Justice for the Vulnerable? — Debating the relationship between Aboriginal People and Australian Criminal Justice

As much as it might be said that a nation is judged by the way it treats its most disadvantaged citizens, the reality of criminal justice is dependent on its relations with the vulnerable. On any measure Australian criminal justice is indicted by the overrepresentation of Aboriginal people in its domain.

Aboriginal Australians constitute less than 2% of the nation's population. Yet they are 20 times more at risk than non-Aboriginal people of coming into contact with the criminal justice process. I say 'at risk' because for young people in particular, the police and the courts are consistently harsher in their treatment of offenders with 'form'. Aboriginal youth and women face a vastly more disproportionate likelihood of criminalisation. Of all this *Australian Criminal Justice* (Findlay, Odgers & Yeo 2005:326) observes:

> This staggering figure is strong evidence that Aboriginal people are discriminated against by agents of the criminal justice system and lack equal protection of the law. One possible explanation for this discrimination is the continuing subjugation of Aboriginal people, since white settlement began, by powerful groups within the white community.

Such an assertion could be challenged, for instance, by the manner in which certain police powers legislation[1] classifies Aboriginal suspects as 'vulnerable people' and thereby accords them particular conditions. On the other-hand, just such special classification might tacitly recognise the capacity of the system to disadvantage Aboriginal suspects under investigation.

Cunneen and Weatherburn largely agree on the disproportionate interest of criminal justice in Aboriginal people. They also accept that involvement in the system may adversely influence future criminal justice encounters. Where they divide is over the causes of Aboriginal over-representation and in particular the extent to which the 'system' might be seen as causally significant. In addition, there is vigorous disagreement over the manner in which relationships such as alcohol and drug abuse might be viewed as independent variables in the process of Aboriginal criminalisation.

It is not the practice of this journal to encourage protagonists to debate their positions through rejoinders. However, in this case, we have deemed that the consideration of Aboriginal over-representation and the recent debate that it has generated is so important, and so in need of public consideration, that the Cunneen/Weatherburn exchange has been made available to our readers.

Cunneen argues the necessity 'to keep the historical record factually correct'. Weatherburn presents empirical correlations which identify immediate contextual variables that influence Aboriginal offending. It is for the reader to determine 'whose history' or 'what research significance' most convincingly explains a tragic feature of the criminal justice in operation through contemporary Australian society.

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1 For example *Law Enforcement (Powers and Responsibilities) Act* (NSW), Part 9, and associated *Regulations* Div. 3

Australian Criminal Justice (2005) proffers over-policing as one explanation for the disproportionate criminalisation of Aboriginal people. The police throughout Australia accept that poor Aboriginal/police relations have not helped develop a more even-handed approach to the exercise of the discretion to arrest and charge (Findlay 2004:chap 9). Court appearance data, and the socio demographics of our custodial populations also suggest that the other main agencies in the system are facing the challenge of apparent discrimination.

Whatever the current causes may be, our authors are right to remind us of the other dimension of the tragedy. The reports of the *Royal Commission into Aboriginal Deaths in Custody* are replete with practical suggestions to ameliorate this overrepresentation, and its deadly consequences. Sadly, at a Commonwealth, and State and Territory level, the money has just not been put behind these recommendations and today their vision is largely unattained. As one Aboriginal activist observed:

> The Royal Commission has been a waste of time...[The Report] was informative, well-researched and expensive. The government has demonstrated the lengths it will go to gather information. However, while money is spent, thousands of human hours worked, and most importantly, Aboriginal lives continue to fall through the cracks of our society, the equivalent amount of effort is not channelled into the recommendations that are the products of the reports (Findlay, Odgers & Yeo 2005:332).

Therefore, criminal justice, and Australia society stand accused of failing to appreciate the nature and consequences of discrimination, and to adequately and humanely respond to its fall-out.

In a period of Australia's history when through immigration policy, national security strategies, and Indigenous affairs the international community is critical of our human rights credentials, the denial of equitable justice experience and outcomes to Aboriginal people fuels this critique. The sentiments of Paul Keating are as sharp now as they were when delivered in Redfern in 1992:

> And if we have a sense of Justice, as well as common sense, we will forge a new partnership [between non-Aboriginal people and Aboriginal people]...Imagine if *we* had suffered the injustice and then were blamed for it. It seems to me that if we can imagine the injustice, we can imagine the opposite. And we can *have* justice. I say that for two reasons: I say it because I believe that the great things about social democracy reflect a fundamental belief in justice. And I say it because in so many ways other areas have proved our capacity over the years to go on extending the realms of participation, opportunity and care (Findlay, Odgers & Yeo 2005:332–333).

Whatever the causes of over-representation (and we are indebted to Cunneen and Weatherburn for debating these), the challenge is for criminal justice to ameliorate its discriminatory influences and outcomes for Aboriginal people. Criminal justice institutions cannot simply declare or even bemoan the over-representation they manage, without addressing and evaluating the adverse consequences of which their processes will exacerbate. If discrimination results from justice at work, then the workings of justice need to recognise and reconcile their responsibility to assist the attainment of justice in its widest sense for Aboriginal Australians.

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References

Findlay, M, Odgers, S & Yeo, S (2005) *Australian Criminal Justice*, Oxford University Press, Melbourne.

Findlay, M (2004) *Introducing Policing: Challenges for police and Australian communities*, Oxford University Press, Melbourne.