

## REVIEW ARTICLE\*

*Aboriginal Peoples and Canadian Criminal Justice* by ROBERT A SILVERMAN and MARIANNE O NIELSEN (Butterworths, 1992), pp i-xv + 1-300. Softcover recommended retail price \$50.00 (ISBN 0 409 90623 9).

*Aboriginal Perspectives on Criminal Justice* edited by CHRIS CUNNEEN (The Institute of Criminology, 1992), pp i-x + 1-94. Softcover recommended retail price \$20.00 (ISBN 0 86758 565 X).

Recent studies have illustrated significant parallels between Australia and Canada in terms of the impact of the criminal justice system on the indigenous peoples of both countries.<sup>1</sup> The most striking similarity is that in both countries

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1 In the Public Inquiry into the Administration of Justice and Aboriginal People *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (1991) (AJI Report) pp 298-299, Commissioners Hamilton and Sinclair observed in relation to Australia and New Zealand that:

...both countries are in a position rather similar to Canada's in a number of ways. All three nations suffer from a tragic over-representation of indigenous peoples in the adult and youth criminal justice system... All three have few members of the indigenous population who work within the system as judges, lawyers, police or correctional officers. Aboriginal people in each country are making ever stronger demands upon the justice system to reform itself and to involve the indigenous community in its plans and operation.

See also JH Wooten, Royal Commission into Aboriginal Deaths in Custody *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) p 2; and L McNamara "Aboriginal Human Rights and the Australian Criminal Justice System: Self-Determination as a Solution?" (1992) 21 *Manitoba Law Journal* 544 at 544-545.

aboriginal people<sup>2</sup> are grossly over represented in prison populations.<sup>3</sup> During the 1980s concern over this particular 'problem'<sup>4</sup> saw the emergence of aboriginal justice<sup>5</sup> reform as a prominent item on the political agendas in both Canada and Australia. Accompanying and supporting this development has been the relatively rapid growth of a body of aboriginal justice literature. The devotion of a special issue of this journal to the topic of "Indigenous Peoples: Issues for the Nineties" is an indication of the recognition of this field as a legitimate subject of Australian legal scholarship. Similar indicators can be identified in Canada.<sup>6</sup> Reports such as the Law Reform Commission of Canada's *Aboriginal Peoples and Criminal Justice*<sup>7</sup> and the *National Report of the Royal Commission into Aboriginal Deaths in Custody*<sup>8</sup> have attracted considerable attention.<sup>9</sup> However, the literature extends beyond the collections of findings and recommendations contained in such reports.

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- 2 "Aboriginal" is used to refer to Aborigines of the Australian mainland and Tasmania as well as Torres Strait Islands peoples; and the First Nations (Indian), Metis and Inuit peoples of Canada.
  - 3 In Australia it has been conservatively estimated that Aborigines are at least 10 times more likely than non-Aborigines to be in prison: D Biles, Research Paper No 6 of the Royal Commission into Aboriginal Deaths in Custody *Aboriginal Imprisonment - A Statistical Analysis* (1989). In 1988/89 51 per cent of sentenced prisoners received into Western Australian prisons were Aboriginal. Aboriginal people constitute two to three per cent of the State's population: DJ O'Shea, Royal Commission into Aboriginal Deaths in Custody *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia: Volume 1* (1991) p 171. In the Canadian province of Manitoba aboriginal people account for more than 50 per cent of people in correctional institutions although they constitute only about 11 per cent of the provincial population: AJI Report note 1 *supra* pp 8, 101. For further information on rates of aboriginal over-representation in Canada, see L McNamara *Aboriginal Peoples, the Administration of Justice and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada With Reference to the Prairie Region* (1993).
  - 4 The implications of the identification of the 'problem' in this respect are discussed in L McNamara "The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the 'Problem' of Over-Representation in the Criminal Justice System" (1992) 21 *Manitoba Law Journal* 47 at 54-57.
  - 5 The term 'aboriginal justice' is often used in relation to the whole range of issues of which aboriginal peoples are seeking resolution, including land claims and native title, self-government and socio-economic inequity. It is used in this article to refer more specifically to the particular question of the impact of the criminal justice system on aboriginal people, and the remedies which are sought in relation to this particular form of oppression.
  - 6 For example, in 1992 the *Manitoba Law Journal* produced a special issue dealing with "Aboriginal Peoples and the Law" (1992) 21(3) *Manitoba Law Journal*.
  - 7 Law Reform Commission of Canada *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Report No. 34* (1991) (LRCC).
  - 8 E Johnston, Royal Commission into Aboriginal Deaths in Custody *National Report* (1991).
  - 9 In Canada, activity of this type has been even greater at the provincial level. Apart from the AJI Report, note 1 *supra*, reports on inquiries have recently been produced in a number of provinces including Nova Scotia, Ontario, Alberta, Quebec and Saskatchewan: *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution* (1989); Osnaburgh/Windigo Tribal Council Justice Review Committee *Tay Bway Win: Truth Justice and First Nations* (1990); Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta *Justice on Trial* (1991) (Alberta Task Force Report); J-P Brodeur, C LaPrairie and R McDonnell *Justice for the Cree: Final Report* (1991); *Report of the Saskatchewan Indian Justice Review Committee* (1992); and the *Report of the Saskatchewan Metis Justice Review Committee* (1992).

