

Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship?†

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Introduction

This lecture looks at issues of crime and violence in Indigenous communities in the context of broader problems of criminal justice law, policy and practice. In particular it addresses four points:

- the problem the legal system has in ensuring protection of Indigenous women in the context of domestic and family violence;
- the problem Indigenous people have in using the legal system to protect and enhance their own interests and rights, particularly in the area of civil and family law, and the implications this has for criminalisation;
- Indigenous access to legal advice and representation and funding issues associated with Aboriginal legal services; and
- the limitations of criminal justice agencies in developing strategic policies that change the way they do business with Indigenous people.

The difficulties experienced by Indigenous people in their interactions with the criminal justice system are well documented and regularly reported upon through the Review of Government Service Provision process (Steering Committee for the Review of Government Service Provision 2007). The extent of over-representation of Indigenous people in the criminal justice system has deepened since the landmark Royal Commission into Aboriginal Deaths in Custody in 1991 and the recent 2007 *Overcoming Indigenous Disadvantage Report* noted that Indigenous people's 'involvement with the criminal justice system continued to deteriorate' (Steering Committee for the Review of Government Service Provision 2007:4).

It is not the purpose of this lecture to review all the relevant data on the problems of over-representation in the criminal justice system. I simply note that Indigenous prisoners represent 24% of the total national prisoner population – a proportion of the prison population which has been consistent over the last few years (Australian Bureau of Statistics 2008). Imprisonment rates for Indigenous men and women have increased quickly: between

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2002 and 2006 the imprisonment rate for Indigenous women rose by 34% and for Indigenous men by 22% (Steering Committee for the Review of Government Service Provision 2007:4); and it would appear criminal victimisation rates are also increasing. In 2002, 24.3% of Indigenous people reported being a victim of actual or threatened violence in the previous 12 months. This was double the rate reported in the earlier 1994 National Aboriginal and Torres Strait Islander Social Survey (Australian Bureau of Statistics 2002:21).

Nor is the purpose of this lecture to discuss debates about causation and over-representation – important as they undoubtedly are (see for example, Cunneen 2006; Snowball & Weatherburn 2007). Rather the purpose at hand is to address several key policy issues in criminal justice administration as they impact on Indigenous people. I am interested in examining the reasons for the failure of criminal justice policy to live up to its ideals of fairness and justice, and explore this question through a number of contemporary sites of public policy concern.

Domestic and Family Violence

Nationally, there is widespread research which shows that Indigenous women experience greater levels of violent crime than non-Indigenous women. Numerous reports indicate that Indigenous women are more likely to be a victim of homicide than other women in Australia; are more likely to be the victim of sexual assault than non-Indigenous women; are more likely to be victims of violent crime than non-Indigenous women; are more likely than non-Indigenous women to be a victim of domestic violence; are more likely to suffer grievous bodily harm in an assault than non-Indigenous women; and are more likely to be hospitalised for assault than non-Indigenous women (see Aboriginal and Torres Strait Islander Social Justice Commissioner 2002, 2003, 2006; Australian Institute of Health and Welfare 2006; Cunneen 2005; Memmot et al 2001).

We know that the under-reporting of incidents of violence by women is a common occurrence – 66% of women nationally did not report an assault to police (Australian Bureau of Statistics 2005:25). There is no reliable data on the extent of under-reporting of violence by Indigenous women. However, given the absence of services in many remote communities we could reasonably expect under-reporting to be higher among Indigenous women than non-Indigenous women.

I am particularly interested in looking at the reasons that prevent Indigenous women from using the criminal justice system to seek protection when they are victims of domestic and family violence. The research reported upon here involved qualitative interviews with 32 Indigenous women who were domestic and family violence victims and living in remote and rural areas. The research also involved interviewing local service providers – from workers in Indigenous healing centres to local magistrates. Some 132 interviews with service providers were conducted. For reasons of confidentiality I have identified the particular Australian State in which these interviews took place as *Utopia*.

