

ABORIGINAL JUVENILES IN CUSTODY*

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INTRODUCTION

In Aboriginal communities across Australia there is serious concern regarding the relationship between Aboriginal young people and the juvenile justice system. Central to those concerns are both the extent to which Aboriginal juveniles are placed in custody, and their treatment whilst in custody. This paper deals with two forms of custody: the use of police custody, and the use of juvenile detention centres. The level of Aboriginal juvenile over-representation in police custody and juvenile detention centres is well documented for most States¹. For example when the research² was conducted upon which this paper is based, some 23 per cent of juveniles in New South Wales detention centres defined themselves as Aboriginal. Aboriginal young people comprised about 1.8 per cent of the State's population. In relation to police custody, a survey conducted by the Royal Commission into Aboriginal Deaths in Custody indicated that 14 per cent of juveniles taken into custody in New South Wales during August 1988 were Aboriginal.³

Historically, Aboriginal children have been the object of particular and extreme intervention by the state. The long, painful and devastating history of an active government policy aimed at destroying Aboriginal life is now being told.⁴ Research has shown that the police were instrumental in implementing the policy of removal of Aboriginal children from their families.⁵ The historian Peter Read estimated that, in New South Wales alone,

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1 See for instance the following:

Cunneen, C, *A Study of Aboriginal Juveniles and Police Violence*, Report Commissioned by the National Inquiry into Racist Violence, Human Rights and Equal Opportunity Commission (1990).

D'Souza, N, "Aboriginal Children and the Juvenile Justice System" (1990) 44 *Aboriginal Law Bulletin*, 4-5.

McDonald, D, *National Police Custody Survey August 1990*, Research Paper No.13, Royal Commission into Aboriginal Deaths in Custody, Canberra, 1990.

Semple, D, 'Juvenile Justice Trends and Future Directions in Western Australia', Paper Presented to the *Australian Bicentennial International Congress on Corrections*, Sydney, 1988.

See also the *Aboriginal Law Bulletin*, 44, June 1990, generally for a special issue concerning Aboriginal young people and the criminal justice system.

2 Cunneen, C, *A Study of Aboriginal Juveniles and Police Violence*, Report Commissioned by the National Inquiry into Racist Violence, Human Rights and Equal Opportunity Commission, Sydney, 1990.

3 Above n2, see McDonald.

4 Edwards, C, and Read, P, *Lost Children* (1990).

5 Goodall, H, "A History of Aboriginal Communities in New South Wales 1909-1939", unpublished Phd Thesis, Sydney University, 1982. Read, P, *The Stolen Generations*, NSW Ministry of Aboriginal Affairs, Sydney.

some 5,625 Aboriginal children were removed from their families under the Aborigines Protection Act and Child Welfare Act between 1883 and 1969.⁶ The policy of removal of Aboriginal children has been described in one report from the Royal Commission into Aboriginal Deaths in Custody as falling within the definition of genocide.⁷

Since the 1970s the removal of Aboriginal children from their families and kinship networks, as a result of either welfare complaints or specific legislation aimed at Aboriginal people, has increasingly fallen into disrepute. Some States have legislated in favour of the Aboriginal Child Placement Principle,⁸ and it is recommended by the Royal Commission into Aboriginal Deaths in Custody that all States and Territories provide such legislative recognition. However it is important to understand that the processes of removal and institutionalisation have not stopped over the last twenty years simply because legislation has been altered and particular practices have been defined as unacceptable. Aboriginal youth are still institutionalised at a truly extraordinary rate as a result of the processes of *criminalisation*. It is important to recognise the continuities with earlier policies which legitimated the removal of Aboriginal children from their families. Indeed the process of criminalisation has replaced the previously overt genocidal doctrine of 'breeding out' Aboriginality. Aboriginal youth are no longer apparently institutionalised because they are *Aboriginal*, but rather because they are *criminal*. While the earlier welfare practices in relation to Aboriginal youth were self-consciously based on race, the practices of the justice system remain committed at an ideological level to the rule of law — equality and due process. Therefore it becomes increasingly important to understand the role of the police in the process of criminalisation and state intervention. Police practices which provide the most latitude in the use of discretion are particularly important to scrutinise. Certainly the research by Gale, Bailey-Harris and Wundersitz⁹ found that decisions by police to arrest and charge young people rather than use less punitive forms of intervention impacted negatively upon the young person's later career through the juvenile justice system.

POLICE CUSTODY: WHAT ARE THE ISSUES?

Given the historical background outlined above, and the level of Aboriginal over-representation in the juvenile justice system, it is little wonder that Aboriginal people have expressed serious concern about the impact of the justice system. Most recently the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence¹⁰ found from the evidence presented to the Inquiry that the issue of relations between Aboriginal juveniles and police was a particular area of major importance. The Inquiry employed a number of consultants to investigate Aboriginal-police relations at the regional level throughout Australia. The issue of young people was continually raised. Harassment by police against Aboriginal youths was alleged in Mareeba, Queensland. In the Pilbara

6 Read, id at 8.

7 Wootten, H, *Report of the Inquiry into the Death of Malcolm Charles Smith*, Royal Commission into Aboriginal Deaths in Custody (1989).

