Aboriginal Incarceration and Deaths in Custody: Looking Back and Looking Forward†

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Introduction

In September 1993, the Institute of Criminology at the University of Sydney conducted a public seminar on issues related to deaths in custody; it included a presentation by one of the present authors on the topic of the monitoring of Australian deaths in custody (McDonald 1994). That presentation concluded with an expression of hope that the full implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (hereafter the *Royal Commission*) would lead to a marked reduction in the number of deaths in custody, nationally, of both Aboriginal and non-Aboriginal people. Nearly four years later, this paper shows that the number of custodial deaths in Australia is approximately the same as the number seen in 1993 and substantially higher than during the 1980s, the period investigated by the *Royal Commission*. A second conclusion of this paper, linked to the first, is that the number of Indigenous people in Australian prisons is continuing to rise since that time, as is the level of over-representation of Indigenous people compared with non-Indigenous people.

On the other hand, looking back over the longer time period since the *Royal Commission*'s report was tabled in the Commonwealth Parliament in 1991, a number of positive outcomes may be identified. Among these are the marked reduction in Aboriginal deaths in police lock-ups in recent years and the work of many Indigenous organisations in a variety of areas linked to the criminal justice system. It is also disappointing to observe, however, that many of the achievements of the Aboriginal and Torres Strait Islander organisations have occurred in the face of a continuing deplorable shortage of financial resources and, in far too many circumstances, an inadequate acceptance of their role on the part of governments, key public servants, and people operating in the criminal justice system.[1]

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† This paper is based on ongoing research conducted by David McDonald and colleagues at the Australian Institute of Criminology, and on a study of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody with regard to reducing the over-representation of Indigenous people in custody, conducted jointly by the authors. See Cunneen and McDonald (1997). It is a revised and expanded version of a presentation given by David McDonald at a public seminar convened by the Sydney University's Institute of Criminology, Sydney, 6 November 1996.

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1 See also the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (1994).

In the balance of this paper, we describe and comment on patterns of deaths in custody and patterns of incarceration of Indigenous people (focusing on their over-representation), and conclude by looking forward, speculating on likely future trends in these two, linked, areas.

Aboriginal deaths in custody

Last year, a young Aboriginal man died in one of Australia's prisons. We know little about him, simply information derived from the transcript of the Coroner's inquest into his death and from a computer printout of his adult criminal history, as recorded by the Corrections Department in the state in which he lived. Perhaps he had a criminal record as a juvenile; we do not know. The first offence recorded in these documents occurred when he was 17 years old, however the nature of the offence is not revealed. Numerous offences occurred over the following few years, mostly relating to driving, possession of illegal drugs, possession of utensils used for the consumption of drugs, receiving stolen property, possession of an offensive weapon and stealing. At first he received a series of non-custodial sentences but later served short periods in prison.

In February 1995, he was convicted of six offences and sentenced to five months and seven days imprisonment. Two months into his sentence he died from self-inflicted hanging.

The circumstances of his death

The Coroner reports that during the Easter period (which was a short time before he died) his defacto wife failed to visit him even though they had been in contact by telephone on a daily basis up to that point. He was worried that his wife had formed a relationship with another man and was planning to leave him. This feeling was reinforced when his wife's mother contacted the prison administration to request that he stop phoning his wife. The Coroner stated, 'I am satisfied that these matters occurring whilst he was in custody without any opportunity for input into these situations has deepened any depression that he had at that time. It has caused him to be so depressed that both prison officers and other prisoners were concerned for his well being.' Because of this, the prison psychologist spoke to the young man and reached the conclusion that he was not at danger of suicide. Unfortunately, the prison psychologist was not aware that his prison medical file showed that he had been on medication for depression over the previous three years.

A couple of hours after the discussion with the psychologist, he wrote and despatched a letter to his wife which indicated (when it was subsequently located) that he intended to kill himself. Lock-down occurred at 10.30pm and a routine patrol found the young man hanging from a bed sheet near his cell door about 12.40am the following morning. One would expect that the prison officers would have entered the cell immediately and commenced resuscitation, but this was not possible. As the Coroner put it:

> Members of the patrol had to run to the office of the Operations Manager to get the key to the safe in B Block. They then had to go back to B Block and gain entry, open the safe, obtain the unit and cell keys from that safe, which finally allowed them access to the cell of the deceased. This caused delay of some minutes before they were able to get to the deceased.

The Coroner found, after a thorough investigation, that the hanging was self inflicted. The young man had taken a sheet from his bed, stood on a chair near the cell door, tied one end of the sheet to the bars above the door and the other end around his neck. The Coroner concluded that he had then stepped off the chair or kicked it aside.

