This study reviews government policy responses aimed at reducing the high incidence of indigenous peoples in custody. Its purpose is to appraise Northern Territory initiatives in the wider context of all Australian jurisdictions during the period of approximately 1985 to 1995.

While the findings of the Royal Commission into Aboriginal Deaths in Custody provide the main frame of reference for the study, the emphasis is not on deaths in custody, but on crime, its incidence among indigenous and non-indigenous people and, in particular, the anomalously high rate of imprisonment among indigenous people.

Existing research projects, literature, investigations and records of parliamentary debates have been examined for this study, in order to shed more light on the policy debate. Historical, criminological and sociological factors were also examined as they are essential in comprehending the complexity of the issues involved.

The study endeavours to show that any effective reduction in indigenous imprisonment rates needs to be globally addressed. Policy responses must aim to redress the inequalities found in all social indicators at the same time. They must also provide developmental opportunities that enable a rapid increase in indigenous self-management.

The study concludes that there are ample opportunities in the criminal justice system for greater Aboriginal involvement in determining more appropriate measures to deal effectively with offending behaviour. In order to achieve equity in the legal system, a shift is needed in the prejudiced and discriminatory assumptions upon which the structures and processes of the criminal justice system are based.
I wish to thank my friends and colleagues for their support, encouragement and assistance in reading the text and providing comments. I also wish to thank Dr Bill Tyler and Dr David Trollope for their assistance during the supervision process throughout the completion of this study.

In addition I wish to acknowledge the Department of Correctional Services for the access to documents and information, related to its role in the Northern Territory criminal justice system. It needs to be stressed however, that responsibility for the opinions expressed, and the interpretation of departmental sources, rests solely with me. The views expressed throughout the study do not necessarily coincide with those held by the Department of Correctional Services.
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CHAPTER 1

1. NORTHERN TERRITORY IMPRISONMENT IN A WIDER AUSTRALIAN CONTEXT

1.1 INTRODUCTION, RESEARCH FOCUS AND PURPOSE OF THE STUDY

The purpose of this study is to examine government responses to the over-representation of Aboriginal and Torres Strait Islander people in custody. The emphasis is placed on the Northern Territory; an emphasis which must be seen within a federal context and, where relevant, in comparison to other states. The study focuses on the period broadly extending from 1985 to 1995. This includes the period before the Royal Commission into Aboriginal Deaths in Custody (RCIADIC, Royal Commission or the Commission hereafter), responses to the findings during the Commission through the interim report by Commissioner Muirhead in 1989, and the post-Royal Commission period in terms of government responses to the findings as reported by Commissioner Johnston, in 1991.

The research focus takes stock of government policy responses, in order to determine how and to what extent government policies may have affected the over-representation of indigenous Australians in custody. This is largely framed around the findings of the RCIADIC with regard to incarceration and Federal, State and Territory Government responses to the Commission's findings. Suggestions are made as to how certain gaps, identified in government policy responses, might be addressed.

---

1 The term indigenous people indicates all Aboriginal and Torres Strait Islander people. Wherever the term Aboriginal people appears on its own, people from the Torres Strait are included.
The study focuses on the Northern Territory and its high incidence of indigenous people in custody. The overall imprisonment rate in the N.T., defined as the number of prisoners per 100,000 population, is significantly higher than the rate of imprisonment in other Australian jurisdictions. Moreover, approximately three quarters of all Territory prisoners are Aboriginal people, while only around one quarter of the general population in the N.T. is represented by Aboriginal or Torres Strait Islander people. Despite the high proportion of indigenous people in custody, the rate of over-representation of indigenous people in custody in the Northern Territory is, except for Tasmania, the lowest when compared to other Australian jurisdictions (Salloom, Biles and Walker, 1993).

This chapter outlines the incidence of imprisonment in the Northern Territory, which is greater than in all other Australian jurisdictions. It also shows the marked difference between the rate of imprisonment of indigenous Australians when compared with the rest of the population, leading to this vastly disproportionate rate of imprisonment for the indigenous population of Australia.

A theoretical framework is developed for the examination of government responses in the chapters that follow. It includes the historical undercurrents of 207 years of white 'settlement', a brief review of explanations of crime and the demographic characteristics of the Northern Territory. Section 1.6 outlines the methodology of the study.
1.2 HISTORICAL UNDERCURRENTS

The history of British invasion, or 'settlement' as it was referred to until recently, provides an overview of the way in which colonisation set the scene for the relationship between Aboriginal people and the police, the courts and the law generally. This was wrought with conflict, ambiguity, exploitation, discrimination and repression (Johnston, 1991:31).

The legacy of non-indigenous settlement is covered in detail by Commissioner Johnston, (Volume 2 of the Royal Commission into Aboriginal Deaths in Custody Report, 1991:3-4) who stressed the importance of understanding it, if one wishes to understand the issues underlying the disproportionate imprisonment rates of Aboriginal people. The underlying issues include dispossession during colonial settlement, the role of the police - firstly to overcome resistance to colonial expansion and later as "protector" -, the oppressive and discriminatory systems of law and, subsequently, the increasing levels of imprisonment since the 1950s. In addition labour and employment policies were used as instruments, wittingly or otherwise, for domination and suppression of indigenous people by colonial and post-colonial societies. An understanding of these issues helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society.

With the unfolding of white 'settlement', personal liberty for Aboriginal people was jeopardised, and discrimination against Aboriginal people by the general population had a significant negative impact on their education, housing, employment, income and self-esteem. The history of
institutionalisation, law enforcement, detention, imprisonment, and the role of police as well as the collusion and encouragement of the general non-Aboriginal population are critical historical factors for any understanding of disproportionate indigenous imprisonment rates (Johnston, Vol. 2, 1991:4).

The Commissioner's findings explain the deleterious relationship between indigenous and non-indigenous people. They show that the greatest increase in the detention of Aboriginal people occurred after the "assimilation policies" of the 1950s, when arrest and imprisonment replaced the forms of segregated controls which took place in "reserves". Trivial behaviours like 'untidiness', 'loitering' and 'immoral conduct' were punishable in court proceedings by incarceration, contravening the key principles of natural justice. Loss of land and charges of vagrancy provide good examples of this exploitation and abuse, making Aboriginal people trespassers on their own land of which they had been dispossessed (Johnston, Vol. 2, 1991:30-31).

Berndt and Berndt (1987:124) speak of the threat of force, used by Europeans to establish their authority on pastoral stations during the mid-1940s, prior to assimilation. The manifestation "or even hint of [Aboriginal] rebellion" was met with instant physical punishment. The authors hold that the regulations of the Aboriginals Ordinance, legislating protectionism between 1918 and 1943, were no more than "paper talk" in outlying districts where adherence to such regulations was noticeably lacking. Examples included Aboriginal workers being flogged for using English language which did not fit the recognised patterns of speech of the pastoralists, regardless of the workers' intent (Berndt & Berndt, 1987:13).
Langton (Johnston, Vol. 5) has commented similarly about differences in the use, meaning, culture and intent of language between indigenous and non-indigenous Australians which continue to date. The lack of protectionism in the real sense of the word was aptly highlighted by William Cooper in 1938. Cooper, an Aboriginal man, wrote to then Prime Minister Lyons after his letters to the editors of various newspapers met with insufficient interest for printing. Cooper wrote:

"We Aborigines are a 'protected' people. I understand that the correct meaning of the word 'protector' is: - 'One who protects from injury - one who protects from oppression; a guardian; a regent; one who rules for a sovereign'. It would please us greatly to have a protector over our people who would live up to that standard, but how do our protectorates work?" (quoted in Pearson, 1994).

The criminalisation of trivial behaviours, described by Berndt and Berndt, are placed in a theoretical framework by Downes and Rock (1986). They point out that state agencies could create far more deviance than would otherwise exist by "criminalizing morally disturbing activities ... mobilizing bias and unduly heavy penalties against groups low in power and status and by attributing quite spurious and stigmatizing features to deviant groups" (Downes & Rock, 1986:126). This view is not, however, generally accepted by the wider community as an explanation of criminal behaviour. Nor was it the view of those exploring reasons for criminal behaviour during colonialism or up until the first half of this century.

1.3 BRIEF REVIEW OF EXPLANATIONS OF CRIME

A number of different theories or views about crime evolved with the development of human endeavours, not least the development of economic structures upon which societies were based at the time. Cohen (1985) and Tyler (1994) explain the development of mid-twentieth century theories of
deviance as having taken place against the backdrop of the earliest theories of moralistic, traditional and classical punishment (just deserts) with little involvement from state authorities but a large element of public spectacle, based on religion. The classical age and enlightenment, with an emphasis on citizens' rights, saw punishment to deter crime. The individual was viewed as a rational and responsible being to be restored to society. The age of positivism and the emergence of scientific theories of crime during the mid to late nineteenth century emphasised genetic causes to explain the failure of the individual to behave rationally and responsibly. Durkheim's functionalist approach, credited with breaking the tradition of looking at the individual for explanations of criminal behaviour, pointed at society and its structures in the search for an explanation of crime. This occurred within a moral framework but away from the individual and into the social realm. Since the 1960s - the age of ideological attack - an explanation of crime has been sought in the interaction between the individual and the wider society.

Downes and Rock illustrate the importance of the influence of the interaction between "deviants and social controllers" on the process of criminalisation (Downes & Rock, 1986:126), thereby opening the field of deviance to a "new criminology". 'New' as opposed to 'old' or 'previous', in that questions raised from interactionist perspectives could not explain, for example, crimes of the powerful, such as white collar, corporate and organised crime (Box, 1981:237). It was argued that critical criminologists needed to explore a "materialist analysis of deviancy" as well as a strategy which could link such theory to social practice (Fitzgerald, 1980:27).
Muncie (1992:5), who criticises the 'new criminology' for "ignoring the structural relations of race and patriarchy", hails the "influential interventionist role" of the critical criminologists in developing a politics of support for marginalised groups such as black youths, prisoners and women, the establishment of independent inquiries into aspects of state authoritarianism and the monitoring of police practices. The social change thus achieved is also acknowledged by Brown and Hogg (1992:198), who emphasise that, in practice, changes are not achievable by class per se. While class may influence the way society's structures evolve, in itself it is not "a vehicle of social change".

New realism reintroduced the concept of relative deprivation and elements of sub-cultural theories in the explanation of crime, as well as the belief that "participation in the process of production is the key to a group avoiding marginality", and the concept of violence and riots being used as forms of political action (Haralambos & Holborn, 1990:642-3). These concepts may be useful in understanding occasional sprees of violence, in which there is conflict between the indigenous and non-indigenous populations, as seen in a number of Aboriginal communities. It also explains, according to Muncie (1992:3-5), the increase in police powers, as the New Right captured the terrain of law and order by capitalising on the "enemies within" and through the rhetoric of lawlessness and declining morality, ignoring once again the crimes of the powerful.

Harding et al (1995:10) hold the view that some Aboriginal crimes have elements of rebellion and protest. They add it is this explanation that perhaps accounts for agitation for more 'law and order' pressures which, when acceded to, reinforce the labelling of lawlessness. Lincoln and
Wilson (in Chappell & Wilson, 1994:82) argue that a number of elements have emerged in the concept of "crime as resistance", relevant to Aboriginal offending. Whilst being depicted as passive victims of alcohol, past injustices, unfair treatment of the agents of the criminal justice system and so on, they point out that Aboriginal people are also part of that justice system, as actors with a role to play and with considerable control over their actions. Offending behaviour by Aboriginal people may be an attempt to exercise control over their own lives, in opposition to police attempts to contain their communities, or to provide a meaningful form of political struggle to the white citizenry against whom they constitute a challenge (Lincoln & Wilson in Chappell & Wilson, 1994:79-81).

The greatest value of the different aspects with which crime and deviance have been viewed during the past three decades, is that an increasing number of factors comes into play when examining the complex phenomenon of offending behaviour. When the above-outlined factors of colonisation and explanations of crime combine with the interests and conflicts among the different stakeholders in the community, one gains an appreciation of the difficulties involved in the public policy arena. Dunn's definition of crime illustrates these complexities as follows:

"most segments of society view crime as a policy issue; yet crime as a problem involving unattained values of law, order, and security may be defined as a social problem, an economic problem, an educational problem, or a problem of individual motivation. In reality, crime is all of these problems and more" (Dunn, 1981:47).

1.4 INDIGENOUS SOCIAL DEMOGRAPHIC CHARACTERISTICS OF THE NORTHERN TERRITORY

In terms of overall representation, the population component of indigenous
Australians is small. The 1991 Census records 265,459 Aboriginal and Torres Strait Islander people in Australia, or 1.6% of the total population—a 16.6% increase from the 1986 census. The largest number of indigenous people resided in New South Wales (26.4%) and Queensland (26.4%), representing 1.2% and 2.4% respectively of these two states' total populations. Western Australia, with 15.7% of Australia's indigenous peoples, represented 2.6% of its general population. Victoria with 6.3% and South Australia with 6.1% of Aboriginal and Torres Strait Islander people, made up 0.4% and 1.2% respectively of their total population. Tasmania's and the Australian Capital Territory's indigenous people, at 3.3% and 0.7% respectively, represented 0.2% and 0.6% of the general population. The Northern Territory, with 15.0% of Australia's indigenous peoples representing 22.7% of its general population, is in the unique position of having less than one seventh of the overall Australian indigenous population account for close to a quarter of its citizens (Castles, 1993:2).

Almost every social indicator shows indigenous people to be in a disadvantageous position when compared with non-indigenous Australians. For example, in terms of housing, the 1991 Census found that 2.5% of indigenous people lived in dwellings classified as "improvised", including structures such as sheds, tents and other temporary accommodation. While there were few of these dwellings in the southern and eastern states, a large proportion of improvised dwellings was found in the Northern Territory (almost 11%), Queensland (8%) and Western Australia (6.5%). The highest proportion was in rural areas of the N.T. where 13% of dwellings, outside Darwin, were recorded as improvised structures (Castles, 1993:11).
Flick (1995) holds that all the investigations, reports and studies undertaken into "what they call the plight" of Aboriginal communities, is quite straightforward to her. She believes that indigenous people "still live, as they did for decades, in tin shacks ... without sewerage or garbage removal services ... carrying water from the creek" adding that "meanwhile, the town water supply runs past the front door" of those communities. Flick claims that 90% of Aboriginal and Torres Strait Islander people die before the age of 45, and suffer from high rates of diabetes among adults and high rates of asthma among children.

Aboriginal people comprise the lowest numbers of healthy, well educated Australians in high-paid, career oriented employment. Langton (in Johnston, 1991:286) sums up the situation thus:

"For many Aboriginal people, present living standards are utterly inadequate for a satisfactory life. Houses are inferior, hygiene and ablution facilities appalling, paid employment except in Aboriginal organisations virtually non-existent, diseases which disappeared in Australian society decades ago rampant, and relevant education and training opportunities poorly provided, if at all. Violence, rape and child abuse occur in Aboriginal society more and more. Many Aboriginal people are desperate for an end to these deprivations and assaults on their lives. Daily conditions in many communities and in most town camps seem unbearable sometimes. If it were not for Aboriginal culture and the access which Aboriginal people have to their land in the Northern Territory these problems might be overwhelming".

As a result of poor living conditions, in remote communities as well as town camps in the Northern Territory, indigenous Australians suffer the highest rates of notifiable diseases such as diphtheria, leprosy, malaria, gonorrhoea, measles, Ross River fever and syphilis. Tuberculosis appears to be the only category where a significant reduction has been noted in that, between 1989 and 1993, the incidence fell from 42 to 13 (Annual Report, Department of Health and Community Services, 1993/94:105).
Health problems in the N.T. are reported in the Northern Territory News, the Territory's only daily newspaper (23/4/95), to cause malnutrition at rates which, unlike tuberculosis, have not dropped over the past 20 years and are compared to extreme conditions in Africa. Gastro-enteritis, claimed to cause malnutrition, is in turn caused by poor housing, overcrowding, poor sewerage and sanitation, "questionable" water, and the quality of food and eating habits in Aboriginal communities: "fast food, tinned meats and poor vegetables are the usual fare". A report, released during April 1995, showed that one in five Aboriginal children may be malnourished. Authors Walker and Ruben were unwilling to use the term "parental neglect", given that any group living under the same "life pressures would have the same health outcomes" (Sunday Territorian, 23/4/95).

Housing in town camps, in Katherine for example, has been likened to "Third World" conditions. Overcrowding is regarded as "chronic", with the only tap 200 metres away from the camp and one out of the two mobile toilets out of order. Four camps house 700 people instead of the 480 they were "designed" to accommodate (Sunday Territorian, 30/4/95). Visiting politicians and, recently, a delegation from the OECD have assessed the situation and tend to confirm the unfavourable reports (ABC News, May & October 1995).

In terms of education and employment, Taylor (1992:25-6) points out that the Community Development Employment Program (CDEP), operating in 168 communities where some 18,000 people work for their unemployment benefits, may not change the low occupational standing of indigenous Australians in an increasingly skilled work force. Aboriginal and Torres Strait Islander
people tend to be concentrated in occupations set for relative decline in the 1990s. Included in this category are farmhands, cleaners, drivers, receptionists and trade assistants, while computer operators are among occupations on the increase. Taylor (1992:1-2) further argues that the goals of the Aboriginal Employment Development Policy (AEDP), aimed at altering the occupational structure of the indigenous work force, runs counter to the expansion of the CDEP scheme, which may increase work force participation but generally does so only in unskilled occupations.

Daly (1993:35) also has reservations about the CDEP scheme. He claims that the improvements noted among Federal Government education and employment programs need to be interpreted with caution, as "the long-term effects of these policies remain in question". He blames the CDEP scheme which, while increasing employment levels for indigenous youth at a time when other Australians have lost their jobs, fails to raise indigenous income levels to non-indigenous Australian standards.

In addition, Aboriginal people are subject to police arrest at rates higher than for other Australians; this is often followed by time spent in police custody or prisons. Debates have raged about the reasons for these trends and vary from arguments that indigenous Australians commit more offences (N.T. News), to the view that colonialism has a case to answer (RCIADIC). In addition, there are theories about crime and inequality (Braithwaite 1979 and Downes 1995), and theories that crime is constructed by the political, legal and economic structures in capitalist societies (Bird, 1987). The writer is of the view that the situation under consideration is the result of a combination of many of the complex factors reviewed in the preceding sections of this study; a combination which, in terms of crime,
seems regularly exploited by the role the popular media have adopted by fuelling community debate and community pressures to 'get tough' on offenders.

1.5 THE MEDIA

Pressures from the community are understood when the relationship between the media, the politicians and the police is examined. There is ample evidence that media reports tend to concentrate on sensational cases which make good stories. According to Sandor (1994:52), crime sells, and when it does, police organisations in particular stand to benefit in budgetary and other ways. Crossin (in Bagnall, 1994:46) alleges that, increasingly, media information is "not to expand our knowledge but to sell a product or advance a cause", while Sandor (1994:52) attributes this to the "symbiosis between politicians, the media and police organisations".

Community attitudes and perceptions seem to favour a 'tougher' approach in law and order issues in most jurisdictions. Sandor (1994:52) states that nowhere was this more apparent than in Western Australia, where the "draconian" Crimes (Serious and Repeat Offenders) Sentencing Act 1992 was introduced. Its purpose: to deal with 'hard-core' juvenile offenders, cast by the "media furore ... as thugs, hoodlums and louts, villains of the worst order, without feeling or conscience". Those opposing the "forces of public opinion as defined by some sections of the media, were portrayed as villains, 'do-gooders' and 'bleeding hearts'". New South Wales introduced truth in sentencing, which led to an increase in prison numbers of 60% (Vinson, 1995:5) and the Northern Territory is set to adopt the new Sentencing Act 1995, expected to lead to similar increases. Election
promises of more police in the streets, community policing and school-based constables seem to be vote catchers at most elections. The 'symbiosis' between the media, police organisations and politicians can thus be unravelled and its continued existence understood.

1.6 METHODOLOGY

The task of identifying government policy responses to indigenous overrepresentation entails an examination of existing research projects, literature, investigations - the most authoritative of which is the work of the Royal Commission - and records of parliamentary debates.

1.6.1 DESIGN

The design is by case study, outlined by Yin (1984:17) as the most appropriate strategy for research in the social sciences when the form of the research question entails how and why, when there is no control over behavioural factors and when the study focuses on contemporary events. Researching the effects of government policies on imprisonment and the subsequent over-representation in custody of Aboriginal people is such a study. There are descriptive, explanatory and exploratory elements in the main research question: How have governments responded and how have the policies of the Northern Territory Government impacted upon the gross over-representation of Aboriginal and Torres Strait Islander people in custody?

The findings of the Royal Commission into Aboriginal Deaths in Custody apply to all States and Territories, hence this case study involves the Northern Territory within the Australian context. The case study includes
three phases: examining Aboriginal imprisonment rates before the Royal Commission; examining the findings of the Royal Commission; and examining the effectiveness of the implementation of the recommendations of the Commission at the stages of reporting the progress of the RCIADIC recommendations, noted during 1992/93 and 1993/94.

1.6.2 MEASUREMENT

While acknowledging the importance of all social indicators, measurement in this study has been restricted to the numbers and rates of imprisonment at different times during the ten-year period under examination: before, during and after the Royal Commission. The first period establishes the baseline, while the latter two consist of points in time which coincide with government annual reporting of the implementations of the recommendations during 1992/93 and 1993/94. The annual reports are in accordance with Recommendation 1 of the RCIADIC, agreed to by all levels of government. (The 339 recommendations are found in full in Volume 1 of Commissioner Johnston's reports)

The outcomes of the implementation process of the Commission's recommendations may reveal changes in the social indicators of which, for the purpose and scope of this study, indigenous imprisonment and over-representation in custody are of central interest.

1.6.3 PROCEDURES

The magnitude of the issues involved in Aboriginal and Torres Strait Islander over-representation in custody becomes clear after perusing the
literature, as does the immensely complex nature of this situation, because almost every area of life's endeavours has the potential to affect custody rates. The Royal Commission identified social disadvantage and criminal justice system processes as having the greatest impact on high indigenous custody levels. Given the scope of this study, the latter factor is given predominant attention. It is however acknowledged that the broad area of disadvantage needs to be addressed simultaneously and with equal or greater vigour than the processes of the criminal justice system, in order to effect a substantial decrease in custody rates of indigenous people. It could be argued however, that more immediate actions can be taken in the criminal justice system than in all the areas of disadvantage.

1.6.4 EXTENT AND LIMITATIONS

Difficulties have been encountered in attempting to collate comparable data. It is only since January 1993 that all States and Territories have made a commitment to record the factor 'Aboriginality' in custody rates, thus enabling more accurate profiles and trends to emerge in forthcoming years. Furthermore, there have been changes in the compilation and reporting of data regarding offence categories. Profiles of the offences for which people are charged and/or of which they are convicted before being incarcerated, have become more detailed, complicating comparisons over time. Conclusions therefore remain tentative and need to be interpreted with caution. The ambitious aim of attempting to establish the effects of different policies on the rates of indigenous imprisonment is not only hampered by the lack of consistent data over time, but also by the wide range of factors impacting on indigenous imprisonment. It is for this reason that the study is as much qualitative as it is quantitative, with
the findings of the Royal Commission providing a recurrent theme, demonstrating trends where available data allow it.

The assumption has been made, throughout this paper, that the recommendations of the Royal Commission into Aboriginal Deaths in Custody are as readily accepted generally as they are by the Federal, State and Territory governments. Occasional comments are made to suggest reservations about a particular recommendation or topic, such as the recommendation to expand the police aide scheme, in relation to which Aboriginal communities have expressed their preference for fully fledged police officers. Insufficient attention to under-policing is another such comment. These are to be considered as marginal comments, as the purpose of this paper is not to provide an examination or critique of the Royal Commission's recommendations.

The boundaries of this study are drawn, albeit flexibly, around the Northern Territory, for the period 1985 to 1995. In order to place the findings in a national context however, Federal and other State experiences are reported where relevant or of interest. While recognising and stressing the need for Aboriginal disadvantage to be addressed with equal if not greater urgency, this study concentrates on the criminal justice system. Social indicators in terms of education, employment, housing and health, and changes in these indicators over time have not been sufficiently examined to allow due treatment in this study.

