Overpolicing: A critical commentary on its conceptualisation and utility in Australian criminological explanations about Aboriginal over-representation in police arrest and custody rates

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A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

Charles Sturt University
October 2009
In their submissions to the Royal Commission into Aboriginal Deaths in Custody, ‘Aboriginal people most frequently identified their relations with police officers as the most serious and constant indicator of the injustice and prejudice which they experience in society’ (Johnston, 1991, Vol 2, p. 207).
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Certificate of Authorship

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma at Charles Sturt University or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by colleagues with whom I have worked at Charles Sturt University or elsewhere during my candidature is fully acknowledged.

I agree that this thesis be accessible for the purpose of study and research in accordance with the normal conditions established by the Executive Director, Library Services or nominee, for the care, loan and reproduction of theses.

Signed

Date
Acknowledgements

In completing this project, I wish to thank my current Principal Supervisor, Dr Christine Jennett, for understanding what I wanted to say and for giving me appropriate guidance to be able to finalise the thesis in a timely manner. The journey to completion has been episodic and long given the necessity to undertake the study on a part-time basis while employed full-time as Director of an Indigenous Higher Education Centre, initially at Charles Sturt University and subsequently, the University of Southern Queensland. In both instances, I truly appreciated the support of the Vice Chancellors at each institution (Professor Ian Goulter and Professor Bill Lovgrove) who approved the provision of two short periods of leave of absence from the workplace to progress the writing phase of the project. Prior to Dr Jennett’s involvement, Professor Julie Marcus and Dr Sharon Pickering proved invaluable as both mentors in research higher degree training and as enthusiastic academic colleagues in the promotion of the discipline of Criminology.

On a personal level I thank my wife, Dr Kaye Price, who has been there for me from beginning to end and who kept me from giving up when employment, cultural and community issues frequently weighed so heavily on my mind.
Mr J Williams-Mozley  
School of Human Services  
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Carseldine Qld 4034  

11 October 1999

Dear Mr Williams-Mozley

Thank you for the additional information forwarded in response to a request from the Ethics in Human Research Committee.

The Committee has approved your proposal "A qualitative exploration into the policing of Aboriginal peoples' use and occupancy of public space and the consequent usefulness of current criminology conceptualisations of 'over-policing'". The protocol number issued with respect to the project is 99/027.

You must notify the Committee immediately should your research differ in any way from that proposed.

You are also required to complete the attached Report form and return it on completion of your research or by 30 June 2001 if your research has not been completed by that date.

Please don't hesitate to contact Mrs Kaye Price on telephone (02) 6338 4200 if you have any enquiries about this matter.

Yours sincerely

Kaye Price

Bernadette Denman  
Executive Officer  
Ethics in Human Research Committee
Abstract

This thesis examines the origin, usage and utility of the concept of overpolicing. Equally importantly, the thesis will explore how, and in what manner, ‘overpolicing’ became established in criminological accounts about Aboriginal over-representation in police arrest and custody rates.

In doing so, the thesis critically evaluates criminological literature pertaining to the policing of Aboriginal people and illustrates how sections of this literature are underscored by propositions about institutional or systemic racism as a function of internal colonialism. The historical and contemporary expression of institutional or systemic racism is argued as being located in policing’s uninterrupted pre-occupation with maintaining social order and control with respect to Aboriginal people’s languages, behaviours and interactions in public space. In illustrating these phenomena, the thesis shows how this literature has largely been developed within the critical and conflict perspectives of sociological Criminology and the crime control model of Criminal Justice. From the latter, with its emphasis on the promotion of hard or pro-active policing practices, the thesis explores the notion of ‘overpolicing’ which arose in the aggressive policing context of North America’s ‘War on Drugs’ and subsequently, its metamorphosis within the Australian policing context as an academic discursive device to both describe and illustrate the manner in which Aboriginal people are policed.
The thesis develops a research and methodological framework that, as a result of focusing on Australian Criminology’s explanatory treatments about the causes of Aboriginal over-representation in police arrest and custody, turns the spotlight onto the range of public order policing practices that are argued as being symptomatic of overpolicing (Cunneen & Robb, 1987; Cunneen, 1990, 1991, 1992a). At this time, no examination has yet been conducted into the history of the emergence, usage or utility of a concept of overpolicing in Australia or elsewhere, and this thesis constitutes the first such examination.

The preliminary chapters of the thesis provide an historical and political analysis of the institution of policing in settler and post-colonial Australian society, emphasising its racist underpinnings and pre-eminent concern with the supervision and surveillance of Aboriginal community life. From there, the thesis moves outside Australia to North America where the term overpolicing first arose in the literature in 1966 and examines the concept’s early usage in that particular policing environment.

Returning to Australia, I investigate empirical research undertaken between the period 1976 and 1996 to develop an account of the key ideas of major writers who attempt to explain Aboriginal over-representation, the nature and scope of Aboriginal crime and Aboriginal criminality, as well as police practices that are argued as contributing to the over-representation of Aboriginal people in arrest and custody rates. Subsequently, a classificatory model is developed for locating research on the issue of Aboriginal over-representation in a chronology, the temporal mid-point of which is aligned
to the period of the conduct of the Royal Commission into Aboriginal Deaths in Custody.

Parallel to this investigation, I examine the emergence and usage of a concept of overpolicing as both a descriptive and discursive device to capture the way in which Aboriginal people are policed in the Australian policing context and also briefly describe research conducted in Canada concerning the overpolicing of Canadian Aboriginal people. In conclusion, the thesis proposes that although the concept has gained more widespread currency as a political tool in questioning the nature and validity of police activities in Aboriginal communities and lifestyles, the concept remains contentious and ill-defined. Further investigations will be required to better articulate the concept’s explanatory power, its alignment with current criminological theories explaining Aboriginal over-representation, and its potential to denote how, when, and in what manner, overpolicing occurs.
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<td>Australian Aborigines League</td>
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<td>APA</td>
<td>Australian Aboriginal Progress Association</td>
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<td>ACT</td>
<td>Australian Capital Territory</td>
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<td>AE</td>
<td>Aboriginal English</td>
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<td>AGD</td>
<td>Attorney-General’s Department</td>
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<td>BOCSAR</td>
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<td>CAA</td>
<td>Council for Aboriginal Affairs</td>
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<td>DAA</td>
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<td>FCAA</td>
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<td>FCAATSI</td>
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INTRODUCTION

1.1 Background to the study

The purpose of this thesis is to explore the origin, usage and utility of the concept of ‘overpolicing’. Equally importantly, the thesis will explore how, and in what manner, ‘overpolicing’ became established in criminological accounts about Aboriginal over-representation in police arrest and custody rates as well as reflecting on its usefulness in such accounts.

Parallel with this investigation, the thesis is also concerned with examining the manner in which Australian Criminology has attempted to explain the causes for Aboriginal over-representation in police arrest and custody. Through an investigation of the relationship between police and Aboriginal people from settler society to the mid-1990s, the spotlight is turned on to the institution of policing and its uninterrupted preoccupation with maintaining social control over Aboriginal people’s languages, behaviours and interactions in public space. In doing so, the thesis identifies a number of public order policing practices that are argued to be distinctive to the policing of Aboriginal people and which Cunneen and Robb (1987) and Cunneen (1990, 1991, 1992a) argue are symptomatic of ‘overpolicing’. Apart from Cunneen’s own commentary about the power of ‘overpolicing’ to simultaneously describe and illustrate the manner in which Aboriginal
people are policed, no investigation has yet been conducted into the origin, antecedents or usage of the term ‘overpolicing’ in general, or more specifically, as it has been used to illustrate the circumstance of Aboriginal over-representation in police arrest and custody rates in Australia. This thesis constitutes the first attempt to do so and explores the term’s evolution and application through an historical analysis of extant literature and commentary between the period 1966 and 1996. This period begins with the first mention of ‘overpolicing’ in American Criminal Justice literature in 1966 and concludes in 1996, as the year in which the newly elected Howard Coalition Government abandoned the Australian Commonwealth government’s long standing social justice agenda for Aboriginal people, replacing it with mainstreaming policies and practices, similar in intent to previously abandoned policies of assimilation.

At the outset, it is important to acknowledge that this historical analysis begins with a proposition that Australian Criminology’s interest in exploring the nature and extent of Aboriginal people’s over-representation in arrest and imprisonment rates began in earnest in the mid 1970s. Regardless of earlier notable historical and anthropological research (Elkin, 1938; Reay, 1945; Berndt and Berndt, 1964; and Rowley, 1970), the precursor to this interest is identified in this thesis as the pioneering socio-legal research of Elizabeth Eggleston (1976). From that time onward, until the establishment of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in October 1987, the focus of criminological research on Aboriginal over-representation remained more or less fixed thematically in terms of describing and explaining this phenomenon through the operations of an
indifferent, unjust and often-contradictory criminal justice system (Broadhurst, 1990, p. 280).

During the following four years (1988 to 1991), criminological research on Aboriginal over-representation was overtaken by the prominence of the Royal Commission’s investigative and judicial examination of the custodial environments of policing and corrections. As a result, only a small number of publications (Bayley, 1989; Cunneen, 1990, 1991a, 1991b; Gale, Bailey-Harris & Wundersitz, 1990; HREOC, 1991) on this study’s subject matter were located for the period.

Following the Royal Commission into Aboriginal Deaths in Custody\(^1\), criminological commentary attempted to expand on previously identified forms of discriminatory policing practices (Cunneen, 1992b, 1992c; O’Shane, 1992; Kitchener, 1992; Pirie & Cornack, 1992; Wootten, 1993; Eades, 1994; and Leicester, 1995). In addition, it is also evident that an attempt was made in Australian Criminology to explore and explain ways in which governments, their criminal justice agencies and Aboriginal communities, might find practical solutions to address the issues highlighted by the Royal Commission commensurate with Recommendation 188.\(^2\) In this regard, the Indigenous Summit into Deaths in Custody\(^3\) on the 17\(^{th}\) of February 1997 commended as ‘best practice’ models the establishment of Community Justice Groups in Kowanyama and Palm Island (Chantrill,

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\(^1\) For brevity, Royal Commission is used throughout to denote a reference to the Royal Commission into Aboriginal Deaths in Custody.

\(^2\) Recommendation 188 required Government to negotiate with appropriate Aboriginal organisations and communities on any policy or program that affected Aboriginal people (Johnston, 1991a, p. 73).

\(^3\) A National Summit of over 100 Indigenous people from the National Aboriginal Justice Advisory Committee (NAJAC), State Aboriginal Justice Advisory Committees and other community groups that preceded a national Ministerial Summit into Aboriginal Deaths in Custody on 1-2 May 1997.
1997) and the Victorian Koorie Justice Worker program (AGD, 1997, pp. 9-11).

McNamara (1993, p. 310-311) has suggested that in addition to the two mentioned foci, post-Royal Commission Aboriginal justice literature also introduced ‘a socio-medical component that broadened the parameters of the literature’ as well as a sizeable and growing body of secondary or ‘follow-up’ literature, ‘including evaluations and critiques of the Royal Commission’s findings and recommendations’. However, with more than ten years having elapsed since the Royal Commission published its Final Report (Johnston, 1991a), it could reasonably be argued that Criminology does not appear to have been sufficiently challenged in recent years to expand its Aboriginal Criminology agenda beyond the post-Royal Commission perspective.

Finally, this study examines the concept of ‘overpolicing’ as a specific research theme. In this regard, the study proposes that the first explicit use of the term ‘overpolicing’ in this country was by the NSW Anti-Discrimination Board (1982, p. 113) in its study of street offences by Aborigines. From that study, the concept gained currency and utility in the ensuing years through research undertaken by Cunneen (1992a, 1992b, 1992c, 1991a, 1991b, 1990, 1988) and colleagues (Cunneen & White, 1995; Luke & Cunneen, 1995; Cunneen & Behrendt, 1994; Cunneen & Robb, 1987). In pursuing this specific research theme, the study will move outside Australia to Canada where the concept of ‘overpolicing’ was employed in a
number of Canadian government inquiries that examined the impact of the
criminal justice system on Canadian Aboriginal peoples (Bellemare, 1988;
Samuelson, 1993; McMullen & Jayewardene, 1995; Smandych, Lincoln and
Wilson, 1995; and Rudin, 2005). From those inquiries, particular policing
practices were identified as having contributed to the circumstance of
Canadian Aboriginal peoples’ over-representation in police arrest and
custody rates. Similar to Australian criminological literature, Canadian
literature also establishes a particular view about the confluence between
‘overpolicing’ and Aboriginal peoples’ over-representation in arrest and
custody rates.

A tangential issue this study will also pursue is whether it can be argued that
the concept of ‘overpolicing’ emerged *because* of Criminology’s focus on
the circumstance of Aboriginal over-representation or, alternatively, as
something that developed somewhat independently from other research in
the area. The significance of this point is that although the concept has been
employed generally in Criminology since 1982, Cunneen (2001, 1992a,
1992c, 1990, 1988, 1987) is the only researcher who can be credited with
any attempt to discover its antecedents, usefulness or validity in
explanations about the over-representation of Aboriginal people in arrest
and custody rates. Whether the concept developed independently or
contemporaneously to Criminology’s research on the question of Aboriginal
over-representation will be the subject of discussion in Chapter 8. However,
prior to any further discussion it is necessary to provide a brief overview of
the discipline of Criminology.
1.1.1 Criminology and theories of crime causation

Bartol (1991, p. 11) has proposed that the conventional goals of Criminology include:

- the discovery of causes of crime, the prediction of crime trends and recidivism, the identification of false theories of crime, the discovery of truth about crime, and the identification of means to control crime.

Typically, the literature on this subject matter has tended to be divided into three broad schools of thought: the classical; neo-classical; and positivist schools, together with an emergent ‘new’ or radical Criminology. From these orientations, Criminological theory has developed within either a biological, psychological or a sociological perspective (Bartol, 1991, p. 11).

The first two perspectives propose that the causes of crime reside in the biological or psychological makeup of particular types of people or in the kinds of choices that individuals freely make. However, one of the major criticisms levelled at both perspectives is that by focusing on individual differences, the root causes of crime, such as social inequality, are ignored. For that reason, it has been argued that the two perspectives stigmatise ‘vulnerable and disadvantaged people in the community’ while at the same time, allowing unjust social systems to continue unchallenged (Goldsmith, Israel & Daly, 2006, p. 82). More pointedly, individual level interventions are seen as discriminatory and representative of attempts by the state to exercise social control over its citizens and, in the extreme, to justify the suppression of racial and other minority groups (Goldsmith et al., 2006, p. 82). Consequently, both biological and psychological theoretical
perspectives are considered unhelpful and contrary in methodology and intent to the objectives of this study’s examination of the disadvantaged position of Aboriginal people before the law and as such, will not be further explored.

In contrast to the above perspectives’ focus on individual pathology, social explanations for crime are often divided into two distinct theoretical categorisations: ‘consensus’ and ‘conflict’ theories (Goldsmith et al., 2006, p. 90). In this regard, Goldsmith et al. (2006, p. 90) consider that:

Consensus theories (Social Ecology; Anomie; Strain; and Opportunity) ask, ‘what are the causes of crime?’, ‘why do people get involved in crime?’ and ‘what are appropriate methods of controlling or preventing crime?’

On the other hand, conflict theories (Labelling; Radical; Cultural Conflict; Class Conflict; Feminist; and Post-Modern) ask, ‘How do power and political-economic-social inequalities affect what is defined as crime and the workings and subsequent impact of the criminal justice system?’ (Goldsmith et al., 2006, p. 90). In opposition to consensus theories’ assumption that ‘there are values held in common in society or that the dominant values are agreed to by all’, conflict theories propose that ‘political interests precede values and that the state does not represent the values of all members, only the more powerful’ (Goldsmith et al., 2006, p. 90). A further strength of using this perspective is the role of history in sociological analysis. In this regard, conflict theories view the needs, ideologies, and characteristics of a society as a reflection of the particular historical conditions of that society. Importantly, conflict theory emphasises the primacy of the role of the
criminal law and asks how laws emerge and are enforced. Concomitant with this approach, ‘conflict theory seeks explanations of crime in the institutions that define criminal acts and in the social relations created by a society’s structure’ (Reid, 1976, p. 209).

A particular perspective within conflict theory that is congruent with this study is the cultural conflict or cultural studies approach. In this approach, Barak (1994, p. 237) argued that the study of crime and crime control not only reflects a concern with the politics of difference and with identity politics, but also overlaps with postcolonial studies, and uses concepts and vocabularies ‘that attempt to reflect the diversity, the plurality, the diffuseness and the blurring of boundaries of academic disciplines and the external world’ (Barak, 1991, p. 237). More specifically,

a cultural studies approach attempts to bring the intersection of class, race, and gender together with the dynamics of mass communication and identity formations to tell the story of crime and crime control; in plain terms it is derived from the everyday interaction of individual life and social history (Barak, 1994, p.238).

One of the more salient contributions within cultural conflict theory is Sellin’s (1938) *Culture, Conflict and Crime*, reproduced in Flowers’ (1988, p.114) examination of the participation of Native Americans in crime. By transposing ‘Aboriginal’ into Sellin’s description of the colonisation of Native Americans, his treatise on cultural conflict, as originally applied, would now read:

the British migration to Australia and subsequent colonisation was the beginning of the long conflict of cultures between whites and Aboriginal people. Conflict was aggravated with the forced movement of the original inhabitants from their traditional countries, the near genocide of their race
and cultures, and a series of government solutions to the Aboriginal problem, including resettling them on missions and reserves with inconsistent shifts between assimilation and retention of Aboriginal cultures. (Flowers, 1988, p.114)

Further, and parallel with the history of Australia’s colonisation, Flowers (1988, p. 114) argued that the ‘the criminal law was one of the primary areas in which this conflict in cultures was most evident’. Overall, cultural conflict emerges as the most apt perspective to underscore the theoretical foundation for this study.

1.1.2 Criminal Justice

A complementary and interrelated field of Criminology that arose in North America in the late 1960s is Criminal Justice, or applied Criminology. The fundamental difference between Criminology and Criminal Justice is the policy analysis orientation of Criminal Justice. Where Criminology is primarily concerned with theorising about crime causation, Criminal Justice is concerned with examining the practical or technical aspects of policing, the courts and corrections as the basis for improved bureaucratic efficiencies surrounding crime prevention and crime control (Hagan, 1990, p.2). For traditional criminologists Wilson and Hernstein (1985; cited in Hagan 1990, p. 577) and Hirschi (1983; cited in Hagan, 1990, p. 577) the policy analysis orientation of Criminal Justice marks Criminology’s severance with theory about crime causation in favour of the examination of larger institutions of social control as they form the criminal justice system.

Within Criminal Justice, the two often cited ideological models of the
Criminal Justice process that guide social policy are Packer’s (1968; cited in Hagan, 1990, p. 578) crime control and due process models. The crime control model emphasises law and order, bureaucratic efficiency in law enforcement and the prosecution of criminals, while due process emphasises the ideals of law, order and justice, with justice and the rights of the accused as paramount (Hagan, 1990, p. 578).

In applying the models to Criminal Justice policy, Hagan (1990, p. 578) identified three ideological approaches: the conservative, liberal and radical approaches. The conservative approach, reflective of the classical school of Criminology, tends to concentrate upon crime in the streets committed by the ‘dangerous classes’ and advocates ‘deterrence by means of more sure, swift and certain punishment and better application of the crime control model’ (Hagan, 1990, p. 678). The liberal approach asserts that ‘in developing crime control measures to contain street crime, the root causes of crime and the crimes of the elite (occupational, organisational and political)’ should also be the subject of Criminal Justice inquiry (Hagan, 1990, p. 679). The radical approach, similar to radical Marxist theory, views crime as an outgrowth of inequalities created in capitalist economic systems and advocates dramatic alteration in the social structure and its institutions as a means of controlling criminality.

On the whole, and probably because of its focus on achieving bureaucratic efficiencies, Criminal Justice is criticised ‘for failing to address the structural criminogenic conditions associated with poverty, unemployment, inadequate housing, substance abuse, and other ecological ills’ (Hagan,
1990, p. 576). Despite this criticism, Criminal Justice’s concern with the institution of policing makes it an appropriate backdrop against which to locate this study’s examination of the concept of ‘overpolicing’.

The escalation of Criminal Justice as a discipline is attributed in part to increased federal funds made available to the Law Enforcement Assistance Administration (LEAA) under the auspices of the United States government’s ‘War on Crime’: a social policy launched in 1967 and abandoned in 1981. In effect, the ‘War on Crime’ was an attack on ‘street crime’ and lower class criminals, particularly unemployed, urban Black male juveniles (Hagan, 1990, p. 575). The metaphor encompassed a new approach to crime prevention and control where, *inter alia*, ‘proactive policing’ was the cornerstone in America’s ‘fight against crime’ (Barak, 1994, p. 281). Grabosky (1999, p. 1) argues that ‘proactive policing’ is itself a metaphor for what became known as ‘zero tolerance policing’. In this regard, Grabosky (1999) suggests that Wilson and Kelling’s (1982) seminal article entitled ‘Broken Windows’ laid the foundation for the idea of ‘zero tolerance policing’ which is meant to refer to ‘a policing strategy which exists as part of a package of carefully designed approaches to combat the crime problems of a specific locality’ (Grabosky, 1999, p. 1). The nub of the idea in ‘zero tolerance policing’ is that police would aggressively pursue two general manifestations of disorder – the physical and the behavioural – through strict enforcement of laws against petty crime in order to prevent the development of an atmosphere conducive to more serious criminal offending (Grabosky, 1999, p. 2).
Although the U.S. government abandoned the ‘War on Crime’ policy – replacing it with a ‘War on Poverty’ - criminal justice literature continued to promote the notion of proactive policing: a policy strategy applied to drug law enforcement in the country’s ‘War on Drugs’. In this regard, reactive policing was replaced with aggressive law enforcement of those identified as ‘most dangerous’ (Barak, 1994, pp. 283 - 284). An outcome from the application of this policy was the unequal or selective enforcement of laws and the subsequent punishment of African Americans and those peoples from minority communities, such as Native Americans. It is within this policy context that a preliminary notion of ‘overpolicing’ emerged from Criminal Justice to describe the differential policing of Black and minority districts.

1.1.3 First reference to ‘overpolicing’

The first specific mention of the term ‘overpolicing’ occurred in an historical account of police-community relations in the United States in a report prepared on behalf of the US Department of Justice’s Office of Law Enforcement Administration. There, Watson (1966) articulated ‘overpolicing’ in the context of the policing of Black and minority districts wherein community members described themselves as being subject to differential treatment, brutality and improper policing by a significant number of the country’s police agencies. However, the term was not defined or explained at that time and no other reference to ‘overpolicing’ in that country appears until twelve years later when Mehay (1979) mentioned ‘overpolicing’ in the context of a cost effectiveness analysis carried out on
contract arrangements for police services between thirty municipal governments and Los Angeles County as the service provider.

In the same year in Britain, Ryan (1979) provided an assessment of the British penal system which encouraged the government to re-think the arguments offered by the penal ‘law and order’ lobby for further repressive penal measures to be endorsed. Incidental to the central argument was a discussion on the enforcement of the Children and Young Persons Act, 1969 which showed that police, in an effort to relate more closely to the local community, were responsible for ‘overpolicing’ some areas, as evidenced by the numbers of juveniles cautioned for trivial misdemeanours.

In Britain, three days of race riots in Brixton and Toxteth in April 1981 led the British Home Office to appoint Lord Scarman to conduct a Commission of Inquiry into the cause of the riots (Lord Scarman, 1981, p. 45, cited in ADB, 1982, p. 111). Notwithstanding the Commission’s finding that the riots were ‘communal disturbances’ and not ‘race riots’ as portrayed in the media, Lord Scarman concluded that the Brixton and Toxteth riots were a direct result of ‘overpolicing’. In this instance, the high level of police harassment of working class, unemployed youth - particularly Asian and West Indian minority groups – was the direct cause of the riots and the object of the riots was to attack the police. Summarising the evidence from the Inquiry, Lord Scarman highlighted the major factors contributing to the riots as ‘the breakdown of the local police liaison committee two years before, the hard, vigorous policing of street crime, including the over use of
stop, search and detain and ‘sus’4 laws, and ‘unlawful racially prejudiced conduct by some police officers’ (Lord Scarman, 1981, pp. 56-58 cited ADB, 1982, p. 112). Although the Inquiry brought the notion of ‘overpolicing’ to the public gaze, it did not attempt to define the concept nor did it allude to its origins or prior use. More importantly, the Inquiry limited the term’s application to the immediate policing environment of Brixton and Toxteth and did not argue whether the concept was applicable in other locations with similar racial tensions between police and minority groups.

In the same year as the Brixton and Toxteth riots, Ashton (1981) completed a PhD thesis that was generally concerned with an exploration of the relationship between race and class in contemporary U.S. society. More specifically, Ashton’s (1981) research focused on the context in which a black Mayor was elected in the city of Detroit; a context which involved explicit controversy and debate over the role of police in the black community. Within that context, Ashton (1981) referred to a historically antagonistic relationship between the black community and police, resulting in black grievances about police brutality, harassment and ‘overpolicing’. Again, ‘overpolicing’ was not defined or explained.

Apart from the instances mentioned above, the notion of ‘overpolicing’ does not resurface overseas until the early 1990s when it featured in several Canadian government inquiries into the policing of Canadian Aboriginal communities. Taken as a whole, the inquiries in that country determined that

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4 ‘Sus’: being a ‘suspected person loitering with intent to commit an arrestable offence’. (Scarman 1981, p.56-58).
‘overpolicing’ was discriminatory, if not racist, and that over-surveillance, over-charging, over-use of police custody and under-policing were manifestations of ‘overpolicing’ (McMullen & Jayewardene, 1995; Henry, Hastings & Freer, 1996). With respect to the term ‘under-policing’, McMullen and Jayewardene (1995, p. 39) have proposed that it represents the opposite of ‘overpolicing’ and is illustrated by the insufficiency of the police response within Canadian Aboriginal communities, when the complainant is Aboriginal.

1.1.4 ‘Overpolicing’: the Australian context

Since the mid 1970s, Australian criminological literature has provided comprehensive evidence that Aboriginal people have been continuously over-represented in the criminal justice system (Eggleston, 1976; Clifford, 1981; ADB, 1982; Hanks & Keon-Cohen, 1984; Bird, 1987; Cowlishaw, 1987; Cunneen & Robb, 1987; Hazlehurst, 1987a; Wilson, 1987; Walker, 1987; Goodall, 1990; Broadhurst & Maller, 1990; Marcus, 1991; McDonald & Biles, 1991; Wootten, 1993; Morris, 1994; Cunneen, 2001, 1990, 1991b, 1982). One of the major themes connecting the literature is an acknowledgement that the Aboriginal population is generally policed differently than the rest of the Australian population. In acknowledging differential policing, criticism has been levelled at the police for their apparent preoccupation with both containing and controlling Aboriginal people’s behaviours, speech and interactions in public, resulting in their continuous over-representation in arrests for public order offences, otherwise known as ‘offences against good order’ or ‘street offences’.
These offences include the separate offences of ‘offensive language’, ‘offensive behaviour’, ‘resisting arrest’ and ‘hindering police in the execution of their duty’ (Jochelson, 1997, p. 3).

In 1980 two Aboriginal lawyers – Paul Coe and Pat O’Shane – presented papers at a NSW Institute of Criminology conference entitled ‘Aboriginals and the Criminal Law in NSW’. In their papers, they raised concerns on behalf of Aboriginal people and their communities that Aboriginal people continued to be policed ‘differently’ than non-Aboriginal people. They argued that a range of Aboriginal experiences showed that policing in NSW was designed to force Aboriginal people to accept the standards of white society, that a ‘frontier mentality’ existed in rural towns, that towns with a high proportion of Aboriginal people appeared to have more police than non-Aboriginal towns, and that Aboriginal people were subject to significantly greater levels of policing than non-Aboriginal people (O’Shane, 1982, p. 33; Coe, 1982, p. 16). Although no specific reference was made to the term ‘overpolicing’ at that point in time (which pre-dated the Scarman Inquiry in Britain by one year) the issues raised by Coe and O’Shane could be argued as the genesis for subsequent criminological research that led to the explicit use and application of the term ‘overpolicing’ to explain Aboriginal over-representation in the Australian criminal justice system.

The first explicit use of the term in this country came a year after the Scarman Inquiry, following publication of the NSW Anti-Discrimination Board study of street offences by Aborigines (ADB, 1982). There, the
Board argued that continued and repeated arrest of Aborigines for trivial offences, continuous police surveillance, the large numbers of police stationed in towns with a high proportion of Aboriginal people and the use of particular legislation to maintain police authority were clear indications that ‘overpolicing’ occurred in Aboriginal communities (ADB, 1982, p. 113). In a departure from earlier explanations about Aboriginal over-representation that highlighted differential policing and Aboriginal lifestyle or culture as likely contributing factors, the ADB (1982) drew attention to police involvement in the enforcement of street offences legislation, the provisions of which placed in the hands of police the power to deal with behaviour they deemed to be lacking in propriety. In essence, the ADB (1982, p. 113) argued that police had become responsible for public behaviour and therefore, the political and social morality of the general community. The overall effect of the enforcement of white community standards was that Aboriginal cultures were vilified and Aboriginal people placed in a subordinate position. In the language of racist discourse, a ‘good’ Aboriginal person is one who is ‘reasonably well-behaved’ and ‘stays in their place’ (Cunneen, 1992, p. 81).

While the ADB (1982) made no attempt to define ‘overpolicing’, it becomes obvious that much of what is conceived of as ‘overpolicing’ in the policing of Aborigines derives from the Scarman Inquiry the year before. However, in addition to the overt police activities mentioned above, the ADB (1982) study suggested that the numerical strength of police in Aboriginal towns or locations with a large Aboriginal population is also an element of ‘overpolicing’. In saying this, the study drew attention to statistical data
collected which showed that increased police numbers in these locations amounted to increased surveillance and, therefore, increased arrest rates of Aboriginal people for public order offences. At that time, the ratio of police per 1,000 head of population was as high as 4:1,000 in Aboriginal towns compared to 1.47:1,000 for the State overall (ADB, 1982, p. 239).

A study of criminal justice in north-west NSW several years later reaffirmed the Anti-Discrimination Board’s findings and, in addition, drew attention to the linking of law and order with the ‘social visibility’ of Aboriginal people (Cunneen & Robb, 1987, p. 192). In essence, the white population of the region argued that Aborigines were a law and order ‘problem’. To remove the ‘problem’, Aboriginal people could be made ‘invisible’ through more policing of the streets and the imposition of curfews. The study also claimed that a concept of ‘overpolicing’ can only be understood within a framework which recognises the role of Aboriginal resistance to authority. In this regard, the study argued that authority based on a process of domination, is continually being contested, opposed and confronted by Aboriginal people. Subsequently, Cunneen and Robb (1987) argued that the concept of ‘overpolicing’ should be seen as directly contiguous with the ongoing dynamics of internal colonialism.

The background to the research highlights how a concept of ‘overpolicing’ arose over forty years ago in the USA within the sub-discipline of Criminal Justice, the policy analysis of which focused on the institutions of policing.

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5 Short (2005, p. 279) considers ‘internal colonialism’ as the situation where the colonising society is built on the territories of the formerly free, and now colonised, people. The colonising society exercises jurisdiction over them and their territories and the indigenous peoples, although they comply and adapt, refuse to surrender their freedom of self-determination over their territories and continue to resist within the system as a whole as best they can.
corrections and the courts and saw a movement away from Criminology’s main activity of theorising about crime causation. However, although the term originated in the North American policing context, no research has been conducted in that country, or elsewhere, to describe it, define it, or establish what it purports to signify. That is, it has not been theorised. Consequently, this study will argue that Australian Criminology’s contributions to explain ‘overpolicing’ are not only unique, but should also be considered as the yardstick for research on this issue.

Whether intended or not, Criminal Justice’s focus on the structural and ideological arrangements for the efficient administration of justice showed how certain police practices brought policing into disrepute (Hagan, 1990, p. 575). Arguably, the most disreputable policing practice highlighted was the harassment of, and probably racist employment of ‘strong’ or ‘hard’ public order policing strategies to target minority groups. Criminal Justice provides the framework for this study to discover how the concept of ‘overpolicing’ might contribute to our understanding of the manner in which Aboriginal people are policed.

1.1.5 Explanation concerning interest in topic

My own interest in this topic springs not only from extensive experience as a police officer and criminal investigator in various state and federal law enforcement agencies, but also from the vantage point of being an Aboriginal person and, therefore, a life-long consciousness of what it means to be ‘Aboriginal’ in this country.
I joined the NSW Police Cadet Corps in 1967 aged sixteen years. It was the same year the Australian population voted overwhelmingly in favour of two amendments to the *Commonwealth of Australia Constitution Act 1900* to allow Aborigines to be counted in the Australian census and for the Commonwealth to make laws on behalf of the Aboriginal race of Australia. To my knowledge, I remain the only Aboriginal person to have been admitted to the Corps from its inception in the mid 1940s until its disestablishment in the early 1980s.

At age nineteen I was sworn into the Office of Constable of Police and spent the next nine years performing uniformed and plainclothes duties in metropolitan Sydney. I resigned in 1979 as a result of a series of racist attacks on my integrity by a group of Detectives working in a specialist squad within the Criminal Investigation Branch. Over the next three years I was employed in the Australian Public Service in Canberra in a new Commonwealth agency, the Aboriginal Development Commission (ADC). During that period, I attempted to re-enter the NSW Police Service and finally, after having overcome a number of disingenuous attempts to prevent me from re-joining, I was admitted to Recruit Training and started service again as a Probationary Constable.

I spent the next five years in uniformed duties at Darlinghurst Police Station before a two year secondment as Special Investigator to the NSW Ombudsman inquiring into public complaints about police maladministration and unlawful conduct. In 1988 I joined the Australian
Federal Police (AFP) and was initially seconded to the Sydney office of the Royal Commission into Aboriginal Deaths in Custody as a Special Investigator assisting Commissioner Hal Wooten, QC. During the early part of my secondment, I came to the conclusion that the Royal Commission’s approach to investigating each Aboriginal death in custody by merely reviewing the Coroner’s Inquest documentation was short sighted, insufficient and half-hearted. Using the investigation of the death of Malcolm Charles Smith as an example, I produced a comprehensive report which had the results of my inquiries and interviews over a three month period in far-south western NSW and north-western Victoria, Long Bay, Broken Hill, Berrima, Goulburn, Grafton and Kirkconnell prisons regarding Malcolm’s family history, forced removal from his family, education, employment, criminal antecedents, prison life and mental and physical health to construct a ‘whole of life’ narrative from birth to death. This investigation methodology was accepted by the Royal Commission and it can be argued that my methodology contributed in part to the Royal Commission being commended by commentators as constituting the most comprehensive inquiry conducted into the social, political and cultural circumstance of contemporary Aboriginal society.

I then spent the next two years working with the Australian Intelligence community before moving to the Commonwealth Attorney-General’s Department in 1992 where I spent the next six years managing the Department’s Indigenous Policy Issues Unit. During this time, I was approached to undertake two twelve month secondments as an Investigator to the NSW Independent Commission Against Corruption (ICAC) inquiring
into public sector and police corruption. After leaving the Attorney-General’s Department I entered the university sector and lectured in undergraduate level Criminology where I had the opportunity to reflect on research conducted into the circumstances of Aboriginal over-representation in police arrest and custody.

In recalling innumerable observations and interactions between police and Aboriginal people throughout twenty-five years of policing and criminal investigations, I began to speculate about the causes for the continuing over-representation of Aboriginal people in criminal justice statistics and, naively, assumed Aboriginal over-representation is largely attributable to practices located within an as yet vague and amorphous concept of ‘overpolicing’. This thesis represents a detailed analysis of that concept, including its origins, application within the literature and its limitations as an analytic tool.

1.2 Statement of the Problem

How did the concept of overpolicing become established in criminological accounts about Aboriginal over-representation in police arrest and custody and how useful is it?

The answer to the above problem will be explored through attempting to answer the following questions:

1. Where and in what manner did the concept of overpolicing emerge?
2. What does overpolicing mean?
3. How is the concept deployed in Australian criminological literature?
I hypothesise that the historical role of police in supervising and controlling Aboriginal people’s language and behaviours continues in contemporary policing and that Aboriginal people are policed differently to the rest of the population, including what may be argued as the differential policing of Middle-Eastern youth and visible, poor immigrants (Kennedy, 2000). Further, I hypothesise that the concept of ‘overpolicing’ is illustrative of how Aboriginal people are policed and that ultimately, ‘overpolicing’ can be construed as distinctive to the policing of Aboriginal people, although Aboriginal people themselves may not be familiar with its illustrative power. Finally, I will argue that the concept remains largely under-developed and that further investigations will be required to establish how and in what manner, the concept could properly be used to either identify or signify the circumstance of ‘overpolicing’.

1.3 Significance of the study

This research is significant for three reasons. First, it is the only research to date to produce a chronological account of Australian criminological literature that is primarily concerned with explaining the circumstances of Aboriginal over-representation in police arrest and custody. Second, and as a result of the first, the study establishes the origin, development and usage of the concept of ‘overpolicing’. Third, it provides an initial evaluation of the usefulness of ‘overpolicing’ as a concept and seeks to explain whether it
is anything more than a discursive device to describe or illustrate the manner in which Aboriginal people are policed.

The value of this research is that it constitutes the first detailed analysis and synthesis of theoretical explanations provided by the criminological literature on the issue of Aboriginal over-representation in police arrest and custody. In doing so, it establishes a functional tripartite classificatory system of extant literature throughout the 1966-1996 period surrounding the most comprehensive inquiry to date concerning the contemporary circumstance of Aboriginal people, the Royal Commission into Aboriginal Deaths in Custody. Equally importantly, it is anticipated that this research will provide a better understanding of police practices and procedures as they relate to the policing of Aboriginal people. Finally, the research provides Australian Criminology with an opportunity to consider how, and in what manner, the concept of ‘overpolicing’ might be incorporated into current theories explaining Aboriginal crime and criminality or perhaps a general theory concerning Aboriginal crime and criminality.

More ambitiously, it is envisaged this research will cause Australian Criminologists to reconsider the focus of ‘Aboriginal’ Criminology from one that attempts to explain Aboriginal offending through a framework of the individual or collective failings of Aboriginal people, to one that focuses on the crimes, legal and moral, perpetrated against Aboriginal people, often by or with governmental sanction. In this context and following Cunneen’s (1999) hypothesis which advocates the forced and systematic removal of Aboriginal children from their families by governments for over fifty years
as constituting the crime of genocide, a new ‘Aboriginal’ Criminology is needed. A ‘rights’ based Criminology would be underpinned by theoretical imperatives around the violation of Aboriginal human rights since 1788 and the postcolonial project wherein such violations were, and still are, permitted to occur (Cunneen, 1999).

1.4 Methodology

1.4.1 Selection of research method

In the course of reviewing criminological literature about Aboriginal over-representation in police arrest and custody rates, I discovered that no research had yet been conducted to establish the origin, antecedents or utility of the concept of ‘overpolicing’. This fact represents a fundamental gap in discipline knowledge and will be addressed through the research problem and questions set out at Section 1.2.

In an attempt to discover how the concept of ‘overpolicing’ became established in criminological explanations about Aboriginal over-representation in police arrest and custody rates, the study adopts historical research as the method of inquiry which, according to Clarke (2005, p. 37), provides for ‘the systematic and objective location, evaluation and synthesis of evidence in order to establish facts and draw conclusions about past events’. McIntyre (2004, p. 11) suggests that in pursuing this method of inquiry ‘the relevant literature needs to be discussed and the evidence assembled, assessed and set in context, and its interpretation justified.
These procedures constitute history as a discipline’ However, as Chan (1996, p. 9) has argued in a reflection on the theoretical, political and practical directions of criminological research, mainstream Criminology has continued to marginalise historical scholarship with the result that:

criminological researchers who specialise in history have often found themselves living in a curious academic hinterland: unwanted in history as far as Criminology is concerned; not proper history as far as History is concerned. (Chan, 1996, p. 9)

While this contention constitutes another interesting turn in the broader debate about the scope and disposition of the contemporary criminological enterprise, it is sufficient here to state that the discipline of History offers Aboriginal researchers the motive, means and opportunity to re-interpret and revise Australian history ‘that has, for many decades, either excluded Aboriginal histories or categorised them as incidental to the master narrative’ (McIntyre, 2004, p. 43) In doing so, Australian history has ‘created a national cult of forgetfulness about Aboriginal histories such that, if they were to be considered at all, they would generally be characterised as a ‘melancholy anthropological footnote’ (McIntyre, 2004, p. 43) or ‘dismissed as a minor irritation in the march of progress’ (Kerr, 2003, p. 11).

McIntyre (2004, p. 47) argues further that with the relatively recent revival of Aboriginal history, Aboriginal people can now aspire to hold onto their history ‘to record their own experiences, their own customs and traditions and their own values, which tells them who they are’. While the adoption of historical research as the methodology probably situates this thesis in the ‘hinterland’ of ‘mainstream criminology’ it is, in all likelihood, one step
further removed, past the ‘hinterland’, and into the desert, by its interpretation of the evidence from an Aboriginal perspective. This perspective will intrude at various points throughout as I am unable or unwilling to either ignore or abnegate my knowledge, experiences or ideology as a critical Aboriginal criminologist.

Having selected the research method, the next step was to locate relevant literature. As is the case for much historical research, the availability of ‘primary source material may be limited for anything other than purely administrative history’ (Bosworth, 2001, p. 434). In this study, the majority of the literature has been obtained from secondary sources which, in essence, comprise the published results of research conducted during the period 1966 to 1996 into the circumstance of Aboriginal over-representation, Aboriginal people and the law, Aboriginal and police relations, or published commentary by Aboriginal and non-Aboriginal people on particular aspects of the administration of the criminal law, policing, the administration of justice and Australian history. The reasons for selecting the period nominated are set out below with reference to identifying the first and most recent publications concerning the literature on the subject matter.

With respect to the inclusion of non-criminological material, it is a fundamental premise in this thesis that a number of key socio-political and legal moments expressly concerned with locating or situating Aboriginal people within the Australian social context can be identified during the thirty year period examined. The key moments that have been identified
and featured in the periods covered in each chapter act as a foundation from which to examine the criminological literature for the same period. In adopting this approach – the juxtaposition of criminological literature and non-criminological commentary - it is hoped that reference to the major socio-political and legal events of the day will contribute to a better understanding of the position and disposition of Aboriginal cultures and societies and, by extension, the manner in which they were perceived in the enactment and enforcement of the criminal law and more particularly, in the manner in which they were policed.

I began my literature search with prior knowledge of the reference to ‘overpolicing’ in the NSW Anti-Discrimination Board’s (1982) *Study of street offences by Aborigines*. This prior knowledge resulted from conversations with one of the study’s two Aboriginal authors, Murray Chapman. In examining the text in the ADB (1982) publication, I located a reference to the Scarman Inquiry on the Brixton and Toxteth ‘race riots’ of 1981 where ‘overpolicing’ was mentioned and which the ADB (1982) referred to in its consideration of the term. Having discerned from the two publications that ‘overpolicing’ was situated in discussions surrounding what could broadly be described as the ‘differential policing’ of minority groups, I then conducted a desktop search through the world-wide-web, CSU and USQ Library collections catalogues and the Australian Institute of Aboriginal and Torres Strait Islander Studies to locate overseas and Australian publications (refereed journal articles, textbooks, e-journal

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*Murray Chapman (now deceased), Paul Coe and myself were fledgling law students at the University of NSW who were mentored by the then head of the Law School and Australia’s most prominent Indigenous legal rights academic, Professor Garth Nettheim.*
articles) that referred to the following subject matter:

- Differential policing
- Over-representation (in the criminal justice system)
- Aboriginal people and the law
- Aboriginal over-representation
- Criminal justice administration

Following this series of searches, I amassed over 400 references which related directly or indirectly to the five subject areas mentioned above. A full text version of each referenced publication was copied (downloaded from the web or obtained via library facilities) and reviewed with a separate index card created for each publication which highlighted the date of publication, the societal, political and physical setting for the research or commentary, whether the bibliography indicated further relevant references to pursue, a brief summary of what the publication set out to achieve, any conclusions or recommendations made, and a classificatory note cross-referencing the publication with any other literature or authors in the relevant subject area. From this approach, Eggleston (1976); Clifford (1982); Bird (1987); Cowlishaw (1987); Hazlehurst (1987); Gail, Bailey & Wundersitz (1987); Cunneen and Robb (1987); Cunneen (1990, 1991, 1992, 1992a, 1992b, 1992c); Johnston (1991); Pirie & Cornack (1992); Wootten (1993) and Smandy, Lincoln & Wilson (1995) were categorised as comprising a core group of publications that featured a wide variety of views and explanations concerning the circumstance of Aboriginal people’s unequal treatment before the law and/or their continuing over-representation in arrest and imprisonment rates.
Following those searches, I then interrogated the Australian Digital Thesis database, ProQuest Dissertation and Theses database, the Australian Institute of Criminology’s CINCH database, and Attorney-General’s Department’s AGIS database to specifically locate the term ‘overpolicing’ in either the topic or subject matter. As there appeared to be no consistency in the way the term was spelt, these searches were conducted by using ‘over-policing’ and ‘overpolicing’ as the key search descriptor. From these searches, the overseas publications of Watson (1966), Mehay (1979), Ashton (1981), Lord Scarman (1981), Hickman, Poitras and Evans (1989), Cawsey et al (1991), Hughes (1991), Rolfe (1991), Samuelson (1993), McMullen and Jaywardene (1995), Rudin (2005) and Henry, Hastings and Freer (1996), were located, copied and collated in year of publication folders. The next step was to review each publication and create a separate index card which highlighted the publication date and author(s), the location of the research, the context of ‘overpolicing’ as mentioned, whether the term was defined or explained and what, if anything, the authors concluded about the usage or utility of concept.