The Coroner is to be commended for making recommendations aimed at minimising the risk of future, similar, deaths occurring. He repeated a recommendation that he had made in 1988 or thereabouts concerning the urgent need to remove possible anchor points

such as those used by the young man to tie the bed sheet to. He also recommended that prison security systems be modified so that staff can quickly gain access to cells when emergencies arise. He also repeated the recommendation that has been made so many times before that medical and other health care staff in prisons have access to, and pay full regard to, information available on a prisoner's physical and mental health status and background.

Here we have a story of the life and death of a young Aboriginal man as seen through the official criminal justice system records. He had a long criminal record dating back to his teens, with his offences all being minor except for the final offence (dangerous driving). During most of his court appearances he 'had the book thrown at him' in the sense that he was charged over a number of linked offences rather than for the most serious offence involved in a particular incident. On most of these occasions his sentences were to be served cumulatively rather than concurrently. He was upset, depressed, but the depth of his depression and his prior history of clinical depression and suicide attempts did not come to the attention of the people in the prison system who had responsibility for his safety and well-being while in their care. Hanging is a particularly dangerous act and it is unlikely that, if the prison officers had got to him and attempted resuscitation more quickly, he would have lived. Nevertheless, that possibility exists. In recounting this story, and noting the findings of the Coroner, we see once again the failure to implement a number of the recommendations of the *Royal Commission*. In a further review of this particular death it was noted that 13 recommendations had been breached in relation to the sentencing and imprisonment of the young man, the care and management procedures once in custody, and the procedures and protocols relating to medical assessment and service provision (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner 1996:453–456).

An extensive review of Aboriginal and Torres Strait Islander deaths in custody between 1989 and 1996 has outlined the ongoing breach of recommendations which those deaths illustrate. It was found that an average of 8.5 recommendations were breached in each death and that recommendations were more frequently breached in deaths which occurred in Queensland and Western Australia (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner 1996:xiv).

Australian deaths in custody 1980 to 1996[2]

The *Royal Commission* recommended, and all governments agreed, that the definition of a death in custody for the purposes of post-death death investigations and for the national monitoring of custodial deaths be as follows:

- the death wherever occurring of a person who is in prison custody or police custody or detention as a juvenile;
- the death wherever occurring of a person whose death is caused or contributed to by traumatic injuries sustained, or by lack of proper care whilst in such custody or detention;
- the death wherever occurring of a person who dies or is fatally injured in the process of police or prison officers attempting to detain that person; and

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2 This section was prepared with the assistance of Ms Vicki Dalton of the Australian Institute of Criminology; her assistance is acknowledged with thanks. For further details, see Dalton 1996.

- the death wherever occurring of a person who dies or is fatally injured in the process of that person escaping or attempting to escape from prison custody or police custody or juvenile detention (Royal Commission into Aboriginal Deaths in Custody 1991, vol 1:190).

What is significant in this definition is its breadth. It covers both deaths which have traditionally been considered deaths in custody, such as those that occur in a police lock-up, prison or juvenile detention centre, and deaths that occur in a hospital or other medical facility when a person is taken there from a place of custody. Furthermore, it is important to note that it also covers deaths that occur while police or prison officers are attempting to detain a person. This last category is made up, in the main, of high speed police motor vehicle pursuits.

Across Australia during the 12 months to 30 June 1996, 75 deaths occurred in the full range of custodial circumstances detailed above. As one would expect from the distribution of the Australian population, the largest number (24 or one-third of the total) occurred in NSW with smaller numbers in the other states. Nineteen or 25 per cent of all deaths in custody were Aboriginal people; six of the Aboriginal deaths occurred in police custody (one in a police lock-up and five while police were attempting to detain the person) and 13 occurred in prisons. None occurred in juvenile detention centres. Six of the 19 Aboriginal deaths occurred in New South Wales, four each in Queensland and Western Australia, three in South Australia, and two in the Northern Territory.[3]

The Aboriginal people who died in custody during the 12 month period were all males. Their mean age was 28 years and the median 24 years. The mean age of the Aboriginal people who died in police custody or while police were attempting to detain them was 22 years, whereas the mean age of the Aboriginal people who died in prison was 31 years. The causes of death were fairly evenly distributed between hanging (6), disease (5), and external trauma (predominantly deaths in motor vehicle crashes) (8).