The issue of disproportionate imprisonment of indigenous Australians has almost totally overtaken the purpose of the Royal Commission, which was set up to investigate Aboriginal deaths in custody. However, disproportionate
custody levels were seen as the sole reason for the alarming number of Aboriginal deaths in custody. Biles, McDonald and Fleming (1989:3) clearly demonstrate the link between extremely high Aboriginal death rates in prisons and the gross over-representation of Aboriginal and Torres Strait Islander people in custody. Table 1.1 refers.

<table>
<thead>
<tr>
<th>TABLE 1.1 RATIOS OF PRISON CUSTODY DEATHS TO ADULT POPULATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>ABORIGINAL</td>
</tr>
<tr>
<td>NON-ABORIGINAL</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

(Source: Biles, McDonald & Fleming, 1989:3)

It is for this underlying yet overwhelming reason that the study almost exclusively addresses the disproportionate custody levels of Aboriginal and Torres Strait Islander people. Table 1.2 provides an overview of the number of persons in custody as at 30 June, 1989.
### TABLE 1.2 PRISONERS IN CUSTODY, BY ABORIGINALITY AND JURISDICTION - 30 JUNE 1989

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>ABORIGINAL</th>
<th>NON-ABORIGINAL</th>
<th>NOT STATED</th>
<th>TOTAL</th>
<th>PER CENT ABORIGINAL(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW (b)</td>
<td>415</td>
<td>4,861</td>
<td>7</td>
<td>5,283</td>
<td>7.9</td>
</tr>
<tr>
<td>VIC</td>
<td>86</td>
<td>2,156</td>
<td>14</td>
<td>2,256</td>
<td>3.8</td>
</tr>
<tr>
<td>QLD</td>
<td>412</td>
<td>1,855</td>
<td>122</td>
<td>2,386</td>
<td>18.2</td>
</tr>
<tr>
<td>WA</td>
<td>558</td>
<td>1,010</td>
<td>-</td>
<td>1,568</td>
<td>35.6</td>
</tr>
<tr>
<td>SA</td>
<td>102</td>
<td>761</td>
<td>8</td>
<td>871</td>
<td>11.8</td>
</tr>
<tr>
<td>TAS</td>
<td>9</td>
<td>215</td>
<td>21</td>
<td>245</td>
<td>4.0</td>
</tr>
<tr>
<td>NT</td>
<td>243</td>
<td>109</td>
<td>-</td>
<td>352</td>
<td>69.0</td>
</tr>
<tr>
<td>AUS</td>
<td>1,825</td>
<td>10,967</td>
<td>172</td>
<td>12,964</td>
<td>14.3</td>
</tr>
</tbody>
</table>

(a) Percentage of those persons for whom Aboriginality was stated in the census
(b) Including ACT  
(Source: Johnston, Volume 3, 1991:66)

Extracting the last column of Table 1.2, an overview of the different proportion of indigenous prisoners in Australian jurisdictions emerges:

Prisoners in Custody - 30 June 1989

PERCENT ABORIGINAL
1.7 SUMMARY

This chapter outlined the purpose of the study and developed a framework within which policy responses, designed to decrease the high incidence of Aboriginal and Torres Strait Islander people in custody, can be considered and examined. Demographic details contrasted the Northern Territory with other Australian jurisdictions.

The inclusion of a brief review of explanations of crime served to note the shift in emphasis from being almost exclusively on the individual, through a recognition of society as a force interacting with individuals in their criminal endeavours, to an emphasis on the role played by conflict and power relationships between those who commit the actions which are subsequently punished by those who decide where, when and how it is appropriate to do so.

Finally the chapter established that Aboriginal people are grossly over-represented in custody and inferred that their circumstances are extremely unfavourable when compared with other Australians in the realms of health, housing, education, employment and social justice.
2. THE CHANGING VIEW OF ABORIGINAL POLICY

2.1 INTRODUCTION

In terms of policy for indigenous people, the general orientation can be traced as having evolved from protectionism through assimilation to self-determination. Arguably the most important thrust in policy orientation is embodied in the 1992 High Court decision Mabo v. Queensland, which revolutionised the concept of "terra nullius" by nullifying it. This led to the Commonwealth Native Title Act, 1993, enacted on 1 January 1994 (Stephenson, 1995). According to Pearson (1994), Mabo represents the "beginning of the sharing of justice and citizenship in this country". This recognition of the existence of Aboriginal people, he says, provides a reasonable starting point for further debate and development. Pearson stresses, however, that a proviso for negotiations to effect change is the recognition of the past: the legacy of colonialism. He also argues that it "is still very much a thing of the present" - that is, colonialism is still working policy, whereby Aboriginal people continue to struggle for their rights and property. Pearson adds that, given the past can no longer be evaded, "there is every indication that Australia is mature enough to deal with it".

2.2 CONCERN FOR INDIGENOUS WELFARE

Cummings (1990:10) holds that the policy of removing 'part'-Aboriginal children from their families was aimed at the prevention of miscegenation
on the one hand, and providing cheap labour on the other: domestic training for girls, to "make the lives of the newly-recruited white families more comfortable" and, for boys, training in the growing pastoral industry, where their labours for mustering camps and stockyards were eagerly sought. This policy was already in progress in 1912 when Spencer, appointed by the Commonwealth Government in 1911 to compile a report on the Aboriginal population in the Northern Territory, strongly recommended continuing the policy, "irrespective of the apparent inhumanity of the practice" (Cummings, 1990:11).

Johnston (Vol. 2, 1991:72/3) regards the child welfare policy and its "non-Aboriginal institutional and individual efforts to deny Aboriginal culture and heritage to Aboriginal children" as having been the most pervasive force in regard to poor self-esteem which, in turn, is reflected in emotional and behavioural factors linked to excessive drinking and offending. The child separation policy has had a profound impact on Aboriginal culture, while its legacy through loss of parenting skills may be felt for generations (Johnston, Vol. 2, 1991:74).

Harris (1990:634/5) explains how assimilation, condemned today for its inadequacy, patronising ethnocentricity and racist set of assumptions, was a genuine intellectual shift during the 1930s and 1940s, when the idea that Aboriginal people were a dying race was abandoned. He argues that assimilation was once progressive in its fight for equality in treatment and access to education, health, social services, employment and all other benefits, institutions and responsibilities of citizenship (1990:638). Harris (1990:620-21) further outlines how Aboriginal spokespeople, like William Cooper and William Ferguson, collected 2,000 Aboriginal signatures
in 1935, and led a delegation to federal parliament to make a plea, as British subjects, for equality with white Australians. In 1936, Cooper formally founded the Australian Aborigines' League with a constitution, policy statement and office bearers, offering associate membership to non-Aboriginal people. Both Cooper and Ferguson, believing they were dealing with an essentially Christian white community which would recognise their claims to be just and right "in a decidedly Christian sense", died before any changes eventuated (Harris, 1990:634).

Harris (1990:848) concludes that a policy of assimilation is, in the final analysis, "a policy of ethnocide". He adds that, while assimilation represented an intellectual leap in the 1930s and 1940s, it is a leap many non-Aboriginal people have not taken yet - leaving another leap to the concept that Aboriginal people can determine their own future.

The 1961 'Native Welfare Conference' saw the introduction of a definition of assimilation, formulated to be subscribed to by all States and Territories. This was necessary, as the aims of the 1951 welfare conference were not met, given that each State's interpretation of providing some freedom from protective and restrictive legislation for Aboriginal people differed, while the commitment of State governments was regarded as questionable (Cummings, 1990:125).

Coombs (1994:20) suggests that Australia's post-war reconstruction activities in relation to health, education, training, and development of the "native people of Papua New Guinea was not matched for Aborigines in Australia", although the then Prime Minister Curtin had realised the need for attention to "the welfare of the [Australian] native peoples". Coombs
(1994:20) further claims that a meeting in 1965 of Commonwealth and State Ministers with responsibility for Aboriginal matters reached tentative agreement that the objective of policy ought to be assimilation, in that

"... all persons of Aboriginal descent will choose to attain a similar manner and standard of living to that of other Australians and live as members of a single Australian community - enjoying the same rights and privileges, accepting the same responsibilities and influenced by the same hopes and loyalties as other Australians"

No conclusions were reached about how the above choices should be realised, however it was in this environment, endorsed by the 1967 referendum, that the Commonwealth Government accepted responsibility for Aboriginal affairs generally. It was also the referendum which, according to Coombs (1994:30/1), opened the way to political action by Aboriginal people and their supporters to obtain land rights. The Council and Office of Aboriginal Affairs, set up in September 1967 under Coombs' chairmanship, failed to achieve the intended outcomes despite an abundantly clear understanding of the need for reform and the potential to redress some of the injustices suffered by Aboriginal people since the settlement of Australia (Coombs, 1994:172).

It can therefore be seen that, despite conferences, petitions, goodwill, agreement for a policy statement based on an intellectual understanding of the need for reform, and the creation of an Office of Aboriginal Affairs, the objective of redressing the injustice of the past was not met. According to Pearson (1995:22), it is the optimism, hope and direction provided by the "revolution" in Australia's historiography, Mabo, and a preparedness to embed Mabo's legal and moral imperatives into our national institutions, that will have to change these symbolic and institutional
achievements into the actual delivery of "social justice for people on the streets, in the tin humpies and living under the bridges". He holds that Mabo, reconciliation and social justice must have consequences for people on the ground; it must mean something for the quality and duration of their lives.

2.3 FEDERAL AND STATE RESPONSES TO INDIGENOUS IMPRISONMENT PRIOR TO THE ROYAL COMMISSION

Prior to the Royal Commission, most efforts of Federal, State and Territory governments to address the disproportionate representation of Aboriginal and Torres Strait Islander people in custody could perhaps be best described as less coordinated measures than post-Royal Commission efforts, often based on trial and error, and generally aimed at improving the undesirable situation of anomalously high custody levels of the indigenous population. Examples of these in the Northern Territory would include programs such as the Galiwin'ku Community Justice Project on Elcho Island and an Aboriginal Visitors Scheme in correctional institutions. Both programs may be seen as having the potential to reduce Aboriginal over-representation in custody. However, to date, they have not developed strategies and have subsequently not resulted in outcomes to affect long-term, substantial or widespread decreases in over-representation. Other measures entail the concept of wilderness camps and prison farms for juvenile detainees and adult prisoners respectively, the latter being a feature of most Australian jurisdictions.

Western Australia introduced a visitors scheme in both police lock-ups and prisons during the late 1980s, possibly as a result of the interim report,
prepared by Commissioner Muirhead as part of the Royal Commission’s preliminary findings. South Australia had schemes in place which diverted people from custody to early release schemes, such as Home Detention, a scheme adopted in the Northern Territory to provide an alternative to imprisonment entirely—that is a "front-end" option, as opposed to the opportunity for early release in South Australia. While these programs have been most useful, innovative and conducive to the rehabilitation of offenders, they do not seem to have made a significant and sustained impact on custody rates, and even less so for Aboriginal than non-Aboriginal offenders. With the emphasis of this paper on the Northern Territory, and the interest in and the potential for various forms of community justice projects, the initiatives promoted in the N.T. will be examined in greater detail.

2.4 NORTHERN TERRITORY INITIATIVES

Some of the Northern Territory initiatives can rightly be hailed as 'an Australian first'. This occurred for example with the Home Detention Program, available for sentencing authorities as a direct alternative to imprisonment, and first utilised in March 1988. The juvenile detention facility at Wildman River, the Wildman Wilderness Camp, is another such initiative. Both programs received a lot of publicity in the N.T. and were of interest to ministers and administrators interstate and in overseas jurisdictions.

Other initiatives implemented by the Northern Territory government include the change from petrol to avgas in most Aboriginal communities, to prevent petrol sniffing; a Community Aid Panel in Katherine; Aboriginal Community
Corrections Officers; Aboriginal police aides; a Drug Abuse Resistance Education (DARE) Program based in schools, and School-Based Constables. The Department of Correctional Services implemented programs such as the Station Placement Program, Juvenile Offender Placement Program (JOPP), and an Official Visitors Scheme. These programs have the potential to offer alternatives to detention for juvenile offenders or to enhance community contacts, once detention or imprisonment have occurred. Appendix 1 details all community and custodial programs offered by the Department of Correctional Services in the Northern Territory.

Other Northern Territory responses include the promotion of increased Aboriginal involvement in the criminal justice system and of initiatives by Aboriginal people which deal with criminal behaviour in a culturally appropriate manner such as by a return to outstations, owned by family groupings. Some of these initiatives are described below.

2.4.1 ABORIGINAL COMMUNITY CORRECTIONS OFFICERS

Aboriginal Community Corrections Officer (ACCO) positions were created in 1986 in an attempt to increase Aboriginal involvement in the Department of Correctional Services. This was intended to provide training opportunities for Aboriginal people in Community Corrections, while at the same time utilising the skills, knowledge and experience of indigenous people to contribute in improving the workings of the criminal justice system in remote communities. The funding for these positions was initially provided by the local Council, which proposed the worker, and the Department of Correctional Services, whose responsibility it was to train and supervise the worker. This program has been significantly expanded since the
introduction of Northern Territory initiatives to increase Aboriginal employment opportunities following the recommendations of the Royal Commission. Section 5.4.1 outlines the expanded program.

2.4.2 COMMUNITY JUSTICE PANELS

The concept of Community Justice Panels arose in South Australia in the 1970s and purported to provide an alternative to the criminal justice system for young offenders. Community Justice Panels, constituted through community membership, are designed to seek an appropriate solution to certain offending behaviours; this may provide young offenders with an alternative to a court imposed sentence. Community justice panels or community aid panels in the N.T. began with the Galiwin'ku Project in 1982. It was based on similar community justice projects in New South Wales and South Australia. The only jurisdiction in the N.T. currently operating a Community Aid Panel is Katherine, which started as a pilot project during the late 1980s.

The 1995 Juvenile Crime Workshop (1995:5) recommended a continuation of the Community Aid Panel, further development of an education role, promotion of Court referrals and an examination of police referrals. It was further recommended that the Community Aid Panel remain in community ownership, albeit with secretariat and transport support from the Department of Correctional Services.

2.4.3 THE GALIWIN'KU COMMUNITY JUSTICE PROJECT

The Galiwin'ku Community Justice Project, initiated by the Department of
Law through the Magistrates Court in 1982, was an attempt to establish a formal community justice mechanism. It was regarded as the N.T. Government's major expression of commitment to community justice principles. Its aim was to provide a justice program which could accommodate Aboriginal law and social control mechanisms within the existing judicial system. This is achieved by inviting senior Aboriginal custodians to discuss and assess an offender's circumstances with the magistrate, prior to sentencing but after close consultation with the defendant's nuclear and extended family. The project aimed to support existing social controls evident in the community and to acknowledge and strengthen them within the contemporary life of the community (Langton in Johnston, Vol 5, 1991:385).

The Galiwin'ku Project developed along Stephen Davis' (the project's consultant) interpretation of the structure of Aboriginal society, namely a "lineage authority structure", along which genealogical links enable identification of specified kin who carry traditional responsibilities for the defendant, including the exercise of specified Aboriginal social controls. The information so obtained was then selectively, and on a restrictive basis, made available to effect consultation with the offender's family prior to Court and to offer detailed social background information to the sentencing authority (Langton in Johnston, Vol 5, 1991:386). The experience of the project was positive, however there was an element of risk which may not have received sufficient recognition or rectification during the operation of the project.

According to Williams (1987), the genealogical basis is flawed, in that genealogical relationships are not causally linked to precise behaviour,
which can be subsequently presumed to "operate in uniformly predictable ways". Williams holds that such use will have no meaning for Aboriginal people in particular cases, or that communication between police, courts, Aboriginal defendants and their families "may proceed on different, even contradictory, assumptions". She claims, instead, that it is firstly relevant to ascertain the individuals who are responsible for the defendant and secondly "what roles they will play in the implementation of sanctions and/or rehabilitation". The roles may be specified in kin terms, at which point it "may be fruitful to make inquiries in terms of genealogical relationship if the interrogator has an understanding of the local conventions of kin usage" (in Johnston, Vol 5, 1991:387).

Williams claims that "genealogical diagrams cannot convey the information relevant to particular issues of social control" - that the implications for magistrates using genealogical data are serious and that "without adequate understanding of the relationship between genealogy, kinship and clanship, errors are likely to occur frequently" (Langton, in Johnston, Vol 5, 1991:386).

Despite criticism of the Galiwin'ku Community Justice Project, the positive features cannot be ignored and led Langton to recommend an independent, formal evaluation of the project:

"It should examine, with the assistance of anthropologists who qualify as experts in the field, options for enabling indigenous forms of social control to operate in Aboriginal communities with the formalised cooperation of the Australian legal system, specifically the visiting magistrate and the Department of Correctional Services" (in Johnston, Vol 5, 1991:388).

Nevertheless, the Galiwin'ku Project is reported by Davis (in Langton, in
Johnston, Vol 5, 1991:383) to have reduced the offence rate on Elcho Island
to "almost nothing". It was the first such project tried in Aboriginal
communities and, while it was barely in existence at the time of the Royal
Commission into Aboriginal Deaths in Custody's investigation, it is claimed
to have reduced the imprisonment rates for Elcho Island from approximately
4.2 times the national rate in 1983 to 2.5 times the national rate in 1984.
In 1984, the imprisonment rate for Elcho Island was comparable to Darwin's
custody rates and considerably less than for the Alice Springs town area.
Since the late 1980s, the involvement of the Department of Correctional
Services in Elcho Island has been negligible (departmental records). This
could lead one to conclude that, at least for Elcho Island, the project has
been highly successful, despite its shortcomings.

2.4.4 THE YIRRKALA PROPOSALS

Coombs (1994:123/4) describes the Yirrkala proposals as a model centred on
a Council of elders from the Yirrkala clans, whose role would be to make
rules to maintain social order, subject to community endorsement. The
Council would further deal with breaches of those rules through a community
court and carry out agreed upon settlements and/or punishments of such
breaches. It would also advise magistrates or judges once a case is before
the court about the issues, attitudes and circumstances involved, and would
provide input on the form and degree of compensation or punishment regarded
appropriate by the community.

Williams (1987), in her submission to the Royal Commission into Aboriginal
Deaths in Custody, identifies the following guidelines as essential for the
effective operation of community justice mechanisms:
"The viability of Aboriginal community justice mechanisms depends on Aboriginal autonomy. At the most basic level this means that police and other Australian law enforcement agencies will not intervene unilaterally in offences involving Aborigines, but will intervene at the invitation of Aboriginal community leaders. They will keep the leaders involved at all stages of dealing with the community member charged with an offence if the matter is dealt with outside the community, and within the community will act to support the authority of community leaders ... Where Aboriginal communities suggest mechanisms of articulation or joint operation with Australian law enforcement agencies, these must be seen as means of providing support for Aboriginal authority, not of superseding it" (in Johnston, Vol 5, 1991:389-90).

2.5 COMMUNITY INITIATIVES

Arrangements have, from time to time, been initiated by an individual or by a Community Council where it was felt that the situation warranted a different approach. These are, to the writer's knowledge, informal arrangements and have not therefore been exercised on a regular basis. For example, a particular incidence of a group of young people offending in a remote community in the Northern Territory has led community elders to represent to the Court their strong feelings about the way in which matters were dealt with. On one such occasion in 1993, the community decided that offending youngsters should be made to perform community service work for the Council and under Council supervision. There was a further stipulation that it would be up to the Council to decide when the youths had worked sufficient hours to consider their 'debts paid' to those they inconvenienced or hurt by their behaviour.

The presiding magistrate agreed with the above arrangement, requiring the Council to report on the outcome and to return the matter before the Court, should there be difficulties with all or some offenders complying with their community work obligations. According to the Community Corrections
officer in that community, there was reasonable compliance with the community work requirements, albeit for a shorter period than might have been the case if the Court had stipulated the hours in accordance with a formal Community Service Order Scheme. This is perhaps an indicator of the often strongly voiced opinion by Aboriginal offenders and their families that punishments from the European system are too long - that is, extending beyond a period of time when, in Aboriginal culture, the matter would have been finished.

A suggested alternative explanation is that the Council might have lost interest in the process of punishment. While this sentencing alternative was never officially discussed, a decision has apparently been made to return to the formal Community Service Order Scheme. A final suggestion was made by the Community Corrections officer that the Council may have been motivated in its decision to keep its young people out of prison on this occasion and out of further trouble, rather than exacting retribution.

2.5.1 JULALIKARI COUNCIL NIGHT PATROLS

Night patrols were initiated by Aboriginal people in the Tennant Creek area during the 1980s; these were assisted by the Julalikari Council after it was formed in 1985. The scheme started officially in 1989 and receives formal support and backup from the local police. Grabosky and James (1985:6) describe the objective of the Night Patrol Scheme as an attempt to "resolve any problems within the town camps and special purpose leases, to settle disputes when they begin, and to remove to a safe place people incapacitated by drink or otherwise likely to become involved in trouble". The volunteers who staff the scheme patrol the town between 4 pm and 4 am,
and enjoy seniority and respect in the Aboriginal community. Incidents are
diffused and a community meeting held the next day, to "mediate the dispute
and admonish perpetrators in a culturally appropriate way".

Grabosky and James (1995:6-7) stress the uniqueness of the program in that
it "addresses major Aboriginal concerns in a culturally acceptable way, yet
is able to operate in tandem with modern law enforcement". They quote
police reports, claiming no marked increase in the number of reports from
the night patrol for the three years prior to 1992; this was attributed to
a substantial increase in the number of disputes or disturbances resolved
by the scheme's volunteers without reference to the police. Police further
reported a significant decrease in alcohol-related crime. For the period 1
July 1991 to 30 June 1992, alcohol-related crimes were down by 43% - from
352 in 1990/91 to 201 in 1991/92. At the same time, 505 people (or 30% of
cases) were placed in the sobering-up centre on a voluntary basis by night
patrols, leading to protective custody figures being reduced by half within
a period of 2 years.

Grabosky and James (1995:7) are of the view that the effectiveness of the
Julalikari Night Patrols rest on their two main features: the willingness
of respected members of the community to become involved in policing and
resolving community problems and the willingness of transgressors to accept
their chastisement. They conclude that, where appropriate, intervention
programs of this nature can reduce problems of excessive violence
dramatically within a relatively short time.

The Tangentyere Council, as resource and service agency for the
Incorporated Housing Associations occupying some 18 special purpose leases
in the Alice Springs town area, has night patrols as well as a Social Behaviour Project. The aim of the latter is to assist when interventions of the night patrols require solutions to territorial disputes. The Council's Four Corners Program assists the Courts with advice for suitable penalties for town campers and their visitors, such as community options and traditional law approaches, and, under strong leadership, makes rules about ways of town living more suited to Aboriginal culture (Juvenile Crime Workshop, 1994:46&69).

2.5.2 THE OUTSTATION MOVEMENT

The outstation movement started during the 1970s (Wilson, 1982:109-110), when large numbers of Aboriginal people, led by adults in the upper age range, left missions and government settlements to live on traditional lands. The ensuing lifestyle has been reported as more peaceful, leading to better morale, often supported by an extensive reaffirmation of traditional religion. This, in turn, allowed pride and esteem to improve dramatically.

The drive of Aboriginal families to move away from larger communities to the lands owned by their elders, was supported by N.T. government departments during the 1980s. Basic services such as electricity, water, education and health services were established according to varying degrees of need. Young offenders were regularly taken to outstations by their most significant relatives in the hope that engagement in ceremonies and hunting or fishing activities, while ensuring temporary removal from the peer pressures to participate in less desirable activities, would provide pride in their culture and meaning to their lifestyles. Reactions from young
offenders about the outstation lifestyle have varied from it being "too hard" or "boring", to positive reactions, describing life on outstations as a good alternative, with "plenty of fishing and hunting" for a satisfactory and acceptable way of life.