From the literature searches I was able to conclude that the first published reference to ‘overpolicing’ occurred in 1966 in a US Department of Justice report concerning the policing of Black minority districts. I then established that Eggleston’s (1976) publication represented the first Australian research output that specifically examined the issue of Aboriginal over-representation and that Cunneen (1987, 1990, 1991, 1992, 1992a, 1992b, 1992c, 2001) was by far, the most prolific individual author of research and commentary concerning the utilisation of ‘overpolicing’ as a descriptor of the manner in
which Aboriginal people are policed and also as a possible factor provoking or stimulating the circumstance of Aboriginal over-representation in police arrest and custody rates. Further, Cunneen (1987, 1992a, 1990, 2001) is the only researcher to have attempted to examine the scope, nature and likely intent of the concept of ‘overpolicing’ in its application to the Aboriginal context and can be credited with an attempt to articulate the concept’s capacity as an analytic tool. As his descriptions and explanations of the concept are derived exclusively from research conducted into the circumstance of Aboriginal over-representation in the State of NSW, this study’s exploration of Criminology’s conceptualisation of ‘overpolicing’ is, for the most part, delimited to the same geographic, socio-political and legal context.

In reviewing Cunneen’s (1992a, p. 76) commentary as Editor of a monograph titled, *Policing and Aboriginal communities: Is a concept of overpolicing useful?*, my attention was drawn to his remarks that the concept had neither been defined or its usefulness evaluated. After a review of all available literature obtained from the searches mentioned above where ‘overpolicing’ was examined or discussed, I found agreement in what Cunneen had argued and determined that this omission constituted a significant gap in knowledge which might be addressed through an inquiry into the origins of the concept, its usage in the literature and also an evaluation of its utility in criminological explanations about Aboriginal over-representation in police arrest and custody rates. As a result, the issues highlighted in Cunneen’s (1992a) commentary became the problem and questions to be addressed in this thesis, as set out in Section 1.2.
Having determined that the first mention of the term ‘over policing’ in the literature occurred in 1966, the next task was to ascertain when the last specific reference to ‘over policing’ occurred. In this regard, it transpired that Cunneen’s (2001) publication, *Conflict, politics and crime: Aboriginal communities and the police* was the latest publication to examine the circumstance of ‘over policing’. However, given the fact that what is said there regarding ‘over policing’ is more or less a reiteration of his earlier (1992a) views concerning the difficulties that are encountered in any attempt to define the concept or articulate its usefulness in criminological explanations about Aboriginal over-representation, this publication was not further considered. In similar vein, a debate within Australian Criminology that arose from Cunneen’s (2006) critical analysis of Weatherburn, Fitzgerald and Hau’s (2003) article titled *Reducing Aboriginal Over-representation in Prison*, and their subsequent rejoinder (2006), could have been considered as appropriate for inclusion in this study. However, in reviewing the three articles it was evident that although some interesting commentary argued whether ‘institutional’ or ‘systematic’ bias and ‘racial discrimination’ may or may not contribute to Aboriginal over-representation in prison, Cunneen and Weatherburn *et al.* were adamant in the original article, the criticism and the rejoinder, that the context for the ‘over-representation’ discussed was ‘over-representation in prison’ (Weatherburn *et al.* 2003, p. 65; Cunneen 2006, p. 329, Weatherburn *et al.*, 2006, p. 366). Furthermore, the majority of the literature that Weatherburn *et al.* (2003, 2006) rely on in promoting their hypothesis that it is ‘high rates of Aboriginal involvement in serious crime’, rather than ‘systemic bias in
policing the law or the operation of the criminal justice system’ that causes Aboriginal over-representation in imprisonment, is already included in this study. As most of the literature cited is specifically concerned with imprisonment and the prison context, the three articles are considered to fall outside the scope of this study which, as mentioned previously, concerns itself with the circumstance of Aboriginal over-representation in police arrest and custody rates.

The next most recent publication located was a Canadian Journal of Criminology article by Henry, Hastings, and Freer (1996) which discussed the ‘overpolicing’ of black and ethnic minority group members in Toronto and Durham. In addition, 1996 was also the year in which the newly elected Howard Coalition government began to dismantle the Aboriginal Affairs portfolio and terminate the Commonwealth grant funds program initiated by the Keating Labor government in 1992 to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody. For both reasons, 1996 was selected as the end date for the period to be examined in this study, creating a thirty year period (1966 to 1996) in which the literature would be reviewed, analysed and interpreted from both an Aboriginal perspective and the theoretical constructs underpinning conflict theory. Consequently, and as a generalisation, all literature located in the various searches whose publication date fell outside the thirty year period was set aside from the literature published between 1966 and 1996.

Nevertheless, there was a considerable amount of literature (both criminological and non-criminological) published outside the nominated
thirty year period that reflected on the issues and events being considered for inclusion in a proposed historical chronology, so these publications were included. The decision for the inclusion of such material was subjective, based on an assessment about the material’s capacity to provide an alternative, supportive or contrary view to the core group of publications selected for their explicit connection to this study’s objectives.

In addition, it was considered relevant to include references to significant social and political events which shaped and defined Aboriginal lives and lifestyles in Australian society. Much of the non-criminological material included in each of the chapters serves to illustrate these points and their value is in highlighting the many historical continuities that still influence the social and cultural milieu for many Aboriginal people or their communities. Ultimately, such material does nothing to demonstrate a connection to the circumstance of overpolicing, however, it may contribute to a better understanding of the underlying disadvantage that exists within Aboriginal cultures and societies and therefore by extension, Aboriginal people’s continuing disadvantage before the law.

From the placement of the literature concerning ‘Aboriginal over-representation’ and ‘overpolicing’ in year of publication folders, a preliminary view emerged about a broad classificatory system for grouping what could be termed the core criminological literature for the period examined. Section 1.4.2 provides an explanation for the proposition in this thesis that the core criminological literature can be grouped in a three-part classificatory system.
1.4.2 Classificatory system to Criminology’s research agenda

An unintended consequence of organising the literature examined in this study was the emergence of a pattern of events and issues that fit comfortably within a three part classificatory system to describe Criminology’s Aboriginal research agenda over the thirty-year period examined in this study. Although tentative, I propose that a useful arrangement that encapsulates both the historical position and disposition of research on ‘overpolicing’ and Aboriginal over-representation is its division along a continuum whose mid point is marked by the establishment and conduct of the Royal Commission into Aboriginal Deaths in Custody. The Royal Commission inquired into the deaths of ninety-nine Aboriginal and Torres Strait Islander people who died in police or other lawful custody between 1 January 1980 and 31 May 1989 (Johnston, 1991a, p. 1). Research either side of the Royal Commission is argued therefore, as falling within either pre-Royal Commission or post-Royal Commission categories.

The pre-Royal Commission period begins in 1966 with the first mention of ‘overpolicing in the literature and concludes in 1987, the year that marked the establishment of the Royal Commission into Aboriginal Deaths in Custody. The period is denoted by the monumental work of Eggleston (1976) and is followed by research conducted by the NSW Anti-Discrimination Board (1982), Cunneen (1982), Bird (1987), Cowlishaw (1987), Cunneen & Robb (1987), Walker (1987) and Hazlehurst (1987a, 1987b). This research led into the Royal Commission that spanned a four-year period during which time numerous reports (Interim Report, Volumes
1-5 National Report, State Reports, Volume 1 & 2 Underlying Issues, Volume 1 – VI Responses to Underlying Issues), submissions and studies were completed, not only in relation to each of the ninety-nine instances of death\(^7\) examined under the Commission’s Terms of Reference, but also the socio-political, historical and legal circumstances that gave rise to the disproportionate number of Aboriginal people being in custody in the first place. This period concludes in 1991 with the publication of the Royal Commission’s Final Report (Johnston, 1991a).

The post-Royal Commission period in the classificatory system in this study comprises the first five years following the conclusion of the Royal Commission, beginning in 1992 and concluding in 1996. In this regard literature published by Cunneen (1992b, 1992c), Eades (1992, 1994b, 1996), Pirie and Cornack (1992), Wootten (1993) and Hazelhurst (1995), will be considered. During this period, research was generated by two distinct stimuli. The first related to the conception of a ‘whole of government’ approach to implementation of the Royal Commission’s 339 Recommendations where, \textit{inter alia}, governments agreed to consult with Aboriginal communities and organisations and use their services in the development and implementation of program initiatives and service delivery outputs\(^8\) (Johnston, 1991a, p. 31). Thus, for the first time in Australian politico-legal history, the collective Federal, State and Territory governments undertook to involve Aboriginal communities in decisions

\(\text{\textsuperscript{7}}\) For example, the individual reports of State Commissioner’s O’Dea 1990; Wootten 1991; Muirhead, 1989; Johnston Q.C, 1991; and Wyvill, 1991.

\(\text{\textsuperscript{8}}\) Recommendations 188 and 192 of the Royal Commission into Aboriginal Deaths in Custody refer (Johnston, 1991, p. 73). See Appendix I for outcomes from the Post Royal Commission Agreement reaffirming engagement with Aboriginal communities.
affecting or impacting on Aboriginal community life, including the conduct of research activities.

The second stimulus was the significant financial contribution from the Commonwealth government’s annual budget in the form of grant funds\(^9\) to induce all levels of government and their respective justice systems to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody. However, following the election of the Howard Coalition government in early 1996 the Aboriginal Affairs portfolio was hastily reduced in both importance and prominence to create the opportunity for the new government to end the grant funds program prior to the introduction of the Budget in June 1996. Without doubt, the haste with which the incoming Howard Coalition government moved to dismantle the Aboriginal affairs portfolio was a direct result of the new Prime Minister’s long-held personal view that Australia should be one society, with no special benefits for any group, particularly Aborigines (Tatz, 1989, p. 3). Still, the cessation of the grant funds program serves as a chronological reference point to close the Post-Royal Commission period and to separate later research or commentary on Aboriginal over-representation (Eades, 1997; Jochelson, 1997; Hunter & Borland, 1999; Hunter, 2001; Ogilvy & Van Zyl, 2001; Weatherburn, Fitzgerald & Hua, 2003; Cunneen, 2006; Blagg, 2008) as beyond the scope of this study.

Although a significant amount of literature and commentary related to this study’s two main research themes is presented in the following seven

\(^9\) Although the total contribution in federal grant funds for this period is unknown, estimates put the figure at approximately $400 million (ATSIC, 1997, p. 2).
chapters, the actual number of studies that contribute to a better understanding of the causes of Aboriginal over-representation either in the criminal justice system generally or police arrest and custody rates specifically, or that attempt to illustrate the circumstance of ‘overpolicing’, is relatively small. Table 1.1 highlights the author, year of publication and key idea or theme emanating from the criminological literature that attempts to explain either Aboriginal over-representation, ‘overpolicing’, or both, that will be considered in subsequent chapters. Equally importantly, the Table depicts the literature’s location in a three part classificatory system developed in this study.

Table 1.1

<table>
<thead>
<tr>
<th>Classificatory System – Criminological Literature 1966-1996</th>
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<tbody>
<tr>
<td><strong>PRE-ROYAL COMMISSION 1966-1987</strong></td>
</tr>
<tr>
<td>Eggleston (1976): First empirical research to establish Aboriginal over-representation; differential policing</td>
</tr>
<tr>
<td>Clifford, (1982) Institutionalised racism</td>
</tr>
<tr>
<td>NSW Anti Discrimination Board (1982): incessant police surveillance; police concerned with maintaining authority; first mention of ‘overpolicing’ in Australian policing context</td>
</tr>
<tr>
<td>Bird (1987): the ‘civilising mission’</td>
</tr>
<tr>
<td>Cowlishaw (1987): ‘oppositional culture’</td>
</tr>
<tr>
<td>Cunneen &amp; Robb (1987): a history of police intervention in far north-west NSW; tentative attempt to infer what ‘overpolicing’ means</td>
</tr>
<tr>
<td>Hazlehurst (1987): number of young police stationed in Aboriginal towns</td>
</tr>
<tr>
<td><strong>ROYAL COMMISSION 1988-1991</strong></td>
</tr>
<tr>
<td>Gail, Bailey-Harris &amp; Wundersitz (1987; 1990): racial bias in police discretion</td>
</tr>
<tr>
<td>Cunneen (1990): police racism &amp; excessive use of force</td>
</tr>
<tr>
<td><strong>Cunneen (1991a): police violence (Aboriginal juveniles)</strong></td>
</tr>
<tr>
<td>Johnston (1991a) RCIADIC National Report</td>
</tr>
<tr>
<td><strong>POST-ROYAL COMMISSION 1992-1996</strong></td>
</tr>
<tr>
<td>Coe (1992): police discretion, genocide</td>
</tr>
<tr>
<td>O'Shane (1992): differential policing, systemic racism</td>
</tr>
<tr>
<td>Pirie &amp; Cornack (1992): What is obscene, the language or the arrest that follows</td>
</tr>
<tr>
<td>Wootten (1993): ‘overpolicing’ is not dependent on the existence of racist attitudes in individual police</td>
</tr>
<tr>
<td>Luke &amp; Cunneen (1995): Aboriginal juvenile over-representation progressively increases with each successive point of discretion in the criminal justice system</td>
</tr>
</tbody>
</table>
1.5 Outline of the Dissertation

There are eight chapters in this thesis. It is organised so that a developmental picture of the circumstances of Aboriginal over-representation in the criminal justice system generally, and police arrest and custody rates in particular, is constructed alongside the emergence and application of the concept of ‘overpolicing’ as an explanation for such over-representation. The first chapter introduces the thesis and gives a background to the research, outlining the research problem and question, providing a justification for the research, defining key terms, introducing the methodology, clarifying limitations and outlining the research.

The second chapter provides an historical background to Aboriginal police relations during the formative years of Australian ‘settler’ society and subsequently, the impact of policing in colonial and post-colonial society. In doing so, the chapter introduces accounts which examine the notions of sovereignty and terra nullius, the establishment of the ‘new police’ in NSW in 1862, the establishment and functions of the ‘Native Police’; and the roles assigned police in the ‘protectionist’ era. Moving forward, developments in policing and Aboriginal people’s location in the social order are discussed and the chapter concludes by introducing the earliest recorded reference to the use of the term ‘overpolicing’.

Chapter Three examines the period 1967 to 1976 which saw amendments to the Australian Constitution regarding the Commonwealth’s legal responsibility for Aboriginal affairs, the establishment of the first
Aboriginal Legal Service and the emergence of Aboriginal political activism around an adaptation of the African American notion of ‘Black Power’. The chapter then introduces commentary about the impact of the election of a federal Labor Government in 1972 and the creation of a new, discrete Ministerial portfolio with sole responsibility for Aboriginal Affairs. From there, the chapter explores four significant key historical events occurring in the year 1976: the publication of Eggleston’s (1976) empirical research, which established the over-representation of Aboriginal people in arrest rates across three states; the introduction of the Anungu Rules in respect of police interrogation of Aboriginal people in custody; the establishment of the Australian Institute of Criminology and its attempt to introduce a national statistical collection process to establish Aboriginal imprisonment rates; and the promulgation of the *Northern Territory Land Rights Act*.

Chapter Four examines the period 1977 to 1982 and continues the examination of Aboriginal over-representation, highlighting the inaugural Director of the Australian Institute of Criminology’s argument for a distinct Aboriginal Criminology. Following that, the thesis identifies the first use of the term ‘overpolicing’ in the Australian policing context as a result of the NSW Anti-Discrimination Board’s (1982) study of street offences by Aborigines and presents the views of two prominent Aboriginal lawyers invited to address a 1981 NSW Institute of Criminology seminar on the topic of Aborigines and the Criminal Law.

Chapter Five examines the period 1983 to 1987 and comprises a diverse mixture of studies, commentary and interpretation around factors associated
with the disadvantaged position of Aborigines and the law. In particular, it provides an analysis of the Commonwealth Law Reform Commission’s report on Aboriginal Customary Law, the policing of Aboriginal people in rural Australia, the notion of the ‘civilising mission’ and an explanation of the concept of ‘overpolicing’ through research conducted in the far-north-west of NSW.

Chapter Six examines the period 1988 to 1991 and brings into gaze the competing perspectives of Aboriginal and non-Aboriginal participants of the bicentenary celebrations of 1988. From there, the chapter is concerned with a concise review of the conduct of the Royal Commission into Aboriginal Deaths in Custody and outcomes from research into racist violence in Australia.

Chapter Seven examines the period 1992 to 1996, the post-Royal Commission period, as previously defined. It begins with a brief examination of the International Commission of Jurist’s visit to far-western NSW to assess the impact of the administration of criminal justice on Aboriginal communities in that region. Next, the chapter provides Aboriginal-specific views on the law from Aboriginal Magistrate Pat O’Shane and Aboriginal Lawyer, Kevin Kitchener. This is followed by commentary from Eades on Aboriginal English usage and Pirie and Cornack’s examination of ‘obscene language’ laws. The chapter next provides a brief examination of Wootten’s commentary on the history of Aboriginal-police relations in NSW, and then examines international literature, drawing on Canadian criminological research and commentary.
relating to Canadian Aboriginal peoples’ over-representation in arrest and custody rates. The end of the chapter is marked by a review of Aboriginal census data over the total period examined in this thesis to determine whether such data contributes to an understanding of the circumstance of Aboriginal over-representation in arrest and custody rates.

The final chapter provides a summary of findings regarding the main inquiry and proposes a schema for arranging the many and diverse indicators of ‘overpolicing’ extracted from the literature examined in this study, as well as proposing an illustrative model of what a concept of ‘overpolicing’ might look like. Following recommendations that highlight the need to develop an approach to measure the indicators of ‘overpolicing’, the chapter presents a proposition about the limitation of a concept of ‘overpolicing’ in Criminology’s explanations about Aboriginal over-representation.

1.6 Conclusion

This chapter has articulated the structure and content of the thesis. In doing so, the chapter identified the fact that Australian criminological literature has referred to the term ‘overpolicing’ in explanations about Aboriginal over-representation in police arrest and custody rates, but that no research has been conducted to establish the term’s origins, usage or utility. Section 1.2 highlighted this gap in knowledge and asked the question:

*How did the concept of ‘overpolicing’ become established in criminological accounts about Aboriginal over-representation in*
police arrest and custody?

The answer to the above problem will be explored through attempting to respond to the following questions:

1. Where and in what manner did the concept of ‘overpolicing’ emerge?
2. What does ‘overpolicing’ mean?
3. How is the concept deployed in Australian criminological literature?
4. Can ‘overpolicing’ be viewed as anything more than a construct that attempts to describe or illustrate how Aboriginal people are policed?

The significance of the research was justified, definitions were presented, the methodology was described and justified, the report was outlined, and the limitations were presented. On these foundations, the thesis then proceeds with a detailed description and analysis of the research.
DISPOSSESSION, DISPERSAL & RESISTANCE

The political conflict in Indigenous and non-Indigenous histories of this country can be compressed into two words: invasion and settlement. Each word carries entire historical perspectives and a range of moral judgements often taken to be absolutely conclusive about the ‘rightness’ or ‘wrongness’ of subsequent Australian history. (Dodson, 1997, p. 3)

2.1 Introduction

To gain an appreciation of the historical continuities that flow from policing’s administrative and enforcement roles in controlling Aboriginal people’s lives, it is necessary to explore the socio-political and legal discourses attached to the process of colonisation. Within this process, one can tease out the key factors and events that are argued as having aided and abetted in the expropriation of Aboriginal land, the attempts to destroy Aboriginal languages and cultures, the marginalisation of those cultures within the emergent Australian nation state and, subsequently, the identification of Aborigines as a ‘problem’ and their criminalisation as the racialised ‘other’.

This chapter examines the period 1788 to 1966 to elicit how the dominant culture has characterised frontier society, emergent nationalism, and Aboriginal people’s place within the imagined nation. Alongside this account, an examination is made of the functions assigned police in the
colonial frontier context and thereafter, the introduction of the British ‘new police’ model as the basis for institutional arrangements for policing in New South Wales and its concomitant impact on Aboriginal people’s lives and lifestyles.

Although this chapter spans one hundred and seventy-eight years of Australian history, there are only five key historical moments considered relevant to the two central themes identified above. The first key moment is the initial act of dispossession of Aboriginal lands by the British government and the ensuing policy prescription of ‘protection’. The second key moment concerns Aboriginal people’s segregation onto missions and reserves in the latter part of the nineteenth century and the movement towards the establishment of a federation to promote and protect ‘white/settler’ interests.

The third key moment is the first half of the twentieth century where two World Wars and a great economic depression had a severe social and economic impact on Australia and caused even more devastation among Aboriginal people. Within this period of disruption, hardship and devastation, the fourth key moment emerges: the repressive policies of ‘assimilation’. Finally, the end of this period is marked by a brief excursion into North American literature to detail the earliest mention of the concept of ‘overpolicing’ in the Criminological literature. In that instance, ‘overpolicing’ was a term used in an historical analysis of police-community relations in the North American policing environment.
2.2 Dispossession

Australia has been described as ‘the lowest, flattest, driest, emptiest, most isolated continent on the face of the earth’ (Griffiths, 1995, p. 10). It has no recorded history of invasions, civil wars, or plagues of the proportions that have decimated other parts of the world (Griffiths, 1995, p. 10). At the beginning of the eighteenth century, when the rest of the world had a rough working knowledge of itself, this continent was still called ‘Terra Australis Incognita’ by Europeans (Griffiths, 1995, p. 11). Even though archaeological evidence has dated Aboriginal occupation of Australia at 10,000 years, conventional wisdom acknowledges the accepted time span is at least 40,000 years, although Broome (1994, p. 10) has suggested Aboriginal occupation could be as lengthy as 120,000 years. What archaeologists and historians now question is any claim that occupation by the original inhabitants was an unbroken line of connection between the people who first set foot on this continent and the people now called Aborigines, or that they were in fact one initial homogenous group (Attwood, 1989, p. xii; Griffiths, 1995, p. 13).

Debate continues unresolved in those disciplines as to whether there was one, two or more migrations of people of different origins arriving at different times in different parts of the continent, whether there were trade routes north to south or east to west, whether mobility associated with a nomadic lifestyle affected the dispersion of the population across the continent, whether there were 200 or 300 languages spoken or whether the
population was 60,000 or 300,000 (Broome, 1994, p. 1) or 700,000 to 1,000,000 (Smyth, 1989, p. 48). This is likely to remain the case for some time as pre-settlement Aboriginal Australia records (oral histories, pictographs, and cultural artefacts) of its occupation are still not readily understood by latter day Australians (Griffiths, 1995, p. 15).

It is probable, more than possible, that such speculation will never be conclusively resolved, however Griffiths (1995, p. 15) is adamant that when ‘imagination and speculation’ about what happened during the past 40,000 years becomes the basis for social and political determinations in the present, it is a matter of serious concern. Nevertheless, the often competing and adversarial explanations about the circumstances of Aboriginal Australia have become commonplace and give rise to a proposition that ‘Aboriginal affairs has become the hair shirt of politics in Australia and perhaps the most bitter and divisive issue to affect the nation’ (Griffiths, 1995). Without doubt, the most plausible reason for the continuing divisiveness in most social and political determinations about Aboriginal Australia is the question of Aboriginal land ownership.

When the British decided to colonise Australia, they were faced with a dilemma: should the land be considered conquered or settled? If the land were to be settled, the laws of Indigenous people need only apply until new colonial laws displaced or supplanted them. In light of the need to own and control land, the colonial British administration considered that a great deal of importance should be placed on ‘settlement’, rather than invasion and
conquest. Accordingly, the country was labelled as being ‘settled’, whereby Aboriginal people were denied the rights generally given to a conquered people. From this very first step, it can be seen that Australian Aboriginal people were invisible to the British eye and that ‘racism’ had an economic base in the land and its resources (McQueen, 1986, p. 30).

The decision to create a settlement in New South Wales was made towards the end of the eighteenth century and tenders were called for transport ships to carry convicts to Botany Bay. The first of these tenders was received in September 1786, with the whole contingent arriving in January 1788. When this fleet set sail from England in 1787, it was for the singular purpose of establishing a South Seas penal settlement to relieve the English prison system of surplus felons (Palmer & McLeod, 1981, p. 7). Having been sentenced and transported under English law, would English law still apply to them on arrival?

For two centuries, legal scholars have insisted that Australia was uninhabited when the First Fleet arrived, consequently, English law as far as it was applicable, was said to have been transported with the settlers. According to the precepts of International Law at the time, a colonising country was permitted to ignore the legal status of aboriginal peoples if the country were to be deemed ‘unoccupied’ (Sarre, 1996, p. 193). In addition, colonising countries were also at liberty to claim as theirs any land that was not, in their opinion, being used appropriately. By contrast, if a country were conquered, local laws prevailed until the conquerors installed a new
legal order (Sarre, 1996, p. 193). According to Sarre’s (1996, p. 193) analysis of Australian Constitutional Law, Australia was deemed to be unoccupied (\textit{terra nullius} or ‘land of no-one’), and thus a legal vacuum existed. Even though the Australian High Court’s ruling in \textit{Mabo}\footnote{\textit{Mabo v Queensland} (1992) ALR 1 (cited in Sarre, 1996, p. 197). The effect of Mabo was that it confirmed, in some instances, Indigenous peoples’ rights to title preceded colonisation and survived the assertion of sovereignty by colonisers.} in 1992 challenged the official colonial position on \textit{terra nullius} by recognising the inherent right of first ownership to land in Indigenous Australian peoples, Sarre (1996, p. 197) estimates that fewer than ten per cent\footnote{The ‘ten per cent’ of Indigenous people that Sarre estimates may benefit from the Mabo decision equates to the proportion of Torres Strait Islander people in the total Indigenous population.} of Indigenous people will ever be able to benefit directly from the \textit{Mabo} decision.

In proclaiming ‘all the country inland westward at least to longitude 135 degrees east’ on February 7, 1788 as constituting the colony of Australia, tens if not hundreds of thousands of Australia’s First Nations peoples became subjects of the British sovereign at the time, King George III. In a British legal decision a century later, the Privy Council confirmed that the Australian colony had ‘…consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time it was peacefully annexed to the British dominion’ (\textit{Cooper v Stuart} [1889] 14 AC 291, cited in Sarre, 1996, p.193).

Historians are now discovering that the English administrators and their lawyers were aware of the existence of at least locally sovereign native or customary laws as early as the 1830s but preferred to ignore them to avoid the difficulties such recognition would have created politically, both
retrospectively and prospectively (Reynolds, 1992, p. 9). As a result, Australian legal history proceeded on the assumption that Australian Indigenous people did not have a system of rights to land. This assumption had the most horrendous consequences when Aboriginal people tried to defend those rights against the settlers and, in hindsight, Wootten (1993, p. 3) has argued, ‘it was an error born of ignorance and racial arrogance’. The notion of racial superiority and its concomitant conviction of presuming to know what is best for Aboriginal people will feature as recurring themes in many of the analyses that follow.

2.3 Frontier policing and the ‘new police’

In an historical analysis of institutional arrangements for policing in NSW from 1788 to 1996, Gordon (2003) investigated the notion of ‘unobtrusive power’ in traditional and new organisational forms where four distinct periods were identified for considering the Police Force’s evolving approach to its internal governance and its position and role in broader NSW society. Although the overall period for Gordon’s (2003) study is the same as this study, the four subdivisions identified (1788 to 1861; 1862 to 1959; 1960 to 1979; 1980 to 1996) are dissimilar to the five chosen for this study by reason of the key events selected to characterise each period. Nevertheless, the four periods are in close proximity to the intervals proposed in this study’s examination of the historical intersections between policing and Aborigines and, as such, they provide a useful framework to

3 The NSW Police Force changed in name to the NSW Police Service in July 1997 (NSW Government, 1990, p. 1).
discuss the development of the policing function in NSW.

One of the earliest instructions of the first Governor of the colony of NSW, Captain Arthur Phillip, was a proclamation for all colonists to maintain peaceful and friendly relations ‘in amity and kindness’ with Aboriginal people who, by virtue of their being defined as British subjects, were entitled to the protection of British law (Broome, 1982, p. 31). As a colony established primarily for confining Britain’s unwanted felons, the role of the military personnel, transported along with the convicts and colonial administrators, was to regulate convict behaviour through discipline and punishment. Realising the initial military garrison was not adept at civil law enforcement and also that many Marines had been stealing from the Government stores they guarded, Governor Phillip appointed the ‘best of convicts’ and later ‘freemen’ to the position of constable in a ‘Night Watch’. The main duties of the Night Watch were to patrol the town at night, to prevent or detect crime, to detain soldiers or sailors who were about after ‘tattoo’ or observed fraternising with convicts (History of the NSW Police, n.d., p. 1).

The role of constable had been transported from England and the policing model adopted initially by Phillip was along the lines of the Royal Irish Constabulary. This policing model required recruits to be unmarried, to have had some military training, to be posted to areas with no family or friends, and to be transferred regularly to prevent fraternisation with the local population (Kamira, 1999, p. 3). The rationale underpinning the Royal
Figure 2.1

Senior Sergeant Charles Dalton wearing the uniform of the New South Wales Police Governor’s escort which is almost identical to that of the 8th King’s Royal Irish Hussars c1875.  

Irish Constabulary model was that the policing of the population was more effective if the police were alien (Hill 1986, cited in Kamira, 1999, p.3). Under this model, the first group of constables operating in Sydney became known as the ‘Constabulary’ with their rural counterparts, acting under the authority of a local Justice of the Bench of Magistrates, being known as the ‘Bench Police’ or ‘Benchers’ (Porter, 1906, pp. 29-30).

The colonial variations of the Royal Irish Constabulary policing model remained in place until 1862 when the NSW Police Regulation Act established a new, single police authority with responsibility for the whole State: the NSW Police Force. In a unique account of frontier policing in Australia, Sturma (1987, p. 23) has argued that while the structure and

organisation of the NSW Police Force was similar to Sir Robert Peel’s London Metropolitan Police Force model of 1829, Australian policing responded to distinctive geographical and demographic factors which made significantly greater use of specialised, highly mobile police forces, particularly mounted police. In essence, the distinctiveness of early Australian policing

...was a direct response by authorities to the challenges of distance and isolation, subduing the native population, regulating a subservient (convict) labour force as well as contending with a dispersed population, an inhospitable climate and the uncompromising topography of many districts (Sturma, 1987, p. 23).

Contrary to the ‘isolationist’ principles underpinning the Royal Irish Constabulary policing model, the ‘new police’ were charged with maintaining cooperative relationships with the public under the following guiding principles:

- The duty of police is to prevent crime and disorder.
- The power of the police to fulfil their duties is dependent on public approval and on their ability to secure and maintain public respect.
- Public respect and approval also means the willing cooperation of the public in the task of securing observance of the law.
- The police should strive to maintain at all times a relationship with the public that gives reality to the tradition that the police are the public and the public are the police.
- The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with these problems (Inkster, 1992, p. 21).

Some time prior to the adoption of Peel’s ‘new police’ model for policing arrangements in NSW and well before interactions between police and Aborigines were marked by enmity and conflict, Governor Phillip had realised the value of the particular skills possessed by Aboriginal people in relation to tracking. As early as 1818 the British House of Commons was
made aware of the value of Aboriginal tracking skills through an Inquiry into the State of the Colony of NSW by Commandant Bigge (1822, p.117) who reported he had the opportunity of seeing ‘native blacks’ that inhabit the areas of Port Hunter and Port Stephens retaking escaped convicts. He declared that:

…they accompany the soldiers who are sent in pursuit and by the extraordinary strength of sight that they possess, improved by their daily exercise of it in pursuit of kangaroos and opossums, they can trace a great distance with wonderful accuracy, the impressions of the human foot. Nor are they afraid of meeting the fugitive in the woods, when sent in pursuit, without the soldiers; by their skill in throwing their long and pointed wooden darts they wound and disable them, strip them of their clothes, and bring them back as prisoners, by unknown roads and paths. (Reynolds, 1990, pp. 41-42)

Phillip’s interest in the local Aboriginal people near Sydney Cove (the Eora people) led him to befriend a young Aboriginal man called Bennelong⁵ who became a valued ally of the Governor as well as being employed by the Government for his tracking skills (Kamira, 1999). From that time onwards, Aboriginal men were used on an ad hoc basis for their bushcraft and tracking skills and the position of Aboriginal Tracker was formalised in 1862 with the establishment of the NSW Police Force. In that year, the position of Aboriginal Tracker appeared in the first Police Rule Book as a discrete Division within the Police Force, along with the General, Detective and Water Police (Gordon, 2003, p. 19) and within ten years, there were sixty-two Aboriginal Trackers on the NSW Police staffing establishment. Over the next sixty years, Aboriginal Tracker numbers gradually decreased to thirty-three in 1920, twenty-two in 1930, twelve in 1940, fourteen in 1950, six in 1960 and none in 1973 (The Sun-Herald, August 3, 1986, cited

⁵ Born circa 1764 of the Wangal people and also known as Wolarwaree, Ogultroyee and Vogeltroya, Bennelong died on January 3 1813 (Brady, 2008a, pp. 11-12).
When Norman Walford of Walgett retired in 1973, along with Frederick Pegus of Moree a few weeks earlier, the NSW Police Force was obliged to reconsider the future of trackers. In the five years to 1973, the two remaining Trackers were utilised only once for tracking duties and a decision was made to discontinue employing Trackers. Economic factors, the increasingly urbanised population and the development of more scientific investigation methods as well as technical innovations (and possibly the fact that an increasing number of police were unaware of Aboriginal bushcraft and tracking skills) all led to a conclusion that Trackers were a virtually redundant resource despite the advantages to country police from the Trackers’ good knowledge of stock and rural conditions and their respected position as a communications link between police and Aboriginal groups (*In the Job*, 1986, p. 17).

Although the position of Aboriginal Tracker was abolished in NSW in 1973, there were several instances in later years where experienced Aboriginal trackers were employed for a specific task. In one such instance in 1986, the head of Walgett Police Station engaged a seventy-year-old Aboriginal man from Tibooburra and a property owner from Wanaaring to retrace the movements of a man wanted for serious crimes in the Angledool region who had evaded Tactical Response Group (TRG) police and Special Weapons and Operations Squad (SWOS) police. The two were briefed to find out whether the offender was still at large in a particular location or whether he
had gone to ground elsewhere. As a result, a particular line of inquiry was
eliminated and the movements of a third party highlighted, with the head of
the inquiry claiming such information could not have been obtained by
relying on contemporary policing methods (In the Job, 1986, p. 17).

In the same year, The Sun-Herald (1986; cited in, In the Job, 1986, p. 16)
reported that on August 3 two ‘black trackers’ were let out of a police lock-
up in a small Western Australian town to look for a white child lost in the
bush. Two hundred local mine workers had searched in vain all day,
however, when temporarily released from custody, the two Aboriginal men
located the child within ninety minutes. They were immediately returned to
their cells to continue their sentences; four months for petty theft and two
months for not paying traffic fines (In the Job, 1986, p. 16). It is presumed
the two men were not employed in the Western Australia Police as Trackers
but were known by local police as skilled trackers and were invited to help
in the search. While demonstrating the regard police had for Aboriginal
people’s bush skills on the one hand, this account also demonstrates the
often-ambiguous relationship between police and Aborigines. Although the
Aboriginal men had been arrested by police for minor offences and were
each serving a sentence in police custody, the same police were not averse
to using their skills to effect an end to the distress for the non-Aboriginal
community. When their immediate use had ended, the two Aboriginal men
were again incarcerated for their violations against white laws.

Returning to Kamira’s (1999) earlier account concerning the participation of
Aboriginal people in policing, it is suggested that by the 1820s the appropriation of Aboriginal bushcraft had extended from guiding explorers and travellers to a situation where the knowledge of its capabilities was used by the authorities to deter would-be convict escapees. Such knowledge was not confined to would-be escapees, and colonial administrators soon came to the view that Aboriginal bushcraft and survival skills made Aborigines superior to Europeans, and as such, this type of expertise had to be controlled. The result was a push to formalise Aboriginal bushcraft skills into employment in policing as trackers, initially to locate white lawbreakers, then later, to assist in punitive expeditions to hunt and capture Aboriginal people who resisted white encroachment onto their lands (Reynolds, 1990, p. 46).

By 1840, Aboriginal tracking skills had been formally incorporated into the Aboriginal Police of the Port Phillip District, Sydney. The Northern NSW Native Police was established in 1848 (later to become the Queensland Native Police) and administered by the colonial government of NSW until 1856, and from then until the end of the century under the new Queensland colonial government (Evans, Saunders & Cronin, 1993, p. 55). According to Chesterman and Galligan:

> the extension of white settlement into inland Queensland, often referred to as the opening up of the Queensland frontier, would have presented many more problems for white settlers, had it not been for the use of Aboriginal trackers. (Chesterman and Galligan, 1997, p. 34)

In the same year as the Northern NSW Native Police Force was established by the colonial government of NSW, the Native Mounted Police Force was
introduced privately by squatters, under the direct control of the Police Commissioner. This arrangement was described as at least partially responsible for ‘the manner in which aggression was most efficiently and relentlessly applied, and violence institutionalised on the frontier’ (Evans et al., 1993, p. 55).

A Southern NSW Native Police Force was established at the same time as the Northern NSW Native Police Force and operated in all parts of the burgeoning colony until it was disbanded in 1852. From at least 1837 onwards, efforts were made to engage members of several Aboriginal language groups to serve in a company of mounted police. One of these, that has been argued as the most ‘successful’, was the Native Police Corps drawn together by Henry EP Dana who commanded the unit from its commencement until it was disbanded in 1852 (Evans et al, 1993, pp. 55-56). This group of Aboriginal troopers, officially enrolled in January 1842, was stationed at Nerre Nerre Warren, about 25 kilometres southeast of Melbourne. Initially, the Corps consisted of twenty men, but by 1851 the number had grown to forty-five and with European troopers, made up the total contingent of sixty.

William Thomas, at one time Port Phillip Protector of Aborigines, noted in his journal of 1845 that Dana had dismissed a Sergeant Bennett from the

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6 Nerre Nerre Warren was the site chosen by the Woiwurrung and Boonwurrung people for the location of the Native Police Corps headquarters. The Native Police were based there between 1837 and 1838 under Christiaan de Villiers and later under Henry E P Dana. The site is today known as the Dandenong Police Paddocks, and is located near the intersection of Police and Stud Roads. Retrieved on March 10 from http://www.prov.vic.gov.au/nativepolice/background.html.
Native Police Force after censuring the Sergeant for ‘not killing the blacks’.

In response, Sergeant Bennett remarked that:

you have no idea how I have been treated because I have endeavoured to pacify the blacks and not kill and slay all I met with, yes, Sir I do believe if I had slaughtered the bodies of Natives as I occasionally met them that I should never have been dismissed from the Police. (William Thomas papers (1844-1847), ML uncatalogued MSSS 214/2 and ML MSSS 214/3, 19 August 1845)

In keeping with the Royal Irish Constabulary model, Aboriginal Police were recruited from locations distant from the area they policed; a strategy that proved beneficial when it was expected they would assist in punitive expeditions against Aboriginal people. As Parbury (1988, p. 63) later argued, ‘the fundamental role of the Native Police was to ‘disperse Aboriginal tribes’ and make the land safe for pastoral enterprise’. In recounting Queensland State Archives material concerning the ‘dispersal’ activities of Sub-Inspector Frederick Urquhart, Kotch (2003) quotes from Urquhart’s personal report to the Police Commissioner, concerning the murder of a Mr E Watson at Pine Tree Station in 1889, where Urquhart argued:

How many of us understand the euphemistic word ‘dispersal’. If it is advisable that, as a colony, we should indulge in wholesale slaughter of the (Aboriginal) race, let us have the courage of our opinions and murder openly and deliberately, calling it murder, not dispersal. (Kotch, 2003, p. 32)

When Aboriginal resistance to frontier settlement resulted in attacks on whites, Native Police under orders from their white officers became part of the larger movement to eradicate such resistance and participated in

7 Urquhart was later Queensland Police Commissioner between 1917 and 1921 and as a result of leading numerous ‘dispersal’ expeditions is described by Kotch (2003) as ‘possibly the greatest mass murderer in Australian history’.
punitive, revenge expeditions. Whether willing or not\textsuperscript{8} Aboriginal police were, together with their white police officers, complicit in many acts of terror, violence, and perhaps murder, against Aboriginal people during the time they were formally engaged ostensibly for their superior bushcraft and tracking skills (Evans et al. 1993, p.57).

2.4 In praise of assimilation

In 1944 Reay (1945), an anthropologist, carried out research to establish the degree of interaction between the non-Aboriginal community at Walgett and ‘approximately 300 people with some admixture of Aboriginal blood’ living within a thirty mile radius of that town. Although Reay (1945) provides no clear statement about the purpose of the research, the overall intent seems to have been one where ethnographic material was collected, collated and sanitised to promote the view that ‘assimilation’ was the correct view to be taken in relation to denying the existence of the ‘part-Aboriginal problem’. Importantly, Reay’s (1945) research reflects the attitudes, values and language of the time.

While Reay (1945) carried out her work under the auspices of the Aborigines’ Welfare Board, her research was under the direction of Professor AP Elkin, Emeritus Professor of the University of Sydney and Editor of *Oceania* in which Reay’s work was subsequently published.

\textsuperscript{8} Evans et al. (1993, p. 57) are of the view that many Native Police were in fact ‘press-ganged’ into service.
Elkin (1979), a noted anthropologist, has claimed he was the person who suggested the term ‘assimilation’. In his seminal publication *The Australian Aborigines*, Elkin (1979, p. 373) points out that in 1938 he suggested the term ‘to indicate the inevitable process through which the Aborigines of New South Wales - almost all ‘part-Aborigines’ - should realize their rights, privileges and responsibilities as Australian citizens’, adding ‘they already possessed both State and Commonwealth franchise by right of birth’.

Reay’s (1945, p. 296) initial focus was on ‘poor whites’ and Aborigines, with the term ‘poor whites’ being used to describe those people living in permissive occupancies,9 itinerant shearsers, labourers, stockmen, old-aged pensioners and travelling bagmen (swagmen). Mention was also made of the Chinese residents who formed a separate community and were regarded by the white community ‘as a better type than the aborigines [sic]’ who did not mix with their Aboriginal neighbours, ‘except to find an easy market for vegetables, fishing bait and perhaps surreptitious liquor’ (Reay, 1945, p. 296).

At this time, non-Aboriginal people living in permissive occupancies mixed freely with Aboriginal people and Reay (1945, p. 297) noted that this category of resident was generally regarded as being Aboriginal by non-Aboriginal people. The same note was made with respect to the immediate white neighbours of Aboriginal families living geographically within the general community. Rather than these living arrangements leading to freer

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9 A permissive occupancy was a form of tenure over Crown land authorising an occupation or use. It was granted under previous legislation and is no longer used, having been replaced by licences (NSW Department of Lands, 2009, p. 2).
associations with whites and ‘leading to the successful assimilation of the aborigines’, the exact opposite was occurring. Reay (1945, p. 297) noted that it was ‘within this group of whites that we find the overwhelming majority of the men who have been convicted of supplying liquor to the aborigines [sic]’.

Reay (1945, 297) goes on to explain the paradox existing within the black/white relationship: whereas a shearer could share his liquor with an Aboriginal person while they were ‘out bush’, there was extreme danger that he would be caught and arrested if he were to do so in the town. This situation gave rise to hostility and resentment, which often ended in a physical affray, giving rise to middle-class white residents’ complaints and, ultimately, arrests of Aboriginal people.

