as "time out" from the rough and tumble of fringe dwelling. Some prisoners are candid about this. They appreciate the good food, the peace and quiet of a more orderly existence, the TV and cards, the spell away from alcohol, and the company of the friends they meet again. This is in contrast to the attitude of most white prisoners, and of course reflects most of all on the conditions under which the Aboriginal prisoners normally live. Some regular customers become dependent on prison: on one occasion a man, released one day, broke back into the prison the following night because he was hungry.

Aborigines & psychology

Mabarn or "Witchdoctors" are the closest equivalent to psychologists in Aboriginal culture. Both are professional problem solvers, though their methods are a little different, as are the problems they attempt to solve. By all accounts Mabarn are rather more successful at their craft; certainly their credibility rating is higher.

Few witchdoctors are female; still fewer white. And their methods do not include the close interrogation of their clients about their sexual practices. I said earlier that an Aboriginal person will normally answer a question if he is given a long enough time in which to deliberate. Sometimes, however, when the occasion is altogether too threatening or embarrassing, he will seek refuge in total silence.

The classic scenario is of an earnest psychologist, required to prepare a report for the Courts, the Prisons

Department or the Parole Board, confronted by a silent, immobile black presence with averted eyes. In all probability, since sex is the topic that raises most anxiety in such authorities, the man is a sex offender. Perhaps he has raped a child. At the very least, the psychologist hopes to shed some light on the offender's version of the offence, his motives and other causal factors deriving from his sexual history, and make a prediction, or educated guess, as to whether he is likely to commit a similar offence again. After four and a half years working in the Kimberleys, I still have difficulties with this one. I blush to recall my efforts when I was based at Fremantle Prison and had never ventured north of Perth. Yet psychologists there are still contending with similar problems; their clients still having to contend with them.

Solutions

I consider the crucial issue about Aborigines in Prison is not what happens when they get there, but how and why so many of them do. The first priority for legislators and planners must be to reduce dramatically the number of Aborigines who proceed through our criminal justice system. No amount of amelioration of prison conditions can make the present gross overrepresentation of Aborigines in prison less than a scandal; it may instead make us more complacent. Some of the reasons for this disproportion in the colour of the prison population may be read between the lines of this paper. Improved social conditions and an attendant reduction in alcohol abuse, a greater respect for and recognition of Aboriginal customary law with increased autonomy for Aboriginal communities, and improved training for white people working with Aborigines in whatever capacity are broad and obvious imperatives, simple to state, more difficult to enact. Perhaps fortunately, they are not my province.

Meanwhile, we who work in prisons are faced with the present realities; even in a more ideal future we are likely to encounter a certain proportion of Aboriginal prisoners, including many of the more serious offenders. I see at least three relatively mundane but practicable measures that could be taken by all Prisons Departments, two of which we have already gone some way towards taking in Western Australia. These are:

- * The employment of Aboriginal staff, particularly as Welfare Officers, and in other Support Service roles. In Western Australia, we have also employed Aboriginal Prison Officers, without great success. Problems in wielding European-style authority may be partly responsible; certainly Aboriginal prisoners resent their own people holding positions of power over them in what they see, quite accurately, as "white" institutions.
- * Adequate training of prison staff at all levels in relevant aspects of Aboriginal culture.
- * The third measure, which has not yet been considered within our Department is to employ Anthropologists who have studied Aboriginal cultures in some depth. Not only would they serve as resource persons for staff

and prisoners, but they would also be engaged in preparing and delivering the staff training programmes proposed above.

Together, these measures should result in a more flexible prison system in which account is taken of Aboriginal culture and custom, from the policy and planning level to the face-to-face interactions between prison officers and prisoners.

Much of what I have talked about is, as you will have realised, not strictly psychology at all, but amateur anthropology. This reflects both the significance of these cultural factors to my job in the Prisons Department, and the absence of a professional anthropologist to do the job of cultural interpretation more adequately in my stead.

**ABORIGINAL TRADITIONAL ATTITUDES &
WESTERN JUSTICE**

Aboriginal Customary Law & The Australian Criminal Law:
An Unresolved Conflict

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Sydney

The problem

On 27 July 1981, Moses Mamarika stabbed his younger brother Terry twice with a long bladed knife and killed him. The incident took place at Umbakumba, a fairly remote community on Groote Eylandt just off the eastern coast of Arnhem Land (NT). During the afternoon the two men had had a series of arguments and disagreements which resulted in a fight. During this fight Terry was wounded in the leg with a knife. He had then limped back to his car and climbed into it. Moses followed him and stabbed him again while he was sitting in the driver's seat. Immediately after the incident Moses had gone to his home and armed himself with a tomahawk and a spear fearing that there would be immediate payback. This in fact took place within a short space of time. Moses was confronted by his three other brothers Claude, Raymond and Andy and was severely wounded by several spear thrusts, one of which penetrated his abdomen. Moses was seriously injured but survived following surgery.

The principal cause of the disagreement between the two brothers was never clarified. It was, however, suggested that there were tensions between the two men over the fact that Moses had a number of wives and was proposing to take another.

A number of court proceedings followed these incidents. Moses Mamarika was initially charged with murder but later pleaded guilty to the lesser charge of manslaughter. Mr Justice Muirhead in the Northern Territory Supreme Court sentenced him to seven and a half years gaol with a non-parole period of two years. The severity of the sentence was appealed to the Federal Court and upheld. The Federal Court did not vary the length of the sentence but suspended it subject to Mamarika entering into a four year good behaviour bond on condition that he not return to his community for three years.(1) The condition that Moses Mamarika not be permitted to return for three years had been requested by the Community Council in a letter to the Court.

The other brothers Claude, Raymond and Andy also faced the Court.(2) They were charged with wounding with intent and inflicting grievous bodily harm to which they all pleaded not guilty. Claude and Raymond were both found guilty of inflicting grievous bodily harm and the jury was directed to enter a verdict of not guilty on both charges against Andy Mamarika. Mr Justice Nader, without passing sentence, ordered that both Claude and Raymond be released on condition that they enter into a six month good behaviour bond.

This incident and the resulting court appearances by various members of the Mamarika family clearly illustrate the conflicts which arise between the operation of Aboriginal

customary law and the Australian criminal law. The resolution of such conflicts is one of the central questions confronting the Australian Law Reform Commission in its reference on Aboriginal customary law.

The Commission's terms of reference

On 9 February 1977, the then Federal Attorney-General referred to the Commission the question of the recognition of Aboriginal customary law. In referring this question to the Commission, the Attorney-General set out a number of relevant matters, including:

- * the special interest of the Commonwealth in the welfare of the Aboriginal people of Australia;
- * the need to ensure that every Aborigine enjoys basic human rights;
- * the right of Aborigines to retain their racial identity and traditional lifestyle or, where they so desire, to adopt partially or wholly a European lifestyle;
- * the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and
- * the need to ensure equitable, humane and fair treatment under the criminal justice system to all member of the Australian community.

In the light of this formidable and potentially contradictory list of principles, the Attorney-General asked the Commission

...to enquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:

- (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
- (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
- (c) any other related matter.

The Commission was also directed to have special regard to 'the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane'.

Clearly, the Commission's terms of reference have a focus on the criminal justice system and the case involving the Mamarika brothers would appear to be the type that it was sought to resolve. The Commission has, in fact, taken a broad interpretation of its terms of reference and has covered a wide range of matters pertaining to Aboriginal customary law. It has not limited its work to the criminal law area. Thus, the Commission has looked

at the problems arising in Aboriginal promised marriage arrangements, the recognition of traditional Aboriginal marriages for certain purposes, Aboriginal child care arrangements and the traditional distribution of property. It has, of course, also looked at the substantive criminal law and principles of sentencing. In researching these different areas the Commission has produced a series of publications on each of the various aspects of the Reference. In November 1980, a general discussion paper was issued (ALRC DP 17) which was widely distributed for comment. The Commission has also produced 12 of a projected 16 research papers which examine in detail the various aspects of the Reference and suggest tentative proposals hoping to provoke comment and response. The remaining four research papers will be available by the end of the year. In addition to these research papers, a second discussion paper (ALRC DP 18) was published in August 1982 summarising the first five research papers. It dealt with marriage, children and the distribution of property. One (possibly two) further discussion paper will be produced by the end of the year dealing with criminal law and sentencing and the concept of community justice mechanisms for Aboriginal communities (eg, Aboriginal courts). The Commission has conducted extensive consultation on the reference throughout Australian and has also produced a series of reports outlining major field trips undertaken.