8 Note s87 of the *Children (Care and Protection) Act* NSW 1987.

9 Gale, F, Bailey-Harris, R and Wundersitz, J, *Aboriginal Youth and the Criminal Justice System*, (1990).

10 Human Rights and Equal Opportunity Commission, *Racist Violence*, Report of the National inquiry into Racist Violence, AGPS, Canberra.

region Western Australia, the relationship between police and Aboriginal juveniles was cause for serious concern. Of the 16 incidents of alleged police violence which were documented, nine involved serious violence against Aboriginal male and female juveniles. In Geraldton (Western Australia), Aboriginal community leaders claimed that Aboriginal juveniles were harassed by police and subjected by some police to racist language and abuse. In South Australia, Aboriginal young people spoke of "continually being harassed by police and felt scared of the police". In Murray Bridge young Aboriginal men stated they had been assaulted and verbally abused by police while being detained.¹¹

Other submissions presented to the Inquiry concerning the relationship between Aboriginal young people and police, and which alleged harassment and violence by police, included the Youth Action Group (Redfern); the Adelaide Streetmeet group;¹² a report from the Northern Territory concerned with alleged police assaults on Aboriginal juveniles in Alice Springs; and submissions from individuals in Fitzroy (Victoria), Woolloomooloo (NSW), Taree (NSW) and Adelaide. In Perth allegations of police harassment against Aboriginal juveniles were made by a Minister with the Uniting Church.¹³ It is also important to note that at public hearings of the Royal Commission into Aboriginal Deaths in Custody in Perth and Sydney, the issue of police violence against Aboriginal juveniles was raised by a number of solicitors and others.¹⁴

The evidence presented to the Human Rights Commission Inquiry portrayed a damning picture of the interaction between police officers and Aboriginal young people. It is, therefore, worth considering other literature which documents and analyses reports of police violence against Aboriginal juveniles (and indeed young people more generally). There has been little previous empirical research which has considered the nature or extent of police violence in relation to Aboriginal youth, although that situation is rapidly changing. This relative neglect is of itself somewhat surprising given the history of Aboriginal-police relations. A recent report by the Equal Opportunity Commission of Western Australia stated that in consultations with Aboriginal organisations and individuals the treatment of Aboriginal young people was raised as a "matter requiring immediate attention". There was a unanimous view among the informants that "police discriminated against Aboriginal young people" and in some areas of the State treated them particularly badly.¹⁵

In a study for the London-based Anti-Slavery Society, Julian Burger noted that:

A most disturbing feature of police relations with the Aboriginal community was the report by Aboriginal legal services officers and solicitors of mistreatment of minors.¹⁶

11 Id at 94, 95.

12 The group was established in early 1986 as a result of concerns by Aboriginal parents in relation Aboriginal youth/police relations in Adelaide. .

13 Above n9 at 95.

14 Royal Commission into Aboriginal Deaths in Custody, *Transcript of Hearing into Juvenile Justice Issues*, Sydney, 25 June 1990; and Royal Commission into Aboriginal Deaths in Custody, *Transcript of Hearing into Juvenile Justice Issues*, Perth, 29 May 1990.

15 Equal Opportunity Commission, *Discrimination in Government Policies and Practices*, s82(b) Report No 8, *Review of Police Practices* (1990) at 39, 40.

16 Burger, J, *Aborigines Today. Land And Justice*, Anti-Slavery Society (1988) at 55.

Burger cited 11 complaints of physical and psychological abuse of minors by police which the Aboriginal Legal Service at Redfern forwarded to the New South Wales Ombudsman in the first four months of 1987. He also noted that police abuses of juveniles were "reported by various individuals and organisations throughout Australia".¹⁷ Burger stated that a Northern Territory youth worker claimed that 85 per cent of the children he had seen go through the courts in Alice Springs alleged they had been "bashed" by police, while both the Victorian Aboriginal Child Care Agency and the Victorian Aboriginal Legal Service claimed that police assaults and abuse occurred in relation to Aboriginal juveniles.¹⁸

Burger concluded that complaints concerning police mistreatment have been largely ignored by the authorities, while the police themselves have claimed that the allegations are exaggerated or fabricated. However Burger noted that juveniles generally do not come forward with the complaints themselves and discuss such mistreatment only incidently. "This appears to be because there is widespread acceptance among Aboriginal children that they are likely to get a 'bashing' from the police".¹⁹

A recent survey of youth workers in Western Australia looked at the incidence of reports of violence against young people made to youth services.²⁰ The research found that youth workers who worked predominantly with Aboriginal youth reported a 60 per cent higher incidence of complaints relating to police assault than the youth workers who worked predominantly with non-Aboriginal youth.