Reay (1945, p. 299) was carrying out her research toward the end of World War II, a time when there was a shortage of manpower, especially in rural areas. To fill this void, there was an increasing demand for Aboriginal labourers, and although Aboriginal people were regarded ‘as slothful and unreliable’ their services were keenly sought after. In her paper, Reay differentiates between small and large land-holding classes, yet emphasises that both groups would obtain Aboriginal workers by underhanded means, sometimes supplying potential workers with alcohol and taking them out to work while they were under the influence. In some cases, Aboriginal labourers were guaranteed a supply of alcohol while they were on the job (Reay, 1945, p. 299). Further, Reay attributes many of Aboriginal people’s
offences against the law to the fact that they were receiving the same wages as whites, a fact she claimed that was resented by many employers who were sometimes outspoken in their regret that the days had passed ‘when an aborigine was content to work for only a plug of tobacco and a ration of flour and tea as payment’ (Reay, 1945, p. 299).

Table 2.1 below shows that an extraordinarily high number of Aboriginal people were convicted of drunkenness in the Walgett area over the period 1934 to 1943.

**Alcohol Related Offences: Walgett**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of whites convicted of supplying liquor</th>
<th>Number of Aborigines convicted of drunkenness</th>
<th>Number of Aborigines convicted of indecent language</th>
</tr>
</thead>
<tbody>
<tr>
<td>1934</td>
<td>4</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>1935</td>
<td>1</td>
<td>27</td>
<td>2</td>
</tr>
<tr>
<td>1936</td>
<td>5</td>
<td>29</td>
<td>3</td>
</tr>
<tr>
<td>1937</td>
<td>15</td>
<td>28</td>
<td>4</td>
</tr>
<tr>
<td>1938</td>
<td>5</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>1939</td>
<td>4</td>
<td>37</td>
<td>8</td>
</tr>
<tr>
<td>1940</td>
<td>1</td>
<td>105</td>
<td>15</td>
</tr>
<tr>
<td>1941</td>
<td>5</td>
<td>93</td>
<td>17</td>
</tr>
<tr>
<td>1942</td>
<td>5</td>
<td>110</td>
<td>12</td>
</tr>
<tr>
<td>1943</td>
<td>6</td>
<td>111</td>
<td>18</td>
</tr>
</tbody>
</table>

(Source, Reay, 1945, p. 300).

Conversely, Reay (1945, p. 300) commented on the difficulty in convicting whites of supplying liquor ‘as they were prone to leaving, or hiding the alcohol in a tree stump, or under a bridge rather than risk being caught’. However, Reay (1945, p. 300) noted that for some it was worth the risk, ‘as they could extract exorbitant amounts of money from the recipient, who was unable to purchase it for himself’.
In one of the earliest sociologically oriented explanations concerning Aboriginal alcohol consumption, Reay equated drunkenness with being a symbol of defiance and argued that if a sober Aboriginal person was found to be in possession of alcohol, they would feign drunkenness as proof they had flouted an unjust law. In addition, Reay contended that ‘this pride in being drunk expresses the aborigines’ contempt for a law they consider unnecessary and ineffective’ (Reay, 1945, p. 301. Further, Reay (1945, p. 299) suggested there was a direct correlation between increased wages and drunkenness and also asserted ‘that due to increased drunkenness, the number of Aboriginal people with police convictions for assault increased in parallel’.

Laws prohibiting the sale or supply of alcohol to Aboriginal people were introduced in NSW in 1838 and remained in force until 1963, when an amendment to the *Aborigines Protection Act 1909* repealed the ‘supply of liquor’ stipulation (Lucas, 1992; Brady 2008b). As Wootten (1993, p. 267) has noted elsewhere, it was only in the latter half of the 20th century that Aborigines without a citizenship certificate were allowed into hotels in NSW. In addition to the repeal of the ‘supply of liquor’ stipulation, the amendment also allowed for payment of wages directly to Aboriginal employees, rather than to the Reserve Superintendent and Aboriginal people in New South Wales were no longer to be removed from the vicinity of townships or placed on reserves and could not be punished for ‘wandering with Aborigines’ (McCorquodale, 1987, p. 23).
Kilkelly (1966, pp. 75-76) has observed that in New South Wales the *Aborigines Protection Act 1909* prescribed that Aboriginal people live in one of four ways: on Government stations; in fringe settlements; private settlements in pastoral areas; or in assimilated groups within the white community. In prescribing Government stations or reserves to be established for Aboriginal people on land set aside for use by the Crown, the Act did not always allow contact between Aboriginal and non-Aboriginal people, but if it did, the amount of contact that did occur varied according to the whims of the reserve or mission manager. Further, under the Act non-Aboriginal people required a permit to enter a closed reserve, as the intention of segregation was that Aboriginal families would be protected from predatory white males. However, Kilkelly (1966, p. 79) also notes the fact that police officers could come and go as they saw fit.

Under the Act, several grants of land were made for Aboriginal people between 1890 and 1909. Goodall (1996) documented these grants (Figure 2.3 below) and noted that at the height of Aboriginal holding of reserve lands in 1911, there were 115 reserves totalling 26,000 acres. Of these, seventy-five were created ‘on Aboriginal initiative’ (Goodall, 1996, p. 96). The success of these farms was curtailed with the advent of the First World War Soldier Settlement Scheme, a scheme that saw allotments being drawn from Aboriginal reserve land. Returned (white) servicemen had access to land that had been cleared and cultivated by Aboriginal people. The Aborigines Protection Board ‘forced’ Aboriginal people off these farms

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10 For example, the Karuah Reserve was established under the *Crown Lands Consolidation Act 1913*, gazetted on 11 May 1923 (Goodall, 1996, p. 96).
with literally only the clothes they had on their backs and ‘they received nothing for decades of effort, sweat and tears’ (Maynard 2007, p. 63). This second act of ‘dispossession’ was to be followed by a third in 1983 when the Wran Government passed legislation that retrospectively validated the second dispossession (Goodall, 1988, p. 6).

**Aboriginal Reserve Lands c. 1911**

*Figure 2.3*

Source: Goodall, 1996, p. 95.
Reay’s (1945) paper is significant not only for providing a record of the language and attitudes of the day, but also for its insightfulness into the machinations between black and white populations in a rural country town. Equally importantly, her research highlighted a number of the issues and events which have been re-visited time and again in more contemporary criminological research (Eggleston, 1976; Clifford, 1981; McCorquodale, 1982; Cunneen and Robb, 1987; Wilson, 1987; Hazlehurst, 1987a; Cowlishaw, 1987; Bird, 1987; Goodall, 1990) to further explain Aboriginal people’s tenuous socio-legal circumstance within Australian society.

2.5  Imagining the ‘lucky country’

The desire for and belief in a ‘white Australia’ was the dominant expression of Australian settler-nationalism from its beginnings in the nineteenth century and for a large part of the twentieth century (Moran, 2002a, p. 677). The discourse of ‘newness’, the staple of nineteenth-century and early twentieth century settler-nationalists, proclaimed that settler colonies or nations were new societies free of the problems, traditions and the class distinctions that bedevilled the ‘old world’, and the ‘absence’ of history or tradition meant that settlers could build their own utopias without hindrance (Moran, 2002a, p. 677). Fundamental to this ideology was the notion that the land was an empty space, waiting to be filled and developed by the new society. Such discourses had an implicit or explicit understanding of the

11 ‘Settler colonies’ are those territories where the main purpose of colonisation was to transplant persons from the home country into a new territory. The eventual outcomes of settler colonialism are societies in which Europeans have settled, where their descendents remained politically dominant over indigenous peoples, and where a heterogeneous society has developed in class, ethnic and racial terms (Riseman (2007, p. 82).
nature of indigenous society where typically, such societies did not count as historical societies with their own traditions and deep-rooted relationship with the land (Moran, 2002b, p. 1016).

‘White Australia’ was a nationalist assertion of pride in the character of the Australian community and as far as possible, it was going to be free of the racial conflict and division that had been the American and South African colonial experiences. By the 1890s The Age newspaper could editorialise:

The problem of Negro citizenship in the United States is given up by the philosopher as unsolvable…In Australia fortunately, we are free from this race problem. The Aboriginals were of too low a stamp of intelligence and too few in number to be seriously considered. If there had been any difficulty, it would have been obviated by the gradual dying out of the native race. What we have to be afraid of is that, from our geographic position, we shall be overrun by the hordes of Asiatics. (Moran, 2002a, pp. 677-678)

The powerful fantasy of harmony and democratic expansion through unity and purity of race stood at the heart of Australian settler-nationalism. White Australia encoded specific racial ideas and fantasies about what held a nation together that encapsulated not only the hopes and dreams of settler-nationalism, but also the settlers’ most potent fears and hatreds. This style of imagining of political community obviously had important implications for those people who were not white: all efforts were made to exclude them, and where they could not be excluded, they would not be regarded or treated as fully fledged citizens of the white national democracy (Moran, 2002a, p. 678). Australia’s White Australia Policy, agreed upon by all mainstream political factions after Australia’s federation in 1901, was given effect by immigration restriction acts and acts relating to citizenship, voting rights,
and rights to social benefits. It was effective in restricting the growth of non-European, non-white populations in Australia for the long period of its operation until 1973 (Moran 2002a, p. 678). ‘The rich fantasy structure of white Australia, which included an elaborate race ideology as well as concepts of civic virtue, democracy, egalitarianism, and freedom’, is not only of historic interest; it is the background and at times, the stumbling block, to efforts since the latter part of the twentieth century to reorient national identity away from notions of race or the ‘kinship of blood’ (Moran, 2002a, p. 678).

Unlike franchise colonialism\textsuperscript{12}, which exploited societies like India, China, Java and Japan for labour and material goods and also as a market for surplus European goods, settler colonialism bypassed the indigene in an attempt to directly connect with the land and ‘is at base a winner-take-all project whose dominant feature is not exploitation but replacement’ (Moran, 2002b, p. 1016). From the beginning, the fundamental resource involved in the colonial enterprise in Australia and the issue that dominated nineteenth century politics was the question of land: how it was going to be carved up between settlers and accordingly, what form of society the organisation of land as a resource was going to produce (Moran, 2002b, p. 1019).

The battle was between the land barons and the lower classes, with the squatters and pastoralists envisaging a hierarchical class society with limited democracy and a well developed aristocracy on the one hand, with the lower classes of convicts, ex-convicts and poorer immigrants aspiring to ownership of small plots of land as the basis for the development of an egalitarian, democratic society beyond

\textsuperscript{12} Riseman (2007, p. 82) has argued that ‘franchise colonialism’ is different to settler colonialism in that franchise colonialism’s main objective was to exploit the indigenous inhabitants as labour in the colonial enterprise (Riseman, 2007, p. 82).
anything they had experienced or could hope to achieve in Britain, on the other (Moran, 2002b, p. 1019).

Though there were debates about Aboriginal policy, and about missions and reserves for Aborigines from the latter half of the nineteenth century, these were often less than a footnote to the larger debate about land and society. Importantly, with few exceptions, the ‘indigenous’ were excluded from land ownership (Moran, 2002b, p. 1019). According to Moran this structural feature of settler-colonialism shapes the forms that settler-nationalism takes and means that, in Australia’s case, there are two settler-nationalist modes for organising the national reality and national identity: assimilationist and indigenizing settler nationalisms (Moran, 2002a, p. 672).

Briefly, assimilationist settler-nationalism is argued as being specific to the ‘indigenous’ and involved social engineering by Australian state and federal governments with an explicit nationalist rationale. Under assimilation policy between the 1930s and 1960s, Aboriginality was considered a ‘retarding’ and ‘bad influence’ (Moran, 2002a, p. 678). In effect, policymakers felt it had to be dismantled in order for Aborigines to take their place as full moral members of the Australian nation. Cultural homogeneity, now separated from notions of biological racial homogeneity, was of central importance to the nation envisaged under this assimilationist regime. From one angle and for some in the settler community, Aborigines remained ‘bad part-objects’ that were to be destroyed or got rid of, only now in a more rationally coordinated manner than in the days of frontier ‘dispersal’ (Moran, 2002b, p. 680). Absorbing the ‘indigenous’ meant the
gradual dissolution of Aboriginal blood, and thus of any trace of Aboriginality that had survived the initial frontier conflicts. For assimilationist settler-nationalists, this was the only way that the purity of white Australia could be preserved.

Alternatively, assimilation policies paved the way for the gradual inclusion of the ‘indigenous’ into the Australian nation after their long period of exclusion and Aborigines moved, at least somewhat, from a position of being outsiders to the nation to a position where they were now deemed to be part of the nation. Bringing Aborigines into the ‘goodness’ of the nation is viewed by Moran (2002a, p. 680) as a reparative gesture through which Aboriginal humanity was restored, where once it had been maligned. According to Moran (2002a, p. 680), this reparative tendency intensified once assimilation policy lost its legitimacy and was replaced by integration and self-determination policies after the 1960s.

Indigenizing settler nationalism, on the other hand, tends to welcome and promote the inclusion of Aboriginal identity and cultures into the Australian national identity and government policy as important and necessary in order to improve relations between the settler and indigenous communities. Within this view, indigenizing settler nationalists ‘experience the transformed relations with the ‘indigenous’ and revisionist colonial histories as something to be confronted rather than dismissed or played down’, and feel compelled to act symbolically and practically (Moran, 2002a, p. 682). An underlying fear is that the damage done in the past to the ‘indigenous’
will flood the present and ruin it, giving rise to feelings that may be
overwhelming and result in melancholia where the nation is perceived as
irredeemably bad. On the other hand, it gives rise to a reparative impulse
that may open the way for a more constructive dialogue between settler and
Indigenous Australians on issues such as compensation for past treatment,
Moran concludes that one needs to at least raise the question of how
significant is the shift from an older form of settler-nationalism that simply
excluded the ‘indigenous’, to a form of settler-nationalism that seeks to
recognise, respect and indeed re-legitimise the nation-state through co-
opting Indigenous identities (Moran, 2002b, p. 1036).

Ultimately, Moran offers the view that the more sophisticated forms of
indigenising settler nationalism do represent a significant change and
provide a moral resource for the extension of Indigenous rights and claims
(Moran, 2002b, p. 1036). However, until such time as the nation-state
enacts real and binding forms of agreement with Indigenous peoples that
recognise their legitimacy, indigenizing settler nationalism is open to the
accusation that it is a form of window dressing that comforts the non-
Indigenous with a sense of their own moral good, and the moral good of the
nation (Moran, 2002b, p. 1036).
2.6 Aboriginal affairs and Aboriginal political activism – 1930s to 1960s

2.6.1 The early years

In homage to those Australian Aboriginal activists who came before the 1960s ‘Black Power’ movement, but perhaps more pointedly to censure those Australian historians who have consigned Aboriginal political activism to irrelevance, Foley (2001) has presented an account of what he views as the three major movements in Australian Aboriginal political activism. In chronological order of their establishment, these were the Australian Aborigines Progress Association (AAPA), the Australian Aborigines League (AAL) and the Federal Council for Aboriginal Advancement (FCAA), later to include Torres Strait Islanders to become the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI). Importantly, Foley (2001, p. 3) argued that even before the advent of organised political activism Aboriginal people in regional areas of south eastern Australia had consciously and continuously resisted invasion and forcible occupation of their lands at a local level from the 1860s. Having made this point, Foley (2001, p. 3) asserted that the nature of Aboriginal activism changed in the 1920s when Fred Maynard, a self-educated former drover and active member of the Waterside Worker’s Federation during the First World War, set up the AAPA.

The AAPA was officially launched in February 1925, just prior to the Great Depression, as ‘the first Aboriginal political organisation’ whose primary
objective was to create formal links between Aboriginal communities over a wide area (Foley, 2001, p. 3). The group that initially consisted of all male office-bearers, apart from a female organising secretary, protested against the revocation of north-coast NSW farming reserves and advocated that all Aboriginal families should receive inalienable grants of farming land within the bounds of their traditional country. In addition, the AAPA demanded that Aboriginal children no longer be separated from their families or indentured as domestics and menial labourers and also that they should be allowed to attend public schools. Of particular significance for the time, members of the AAPA promoted the idea that Aboriginal people themselves should control their own lives (Maynard, 2007, p. 67; Maynard, 2005, p 1).

During the Depression era, the AAPA engineered small scale alliances with white unemployed activists who joined Aboriginal activists in Dubbo, NSW in protests over unemployed Aboriginal people being denied work relief. Key Aboriginal activists such as Tom Peckham, Ted Taylor, Pearl Gibbs, Jack Patten and Bill Ferguson were instrumental in developing these alliances (Maynard, 2007, p. 46). There were stop-works, protests and strikes around NSW including Wallaga Lake, Menindee, Burnt Bridge, Brewarrina and Purfleet. Ultimately, AAPA protest and advocacy activities were undertaken with one single objective mind: to cause the abolition of the Aborigines Protection Board, established under the Aborigines Protection Act 1909 (Maynard, 2007, p. 46).

One of the early all-Aboriginal political organisations was the AAL established in Melbourne in early 1936 by William Cooper, Doug Nichols,
Bill and Eric Onus and others to ‘gain for Aboriginal people those civil and human rights denied since occupation’ (Foley, 2001, p. 3). Despite the excessive amount of travel throughout Australia by key members of the AAL in the 1930s to the 1960s to make contacts, compile information and organise localised political action, it was arguable whether the AAL ever amounted to anything more than a south east Australian regional organisation. However, the AAL’s standing changed in 1937 when it joined with Bill Ferguson and Jack Patten’s New South Wales based Aborigines Progressive Association (APA) to launch the national symbolic Day of Mourning. a year later on the anniversary of the sesquicentenary of British settlement (Foley, 2001, p. 4).

Twenty years later, amid the conservative atmosphere of Menzies’ post-war Australia, twenty-five people, representing eight different Aboriginal organisations, met in Adelaide in February 1958 to form the first national Aboriginal organisation, the Federal Council for Aboriginal Advancement (FCAA). Of the twenty-five Council members only three were Aboriginal and as the organisation grew, the dominance of non-Aboriginal people on the governing committee became entrenched, leading to Aboriginal discontent at the lack of Aboriginal control (Foley, 2001, p. 4). A change in name in 1964 to the Federal Council for the Advancement of Aboriginals and Torres Strait Islanders (FCAATSI) acknowledged the inclusion of Torres Strait Islanders as the second cultural group who, together with Aboriginal people, constitute Australia’s Indigenous cultures.

13 See Appendix D ‘Day of Mourning’ flyer, 26 January 1938, Anti Slavery Society, UK celebrated today as NAIDOC: National Aboriginal & Islander Day Observance Committee.
14 Bert Groves, Doug Nichols, Jeff Barnes (Foley, 2001, p.4).
Despite Foley’s (2001) criticism that non-Indigenous people continued to dominate the organisation’s governing body, it is unlikely FCAATSI would have been able to mount such a successful ‘Vote Yes’ campaign for the 1967 Referendum had it not been for the widespread support garnered through the organisation’s non-Aboriginal members and supporters. Similarly, Tatz (1981, p. 7) has argued, but Foley (2001, p. 4) seemed disinclined to acknowledge, the mainly white ‘advancement leagues’ working within the civil rights framework did ‘gain something’ for Aborigines in their thirty years of political activism before their demise at the hands of the Black Power movement. In this regard Tatz (1981, p. 7) has pointed out that it was the white middle-class liberals behind the leagues that ‘sought the right of Aborigines to normal citizenship’ and also campaigned for equal wages, free and compulsory education, and against the prohibition on Aboriginal drinking, the forced removal of Aboriginal people from reserves, mining on such land, for a federal franchise, and for the successful 1967 Referendum.

2.6.2 The 1960s

In 1951, a major mineral discovery of bauxite was made in East Arnhem Land on the Yirrkala Mission, which had been established sixteen years previously as a Methodist Church mission. To capitalise on the discovery, the Commonwealth government passed the Minerals (Acquisition) Ordinance in 1953, which vested interest in mineral discoveries in the Crown. As the ore body was located on land held by the Methodist Church
under a mission lease, the Commonwealth needed to obtain the Church’s consent to transfer a lease to a mining company (Griffiths, 2006, p. 19).

Five years later, the Commonwealth began negotiations for the granting of leases to mining companies to extract the bauxite deposit. Preliminary negotiations between the Minister for Territories, Paul Hasluck and the head of the Methodist Mission Board, the Reverend Cecil Gribble were lengthy, at Hasluck’s insistence, to satisfy him that Aboriginal interests would be safeguarded. During the negotiations, the Methodist Church appointed a missionary couple, Edgar and Ann Wells, to Yirrkala. Edgar Wells had studied anthropology at Sydney University under Professor HP Elkin and had apparently taken the view before arriving at Yirrkala that Aboriginal people had not been consulted about the transfer of the leased land Gribble had agreed to this transfer and Wells believed, as Hasluck did, that the introduction of mining was a beneficial step along the path to assimilation for Aboriginal people (Griffiths, 2006, p. 92). Enlisting the aid of Professor Elkin and another noted anthropologist, HW Berndt, Wells mounted a campaign on behalf of the Yirrkala people which led Labor Opposition Senator Kim Beazley Snr to travel to Yirrkala and suggest a protest to Parliament in the form of a bark painting, a traditional visual art form of Arnhem Land Aborigines (Griffiths, 2006, p. 18; Chesterman & Galligan, 1997, p. 194). The petition aroused considerable media interest and Beazley moved for a select committee to investigate the complaints of the people from Yirrkala. In accepting Beazley’s proposal for an inquiry, Hasluck reminded Parliament that:
...reserves and missions had been created at a time when Aborigines were thought to be a dying race, but now there is a growing belief that the obligations towards the Aboriginal people are greater than simply to provide as it were, an isolation ward in which they may die in peace. (Hansard, 1963, Vol. 39, p. 392 quoted in Griffiths, 1995, p. 93)

A select committee, established by the Australian Parliament, travelled to Yirrkala in 1963 and subsequently provided advice that Aboriginal people at the mission were not strongly opposed to the mining but were, however, angered about not being consulted, particularly in relation to protection of sacred and special places within the leased lands. The Committee also confirmed Aboriginal people’s view that they were not consulted and recommended that the land leased to the mining company should be declared a protected area with Aborigines having exclusive rights to hunting and fishing, with consultation to take place on the location and preservation of sacred sites (Griffiths, 1995, p. 19).

In June 1966, eighty members of the Gurindji language group working on Wave Hill cattle station in the Northern Territory, impatient with the delay in the implementation of the Arbitration Commission’s ‘equal pay’ decision of 1965, had walked off the job declaring they would no longer work for unjust wages. In mounting an industrial campaign from the banks of the Victoria River, the protest became the first concerted action for Aboriginal land rights and the Gurindji people’s concerns presented to Parliament spoke to their desire to:

...regain tenure of our tribal lands, of which we were forcibly dispossessed in times past and for which we received no recompense. This land belonged to our forefathers from time immemorial – we feel that morally if not legally, the land is ours and should be returned to us. We are not a
degraded people and if given our rightful heritage, we would show the rest of Australia and the world, that we are capable of working and planning our own destiny as free citizens. (Hansard, 1966, Vol. 53, p. 2359, quoted in Griffiths, 1995, p. 100)

In an historical analysis of Aboriginal affairs from 1788 to 1995, Griffiths (1995) has argued that the 1960s was a period of intense international protest against racial discrimination, particularly against apartheid in South Africa and discrimination against Blacks in the USA. Although comparatively less dramatic than overseas events, the treatment of Australian Aboriginal people did not escape media scrutiny and on 13 October 1966 Paul Hasluck, Minister for External Affairs, signed the International Convention on the Elimination of All Forms of Racial Discrimination on behalf of Australia (Griffiths, 1995, p. 99). In doing so, Australia became signatory to provisions that upheld fundamental human rights such as ‘the right to freedom of movement and residence’ and which, by extension, held that ‘no one was to be subject to arbitrary interference’ where their ‘privacy, family or house’ was concerned (Griffiths, 1995, p. 99). Consequently, supporters of Aboriginal rights at the time were confident in being able to point out to the federal government that the restrictive laws of some Australian states violated this right as Aboriginal people were still not free to move from reserves and missions and were not free from interference in the privacy of their homes.

Concomitant with the burgeoning public awareness about racial issues in Australia, the Commonwealth government began to take more interest in Aboriginal affairs with Prime Minister Menzies agreeing in 1965 to repeal
Section 127 of the Australian Constitution\textsuperscript{15} that excluded Aborigines from being counted in the census. However, Menzies could see no reason for removing paragraph xxvi of Section 51\textsuperscript{16} that prevented the Commonwealth from making special laws for Aboriginal people, believing that its removal might lead to a range of laws that set Aboriginal people apart from the rest of the community. On the other hand, the Opposition Leader at the time, Gough Whitlam, argued the Commonwealth required the power to override some of the ‘obnoxious laws of the States’ (Griffiths, 1995, p. 99).

As Bennett (2004) has argued, the reasons for the two provisions in the original Constitution were threefold. On a practical level, politicians at that time generally believed that to include Aboriginal people in a census might distort the number of House of Representatives seats to be allocated to the different states. Second, another widely held belief at the time was that Aboriginal people were ‘dying out’ and, as a result, would shortly cease to be a factor in questions of electoral representation. Finally, many believed that Indigenous people were not intellectually worthy of a place in the political system (Bennett, 2004, p.1). The animus towards Aboriginal people and the justifications put forward for their continuing exclusion at the beginning of the 20\textsuperscript{th} century were best illustrated by comments from Western Australian Senator Matheson of the new Australian Parliament who stated there was a need to ‘take some steps to prevent any aboriginal [sic]

\textsuperscript{15} Prior to 1967, Section 127 stated: In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted (ABS, Year Book Australia, 2004).

\textsuperscript{16} Prior to 1967, Section 51 stated: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - (xxvi) The people of any race, other than the aboriginal [sic] people in any State, for whom it is deemed necessary to make special laws (ABS, 2004, p. 2).
from acquiring the vote’ and Mr O’Malley, Tasmanian Member of Parliament, who dismissed the need to include Aborigines in a national census as ‘there is no scientific evidence that he is a human being at all’ (Bennett, 2004, p. 1).

Menzies retired from politics in 1966 but not before a proposal for holding a referendum on the two stated constitutional amendments was adopted by Parliament. Nonetheless, Harold Holt, who succeeded Menzies as Prime Minister, postponed the referendum proposal for a year owing to a regulatory requirement to hold an election towards the end of 1966. However, before the election the Australian government had to turn its attention to two further Aboriginal issues which had become prominent through two separate political campaigns (Griffiths, 1995, p. 100).

In February 1965 the Commonwealth Arbitration and Conciliation Commission began hearing an application to vary the Cattle Station Industry (Northern Territory) Award 1951 to have those sections which discriminated against Aborigines deleted (Bandler, 1989, p. 22). Over the course of the year, the Commission received submissions from a range of sources, including the Vestey’s pastoral superintendent for the Northern Territory (who was also the manager and director for Vestey’s in Queensland and the Kimberley and also director of Australian Investments Agency Pty Ltd and Northern Territory Pastoral Lessees’ Association), JP
Morris, who said during the course of examination by John Kerr QC,\textsuperscript{17} counsel for the Cattle Producers Council, that:

\ldots it was policy to use Aboriginal labour in the pastoral industry but it was not customary to pay except in kind, such as food rations [flour, tea, jam, and perhaps some other staple commodities], and that, for climatic reasons, an indigenous workforce was preferable to a white workforce. (Bandler, 1989, p. 23)

While ‘economic conditions in the beef industry were the best in history’ and the outlook ‘never better’, a succession of cattle industry representatives argued the industry could not pay full wages to Aborigines (Bandler, 1989, p. 23). With the final hearing in December 1965, the decision of the Commission was announced on 7 March 1966 where it was decided that those Aborigines who worked in the pastoral industry in the Northern Territory and were employed under the Cattle Station Industry Award would receive award wages. However, the Commission decided that the Award would not be introduced for two years and eight months from the judgement of the Commission and no provision was made for a wage increase in the interim period (Bandler, 1989, p. 23). As Griffiths (1995, p. 99) argued, there was no doubt the deferral was devised primarily to give the pastoral industry time to adjust.

In the same vein as the Gurindji ‘walk off’, the federal government was also forced to revisit decisions made previously concerning the Yirrkala peoples’ land claim which it had referred to a Committee on Integration which was

\textsuperscript{17} Later, as Governor-General, Sir John Kerr was instrumental in the dismissal of the Whitlam Labor Government in 1975.
established, ostensibly, to monitor the ‘assimilation’ program in the Northern Territory. Ultimately, in being forced to declare its position on land rights claims, Parliament was advised through the Minister for the Interior, Peter Nixon, Country Party, that:

…the government believes it is wholly wrong to encourage Aborigines to think that because their ancestors had a long association with a particular piece of land, the Aborigines of the present day have a right to demand ownership of it…They should receive ownership under the system that applied to the Australian community and not outside it (Griffiths, 1995, p.117).

The Yirrkala peoples claim, as an integral element in the emergent ‘Land Rights’ debate, became the genesis for Justice Blackburn’s decision in 1971 in the case of *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia* (known as the ‘Gove case’) which, while delivering an adverse judgement for the Yirrkala claimants, concentrated Aboriginal activism around a focal point for future action: land rights (Griffiths, 1995, p. 116). For a comprehensive chronology of events affecting the Aboriginal land rights struggle see Appendix K.

When the Liberal Coalition government was returned to office in November 1966, Prime Minister Holt announced a referendum would be held on two constitutional matters. The first and entirely new matter was a proposal to increase the membership of the House of Representatives, without increasing the numbers in the Senate. The proposal argued that although there had been a dramatic increase in the Australian population, membership in the House of Representatives, which was based proportionally on State and Territory population numbers, had remained the same (Griffiths, 1995,
The second matter as originally projected in early 1966, was the proposal for the removal of two sections in the constitution considered discriminatory towards Aboriginal people (Griffiths, 1995, p. 100). The 1967 constitutional Referendum referred to above will be discussed in more detail at Section 2 in Chapter Three.

2.7 Aboriginal identity - No shades of black

Table 2.2 set out the unofficial count\(^\text{18}\) of the Aboriginal population for the year 1966. Section 3.3 in Chapter Three highlights the fact that before the 1971 census, so-called ‘full-blood’ Aborigines were not included in census counts, therefore, the 1966 count is only a count of the so-called ‘part-Aboriginal’ population.

Table 2.2

<table>
<thead>
<tr>
<th>New South Wales</th>
<th>14,219</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>1,790</td>
</tr>
<tr>
<td>Queensland</td>
<td>19,003</td>
</tr>
<tr>
<td>South Australia</td>
<td>5,505</td>
</tr>
<tr>
<td>Western Australia</td>
<td>18,439</td>
</tr>
<tr>
<td>Tasmania</td>
<td>36</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>21,119</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>96</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>80,207</strong></td>
</tr>
</tbody>
</table>

\(^{18}\) From the time of Federation (1901) until the 1967 Referendum, all Australian censuses counted Aboriginal and Torres Strait Islander peoples, however, such counts were excluded from the official population statistics until 1971 (ABS, 2004, p. 2).
As can be seen from note (b), Torres Strait Islander people were not counted together with Aboriginal people at this time, therefore, the ABS heading ‘Indigenous Census Count’ is a misnomer. Semantics aside, ABS Indigenous Census data will be presented at relevant points in each of the following chapters with a view to aiding discussions concerning Aboriginal people’s proportional representation in a range of social indicators, including over-representation in arrest and custody rates.

2.8 Earliest expression of ‘overpolicing’

As a result of a world-wide search of extant literature to discover the origins of the term ‘overpolicing’, it was found that the term was first used in the United States in the final year of the period examined in this chapter: 1966. In this regard, Watson (1966) is acknowledged in this study as having first mentioned the term in a document he prepared on behalf of the US Department of Justice Office of Law Enforcement Administration. Essentially, the document was an historical account of police-community relations in the United States. The brief reference to overpolicing occurred within the broad context of the policing of black minority districts in which community members were described as being subject to differential treatment, brutality and improper policing by a significant number of police agencies. Despite its prominence in this study as the first mention of the term overpolicing, Watson’s (1966) account does not enter into any substantive discussion, explanation or evaluation of the concept of overpolicing and as a result, does little to contribute in resolving the
questions posed at 1.2.

2.7 Conclusion

This chapter spanned one hundred and seventy-eight years of Australian history examining five key moments to elicit how the dominant culture has characterised frontier society, emergent nationalism, and Aboriginal people’s struggle to reposition themselves within the imagined nation.

At the outset, the chapter provided a focus on the initial act of dispossession of Aboriginal lands. It then briefly referred to how contemporary debates about compensation or reparation for the expropriation of Aboriginal lands have tended to involve questions concerning whether the colony was conquered or settled, whether Aboriginal people’s occupation was continuous or occurred in ‘waves’, or whether Aboriginal people had a system of land rights in the first place.

At section 2.3 the chapter then provided an analysis of the evolution of policing within the new colony and explained the operation of the earliest model of organised policing in Australia: the Royal Irish Constabulary. Following that, the chapter briefly explained the tenets of Sir Robert Peel’s ‘new police’ model incorporated in the establishment of the London Metropolitan Police Force and subsequent to that, the adoption of the ‘new police’ model for policing arrangements in NSW. Within this discussion, the chapter noted how earlier versions of ‘native police forces’ were
amalgamated to form the Division of Aboriginal Tracker, following the establishment of the NSW Police Force in 1862. The chapter highlighted the rise and demise of the Division over a one hundred and eleven year service period and mentioned, for the first time, the nature of an often ambiguous relationship between Aboriginal people and police within the criminal justice system. While the Aboriginal Tracker role was concerned mainly with ‘tracking’ non-Aboriginal offenders or missing persons, the chapter noted that ‘native police’ were utilised specifically to ‘disperse’ Aboriginal people from their lands and were, together with their white police officers, complicit in many acts of terror, violence, and perhaps murder against Aboriginal people during the time they were formally engaged by settler society.

The chapter then examined sociological research undertaken by Reay (1945) who provided a unique contribution to understanding the circumstance of relations between black and white in a rural setting. In the end, it would appear that Reay’s research provided a catalyst for a number of contemporary Australian criminologists, sociologists and historians who continue to seek answers or explanations for the continuing circumstance of Aboriginal over-representation in public order offences.

Following that, the chapter provided a brief examination of the concepts of ‘settler nationalism’ and ‘benign whiteness’ and their impact on the histories of Aboriginal dispossession where the conquering, transforming and ordering of space was the central feature of a process through which white
western identity was expressed and consolidated in imperialism. This discussion was juxtaposed with an homage to the beginnings of organised Aboriginal activism which sought to reposition Aboriginal people’s social, political and economic status. In the same vein, the next section examined Aboriginal political activism in the early 1960s, this time focusing on the activities of tradition-oriented communities in the Northern Territory who waged campaigns for equal wages and a say in how their lands were being used by pastoral and mining interests. Both forms of political activism were motivated by the same, single issue: Aboriginal land rights.

In the final section, it was shown that the earliest reference to the term ‘overpolicing’ occurred in 1966 in a North American study of the history of police-community relations in the United States. Although the study found that the term had been used by African Americans to describe a different type of policing experience than that of white community residents, the term was not explained or evaluated and consequently, that study did not contribute to the objectives of this study.
3

CHALLENGES TO ACCEPTED WISDOM

3.1 Introduction

This chapter examines the first period in a chronological historiography where key socio-political and legal moments are identified and discussed in order to contribute to an understanding of the relationship between policing and Aboriginal people’s over-representation in police arrest and custody rates. The period examined is 1967 to 1976 and during this time, seven key political and social moments unfolded to signal a significant shift in the way in which Australian society imagined Aboriginal identity and how the persistent, unresolved issues associated with Aboriginal legal, social and political rights would be managed.

A key moment at the beginning of this period was the 1967 Commonwealth Referendum which removed a lingering distinction between black and white citizenship and also re-configured white notions of Aboriginality. Consequently, the divide that had evolved from policy prescriptions dealing separately with tradition oriented Aboriginal cultures and lifestyles and so-called urban Aboriginal cultures and lifestyles was formally abandoned and, at least philosophically, all Aboriginal people were to be treated as one homogeneous, racial group. From this acknowledgement, a further two key moments emerge over the ensuing five years: the beginning of a unified
Aboriginal political voice and a centralised national federal bureaucracy to manage Aboriginal affairs.

Following an account of the paucity of available statistics concerning the state of Aboriginal over-representation in police arrest and custody rates for the period under discussion, the analysis moves forward to consider four key moments that mark the year 1976 as deserving of special consideration in the history of Australian criminology. The first key moment involved the publication of Eggleston’s (1976) monumental research that provided the first empirical evidence in Australia of Aboriginal people’s over-representation in police arrest and custody. In the same year, the Supreme Court of the Northern Territory was moved to publicise the extent of Aboriginal disadvantage before the law and introduced a process similar in nature and intent to the English Judges Rules to safeguard Aboriginal interests during police interrogation. In brief, the process became known as ‘the Anunga Rules’ with applicability in all Australian legal jurisdictions, although it became evident that its application has remained tentative outside the Northern Territory.

The third key moment that year was the establishment of the Australian Institute of Criminology which, apart from creating a research agenda around Aboriginal criminological issues from the outset, initiated a national collection of statistics on imprisonment rates which included identified data sets on Aboriginal imprisonment rates. In effect, this statistical collection demonstrated that Aboriginal people have been over-represented in imprisonment each year since 1974. The fourth key moment was the
enactment of the Commonwealth government’s *Aboriginal Land Rights (Northern Territory) Act 1976* which, after almost two hundred years of legal and societal dissent about recompense to Aboriginal people for the loss of their lands, acknowledged their contemporary rights to manage and care for their lands. The final section of the chapter highlights critical commentary that year by Mick Dodson (1976) who made known his views concerning the plethora of white experts who presume to know what is best for Aboriginal people and who have failed, time and again, to produce any viable outcomes to change the continuing state of Aboriginal disadvantage before the law.

### 3.2 Constitutional change

In an article prepared for the *Koori Mail* newspaper to celebrate the fortieth anniversary of the 1967 Referendum, Attwood and Marcus (2007) argued the Referendum has commonly been represented as an event of considerable importance in Australia’s history. Historian Henry Reynolds considered the Referendum’s place in history, not only as ‘a symbolic event enshrined in history’ but also as an event that stands alongside the 1965 equal pay decision, the 1976 *Aboriginal Land Rights Act*, the *Mabo* judgement and the *Wik* case ‘as one of the major milestones of Indigenous peoples’ relationship with the Australian nation-state’ (Reynolds, 1998, p. 56, cited in Bennett, 2004, p. 8).

On the other hand, Attwood and Marcus (2007) have argued that although politicians, activists, journalists, broadcasters and even some historians
continue to claim that the Referendum granted Aboriginal people the rights of citizenship (such as the vote), repealed racially discriminatory State laws and transferred Aboriginal affairs to the Commonwealth, a reading of the Constitution reveals the changes endorsed by the Referendum did none of these things. In essence, the Referendum provided for only two changes. First, the repeal of Section 127 enabled the counting of Aboriginal people in the next (1971) national census (and each census after that) but did no more than this. Unlike the American Constitution, the Australian Constitution makes no mention of citizenship and so there was no prospect that any such rights could be provided by changing that clause. In any case, it has been argued that by the time of the Referendum most of the specific Commonwealth and State laws discriminating against Aboriginal people had been repealed, including those laws up to 1962 that had prevented Aboriginal people from voting in Commonwealth elections (Attwood & Marcus, 2007). Second, an amendment to Section 51xxvi enabled the Commonwealth to enact special laws for Aboriginal people in particular circumstances, however the Section did not require any Commonwealth government to use that power. Nor did Section 51xxvi compel a Commonwealth government to assume a greater role in Aboriginal affairs, let alone take over responsibility for Aboriginal affairs from State governments. Furthermore, according to Attwood and Marcus (2007), no provision of the Constitution prior to 1967 actually prevented the Commonwealth from enacting general laws applying to Aboriginal people in their status as Australians.
Acknowledging an obvious discrepancy between the way in which the Referendum has been represented and the actual legal changes it made, Attwood and Marcus (2007) have suggested that the reason for the Referendum’s significance is a consequence of the way in which the Referendum was presented at the time by those who fought for constitutional change, that is, the leaders of the Federal Council for the Advancement of Aboriginals and Torres Strait Islanders (FCAATSI) and their allies in the churches and labour movement. In this regard, Attwood and Marcus (2007) have contended that FCAATSI’s leaders knew the Constitution made no reference to citizenship rights or control of Aboriginal affairs by the Commonwealth, yet they nevertheless persisted in representing the Referendum in these terms for reasons that were both historical and political. Elaborating on these two points, Attwood & Marcus (2007) argued that when calls for a similar referendum were made in 1957, most Aboriginal people were denied the rights of citizenship and it was commonly believed that the Constitution did in fact prevent the Commonwealth from assuming a greater role in Aboriginal affairs.

The argument that the Australian Constitution should be amended to give the Commonwealth power in Aboriginal affairs was not new and was originally raised in the first decade after Federation. Christian men and women, anthropologists and activists, such as Bessie Rischbieth of the Australian Federation of Women Voters, argued at that time that the Commonwealth government should have responsibility for the Aboriginal population (Koori History Website, 2008). In the mid-1920s, Archdeacon Lefroy of the London-based Anti-Slavery Society called on the Australian
Government to hold a referendum on the issue of Commonwealth responsibility for Aboriginal welfare. In a submission to a Royal Commission on the Australian Constitution in 1929, Archdeacon Lefroy argued that Aborigines ‘should be made a national responsibility because all Australia owes to them a debt of reparation. We have certainly dispossessed them of their country; no one will question that’ (Koori History Website, 2008). Although a number of the Royal Commissioners expressed their support for Archdeacon Lefroy’s argument, the majority, however, were philosophically opposed to the idea of federal level control of Aboriginal affairs.

Attwood and Marcus (2007) contend that by 1966, FCAATSI leaders acknowledged most Aboriginal people had been granted the political rights of citizenship and that the Commonwealth was playing a greater role in Aboriginal affairs, however, what was needed was a more meaningful form of citizenship rights which were economic and social in nature, and they reasoned Commonwealth control was the primary way to achieve this. More particularly, it was assumed that true citizenship could only be achieved through the enactment of Commonwealth laws that advantaged the social and economic circumstance of Aboriginal people. Although the campaigners called on electors to ‘Vote Yes’, they did not assume that constitutional change itself would give meaningful citizenship rights to Aboriginal people. Instead, the intended outcome was to achieve a massive endorsement from the Referendum proposal which, it was believed, would require the Commonwealth Government to enact reforms, sooner or later, to achieve these goals (Marcus & Attwood, 2007).
Attwood and Marcus (2007) contend that over time, this vital distinction, which was blurred in the campaigning at the time, disappeared from sight due to the perpetuation of a popular myth that simplified a complex reality by asserting that the Australian public’s endorsement of the Referendum proposal in 1967 in, and of itself, brought about citizenship rights for Aboriginal people and Commonwealth responsibility for Aboriginal affairs, and that it did so immediately.

Misrepresentation of the Referendum in these terms has made it very difficult, if not impossible, for most Australians to grasp what was at stake in the Referendum and what it did and, more importantly, did not achieve (Attwood & Marcus, 2007). On this point, Standfield (2004, p. 3) has argued that the advocates of the Referendum purported that it symbolised the ‘end of racism’, however, its actual legacy is that it is probably best remembered as a time of white Australian goodwill towards Aboriginal people that bolstered ‘notions of benign whiteness in the face of continuing structural inequalities based on race’.

The promise of the Referendum was that the Commonwealth Government would implement wholeheartedly a program of special rights for Aboriginal people so that they could truly become Australian citizens. However, Attwood and Marcus (2007) contend that, to date, no Australian Government has ever properly realised that promise.
3.3 Calculating Aboriginality

When Arthur Phillip was appointed Captain-General and Governor-in-Chief of New South Wales in 1787 he also became, ex officio, the first Australian statistician and was required to collect and collate a range of information in numerical form annually for the British Home Office. Initially, the information collected related to the distribution of tools and utensils, rates of consumption of stores and provisions for the convict population, civilian and military establishments and ‘an account of the numbers inhabiting the neighbourhood of the settlement’ (ABS, 1988a, p. 3). Soon after establishment of the penal colony the Home Office also required information on the number of land grants made to emancipated convicts, the number of livestock in the colony (sheep, cattle, horses, goats, hogs), acres of wheat and maize under cultivation according to ownership by government or individuals, and the classification of men, women and children as military, civilian or convict, which later included the numbers of births and deaths under each of these classifications. The difficulty of collecting data on births and deaths was highlighted in 1801 by the surgeon responsible, who commented in the annual return that ‘the state of births and deaths is accurate as far as comes within our knowledge, but people die and children are born without our being made acquainted therewith’ (ABS, 1988a, p. 4).