Non-recognition of Aboriginal customary law

The decision that Australia should be regarded as a settled colony, rather than as conquered or ceded, resulted in the general body of English law including the criminal law, applying to Aborigines. While there was some uncertainty in the early days over whether the courts should deal with Aborigines, at least where the offences concerned only Aborigines, these were largely removed by the decision of the Full Court of the New South Wales Supreme Court in R v. Jack Congo Murrell(3) which held unanimously that the court had jurisdiction to try one Aborigine for the murder of another. The following year 1837, the Colonial Office in London directed the Governor of New South Wales to ensure that all Aborigines within his jurisdiction were to be treated as British subjects. Thus Aboriginal and non-Aboriginal were to be governed by one law.

...I would submit...that it is necessary from the moment the Aborigines of this country are declared British subjects they should, as far as possible be taught that the British laws are to supersede their own, so that any native, who is suffering under their own customs may have the power of an appeal to those of Great Britain or, to put this in its true light, that all authorised persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their own laws. (4)

This non-recognition applied as much in civil and criminal matters: it involved the compellability as witnesses of tribal spouses just as much as the refusal to recognise Aboriginal customary law as a defence to crimes as defined by British law.

The criminal law and Aborigines

From the establishment of the colony until quite recent times, it has been considered inappropriate that the customary practices and rules of Aborigines should be recognised within the general legal system. However, a number of factors have led to a reconsideration of this position. These have included:

- * the discriminatory treatment of Aborigines and their disproportionate representation in the criminal justice system. This is true of both appearances in the courts and the numbers in the prison population. For example, while constituting a little over one per cent of the Australian population, Aborigines provide nearly 30 per cent of the present population;(5)
- * the failure of the general legal system to deal effectively and appropriately with inter-Aboriginal disputes;
- * the movement away from policies of assimilation and integration towards policies based on self management, at least at Federal level, but to some extent also at State and Territory level;
- * the perceived injustice of denying all recognition to distinctive and long established Aboriginal ways of belief and action.

All these factors have led to developments in the areas of Aboriginal land rights, sacred sites and other aspects of the Aboriginal heritage, the recognition of traditional marriage for certain purposes and some provision for traditional distribution of property on death. Admittedly these have been on a piecemeal basis and have certainly not applied in all jurisdictions in Australia. In fact, it is only in the Northern Territory where legislation exists to cover all of these areas, although each of the States has legislation covering some of these areas. Notably there is no legislation recognising Aboriginal customary law and practices in the area of the criminal law. However, the courts, confronted with the reality of Aboriginal adherence to different or conflicting rules or values, have attempted to refine or mitigate the general law's non-recognition of such rules or values. This has been done by the courts principally in two ways. First by exercising sentencing discretions to take Aboriginal customary law into account(6) and second, by taking Aboriginal customary law into account in applying established defences such as provocation, duress and claim of right.(7) The question which arises is whether these existing methods of recognition are adequate or satisfactory? Or alternatively, whether some form of legislative recognition of Aboriginal customary law is required.

A number of different options are available for taking account of Aboriginal customary law in criminal cases. These include:

- * continuation of the present system of relying on the sentencing discretion of the court to take into account Aboriginal customary law and providing certain guidelines for judges in carrying out this task;

- * extension of the substantive criminal defences to specifically allow for Aboriginal customary law;
- * a special defence based on Aboriginal law which could be either a complete defence or a partial defence;
- * the introduction of procedural alternatives to divert certain Aboriginal customary law cases from the criminal justice system.

This paper concentrates on the question of a special customary law defence, although it should be said that other reform options could be in conjunction with such a defence rather than treated as alternatives.

The extent of the problem

It has often been suggested that the recognition of Aboriginal customary law would resolve many of the problems facing Aborigines in their contact with the criminal justice system. Rarely however is it made clear what this means, nor have concrete solutions been put forward as to how this can be done. There is no doubt that the criminal justice system is confronted with a vast problem given the number of Aborigines which it processes but where does one look for a solution.

...it (has) been suggested that the real problem is not Aboriginal or social at all but lies with the discriminatory operation of the criminal justice system - that policemen are too ready to arrest Aborigines or the poor and that the courts are too prone to imprison them. Conversely, those within the criminal justice system complain that it is overloaded with Aborigines or the poor simply because it is burdened by society with a number of social and political problems which society cannot solve.(8)

Thus is it the 'white man's' justice system which just does not work for Aborigines or is it a problem of the Aborigines themselves.

The vast majority of offences committed by Aborigines and the reasons they are coming before the courts do not relate to Aboriginal customary law. Certainly there is a proportion of cases involving double punishments and possible injustice but the solution to the problem of the numbers of Aborigines in the courts does not lie in the recognition of Aboriginal customary law. In the Mamarika cases, all the persons convicted came away from the court on good behaviour bonds, although some would no doubt argue that the charges against Claude, Ray and Andy should never have been laid, or at least should never have been dealt with by the court. Yet it would seem that it is not this kind of case that is filling the prisons with Aborigines, nor is it by any means the typical case of Aborigines in the courts. Yet it is the kind of case where direct conflicts arise between Aboriginal customary law and the Australian criminal law. The Law Reform Commission research based on the limited evidence available suggests that:

- * even when traditionally oriented Aborigines are involved in criminal charges, the case will frequently involve non-traditional elements (especially alcohol) or a non-tradition offence;
- * it is much more common, even for traditionally-oriented Aborigines, that the act that resulted in the charge was a violation of both Aboriginal customary law and the general law, or was not specifically allowed or justified by Aboriginal customary law, than that it was so justified or allowed;
- * the explanation for very high offence and imprisonment rates of Aborigines is not, in any direct way, the product of non-recognition of Aboriginal customary law by the substantive criminal law;
- * it seems to follow that the problems reflected by those exorbitant rates are not likely to be solved by the recognition of Aboriginal customary law in the rules of the substantive criminal law. Indeed, if the characteristics of traditionally-oriented Aboriginal offenders do not differ markedly from the characteristics of other Aboriginal offenders, it may be that solutions will not be found directly through any form of recognition of Aboriginal customary law. They will involve the general law and its administration or the social, educational and economic conditions of Aboriginal life.

It is not suggested that Aboriginal customary law is not relevant in particular criminal cases, or that the recognition of Aboriginal customary law may assist indirectly in maintaining order in Aboriginal communities but it does help to put into perspective the limited character of the Commission's enquiry in the area of the substantive criminal law.

Nonetheless, particular conflicts do occur, and so too do problems of the interaction of the two systems (ie, double jeopardy). As mentioned earlier in this paper, these problems at present are largely resolved at the sentencing level. Unfortunately, this relies entirely on the individual judge's discretion and provides no guarantee that justice will be done in the particular case. In addition, Aboriginal customary law may be relevant in ascertaining an Aboriginal person's state of mind (ie, as an aspect of the mental element of an offence) or in assessing the reasonableness of his conduct where this is necessary as an aspect of a particular defence (eg, provocation, duress, self defence, etc). It is suggested that there is already scope for taking into account Aboriginal customary law in the application of these defences. The important question for consideration is whether or not a new defence based on Aboriginal customary law should be created.

An Aboriginal customary law defence

In many respects a customary law defence would be the clearest as well as the most direct way of linking criminal responsibility under the general law with Aboriginal customary law. As Brady and Morice comment:

the true dilemma of Aboriginal versus Australian law lies in the situation whereby an action which may conform to Aboriginal law comes to be adjudicated upon by Australian law as an illegitimate act.(9)

At the level of the substantive law, only a customary law defence can directly or completely deal with this dilemma. Thus in the case involving the attack on Moses Mamarika by his three brothers Claude, Raymond and Andy the existence of such a defence could have been raised and possibly have completely exonerated them. The existence of such a defence would not preclude such a case from coming to the court at all and evidence would be needed to substantiate that the conduct was in fact according to Aboriginal customary law.

Little consideration has been given to the creation of such a defence in Australia or in other comparable overseas countries. In fact, the Commission is not aware of any country which has accepted a general customary law defence in the criminal law which could be equated with an Aboriginal customary law defence. The Law Reform Commission of Papua New Guinea has proposed an absolute customary law defence in respect of all offences other than homicide and certain serious assaults but the recommendation has never been implemented.(10)

A number of relevant proposals that have been made in Australia:

- * The Laverton Royal Commission in its Report in 1976 adopted as one of its recommendations:

Amendment to the relevant criminal statutes to make it a defence where a court is satisfied that an Aboriginal acting bona fide and in compliance with his tribal law contravenes a provision of a criminal statute, pending information being obtained on Aboriginal law and until a decision is made to incorporate part of that law into statutory law.(11)

- * The preliminary report of the South Australian Aboriginal Customary Law Committee also recommended that further consideration should be given to a customary law defence. In a private submission to the Commission, the Chairman of this Committee, Judge Lewis, strongly supported the creation of customary law defences in certain situations.