Other research has considered the role of police violence in relation to youth generally. Again, while this area of research has been largely ignored, there is now a rapidly developing body of empirical literature outlining the extent of the problem. A research project initiated by the New South Wales Youth Justice Coalition interviewed young people in refuges, drop-in centres and a detention centre in the Sydney metropolitan area concerning their relations with police.²¹ One aspect of the research was to gauge the extent to which police used violence and intimidation in their dealings with young people. The survey found that half of those juveniles who were taken to Sydney police stations complained of being "treated badly", while almost one third said that they had been hit or kicked by police officers. An extensive review of the juvenile justice system in New South Wales conducted by a number of practitioners and academics in the field also noted the unacceptable level of violence by police officers in dealing with young people.²² The *Kids in Justice Report* noted in summary that, despite some beneficial changes such as the move towards community policing,

There are very high and unjustifiable levels of violence and abuse. The relationships between young people and police in many instances are governed by fear and threat.

17 Id at 57.

18 Ibid.

19 Id at 58.

20 White, R, Underwood, R and Omelczuk, S, "Victims of Violence: The View from Youth Services". Paper Presented to the Australian New Zealand Society of Criminology Conference, Sydney, September 1990.

21 Bacon, J and Irwin, J, "If I Had a Gun I Would Shoot the Lot" A Report on Young People and Police, Youth Justice Coalition (1990).

22 Youth Justice Project, *Kids In Justice. A Blueprint for the 90s* (1990).

Neither police powers nor suspects' rights are adequately set out in law or guidelines. Improved procedures are required.²³

The research conducted for the Report found that one third of those interviewed complained of police violence either at the point of arrest, while being transferred back to the police station, or at the police station itself.²⁴

Christine Alder in her Victorian study of homeless youth as victims of violence found that 47 per cent of females and 58 per cent of males in her sample reported being victims of police violence.²⁵ O'Connor and Sweetapple in their Queensland study of juvenile justice also found evidence of the use of implicit and explicit violence by police in relation to young people.²⁶ Most recently a study conducted by the Federation of Community Legal Centres in Victoria found that there were widespread complaints concerning physical and verbal mistreatment by police: Fifty-five respondents alleged 127 incidents of mistreatment. The majority alleged physical abuse by police officers. Over a third of the respondents were juveniles. Very few made any formal complaints.²⁷

In summary, there have been a number of studies transversing most Australian jurisdictions which have raised the issue of allegations of police violence against juveniles.

POLICE CUSTODY: A RESEARCH STUDY ON THE USE OF VIOLENCE

The research which is reported below was conducted as part of the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence.²⁸ The research was conducted in New South Wales, Queensland and Western Australia. It was concerned primarily with one aspect of the relationship between Aboriginal juveniles and the police: the question of allegations of police violence. The importance of this question was clearly defined by the material already summarised in the preceding section of this paper. A summary of the research findings is presented below.

The information was based on interviews with 171 Aboriginal juveniles in detention centres in the three States referred to above. The majority of Aboriginal youths in detention centres were interviewed.²⁹ The information was collected through the use of structured interviews in small groups of two to six individuals. The focus of the research was the incidence of alleged violence by police officers towards Aboriginal juveniles.

Overall 85 per cent of the juveniles interviewed reported being hit, punched, kicked or slapped by police. In New South Wales 82 per cent of juveniles reported being assaulted,

23 Id at 9.

24 Id at 253.

25 "The incidents predominantly involved the use of fists and/or hands, but also involved kicking and general 'pushing around'. The yellow pages of the telephone directory were frequently reported as having been used... Verbal abuse and general intimidation accompanied the physical abuse". Alder, C, *Homeless Youth as Victims of Violence*, Criminology Department, University of Melbourne at 38.

26 O'Connor, I, and Sweetapple, P, *Children in Justice* (1988).

27 Federation of Community Legal Centres, *Report into Mistreatment of Young People by Police*, Melbourne, (June 1991).

28 Above n2.

29 Id at 9 to 16 for a discussion of how many juveniles were interviewed in various detention centres.

while in Queensland 90 per cent and in Western Australia 94 per cent of juveniles reported being assaulted by police.

Some 63 per cent of juveniles reported being hit by objects by police. The most common object was a police baton (49 per cent), but also included telephone books (23 per cent), torches (14 per cent) and other objects such as bats, golf clubs and brooms. Many of the juveniles who reported being hit with batons stated that the incidents occurred, not during arrest as might be expected, but at the police station and often in the police cells. For instance of the 36 Aboriginal juveniles who were interviewed in Mt Penang (NSW) some 15 stated that they had been hit with police batons. More than half (9) of the 15 stated that they had been hit by batons at the station usually while detained in the cells. Aboriginal girls had similar complaints of violence to the Aboriginal boys. Eleven of the 14 girls interviewed alleged that they had been assaulted. There were also allegations of sexual harassment.

The alleged assaults which were reported in the research occurred on the street, during arrest and at the police station. Complaints about violence and harassment in public places came particularly from suburban and business centres in Sydney, Brisbane and Perth but also included other rural areas across the three States. Most of the juveniles interviewed had complaints concerning violence while they were detained in police stations and were being questioned about alleged offences.

In some cases the juveniles stated to the researcher that they had committed the offences for which they were being questioned, however they only made admissions after the use of violence. Other juveniles stated that they had not committed any or all of the offences for which they were being questioned. However they made admissions after the use of violence. Other juveniles stated that they were questioned, subjected to violence, and then released after no admissions were made.

