

# *Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues*

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## **Introduction<sup>1</sup>**

They are the living example of a whole race of criminals, and have all the passions and all the vices of criminals (Cesare Lombroso, *Crime: Its Causes and Remedies*, p 39).

How we speak, the language and the categories we use, construct problems in particular ways, and imply certain solutions. The object of discussion becomes defined and the possible policy responses are circumscribed to address the 'problem'. The language we use also reflects power: who has the power to define the problem in a particular way, who is silenced by a particular representation. Defining crime, criminals and crime problems are susceptible to these issues of construction and representation, and the consequences can be particularly problematic in matters where crime is aligned with notions of 'race'.

The origins of this article lie in a paper by Weatherburn, Fitzgerald and Hua (2003) published in the *Australian Journal of Public Administration* and widely distributed among government agencies through the New South Wales Bureau of Crime Statistics and Research networks. The purpose of the Weatherburn et al paper was to criticise scholarly explanations of the over-representation of Indigenous people in the criminal justice system. The authors argued that the primary cause of over-representation was widespread criminality among Indigenous peoples, rather than what they termed 'systemic bias' in the criminal justice system. According to the authors too much attention had been paid by academics and researchers to identifying 'systemic bias' as an explanation for Indigenous over-representation. A second leg to their argument was that policy initiatives had been overly focussed on 'diversion' rather than dealing with the underlying causes of offending behaviour. A third leg to the argument is that resources have been directed at diversion rather than reducing offending levels through improved socio-economic conditions.

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At the same time as the Weatherburn article was published, Di Sisely, the then Equal Opportunity Commissioner (EOC) of Victoria, commissioned research to report on over-representation of Indigenous people in the criminal justice system, and the existence of systemic bias, discrimination and institutional racism. The research group included the author and Blagg, Morgan and Ferrante from the Crime Research Centre in Western Australia.<sup>2</sup>

The impetus for this article derives from both the research commissioned by the Victorian EOC<sup>3</sup> and the need to provide a response to the Weatherburn et al argument. A much fuller discussion of the over-representation of Indigenous people in the criminal justice, and in particular the concepts of systemic bias, discrimination and institutional racism can be found in the EOC report (Blagg et al 2005). However, it is important to consider briefly the conceptual framework used to account for differential treatment by criminal justice agencies. One of the problems with the Weatherburn critique of 'systemic bias' is precisely the failure to provide such a conceptual analysis.

The article begins with a discussion of the three concepts often used when discussing and explaining the over-representation of Indigenous people, and racial minorities more generally, in the criminal justice system: systemic bias, racial discrimination (and also 'indirect racial discrimination') and institutional racism. Following this discussion there is a critique of Weatherburn's account of over-representation.

## Conceptualising 'Race' – Based Differences

Although these terms 'systemic bias', 'racial discrimination' (and also 'indirect racial discrimination') and 'institutional racism' are sometimes used interchangeably, they do have different meanings and connotations, and often reflect one's theoretical and methodological focus. A search of the relevant Australian databases such as APAFT, CINCH and AGIS revealed that the concept of systemic bias was used infrequently in the Australian academic and public policy literature on Indigenous people and the criminal justice system. However, it is used far more frequently in North American analysis of race and criminal justice. The use in the US reflects an apparent pre-occupation with individual decision-making and bias. The concepts of racial discrimination (and in particular indirect racial discrimination) and institutional racism are used more often in the Australian context. Institutional racism is a concept commonly used in the UK.<sup>4</sup>

### *Systemic Bias*

Australian database searches revealed that the *only* use of the term 'systemic bias' in academic discussions on Aboriginal people and the criminal justice system was the previously mentioned article by Weatherburn et al (2003). The irony of this is that the point of the Weatherburn article was to criticise the use of 'systemic bias' explanations by other Australian academics writing on Aboriginal over-representation in prison.

Occasionally reports by the Human Rights and Equal Opportunity Commission (HREOC) discuss systemic racism and systemic racial discrimination, although not necessarily in relation to Aboriginal people and the criminal justice system. For example, a report on South Sea Islanders in Australia discusses the history of their treatment in terms of systemic racial discrimination (Race Discrimination Commissioner 1993).

2 See Blagg, Morgan, Cunneen & Ferrante (2005).

3 The views expressed here are those of the author. They do not necessarily reflect the position of the Victorian EOC or the other researchers on the project.

4 For further discussion of the US material and the British discussions on institutional racism since the McPherson Inquiry, see Blagg, Morgan, Cunneen & Ferrante (2005).

Perhaps the closest example to the type of analysis Weatherburn et al (2003) are critiquing is a chapter in the Third Report of the Aboriginal and Torres Strait Islander Social Justice Commission which discusses 'systemic racism' as a cause of Aboriginal over-representation in the juvenile justice system — however, it should be noted that the concept is used far more broadly than simply describing bias in decision-making (Aboriginal and Torres Strait Islander Social Justice Commission 1995).