Trend data shows that the number of Aboriginal deaths in custody during the year to 30 June 1996 was particularly high. Table 1 shows the 1980 to 1996 trends in the deaths of Aboriginal people in institutional settings, that is in prisons and police lock-ups or during transfer to or from them, or in medical facilities following transfer from prisons or police lock-ups. In other words, it excludes deaths that occur while police or prison officers were attempting to detain a person.[4] It is to be noted that the 14 Aboriginal deaths in prisons and police lock-ups which occurred during 1996 is equal to the highest figure recorded since the 1988/89 year when there were 15 such deaths. Looking at it from another perspective, there have only been two years, over the last 16, in which there were more Aboriginal deaths in custody in Australia than occurred in the 12 months to June 1996. It is worth repeating the fact that 13 of the 14 deaths of Aboriginal people in institutional settings occurred in prison and that this number far outstrips that of any previous year. In fact, the average number of Aboriginal prison deaths over the previous 15 years was 5.3 per annum, less than half the 1995/96 number.

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3 Of the 56 non-Aboriginal deaths in the same period, 21 occurred in police custody, 33 in prison custody and two in juvenile detention centres. Eighteen of the deaths occurred in NSW, 13 in Victoria, 10 in Queensland, six in Western Australia, five in Tasmania, and two each in South Australia and the ACT (see also Dalton 1996).

4 Restricting the cases to deaths in institutional settings enables us to look at trends over the period since 1980, as deaths in non-institutional settings were not recorded, nationally, prior to 1990.

Table 1 Aboriginal Deaths in Custody 1980–81 to 1995–96
Year of Death, Custodial Authority, Institutional Settings Only*

Year	Police	Prison	Juvenile Detention	Total
1980–81	7	2	1	**10**
1981–82	2	3	-	**5**
1982–83	5	4	-	**9**
1983–84	3	2	-	**5**
1984–85	8	5	-	**13**
1985–86	5	4	-	**9**
1986–87	15	2	1	**18**
1987–88	6	4	1	**11**
1988–89	10	5	-	**15**
1989–90	5	9	-	**14**
1990–91	2	5	-	**7**
1991–92	5	4	-	**9**
1992–93	1	5	-	**6**
1993–94	2	12	-	**14**
1994–95	1	11	-	**12**
1995–96	1	13	-	**14**

*Deaths in prisons, police lock-ups or juvenile detention facilities, during transfer to or from them, or in medical facilities following transfer from detention facilities. Source: Dalton (1996).

Table 2 shows the number of Aboriginal deaths in all custodial circumstances covering the period since 1990/91, the first year in which national data of this breadth has been available. The prison data in this table are the same as in the previous one: the data on deaths in police custody and whilst police were attempting to detain people shows that the number of these police custody-related deaths was particularly high during the year to 30 June 1996.

Table 2 Aboriginal Deaths in Custody 1990–91 to 1995–96, Custodial Authority Deaths in All Custodial Circumstances

Year	Police	Prison	Total
1990–91	3	5	**8**
1991–92	7	4	**11**
1992–93	3	5	**8**
1993–94	4	12	**16**
1994–95	2	11	**13**
1995–96	6	13	**19**

Source: Dalton 1996.

These figures speak for themselves. The number of Aboriginal deaths in custody in Australia, particularly in Australian prisons, is not only unacceptably high but is markedly higher than in previous years, despite the work of the *Royal Commission*, the commitments made by governments to implement the *Royal Commission*'s recommendations and the efforts of government and Aboriginal organisations to work to reduce the number of deaths in custody. The substantial reduction, over the years, in deaths in *police* custody, which is accompanied by a continuing increase in the number of *prison* deaths, reminds us that effective implementation of the recommendations of the *Royal Commission* can and will have the desired outcomes. What is missing is the genuine implementation of some of the key recommendations.[5]

Detaining and locking-up Australia's Aboriginal people

Aboriginal people in this country are subject to an incredibly high level of incarceration both in absolute terms and relative to the levels experienced by the non-Aboriginal population. This pattern is seen at a number of different points in the criminal justice system:

- Aboriginal people are apprehended by the police and held in police cells across Australia at a rate 27 times that of non-Aboriginal people (Cunneen and McDonald 1997).
- Some 25 per cent of Aboriginal people between 15 and 44 years of age report that they have been arrested in the last five years, most frequently for disorderly conduct and/or drinking in public (Australian Bureau of Statistics 1994).
- The rate of detention of Aboriginal children aged 10–17 years is over 21 times that of non-Aboriginal children (Atkinson and Dagger 1996).
- The rate of Aboriginal imprisonment is over 18 times that of non-Aboriginal imprisonment (Australian Bureau of Statistics 1996).