Between 1790 and 1825, the annual collection was achieved through the conduct of a ‘muster’ of the colony’s population and livestock on specified days at each of the settlements at Parramatta, Toongabbie and Hawkesbury.
From 1821, the NSW Governor was required to transpose the annual statistical collections into the *Blue Book*, a creation of the new British Colonial Office to ensure the systematic collection and reporting of vital statistics from the thirty British colonies that remained after the loss of the American colonies and following the end of the Napoleonic wars (ABS, 1988a, p.5). Despite initial difficulties being created through receiving the *Blue Book* later than the other colonies and also coming to grips with an ‘altogether new form of presentation’ (the 1821 return was not sent to the Colonial Office until 1825) the *Blue Book* remained in force as the annual statistical return of the Australian colonies until self-government in 1855 when it was transformed into what became known as the Statistical Register (ABS, 1988a, p. 5).

In keeping with one of the earliest directions to Governor Phillip, that Aboriginal people were, by virtue of the colony’s ‘peaceful settlement’, British subjects, successive Governors and colonial bureaucrats declined to enter particulars in the population section of the *Blue Book* which had headings referring to ‘Free Blacks’ and ‘Slaves’. While the two headings had obvious relevance to Black populations of other colonies, particularly the West Indian Colonies, these pages were ignored in NSW and were replaced in later entries with headings that referred to ‘civil’ and ‘military’ populations (ABS, 1988a, p. 6).

The first formal census of the modern type in Australia was held in NSW in 1828 through an Act of the NSW Legislative Council to ascertain:
the number, names and conditions of the Inhabitants of the Colony of NSW; and the number of Cattle; and the quantities of located, cleared and cultivated Land within the Colony (ABS, 1988, p.10).

At that time, the census recorded a civilian population of 30,827 persons over twelve years of age with roughly three-quarters of the census population indicating a previous or current classification as a ‘convict’. The next census was conducted in 1833, then again three years later in 1836.

The next four censuses were conducted at five yearly intervals but from 1856 onwards, the colony adopted the British decennial census period and a census was conducted every ten years by the NSW Governor until federation of the five colonies in 1901, when responsibility for an Australian census shifted to the Commonwealth Government under the Australian Constitution Act 1901 (ABS, 1988, p. 11). From the Blue Book and Statistical Register of NSW census counts and later the Commonwealth Census, the population figures for NSW up to the beginning of the period covered by this chapter were enumerated as follows:

Extract from Population of Australia, States and Territories

Table 3.1

<table>
<thead>
<tr>
<th>Year</th>
<th>NSW</th>
<th>Year</th>
<th>NSW</th>
</tr>
</thead>
<tbody>
<tr>
<td>1828</td>
<td>36,598</td>
<td>1891</td>
<td>1,127,137</td>
</tr>
<tr>
<td>1833</td>
<td>60,794</td>
<td>1901</td>
<td>1,354,846</td>
</tr>
<tr>
<td>1836</td>
<td>77,096</td>
<td>1911</td>
<td>1,646,734</td>
</tr>
<tr>
<td>1841</td>
<td>130,856</td>
<td>1921</td>
<td>2,100,371</td>
</tr>
<tr>
<td>1845</td>
<td>189,609</td>
<td>1933</td>
<td>2,600,647</td>
</tr>
<tr>
<td>1851</td>
<td>268,344</td>
<td>1947</td>
<td>2,984,838</td>
</tr>
<tr>
<td>1856</td>
<td>269,722</td>
<td>1954</td>
<td>3,423,529</td>
</tr>
<tr>
<td>1861</td>
<td>350,860</td>
<td>1961</td>
<td>3,917,013</td>
</tr>
<tr>
<td>1871</td>
<td>502,998</td>
<td>1966</td>
<td>4,237,901</td>
</tr>
<tr>
<td>1881</td>
<td>749,825</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Source: ABS, 1988, p.256).
Caveats on the above table\(^1\) qualified the figures prior to 1971 as being an estimate of the resident population only, and that the figures prior to 1966 excluded ‘full-blood Aboriginals’.

While the preceding section provides ample evidence that Australia’s non-Aboriginal population was carefully and regularly enumerated from the first day of settlement, the same cannot be said about the interest of the NSW colony, and later, the Commonwealth, in gaining an appreciation of the demographics of the country’s Aboriginal population. In this regard, a special article prepared by the Aboriginal and Torres Strait Islander Commission (ATSIC) for the 1994 edition of *Year Book Australia* stated that previous estimates made of the Aboriginal and Torres Strait Islander population at the time of settlement ranged from around 300,000 to over one million. Further, that in the years following colonisation, the Aboriginal and Torres Strait Islander population declined dramatically under the impact of newly introduced diseases, repressive and often brutal treatment, dispossession and social and cultural disruption and disintegration and that ‘such data as is available suggests a decline to around 60,000 by the 1920s’ (ABS, 1994, p. 2).

When consideration was given to enumerating the Aboriginal population, demographic statistics made a distinction between ‘full-blood’ and ‘half-caste’ or ‘part-blood’ Aboriginal people up until 1966. As Gardiner-Garden (2003, p. 3) disclosed in a seminal paper on defining Aboriginality in

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\(^1\) Table 3.1 is an extract of a table that detailed the population of Australian States and Territories between 1828 and 1986 (ABS, 1988, p. 256).
Australia, Aboriginal people were initially grouped by reference to their place of habitation in the first few decades of settlement. As settlement expanded, resulting in greater dispossession and intermixing, a raft of other definitions came into use. The most common involved reference to ‘Blood-quantum’ classifications which entered legislation in NSW in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874 and Tasmania in 1912 (Gardiner-Garden, 2003, p. 3). From then until the late 1950s States regularly legislated all forms of inclusion and exclusion to benefits, rights, or places by reference to degrees of Aboriginal blood which resulted in capricious, often inconsistent, practice based on nothing more than an observation of skin colour. The absurdity of these racial divisions was reached in Western Australia where it was revealed that in 1960 Aboriginal welfare officers were dealing in fractions as small as $1/128^{\text{th}}$ in determining eligibility for certain benefits (Broome, 1994, p. 181).

Following Federation in 1901 an attempt was made to provide a count or estimate of the Aboriginal and Torres Strait Islander population at every national census but, for reasons articulated later in this section, such counts and estimates were never included in the official count of the Australian population until 1971. Table 3.2 below sets out the unofficial estimate of the Aboriginal and Torres Strait Islander population between 1901 and 1966.
Table 3.2

Estimates of the Aboriginal and Torres Strait Islander Population Prior to the 1971 Census

<table>
<thead>
<tr>
<th>Census Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>93,000</td>
</tr>
<tr>
<td>1921</td>
<td>72,000</td>
</tr>
<tr>
<td>1933</td>
<td>81,000</td>
</tr>
<tr>
<td>1947</td>
<td>76,000</td>
</tr>
<tr>
<td>1954</td>
<td>75,000</td>
</tr>
<tr>
<td>1961</td>
<td>84,000</td>
</tr>
<tr>
<td>1966 (a)</td>
<td>80,000</td>
</tr>
</tbody>
</table>

(a) Excludes Torres Strait Islanders.

(Source: ABS, 1994, p. 2).

In each of the estimates above, Aboriginal people categorised as ‘full-blood Aboriginal’ were excluded from the counts. *A propos, Year Book Australia* (1966) noted from the 1961 Census that Aboriginal people were said to be ‘scattered over the whole of the mainland, but are mostly in the Northern Territory, Queensland and Western Australia’ and that for this census ‘persons with Aboriginal blood to the extent of one-half and with European blood to the extent of one-half are included in the numbers of the population and are of course enumerated in the census’ (ABS, 1966, p. 225). On this criterion, it becomes obvious that the unofficial counts for each of the years in Table 3.2 underestimated the actual Aboriginal and Torres Strait Islander population. It also becomes obvious that actual numbers showing the true state of the Indigenous population’s decline or growth during almost 200 years of white settlement will never be known.

It is only since the 1967 Commonwealth Referendum, where section 127 of the Australian Constitution requiring the exclusion of Aboriginal people
from estimates of the population of the Commonwealth or of a State or other part of the Commonwealth was repealed, and the *Constitution Alteration (Aboriginals) Act 1967* proclaimed, that all Aboriginal people, no matter how they were previously categorised under the various ‘Blood quantum’ definitions of ‘Aboriginal’, have been counted in the Australian census (ABS, 2004, p. 5). In this regard, the 1971 census (Table 3.3 below) recorded 106,000 Aboriginal people, an increase of 44.6% from the 1966 figure of 80,000.

**Table 3.3**

*Indigenous Census Count – 1971*

<table>
<thead>
<tr>
<th>State</th>
<th>Number (no.) 1971</th>
<th>Change in % from 1966</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>23,876</td>
<td>&gt;67.9</td>
</tr>
<tr>
<td>Victoria</td>
<td>6,371</td>
<td>&gt;255.9</td>
</tr>
<tr>
<td>Queensland</td>
<td>31,922</td>
<td>&gt;68.0</td>
</tr>
<tr>
<td>South Australia</td>
<td>7,299</td>
<td>&gt;32.6</td>
</tr>
<tr>
<td>Western Australia</td>
<td>22,181</td>
<td>&gt;20.3</td>
</tr>
<tr>
<td>Tasmania</td>
<td>671$^2$</td>
<td>&gt;1,7633</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>23,381</td>
<td>&gt;10.7</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>255</td>
<td>&gt;165.6</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>106,000</strong></td>
<td><strong>&gt;44.6</strong></td>
</tr>
</tbody>
</table>

(Source: Adapted from ABS, 2004, pp. 1-2).

The dramatic increase in 1971 is attributed to several reasons, including the mandatory nature of the census as well as census takers being more meticulous in accounting for Aboriginal people. Griffiths (1995, p. 114) and Foley (2001, p. 2) contend that such increase could have been a result of heightened interest in the politics of Aboriginal affairs, including

$^2$ The number of Tasmanian Aboriginal people increased from 36 counted in the 1966 census to 671 counted in the 1971 census.
widespread international attention to racism and human rights issues through Aboriginal political activism. Accordingly, more Aboriginal people may have become more willing to identify as Aboriginal. Another likely reason for the increase was the change in the definition of who constituted an Aboriginal person. In the 1971 Census, an attempt was made to remove ‘Blood quantum’ distinctions by adoption of the following definition of an Aboriginal person as: ‘A person of Aboriginal descent, who identifies as an Aboriginal and is accepted as such by the community with which he is associated’, changing the concept of Aboriginal from one which was essentially racial to one which was more social and political (Griffiths, 1995, p. 113). This definition remains in use today, predominantly in program administration and also some legislation and court judgements, and sits alongside another definition common in legislation that defines an Aboriginal as ‘a person who is a member of the Aboriginal race of Australia’ (Gardiner-Garden, 2003, p. 1).

3.4 Challenges to benign whiteness

In what could be called a personal treatise concerning the manifestation and ideology of ‘Black Power’ in Aboriginal Australia in the late 1960s and early 1970s, Foley (2001) recounts the comments of the then Chairman of the Council for Aboriginal Affairs and also Governor of the Reserve Bank of Australia, ‘Nugget’ Coombs, at an address at the University of Western Australia in 1973. In that address, Coombs had made the observation that the ‘politically active Aboriginal intelligentsia’ in Redfern and other urban centres ‘were the most interesting group, from the political point of view, in
the whole of the Aboriginal community in Australia’ (Foley, 2001, p.1). Foley (2001) then argued that at that time, Coombs’ view was not shared by the clique of predominantly male, non-Indigenous Australian historians who, in presuming to know what constituted Australian history and perhaps as a consequence of ignorance, trivialized, marginalised and dismissed the achievements and historical influence of the so-called Australian Black Power Movement (Foley, 2001, p. 1).

Emphatically, Foley (2001, p. 18) argued ‘superficiality’ seemed to be the order of the day when it came to academic historical accounts of the Black Power Movement and that until that problem had been addressed

we cannot begin to understand the profound effect it had on both black and white Australia’, nor ‘can we properly analyse or understand the events, actions and ideas in contemporary Indigenous communities unless we are aware of the way in which these communities perceive their own histories (Foley, 2001, p. 18).

Continuing his criticism of the discipline of history, Foley (2001, p. 2) points to historians Bennett (1991) and Griffiths (1995) as ‘openly hostile’ to an examination of the Black Power Movement while acknowledging that Franklin (1976), Marcus (1986) and Attwood (1992, 1989) at least show some interest in the era. More broadly, Foley (2001, p. 17) argued ‘that the prevalent silence of Australian historians assisted the process of national denial’ that enabled Australian legal and parliamentary institutions to delude themselves about _terra nullius_ for two hundred years and that history, and its sister discipline anthropology, have become ‘complicit in the anti-Aboriginal policies of the Australian State’ and have had a ‘vested interest
in the distortion and diminution of Indigenous perceptions of the history of the Australian social and political landscape’. To reinforce his view, Foley (2001) draws on commentary from Reynolds (1976, p. 1, cited in Foley, 2001, p. 17) who stated that ‘Aborigines are the fringe dwellers of Australian historiography’ and also Stanner (1968, p. 22, cited in Foley, 2001, p. 17) who declared that ‘the absence of Indigenous histories and Indigenous people in Australian history on such a scale cannot possibly be explained by absentmindedness’.

In defining the Black Power Movement in Australia as a loose coalition of individual young Indigenous activists who emerged in Redfern (NSW), Fitzroy (Victoria) and South Brisbane (Queensland) in the period following the 1965 ‘Freedom Rides’ throughout northern NSW in 1965, Foley (2001) has outlined, through an interpretive narrative as both observer and participant, what he considered as the more significant events and issues associated with the movement during that period. Briefly, Foley (2001, p. 3) asserted that the movement was able to lay claim to having orchestrated the establishment of the Redfern Aboriginal Legal Service in 1970, of disrupting the South African Springbok rugby tour of 1971 and of establishing the ‘Aboriginal Tent Embassy’ in Canberra in 1972. These events, he argued, not only consolidated the ideas, personalities, actions and alliances of the movement but also influenced Indigenous political notions and actions for the next decade.

Reinforcing Attwood and Marcus’ (2007) view that organisers of the 1967 ‘Vote Yes’ campaign looked to the constitutional amendments to
immediately deliver a legislative reform program of special rights for Aboriginal people, Foley (2001, p. 6) admits that he and the ‘young radicals’ of the loosely defined Black Power Movement felt betrayed when the sought-after reforms did not occur. Further, and disregarding an implied respect held for the older Aboriginal activists such as Charlie Perkins, Ken Brindle, Doug Nichols, Neville Bonner, and activist on behalf of Aboriginal rights Faith Bandler, Foley (2001, p. 6) puts this issue at the forefront as the cause for conflict between the old style organisations, which were considered as ‘ineffective’, and the ‘young firebrands’, who were eager to pursue more deliberate protest methods in keeping with the movement’s ideological aspiration of ‘self-reliance’. To this end, the Black Power Movement was adamant that a new form of Aboriginal community organisation needed to be created, one which was first and foremost ‘Aboriginal controlled’ (Foley, 2001, p. 6).

Regardless of the homage paid by Foley (2001) to the pioneering work of the earlier Aboriginal political organisations it becomes clear that it was the Black Power Movement (which included Foley) that overtook, subordinated and consumed the more conservative, less confrontational Aboriginal political organisations that the Black Power Movement now viewed as having outlasted their usefulness. Given that the Australian Black Power Movement had adopted much of the ideology, tactics and strategies employed by the American Black Power Movement it was perhaps inevitable that, on learning of the younger generation of Black American activists’ disillusionment at the pace of change under the old conservative, passive, Christian leadership of Martin Luther King, and subsequently their
adoption of ‘direct confrontation’ as the mode of operation, that the
Australian Black Power Movement would follow (Foley, 2001, p. 7).

of Black political activism in the USA provided a stimulus and a model for
the more militant urban Aborigines’, and admits the Redfern activists were
drawn to the methods of the San Francisco based Black Panther Party of
America, in particular its ‘Pig Patrol’. The ‘Pig Patrol’ had its origins in the
‘ghetto’ suburb of Oakland California where, having ascertained that it was
not unlawful in California to openly carry firearms in public, the Black
Panther Party armed its members to patrol Oakland to ‘defend the black
community’ against a state of incessant police harassment and intimidation
(Foley, 2001, p. 8).

Despite members of the Black Panther Party leadership being killed or
gaoled as a result of armed confrontations with police, the Redfern activists
adopted the basic idea of patrol to monitor and record police harassment of
the Redfern Aboriginal community (Coe, n.d.). In saying this Foley (2001,
p. 8) argued that from the mid to late 1960s NSW police, particularly ‘the
brutal’ No. 21 Division plainclothes police, regularly saturated the inner-city
suburbs of Redfern, Alexandria, Chippendale and Newtown with a view to
detaining and arresting Aboriginal people to remove them from the streets.
A particular focal point for police activity throughout these years was two
hotels frequented by Aboriginal people in the centre of Redfern: the
Empress Hotel (the ‘Big E’) and the Clifton Hotel. From his observations at
the time, Foley (2001, p. 30) recalled that police:
would come in [to the Empress and Clifton hotels] and beat the shit out of everyone inside, arbitrarily arrest anyone who objected, and when the wagons were full they’d drive off and lock people up on trumped-up charges.

In 1969, a small group of activists\(^3\) began observing and collecting information on regular police raids at the two hotels where a year later an official curfew was in place restricting Aboriginal people’s right to be on the streets in Redfern after 9.30pm (Coe, n.d p.1). Wootten’s (1993, p. 268) recollection is that the Redfern curfew applied after 10.15pm, a quarter of an hour after the mandatory closing time for hotels at that time. Exploiting the *Summary Offences Act*,\(^4\) which Coe (n.d.) has argued was a reaction by the Askin Coalition State Government ‘to stop large student gatherings and to remove culturally and racially undesirable people from Sydney streets’, police would make indiscriminate arrests of any Aboriginal person on the streets after the curfew and charge them with either public drunkenness, offensive behaviour or unseemly words or a combination of the three. Against this background, the small group of Redfern activists - armed with notebooks and pencils - mounted a campaign to photograph and witness police arrests with the intention of passing the information on to media and government agencies in an effort to stop these ‘repressive police actions’ (Coe, n.d.)

After failing to get a response to their campaign, the Redfern activists then spoke at university campuses and to trade union groups to highlight the problems of police harassment and arbitrary arrest. Following voluntary

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\(^3\) Foley comments that initially the group comprised Gary Williams, Lynn and Billy Craigie, and Gary Foley (Foley, 2001, p. 8). Coe (n.d.) expands on this group to also include himself, Denis Walker, Isobel Coe, Tony Coorey, Bronwyn Penrith, Les Collins and James Wedge.

\(^4\) See discussion in Chapter 4 concerning the nature and intent of this Act.
work by a group of white law students and lawyers to assist arrested Aboriginal people with obtaining bail, interviewing them in police lock-ups and preparing their defence, Peter Tobin, a white lawyer, approached the then Dean of the University of NSW Law Faculty, Professor Hal Wootten, to attend a meeting with the ‘monitoring group’ to see what assistance and advice he could give. After enlisting the aid of a number of white lawyers and witnessing police activities in Redfern themselves, Wootten’s group made an attempt to change NSW Government policy towards Aborigines and end police mistreatment (Wootten, 1993, p. 269).

Initially, Wootton (1993, p. 269) made contact with the Commissioner of Police about police mistreatment in Redfern and was informed that ‘police have to apply the law equally and cannot distinguish between races; if Aborigines obey the law they will not be in trouble with the police’. Subsequently, Wootten (1993, p. 269) argued that ‘the myth of equal treatment’ has often been used to justify a refusal to look at or even acknowledge the existence of Aborigines and although abandoned at policy and training levels in the police service, the myth is often resurrected at a theoretical level by those opposed to special measures for Aborigines.

When this approach failed the group then made a submission to the new Commonwealth Office of Aboriginal Affairs for grant funding to establish a full-time shop-front legal service. In early 1971, the Coalition Government’s Office of Aboriginal Affairs provided sufficient funding to pay for the salaries of a full-time solicitor, field officer and secretary and the

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5 Equal treatment before the law is sometimes misunderstood. It does not necessarily mean ‘same treatment’. Discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different. (www.judcom.nsw.gov.au/publications/benchbk, Section 1.1, accessed March 20, 2008).
Aboriginal Legal Service (ALS) was born. Reiterating the rhetoric of the Black Power Movement of the day, Coe (n.d.) was adamant the ALS would be ‘fully Aboriginal controlled’ and further, that the expectation that Aboriginal people govern and control their own lives was growing, not diminishing and therefore, that any successive government must acknowledge the right of Aboriginal people to ‘self-determination’ (Coe, n.d.).

Unquestionably, the incidence of police patrols, incessant surveillance, harassment and arbitrary arrest for public order offences of inner city Aboriginal residents at this time was the basis for commentary ten years later by Coe (1981) who argued the case that:

...historical continuities pervaded the policing of Aboriginal people and that one of the most pervasive was that Aboriginal people continued to be policed differently than the rest of society, and to their detriment (Coe, 1981, p. 14).

3.5 Self-determination: Rhetoric and Reality

At the national level, Parliament continued to debate how best the Government could meet its policy objective of assimilation for all Aborigines and frequently referred to disappointment at the slow pace at which programs to improve Aboriginal ill-health caused by ‘inferior and scandalous housing conditions’ had progressed (Griffiths, 1995, p. 117). Parallel with these debates, Griffiths (1995, p. 119) argued the issue of land

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6 Coe’s personal account of the establishment of the ALS is detailed in Appendix H.
rights continued to fester as a result of there being no clear understanding by either Government or opposition on how to articulate Aboriginal people’s special relationship with land or what that might mean in the context of assimilation. Although unwilling to enshrine Aboriginal people’s traditional affinity with the land in the legal system, Prime Minister McMahon floated the idea in Parliament that the Government was willing to create a new form of lease for land on Aboriginal reserves. In this regard, the Government argued that merely translating Aboriginal affinity with the land into some form of legal rights may lead to uncertainty and possible legal challenge to land titles in Australia which, up to that time, had remained unchallenged and secure (Griffiths, 1995, p. 119).

On the vexed question of mineral leases on Aboriginal reserve lands, McMahon went on to state that the Government had concluded that in the national interest, and the interest of Aboriginal communities themselves, mineral exploration and development on those lands would continue (Griffiths, 1995, p.120). Consolidating the Government’s view on Aboriginal affairs in an address to the nation on the 26th of January, 1972 Prime Minister McMahon proposed that his Government’s aim was:

…to have one Australian society in which all Australians, including Aboriginal Australians, will have equal rights, responsibilities and opportunities where Aborigines will receive effective and respected places in a single Australian society. But at the same time, they will be encouraged to preserve and develop their own culture, languages, traditions and art…and have a right to decide for themselves at what pace and to what extent they can come to identify themselves with that society. (Hansard, 1972, vol. 75, pp. 122-148, cited in Griffiths, 1995, p. 119)
Rather than appeasing Aboriginal interests or heralding a ‘new era of assimilation’ as was anticipated, McMahon’s address incited Aboriginal activists to travel from their base of operation in Redfern to set up a camp on the lawns in front of Parliament House in Canberra and assign the camp with the iconoclastic title of the ‘Aboriginal Tent Embassy’. According to Griffiths (1995, p. 120), the origins of the Aboriginal Tent Embassy are obscured by the wide variety of anecdotal accounts available and it is now difficult to know whether it was a result of long-term planning or a spontaneous demonstration in reaction to McMahon’s address. However, Foley (2001, p. 13) is more confident about the Embassy’s origins recalling that it was known prior to the 25th of January that McMahon was going to make his major policy statement on Aboriginal affairs on Australia Day - the day Indigenous people regard as ‘Invasion Day’ – and that apart from being provocative, it was inevitable that regardless of what McMahon said, the Black Power Movement would ‘deliver some sort of consequence’. The consequence was that at a meeting of several members of the Black Power Movement7 in Darlinghurst on the night of the 26th of January, a decision was taken to send four young Aboriginal men8 to Canberra to ‘confront the federal Government on its own ground’, to set up a protest and ‘hold the fort’ until a major demonstration could be organised (Foley, 2001, p. 14).

On their arrival on the morning of the 27th of January, the four men pitched a beach umbrella on the lawns of Parliament House and proclaimed the site

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7 Paul and Isobel Coe from Cowra, John Newfong from Queensland, Bob, Kaye and Sol Belllear from Sydney, Tony Coorie and Chicka Dixon from Sydney, Alana and Samantha Doolan from Townsville, Gary Williams and Gary Foley from northern NSW, Lyn and Billy Craigie from Moree (Foley, 2001, p. 13).

8 Billy Craigie, Tony Coorie, Michael Anderson and Bertie Williams, driven by a Communist Party photographer, Noel Hazard (Foley, 2001, p. 14).
the ‘office of the Aboriginal Embassy’ declaring that McMahon’s address the day before had ‘effectively relegated Indigenous people to the status of aliens in our own land’ (Foley, 2001, p. 14).

Following the establishment of the ‘Embassy’, Foley (2001, p. 14) remarked, by ‘a stroke of luck’, the protestors discovered that camping on the lawns of Parliament House was not unlawful under ACT ordinances, as long as there were no more than twelve tents pitched on the lawns at any one time. Consequently, the protestors limited the number of tents in the ‘Embassy compound’ to no more than eleven and by this means foiled any pre-emptive action by the ACT police to remove them. Less than a fortnight after its establishment, the Embassy issued a five point plan for land rights which, inter alia, called for Aboriginal control of the Northern Territory, legal title to all existing reserve lands and settlements throughout Australia and minimum compensation of at least six billion dollars and a percentage of the gross domestic product for lands alienated (Lothian, 2002, p. 22).

In response to the support being expressed for the protest by both black and white Australians, the Opposition Leader Gough Whitlam visited the Embassy in early February and met with its officials, afterwards declaring that a Labor Government would ‘absolutely reverse’ the McMahon Government policy on land rights and ‘would introduce a civil rights bill, overrule state laws that discriminated against Aborigines and also provide free legal advice for Aborigines’ (Foley, 2001, p. 15). Three months later, the Government’s response to the burgeoning Tent Embassy was a
proclamation announcing its intention to introduce a new ordinance to make it an offence to camp on unleased Commonwealth land within the city of Canberra, thereby forcing an end to what federal Opposition spokesperson Kep Enderby declared as Aboriginal people’s fundamental right under British law to ‘peaceful assembly’ (Foley, 2001, p. 15).

In the wake of the amendment to the Commonwealth Lands Ordinance being gazetted, ACT police moved in and forcibly removed the Tent Embassy, arresting eight people in the process which was televised and condemned roundly as ‘establishing violence as a new symbol of black and white relationships’ (Foley, 2001, p. 15). The forced removal of the Embassy provoked a large demonstration on the site a few days later where Aboriginal activists ‘spoke thousands of words on an historic occasion and none, or very few, were reported in the Australian press’ (The Age, 21 July, 1972, cited in Foley, 2001, p. 15). An attempt to re-erect the tent Embassy led to another violent confrontation with police, this time with eighteen people being arrested and many receiving injuries. An appeal by the protestors to meet with the Government ‘to prevent a national black crisis including bloodshed and possible deaths’ went unmet and on July 30 about two thousand Indigenous protestors and their supporters staged the largest land rights demonstration up to that point in time at the Embassy site (Foley, 2001, p. 15). Forewarned about the large ACT and NSW police strength being brought together to disperse the demonstration and, more importantly, to minimise harm or injury to the many young and elderly people who were participating, Embassy officials allowed the police to walk in and remove
the tents claiming ‘a great moral victory’ for the movement and ‘the high political point for the advocates of Black Power’ (Foley, 2001, p. 16).

Four weeks later, the ACT Supreme Court declared the _Trespass on Commonwealth Lands Ordinance_ invalid on a process related issue and immediately the Embassy was re-erected, this time sporting the new Aboriginal flag designed by Harold Thomas, a Luritja man from Central Australia. As Lothian (2002, p. 27) argued, the new flag ‘arresting in its design and colours of black, red and yellow’, boldly underscored the Embassy’s assertion of Aboriginal nationhood. Meanwhile, in trying to push through retrospective legislation to restore the ordinance, the Government was further embarrassed when Liberal Senator Jim Killen crossed the floor to vote with the Opposition on its motion to have all charges against Embassy demonstrators dropped (Foley, 2001, p. 16).

Towards the end of 1972 the Government and Opposition were locked into their respective election campaigns when the ‘customarily conservative’ FCAATSI weighed in to publicly condemn the McMahon Government with its Secretary, Faith Bandler stating:

We’ve never been involved in party politics before but we’ve got no alternative. Getting rid of the McMahon Government is the goal of everyone now – it’s a priority, even over land rights. (Bandler, 1989, p. 22).

Consolidating the Opposition’s position on Aboriginal affairs Gough Whitlam declared in his election policy speech that:
Australia’s treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians – not just now but in the greater perspective of history…the Aborigines are a responsibility we cannot escape, cannot share, cannot shuffle off; the world will not let us forget that (Harris, 2005, p. 6).

When Labor came to power in December, Australia was experiencing a boom in economic development following discoveries of oil, gas, uranium and nickel – mainly on Aboriginal reserve lands – the benefits of which Whitlam determined would be shared by all Australians (Griffiths, 1995, p. 125). Among a list of priorities for the new government was the promise to introduce a wide range of welfare programs to assist Aborigines who, for Labor, had become a political symbol of dispossession and neglect. Linked to Labor’s promise of assistance the new government also promised a new approach to Aboriginal affairs, one underpinned by Aboriginal ‘self-determination’ (Griffiths, 1995, p.125). At the time, ‘self-determination’ was taken to mean that ‘Aboriginal people themselves would be involved and participate in making policies and in decisions that affect them and their future’ (ABS, 1975, p. 971). Years later, Article 1 of the International Convention on Civil and Political Rights more formally declared that self-determination is the right of all peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’ (HREOC, 2003, p. 2).

Prior to the Labor win in 1972, Tatz (1981, p. 7) has argued, neither State nor Federal party politics rated or treated Aborigines as a political issue and that it was only ‘very briefly’ during the Whitlam era between December 1972 and the early months of 1975 that Aborigines were raised to the status
of a ‘political problem’ the resolution of which, in Whitlam’s own words, ‘would be the yardstick by which Australia’s civilisation would be measured in the perspective of history’ (Tatz, 1981, p. 7). Tatz (1981) noted that when the Whitlam Government was brought to an untimely end by the Governor-General in early 1975 in a controversial political manoeuvre that dissolved Parliament, it had been in office for less than two and a half years. Following Whitlam’s ‘dismissal’ Tatz argued pessimistically that:

...the rhetoric and euphoria ended, with Aborigines being relegated to what they have been – at least consciously – for the last thirty years: a social problem, within a generic species that embraces (pejoratively) the aged, the doped, the drunk, the criminal, the sick, the jobless and the retarded, for all whom there is need only of more money for more officers for more problems. (Tatz, 1981, p. 7)

Since 1972, the Embassy has been erected again and again and it remains a constant, if uneasy, presence among the tourist surrounds of Old Parliament House being variously described as ‘an eyesore’ and ‘a place of pilgrimage’ (Lothian, 2002, p. 28). Taken as a whole, its symbolic importance to Aboriginal people was recognised in 1995 when it was listed on the Register of the National Estate. Despite the listing, the Howard Coalition Government argued in 2000 and in subsequent years that the site would be better served by an ‘authorised and structured exhibition’ (Lothian, 2002, p. 29). Notwithstanding the ‘euphoria’ generated in this intense period of political upheaval, change and compromise, had anything really changed in the way Australia dealt with the ‘Aboriginal problem’?

Two years after the formation of the first Aboriginal Legal Service in Redfern, a year after the establishment of the Tent Embassy and a year after
the installation of a federal Labor Government that promised ‘self-determination’ in Aboriginal affairs, the Australian Institute of Criminology (AIC) was formally established under the *Criminology Research Act 1971*. Within three years, the AIC introduced the Australian Prisoner Index – an annual census of all prisoners detained in State prisons on a specified date - which provided statistical evidence of the disproportionate imprisonment rate for Aboriginal people compared to non-Aboriginal people (Clifford, 1982). A summary of the Institute’s broad advisory, research, training and publication functions is set out at Appendix C.

The AIC’s annual prison census series has shown that Aboriginal people have been over-represented in the country’s prison population each year since the initial collection in 1976. Later sections in this chapter and subsequent chapters will show that through the introduction of the AIC Australian Prisoner Index and the publication of Eggleston’s (1976) seminal research the same year, two themes emerged that would become the cornerstone for subsequent criminological research on Aboriginal crime and criminality over the next fifteen years: Aboriginal over-representation in arrest and imprisonment rates; and discrimination in the criminal justice system.

### 3.6 Aboriginal over-representation – a preliminary view

Following a request from an unnamed Legal Service to ascertain the number of Aborigines in NSW prisons and also the length of sentence served, the Bureau of Crime Statistics and Research (BOCSAR) (1974) conducted what
appears to be the first study to qualify and quantify Aboriginal overrepresentation in imprisonment in that State. With the cooperation of the Department of Corrective Services, the BOCSAR conducted a census in all NSW prisons in December 1971 soon after the Commonwealth census which, as previously mentioned, was the first census to adopt the criterion of ‘self-identification’ in relation to Aboriginal respondents. In its study, the BOCSAR framed the following question as the basis for subsequent analysis in terms of age, occupation, education, type of offence and current sentence:

What is your racial origin?
(if of mixed origin indicate the one to which you consider yourself to belong) Circle one number only or give one origin only.

1. European origin
2. Aboriginal origin
3. Torres Strait Islander origin
4. Other origin

(Source: BOCSAR, 1974, p. 1).

On the basis of this question, 202 Aboriginal men and eleven women identified themselves as being of Aboriginal origin. While the BOCSAR was able to conduct a cursory analysis of occupation, education level, principal offence and current sentence within the Aboriginal inmate population, it was unable to provide a comparison with non-Aboriginal inmates and also acknowledged its inability to compare the social characteristics of Aboriginal prisoners with those of the general prison population. Comprising only eight pages in total, the study acknowledged that a simple census such as this had inbuilt limitations and that it was only possible to gain ‘some knowledge of the Aboriginal inmate group’ (BOCSAR, 1974, p. 1). In essence, the study raised more questions than it
answered and the Bureau argued that given that this was the first preliminary sketch, the circumstance of Aboriginal imprisonment required intensive investigations. Importantly, the study did not conduct a comparison between Aboriginal prisoners and the general prison population to quantify Aboriginal over-representation, arguing this was a matter for the supplement to its initial statistical report. Unfortunately, an exhaustive search of the BOCSAR’s resource collection failed to locate the mentioned supplement to its 1974 Report.

3.7 Fear, favour or affection

Two years after the BOCSAR published its tentative pilot study into Aboriginal over-representation in imprisonment in NSW, Eggleston (1976) published her monumental research in a text titled, Fear, favour or affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia. The first part of the title is worth closer examination as it appears to deride the wording within the Police Oath of Office9 where in actual fact, ‘without’ precedes the words ‘favour or affection’ and the word ‘fear’ does not appear. Eggleston’s (1976) inclusion of ‘fear’ and exclusion of ‘without’ in the title rendered clearly a particular view that attempted to separate the rhetoric from the reality as to the way in which Aboriginal people were being policed.

9 ‘I [name] do swear, that, I will well and truly serve, our sovereign lady the Queen, as a police officer without favour or affection, malice or ill-will, until I am legally discharged, that I will see and cause, her Majesty’s peace to be kept and preserved, and that, while I continue to be a police officer, I will, to the best of my skills and knowledge, discharge all the duties thereof, faithfully, according to law, so help me God’. Source: http://www.policensw.com/info/misc_gun/oath.html.
While earlier commentary in anthropological and historical accounts of Aboriginal societies by Elkin, (1938), Kriewaldt, (1960), Berndt and Berndt, (1965), Rowley, (1972, cited in McRae et al., 1991) and Hasluck (1942, cited in Parker, 1987) had drawn attention to legal injustices suffered by tradition-oriented Aborigines in various legal jurisdictions, Eggleston’s (1976) research provides the starting point for this study’s examination of Australian criminology’s explanations concerning Aboriginal over-representation and is considered significant for the following reasons.

Effectively, Eggleston’s (1976) was the first research in this country to establish the nature and extent of Aboriginal over-representation in arrest and imprisonment rates. In doing so, it also looked further than individual pathology as a means of explaining such over-representation and in the process, turned the spotlight on structural factors in the administration and operation of the criminal justice system itself. In addition, it was the first sustained and systematic examination and analysis of the relationship between Aborigines and the Australian legal system, particularly with respect to how that relationship underpins Australia’s race relations (Hanks & Keon-Cohen, 1984, p. xiii). Consequently, it becomes apparent that the discriminatory attitudes, practices and behaviours evinced within the criminal justice system would not be able to proliferate if they were not tolerated in broader Australian society in the first place (Tatz, 1984, p. 111). These facts become even more significant when it is realised that Eggleston was a lawyer herself and that prior to commencement of her fieldwork she had no expressed interest in, or personal knowledge of, the circumstances of Aboriginal people in this country (Waller, 1984, p.305).
The starting point for Eggleston’s (1976) research was statistical data that showed Aboriginal people were over-represented in the prison population of Western Australia. From there, she sought to confirm whether a similar pattern existed in other States. For the purposes of her research, which at that time constituted her doctoral thesis, Eggleston (1976) elected to provide a comparative examination of Western Australia with the States of South Australia and to a lesser extent, Victoria. If the pattern of over-representation was confirmed, a further aspect of the research was to determine whether the difference between Aboriginal and non-Aboriginal imprisonment rates was due to greater criminality by Aboriginal people compared to non-Aboriginal people or, alternatively, discrimination in the administration of justice.

After initial collection of data about the administration of relevant laws and legal systems of the three States, Eggleston (1976, p. 2) pursued a range of fieldwork activities deemed necessary to develop a picture of what she termed ‘the law in action’. Foremost among these activities was the examination of records and direct observations in ‘ten sample towns’ in Western Australia. In each sample town, fieldwork focused on an examination of police and court records; direct observations of court hearings, police actions and the operations of prisons, Aboriginal missions and reserves; and interviews with representatives of the judiciary, legal profession, police, prisons and Aboriginal community groups.

While acknowledging the likely un-representativeness of the Western Australian towns selected, Eggleston (1976) argued that her choices were
governed by two factors: the concentration of Aboriginal population and the location of courts and police stations. So, while some towns were selected because it was known they had a substantial Aboriginal population, others were chosen on the basis they were centres of police administration for a district that included towns with varied Aboriginal populations.

In a quantitative analysis of all criminal cases (4,002 in total) heard by the lower courts in the ten sample towns for the year 1965, Eggleston (1976, p. 14) found that the offences with which Aborigines were most frequently charged in ranking order were ‘drunkenness, disorderly conduct, traffic offences, stealing and Native Welfare offences’. From this analysis she concluded ‘the Aboriginal offence *par excellence* is drunkenness, with charges constituting 48 per cent of all charges against Aboriginals’ (Eggleston, 1976, p.14). In comparison, the ranking of offences for non-Aboriginal people began with traffic offences, followed by offences under other Acts, drunkenness, stealing and offences under Licensing Acts.

From her analysis, Eggleston (1976, p. 14) argued that a further contrasting pattern between Aboriginal and non-Aboriginal populations emerged in relation to imprisonment. While constituting 2.5 per cent of the population in Western Australia, Aborigines made up 24 per cent of the prison population for that State. By 1971, the rate of Aboriginal imprisonment had increased to 32 per cent (Eggleston, 1976, p. 15). In South Australia, Aborigines constituted 0.7 per cent of the population but represented 14 per cent of the State’s prison population (Eggleston, 1976, p. 16).

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10 See definition of Native Welfare Offence at Section 1.5.
What Eggleston (1976) established conclusively through her empirical research was that Aboriginal people were not only arrested in disproportionate numbers in relation to public order offences, but that they were also convicted and sentenced to imprisonment far more frequently than non-Aboriginal people committing similar summary offences.\(^{11}\)

Establishing whether such over-representation was due to greater criminality on the part of Aboriginal people or some other factor was the next stage in Eggleston’s research.

Beginning with an examination of the social conditions for Aboriginal people at that time, Eggleston (1976) restated Stubbs’ (1966, cited in Eggleston, 1976, p. 7) findings that over 90 per cent of Aboriginal people lived in poverty. Linked to poverty, as both cause and effect, Aboriginal people were also shown to have limited educational opportunities and low occupational status. In addition, and as a reflection of the overall circumstance of poverty, Aboriginal people also suffered chronic poor health, including a high infant mortality rate (Kalokerinos, 1969, p.6, cited in Eggleston, 1976, p. 8).

Noting the recent abandonment of the policy of ‘assimilation’\(^{12}\) at the federal level and its replacement with ‘self-determination’, Eggleston (1976) next provided an overview of the history of Aboriginal relations with white Australia, including the impact of the legal system, the criminal law and

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\(^{11}\) Eggleston’s study was the first empirical research to establish the two outcomes through statistical data.

\(^{12}\) It should be noted that ‘integration’ was an intermediate policy between ‘assimilation’ and ‘self-determination’.
policing in particular, as well as the administrative processes associated with prosecution, bail and special legislation then in force which applied specifically to Aboriginal people. On the last point, McCorquodale (1987), Barrister at Law, estimated that since ‘settlement’, approximately 700 separate pieces of prescriptive legislation had been enacted throughout Australia with reference to the status or condition of being Aboriginal. This included no less than sixty-seven classifications, descriptions or definitions that have been applied at various times by governments in pronouncing who is ‘Aboriginal’. It was argued that while much of this ‘special’ legislation had an ‘avowedly benevolent intention’ (McCorquodale, 1987, p. xiv) many Acts were also discriminatory as a result of provisions that created ‘status offences’ where criminal sanctions applied only to the conduct of Aboriginal people. For example, in addition to drunkenness and vagrancy being offences under the general criminal law, these offences were replicated as status offences where being Aboriginal was the necessary precondition for prosecution (Eggleston, 1976, p. 226).

From her focus on historical and contemporary interactions between police and Aborigines in the administration of the law, Eggleston (1976, p. 17) established, **inter alia**, the policing of Aboriginal people was often more intense and more extensive than for the remainder of Australian society. In this regard, attention was drawn to the earlier role of police in assisting in the forced removal of Aboriginal people from their traditional lands, the continuing role of police in the forced removal of Aboriginal children from their families, and their multiple roles as law enforcers, Aboriginal
Protectors, gaolers, prosecutors, bailiffs, child welfare agents, and officials in the administration of Aboriginal-specific legislation.

Given the length, degree and nature of police interventions in the lives of Aboriginal people, Eggleston (1976, p. 17) posed the question ‘Did police treat Aboriginal people the same as other Australians in the administration of justice?’ Eggleston (1976, p. 18) is quite clear in the view that Aboriginal people were subject to differential treatment by police. She found that, generally speaking, police ascribed to Aboriginal people ‘inferior standards of intelligence, morality and behaviour’ and were ‘prejudiced against the race’ (Eggleston, 1976 p. 18). Prejudice, as defined by Simpson and Yinger (1965, cited in Eggleston, 1976, p. 18) means ‘a rigid emotional attitude toward a human group’ and involves both pre-judgement and misjudgement of the members of that group. On this point, she concluded that prejudice was more pronounced in country policing than in metropolitan policing (Eggleston, 1976, p. 18).

In an attempt to explain police prejudice against Aboriginal people, Eggleston (1976, p. 19) surmised three factors were at play. First, prejudice was a carry-over from an earlier period where frontier conditions produced direct conflict between police and Aborigines, who were presumed at law to be inferior. Second, if intolerance was a feature of the social environment where a police officer was stationed, it was likely the police officer would adopt the same view in order to position himself as a member of the white community. Finally, to a limited extent, police prejudice may be based on objective fact and their observation of the actual behaviour of Aboriginal
people. For instance, police may observe that more Aborigines than whites in a particular town get drunk in public. While this might be the case in many locations, no account is taken of the higher visibility of Aborigines, who are readily identified through skin colour and their segregation on missions and reserves on the fringes of towns (Eggleston, 1976, p. 19).