Two old pieces of research also approximate a 'systemic bias' approach.<sup>5</sup> Both, like the Social Justice Commissioner's report, deal specifically with Aboriginal young people in the juvenile justice system. Significantly however, neither piece of research argues that the over-representation of Aboriginal youth in the juvenile justice system can be solely or even primarily explained by adverse discretionary decision-making. Nor does either piece of research make any claims in relation to Aboriginal adult imprisonment. It is a hollow claim by Weatherburn and his colleagues that 'systemic bias' somehow pervades explanations of Indigenous over-representation in the criminal justice system.

Database searches show that the use of concepts of systemic bias or systemic discrimination are far more frequent in the Australian literature in discussions of gender, sexuality, hate crime and the law. Systemic bias is also used in discussions on judicial decision-making, although again not specifically in relation to Indigenous people. Commonly, systemic bias is associated with individual decision-making processes and a frequently canvassed solution is to make the judiciary more representative of the broader community (Wood 1995, Mason 2001).

### *The US Literature on Systemic Bias*

There is a vast US literature on the question of bias and discrimination in the criminal justice system and it is not the purpose of this article to review that literature.<sup>6</sup> However, there are some salient points for consideration of the Australian situation. Debates over the relationship between race and crime in the US are primarily concerned with the over-representation of African Americans in the criminal justice system. Much of this debate is polarised between those who argue that the over-representation of African Americans is the result of the inherent racism of the criminal justice system and those who argue that, given the high victimisation rates in black communities, under-enforcement of the criminal justice system is the problem rather than over-enforcement.

In discussing the US literature on minority over-representation, both Wolpert (1999) and Davies (2003) make several important points. Firstly, Wolpert argues that much of the adversarial argument between opposing sides creates simple polarities which are antithetical to understanding the complexities of the relationship between 'race' and crime. There is unlikely to be a single answer and reductionist arguments do not assist in understanding complexity.

Secondly, the development of policy to address these issues is unlikely to be mutually exclusive of the two opposing explanatory models. According to Wolpert it is not a zero sum game. For example, 'recognizing racism in police practice and arrest procedures does not mean victim's interests cannot be adequately addressed' (1999:284). Similarly, recognising the criminogenic effects of economic disadvantage and unemployment are important in understanding offending levels in communities irrespective of their racial composition. The lesson from Wolpert's review of the literature is that the simplistic debates in the US between 'racial bias' and 'Black offending' have done little to promote understanding or policy development.

5 Luke & Cunneen (1995), Gale et al (1990) published 10 and 15 years ago respectively.

6 For further discussion see Blagg, Morgan, Cunneen & Ferrante (2005).

Australian discussions on over-representation have tended to avoid of this type of simplistic debate until recently. Most writers and researchers in the area seek to develop explanatory models which account for complexity. Such an approach was a hallmark of the Royal Commission into Aboriginal Deaths in Custody, and has been repeated in major reports, research and writing since then. The exception to this has been Weatherburn et al (2003) who have attempted to generate a polarised debate into an Australian framework where it had been largely absent.

### ***Racial Discrimination***

Racial discrimination and indirect racial discrimination are prohibited under Australian law. It would seem reasonable that criminologists research this issue given that their trade is the study of unlawful behaviour. Indirect discrimination would appear to provide a particularly fruitful area for research given that the prohibition against indirect discrimination 'attempts to combat practices which appear "facially neutral" but which adversely affect a person or group of people who share a common attribute such as race' (Tahmindjis 1995:104).

There have been studies that suggest indirect discrimination may impact on Aboriginal people in contact with the criminal justice system. These have involved discretionary decisions in the juvenile justice system (Gale et al 1990; Luke & Cunneen 1995), and in the provision of mainstream programs to Aboriginal young people in detention where those programs do not relate to the cultural needs of Indigenous youth (Cunneen 1991). However, this work is not presented as an explanation for Aboriginal over-representation in the juvenile (or adult) criminal justice systems.

The Royal Commission into Aboriginal Deaths in Custody suggested in Recommendation 212 that the area of indirect discrimination should be examined for the potential to challenge entrenched institutional practices:

The Human Rights and Equal Opportunity Commission and State Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organisations and Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination and representative actions (Johnston 1991:vol 4, 78).

A leading legal authority on discrimination, Phillip Tahmindjis (1995:123) has concluded 'that instances of indirect racial discrimination may be enormous, occurring in ... employment, education and training, health and justice'. Despite this there appears to be little work by criminologists on how indirect racial discrimination may operate within the criminal justice system and serve to entrench unlawful behaviour against Indigenous people (and other racial minorities). Certainly to my knowledge, no large public-funded crime research organisation like the Australian Institute of Criminology or the New South Wales Bureau of Crime Statistics and Research have ever undertaken this type of important research. One can only speculate that the study of unlawful behaviour on the part of government agencies connected to the criminal justice system is too sensitive for government-sponsored criminology.

### **Institutional Racism**

The concept of institutional racism has been used more frequently than 'systemic bias' in the Australian literature when discussing the relationship between Indigenous people and the criminal justice system.<sup>7</sup> It is important to distinguish racism from prejudice, discrimination and other types of hostility or aggression which are explained in terms of individual pathology. Hollinsworth notes:

Racism is not primarily a psychological or person attribute but is much more a relationship of domination and subordination, of inclusion and exclusion. We can identify different forms of racism including interpersonal, institutional, ideological and systemic (Hollinsworth 1992:40).