The Indigenous women who were interviewed for this research varied in their age from their late teens to their sixties. They revealed a picture of ongoing and often extreme violence. Within the one relationship some violence would be reported to authorities and other violence would not. The interviews showed that most women reported at least some of the violence, some of the time. The major reasons identified by Indigenous victims of violence for not reporting violence or seeking a domestic violence order included:

- Fear of the perpetrator
- Family and kinship issues
- The nature of Indigenous relationships
- The fear of intervention by child welfare authorities and the subsequent removal of children
- The unavailability of community support and services
- Lack of police presence and police responses, and
- Empathy for the perpetrator.

Fear of the perpetrator may be a common reason for both Indigenous and non-Indigenous women in not reporting violence. However, family and kinship issues are complex in Indigenous communities and have various impacts on the nature of domestic and family violence, as well as on decisions whether to report the violence or not. The idea of 'fear of the perpetrator' involves a potentially much larger group of people rather than the individual perpetrator. It can involve the perpetrator's brothers, sisters, and extended family. The jailing of the offender does not remove this fear, and in fact can exacerbate the likelihood of ongoing retaliation by other members of the extended family. This fear is reinforced in small tightly-knit communities where the reporting of violence becomes known quickly throughout the community. The fear may be of retaliatory violence, but it may also be a more general fear of social ostracism.

One of the major assumptions underpinning western ideas about both offenders and victims is that they are autonomous individuals who make decisions *as individuals* (Blagg 2008). Many Indigenous women have different views about the relative permanency of interpersonal relationships, and the connections of kinship such that leaving a relationship may not be a *choice*.

In Indigenous communities you are life partners and that is it. That is a cultural thing. The man may have sliced and diced you, but he is still part of your life. 'You are the father of my kids.'
(*Victim RW1*)

The close ties to family groups are very strong, and the repercussions later on down the track. They lose identity and family. "If I report what's going to happen to my family?" There is the shame factor and the ostracism if they report. The family pressure comes from both sides, her family and her partner's. (*Indigenous worker IP5*)

At times in the interviews, there were expressions of sympathy or empathy for the perpetrator of violence. The women who were interviewed often saw the perpetrator's violence as arising from a range of factors including drugs and alcohol, and more deeply, the shocking experiences many Indigenous people in Australia have survived.

[The violence] happens when he is drunk or when he is stressing out for drugs. I talk to him many times to get off it especially since we had our bubba taken off us. I try my best to stop him. He just starts hitting me. I know when he start drinking he's going to hit me. He's got a real anger inside of him. It's something must have happened to him. All he told me was he got bashed by his father, he got bashed when he was in jail. He doesn't know his real father. He tell me he seen a couple of his brothers hung themselves. (*Victim RW3*)

The interviews also revealed that there is a great deal of personal experience of the failure of criminal justice interventions to either deter or rehabilitate offending behaviour. Indigenous people have experienced intensive governmental intervention, particularly by criminal

justice and welfare agencies, over many generations. The fear of what might happen to an offender in prison is tempered by the familiarity of the prison experience.

He is on a suspended sentence now. If he breaches he goes back to jail. We supported him in the courthouse, and the judge said lucky for him ... I was really worried that he would go to jail. I have a child. But he was looking forward to going to jail, but they gave him a suspended sentence. (*Victim P5*)

For many victims, experience has shown that imprisonment is unlikely to improve the behaviour of offenders.

He has been to jail for breaking that order. He still commits that violence when he came out of jail. He hasn't changed. He seems worse. (*Victim DO4*)

Perhaps one of the greatest barriers to Indigenous women reporting violence to police is the fear of having children removed by government agencies. There is widespread knowledge in Indigenous communities that reporting domestic and family violence can lead to intervention by the child welfare authorities. This fear of 'child welfare' intervention was frequently mentioned by both service providers and victims, and was prevalent in all the locations where interviews were conducted. This issue would appear to be a national problem with police introducing procedures of notifying child protection agencies if they attend a domestic violence incident where there are children present (or normally resident).