5 Research conducted by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) demonstrates the degree to which breaches of the *Royal Commission*'s recommendations are directly linked to recent Aboriginal deaths in custody.

- In Western Australia in 1993, 15.6 per cent of the state's all-ages Aboriginal population was arrested, compared with only 1.7 per cent of the state's non-Aboriginal population (Harding et al 1995:38).

This pattern of contact with the criminal justice system, so frequently leading to incarceration, commences at an early age. It represents a failure of the institutions of non-Indigenous society to deal with the recognition of Aboriginal rights and the consequent levels of social disadvantage. The case of an Aboriginal boy in Central Australia is illustrative (*R v Llewellyn and Pryce*, quoted in Cunneen & McDonald 1997:67–68). AR was sentenced by a Magistrate in the Children's Court to 21 months detention at the age of 13 years. On appeal, the Chief Justice of the Northern Territory released the lad on an 18 months probation order after he had already served over five months in detention at a juvenile centre some 1500 kilometres from his home and relatives.

Even at this early age he had a criminal record, having committed some 30 offences on 17 different occasions in the past, mostly relating to damage to property and dishonesty. He stated that he had committed these offences to get lollies and loose change because he was hungry and did not know how else to get food. On several occasions he had turned himself in to police when it was dark and he was unable to get home. During his court hearings, he pleaded guilty to the offences for which he was charged.

The Magistrate sentenced him to 21 months detention and stated that he was 'a wild animal on the streets of Alice Springs'. He went on to state that:

> there is nothing that can be done for you. There is nothing put forward because in fact there isn't any kind of organisation, and bereft of parents and bereft of uncles ... the Government will have to do something about you. So I'm going to put you into detention (quoted in Cunneen & McDonald 1997:68).

This boy left school at about 10 or 11 years of age. His parents had separated when he was an infant but both parents had visited the court during the proceedings. When the matter was dealt with on appeal, the Chief Justice indicated that he had serious doubts that, because of the boy's lack of education and his young age, he would have understood the legalistic conditions of the bonds and bail undertakings to which he had been subjected and the consequences of failing to observe those conditions.

More importantly, the Chief Justice noted that there 'was no consistency and care and supervision of the appellant during the many months from the time he first came under notice of the court, let alone the police' and it was these factors that lead the Magistrate to the conclusion that the boy 'had to be locked up in the criminal justice system because there was no-one else to look after him' (quoted in Cunneen and McDonald 1997:68). The Chief Justice went on to find that the case was 'absolutely alarming' and that the boy should never have been in custody:

> Surely we have not reached the stage of sending children to prison — for that is what it amounts to — to be cared for, where it appears there is no-one else prepared to accept that responsibility. If that is the case there is a need for drastic re-ordering of resources ... Courts do not decide that a person is in need of care and then place him or her in penal confinement for that purpose (quoted in Cunneen and McDonald 1997:68).

From this case we have concluded elsewhere that 'Australian society is indicted when a judicial official assumes that the best way the society can deal with a troubled 13 year old is to imprison him' (Cunneen and McDonald 1997:68).

Discrimination and over-policing

Most Aboriginal people in Australia can recount their own experiences or the experiences of friends and relatives which demonstrate the continuing discriminatory operation of the criminal justice system. One case study we examined concerned a young Aboriginal woman whom we will call 'Anne' (Cunneen and McDonald 1997:64–65). During the early hours of a Sunday morning in a country town in South Eastern Australia, she and her defacto husband were subjected to racist taunts by a non-Aboriginal woman. An altercation followed and her husband was arrested by the local police and taken to the lock-up. Anne followed wanting to see her husband to obtain their car keys from him. She described what happened in the following terms:

> I went to the front counter of the police station, no-one was there so I rang the buzzer, I heard a voice saying "I'll be there in a minute". After a short period the four officers who I had seen outside the pizza parlour [where the altercation occurred] arrived. I questioned the police about their behaviour with regard to [my husband] and in other respects and, after a short period, one of the police officers grabbed my hair from the rear and rushed me out of the police station door onto the street. He stood at the door laughing and returned to the police station. I yelled to him "I'll see you in fuckin' court, I'll have you". I then ran down the street crying back to the pizza parlour where my friends were (Cunneen and McDonald 1997:64).

That was not the end of the matter. The response of the police to this incident was to serve on Anne a Summons to Appear in Court on five charges. Namely:

- using indecent language in the main street outside the pizza parlour;
- using indecent language on the street in front of the police station (only the police heard the offensive words);
- using indecent language in the foyer of the police station (again, only the police heard the language);
- hindering a member of the police force in the execution of his duty; and
- trespassing on the police station (Cunneen & McDonald 1997:65).