Before considering the various arguments for and against a defence based on Aboriginal customary law it should be said that the Law Reform Commission has no fixed view on this issue. It has received submissions giving persuasive arguments on both sides and although in Research Paper 6 it comes down against a complete defence this is by no means conclusive. It is intended to provoke discussion and the comments of participants at this seminar would be greatly appreciated.

If a customary law defence is to be created what area should it cover? It is suggested tribal killings or executions (and related life threatening assaults), cannot be condoned or authorised. It follows that a complete customary law defence should not be available in such cases because to provide such a defence would involve the general law in specifically endorsing or licensing customary law actions such as payback killings. The Law Reform Commission has suggested on a number of occasions that this ought not to occur.⁽¹²⁾ In such situations customary law would only be relevant if it came within one of the existing criminal law defences or as a component in the sentencing process. There are, however, arguments which suggest that the customary law defence is still viable and should be available in cases involving traditional punishments such as spearings:

It is submitted .. that since there is considerable evidence that spearing continues to be used either as a threat or in reality as a means of resolving disputes then provision ought to be made for such continuation by creating customary law defences by amendment to the relative federal and state statutes. Alternatively, it is open to those administering justice to ignore the existence of customary acts amount to breaches of the criminal law by 'looking the other way'.

In the view of the writer, such an approach would be, at most, a dishonest one, and at least one with which the Crown ought to have no association. Essentially, this submission amounts to one in which it is urged that legislation be passed to create the defence of the customary law in appropriate cases....⁽¹³⁾

The argument runs that such a defence is the most honest and direct way of taking Aboriginal customary law into account in criminal cases and of acknowledging the conflict of obligations that does occur. A major defect of existing informal procedures of recognition (eg non prosecution) is the danger that they can be applied arbitrarily or selectively, or varied without notice by executive or police decision. A formal customary law defence avoids these dangers. It is not however without difficulty. It would only apply in situations where the violation of the general law was specifically legitimised by customary law. Such cases (possibly the Mamarika case) are in fact uncommon. Almost all the cases that have been brought to the Law Reform Commission's attention deal with:

- * breaches of customary law which are not adequately sanctioned by the general law; and
- * breaches of customary law which are also a breach of the general law.

Is there justification in creating a controversial and possibly complex amendment, the effects of which in practice would be uncertain, to cover what is, in fact, a very small minority of cases?

A further difficulty is that the notion of a defence does not quite fit with the operation of an informal customary law system. Traditional ways of resolving disputes are finally balanced mechanisms for the resolution of conflict through threats or demonstrations of limited violence. It is unlikely that a strictly formulated defence would come close to corresponding with or 'fitting' this reality. Procedures to divert such cases from the courts may be preferable to dealing with them in accordance with the customary law defence.

Finally there may be the danger of a substantive customary law defence depriving persons, including Aboriginal 'victims' of assaults, of legal protection. The defence thus raises the implications of 'equal protection' under the law.(14) In this context it is interesting to note Eggleston's conclusions:

Even though it might be unjust to individual Aborigines to punish them for killings, especially in the early days of contact, the conviction may be justifiable ... Harshness and injustice can be modified by imposing lenient sentences. Today, when considerable modification of tribal custom has already occurred, it seems a retrograde step in most cases to make tribal law an absolute defence to a charge of murder, though it should mitigate punishment and could possibly be made the basis for reducing the charge to manslaughter. (15)

A partial customary law defence

An alternative to a complete defence of Aboriginal customary law is a partial defence which would be similar to diminished responsibility reducing murder to manslaughter. A partial defence would not deprive a victim of legal protection or of the right to redress. It would not involve an endorsement of payback killings or woundings, but rather an acknowledgement of the direct conflict of laws and allegiances that can occur. Further, it would be an adjunct to the sentencing discretion now exercised by judges but would include the jury as a representative perhaps of community opinion.(16)

Such a partial defence it seems would be most relevant in cases of deliberate homicide, the very situation where it is suggested above there is the least justification for allowing customary law processes to operate. In all other cases involving less serious offences, the same result would be achieved, in a less formal way, through the use of discretion. Thus it can be

argued that the creation of a partial customary law defence may achieve little more than is currently achieved by the use of sentencing discretions.

Procedural alternatives

While it is argued that a partial customary law defence combined with sentencing discretions is preferable to a complete customary law defence a number of procedural alternatives are available to tacitly recognise Aboriginal customary laws. Such procedures already exist and are exercised in some jurisdictions but further development of these, in addition to a partial or complete defence, is a possible option for the recognition of Aboriginal customary law. These procedural alternatives include:

- * non-prosecution for certain offences (eg the South Australian police policy on traditional punishments)(17);
- * prosecution for a lesser offence (eg to allow the matter to be dealt with locally by the magistrate rather than in a distant centre by the Supreme Court or a District Court);
- * the entering of a nolle prosequi (a no bill application) by the Crown;
- * decisions by a court to discharge absolutely or not to record a conviction (these powers may only be available to lower courts).

Essentially these alternatives are all currently available and it would not involve a dramatic change of policy to consider their use on a more regular basis.

One alternative that requires further consideration is the exclusion of customary law cases through some formal procedure such as a pre-trial hearing or an interlocutory proceeding. It is argued by proponents of such a scheme that it would not involve any radical reform of the criminal justice system. It would protect the autonomy of Aboriginal groups in resolving their disputes through a customary law process by preventing such disputes from coming before the courts in the form of criminal prosecutions yet it would not exclude police action to protect persons under threat or to protect imminent violence. It should be said that not all cases involving aspects of Aboriginal law would necessarily come within the ambit of an exclusionary procedure. However two distinct cases would appear to be appropriate. The first is where no further action is contemplated by the court because it is considered that the person charged has acted appropriately and in accordance with customary law. And secondly, where further action may be taken, but it is appropriate that this be done at the local level, perhaps informally, rather than through the courts.

Various procedures could be developed to divert such customary cases from the general court system. Two options have been suggested to the Commission. The first, is the appointment of an official with special expertise and experience in customary law matters, to whom decisions on prosecution would be referred by the police, and who would, after formal or informal

investigation of the facts, recommend to the Attorney-General whether a prosecution should follow.(18) A version of such a scheme is the nolle prosequi or "no bill" application which involves an application to the Attorney-General that a prosecution should not proceed in the public interest. Interestingly, Mr Justice Nader in R v. Claude Mamarika, Raymond Mamarika & Andy Mamarika expressed the view that a no bill application was a better vehicle for deciding such matters than a controversial decision of the court made on the basis of rules of public policy.

The second option would be for the trial judge himself to have power, at any stage of the trial, to adjourn or even terminate the hearing if it becomes clear that the matter has been satisfactorily resolved under the Aboriginal customary law applicable to the parties, so that the public interest would not be served by continuation of the case. This option may provide some practical difficulties in spelling out exactly how the power to terminate or adjourn should be exercised.

Conclusion

This paper has not attempted to canvas in depth the many criminal law issue that the Law Reform commission has to look at in its Aboriginal Customary Law Reference. It has concentrated on the rather narrow question of whether there should be a defence available to Aborigines charged with criminal offences based on their customary law and practices. It has looked at the arguments for and against as well as the possible alternative, some form of diversionary procedure. There are some dangers of over simplification in this presentation as the 'recognition' of Aboriginal customary law in the general criminal law is not a single, clearly defined issue but involves a series of complex, interlocking questions. This paper has not, for example, discussed whether it is proper, or desirable, to enact special criminal laws or procedures for Aborigines (19) or the extent to which Australia may be precluded from recognising, or conversely required to recognise, indigenous institutions and rules in the criminal justice area by its international commitments especially with respect to human rights.(20) Very briefly the view that has been expressed in a number of the Commission's Research Papers is that the recognition of Aboriginal customary law is not racially discriminatory or a denial of equality before the law or equal protection if:

- * it is a reasonable response to the special needs of those Aboriginal people affected by the proposals;
- * it is generally accepted by them;
- * it does not deprive individual Aborigines of basic human rights, or of access to the general legal system.