The reason I haven't reported is my kids, my babies. I'm worried about them being taken. I had four children. Because police are brought to a house where there is violence, the kids get taken straight away. The Stolen Generation I reckon is coming back. (*Victim CC9*)

Between 1999 and 2005 the rates of substantiated notifications for child abuse and neglect for Indigenous children have increased significantly – doubling from 14.8 per 1000 children to 29.5 per 1000 children. The increase was far greater than for non-Indigenous children, and the 2005 rate for Indigenous children was 4.5 times higher than the non-Indigenous rate (Steering Committee for the Review of Government Service Provision 2007:3.85). Police reports arising from domestic violence incidents have been a significant contributor to this increase (Humphreys 2007). The current system of reporting places Indigenous women in an untenable position of having to choose between reporting violence and running the perceived risk of losing their children.

Although there is reluctance to report domestic and family violence, protection orders are frequently taken out involving Indigenous victims. Based on the population, Indigenous people are 5.7 times more likely than non-Indigenous people to be the aggrieved (victim) in a domestic and family violence order. Indigenous applications comprised 17.2% of all applications for orders before the courts in 2006-07 in Utopia.

The main reason for the frequency of orders involving Indigenous women as victims is because police initiate the process. In 2006-07 police were the applicants in 73% of protection orders involving an Indigenous aggrieved. This was 21 percentage points higher than non-Indigenous applications. In many remote Indigenous communities in Utopia, the police are the applicants in more than 95% of the orders.

While Indigenous people have higher rates of domestic violence order use than non-Indigenous people, they are much less likely to be the person applying for the order. This raises questions about engagement with and confidence in the legal process, as well as the availability of services to assist with private applications.

There is also a significant problem with the lack of attendance of Indigenous victims and respondents at the court when the order is made. This raises issues about the sense of

ownership of the legal process by Indigenous people and has implications in terms of either the victim or the respondent understanding the nature of the order. There is widespread recognition of the problems associated with victims and perpetrators not understanding the orders, their requirements and obligations under the order or the consequences of a breach of the order. There is also a general lack of community knowledge about domestic and family violence and potential legal responses.

In Utopia, applications for Indigenous domestic and family violence orders are more likely to be granted by the court than non-Indigenous applications, and are less likely to be dismissed, struck out or withdrawn than non-Indigenous applications. Yet there is a much greater disengagement with the legal process than is found in non-Indigenous applications for domestic violence orders. Overwhelmingly, the picture emerges that the legal system is extraneous to the issue of Indigenous violence; it is a legal system that lacks an organic connection to community.

The lack of connection to community and absence of positive impact is further reflected in the extent to which the orders are breached and subsequent criminal proceedings are undertaken. In Utopia, for every 10 Indigenous breaches of a domestic violence order, between four and five will result in a sentence of imprisonment. The existing prevalence of imprisonment as a sanction means that increasing the use of imprisonment or increasing the length of sentence is unlikely to lead to lower levels of recidivism or violence. It also decreases the likelihood that many victims will report breaches because they do not want their partner incarcerated. In the interviews I conducted the lack of deterrent value in imprisonment was recognised by police, magistrates and service providers. Because there is no 'shame' involved in going to prison for Indigenous people (Blagg 2008), I would also suggest there is little public denunciation value for Aboriginal people in a term of imprisonment. The most tangible function that imprisonment fulfils is short-term incapacitation.

Civil and Family Law Needs

As criminologists we tend to compartmentalise both people's problems and the law through a disciplinary focus on crime, the criminal law and the criminal justice system. The second part of this lecture draws attention to a consideration of the interaction between civil and family law needs, and criminal law and criminalisation. The argument I am putting here is that the failure to ensure access to justice for Indigenous people in areas of law which is not criminal (that is, civil and family law) has an impact on the criminalisation of Indigenous people. It is also an argument for criminologists to think more broadly about the nature of the problems which economically and socially marginalised people face and the often direct and specific relationship there is between this marginalisation and criminalisation.