Eggleston (1976, p. 20) also argued that contrary to the views expressed by police, few Aboriginal people expressed general hostility towards the police, instead arguing a distinction was made between those individual police who treated them fairly and those who harassed them. While acknowledging prejudice need not necessarily result in discrimination, that is, ‘differential treatment’ of individuals considered to belong to a particular social group, Eggleston (1976, p. 18) put the view that it is reasonable to expect that in most cases prejudice and discrimination co-exist. She also argued that, contrary to police protestations that the law is applied equally and impartially to all, Aboriginal people were policed markedly differently from the broader population and that the difference was attributable to police discrimination. In support of her view, Eggleston (1976, p. 23) offered that evidence of police discrimination was discernable in their widespread preference to arrest Aborigines for minor offences rather than proceed by summons, to ignore accepted standards and regulations regarding the conduct of formal interviews and in obtaining confessions, to remand in custody rather than grant bail, and in the frequency of patrols on missions and reserves where spotlighting, harassment and unlawful entry to homes was common practice. Overall, Eggleston (1976) provided persuasive evidence that Aboriginal people were not only arrested and imprisoned at
greater rates than the general population but that their over-representation on
these two matters was due in large part to the discriminatory operation of
police in particular and the criminal justice system in general.

In a reflection on the nature, scope and findings of Eggelston’s field work of
the 1960s at the Annual Conference of the Local Court of New South Wales
in July 1992, The Honourable Justice Mary Gaudron then of the High Court
of Australia commented that much had changed since 1965, stating that:

Since then, men had walked on the moon and travelled in space, international communism had collapsed under its own weight, communications technology had turned us into what is described as ‘the
global village’ with the events of the day, no matter what remote part of
the world, being visible, almost as they happen, on our television screens. In contrast to these significant world events however, the position of Aborigines is not much changed and, worse still, continues largely hidden from view (Gaudron, 1992, p. 85).

3.8 Protection in police interrogation – the Anunga Rules

In Australia, the general law provides that police are entitled to question any
person at any time when investigating a crime and that such a person cannot
be compelled to answer any questions put. As a general principle, a suspect
has the right to remain silent and no inferences can be drawn from a
person’s exercise of the right to silence. Further, in the event a person
makes an admission or confession to police, two distinct rules apply to the
admissibility of any such confession or admission. First, to be admissible
the statement must be made voluntarily and not result from duress, intimidation, persistent importunity\textsuperscript{13} or sustained or undue insistence or

\textsuperscript{13} ‘To harass with persistent requests; demand of (someone) persistently’ Collins English Dictionary and Thesaurus, 1992).
pressure. Second, even if a statement is found to be voluntary, it may still be excluded in the exercise of the judge’s discretion, if it is considered that it would be unfair to the accused to receive it in evidence (McRae et al., 1991, p. 234). Despite these general safeguards and the presumption at law ‘that everyone is equal under the law’, the legal system has long known Aboriginal people suffer special problems in the exercise of their right to remain silent and to refrain from incriminating themselves in police interrogations. These problems are particularly pronounced in terms of Aboriginal people’s understanding of English, English concepts of time, number and distance, and legal terminology, many of which are not translatable into Aboriginal languages.

An overarching concern within the context of Aboriginal people’s disadvantaged position before the law that emanates from Aboriginal English usage is the concept of ‘gratuitous concurrence’, first highlighted as being disadvantageous to Aboriginal people in police interrogation and trial proceedings by Eades (1988, 1993, 1995, 1996) and in her influential research on Aboriginal English in the courts (1992, 1994a, 1994b, 1997). Essentially, Aboriginal people by their nature are generally courteous and polite and will answer questions put by white people in a way in which they think the questioner wants. In the police interrogation context, agreeing with whatever police ask has led to Aboriginal people abrogating their right to silence and inadvertent confessions (Forster, J 1976).

In 1976 at the height of a series of cases dealing with the admissibility of Aboriginal confessional evidence, Forster J of the Supreme Court of the
Northern Territory, joined by Muirhead and Ward JJ, rejected the tendering by the Crown of typewritten records of interview in the matters of Anunga and Wheeler and formulated a set of guidelines for the admissibility of statements made by Aboriginal people during the course of police interrogation, to become known as the Anunga Rules. Consisting of nine ‘guidelines’, the Anunga Rules established the Court’s view as to how police should conduct interviews with Aboriginal suspects once in police custody and being questioned in relation to a crime. The Anunga Rules are set out fully in Appendix G.

Briefly, His Honour proposed that great care should be taken in interviewing Aboriginal people who were not fluent in the English language and that a series of ‘checks and balances’ ought be carried out by police to demonstrate fairness in their dealings with Aboriginal people. Such actions included, where practicable, obtaining the services of a ‘prisoner’s friend’, who may also be an interpreter; making sure that the arrested person fully understands the caution by having them restate what they understood it to mean; taking care in formulating questions to obviate gratuitous concurrence; not continuing interrogation for unduly long periods; offering refreshments if facilities exist but if not, prisoners should always be offered a drink of water; obtaining legal assistance if requested; and supplying substitute clothing if necessary when removing the prisoner’s own clothing for forensic purposes (Forster, J 1976). At the conclusion of his judgement, Forster J (1976) addressed the issue of the enforceability of the Rules which he suggested were not absolute Rules, but, similar to the consequences for
police in not adhering to the English Judges’ Rules, could result in the exclusion of statements of persons questioned, if not observed.

In its Report on the recognition of Aboriginal customary law, the Aboriginal Law Reform Commission (ALRC, 1986, pp. 256-265) proposed that uniform legislation based on the Anunga Rules should be introduced throughout Australia. In addition, the Report rejected the proposition that the Rules should be extended to migrants or other disadvantaged groups who suffer similar problems before the law as Aborigines, arguing Aborigines are especially disadvantaged and therefore, they are entitled to special protection. Notwithstanding the ALRC’s strong views concerning national legislation to protect Aborigines in police interrogation, no action has been taken to date to effect that recommendation and it remains the case that of the seven Australian police jurisdictions outside the Northern Territory, only South Australia, Queensland and the ACT police are issued with guidelines based on the Anunga Rules (McRae et al, 1991, p. 256). As to whether or not the Anunga Rules have led to any appreciable change in the treatment of Aboriginal people or safeguarded their rights in police interrogations, Samuelson (1993, p. 3) has argued that:

> there is little evidence that the *Anunga* guidelines have contributed in any notable way to positive change in Australian police handling of Aboriginal peoples. Indeed, since their promulgation in 1976, Aboriginal-police relations have deteriorated very noticeably in Australia and have reached crisis proportions.

### 3.9 Aboriginality and Census trends

Section 3.3 of this chapter drew attention to the fact that Indigenous people
were first included in an official census in 1971 following an amendment in 1967 to Section 127 of the Australian Constitution. Table 3.4 below highlights Indigenous population data from the 1976 census and also what appears to be a dramatic increase in the Aboriginal and Torres Strait Islander population from the 1971 census. For instance, Tasmania, the Australian Capital Territory and Victoria experienced population increases in the order of 338%, 224% and 131% respectively. NSW recorded an increase of almost 70% and South Australia just below 50%, while to a lesser extent Queensland recorded an increase of close to 30% and Western Australia a 17% increase. Only the Northern Territory stands out with no discernable population increase in the five year period that had elapsed since the 1971 census.

In comparing the dramatic difference in population figures between the 1971 census and 1976 census, it is unlikely natural growth can account for the sizeable increase (38.8%) in the Indigenous population. The more likely reason for such ‘growth’ is that, apart from enhanced data collection methods adopted by the ABS to capture Indigenous populations, the 1976 census also captured increased awareness among Aboriginal and Torres Strait Islander people themselves about the mandatory nature of the Australian census and, consequently, more people enrolled as well as identified as Aboriginal or Torres Strait Islander.
Indigenous Census Count – 1976

Table 3.4

<table>
<thead>
<tr>
<th></th>
<th>Number (no.) 1976</th>
<th>Number (no.) 1971</th>
<th>Change in % from 1971</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>40,450</td>
<td>23,873</td>
<td>&gt;69.4</td>
</tr>
<tr>
<td>Victoria</td>
<td>14,760</td>
<td>6,371</td>
<td>&gt;131.7</td>
</tr>
<tr>
<td>Queensland</td>
<td>41,345</td>
<td>31,992</td>
<td>&gt;29.5</td>
</tr>
<tr>
<td>South Australia</td>
<td>10,714</td>
<td>7,299</td>
<td>&gt;46.8</td>
</tr>
<tr>
<td>Western Australia</td>
<td>26,126</td>
<td>22,181</td>
<td>&gt;17.8</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2,942</td>
<td>671</td>
<td>&gt;338.5</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>23,751</td>
<td>23,381</td>
<td>&gt;1.6</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>827</td>
<td>255</td>
<td>&gt;224.3</td>
</tr>
<tr>
<td>Australia</td>
<td>160,915</td>
<td>115,953</td>
<td>&gt;38.8%</td>
</tr>
</tbody>
</table>

(Source: Adapted from ABS, 2004, pp. 1-2).

Given the long and contentious history surrounding the definition of Aboriginality and given that defining Aboriginality is not actually necessary for achieving most public policy goals, I am in agreement with Gardiner-Garden (2003) who has suggested it is now probably timely to abandon the need for an official definition of Aboriginality.

3.10 From little things big things grow

Section 3.2 in this chapter briefly mentioned that the first occasion on which Aboriginal people sought to use the ‘white man’s law’ to achieve their ends occurred when the Yirrkala people, traditional owners of the Gove Peninsula, initiated legal action in December 1968 in Milirrpum v Nabalco Pty Ltd and the Commonwealth 1971. In essence, the legal action was an
attempt to prevent the establishment of a bauxite mine on Yolgnu\textsuperscript{14} land in the north-eastern corner of Arnhem Land where the Commonwealth Government had earlier that year granted Nabalco Pty Ltd a special lease for forty-two years over 200 square miles of Yolgnu reserve land. In the end, Justice Blackburn ruled that the Yolgnu people could not prevent mining on their lands because ‘native title’ was not part of the law of Australia. In this regard, Justice Blackburn argued that the initial colony of NSW had to be regarded as a ‘settled’ or ‘occupied territory’, rather than a ceded or conquered one and that at law, no doctrine of communal native title applied to settled colonies (Curthoys & Lake, 2005, p.4). Qualifying this reasoning, Justice Blackburn held that even if communal native title had survived British sovereignty, such rights would have been extinguished with the later grants of leases or by the establishment of reserves. Further, he found that the Yolgnu had not demonstrated a relationship to land which was proprietary in nature and therefore, their claims were not in the nature of proprietary interests (Curthoys & Lake, 2005, p. 4).

Although \textit{Milirrpum} was unsuccessful in ‘proving’ the existence of communal native title under Australian law it fomented Aboriginal activism around land rights which was ‘expressed most strikingly’ in the Tent Embassy protest campaign of 1972 (Curthoys \textit{et al}., 2008, p. 5). For present purposes, the term ‘land rights’ is usually applied in contexts where third or fourth world peoples have been dispossessed by a recent group of colonisers. Not only does this colonisation place in doubt, alter, or

eliminate the original occupants’ rights and interests in the land they occupy, usually without compensation, but it generally results in a loss of personal and political autonomy and group sovereignty. Thus land rights concerns both property and political rights and the land rights movement seeks to restore, to the greatest extent, the original rights, although complete restoration is almost unknown and what may result is new rights in an altered social and political context (Peterson, 1981, p. 3).

A year after the Milirrpum decision the new Whitlam Labor government invited the former lead counsel for the Yolgnu in that case, Justice Woodward, to head a commission of inquiry into Aboriginal land rights in the Northern Territory. A year after that, the Commission delivered its final report with the major recommendations calling for the preservation and extension of Aboriginal land rights, including the ability to veto mining projects on Aboriginal land and, the establishment of a land claims procedure under an Aboriginal Land Commissioner (Curthoys et al., 2008, p. 5). Although Commissioner Woodward’s recommendations were incorporated into legislation in the form of a Bill, Labor lost office in early 1975 to a Coalition government led by Malcolm Fraser which, consequent to a pre-election policy that promised land rights and continuation of the process of self-determination, passed the Aboriginal Land Rights (NT) Bill through Parliament in June 1976 almost unchanged from Labor’s Bill (Griffiths, 1995, p. 168). Concomitant with Woodward’s recommendation that new legal provisions had to be put in place for the incorporation of

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15 When introducing the Fraser Government’s policy to the first parliamentary session after the election, the Governor-General used the term ‘self-management’ and ‘self-sufficiency’ in place of self-determination (Griffiths, 1995, p. 166).
communities, the Aboriginal Councils and Associations Bill also passed through Parliament in much the same form as had been presented by the previous Labor government.

Between June 1976 and the final Parliamentary sitting in December that year, the government was consumed by a number of issues on its Aboriginal affairs agenda. In October, Parliament was presented with the Hay Report on Aboriginal affairs expenditure, requested earlier that year by the incoming Coalition government as a result of ‘unheard of amounts’ of money allocated to State governments and direct spending by the Commonwealth for ‘Aboriginal purposes’ during the years of the Whitlam government (Griffiths, 1995, p. 166). In a somewhat derisive manner, Griffiths (1995, p. 166) has proposed that ‘the three areas where money was freely available to almost anyone who could present a convincing submission were housing, health and education’. In this regard, Griffiths (1995, p. 167) stated that Commonwealth Government expenditure in the financial year 1972/73 comprised a contribution of $22 million to the States and direct Commonwealth funding of $61 million; a total of $83 million for the year. Two years later, in the financial year 1975/76 contributions to the States had almost doubled to $41 million, while direct Commonwealth funding had risen from $61 million ‘to a staggering’ $192 million, making a total expenditure for that year of $233 million (Griffiths (1995, p. 167). However, contrary to expectations that the Hay Report would recommend heavy cuts in expenditure, the Fraser government actually increased spending by $25 million on its previous estimate, bringing the total
expenditure on Aboriginal affairs for the financial year 1976/77 to $177.6 million (Griffiths, 1995, p. 170).

In the same parliamentary session, the bipartisan House of Representatives Standing Committee on Aboriginal Affairs presented its report on a requested investigation into the problem of alcohol in Aboriginal communities in the Northern Territory (Griffiths, 1995, p. 170). The Committee chair, Phillip Ruddock, introduced the report saying:

> Alcohol is the greatest present threat to the Aborigines of the Northern Territory and unless strong immediate action is taken, they could be destroyed...it has led to a breakdown in traditional authority and the discipline of the clan elders...communities should decide whether alcohol should be permitted on settlements. (Griffiths, 1995, pp. 170-171)

Another member of the committee, Les Johnson of the Labor Party, said that ‘drinking reflected despondency arising for the loss of traditional land and lifestyle’, adding that ‘the effect of alcohol was very public and very visible’ (Griffiths, 1995, p. 171). While arousing a great deal of emotional debate and discussion on the ‘causes and possible cures for the epidemic of alcoholism’, this issue was more or less subsumed by another report tabled in the same sitting: a Parliamentary Select Committee’s report on Aboriginal health.

Again, focusing on the Northern Territory, a case was made that the health of Aboriginal people had been a major concern of successive Commonwealth governments since 1910 when the Commonwealth assumed responsibility for administration of the Northern Territory. Reflecting the language of the day, Griffiths (1995, p. 171) argued that conventionally, the
poor state of Aboriginal health had been linked to ‘their primitive lifestyles and the appalling condition in which they lived’ thus, in terms of the assimilation project, most efforts to improve Aboriginal health had been directed towards changing Aboriginal people’s living habits. The change from the policy of assimilation to that of land rights and self-determination recognised that the maintenance of Aboriginal health was related to their traditional ways of living, including their relation to the land. With the changed policy environment, it was expected that for those Aboriginal people who had regained their land, there would be a consequent improvement in their health (Griffiths, 1995, p. 172). The immediate problem arising from the new policy environment was expressed along the lines of ‘how to deliver health services to eliminate these diseases, without intruding too much into the Aboriginal culture’ (Griffiths, 1995, p. 172). In this context, the Select Committee had been asked to investigate alternative health care methods, ‘which took into account Aboriginal lifestyles, including camp situations, and the participation of Aboriginal traditional healers in health care delivery’ (Griffiths, 1995, p. 173).

At that time, both Government and Opposition agreed that the ‘diseases’ and ‘disabilities’ that needed to be eliminated from Aboriginal communities were ‘yaws, leprosy, hookworm, trachoma, pulmonary infections, deafness, malnutrition, infant mortality and alcoholism’ (Griffiths, 1995, p. 172). Referring to the work of Professor Fred Hollows in the elimination of eye disease (trachoma) and Dr Randy Spargo in community health in the Kimberley region, Opposition Health spokesperson Kim Beazley Snr. argued that what was needed were ‘concentrated programs similar to what
Hollows and Spargo had developed, to attack each of the health problems. Whether out of frustration or flippancy, Beazley’s Opposition colleague, Gordon Bryant, reminded Parliament during debate on the Report that ‘failure to solve the problems of the Aboriginal people had almost become an endemic disease of the government itself’ (Griffiths, 1995, p. 172).

A further key issue to emerge in the early 1970s was the need to consult Aboriginal people regarding the appropriate direction and pace of government policies (Griffiths, 1995, p. 173). According to Griffiths (1995, p. 173) the question was ‘how an unsophisticated, scattered and poorly organised constituency of Aborigines could be engaged in consultation with a highly complex and heavily regulated government system?’ Although the National Aboriginal Consultative Council (NACC)\textsuperscript{16} had been set up in 1973 by Whitlam for exactly this purpose, a review by a Parliamentary Committee of Inquiry led by Dr L R Hiatt found the NACC ineffective in providing advice to the government and also that the great majority of Aboriginal people knew little or nothing about it (Griffiths, 1995, p. 173).

One of the more prominent criticisms of the NACC during its short life was that in attempting to structure its membership on traditional family and kinship lines, many communities were disadvantaged due to the uneven distribution of communal groupings throughout the country and it was also argued that tradition-oriented communities were disadvantaged when dealing with the ‘more sophisticated urban Aborigines’ (Griffiths, 1995, p. 173).

\textsuperscript{16} The NAAC consisted of a total of forty-one members elected solely by Aboriginal people from the States and the Northern Territory. The NAAC’s initial chair was Mr Bruce McGuiness from Victoria.
173). In addition, the lack of a properly staffed NACC secretariat made communication with widely scattered communities throughout the country almost impossible. The Labor government had previously acknowledged these deficiencies while in office and consequently, supported the recommendations of the Hiatt Report which also included winding up the longest serving Aboriginal affairs body, the Council for Aboriginal Affairs (CAA). Established in 1967 after the referendum to provide Aboriginal people with an avenue of approach to government and to facilitate relationships between the Commonwealth and States, the CAA’s functions had largely been overtaken with the appointment of a Minister and a Department of Aboriginal Affairs (DAA) during the Gorton government era.

In the last parliamentary sitting for 1976, the final item on the government’s Aboriginal affairs agenda was the Land Rights (N T) Bill. As expected, the final reading of the Bill provided the opportunity for ‘some strong expressions of concern’ to be raised by members with W C Wentworth querying the Bill’s definition of an Aborigine as ‘a person who is a member of the Aboriginal race of Australia’, claiming the definition would allow ‘anyone who had one sixty-fourth part Aboriginal blood to successfully claim recognition and entitlement’ (Griffiths, 1995, p. 174). On the other side of the House, Kim Beazley Snr. and Gordon Bryant spoke of the need to protect Aborigines against the inroads of the mining industry, the dangers of giving the Northern Territory government too much power and the

\[17\] When established the CAA comprised ‘Nugget’ Coombs (Chair), Professor W E Stanner (anthropologist), and Barrie Dexter (a senior public servant). Retrieved on August 15, 2008 from http://www.indigenousrights.net.auorganisation.asp?
continuing menace of racism in Australia (Griffiths, 1995, p. 174). In the end, both the *Land Rights (N.T.) Bill* and *Aboriginal Councils and Associations Bill* passed peacefully through Parliament to become Acts\(^\text{18}\) and mark the beginning of a new era for Aboriginal people while at the same time, placing Aboriginal affairs high on the political agenda in Australia (Griffiths, 1995, p. 174).

Although the Commonwealth government’s Land Rights legislation ensured Aborigines in the Northern Territory could retain a traditional relationship with the land together with an inherent right to negotiate mining proposals to secure royalties, the vexed question of whether or not land ownership could or should provide an economic power base for Aboriginal people to use in negotiating their place in Australian society remained unclear (Griffiths, 1995, p. 175).

### 3.11 Same day, different date

At the end of this chapter, it is appropriate to recount the comments of Mick Dodson\(^\text{19}\) (1976) in the last month of that year who, on being asked to provide an ‘Aboriginal perspective’ in an editorial for a special issue of the *Legal Service Bulletin* devoted wholly to discussion on ‘Aborigines and the Law’, began by recounting the recent resurgence of interest in the topic since 1974 as evidenced by ‘conferences in Canberra and Melbourne, some

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\(^\text{18}\) *Aboriginal Land Rights (Northern Territory) Act, 1976; Aboriginal Councils and Associations Act, 1976.*

\(^\text{19}\) Mick Dodson, an Aboriginal lawyer at the time, was later appointed as a Royal Commissioner to the Royal Commission into Aboriginal Deaths in Custody and following that, the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner.
very important legal decisions in South Australia and Western Australia and
in the Northern Territory’, as well as publication of numerous books, pamphlets and articles. Having acknowledged that this particular issue of the *Bulletin* was set aside to examine the status of Aboriginal people before the law Dodson (1976) declared critically that, as an Aboriginal person, he viewed this latest exercise with a great deal of scepticism claiming the continued discussions, conferences and publications appeared to offer scant results, immediately or in the long term.

Continuing the criticism Dodson (1976) argued that Aboriginal people were fully aware of the repressive and racist legal systems which subject them to great disadvantage and injustice, suggesting that the great volumes of writings and works seem to be of little value to a people who live under exploitation, oppression and inequality, not only before the law but also in other areas of social existence. Further:

> We live that existence, we have small mileage in experts exposing the problem and ultimately, the outcome leaves us no further advanced or better off than we were when the invaders first conquered our country’. (Dodson, 1976, p. 98)

Getting to the nub of the issue Dodson (1976) alludes to Aboriginal people being weary from the squabbles and bickering between differing bodies and decision makers presuming to know what was best for Aboriginal people or what was in the best interests of Aboriginal people and asked whether this special issue of the *Bulletin* was yet another mud-sling or would it prompt action? Acknowledging frustration and disappointment with other similar ‘efforts’ Dodson (1976) admitted to doubt and despair that the discussions
in the special issue would achieve any more than their forerunners. As a final invective, Dodson (1976) proposed that if the Special Edition of the *Bulletin* was to be viewed as a gentle suggestion for reform, then for all its worth to Aboriginal people, ‘the writers should take their works and stuff them up their collective backsides’, insisting that ‘surely things must have advanced beyond trinkets and beads’! (Dodson, 1976).

Only a month before Dodson’s commentary on his frustration with the ‘racist legal system’, Paul Coe and Cecil Patten from the NSW Aboriginal Legal Service had travelled to England to mount a protest after Coe lost an action in the ACT Supreme Court to overturn the legal fiction of *terra nullius*. Landing in a small boat on the English coast at Dover, Coe and Patten ‘took possession of the whole country’, planted the Aboriginal flag and informed the British Prime Minister, James Callaghan, by letter that their invasion had been a replica (minus their boat sinking before they got to shore) ‘of the purported British taking of Australian Aboriginal territory’ (Harris, 1979, p. 26). As a political action, it was meant to demonstrate the absurdity and injustice of the Australian legal concept of *terra nullius*, or land belonging to nobody, when the British came in 1788 and declared possession of the whole of the Australian continent. Although Dodson and Coe utilised different tactics to make their points, it is notable that, as lawyers, they each cited the source of their exasperation as the Australian legal system and its unfair, unjust and supercilious treatment of Aboriginal people.
3.12 Conclusion

In this chapter attention was drawn to a broad range of political, legal and social issues impacting on the circumstances of Aboriginal people during the period 1967 to 1976. One of the more important socio-political events to occur at the beginning of the period was the 1967 Referendum which, although successful in achieving constitutional change, has continued to be misrepresented by claims that it either granted Aboriginal people the rights of citizenship, repealed racially discriminatory State laws or transferred Aboriginal affairs to the Commonwealth. While the referendum did not achieve any of these outcomes, it did result in the removal of two provisions in the Constitution that were discriminatory in both nature and intent towards Australian Aboriginal people.

The chapter also highlighted the beginnings of governmental statistical collections and the manner in which population counts grew from ‘musters’ in colonial Sydney to adoption of the English based decennial census system and thereafter this country’s own census collection which, prior to 1971 and subsequent to the referendum mentioned above, did not include so called ‘full-blood’ Aborigines in census counts. As discussed, many of the problems associated with enumeration of the Indigenous population appear to have arisen as a result of non-Indigenous Australia’s pernicious tendency to quantify and control ‘Aboriginality’, particularly as these decisions related to government expenditure on Aboriginal people and their communities.
Following an examination of Aboriginal activist Gary Foley’s (2001) interpretation of the history of the Australian Black Power Movement and its precursor Aboriginal advocacy movements, the chapter discussed the Commonwealth government’s vacillation on the issue of Aboriginal self-determination within the Aboriginal Land Rights debate, and the political tensions that emanated from the establishment of the Aboriginal Tent Embassy on the lawns of Parliament House in Canberra.

The chapter then considered the conduct of a census in NSW prisons in 1971 by the NSW Bureau of Crime Statistics and Research which appeared to have been the first study to qualify and quantify Aboriginal over-representation in imprisonment in that State. Apart from that important outcome, the study was also significant for its adoption of the self-identification criterion used earlier the same year in the first Australian Census to count Aboriginal and Torres Strait Islander people in the Australian population.

Following that, the chapter examined Eggleston’s (1976) seminal research which quantified and exposed the nature and extent of Aboriginal over-representation in arrest and imprisonment rates in three Australian States. In this regard, Eggleston (1976) made it quite clear that Aboriginal people were subject to differential policing, particularly as this state of affairs related to the policing of public order offences in country areas. Ultimately, Eggleston (1976) concluded that a significant factor linking differential policing to Aboriginal over-representation in police arrest and custody was police prejudice against Aboriginal people. In an attempt to explain police
prejudice, Eggleston introduced the notion that prejudice was a carry-over from an earlier period where frontier conditions produced direct conflict between police and Aborigines. Overall, Eggleston provided persuasive evidence that Aboriginal over-representation in arrest and imprisonment rates was due in large part to the discriminatory operation of police in particular, and the criminal justice system in general.

In quick succession, the chapter then looked at the promulgation of the Anunga Rules to protect Aboriginal people in police interrogations, a comparison between 1971 and 1976 census data that showed a 38% increase in the Indigenous population in the latter census and the parliamentary journey of the 1976 Northern Territory Land Rights Act. Finally, the chapter introduced commentary by the former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson who, at the end of the period examined, was forthright in his criticism about non-Aboriginal experts presuming to know what is best for Aboriginal people, particularly as it relates to the administration of the law.
4

OVERPOLICING REVEALED

4.1 Introduction

This chapter follows the pattern of the previous chapter where key socio-political and legal moments are identified and discussed in order to contribute to an understanding of the historical continuities in the relationship between policing and Aboriginal people’s over-representation in police arrest rates. The period examined in this chapter is 1977 to 1982 and begins with discussion of the establishment of a national inquiry into the recognition of Aboriginal customary laws and then introduces the first overseas references to the term ‘overpolicing’. While the previous chapter highlighted the establishment of the Australian Institute of Criminology, together with its initiation of a national prisoner census, this chapter introduces the Institute’s inaugural Director’s views on what Australian criminological literature had said up to this point in time regarding Aboriginal people’s disadvantage before the law and a proposal for a new kind of Criminology: an Aboriginal Criminology.

The chapter then provides an introduction to the first use of the term ‘overpolicing’ in the Australian policing context through an analysis of the NSW Anti-Discrimination Board’s research into the policing of street offences in Aboriginal towns and communities and following that, the chapter explores presentations from a NSW Institute of Criminology seminar on Aboriginals and the Criminal Law by two prominent NSW
Aboriginal lawyers - Paul Coe and Pat O’Shane - who probe some of the more disconcerting aspects of the application of the criminal law, particularly police practices in rural locations with large Aboriginal populations and also the notion of ‘differential policing’. O’Shane (1982) then provides a response to a presentation given by Superintendent Frank Killen (1982, p. 40), then Officer in Charge of the Dubbo Police District who, according to O’Shane, made a number of ‘intemperate innuendos’, if not ‘blatant slanders’ towards Aboriginal people in an address titled ‘Aboriginals and the Law: Police – Aboriginal Relations’ (O’Shane, 1982, p. 38).

4.2 The compatibility of Aboriginal Customary Law – A Reference

In 1977 the Commonwealth government provided a reference to the Australian Law Reform Commission (1986, p. 19) to inquire into, and report upon, the question of whether Aboriginal customary law should, or could, be recognised within the Australian legal system.¹ In its opening commentary, the Commission expressed the view that the reference needed to be seen in the context of the history of Aboriginal and European relations in this country. In this regard it provided a thumbnail sketch of the history of contact since 1788 which, inter alia, stated that Aboriginal people had occupied Australia for at least 40,000 years, that at the commencement of English colonisation there was no single Aboriginal nation, that Aboriginal Australia had considerable diversity in terms of language and culture, and that the devastation caused by dispossession, relocation, introduced diseases

¹ The gazetted Terms of Reference for the Inquiry are set out in Appendix E.
and indiscriminate killings had reduced the Aboriginal population during the first hundred years from an estimated 300,000 to 60,000 (Smyth, 1989, p. 48).

In addition, the ALRC (1986, p. 19) noted that at the time of European settlement of the colony the common view was that ‘Aborigines were primitive, if not sub-human’, reinforcing one of two opposing views: that Aborigines were a ‘survival into modern time of a protoid form of humanity incapable of civilisation; or that they were decadents from a once higher life and culture’. No matter which of the two views prevailed, both views permitted European moral standards to atrophy and tacitly exempt settlers from wrongdoing where acts of dispossession, neglect and violence towards Aboriginal people were concerned (ALRC, 1986, p. 20). In considering these issues, what then was the legal position of Aboriginal people as a result of the colonisation of this country?

For the purposes of its acquisition and the application of English law, the Colonial Office treated Australia as a settled colony, that is, one uninhabited by a recognised sovereign or by a people with recognisable institutions and laws. Unlike North America, Canada and New Zealand, no treaties were negotiated with Australian Aboriginal groups and no arrangements were made with them to acquire their land or to regulate dealings between them and the colonists. In addition, the communal nature and structure of Aboriginal society was negated at law because, according to the imported principles and precepts of English law, Aboriginal people were to be treated as individuals, not as groups or communities. However, the application of
the law, including criminal law, was less certain in practice, especially for offences committed by one Aboriginal person against another. Subsequently, for a considerable time the practice was to apply English law at least to offences committed by colonists against Aboriginal people and by Aboriginal people against colonists, ensuring some measure of protection for each group against the other (ALRC, 1986, p. 34).

Where offences were committed under Aboriginal law, the protection of the English law was less than consistent or certain. In NSW, Victoria and South Australia criminal courts were of the view that it was unjust to apply English law to the killing of an Aboriginal person by members of another Aboriginal language group (ALRC, 1986, p. 34). Notwithstanding the fact that Aboriginal people were British subjects, as a result of various proclamations and statutes, this status was not conclusively decided until 1836 in the NSW Supreme Court in the matter of R v Jack Congo Murrell where, in considering the question of jurisdiction, the court decided Australian law could no longer support the coexistence of two laws for Aboriginal people and, as a result, customary law was denied any formal recognition by the general law as applied in Australia (McCorquodale, 1987, p. 419).

While R v Murrell ostensibly dealt with questions of jurisdiction around ‘Black on Black’ violence, the refusal to accord recognition was easily extended to Aboriginal customary laws relating to land which, subsequently, enabled the Crown to grant vast areas of land to settlers without regard to prior Aboriginal occupation (ALRC, 1986, p. 35). The questions of whether
Aboriginal customary law existed under either statutory law or common law, whether Australia had jurisdiction concerning customary law, or whether Australia was settled or conquered, therefore giving rise to the validity of Aboriginal title in Australia, were not considered again until 1971 in the matter of *Milirrpum v Nabalco Pty Ltd* (1971, 17 FLR 141, 198 (Blackburn CJ), cited in ALRC, 1986, p. 136). There, the Aboriginal plaintiffs were unable to ‘prove on the balance of probabilities that their predecessors had in 1788 the same links to the same areas of land now claimed’, resulting in the denial of the existence of a doctrine of Aboriginal title in Australia (ALRC, 1986, p. 135). Two years after the commencement of the ALRC Inquiry, the matter of *Coe v the Commonwealth* (1979 24 ALR 118, cited in ALRC, 1986, p. 52) opened up the possibility for at least some members of the High Court of Australia to comment that the pre-settlement existence of Aboriginal title ‘was arguable’.

As the final report of the ALRC Inquiry into Aboriginal customary law was not published until 1986, subsequent discussion on this matter falls outside the scope of the chronology of issues and events for this chapter and relevant findings from the Inquiry will be discussed in the following chapter at section 5.3.

### 4.3 ‘Overpolicing’ – early overseas references

On a further matter of consistency, it is appropriate to mention at this juncture in the chronology that in the same year as the legal determination in *Coe v the Commonwealth* (1979) was handed down by the High Court of
Australia, North American criminological literature provided the second mention of the term overpolicing. In that instance, Mehay (1979) reported on a cost-effectiveness analysis carried out on contract arrangements for police services between thirty municipal governments and Los Angeles County as the service provider (Mehay, 1979).

Mehay (1979) argued that although the contract system standardised arrest policies and patrol policies, municipalities with contract police services appeared to experience higher levels of violent crime, higher costs per officer and lower patrol levels than did independent cities. He argued that in the absence of a reliable policing standard between the two types of police services, it was difficult to determine whether contract cities were ‘over-policed’ or independent cities ‘under-policed’ and therefore, whether any economic advantage flowed to municipal governments by contracting police services. Owing to the context in which the term ‘over-policed’ is used, as a measure relating to contract police services and not police practice itself, Mehay’s (1979) analysis falls outside the scope of this study.

Within two years of Mehay’s (1979) cost-effectiveness analysis, the third mention of overpolicing in the literature is located in a PhD thesis submitted to Michigan State University by Patrick Ashton in 1981. Ashton (1981) examined the impact of the election of a Black mayor, whose stated objective in office was to reform the social organisation of the police department and also the conduct of policing in that city. However, the representation of overpolicing in the thesis is cursory and used solely as an illustration of the types of grievances often repeated by the Black
community against police, whose role they viewed as the maintenance of both racial oppression and class exploitation. Similar to the previous North American reference above, there was no substantive discussion, explanation or evaluation of the concept of overpolicing and as such, this reference also falls outside the scope of this study.

4.4 Aboriginal crime and criminality

In delivering the 1981 Australian Institute of Criminology John Barry Memorial Lecture, Clifford (1982), the inaugural Director of the AIC, recounted his earlier involvement with the United Nations (UN) in attempts to develop a simple index which would be indicative of the level of ‘criminal justice’ in the various systems of government around the world, similar to what the UN had already established for population, malnutrition and illiteracy. Ultimately, after several years of concentrated work, the exercise was abandoned when a conclusion was made that the official figures for crime could not measure the amount of crime in a society - only what the police and courts had done about the amount of crime which was reported (Clifford, 1982, p. 2). Further, that change in the laws of different countries, changes in police policies and discretion and varying standards of evidence, all made it clear that variations and inconsistencies undermined the validity of official statistics as measures of crime. Nevertheless, his own continued consideration of the issue led him to request that each UN Member State provide advice to the UN Secretary-General of the number of persons in custody in their respective countries after a simple head count to be taken on the 1st of December 1971. Clifford (1982, p. 3) had argued to
UN Member States that by comparing that figure with national populations it was possible to get some idea of the punitiveness in world societies.

Continuing this work on arrival in Australia, Clifford (1982) sought to get the figures for daily average prison populations in each of the States and then to obtain comparable regional figures. This was followed later by similar collections to obtain quarterly figures for juveniles in detention and also the use of probation and parole. The developmental work by Clifford (1982) and his AIC colleagues became the AIC Australian Prisoner Index which has shown the state of Aboriginal over-representation in imprisonment each year since its inception in 1976. While acknowledging that since that time there had been improvements in statistical collection methods, as well as the development of a variety of self-reporting and victimisation studies, together with better insight regarding the extent to which official figures can mislead if read in isolation from changes in population, health, education, welfare and housing, Clifford (1982, p. 3) argued that ‘rates of imprisonment are still the best criminal justice indicator available at the moment’. Further, that they ‘represent an eloquent reflection of the level of tolerance and punitiveness in society’ (Clifford, 1982, p. 3). He does caution, however, that ‘when, in a society, rates of imprisonment rise for a particular group, we need to worry about discrimination in that society’s criminal justice system’ (Clifford, 1982, p. 3).

Clifford (1982, p. 4) reasoned that when dealing with the disproportionately large numbers of Aboriginal people coming before the courts the superficial
conclusion could be that ‘colour and criminality are indeed blended’ or that ‘deprivation goes hand in hand with delinquency’. Referring to the beginnings of Criminology and Lombroso’s perceived correlation between physical stig mata and anti-social behaviour, then subsequently, the demise of this early view about the aetiology of crime, Clifford (1982, p. 4) argued that rather than actual disabilities, ‘difference’ (such as skin colour) may be a sufficient indicator of criminality in a selective criminal justice system. Referring to the high rates of imprisonment for Aboriginal people Clifford (1982) was not accepting of commentary which stressed the view that the very conspicuousness of Aboriginal people in Australian society may well contribute to their inability to avoid blame or prosecution. Instead, he argued that while deprivation, sub-standard housing, ill health and malnutrition are frequently correlated with drinking and anti-social behaviour, such a view does not explain why not all or even most Aboriginal people so afflicted find their way to the courts (Clifford, 1982, p. 4).

For Clifford (1982, p.4), the real problem was not Aboriginal or social at all but the discriminatory operations of the criminal justice system where ‘police are too ready to arrest Aboriginal people and the courts too prone to imprison them’. He concluded that whether one was of the view that the criminal justice system was a discriminating instrument of power or a social scapegoat for problems which society cannot solve, it was nevertheless a useful barometer of the state of balance between law and order, on the one hand, and human rights, on the other (Clifford, 1982, p. 5).
As an example of the discriminatory nature of the criminal justice system, Clifford (1982, pp. 7-8) raised the issue of Aboriginal people and public drunkenness. In this regard he asserted that drunkenness had been identified as being ‘at the core of the problem by social workers, sociologists, law enforcement personnel and Aboriginal people alike’, noting that while white people in Australia could institutionalise their drinking in clubs, or do it more privately, Aboriginal people were more likely to drink in public places which made them more vulnerable to arrest and also kept alive white convictions about the suitability of Aboriginal people being allowed to drink, long after prohibition laws had been repealed (Clifford, 1982, pp.7-8).

In a brief reference to available data from Western Australia for the years 1973 to 1976, Clifford (1982, p. 9) referred to the predominance of drunkenness offences and the high proportion of sentences of imprisonment for that offence, noting that ‘those with experience’ know that alcohol was associated with many of the more serious offences committed by Aboriginal people, such as assaults, unlawful use of motor vehicles, disorderliness and offences against the police. To confirm this view, Clifford referred to Parker’s past commentary ‘that most Aboriginal ‘crime’ consisted of offences against good order, many of them prompted by drunkenness’ and that ‘drunkenness is often associated with the more serious assaults, including homicide’ (Clifford, 1982, p. 9).

Clifford (1982) also referred to another of Parker’s contentions ‘that an inter-relationship exists between inadequate housing, unemployment, ill health, poor education and crime’ and suggested this inter-relationship is a
common theme in the literature and links in to both drunkenness and crime. By way of example, Clifford (1982, p. 9) highlighted a 1975 study undertaken by Kamien of the drinking patterns of Aborigines in a rural community in NSW where it was suggested that fifty per cent of all males were heavy drinkers and where the author compared the circumstance of Aboriginal people to that of the poor in England during the Industrial Revolution where drink was the only escape from misery.

Continuing on this theme, Clifford (1982, p. 9) referred to comments from a paper delivered at a Monash University Research Seminar in 1972 by the Reverend P G E Albrecht, of the Finke River Mission in Alice Springs, who suggested that for Aborigines, as for whites, alcohol is often an escape mechanism, a relief from boredom, from the loss of identity and role, as well as from psycho-social problems.

Clifford (1982) then compared the circumstance of Aboriginal people with that of Aboriginal minority groups in other countries and argued that similar considerations applied to the disproportionate arrest of Canadian Aboriginal people, Maoris and Island people in New Zealand, and the Malays in Sri Lanka. Typically, 30-40 per cent of prisoners in these countries were from minority groups. However, though certain minorities in other countries have typically disproportionate rates of imprisonment, 1976 census data showed that Australia’s own rate of 726.5 Aboriginal people in prison per 100,000 was a good deal higher than those other countries (Clifford, 1982, p. 5). ‘When in some states that rate exceeds 1,000 per 100,000 we are beyond all recorded limits’ and that is why it becomes reasonable ‘to
speculate that it may be the highest rate of imprisonment in the world’ (Clifford, 1982, p. 5).

While acknowledging that the Australian figure may have been affected to some extent by the smallness of the total Aboriginal population, Clifford (1982) claimed such disproportionate rates of imprisonment should be a cause for great concern, unless one is prepared to regard the total Aboriginal population as ‘basically criminal’, which Clifford (1982, p. 5) dismissed immediately, arguing ‘the figures are too strikingly condemnable to be accepted at such face value’. To emphasise this point Clifford (1982, p. 7) restated that what had long been known about the Aboriginal population was that while Aboriginal people comprised one per cent of the Australian population, they constituted nearly thirty per cent of the prison population.

Acknowledging existing difficulties in obtaining criminal justice statistics as a result of the move to non-discriminatory recording – and therefore the abandonment of a separate categorisation for Aborigines - Clifford (1982, p. 7) praised the willingness of the Western Australian Government to look critically at its own high rate of Aboriginal imprisonment. In this regard he restated then-current data showing that, as at 30 June 1980, Western Australia had 920 non-Aboriginal people sentenced in prison as opposed to 439 Aboriginal people, an Aboriginal imprisonment rate of 1,300 per 100,000 as against 81 per 100,000 for non-Aboriginal people. In March of the same year, if the populations of the ACT and NSW were combined it would have produced an Aboriginal imprisonment rate of 600 per 100,000, compared with 72 per 100,000 for non-Aboriginal people. Similarly, in
November the same year in South Australia the Aboriginal imprisonment rate was 1,000 per 100,000 compared with the non-Aboriginal rate of 60 (Clifford, 1982, p. 7).

Interpreting the comparative figures for Aboriginal and non-Aboriginal imprisonment rates in the three States, Clifford (1982, p. 7) estimated that the imprisonment rate for Aboriginal people in Western Australia was thirty per cent higher than for Aboriginal people in South Australia, and nearly three times the imprisonment rate for Aboriginal people in NSW. However, as Western Australia’s average non-Aboriginal imprisonment rate was about twenty per cent higher than the rates for non-Aboriginal people in those two states, the disparity between Western Australia’s Aboriginal imprisonment rates and the Aboriginal imprisonment rates in South Australia and NSW should be viewed as part of a much greater use of imprisonment for all types of offenders in that State. Nonetheless, Clifford (1982, p. 7) counselled that ‘you have to believe either that Aboriginals [sic] are the most criminal of minorities in the world or that there is something inherently wrong with a system which uses imprisonment so liberally’.

Returning to the issue of the policing of Aboriginal people, Clifford (1982, p. 6) declared that, without doubt, there had been a measure of police discrimination in the past that accounted for so many Aboriginal people crowding the courts and the prisons, noting such had been referred to as a form of ‘institutionalised racism’. Clifford (1982, p. 6) then speculated that the risk of institutionalised racism was less at the time of delivering the John

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2 Lea has defined ‘institutional racism’ as, racial prejudice and discrimination which are generated by the way institutions function, intentionally or otherwise, rather than by the individual personalities of their members (Lea, 2000, p. 219).
Barry Memorial Lecture, given the existence of an active Aboriginal Legal Aid Service and a greater awareness among Aboriginal people themselves about their rights. In addition, Clifford (1982, p. 6) stressed that there had also been improvements in police training which had ‘reduced the flow’ of Aborigines coming into contact with the criminal justice system. He cited, for example, the fact that Northern Territory police received twenty-five hours of ‘training on Aboriginals’ [sic] but he admitted however, the same training was more limited elsewhere. Conversely, Clifford (1982, p. 10) suggested that police were often under pressure to ‘do something’ when offences were clearly committed and while decriminalising some forms of behaviour and tolerating others could offer marginal improvement, a great deal more was required to bring down Aboriginal arrest and imprisonment rates.