Only a general customary law defence to crimes affecting others may cause difficulties under these criteria. This is a factor that proponents of such a defence would need to carefully consider. In addition, certain of the international human rights instruments impose some restrictions upon the recognition of indigenous practices and customs. These are not, it is suggested, inappropriate 'Western' or 'European' standards but of basic common values.

The various proposals that have been put forward in this paper and the other Research Papers the Commission has produced on what is an exceedingly difficult Reference are intended to provoke discussion and hopefully, this seminar will provide some of the assistance and feedback the Commission needs.

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Contemporary Issues In The Management Of Law & Order
In South Australia Pitjantjatjara Community

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In this paper the problems of law and order among the Pitjantjatjara of South Australia's North-West will be discussed. Most of the 1,450 people concerned are distributed south of the Northern Territory border, between seven major centres, and some 25 so-called homeland communities. However the discussion, and statistics also include the 500 people of Yalata, situated to the south of the head of the Bight.

Although problems vary in form and intensity from east to west they pose some intractable enigmas. Thus petrol sniffing for juveniles and drinking for adults are the two principal offence areas identified by the Pitjantjatjara: but to the extent to which they are offences known to South Australian law, they are notoriously difficult to deal with. The Pitjantjatjara say they want empowerment at the local level through the creation of wardens: but over the past 15 years warden schemes have been tried and found seriously wanting. The Pitjantjatjara are determined to keep their customary methods for dealing with disputes in the traditional mode, and concede that "serious" offences should be dealt with by the conventional South Australian legal system: if this is the case, to what extent is their a genuine legal problem? And if one looks at priorities as manifested by business items discussed at Pitjantjatjara Council meetings over the past seven years, law and order are scarcely mentioned.

This paper will endeavour to describe the position generally and then to propose an approach to the resolution of problems.

The general position

Since 1980 it has been possible to provide an offences profile of the North-West area following the creation by the Police Department of a Statistics Section in 1978. The figures provided replace the ad hoc and often subjective accounts of the 70's, though it is highly probable that the position has not changed materially over the last 15 years. Figures 1 to 6 give a current picture of the extent of the law and order problem in the North-West and Yalata.¹

In the collection of statistics there has been difficulty in resolving the expression of crime as a function of the number of offenders or the number of offences. The profiles provided in Figures 1 to 6 follow the practice detailed in the South Australian Year Book of providing figures for the number of persons convicted, rather than the number of persons charged. It has thus been possible to describe a community or group of communities in terms of an "offender pool" expressed as a

percentage of the total population. Further information is provided as to the ages of offenders, and four offence categories have been devised, with the offences committed in each being expressed as a percentage of the total. Thus:

Offender Age Profile

1. Less than 16 years
2. 16 - 18 years
3. 18 - 22 years
4. More than 22 years

Offences Categories

1. Against the person
2. Against property
3. Alcohol related
4. Miscellaneous

In the North-West in 1980, an offender pool of 154 individuals was the equivalent of 11.2% of the population, or about five times the size of the offender pool for the State as a whole - which was 27,171 in 1,293,800, or 2.1%. Moreover in the State as a whole juveniles comprised 22.3% of offenders - with adults 77.7%. In the North-West the figures are 61% juveniles and 29% adults. At Yalata the offender pool is a staggering 33.2% of the population - perhaps a reflection of the fact that it is the one Pitjantjatjara community that has been formed from relocating the original inhabitants from the south of the Great Victoria Desert around Ooldea - although what might be a reflection should not be taken as an explanation of a particularly tragic and complex problem. Such explanation is outside the scope of this paper.

Perhaps the most prevalent classes of offences committed in Central Australia are those concerning property. Settlement buildings, particularly ablution blocks, community halls, unused stores, and to a lesser extent the schools and houses, all become objects of vandalism, with alcohol and petrol sniffing typically associated with the offences.

Juvenile behaviour & offences

One of the major consequences for the Pitjantjatjara of Reserve settlements has been the destruction of old certainties, and confusion as to how to deal with new problems in social affairs. The behaviour of children, in particular, has created difficulties for a society which has traditionally prepared to allow them wide latitude in behaviour. Such were the certainties of adult life and the immanence of the great supernatural sinews which held it together, that adults had no need of the parvanimity which requires children to be creatures of obedience. Kids could have fun. Even fear of children getting lost - except for the very young - had little currency in an environment where the landscape was a mantle. Moreover the human environment was one rich in kinsfolk who looked after each other in accordance with the responsibilities signposted by kinship relationships.

In modern settlements, however, children have been able to generate a life to a large extent independent of the dictates of tradition. At school they become socialized to a system of values and a framework of thinking imposed from the outside: children congregate at picture evenings, at the store, or a building site in pursuit of treasures and surprises that traditional life was not able to offer. As Figures 1 to 6 show, juveniles and young adults constitute the majority of offenders in all communities except Yalata.

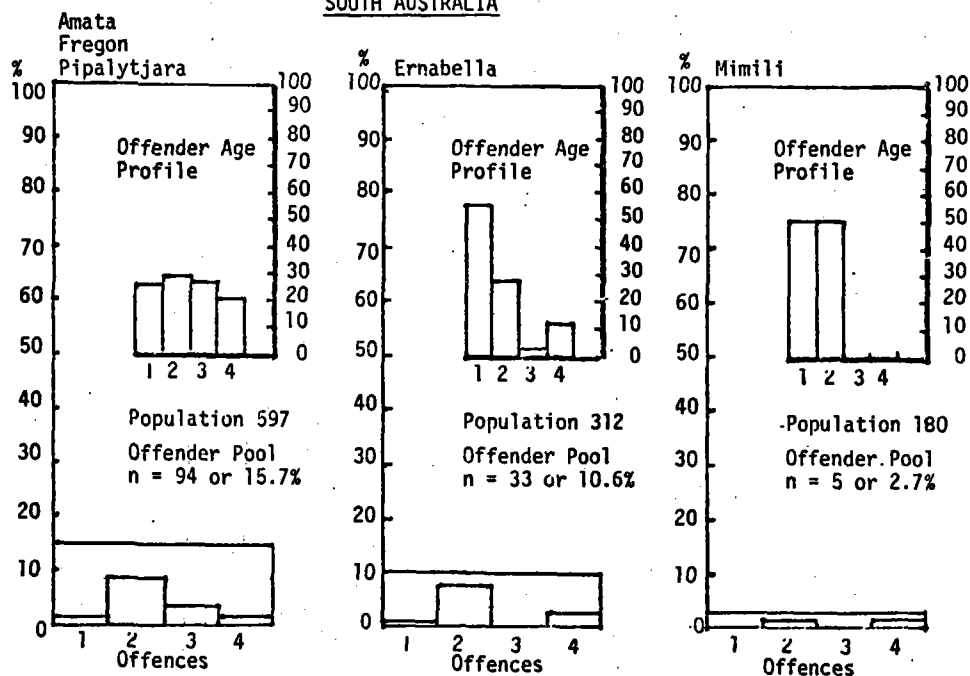
One of the major manifestations of this new turn of events has been the phenomenon of petrol sniffing. Regular petrol sniffers at Amata and Fregon are as young as eight and ten, and as old as 21. The inhalation of petrol fumes produces a state of euphoria and hallucinations, described by one observer, "like going to the movies in your head".

There is a growing literature on the subject, with the most recent South Australian analysis being that of Morice, Swift, and Brady, centring on Yalata,² and more generally among the Western Desert people, Ferguson,³ and Huey.⁴ Studies in the Northern Territory include Nurcombe,⁵ Eastwell,⁶ and Tomlinson.⁷ Studies generally conclude that petrol sniffers are in a similar position to victims of lead poisoning, with resultant behavioural and academic problems, particularly in respect of disturbance in attention, hyperactivity, reduced verbal auditory competency; and excitability.⁸ But the most immediate and overt result is intoxication, the social consequences of which vary, but typically children will congregate in clusters and create mischief. Often this takes the form of abuse - simply swearing at, in particular, mothers, whose anatomy gives the Pitjantjatjara child as much scope for lurid insult as anyone else; though the Pitjantjatjara mother is perhaps more tolerant than most. But petrol sniffing is also associated with offences against the person and property. There has been a history for 15 years of car stealing, store and house breaking, larceny, and offensive behaviour while children sniff petrol. The most intractible sniffers are stigmatized as "bad kids", and this becomes a self fulfilling prophecy as the children go from bad to worse.