The comments, quotes and analysis presented in this section of the lecture are drawn from research I have been conducting for Legal Aid NSW on Aboriginal civil and family law needs. The research has involved running focus groups with Aboriginal men and Aboriginal women in various urban, regional, rural and remote communities in New South Wales. In addition, interviews were conducted with Aboriginal and non-Aboriginal people working in various justice-related organisations.

It was clear from the research that there is a significant degree of unmet legal need in both civil and family law.

[It's] sheer desperation, as far as family and civil law matters go. They have nowhere to go for any legal advice ... [Family law matters] end up becoming criminal matters because they don't know how to deal with those family law matters, the only way they know how to deal with it is to go out and have a big punch up ... They don't realise what their rights are in civil law; they don't even know what that is. (*Legal support worker Wagga*)

There is little contact with the family law system by Aboriginal people, except in relation to conflict over children, either through child protection matters or disputes over access and residency under the *Family Law Act 1975* (Cth). Questions of access and residency arrangements frequently involve more people than the biological parents and often include grandparents. However, it is the intervention of child welfare agencies and the potential removal of children which causes the greatest concern in communities, especially for Aboriginal women.

CASE STUDY

The family had DOCS come in and tell them that they needed to get new furniture but the family did not understand that this was a condition that, if not fulfilled, would lead to them losing their kids. They didn't understand the implications that a suggestion by DOCS to get some new furniture would turn up in an affidavit as a failure and a reason to take the children. Challenging the DOH to come and fix the premises could have been something that could have been done. They failed to tell Centrelink that they had taken one of the kids out of childcare and put them into school, so money was going to the wrong place and was actually owed to the family. At the moment, legal aid is only available once you hit the court process, what we need is a coordinated effort by community workers, social workers, legal workers to proactively address all the issues, where the client is actually advised what the risks of non-compliance with DOCS suggestions are. Waiting until DOCS has already formulated its affidavit of failures, where something is already in court, and this in an environment where intervention is coming in earlier and adoption out is an option earlier, without this holistic approach, we are going to have another stolen generation.

(*Legal practitioner Redfern*)

The absence of legal knowledge and, perhaps more importantly, the lack of legal representation in the area of child protection is a significant problem for Aboriginal people. On the basis of interviews with Aboriginal community members and the observations of legal and paralegal workers, it is clear that the lack of legal assistance and representation is related to the likelihood of the removal of children.

DOCS sends a letter to a mother to come to court and she appears without representation, not realising that she is there to answer an application to take her kids. She has no legal support then in that proceeding. (*Aboriginal legal support worker 2 Bourke*)

They accept what's going on, they are very much in the dark ... We as Aboriginal people still regard DOCS as a power that we can't reckon with. We as a group of people are still scared of DOCS and we won't take them on ... (*Aboriginal legal support workers 1 Penrith/Mt Druitt*)

Another area of particular concern which emerged from the focus groups was racial discrimination. It is likely that with the advent of federal, State and Territory anti-discrimination legislation the more overt or blatant practices of racial discrimination have disappeared in Australia. However, it is clear that racial discrimination was a keenly felt experience among many of the people who participated in focus groups.

I reckon discrimination is just an everyday event for every one of us women sitting here ... and when you go and speak to someone about it they think you're just crying 'blackfella'. They tell you, 'don't worry about it, it will be alright. Well it's not alright ... you've still got to walk around every day with that in your head ... some people are not as strong as others and they take

it to heart, and then they do things to themselves ... or others, and then they end up in jail.
(Redfern women's focus group participant)

For many people, racial discrimination is something you 'put up with' or learn to live with rather than seek legal redress. Yet for others the shame and humiliation of discrimination leads to a lashing out either at oneself or others. There is a link between racial discrimination and potential for criminalisation: 'Discrimination is one of those things that *becomes* criminal stuff, because we react'. *(Aboriginal legal support workers I Dubbo)*

The case study below shows that *some* Aboriginal people do receive legal advice and gain redress.