Indeed, the danger of focusing too heavily on reports such as these, despite their considerable political significance, is the risk of obscuring the diversity of the existing literature, including its size (particularly in Canada) and the appearance of indigenous voices within the dialogue.

This review article will provide a brief overview of the emergence of a body of literature dealing with indigenous peoples and the criminal justice system in both Canada and Australia, including a discussion of two recent contributions. It need hardly be said that the legal, political, social and economic, and perhaps most importantly, cultural contexts for aboriginal people in both countries are not identical. Consequently there are important differences in the style and themes of the literature. However, it is equally important to recognise common themes (evident in both collections reviewed below), including the imperative of confronting indigenous dispossession as a foundation to reform in the criminal justice area, and the crucial need for recognition *and* implementation of indigenous rights of autonomy in relation to social order and justice administration.

## I. CANADA

In Canada, 'justice' has emerged as a key element of the aboriginal political agenda,<sup>10</sup> and 'aboriginal justice' has evolved into a distinct field of academic research. Griffiths and Verdun-Jones have observed that:

The role of research in the formulation of criminal justice policies and the development of programs and services in the administration of justice is a complex one. There has traditionally been a split between academics and practitioners that has hindered the free flow of information and ideas, although there are other political and bureaucratic factors as well.<sup>11</sup>

Aboriginal justice research may be an exception to this rule. Recent criticisms of the justice system for its failure to deal effectively with aboriginal people have not been offered in isolation, but increasingly, are explicitly linked with a pattern of non-aboriginal domination in which the *Indian Act*<sup>12</sup> and the criminal justice system were, and continue to be, two of the most powerful legal mechanisms.<sup>13</sup> As a topic of investigation then, a significant proportion of the aboriginal justice literature is now more strongly aligned with broader aboriginal autonomy

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10 In 1989 the then National Chief of the Assembly of First Nations identified 'justice' as one of six areas in which aboriginal aspirations were focused: see G Erasmus "Epilogue: The Solutions We Favour for Change" in B Richardson (ed) *Drumbeat: Anger and Renewal in Indian Country* (1989) p 300.

11 C Griffiths and SN Verdun-Jones *Canadian Criminal Justice* (1989) p 597.

12 For an introduction to the impact on aboriginal peoples of this statute see R Bartlett *The Indian Act of Canada* (1988).

13 See AJI Report note 1 *supra* pp 62-72.

aspirations and political activity, than with criminology's critiques of the operation of criminal laws and the way justice is administered in countries such as Canada and Australia.

The atypical nature of aboriginal justice research in terms of the level of convergence between academics and policy makers is also reflected in the extent to which both the research and political environments, and the developing literature, have tended to be dominated in recent years by the volumes produced by public inquiries.

Given the political relevance of aboriginal justice literature, accessibility is a major consideration. As Silverman and Nielsen have noted, the literature is located in academic journals covering subject areas ranging from law to the medical sciences, in government publications, in the newspapers, magazines and newsletters of indigenous organisations throughout the country and more recently, in monographs and edited collections. Published bibliographies therefore play a crucial role in making the literature visible and available.<sup>14</sup>

The editors of *Aboriginal Peoples and Canadian Criminal Justice*<sup>15</sup> expressed a desire to "represent a Native point of view."<sup>16</sup> However, Silverman and Nielsen found this aim incompatible with their central objective which was to "span the criminal justice process with empirically based materials" for the purpose of "introduc[ing] students of sociology, anthropology, criminology, corrections, and Native studies to issues with direct implications for Aboriginal peoples involved in the Canadian criminal justice system".<sup>17</sup>

The coverage of *Aboriginal Peoples and Canadian Criminal Justice* is certainly impressive, although the almost exclusive reliance on existing materials results in a certain lack of currency or topicality. Extracts from newspaper articles are reproduced throughout the collection, and while not entirely satisfactory as a solution to the weaknesses noted, are generally an effective addition to the substantive chapters. Perhaps most importantly, these extracts highlight the level of popular attention which aboriginal justice issues has attracted in Canada in recent years.