There are two major situational factors in understanding police violence against Aboriginal juveniles which are important. The first relates to the policing of public space and the contest which occurs over the use of such space. The second situational factor relates to what occurs at police stations and lockups. It is primarily related to gaining admissions from individuals who have been arrested, but also often includes a routine form of summary 'punishment'.

These situational factors often overlap — not all forms of police violence in public directly relate to the establishment or confirmation of police authority. Unprovoked violence and harassment by police officers may occur without any overt challenge to their authority. Similarly violence in the police station or lockup may occur without any directly instrumental link to gaining an admission from the alleged offender. However the evidence from Aboriginal juveniles as to what occurred in police stations confirmed the view that in most cases the alleged violence by police officers did have an instrumental purpose to it.

Some 81 per cent of the juveniles said that they had been subjected to racist abuse by police officers. Many of the Aboriginal girls who were interviewed stated that they were abused with language which was both racist and sexist. The use of such derogatory language, beside being racist in its content, also is important in relation to the provocation in-

volved and the likely consequences of further charges (assault police, resist arrest, offensive language) should the Aboriginal juvenile retaliate in some manner.³⁰ In addition, the psychological effects of such racist abuse (and, in the case of females, linked with sexist abuse) should also not be underestimated.

A number of juveniles said that while they were in police custody there had been suggestions made by police officers in relation to committing suicide and that there had been threats made by police in relation to hanging. Some examples from New South Wales included a 17 year old youth who alleged that he had been kicked and hit with batons by 5 police in the cells at an outer-metropolitan Sydney police station in mid 1989. After the alleged violence, he was given a sock and told, "you may as well use it". Another youth claimed to have been punched and hit with a baton in a south western New South Wales police cell. He alleged that he was then told by a police officer to "rip the edge off a blanket if you want to hang yourself". Another 16 year old Aboriginal boy stated that while he was in a mid-north coast New South Wales police cell he was told by a sergeant that, "If you don't shut up, we'll hang you". The sergeant then came into the cell and hit the youth. The youth stated that after the sergeant left the cell he ripped up the blanket and wrapped one end around the edge of the wire covering the cell light. It was not possible to comprehensively examine this issue in all the States surveyed. However in Western Australia some 21 per cent of the juveniles interviewed alleged that such suggestions and/or threats had been made by police officers.

Few of the juveniles interviewed had made any form of complaint in relation to the alleged assaults. Where there was some form of complaint made, the actual nature of that complaint was often ambiguous: it may simply have involved telling a welfare worker or solicitor about the alleged assault. There were a number of reasons given for not complaining about alleged assaults, including a sense of futility ("what's the point?"); ignorance of procedures ("I didn't know you could complain"), fear of retaliation and harassment ("I didn't want to get into any more shit with the coppers"), and a sense in which the violence was something "normal" and to be expected. For those who do notify the legal service of being assaulted, solicitors may be reluctant to raise the issue because of the lack of substantive evidence, their own sense of frustration and futility in relation to police complaints mechanisms and a lack of resources to follow through complaints.

Many of the reasons for the failure to report alleged assaults which were documented in the current research have been replicated in other research across the nation. For instance the WA Equal Opportunity Commission found that:

Few Aboriginal people were willing to lodge complaints about police treatment for a number of reasons [including] a fear that victimisation will result, particularly if the complaint is dismissed [and] doubts that available avenues allowed effective investigation of complaints.³¹

30 The Report by the Equal Opportunity Commission in Western Australia also notes that complaints about constant verbal abuse by some police officers (including terms like "boong" or "nigger") were raised by nearly all the community consultations. The Report drew the link between insulting language and methods of arrest involving excessive force, which then gave rise to provocation and further criminal charges. The Report notes that "there was particular concern that young Aboriginal people were susceptible to provocation of this sort". See above n15 at 38.

Many other reports have highlighted the fact that there is a sense in which police violence is viewed as "normal" behaviour. Alder states that the youth she interviewed in Melbourne "made it clear that police violence was an expected part of police/youth relations".³² Similarly Bacon and Irwin note in their Sydney study that "generally police did not adhere to legal procedure and subjected young people to verbal and physical abuse. Many young people regarded this behaviour as normal".³³ A Western Australian Aboriginal Legal Service solicitor in evidence before the Royal Commission into Aboriginal Deaths in Custody similarly noted in relation to police violence that "children seem to think it's normal. They don't report it, they don't even think it's worth their mentioning it. That's one of the problems, another is fear of later harassment once they've complained".³⁴ Again from Western Australia, Rayner cites no less than three State Departmental studies and reviews which contain allegations of police assaults, threats, insulting and abusive language towards juveniles during questioning.³⁵ One of the three Reports (referred to as the Longmore study) stated

There was a tendency to accept as normal that one can expect to be roughed up by the police, not have friends or family at questioning, plead guilty to some charges of which one is innocent [and] not argue with the prosecution's version of events.³⁶