2.6 TRANSFERABILITY OF PROGRAMS

Tyler (1995:128-131) examines the attempt to develop Aboriginal criminal justice policies in remote parts of the Northern Territory and their potential for transposing N.T. schemes to other Aboriginal situations. He cautions policy makers and invites them to pay careful attention to the different meanings of the concept of "community", which may render notions of Aboriginal self-determination and its relationship to public order extremely problematic. He stresses the need to be mindful of the appropriateness of policies and programs in terms of Aboriginal empowerment and self-determination on the one hand, and the definition of "community" on the other. While successful experiments in the N.T. are often a local response to the problems associated with high imprisonment and criminalisation rates of Aboriginal people in remote communities - such as night patrols, community liaison and community justice panels - these need to be viewed in the wider social and political context in which these communities "have been constituted as self-managing entities, i.e. as community councils, community government, or organisations which derive from these forms".

The central questions posed relate to what a community is "in the public sphere of the Aboriginal domain" and how its types of organisations might "differ from those constituted outside this domain"; how desirable the
conditions of community life and organisations from remote Australia are for replication in less remote situations; and how the concept of community, "offering as it does a politically acceptable, culturally appropriate and democratic expression of the new order of self-management and self-determination", can be ameliorated with "the structures of post-assimilationalist administration" (Tyler, 1995:130).

Grabosky and James (1995:7) note that the Julalikari Council's night patrol program has been successfully replicated in other areas. They too, stress the importance of the concept of community, to the extent that sufficient community cohesion is needed in order for the program operators' authority to be accepted. Grabosky and James included the night patrol program in a publication of 18 examples of crime prevention initiatives in Australia and around the world.

2.7 ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY AND THE INITIAL RESPONSE OF NORTHERN TERRITORY POLITICIANS

The RCIADIC, by far the most comprehensive and authoritative inquiry into Aboriginal custody, was established by the Commonwealth in response to a public outcry in Aboriginal communities, and echoed in the wider community, on account of Aboriginal deaths in custody reaching alarming levels in 1987. The Royal Commission into Aboriginal Deaths in Custody set out to examine the alarming rate of Aboriginal deaths in custody but widened its scope to include the underlying reasons for Aboriginal deaths in custody.

As part of its interim findings, the Commission concluded that the 99 Aboriginal deaths in custody did not present a disproportionate rate of
death when compared with the wider custodial population for the period under investigation - that is, between 1 January 1980 and 31 March 1989. What the Commission did find was an overwhelming difference in the rate at which Aboriginal people were imprisoned compared with the rate of the general population. It also found that the extreme disadvantage in almost all areas of indigenous Australians' lives was the underlying reason for the gross over-representation of Aboriginal and Torres Strait Islander people in prison.

The Commission, while acknowledging that criminal justice, police and prison reform were largely State and Territory responsibilities, strongly advocated that Commonwealth, State and Territory governments allocate their resources equitably if each was committed to address effectively the disadvantaged position of Aboriginal people. It recommended that this could be achieved if mainstream programs were to "aim to deliver social justice to Aboriginal and Torres Strait Islander people" in all jurisdictions, with ATSIC's specialist programs as supplementary, in order to redress "the extreme disadvantages". The extreme disadvantages were found to range from the "central issue of denial of self-determination to poor health, education and employment status, seriously flawed relations between Aboriginals and Torres Strait Islanders and the wider community (including the criminal justice system), and the lack of economic opportunity" (ATSIC, 1994:x-xi).

Northern Territory parliamentarians debated the interim report of the Royal Commission, prepared by Commissioner Muirhead, reflecting the changing view of Aboriginal policy. It was pointed out by the Leader of the Opposition that the loss of power, caused by institutionalisation and paternalism has
led to a crushed belief in the self, powerlessness and lack of self-worth which, when viewed from a cell at the point of "absolute rock bottom", may be the cause for taking one's own life (1989:5491). The Leader of the Opposition advocated the need to "empower the poor and the oppressed in our society ... and have policies which allow people to have a sense of self worth" in order to reduce imprisonment rates. He stressed the need for control of resources, power through parliament, Aboriginal organisations and people, and land rights to increase a support base to exercise their power. A final strong argument was made for implementing Commissioner Muirhead's recommendation for a Northern Territory Task Force to examine the RCIADIC recommendations (Hansard, 1989:5493).

Other interesting points during the N.T. parliamentary debates were made with regard to the link between land rights and over-representation in prison. The member for Nightcliff contradicted the Leader of the Opposition's intimation that land rights might reduce over-representation by citing South Australia - with land rights - and Western Australia - without land rights - being the "worst" in terms of over-representation, arguing that land rights are "not a driving force in this argument". While this minister recognised the problem to lie in the proportion of Aboriginal people in custody, he stressed there to be "less over-representation of Aboriginal people in the prison population in the N.T." than in most other states or territories (Hansard, 1989:5494-5).

The lack of recognition of the difference between Aboriginal laws, unchanged for centuries, and "white man's law", changing every day, was pointed out during parliamentary debates by the late member for Arafura. It is this, he said, which "confuses our people" (Hansard, 1989:5499).
This politician added another dimension to the arguments. He expressed the problem as residing in the fact of being "caught between two worlds: our world and the world of the whites which began here 200 years ago". He stated: "Caught between two worlds and it does not matter what laws are made or what programs governments try to implement in communities. They will never work. It is up to ourselves. We have to come to terms with your law, with the Commonwealth ... Nobody has the answer to the problem ... Main thing is our culture ... is what keeps us living today" (Hansard, 1989:5498/9).

2.8 SUMMARY

Aboriginal policies have been discussed, noting the progression through protectionism and assimilation. The inhumanity of the policies during the earlier part of the twentieth century has been recognised and is being rectified, with a shift towards self-determination. Hope has been expressed by sections of the Aboriginal community that, with the recognition in 1992 of indigenous land ownership prior to the European invasion, justice and citizenship in Australia can be debated, developed and shared. The view has also been expressed that Australia has reached the maturity to recognise the past legacy of colonialism, acknowledge it, deal with it, and move on to a level where partnerships are forged on an equal footing.

Programs and initiatives have been examined in terms of their potential to decrease the unacceptably high levels of Aboriginal over-representation in custody. It was noted that wider social, cultural and political factors in individual Aboriginal communities need to be carefully examined before
attempts are made to implement programs, initiatives or policies which include aspects of non-Aboriginal organisational structures. At the same time, a plea has been made to support Aboriginal people to acknowledge the inevitability of being caught between two worlds of law, notwithstanding that Aboriginal culture and its dictates are a vital element in all undertakings.

Differing views about the importance of land rights and the link to over-representation in custody have been quoted and lead the writer to accept, if not take for granted, that Aboriginal culture is vital for survival and that land forms the core and the basis of indigenous culture.
3. INDIGENOUS PEOPLE AND THE LAW - A LITERATURE REVIEW

3.1 INTRODUCTION

This chapter aims to provide a basis for examining the issue of indigenous over-representation in custody from a broader view, based on the theoretical perspective of deviance, outlined in the first chapter, but expanded by the empirical evidence of several studies. Reference is made to additional theoretical viewpoints, providing further understanding of the complexity of factors bearing on the over-representation of Aboriginal and Torres Strait Islander people in custody. The last section outlines strategies to affect a reduction in imprisonment, and advocates changes in sentencing policies. These considerations may also be relevant to the general population of offenders. The focus remains however on the over-representation in custody of indigenous Australians, commencing with the introduction of European law in Aboriginal society and the conflict thus created.

3.2 "WHITEFELLA LAW IN BLACKFELLA COUNTRY"

The imposition on indigenous Australia of a foreign system of law by the colonialists, or post-colonialists, adds another dimension to that society's system of law. The indigenous population had an intricate set of laws which had served their societies for thousands of years. When those traditional laws were not respected or acknowledged by the newcomers, it could have been foreseen that there might be a reciprocal retribution and
lack of respect for the new and alien laws imposed. The principles and philosophies, on which the maintenance of social order were based, are different, as are the concepts of offending and punishment. Bird (1987:8) points out that crime for Aboriginal people traditionally centred around "the breaking of marriage taboos, the telling of secrets and the making of magic". While society was structured along gender and age rather than class lines, punishment was by public shaming, spearing, clubbing, magic or banishment. She contrasts this with British law, which was "based on terror" and entailed brutal punishment. In its "moral bankruptcy", relevant to the "civilising mission", it criticised "cruel tribal punishments" (Bird, 1987:9). One could argue however that there were similarities in the methods of physical punishment, while the systems of authority which meted out punishment or sanctioned behaviour were based on different motivation, structures and power relations.

Coombs (1994:120) argues that the Aboriginal systems of customary law have been gravely interfered with by Australia's prevailing legal system, to which Aboriginal people have been made subject, the consequences being not least "the several destructive results on the once effective Aboriginal measures of self-control". Coombs expresses the lack of respect for each culture's legal system in the much stronger term of "repugnance" with which each views the other's punishment measures. He adds that "their [Aboriginal] repugnance is arguably better founded than ours, where corporal punishment is concerned. Death excepted, a physical punishment involves a short-term distress. Imprisonment, separation from one's social network and isolation (physical and cultural) cause long-term distress" (Coombs, 1994:120-121). One of the most destructive measures to inflict upon "institutionalised Aborigines where they are socialised into prison
behaviour", must be the lack of being "re-integrated or re-socialised as they would be under Aboriginal customary law" (Coombs, 1994:121). These sentiments highlight the destructive and undermining consequences of imprisonment on the traditional structures of indigenous Australians, so important in establishing cultural pride and value.

O'Shane (in Cunneen, 1992:6) argues that Aboriginal people are the "victims of an unjust legal system - one maintained on the basis of inequality". She holds that, while this was true during the 1970s, it is still true today, after a myriad of reports, inquiries and commissions have ascertained the problems. Her main criticism rests with governments and bureaucracies, some of whom acknowledge the reports and some of whom bury them, while those who implement programs do so without Aboriginal involvement in their planning, design and implementation. Instead, those programs meet the needs of government and bureaucracies in order to point to "something being done without there being any real intention of doing anything" (O'Shane in Cunneen, 1992:5). This point bears relevance when one considers the regularly stated arguments by governments, the press and individuals alike, that huge amounts of money are spent on the well-being of Aboriginal people and that, in fact, too much is undertaken to improve their status. Questioning the reasons for the lack of improvements commensurate with resource input thus becomes a crucial task.

Pearson (1995:22) introduces the concept of a spiritual malaise among Aboriginal people which started when many lives lost purpose as a result of dispossession. This concept may contribute to answering the questions posed above. He believes that "until Aboriginal people feel proud and comfortable in their own country, and comfortable in their dealings with
other Australians, this spiritual malaise will represent the biggest reason for our failure to make progress". Pearson (1995:22) further believes that issues like "land ownership, meaningful work opportunities, economic development, cultural renaissance and social justice" are therefore an inescapable part of the solution, while he sees leadership from Government and Aboriginal community leaders as the key to the solution.

Commissioner Muirhead, as part of his contribution to the RCIADIC (1988:12), comments thus:

"I am confident ... a significant number of deaths have their roots, not only in health issues, but in the very despair of individuals, in frustration, in anger, in legal practices and procedures in which many Aborigines have no confidence".

In support of that interpretation, Hazlehurst and Hazlehurst (1989:46) conclude that the destructive effects on Aboriginal society contribute to the enormous disproportion of Aboriginal people in custody. They quote the Sydney Morning Herald of 21 April, 1989, stating that a recognition of those factors, together with the international obligations, may point "a way forward to restitution and the prospect of reconciliation".

3.3 EXISTING RESEARCH ON ABORIGINAL IMPRISONMENT, OVER-REPRESENTATION AND RECIDIVISM

In terms of Aboriginal over-representation and recidivism, Alexander (1987:323-342) reports the findings of a research project, undertaken in 1985. The project was commissioned by the NSW Department of Corrective Services and the Ministry of Aboriginal Affairs, to "investigate the chief causes and the rate of Aboriginal recidivism as well as making
recommendations as to what kind of post-release support schemes would prove efficient, effective and useful" (p 323).

Alexander's (1987:324) project is particularly relevant to this study, in terms of the responses made by Aboriginal inmates. The methodology involved interviews with 68 Aboriginal ex-inmates, 100 Aboriginal inmates, 30 NSW State Government Officers and Aboriginal service providers and archival records of 154 Aboriginal prisoners released from NSW gaols during the first 6 months of 1983. The interviews were conducted by Alexander and two Aboriginal researchers who were themselves former inmates and who kept the ex-inmates well informed, throughout the research process, in terms of the correctness of the researchers' interpretation of their statements.

Alexander found that the imprisonment rate for Aboriginal people in Australia in 1984, was 15.3 times higher than the rate for non-Aboriginal people, while the rate in NSW in 1984 was 11 times that of non-Aboriginal people (1987:333-4). The failure to deter the same person from committing further offences was demonstrated by Alexander's research in terms of recidivism. He found the following figures among the 68 ex-inmates and 100 inmates interviewed:

- 63% and 67% respectively had been sent to a juvenile institution at least once - average age of these 110 persons out of the sample of 168 was 13.2 years, with the range being 5 to 17 years of age. In general, Aboriginal juveniles are 12 times more likely to be in a corrective institution than their non-Aboriginal counterparts, while in 1982, 18% of Aboriginal children spent time in such institutions. In 1982, they comprised 1.5% of the NSW population;

- At the age of 26, 69% of the ex-inmates and 70% of the inmates had been sent to an adult gaol more than once. The average of the 168 sample had been imprisoned 3.5 times, with the range varying from 1 to 12 times. The average time spent in gaol for the same group was 5 years, with the range varying from 1 month to 38 years (Alexander, 1987:334).
The researchers' findings include the following during the interview stage of their project:

- A large degree of distrust among the Aboriginal inmates of "white fellows", motives for their research efforts and who would benefit from this research, and a distrust of Government agencies in general and the Department of Corrective Services in particular.

- A clear need to establish themselves and their loyalties in order to satisfy the ex-inmates' need to find security, trust and a different attitude than the hostile prison environment or the racist outside world.

- A lack of interest among the inmates and some ex-inmates, resulting from having either only short sentences to serve and thus not experiencing any benefits, or from a general resistance to participate in something that would only lead to more disillusionment (Alexander, 1987:325-327).

Further findings include that:

- 68% of ex-inmates and 77% of inmates were unemployed at the time of the offence;

- Upon release, 74% of the ex-inmates remained unemployed, while 26% found some form of employment;

- The main comments from the latter group centred around the importance of getting a job when they are released from gaol;

- 68% of ex-inmates and 79% of inmates stated they had consumed alcohol at the time of committing their offence, while 44% and 47% respectively stated they took other drugs at the time of the offence;

- 21% of ex-inmates and 18% of inmates stated they had not consumed alcohol nor drugs at the time of committing their offence (Alexander, 1987:329-332).

Unemployment at the time of committing an offence appears as a factor in a large number of cases. It is also an important consideration for inmates prior to their release. The scope of this study does not allow both issues of unemployment and alcohol to be included. Because the latter is more visible in the community and perhaps easier to target with positive
measures in the short to medium term, it receives a higher profile in this study. However, the critical impact of unemployment on recidivism is in no way diminished by this choice.

Even though Alexander's findings relate to a study conducted in New South Wales, anecdotal evidence and a degree of empirical evidence is available to establish that the situation is not so different in the Northern Territory. In terms of alcohol use at the time of committing offences, the figures in Table 3.1, below, show the alcohol related receptions in Northern Territory prisons for the period January 1993 to June 1995:

<table>
<thead>
<tr>
<th>ALL PRISONS</th>
<th>RECEPTIONS</th>
<th>FINE DEFAULT</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALCOHOL RELATED NUMBERS</td>
<td>ALCOHOL RELATED NUMBERS</td>
<td>ALCOHOL RELATED NUMBERS</td>
</tr>
<tr>
<td>ABORIGINAL OFFENDERS</td>
<td>2235</td>
<td>2912</td>
<td>436</td>
</tr>
<tr>
<td>NON-ABORIGINAL OFFENDERS</td>
<td>378</td>
<td>847</td>
<td>93</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2613</td>
<td>3759</td>
<td>529</td>
</tr>
</tbody>
</table>

Source: Department of Correctional Services, Research and Statistics Unit.

The figures in Table 3.1 show that, of the total receptions (3759), alcohol was a factor in 70% of cases and in 73% of the 720 fine defaulters. Comparing Aboriginal and non-Aboriginal prisoner receptions, alcohol was a factor in 77% and 45% of cases respectively, while the comparison between Aboriginal and non-Aboriginal fine defaulters shows that in 82% and 49% of cases respectively, alcohol was related to their incarceration.
It has been pointed out that the issue of alcohol is only a symptom, not an explanation or reason for so many incidents of offending behaviour (Alexander, 1987:332). Excessive use of substances such as alcohol tend to point to a much deeper problem, festering below the surface of the social conditions and circumstances of many Aboriginal people.

3.3.1 JUVENILE JUSTICE

Gale et al (1990:2) completed a longitudinal study in South Australia for the period July 1979 to June 1984 to establish whether Aboriginal youth receive different treatment from the criminal justice system to that of their non-Aboriginal counterparts. They are of the view that the area of juvenile justice in Australia is almost entirely neglected, yet it is the area of greatest concern to Aboriginal people. Their findings indicate that when Aboriginal youths are in contact with the law at an early age, the resulting disadvantage has serious repercussions well into their adult lives. They claim that there is "absolutely no doubt that such disadvantage exists and that its consequences are extremely serious".

Gale et al (1990:4) illustrate the difference between the proportion of court appearances and detention for Aboriginal and non-Aboriginal youths. Table 3.2 provides a comparison of the outcomes at the point of arrest, referral to court and detention in South Australia for the period under study. They argue that their statistics do not prove that Aboriginal youth commit more crimes than non-Aboriginal youth, but "raise the possibility that the law is applied differentially by law-enforcement agencies". Their official data represent the processes involved - that is the percentage of
youth processed at different levels - but not the element of discretion utilised at every level of the juvenile justice system. They hold that the decision makers, by and large, operate within the legal limits at each level of the system, even where they are systemically discriminatory and therefore perpetuate the discrimination (Gale et al 1990:6).

TABLE 3.2 COMPARISON OF OUTCOMES AT POINT OF ARREST, REFERRAL AND DETENTION FOR JUVENILES IN SOUTH AUSTRALIA

<table>
<thead>
<tr>
<th></th>
<th>ABORIGINAL</th>
<th>NON-ABORIGINAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>COURT APPEARANCES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RESULTING FROM ARREST</td>
<td>43.4%</td>
<td>19.7%</td>
</tr>
<tr>
<td>COURT REFERRALS BY THE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SCREENING PANEL</td>
<td>71.3%</td>
<td>37.4%</td>
</tr>
<tr>
<td>COURT APPEARANCES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RESULTING IN DETENTION</td>
<td>10.2%</td>
<td>4.2%</td>
</tr>
</tbody>
</table>

(Source: Gale et al, 1990:4)

Gale et al (1990:8) also hold the view that, while a high proportion of the system's operators may go to extreme lengths to try and give Aboriginal youth a fair opportunity to obtain justice and rehabilitation, there is frustration at their inability to deliver equity which stems from the cultural values of the society in which the system operates. The inherent discrimination patently suffered by young Aboriginal people, they argue, can be explained only by deep seated causes within our society; by the "unacceptable face of social, cultural and racial bias". They conclude that the numerous reforms at both legislative and welfare levels "have apparently failed to deliver even the beginnings of equity" (Gale et al, 1990:8).
The basic arguments presented by Gale et al (1990:30) are that, despite Juvenile Screening Panels and Juvenile Aid Panels, pursuant to the South Australian Juvenile Courts Act of 1971, the incidence of young Aboriginal people being formally processed has not been reduced. Rather, they argue, each new piece of legislation seems to contribute to an increase in the formal processing of cases rather than to effect any reduction. They conclude that Aboriginal youths are disproportionately involved at each stage of arrest and court appearance. At the final point of sentence, they found the chances of Aboriginal youths to be sentenced to detention to be 23 times greater than for the rest of the population. They claim that, in South Australia, the position of Aboriginal youth in relation to their non-Aboriginal counterparts, actually deteriorated (Gale et al, 1990:41).

Havemann and Havemann (in Hazlehurst, 1995:226) claim that juvenile net-widening may be associated with diversion from the formal juvenile, or adult, criminal justice system. They point out however that diversion in New Zealand - where family conferencing is widely used to find more appropriate solutions to criminal behaviour - led to a sharp drop in the number of children coming before the courts: from 7,236 in 1989 to 1,887 in 1990. They also hold that, while diversion is widely supported in Australia, "it lacks any means of either reviewing practices to identify disparate outcomes reflecting race or gender bias or fettering the discretion of those who impose it".

In the Northern Territory, family conferencing is currently piloted in Alice Springs. An evaluation of the pilot program is awaited with great interest, as it may provide an indication as to whether family conferencing is a superior option to different forms of Community Justice Panels.
"Rights Now", the newsletter of the National Children's Youth Law Centre (Vol 3, No. 4, November 1995) reports the following on family conferencing:

"The most worrying aspect of some of the Australian adaptations of the Conference is that they serve to extend the powers of the police who become investigators, prosecutors, judges and punishers. It is well known that many police officers consider juvenile courts to be a joke and want a tougher approach to youth offending. A Conference held in a police station and presided over by a uniformed police officer is light years away from the New Zealand model.

Conferencing provides a bold new approach to juvenile justice. Whether it will enhance or diminish the rights of young people will depend on whether there is genuine empowerment of young people and families and on the extent to which conferences are controlled by the police".

The question is posed whether Australians have "hijacked a good idea by adding a philosophical overlay of 'reintegrative shaming', by emphasising the victim's rights and by giving control of the process to the police" (Rights Now).

Havemann and Havemann (in Hazlehurst, 1995:231-232) analysed the introduction of diversion, family conferencing and restrictions on the use of police powers in New Zealand - pursuant to the Children, Young Persons and Their Families Act, 1989 - as being a result of law reform relating to neglected children and young offenders. This occurred at a time when both Labour and National parties in New Zealand were competing for votes during 1987-1990, by being "tough on law and order". A 1989 values survey indicated that 75-80% of voters perceived criminality to be on the increase and were in favour of "stiffer jail sentences" (75+%) and "increased police powers" (80+%).
Broadhurst (1984) has undertaken substantial studies in recidivism in Western Australia over a five-year period. His study (quoted in Johnston, Vol. 3, 1991:68/9) established that for Aboriginal men "the probability of ultimate recidivism" was 80% with a median time before failure of approximately 11 months after last release from imprisonment. This compared with 40% for non-Aboriginal men, with a median time of 19 months, while for Aboriginal women the rate was 75%, compared with 25% for their non-Aboriginal counterparts.

Broadhurst identified the following factors as significant in leading to high recidivism rates:

- younger prisoners have "a very much higher probability of re-offending than older prisoners;
- for Aboriginal students, unlike the situation for non-Aboriginal students, greater exposure to schooling did not correspond to lower rates of recidivism;
- for individuals, employed at the time of committing the offence and re-commencing work immediately upon release, there was a lower probability of failure than for unemployed individuals;
- single prisoners, divorced, separated or in de facto relationships had higher risks of failure than others;
- those released unconditionally were subject to higher recidivism rates than those released on parole;
- escaped prisoners showed higher recidivism rates than others;
- prisoners with more than $200.00 on release had improved prospects "both in terms of ultimate probability and as to time before failure";
- prisoners who had received special leave had lower rates of recidivism (Johnston, Vol.3, 1991:69-70).
Alexander (1987:333-4), in his study of 68 Aboriginal ex-inmates and 100 current Aboriginal inmates in NSW, holds that imprisonment fails in both areas of deterrence and rehabilitation. He argues that the failure to deter others is demonstrated by the continuing high rates of imprisonment of Aboriginal people - i.e. the rate in Australia in 1984 was 15.3 times higher than for non-Aboriginal people, while the rate in NSW in 1984 was 11 times that of non-Aboriginal people.

In Alexander's study, direct answers from the 68 ex-inmates and 100 inmates to questions about deterrence included 41% and 39% responses respectively, indicating they did not worry about going to gaol because "nothing could be done about it or that they had been there before" (1987:336). 74% and 91% respectively stated they knew that, if caught, they might have to go to gaol for their offence. Alexander concludes that, instead of deterring an offence being committed, imprisonment would, in some cases, lead to "a series of actions which are aimed at avoiding being caught and imprisoned".