In a forceful statement concerning the perplexing state of Aboriginal over-representation, Clifford declared that:

> Even the most dedicated geneticist cannot believe that the massive disproportion of Aborigines before our courts and in our prisons denotes a different kind or special degree of criminality. When behaviour so widespread as to be practically normal amongst Aboriginals [sic] is labelled criminal by our law, there is a need for rethinking the law. When imprisonment does not deter but is shouldered by the Aboriginal [sic] as an inevitable yoke to be carried as a consequence of his residence in a white society, we would be moronic to go on using it punitively and ineffectively. (Clifford, 1982, p. 10)

Clifford (1982) is afforded special consideration in this chapter for two significant reasons. First, he remains the only Criminologist to argue directly that Criminology should look to causes other than those offered
through dispositional ³ theories in explaining the circumstance of Aboriginal crime and criminality. In this regard Clifford (1982, p. 15) declared that Criminology in Australia may be credited with the discovery that Aboriginal imprisonment rates are not only disproportionately high but beyond any possible rational explanation which ignores the defects of the criminal justice system itself. After citing the accomplishments of Eggleston (1976), the NSW Bureau of Crime Statistics (1974) and the AIC’s national quarterly imprisonment survey in highlighting the nature and incidence of Aboriginal over-representation in police arrest and imprisonment rates, Clifford (1982, p. 16) gave consideration to the question of whether Criminology, having identified and published the problem, could provide some of the answers.

Second, and perhaps more important than the first reason given above, Clifford (1982, p. 16) responded to his own question by arguing the need for the development of a distinct Aboriginal Criminology where Aboriginal people themselves would expound the theory and methods to explain Aboriginal crime and criminality. In doing so, Clifford (1982) remains one of the few Australian Criminologists to date to give effect to Aboriginal self-determination by advocating that Aboriginal people themselves be fully trained to apply the general principles of Criminology to their own basic concepts, norms of social behaviour and methods of tolerating or dealing with deviation.

In a forceful commentary on why there should be an Aboriginal Criminology, Clifford (1982, p. 20) argued that while the principles of

³ Dispositional theories consider what genetic, biological, or environmental factors cause (or determine) behaviour, and where they are located. Dispositional theories are concerned not only with the possible influences of the past on criminal behaviour, but also on the present circumstances that influence behaviour and future-related behaviour as well (Bartol, 1991, pp. 6-7).
Criminology are common and universal, and while methods should have a single criterion across the world (as valid or invalid), there was a case to be made for different types of Criminology to suit situations where concepts and resources were different from those in the West. In the Australian context, Clifford (1982, p. 16) argued that the case for an Aboriginal Criminology was adequately demonstrated on the basis of Aboriginal people’s continuing disadvantaged position within Australian society and the fundamental cultural differences that exist in and between Aboriginal cultures and also between them and the dominant culture.

4.5 1981 Census data

Table 4.1 provides a comparison of the total Indigenous population for the 1976 Census and the 1981 Census.

**Indigenous Census Count – 1981**

Table 4.1

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Number (no.) 1981</th>
<th>Number (no.) 1976</th>
<th>Change in % from 1976</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>35,376</td>
<td>40,450</td>
<td>-12.6</td>
</tr>
<tr>
<td>Victoria</td>
<td>6,057</td>
<td>14,760</td>
<td>-59.0</td>
</tr>
<tr>
<td>Queensland</td>
<td>44,698</td>
<td>41,345</td>
<td>8.1</td>
</tr>
<tr>
<td>South Australia</td>
<td>9,825</td>
<td>10,714</td>
<td>-8.3</td>
</tr>
<tr>
<td>Western Australia</td>
<td>31,351</td>
<td>26,126</td>
<td>20.0</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2,688</td>
<td>2,942</td>
<td>-8.6</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>29,088</td>
<td>23,751</td>
<td>22.5</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>823</td>
<td>827</td>
<td>0.5</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>159,897</strong></td>
<td><strong>160,915</strong></td>
<td><strong>-0.6</strong></td>
</tr>
</tbody>
</table>

(Source: Adapted from ABS, 2004, pp. 1-2).
In Queensland, Western Australia and the Northern Territory it can be seen that there was an increase in the Indigenous population totals. While it could be argued that the increase in Queensland accommodated natural growth, it is doubtful the same explanation could be offered in terms of the 20% increase in Western Australia and the 22% increase in the Northern Territory.

Unfortunately, the ABS explanatory notes accompanying the Table do not offer any cogent reasons for the increases other than that ‘the excess of births over deaths accounted for a proportion of increases’ in the census counts over the period 1976 to 2001 (ABS, 2004). Later, Smyth (1989, p. 57) was able to discern that the 1981 census achieved lower rates of under-enumeration for the population as a whole than the 1976 census, and that the census experienced lower rates for non-response to a much improved question regarding ‘Aboriginal origin’.

Importantly, the ABS (2004) offered no specific reason or hypothesis for the decreases in the Indigenous populations of New South Wales, Victoria and South Australia (the decrease in Tasmania of 0.5% is insignificant), and one is left wondering if Indigenous morbidity, mortality and accidental death rates for this period were extraordinarily high. Whatever the reasons, reference to Table 5.1 in Chapter 5 will show that in the 1986 Census, a significant increase occurred once again for Indigenous populations in each state and territory.
4.6 The unseemliness of overpolicing

Six years after the publication of Eggleston’s (1976) *Fear, Favour or Affection* the NSW Anti-Discrimination Board (ADB, 1982) published a Report of a study of summary street offences by Aborigines in ten ‘Aboriginal’ towns in NSW. For the purposes of the Board’s study, ‘Aboriginal town’ was taken to mean a town with a significant Aboriginal population.\(^4\) The Aboriginal towns identified were Enngonia, Brewarrina, Bourke, Lightning Ridge, Boggabilla, Moree, Walgett, Wee Waa, Cobar and Condobolin.

At the outset, the ADB (1982) gave a clear indication that the purpose of the study was to examine the nature and context of charges brought under two separate laws relating to street offences: the *Summary Offences Act 1970*, introduced by a Coalition government, and the *Offences in Public Places Act 1979*, introduced by the then current Labor government. Although the Board was cognisant of previous statistics published by the BOCSAR (1974) that showed the continuing over-representation of Aboriginal people charged with street offences under the 1970 *Summary Offences Act*, it was particularly interested to know whether there had been any appreciable change in the number of Aboriginal people charged since the introduction of the 1979 *Offences in Public Places Act*. In this regard, the latter Act had changed the law so that minor instances of public misbehaviour were no longer punishable by imprisonment but dealt with through the imposition of a fine only (ADB, 1982, p. i).

\(^4\) ‘Significant’ is not defined, however the Report stated that it adopted the practice of using the shorthand term ‘Aboriginal town’ from the BOCSAR (ADB, 1982, p. iv).
Through an examination of court records relating to charges and appearances for street offences in Local Government Areas (LGA) with high Aboriginal populations, the ADB (1982, pp. 40-43) found that Aborigines charged with minor offences in public places greatly outnumbered non-Aborigines. Establishing the charge or conviction rates for non-Aboriginal people in the stipulated Aboriginal towns is difficult as the only comparative data relates to charges under the *Offences in Public Places Act* for ‘the rest of the State’ (ADB, 1982, pp. 38-48). The two most common offences that Aboriginal people were charged with were, ‘unseemly words’ (56 per cent in 1978; 61 per cent in 1980) and ‘fighting’ (34 per cent in 1978; 8.9 per cent in 1980). In two thirds of all cases, alcohol was a factor (ADB, 1982, p. 49).

With respect to a dramatic decrease in charges for the offence of ‘fighting’ in 1980, the ADB (1982, pp. 44-45) attributed the decrease to the new category of ‘unseemly words’ under the *Offences in Public Places Act* which now captured other behaviours - such as fighting - as an element of the offence. Nevertheless, the words ‘fuck’ and ‘cunt’ used singularly or together, accounted for 94 per cent of all unseemly words charges. It is especially significant that the ‘victim’ of the unseemly words – the member of the public whose sensibilities were so offended by the words – was usually a police officer (43 per cent of all cases in 1978 and 75.4 per cent of all cases in 1980).
Taking account of historical and cultural factors related to Aboriginal people’s use of English, the ADB (1982, p. 193) acknowledged that the words do not carry the same extreme meanings associated with them in Anglo usage. This same conclusion was reaffirmed many years later by Eades (1994), a forensic linguist, who specialised in research about the disadvantaged position of Aboriginal people before the law in their use of Aboriginal English in the Court system. In addition, when Wilson (cited in Bird, 1987, p. 27) conducted an eight-week long ‘fuck count’ in Queensland country towns, he found that although Aboriginal people were mostly charged with using the word ‘fuck’, it was used more in public by whites than Aboriginal people and that even police laying unseemly words charges against Aborigines were heard to utter the word.

Apart from reinforcing the fact of Aboriginal over-representation in arrest rates, the study highlighted two additional issues. The first was that Aboriginal towns had the highest rate of arrest for females in NSW for street offences: 28.5 per cent compared to 10.4 per cent for the rest of the State (ADB, 1982, p. 48). With respect to the circumstance of Aboriginal women, Payne (1992), an Aboriginal lawyer, argued that the impact of the criminal justice system on Aboriginal women was twofold: it was a reflection of the wider issues of dispossession, alienation, poverty and discrimination which feature customarily in the everyday lives of Aborigines, as well as the socio-economic position of women generally within a male dominated ‘western’ society (Payne, 1992, p. 33).
The second issue, ironically, was that despite the intention of the 1979 legislation to reduce imprisonment by removing gaol as a punishment, Aboriginal people were still going to gaol for the offences of using unseemly words to a police officer. From interviews with Aboriginal people it was established that the reason why Aboriginal people were still being gaol was because they did not have the ready cash to pay the fines and preferred to ‘cut out’ the fine (ADB, 1982, p. 49). The ADB (1982, p. 128) proposed that non-payment of fines was a form of protest, or act of defiance, of powerless individuals hitting out at what is seen as an unjust system. This explanation accorded with a further observation in the study that the enforcement of street offences in Aboriginal towns can be viewed as a continuation and contemporary expression of the historical role played by police in the construction and maintenance of the political and social order.

Overall, the ADB (1982) study is considered significant for the following reasons. First, it was a major undertaking that attempted to provide specific insight into the circumstances of Aboriginal over-representation in arrest rates in NSW. Second, it showed that in rural NSW at least, public order policing was concerned with the maintenance of police authority (ADB, 1982, p. 128). Finally, the Report was largely the work of two [then] Aboriginal law students (Murray Chapman and Kevin Kitchener) who shaped the research and writing from Aboriginal perspectives. I would contend that much of what Chapman and Kitchener did on behalf of the ADB was congruent with what Clifford (1982) envisaged in the development of an Aboriginal Criminology.

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5 ‘Cut out’ is a colloquialism for serving the total amount of the fine on a per diem basis in a gaol or a police cell.
However, and more importantly for the purposes of this study, the ADB’s study stands alone as the first empirical research in Australia to explicitly employ a concept of overpolicing to explain Aboriginal over-representation in police arrest and custody rates for minor street offences. In doing so, it is obvious the ADB (1982, p. 111) drew on the findings from Lord Scarman’s (1981) Inquiry into race riots in the towns of Brixton and Toxteth in April 1981. From his inquiries, Lord Scarman concluded that the Brixton and Toxteth riots were a direct result of ‘overpolicing’. In this instance, ‘overpolicing’ was said to have occurred as a consequence of the high level of police harassment of working class, unemployed youth, particularly Asian and West Indian minority groups. Although Lord Scarman brought the notion of ‘overpolicing’ to the public gaze, he did not attempt to define the concept, nor did he allude to its origins or prior use. More importantly, the Lord Scarman limited the term’s application to the immediate policing environment of Brixton and Toxteth, and did not argue whether the concept was applicable in other locations with similar racial tensions between police and minority groups.

Returning to the ADB’s (1982, p. 77) construction of ‘overpolicing’, the Board argued that a high proportion of Aboriginal people in the named Aboriginal towns were continually and repeatedly arrested for trivial offences as a result of police acting to implement a belief that Aboriginal people warranted considerably more of their time and attention than did non-Aboriginal people. The ADB’s (1982) claim of incessant police surveillance, which in and by itself constitutes harassment by ordinary standards, was borne out by evidence from an examination of police
numbers in the Aboriginal local government areas which, when compared to the rest of the State, showed that Aboriginal people in those towns were subjected to a greater degree of supervision over their lives and lifestyles, which was wholly disproportionate to that experienced by any groups in the non-Aboriginal community. Overall, the Board concluded there were clear indications that ‘overpolicing’ occurred in Aboriginal communities (ADB, 1982, p. 77).

In addition to its significance as the first Australian criminological research to employ a concept of overpolicing to explain Aboriginal over-representation, the ADB (1982) study also made the first attempt to quantify the ratio of police to Aboriginal people in those locations with large Aboriginal populations. In this regard the study compared the ratio of police per 1000 of population between NSW as a whole, and a number of other centres, and found the ratio to be twice or greater than the State average in Bourke, Moree, Walgett, Brewarrina and Central Darling (Wilcannia).

As discussed earlier, the ADB (1982, p. 42) study was also centrally concerned with the use of particular legislation by police and how that legislation was used to maintain police authority. Parenthetically, the study found that the majority of charges for offensive behaviour were related to language, and in the vast majority of cases the language complained of was directed at police officers. In an immediate sense it was argued that overpolicing was linked to the use of street offences legislation to enforce
police authority which, ultimately, resulted in the criminalisation of Aboriginal people.

Subsequently, it was argued that in the Australian policing context, ‘overpolicing’ was dependent to a large extent on historical continuities that continued to impact on the contemporary relationship between Aborigines and police. In this regard the study concluded that police had played a key role in the physical segregation and separation of the Aboriginal community from the rest of the population. As agents of a white dominated society, police had been actively involved in assigning Aboriginal people to a marginal existence through the maintenance of order and discipline in Aboriginal towns. This order was of a quite specific kind and the Aboriginal community occupied a quite specific place within it. Consequently, the enforcement of street offences legislation in these towns can be seen as a ‘continuation and contemporary expression of the historical role played by the police in the construction and maintenance of this order’ where, if un-accepting of their place in this order, Aboriginal people come to be viewed by police as a ‘problem’ (ADB, 1982, p. 128).

4.7 Aboriginal perspectives on the criminal law

In 1982 the University of Sydney based Institute of Criminology published the proceedings of a seminar held the year before titled Aboriginals and the Criminal Law in NSW in which a number of Aboriginal people and non-Aboriginal people involved in the administration of the NSW criminal justice system had been invited to speak and present seminar papers for
discussion. While a number of prominent Aboriginal people present had their commentary recorded in relation to a robust debate that arose from a paper delivered by the then Officer in Charge of the Dubbo Police District, Superintendent Frank Killen, it is the insights of the two key Aboriginal speakers that are of particular interest in this section. In this regard, the views of Paul Coe, then Chairman of the Board of Directors of the NSW Aboriginal Legal Services (ALS) and Pat O’Shane, then an appointed member of a NSW Parliamentary Committee on Aboriginal Land Rights will be discussed. However, some consideration will be given to O’Shane’s (1982, p. 37) response to what eventuated as a ‘heated debate’ around Superintendent Killen’s denunciation of the Aboriginal Legal Service.

After thanking the Institute for the opportunity for Pat O’Shane and himself to present their points of view at the seminar, Coe (1982, p. 14) declared that before dealing with specific aspects of the relationship between Aborigines and the police, an understanding of the 200 year history of oppression of Aboriginal people by Europeans was vital to understanding Aboriginal relationships with the criminal law in NSW in the 1980s. After drawing attention to the fact that Europeans invaded this continent, stole the land from Aboriginal people without compensation, obliterated our culture, killed and raped our people and began a systematic and sustained campaign of oppression of our people. (Coe, 1982, p. 14)

Coe (1982, p. 14) then made what was arguably the first public pronouncement that equated the ‘systematic and sustained campaign of oppression’ of Aboriginal people with the crime of ‘genocide’. After referring to the three constituent elements of the definition of genocide
adopted by the Nuremburg Tribunal and declared by the United Nations on the 12th of January 1946 as comprising,

a direct mass murder by order or destruction...forcing an ethnic, racial or religious group to live in conditions which might lead to a partial or complete liquidation of that group, and measures taken in order to prevent births in that group or a violent shifting of the children to be brought up in another group...

Coe (1982, p. 14) concluded the definition applied to the circumstances of Aboriginal people. Hence, according to the United Nations’ definition, Coe (1982, p. 14) argued that the settlers and colonisers of Australia were guilty of genocide in the first sense, that the forced removal of 'part Aboriginal' children from their 'full-blood' mothers as widely practiced until recently, was genocide in the third sense and the 'assimilation' policy of the Australian Governments has clearly been genocide in the second sense. Notwithstanding the rhetoric of successive governments that ‘assimilation’ was intended to serve the best interests of the child, or done without malice or indifference to the circumstance of Aboriginal people, Drumgold (2001, p. 4) is of the view that ‘Australia decided that surreptitious genocide was the preferred option’ to eliminate ‘the Aboriginal problem’.

Coe (1982, p. 15) stated that the reason for emphasising the genocide which has been committed against Aboriginal people was to reinforce the point that the present relationship between Aboriginal people and the legal system, with the police as agents of that system, can only be understood in the light of two centuries of oppression of Aboriginal people. In Coe’s (1982, p. 15) view, the only form of reparation for such horrifying injustices was the provision of ‘meaningful compensation and land rights’. The issue
of ‘land rights’ as ‘compensation’ was promoted by Coe (1982) on at least five separate occasions throughout his presentation and can be viewed as being as significant an issue for Coe as was his criticism of the NSW criminal justice system in general, and policing more specifically.

Having established the background to the present position of Aboriginal people, Coe (1982, p. 15) then drew attention to the position of Aboriginal people and the criminal law. He argued that for both the ALS and Aboriginal people in NSW, the administration of the criminal law ‘has not been some remote matter of academic interest’ but the means whereby Aboriginal people ‘have been discriminated against, persecuted and oppressed, often with the active collaboration of the Government of the day’. Expanding on this point, Coe argued emphatically:

> Not once has the Legislative Assembly ever asked the Aboriginal people ‘How do you think these particular laws are going to affect you, and how would you like these laws to be modified so that they take into account your particular lifestyle?’ That has never been done so it is rather ludicrous now to expect Aboriginal people to turn around and say ‘We embrace the criminal laws of New South Wales. We embrace the judiciary of New South Wales. We embrace and endorse the police set-up for the State of New South Wales’. We do not: for the simple reason we have had no say in the building of those institutions, in the maintaining of those institutions or in offering the guidelines in how those institutions run. We have always been spectators. (Coe, 1982, p. 28)

Returning to the opening of his address where he indicated he wanted to deal with specific aspects of the relationship between Aboriginal people and police, Coe (1982, p. 17) opened that discussion with reference to the position of Aboriginal people in country areas of NSW since the repeal of the Summary Offences Act and the enactment of the Intoxicated Persons Act, declaring the former legislation ‘a disgrace to a supposedly civilised
society’. Coe (1982, p. 17) then mentioned briefly that the basic thrust of the new legislation was to replace the old crime of ‘drunkenness’ with an alternative method of dealing with a person who is ‘seriously affected apparently by alcoholic liquor’ by their being detained in a ‘proclaimed place’ until sober. Coe (1982, p. 17) pointed out that in combination with the enactment of the *Intoxicated Persons Act*, the government had declared its intention to maintain separate statistics on Aboriginal persons detained under the *Act* ‘for the purposes of ascertaining whether discrimination was still being practiced against Aboriginal people’. Coe (1982, p. 17) also argued that contrary to the view expressed by NSW Police Association that the maintenance of separate statistics for Aboriginal people ‘was racist’, the position of the Aboriginal Legal Service was that ‘it was vital that separate statistics be kept’ and was awaiting ‘with interest the publication of the first statistics in this area’.

Referring to Section 8 of the *Act* which gave ‘immunity to police, authorised persons or any persons engaged in the conduct of a proclaimed place’ in respect of actions done in good faith in the execution of the *Act*, Coe (1982, p. 18) reiterated his understanding that in country areas, virtually the only proclaimed places created were the local police cells. McCorquodale (1982, p. 48) confirmed this understanding in his legal analysis of the *Act* by declaring that ‘in practice, “police lock-up” may be read for proclaimed place’. In Coe’s (1982, p. 18) view, the clear implication arising from this particular circumstance was that police had ‘absolute discretion’ as to who they would take into custody, without being called upon to account for their actions in a court of law. ‘Once again, Aboriginal people got a second class
deal and would be comfortably out of view of white Australia and would not be paraded before the courts’ (Coe, 1982, p. 18).

After exhorting the current government to provide sufficient funds to Aboriginal communities to establish centres for Aboriginal intoxicated persons in inner city and country areas, Coe (1982) then addressed a number of concerns surrounding proposed reforms to improve relationships between Aboriginal people and the Police Force. Despite apparent agreement with the idea that there was room for improvement in this particular relationship, Coe (1982, p. 19) cautioned that unless the underlying issue of compensation and land rights was dealt with first, whatever else that might be done to improve the relationships between police and Aboriginal people would be viewed by Aboriginal people as ‘merely cosmetic’.

With reference to ‘policing issues’ Coe (1982, p. 19) suggested that one aspect that could be immediately improved was the establishment of a system whereby police notify the ALS when an Aboriginal person is arrested. He argued that at the time, ‘NSW government policy is not to notify the ALS of all arrests of Aborigines’, and referred to a recent statement by the then Minister for Police, Mr Crabtree, who had justified the government’s position on the basis that the then Police Commissioner, James Lees, considered that:

if police were directed to inform the ALS of all arrests of Aborigines, criticism could be forthcoming from other sections of the community and suggestions made that police were in fact touting for the ALS (Coe, 1982, p. 19).
In rejecting the claim ‘with contempt’ on behalf of the ALS, Coe (1982, p. 19) remarked that it was well known throughout the legal profession that the ALS is funded to represent all Aboriginal people and that the number of Aboriginal people represented by private practitioners ‘is incredibly small’ and called on the government to implement the suggested reform.

Referring to a number of positive reforms in South Australia, Coe (1982, p. 20) insisted that one such reform there - although ‘cosmetic’ - that could easily be transposed to NSW was the establishment of an Aboriginal/Police Liaison Committee which, apart from creating a communication bridge between police and Aboriginal communities on police department policy, took responsibility for improved education programs in police training in the area of Aboriginal affairs. Coe (1982, p. 20) suggested that a training program under a similar liaison committee in NSW could provide ‘greater insight into the plight of Aboriginal people’ to police being stationed in Aboriginal towns, ‘before being stationed in these towns’.

Coe (1982, pp. 21-22) then stated that he could not let the opportunity pass without making specific reference to the appalling situation that existed in certain NSW Aboriginal towns where it appears that police adopt a ‘frontier mentality’. Drawing on a number of examples of police discrimination in the towns of Walgett and Taree, Coe (1982, pp. 21-22) forcefully argued that ‘police discretion is constantly exercised against Aboriginal people’ and that ‘police rarely use their discretion not to proceed’ against Aboriginal people.
Coe (1982, p. 25) then made a passing reference to a finding of the 1975 Laverton Royal Commission about ‘long standing prejudices and attitudes of police’ towards Aboriginal people, and the comparatively high levels of adult and infant mortality rates for Aboriginal people, compared with those for the rest of the population as detailed in a recent NSW Health Commission Report. He then mentioned the continuing state of ‘grossly inadequate housing for Aboriginal people’ and the establishment of a parliamentary inquiry to look into the question of Aboriginal Land Rights in NSW. He concluded his presentation by setting out eleven demands from the ALS for the government to enact land rights legislation, arguing ‘land rights are not a form of charity: they are a form of compensation for the loss of Aboriginal lands’. In this regard, Coe (1982, p. 25) was adamant that land rights is the only means by which Aboriginal people can escape the vicious poverty cycle in which they now find themselves (Coe, 1982, p. 25).

Following Coe’s presentation, Pat O’Shane – Aboriginal lawyer and then appointed member of a NSW Parliamentary Committee on Aboriginal Land Rights - delivered a presentation titled ‘Some Rural Problems’ where, as background to consideration of some of the problems for Aboriginal people in the application of the criminal law ‘in the rural situation’, she referred to statistics from the 1979 Bureau of Crime Statistics and Research Statistical Bulletin regarding collections for drink driving, drug, drunkenness and other criminal charges. In this regard, she mentioned that while the BOCSAR was unable to collect statistics distinguishing Aboriginal people from others, inferred arrests of Aboriginal people for drunkenness in NSW were greater in number in ‘Aboriginal towns’, that the pattern of sentencing in
Aboriginal towns differed markedly from city and suburban courts, and that courts in Aboriginal towns set bail at a higher level for Aboriginal people than non-Aboriginal people. O’Shane (1982, p. 35) also reiterated the fact that statistics showed that the majority of Aboriginal offenders were involved in offences against public order which, in her view, indicated that the criminal law was used as a means of social control and that it was essentially ‘concerned with authority…in maintaining bonds of obedience and deference’. For O’Shane (1982, p. 35), it was this aspect of the criminal law ‘which demonstrated to Aborigines that the great white master is here and is intent on maintaining his colonial domination’.

In referring to the 1974 ABS Prison Census, O’Shane (1982, p. 31) repeated the Bureau’s findings that although Aborigines constituted roughly 0.8 per cent of the population of NSW, they were imprisoned at a rate seventeen times higher than that for the rest of the population and that such statistics, taken collectively, ‘represent clear evidence that Aboriginal people are subject to systemic discrimination’ and also, that ‘they have a different experience from the rest of the population at the hands of the criminal justice system’. With reference to the two findings, O’Shane (1982, p. 31) suggested that although ‘important’, they did not take the matter very far and it was necessary to ask two questions: “what is the criminal law?” and “what is the role of its administrators?”

After considerable commentary regarding her ideological position concerning the general nature of the criminal law, O’Shane (1982, p. 34) returned to say something more specific in relation to Aborigines in the
rural situation. First, she reinforced the fact that contrary to non-Aboriginal perceptions, the majority of Aborigines in NSW lived in the metropolitan area not in rural locations, however, where an Aboriginal person lived was irrelevant as they are far more visible than any other community group, not only because of their skin colour but more importantly because of their utterly depressed socio-economic conditions and their state of dispossession. Admitting there were other factors of course which could and should be looked at, O’Shane (1982, p. 33) referred to Eggleston’s (1976) conclusion that many police expressed ‘prejudice’ against Aborigines, an attitude which O’Shane argued Eggleston found ‘to be more common amongst police in country and outback towns than in the cities’. Further, such attitudes appear to be a carryover ‘from an earlier period when frontier conditions produced direct conflict between the two races’.

Referring to a 1979 NSW Ethnic Affairs Commission paper ‘Ethnic Affairs and the Police’, O’Shane (1982, p. 33) reiterated findings from a section in the paper on the attitude of police towards Aborigines which concluded that ‘police see their contacts with Aborigines as posing more problems for them than do their contacts with immigrants’. The main reason given for this state of affairs was firstly, ‘the militancy and hostility of Aborigines’ and secondly, ‘too much Government assistance’. O’Shane (1982, p. 33) proposed that these responses say less about the perceptions of police than about the extent to which they internalise the ruling ideology and that they indicated ‘very different reasons for police prejudice than does Eggleston’.
Following a brief reference to the attitude of the judiciary towards Aborigines and a comment that Aboriginal people’s ‘ignorance of the law’ was perhaps a compounding factor in the way Aborigines are dealt with in courts of summary jurisdiction, O’Shane (1982, p. 34) returned to her ideological position and proposed the view that the reasons for the phenomenon of Aboriginal over-representation in the criminal justice system lie in the ‘objective imperatives of the capitalist system’, which in her view meant:

the need to maintain a tight, rational system, the need to impress upon the minds of the damned the majesty and might of the law, the need to maintain domination and authority. (O’Shane, 1982, p. 34)

Ultimately, O’Shane (1982, p. 34) posited the view that it was not enough to concentrate on the problems with respect to police and that attention must be focused on the judiciary as well, given that it was only a year earlier when country magistrate Quin S M publicly referred to Aborigines as ‘a pest race’.

In Superintendent Killen’s (1982, p. 40) presentation, several references were made to distinguish ‘well-behaved, law abiding Aborigines’ from the ‘small group of related families in the various police patrols’ in the Dubbo Police District who were regarded by police as ‘habitual offenders’ involved in the more serious types of offences. Although attempting to provide a balanced account of police-Aboriginal relations in one of the largest police districts in NSW which included Mudgee, Dubbo, Walgett, Bourke, Coonamble, Coonabarabran and Brewarrina, Killen (1982, p. 40) went to some lengths to present the view that police generally, and particularly in the country, treated Aboriginal people the same as the rest of the
community. Reinforcing this view, Killen (1982, p. 40) referred to Part IX of Police Rules and Regulations which came into effect six years previously, which stated, ‘A member of the Force shall be strictly impartial in the discharge of his duties towards all persons’. Further, ‘as far as police activity is concerned, no distinction is made between the treatment of aborigines [sic] and any other section of the population’.

After commending the amount of time dedicated to ‘aboriginal [sic] matters’ in police training (a two hour ‘talk’ in recruit training, one and half hours in the Sergeants’ course, and one and a half hours in the Senior Police course), Killen (1982, p. 42) stated that he believed an ‘inhibiting factor’ in good police-Aboriginal relations was the role played by the Aboriginal Legal Service. In this regard, Killen (1982, p. 42) postulated that those employed in the ALS were ‘unprofessional’, ‘immature’, ‘obstructive’, and that many Field Officers had ‘adverse records’ and ‘unfriendly attitudes’ towards police, arguing ‘surely better types should be selected for this work’.

After commenting that she had hoped the forum would have presented participants with a good opportunity to discuss some of the problems in a ‘serious and rational way’ and also that she had hoped not to engage in ‘police bashing’, O’Shane (1982, p. 37) remarked that she ‘felt compelled’ to comment on Superintendent Killen’s paper. In this regard, O’Shane (1982, p. 37) stated that ‘intemperate innuendos, if not blatant slanders’ were ‘no substitute for serious discussion of serious problems’ and that it was more than a little paternalistic to say the ‘majority of Aboriginals are reasonably well behaved and reasonably good citizens’. O’Shane (1982, p.
37) then referred once again to Eggleston’s (1976) finding that there was a vast difference between the experiences of Aborigines and Anglo-Australians on the matter of bail, and also to Cohen, Chappell and Wilson’s (1975, cited in O’Shane, 1982, p. 37) conclusion that ‘such differential treatment reflects not only the poverty of Aborigines but also indicates a definite discriminatory policy’. She concluded her presentation by commenting that there was a growing body of objective evidence that showed a situation existed which ‘neither Superintendent Killen nor anyone else could dismiss with barely veiled insults’ (O’Shane, 1982, p. 37).

O’Shane (1982, p. 38) then put forward a number of proposals aimed at ameliorating some of the problems, including: a call to the NSW Government to institute an investigation of police/Aboriginal relations; funds and other resources for police liaison and educational programs (condemning Superintendent Killen’s police ‘training’ on Aboriginal affairs as ‘so poor as to be ludicrous’); and the establishment of a clearing house to investigate complaints by Aborigines about police. Finally, O’Shane (1982, 38) commented that a suggestion often put forward to improve police/Aboriginal relations is that more Aboriginal people be recruited to the police force, however, given the role of police as described, O’Shane (1982) insisted ‘it was a suggestion having no merit’ in her view.

4.8 Conclusion

This chapter examined the period 1977 to 1982 and began with a preliminary discussion about the nature and intent of a proposed national
inquiry by the Australian Law Reform Commission into the recognition of Aboriginal customary laws. The discussion highlighted the fact that the Commission’s final report was not published until 1986 and that for the sake of consistency in the chronological approach taken in this thesis, further discussion on the conduct of the Inquiry would be held over until an appropriate juncture in Chapter 5.

Following that, the chapter introduced two more references concerning the term ‘overpolicing’. There, it was argued that Mehay (1979) and Ashton’s (1981) references to the term ‘overpolicing’ fell outside the scope of this study as both were tangential to the main inquiry. Despite their irrelevance to the main inquiry, it was necessary to mention the two references as they form part of the developmental picture regarding the origin and employment of the term ‘overpolicing’ in all its manifestations.

The chapter then introduced the inaugural Director of the Australian Institute of Criminology’s views surrounding Aboriginal people’s disadvantaged position before the law and the Director’s proposal for a new kind of Criminology: an Aboriginal Criminology. Importantly, Clifford (1982, p. 4) argued that in relation to the over-representation of Aboriginal people in the criminal justice system, the real problem was not Aboriginal or social at all but the discriminatory operations of the criminal justice system where ‘police are too ready to arrest Aboriginal people and the courts too prone to imprison them’. Further, Clifford (1982) offered the view that whether the criminal justice system was seen as a discriminating instrument of power or a social scapegoat for problems which society cannot solve, it
was nevertheless a useful barometer of the state of balance between law and order on the one hand, and human rights, on the other.

Following that, the chapter examined the first use of the term ‘over policing’ in the Australian policing context through an analysis of the NSW Anti-Discrimination Board’s research into the policing of street offences in Aboriginal towns and communities. Apart from reinforcing the fact of Aboriginal over-representation in arrests for minor street offences, the ADB’s research highlighted two further issues: Aboriginal towns had the highest rate of arrest for females in NSW for street offences; and Aboriginal people were still going to gaol for the offences of using ‘unseemly words’ to a police officer, despite the introduction of legislation to remove gaol as punishment for minor street offences.

Finally, the chapter provided an account of presentations by prominent Aboriginal lawyers Paul Coe and Pat O’Shane from the proceedings of a NSW Institute of Criminology seminar on ‘Aboriginals and the Criminal Law’. In his presentation, Coe proposed that because of the dispossession and attempted genocide of Aboriginal people, only meaningful compensation and land rights could reverse the historical injustices done to Aboriginal people under the imported British legal system. Coe also relayed how the abolition of the offence of ‘drunkenness’ under the new Intoxicated Persons Act had made no demonstrable difference to the detention rates of Aboriginal people in police custody and that in country areas, in particular, Aboriginal people were still discriminated against through the arbitrariness of ‘police discretion’.
O’Shane directed her attention towards ‘rural policing issues’ and highlighted previous research findings that Aboriginal people are over-represented in the criminal justice system and that such over-representation arises from their ‘differential treatment’ by police and also the magistracy. O’Shane also restated Eggleston’s conclusions that many police expressed ‘prejudice’ towards Aborigines, and that such prejudice was found to be more common amongst police in country and outback towns than in the cities. With brief reference to a presentation by Superintendent Killen, then Officer in Charge of the Dubbo Police District, the chapter reiterated O’Shane’s response which, in essence, censured Killen for a surreal rendition of the state of affairs between Aborigines and police and also for his overt attack on the ALS and Field Officers employed by the ALS.
5 LAW, POLICING AND THE CIVILISING MISSION

5.1 Introduction

Continuing the chronological historiography commenced in chapter 3, this chapter examines the period 1983 to 1987. Although brief, the five year period is marked by a proliferation of research and social commentary that reaffirmed the disparate, often piecemeal approach taken by the legal system in acknowledging Aboriginal people’s calls for equality of treatment before the law, as well as substantial evidence that confirmed previous research conclusions that certain policing practices contributed to the circumstance of Aboriginal over-representation. In addition, the period is underscored by two significant national inquiries: the publication of the Australian Law Reform Commission’s (ALRC) report on Aboriginal Customary Law and the announcement by the Commonwealth government in late 1987 of the establishment of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) to inquire into the reasons why so many Aboriginal people died in police and other forms of lawful custody.

5.2 Coexistence versus extinguishment

The previous chapter highlighted the Terms of Reference for the ALRC Inquiry into Aboriginal Customary Law at section 4.2. It was noted there that in terms of chronological accuracy, the ALRC’s (1986) Terms of
Reference were first issued in 1977 and that it was a further nine years before the Inquiry was completed and the final report published in 1986. This section examines the conduct of the Inquiry and the conclusions reached in relation to the question of whether customary law should or could co-exist with the Australian legal system.

Although the question of recognition for Aboriginal customary law had been considered by Australian governments previously, the ALRC (1986, p. 40) pointed to several factors that had emerged since the 1836 decision in *R v Jack Congo Murrell* which tended to point to the need for a reappraisal of the position of Aboriginal customary rules and practices. These factors included: the perception that denying all recognition to distinctive and long standing Aboriginal beliefs and action may be unjust; the apparent failure of the legal system to deal effectively with Aboriginal disputes; and published statistics indicating disproportionately high levels of Aboriginal contact with the criminal justice system and raising the spectre of discrimination within that system (ALRC, 1986, p. 4).

On the issue of Aboriginal/police relations, the ALRC (1986) received a number of submissions from both city and country areas giving examples of poor relations with the police. These ranged from misunderstandings due to the lack of police understanding of Aboriginal society through to the abuse of police power and authority. Citing a submission from the House of Representatives Standing Committee on Aboriginal Affairs’ *Report into Aboriginal Legal Aid*, the ALRC (1986, p. 107) noted that ‘there is evidence that harassment, discrimination, maltreatment and abuse of legal rights by
police is widespread’. A final factor the Commission took into account was the movement at the federal government level away from policies of ‘assimilation’ and ‘integration’ towards policies promoting the notion of ‘Aboriginal self-determination’. In terms of the first policy prescription, the 1961 Native Welfare Conference of Federal and State Ministers had determined that:

…the policy of assimilation means that all Aborigines and part-Aborigines are expected to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same customs and influenced by the same beliefs as other Australians. (ALRC, 1986, p. 21)

With respect to integration, the ALRC (1986, p. 22) noted that a few years after consensus was reached by Commonwealth and State Ministers on what was meant by ‘assimilation’, other developments in Aboriginal affairs (including the further repeal of prohibitive State and Territory legislation; the establishment of a Commonwealth Office of Aboriginal Affairs; and public attention being brought to the Northern Territory Aboriginal stockmen’s equal wages campaign) contributed to a greater awareness of the ‘paternalism’ and ‘arrogance’ inherent in the assimilation policy. Essentially, the fundamental tenet underpinning assimilation was that Aboriginal equality could only ever be achieved through the loss of Aboriginal identity. Subsequently, critics of the policy of assimilation began to use ‘integration’ to denote a policy which recognised the value of Aboriginal cultures and the right to retain languages, and customs and the right to maintain distinctive communities (ALRC, 1986, p. 22).

From the Preamble to the Terms of Reference it becomes apparent the Commonwealth government’s primary motivation for inquiring into the
circumstance of Aboriginal customary law was its new-found responsibility, derived from the 1967 Referendum, ‘to make laws for and on behalf of the Aboriginal race of Australia’ (ALRC, 1986, p. 5). Subsequent developments, such as the enactment of Land Rights legislation in the Northern Territory¹, attempts to establish a nationally elected representative Aboriginal body, the establishment of the Aboriginal Development Commission (ADC) to provide economic independence, and the emergence of proposals for a national treaty or ‘Makarrata’, were considered by the Commonwealth government to be at the same time both significant, and insufficient in terms of providing any specific impetus for an inquiry into the recognition of Aboriginal customary law (ALRC, 1986, p. 5). In this regard the government stated its concerns about a range of substantive and procedural legal issues including the need to ensure Aborigines enjoy basic human rights, their right to retain their racial identity and traditional lifestyle and the difficulties that had emerged in the application of the criminal law, as well as the need to ensure equitable and fair treatment under the criminal justice system to all members of the Australian community (ALRC, 1986, p. 8).

Nine years later, as a consequence of seventeen extended field trips to the top end of the Northern Territory, Western Australia and South Australia, four overseas visits to the USA and Canada, engagement of forty Honorary Consultants, 506 written submissions, a total of forty-eight public hearings in each of the States and the Northern Territory, and thirty-six discussion papers, seminars and research papers, the ALRC (1986) produced a 1022

¹ Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); Pitjantjatjara Land Rights Act 1981 (SA). (ALRC, 1986, pp. 61, 62)
page report in two volumes. In short, the ALRC (1986) was of the view that Aboriginal customary law should be recognised, in appropriate ways, by the Australian legal system (Williams-Mozley, 1999, p. 7). However, such recognition was contingent upon a number of considerations. First, recognition was to be achieved against the background and within the framework of the general law. In this regard it was stated that, except in limited circumstances, recognition did not exist to the exclusion of the general law. Second, as far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, without the need for the creation of new or separate legal structures. Third, the Commission argued that, as a general principle, codification of Aboriginal customary laws, or their enforcement, was inappropriate. Fourth, the Commission proposed that any forms of recognition be specific, as opposed to having general application, and finally, that customary law was a notion that should be understood broadly, rather than narrowly (Williams-Mozley, 1999, p. 7).

From an Aboriginal perspective it is probably true to say that many non-Aboriginal people hold the view that customary law applies only to tradition-oriented Aboriginal people. This view was reflected in the work of the ALRC (1986, p. 5) which itself provided an almost exclusive interest in and emphasis on the circumstance of Aboriginal community life in the Northern Territory, arguing for its purposes that the term ‘Aboriginal customary law’ would be used throughout to refer to ‘the distinctive rules, traditions, customs and practices adhered to by groups of traditionally oriented Aborigines’. Notwithstanding such a skewed view, the fact is that
less than a quarter of the total Aboriginal population can be said to live in remote tradition-oriented communities. In addition, the ALRC (1986, p. 5) opined that many Aboriginal people would argue Aboriginal customary law is difficult to define in non-Aboriginal terms because it covers the rules for living and is backed by religious sanctions, comparable to Talmudic Law or Koranic Law, where daily existence is organised around compliance with divine guidance. From an anthropological perspective, Berndt (1965, cited in Williams-Mozley, 1999, p. 8) argued in favour of content rather than description and suggested customary law is the sum of three sets of relationships: people and land; people and deities; and people and people. These relationships, in turn, are acted upon by three highly interdependent factors: religion; the natural environment; and social organisation and kinship.

Despite the fact the ALRC (1986) was adamant in its recommendations that aspects of customary law should be recognised, it is obvious from material presented to the Commission over the life of the Inquiry that many elements of Australian society were, and probably remain, opposed to giving such recognition. On the last point above it is interesting to note some of the arguments offered in opposition to the recognition of customary law. These included: the community divisiveness recognition would apparently cause; the declining importance and limited scope of customary laws; the extent of law and order problems in Aboriginal communities; the difficulties of definition in so far as Aboriginal identity and customary laws are concerned; and finally, the problems of unacceptable punishments and rules associated with customary law (ALRC, 1986, pp. 86-94). In the end, the ALRC (1986,
p. 94) concluded that such statements were either not objections to recognition as such or, more importantly, that they were not persuasive, and recommended recognition for Aboriginal customary law in the areas of traditional marriage, traditional patterns of property distribution, Aboriginal child custody, hunting and fishing rights as well as some recognition under criminal law in terms of sentencing and community justice mechanisms.

For example, in recognising traditional marriage, the Commission recommended that children of such marriages be recognised as legitimate for the purposes of Australian laws and that custody decisions which concern the welfare of Aboriginal children should adhere to Aboriginal child placement principles. In each of the other areas where it recommended recognition, the Commission took the approach that recognition should be formulated specifically and be limited in its extent, existing within the bounds of current Australian law (ALRC, 1986, p. 117). In other words, no recommendations were made for developing comparable legislation, creating specific exemptions or special measures, or altering the operations of existing State or Territory laws.

Overall, the ALRC (1986, p. 117) took the view that Australia’s international obligations under the Convention for the Elimination of Racial Discrimination (CERD) and the International Convention on Civil and Political Rights (ICCPR) require that Australian legislation should not discriminate on the grounds of ‘race, colour, descent, or national or ethnic origin’. In saying this, it also concluded that these obligations did not preclude reasonable measures distinguishing particular groups and
responding in appropriate ways to their special characteristics, provided that
basic rights and freedoms are assured to members of such groups. It then
went on to dismiss the creation of ‘special measures’ in recognising
Aboriginal customary law on the grounds that such recognition could be
said to discriminate against no less than four groups or classes of persons:
traditional Aboriginal people themselves; other Aboriginal people; other
Australians generally; and non-Indigenous groups (ALRC, 1986, p. 118).