EXPLAINING POLICE VIOLENCE

Most explanations of police violence argue that violence occurs as a result of police seeking to establish their authority when it is under challenge.³⁷ Such explanations derive primarily from American sociological interpretations built loosely around interactionist perspectives. Piliavin and Briar argue that police develop and act upon sets of expectations in relation to perceived "trouble". Such expectations are formulated around the symbols of subculture, class and race. Riess has argued that police violence is provoked by those who defy police authority. Skolnick developed his theory around the concept of the "symbolic assailant" whereby violence becomes associated with particular types of socially-defined individuals whom the police need to recognise in advance.³⁸

In Australian studies that have dealt with police violence against juveniles, aspects of this literature have been applied. Both Alder, and O'Connor and Sweetapple, conclude that the police response to young people is determined by the young person's perceived

31 Id at 9.

32 Above n2 at 39.

33 Above n21.

34 Above n14, Perth transcript at 173.

35 Rayner, M, *Fending For Yourself*, Report to the Human Rights and Equal Opportunity Commission's Inquiry into Homeless Children, Perth (1988) at 37.

36 Id at 34.

37 For an early example see Westley, W, "Violence and the Police" (1953) 49 *American Journal of Sociology* 34-41.

38 Piliavin, I and Briar, S, "Police Encounters with Juveniles" (1964) 70 *American Journal of Sociology* 206-214. Riess, A, "Police Brutality: Answers to Key Questions" in Niederhoffer, A and Blumberg, A (eds), *The Ambivalent Force: Perspectives on the Police* (1973). Skolnick, J, *Justice Without Trial* (1966). For a discussion of this literature see also James, S and Polk, K, "Policing Youth" in Chappell, D and Wilson, P (eds), *Australian Policing: Contemporary Issues* (1989).

co-operation with police. Violence by police is an attempt to address the non-recognition of their authority.³⁹ "The fact that encounters between police and these young people are likely to commence on the street further aggravates the initial situation, as the public arena intensifies the need of police to maintain an image of control".⁴⁰

In some circumstances the struggle over recognition of authority may be a suggestive way of understanding police violence. However it does have limitations. In general the American literature implicitly provides a rationality and legitimation to police violence. It also only accounts for some police violence arising in particular situational confrontations. The limitations of the traditional approach are that it covers limited situations, and that it draws attention away from deeper structural and historical explanations for the use of violence.

The results of the current research suggest particular structural reasons for police violence. These structural considerations relate both to the policing of people in public places and to the events which occur when individuals are in police custody. The conditions relate to both policing in general and to the policing of Aboriginal people specifically.

The policing of Aboriginal people in public places arises from wider historical, economic and cultural factors. Historically, the police have been called upon to enforce the dispossession, relocation and maintenance of control over Aboriginal people.⁴¹

In addition there are particular cultural and economic reasons for the use of public space by Aboriginal people which have brought them into conflict with police. The police themselves have had a central and institutionalised role in the policing of public order.

The results of this research also demonstrate that allegations of violence occurred in relation to questioning and the making of statements in police stations. One implication is that there needs to be a substantial review of the mechanisms for protecting the rights of juveniles in custody. The research also raises a whole series of questions relating to police interrogation including training, acceptable techniques and the usual practices used in obtaining confessional statements. Repeatedly in this Report young Aborigines are said to see police violence as "normal". This should alert us to the fact that violence may be a more or less accepted work practice, neither marginal or exceptional. The use of such violence can be seen as related to the central tasks of policing: order maintenance and gaining convictions.

Furthermore, if violence has had an historical acceptance in policing generally, how much more so is this the case with policing Aboriginal people? While it is not the place

39 Other Australian research by Craig and Settle is critical of the view that considers police violence as a response to a perceived threat to police authority. Craig and Settle argue that "often unnecessary violence is employed against ...those who are, objectively, unlikely to pose a serious threat of physical attack on the police member who confronts them" and, further, "so often those who are the subjects of differentially-employed violence are precisely those who have learnt to demonstrate obsequiousness". Craig, J, and Settle, R, "Police Violence and the 'Symbolic Assailant': A Reappraisal", paper presented to The Australian Law and Society Conference, La Trobe University, Bundoora, 12-14 December 1989.

40 Above n25 at 52.

41 See for example Cunneen, C and Robb, T, *Criminal Justice in North West NSW*, Bureau of Crime Statistics and Research (1987) at 187 to 214.

here to review the literature, the dispossession of Aboriginal people, to the extent that it was enforced and secured by police, was built on violence. Similarly the ongoing maintenance of "order" often explicitly refers to more draconian policing of Aboriginal people. Thus by definition "order maintenance" apparently demands and justifies police surveillance and intervention. In addition the routine nature of police violence in the interrogation of juveniles and other suspects has been remarked upon in Australia and overseas. O'Connor and Sweetapple note that violence and intimidation "pave the way for the non-problematic processing of the offender".

IS THE VIOLENCE RACIST?

There is no evidence presented in the current research to suggest that allegations of police violence are either more or less common among Aboriginal youth than among non-Aboriginal youth. Other research referred to earlier in this article demonstrates that non-Aboriginal youth are also subjected to violence. Clearly the issue of police violence is perceived to be widespread.