CASE STUDY

The family bought a stroller from Kmart Bondi Junction and were walking with it in Kmart Broadway, the baby was about 8 days old, and the stroller was snatched away with the baby in it [by security], and the only indicator that they were suspicious is that they were Aboriginal, and they have a new stroller. [The] family got an apology and a store credit.

(Legal practitioner Redfern)

But this is rare: from the focus group surveys some 28% (of 153 participants) indicated they had experienced discrimination *recently*, however only 17% of those sought legal advice. It is also not difficult to imagine the case study above ending very differently with family members resisting security guards, the police being called and intervening, and a string of criminal charges being laid. Indeed the focus group discussions indicated specific examples where resistance or reaction to discrimination ended in the criminalisation of the person discriminated against.

Some of the major issues to emerge in terms of civil law problems identified in the focus groups included:

- Housing and tenancy (forced relocations, and lack repairs)
- Discrimination (particularly among services such as shops and real estate agents, and in gaining employment)
- Education (particularly in relation to school suspensions and expulsions)
- Employment (particularly in relation to pay, bullying and harassment, and unfair dismissal)
- Social security (particularly with disputes with Centrelink over entitlements and payments)
- Credit and debt (particularly in relation to mobile phone contracts, high pressure sales for items like computers, used cars and associated finance, and funeral funds). Credit problems that become insurmountable through not being dealt with through letters not being opened and literacy issues.

In the context of civil law needs, it is worth reiterating the long-term impacts of colonial policy. It was noted above that there is ongoing fear relating to child removal, and in particular fear concerning potential intervention of police and child protection agencies. It is also worth considering the long-term impacts of control over employment, wages and personal financial matters, particularly in the context of the inability of Aboriginal people to accumulate family wealth and capital over generations. There is a very strong argument that the contemporary social and economic disadvantage of Indigenous people (and the

multifaceted legal needs which flow from this) is derived from or is an outcome of various government policies.

Government control over finances and pay for Aboriginal workers lasted most of the 20th century. There were negligent and, at times, corrupt and dishonest practices which lead to the withholding of moneys from Aboriginal wages that had been paid into savings accounts, and trust funds. In addition to these practices there were also under-award payments to Aboriginal workers which continued after they were outlawed by the introduction of the *Racial Discrimination Act 1975* (Cth).

The Senate Standing Committee on Legal and Constitutional Affairs found:

compelling evidence that governments systematically withheld and mismanaged Indigenous wages and entitlements over decades. In addition, there is evidence of Indigenous people being underpaid or not paid at all for their work. These practices were implemented from the late 19th century onwards and, in some cases, were still in place in the 1980s. Indigenous people have been seriously disadvantaged by these practices across generations (Standing Committee 2006:4).

The effects of the stolen wages of Indigenous people and subsequent immiseration arising from this exploitation, is fundamental to understanding the contemporary situation of Indigenous people in Australia. Some States such as New South Wales and Queensland have established meagre systems of compensation for these massive frauds. Other States like Western Australia have chosen to ignore the issue. Despite the establishment of repayment schemes in some jurisdictions, many Aboriginal people are unaware of their entitlements. In the focus groups conducted in New South Wales, some 93% of the 153 Aboriginal participants were unaware of the government's repayment scheme in that State despite the impending deadline for registration.

The point I want to reinforce here is twofold: first, the lack of access to civil and family law can give rise to criminalisation; secondly, the social and economic marginalisation that Indigenous people experience, and which contributes to specific civil and family law needs, has its roots in earlier colonial policies and practices.

Aboriginal Legal Services and Access to Justice

The third section of this lecture addresses the question of legal representation and access to justice. The adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law. It represents the ability of Indigenous people to use the legal system (both criminal and civil) to a level enjoyed by other Australians. Further, given the significant over-representation of Indigenous people in the criminal justice system, one might expect a level of funding to Aboriginal and Torres Strait Islander Legal Services (ATSILS) to represent a serious commitment to remedying where possible this problem.