The negative reactions of 94% and 96% of the ex-inmates and inmates respectively to the question whether they thought prison "too nice" or like "a holiday camp", dispel the myth that the prison regime is too lenient. The reactions varied from a dislike for, to a hatred of, the prison environment. Alexander (1987:336) argues that the lack of deterrence of imprisonment "has much more to do with the feeling of Aboriginal people, namely that, even if not actually imprisoned (while in gaol), they are already imprisoned" (1987:336). It would be important to survey the situation in the Northern Territory, where comments are regularly made that prison is no punishment, but a 'holiday camp'.
Alexander utilises the imprisonment rate of 620 per 100,000 population (compared to about 56 per 100,000 for non-Aboriginal people) in NSW on 30 June, 1984, and a recidivism rate (a return to gaol over a 2-year period) of 52% for Aboriginal inmates, to conclude that harsher treatment of Aboriginal offenders "does not and will not affect law and order, let alone achieve justice" (Alexander, 1987:336-7).

In terms of rehabilitation, Alexander (1987:337/8) establishes the failure of imprisonment to rehabilitate on the basis of a lack of appropriate educational or vocational programs in gaols. Alexander's recommendations include a variety of programs inside the gaols, a Mobile Resource Unit and the establishment of post-release centres, staffed by Aboriginal staff, one of whom at least would be an ex-inmate, and catering for between 12 and 15 Aboriginal ex-inmates with access to drug and alcohol counselling, educational and vocational programs and a workshop. They stress that one has to participate in these programs in order to be eligible to reside in post-release centres. The mixture of rehabilitation programs and work programs, through the workshop, would offer a "real breathing space" for the ex-inmates (Alexander, 1987:340/1).

3.4 THE CRIMINAL JUSTICE SYSTEM - A CASE OF SYSTEMIC BIAS?

Is it true, as O'Shane suggests, that Aboriginal people are the victim of an unjust and unequal legal system? According to O'Shane, the disproportionately high rates of Aboriginal involvement at every level of the system are a result of Aboriginal people being victims of racism by police, magistrates, judges and prison authorities. She cites the findings of the Eggleston (1976) research study, carried out during the mid to late
1960s, which found that the largest discriminating factor was to be found in the lack of legal representation, albeit somewhat diminished after the establishment of Aboriginal Legal Services in the mid 1970s (O'Shane in Cunneen, 1992:3).

Somers (1977:3-4) reports "disturbing evidence that the justice system unduly penalises not only Aboriginal offenders as against non-Aboriginals, but convicts and sentences rural Aboriginals more severely than urban Aboriginals". She reveals that, from the 1971 Census figures, Aboriginal cases of offensive behaviour in South Australian towns with a large Aboriginal population were less likely to be fined, 7 times more likely to receive a prison sentence than in other country towns and 6 times more likely to do so than in Sydney. Cases of "unseemly" words and drunkenness showed similar results, with similar patterns in other states.

Bird, in her study of statistically significant over-representation of Australia's indigenous population, concludes that this gross over-representation at all stages of the criminal justice system was due to "the use of the criminal law as a means of controlling and moulding a colonised people", adding that until the "fundamental racism of Australian society, which permeates all its structures is addressed, Aborigines will continue to be 'objects of policing'" (Bird, 1987:2). Having studied comparative social research findings from Africa, the USA, Canada and Papua New Guinea - where similar effects of dispossession and marginalisation of indigenous Peoples were found - Bird holds that, "although in theory there is now a recognition of the equality of all races, in practice the superiority complex of white people exists today, and is part of the construction of Aboriginal crime" (Bird, 1991:5).
McConnochie et al (1993:21) explain that by the increasing use of race as "a prop to support processes of imperial and colonial expansion, to justify the invasion of many lands by European societies, and to support claims that people of European (or white) descent were superior to all other peoples" thus believed in the right to conquer and control the whole world. They do not doubt that racism developed as a "vehicle for rationalising the exploitation and denial of human rights to millions of people" and that thereby "the master race could justify, (at least to itself) the appalling acts of the 18th, 19th and early 20th centuries" (1993:42-43). Charmichael and Hamilton equate institutional racism with colonialism (quoted by McConnochie et al, 1993:40).

Nettheim, who illustrates labelling in Queensland, asked in 1977: "Is it the situation that Aborigines [on Qld 'reserves'] are shiftless, careless and lazy, living on welfare and alcohol, and therefore requiring confinement and control by the government? Or has governmental control over the decades created a situation where Aborigines see little point or inducement for acquiring such characteristics as initiative and responsibility?" (Nettheim, 1977:28). It is clear that the way in which one chooses to view a given situation has a pertinent bearing on the people viewed within that situation.

Haralambos and Holborn (1991:611-612) point out that individuals' self-concept is largely derived from the response of others, tending to see themselves "in terms of the label ... [which may] produce a self-fulfilling prophecy whereby the deviant identification becomes the controlling one". This may in turn lead to rejection from social groups, encouraging further deviance, and deny the ordinary means of carrying on the routines of
everyday life. While this is explained by the authors in the context of the development of a sub-culture, the concept of stereotyping Aboriginal peoples may highlight its influence on self perception for indigenous Australians.

O'Shane makes statements regarding "outrageously racist comments by judicial officers" such as a New South Wales magistrate telling an Aboriginal defendant "that his people are 'a pest race'; or blatantly racist penalties" such as "the imposition of a six-month term of imprisonment upon an Aboriginal man in Queensland who spat at a Reserve manager". O'Shane states that a seemingly regularly made assumption, that judicial officers are, by reason of their status, unlikely to be racist, cannot hold as penalties can only be imposed by judicial officers. She adds however that, while the processes attempting to change racist and sexist attitudes are difficult, "attitudinal change is possible given sustained commitment to such change" (O'Shane in Cunneen, 1992:6).

It would seem that attitudinal change is the hardest change to make in any circumstance. If it is accepted that today's society is a racist society, it follows that all human beings, socialised in that society suffer from racism, albeit in differing degrees. This includes not only the judicial officers O'Shane discusses, but any kind of officer and any kind of person. Martin (1973:3) reminds us that the stereotype of "the dirty, shiftless, inferior, promiscuous, plonk-drinking native" was fostered by increased dependency through the institutionalisation and paternal management, which began when resistance was reduced by legislation to restrict Aboriginal people to reserves and missions.
Somers' (1977:4) emphasis on the argument that the "deplorable situation of Aboriginals in this area does not arise from any formal bias in the criminal law" against Aboriginal people, needs further examination. She adds that not only is the criminal law system not funded on any criteria of racial discrimination, "it is unlawful to discriminate against Aboriginals or other racial minorities. We must therefore focus on administrative practice in the criminal justice situation and on elements of the Aboriginal situation which render them particularly vulnerable".

The following claim encapsulates the difficulties experienced by law enforcement agents, when pressures are placed on the way they execute their duties:

"Reliance on observational and case study material is obviously inadequate to prove that police systematically discriminate against Aboriginal youth when deciding whether or not to apprehend them and which charges to impose. Nevertheless, it does provide some evidence that not all officers exercise their discretionary powers equitably, whether because of personal bias or because of community pressure on them to react with obvious 'toughness' towards a group who are generally perceived by white mainstream society to be 'irresponsible', 'drunken', 'lazy', 'troublemakers' (Taft, 1975:39).

Harding et al (1995:7) hold that people from poor neighbourhoods, who behave or look different, have "a very much greater chance of being caught in the law enforcement 'net'". They conclude that the interaction between those factors and race "assures higher rates of Aboriginal involvement with police and formal criminal justice procedures and interventions". Harding et al (1995:8) quote Duguid (1992 unpublished) who completed a detailed re-analysis of Gale's study. They report that Duguid was unable, like Gale et al, to demonstrate that strong differences in the probability of arrest between Aboriginal and non-Aboriginal people resulted from harsher and unfair treatment of Aboriginal people by police, once a number of variables
were taken into account. Duguid did find however that there was overwhelming evidence that Aboriginal offenders were more likely to be arrested than reported after controlling for the same variables¹, identified by Gale et al. Harding et al accept this as "clear statistical support for the proposition that 'race' or Aboriginality increases the risk of arrest for Adelaide juveniles" (Harding et al, 1995:7).

Coe (in Cunneen, 1992:80) focuses on the importance of the 200-year history of oppression of Aboriginal people, when considering the relationship between Aboriginal people and the legal system, with the police as its agents. Cunneen (1992:90), while warning that looking at over-policing may constitute an overly simplistic account of the situation if it is not considered within a framework of broader historical and political relations, points out that administrative decision-making by Police Departments can directly constitute a process of structural racism. He emphasises that over-policing, when viewed in its historical and political context, "should be seen as a process of contestation: the struggle between the imposition of a dominant order and the resistance of a dispossessed cultural minority". With the results of reports of the RCIADIC and a National Inquiry into Racist Violence, Cunneen concludes that "Aboriginal people are policed in a way different from, and at a level greater than, non-Aboriginal people. Over-policing exists as one of a number of processes which gives life to the structure of racism" (Cunneen, 1992:90-91).

Payne (in Cunneen, 1992:32-33) considers Aboriginal women and the law, and reports that the devastating effects of the institutionalisation, resulting

¹age, sex, race, offence, arrest or summons, neighbourhood, employment, family structure, address, previous appearances and number of charges, as well as addressing the problem of sparse data.
from the policy of forced 'adoption' of Aboriginal infants and children are and "will continue to be, a major factor in Aboriginal over-imprisonment for both sexes for a long time to come", as indeed its commonness was found in the backgrounds of the deaths investigated by the Royal Commission. Payne stresses the other issues of Aboriginal disadvantage, found by the Royal Commission, were emphasised by racism, alienation, poverty and powerlessness and often resulted in hopelessness and alcoholism. She reiterates that these factors contributed more significantly to the imprisonment of Aboriginal people than any degree of criminality.

Payne (in Cunneen, 1992:32-36) further holds that Aboriginal women, representing the least employed and lowest economic group in Australia, "get the worst deal allround". They are regularly imprisoned for non-payment of fines, drunkenness and social security fraud, as the result of extreme poverty. They have to cope with the results of decriminalisation of drunkenness because, commendable as that policy decision may be, their drunken partners are brought home as the resources to complement the legislation have not stretched far enough to provide sufficient sobering-up centres or detoxification units. This argument is amply reinforced by the findings of the Royal Commission in the N.T., where there were no deaths in custody of Aboriginal women during the investigation period. Yet 39 Aboriginal women died due to homicide. They are 28 times more likely to die from homicide than any other Australian person.

Finally, Payne points out that Aboriginal women consider they are subjected to three kinds of law: "white man's law, traditional law and bullshit law". The last kind is used to explain a distortion of traditional law used as a justification for assault and rape of women, or "for spending all the
family income on alcohol and sharing it with cousins, justifying the action as an expression of cultural identity and as fulfilling familial obligations". She argues that on those occasions, Aboriginal tradition is to justify what is essentially "selfish exploitation based on an individual desire for alcohol" (Payne in Cunneen, 1992:37).

Cunneen's argument, that Aboriginal people are policed in a different way, and at greater levels than non-Aboriginal people includes this point. He holds however, that over-policing is misconceived if it fails to pay attention to the levels of violence perpetrated against Aboriginal women. Cunneen argues that, in the arena of protecting women, the issue is one of under-policing (1992:88-9). He is critical of the Royal Commission for failing to grasp the issue of under-policing more fully in that it is not just an issue of resources, acknowledged in recommendation 88, but clearly an issue of police response. Aboriginal women are reported to have made consistent complaints to the National Inquiry into Racist Violence about the lack of response when requesting police assistance (Cunneen, 1992:89).

Australian imprisonment rates reveal the greatest over-representation to occur among Aboriginal women in all jurisdictions, except the Northern Territory. The level of discrimination is argued to be compounded by the combination of race and gender (O'Donoghue in Commonwealth Implementation Report, Vol. 1, 1994:107).

Clifford (1982:11) expresses the dilemma of gross over-representation of Aboriginal people in the criminal justice system as follows:

"Even the most dedicated geneticist cannot believe that the massive disproportion of Aboriginals before our courts and in our prisons denotes a different kind or special degree of criminality. When behaviour so widespread as to be practically normal among Aboriginals
is labelled criminal by our law, there is a need for rethinking the
law. When imprisonment does not deter but is shouldered by the
Aboriginal as an inevitable yoke to be carried as a consequence of
his (sic) residence in a white society, we would be moronic to go on
using it punitively and ineffectively. On the other hand, even the
most impassioned environmentalist would not go so far as to advocate
total permissiveness towards behaviour which Aboriginals themselves
recognise as being socially suicidal".

3.5 ARGUMENTS FOR STRATEGIES WHICH COULD AFFECT AN OVERALL
REDUCTION IN IMPRISONMENT RATES

Since the mid twentieth century, there has been a move away from custodial
sentences to conditional liberty programs, either in their own right, or
with full or part suspended sentences. Vass (1990:80-81) reports that,
after ten years of operation, suspended sentences failed to achieve (in
Britain) a reduction in the prison population. He argues that this was due
to the tendency of the alternatives to replace other, existing non-
custodial sentences rather than providing a substitute to prison sentences.
While initially the number of people incarcerated fell, subsequently the
number increased to a point which, according to informed estimates, was
higher than would have been the case without suspended sentences.

Wasserstrom (in Baird & Rosenbaum, 1988:61-62) holds the view that the
criminal justice system's search need not be to establish the degree or
level of appropriate punishment commensurate with the degree of
responsibility, but simply to consider "what mode of behaviour toward the
offender is most apt to maximise the likelihood that he or she will not in
future commit those obnoxious or dangerous acts that are proscribed by the
law". Wasserstrom makes an argument for a proposal to "punish" offenders
within a rehabilitative framework, in order to affect custody rates in the
In a system of social control, one cannot ignore the, as yet, non-offenders who are by far the largest category of citizens. Because this large class of potential offenders needs to be influenced to remain so, "we should thus subordinate the prevention of first offences to the prevention of recidivism" (Hart (1961) quoted in Baird & Rosenbaum, 1988:63). This latter argument not only offers justification for punishment, but also, according to Wasserstrom (in Baird & Rosenbaum, 1988:64), it provides the answer to the question of why anyone should be punished at all. Wasserstrom adds that while Hart's view is less a justification of punishment than of a system of "threats of punishment", the actual punishment of offenders is necessary in order to keep the threat of punishment - that which deters the potential offenders - credible.

If the need to punish the offender and deter the potential offender is accepted, one may wish to argue about the strength of the punishment on the one hand and the costs of punishment on the other - particularly where imprisonment is concerned. Von Hirsch (in Byrne et al, 1992:211) claims that those who commit crimes of "middling seriousness" are either punished too much or too little. He argues that one way to achieve a reduction in imprisonment levels is the systematic scaling of intermediate sanctions. He compares the only two methods of "scaling" intermediate sanctions developed to date: his own method, co-authored by Wasik and Greene (1989) and based on scaling non-custodial sanctions according to "just desert principles"; and a method, designed by Morris and Tonry (1990), which utilises scaling principles based on a hybrid rationale that embodies both preventive and retributive elements. Both methods recognise that intermediate penalties are punishments, and argue there should therefore be a set of explicit guiding principles to scale those penalties rationally.
and fairly. A substantial impact on the objective of reducing the use, and therefore the level of imprisonment, is stressed as the desirable outcome of the proposed scheme (Von Hirsch in Byrne et al, 1992:212).

A scaled 'just desert' model is of particular interest in its claims to reduce imprisonment - or truly utilise imprisonment as the oft referred to 'sanction of last resort'. The additional features of von Hirsch's model (in Byrne et al, 1992:212-216) warrant a mention, as they need inclusion in order to achieve the stated reduction in custody levels. He advocates that intermediate penalties, such as substantial fines or community service, would be reserved for crimes of at least intermediate gravity - and not, as may be the case, for the least serious offences where the person is potentially cooperative. As well as simple, the scheme would place limits on the interchangeability of penalties and prevent the "piling up of multiple sanctions on particular defendants". This latter limitation would bring the "revocation sanction under control" (1992:213). Von Hirsch further proposes a penalty scale whereby a term of imprisonment would seldom exceed 5 years, even for serious felonies; a penalty scale which is anchored to a crime's comparative seriousness, leaving for example only acts of actual or threatened violence to the person open to imprisonment; and a scheme which bars the singling out of those offenders who show "bad criminal or social histories" (von Hirsch in Byrne et al, 1992:215).

Von Hirsch's desert-based scaling of intermediate punishment model would prevent the routine sanction of imprisonment for breaching the conditions of a conditional liberty order, other than by a further offence, thus reducing the revocation sanction. Under the von Hirsch scheme, imprisonment could be invoked only for "more reprehensible kinds of
conduct", or breaches which would be (nearly) comparable in gravity to
criminal conduct that would warrant a custodial sentence in the first place
(in Byrne et al, 1992:214). This argument is broadly in line with Vass,
who holds that the failure to divert is precisely because those offenders
would not have been imprisoned in the first place, if there were no
conditional liberty orders with suspended sentences.

Vass (1990:164) views the alternatives to imprisonment, even where they
demonstrate some effective diversion, to be seriously flawed in that they
fail to show any clear effect on prison numbers. He argues with critics of
community alternatives - who have suggested "they only disperse the means
of control and act as complementary, not antithetical, sanctions to the
prison" and this is an essentially inherent property of those penal
measures - by claiming clear evidence of the lack of any coherent policy
for the reduction of the prison population. It is only in that sense, that
alternatives to custody achieve an undesirable expansion of the net of
social control. Vass states that the lack of a systematic and rational
understanding of what the purpose of prison, alternatives, and general
criminal justice policy should be, leads to a continuous escalation of the
"prison crisis and the politics of punishment".

Vass quotes De Haan, who holds that "punishment ... is no longer seen as a
'necessary evil', but as a 'normal' response to criminal behaviour" (Vass,
1990:164) and Rutherford, who has this to say:

"Most contemporary prison systems are expanding through a combination
of drift and design. Criminal justice administrators perpetuate the
myth that the prison system is swept along by forces beyond their
control or influence. The convenient conclusion is announced that,
given increased rates of reported crime and court workloads, it
inevitably follows that there is no alternative other than for the
prison system to expand further. Strategies which might shield the
prison system from increases in persons processed by criminal justice have been disregarded and administrators have preferred to proceed as though policy choices do not exist. In large part, criminal justice administrators are the architects of the crisis with which they are now confronted... Most typically, expansion occurs in the absence of coherent policy...” (Rutherford in Vass, 1990:164-5).

These words seem significant when the results of recent sentencing policies are examined. For example, as a result of the introduction of the "Truth in Sentencing" legislation in NSW in 1988, an increase of 60% has been recorded in the NSW prison population (Vinson, 1995:5). Vinson also points out that, as at 30 June 1994, 18.4% of those in prison under sentence, were serving aggregate sentences of less than one year, and 8% of those under sentence were serving less than 6 months - the very groups which should be prime targets for alternative forms of punishment (Vinson, 1995:6).

The N.T. also experiences high numbers of short prison terms. While it is not necessarily the case that the N.T. will develop a similar pattern to NSW, the reverse is also not necessarily inevitable. Current profiles in the N.T. show the highest proportion of the prison population serve sentences of 12 months or less (60%). The largest offence categories are Assault (19%), Justice Procedures (12%), Drive Under the Influence (11%), Drive Disqualified (9%) and Break and Enter (8%) (DCS 1994/95 Annual Report). With the current community alternatives in place, these numbers may be higher than could be the case if sentencing practices favoured community alternatives over custody.

Menninger (in Baird & Rosenbaum, 1988:50) postulates that all punishment should be replaced by therapy. This may be considered as an extreme and impracticable solution to the criticisms of the current system; the point should however not be lost that many people ending up with "treatment in
jail" are usually the poor, friendless and the ignorant. Menninger's argument holds that "it is not the successful criminal upon whom we inflict our antiquated penal system. It is the unsuccessful criminal, the criminal who really doesn't know how to commit crimes and who gets caught.... The clumsy, the desperate, the obscure, the friendless, the defective, the diseased - these men who commit crimes that do not come off - are bad actors indeed. But they are not the professional criminals, many of whom occupy high places" (Menninger in Baird & Rosenbaum, 1988:65).

This latter point has been made by sociologists and criminologists alike (eg Box (1981), Reiman (1979), and Wilson & Braithwaite (1978)). It is a point that cannot be overlooked, particularly when dealing with the large numbers of Aboriginal offenders, occupying those antiquated penal institutions Menninger refers to. Nor can one overlook, however, that the damage to victims is no less real and hurtful when it is inflicted by the poor, clumsy, diseased, defective or friendless. Additionally, victims may, and often do, fit the same category, particularly in street crime (Downes & Rock, 1986:215-6). A serious search for punishment alternatives to deal with the category of offenders described by Menninger warrants consideration.

3.6 SUMMARY

This chapter examined existing research and found that, among the factors leading to offending, re-offending and high levels of Aboriginal imprisonment, are the issues of dispossession and the lack of opportunities for development; a breakdown in traditional structures of control; and individual despair, frustration and anger at the criminal justice processes
perceived as alien by Aboriginal people. It has been stated that imprisonment is hardly a deterrent for criminal behaviour, and less so a sanction to achieve justice. A profile of prisoners suggested a high incidence of unemployment and alcohol consumption at the time of the offence, while the lack of rehabilitative programs in custody and support schemes upon release do not enhance the chances of surviving without further offences upon release from prison.

Arguments have been made, and are reinforced by the findings of studies in South Australia, that young Aboriginal people are disadvantaged in their contact with law enforcement agencies and that early conflicts with the law in many cases lead to continued involvement with the system at a later age. It has also been argued that Aboriginal women receive particularly harsh treatment from the agencies of the criminal justice system.

The question of prejudice and racism has been raised by a number of authors. It is a term which may offend some people, however it should be realised that, being the product of a racist system, it can not possibly be otherwise than for everyone to be, to varying degrees, influenced by that system. Taking offence or failing to recognise the powerful and destructive effects of systemic racism, is far less constructive than acknowledging the legacy, and working towards rectifying systematic disadvantages suffered by indigenous minority groups.

The chapter has stressed the importance of recognising the past, in order to understand the present and work towards a better future. This seems of particular relevance to the over-representation of Aboriginal and Torres Strait Islander people in custody. The powerful influence of the media has
played its part in distorting the picture of crime which, when accompanied by a lack of different, long term policy choices to provide alternatives to incarceration, places solid barriers in the path of decreasing indigenous imprisonment rates.

Sentencing practices have been suggested which are believed to enhance a reduction in overall imprisonment rates. They advocate less emphasis on previous records of convictions and the use of incarceration only when the nature of the crime warrants physical isolation from society, while paying greater attention to the reintegration of offenders into the community upon release. It has also been advocated that a decrease in Aboriginal over-representation in custody could be achieved by equity in criminal justice processes for Aboriginal and non-Aboriginal people. Greater use of community based programs has the potential to assist in realising the objective of reducing imprisonment rates in general and Aboriginal over-representation in prisons in particular. In the final analysis there is no escape from the need for a global strategy, whereby all social indicators are attacked simultaneously, if an enduring impact is to be made on indigenous over-representation in custody.
CHAPTER 4

4. FINDINGS OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

4.1 INTRODUCTION

The Royal Commission reported its findings in 5 volumes of National Reports, written by Elliott Johnston, QC. The findings related to incarceration are grouped so as to state the extent of the disproportion of Aboriginal and Torres Strait Islander people in custody; the underlying issues explaining the disproportionate custody numbers; strategies for reducing the high custody numbers; and the inter-relationship of the underlying issues associated with indigenous incarceration levels.