In reality adults only react to petrol sniffing if their are accidents, otherwise children go ahead more or less unhindered. Parents tend to fulminate on the subject, saying that fathers ought to hit their petrol sniffing sons, since it becomes a habit and "makes the blood bad". But it is a serious matter for a parent to take this advice. In 1981 the man Kelly, who was a warden at Fregon beat his son aged 14 for petrol sniffing. His enraged wife cleaved him with a steel fence dropper, and his sister then intervened in order to stop the fight. Meanwhile Kelly obtained another steel dropper and in retaliation hit his wife. The community then became polarized. A spear was thrown at Kelly, but it missed. The police were called but the fight had taken its course - billowing into a dangerous climax, but subsiding by the time they arrived. However, the woman who tried to arbitrate was finally speared. She, in fact, was from Amata. When the Amata men heard about this they threatened to come over to Fregon to retaliate; and although this has not happened, it

OFFENCES PROFILE NORTH WEST OF

SOUTH AUSTRALIA

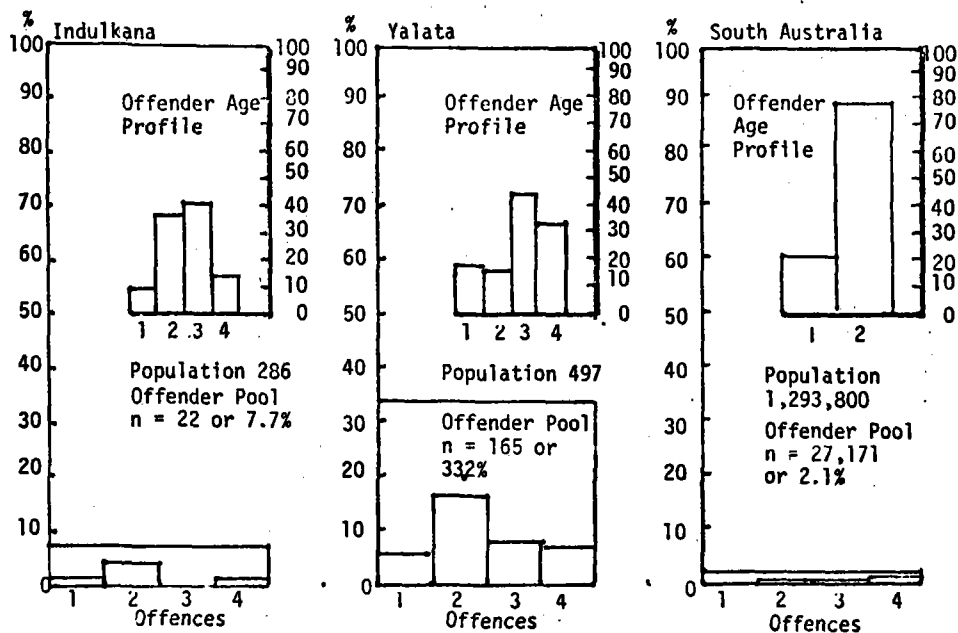


Offences category

1. Against person
2. Against property
3. Alcoholism
4. Miscellaneous

Offender Age Profile

1. <16yr.
2. 16-18yr.
3. 18-22yr.
4. >22yr.



FIGURES 1. to 6.

will no doubt be taken into calculations when future disputes are in the process of being solved.⁹ Many Pitjantjatjara therefore prefer an outsider to cope with petrol sniffing because it avoids community polarization, and the spread of disputation.

Europeans respond to the problem with varying degrees of interest and sensitivity. One one settlement a school teacher intervenes in petrol sniffing with a clip to the ears and a kick to the backside.¹⁰ And there are still those who claim that given a whip they would cure any petrol sniffer by "stripping off his hide".

Juvenile delinquency with or without petrol sniffing has been a phenomenon accompanying institutionalization. Most of the youngsters concerned become initiated, and as adults, leave behind deviant behaviour - almost as though it was of itself a rite of passage. Thus one lad whose adventures once had the Adelaide Juvenile Court at the end of its tether, is now a much respected teacher aide, another recalcitrant became council chairman, and is now a member of the Anangu Pitjantjatjara executive. He was also mechanic to the Pitjantjatjara Health Service and the Department of Further Education representative in the area. One of his confreres, equally difficult in his time, is now the Department for Community Welfare's representative. Not all, however, have been so lucky. Recently an unreformed recalcitrant of the mid 60's, broke into the office safe and stole \$5,700 while drunk - the keys having been left in the safe while the person responsible was having a fight. The stolen money reappeared in various lots and in various places, and the unrepentant and quixotic thief waved beer cans in the air as he challenged the council to a fight, and then drove off. He was finally arrested then gaoled for three months, but on his return he was in further trouble for cattle stealing.

Finding appropriate ways and means of dealing with delinquent behaviour at the time of the offence has proved vexatious and elusive. There is very much an element of people simply not knowing what to do. Initiation as such is not the answer, since it cannot be arranged without extensive preliminaries, and in any case it is not guaranteed or designed as a "cure". There was a case of a mature man who chastised an adolescent who was petrol sniffing in the settlement areas of Amata. The adolescent who had been initiated retaliated with such vilification that the man, caught unawares, became confused and unable to cope. He found no alternative but to walk away. This incident perhaps illustrates a growing alarm at the medium-term consequences of forcing troublesome adolescents into early initiation to "cure them". Signs are that this strategy is not working.

Another man whose sense of social concern once constrained him to seek the Superintendent's concurrence in making him a warden (1970), engaged a group of Adelaide officials, in 1981, in an account of his detestation of petrol sniffers and their lackadaisical families, the very night his own son rolled a truck he had taken illegally while sniffing petrol. It was no ordinary accident, perhaps no ordinary occasion, with the truck turning end to end and finishing on the top of another vehicle.

However, adult tolerance is very high, as evidenced by an apparently total lack of concern when children eavesdrop more or less as a matter of course, on community meetings, taking a can of petrol to the cover of a bush mere metres from proceedings. At Amata children openly walk the streets sniffing petrol, even posing for photographs, cans poised.

Rev J Downing, an Alice Springs community development worker, reported in 1971 that juvenile delinquency was most evident at Amata, Ernabella, with little signs of disturbance at Fregon, Mimili, or Indulkana. Reasons given by the community for what was then regarded as an upsurge in delinquent behaviour were:

- * the association of children with segregated lads at Amata
- * the influence of lads from the Warburton mission - to the West who would impart their delinquent habits to tyros at Amata
- * the influence of moving pictures - particularly with regard to stealing
- * parents not properly caring for their children.

Downing thought that at Amata and Ernabella there was the greatest degree of administrative manipulation of community members with consequent erosion of codes of behaviour, discipline, and systems of belief.¹¹

Downing also noted that in situations of rapid social change where old practices and values are challenged, the first to suffer are the older children and adolescents. Some school teachers, particularly in the mid 70's, post Vietnam period, came in as agents of change - themselves young and possibly rebellious - and found it easy to identify with the children, reinforcing their frustrations and anxieties in the name of "liberation". Children's ambitions were thus stimulated and they gained courage in ignoring the rules of society and the discipline of their own culture.

Dealing with juvenile problems has not to date yielded credible solutions. To begin with there is always a lag between the time of commission of an offence to its resolution in court. While this may be as short as a week, it may be as long as 12 months - and the median is 120 days.¹² Sending offenders to outstations for traditional instruction has not worked well. Sending offenders to Adelaide either on remand or for punishment has been regarded as unsatisfactory - either because youths are in an alien environment for an apparently good purpose, or because the absence from home provides the offender with enviable notoriety.

The most recent idea is to punish the parents of juvenile offenders.¹³ But this has been considered off and on for nearly 15 years. Thus in 1969, a magistrate dealt with a juvenile

offender by fining his mother. This measure seemed effective but was not followed up. Then in November 1981 it was welcomed by a community meeting as a measure which should be readopted. But an opposite view, expressing abhorrence was adopted by a further meeting. Now in September 1983 it is being advanced as a procedure favoured by communities generally in the North-West. But one has the uncomfortable feeling that the matter is not yet configured for resolution.

Alcohol

The commonly accepted view in the North-West is that children and adolescents having dissipated themselves on petrol, graduate to alcohol in young adulthood. Drinking is looked upon with considerably more concern, however, since there is a wide realisation that serious injury or death may result from ensuing fights, or from dangerous driving. This concern is reflected in the provisions of S 43 (1) (c) and (d) of the Pitjantjatjara Land Rights Act 1981 for the regulation of possession and consumption of alcohol on the Pitjantjatjara lands.