The collection is divided into nine parts, beginning with introductory and general information on matters such as demographic conditions, and the legal history and current status of aboriginal peoples in Canada. Lawrence Barkwell's contribution on the growth of the colonial 'law and order' regime and its impact on the Metis

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14 Two excellent publications of this type are C Horn and CT Griffiths *Native North Americans: Crime, Conflict and Criminal Justice. A Research Bibliography* (4th ed, 1989); and J Harding and B Forgay *Breaking Down the Walls: A Bibliography on the Pursuit of Aboriginal Justice* (1991).

15 RA Silverman and MO Nielsen (eds) *Aboriginal Peoples and Canadian Criminal Justice* (1992).

16 *Ibid* p vii.

17 *Id.*

during the early nineteenth century highlights the diversity of indigenous peoples in Canada, even in relation to the rather specific issue of the impact of the non-aboriginal criminal justice system.<sup>18</sup>

The bulk of the collection consists of articles dealing with 'contemporary' matters such as policing, the courts and incarceration. Two of the primary objectives of these contributions are to *explain* the dramatic over-representation of aboriginal peoples at all stages of the criminal justice process, and to examine the desirability and feasibility of returning to aboriginal communities responsibility for crime control and the maintenance of social order/harmony.

The contributions on the first stage in the criminal justice process - policing - illustrate the inherent limitations of reforms which purportedly attempt to respond to the former without seriously giving effect to the latter. Along with Depew's discussion of the detrimental impact of the crime control model of policing in aboriginal communities,<sup>19</sup> Havemann's article on "The Indigenization of Social Control in Canada"<sup>20</sup> highlights the need for close examination of justice reform initiatives labelled as "community-based" or "Aboriginal-controlled", including the various policing strategies which have been implemented in parts of the country since the Royal Canadian Mounted Police (RCMP) Native Special Constable Program was established in 1973.<sup>21</sup> As Havemann notes:

Indigenization and the creation of semi-autonomous entities must be acknowledged for what they are - hybrids of the imposed system of social control which appropriate indigenous personnel to enhance legitimacy.<sup>22</sup>

Alberta's Louis Bull and Blood Reserve Police Forces (discussed in the collection)<sup>23</sup> appear to represent a departure from this limited capacity to a point of

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18 L Barkwell "Early Law and Social Control among the Metis" note 15 *supra* p 61. See also S Corrigan and L Barkwell (ed) *The Struggle for Recognition: Canadian Justice and the Metis Nation* (1991).

19 R Depew "Policing Native Communities" note 15 *supra* p 97.

20 Note 15 *supra* p 111.

21 The programme, designed to increase the level of aboriginal involvement in the policing of aboriginal communities was established following a recommendation from the *Report of the Task Force on Policing on Reserves* (1973). For further details see CT Griffiths and JC Yerbury "Natives and Criminal Justice Policy: The Case of Native Policing" (1984) 26 *Canadian Journal of Criminology* 147; and H Feagen "The Royal Canadian Mounted Police Special Constable Program" in CT Griffiths (ed) *Circuit and Rural Court Justice in the North. A Resource Publication* (1984). The programme was formally abolished in May 1990 following an evaluation which concluded that the programme had "outlived its usefulness" and which emphasised the need to begin "looking at its replacement with something more attuned to the 1990s": RHD Head *Policing For Aboriginal Canadians: The RCMP Role* (1989) cited in Alberta Task Force Report note 9 *supra* pp 2-31.

22 Note 15 *supra* p 117. See also J Harding "Policing and Aboriginal Justice" (1991) 33 *Canadian Journal of Criminology* 363.