Here we have yet another example of numerous breaches of the recommendations (including recommendations 86, 88, 214 and 215) of the *Royal Commission*. It is clearly a case of severe over-policing and of the ongoing harassment of Aboriginal people by police that occurs far too frequently in both the urban and rural areas of this nation.

Levels and patterns of incarceration

As we have observed, the large numbers of Indigenous people in custody, and their high rate of custody compared with the rate among non-Aboriginal Australians, occurs in areas of police custody, custody in juvenile detention centres and custody in adult prisons.

Police custody

Table 3 provides details on Indigenous people apprehended by police and held in police lock-ups throughout Australia during the month of August 1995. The rate of Aboriginal incarceration in police lock-ups was 2228 per 100 000 population compared with a rate for non-Aboriginal people of 83 per 100 000, with the result that the Aboriginal rate is 27 times that of the non-Aboriginal rate. Significant state-by-state differences occur in Aboriginal custody rates. In Western Australia the Aboriginal custody rate is 39 times that of the non-Aboriginal rate in that state.

Table 3 Police Custody Rates per 100 000 Population*
National Police Custody Survey, August 1995

State	Aboriginal/TSI	Other	Over-representation**
NSW	850	42	20
Vic.	907	77	12
Qld	2327	121	19
WA	3911	99	39
SA	4841	164	29
Tas.	425	68	6
NT	2889	261	11
ACT	1473	44	34
Australia	**2228**	**83**	**27**

* Rates based on total population as at 30 June 1994.
** Ratio of Aboriginal rate to the rate for 'other' (ie, non-Aboriginal people).
Source: Cunneen and McDonald (1997:21).

Juvenile corrective centres[6]

Table 4 provides information about Indigenous children and young people in juvenile detention centres throughout Australia. As at 30 June 1996, the total was 322 juveniles with some 39 per cent being in New South Wales detention facilities. The level of over-representation of Indigenous juveniles in detention, compared with non-Indigenous juveniles, was 21.3 times nationally, with a high of 41.1 times in Queensland and a low of 3.8 times in the Northern Territory. (The ACT over-representation level should be disregarded as it is based on only one Aboriginal case.) Of particular importance is the fact that the level of over-representation of Indigenous juveniles in detention (21.3 times that of their non-Indigenous counterparts) is even higher than the corresponding levels for people in adult prisons (approximately 18 times; details below).

Indigenous juveniles composed, at 30 June 1996, approximately 33 per cent of all juveniles in detention. The proportion was 69 per cent in the Northern Territory, 62 per cent in Queensland and 55 per cent in Western Australia, with lower proportions found in the other states and territories.

6 These figures include a small number of young people aged 18 years or above (not strictly juveniles) held in juvenile corrective centres.

Table 4 Persons in Juvenile Corrective Institutions, Australia, 30 June 1996
Jurisdiction, Aboriginality and Level of Over-representation

State	Aboriginal/TSI	Other	Over-representation*
NSW	127	329	20.5
Vic.	7	117	9.8
Qld	89	55	41.1
WA	63	51	31.6
SA	20	70	13.7
Tas.	6	20	8.2
NT	9	4	3.8
ACT	1	15	19.0
Australia	**322**	**661**	**21.3**

* Ratio of Aboriginal/TSI rate to the rate for 'other', ie, non-Aboriginal/TSI.
Source: Atkinson and Dagger 1996.

Adult prisons

Details relating to Indigenous people in adult prisons including the trends since 1988 are presented below in Table 5. It will be noted that the number of Aboriginal prisoners has increased each year, with the number increasing by more than one-third between 1988 and 1993 (the same data collection method was used for each of those years) and increasing by 6 per cent in the single year from July 1994 to July 1995 (July 1996 data are not yet available).

Table 5 Aboriginal and TSI People in Australian Prisons, 1988–1996
Numbers and Levels of Over-representation

Year	Number	Per cent Aboriginal	Aboriginal imprisonment rate*	Level of over representation**
30 June 1988	1809	14.7	1232	14.2
30 June 1989	1825	14.1	1207	13.4
30 June 1990	2041	14.3	1312	13.5
30 June 1991	2166	14.4	1354	13.5
30 June 1992	2223	14.3	1359	13.2
30 June 1993	2416	15.2	1438	14.1
July 1994	2742	17.5	1598	16.5
July 1995	2907	18.1	1692	17.4
March 1996	3069	18.8	1786	18.3

* Rate per 100 000 adult Indigenous population.
** Ratio of the Aboriginal rate to the non-Aboriginal rate.
Sources: 1988–1993: National Prison Censuses (Australian Institute of Criminology); 1994–1996 Australian Bureau of Statistics. The data covering the two time periods specified were collected in different ways and are therefore not directly comparable. They should not be treated as a continuous time series.