There are, however, compelling reasons for considering the use of violence against Aboriginal youth as part of an *institutionalised* form of racist violence. This is not to suggest that individual police officers who subject Aboriginal youth to violence are necessarily individual racists — they may or may not subject other youth to the same treatment. Rather it is to argue that the wider policing processes which bring such a massively over-representative number of Aboriginal youth into the juvenile justice system has the effect of subjecting those youth to violent treatment: the violence which is part of the routine practices of policing. In other words, the processes of criminalisation entail subjecting individuals to varying degrees of violence. Those same processes selectively discriminate against Aboriginal youth. In addition the over-representation has racist outcomes. Aboriginal people are seen to be in some way as "naturally" criminal.⁴² Thus there are structural reasons for regarding the violence against Aboriginal youth as being racist.

In addition there is also a "vocabulary" of racism which goes with the violence and transforms what may be a simple violent act into an action which constitutes racist violence. Evidence presented to the Royal Commission into Aboriginal Deaths in Custody by a New South Wales Aboriginal Legal Service solicitor stated that it was his experience that police, when dealing with Aboriginal youth, used racial epithets. Thus it was never a case of calling an Aboriginal youth "you bastard", it was always "you *black* bastard".⁴³ Certainly the evidence in this article supports the widespread use of racist language where over 80 per cent of those interviewed complained of racist abuse. One should consider

42 Commissioner Wooten made this point succinctly in relation to the death of Mark Quayle in Wilcannia, NSW. He wrote, "I find it impossible to believe that so many experienced people could have been so reckless in the care of a seriously ill person dependent on them, were it not for the dehumanised stereotype of Aboriginals so common in Australia and in the small towns of western NSW in particular. *In that stereotype a police cell is a natural and proper placer for an Aboriginal*" [emphasis added]. Wooten, H, *Report of the Inquiry into the Death of Mark Anthony Quayle*, Royal Commission into Aboriginal Deaths in Custody (1991) at 2.

43 See above n14, Sydney transcript, Boersig, M, at 33. Boersig goes on to state that at a certain New South Wales police station he was told by an officer after his client had left that "He's a good coon".

then the social transformation which occurs around the act of violence which is affected by the use of racist language. The violence is no longer a simple physical act, nor in the case of gaining admissions an act with a simple instrumental purpose; it is socially contextualised within the language of racism. The act of violence derives its social meaning through a context which is defined in racial terms. The person being assaulted is not simply a "suspect", he or she is simultaneously categorised in racially derogatory terms such as an "Abo" or "boong".

Similarly one might consider the language involved in sexist abuse. Other studies have highlighted sexual harassment by police officers against girls ranging from the use of sexual comments to strip searches.⁴⁴ However the current research made clear that the sexist abuse was always contextualised by race: "you slut" inevitably becomes "you black slut". Indeed in evidence to the National Inquiry into Racist Violence, an Aboriginal woman from Townsville captured the combination of threats of violence towards Aboriginal women when she stated that, while she was in police custody in Townsville, police officers alternated between saying "should we rape her" or "should we hang her".⁴⁵ In this case the threat of sexual violence and racial violence are used in combination. Thus particular actions are placed within a context which articulates and defines them as racist.

CUSTODY IN JUVENILE DETENTION CENTRES

The purpose of the current research was not to specifically investigate juvenile institutions in relation to racism. However it became unavoidable that some issues relating to institutions would be raised in the research. This section of the paper seeks to raise a number of questions and issues which require further investigation. As noted in the introduction the extent to which Aboriginal young people are placed in the custody of juvenile detention centres is cause for serious concern among Aboriginal communities. For instance in Western Australia, Aboriginal young people made up less than 5 per cent of the State's population, yet they comprised some 73 per cent of the juvenile institutional population at the time of this research in mid-1990.

In several institutions there were complaints about racism within the institution. These complaints generally related to perceived differences in treatment, particularly in relation to discipline and punishment.

The question of simply knowing how many Aboriginal young people were in custody was a source of concern in some areas. In one juvenile institution in New South Wales, the researcher was told by a senior staff member, "I don't know how many Aboriginal kids are here. We don't discriminate between Aboriginal kids and the rest. They're all treated the same".⁴⁶ The researcher was then told that there were five Aboriginal boys and two Aboriginal girls in the institution. In reality, after talking to some of the inmates, there were 15 Aboriginal juveniles, or 20 per cent of the total inmate population within the institution. One result of the apparent denial of Aboriginality is that there is no distinct pro-

44 Above n22 at 254.

45 Above n10 at 87.

46 Similar comments of the type, "we don't discriminate", were made in institutions in other States.

vision for a particular cultural group within the institution — although the group constitutes such a sizeable minority in New South Wales and indeed the vast majority in States like WA. Given the extensive over-representation of Aboriginal juveniles in institutions nationally, this denial of Aboriginal culture is likely to have serious consequences on the maintenance and development of Aboriginal culture. Any institutionalised mechanisms which routinely have destructive effects on Aboriginal culture could be considered within the framework of cultural genocide.