23 Note 15 *supra* pp 87-92. The Louis Bull programme has been in operation since 1987: see Angus Reid Group *Effects of Contact With Police Among Aboriginals in Manitoba* (1989). The Blood Reserve project

greater alignment with aboriginal self-government aspirations. Yet, the experience of earlier initiatives such as the Dakota-Ojibway Tribal Council (DOTC) Police Force in Manitoba suggests that serious administrative and operational problems are difficult to avoid within a framework of relatively limited autonomy.<sup>24</sup>

In Canada, as in Australia,<sup>25</sup> considerable attention has been focused on the evidence of systemic discrimination and inherent racism in the judicial decision-making process as one of the explanations for aboriginal over-representation in prisons. In 1991 the *Report of the Aboriginal Justice Inquiry of Manitoba* offered the following indictment of discrimination in the justice system:

Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against the current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination.<sup>26</sup>

Yet, Carol LaPrairie<sup>27</sup> warns against the simplistic assumption that discriminatory sentencing accounts for the over-representation of aboriginal people in prisons. She notes that until very recently there has been little empirical research done which would "support or reject the existence of unwarranted disparity or overt racial bias in the sentencing of aboriginal people,"<sup>28</sup> and concludes that the existence of "systemic discrimination" may be more relevant in accounting for the disproportionate incarceration of aboriginal people.<sup>29</sup>

The following chapter - "Leaving Our White Eyes Behind: The Sentencing of Native Accused"<sup>30</sup> - picks up this theme albeit from an anecdotal rather than an empirical perspective. Rupert Ross discusses the implications of the non-aboriginal justice system's misinterpretation of aboriginal cultural values and traits,

was developed with the co-operation of the Alberta Solicitor General, the Department of Indian Affairs and Northern Development (DIAND) and the RCMP: Alberta Task Force Report note 9 *supra* pp 2-60.

24 See B Hawkins "The Dakota-Ojibway Tribal Police" in CT Griffiths (ed) note 21 *supra*; and EA Shewchuk *National Survey of Police Forces* (1989).

25 See J McCorquodale "Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases", and J Walker "Prison Cells With Revolving Doors: A Judicial or Societal Problem", both in KM Hazlehurst (ed) *Ivory Scales: Black Australia and the Law* (1987); also B Craigie "Aboriginal People and the Criminal Justice System in the 1990s" note 52 *infra* p 13.

26 AJI Report note 1 *supra* p 109.

27 "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions" note 15 *supra* p 133.

28 *Ibid* p 136. See S Clark, *Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders* (1989).

29 See further, C LaPrairie "Native Women and Crime: A Theoretical Model" (1987) 7 *Canadian Journal of Native Studies* 121; and C LaPrairie *If Tribal Courts Are the Solution, What Is the Problem?* (1989).

30 Note 15 *supra* p 145.

particularly within the adversarial courtroom. He suggests that the blanket application of standardised sentencing criteria impacts adversely on aboriginal accused in a manner that actually confounds the "essential and lofty goals"<sup>31</sup> of the justice process in terms of rehabilitation and deterrence.<sup>32</sup>

The chapters on sentencing and community corrections continue the themes outlined above, with an emphasis on the devastating impact of incarceration on many aboriginal individuals and communities,<sup>33</sup> and on the relative merits of various types of criminal sanctions. Several of the shorter contributions provide a strong sense of the value of incorporating elements of aboriginal cultures such as the observance of aboriginal religious practices in prisons,<sup>34</sup> or the creation of alternative dispositions which allow the offender's community to participate in his/her punishment.<sup>35</sup>

Given the way in which the aboriginal justice reform debate has progressed in Canada in recent years it seems entirely appropriate that the collection concludes with a section on aboriginal justice systems and an extract from the *Report of the Aboriginal Justice Inquiry of Manitoba*. The highlight of this report was a recommendation that aboriginal communities be empowered to establish their own justice systems,<sup>36</sup> a proposal that was echoed by the Law Reform Commission of Canada.<sup>37</sup>

As Nielsen observes in her own contribution to *Aboriginal Peoples and Canadian Criminal Justice*, autonomy-based justice initiatives of this type must be

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31 *Ibid* p 158.

32 See also R Ross *Dancing With a Ghost: Exploring Indian Reality* (1992).

33 For example in C Faulkner "Inuit Offenders" note 15 *supra* p 184. Faulkner observes that:

Inuit women see the incarceration of their people, both women and men, as being an enormous problem. As mothers of children who are sent south as a form of punishment, they have little knowledge of the environment or concept of the correctional/parole system in which their children are to be surviving for quite a few years. In the case of women offenders, it is believed that they have to contend with unfair treatment, the presence of male guards and racist treatment from other inmates.