The Royal Commission into Aboriginal Deaths in Custody had emphasised the important work of ATSILS in safeguarding and promoting the legal rights of Indigenous people as well as providing competent legal representation. Promoting Indigenous legal rights was seen to be necessary in all areas of the law, both civil and criminal, and included the ability to provide community legal education, engage in policy development and advocate for law reform (Cunneen 2006). The development of the first ATSILS in the 1970s with their organic links to local communities and their unique structure of Indigenous field officers,

represented the demand for Indigenous self-determination, culturally connected legal representation and an emphasis on protecting and enhancing the human rights of Indigenous people in Australia.

The work of ATSILS is complex and difficult because of the specific needs of Indigenous people in Australia. Some of the major reasons for the complexity of Indigenous legal representation include:

- the often serious nature of the criminal offences;
- the multiple legal needs across criminal, family and civil law;
- language barriers;
- cross cultural issues;
- socio-economic disadvantage;
- geographic isolation; and
- the lack of sentencing alternatives, particularly in rural and remote areas (Cunneen & Schwartz 2008).

All of the above points could be the subject of a lecture in themselves. I want to make the point here however, that what we have seen is a reduction in resources going into ATSILS nationally, and this was particularly the case over the life of the former Howard Government.

For Indigenous people living in remote areas their only access to legal advice and representation is through the ATSILS. However because of funding constraints ATSILS almost exclusively deal with criminal matters. It has been argued that in remote communities, access to justice is 'so inadequate that remote Indigenous people cannot be said to have full civil rights' (Top End Women's Legal Service cited in Senate Legal and Constitutional References Committee 2004:5.120). Living in remote communities is an issue that particularly affects Indigenous people given that 27% of Indigenous people in Australia live in remote or very remote communities compared to just 2% of the non-Indigenous population (Steering Committee for the Review of Government Service Provision 2007:2).

While access to civil and family law services may be non-existent, the service in relation to criminal matters is often very poor because of resource issues. The cost of travel to these communities is prohibitive, and face-to-face meetings are often impossible (Senate Legal and Constitutional References Committee 2004:5.115). Where practitioners do attend, there is often little or no time to obtain a brief or advise clients of options. This lack of contact time can lead to advice to plead guilty irrespective of the merits of the case (Senate Legal and Constitutional References Committee 2004:5.116). Indeed, there is evidence that Indigenous clients as a whole are more likely to put in guilty pleas and less likely to put in not-guilty pleas than other offenders (Office of Evaluation and Audit 2003:3).

The lack of resources and workloads negatively impact on the capacity of ATSILS to attract and maintain expert legal staff (Joint Committee of Public Accounts and Audit 2005:4.2). In addition, salaries are uncompetitive when compared with Legal Aid Commissions (Cunneen & Schwartz 2008). Low salaries mean ATSILS practitioners are likely to be nearer the beginning of their careers – so the representation is provided by young, inexperienced lawyers.

As part of their funding requirements, the primary focus of ATSILS is to represent those in danger of incarceration, given the extent of Indigenous over-representation in prison. The number of criminal cases dealt with by ATSILS increased by 67% between 1998 and 2003, yet despite this massive increase, funding for these services did not substantially increase in that period (Joint Committee of Public Accounts and Audit 2005:2.2). The realities of the demand on ATSILS are highlighted by the fact that the vast majority (83%) of Indigenous prisoners interviewed for an Office of Evaluation and Audit survey did not have anyone present to support them or advise them when they were interviewed by the police after their arrest (2003:3).

Despite a growing demand for child protection, civil and family law matters, ATSILS are unable to service these due to insufficient resources. The result is that Indigenous people are unable to access the legal system to protect or further their economic, cultural or social interests. There is a widely acknowledged danger that civil or family law issues can escalate to criminal acts, resulting in charges and a perpetuation of the cycle of over-representation (Joint Committee of Public Accounts and Audit 2005:2.41). In addition there are significant limitations on representation in criminal matters, particularly in rural and remote areas. As a result, grossly inadequate access to justice serves to perpetuate cycles of disadvantage.