In addition it is worth considering specific programs which may themselves be of a type which devalue and actively repress Aboriginal culture. Some commentators have referred to the behaviour modification program at Nyandi detention centre in Perth which was designed for the girls who were inmates there. The program was designed to instil “traditional” female stereotypes of submission and compliance. Deveson in a report to the Western Australian Government noted the contradictions between Aboriginal culture and the values implicit in the behaviour modification program.⁴⁷ Rayner notes that all detention centres in WA have some form of behaviour modification program.⁴⁸ By virtue of definition, detention centres (or *training* schools as they are often titled) will be involved in some form of behaviour modification and reward/punishment system. It is clearly imperative to evaluate such schemes in relation to the impact on Aboriginal cultural values. If it is shown that detention centres have a negative impact on Aboriginal cultural values, if they either consciously or unconsciously devalue Aboriginality, then there is a clear case of regarding the effects of such institutionalisation as constituting a form of genocide.

These matters require further investigation. There has been little systematic investigation of racism in juvenile detention centres. Much of the research which does exist is outdated. For instance the Queensland Government instituted an inquiry into Westbrook detention centre in 1961. The Report found that the punishment was “degrading”, “destructive to human dignity and pride” and “callous”.⁴⁹ It was acknowledged “claims by the inmates that there was discrimination by the Superintendent against coloured inmates were fairly frequent”. It was found that in the institution’s official punishment book Aboriginal young people were referred to as “black dog”, “black mongrel”, “typical nigger” and “darkies”, among other racist and derogatory phrases.⁵⁰

Further analysis of the treatment of Aboriginal juveniles in detention centres and non-government institutions has come to light through various individual reports of the Royal Commission into Aboriginal Deaths in Custody.⁵¹ Like the Queensland report, these reports generally refer to periods of incarceration during the 1960s or earlier. Commissioner

47 Deveson’s work is cited in Rayner. See above n35 at 29. Lynne Atkinson made similar observations in relation to Nyandi in a paper “Aboriginal Women in Prison” presented to the Australian New Zealand Society of Criminology Conference, Sydney, August 24-26 1990.

48 Above n35 at 67 to 68.

49 Schwarten, A E, *Report Westbrook Farm Home For Boys Inquiry*, Report to the Minister for Health and Home Affairs, Queensland Legislative Assembly, 14 November 1961 at 43.

50 Ibid.

51 See for instance the Royal Commission reports on the deaths in Western Australia of Christine Leslie Ann Jones, Hugh Wodulan, Nita Blankett, Albert Dougal and Paul Farmer; and in New South Wales of Thomas Carr, Thomas William Murray, Malcolm Charles Smith and Clarence Alec Nean.

Wootten noted in relation to the death of Malcolm Charles Smith that racist attitudes to Aboriginal inmates in Mt Penang during the 1960s were "appalling".⁵² During this period the approach of the of the Department's officers was of official denial of Aboriginality which corresponded with the approach of assimilation. However the practices were one of covert recognition of Aboriginality and it's denigration. For instance, in the case of Clarence Alec Nean, an Aboriginal youth was referred to, in a file note by a superintendent of a New South Wales institution, as a "typical, lazy aboriginal who avoids exertion at all costs".⁵³

Other Royal Commission reports from Western Australia refer to various individuals coming under notice of the Child Welfare Department. In the report on Christine Jones, Commissioner O'Dea notes that Christine was separated from her family at the age of 5 years old and made a State ward. He stated that the effect of institutionalisation was "family isolation and cultural breakdown" and that Christine was "not taught anything about Aboriginal culture".⁵⁴ In relation to another Western Australian Aboriginal person, Paul Farmer, Commissioner Muirhead notes that reports prepared while Farmer was at Longmore detention centre during the early 1960s referred to Farmer's Aboriginal cultural beliefs as "superstitions" and that "Paul was not sympathetic towards efforts made at assimilating him more to white ways".⁵⁵

At least three Royal Commission reports refer to the inadequacy of psychological reports in general, and intelligence tests in particular, in relation to assessing Aboriginal juveniles.⁵⁶ In the case of Paul Farmer in Western Australia, the psychological testing had the juvenile categorised as a "borderline defective". Commissioner Muirhead rejects this conclusion and adds that "psychological testing mechanisms adapted for European-type cultures are apt to be confused by Aboriginal responses".⁵⁷ However the case is more forcefully argued by Commissioner Wootten, who sees such tests acting to "support and legitimise racial prejudice" including the stereotyping of young Aboriginals.⁵⁸ The use of "science" serves to further disguise racist administrative procedures as apparently neutral. In addition, the type of racist assumptions, presented in a pseudo-scientific manner to justify the ongoing classification and incarceration of Aboriginal children, have also been more widely criticised in relation to New South Wales.⁵⁹

Assimilation as an official policy has fallen into disrepute. Yet it is worth recalling that the various government and non-government institutions in which Aboriginal young people were incarcerated were seen as important instruments in the implementation of assimilation.

52 Above n7 at 26, 87 and 88.

53 Wootten, H, *Report of the Inquiry into the Death of Clarence Alec Nean*, Royal Commission into Aboriginal Deaths in Custody (1990) at 47.