In stressing the importance of the inter-relationship of the underlying social, cultural and legal factors for an understanding of the disproportionate rate at which Aboriginal and Torres Strait Islander people are detained in custody, Commissioner Johnston (Vol. 4, 1991:1-3) has this to say:

"The major point ... is that changes to the operation of the criminal justice system alone will not have a significant impact on the number of Aboriginal persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant factors in over-representation ... Changes in this area will be difficult and in many cases not achievable in the short term, but unless these factors are addressed it is unlikely that there will be any significant reduction in the numbers of Aboriginal people who are taken into custody" (Johnston, Vol. 4, 1991:1).
The Commissioner goes on to say that "non-Aboriginal Australia generally has a poor knowledge of history and of the way in which it has shaped Aboriginal lives today". Yet Johnston believes that an appreciation of this history is fundamental to understand the circumstances in which indigenous people live today and in order to explain the poor relations between Aboriginal and non-Aboriginal people. He adds that "government policies under which Aboriginal people were controlled and excluded from mainstream society both reflected and reinforced perceptions of Aboriginal people in the wider community. Those attitudes cannot be erased simply by changing the policy" (Johnston, Vol. 4, 1991:1-2).

Johnston concludes his summary of the inter-relationship between Aboriginal disadvantage and their disproportionate representation in the criminal justice system by stating:

"Collectively, Aboriginal people have been denied access to the social and economic power which is essential to effective participation in mainstream society. The dislocation of Aboriginal people from their land and culture, and the intrusion of western society into Aboriginal life has rendered many Aboriginal forms of social control ineffective ... The high levels of involvement of young people in criminal offending, the problematic use of alcohol, self destructive behaviour and interpersonal violence reflect the difficulties which Aboriginal people are still experiencing in overcoming these effects ... In view of the projected increase in the Aboriginal population, it is likely that their over-representation in custody will continue ... Unless Aboriginal people are supported in their efforts to overcome the social problems confronting them, this over-representation may very well increase ... The issue of giving back to Aboriginal people the power to control their own lives is therefore central to any strategies which are designed to address these underlying issues ... Redressing these inequalities [poverty, inadequate living conditions and consequent poor health and past inequalities in educational access, employment and in low levels of material wealth] is an integral part of returning control to Aboriginal people" (Johnston, Vol. 4, 1991:2-3).
It will be seen from the data on disproportionate custody levels, in both police cells and prisons, that there are few short term gains indeed. However, some positive changes are occurring which may, with improved statistical recording, begin to show improved outcomes in years to come. In any event, consistent recording methods across all jurisdiction will, as a minimum, shed more light on trends and allow for comparisons to unravel which policies and programs lead to better results.

4.2 THE EXTENT OF DISPROPORTIONATE CUSTODY LEVELS

The Royal Commission found that a disproportionate number of Aboriginal people was being held in all forms of custody in most locations throughout Australia. The findings are reproduced in tables 4.1 and 4.2 below; they illustrate the high levels of Aboriginal imprisonment and police custody respectively. Commissioner Johnston (vol. 1, 1991:221) expresses the view that the over-representation for indigenous peoples in police cells at over twenty times the rate for other Australians "is a national disgrace, one which shames Australia in the eyes of the international community".

Commissioner Johnston expressed dissatisfaction at the lack of statistics on sentencing offenders and the failure to distinguish between Aboriginal and non-Aboriginal people. National comparisons are thus not possible. The available figures are gathered from correctional authorities and, while not altogether satisfactory, allow at least limited comparisons. The large number of people attending courts and not subsequently sentenced to a term of imprisonment, are not included (Johnston, Vol. 3 1991:64-5).

Table 4.1 shows the Northern Territory non-Aboriginal imprisonment rate in
June 1989 as being the highest, at 124.5, when compared with the national average of 97.2. The N.T. rate is almost twice as high as that of Tasmania, which stands as the lowest rate at 69.3. In terms of numbers, the level of disproportionate imprisonment of Aboriginal people varies from five times that of non-Aboriginal people in Tasmania to a high of forty-three times in Western Australia (Johnston, Vol. 1, 1991:222)

The disproportion in prison populations, as at 30 June, 1989, is also shown in Table 4.1. The data translate to a rate for Aboriginal people of over 15 times greater than for non-Aboriginal people. Police custody levels, illustrated in Table 4.2, show an even greater disproportion.

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>ABORIGINAL RATE</th>
<th>NON-ABORIGINAL RATE</th>
<th>LEVEL OF DISPROPORTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW(b)</td>
<td>1,300.4</td>
<td>118.1</td>
<td>11.0</td>
</tr>
<tr>
<td>VIC</td>
<td>1,201.3</td>
<td>73.2</td>
<td>16.4</td>
</tr>
<tr>
<td>QLD</td>
<td>1,238.4</td>
<td>100.8</td>
<td>12.3</td>
</tr>
<tr>
<td>WA</td>
<td>2,665.6</td>
<td>101.5</td>
<td>26.3</td>
</tr>
<tr>
<td>SA</td>
<td>1,270.4</td>
<td>76.5</td>
<td>16.6</td>
</tr>
<tr>
<td>TAS</td>
<td>258.2</td>
<td>69.3</td>
<td>3.7</td>
</tr>
<tr>
<td>NT</td>
<td>1,271.5</td>
<td>124.5</td>
<td>10.2</td>
</tr>
<tr>
<td>AUST</td>
<td>1,464.9</td>
<td>97.2</td>
<td>15.1</td>
</tr>
</tbody>
</table>

(a) Prisoners per 100,000 of the relevant adult (17 years and above) population at the 1986 Census of Population and Housing.
(b) Including ACT.
(Source: Johnston, Vol. 1, 1991:226)

Table 4.2 outlines the police custody rates as at August 1988. The Northern Territory, with the highest rate for non-Aboriginal persons in custody, is
worth noting. While the Aboriginal rate is not the highest in the NT - both WA and SA showing higher rates - the overall rate in the NT is extraordinarily high. The level of disproportion is again, together with the ACT, the lowest after Tasmania.

A comparison between the incarceration rates of police custody and prison custody explains the reason for the Royal Commission's emphasis on police custody with regard to the number of deaths of Aboriginal people in custody. The rate for Aboriginal people in police custody, standardised to the total Australian population, is 3,726 per 100,000, while the non-Aboriginal rate is 130, resulting in a disproportion factor of 28.7 (Johnston, Vol.1, 1991:224).

<p>| TABLE 4.2 POLICE CUSTODY RATES, ABORIGINAL AND NON-ABORIGINAL, BY JURISDICTION - AS AT AUGUST 1988(a) |
|-----------------------------------|-----------------|-----------------|-----------------|-----------------|</p>
<table>
<thead>
<tr>
<th>STATE</th>
<th>ABORIGINAL RATE</th>
<th>NON-ABORIGINAL RATE</th>
<th>TOTAL RATE</th>
<th>LEVEL OF DISPROPORTION(b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>1,312</td>
<td>87</td>
<td>103</td>
<td>15</td>
</tr>
<tr>
<td>VIC</td>
<td>1,570</td>
<td>117</td>
<td>123</td>
<td>13</td>
</tr>
<tr>
<td>QLD</td>
<td>2,840</td>
<td>170</td>
<td>237</td>
<td>17</td>
</tr>
<tr>
<td>WA</td>
<td>7,730</td>
<td>180</td>
<td>385</td>
<td>43</td>
</tr>
<tr>
<td>SA</td>
<td>4,877</td>
<td>187</td>
<td>239</td>
<td>26</td>
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<tr>
<td>TAS</td>
<td>640</td>
<td>123</td>
<td>135</td>
<td>5</td>
</tr>
<tr>
<td>NT</td>
<td>4,776</td>
<td>429</td>
<td>1,415</td>
<td>11</td>
</tr>
<tr>
<td>ACT</td>
<td>1,967</td>
<td>185</td>
<td>197</td>
<td>11</td>
</tr>
<tr>
<td>AUST</td>
<td>3,539</td>
<td>131</td>
<td>183</td>
<td>27</td>
</tr>
</tbody>
</table>

(a) Police custodies August 1988 per 100,000 population at the 1986 Census.
(b) Ratios of Aboriginal custody rates to non-Aboriginal rates.

(Source: Johnston, Vol. 1, 1991:223)
Table 4.3 is a synopsis of sentenced prisoners received, by Aboriginality and jurisdiction, for April 1989. This shows that a total of 20.4% of all prisoners received during April 1989 were Aboriginal people. The highest numbers are shown for the Northern Territory - 68.1% of Aboriginal receptions - and Western Australia, where Aboriginal receptions comprised 56.4% of the total receptions.

**TABLE 4.3 SENTENCED PRISONERS RECEIVED BY ABORIGINALITY AND JURISDICTION, APRIL 1989**

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>ABORIGINAL</th>
<th>NON-ABORIGINAL</th>
<th>NOT STATED</th>
<th>TOTAL NUMBER</th>
<th>PER CENT ABORIGINAL(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW (b)</td>
<td>44</td>
<td>416</td>
<td>73</td>
<td>533</td>
<td>9.6</td>
</tr>
<tr>
<td>VIC</td>
<td>11</td>
<td>216</td>
<td>-</td>
<td>227</td>
<td>4.8</td>
</tr>
<tr>
<td>QLD</td>
<td>55</td>
<td>327</td>
<td>-</td>
<td>382</td>
<td>14.4</td>
</tr>
<tr>
<td>WA</td>
<td>123</td>
<td>95</td>
<td>-</td>
<td>218</td>
<td>56.4</td>
</tr>
<tr>
<td>SA</td>
<td>46</td>
<td>162</td>
<td>1</td>
<td>209</td>
<td>22.1</td>
</tr>
<tr>
<td>TAS</td>
<td>11</td>
<td>74</td>
<td>-</td>
<td>85</td>
<td>12.9</td>
</tr>
<tr>
<td>NT</td>
<td>47</td>
<td>22</td>
<td>-</td>
<td>69</td>
<td>68.1</td>
</tr>
<tr>
<td>AUS</td>
<td>337</td>
<td>1312</td>
<td>74</td>
<td>1,723</td>
<td>20.4</td>
</tr>
</tbody>
</table>

(a) Percentage of those persons for whom Aboriginality was stated in the data collection
(b) Including prisoners sentenced in the ACT
(Source: Johnston, Volume 3, 1991:65)

Table 4.4 shows that the national over-representation rate for Aboriginal adult prison receptions for April 1989 was 23.4 and that the Western Australian over-representation rate was "at the remarkably high figure of 61.6" (Johnston, Vol 3, 1991:65). The over-representation in prison reception rates for Queensland and the Northern Territory were the lowest in April 1989.
### TABLE 4.4  ABORIGINAL AND NON-ABORIGINAL ADULT PRISON RECEPTION RATES, BY JURISDICTION - APRIL 1989

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>ABORIGINAL RATE</th>
<th>NON-ABORIGINAL RATE</th>
<th>LEVEL OF OVER-REPRESENTATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEW SOUTH WALES</td>
<td>137.9</td>
<td>10.6</td>
<td>13.1</td>
</tr>
<tr>
<td>VICTORIA</td>
<td>153.7</td>
<td>7.3</td>
<td>20.9</td>
</tr>
<tr>
<td>QUEENSLAND</td>
<td>165.3</td>
<td>7.8</td>
<td>9.3</td>
</tr>
<tr>
<td>WESTERN AUSTRALIA</td>
<td>587.6</td>
<td>9.5</td>
<td>61.6</td>
</tr>
<tr>
<td>SOUTH AUSTRALIA</td>
<td>572.9</td>
<td>16.3</td>
<td>35.2</td>
</tr>
<tr>
<td>TASMANIA</td>
<td>315.5</td>
<td>23.9</td>
<td>13.2</td>
</tr>
<tr>
<td>NORTHERN TERRITORY</td>
<td>245.9</td>
<td>18.8</td>
<td>9.8</td>
</tr>
<tr>
<td>AUSTRALIA</td>
<td>270.5</td>
<td>11.6</td>
<td>23.4</td>
</tr>
</tbody>
</table>

(Source: Johnston, Volume 3, 1991:66)

Census data for 30 June, 1989, show that 14.3% of the total number of 12,964 prisoners in Australia's gazetted prisons were indigenous people:

### TABLE 4.5  PRISONERS IN CUSTODY, BY ABORIGINALITY AND JURISDICTION - 30 JUNE 1989

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>ABORIGINAL</th>
<th>NON-ABORIGINAL</th>
<th>NOT STATED</th>
<th>TOTAL</th>
<th>PER CENT ABORIGINAL(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW (b)</td>
<td>415</td>
<td>4,861</td>
<td>7</td>
<td>5,283</td>
<td>7.9</td>
</tr>
<tr>
<td>VIC</td>
<td>86</td>
<td>2,156</td>
<td>14</td>
<td>2,256</td>
<td>3.8</td>
</tr>
<tr>
<td>QLD</td>
<td>412</td>
<td>1,855</td>
<td>122</td>
<td>2,386</td>
<td>18.2</td>
</tr>
<tr>
<td>WA</td>
<td>558</td>
<td>1,010</td>
<td>-</td>
<td>1,568</td>
<td>35.6</td>
</tr>
<tr>
<td>SA</td>
<td>102</td>
<td>761</td>
<td>8</td>
<td>871</td>
<td>11.8</td>
</tr>
<tr>
<td>TAS</td>
<td>9</td>
<td>215</td>
<td>21</td>
<td>245</td>
<td>4.0</td>
</tr>
<tr>
<td>NT</td>
<td>243</td>
<td>109</td>
<td>-</td>
<td>352</td>
<td>69.0</td>
</tr>
<tr>
<td>AUS</td>
<td>1,825</td>
<td>10,967</td>
<td>172</td>
<td>12,964</td>
<td>14.3</td>
</tr>
</tbody>
</table>

(a) Percentage of those persons for whom Aboriginality was stated in the census
(b) Including ACT

(Source: Johnston, Volume 3, 1991:66)
4.3 REASONS FOR CUSTODY

As at 30 June, 1989, there were 12,964 people in custody in Australia, 351 of whom were in the Northern Territory, where 306 were under sentence (10,676 for Australia); 1 was unfit to plead (46 in Australia); 41 persons were unconvicted (1,579 in Australia); and 3 persons were awaiting deportation (7 Australia-wide). In addition, throughout Australia 547 prisoners were awaiting appeal, 89 were awaiting sentence and 20 persons were incarcerated for reasons unknown. Of the 351 persons in custody in the Northern Territory on 30 June, 1989, 69% or 243 persons were Aboriginal and Torres Strait Islander people, 215 of whom were under sentence and 28 being unconvicted prisoners (Johnston, Vol. 1, 1991:206).

The offences, for which people are imprisoned are recorded by Most Serious Offence (MSO). There are two ways in which these categories are referred to: sentenced prison receptions and prisoners in institutions at a given time, for example on 30 June for the yearly Census. The Department of Correctional Services records Monthly Daily Averages for the three N.T. prisons, sentenced prisoners held by MSO and aggregate sentence, and prisoners sentenced by MSO and aggregate sentence for given time periods.

During the investigations of the Royal Commission, all Australian Corrections Departments were requested by the Commission's Research Unit, to provide MSO data for the month of April 1989. The Australia-wide results were reported in the Commission's Report (Johnston, Vol. 1, 1991:207). They are reproduced in Tables 4.7 and 4.8 and include all persons received into prison under sentence during the month, including those for default of payment of fines.
Table 4.6 displays marked differences in the offences for which people were convicted, sentenced and received in prisons during April of 1989. Perhaps the most striking is the high number of fine defaulters, particularly among Aboriginal receptions, although it is also the highest in the non-Aboriginal category. The greater percentage of Aboriginal prison receptions - 20.4% of the total of 1,649 for both categories of prison receptions - illustrates that the flow of Aboriginal people into prison during a period of one month is considerably higher than the number of Aboriginal prisoners at any one time (eg 14.3% on 30 June 1989, as shown in Table 4.5).

<table>
<thead>
<tr>
<th>OFFENCE</th>
<th>ABORIGINAL</th>
<th></th>
<th></th>
<th>NON-ABORIGINAL</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NUMBER</td>
<td>PERCENT</td>
<td>NUMBER</td>
<td>PERCENT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HOMICIDE</td>
<td>4</td>
<td>1.2</td>
<td>13</td>
<td>1.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ASSAULT</td>
<td>40</td>
<td>11.9</td>
<td>87</td>
<td>6.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SEX OFFENCES</td>
<td>11</td>
<td>3.3</td>
<td>42</td>
<td>3.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OTHER AGAINST PERSON</td>
<td>1</td>
<td>0.3</td>
<td>13</td>
<td>1.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ROBBERY</td>
<td>1</td>
<td>0.3</td>
<td>28</td>
<td>2.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BREAK AND ENTER</td>
<td>25</td>
<td>7.4</td>
<td>144</td>
<td>11.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FRAUD</td>
<td>2</td>
<td>0.6</td>
<td>71</td>
<td>5.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THEFT</td>
<td>28</td>
<td>8.3</td>
<td>212</td>
<td>16.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PROPERTY DAMAGE</td>
<td>14</td>
<td>4.2</td>
<td>19</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FINE DEFAULT</td>
<td>133</td>
<td>39.5</td>
<td>258</td>
<td>19.7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JUSTICE PROCEDURES</td>
<td>18</td>
<td>5.3</td>
<td>110</td>
<td>8.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GOOD ORDER OFFENCES</td>
<td>11</td>
<td>3.3</td>
<td>39</td>
<td>3.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DRUG OFFENCES</td>
<td>3</td>
<td>0.9</td>
<td>60</td>
<td>4.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TRAFFIC OFFENCES</td>
<td>37</td>
<td>11.0</td>
<td>204</td>
<td>15.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OTHER</td>
<td>9</td>
<td>2.7</td>
<td>12</td>
<td>0.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>337</td>
<td>100.0</td>
<td>1,312</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Source: Johnston, Vol. 1, 1991:207)
The Commission concluded from the data that there was little variation in the national averages shown in Table 4.6 from the pattern found in 1987 and that, unlike sometimes assumed but not evidenced, the majority of Aboriginal people is not imprisoned as a result of trivial offences such as public drunkenness or offensive behaviour (Johnston, Vol. 1, 1991:208). The writer has some reservation about this conclusion. It could be argued for example that, apart from assault and property damage, the percentages of Aboriginal offenders are similar, lower, or substantially less than those of their non-Aboriginal counterparts. The assault category, qualifying as the most serious of these, may need further examination in order to establish the nature of these assaults.

The difference between offending patterns of Aboriginal and non-Aboriginal persons convicted and charged, is perhaps better illustrated by Table 4.7, outlining MSO as at June 1989. However, here one cannot assume either that higher proportions of Aboriginal people commit, across the board, more serious offences than non-Aboriginal people. While this may be the case in some jurisdictions some of the time, one would need to carefully scrutinise available data from all jurisdictions, before endorsing authoritative opinions such as expressed in the Commission's findings.

Another area worth examining is the cultural element, which is not revealed by the bare figures. For example, one could link offences such as Break & Enter and Theft to poverty, while the lower rates of drug-related offences may indicate that indigenous people generally do not have the means to use drugs, other than cannabis perhaps, or the means to be involved in the importation of drugs. Where Fraud is concerned, it could be argued that indigenous people do not have access to employment opportunities where
white collar crimes mostly occur, to proportionately represent their non-indigenous counterparts. Emotions such as powerlessness, anger and frustration, resulting from the historical undercurrents outlined in section 1.2 of this study, could be argued to underscore offences such as Good Order Offences and Property Damage, as well as the serious offences of Homicide, Assault, Sex Offences and the category Other Against the Person.

<table>
<thead>
<tr>
<th>OFFENCE</th>
<th>ABORIGINAL</th>
<th>NON-ABORIGINAL</th>
<th>TOTAL</th>
<th>PER CENT ABORIGINAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>HOMICIDE</td>
<td>161</td>
<td>1,167</td>
<td>1,328</td>
<td>12.1</td>
</tr>
<tr>
<td>ASSAULT</td>
<td>322</td>
<td>760</td>
<td>1,082</td>
<td>29.8</td>
</tr>
<tr>
<td>SEX OFFENCES</td>
<td>256</td>
<td>1,046</td>
<td>1,302</td>
<td>19.7</td>
</tr>
<tr>
<td>OTHER AGAINST PERSON</td>
<td>24</td>
<td>119</td>
<td>143</td>
<td>16.8</td>
</tr>
<tr>
<td>ROBBERY</td>
<td>117</td>
<td>1,397</td>
<td>1,514</td>
<td>7.7</td>
</tr>
<tr>
<td>BREAK &amp; ENTER</td>
<td>352</td>
<td>1,620</td>
<td>1,972</td>
<td>17.8</td>
</tr>
<tr>
<td>FRAUD</td>
<td>20</td>
<td>504</td>
<td>520</td>
<td>3.8</td>
</tr>
<tr>
<td>THEFT</td>
<td>193</td>
<td>1,219</td>
<td>1,412</td>
<td>13.7</td>
</tr>
<tr>
<td>PROPERTY DAMAGE</td>
<td>49</td>
<td>177</td>
<td>226</td>
<td>27.7</td>
</tr>
<tr>
<td>JUSTICE PROCEDURES</td>
<td>113</td>
<td>587</td>
<td>700</td>
<td>16.1</td>
</tr>
<tr>
<td>DRUG OFFENCES</td>
<td>25</td>
<td>1,260</td>
<td>1,285</td>
<td>1.6</td>
</tr>
<tr>
<td>GOOD ORDER OFFENCES</td>
<td>46</td>
<td>142</td>
<td>188</td>
<td>24.5</td>
</tr>
<tr>
<td>TRAFFIC OFFENCES</td>
<td>102</td>
<td>449</td>
<td>551</td>
<td>18.5</td>
</tr>
<tr>
<td>OTHER</td>
<td>45</td>
<td>520</td>
<td>565</td>
<td>8.0</td>
</tr>
<tr>
<td>ALL OFFENCES</td>
<td>1,825</td>
<td>10,967</td>
<td>12,788</td>
<td>14.3</td>
</tr>
</tbody>
</table>

(Source: Johnston, Vol. 1, 1991:210)

The offence types, or reasons for custody, are included here to provide an overview of offending patterns. The trends would need to be monitored over time, in order to establish whether changes have occurred in terms of the
seriousness of offences, so often claimed in the wider community. It would also be of interest to examine the above-mentioned cultural element in the context of changes in offending patterns.

Difficulties abound however in the task of unravelling changes in offence trends, owing to changes in the recording of offence categories. Any comparison would need to be approached with caution, although tentative conclusions are still of interest. In order to make any form of comparison, offences would have to be grouped, say in the categories of offences against the person, which comprise homicide (in later years grouped in murder, manslaughter and dangerous act), assaults, sex offences, and 'other' against person; property offences, which involve robbery, break & enter, theft and fraud; while a third category could involve all remaining offences, such as driving and traffic, drugs, justice procedures and good order offences.

Comparing changes in the degree and pattern of offences over time is a research attempt that must be encouraged. This would also be of broader interest in terms of possible explanations for criminal behaviour from a sociological perspective, enabling the exploration of links between those patterns and general changes occurring in society. Monitoring of the social indicators in Aboriginal society, informing progress or deterioration in the socio-economic level of offenders, would enhance the completeness of all the relevant factors for analysis.

Walker and McDonald (1995:4) argue that their data indicate sentence lengths may be biased in favour of indigenous offenders. A possible explanation for this, they suggest, may be to avoid accusations of racial
bias in sentencing. However, this may not constitute a full explanation as the degree of seriousness and intent behind the offence on the part of the perpetrator, as well as the discretion available to the judiciary after taking into consideration all the circumstances involved in each offence and within each category, need to be considered as factors impacting on the sentence length. Table 4.8 reproduces the findings upon which Walker and McDonald's suggestions are based. The compilation of details about each offence, circumstances of aggravation, intent and seriousness would represent a task of a magnitude well beyond this study.