It is also important to observe that the level of over-representation of Aboriginal people in the prison system, that is the Aboriginal imprisonment rate compared with the non-Aboriginal imprisonment rate, has remained at a markedly high level. In fact, the level of over-representation for the most recent period for which data are available, March 1996, is 18.3 compared with 17.4 in March 1995 (ABS 1996). This means that the Aboriginal imprisonment rate increased by more than 5 per cent during that 12 month period or, putting it another way, the Aboriginal imprisonment rate is increasing faster than the non-Aboriginal imprisonment rate. As of March 1996, 19 per cent of the people in Australian prisons were Aboriginal, although Aboriginal people make up less than 2 per cent of the national adult population (ABS 1996).

Reducing incarceration rates

The National Report of the *Royal Commission* focused on the appallingly high levels of incarceration of the Australian Aboriginal population and includes many recommendations on action required to reduce the number of Indigenous people in custody and to reduce their level of incarceration compared to the level experienced by the non-Aboriginal population. These recommendations cover both the underlying issues that lead to Aboriginal people committing offences and ending up in custody (such as education, employment, alcohol use, and discrimination), as well as those which deal specifically with the operation of the criminal justice system and are aimed at minimising or removing discriminatory practices and ensuring that imprisonment is used only as a sanction of last resort. We have recently

concluded a study evaluating the implementation of this later group of recommendations aimed specifically at the criminal justice system. A central conclusion of the study is that Australian governments have failed to meet the undertakings they made to take effective action to reduce Aboriginal incarceration. Indeed, as noted above, the numbers in custody are continuing to increase.

Our review of the implementation of the *Royal Commission*'s recommendations specifically aimed at reducing over-representation produced a number of both general and quite specific answers to why levels of over-representation have not fallen, as follows.

- Governments have failed to adequately implement specific recommendations relating to the administration of the criminal justice system. This failure represents a massive lost opportunity to resolve critical issues which lead to the unnecessary incarceration of Aboriginal and Torres Strait Islander people.
- Inadequate regard has been given to a key recommendation (188) on the need for negotiation and self-determination in relation in the design and delivery of services. A failure to comprehend the centrality of this recommendation has negatively impacted on the implementation of a range of other recommendations.
- The wider socio-political context is working against the interests of Aboriginal people receiving fair and just treatment from the legal system. There has been a stronger emphasis on more punitive approaches to law and order in many Australian jurisdictions since the *Royal Commission* reported. This more punitive approach has been particularly evident in changes to sentencing law, but also affects other areas such as the failure to decriminalise public drunkenness.
- The recommendations of the *Royal Commission* in general terms still provide a blueprint for reforming key aspects of criminal justice administration. Enormous potential still exists to significantly reduce the number of Aboriginal and Torres Strait Islander people in custody through the implementation of the recommendations.
- Problems exist, however, with some of the *Royal Commission*'s recommendations in terms of inadequate drafting or inadequate indication of process. There are also problems in terms of the reporting mechanisms required of governments.

The report provides many specific examples which directly led to our conclusions as to why levels of over-representation were not falling. Government departments have failed to develop processes of accountability or transparency in the way decisions are routinely made. For example, it is virtually impossible to monitor systematically at present the comparative use of summons over arrest (Cunneen and McDonald 1997:89). There continue to be widespread complaints about violent, racist and inappropriate police behaviour (Cunneen and McDonald 1997:103). Regional disparities within states (for example, Victoria) for public drunkenness and public order offences are pronounced. There is enormous potential for the reduction of unnecessary custodies. In Queensland, for example, 59 per cent of Aboriginal and Torres Strait Islander police custodies (where the offence was known) related to drunkenness or public disorder (Cunneen and McDonald 1997:112–113). In some states Aboriginal and Torres Strait Islander people are arrested and held in custody for offences such as vagrancy (Cunneen and McDonald 1997:115). There are many examples where arrest is not used as a last resort and where offensive behaviour, resist arrest and assault police charges are used on the basis of initial intervention by police (Cunneen and McDonald 1997:124). Although there are some excellent examples of Aboriginal-run programs, by and large attempts to involve Indigenous people in the sentencing process remains haphazard. In some jurisdictions there are also specific offences (such as motor-vehicle

related offences and 'fail to appears') where Aboriginal and Torres Strait Islander people are jailed and alternatives have not been developed (Cunneen and McDonald 1997:155). The high criminalisation and incarceration rates for Indigenous young people remain a disastrous time bomb which will affect the life chances of another generation of Aboriginal and Torres Strait Islander people: diversion is infrequently used, Indigenous-run alternatives are not available, and young people are routinely held in police lock-ups (Cunneen and McDonald 1997:186–187).