The following article by Brad Morse and Linda Lock "Native Inmate Views on Incarceration" note 15 *supra* p 187 reflects concerns similar to those identified by research in Australia: see C Alexander "From Dreamtime to Nightmare: The Voices of 168 Aboriginal (ex-) prisoners in NSW" (1987) 23 *Australian and New Zealand Journal of Sociology* 323; and R Midford "Imprisonment: The Aboriginal Experience in Western Australia" (1988) 21 *Australian and New Zealand Journal of Criminology* 168.

34 Such as the holding of a sweat lodge ceremony: "Sweat Lodge Creates Greater Understanding - Alberta Prisons" note 15 *supra* p 176. See also J Couture "Traditional Aboriginal Spirituality and Religious Practice in Prison" note 15 *supra* p 199.

35 See "Yukon Gives Tribal Justice a Try" note 15 *supra* p 207.

36 AJI Report note 1 *supra* p 642. For a summary and preliminary analysis of the recommendations of the Aboriginal Justice Inquiry of Manitoba, see L McNamara "Autonomy-Based Solutions and Criminal Justice Reform" (1992) 54 *Aboriginal Law Bulletin* 4.

37 LRCC note 7 *supra* p 16.

seen as part of the wider context of aboriginal self-government.<sup>38</sup> However, given the importance of this relationship to the future direction of aboriginal justice reform two aspects of Nielsen's article are particularly disappointing. First, the emphasis on 'traditional justice' would appear to pre-suppose rather too much about the forms which aboriginal justice systems might take. The setting up of a dichotomy between 'traditional native practices' and 'contemporary justice system practices'<sup>39</sup> is both unrealistic and ultimately unproductive.<sup>40</sup> Second, the vague (almost hinting at 'greener pastures') reference to the design of "integrated justice mechanisms" in a number of other countries including Australia, does little to further the case for comparative aboriginal justice research and studies.<sup>41</sup>

Dickson-Gilmore's article on the 'traditionalist' proposal for a separate justice system for the Kahnawake Mohawk nation is a more effective discussion of the prospects of aboriginal-controlled justice institutions in Canada.<sup>42</sup> "Resurrecting the Peace" is a perceptive account of the political realities in one aboriginal community (in this case, Kahnawake), an appreciation of which will obviously be crucial to the successful implementation of justice initiatives. Dickson-Gilmore argues that:

... the essential question to be asked in regard to ... plans for a separate traditional justice system is not "is it really traditional?" but "is it workable within the context of Kahnawake?"<sup>43</sup>

She concludes that the answer will depend on the attainment of sufficient consensus within the Kahnawake community, and sufficient support for aboriginal self-determination from provincial and federal governments.<sup>44</sup>

The publication of a collection such as *Aboriginal Peoples and Canadian Criminal Justice* by a mainstream publisher (Butterworths) is indicative of the enormous growth in aboriginal justice literature in Canada, particularly during the

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38 MO Nielsen "Criminal Justice and Native Self-Government" note 15 *supra* p 243.

39 *Ibid* p 248.

40 See text accompanying notes 64-66 *infra*.

41 Note 38 *supra* p 255.

42 See J Harding and B Spence *An Annotated Bibliography of Aboriginal-Controlled Justice Programs in Canada* (1991).

43 Note 15 *supra* p 271.

44 Members of the Kahnawake community were involved in the Oka standoff in 1990 when Mohawks from the nearby Kanesatake Reserve opposed the construction of a golf-course on an area of land to which they had an outstanding claim. The incident had an enormous impact on the profile of the Aboriginal rights struggle in Canada. See D Lavery and B Morse "The Incident at Oka: Canadian Aboriginal Issues Move to the Front Burner" (1991) 48 *Aboriginal Law Bulletin* 6. For a detailed account of the crisis, see G York and L Pindera *Peoples of the Pines: The Warriors and the Legacy of Oka* (1991); and R Hornung *One Nation Under the Gun* (1991). See also Canada, House of Commons *The Summer of 1990: Fifth Report of the Standing Committee on Aboriginal Affairs* (1991); and D Neel "Life on the 18th Hole" in D Jenson and C Brooks (eds) *In Celebration of Our Survival: The First Nations of British Columbia* (1991).

last decade. Its preparation as a teaching resource also reflects the high level of interest in justice studies and the study of issues of particular concern to indigenous peoples.<sup>45</sup> The collection successfully draws together a wide range of contributions which, although of variable quality, provide a solid introduction to the available literature dealing with aboriginal peoples and the criminal justice system in Canada.