**TABLE 4.8 AVERAGE AGGREGATE SENTENCES, BY MSO AND ABDORIGINALLITY, AUSTRALIA, 30 JUNE 1992**

<table>
<thead>
<tr>
<th>OFFENCE/CHARGE</th>
<th>ABORIGINAL</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SENTENCED PRISONERS</td>
<td>SENTENCE (MONTHS)</td>
</tr>
<tr>
<td>HOMICIDE</td>
<td>161</td>
<td>154.7</td>
</tr>
<tr>
<td>ASSAULT</td>
<td>354</td>
<td>26.2</td>
</tr>
<tr>
<td>SEX OFFENCES</td>
<td>279</td>
<td>77.7</td>
</tr>
<tr>
<td>OTHER AGAINST PERSON</td>
<td>25</td>
<td>55.2</td>
</tr>
<tr>
<td>ROBBERY</td>
<td>130</td>
<td>60.0</td>
</tr>
<tr>
<td>BREAK &amp; ENTER</td>
<td>355</td>
<td>27.7</td>
</tr>
<tr>
<td>FRAUD &amp; MISAPPROPRIATION</td>
<td>15</td>
<td>14.9</td>
</tr>
<tr>
<td>OTHER AGAINST PROPERTY</td>
<td>226</td>
<td>17.4</td>
</tr>
<tr>
<td>JUSTICE PROCEDURES</td>
<td>180</td>
<td>16.8</td>
</tr>
<tr>
<td>OTHER AGAINST GOOD ORDER</td>
<td>19</td>
<td>10.9</td>
</tr>
<tr>
<td>DRUG OFFENCES</td>
<td>34</td>
<td>28.1</td>
</tr>
<tr>
<td>DRIVING OFFENCES</td>
<td>183</td>
<td>9.6</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>1981</strong></td>
<td><strong>43.0</strong></td>
</tr>
</tbody>
</table>

* Total includes offence categories in which there were too few prisoners to tabulate separately.

(Source: Walker & McDonald, 1995:4)
Walker and McDonald's data also suggest that indigenous Australians are over-represented in most offence categories. This is demonstrated by Table 4.9, below, which shows a decrease in over-representation ratios between 1988 and 1992 (Walker & McDonald, 1995:3). The questions could be raised whether such decrease is due to favourable sentencing practices to avoid accusations of bias, or whether the awareness, created by the findings of the Royal Commission, has led to greater equity in sentences.

**TABLE 4.9 INDIGENOUS OVER-REPRESENTATION RATIOS, BY MSO/CHARGE, AUSTRALIA, 30 JUNE 1988-92**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>HOMICIDE</td>
<td>12.0</td>
<td>10.9</td>
<td>11.5</td>
<td>12.1</td>
<td>11.7</td>
</tr>
<tr>
<td>ASSAULTS</td>
<td>38.7</td>
<td>34.3</td>
<td>29.4</td>
<td>31.2</td>
<td>29.0</td>
</tr>
<tr>
<td>SEX OFFENCES</td>
<td>21.3</td>
<td>19.8</td>
<td>19.6</td>
<td>18.4</td>
<td>17.9</td>
</tr>
<tr>
<td>AGAINST PERSON</td>
<td>6.0</td>
<td>16.5</td>
<td>13.5</td>
<td>14.4</td>
<td>15.8</td>
</tr>
<tr>
<td>ROBBERY</td>
<td>7.2</td>
<td>6.7</td>
<td>7.1</td>
<td>6.7</td>
<td>6.9</td>
</tr>
<tr>
<td>BREAK &amp; ENTER</td>
<td>15.4</td>
<td>17.6</td>
<td>15.7</td>
<td>17.3</td>
<td>16.1</td>
</tr>
<tr>
<td>FRAUD &amp; MISAPPROPRIATION</td>
<td>2.7</td>
<td>3.2</td>
<td>3.9</td>
<td>2.0</td>
<td>2.7</td>
</tr>
<tr>
<td>OTHER AGAINST PROPERTY</td>
<td>14.6</td>
<td>14.1</td>
<td>13.5</td>
<td>13.1</td>
<td>12.3</td>
</tr>
<tr>
<td>JUSTICE PROCEDURES</td>
<td>28.4</td>
<td>15.5</td>
<td>20.3</td>
<td>19.1</td>
<td>19.1</td>
</tr>
<tr>
<td>*OFFENSIVE BEHAVIOUR</td>
<td>30.0</td>
<td>32.1</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>OTHER AGAINST GOOD ORDER</td>
<td>29.9</td>
<td>28.8</td>
<td>21.6</td>
<td>11.5</td>
<td>12.7</td>
</tr>
<tr>
<td>DRUG OFFENCES</td>
<td>1.4</td>
<td>1.6</td>
<td>1.6</td>
<td>1.4</td>
<td>2.3</td>
</tr>
<tr>
<td>DRIVING OFFENCES</td>
<td>22.9</td>
<td>19.2</td>
<td>26.1</td>
<td>20.7</td>
<td>22.6</td>
</tr>
<tr>
<td>OTHER OFFENCES/UNKNOWN</td>
<td>16.2</td>
<td>9.8</td>
<td>8.8</td>
<td>9.2</td>
<td>11.0</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>14.2</td>
<td>13.4</td>
<td>13.5</td>
<td>13.2</td>
<td>13.2</td>
</tr>
</tbody>
</table>

*Unavailable separately for all years. Post-1989 incl. in "Other against Good Order".*

(Source: Walker & McDonald, 1995:3)
Table 4.9 provides an interesting picture, which raises a number of questions about the abolition of the "Offensive Behaviour" category, offences which are included in "Other Against Good Order", a category which has also decreased substantially. The category "Against Person" increased significantly in 1989 and appears to have remained on a much higher level than 1988 for the remaining years. A possible reason could be that this category has absorbed part of the numbers of the "Offensive Behaviour" category. The "Other Offences/Unknown" category has not increased sufficiently to suggest the numbers of offensive behaviours have been absorbed in this category. Justice procedures have decreased substantially, many of which may relate to breaches of court or parole board orders, if other jurisdictions have experienced similar breach rates to the Northern Territory.

4.4 FINDINGS IN TERMS OF THE POLICE AS AN AGENCY OF THE CRIMINAL JUSTICE SYSTEM

The Royal Commission found that, despite police administrations being essentially reactive agencies, "responding to crime and behaviours which are caused by factors outside their control", there were significant factors within police control or responsibility, which impacted on "the intensity and mode of police response" (Johnston, Vol. 3, 1991:30). Other factors impacting on the high arrests of indigenous people were found to be the "susceptibility of policing to become more intense in relation to Aboriginal people as a result of local law and order campaigns"; the allocation of police resources; the mechanisms by which police "monitor and supervise the use of the power of arrest and detention to ensure that these
powers are not used needlessly"; and "policing constraints" on the objective of reducing the number of arrest and detentions in police custody.

Johnston (1991:32) claims that, despite the inevitability of police "being caught between a number of different political demands" in the context of "substantial conflict between the Aboriginal and non-Aboriginal communities", they remain actors themselves. Actors who can choose among a range of responses, either to continue the conflict or contribute to resolving it.

It can be seen that, sometimes, administrative procedures may hold conflicting objectives. This is the case for example where general police procedures lead to warrant checks being conducted on a routine basis. If a special operation is being carried out, warrant checks may interfere with optimal results of the special operation. Johnston argues that, despite the desire of senior police to reduce detention rates, the potential to increase rates follows from other constraints of an institutional nature, such as the financial or promotional incentives to police officers who have high arrest rates, given these are a measurement of the standard of efficiency of individual or the squad's performance (Johnston, Vol. 3, 1991:33-4).

Other measures, inhibiting a decrease in arrest rates, include financial incentives such as the "reimbursement of meal allowances for meals provided to prisoners", usually in remote areas, or an allowance, frequently paid to the police officer's wife, for searching women prisoners. The Commission found these to be potential financial benefits from the detention of
prisoners, which can be regarded as "countervailing the attempts of any police administration to encourage management of incidents with procedures other than arrest". Or, put another way, they are not disincentives for areas where arrests are already high, such as Western Australia, Queensland and the Northern Territory (Johnston, Vol.3, 1991:34).

The policy of South Australian Police Departments is clear on arrest being used only as a last resort. However, there is no evidence of statistical monitoring of the use of arrest, leaving the monitoring as a supervisor's responsibility. Apart from a police culture which might run counter to positive responses for non-arrest, arrest is often regarded "more convenient" than a summons. Johnston says this issue's "pertinence to high numbers of Aboriginal detention is obvious" (Johnston, Vol.3, 1991:36-38).

The importance of the police culture and its centrality to the proper functioning of the entire criminal justice system cannot be over-emphasised and is perhaps best illustrated by quoting Fitzgerald QC (1989:200), who puts it thus:

"The institutional culture of a police force is of vital importance to a community. A police force is numerically strong, politically influential, physically powerful, and armed. It stands at the threshold of the criminal justice system and is in effective control of the enforcement of the criminal law. Each police officer has extensive authority over all other citizens, however powerful, coupled with wide discretions concerning its exercise. Subsequent stages in the criminal justice process, including courts and prisons, are largely dependent on the activities of the police force, and will inevitably be affected by its deficiencies, especially any which are cultural and therefore widespread".

Efforts in the Northern Territory were commended by the Commissioner in terms of its preventive, or community policing, programs. Similarly, the
school based program received favourable mention in a report, prepared by Langton (1990), head of the Aboriginal Issues Unit (AIU) in the N.T. It is stressed that an alternative perspective on the allocation of police resources is to look at those programs which are preventive in object, such as police liaison work, the resourcing of cross-cultural training programs with longitudinal monitoring, and the development of Aboriginal police schemes (in Johnston, Vol 3, 1991:40).

4.5 STRATEGIES FOR REDUCING HIGH CUSTODY LEVELS

The Royal Commission recommended a host of policies and programs which, through diversion from police and prison custody, would reduce the high incarceration rates. The suggested strategies include decriminalisation of public drunkenness - still a crime in Queensland, Victoria and Tasmania (Week-End Australian, 16-17/12/95) but decriminalised in the Northern Territory in 1974, the use of arrest as a last resort, the allocation of more police resources towards crime prevention, liaison and training, and a reconsideration of bail arrangements, such as on-the-spot-bail in preference to conveying the alleged offender to a police station (Johnston, Vol. 3, 1991:14-55).

In terms of prison custody, the Commission recommended extensive use of community based justice initiatives, leaving prison truly as an option of last resort. Examples provided are community service, home detention, and other community based programs. However, greater efforts were urged in the monitoring and evaluation of new developments in order to trigger noticeable outcomes on a national basis. While many positive initiatives
exist in various jurisdictions, Commissioner Johnston (Vol. 3, 1991:59) argued that these have been primarily piecemeal.

In terms of informal arrangements between Aboriginal people and agents of the criminal justice system, Langton, who compiled the submission of the N.T. AIU to the Royal Commission, (in Johnston, Vol. 5, 1991:393-400) found that Aboriginal people appreciate being involved in the court process. Interviews with Aboriginal people, who remember the recommendations of the Aboriginal Law Reform Commission, seem to reveal that they believe no action has been taken on those recommendations. Langton reports that Aboriginal elders in the N.T. believe "they are saying the same thing over and over again with no effect" - yet, because of the importance of the issues, have given "advice in an attempt to obtain some recognition for, and cooperation with, their Law" (p 397).

In order to achieve meaningful negotiation or dialogue, the N.T. Aboriginal Issues Unit recommends training courses for Aboriginal people in the understanding of the Australian system and to obtain skills for positions of employment within that system; the design and introduction of legal education courses, using Aboriginal languages as the medium where necessary; Aboriginal Liaison Officers in all N.T. courts, assisting families and offenders with information about the court and sentencing processes; and a comprehensive strategy for Aboriginal interpreters, incorporated in the N.T. Interpreters Service (in Johnston, Vol. 5, 1991:398-400). It goes without saying that this is in addition to the cross-cultural training and awareness advocated for non-Aboriginal people.
Education in the criminal justice system is a high priority, recognised by Aboriginal Legal Services. However, the Aboriginal Youth Legal News (1995:11) reports that Aboriginal Legal Services, traditionally, have not been funded for legal education as a major focus of their activities. Only 2 of 18 respondents to a National Aboriginal Youth Law Centre Survey claimed to provide legal education in the areas of care and protection, family law, income security, employment and victim's compensation. If indigenous people are to gain a greater understanding of the legal system and the framework within which it operates, this would be an important area to address.

4.6 THE INTER-RELATIONSHIP OF THE UNDERLYING ISSUES AND HIGH LEVELS OF CUSTODY

Commissioner Johnston (Vol. 4, 1991:3) stresses the importance of the inter-relationship of all the issues leading to disproportionate custody levels of indigenous Australians. Johnston holds that, while all the identifiable components need to be addressed in policies and programs, particular solutions with respect to each of them "will be found to flow from application of the principles of self-determination and self-management". This contention is part of the submission to the Royal Commission by Aboriginal Issues Units (AIU). Langton (Vol. 5, 1991:292), submitted the following on behalf of the AIU:

"Political power, self-determination, an end to welfarism and paternalism and the development of an economic base underpin the needs which Aboriginal people have expressed in coming to terms with the constant risk of custody and the risk of dying in custody which an Aboriginal person in the Northern Territory faces".
Other points made in Langton's submission to the Royal Commission include the despondency felt by Aboriginal people over the years, about government inaction on known problems with known solutions. This they see as leading more and more to their inability and unwillingness to continue in attempts to rectify serious problems. Langton goes on to say that "without the goodwill of Aboriginal people, the task becomes more and more difficult", while "much of the goodwill of non-Aboriginal people withers too as the problems seem more and more incapable of solution" (Langton, in Vol. 5, 1991:292). The AIU believes that the problems underlying the slow pace of change in Aboriginal conditions lie, in part, in "getting federal funding through to the problem areas, through to Aboriginal organisations, or through to other responsible agencies in the Northern Territory (Vol. 5, 1991:288).

Pearson (1994) acknowledges that throwing money at various organisations is not the only answer, claiming it regularly serves a more cosmetic than constructive purpose. Pearson holds that it may often be a way of "masking an avoidance of issues more fundamental and meaningful". Rather, Pearson (1995:22) argues, we need community leadership. Leadership which is about "knowing the problems, appreciating the difficulties, deconstructing the old approaches and condemning the inertia and apathy". On a more positive note Pearson, claiming to be a self-confessed policy optimist, stresses that community leadership is also about "never giving up on the search for solutions and enjoining people to the belief that, with commitment, we can succeed".

The point made by the late member for Arafura in the Legislative Assembly of the Northern Territory, namely that the lack of recognition for
Aboriginal laws, unchanged over centuries, and "white man's law" which changes every day - and perhaps the lack of understanding what this really means for Aboriginal people - is a message of critical relevance and may underscore a lot of the confusion felt about the criminal justice system. It could be a vital part of the persistent impact of underlying issues and how they relate to the massive over-representation of Aboriginal people in custody. Laws, culture and land appear to be intrinsically linked with the existence and survival of Aboriginal peoples. Notwithstanding that this study does not seek to develop a comprehensive perspective on Aboriginal laws, it remains that a greater understanding of the subject related issues would greatly assist in improving Aboriginal and non-Aboriginal relationships.

4.7 SUMMARY

This chapter reported the findings of the Royal Commission, including the submissions to the Commission by Aboriginal Issues Units. The findings are an indictment of indigenous over-representation in police and prison custody. Strategies, implemented to reduce high custody levels were discussed, as was the critical role that self-management and self-determination would need to fulfil towards a solution to the problem. Indications are that no program or policy in the criminal justice system is likely, in isolation, to effect a sustained reduction in Aboriginal custody levels. There are however areas where vast improvements can be made in the service delivery in the courts, police stations and correctional centres, which, where combined with strategies to redress disadvantage, may effectively result in a meaningful reduction in custody levels.
CHAPTER 5

5. RESPONSES TO THE RECOMMENDATIONS OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

5.1 INTRODUCTION

This chapter outlines government and community responses to the Royal Commission's recommendations. Trends affecting indigenous people in police and prison custody during the 1990s, as reported by the Australian Institute of Criminology in accordance with recommendations 41 and 47 of the Royal Commission, are also outlined. Community impressions of proposed and implemented policies or programs are discussed.

5.2 CUSTODY TRENDS IN RELATION TO INDIGENOUS PEOPLE

McDonald, Walker and Howlett, assisted by Dalton, Dagger and Salloom, fulfilled the requirement of the Commonwealth Government's commitment under Recommendations 41 and 47 of the Royal Commission by compiling trends in Aboriginal and Torres Strait Islander deaths in custody and incarceration. (Their report is included in the first Annual Report of the Commonwealth Government (Vol. 1, 1994:2-41) and is drawn upon and referenced as McDonald et al, Vol. 1, 1994). McDonald et al (Vol. 1, 1994:2-3) report that the picture is not positive, as the number of indigenous people in prison, and their imprisonment rates, are increasing. The over-representation levels are not falling in either police or prison custody. The authors state that, following the Royal Commission's National Report, "little improvement
has occurred in the key area of reducing the massive over-representation of Aboriginal and Torres Strait Islander people in all forms of custody.

Tables 5.1, 5.2 and 5.3 present an overview of the levels of indigenous over-representation in prison, juvenile detention centres and police custody, as at 30 June, 1992.

McDonald et al (Vol. 1, 1994:4) note that there were 2,198 people of known Aboriginal and Torres Strait Islander origin amongst a total of 15,559 prisoners in Australian institutions at the time of the 1992 National Prison Census. Although Aboriginal people comprise only 1.2% of the adult population, this figure represents 14.1% of the Australian prison population. At 30 June, 1992, the date of the census, the national imprisonment rate for indigenous people was 1,481 per 100,000 of the general population. For non-indigenous people, the rate was 99 per 100,000. The differences for the individual jurisdictions are shown in Table 5.1, which illustrate the ratios of the rates of imprisonment of the indigenous population to those the non-indigenous population.

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
<th>AUST</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEVEL</td>
<td>11.0</td>
<td>17.1</td>
<td>14.5</td>
<td>22.7</td>
<td>23.4</td>
<td>3.7</td>
<td>10.6</td>
<td>40.2</td>
<td>14.9</td>
</tr>
</tbody>
</table>

(Source: McDonald et al, Vol. 1, 1994:5)

1 Data for the tables have been extracted from census data, as January 1993 is the starting date for all States and Territories to compile separate data for Aboriginal people in custody.

2 The figure for the ACT is based on the low number of indigenous prisoners (3) held in the ACT at the time of the census, and the small numbers of indigenous people in the ACT.
Between 1988 and 1992, the number of indigenous people in Australian prisons increased by 29%, and their imprisonment rate increased by 9.5%. McDonald et al (Vol. 1, 1994:5) explain this difference by an increase in the size of the Aboriginal and Torres Strait Islander population over the five-year period. They show however that significant increases in the rates of indigenous imprisonment occurred in New South Wales, Victoria and South Australia. In contrast, the rates decreased in Queensland and Tasmania, while remaining virtually constant in Western Australia and the Northern Territory.

Table 4.1 (page 70) shows the level of disproportion in prisons for June 1989. It is of interest to note that prison custody levels between 1988 and 1992 show a different pattern than between 1989 and 1992. This indicates that variations in imprisonment and over-representation rates may be substantial when making spot-in-time comparisons. Hence, the need for caution when attempting to extrapolate data from spot check analyses.

As for juveniles, the data presented by McDonald et al (Vol. 1, 1994:5) show indigenous juveniles in detention represented at levels similar, or higher than, adults in prison. The lack of comprehensive data prevents a comparison between different jurisdictions. Juvenile offending appears to have been a low priority focus in most Australian jurisdictions, as claimed by numerous sources throughout this study, and evidenced by the paucity of data available in relation to this category of detainees. Table 5.2 provides the available data.
TABLE 5.2 LEVELS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE IN JUVENILE CORRECTIVE INSTITUTIONS, AS AT 31 MARCH 1993

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
<th>AUST</th>
</tr>
</thead>
<tbody>
<tr>
<td>FACTOR OF OVER-REPRESENTATION</td>
<td>21</td>
<td>37</td>
<td>26</td>
<td>48</td>
<td>N/A</td>
<td>-</td>
<td>4</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>DETENTION NUMBERS</td>
<td>96</td>
<td>15</td>
<td>48</td>
<td>78</td>
<td>NIL</td>
<td>14</td>
<td>NIL</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Source: McDonald et al, Vol. 1, 1994:5-6)

As a result of the Royal Commission, data on custody for adults have become more accurate and readily available. McDonald et al (Vol. 1, 1994:6) claim that the first National Police Custody Survey was conducted in August 1988 (Table 4.2 on page 71) under the auspices of the Royal Commission. All jurisdictions agreed to the Commission's recommendation for the Australian Institute of Criminology to regularly conduct, in conjunction with police services, national surveys on people in police cells. The results in Table 5.3 are from the Institute’s survey, conducted in 1992.

TABLE 5.3 LEVELS OF ABORIGINAL AND TORRES STRAIT ISLANDER OVER-REPRESENTATION IN POLICE CUSTODY, BY JURISDICTION, AUGUST 1992

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
<th>AUST</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEVEL</td>
<td>15.8</td>
<td>10.2</td>
<td>13.3</td>
<td>51.9</td>
<td>20.9</td>
<td>3.0</td>
<td>14.3</td>
<td>4.4</td>
<td>26.2</td>
</tr>
</tbody>
</table>


A comparison of the two surveys into police custody led to the significant conclusion that, nationally, the total number of incidents of police

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3 This table, unlike the other two tables, has not been reproduced from the McDonald et al report. The data, incorporated in the text, has been summarised in a table for the convenience of the reader.
custody decreased by 10.2%. The national police custody rate fell by 17% (from 183 per 100,000 to 152 per 100,000), although the reduction was not spread evenly among States and Territories. The national police custody rate for indigenous people fell by 21% over the four-year period, from 3,539 per 100,000 in 1988 to 2,801 per 100,000 in 1992. However, while total incidents in police custody fell, the proportion of the total number of indigenous people did not fall. In fact, it rose - by 0.7% nationally. (McDonald et al, Vol. 1, 1994:6)

The national increase in the proportion of indigenous people in police custody conceals important differences between the jurisdictions. McDonald et al (Vol. 1, 1994:6-7) demonstrate that the proportion of people in police custody who were Aboriginal fell in Queensland, South Australia and Victoria. And, while large percentage reductions also occurred in Tasmania and the Australian Capital Territory - albeit with small numbers - the proportion rose in New South Wales, Western Australia and the Northern Territory.

Table 5.3 shows that the level of over-representation of indigenous people in police custody nationally in 1992 was a factor of 26 - meaning that indigenous people were held in police cells at a rate 26 times that of non-indigenous people. McDonald et al (Vol. 1, 1994:7) advise that most of the incidents involved men (88%), but that Aboriginal women were particularly heavily over-represented, at more than 44% of police custody figures, although only 1.1% of the national population aged 15 years and over consists of Aboriginal women. In addition, 23% of the cases in police custody were linked to public drunkenness, 42% of whom were represented by indigenous people.
The Federal Government, in its first Annual Report on the implementation of recommendations of the Royal Commission (1994:i-xvi) outlines the limitations of its jurisdiction in addressing criminal justice reform issues, essentially a State/Territory responsibility. The Report stresses funding allocations of more than $400m over five years, commencing in 1992-1993; the importance of a comprehensive and reliable database on all relevant social policy areas, such as health, education, employment, incarceration and housing; and the Commonwealth Government's role in terms of reconciliation.

Reconciliation, as stated by the Hon. Aboriginal Affairs Minister Tickner, cannot exist without justice. The preamble to the legislation underpinning the reconciliation process states:

"... as a part of the reconciliation process, the Commonwealth will seek an ongoing national commitment from governments at all levels to co-operate and to co-ordinate with the Aboriginal and Torres Strait Islander Commission as appropriate to address progressively Aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and any other relevant matters in the decade leading to the centenary of Federation, 2001 (in First Annual Report, Vol. 1, 1994:xiv).

Consequently, the Commonwealth established the Aboriginal and Torres Strait Islander Social Justice Commission with extensive powers in relation to State, Territory and Commonwealth governments and invited its first Commissioner, Pat Dodson, to consider the adequacy of the monitoring process and provide constructive ideas for enhanced scrutiny. Minister Tickner further stated that it must not just be left to governments to give
effect to the Royal Commission commitments. He stressed the need for the media and the wider Australian community to play their part in holding indigenous social justice as a national priority (in First Annual Report, Vol. 1, 1994:xv-xvi).