The report also details specific areas in which action is required to implement, or more fully implement, the *Royal Commission*'s recommendations. As suggested above, running through this is the need for governments to truly understand and implement Recommendation 188 of the *Royal Commission* which states:

> That Governments negotiate with appropriate Aboriginal organizations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.

It has been demonstrated that, when this principle is fully understood and fully articulated in the way government agencies and Aboriginal organisations interact, mutually beneficial outcomes are observed. On the other hand, when government policies and programs are developed in isolation from the Aboriginal people who are meant to be the beneficiaries of those services, it is almost inevitable that problems will arise in the programs' implementation.

No doubt exists that the number of Aboriginal people in custody will fall if action is taken along the lines put forward by the *Royal Commission*. Based on our evaluation research, we suggest that this action occur in seven different areas:

- Improving the information available about the use of custody.
- Improving the relationships between the police and Aboriginal people, particularly through police showing greater respect for Aboriginal people and the further enhancement of community-based processes of social control, such as night patrols.
- Adequately responding to public drunkenness, dealing with it as a problem of health and social welfare, rather than a form of criminal behaviour — most importantly, the establishment of a sufficient number of adequately funded sobering up facilities, rather than having Aboriginal people apprehended for public drunkenness and held in the cells. The development of local protocols between the police and Aboriginal organisations and those who operate the sobering up facilities is important in this regard.
- Improvement of police practices and procedures: implementing the principle that arrest is used only when no other option for dealing with a social problem is available is a principle which should underlie policing generally. What we need is for police to focus more on the prevention and resolution of the problems which come to their attention, rather than enforcing the law and maintaining good order in a manner which ignores the alternative actions available.
- Similarly, imprisonment should be used by the courts only as a sanction of last resort. Many options exist for diverting people away from the prison system with resulting beneficial outcomes for the individuals, their families and the society generally.
- Further improvements can be made in the operation of the courts, in some areas of legislation, and in Aboriginal legal representation before the courts. Among these are fuller

and more effective cross-cultural training of judicial officials, better use of interpreters, the reversal of current trends towards harsher penalties including (in some jurisdictions) mandatory minimum sentences for potentially quite minor offences. Aboriginal legal services should be receiving more funds than in the past if Aboriginal people are to receive justice before the courts.

- Young Aboriginal people do not fair well in the juvenile justice system; a need exists for a wider range of community-based alternatives to incarceration, particularly alternatives that are designed cooperatively between Aboriginal organisations and official agencies.

Looking forward

Clearly a link exists between the historically high levels of Aboriginal deaths in custody that Australia is experiencing and the historically high levels of incarceration. It is not trite, but an important point to make, that if Aboriginal people were not in custody, they would not be dying in custody. In advocating policies and programs to markedly reduce the levels of Aboriginal incarceration, we emphasise the need to implement the *Royal Commission*'s recommendations in their entirety so that respect of Aboriginal rights and the achievement of social justice in *all* domains is the goal. People in custody tend to have low levels of education and/or poor employment records (Mukherjee and Dagger 1995). Addressing Aboriginal social disadvantage and respecting the principle of self-determination in these interrelated areas will result, in turn, in a reduction in over-representation in custody and over-representation in deaths in custody.

Particularly frustrating for many observers is the fact that desired outcomes have been achieved in some areas but not in others, depending on the commitment to implement *Royal Commission* recommendations. A good example is deaths in police custody. It is now a rare event for an Aboriginal person to die in a police lock-up whereas, during the 1980s, some two-thirds of the total number of Aboriginal custodial deaths occurred in such settings. Police services have generally taken seriously the *Royal Commission*'s recommendations about more effective screening of at-risk detainees, the diversion from custody of such people and adequately caring for the people who are in the cells. A second example is the use of imprisonment for fine default. We have the situation where hundreds of people are in prison for failing to pay their fines — a process that can be characterised (at least in part) as imprisoning people for poverty. We have seen, at certain stages, governments introducing policies of not imprisoning people for fine default, with an immediate reduction in the prison population. The implementation of these policies nationally is a matter of urgency.