The concept of racism and institutional racism refers to broad social practice compared to 'bias' which tends to relate to individual decision-making. At times in the literature, institutional racism and indirect discrimination appear almost interchangeable, and this perhaps relates to the attempt to join a concept used in sociology and studies of racism (institutional racism) with a concept which has legal force (indirect discrimination).

The concepts of racism and 'institutional racism' in relation to Indigenous people and the criminal justice system are used in several reports by the Human Rights and Equal Opportunity Commission (HREOC), the Royal Commission into Aboriginal Deaths in Custody, and various academic writings, including some by this author (Cunneen 2001a).

The question of racism was fundamental to the Royal Commission into Aboriginal Deaths in Custody: racism is 'institutionalised and systemic, and resides not just in individuals or in individual institutions, but in the relationship between the various institutions' (Johnston 1991:vol 4, 29.5.2, 124). According to Elliot Johnston, non-Aboriginal people have great difficulty understanding institutional racism, particularly as it has changed over time. The period of protection and assimilation were perhaps more easily identifiable as institutionally racist, however, according to Johnston, institutional racism in the contemporary period is more subtle and not always obvious. He defines institutional racism in the following way:

An institution, having significant dealings with Aboriginal people, which has rules, practices, habits which systematically discriminate against or in some way disadvantage Aboriginal people, is clearly engaging in institutional discrimination or racism (Johnston 1991: vol 2, 161).

## **Explaining Indigenous Over-Representation: The Weatherburn Thesis**

Having established the broad conceptual framework for discussing systemic bias, discrimination and institutional racism, the second part of this article turns to a specific discussion of over-representation advanced by Weatherburn and his colleagues. The argument is simple enough: the main reason Aboriginal people are over-represented in *prison* is because they commit many more offences than non-Aboriginal people. From Weatherburn's perspective most other people researching and writing in the area have it wrong because they have erroneously argued that the main reason Aboriginal people are over-represented in prison is because of 'systemic bias' in the criminal justice system. Weatherburn does not define what he means by 'systemic bias', and it has been established in the first part of this article that it is difficult to locate recent instances where the concept has been used at all in relation to Indigenous people.

It is important to note that Weatherburn is referring specifically to prison custody and the reasons for over-representation in imprisonment levels. Much of the literature he is critical of in fact relates to police custody — a point that is not acknowledged. For example, it is hardly surprising that the Royal Commission into Aboriginal Deaths in Custody had a

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7 And, indeed, the relationship between Indigenous people and state bureaucracies more generally. For a discussion on institutional racism and health services for Aboriginal people see Mooney (2003).

focus on reducing Indigenous people in police custody when two thirds of the deaths in custody investigated by the Commission occurred in police custody rather than prison. A reduction in the number of Indigenous people (and indeed all people) in police custody is clearly a legitimate aim in itself. Targeted strategies aimed at reducing rates of police custody will not necessarily translate into reduced rates of imprisonment. It seems disingenuous to criticise strategies aimed at reducing police custody for not having an impact on imprisonment.

### ***Underlying Issues vs Discrimination: An Artificial Argument***

The second leg of the Weatherburn argument is that too much attention has been paid to changing the criminal justice system (primarily through diversion) as a way of reducing Indigenous over-representation rather than attacking the causes of offending behaviour.

A central problem with the Weatherburn approach is that it constructs a simple binary explanation for Aboriginal over-representation in prison as either the result of systemic bias *or* offending levels among Aboriginal people. This binary approach is simplistic on a number of levels, but perhaps most importantly it constructs one explanation, 'systemic bias', to enable the positioning of its own preferred explanation of 'offending levels'. A significant problem is that no-one actually uses the explanation of 'systemic bias' to explain Indigenous over-representation in prison. From this simplistic dichotomy Weatherburn et al draw a further simple polarity: most reform activity has been directed at diversion, rather than addressing offending levels by Indigenous people.

The Weatherburn approach creates this simple binary opposition by ignoring inconvenient arguments, or seriously distorting the literature. The need for a multifaceted conceptualisation of Aboriginal over-representation which goes beyond single causal explanations (such as poverty, racism, etc.) has been acknowledged for decades. An adequate explanation involves analysing interconnecting issues which include historical and structural conditions of colonisation, of social and economic marginalisation, and institutional racism, while at the same time considering the impact of specific (and sometimes quite localised) practices of criminal justice and related agencies (Cunneen 2001a).

The Royal Commission into Aboriginal Deaths in Custody acknowledged the importance of history, and the complexity of the interaction between Indigenous people and the criminal justice system:

One of the central findings of the Commission is that a multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody and tragically to die there ... So much of the Aboriginal people's current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past (Johnston 1991: vol 2, 1).

The Royal Commission was also very clear in its analysis of the approach to dealing with the over-representation of Indigenous people in the criminal justice system. It concluded in 1991 that the over-representation of Indigenous people in the criminal justice system is inextricably linked to their socio-economic status. The Report found that:

The single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally (Johnston 1991: vol 1, 15).