5.4 NORTHERN TERRITORY RESPONSES TO THE RCIADIC

Northern Territory responses concentrate on four major initiatives, with a specific impact on the criminal justice area: the Aboriginal Employment and Career Development Strategy, the Living With Alcohol Strategy, the Ending Offending Program and the upgrading of Prison Education Programs. Other government and community initiatives, in the area of domestic and family violence are, although complementary, of relevant importance.

5.4.1 ABORIGINAL EMPLOYMENT AND CAREER DEVELOPMENT STRATEGY

The introduction of the Aboriginal Employment and Career Development Strategy aims to attract indigenous people to the full range of government vacancies, either through identifying specific positions for Aboriginal people or, in line with the strategy, strongly encouraging Aboriginal people to apply for particular vacancies. The creation of Aboriginal Community Corrections Officer (ACCO) positions has improved since the introduction of the N.T. government's Aboriginal Employment and Career Development Strategy. The ACCO positions, as previously stated, were created in 1986 in an attempt to increase Aboriginal involvement in the Department of Correctional Services. In addition, formal funding arrangements with a tri-partite commitment to this initiative, are in place between ATSIC, local Community Councils and the Department of Correctional
By late 1995, a total of thirteen ACCO positions had been approved under the tri-partite arrangements. The officers are employed in Nguiu, Maningrida, Yirrkala, Angurugu, Umbakumba, Wadeye, Lajamanu, Ngukurr and Dagaragu in the Northern Region of the N.T., and in Tennant Creek, Papunya, Yuendumu and Ti Tree in the Southern Region. Two officers are attached to each of the Regional Services Units in Darwin and Alice Springs, to provide relief duties in Community Corrections Officer positions in Groote Eylandt, Nhulunbuy, Jabiru and Port Keats. The career structure of these positions now provides entry points to Community Corrections Officers and Senior Community Corrections Officers through the positions of Aboriginal Community Corrections Officer and Regional Corrections Officer.

Greater community involvement has also been forged through offering, on a fee for service basis, contracts to Community Councils who employ local people to provide surveillance and support for participants in the Home Detentions Program. This initiative has ensured Home Detention to be available as a viable option in remote Aboriginal communities, to provide an alternative to imprisonment in areas where it can be argued to be most needed if an impact on indigenous over-representation rates is the intended outcome.

5.4.2 LIVING WITH ALCOHOL

In November, 1991, the Northern Territory government introduced the Living With Alcohol (LWA) program. A levy on alcohol sales was specifically introduced for the purpose of funding a range of initiatives and strategies to reduce the use and abuse of alcohol (Crundall, 1995:1).
The Living With Alcohol program was founded on the recommendations and findings of a bipartisan Sessional Committee on alcohol, appointed to address the issues of alcohol use throughout the N.T. The establishment of the Sessional Committee resulted from a number of factors: the 1988 Interim Report of the RCIADIC and the subsequent formation in Alice Springs of the Aboriginal Issues Unit which researched and prepared the report "Too Much Sorry Business", the closure of the Port Keats club after the much publicised smashing of the premises by the non-drinkers in the community, and a series of homicides in Alice Springs (Quinn, 1992:44), perpetrated under the effects of alcohol intoxication.

Crundall (1995:3-8) describes the LWA program as an "innovative public health campaign aimed at reducing alcohol-related harm throughout the Territory", addressing the detrimental personal, social and economic costs involved. The program focuses on three main dimensions, namely culture, care and control, each considered equally critical to the success of the program. The program's staff are involved in:

- policy development and coordination, through inter-departmental and community consultative committees;
- community education through general and targeted education and information sessions, and mass media campaigns;
- training and professional development for workers in alcohol related fields, which includes accredited courses at Batchelor College, N.T. University and the N.T. Hotels and Hospitality Association;
- treatment services, including the exploration of on-site services for Aboriginal communities and mobile treatment facilities for those reluctant to leave their land and families; and
- contributions to the Liquor Commission, Police, Legislative Assembly and the judiciary for regulation and legislation measures, such as the imposition of individual prohibition orders, mandatory user-pays education and treatment courses for drink drivers who wish to regain their licence and regionalisation of liquor trading hours.
The Living With Alcohol program has adopted a community development and social planning approach, and collaborates with a wide range of agencies and services, maximising community penetration, avoiding duplication and recognising the distinctive skills and knowledge of different groups. Its research and evaluation components ensure continued program effectiveness and optimal resource allocation (Crundall, 1995:10).

Evidence to date suggests that the LWA program is achieving harm reduction, including the following indices:

- per capita consumption of absolute alcohol fell by 18% from 18.3 litres
- 31% fewer alcohol-related deaths and 29% fewer alcohol-related accidents on N.T. roads
- 22.9% of patients in Alice Springs Hospital identified as being 'at risk' from their drinking during the first quarter of 1995 compared to 29.9% in 1994 and 32.5% in 1993 for the same periods
- 6% reduction in alcohol-related prison receptions in the first half of 1994 when compared to the same period in 1993 (Crundall, 1995:11-12).

Crundall (1995:11), who is the program's research and evaluation co-ordinator, argues that the distinctiveness of the program can be contributed to the N.T. government's move away "from theory and rhetoric to policy and action". He adds this makes the N.T. the only jurisdiction "to demonstrate its political will to raise funds and address the enormous costs exacted by alcohol".

5.4.3 ENDING OFFENDING PROGRAM

One of the Department of Correctional Services' initiatives, the Ending Offending Program, received funding from Living with Alcohol. A Community Corrections Officer with expertise in the field of substance abuse by
Aboriginal people, was trained to deliver the program. Virtually single-handedly, this worker implemented and delivered the program, which is currently operating in all Territory institutions. She adapted the program, which was developed in Scotland, to ensure its relevance to Aboriginal offenders by concentrating on the link between drinking patterns and offending as it relates to the Territory's indigenous population.

The program is based on the concept of controlled and safe drinking practices and appears to be highly successful for people who find abstinence from alcohol too demanding. Follow-up support is offered in remote community settings, to provide ongoing intervention for those who completed the program in custody. A number of communities have invited the worker to provide program sessions in the community, to effect preventive strategies for those at risk of offending. A number of offenders are trained, in both custodial and community environments, to take on an important role in the follow-up support process in their home communities.

The increased involvement of indigenous people in the criminal justice system through the initiatives outlined in 5.4.1, assists in the creation of a mutual support network in remote communities, strengthening the role Aboriginal people with training in relevant areas can assume.

5.4.4 PRISON EDUCATION PROGRAMS

In line with recommendation 184, N.T. prison education programs have been upgraded. The 1992/93 Northern Territory Implementation Report (1994:82) informs that implementation has been completed with ongoing commitment for education programs and training opportunities in the new Industries Blocks at Darwin and Alice Springs prisons. The 1993/94 Implementation Report
(1995:133) states that, among the 143 prisoners enrolled in education programs during the first semester of 1994, there were 97 Aboriginal students.

In an Overview of Education and Training in N.T. Correctional Institutions, delivered at the International Forum on Education in Penal Systems in Hobart, Tasmania, in November 1995 (Manners, 1995:1), changes and future developments are outlined. Among the changes it is noted that the responsibility for the training of inmates transferred from the Education Department to the Department of Correctional Services (DCS) in January 1994 and that DCS became a registered private provider of Vocational Education and Training. The latter requires implementation of the National Training Reform Agenda and offers transferability of modules and courses between institutions inside as well as outside the prison system.

For the purpose of delivering all educational programs, an Institutional Programs Branch was created. The Branch aims to "efficiently and effectively allocate resources towards the task of reducing the rate of re-offending among institutional clients". Holistic programming intends to improve the quality and relevance of service provision (Manners, 1995:2).

Education and training statistics, reported for 1994/95 (Manners, 1995:6), include the results of detailed prisoner profiles/assessments undertaken in 1994. Of the 205 Aboriginal prisoners assessed, 31 (or 15%) spoke English as their first language. For the remaining 174 Aboriginal prisoners, English was their second, third or fourth language. They were assessed to be at stages one and two on a scale of four, with stage one indicating the need for intensive literacy/numeracy support prior to commencing vocational
or other training. In terms of enrolments in education and training programs, 199 Aboriginal clients completed 381 units in pre-vocational courses and 45 modules from vocational courses during the first semester of 1995 (Manners, 1995: 6-7). These figures represent a substantial increase in the number of Aboriginal prisoners enrolled in educational programs from the previous year and highlight the backlog in terms of literacy and numeracy skills.

Apart from an increase in the number of Aboriginal prisoners undertaking accredited and non-accredited education and/or training modules and the successful completion of these modules or courses, a link with community organisations and training providers has been established to encourage access to work or education upon release (N.T. Correctional Services Education Services Operational Plan, 1995). The Strategic Plan for the N.T. 1993-1995 Triennium includes objectives for furthering the links with Aboriginal communities. It also includes the establishment of a pre-release program with the involvement of DEET, Community Corrections and other stakeholders; the utilisation of Aboriginal educators in the areas of culture and self-esteem; and drawing on the expertise of Batchelor College and NTU's Faculty of Aboriginal and Islander Studies. Resourcing the facilities to achieve the above-mentioned objectives, is part of the strategies of the Operational Plan (1995:4).

5.4.5 OTHER GOVERNMENT AND COMMUNITY INITIATIVES

Section 2.5.1 (p 30) discussed the Night Patrol Scheme as an important community initiative which received government support and assistance. In the context of this section, it is important to highlight the interaction
between the N.T. government and Aboriginal community leaders which, since the Royal Commission, appears to have intensified in terms of expanding and formalising these initiatives, even though this may not have happened at the policy level. Changes to the Tennant Creek liquor laws, also initially proposed by the community, were formalised through arrangements between the community and the N.T. Liquor Commission.

The introduction of a Police Domestic Violence Unit and funding for domestic violence projects, has resulted from recommendations at a 1994 Aboriginal workshop on community violence. The N.T. is renowned for its higher than average alcohol consumption levels and violent offending rates. A domestic violence pilot project in Darwin's northern suburbs in 1994, introduced by the Northern Territory Police Force, was funded on an ongoing basis after proving highly successful. A fully fledged community awareness campaign was launched in November 1995, to clearly provide the message that violence within the family is a crime which has to stop. The campaign is part of the N.T. government's Domestic Violence Strategy, introduced in April 1994 and, with the inclusion of a discrete Family Violence Action Plan for Aboriginal communities (Cummings & Katona, 1995), is addressing in a culturally appropriate way the high incidence of violence against Aboriginal women.

The 1993/94 Northern Territory Implementation Report (1995:69) notes the strong support, by Aboriginal representative organisations, for continuation and further development of Aboriginal controlled and directed programs like the Night Patrol Scheme. With reference to the measures introduced in Tennant Creek, the Implementation Report acknowledges the difficulty of striking a balance between those members of the Tennant Creek
community who do, and those who do not, have a problem controlling alcohol consumption levels. Maley (1995:1) summarised the "cold hard facts" of the impending Tennant Creek trial, and stressed the sales of liquor with meals in Saloons and Lounge Bars, Motels or Clubs would not be affected - nor would bush orders. He requested the whole community to adopt, like the Liquor Commission, a "wait and see" attitude while, with "objectivity and impartiality, allowing time to be the judge of long term variations to liquor licences in Tennant Creek" (Maley, 1995:2).

This seems another good example of the value of community initiated attempts to deal with problems specific to their immediate area, in preference to government imposed initiatives, which may or may not be as acceptable or readily embraced. While there can be no guarantee that these schemes will work elsewhere, the Night Patrol Scheme has been embraced enthusiastically by other Aboriginal communities.

5.5 OTHER DEVELOPMENTS IN THE NORTHERN TERRITORY

The first agreement between Aboriginal people, mining giant CRA and the Northern Land Council (NLC) occurred on 10 November, 1995. Mining on land already under Native Title claim was at issue. According to Pearce, Director of the NLC, the deal demonstrates that agreements between Aboriginal people and mining companies are not only possible, but also expeditious, as the agreement was reached within three months. The agreement sets an example for other states and countries, and dispels popular claims that mining is finished as a result of the Native Title Act (7.30 Report, ABC TV, 10.11.1995). The merit of such deals is to
demonstrate that Aboriginal community interests can be defended by the community, on its own strength.

Other positive developments have eventuated through increased media exposure of Aboriginal art, music and cultural events. Combined with international interests in Aboriginal culture, improved portrayal of indigenous people in the media, and Aboriginal radio and television stations, a more positive and valued profile of Aboriginal people results, encouraging increased worth and esteem among indigenous Australians.

5.6 YOUTH AND THE CRIMINAL JUSTICE SYSTEM

The area of young people and the criminal justice system has consistently been criticised for its low priority in most, if not all, jurisdictions, despite regular feedback from Aboriginal people that this area features high on their list of priorities (Gale et al (1990), Hazlehurst (1990), Langton (1990), Cunneen (1992), Harding et al (1995), and throughout the Royal Commission Reports (1991)). Particular concern has been expressed at the high rates of detention for indigenous youths.

Harding et al (1995:70-81) provide data for all juveniles in detention, in all jurisdictions, for the years 1990-1993. Table 5.4 reproduces these figures to illustrate the trends around Australia and highlight the lack of complete and consistent data. While there is a decrease in juveniles in detention during this period, it is not consistent nor uniform across all jurisdictions.
TABLE 5.4 CENSUS OF JUVENILES (AGED 10-17) IN DETENTION BY JURISDICTION, 1990-1993

<table>
<thead>
<tr>
<th></th>
<th>WA</th>
<th>SA</th>
<th>QLD</th>
<th>NSW</th>
<th>VIC</th>
<th>NT</th>
<th>TAS</th>
<th>ACT</th>
<th>AUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>n RATE</td>
<td>132</td>
<td>40</td>
<td>113</td>
<td>356</td>
<td>147</td>
<td>39</td>
<td>10</td>
<td>12</td>
<td>849</td>
</tr>
<tr>
<td>1991</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>n RATE</td>
<td>120</td>
<td>46</td>
<td>100</td>
<td>310</td>
<td>110</td>
<td>37</td>
<td>14</td>
<td>9</td>
<td>746</td>
</tr>
<tr>
<td>1992</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>n RATE</td>
<td>97</td>
<td>67</td>
<td>73</td>
<td>320</td>
<td>n/a</td>
<td>34</td>
<td>13</td>
<td>11</td>
<td>n/a*</td>
</tr>
<tr>
<td>1993</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>n RATE</td>
<td>113</td>
<td>n/a</td>
<td>97</td>
<td>270</td>
<td>69</td>
<td>21</td>
<td>16</td>
<td>5</td>
<td>n/a*</td>
</tr>
</tbody>
</table>


(Source: Harding et al, 1995:80)

Data are not available to illustrate the differences in rates between indigenous and non-indigenous youths for the same period. Harding et al (1995:81) include however a table separating race, for juveniles in detention as at 31 March, 1993. Table 5.5 reproduces these data to provide an overview of the difference in detention figures at that point in time. The figures show that it was 24.2 times more likely for an Aboriginal youth to be detained in Australia than a non-Aboriginal youth, a rate substantially higher than for adult imprisonment. The over-representation ratio for Western Australia was 48.3 and 4.0 for the Northern Territory. A column has been added with the over-representation ratio for all jurisdictions, to provide an easy overview of the differences.

It should be noted that Tasmania, the N.T. and the A.C.T., showing the lowest over-representation ratios, are small jurisdictions when compared to
the other states. New South Wales and South Australia are the only other jurisdictions with lower than the average Australian ratio of over-representation for indigenous youth. Also worth noting is the high rate of non-indigenous juveniles in detention in the N.T. on 31 March, 1993, when compared with the other jurisdictions: more than twice the Australian rate.

<table>
<thead>
<tr>
<th></th>
<th>ABORIGINAL</th>
<th></th>
<th>NON-ABORIGINAL</th>
<th></th>
<th>OVER-REPRESENTATION RATIO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NUMBER</td>
<td>RATE</td>
<td>NUMBER</td>
<td>RATE</td>
<td>RATIO</td>
</tr>
<tr>
<td>NSW</td>
<td>76</td>
<td>610.1</td>
<td>194</td>
<td>29.3</td>
<td>20.8</td>
</tr>
<tr>
<td>VIC</td>
<td>12</td>
<td>425.1</td>
<td>57</td>
<td>11.4</td>
<td>37.3</td>
</tr>
<tr>
<td>QLD</td>
<td>48</td>
<td>363.8</td>
<td>49</td>
<td>13.7</td>
<td>26.6</td>
</tr>
<tr>
<td>WA</td>
<td>74</td>
<td>981.3</td>
<td>39</td>
<td>20.3</td>
<td>48.3</td>
</tr>
<tr>
<td>SA</td>
<td>18</td>
<td>648.2</td>
<td>43</td>
<td>27.5</td>
<td>23.6</td>
</tr>
<tr>
<td>TAS</td>
<td>0</td>
<td>0.0</td>
<td>16</td>
<td>29.0</td>
<td>0.0</td>
</tr>
<tr>
<td>NT</td>
<td>14</td>
<td>194.5</td>
<td>7</td>
<td>48.2</td>
<td>4.0</td>
</tr>
<tr>
<td>ACT</td>
<td>0</td>
<td>0.0</td>
<td>5</td>
<td>13.7</td>
<td>0.0</td>
</tr>
<tr>
<td>AUS</td>
<td>242</td>
<td>502.5</td>
<td>410</td>
<td>20.8</td>
<td>24.2</td>
</tr>
</tbody>
</table>

(Source: Harding et al, 1995:81)

A number of interesting programs have been implemented in South Australia following the recommendations of the Royal Commission. Examples of these in custodial institutions include Aboriginal welfare officers, special leave periods from custody, learning to drive programs, visits from Aboriginal musicians to perform for detainees, the exploration of the value of an Aboriginal photographer to teach residents photography skills, in order to document pictorially their detention experience, and a senior level management Aboriginal Personnel consultant, who ensures the needs and
concern expressed by increased numbers of Aboriginal workers are noted by those responsible for developing policy and procedures. Programs in the community include a mobile patrol for Aboriginal youth in Murray Bridge, a youth coffee shop in Coober Pedy, a range of camps, aimed at improving relations between the police and Aboriginal youth deemed at risk, and a youth support group in Adelaide's Hindley Street, which provides advocacy, mediation and role modelling of standards of street behaviour for at risk youths who congregate in the area (1993 South Australian Implementation Report, 1994:14-24).

Northern Territory initiatives include an annual Juvenile Justice Workshop, held in different localities, to facilitate attendance by a wide range of community and government agencies, to assist the development of programs and policies for juveniles. It is difficult however, to establish whether new initiatives and, if so, which ones have been responsible for the reported decrease of 53% in juvenile detention numbers for the years 1989/90 to 1993/94 (1993/94 Northern Territory Implementation Report, 1995:61). This would be an interesting exercise for future study.

Table 5.6 shows the Juvenile Justice system commencements in the Northern Territory for the year ending 30 June, 1994. The Community Service Order Scheme has been utilised heavily by Juvenile Courts for both indigenous and non-indigenous youths, as has probation. Indigenous youths can be seen to be over-represented in all program categories. Remand numbers appear particularly high, suggesting that alternatives in this area might be of paramount importance.
TABLE 5.6 NORTHERN TERRITORY JUVENILE JUSTICE SYSTEM COMMENCEMENTS - YEAR ENDING 30 JUNE, 1994.

<table>
<thead>
<tr>
<th></th>
<th>ABORIGINAL</th>
<th>NON-ABORIGINAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>REMAND</td>
<td>49</td>
<td>25</td>
</tr>
<tr>
<td>DETENTION</td>
<td>19</td>
<td>8</td>
</tr>
<tr>
<td>PROBATION</td>
<td>91</td>
<td>50</td>
</tr>
<tr>
<td>COMMUNITY SERVICE ORDER</td>
<td>156</td>
<td>105</td>
</tr>
</tbody>
</table>


Owing to an inability to establish which initiatives have been most successful in promoting a reduction in juvenile detention numbers, further research could ensure that the potential of the best programs is optimised while replacing initiatives with least potential to reduce detention rates. Indigenous people would need to be invited to accept a high profile in such research, right through the policy development, implementation and monitoring process. Programs which have been claimed to be successful in varying degrees include culturally appropriate community based programs, such as family conferencing, currently piloted in Alice Springs, and different forms of Community Aid/Justice Panels, such as the one operating in Katherine.

An interesting alternative to remand for juveniles arose in Alice Springs, when its juvenile detention facility closed. An Aboriginal child care organisation inherited the facility and negotiated with Correctional Services to reserve places, on a fee for service basis, for young people in need of a safe placement while awaiting court appearances in preference to being taken to Darwin or the Police lock-up in Alice Springs.
Aboriginal community perceptions in terms of the recommendations related to young Aboriginal and Torres Strait Islander people and the juvenile justice system (recommendations 62 and 234-245) are reported as follows in the 1993/94 Northern Territory Implementation Report (1995:60):

"In workshops held to allow Aboriginal people and their representative groups to provide feedback on action taken to implement the recommendations, concern was expressed about the numbers of juveniles that come into contact with the system. An explanation of the action taken did not generate any specific requests or suggestions for alternative approaches".

5.7 ABORIGINAL JUSTICE ADVISORY COMMITTEES (AJACs)

The 1993/94 Northern Territory Implementation Report (1995:4) contains an acknowledgment that there was criticism from some Aboriginal people and organisations that the 1992/93 Implementation Report had been unduly optimistic in its reporting of the actions taken by various government departments. The Office of Aboriginal Development, monitoring all programs and coordinating the annual report, therefore took the view "that a more comprehensive process was required to provide information to Aboriginal people and organisations and to obtain specific responses". The process involved workshops, designed to be inclusive of all organisations which might have in interest in the areas under discussion. Senior departmental officers "provided information and received direct feedback from the organisations and individuals" attending these workshops (1993/94 N.T. Implementation Report, 1995:4). Considerable concern was expressed about the need for a formally constituted Aboriginal Justice Advisory Committee (AJAC), while strong views likened the first Implementation Report's presentation of the situation in the Northern Territory to "Grimm's Fairy Tales" (1995:5). The Northern Territory and Tasmania are the only two jurisdictions without an independent AJAC.
The 1993 South Australian Implementation Report (1994:9) also revealed a greater need for independent and statewide scrutiny and input by Aboriginal people and organisations into the AJAC, than provided by the structure of the Committee when it was first established in 1990. The initial structure consisted of approximately equal Aboriginal and Government representation. Currently, it entails an independent and state-wide AJAC, with the support of the Aboriginal and Torres Strait Islander Commission (ATSIC), to hold consultations across the state. AJAC's main role is to monitor the Royal Commission's recommendations from a community perspective and "to propose changes to the operation of the criminal justice system based on their experiences".

While South Australia reported impressive program initiatives in its 1994 Implementation Report, either implemented or to be investigated for implementation, criticism was levelled at its accuracy too. According to the South Australian AJAC, an exaggerated and too optimistic picture was painted by the government in the number of recommendations claimed to be implemented and achieved (ABC Radio, 10.10.1995).

5.8 SUMMARY

This chapter outlined some positive developments in terms of community and government initiatives, sometimes cooperatively implemented, to improve the social conditions of Aboriginal people. Despite these initiatives, there has been no improvement in the indicator of Aboriginal over-representation in custody. Levels of arrest are still as high, if not higher than the pre-Royal Commission levels. It needs therefore to be established whether the
changes are still piecemeal, whether the political will and commitment are high enough to make a noticeable difference, or whether it is reasonable to expect that five years is not a substantial enough period to expect concrete changes from decisive actions to have eventuated.

There have been some positive changes in the relations between Aboriginal and non-Aboriginal groups, which are evidence that cooperation is not only possible in theory but in urgently needed practice. The mining agreement is one such development and positive imagery of Aboriginal and Torres Strait Islander Australians is another. The cooperation, witnessed between the Aboriginal community and government agencies in efforts to improve the conditions in Tennant Creek, suggests a variety of further initiatives is possible, if based on similar principles of negotiation, consultation and cooperation.