From time to time one will come across roadside signs in community precincts warning drunks to stay away - not that this stops them.

Concern over alcohol is greatest in the East - particularly at Indulkana, where there is easy access to liquor outlets at the newly established rail village of Marla. But the problem exists to a greater or lesser extent throughout the lands with outlets at Ayers Rock, or for that matter, Alice Springs, only several hours away. The problem is worst at Yalata.

A recent observer, John Tregenza, describes current concern as serious, particularly in respect of those who consume alcohol in communities, or retire in a drunken state:

... The fears expressed as a result of this behaviour are associated with rowdiness and disruption ... disorderly behaviour, anti-cultural behaviour (talking and singing non-public matters and overlooking appropriate relationship behaviour), violence and assaults, disputes which involve non-Pitjantjatjara weapons or stances, the driving of motor-vehicles in a manner which puts people at risk ... not only are these aspects of behaviour unacceptable, but also, they can cause a chain reaction of responses ... which in themselves have the potential to be extremely disruptive, and the cause for further offences.¹⁴

In these circumstances communities wish to be empowered to act swiftly, firstly to incarcerate offenders and then to deal with them in a locally convened court. It has even been suggested that communities should have the power to seize and either destroy or sell the motor vehicle of any offender. This raises the question, then, of how such local control might be implemented.

Local management of offenders

Whereas authority traditionally was characterized by consensus and compliance by a collectivity, the new order of offences raises totally novel questions of coercion and voluntary submission. Offences such as those discussed, require action involving someone laying hands on an offender but without their being any quid pro quo, ie, the balance-maintaining tit for tat configuration of traditional dispute resolution. This contemporary maintenance of order requires a unilateral exercise of power, which to a Pitjantjatjara is normally only ever thinkable in the punishments sometimes required in esoteric ritual contexts. To engage in such a unitary transaction in secular contexts, is to conduct an incongruent transaction, ie, to commit a "blasphemy", which is untenable and requires redress and therefore further violence.

In white Australian society, management of public order involves a comparatively unilateral approach as reflected in the employment of police power. The Pitjantjatjara say they want such power, but in its exercise their appear intractable problems.

Wardens

The possibility of introducing to the North-West lands a system of Aboriginal wardens has been a topic of consideration for 20 years. Downing notes that as far back as 1952 attempts were made to establish a local law enforcement system at Papunya with the appointment of "community officers". Later "camp orderlies" were appointed. As Downing correctly notes, traditionally it is only the 'members of any one clan that have the full power and/or authority to control the affairs of that clan. Where there are many family groups, as at Papunya, the enforcement of Aboriginal law becomes very difficult'.¹⁵

Father Pat Dodson, himself an Aborigine, observes in the case of the Murrumbata that traditional laws can never be subjugated to modern dictates. If people are Aboriginal they are in fact ceremonial men. By carrying out ritual duties they are able to survive in a cross cultural situation: their identity is always Murrumbata, and a person's status as a man comes from there - not from being able to handle Western European economic or legal niceties. The question of justice centres around the authority of the lodge of elder men who are not always the dispensers of harsh retribution, but as much teachers of how to live in accordance with the lore that gives meaning to life.¹⁶ Thus, the support of traditional authority is paramount to any strategy of local involvement in maintaining law and order.

On the other hand, Terry Syddall, whose extensive magisterial experience in the Kimberleys has given him considerable insight into problems of remote communities, argues that in substance European and traditional law are less different than people imagine. He cites the case of the La Grange community which is moving towards a synthesis of the customary and statute law, referring collectively to them as Bidyadanga law. It is the

view of the community that they should have total control of the Bidyadanga law, which is upheld by the appointment of witirr or traditional policemen. The community appoints two from each section (or kin group) so that there will be a pool of witirr which can be mobilized in respect of a given dispute in such a way as not to violate rules of behaviour enforced by constraints of kinship. The Bidyadanga law operates in respect of the right seen by the community to regulate the behaviour of its members privately, and free from uninvited external interferences.¹⁷

In recent discussions as to the possibility of introducing to the North-West lands a system of Aboriginal wardens, the Aboriginal view when stated abstractly, is that they would like to see not wardens, but Aboriginal police, duly vested with full police powers together with accoutrements - uniforms, cars, and so on. While one is obliged to give such viewpoints their full weight, there is a long history of Aboriginal people, who having accepted positions given them quasi police powers, the Ernabella wardens, the Amata atunmanykupai¹⁸ for example, have become quickly uncomfortable with their situation. This sometimes occurred by their being unable to cope with the problem of seizing a kinsman, or having to deal with someone whom they are obliged by custom to avoid; or, as easily, to support him in a dispute regardless of its rights or wrongs.

Thus the Ernabella community advisor in 1981 advised that there was a system of wardens operating at Ernabella consisting of senior community members. However, they resigned when they saw their positions becoming untenable due to their potential involvement in the use of force. According to him, the community wants to have police powers so that wardens may arrest offenders but more importantly have power over family retaliation.¹⁹ And following the resignation of the first two atunmanykupais at Amata in 1969 the job fell to a senior, and respected community member who had been brought up on a nearby station. As well as being a highly competent stockman he was familiar with European custom and fluent in English. At the expiration of two weeks he wrote the following letter:

I am sorry boss, I don't like this job to chase around the person, and I would like to be an ordinary man. People might have bad thoughts about this man chasing around people, and they will hurt me. This what I think and it's true. Please I want to be ordinary. I don't want to be a police officer from now on.²⁰

The experience in the North-West of the failure of systems using local people to control problems which are essentially Western European in origin and character, is reflected in similar schemes overseas. Thus, in both America and Canada crime on reservations is significantly higher than the rest of the population - in the case of the American Indian it is cited as 2,006 per 100,000 population on reservations as against 1,471 per 100,000 for rural America generally. The BIA established an Indian training and research centre to provide a 10 week training course for tribal police. Critics charged the BIA of 'pitting

Indian forces against Indian forces...'²¹ And an Inuit commented in the case of Canada, that 'working for the Royal Canadian Mounted Police is not an attractive proposition for Inuit since they are placed in a position in which it becomes their duty to enforce laws they do not believe in themselves.'²² They run a high risk of being seen as turncoats or stool pigeons.

The current position

The outstation movement in remote areas may be doing something to assist the reduction of crime - particularly in the case of juveniles. Toyne argues that crime decreases in proportion to distance from liquor outlets; and the frequency of crime is also a function of remoteness since if police visits are infrequent the dispute is likely to be resolved traditionally, and quite often serious events never reach the ears of police.²³ Nurcombe attributes the decline in petrol sniffing in Arnhem Land in part to the mobilization of traditional authority, and at the same time emphasized the importance of encouraging traditional culture through the schools.²⁴

There is indeed complete certainty as to the way in which the people wish to handle indigenous affairs. Their position was made plain in an extraordinarily outspoken - even aggressive - public statement at Amata on 19 April 1981 when the Australian Law Reform Commission, visited Amata in the course of its work with the Aboriginal Customary Law Reference. On that occasion a group of some 120 Pitjantjatjara men and women representing all communities in the North-West area, stated with rare emphasis that they would not countenance any suggestion that customary law activities be modified or proscribed. They were adamant that they intended to pursue all customs and practices associated with this law - to do otherwise would not only place upon themselves an impossible burden, but would, from a social point of view, be their undoing. This stand exemplifies the strength, optimism, and realism, adverted to by Father Dodson in his remarks above.

On the other hand, views expressed and schemes tried in respect of the modern problems - particularly of petrol sniffing and alcohol are ambiguous and contradictory. Rehabilitation schemes such as that at Angatja, an outstation West of Amata, where juveniles are weaned off petrol by two highly motivated community leaders and taught traditional skills - such schemes are curiously unconvincing. The children concerned are reported as not staying, and, of course, to go in the first place requires the fulfilment of specific kinship relationships. And if one looks at the matters discussed by the major viable political entity of the area - the Pitjantjatjara Council - issues of law and order do not come into priorities: yet people say they really are worried. Finally, one has the impression that it is the women who are most concerned, but their power to act is proscribed by overriding customary institutions.