As the Aboriginal and Torres Strait Islander Social Justice Commissioner has more recently concluded regarding the Royal Commission:

The emphasis on the social, economic and cultural disadvantage underlying incarceration and deaths in custody was a defining characteristic of the Report. It linked the *symptoms* of Indigenous distress, such as the high rate of encounters with the criminal justice system, with the underlying *cause* of systemic disadvantage suffered by Indigenous Australians (Aboriginal and Torres Strait Islander Social Justice Commissioner 2003:4).

The central finding of the Royal Commission was that Aboriginal people die in custody at a rate relative to their custodial population. However, 'the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often' (Johnston 1991:vol 1, 6). The Royal Commission found that there were two ways of tackling the problem of the disproportionate number of Aboriginal people in custody. The first was to reform the criminal justice system; the second approach was to address the problem of the more fundamental factors which bring Indigenous people into contact with the criminal justice system — the underlying issues relating to over-representation. The Commission argued that the principle of Indigenous self-determination must underlie both areas of reform. In particular the resolution of Aboriginal disadvantage could only be achieved through empowerment and self-determination. The Royal Commission always prioritised the question of underlying issues:

Changes to the operation of the criminal justice system alone will not have a significant impact on the number of persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant factors in over-representation (Johnston 1991: vol 4, 1).

However, the Royal Commission also found that there was much potential to reform the criminal justice system, including both increased diversion from the system and reforms for minimising deaths in custody. This overall focus is reflected in the recommendations from the Royal Commission. The 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody can be broadly grouped as follows:

- 126 recommendations dealing with underlying issues.
- 106 recommendations dealing with over-representation in the criminal justice system.
- 107 recommendations dealing with deaths in custody (Victorian Implementation Review Team 2004:18).

More than a third of recommendations dealt with underlying issues, slightly less than a third dealt with the changing the criminal justice system to minimise over-representation and another third with deaths in custody issues. That many of the recommendations dealt with diversion from police custody is also hardly surprising given that two thirds of all the deaths which were investigated occurred in police custody. Furthermore, most Aboriginal people at the time of the Royal Commission were in police custody for public drunkenness and, to a lesser extent, street offences (Johnston 1991:vol 1, 12–13).

Weatherburn et al misrepresent the literature on over-representation. An example is the reference to the Cunneen and McDonald (1997) report *Keeping Aboriginal and Torres Strait Islander People Out of Custody*. Weatherburn et al (2003:66) state:

Cunneen and McDonald acknowledge that Aboriginal offending patterns may explain Aboriginal over-representation in prison but devote most of their discussion to the discriminatory treatment of Aboriginal people by the law, the police and the courts.

As a point of fact, *Keeping Aboriginal and Torres Strait Islander People Out of Custody* was a report commissioned by ATSIC with specific terms of reference to analyse the implementation of 74 recommendations directly related to reducing custody levels in the criminal justice system through changes to the operation of the criminal justice system. It was never meant to be either a comprehensive explanation of over-representation, nor an explanation of systemic bias. Nor did it only deal with prison custody. As noted in the introduction to the report:

The Royal Commission concluded that a direct link exists between the underlying issues (such as poverty, discrimination, employment, health, education, etc.), offending, criminal justice system responses to Aboriginal people and Aboriginal offending, over-representation in custody, and deaths in custody. This study does not address that totality ...

In restricting our attention to a set of recommendations directly concerned with reducing over-representation, we are not, in any sense, suggesting that the other recommendations (especially those dealing with the underlying issues) are unimportant or less important. Indeed, we are aware that ATSIC has contracted other researchers to undertake parallel studies addressing other groups of recommendations ... We stress that, if the national goals of eliminating Aboriginal deaths in custody, over-representation in custody, and Aboriginal disadvantage generally, are to be achieved, action is required in *all* the areas covered by the Royal Commission's recommendations and possibly beyond them [emphasis in the original] (Cunneen & McDonald 1997:16).

Weatherburn et al do not cite the most comprehensive book on Indigenous legal issues which is McRae et al (2003). However, as with all major writers in the area, the authors note that:

Drawing attention to the complex mix of factors and underlying causes which contribute to Indigenous over-representation does not involve ignoring the need for changes to the operation of the criminal justice system ...

In addressing the 'intra-system' factors that contribute to over-representation, and associated reform strategies, it is important to recognise the limitations of simply 'tinkering' with the existing criminal justice system. The absolute necessity of a fundamental change in the social, economic and political conditions of Indigenous people --- including the achievement of meaningful self-determination --- must be borne in mind (McRae et al 2003:493-494).

It has not been possible to identify any scholars working in the area who explain Indigenous over-representation as a result of 'systemic bias'. Most take a much more nuanced and complex approach to the problem.