A central theme of the *Royal Commission* recommendations is that of Aboriginal self-determination. It pointed out that self-determination is seen in action when Aboriginal people and organisations are at the centre of the process of identifying the problems that they face, setting priorities for action, and implementing programs of activity working towards redressing disadvantage and enhancing positive well-being. The process of self-determination is seen in action when people in non-Aboriginal organisations listen to Aboriginal people and work with them in a mutually respectful way, towards achieving shared goals. Across the nation we have Aboriginal organisations staffed by Aboriginal people who have the motivation and expertise to work in this manner. Too often, though, they are thwarted by the inappropriate attitudes of the leaders and staff of the government agencies with whom they interact and by the miserly funding which so many organisations receive.

The 1996 report of the Commonwealth Government's National Commission of Audit demonstrates the failure of people in influential positions in shaping government policy to understand the principle of Aboriginal self-determination. In advocating (in the name of 'reducing duplication') the mainstreaming of legal aid for Aboriginal people by removing from Aboriginal Legal Services the task of representing their people before the courts, the Commission demonstrated its lack of understanding of the needs of Aboriginal people, the capacity of Aboriginal organisations, the processes for reducing Aboriginal disadvantage and, over-arching all of this, it displays an ignorance of the concept of and pathways to self-determination.

Looking forward, then, with regard to Aboriginal deaths in custody and levels of Aboriginal incarceration, we are not optimistic. Despite commitments having been made by the Premiers and Chief Ministers and their senior public servants, we see the implementation of policies that directly and inevitably result in the number of Aboriginal people in Australia's prisons continuing to increase and the level of over-representation in custody not falling. We continue to see prisons that are over-crowded and under-resourced, placing often intolerable pressures on both prisoners and prison staff. We continue to see inadequate understanding of the *Royal Commission*'s recommendations about the nature of care for prisoners and the services that they need, and/or a lack of implementation of those recommendations where their import has been grasped. The result is the historically high level of Aboriginal deaths in Australian prisons.

The international community's perceptions of Australia is also important. As a nation, we have little authority to speak about human rights in other nations when Australia's Indigenous people are experiencing the appalling disadvantage outlined in this paper. The international community will not look favourably on a nation where a Member of Federal Parliament stated, in her maiden speech in the House of Representatives on 10 September 1996, 'Today ... I talk about ... the privileges Aboriginals enjoy over other Australians. I have done research on benefits available only to Aboriginals and challenge anyone to tell me how Aboriginals are disadvantaged ...'. The ignorance of Aboriginal disadvantage and of how to reduce it, revealed by such a statement, is a matter of deep concern.

Given the facts on trends in Aboriginal deaths in custody and incarceration sketched in this paper, along with the lack of commitment and action of many of Australia's governments in implementing the recommendations of the *Royal Commission*, one cannot assume that the next five years will produce any better outcomes in these areas than we have seen over the past five years.

List of cases

R v Llewellyn and Pryce, Supreme Court of the Northern Territory Justices Appeal, Martin CJ, unreported, 8 May 1995.

REFERENCES

Atkinson, L & Dagger, D (1996), *Persons in Juvenile Corrective Institutions, No. 75, June 1996*, Australian Institute of Criminology, Canberra.

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

Australian Bureau of Statistics (quarterly) *National Correctional Statistics, Prisons*, National Correctional Statistics Unit, Melbourne.

Cunneen, C & McDonald, D (1997) *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Aboriginal and Torres Strait Islander Commission, Canberra.

Dalton, V (1996) *Australian Deaths in Custody and in Custody-related Police Operations 1995/96*, Australian Institute of Criminology, Canberra.

Harding, R, Broadhurst, R, Ferrante, A & Loh, N (1995) *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody*, The Crime Research Centre, The University of Western Australia and The Hawkins Press, Sydney.

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (1994) *Justice Under Scrutiny*, Australian Government Publishing Service, Canberra.

McDonald, D (1993) *National Police Custody Survey, August 1992, Preliminary Report*, Australian Institute of Criminology, Canberra.

McDonald, D (1994) 'The Monitoring of Australian Deaths in Custody: Some Contemporary Issues', *Current Issues in Criminal Justice*, vol 6, no 1, pp 76–89.

Mukherjee, S & Dagger, D (1995), *Australian Prisoners 1993: Results of the National Prison Census 30 June 1993*, Australian Institute of Criminology, Canberra.

National Commission of Audit (1996), *Report to the Commonwealth Government June 1996*, Australian Government Publishing Service, Canberra.

Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) *Indigenous Deaths in Custody 1989 to 1996*, Aboriginal and Torres Strait Islander Commission, Canberra.

Royal Commission into Aboriginal Deaths in Custody (1991) *National Report*, Australian Government Publishing Service, Canberra.