Government Strategic Policy and Aboriginal Justice Agreements

In the final section of this lecture, I want to turn to the broad policy framework affecting Indigenous people and the Australian criminal justice system. Generally speaking, and as a result of the Royal Commission into Aboriginal Deaths in Custody in the early 1990s, there has been a proliferation of strategies and policies designed to reduce Indigenous over-representation in the criminal justice system and/or to improve criminal justice agency responses to Indigenous people. The most important of these has been the development of State-wide Indigenous Justice Agreements (IJAs) negotiated between government and peak Indigenous bodies in several Australian States (including New South Wales, Queensland, Victoria and Western Australia).

There are a number of lessons which can be learnt from the experiences of developing IJAs over recent years. First, there are obvious omissions from the list of jurisdictions that have developed these agreements (including South Australia, Northern Territory and Tasmania). Those States with an Indigenous Justice Agreement have a more consistent and coherent approach to working with Indigenous people and the justice system. The existence of an IJA focuses government agencies on the issue of Indigenous people and the justice system in a way that is absent in those States without a Justice Agreement. Furthermore, it is only in those jurisdictions with a Justice Agreement which contains monitoring and evaluative components (in particular, Victoria and Queensland) that we have any overall picture of the various justice programs and initiatives that are in operation (Cunneen & Allison 2008).

It is those States with quality processes for *ongoing* engagement with Indigenous communities that have been the most effective in developing criminal justice policy. Effective community engagement may require establishing relevant bodies (for example, the Aboriginal Justice Forum (AJF) in Victoria). Community engagement may also occur through independent representative Aboriginal Justice Advisory Councils (AJACs) (or similar bodies). It has been those States with Indigenous bodies actively involved in the negotiation, formulation and ongoing monitoring of IJA that have been the most successful

in developing policy. It was one of the great failures of the Howard era that at Federal and State level Indigenous representative bodies were progressively dismantled as part of the attack on the principle of Indigenous self-determination.

In addition to Indigenous Justice Agreements, many criminal justice agencies have developed their own strategic frameworks for working with Indigenous people. These have met with mixed results. Nationally, police services are the criminal justice agencies most likely to have developed a strategic policy in relation to Indigenous people. To a lesser extent, some correctional and juvenile justice agencies may also have strategic policies in place (Cunneen & Allison 2008). The fact that police have been at the forefront of these strategic policy developments probably reflects that as a government justice organisation, police services have had the poorest relationship with Indigenous people. Legal Aid Commissions, Directorates of Public Prosecutions and the courts are the criminal justice agencies least likely to have strategic policies relating to Indigenous people, even though any one of those organisations may have a range of initiatives in place (for example, the Murri Court, Koori Court, circle sentencing).

Despite the moves by government justice agencies to improve the way they work with Aboriginal and Torres Strait Islander people there are a number of fundamental problems. I would like to identify some of the main issues.

Indigenous Representative Bodies

The States and Territories with strong local representative AJACs or similar have done the best in negotiating Justice Agreements. There are a number of instances where it has been recommended that State advisory groups be established to ensure effective implementation, monitoring and evaluation of relevant policy frameworks, for instance, by the Law Reform Commission of Western Australia (2006) and the *Mahoney Inquiry Report* (Mahony 2005) and in Queensland in the independent evaluation of the *Aboriginal and Torres Strait Islander Justice Agreement* (Cunneen 2005). In the absence of a national Indigenous representative body, and with only a limited number of State and Territory representative bodies, negotiation and consultation with Indigenous people varies greatly between jurisdictions.