### ***The Consideration of Economic Factors***

One of the argument's put forward by Weatherburn is that economic factors associated with Indigenous over-representation have been ignored by researchers. There is certainly more room for research in this area, as well as the links between schooling, education and offending by Indigenous young people. However, there has been considerable reference to economic factors associated with Indigenous over-representation. Numerous studies have indicated the links between the socio-economic position of Aboriginal people and the level of offending by Aboriginal people, including Cunneen and Robb (1987), Devery (1991) and Beresford and Omaji (1996). An Australian Institute of Criminology study has also noted the importance of considering the links between offending levels (as measured by imprisonment figures) and employment and educational disadvantage (Walker & McDonald 1995). The authors identify the association of social problems such as crime, with unemployment and income inequalities. They suggest that the reason crime is so



problematic in Aboriginal communities is because of the lack of employment, educational and other opportunities. The authors argue that social policies aimed at improving these conditions are likely to have a significant effect on the reduction of imprisonment rates (Walker & McDonald 1995:6).

More recently, Hunter and Borland (1999) found that the high rate of arrest of Aboriginal people, often for non-violent alcohol-related offences, is one of the major factors behind low rates of employment. Hunter (2001) has argued that improving labour market options for Aboriginal people would markedly reduce arrest rates. Cunneen (2002) in a recent discussion paper for New South Wales AJAC links specific economic and social disadvantage in ATSIC regions in New South Wales with high levels of court appearances, imprisonment and victimisation for Indigenous people in those ATSIC regions.

### ***Aboriginal Organisations and Policy Development***

One of the most serious omissions in the Weatherburn argument is the absence of any consideration of the role of Indigenous organisations in identifying and dealing with issues of Indigenous over-representation. Some of the key developments over the last decade and half include the work by Aboriginal Justice Advisory Committees (AJACs), the Indigenous and Ministerial summits and the subsequent development of Aboriginal Justice Plans in many Australian jurisdictions.

The establishment of AJACs developed directly from the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Most AJACs have argued for many years that there is a need to address both underlying issues and the more immediate causes of Aboriginal over-representation in the criminal justice system. Arising from the work of the AJACs were the National Indigenous and Ministerial Summits of 1997. The major outcome of these Summits was the commitment to develop Aboriginal Justice Plans or Justice Agreements. The focus of these has been to address underlying social, economic and cultural issues; justice issues; customary law; law reform and funding levels. The plans may include jurisdictional targets for reducing the rate of Indigenous over-representation in the criminal justice system (such as the *Queensland Justice Agreement*); planning mechanisms; methods of service delivery; and monitoring and evaluation.

As an example, the *Victorian Aboriginal Justice Agreement* discusses a number of issues which contribute to Indigenous over-representation in the criminal justice system. The first that is highlighted is underlying issues. The *Agreement* states:

The over-representation of Aboriginals within the criminal justice system cannot be considered in isolation from their social environment. Factors such as extreme social and economic disadvantage experienced by Aboriginal people (originally identified by the Royal Commission) remain largely unchanged and continue to place enormous stress in families and communities. The factors include high unemployment levels, poor education outcomes, poor health and low life expectancy, inadequate housing, and widespread welfare dependency (*Victorian Aboriginal Justice Agreement*:12–13).

Indigenous organisations and government policy development has clearly acknowledged the need for balanced approaches to dealing with Indigenous over-representation in the criminal justice system, and this is clearly reflected in the diverse range of strategies to be found in various justice agreements. It is simply not the case that 'diversion schemes of one kind or another have been the dominant means by which most State and Territory governments have sought to reduce Aboriginal over-representation in prison' (Weatherburn et al 2003:69).

### ***Absence of Reference to the Literature on Aboriginal Victimization or Indigenous Programs***

Weatherburn et al's (2003:65) argument that 'the dominant focus of scholarly attention ... has been on systemic bias' is, at best, a gross misrepresentation of a broad-ranging literature that is both theoretical and policy-directed in its focus. The Weatherburn argument provides no acknowledgement or reference to the academic and public policy work that has been conducted on issues of Indigenous victimisation and crime prevention. Over the last decade there has been a particular concentration on the level of violent crime in Aboriginal and Torres Strait Islander communities in Australia. Perhaps the most comprehensive report in regard to this issue is *Violence in Aboriginal Communities* (Memmott et al 2001).

There has also been a series of studies on domestic (or family) violence in Aboriginal communities (Blagg 2000a, 2000b, 2001), a review of crime prevention programs in Aboriginal communities (Cunneen 2001b), comprehensive work on night patrols (Blagg & Valuri 2003, 2004), emerging research on Aboriginal courts (Harris 2004, Marchetti & Daly 2004) and the relationship between governance and community justice mechanisms (Blagg 2005). In fact, if one was to characterise the criminological literature on Aboriginal people and the criminal justice system over the last ten years it is dominated, not by concerns about systemic bias, but rather with the development of effective programs for dealing with crime in Aboriginal communities that are cognisant of Aboriginal demands for self-determination.

Nor have the connections between offending and abuse of alcohol and other drugs been neglected by researchers or policy makers. The Race Discrimination Commissioner (1995) argued that there was a direct link between alcoholism and unemployment, poverty, education and high rates of imprisonment. The Weatherburn article simply glosses over the complex regulatory issues around alcohol use and abuse. It is clear that the proportion of Indigenous people who *do not consume alcohol* is twice as great as the proportion among non-Indigenous people (32 per cent compared to 16 per cent). However, among those who do drink there are twice the proportion of Indigenous people who drink at harmful levels than non-Indigenous people (22 per cent compared to 10 per cent), and harmful drinking starts at an earlier age among Indigenous people (Race Discrimination Commissioner 1995:12).