The monitoring process of the implementation of the Commission's recommendations has not escaped criticism, whether in jurisdictions with or without an independent AJAC. While criticism has related to the portrayal of too optimistic a picture of government action in its implementation efforts, it would seem that there is a need for an appropriate forum where serious consultation can occur between community stakeholders and those who develop, implement and monitor the policies and programs under scrutiny. Feedback workshops, such as the one reported in the 1993/94 Northern Territory Implementation Report, could be vastly improved if ongoing consultation were complemented by regular program information and brainstorming sessions. Such sessions might provide opportunities for ideas and suggestions, leading to alternative approaches in the criminal justice system, to emerge.
6. DISCUSSION, SUMMARY AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter presents a synopsis of Northern Territory responses and related outcomes as to the alarming levels of indigenous arrest and custody rates. A discussion follows, which focuses on the relevant aspects of the justice system, and, more broadly, on social indicators other than custody.

A section of the chapter is devoted to a discussion of possible strategies and approaches not explored so far, and their potential in contributing to a resolution of the problem. The chapter makes a concluding comment and translates the main elements into a number of recommendations.

6.2 SYNOPSIS OF RESPONSES TO INDIGENOUS OVER-REPRESENTATION IN CUSTODY AND RELATED OUTCOMES IN THE NORTHERN TERRITORY

N.T. responses to the over-representation of Aboriginal people in custody in general and to the recommendations of the Royal Commission in particular have been referred to in chapters 2 and 5. They included the Galiwin'ku Community Justice Project, the Yirrkala Council proposal, the Outstation movement, Aboriginal Community Corrections Officers, a wilderness camp and prison farm, the Home Detention Scheme, and Community Service Orders for people unable to pay their fines. Post-Royal Commission programs included the Aboriginal Employment and Career Development Strategy, the Living With Alcohol (LWA) Strategy, the Ending Offending Program, the Domestic and
Family Violence Strategy, a Strategic Plan for Prison Education Programs, and support by way of funding, regulation and endorsement of various community initiatives such as the Night Patrols, and smaller scale individual community efforts.

Other responses included greater access by Aboriginal people to employment in the Police Force and Correctional Services as well as in the critical areas of health and education. Aboriginal training courses, offered at Batchelor College and the Faculty of Aboriginal and Islander Studies at the N.T. University, have worked towards providing the necessary skills to ensure that employment and cultural needs of Aboriginal people are met.

Thus the N.T. designed and implemented a range of strategies, as summarised above. There is evidence to show that in general, government responses had a slow but broadly positive impact in a number of areas. Crundall for example commented, as mentioned in chapter 5, that the N.T. government, by moving away from theory and rhetoric to policy and action, has made the N.T. the only jurisdiction to "demonstrate its political will to raise funds and address the enormous costs exacted by alcohol". There is also evidence to suggest that impacts on social issues which may lead directly or indirectly to increased indigenous custody levels, have been more successful where the indigenous community has been the instigator or partner in the design of initiatives or strategies.

Elements of the media have contributed positively to greater community awareness as triggered by the Royal Commission and the ensuing initiatives. Increasingly, a more positive portrayal of Aboriginal people's endeavours seems to have developed, although a lot remains to be done in this area.
Yet, the data relating to custody, and by extent to deaths in custody, shows no improvement to the pre-Commission data. The over-representation of indigenous people in Her Majesty's custody continues to be a critical challenge to government and has not reduced despite resources and strategies devoted specifically to its resolution. It would seem that, unless there is a consistent overall strategy in approaching the problem, progress remains slow with little meaningful improvement, as measured against the relevant indicators.

6.3 DISCUSSION

The discussion centres around the criminal justice system, other social indicators and the possible impact of strategies not yet canvassed.

6.3.1 THE NORTHERN TERRITORY JUSTICE SYSTEM

Section 3.4 of this study documented some of the main views held by researchers with regard to the role of the criminal justice system on the issue of over-representation. The views ranged from the use of the law as a means to control colonised people, to prejudice, and to institutional racism. It pays to revisit the most salient of these views, starting with Haralambos and Holborn (1991:611) who made the very important point about labelling as a self-fulfilling prophecy trigger, "whereby the deviant identification becomes the controlling one".

Coe drew the link between the imposition of a dominant order and the resistance of a culturally dispossessed minority with reference to over-policing and to structural racism, while Payne and Cunneen stressed the
particular disadvantage to which Aboriginal women are subjected (in Cunneen, 1992).

Much attention and time could be devoted to a study of the various processes and mechanisms in the criminal justice system. It seems, however, that one important part of the problem relates to attitudes within the system rather than to the organisational structure of the system. To this extent, it is worth quoting Clifford (1982:11) once more, who claimed that "... when behaviour so widespread as to be practically normal among Aboriginal people is labelled criminal by our law, there is a need for rethinking the law. When imprisonment does not deter but is shouldered by the Aboriginal as an inevitable yoke to be carried as a consequence of his (sic) residence in a white society, we would be moronic to go on using it punitively and ineffectively."

Yet the system goes on to use imprisonment punitively and ineffectively, as illustrated by the data presented in the previous chapters. Rutherford's comments on the expansion of most contemporary prison systems being the result of a "combination of drift and design" (in Vass, 1990) are also telling in this regard.

Seen in this context, the construction of the new Alice Springs prison is difficult to reconcile with regular claims of "prison as a last resort", as is the proposal to re-criminalise public drunkenness. Even though the need for a new facility in Alice Springs is not contested, increases in the number of prisoners, witnessed in NSW as a result of the 'Truth in Sentencing' legislation in that state, may provide a scenario the N.T. needs to avoid. Increases in the already higher N.T. imprisonment rate would be counter-productive to current criminal justice trends, and may further jeopardise efforts to reduce the vastly disproportionate custody rate of indigenous Territorians.
The question was posed whether the persistent indigenous over-representation in custody, despite post Royal commission responses by the N.T. government, was attributable to the relatively short post-Commission period, or to the ineffectiveness of the approach adopted in the response to the Commission's recommendations. Even though the time factor may partly contribute to the explanation, the analysis of findings and views presented in previous chapters would strongly indicate that the way the problem is approached is the predominant factor. Here too, a consistent overall strategy is needed to obtain meaningful improvement as measured against all the relevant indicators. This view was clearly expressed by Johnston (Vol. 4, 1991:1) when he argued that

"... changes to the operation of the criminal justice system alone will not have a significant impact on the number of Aboriginal persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant factors in over-representation ... Unless these factors are addressed it is unlikely that there will be any significant reduction in the numbers of Aboriginal people who are taken into custody".

Johnston also acknowledged that, for many indigenous people, present living standards are utterly inadequate for a satisfactory life and concluded that the extreme disadvantage in almost all areas of indigenous Australians' lives was the underlying reason for the gross over-representation of Aboriginal and Torres Strait Islander people in custody. The Commissioner recommended that programs should aim to deliver social justice to indigenous people.
Coombs (1994) argued that the destructive effects on the once effective Aboriginal measures of self-control were the result of the prevailing Australian legal system's interference with Aboriginal systems of customary law. The long-term distress, caused by imprisonment, separation and the physical and cultural isolation from indigenous social networks, inflicted further hardship, with the most destructive effects flowing from the lack of re-integration and re-socialisation upon release, which would have been part of Aboriginal customary law.

Commissioner Muirhead's (1988) confidence in the reasons for indigenous over-representation and deaths in custody can easily be shared when noting his claims that a significant number of deaths have their roots in the very despair of individuals, in their frustration and anger, and in the legal practices and procedures in which many indigenous people have little or no confidence. Another important reason has been argued to lie in the removal of indigenous children from their families, thereby denying Aboriginal culture and heritage to Aboriginal children. This policy impacted profoundly on Aboriginal culture, and carries a legacy which, through lack of parenting skills, may reverberate for generations (Cummings, 1990 and Johnston, Vol. 2, 1991).

Pearson (1995) is acutely relevant when he sums up the debate by claiming that the symbolic and institutional achievements need to change into an actual delivery of "social justice for people on the streets, in the tin humpies and living under the bridges". Social justice and reconciliation must mean something for the quality and duration of indigenous lives.
Research is unambiguously pointing the way. Linking custody rates to offending behaviour and attempting to modify behaviour through custody or further custody has resulted in a failure over the years in bringing about any significant change. The challenge of a resolution needs to be tackled by linking custody rates and offending behaviour to the whole register of factors having impacted on indigenous society from 1788 to the present. They include physical and cultural dispossession, displacement, marginalisation and neglect, particularly in providing opportunities for development at the same time as the incoming and growing population was forging ahead on its own development exclusively, thus magnifying the separateness over most of the 207 years of this recent history. Yet this was imposed on a society whose intrinsic dignity continues to enthuse researchers worldwide.

Government responses, Australia-wide, need to be commensurate with the magnitude of the problem and can be viewed in the closely linked categories of socio-economic circumstances on the one hand and national reconciliation on the other. The whole register of social indicators needs to be targeted and monitored simultaneously, while ensuring that a return of power and control to Aboriginal people is included in every possible way.

6.3.3 OTHER POSSIBLE STRATEGIES FOR REDUCING INDIGENOUS OVER-REPRESENTATION: A NATIONAL COUNCIL

The previously expressed view that, unless there is a consistent overall approach, progress may continue to be unacceptably slow and piecemeal. A National Council with representation of relevant federal, state and non-
government bodies could be envisaged as one such global strategy. Its policy, strategic and resourcing role would be to guide, coordinate funds and monitor a comprehensive range of strategies to address root determinants of indigenous disadvantage. It is envisaged that peak members of such Council might be ATSIC, the Aboriginal Council for Reconciliation, the Council of Churches, the Law Reform Commission, the Australian Institute of Criminology, and the Police. The Council would report on progress to Parliament on an annual basis and according to set performance indicators applying to the funded projects.

An attractive consideration, not devoid of difficulties, would be to vest the Police with Lead Agency status in community relations. This would include Police to provide a role model, instigator and coordinator of best practice community relations as a whole of government initiative. The Aboriginal Council for Reconciliation would carry responsibility for cross-cultural education, while the Law Reform Commission would have the responsibility for all areas of law reform, sentencing practices and sentencing alternatives. ATSIC would continue with its responsibilities for funding arrangements, with the Australian Institute of Criminology fulfilling the coordination of data gathering, information and research functions, allowing accurate comparisons of outcomes across all jurisdictions. The over-riding task of a National Council would be to coordinate strategies and responses to the specific targeting of issues relating to all the negative social indicators, including the high rate of indigenous custody. As a federal agency with recognised authority, it would oversee all social and criminal justice matters, while accepting matters referred to it by other agencies.
Government and non-government agencies alike could be called upon to cooperate with the Council, in line with their funding arrangements. This would provide a renewed thrust to the current approaches, not only in effecting changes through wider community networks, but also in harnessing community support through its variety of inputs and broad-based membership.

Additional benefits of a National Council would include an interchange for ideas, research and the coordination of appropriate, feasible and prioritised issues. This could also include determining issues such as a time-frame for the rectification of water, sewerage and garbage problems in Aboriginal communities, as suggested by Flick (1995). Such time-frame, when coupled to a housing policy, could in turn be aligned with strategies bearing on a number of other indicators.

Another area for consideration would be the development of appropriate and accredited training programs for indigenous and non-indigenous people. Programs for the former could relate to individuals and community organisations accessing the full range of economic and political programs, existing in Australia's bureaucratic structures, while the latter would concentrate on structured competency based cross-cultural training programs, incorporating knowledge, skill and attitude.

Finally, a National Council may contribute to accelerate the coordination of reform in criminal justice systems, currently left to each individual State and Territory, within their legislative frameworks. The establishment of national standards in correctional programs and the consistent collection of comparative data could be greatly enhanced by a coordinating Council.
A National Council as envisaged might give serious consideration to coopting the Army, who may have an appropriate role to play in assisting with development towards indigenous self-determined solutions. It must be remembered that the Army, in cooperation with the N.T. Department of Health and Community Services, contributed to combat further eye problems in Katherine in 1993, Central Australia in 1994 and Maningrida in 1995. Stemming from Fred Hollows' project for trachoma, these annual exercises have proved to be beneficial to the providers and recipients of these services (N.T. News and Defence Force Public Relations Officer).

The infra-structure is in place and one could assume that resources may be shifted without too much disruption to the regular activities and duties of army personnel. A concerted effort could be made for a set period, within a firm long term plan, to achieve specific outcomes. Such efforts could be based on models which incorporate long term and holistic approaches, such as a concept of voluntary conscription, to attract willing young people to be involved in a nation-wide program of assistance to improve and raise the living conditions of indigenous people in remote areas to the general standards of the Australian community. The skills and training thus obtained would provide additional, long term benefits to the relevant communities by way of employment opportunities for ongoing maintenance.

The possibility might also be considered for a government-funded branch to be negotiated with Community Aid Abroad, to provide community aid at home.

From the preceding comments and suggestions it is clear that, in the writer's view, a shift in traditional approaches to problem solving is needed. Global strategies, unimagined hitherto, warrant consideration.
Pearson's (1994) view corroborates an aspect of the need for global strategies when he says that it is "as unjustifiable to refuse a voice to a non-Aboriginal Australian wishing to engage in the discourse on Aboriginality today as it was to refuse a voice to Mr Cooper in 1938".

A National Council advocated above would indeed combine a non-Aboriginal voice to the voice and will of indigenous people. It needs to be kept in mind that non-Aboriginal people need not be coy about 'helping' Aboriginal people, as there is a place for such assistance in the search for strategies. As stated by Commissioner Johnston (Vol. 4, 1991), solutions with respect to each issue will be found to flow from application of the sound principles of self-determination and self-management. This entails partnership and negotiation with Aboriginal communities on a systematic scale. This is true particularly for communities which have been less assertive in terms of proposing schemes to commence their own solutions, as Yirrkala, Alice Springs, Tennant Creek or Elcho Island have. It is also compatible with the Australian system in general, providing absolute priority is given to indigenous culture and the aim to foster self-determination and self-management.

6.4 CONCLUDING COMMENT

It could be expected that, with projected improvements in the main areas of social justice and reconciliation, solutions will flow to the criminal justice system. This requires a coordinated and well-resourced effort to develop an overall strategy. The quality of life and the pride of all Australians stands to benefit from an improvement in the quality of life.
for all indigenous Australians. It is with this in mind that the study cannot but conclude with wide-ranging recommendations.

6.5 RECOMMENDATIONS

1. Engage in widespread, continued debate and invite strong community input in the review process of the N.T. Sentencing Act, to fiercely argue the repercussions of the contradictory objectives of the legislation and the stated objectives in terms of indigenous over-representation in custody.

2. The commissioning of a formal, independent evaluation of the Galiwin'ku Community Justice Project, along the suggestions outlined by Langton. A comparative study of Community Justice/Community Aid Panels and Family Conferencing, as currently piloted in Alice Springs, would be valuable in guiding future program planning.

3. Exercise the duty of care by ensuring that it be mandatory to provide access to appropriate interpreters for all cases where defendants are not fully conversant with the English language and/or court processes, in order to protect the right of each individual to an appropriate defence.

4. Further research in the criminal justice area. This includes studies to establish whether findings from other states would be similar in the N.T. (e.g. Alexander, Gale et al, Bird and Broadhurst) in terms of recidivism, prison as a holiday camp, the impact of schooling on
juveniles in detention, patterns of offending, and sentencing practices to establish the extent to which the principle of last resort is effectively applied.

5. Explore and adopt ways to facilitate indigenous offenders to regain their sense of self-worth, esteem and pride as a unique human being. The implementation of Art Projects could set the stage for recovering cultural pride and self-worth, while fostering greater understanding and appreciation in the general community of indigenous cultures, as well as for the humanity of those who, through whatever circumstances find themselves in custody.

6. Provide the infrastructure and knowledge required to enable Aboriginal communities, particularly in remote localities, to pro-actively participate in consultations on equal footing.

7. Identify areas of Aboriginal law which lend themselves for incorporation into mainstream European law, effecting one law which is acceptable to all, with culturally appropriate sentencing alternatives attached for the indigenous population.

8. Ensure that the sanction of imprisonment be truly utilised as a 'sanction of last resort'.

9. Introduce a rehabilitative framework when the punishment of offenders is considered: a framework which incorporates reintegrative elements, particularly in terms of custody, while emphasising community based sentencing alternatives wherever possible.
10. Prevent the routine sanction of imprisonment for breaching the conditions of a conditional liberty order, other than by a further offence, in line with von Hirsch's 'just desert' model. Address, through further research, the need to successfully enforce conditional liberty orders, in order to maintain the credibility and integrity of the conditional liberty sanction, without actioning the implied threat of imprisonment.

11. Continue to expand education, training and employment of Aboriginal people in all areas, including in the criminal justice system, and promote increased employment opportunities in remote communities. This may be facilitated through the suggested involvement of the Defence Forces, or through specific employment programs along the lines of a buddy/mentor scheme, allowing cultural differences to be fully explored, without alienating the trainee.

12. Design and implement a substantial, accredited cross-cultural training process for non-indigenous managers and relevant officers of government agencies, which includes knowledge, skill and attitude, and incorporates monitoring and evaluation, to ensure competency is attained and ongoing.

13. Develop a well designed and fully committed national strategy for improved relationships on all fronts. This may include specific strategies in all agencies of the criminal justice system to fade prejudice, stereotyped and racist attitudes, while fostering improvements in the main areas of social justice and reconciliation.
14. Facilitate community development whereby communities identify their own problems and implement their own solutions, by taking account of local nuances. This provides better opportunities for Aboriginal self-management and self-determination.

15. Explore the merit of vesting the Police with Lead Agency in community relations at federal and state levels.

16. Commonwealth government to give consideration to establishing a National Council with the functions and responsibilities, outlined in section 6.3.3.

The above recommendations may provide greater potential for, and more importantly a greater success rate in, achieving social justice for indigenous Australians. The intended outcomes in terms of indigenous over-representation may be expected to flow more freely from broad-based national strategies, than the current attempts by individual State and Territory governments.
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**COMMONWEALTH GOVERNMENT PUBLICATIONS**


**STATE GOVERNMENT - PUBLISHED DOCUMENTS**


NORTHERN TERRITORY GOVERNMENT - PUBLISHED DOCUMENTS


NORTHERN TERRITORY GOVERNMENT - UNPUBLISHED DOCUMENTS


NEWSLETTERS

RIGHTS NOW - Newsletter of the National Children's Youth Law Centre, Vol. 3, No. 4, November 1995.

1. CURRENT COMMUNITY BASED CORRECTIONAL PROGRAMS

1.1 PROBATION

Probation was established prior to self-government in the Northern Territory and provides basic supervision to offenders who have been sentenced to a period on probation or who are placed on probation in lieu of imprisonment or detention. That is, a full or part suspended sentence may accompany a Probation Order, or as it also called a Bond or Recognizance to be of good behaviour. The offender signs the Order, thereby agreeing to abide by the conditions specified. Conditions stipulate not to offend and may include the acceptance of supervision by the Department of Correctional Services. If the offender successfully completes the conditions of the Order and, where applicable, follows the directions of a supervising officer, the episode is completed. Should the offender appear before the court within the period of the Order, the sentencing authority has the discretion to act in the most appropriate manner warranted, by reconsidering all the circumstances and materials before the court. Court actions may vary from no action to breaching the Order and directing any suspended term of imprisonment to be served.

1.2 PAROLE

Parole always involves departmental supervision and is a community based option whereby offenders, sentenced to a term of imprisonment, may apply to be considered for parole at the stipulated time by the court, when it fixed a minimum term or non-parole period. An application is considered by the Northern Territory Parole Board, consisting of five community members, a departmental secretary and the Chief Justice who is the chairperson of the Board. Parole is more serious than probation, in that parolees are

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1 Information about the programs and sentencing alternatives offered by the Northern Territory Department of Correctional Services has been extracted from Annual Reports, departmental documents and general departmental information.
completing their sentence of imprisonment in the community. Should the parole order be revoked for committing further offences or failure to abide by the conditions of the parole order, parolees may be returned to prison to complete the original sentence. In the event of a further offence being committed which attracts a term of imprisonment, the parole order is automatically revoked.

1.3 COMMUNITY SERVICE ORDERS AND FINE DEFAULT

Community Service Orders (CSO) are available to sentencing authorities as a sentencing option in preference to other sanctions, whereby the offender provides unpaid work to the community. The Department of Correctional Services provides suitable projects for offenders to complete this work and supervises the CSO, together with members of the approved non-profit organisations where such work is carried out. The community benefits by free labour for tasks and projects which would not otherwise be carried out, while the offender is given an opportunity to repay debts to the community, caused by the harmful effects of the offending behaviour which led to the CSO.

Fine default is an opportunity for offenders who have been fined - but cannot afford to pay such fines - to complete community work in lieu of serving the time, directed for non-payment of fines. It is not compulsory for persons who default on their fine, to complete a CSO and a small number of offenders decline to participate in the CSO program.

1.4 HOME DETENTION

Home Detention (HD) provides an opportunity for offenders to be detained at home, rather than in a correctional centre. Home detainees are thus able to remain with their families, in their employment and are able to keep in contact with their social network, albeit in their own home only. Prior permission is obtained for any 'legitimate absence', which includes work, medical and church purposes and a weekly shopping opportunity. All other activities, such as sport or hobbies may be conducted from the home only, where regular unannounced visits are made by surveillance officers, to check that detainees abide by the conditions of their HD. Random breath
tests are conducted, as the use of alcohol is prohibited.

1.5 BAIL ASSESSMENT AND SUPERVISION SCHEME

The Bail Assessment and Supervision Scheme (BASS) allows offenders, who have been refused Bail, to be re-assessed for suitability for release to Bail. The assessment examines possibilities for an offender to be released into the care of a person or place, where the chances of successfully complying with Bail conditions are sufficiently enhanced for the court to agree to Bail release. Conditions of supervision by Correctional Services may be a condition of such Bail.

2. CURRENT CUSTODIAL PROGRAMS

2.1 SECURE INSTITUTIONS

Minimum, medium and maximum security custody is offered from the Northern Territory's two secure adult correctional centres in Darwin and Alice Springs and a maximum security juvenile detention facility in Darwin. Programs offered in these institutions comprise welfare, chaplain, dental, health and mental health services as well as education, employment, vocational training and alcohol programs.

2.2 OPEN INSTITUTIONS

A minimum security, or open prison farm for adult prisoners is operated from Gunn Point, some 40 km out of Darwin. This facility is set to close during 1996, as did its counterpart Beatrice Hill some years ago, which had the purpose of combating the unwanted mimosa in the adjacent areas. Alice Springs operates a number of cottages outside the perimeter fence, where independent living and working conditions are encouraged. The Department of Correctional Services announced its commitment to provide a similar facility in Darwin, once Gunn Point Prison Farm closes. A minimum security juvenile facility operates from a bush setting at the Wildman River, some 100 km from Darwin. Vocational and life skill programs are offered to the detainees, with an emphasis on those skills which may be required in communities upon their return home. All open institutions organise
community work parties and/or mobile work camps for projects further afield.

2.3 OFFICIAL VISITORS SCHEME

Official visitors schemes operate from all institutions where an interest is shown in the role of regular visits by interested community members. The rationale is to encourage significant community members to maintain contact between prisoners and their communities, of particular importance for Aboriginal inmates. Visitors are appointed and provided with the necessary documentation to visit correctional centres in the capacity of a visitor on official business.

3. OTHER INITIATIVES

3.1 JUVENILE OFFENDER PLACEMENT PROGRAM

This program offers a placement to juvenile offenders who, for whatever circumstances, cannot be released from court into the care of their family. Upon request from the court, an assessment is completed to establish whether the offender can be matched to a family, offering mutual benefits to both parties. The care-giving family receives a nominal payment for these services, joint training and support by the Departments of Health and Community Services and Correctional Services and agrees to provide a culturally appropriate home environment for the young person until the matters before the court are dealt with. The young person gains by avoiding detention whilst awaiting sentence, which is usually for a period of 4 to 6 weeks.

3.2 STATION PLACEMENTS

Station placements are, where possible, identified and negotiated between the Department of Correctional Services and station owners with the aim of providing a young offender with an alternative lifestyle to the one (s)he may be accustomed to. The benefits are found in the skills learnt during such a placement, the temporary relief from peer pressures and the general benefit of a different experience.