## II. AUSTRALIA

In Australia, Elizabeth Eggleston's *Fear, Favour, or Affection*<sup>46</sup> is commonly identified as the pioneering work in relation to the issue of Aboriginal contact with the criminal justice system,<sup>47</sup> although a serious commitment to research in this area did not really occur until the 1980s. Since this time a number of institutions have contributed to this development. During the 1980s the Australian Institute of Criminology played a major role in the emergence of a growing body of Aboriginal justice research and literature,<sup>48</sup> including the publication of one of the few available Aboriginal justice bibliographies.<sup>49</sup> The *Aboriginal Law Bulletin*, published by the Aboriginal Law Centre at the University of New South Wales has also strongly supported Aboriginal justice research and scholarship.

The latter part of the last decade has seen a strong focus in Australia on the issue of deaths in custody in Australia, a phenomenon which has no direct parallel in Canada. Its impact on the shape and volume of Aboriginal justice literature has been substantial. It has introduced a socio-medical component and thereby further broadened the parameters of the literature.<sup>50</sup> It was obviously the specific impetus

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45 The publication of *Aboriginal Legal Issues*, note 69 *infra*, by The Law Book Company in Australia is similarly encouraging.

46 E Eggleston *Fear, Favour, or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (1976).

47 Other important contributions during this period included B Sanson-Fisher "Aborigines in Crime Statistics: An Interaction Between Poverty and Detectors" (1978) 11 *Australian and New Zealand Journal of Criminology* 71; and M Daunton-Fear and A Freiberg "'Gum-Tree' Justice: Aborigines and the Courts" in D Chappell and P Wilson (eds) *The Australian Criminal Justice System* (2nd ed, 1978).

48 See, for example, B Swanton (ed) *Aborigines and Criminal Justice* (1984); and K Hazlehurst (ed) *Justice Programs for Aboriginal and Other Indigenous Communities* (1985).

49 K Hazlehurst (ed) *Aboriginal Criminal Justice: A Bibliographical Guide* (1986). The amount of material produced in the period between 1986-1993 would certainly warrant a follow-up bibliography.

50 For an introduction to the multi-disciplinary literature in Aboriginal deaths in custody, see D Biles, D McDonald and J Flemming *Australian Deaths in Custody 1980-1988: An Analysis of Aboriginal and Non-Aboriginal Deaths in Prison and Police Custody. Research Paper No. 7* (1989); RD Goldney and JP Reser "Aboriginal Deaths in Custody" (1989) 151 *Medical Journal of Australia* 181; JP Reser "Aboriginal Deaths in Custody and Social Construction: A Response to the View That There Is No Such Thing As Aboriginal

for the appointment of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1987,<sup>51</sup> the output of which has come to dominate - at least in terms of sheer volume - the body of Aboriginal justice literature in Australia.

In its four years of operation the RCIADIC generated an enormous amount of material including a five volume national report and a six volume collection of regional reports, approximately 100 reports of inquiries into individual deaths in custody, an extensive series of research papers, and hundreds of submissions from individuals and organisations. The Commission has also prompted a sizeable and growing body of secondary or 'follow-up' literature, including evaluations and critiques of the RCIADIC's findings and recommendations.

*Aboriginal Perspectives on Criminal Justice*<sup>52</sup> can be located within the 'post-RCIADIC' phase of Aboriginal justice literature, both chronologically, and to a large extent, thematically. Yet, this collection is also a good example of an important direction in Aboriginal justice literature: a conscious commitment to the task of "providing the space for Aboriginal people to put their ideas, research and theoretical perspectives on the criminal justice system."<sup>53</sup>

The majority of the articles contained in the collection were originally presented at a 1991 (Sydney University) Institute of Criminology seminar on "Aboriginal People and the Criminal Justice System: Issues for the '90s", which was particularly significant because, as Cunneen describes in the collection's introduction, "the chairperson and speakers were Aboriginal".<sup>54</sup> Certainly the "key feature"<sup>55</sup> of *Aboriginal Perspectives on Criminal Justice* is the extent to which it reflects a commitment to presenting the views of Aboriginal people of the criminal justice process.