Alcohol consumption also varies significantly depending on the kind of community in which people reside. We do not have good national information on these issues. However, Northern Territory data suggests that alcohol consumption is greater in camps around larger towns and least among people living in remote communities (Race Discrimination Commissioner 1995:13).

Reports by the Race Discrimination Commissioner on Mornington Island during the early 1990s clearly indicated the problems where local Aboriginal councils have an economic dependency on the sale of alcohol, and on the problems associated with prohibition where communities are often evenly split over whether the sale of alcohol should be regulated according to mainstream standards or prohibited. If there is insufficient community support for prohibition, then the consequent development of an illicit market in alcohol can lead to great social harm with few benefits. The current development of alcohol management plans in Queensland arising from the Cape York Justice Study shows the problems that arise where there is inadequate local community support for supply restrictions.<sup>8</sup> It also shows how a selective prohibition model can have significant criminalising effects in Aboriginal communities.<sup>9</sup>

In 'dry' Indigenous communities there may be still significant drug problems. The Pitjantjatjara lands are an example where alcohol is prohibited but there has been a long-running and very serious issue of petrol sniffing, and this is despite criminalisation through by-laws and heavy restrictions on access.

There is also an absence by Weatherburn of any serious discussion of the development and evaluation of Indigenous programs. The authors state that the *only* diversion program shown to reduce Indigenous crime and recidivism is youth justice conferencing (Weatherburn et al 2003:70). Such a statement is parochial (presumably the authors are thinking of New South Wales) and shows a lack of engagement with what has been happening in the area of Indigenous justice. There have been positive evaluations of, for example, community justice groups in Queensland dating back to the 1990s (Cunneen 2001b). It also ignores the development of widespread initiatives such as Aboriginal Courts in South Australia, Victoria and Queensland; community supervision in Western Australia; community patrols throughout Australia (Blagg & Valuri 2003, identified 100 such patrols); and anti-violence programs (Memmot et al 2001, identified 131 such programs).

Many of these are Indigenous community initiatives providing both community capacity building and localised responses to crime problems. These programs will never be evaluated to the statistical standards of a government-funded research body. Indeed in many cases their annual operating budgets are significantly less than the cost of a professional evaluation. More importantly, often the strength of these community-based programs is their localised role in community governance and their capacity to operate in the margins of state regulation and control. To simply characterise them as 'diversion' is to miss their most critical functions and to fail to understand why they may have such important impacts on reducing offending behaviour.

### ***Data on Offending and Victimization***

A small section of the Weatherburn et al paper presents new data on Indigenous arrest rates and self-reports of offending for New South Wales. The data on arrest rates is unproblematic if taken as simply arrest rates rather than offending rates, and reflects similar findings to work the Crime Research Centre in Western Australia has been producing for a decade. There is also the presentation of data on prior convictions — again material which has been available for some jurisdictions and as a result of particular studies for many years (for an overview see Cunneen 2001a:28). What is new in the Weatherburn article is that the data is provided for adults in New South Wales.

The Weatherburn argument attempts to pre-empt criticism on the limit of arrest data as a true reflection of actual offending levels by arguing that a self-report study of high school students in New South Wales also shows that Aboriginal young people report higher levels of offending than non-Indigenous youth. There is no reference to any of the problems associated with self-report data, and in particular the limitations of the data with minority groups.<sup>10</sup>

The authors draw the conclusion that differences in arrest rates 'are reflective of real differences and patterns of involvement in crime among Aboriginal and non-Aboriginal people' (Weatherburn et al 2003:69). This ambiguous statement side-steps the critical issue.

8 'Palm Island Tensions Rise in Response to Proposed Alcohol Bans' <<http://www.abc.net.au/pni/content/2005/s1285818.htm>>.

9 Criminal charges related to alcohol possession in prohibited areas rose by 414% in the Aboriginal communities where alcohol management plans had been introduced (Cunneen et al 2005:156).

10 See Walker et al (1996:47) for discussion of some of the problems minorities and self report data in the US.

If all Weatherburn is arguing is that Indigenous people commit more offences than non-Indigenous people, and their pattern of offending is different from non-Indigenous people then there will be little argument. I am not aware of anyone researching, writing or developing policy in the area who would argue against that proposition.

However, the broader Weatherburn argument that ‘the leading current cause of Aboriginal over-representation in prison is ... high rates of Aboriginal involvement in serious crime’ (Weatherburn et al 2003:65) is less clear cut. It is my argument that we simply do not know the ‘real’ level of offending by Indigenous people. Epistemologically, I would question whether this is indeed ‘knowable’ separate from the agencies which identify and process crime. We simply cannot discount the contribution of institutional practices and legal frameworks within which criminalisation and the use of imprisonment is embedded. To state this is not to minimise the fact that serious criminal acts occur in Indigenous communities — the homicide rate alone is witness to this (Mouzos 1999). Nor is it an argument that the volume of serious offences is not a significant cause of over-representation.