In these transcultural situations one has continually to be aware of the pressure for genial accord to dominate. Genial accord is the mutual desire between two parties for fast recourse

to common ground (however unimportant) and the use of geniality to cement each other to it. This occurs particularly where neither side is sure of its ground, and where the issues are complex. Moreover sensitivity in consultation is almost guaranteed to result in genial accord. This is not to gainsay the need for sensitivity, but it is to cast doubt on consultation as an appropriate method for producing lasting administrative solutions. Consultation is fundamentally a political artifice, but has the property of looking right and at the same time, enabling evidence on all sides to be selected either to confirm a settled point of view, or to obfuscate a situation people do not yet want resolved, or to produce a genial accord.

Having said that, it follows that I hold the view that a solution will not be forthcoming by way of empathetic excogitation - with or without due consultation - on the part of well-meaning Europeans. That process has been tried in housing and health and has not worked. However, the Pitjantjatjara, having negotiated the funds and the autonomy to devise their own solutions, are indeed finding them. Yet the enigma keeps emerging. The Pitjantjatjara have repeatedly disclaimed their own capacity to handle the profoundly difficult cultural problem posed by law and order, and have sought third party backing to enforce decisions requiring, or likely to require, coercion. In doing so they have fallen between a neo-paternalism which interprets their position as an abrogation of autonomy and therefore they cannot really be meaning what they say; and a benign ethnodenigration which interprets it as an abrogation of responsibility.

It is perhaps an example of a problem where the Pitjantjatjara are going to need to look to the wider environment for solutions - rather than a reflex resort to their old masters. And it may well be that the most effective approach would be for the Pitjantjatjara Council to negotiate funds to the equivalent of that now being spent on the maintenance of law and order, with a view to their buying the kind of assistance they determine to be appropriate and to control its deployment - in much the same way as the Pitjantjatjara Homelands Health Service has been doing in the provision of a non-Government health service. Clearly there would be considerable dangers in the potential for creating unrealistic expectations, as well as misconceptions in the wider community as to the creation of a private legal system - though that, of course, is precisely what the abortive warden system does. It would not be a question of the Pitjantjatjara working to an exotic legal base, but rather developing the particular institutional modes to suite their circumstances. This course would require from the Pitjantjatjara an initiative to seek answers through political negotiation, and that in turn would depend on their deciding really where issues in law and order come in their priorities. But that process will always be prejudiced if professionals are unyielding in the view that professional judgement has unchallengeable prerogatives in determining what is politically "proper".

The real issue in Pitjantjatjara South Australia seems to boil down to the distinction between complaint and action. So far as complaint is concerned - and there is a good deal of it -

administrators and professionals need to be careful. To ignore it would be untenably cavalier; to temporise may be to perpetuate an unsatisfactory status quo; but, to introduce change, poses the problem of what change in respect of which complainant?

The Pitjantjatjara, having demonstrated real expertise in having other priorities accommodated politically, should not, in my opinion, be regarded as peculiarly handicapped in respect of law and order. If there is indeed a problem whose solution requires a change to the rules, or special funding, then that has to be identified by the collectivity of Pitjantjatjara and sorted out politically.

Conclusion

This paper is not a plea to do nothing. What I am advocating is the need to distinguish between two spheres of concern - one administrative, the other political. In South Australia, there is honing to be done administratively to an arrangement which in broad terms works. To this end, an Aboriginal Customary Law Committee exercises an oversight and in close cooperation with the Pitjantjatjara has made many recommendations and will continue to do so. But now that the Pitjantjatjara have their own political organisations it is over to them to negotiate new rules and any accompanying resources. The associated prerogatives and opportunities will, however, be obfuscated by an unwonted intrusion by non-Aborigines, however well motivated we may be and however clear we imagine our vision to be. In that context, the European role is to contribute service but withhold counsel.

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ABORIGINES & CRIME STATISTICS

Crime Statistics Relating
To Aboriginal People In South Australia

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The main purpose of this paper is to present a summary of criminal justice statistics relating to Aboriginal people in South Australia. However, in light of experience the Office the Crime Statistics has had in compiling and disseminating this information over the past few years, I would also like to take the subject a little further. During this period, it has become more and more apparent that people like myself, who collect figures on the ways the criminal law affects Aboriginal people, have reached somewhat of a turning point - without being too dramatic, one might even term it a "crisis point" - in our work.

Put bluntly, we seem to have been collecting and disseminating data for a long time, but not enough is happening. In the light of this inaction very many people - among the Aboriginal community, among researchers, and even in bureaucracy and government - are beginning to ask "what is the point?". "How many more books must be written to explain the phenomenally high rates of Aboriginal imprisonment...before the one body that has resources and the finances and the power to make inroads into the injustices...takes positive action?". This rhetorical question in the editorial of the most recent Aboriginal Law Bulletin (Number 8, August 1983) sums up the exasperation. I am very much afraid that unless researcher-bureaucrats like myself start to look beyond their immediate tasks and take such issues seriously, we will begin to be seen as - and may even become - irrelevant, even counterproductive. So as well as presenting statistics, I think I must address the question of "what should be done?". First, though, to the statistics.

It is now almost seven years since the appearance of the late Elizabeth Eggleston's pioneering work, Fear, Favour and Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia (Eggleston, 1976), and even before then, researchers and organisations such as the New South Wales Bureau of Crime Statistics had been mapping out the extent of Aboriginal peoples' involvement with the law, and degrees of discrimination which seemed to be exercised against them. It was Eggleston, however, who brought matters to a head with detailed case study and statistical material collected from ten towns in three States. Encompassing such key aspects as modes and rates of apprehensions, bail, legal representation, case outcomes and penalties, it left little doubt that in each phase of the legal process, there were significant differences in ways Aboriginal communities were being treated.

With respect to apprehensions for example, they seemed to have much higher arrest rates - even for minor offences - than other groups, and Eggleston suggested that this was because Aboriginals were less likely to be let off with a warning by police. In actual modes of apprehension, moreover, Aboriginal

people were far more likely to be arrested than summonsed, although there was no evidence that summonses would have been less effective.

Aboriginals also were less likely to obtain bail, and they were two and a half times less likely to be legally represented (two per cent as opposed to five per cent). Perhaps the most striking disparities, however, were in case outcomes and penalties. Although the great majority of all defendants in the ten towns were convicted, those cases which did result in acquittals or dismissals far less frequently involved Aboriginal people. For all offences - particularly the minor ones - moreover, Aboriginal people seemed far more likely to be gaoled directly, or to end up in prison because of default in fine payment.

Put very briefly, then, these were the sorts of findings that emerged from studies during the 70s. At the time, they seemed to give a significant impetus for reform. As we approach the mid-80s, however, it is logical to begin to ask what concrete changes have been effected. In answering this, I will mainly refer to South Australian statistics, because these are the ones I know best. However, I doubt whether they differ significantly from the other States.

Looking first at apprehensions, even a cursory review indicates that during the 80s, Aboriginal people are still far more likely to be apprehended - particularly for minor offences - than other members of the community. Latest figures for South Australia cover summary court appearances for the first six months of 1982. When compared with the latest ABS population (30 June 1981), they suggest that for persons who identified as Aboriginals, the rate of appearances was 385.0 per 1,000 population. For other Australians, the rate was about 11.0 per 1,000 population. About 60 per cent of the cases where Aboriginals appeared involved minor charges such as drunkenness, and vagrancy. It is also clear that Aboriginal people continue to be far more prone to being arrested than summonsed. During January to June 1982, for example, more than 90 per cent of Aboriginals had been arrested, compared with only 60 per cent of non-Aboriginal defendants.

Moving to the next stage - bail. Again, the anomalies noted by researchers during the 70s still are very much in evidence. The Office has found that a useful way to analyse this question is by dividing cases into two categories: those which required only one hearing and those which took more than one appearance by the defendant to be finalised. Generally, percentages getting bail before the final appearance were lower in 'single hearing' cases - 86.4 per cent compared with 93.1 per cent for cases involving two or more hearings during the first half of 1982. For both groups, however, chances of a custodial remand were much higher, if the defendant was from an Aboriginal background. Among the 9.7 per cent of 'single appearance' cases where bail had not been granted, for example, more than 69.8 per cent were Aboriginals: on a 'pro rata' basis, this suggests they were nine times more likely to have been denied bail. On the more serious 'multiple appearance' cases, the disparities were not

quite so marked: 19.6 per cent of Aboriginal defendants in custody as opposed to 5.5 per cent from other backgrounds. In the context of such figures, however, it is not difficult to understand why more than 14 per cent of persons in prisons in South Australia at 30 June 1982 were from Aboriginal backgrounds or Torres Strait Islanders.