The Lack of Government Accountability

There is a real problem in the lack of evaluative information and documentation concerning implementation, monitoring and outcomes of strategic policy frameworks, which makes any assessment of effectiveness very difficult. The only IJAs to have been independently evaluated are those of Queensland and Victoria, and nationally only a handful of departmental Indigenous strategic plans have been independently evaluated.

The Lack of Continuity in Policy and Strategy

The issue of continuity in strategic planning is important. After reviewing Indigenous justice strategies across Australia (Cunneen & Allison 2008) it is clear that constant change in government policy is a significant barrier to success. There appears to be regular change, which disrupts processes of reform and accountability. For example, there may be two or three significant changes in policy frameworks in five or six years, although there is no indication (through evaluation) that previous strategies failed. It becomes difficult to determine whether central strategic planning through an IJA or State-wide plan actually impacts on departmental or agency policy, or whether existing policies and programs are simply rearranged, recycled and rebadged to fit a new strategic direction.

Conclusion

I want to conclude by making some comments about institutional blockages to reform and also some of the progressive developments in Indigenous justice. A major blockage to reform is what might be conceptualised as a type of institutional racism. Institutional racism is concerned with broad social (or institutional) practice – it is not about individual attitudes or prejudices. It is a broader systemic problem that affects the way institutions operate. It is the rules, laws, policies and practices which systematically discriminate against or disadvantage Aboriginal and Torres Strait Islander people. It is aligned with what we think of in human rights law as indirect discrimination.

I would like to suggest that some of the problems identified in this paper can be understood in terms of institutional racism.

- Part of the reason current policies and practices in relation to domestic and family violence do not work for Indigenous women lies in the failure to understand *difference*. Laws, policies and practices ignore culturally and historically formed differences and proceed on the assumption that all women experience and respond to domestic violence in the same way.
- Part of the failure to provide for the civil and family law needs of Indigenous people derives from the historically formed view that Indigenous people are outside the civil framework of Australian society (that is, less than equal citizens) and the current view that Indigenous people are essentially a population with criminal problems. The understanding that marginalisation is derived from law and governmental practice, and the linkages between marginalisation, civil and family law need, and processes of criminalisation is ignored.
- The continuous underfunding of ATSILS and the inability of other legal providers to meet the basic needs of Aboriginal people similarly reflects a systematic neglect of the legal needs of Indigenous people. In this context, it is worth noting that the South Australian Aboriginal Legal Rights Movement has lodged a complaint with the UN regarding the systematic underfunding of ATSILS as constituting racial discrimination.
- The neglect of criminal justice policy development at least in some States also reflects the lack of recognition of Indigenous self-determination, and negotiation and consultation principles. Government prefers to proceed on the basis that it knows best and can act in the best interests of Indigenous people – a principle long applied to Indigenous affairs in Australia, despite overwhelming evidence to the contrary.

On the other hand there are positive developments (like, for example, the Koori, Nunga or Murri courts, community justice groups, healing centres or programs, night patrols, etc) and these tend to be organic developments from Indigenous communities and sometimes in partnership with non-Indigenous justice personnel. Indigenous demands are more likely to be met by a transformation in the justice system that allows the development of a hybrid system where traditional legal bureaucratic forms of justice are combined with elements of informal justice and Indigenous justice.

The development of Aboriginal justice programs, mechanisms and processes is one way of facilitating the development of Indigenous self-determination and satisfying the practical demands by Indigenous people for a more effective legal system. Indigenous responses to

justice problems tend to be seen in a holistic framework, based on self-determination and with a strong organic connection to community initiatives. Indigenous demands are for a system of law that respects Indigenous self-determination. In practice however those demands are for the development of a system which combines elements of both Indigenous and non-Indigenous law and practice, and includes a significant role for Indigenous Elders in justice decision-making at a community level and through the courts, as well as an emphasis on Indigenous modes of healing. The result of these demands is likely to be a postcolonial hybridisation of law – where there is an acceptance of difference and preparedness to step outside the framework of current Anglo-Australian law. The potential result is a decolonisation of Australian legal institutions.

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