There is a further problem: neither the arrest data nor the self-report data presented by Weatherburn come near to matching the rate of over-representation of Indigenous people in prison. Indigenous people are around *17 times* over-represented in New South Wales prisons on census data (and higher still on reception data when that is available) (SCRGSP 2004). Yet Weatherburn et al’s arrest data show much lower levels of over-representation and particularly so for serious offences (5.7 times for murder, 3.8 times for sexual assault, 3.4 times for child sexual assault). The highest rate of over-representation in the list of offences provided by Weatherburn is for break and enter (9.9 times) and assault (11.1 times).

Similarly, the self-report data by young people at school shows for most offences an over-representation of Indigenous youth in reported offences by a factor of 2 or less. In other words, Indigenous young people report committing offences at around twice the rate of non-Indigenous youth, yet they are *15.6 times* over-represented in juvenile detention (SCRGSP 2004). Given this disparity between self-report and detention levels, it is not surprising there is a concern about whether Indigenous young people are being diverted from the juvenile justice system to the same extent as non-Indigenous youth, and whether bail and breach of bail poses particular issues for Indigenous young people.

By criticising the Weatherburn et al argument, I am not suggesting that the level of offending among Indigenous people is not a problem. I am, however, arguing against simplistic propositions concerning the relationship between the volume of Indigenous offending and their level of over-representation in adult and juvenile prisons. The relationship is complex and mediated by a range of factors other than offending. For example the Weatherburn thesis gives us little scope to understand why, for example, the imprisonment rate of Indigenous people in New South Wales is roughly double that of Victoria (1,970.9 compared to 1,060.3 per 100,000 at the 2001 prison census (ABS 2002:3)).

### ***Distortion of Facts on Commonwealth Funding After the Royal Commission into Aboriginal Deaths in Custody***

Indicative of the problems with the Weatherburn argument, and the tendency to misrepresentation, is the discussion of Commonwealth funding in response to the Royal Commission. Weatherburn et al (2003:69) claimed that:

Much of the money allocated by the federal government to state and territory governments in response to the RCIADIC recommendations has been directed at programs designed to alter police procedure or the operation of the criminal justice system.

Such a statement attempts to support the argument that too much attention has been paid to remedying the criminal justice system of 'systemic bias' rather than attacking the root causes of offending behaviour. However, the statement by Weatherburn et al is wrong and displays either an attempt to deliberately mislead readers or a reckless disregard for the truth.

Weatherburn et al cite Cunneen and McDonald (1997:224) as the source of the material demonstrating the apparent 'over' spending on police and the criminal justice system. The material in the Cunneen and McDonald report is reproduced below in Table 1. The columns showing percentages have been added.

The \$400 million allocated by the Commonwealth as a response to the Royal Commission was developed in two stages in March 1992 and June 1992. One thing that is immediately apparent from Table 1 is how little of the money was allocated to the criminal justice system. Some \$7.52 million was allocated to 'reforms to policing, custodial arrangements, criminal law, judicial proceedings and coronial inquiries'. This amount represented 5 per cent of the first stage allocation, and 1.9 per cent of the total \$400 million. A further \$6.94 million was allocated to 'youth bail services'. This amount represented 4.6 per cent of the first stage allocation, and 1.7 per cent of the total \$400 million package. Even if the allocation of funds to the Aboriginal Legal Services is included in this amount it still represents less than 16 per cent of the total Federal allocation to Royal Commission recommendations.<sup>11</sup>

It is quite clear that the overwhelming bulk of Commonwealth money after the Royal Commission went to addressing the underlying issues. The largest single allocation was to drug and alcohol services. More money was allocated to Aboriginal pre-school places than to reforms to policing. Much of the second stage allocation went to economic development including land acquisition, employment programs and other economic initiatives. Weatherburn et al misrepresent the allocation of Commonwealth monies in an attempt to demonstrate that money was (mis) spent on reforming the criminal justice system rather than attacking the underlying issues. Not only is this wrong, it also diverts attention away from a more important question: if so much of the Commonwealth allocation was directed at underlying issues, why haven't we seen a marked improvement in the socio-economic situation of Indigenous people and a lessening in over-representation in prison?

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11 It is not accurate to see the allocation of funding to the Aboriginal Legal Services as simply connected to the operation of the criminal justice system. The Royal Commission into Aboriginal Deaths in Custody recognised the important work of ATSILS in safeguarding and promoting the legal rights of Indigenous people in all areas of the law both civil and criminal, and also included the ability to provide community legal education, engage in policy development and advocate for law reform. A specific area discussed by the Royal Commission was the need to ensure Aboriginal women's interests were represented by ATSILS. For further discussion see Blagg et al (2005).