It can be seen therefore, that on the one hand the ALRC (1986) not only
created reasonable arguments for recognition, with a subsequent
recommendation that recognition be accorded customary law in a number of
ways, it then, on the other hand, completely demolished its own reasoning
and recommendation by claiming that any special measures to accommodate
customary law could be said to be discriminatory under certain international
covenants. In much the same way, the Commonwealth Attorney-General’s
Department (AGD) set about developing a circular argument as to where it
considered responsibility lay for implementation of the ALRC (1986)
recommendations. In this regard AGD (1994, p. 12) argued vehemently that
‘it was not responsible for implementing any part of the Report’. Referring
to an agreement in 1986 (approved in November 1987 by the Standing
Committee of Attorneys-General) between the then Attorney-General and
the then Minister for Aboriginal Affairs, AGD (1994, p. 12) restated its
view that the Department of Aboriginal Affairs would have primary carriage
for the examination and development of policy considerations, with AGD
only assisting with legal and legal-policy considerations. AGD (1994, p.
12) then proposed that ATSIC, in becoming responsible for implementation
of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, should also have primary responsibility for responding to the ALRC (1986) report adding, ‘the report’s recommendations are controversial in varying degrees, and different views could be taken on several of them within and between Indigenous communities and also the wider community’.

In declaring itself ‘lacking in terms of a capacity to allow the requisite participation by Indigenous communities in the policy development process’, AGD (1994, p. 12) asserted its pre-eminence as the Commonwealth Government’s premier legal advising and legal policy office, while at the same time, abrogating responsibility for implementing the ALRC’s (1986) recommendations on Aboriginal customary law. In this context, it is relevant to point out that the ALRC itself was situated within the Attorney-General’s portfolio. These dichotomies have, in my view, been the single most important reason why successive Commonwealth governments have failed to act on the recommendations since the publication of the Law Reform Commission’s Report on Aboriginal Customary Law over twenty years ago (Williams-Mozley, 1999, p. 11).

5.3 1986 Census data

Table 5.1 sets out the 1986 census data for the Indigenous population. Overall, there was a forty two per cent increase in the total number for the Indigenous population from the 1981 census with all States and Territories recording increases.
**Indigenous Census Count – 1986**

**Table 5.1**

<table>
<thead>
<tr>
<th></th>
<th>Number (no.) 1981</th>
<th>Number (no.) 1986</th>
<th>Change in % from 1981</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>35,376</td>
<td>58,999</td>
<td>&gt; 66.8</td>
</tr>
<tr>
<td>Victoria</td>
<td>6,057</td>
<td>12,600</td>
<td>&gt;108.0</td>
</tr>
<tr>
<td>Queensland</td>
<td>44,698</td>
<td>61,250</td>
<td>&gt; 37.0</td>
</tr>
<tr>
<td>South Australia</td>
<td>9,825</td>
<td>14,285</td>
<td>&gt; 45.4</td>
</tr>
<tr>
<td>Western Australia</td>
<td>31,351</td>
<td>37,786</td>
<td>&gt; 20.5</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2,688</td>
<td>6,716</td>
<td>&gt;149.9</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>29,088</td>
<td>34,738</td>
<td>&gt; 19.4</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>823</td>
<td>1,059</td>
<td>&gt; 28.7</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>159,897</strong></td>
<td><strong>227,593</strong></td>
<td><strong>&gt; 42.3</strong></td>
</tr>
</tbody>
</table>

(Source: Adapted from ABS, 2004, pp. 1-2).

Victoria and Tasmania recorded the most significant increases with Indigenous numbers doubling in Victoria and increasing almost one and a half times in Tasmania.

From the first ‘reckoning’ of the Indigenous population in 1966 to the present census, the sequential pattern for total Indigenous census numbers can be represented as follows: 1966 : 80,000; 1971 : 106,000 (an increase of 44.6%); 1971 : 115,953 (an increase of 9.3%); 1976 : 160, 915 (an increase of 39%); 1981 : 159,897 (a decrease of 0.6%); 1986 : 227,593 (an increase of 42%) (ABS, 2004). Further analysis of Indigenous census data will be undertaken in chapter seven when the last census to fall within the period examined in this study is discussed.
5.4 The ‘civilising mission’

Five years elapsed after the ADB’s (1982) study on Aborigines and street offences before any further research on Aboriginal over-representation was published. In 1987, Bird (1987), Cowlishaw (1987), Cunneen and Robb (1987) and Hazelhurst (1987) all published the results of studies they had conducted which, although not specifically stated, appear to have been inspired in part from the ADB (1982) study.

In an ethnographic oriented study utilising both Marxian conflict and social process labelling perspectives Bird (1987), a lawyer and historian, attempted to discover whether Aboriginal people were being arrested, convicted and imprisoned at a greater rate than non-Aboriginal people. For her study she chose a total of seven towns (four in South Australia and three in Western Australia) in which she collected data from police and court records and conducted fieldwork involving unstructured interviews and participant observation with Aboriginal informants, solicitors, police, magistrates, justices of the peace, social workers, government officials and academics. Ultimately, Bird (1987, p. 2) concluded that Aborigines were ‘grossly over-represented’ in all stages of the criminal justice system. Echoing Eggleston’s (1976) earlier findings, Bird (1987, p. 2) determined Aboriginal crime consisted largely of ‘public order’ offences with adults being charged with drunkenness, offensive language/offensive behaviour and juveniles being charged with offences related to vandalism and petty theft. In contrast, the majority of non-Aboriginal offenders were charged with traffic offences.
In a cautionary note to the use of official statistics, Bird (1987, p. 3) argued that while they produced knowledge that was reliable, they were not necessarily valid as they gave no indication of whether an arrest was due to discrimination, or whether a verdict of guilty was due to a defendant’s failure to understand the court process, lack of legal representation, the racial or class prejudice of the Bench or some other factor. As such, a clear delineation between Aboriginal and non-Aboriginal crime ‘could only be explained in part by the interaction between white officials, white residents and blacks’ (Bird, 1987, p. 4). For Bird (1987, p. 5), a more meaningful explanation is found in the proposition that the criminal law has been used to control and mould a colonised people in furthering what she called the ‘civilising mission’.

Essentially, the ‘civilising mission’ is a construct to explain the dispossession and marginalisation of Aboriginal people from their land and the imposition of an alien politico-legal system that expected subordination from a colonised people and the recognition of the superiority of white people and white culture (Bird, 1987, p. 5). The nub of the concept is the construction of Aboriginal crime both within the racially tense interactions between white people and black people and within the wider framework of colonisation and the ‘civilising mission’. The location of the ‘civilising mission’ was the church administered missions and government reserves, where Aboriginal survivors of the guerrilla wars, famine and introduced diseases that accompanied ‘settlement’, were herded to be ‘civilised’ (Bird, 1987, p. 5).
The dominant character throughout the process – whether in the role of police officer, welfare officer, teacher, priest, bureaucrat or politician – was the white ‘protector’. Bird (1987, p. 5) argued the aim of the white protector was to make black people as much like white people as possible, but within the framework of dominance and subservience, where Aboriginal men and women were put in subservient roles as stockmen and domestic servants, and children were taken from their families in order that they might be given the ‘blessings’ of a civilised upbringing.

Bird (1987, p. 20) argued further that while a good deal of research on Aboriginal crime tended to highlight an apparent association with alcohol – even though it can be argued alcohol use is no more than indirectly linked to crime - the crimes of being found drunk in a public place, being drunk and disorderly, being a vagrant or using offensive or indecent language have historically criminalised the ‘unrespectable poor’, both to discipline them and to promote the image of a well-ordered, well fed, sober and industrious society. However, in a powerful restatement of the historical context of black and white crime in this country and also the ‘moral bankruptcy’ and expediency of the ‘civilising mission’, Bird (1987, p. 52) argued that:

none of the problematic behaviours of white people, from genocide through to exploitation of labour, to the extra-legal assaults on reserves and the oppressive permit systems, were ever constructed as crimes.

‘Yet, as Bird (1987, 52) argues further, Aboriginal people’s behaviours such as ‘fraternisation with kin, outdoor drinking and even use of the English language were constructed as crimes’, simply because the dominant white society deemed these behaviours ‘deviant’, notwithstanding such ‘deviancy’
was generally confined to what Bird (1987, p. 52) described as ‘apartheid-like missions and reserves’.

The apartheid-like Queensland reserve system intrigued criminologist Paul Wilson (1987) who attempted to establish the level and extent of interpersonal violence in Queensland Aboriginal reserve communities. In an examination of Queensland crime statistics concerning ‘black on black’ crimes of violence in Aboriginal reserves, Wilson (1987, p. 9) found that the homicide rate per year across seventeen reserve communities was 39.6 per 100,000 compared with an annual rate for the State of 3.28 per 100,000 and a national rate of 4.0 per 100,000. Similar to Bird (1987), Wilson (1987, p. 10) argued that the process of colonisation had something to offer in terms of a logical argument to account for the circumstance of contemporary Aboriginal over-representation in arrest and imprisonment rates. In an attempt to explain a homicide rate ten times the national average, Wilson (1987, p. 10) argued that the historical and cultural stimulus behind the violence was the forced settlement of Aboriginal people on reserves and the paternalism inherent in white laws and white bureaucracies that administered these laws which ‘imprisoned Aboriginal people, alienated them from the society generally and, in some cases, killed them’.

Returning to Bird, her study is considered significant for two reasons. Importantly, and similar to Eggleston (1976), Clifford (1981) and the ADB (1982), it critically questioned popular notions in criminological literature promoting individual pathology (as expressed in notions of biological weakness, cultural backwardness, poverty or ‘identity crisis’) as
explanations for Aboriginal crime and criminality. Therefore, from the Marxian and conflict perspectives, any attempt to reduce Aboriginal over-representation would require fundamental changes in the structure of the criminal justice system. Second, the ‘civilising mission’ was a concept that captured simultaneously the legislative intent and purpose of government policy concerning the disposition of Aboriginal people and also the physical setting where such intent was validated.

The overwhelming conclusion reached by Bird (1987, p. 52) was that Aboriginal over-representation, poverty, ill-health, poor housing and inappropriate education were all legacies of the ‘civilising mission’, which served to illustrate the fundamental racism of Australian society. In this regard, Bird (1987, p. 52) was unapologetic in declaring that ‘racism is writ large in white Australia, and it is the daily experience of the Aborigines’.

5.5 Oppositional culture

In the same year Cowlishaw (1987), an anthropologist, published an article based on an examination of policing in rural Australia. Her research involved fieldwork in a number of towns, mostly in western NSW, and was expressed through a description of events that took place in a composite fictional town called ‘Brindleton’. Drawing on court records Cowlishaw (1987, p. 48) demonstrated that the largest category of behaviour which resulted in Aboriginal peoples’ court appearances was to do with assaulting or offending people and that the most offended were the police. In total, forty-three of the eighty-seven cases reviewed involved offensive behaviour
or resisting arrest charges brought about by police. The second largest category of offence had to do with traffic offences, followed by property offences (Cowlishaw, 1987, p. 48).

With respect to offensive behaviour charges, Cowlishaw (1987, p. 48) argued that ‘offensive behaviour’ obviously depended on a specific cultural notion of what behaviour is offensive in which context and that clearly, cultural norms differed with class and racial groupings. Citing ‘swearing’ as a good example of the capriciousness inherent in the term ‘offensive’, Cowlishaw (1987, p. 48) argued that the language used in the court is at odds with that used outside it, even by the same people. One of the most bizarre examples of this phenomenon is that of producing evidence in cases of offensive language where words that are frequently heard in the street and pubs are produced with intense solemnity by police as used against them by Aboriginal defendants: “He said, fuck off, fucking cunt cop, your honour” (Cowlishaw, 1987, p. 48). A string of repetitions of the same terms is then followed by the police officer’s reporting of his own restrained responses. Cowlishaw (1987, p. 48) then suggested the task of the magistrate was made difficult by the need to constantly disapprove of such behaviour that must, over time, become extremely familiar and as a result, ‘it becomes clear that a degree of arbitrariness exists around decisions about the context and import of such language’.

With regard to police, Cowlishaw (1987, p. 49) proposed that most of the Aboriginal population in ‘Brindleton’ had had some interactions with police that had not resulted in court appearances and that those aged twenty or
more, would have memories of the earlier regime where the police would regularly visit the reserve, enter the humpies and shacks and arrest people for being drunk, often having to awaken them first. Ultimately, Cowlishaw (1987, p. 49) concluded that police and Aborigines have been ‘mutually hostile’ for many years.

Apart from providing confirmatory evidence of many of the historical events, policies and practices identified by Eggleston (1976), Clifford (1981) and Bird (1987) related to police interventions in Aboriginal people’s lives and the discriminatory attitudes evident in white society, Cowlishaw (1987, p. 59) introduced the notion of ‘oppositional culture’. In acknowledging the interactions between police and Aborigines as ‘mutually hostile’, together with broad acceptance of the view that Aborigines are not a legitimate political entity, Cowlishaw draws on Sennett and Cobb’s (1973, cited in Cowlishaw, 1987, p. 49) proposition that ‘if dignity is as compelling a human need as food and sex, then one strategy for powerless groups is to create their own arena of dignity’. The point here is that members of a group can gain their sense of honour from the group’s integrity, rather than from those who dominate the economic and political arena.

Cowlishaw (1987, p. 50) argued that notwithstanding the diversity of lifestyles, aspirations and loyalties within and between Aboriginal societies, ‘oppositional culture’ is represented by the large groupings which reside at the ‘Aboriginal end’ of country towns or on the reserves and missions and is closely interwoven through ties of kinship and marriage and a shared past. It was Cowlishaw’s (1987, pp. 49-50) view that the vilification of
Aborigines for the last one hundred years by whites in ‘Brindleton’ both created and sustained the oppositional aspects of Aboriginal culture, but that rather than responding with shame, oppositional culture acted as both a challenge to those who would despise Aborigines, as well as a defence against them and ‘the fact that certain of its features are an immediate trigger to white hostility confirms and reactivates the oppositional nature of Aboriginal culture’. Supplementing Cowlshaw’s (1987) representation, Cunneen (1988, p. 189) proposed a year later in a Marxist oriented analysis of the notion of ‘public order’ that Aboriginal communities have continually struggled with the imposition of the dominant culture’s use of social space and that ‘Aboriginal oppositional culture’ arises specifically out of the challenge of reclaiming ‘social space’, now regulated through the manifold legal categories of ‘public order’.

Although it was acknowledged that most Aborigines do not take part in acts of defiance, resistance or public drunkenness, Cowlshaw (1987, p. 50) concluded the significance of such acts is well understood. In referring to the hypocrisy of white people loudly bemoaning Aboriginal drinking while at the same time ignoring the frequency of public drunkenness of white men, Cowlshaw (1987, p. 50) proposed that alcohol addiction is not a monopoly of Aborigines. Further, that as most European drinking is done behind closed doors, it becomes evident that white people are ashamed of their drinking habits which, according to Cowlshaw (1987), provided Aboriginal people with a wealth of humorous, ironic comment on this instance of white hypocrisy.
Despite Cowlishaw giving descriptive examples of ‘oppositional culture’ to demonstrate Aboriginal defiance to white imposed mores and values, the types of humour exhibited in rejecting acts of humiliation and the role of political activism in refuting white ideals to support a fundamental premise - Aborigines have not conformed or surrendered to white hegemony - the overall value of the examples to the argument, is limited. Despite total agreement with Cowlishaw’s (1987, p. 51) assertion that ‘Aboriginal societies have their own distinctive vocabularies, family form, pattern of interpersonal relationships and even their own economy’, I would argue that most white Australians have little or no knowledge of such matters or worse, no particular interest in wanting to know about Aboriginal cultures and societies. Further, even though most Aboriginal people would readily identify with and appreciate the language, humour and acts depicted in Cowlishaw’s (1987, p. 49) examples, her own admission that ‘not all or even most Aborigines are active in creating what could be called an oppositional culture’ relegates the efficacy and power of the notion of ‘Aboriginal oppositional culture’ to the periphery of social anthropology and in doing so, also reinforces Aboriginal people’s position at the margins of mainstream society.

5.6 Law and Order rhetoric

Two years prior to the notion of ‘oppositional culture’ being introduced by Cowlishaw (1987), the then NSW State Premier, the Hon. Neville Wran, QC requested the BOCSAR to conduct an investigation into claims made by white law and order lobby groups in 1987 concerning a perceived
breakdown of law and order in the Orana\(^2\) region, north-west NSW. The claims \(^3\) alleging a ‘crime wave’ in the region and a serious breakdown in law and order amounting to a ‘crisis’ in the administration of criminal justice - were made in various towns in the north-west of NSW, primarily Dubbo, Bourke, Brewarrina, Wellington and Walgett, towns representing the most significant concentration of Aboriginal people in the region.

**NSW Police Orana Local Area Command**

**Figure 5.1**

Map 2 above of the NSW Police Orana Local Area Command illustrates the location and proximity of the mentioned Aboriginal towns and police stations in the Command District. In this regard, District Headquarters is located at Dubbo and police stations with varying police numbers are located at Geurie, Gilgandra, Narromine, Stuart Town and Tooraweenah.

\(^2\) The Orana region comprises the city of Dubbo and the towns of Bourke, Brewarrina, Cobar, Coolah, Narromine, Mudgee, Walgett and Wellington.

\(^3\) See Appendix F: List of major claims of the law and order lobby.
Bourke, Brewarrina and Walgett are some distance north-west of Dubbo outside the Orana Local Area Command but incorporated with that region in the North Western Local Government division.

The BOCSAR engaged Cunneen and Robb (1987) to conduct the Inquiry with the Terms of Reference stated as being:

(a) To assess the relative rates of, and factors involved in, offending within the Orana region; with particular reference to the alleged offending of Aborigines and juveniles.

(b) To evaluate the effectiveness of existing laws and procedure in dealing with the alleged offending.

(c) To examine the role and response of other government agencies in dealing with offences and offenders within the region.

(d) To analyse media treatment of law and order issues within the region.

(e) To assess community attitudes towards the problems of law and order within the region (Cunneen & Robb, 1987, p.3).

In response to the specified complaints, Cunneen and Robb (1987, p. 218) found that at the time of the alleged ‘crime wave’, reported crime increased only four per cent in the Orana Police District with five of the other nine police districts reporting the same or higher increases over the same period. What was particularly interesting, however, was that in the year following the complaints, reported offences rose over thirty per cent in the Dubbo Police District, the largest increase in any police district (Cunneen & Robb, 1987, p. 218).
While an increase in actual offending was partly responsible, the main reason given for the dramatic increase was increased reporting of crime to police and changes to police practice and procedures, for example, ‘police crackdowns’, and the computerisation of police data collection systems. In other words, the evidence did not support the contention of a ‘crime wave’ or ‘crisis’. Further, and also contrary to public perception, there was no evidence that police did not have sufficient powers to control street offences as they could, and did, in fact, bring a variety of charges (Cunneen & Robb, p. 219).

In reviewing the history of the region, Cunneen & Robb (1987, p. 188) highlighted the fact that as early as the 1920s, Aboriginal people in that area had been ‘objectified’ and ‘homogenised’ as ‘the problem’ by sections of the non-Aboriginal population. Central to this view was a generalisation that all Aboriginal people as a group are to blame for various forms of social disorder. Thus, according to this view, if Aboriginal people can be made ‘invisible’, that is, removed from public places, then law and order would be reinstated (Cunneen & Robb, 1987, p. 188).

Looking at law and order from another angle, Cunneen and Robb (1987) pieced together the long-term effect of the law’s intrusion and intervention into Aboriginal lives, arguing that from an Aboriginal perspective, the first crisis in the maintenance of social order and the rule of law was the initial act of dispossession in 1788. With the establishment of the Mounted Police in 1825, contact between police and Aborigines was largely based on the continuing process of dispossession. As noted by Foley (1984, cited in Cunneen and Robb, 1987, p. 188), the task of the Mounted Police in colonial NSW in securing the ‘frontier’ was paramilitary in nature and quite
different to the notion of ‘policing by consent’ as the emergent British model of policing implied. In the colonising process, the Mounted Police ‘dispersed’ Aboriginal people from their lands, shot and killed them in punitive expeditions and took part in massacres to eradicate them.

While all or even most police were not involved in these acts, the point in acknowledging the earlier police role is that it shows clearly the inability of introduced European law to protect Aboriginal people. The word ‘protection’ is imbued with an altogether different meaning when considering its use in more recent times within the framework of the Aborigines Protection Act 1909. This Act, administered by the NSW Aborigines Protection Board between 1914 and 1934, remained in force until 1969 and provided police with ‘protective’ and ‘prosecutorial’ powers to exert vast control over the movement and lives of Aboriginal people. The twelve functions extracted from the Act to illustrate the position of power police had in the role as protectors/prosecutors of Aboriginal people have been restated by Goodall (1982) as:

1. Issue rations to Aborigines.
2. Reduce the ration lists by investigating all applicants and issuing rations only to deserving cases.
3. Force children to attend school by withholding rations if they did not comply.
4. Refuse rations to Aborigines in order to persuade them to go to another locality or to move onto an Aboriginal reserve or station.
5. Decide whether or not an Aborigine was sick enough to see a doctor.
6. Patrol and maintain order on unsupervised Aboriginal reserves.
7. Recommend on the disposal of reserve land.
8. Expel trouble makers from Aboriginal reserves and enforce orders issued in other areas which refused access to any Aborigines Protection Board reserve or station.

9. Remove children from their parents and send them to the Board’s training homes, on the grounds that they were neglected or that they were 14 years of age.

10. Institute proceedings against Aboriginal parents who took their children away from Aboriginal reserves or from schools in an attempt to escape the Board’s decision that their children should be removed from them and ‘trained’.

11. Expel light-coloured people from Aboriginal reserves and stop them from returning to their families still living on reserves.

12. Institute proceedings to remove whole Aboriginal communities from certain localities, under section 14 of the Act. Aborigines vulnerable to this section include not only those receiving rations but any person with an admixture of Aboriginal blood. (Goodall, 1982, p. 179)

There is little doubt implementation of these functional demands brought about widespread fear and loathing of the police. Overall, Cunneen and Robb (1987, p. 199) suggested it was reasonable to argue the level of police intervention into the lives of Aboriginal people is quite incomparable to that experienced by non-Aborigines which may, to some extent, account for much of contemporary Aboriginal people’s enmity towards police.

A disconcerting fact that emerged was the charge rates for Aboriginal juveniles (Cunneen & Robb, 1987, p. 219). In this regard there was a marked difference between Aboriginal and non-Aboriginal populations. For example, in Dubbo in 1985-1986, the charge rate for Aboriginal juveniles was six times greater than for non-Aboriginal juveniles, forty-seven times greater in Wellington, fifty-seven times greater in Brewarrina, thirty-six times greater in Bourke, and ninety times greater in Walgett (Cunneen and Robb, 1987, p. 219).
A similar disparity applied to adults with Aborigines over-represented in the major towns surveyed in the region in every offence category. Although constituting 14.6 per cent of the population in those towns, Aborigines accounted for 47.1 per cent of persons arrested, an over-representation factor of 3.2. However, while Aboriginal people were sentenced to imprisonment more often than non-Aboriginal people, Cunneen and Robb (1987, p. 220) argued the difference between the two groups disappeared when offenders with prior criminal records (more prevalent amongst Aboriginal defendants) were ignored.

In showing the claims of the Orana region’s ‘law and order lobby’ to be unsubstantiated, Cunneen and Robb (1987, p. 220) took the opportunity to shine the spotlight on a real ‘crisis’ the law and order lobby most likely considered as either not ‘their’ problem, or part of ‘the Aboriginal problem’: the circumstance of Aboriginal over-representation. Quite bluntly, Cunneen and Robb (1987, p. 220) declared Aboriginal over-representation was both persistent and extensive. That is, the levels of over-representation had persisted historically, despite changes to legislation and broader policy. The levels were also extensive in the sense of their magnitude; Aboriginal people were not slightly over-represented, they were grossly over-represented. Consequently, Cunneen & Robb (1987, p. 220) suggested that a dual explanation for Aboriginal over-representation is occasioned through socio-economic factors on the one hand, and overpolicing on the other.

As far as the first part of the explanation is concerned, the documented poverty of Aboriginal people in the Orana region placed them at the lowest point on all major social indicators. While acknowledging that it is difficult to point to any simplistic causal relationship between poverty and
unemployment, on the one hand, and over-representation in the criminal justice system, on the other, the Report conceded that other research (Dunstan, 1976a and 1976b; Braithwaite, 1979; Windshuttle, 1981; cited in Cunneen and Robb, 1987, p. 35) was less cautious and pointed to a strong relationship between socio-economic position and levels of criminal activity. The Report also acknowledged the likelihood that some Aboriginal crime is a protest against perceived discrimination and social conditions (Cunneen & Robb, 1987, p. 220).

As far as the second part of the explanation is concerned, the concept of ‘overpolicing’ is introduced at various points in the Report as a state of affairs that can be deduced through particular events. Although ‘overpolicing’ is nowhere actually defined or described but rather, inferred, there are instances provided which point to what the concept is meant to convey as an explanation for Aboriginal over-representation. First, it proposes as axiomatic that any community that is over policed will show high statistics for crime. This is certainly the case for the majority of Aboriginal communities and specifically for those examined in northwest NSW with Aboriginal people grossly over-represented in all offence categories (Cunneen & Robb, 1987, p. 220).

Conversely, Beacroft (1987, p. 7) argued that on Queensland Aboriginal reserve lands where the usual police presence is unsworn Aboriginal community police with no general powers of arrest, Aboriginal people complain they are ‘under policed’ on their own land.⁴

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⁴ Similar to ‘overpolicing’, ‘under policing’ is not defined, but is described by McMullen & Jayewardene (1995, pp. 38-39) as being demonstrated through undue delays by police in responding
At another level, attention is drawn to the relationship between ‘overpolicing’ and the charges of ‘assault police’, ‘hinder police’, and ‘resist arrest’, a police-initiated group of charges in which levels of Aboriginal over-representation reached their peak. A third instance relates to what Cunneen and Robb (1987, 221) refer to as ‘the mundane and obvious’ expression of ‘overpolicing’, the sheer number of police stationed in small communities, such as the northwest NSW communities examined.

‘Overpolicing’ is also demonstrated in the use of particular legislation. The report detailed increased police use of the common law offence of ‘riotous assembly’ against Aboriginal people as opposed to less serious charges of ‘unlawful assembly’ and ‘affray’ after civil disturbances (Cunneen & Robb, 1987, p. 222). Finally, mention was also made of the police response to collective disturbance where, in Bourke for instance, a ‘quick fix’ was to fly in Tactical Response Group (TRG) police from Sydney. Once the TRG had restored order, they were returned to Sydney having had no connection to, or understanding of, whatever tension, conflict or historical factors led to the disturbance in the first place (Cunneen & Robb, 1987, p. 222).

What then, is the significance of this Report? First and foremost, Cunneen and Robb’s (1987) analysis of the Orana region is the first study to attempt to describe a number of the constituent elements of a concept of ‘overpolicing’. Next, it cogently reaffirms the previously mentioned

to Aboriginal complainants about the commission of a crime and also police apathy in the investigation of crimes committed against Aboriginal people.

This group of offences has been referred to as the “Aboriginal Trifecta” (Jochelson, 1997, p. 3). The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs criticised what it called “provocative policing”; referring to the 'Trifecta' as offensive language, resisting arrest and assaulting police (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 1994, p. 222).
historical continuities that are argued as instrumental in creating and perpetuating the circumstance of Aboriginal over-representation in the criminal justice system. Finally, it contains a detailed account of the quite considerable efforts of policing and social policy to affect the social control of Aboriginal people in the region. What the Report did, according to the then Director of the NSW Bureau of Crime Statistics and Research, Dr. Sutton, was provide clear evidence of the degree of intervention by the criminal justice system into the lives of Aboriginal people in the region. Noting the picture drawn by the report was ‘far from idyllic’ the Director was sufficiently moved to declare that ‘white Australia needed to re-think the effect its legal institutions have had, and are having, on Aboriginal Australians’ (Cunneen & Robb, 1987, Preface).

5.7 Anthologies, revolving doors and racial tension

In 1987, Hazlehurst presented a paper at the Police in Our Society series titled *Racial Tension, Policing and Public Order: Australia in the Eighties*. At the time, she was engaged as a researcher at the AIC in Canberra and had previously edited two criminological anthologies. The first, *Justice Programs for Aboriginal and other Indigenous Communities*, published in 1985, was a collection of papers presented at an AIC workshop to follow up on proposals developed at the Institute’s 1983 conference on *Aborigines and the Law*. The second, *Ivory Scales: black Australia and the Law*, published in 1987, was a diverse collection of studies, argument and analyses focusing on the functional and dysfunctional aspects of contemporary criminal law in its application to Black Australians. Prior to discussing *Racial Tension,*
Policing and Public Order, it is appropriate to mention some of the important aspects of the two anthologies.

Having recognised that ‘Aboriginals [sic] in Australia were among the most imprisoned race in the free world’ (Hazlehurst, 1987, p. 6), and questioning the effectiveness of imprisonment in deterring Aboriginal crime or in preventing recidivism, the 1983 Aborigines and the Law seminar asserted that more than a mere statement of issues and needs was required. What was required was action and the seminar proposed a ‘think tank’ venue in which areas of needed research could be proposed, alternative schemes discussed, and practical solutions to some of the daily problems facing the police, courts and Aboriginal and non-Aboriginal communities explored. Subsequently, the 1985 Workshop noted that few systematic studies of Aboriginal criminal justice had been undertaken since the pioneering work of Eggleston. What little had been done amounted to ‘repeated re-statement of the problem, scarce documentation of the practical issues, and sporadic proposals for reform’ (Hazlehurst, 1985, p. 238).

The most important outcome from the Workshop was the identification of a number of areas for proposed future study that could be argued as constituting the research agenda for Australian criminology for the next several years. This included, inter alia, the training and recruitment of Aboriginal people as criminal justice professionals; customary and contemporary means of Aboriginal social control; the nature of Aboriginal offending; the pros and cons of Aboriginal involvement in law enforcement; Aboriginal conflict management; prisoner and post-release rehabilitation;
solvent abuse; the potential for the revival of community involvement in the socialisation of children and in their protection from criminal behaviour; current and alternative models of sentencing and diversion; community options for prisoner rehabilitation; the cycle of Aboriginal incarceration, prisoner release, rehabilitation and recidivism; establishment of standardised national crime statistics; and analysis of legislative, bureaucratic and organisational habits which institutionalise Aboriginal disadvantage and alienation from criminal justice administration (Hazelhurst, 1985, pp. 239-240).

In *Ivory scales: black Australians and the Law* (Hazlehurst, 1987b), contributors to the anthology include Nettheim, McCorquodale, Walker, Bird, Parker, Broadhurst and Gale and Wundersitz. Apart from an abbreviated version of Bird’s (1987) study as detailed above, the only paper relevant to this study is Walker’s (1987) *Prison cells with revolving doors: a judicial or social problem*, which offers an interesting quantitative analysis of discretionary decision making intervals within the criminal justice system as a possible explanation for Aboriginal over-representation.

Using National Prison Census data for the years 1982 through to 1986 to compare the ratio of Aboriginal imprisonment to non-Aboriginal imprisonment in each state, Walker (1987, p. 107) arrives at the point of being able to state, ‘overall, in Australia an Aboriginal is over sixteen times more likely to be in prison than a non-Aboriginal’. Further, the predominant offence category is ‘other good order’\(^6\) (32.1 per cent of all

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\(^6\) ‘other good order’ offences are not defined in Walker’s paper. See Appendix A Australian National Classification of Offences (Walker, 1990).
offences), followed by ‘driving’ offences (26.1 per cent), administrative offences (25.4 per cent), assault (23.9 per cent), and ‘other offences’ (39.7 per cent (Walker, 1987, p. 107). Posing the question, ‘How can such a bias occur in a supposedly fair legal system?’ Walker (1987) then identified numerous discretionary points at which Aboriginal people might be disadvantaged in the criminal justice system. These points were positioned at four intervals along a continuum to represent the police decision to arrest; police decisions to grant bail or remand in custody; the court’s decision to convict; and following conviction, the court’s decision to impose a penalty of imprisonment (Walker, 1987, p. 107).

In compiling a list of key independent variables that may account for Aboriginal over-representation under each of the four decision-making intervals, Walker (1987, p. 107) arrives at a total of twenty-five possible causes. Walker (1987, p. 107) then proposed, without mention of any relevant reason, that even if the variable of prejudice or racial bias by police, magistrates, judges and juries was removed from any further consideration, there were still twenty-one items on the list, each of which could independently contribute to high Aboriginal imprisonment rates. He then provided an assessment of the remaining twenty-one variables against quantitative data on court conviction rates, imprisonment rates, and duration of sentence that were qualified by factors such as a prior criminal record, seriousness of offence, and prior imprisonment.

In the end, Walker (1987, p. 114) concluded the courts cannot be held to blame for the high rates of Aboriginal imprisonment. As police had already
been taken out of Walker’s decision-making schema, along with any suggestion of bias within any element of the criminal justice system, the conclusion reached was that ‘the criminal justice system is not likely to be responsible for Aboriginal over-representation, it may be merely responding logically and even sympathetically to the offending patterns of Aboriginals’ (Walker, 1987, p. 114).

With a passing reference to the earlier Gale and Wundersitz (1985) study on Aboriginal juvenile offending in South Australia, Walker (1987, p. 116) claimed that to redress the stated imbalance between Aboriginal and non-Aboriginal imprisonment rates, ‘efforts should be directed at the parents and teachers of young Aboriginals to help them keep their children out of mischief before they begin to collect criminal records’, arguing that the courts are helpless when presented with multiple repeat offenders who persist in offending. He then argued the only point increasingly lengthy prison sentences serve is that they prevent the commission of offences while the offender is imprisoned (Walker, 1987, p. 116).

For Walker (1987), employment and levels of education were argued as more powerful predictors of imprisonment than ‘Aboriginality’ and his argument and view as to the cause of Aboriginal over-representation stands in stark contrast to explanations discussed thus far.

Returning to Racial Tension, Policing and Public Order, Hazlehurst’s (1987a) paper began by introducing the so-called ‘Brewarrina Riot’ that occurred on the night of the 15th of August, 1987 in which approximately
150 Aboriginal people clashed with Brewarrina’s seven police officers at a wake following the funeral of an Aboriginal man, Lloyd Boney, who had died in police custody the week before (Hazlehurst, 1987a, p. 18). Pty (1994, p. 11) argues that ‘while police are notorious for arresting Aboriginal people for little or even no provocation’, the decision to break up the wake for Lloyd Boney was not simply routine police behaviour. He contends that what was remarkable about the police conduct on that night was their complete lack of awareness of both the number, and the feeling, of Aboriginal people at the wake (Pitty, 1994, p. 11).

A Report of the ‘riot’ prepared for the NSW Minister for Aboriginal Affairs, Mr Ken Gabb, by police, the Departments of Youth and Community Services, Aboriginal Affairs, Attorney-General’s and the Anti-Discrimination Board showed that the levels of police at Bourke were unusually high. Bourke, a twenty-four hour station, had 27 officers on roster, approximately four times the State average per head of population. The nearby town of Nyngan, of similar size, had only four police officers (Hazlehurst, 1987a, p. 18).

Drawing on commentary from the Report, Hazlehurst (1987a, p. 19) noted that the majority of the police at Bourke were young and inexperienced constables who, it was argued, had little understanding of Aboriginal cultures and little preparation to work with Aboriginal communities. In addition, the Report concluded that whether or not individual police officers were prejudiced themselves, they inherited in Bourke – as in many small towns – a chronic state of racial tension between the black and white
townspeople. Further, when too many police, especially young, enthusiastic officers, are stationed in a small centre it was likely Aboriginal residents would feel harassed by an ‘army of occupation’. According to Hazlehurst (1987a, p. 19), this type of ‘enforcer role’ would guarantee the continuation of a state of hostility between Aborigines and police and would ensure regular breakdowns of public order.

Another discerning observation from the Report was that in small communities, such as Bourke, Aboriginal people take far more interest in individual police officers and scrutinize their behaviour, particularly off-duty behaviour. Consequently, if ‘police curse and drink with the worst of them’, such behaviours do not go unnoticed (Hazlehurst, 1987a, p. 19). On the other hand, the Report submitted that ‘the attention of some police to wrongdoing by Aboriginal people can, to put it politely, border on excessive diligence’ with the result that many Aboriginal people feel their lives to be in a constant state of siege – a state of existence which is almost totally unknown to middle class and working class white Australia (Hazlehurst, 1987a, p. 27).

Turning attention once again to the circumstance of policing, the Report noted that the tradition of posting ‘problem police officers’, or of posting newly graduated officers, to remote areas to police Aboriginal communities – as either punishment for misconduct or as a ‘teeth cutting’ exercise – only promoted the view that ‘policing Aboriginals [sic] is an undesirable job, or a mere stepping stone to brighter prospects elsewhere’ (Hazlehurst, 1987a, p. 32). Whether by accident or design, the end result was that all too often
Aboriginal communities were landed with the frustrations or ambitions of the ill-tempered or the inexperienced, and denied the benefits of quality policing (Hazlehurst, 1987a, p. 32).

Returning to the circumstances surrounding the so-called ‘riot’, Hazlehurst’s (1987a, p. 2) examination of the events on the night of the 15th of August are incidental, as the primary purpose of the paper was to sheet home the fact that Boney was the forty-fourth Aboriginal person to die in lawful custody since 1980 and the one whose death prompted the Commonwealth government to announce ‘a Royal Commission of Inquiry into a spate of unsatisfactorily explained Aboriginal deaths in custody’.

The remainder of Hazlehurst’s (1987a) paper then discussed a range of explanations that had been considered up to that point in time to account for previous deaths in custody, including ‘cult’ or ‘copycat’ suicides, the trauma of gaol, delirium tremens or alcohol withdrawal, temporary madness or depression. As explanations about the cause(s) of death in custody are not the concern of this study, further examination of her paper seems unwarranted. However, her paper is the last in this Chapter’s examination of the pre-Royal Commission period and serves to introduce the next period in the chronology in Chapter 6: the Royal Commission into Aboriginal Deaths in Custody.

5.7 Conclusion

This chapter was concerned with an examination of the period 1983 to 1987
in which a considerable amount of research activity around the circumstance of Aboriginal over-representation produced some interesting insights into likely factors that contribute to differential policing of Aboriginal people. From an analysis of the ALRC Report on the Recognition of Aboriginal Customary Law it was noted that there was substantial evidence that harassment, discrimination, maltreatment and abuse of Aboriginal people’s legal rights by police was widespread. The ALRC Report also examined the policy of assimilation and commented that it was obvious the fundamental tenet underpinning the policy had always been that Aboriginal equality could only ever be achieved through the loss of Aboriginal identity. The Report then highlighted a modest movement within the federal political arena away from assimilation towards the notion of integration which, in contrast to assimilation, recognised the value of Aboriginal cultures and the right of Aboriginal people to retain their languages, customs and the right to maintain distinctive communities.

The chapter also drew attention to the fact that, although the ALRC supported the recognition of Aboriginal customary law in principle, such recognition was qualified and contingent upon a number of caveats including:

- recognition was to be achieved against the background and within the framework of the general law;

- as far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, without the need for the creation of new or separate legal structures;

- that as a general principle, codification of Aboriginal customary laws or their enforcement was inappropriate

- that any forms of recognition be specific, as opposed to having general application; and
that customary law was a notion that should be understood broadly, rather than narrowly.

Ultimately, the Commission undermined its own reasoning and recommendations by claiming that any special measures to accommodate Aboriginal customary law could be said to be discriminatory under certain international covenants. Thus, a pretext was established which legitimised successive Commonwealth government’s failure to implement any of the Report’s substantive recommendations around ‘recognition’.

Bird’s (1987) study to attempt to discover whether Aboriginal people were being arrested, convicted and imprisoned at a greater rate than non-Aboriginal people led her to echo Eggleston’s (1976) earlier findings that Aboriginal crime consisted largely of ‘public order’ type offences, and also that Aboriginal people were grossly over-represented in all stages of the criminal justice system. In an attempt to establish factors that delineated Aboriginal crime and non-Aboriginal crime, Bird introduced the notion of the ‘civilising mission’, a construct to explain the dispossession and marginalisation of Aboriginal people from their land and the imposition of an alien politico-legal system that expected subordination from a colonised people and the recognition of the superiority of white people and white culture. The nub of the concept was the construction of Aboriginal crime both within the racially tense interactions between black and white and within the wider framework of colonisation and the ‘civilising mission’. The location of the ‘civilising mission’ was the church-administered missions and government reserves where Aboriginal survivors of the guerrilla wars, famine and introduced diseases that accompanied
‘settlement’ were herded to be ‘civilised’. Bird’s construct critically questions popular notions in criminological literature promoting individual pathology as the explanation for Aboriginal crime and criminality and captures the legislative intent and purpose of government policy concerning the disposition of Aboriginal people. The overwhelming conclusion reached by Bird was that Aboriginal over-representation, poverty, ill-health, poor housing and inappropriate education were all legacies of the ‘civilising mission’ which served to illustrate the fundamental racism of Australian society.

In providing confirmatory evidence of many of the historical events, policies and practices identified by Eggleston (1976), Clifford (1982), and Bird (1987) related to police interventions in Aboriginal people’s lives and the discriminatory attitudes evident in white society, Cowlishaw introduced the notion of ‘oppositional culture’. Essentially, the notion proposed that if dignity is as compelling a human need as food and sex, then one strategy for powerless groups is to create their own arena of dignity so that members of that group can gain their sense of honour from the group’s integrity, rather than from those who dominate the economic and political arena. On her own admission that not all or even most Aboriginal people are active in creating what could be called an ‘Aboriginal oppositional culture’, Cowlishaw’s notion failed to contribute in any meaningful way to this study’s main inquiry concerning the question of how ‘overpolicing’ established itself in Australian criminological literature.
Cunneen and Robb’s (1987) research into complaints of a perceived law and order ‘crisis’ in the Orana region of north-west NSW showed that non-Aboriginal people had objectified Aboriginal people as ‘a problem’ and the cause of social disorder in the region from as early as the 1920s. The research also showed that the level of police intervention into the lives of Aboriginal people was quite incomparable to that experienced by non-Aboriginal people and that to some extent, this particular circumstance may account for much of contemporary Aboriginal people’s enmity towards police. In showing the claims of the Orana region’s law and order lobby to be unsubstantiated, Cunneen and Robb took the opportunity to shine the spotlight on a real ‘crisis’ the law and order lobby most likely considered as either not their problem, or part of the Aboriginal problem: the circumstance of Aboriginal over-representation. Put simply, Cunneen and Robb declared that despite changes to legislation and broader policy, Aboriginal over-representation was both persistent and extensive and that the most significant explanation to account for this state of affairs was ‘overpolicing’. While confirming it was difficult to point to any simplistic causal relationship between socio-economic factors and Aboriginal over-representation in the criminal justice system, Cunneen and Robb acknowledged the likelihood that some Aboriginal crime is a protest against perceived discrimination and social conditions. Unfortunately, after having introduced ‘overpolicing’ as a construct to explain Aboriginal over-representation, Cunneen and Robb do not provide an explanation or description of what the term actually means, instead inferring through a number of instances what ‘overpolicing’ is meant to convey. In this regard Cunneen and Robb reasoned that ‘overpolicing’ was demonstrated when: an
Aboriginal community showed high statistics for crime; the group of police-initiated charges of ‘assault police’, ‘hinder police’ and ‘resist arrest’ were high in Aboriginal communities; the number of police stationed in small communities - such as the northwest NSW communities examined – was higher than other comparable locations; and finally, when police used particular legislation or specialist police to subordinate and control Aboriginal people’s relationships and interactions in public.

In discussion of an anthology compiled by Hazlehurst and titled *Ivory scales: black Australians and the Law*, the chapter considered Walker’s (1987) contribution of a quantitative analysis of discretionary points within the criminal justice system as a possible explanation for Aboriginal over-representation. From that analysis, Walker was able to state categorically that Aboriginal people were sixteen times more likely to be in prison than a non-Aboriginal person and that the predominant offence category is ‘other good order’, followed by ‘driving’ offences, administrative offences, assault, and ‘other offences’. When police discretion or bias were discounted from consideration as variables that may contribute to high Aboriginal imprisonment rates, the only variables remaining were those associated with the administration of the court system and Aboriginal people themselves. In the end, Walker concludes that the courts cannot be held to blame for the high rates of Aboriginal imprisonment and also that the criminal justice system is not likely to be responsible for Aboriginal over-representation, but may be merely responding logically and even sympathetically to the offending patterns of Aboriginal people. Ultimately, a conclusion was reached that Walker’s argument that Aboriginal education
and employment levels were more powerful predictors of imprisonment than ‘Aboriginality’ *per se* stood in stark contrast to explanations up to this point which all sought explanations in the discriminatory manner in which the criminal justice system operated to the disadvantage of Aboriginal people.