The collection reveals a variety of concerns and a range of emphases amongst the Aboriginal authors, reflecting a significant rebuff to the myth of a homogenous Aboriginal perspective. This diversity is symbolised and further illustrated by the

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Suicide" (1989) 2 *Australian Aboriginal Studies* 43; RG Broadhurst and RA Maller "White Man's Magic Makes Black Deaths in Custody Disappear" (1990) 35 *Australian Journal of Social Issues* 279; and I Temby "Preventing Custodial Deaths: A Systematic Approach" (1989) 22 *Australian and New Zealand Journal of Criminology* 193.

51 According to Commissioner Elliott Johnston, the Royal Commission "was established in October 1987 in response to growing public concern that deaths in custody of Aboriginal people were too common and public explanations were too evasive to discount the possibility that foul play was a factor in many of them": E Johnston, Royal Commission into Aboriginal Deaths in Custody *National Report: Overview and Recommendations* (1991) p 1.

52 C Cunneen (ed) *Aboriginal Perspectives on the Criminal Justice System* (1992).

53 *Ibid* p ix.

54 *Ibid* p vii.

55 *Id.*

inclusion of an artistic component in the form of poems and photographs which express the artists' own concerns about the criminal justice system.

The collection opens with Pat O'Shane's sobering reminder that many of the 'conclusions' of the RCIADIC in relation to the inherent racism of the criminal justice system and its disproportionate impact on Aborigines were available and "vehemently expounded"<sup>56</sup> during the 1970s. The effect of this reminder is to highlight not just the history of current concern about systemic discrimination but to illustrate the inadequacy of conventional non-Aboriginal government responses:

What is interesting, and frustrating, is that every report, every inquiry, every commission reveals the same things. While governments sometimes acknowledge those reports, and sometimes bury them, they do not implement practical programs for change.<sup>57</sup>

According to O'Shane, one of the basic flaws of programmes that have been implemented is that they "...have little Aboriginal involvement in their planning, design, and management."<sup>58</sup>

These sentiments are reflected in Bill Craigie's identification of "the need to return the control of Aboriginal rights to Aboriginal people" as the "essential and fundamental theme" arising out of studies of the impact of the criminal justice system on Aboriginal people.<sup>59</sup> Craigie's argument about the importance of international law in supporting Aboriginal aspirations (in part, by creating obligations for the Federal Government) in relation to matters such as land rights and self-determination, signals a major development in the Aboriginal justice agenda: the making of an explicit connection between Aboriginal over-representation in prisons and the denial to Aboriginal people of "fundamental civil and political rights."<sup>60</sup>

Chapters on Aboriginal-police relations, and the operation of the *Summary Offences Act 1988* (NSW) by Evelyn Crawford and Kevin Kitchener respectively, reveal an increasingly familiar picture of conflict and selective enforcement, and suggest that the problems of the 1990s are not all that different from the problems of the 1980s or the 1970s. The patterns and statistics are made undeniably personal by the accounts of the system's treatment of David Barry offered by Jason Behrendt<sup>61</sup> and Cherie Imlah.<sup>62</sup>

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56 P O'Shane "Aborigines and the Criminal Justice System" *ibid* p 3.

57 *Ibid* p 5.

58 *Id.*

59 B Craigie "Aboriginal People and the Criminal Justice System in the 1990s" *ibid* p 13.

60 *Ibid* p 17. See also S Pritchard *Self-Determination: The Rights of Indigenous Peoples Under International Law* (1990); and L McNamara *Aboriginal Human Rights, the Criminal Justice System and the Search for Solutions: A Case for Self-Determination* (1993).

61 J Behrendt "Prison As a Death Sentence: The Case of David Jason Barry" note 52 *supra* p 26.

62 C Imlah "David" *ibid* p 30.

What *may* be distinctive about the 1990s is the nature of the solutions so clearly mapped, and documented justice administration problems. The centrality of demands for Aboriginal control has already been noted. In her discussion of "Aboriginal Women and the Law"<sup>63</sup> Sharon Payne supports such an approach, confirming that "[s]olutions, and they do exist, will come from within the Aboriginal community."<sup>64</sup> She argues strongly however, that support for Aboriginal autonomy does not necessarily translate to a total endorsement of the re-application of traditional or customary laws:

While I concede traditional law solutions have much to offer and would not wish to undo all that has been positive in taking account of customary law in areas where customary laws are a continuing reality in the lives of traditionally oriented people, the current cry to return wholesale to the old ways is asking for trouble.<sup>65</sup>

Payne argues that "a distortion of traditional law [has been] used as a justification for assault and rape of women, or for spending all the family income on alcohol and sharing it with cousins, justifying the action as an expression of cultural identity and as fulfilling familial obligations."<sup>66</sup> Such observations reinforce the importance of *representative* Aboriginal control of justice reform, and the necessity of innovative and creative responses to the inadequacies of the current justice process.