**Table 1. Commonwealth Expenditure Related to the Royal Commission into Aboriginal Deaths in Custody**

<b>The Commonwealth Response to the Royal Commission into Aboriginal Deaths in Custody</b>	<b>\$ Million</b>	<b>% Each Stage</b>	<b>% Total</b>
<b>First Stage Response Announced 31 March 1992: \$150 million over five years</b>			
Aboriginal drug and alcohol services	71.6	47.7	17.9
Aboriginal legal services	50.4	33.5	12.6
Reforms to policing, custodial arrangements, criminal law, judicial proceedings and coronial inquiries	7.52	5.0	1.9
Youth bail hostels	6.94	4.6	1.7
Link Up services	1.9	1.3	0.5
National Aboriginal & TSI Survey	4.4	2.9	1.1
ATSIC Monitoring Unit	4.3	2.9	1.1
Monitoring and reporting on the human rights of Aboriginal and TSI people by the Commonwealth Human Rights & Equal Opportunity Commission	3.14	2.1	0.8
<b>Subtotal</b>	<b>150.2</b>	<b>100.0</b>	
<b>Second Stage Response Announced 24 June 1992: \$250 million over five years</b>			
Land acquisition and development program	60.0	24.0	15.0
Aboriginal Rural Resources program	6.6	2.6	1.7
Community Economic Initiative Scheme	23.3	9.3	5.8
Australian National Parks and Wildlife Service contract employment program for managing natural & cultural resources	10.6	4.2	2.6
Aboriginal industry strategies in the pastoral, arts and tourism areas	15.0	6.0	3.7
Community Development Employment Program	43.9	17.5	11.0
Young Peoples' Employment Program	21.9	8.7	5.5
Young Peoples' Development Program	23.0	9.2	5.7
Aboriginal Youth Sport & Recreation Development Program	9.0	3.6	2.2
Additional Aboriginal Education Workers	20.0	8.0	5.0
600 more pre school places for Aboriginal children	10.0	4.0	2.5
Improved co-operation between the Commonwealth & the States/Territories; assist them to monitoring initiatives arising from the RCIADIC	6.9	2.7	1.7
<b>Subtotal</b>	<b>250.2</b>	<b>99.8</b>	
<b>Total</b>	<b>400.4</b>		<b>100.0</b>

Source: Cunneen &amp; McDonald 1997:224-225.

## Conclusion: Human Rights, Racial Discrimination and Over-Representation

The purpose of this article has been to explore some of the conceptual issues around systemic bias, racial discrimination and institutional racism, as well as providing an assessment of Weatherburn et al's arguments concerning Indigenous over-representation. Some general conclusions that can be drawn in relation to over-representation of Indigenous people in the criminal justice system include the following.

Firstly, there is a need for clarity in regard to the terms we use, and an appreciation of the differences between concepts such as systemic bias, racial discrimination and institutional racism. There is also a need to understand the limitations of statistical data in terms of analysing racial discrimination (particularly indirect discrimination) and institutional racism. The phenomenon of institutional racism is much deeper than statistics are likely to reveal, although data may show important trends in access and equity.

Second, there is a need to develop explanatory models which understand and account for complexity both in terms of offending behaviour, as well as criminal justice responses to social groups, particularly where those groups have been racialised. Related to this point is that public policy responses are likely to require complex, multifaceted and targeted initiatives across a broad range of areas.

Diversion has been one strategy used in an attempt to minimise contact with criminal justice agencies, particularly the police and courts. It has been part of multiple government strategies for Indigenous peoples including those which focus on employment, education, health, violence prevention, etc. However, in my view the Weatherburn article fails to distinguish between diversion and Indigenous programs related to community capacity building and control over offending behaviour. What looks like 'diversion' from a non-Indigenous, orthodox criminological perspective, may look like community control with a commitment to actualising self determination from an Indigenous perspective. To characterise community initiatives like night patrols, circle sentencing or community justice groups as 'diversion' betrays a profound lack of appreciation of the origin of these interventions and their capacity to generate individual and social change.

Finally, there is a need to understand, document and challenge racial discrimination and institutional racism, and such a challenge is not only about constructing an explanation for Indigenous over-representation in the criminal justice system. It is also fundamentally about issues of equity, justice and human rights. The study of racism in the criminal justice system is an important human rights and public policy issue, *irrespective* of whether it has any connection to explaining the over-representation of Indigenous people. There are a number of reasons why criminologists should be concerned with this issue:

- Racial discrimination is unlawful behaviour under domestic and international law.
- Equity is a fundamental principle in the provision of government services.
- Equality before the law is a fundamental principle to the rule of law.
- There is a small but important tradition in criminology which regards the abuse of human rights as a crime, and a fundamental area for theory and research.<sup>12</sup>

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12 For a recent example see, Green & Ward (2004).

It is interesting that when lawyers study issues of discrimination they are not questioned as to the relevance of the work they undertake, and this is probably because principles of fairness, equality and non-discrimination are seen as foundational principles to the rule of law. Nor are sociologists or political scientists questioned as to their interest in institutional racism perhaps because the analysis of social and political power is fundamental to their disciplines. Yet it is a very different situation when criminologists undertake this type of work, perhaps because the vast bulk of criminological research sees crime within the narrow confines of individual responsibility and the criminal law, and state responses as the more or less technical application of laws, policies and procedures to control crime. Most government-employed 'administrative' criminologists steer as far away as possible from broader issues of fairness, equality and human rights. Yet, criminologists can make a significant contribution to the study of these issues and it is a study that can be justified on political, moral and disciplinary grounds.

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