If apprehension and bail figures were the only criteria, one might be tempted to argue that nothing has changed since 1975. On the next question - legal representation - however, there are grounds for optimism. Funding for legal aid bodies has resulted in far more defendants being represented at their final court hearings. In South Australia during the first half of 1982, more than 80 per cent of Aboriginal defendants facing charges requiring more than one hearing, and 34 per cent of those with a single appearance, had a lawyer. This compares quite favourably with 77.5 per cent and 26.3 per cent for all others.

Unfortunately, improved legal representation does not seem to have had a significant impact on outcomes and penalties. For all offences, we still find that Aboriginal defendants are more likely to have convictions recorded against them and to incur more severe penalties. Of course, as Eggleston herself pointed out, it can be misleading to take such correlations in isolation without examining such other key factors as prior offence histories. However, even when attention is confined to such trivial offences as drunkenness and vagrancy, the inescapable conclusion still must be that the system is biased against the Aboriginal defendant. During the first half of 1982, only forty defendants received a direct sentence of imprisonment for drunkenness. Of these, no less than thirty-five (87.5 per cent) were Aboriginals.

The figures I have cited are just a small part of the information which the Office of Crime Statistics now publishes every six months. They continue not only to monitor the trends Elizabeth Eggleston found, but to explore other aspects of criminal justice. There is not time to mention all the extra issues which are covered, but I should not let this occasion pass without referring to statistics on Children's Court and Aid Panel appearances made available to us by the Department for Community Welfare. Consistently, these show that young Aboriginal people suspected of offending are:

- * more likely to be arrested than summonsed
- * more likely to be referred to courts rather than to aid panels (during the first half of 1982, 64 per cent of young Aboriginal defendants went to court, compared to only 36 per cent of other defendants - penalties imposed by aid panels generally are far less severe than courts)
- * more likely to have been remanded in custody.

As stated at the outset, however, there is more to do today than merely compare our findings with those of Eggleston and other researchers in the 70s. I want to go further, and ask basic questions about what we are doing. Perhaps the most provocative

way to do so is by working through a counter-thesis which has begun to worry me more and more: that publishing these figures might actually be counterproductive.

The reason I say this is that with each successive six month report, there seems to be less of a reaction. Even twelve months ago, at least some people were moved to demand action. Now it is no longer news. Certainly, there are very few reporters prepared to take up the gauntlet and pursue the goal of equal rights for a minority.

As someone who is still a relative outsider, it would be very easy (and also very defensive) to dismiss all this merely as a sign of South Australian parochialism, and of the local media's incapacity to pursue any issue "in depth". However, I think there really are much deeper reasons. The fact is that by routinising, computerising, bureaucratising the sort of research that Elizabeth Eggleston undertook, we are making these results almost too familiar, too much a part of the background.

The implications go much further than merely desensitising the media. It is that by inadvertantly helping foster apathy, we might actually be making it more difficult for the champions of reform. Without being too cynical, it would have to be said that in the current era of limited public resources and 'consensus' politics, trying to coerce the machinery of justice into expending significant resources on a relatively powerless minority must be remarkably difficult. By helping to stagemanage twice yearly demonstrations of just how little the public cares about these issues, we can only be cutting the ground from under those who are trying.

Pursuing this line of thinking to its logical conclusion, it could be argued that if the Office of Crime Statistics were really concerned about inequities in the criminal justice system, it would actually reduce the number of reports it produces, highlighting the problem. Of course, this shows where the flaws in the reasoning lie. the answer cannot be to turn a blind eye to injustices most of the time, in the hope that if you only occasionally direct peoples' attention to them, you will have a better chance of obtaining some reaction. That really amounts to becoming resigned to indifference and apathy. In my view, the only way for researchers to combat these problems is by intensifying their own grasp of the historical and political dimensions of their work, and finding ways of conveying this far more forcefully to their audience.

Central to the historical grasp is, of course, the havoc that European settlement has wrought on Aboriginal society. By this I do not just mean physical violence inflicted on individuals - although the record of that is sickening enough - nor the immense loss of life due to introduced diseases and alcohol. I mean the total failure to recognise, let alone accommodate, the complex relationships which existed (and still do exist) among Aboriginal people, or between them and their environment. It is only now, for example, that physical anthropologists are beginning to appreciate that far from merely "living off" the land, Aboriginal inhabitants had a profound

impact on it - ironically, modifying it in ways that made it far more amenable to European modes of intensive agriculture. Similarly, although during the past fifty years, a minority of social scientists have been developing some insight into the complex religious beliefs and customary laws that exist in Aboriginal societies, most Europeans have remained profoundly ignorant - and through this ignorance have helped destroy them.

Once researchers achieve this sort of historical perspective, it should be far easier for them to avoid presenting statistics in a "one dimensional" way - as a series of injustices - and tie them to a far more forceful account of the role that Western law has played in the despoilation of an economy and a culture. They can cite, for example, the way that "law and order" followed the white squatter during the nineteenth century: giving them "rights" to land they had taken, defining it as "wrong" for Aboriginal people to slaughter cattle found on traditional hunting grounds, and throwing all sorts of legal obstacles (eg inadmissability of testimony from Aborigines) in the way of prosecution of whites responsible for massacres. If one looks closely at contemporary data, there is still every indication that versions of this "rough frontier justice" are still in action: arrest rates are extremely high in remote country regions of South Australia, and on factors like bail, legal representation and case outcome the lot of the Aboriginal defendant is particularly harsh.

I think, too, that with this historical knowledge, researchers will achieve a much keener grasp of their own political roles in these processes. The point has been brought home to me by reading C.D. Rowley's (1970) account of race relations in South Australia. As Rowley points out, South Australia is "the colony that was meant to be different" - where an Aboriginal always would have the rights of any other citizen. The practical consequence is that from the start, there has been no shortage of people to play the role that - albeit with more sophisticated technology - the Office of Crime Statistics still is playing: contrasting ideals of justice with its realities. Of course, these "consciences" have never posed a significant threat to economic interests, who have been able to characterise them as impractical do-gooders. Even more disquieting, though, is that this idealism itself seems to incorporate strains of the very ethnocentricity which have been so destructive. For example, the high minded sentiments about Aborigines' rights in the 'Letters patent' establishing the colony seem to take it for granted the complex rights and duties which constituted their societies could be ignored, and the individual members simply be reconstituted with full rights as citizens in European society. In this context it does not require great intellectual effort to perceive that if researchers simply confine themselves to issues of equity - arrest rates, bail, case outcomes, etc - they also may be helping to skirt around far more profound injuries which have resulted from the clash between two unequal cultures and economies.

At an Institute of Criminology conference earlier this year, Bill Clifford argued that

"The Aborigines themselves will suffer of their problems, and particularly their crime and violence problem, if not treated as we would treat the problems of any other sub-culture with issues of identity, violence and alcoholism to be solved by improved social conditions and higher expectations." (1983: 10).

By now it should be clear that this is a remark with which I profoundly disagree. Certainly, it is every Australian's responsibility to try to help Aboriginal people improve their life chances. However, I cannot see how either culture can hope to achieve such an objective, without also developing a forceful and coherent consciousness of the history of race relations on this continent. In my view, a body such as the Australian Institute of Criminology is ideally suited to coordinating this analysis - and in particular to refining our knowledge of the role that criminal law has been (and still is) playing.

To some, it may seem a "cop out" that I nominate the Institute - that is "someone else" - for this role, but the sad fact is that without significant injections of resources, places like the Office of Crime Statistics can do little more than maintain information systems. Nonetheless, I do hope that if this paper has achieved nothing else, it has at least shown that whenever the new era commences, the Office will do its best to play a part.

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CRIMINAL JUSTICE
12-16 SEPTEMBER 1983

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* Owen BEVAN	Police Department, South Australia
* Katherine BRADFIELD	Quaker Race Relations Committee, Australian Capital Territory
* Ted BUNT	Police Department, New South Wales
* Irene CASEY	Campaign Against Racial Exploitation, South Australia
* Diat CALLOPI	Ministry of Aboriginal Affairs, New South Wales
* Valma CLOSE	Corrective Services Department, New South Wales
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Greg COLES	Student, Australian Capital Territory
* Don FARMER	Aboriginal Rights Committee, Western Australia
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* Bill GALVIN	Police Department, New South Wales
* Joseph GEORGE	Probation & Parole Service, Western Australia
* Angela GORTA	Corrective Services Department, New South Wales

* Denotes those persons present during at least part of the seminar's plenary session on the final day, that is, 16 September 1983.

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