54 O'Dea, D J, *Report of the Inquiry into the Death of Christine Leslie Ann Jones*, Royal Commission into Aboriginal Deaths in Custody (1989) at 4.

55 Muirhead, J H, *Report of the Inquiry into the Death of Paul Farmer*, Royal Commission into Aboriginal Deaths in Custody (1989) at 9 and 10.

56 Above n7, n53 and n55.

57 Above n53 at 3.

58 Above n53 at 36 and 46.

59 Milne, C and Munro Jnr, L, *Who is Unresponsive? Negative Assessments of Aboriginal Children*, Discussion Paper 1, Aboriginal Childrens Research Project (1981).

lation. That is, as instruments in a policy which has been defined as genocidal. Assimilation as a policy has been replaced officially with self-determination. Yet what does self-determination mean in the context of juvenile justice? Clearly extraordinary numbers of Aboriginal juveniles are incarcerated in state-controlled institutions. Whether the types of policies which were once seen to be effective in relation to assimilation still exist is certainly open to investigation. Management policies, specific programs and general conditions of detention centres all need to be examined in the light of their potentially genocidal effect. Predictably the official response is that discriminatory practices in institutions do not exist and the overt racism apparent during the 1960s and 1970s is no longer acceptable. Again the degree to which overt racism exists should be subject to investigation.

OTHER ISSUES RELATING TO DETENTION

Obviously general changes in the administration of juvenile justice will impact specifically on Aboriginal juveniles. We need to be particularly aware of how more punitive approaches generally will differentially affect Aboriginal young people.

Amendments to the New South Wales *Children (Criminal Proceedings) Act* 1989 allow the courts to direct persons of or above the age of 16 years old, guilty of an indictable offence or of absconding, to be committed to prison. Section 28 of the *Children (Detention Centres) Act* provide for the transfer of certain young offenders to adult prison. Figures available on the twelve months after the amendment indicate that 28 young people had been transferred from detention centres to adult prisons. Nine of the 28 were Aboriginal.⁶⁰ The construction of a specific juvenile unit at the new Lithgow prison appears to indicate an ongoing institutional acceptance of these transfers. In this light the death of the 17 year old Aboriginal youth Dermot Pidgeon might be considered. He was found hanged in Maitland Gaol within one week of his transfer from Endeavour House detention centre.

The types of problems faced in juvenile units in adult prison include reports from the juvenile unit at Long Bay prison complex where it has been alleged that juveniles have been kept in their cells 23 hours per day, subjected to the Malabar Emergency Unit armed with dogs, subjected to MACE, and the occurrence of numerous suicide attempts. John Howard, in his analysis of juvenile suicides, states that "young offenders appear to be 'safer' in youth rather than adult custodial settings".⁶¹ In addition to transfers to the adult prison system, there has also been the construction of a new high-tech juvenile maximum security institution at Kariiong (NSW).

Generally there has been an increase in the numbers of juveniles detained in New South Wales since the mid 1980s. On 30 June 1985 there were 311 juveniles in detention centres. Since 1990 the number has been consistently in excess of 400. It would also appear that there has been a substantial increase in the average length of time to be served in custody. Prior to changes in the remission system in September 1987, the average length of stay was 80 days. According to Departmental figures released in April 1989, the average had increased to 140 days. More recently the Judicial Commission has released a re-

60 Above n22 at 331.

61 *Campaign for Criminal Justice Newsletter*, No 6, January 1991.

port on sentencing in the Children's Court since the introduction of the *Sentencing Act* 1989. According to the report the average length of the minimum or fixed term is approximately 140 days. Again, because of the over-representation of Aboriginal juveniles in the system, increases in the number of detentions and the length of detention are likely to impact specifically on Aboriginal youth.

Many of the Australian Departments concerned with juvenile justice have paid at least some lip-service to notions of Aboriginal community involvement in juvenile corrections. For instance there has been discussion by the NSW Department of Family and Community Services of community-based programs in country areas with significant Aboriginal populations. In Bourke there has been plans for some time of a residential training centre for Aboriginal young people. It would appear that the most important question is where the control of such 'community-based' programs will be centred. 'Community-based' does not mean in itself community control. A central feature of any scheme designed for Aboriginal young people should be that the control (not simply the 'involvement' or 'in consultation with') of such schemes should be placed firmly in the hands of the Aboriginal communities which are affected.

CONCLUSION

This paper has dealt primarily with issues relating to Aboriginal young people in police custody and, to a lesser extent, those in the custody of juvenile detention centres. It is apparent that there are many very pressing issues associated with these forms of custody, not the least of which are the level of over-representation and the conditions of treatment whilst in custody.

Recommendation 62 from the Royal Commission into Aboriginal Deaths in Custody states the following:

That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

It is apparent that we need to confront the role of the justice system in relation to the indigenous people of Australia. One particularly harsh and destructive point of that relation is with Aboriginal young people. Both the Royal Commission into Aboriginal Deaths in Custody and the Human Rights Commission's National Inquiry into Racist Violence contain many recommendations aimed at State and Federal authorities. While the implementation of these recommendations will not necessarily provide magical solutions, they will at least enable a serious grappling with the magnitude of the problem.