The "Commentaries" section of the collection contains three chapters. Hal Wootten's contribution - part defence of the RCIADIC,<sup>67</sup> part endorsement of the need for Aboriginal participation in the administration of the justice process - is followed by yet another attempt by James Crawford to argue the merits of formal recognition of Aboriginal customary law in the terms originally recommended during Crawford's time with the Australian Law Reform Commission.<sup>68</sup> The

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63 *Ibid* p 31.

64 *Ibid* p 35.

65 *Ibid* p 37.

66 *Id.*

67 Wootten was responsible for the investigation of 18 individual deaths in custody for the RCIADIC and the production of the *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, note 1 *supra*.

68 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws. Report No. 31* (1986). See also, J Crawford, P Hennessy and M Fisher "Aboriginal Customary Law: Proposals for Recognition" in KM Hazlehurst (ed) note 25 *supra* p 190. To some extent it would appear that the wider Aboriginal justice agenda has moved beyond the specific issue of recognition of customary law, at least in the criminal justice context, to a point where the Australian Law Reform Commission's recommendations are practically redundant. Certainly the Federal Government has treated the 1986 report as irrelevant, or at least insufficiently important to warrant serious attention. Yet, developments such as the consideration by the Legislative Assembly of the Northern Territory Committee on Constitutional Development of the issue of including a recognition of customary law in a draft constitution (Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development *Recognition of Aboriginal Customary Law. Discussion Paper No. 4* (1992)), and the creation of the Council for Aboriginal Reconciliation by the Federal Parliament, illustrate that calls for 'recognition' are still a significant part of the wider Aboriginal rights debate.

collection ends with the editor's own contribution - a discussion of the appropriate place of the concept of over-policing in explaining the experience of Aboriginal contact with criminal justice system. Cunneen's argument about the danger of endorsing over-policing as an easy, but ultimately, simplistic explanation of the nature of the relationship between the justice system and Aboriginal peoples is typically well made.

At a time when there is no shortage of empirical source material on the circumstances of Aboriginal contact with the justice system, *Aboriginal Perspectives on Criminal Justice* represents an important contribution to a growing, and one might venture, increasingly persuasive body of literature in Australia. The collection would be an excellent addition to currently available teaching materials. While it does not provide the extensive coverage of *Aboriginal Peoples and Canadian Criminal Justice* (this is clearly not its objective), it does bring together an important part of the justice reform debate: a range of Aboriginal perspectives. While it stands as an accessible and impressive volume in its own right, it could conceivably be employed as an effective teaching resource, perhaps in conjunction with a more substantive Australian collection such as McRae, Nettheim and Beacroft's *Aboriginal Legal Issues*.<sup>69</sup>

### III. CONCLUSION

The overwhelming theme of both *Aboriginal Peoples and Canadian Criminal Justice* and *Aboriginal Perspectives on Criminal Justice* is the basic need for indigenous control over decision making in relation to issues of social control and justice administration. In this respect both collections are indicative of a broader trend in aboriginal justice literature in both Australia and Canada: the emergence of research and scholarship which supports the autonomy aspirations of indigenous peoples in terms of political and legal status. While the level of support for a fully autonomous Aboriginal justice system, which exists in Canada, has not yet been strongly demonstrated in Australia, it is likely that similar proposals for autonomous dispute resolution and social control mechanisms will be a significant feature of the Australian Aboriginal justice reform agenda during the remainder of the 1990s. A willingness to take account of the experience of, and developments in, countries such as Canada, will go some way towards ensuring the productivity of the debate.

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<sup>69</sup> H McRae, G Nettheim and L Beacroft *Aboriginal Legal Issues: Commentary and Materials* (1991); reviewed by this author in (1991) 20 *Manitoba Law Journal* 708.