Finally, Hazlehurst’s (1987a) analysis of the so-called ‘Brewarrina Riot’ in August 1987 reaffirmed previous research that a chronic state of racial tension existed in many rural and country areas of NSW and that police attention to Aboriginal wrongdoing in these locations bordered on ‘excessive diligence’, with the result that Aboriginal people felt their lives to be in a constant state of siege. Importantly, Hazlehurst’s analysis drew attention to the fact the cause of the ‘riot’ was the death the week before of the forty-fourth Aboriginal person to die in lawful custody in Australia since 1980 and whose death was a key factor in finally prompting the Commonwealth government to announce a Royal Commission of Inquiry into a collection of unsatisfactorily explained Aboriginal deaths in custody.
NOTHING TO CELEBRATE

One of the most important and all-pervading issues of which I have become aware is the almost invariable failure of non-Aboriginal people to listen seriously to Aboriginal people who are trying to explain the issues from their own direct and personal experience. Unconsciously or consciously, the assumption is that white experts know best, and certainly better than Aboriginals, not only what the problems are, but what should be done about them. (Hal Wootten, QC, 1993, p. 49)

6.1 Introduction

This chapter continues the study’s development of a chronology of criminological explanations regarding the circumstance of Aboriginal over-representation and provides an analysis of the key socio-political and legal events concerning the policing of Aboriginal people and Aboriginal affairs during the period 1988 to 1991. It begins with an exploration of two significant national events taking place at the beginning of 1988: the conduct of the country’s celebrations on the anniversary of two hundred years of white settlement and the commencement of the investigation phase of the Royal Commission into Aboriginal Deaths in Custody. While attention will be drawn to the general nature of the Royal Commission’s findings on Aboriginal over-representation, this study will not be concerned with a reiteration of the Commission’s primary task: the forensic examination of the circumstances surrounding the death of each of the ninety-nine deceased persons named under its Terms of Reference and the

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1 For the purposes of brevity, Royal Commission will be used throughout to refer to the Royal Commission into Aboriginal Deaths in Custody in text and RCIADIC in referencing.
custodial environments of policing and corrections. For an analysis of the operation and mode of investigation adopted by the Royal Commission see Johnston (1991, 1991a); Royal Commission into Aboriginal Deaths in Custody National Reports 1-5 (1991); Rowse (1992); ATSIC (1997); ATSIC (1998); Amnesty International (1997); McDonald (1996); and Williams (2001).

After a brief examination of the Royal Commission and Australia’s bicentenary celebrations, the chapter re-states the views of a visiting North American academic regarding the state of community policing in Australia in the mid 1980s. The chapter then draws attention to an increase in the incidence of racist violence towards Australian immigrant groups in the two years following the commencement of the Royal Commission and sets out the background and major findings from the conduct of a national inquiry into Racist Violence by the Human Rights and Equal Opportunity Commission (HREOC). In doing so, the chapter highlights the nature and extent of racist violence towards Aboriginal people in contemporary Australian society and notes the conduct of two special investigations that were commissioned by HREOC during the Racist Violence Inquiry to inquire into the events and circumstances surrounding a police raid on private residences in the inner city Sydney suburb of Redfern and also the treatment of Aboriginal juveniles in police custody. The former investigation draws attention to the fact that the history of the nature and extent of police interventions in the lives of Aboriginal people in a NSW metropolitan location are similar to Aboriginal peoples’ experiences in NSW rural areas.
6.2 Royal Commission into Aboriginal Deaths in Custody

For the twenty year period prior to 1988, the Aboriginal proportion of the total Australian population ranged between one and two percent (ABS, 2004, pp. 1-2). During the 1980s it became evident that the proportion of Aboriginal deaths in police custody and prison far exceeded one to two percent. Table 6.1 below enumerates the known Aboriginal deaths in police and prison custody, prior to the establishment of the Royal Commission into Aboriginal Deaths in Custody in 1987.

Deaths in Police Custody and Prison
Year of Death and Aboriginality 1980-81 to 1986-87

Table 6.1

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Deaths</th>
<th>Aboriginal Deaths</th>
<th>Aboriginal Deaths as Proportion of deaths in custody</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>41</td>
<td>10</td>
<td>24%</td>
</tr>
<tr>
<td>1981-82</td>
<td>44</td>
<td>5</td>
<td>11%</td>
</tr>
<tr>
<td>1982-83</td>
<td>47</td>
<td>9</td>
<td>19%</td>
</tr>
<tr>
<td>1983-84</td>
<td>47</td>
<td>5</td>
<td>11%</td>
</tr>
<tr>
<td>1984-85</td>
<td>50</td>
<td>13</td>
<td>26%</td>
</tr>
<tr>
<td>1985-86</td>
<td>37</td>
<td>9</td>
<td>24%</td>
</tr>
<tr>
<td>1986-87</td>
<td>76</td>
<td>18</td>
<td>24%</td>
</tr>
</tbody>
</table>

(Source: ATSIC, n.d., p. 2; ATSIC, 1998, p. 15.)

In the few years previous to 1987 there had been several deaths in police and prison custody which caused serious alarm among Aboriginal communities across the country. These included in particular, the deaths of Eddie Murray in NSW, and the deaths in Western Australia of John Pat, Charlie Michael, Dixon Green and Robert Walker (ATSIC, 1998, p. 2). The
year 1987 was also marked by an apparent increase in the number of Indigenous deaths in custody, although no-one was sure at the time of the exact number of people dying. Many of the deaths occurred in police and prison custody within the first eight months of 1987, including the deaths of Mark Quayle and Lloyd Boney in NSW, Kingsley Dixon in South Australia and Alistair Riversleigh in Queensland. Three deaths in custody between late 1986 and early 1987 had involved a single community in Yarrabah, Queensland (ATISC, 1998, p. 2).

As a result of activism by Indigenous organisations including the Committee to Defend Black Rights, Aboriginal Legal Services and the families of those who had died in custody and their supporters, as well as of a public campaign of speaking tours, political lobbying nationally and internationally to the United Nations and critical commentary from Amnesty International concerning Australia’s record on Indigenous deaths in custody, the Commonwealth government secured the agreement of the States and the Northern Territory to jointly sponsor a Royal Commission to inquire into each Aboriginal death in police and prison custody since 1 January 1980 (ATSIC, 1998, p. 2).

When the Royal Commission was announced it was thought that there were approximately forty-four deaths that required investigation and on 16 October 1987, Letters Patent were issued to the Honourable James Henry Muirhead, QC to inquire into and report upon:

(i) the deaths in Australia since 1 January 1980 of Aboriginals and
Torres Strait Islanders whilst in police custody, in prison or any other place of detention,

(ii) any subsequent action taken in respect of those deaths.

(Source: Nagle & Summerrell, 2002, p. 56.)

Commissioner Muirhead was requested to report the findings of his inquiry and to make such recommendations as appropriate by 31 December 1988, however, on 6 May 1988 the original Letters Patent were amended to:

(i) …

(ii) authorise him, for the purpose of reporting on any underlying issues associated with the deaths to take account of social, cultural and legal factors which, in his judgement appeared to have a bearing on the deaths,

(Source: Nagle & Summerrell, 2002, pp. 57-58.)

Essentially, the amendment permitted the Royal Commission to expand upon its de-limited investigation of the circumstances of death, to one that would now inquire into a broad range of extramural societal conditions that better informed the Royal Commission of the reasons why so many Aboriginal people were in police and other lawful custody in the first place. Without wanting to appear presumptuous, I would like to think that the investigation methodology that I adopted as a Special Investigator for the Royal Commission in the investigation of the death of Malcolm Charles Smith had some bearing on the amendment to the Letters Patent. Using that investigation as a case study, I proposed to the Royal Commission that its reflection on the immediate circumstance of death limited its capacity to comprehend the systemic, institutional or recurring themes that had become evident in my cursory examination of those deaths in custody that had occurred in the States of NSW, Victoria and Tasmania. The investigation
methodology I proposed was that each investigation comprise not only a re-
examination of the Coronial Inquest, but also a broader investigation of the
deceased’s life, from birth to death or, more succinctly, a ‘whole-of-life’
investigation. In doing so, the investigation would examine the deceased’s
childhood development, family life, education, criminal antecedents,
employment history, forced removal under ‘assimilation’ and history of
institutionalisation, the incidence of mental and physical ill-health, or any
circumstance that spoke on behalf of the deceased, during life. Although
my investigation methodology was adopted by the Royal Commission,
resulting in subsequent commentary that it was the most comprehensive
inquiry up to that point in time concerning the contemporary circumstances
of Aboriginal cultures and societies, it was probably other reasons that I
remain unaware of that triggered the 6th of May 1988 amendment to the
Letters Patent.

In total, 123 deaths in custody were initially investigated. Of these, twenty-
four did not fall within the terms of reference of the Royal Commission\textsuperscript{2} and
subsequently, the Royal Commission was tasked to investigate ninety-nine
individual Aboriginal deaths in custody. Commissioner Muirhead was
allocated three additional Commissioners (Elliott Johnston, QC; Hal
Wootten, QC; & Francis Wyvill, QC) and also granted an extension to the
completion date to 30 June 1989. On 27 October 1988, The Honourable
Daniel O’D ea was appointed to conduct inquiries in Western Australia and
Patrick Dodson was appointed in April 1989 to inquire into ‘underlying

\textsuperscript{2} Of the 24 deaths determined as ‘outside the Terms of Reference’, 7 deceased were not Aboriginal, 10 deaths did not occur in custody or detention, 2 deaths were outside the time restrictions of the Terms of Reference, and in 5 deaths, no injury caused death. Appendix B, Individual Deaths, National Report, Vol. 5, 1991.
issues’ in that State. In the end, the final reporting date for the Royal Commission was extended to 26 April 1991 (Nagle & Summerrell, 2002, pp. 56-58).

In due course the Royal Commission found that thirty percent of the deaths investigated under the Terms of Reference were caused by suicide, twenty-five percent by trauma to the body, and forty-five percent by substance abuse or natural causes. Many, if not all of the ninety-nine deaths were found to be avoidable (ATSIC, n.d., p. 3). Two-thirds of deaths occurred in police custody, with Western Australia having the highest number of deaths (32), followed by Queensland (27) and New South Wales (15) (ATSIC, n.d., p. 3).

From the conduct of a survey of Aboriginal people in police cell custody on 1 August 1988, the Royal Commission concluded there were 3539 Aboriginal persons taken into custody per 100,000 of the Aboriginal population compared with 131 non-Aboriginal prisoners per 100,000 of the non-Aboriginal population. Again, in June 1989, a similar survey found that there were 1464.9 Aboriginal persons in prison per 100,000 of the Aboriginal population compared with 97.2 non-Aboriginal prisoners per 100,000 of the non-Aboriginal population (ATSIC, n.d., p. 3). In each instance the level of Aboriginal over-representation in police custody was 27 and 15.1 respectively (ATSIC, n.d., p. 3). From these surveys the Royal Commission was able to draw the following conclusions in relation to the frequency of Indigenous deaths in custody:
Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. However, what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community.

The conclusions are clear. Aboriginal people die in custody at a rate relevant to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community. But this occurs not because Aboriginal people in custody are more likely to die than others in custody, but because the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often. (Johnston, 1991a, p. 6)

Through its analysis of the ‘underlying issues’ the Royal Commission was also able to conclude that the most significant factor contributing to the circumstance of over-representation was Aboriginal people’s ‘disadvantaged and unequal position within the wider society: economically, culturally and socially’ (ATSIC, 1998, p. 5). In their submissions to the Royal Commission, Aboriginal people ‘most frequently identified their relations with police officers as the most serious and constant indicator of the injustice and prejudice which they experience in society’ (RCIADIC, 1991, Vol 2, p. 207). Ultimately, the Royal Commission found that no person had deliberately caused a death or deliberately inflicted harm, although it was clear there were a number of instances where there was little understanding of the duty of care owed by custodial authorities (ATSIC, 1998, p. 5).

In total, 339 Recommendations were made to achieve the ends of reducing custody levels, remedying social disadvantage and ensuring Aboriginal self-determination. Of these, recommendations 86-91 referred specifically to police practices and procedures, in particular the use of arrest as a last resort which, while directly aligned to a national goal of reducing Aboriginal over-representation in custody, continue to ‘have no more than government lip
service paid to them’ (ATSIC, 1998, p. 11). Further discussion concerning implementation of the recommendations regarding policing will feature in the Post-Royal Commission period in Chapter 7.

6.3 Two hundred years of benevolence

In 1988 Australia commemorated the 200th anniversary of permanent European settlement to recognise ‘all aspects of the nation’s life and heritage’ (ABS, 1986, p. 1). Planning for the year-long bicentennial celebrations began nine years before the anniversary date with the establishment by the Commonwealth Government of the Australian Bicentennial Authority in April 1979 as a limited company registered in the Australian Capital Territory. The Authority’s task was publicised as being ‘to plan, coordinate and promote the celebrations for the Bicentenary’ and to foster the widest possible participation ‘by encouraging involvement in the program by the shareholder governments, local government authorities, community groups, the corporate sector, the public generally and the international community’ (ABS, 1986, p. 1).

From a lengthy consultation process with ‘thousands of Australians throughout the country’ as well as commissioned research, the Authority was informed that eighty percent of Australians believed it was ‘very important’ to have a major national celebration in the Bicentennial year, and that ‘communities everywhere’, wished to plan their own local celebrations ‘on wide-ranging educational and cultural pursuits, designed to strengthen national unity and identity’ (ABS, 1986, p. 2). In a move to de-centralise
planning, the Authority established Bicentennial Councils in each state and territory and by the end of 1985, over 520 Bicentennial Community Committees had been formed throughout the 830 local government areas in Australia. Subsequently, in the same year, the Authority announced the establishment of a grants program package, totalling $17.5 million to help Councils and Committees undertake activities under the Bicentenary theme ‘Living Together’, including the opportunity to ‘re-examine Australia’s history spanning 40,000 years, but with particular emphasis on the past 200 years’ (ABS, 1986, p. 2).

More specifically, Bicentennial activities were to be developed for the purpose of ‘encouraging Australian people to look at themselves critically in a process of national self-assessment’ with the view to focus ‘on the present and the future – on Australia today, its place in the world and options for tomorrow’ (ABS, 1986, p. 2). Ultimately, the Authority’s planning principles and strategies were based on the following objectives:

1. To celebrate the richness of diversity of Australians, their traditions and the freedoms which they enjoy.

2. To encourage all Australians to understand and preserve their heritage, recognise the multicultural nature of modern Australia, and look to the future with confidence.

3. To ensure that all Australians participate in, or have access to, the activities of 1988, so that the Bicentenary will be a truly national program in both character and geographic spread.

4. To develop projects and programs which will provide significant and enduring legacies to present-day Australians and future generations.

5. To project Australia to the world and invite international participation with the aim of strengthening relationships with other nations. (ABS, 1986, pp. 2-3)
In promoting the overarching theme of ‘diversity’ and ‘multiculturalism’, Aboriginal Australia became a footnote with the proud boast that an ‘Encyclopaedia of the Australian People’, produced by the Research School of Social Sciences at the Australian National University, would ‘document the diverse origins and ways of life of Aboriginal Australians, Torres Strait Islanders and the different cultural groups that have settled this country in successive waves of immigration’ (ABS, 1986, p. 4).

In the Bicentennial year, white Australia celebrated what the then Prime Minister Bob Hawke described as ‘our most momentous anniversary – 200 years of European Settlement’. Standfield (2004, p. 5) has argued that the rhetoric of the Bicentennial was heavily biased in the language of multiculturalism - the official population policy - which stressed Australian ethnic diversity. In this regard, Standfield (2004, p. 5) argued that multiculturalism operated not only to explain, but also control, internal diversity, once methods of exclusion at the nation’s borders had been removed. ‘As is apparent in the treatment of Aboriginal people though, white power and domination can be maintained without exclusion from society’ (Standfield (2004, p. 5). Although Indigenous cultures were promoted within the Bicentennial rhetoric as a ‘unique feature’ of the Australian nation in parallel with the prominent theme ‘that Australians are all immigrants’, Standfield (2004, p. 5) argued that such rhetoric also worked to negate Aboriginal claims to sovereignty as the original owners of the land:

The deliberate strategy to link Indigenous, immigrant and white Australians was reductive, shrinking time and power relations to place all on an equal footing which did not accurately reflect Australian society, reducing history to a simple narrative of waves of migration. (Standfield,
Citing Morris (1988, p. 73), Standfield is in agreement that ‘such cultural equivalence threatens to subsume the historical particularities of Aboriginal existence’ (Standfield, 2004, p. 5). Equally importantly, Standfield (2004, p. 6) was of the opinion that the Bicentennial celebrations formed the perfect showcase for the idea of benign whiteness embodied in multiculturalism, providing a chance to display Australian society as a mix of cultures brought together by the goodwill of whites. While this was a dominant representation in Bicentennial events, it became apparent that not all Australian society was comfortable with this dominant construction, with Aboriginal protests on Australia Day and reactions from white Australians to Aboriginal protests. According to Standfield (2004, p. 6) Aboriginal protests were organised to focus on the structural aspects of race power relations which continued to shape Australian society. Thus, such protests highlighted the disadvantage and discrimination that Aboriginal people endured in the face of all the celebration. Although white media reports in the days leading up to the protests built an expectation of violence, the protests that did eventuate on Australia Day were peaceful and in a noticeably idiosyncratic manner, were viewed by white Australians as a metaphor for what was best about white Australia:

There is probably no better illustration of the high degree of freedom Australians enjoy than the fact that today’s official celebrations are there to be enjoyed, ignored or the subject of protest. It is an individual choice…Like all Australians, the Aborigines have the right to free speech and peaceful demonstration, and fair minded whites hope that the protests will focus the nation’s attention on the past sins against the Aborigines and engender a spirit of white and black cooperation…Mass immigration has turned Australia into a multi-racial society that displays a high degree of tolerance to newcomers and those who want to preserve the customs of their homelands. (Editorial: Canberra Times, 26 January 1988, p. 9, cited in Standfield, 2004, p. 6)
For Standfield (2004, p. 6), the editorial outlined the degree of control that white Australians felt about two issues: whether Indigenous people were allowed to protest, that is, the idea that ‘our’ system of freedom allows ‘you’ the choice to protest, and also that immigrants were tolerated to enter the country and then continue to practice their culture:

These were the things that only white Australians could celebrate, as it was (and still is) only white Australians who naturally and automatically embody these values of freedom and tolerance. (Standfield, 2004, p. 6)

6.4 Some thoughts on country policing

In an examination of the state of community policing in Australia in the mid 1980s Bayley (1989, p. 64), a visiting North American academic, asserted that at least three of the four recurring features of community policing (deployment for non-emergency interaction, encouragement of non-emergency servicing and grass roots feedback) as determined from studies in Canada, the United Kingdom, Japan, Singapore and the United States are apparent in every Australian State in smaller country police stations. Bayley (1989, p. 64) suggested that the fourth feature - community based crime prevention – was not evident in country policing because it was apparent to him that crime was comparatively rare in country areas and consequently, people did not need to take special precautions. In any event, Bayley (1989, p. 77) was of the view that, generally, country police officers work so closely with communities that ‘it becomes apparent there is no real separation between enforcement and prevention as there is in cities’. Whereas city police speed in and out of incidents, enforcing the law, country police ‘are guided by their knowledge of the people involved, the
expectations and resources of the community, and an estimation of future consequences’ (Bayley, 1989, p. 77). Importantly, Bayley (1989, p. 77) asserts ‘understandings’ are worked out between country police and sections of the community like publicans, youths, chronic drunks, Aboriginal people and itinerant workers as to what kinds of behaviour will, or will not, be tolerated. Further, that these ‘understandings’ are built up through countless talks, chats, discussions – not by the cold example of summonses and arrests - and it follows that ‘country policing reflects a discriminating adaptation of law to circumstance’ (Bayley, 1989, p. 77).

Bayley’s (1989, p. 52) view that country police are involved in everything, so much so that the dividing line between being a police officer and a private citizen is often blurred, stands in stark contrast to Stafford’s (1986, p. 52) conclusions that country police ‘do not form part of the local core status system and a consequence of their status marginality is that they turn ‘inwards’ for emotional and social support’. Further, a level of frustration often accompanies the position of policeman in a town with a significantly high Aboriginal population where there are repeated confrontations with the ‘too smart’ characters, the drunk and disorderly, the multiple offenders who, it appears have little or no respect for the law or its enforcement officers. The solution is to engage in group solidarity, to simply and swiftly close ranks (Stafford, 1986, p. 52).

Stafford (1986, p. 52) argues that, similar to the notion of an ‘Aboriginal oppositional culture’ proposed by Cowlishaw (1987) and discussed in section 5.5, police ‘group solidarity’, inward focused support and closure of
ranks around ‘their own’, may be indicative of a ‘police oppositional culture’. Ultimately, Bayley’s (1989) contentions are also at odds with what the literature in this study demonstrates concerning the ‘discriminatory’, as opposed to ‘discriminating’, adaptation of law by police to the circumstance of policing Aboriginal people in so-called country locations.

6.5 Racist violence

A little over a year after the commencement of the Royal Commission into Aboriginal Deaths in Custody, the Human Rights and Equal Opportunity Commission (HREOC) established a National Inquiry into Racist Violence (HREOC, 1991). The fundamental purpose of the Inquiry was to examine concerns related to the actions of Australian based extremist groups in their campaign of terror against various ethnic groups and organisations. For this purpose, the Inquiry adopted the following definition of ‘racially motivated violence’:

A specific act of violence, intimidation or harassment carried out against an individual, group or organisation (or their property) on the basis of race, colour, descent, or national origin. (HREOC, 1991, p. 14)

Following a call for submissions to the Inquiry, 236 individuals, organisations and government departments responded with written submissions. To obtain a more comprehensive picture of racist violence, the Inquiry commissioned a number of specialised studies, including Cunneen’s study of police violence against Aboriginal juveniles in detention and what became known as the ‘Redfern Raid’, and also established six regional consultancies in the Pilbara and Geraldton, (WA); Cairns (Qld); Adelaide (SA); Bourke (NSW) and the Northern Territory (HREOC, 1991, pp. 8-13).
In the course of its examination the Inquiry established, unexpectedly, a nationwide pattern of serious complaints of racist violence against Aboriginal people. The overwhelming feature of the evidence by Aboriginal people in relation to racist violence was their complaints concerning police misconduct (Cunneen, 1991b, p. 148). On this point, the Inquiry found that ‘Aboriginal police relations had reached a critical point due to widespread involvement of police in acts of racist violence, intimidation and harassment’ (Cunneen, 1991b, p. 148).

On a general level, an AIC survey of public perceptions of police two years before the HREOC Inquiry determined that, while the majority of respondents in all States and the Northern Territory considered police as ‘honest’ and were satisfied with assistance provided by police, there had been a considerable decline in the public’s respect for police in each jurisdiction over the preceding twenty years (Swanton et al., 1988, p. 1). In a second iteration of the survey, Swanton, Wilson and Walker (1988, p. 6) found that overall, the groups perceived as being most discriminated against by police were the young, convicted persons and Aboriginals.

HREOC (1991) found that while the intensity of allegations of police violence varied from area to area, it was clear from all the evidence presented to the inquiry that the treatment of Aboriginal people by police was an issue of national significance (Cunneen, 1991b, p. 148). For instance, the Bourke consultant’s report indicated that ninety per cent of Aboriginal people in the Bourke region had contact with police and ‘the
contact usually has racist violence overtones’ (Cunneen, 1991b, p.148). In this regard, racist violence by police officers was found to take a number of forms including verbal abuse, physical assault, provocation and harassment (HREOC, 1991, pp. 89-94).

There was also substantial evidence brought before the Inquiry by non-Aboriginal people concerning police conduct towards Aboriginal people, such as other police officers, doctors, nurses and missionaries. For instance, evidence from a serving Queensland police officer with twelve years experience concluded that:

> There is entrenched racism in the police force and there is an element of police officers who are racist...there is consistent and widespread maltreatment of Aboriginal and Islander people by police. (HREOC, 1991, p. 81)

Similar to Goodall’s (1990) examination of the role of the ‘law and order’ lobby in police decision making in Brewarrina, and Cunneen and Robb’s (1987) analysis of the same group in far north-west NSW the same year, HREOC also raised the issue of the relationship between policing and the strident calls for ‘law and order’ in some parts of the country. Consequently, evidence was received by the Inquiry of the pressure put on local police by local business people and politicians for more police and increased police resources to take more punitive measures against Aboriginal people (Cunneen, 1991b, p. 151). On this point, the Inquiry took note of an analysis of the apparent disproportionate number of police stationed in the Aboriginal towns of Bourke, Brewarrina, Walgett and Wilcannia and an associated growth in police numbers over the period 1986-1990.
Table 6.2 is a facsimile of a table produced by the Inquiry to illustrate its contention that Aboriginal towns have significantly greater numbers of police per head of population than the State average.

**NSW Police Authorised Strength**

Table 6.2

<table>
<thead>
<tr>
<th>Town</th>
<th>May 1986</th>
<th>March 1990</th>
<th>Approx. Town population</th>
<th>1990 Ratio police/population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bourke</td>
<td>26</td>
<td>30</td>
<td>3,400</td>
<td>1:113</td>
</tr>
<tr>
<td>Brewarrina</td>
<td>7</td>
<td>11</td>
<td>1,600</td>
<td>1:145</td>
</tr>
<tr>
<td>Walgett</td>
<td>17</td>
<td>26</td>
<td>2,500</td>
<td>1:96</td>
</tr>
<tr>
<td>Wilcannia</td>
<td>6</td>
<td>11</td>
<td>800</td>
<td>1:73</td>
</tr>
<tr>
<td>NSW</td>
<td>10,743</td>
<td>12,427</td>
<td>5,701,500</td>
<td>1:459</td>
</tr>
</tbody>
</table>


For comparative purposes with the above Table, the Inquiry reproduced the ‘Eric St Johnston ratio police to population’ formula recommended in the 1989 Fitzgerald Inquiry into Policing in Queensland, set out below as Table 6.3.

**Eric St Johnston Ratio Police to Population**

Table 6.3

<table>
<thead>
<tr>
<th>Population Size</th>
<th>Ratio Police/Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population under 5,000</td>
<td>1:1000</td>
</tr>
<tr>
<td>From 5,000 to 20,000</td>
<td>1:530</td>
</tr>
<tr>
<td>Over 20,000</td>
<td>1:350</td>
</tr>
</tbody>
</table>


Applying this formula to the towns shown in Table 6.2, the Inquiry commented that Wilcannia should have one to two police officers instead of
eleven, Walgett two to three officers instead of twenty-six and Bourke would have three to four officers instead of thirty.

In terms of analysing the evidence brought before the inquiry, Cunneen (1991b, p. 149) contended a number of factors seemed important. They included the level of surveillance and intervention into Aboriginal social and cultural life and the related issues of ‘overpolicing’ and the use of para-military police; treatment in police custody and the forms of racist violence; and the specific nature of violence against Aboriginal women and young people (Cunneen, 1991b, p. 149).

Evidence in relation to surveillance of Aboriginal communities included the use of spotlighting, constant patrols, ‘stop and search’ powers, the use of police dogs, entry into homes without warrant, and harassment (HREOC, 1991, pp. 82-84). Such policing methods were seen to be highly intrusive and generated a constant sense of tension. Considerable evidence was also brought before the Inquiry in relation to police methods of dealing with Aboriginal people in public places. Again the evidence came from around the nation (HREOC, 1991, pp. 85-88).

Police intervention into Aboriginal organised cultural and social events was also the subject of evidence in relation to provocation, harassment and the use of force. Evidence came from around Australia and from both Aboriginal and non-Aboriginal people who were present at specific incidents where the use of para-military police squads was argued by Cunneen (1991b, p. 149) as ‘closely related to overpolicing’. Subsequently,
the Inquiry determined that ‘overpolicing’ referred to:

both the degree of police intervention and the nature of that intervention. The degree of intervention can be demonstrated through the number of police stationed in areas with large Aboriginal communities and through the type of specialist police (such as the Tactical Response Group) used to control Aboriginal communities.

The nature of interventions occurs through particular policing practices, and may refer to a whole range of activities including: the discriminatory use of particular legislation (e.g., the use of public order offences); regular foot or vehicle patrols which create an atmosphere of surveillance and tension; spotlighting by police of houses in Aboriginal settlements; discriminatory policing of particular activities such as stationing of police in front of hotels patronised by Aboriginal people. (HREOC, 1991, pp. 90-91)

Cunneen (1991b, p. 149) argued further that the link between overpolicing and racist violence revolved around the issue of structural racism:

Over policing draws its legitimacy from the conditions of colonialism and the history of the role of the police as an instrument in the maintenance of colonial relations’. (Cunneen, 1991b, p. 149)

In this regard, Cunneen (1991b, p. 149) proposed that it was necessary to make clear the role of policing at a structural level to explain racist violence adequately – ‘to push beyond the view that sees racist violence as simply the result of individual racist police officers’. Ultimately, Cunneen (1991b, p. 151) concluded:

the picture painted by the Racist Violence Report is not a happy one. It is not one that sits well with the liberal ideology which underpins the dominant view of how the world operates or, in particular, how the criminal justice system operates. The types of incidents described in the report are the ones we assume happen elsewhere; in places outside and removed from our own, supposedly more noble, traditions. (Cunneen, 1991b, p. 151)
6.6 1991 Census data

Table 6.4 below shows there was an overall increase of sixteen per cent in the Indigenous population from the 1986 census with the most significant increases occurring in the ACT, Tasmania and Victoria. In each instance ABS analysis of census data gives no cogent explanation for the increases other than a cursory notation regarding ‘natural growth’ (ABS, 2004). For the fifth census in a row, NSW recorded the second largest Indigenous population after Queensland. Reference to Tables 5.1, 4.1, 3.3, and 3.4 shows that the gap in total population numbers between Queensland and NSW has gradually decreased to the point where the NSW Indigenous population is now almost level with Queensland.

Indigenous Census Count – 1991

Table 6.4

<table>
<thead>
<tr>
<th></th>
<th>Number (no.) 1986</th>
<th>Number (no.) 1991</th>
<th>Change in % from 1986</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>58,999</td>
<td>69,999</td>
<td>18.6</td>
</tr>
<tr>
<td>Victoria</td>
<td>12,600</td>
<td>16,729</td>
<td>32.8</td>
</tr>
<tr>
<td>Queensland</td>
<td>61,250</td>
<td>70,102</td>
<td>14.5</td>
</tr>
<tr>
<td>South Australia</td>
<td>14,285</td>
<td>16,223</td>
<td>13.6</td>
</tr>
<tr>
<td>Western Australia</td>
<td>37,786</td>
<td>41,769</td>
<td>10.5</td>
</tr>
<tr>
<td>Tasmania</td>
<td>6,716</td>
<td>8,882</td>
<td>32.3</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>34,738</td>
<td>39,893</td>
<td>14.8</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>1,059</td>
<td>1,592</td>
<td>50.3</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>227,593</strong></td>
<td><strong>265,371</strong></td>
<td><strong>16.6</strong></td>
</tr>
</tbody>
</table>

(Source: Adapted from ABS, 2004, pp. 1-2).

6.7 The Redfern Raid

In the course of the HREOC (1991) Inquiry in Racist Violence, the Commission engaged Chris Cunneen, then Associate Professor in
Criminology, Sydney University Law School, to conduct research on its behalf regarding Aboriginal-Police relations in Redfern, NSW, with special reference to what was termed the ‘Redfern Raid’ of 8 February 1990. Having regard to what follows, it is interesting to note that the ‘Redfern Raid’ occurred five months before the renaming of the NSW Police Force and repeal of the former Police Regulation Act 1899, and the establishment of the NSW Police Service whose primary objective was stated as being ‘to have the police and community working together to establish a safer environment by reducing violence, crime and fear’ (NSW Government, 1990, p. 1).

Briefly, the ‘Redfern raid’ occurred in the early hours of the morning of the 8th of February 1990 and involved 135 police officers (70 to conduct the raid and 65 to act as ‘back-up’ and also seal off the area) from the Tactical Response Group, Anti-Theft Squad, Rescue Police and Redfern Police. The objective of the raid was the execution of at least eight search warrants on eight residences in an area known locally as The Block. The Block is comprised of Everleigh, Caroline, Vine and Hugo Streets Redfern where, apart from those in a few houses, the residents are Aboriginal (Cunneen, 1990, p. 13).

From evidence provided to the Inquiry, police in riot gear and carrying shotguns, broke down the doors to the eight residences, forced the sleeping occupants onto the floor at gunpoint and kept them there while the searches were conducted. The majority of the occupants in the eight residences searched were women, children and elderly. Of the eight search warrants
executed, Cunneen (1990, p. 14) was able to obtain the details of the contents of seven. Subsequently, he established that all were issued at Waverley Local Court by a Justice of the Peace and the applicant in each case was a sergeant from the Sydney District Anti-Theft Squad. Five of the seven warrants named a suspect as well as the address on The Block where they would be located and the property expected to be recovered. The grounds for the issue of the warrants ranged from car theft, break, enter and steal and assault, to armed robbery, possession of firearms and supply of illicit drugs (Cunneen, 1990, p. 16).

In the process of executing the search warrants, police arrested eight persons that resulted in three persons being charged with ‘goods in custody’, two persons being detained for unpaid court imposed fines, a juvenile being charged with possession of two ‘bongs’, and two persons being charged with seven and five year old ‘breach of bail’ and ‘fail to appear’ warrants. None of the eight persons arrested during the raid were the suspects named in any of the warrants. In addition, in most instances, the property specified in the warrants was not located. In one instance, Cunneen (1990, p. 17) established from the occupier’s copy of the search warrant that it originally referred to the house next door. Police had apparently altered the number of the house on the warrant with a ballpoint pen to the number of the house that was forcibly entered and searched.

About midday the same day, approximately 100 Aboriginal people attended a community meeting at Mundine’s Gym on the corner of Everleigh and Vine Streets. Many of the occupants of the houses that police had entered
and searched earlier that morning were present at the meeting. The meeting issued a press release expressing disgust at the police tactics during the raid and highlighted the fact that as a result, no person was charged with a serious offence. In addition, all but one of those persons detained had been released on bail by the time of the meeting (one person chose to ‘cut out’ an unpaid fine). Finally, the meeting noted the similarity in police tactics between the Redfern raid and an earlier raid in April 1989 that had resulted in the shooting death of an Aboriginal man, David Gundy (Cunneen, 1990, p. 21).

Apart from urging the Royal Commission into Aboriginal Deaths in Custody to investigate the raid as part of its investigation into the death of David Gundy, the meeting also called for a review of the system of issuing search warrants. In this regard, the meeting proclaimed that search warrants should be issued by a District Court or Supreme Court Judge, rather than a Justice of the Peace of a local court (Cunneen, 1990, p. 21).

The day after the raid, the police commander who authorised the raid publicly rejected the claim that the raid was a failure (The Sydney Morning Herald, 9/2/90 p. 2, cited in Cunneen, 1990, p. 21). Further, he claimed police conducted the raid in response to requests from the Redfern community over concerns about the growing incidence of crime and heroin abuse during the previous three months (Cunneen, 1990, p. 21). From available evidence however, it was apparent that none of the more serious items mentioned in the warrants (firearms, proceeds from robberies) were located in the raid, nor was any heroin. The only drug related charge arose
out of a juvenile’s possession of an implement for the use of drugs (two ‘bongs’). The commander further commented that:

Our normal surveillance activities can’t operate in a place like the black community. You stand out like you know what. Where do you survey the activity of people when they are all the one breed? So you have then got to look at alternative methods and that was what today was all about. (Cunneen, 1990, p. 22)

What the commander argued was that because the community is Aboriginal, police cannot perform normal surveillance activities, therefore ‘alternative methods’ are justified. The justification for a departure from normal police activity arises in the particular context of the community being categorised racially as ‘one breed’. As such, it can be argued the police raid was fundamentally racist (Cunneen, 1990, p. 22).

In support of a contention that the Redfern raid was merely one more example of the racist manner in which the Redfern Aboriginal community was policed, the Report provided an historical background to Aboriginal/police relations in that location over the previous thirty years. From the late 1960s and early 1970s, Aboriginal people had frequently claimed they were regularly arrested without cause and also subject to a police imposed curfew (Lyons, 1980, p.136, cited in Cunneen, 1990, p. 1). The Report also noted that the lengthy history of Aboriginal complaints about discriminatory policing methods in Redfern led to a small group of non-Aboriginal legal professionals, university students, Aboriginal activists and community leaders establishing the first Aboriginal Legal Service (ALS) in Australia at Redfern in 1970 (Wootten, 1974, p. 60).
While such complaints arose out of the activities of police stationed at Redfern, ongoing concern was also expressed about the activities of police from outside the Redfern region. Typically, such complaints centred on the deployment of police from 21 Division (also known as the ‘mobile’, ‘special’ or ‘riot’ squad) and its alleged violence against Aboriginal adults and youth (Identity, August 1973, p.37).

Support for Aboriginal claims of discriminatory police practices in this period was provided by the NSW Bureau of Crime Statistics and Research (1973, pp. 41-45, cited in Cunneen, 1990, p. 2). In its publication of court statistics from the Central Court of Petty Sessions (which covers the Redfern area) Aboriginal people were over-represented by a factor of 10.7 compared with their population in the inner city. Sixty-three percent of the offences for which Aboriginal people were arrested and convicted were for ‘unseemly words’ and ‘vagrancy’. This figure was double the proportion for the total inner city population (Cunneen, 1990, p. 2).

As a result of a series of meetings in 1973 between non-Aboriginal representatives of the ALS and Police from Redfern and 21 Division about the ongoing conflict in Redfern, an agreement was reached for the establishment of an Aboriginal-police Liaison Committee. Soon after, arrests of Aboriginal people dropped by seventy-five per cent (The Sydney Morning Herald, 7 September, 1974, p.13 cited in Cunneen, 1990, p.2). The Anti-Discrimination Board (1982, p. 138)) attributed the drop in arrests to an ‘alteration in police practices rather than any change in the behaviour of Aborigines in Redfern’. The ALS noted later that as soon as Aboriginal
people assumed full control of the ALS in 1974, Aboriginal-police relations deteriorated (Ruddock Report, 1980, p. 136, cited in Cunneen, 1990, p. 2). By mid-1975 the liaison committee had ceased to operate and complaints from the ALS about police tactics in Redfern soon re-emerged. Parallel with the re-emergence of complaints by the ALS, Aboriginal staff were continually harassed by police and in the three months prior to May 1975, over half the Service’s staff had been arrested (The Sydney Morning Herald, 8 May 1975, p. 10, cited in Cunneen, 1990, p. 3).

Throughout the 1980s, the ALS continued to complain about policing practices in Redfern. Confining itself to what it termed ‘large scale police incursions’, the Report examined nine major incidents during the period May 1981 to January 1990.

**Major Police Incursions into Redfern 1981 – 1990**

Table 6.5

<table>
<thead>
<tr>
<th>Year</th>
<th>Police</th>
<th>Arrest</th>
<th>Official Complaint</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 1981</td>
<td>20 vehicles</td>
<td>5</td>
<td>U/K</td>
</tr>
<tr>
<td>December 1981</td>
<td>Rescue Squad</td>
<td>N/A</td>
<td>U/K</td>
</tr>
<tr>
<td>January 1982</td>
<td>Special Crime Squad</td>
<td>13</td>
<td>Yes</td>
</tr>
<tr>
<td>November 1983</td>
<td>80 Police</td>
<td>34</td>
<td>Yes</td>
</tr>
<tr>
<td>December 1987</td>
<td>TRG</td>
<td>N/A</td>
<td>U/K</td>
</tr>
<tr>
<td>August 1988</td>
<td>TRG</td>
<td>N/A</td>
<td>U/K</td>
</tr>
<tr>
<td>July 1989</td>
<td>6 (Crime Squad)</td>
<td>0</td>
<td>Yes</td>
</tr>
<tr>
<td>October 1989</td>
<td>10 (Redfern &amp; others)</td>
<td>3</td>
<td>Yes</td>
</tr>
<tr>
<td>January 1990</td>
<td>Operation Beatham</td>
<td>14</td>
<td>Yes</td>
</tr>
<tr>
<td>February 1990</td>
<td>135 (TRG &amp; others)</td>
<td>8</td>
<td>Yes</td>
</tr>
</tbody>
</table>

N/A = Not available
U/K = Unknown

(Source: Cunneen, 1990, p. 5).
Table 6.5 above sets out the major ‘police incursions’ from the Report. All incidents examined were either the subject of complaint by the ALS to the Ombudsman’s Office or subject to widespread media attention (Cunneen, 1990). From his analysis of available evidence surrounding police interventions in Redfern, Cunneen (1990, p. 22) concluded that the Redfern Aboriginal community has a lengthy history of being over policed and that a common element throughout is the use of excessive force.

While it is clear the Aboriginal community in Redfern has attempted to highlight the differential policing of their community for over twenty years through public complaints mechanisms and the media, the community remains the object and focus of police tactics that would not be tolerated elsewhere. Ultimately, as far as the Redfern Raid was concerned, Cunneen (1990, p. 35) proposed it was ‘open to the National Inquiry into Racist Violence to find that the raid constituted an act of racist violence’, a view with which the Inquiry concurred (HREOC, 1991, p. 103).

6.8 Racist Violence - Aboriginal juveniles

In further research commissioned by the National Inquiry into Racist Violence, Cunneen (1991a) conducted an examination into Aboriginal community concerns regarding the relationship between Aboriginal young people and the juvenile justice system. At the time, Aboriginal youth comprised around twenty-five per cent of those held in NSW detention centres although Aboriginal people comprised around 1.9% of the general youth population (Luke & Cunneen, 1996, p. 95). In order to evaluate the
extent to which Aboriginal juveniles are placed in custody and following that, their treatment while in custody, two forms of custody were nominated: police custody, and the use of juvenile detention centres. However, it is only the former that is considered relevant to the objectives of this study.

In total, 171 Aboriginal juveniles in detention centres in New South Wales, Queensland and Western Australia were interviewed in relation to one aspect of the relationship between Aboriginal juveniles and the police, namely, the question of allegations of police violence (HREOC, 1991, p. 95). Through semi-structured interviews in a small group environment, Cunneen (1991a) established that overall, eighty-five per cent of juveniles interviewed reported being hit, kicked or slapped by police. The breakdown for the states concerning this response was New South Wales eighty-two per cent; Queensland ninety per cent; and Western Australia ninety-four per cent (HREOC, 1991, p. 96). Sixty-three per cent of the juveniles interviewed reported being hit with objects by police. The range of objects used by police in their ill-treatment of juveniles was reported variously as being police batons (49%), telephone books (23%), torches (14%) and other objects such as bats, golf clubs and brooms (Cunneen, 1991a, p. 96). More often than not, juveniles reported being hit after arrest, usually in police stations or police cells. Importantly, eighty-one per cent of those interviewed said they had also been subjected to racist verbal abuse by police officers (Cunneen, 1991a, p. 209).

A particularly disturbing aspect surrounding the circumstance of Aboriginal juveniles’ over-representation in the criminal justice system and highlighted
through Cunneen’s (1991a) research is the impact of police violence or threats of violence to elicit admissions of guilt. In some cases, the juveniles interviewed said they had committed the offence for which they were being questioned. However, they only made admissions after the use of violence. Other juveniles stated that they had not committed any or all the offences they were being questioned about, but had made admissions after the use of violence. Still others stated they were questioned, subjected to violence and then released after no admissions were made (Cunneen, 1991a, p. 209).

Drawing on the extant literature, Cunneen (1991a, p. 209) offered the view that most explanations of police violence argue that violence occurs as a result of police seeking to establish their authority when it is under challenge. Such explanations derive primarily from American sociological interpretations built loosely around interactionist perspectives and suggest that police develop and act upon ‘sets of expectations’ in relation to perceived ‘trouble’. The expectations of ‘trouble’ are generally formulated around the concept of the ‘symbolic assailant’ wherein violence becomes associated with particular types of socially defined individuals whom the police need to recognise in advance (Cunneen, 19991a, pp. 207-209). Alternatively, Australian studies that have dealt with police violence against juveniles conclude that the police response to young people is determined by the young person’s perceived cooperation with police (Cunneen, 1991a, p. 209).

From this research, Cunneen (1991a, p. 212) was able to suggest there are particular structural reasons for police violence. The reasons related both to
the policing of people in public places and to the events which occurred when people were in custody. Both, he argued, related to policing in general and the policing of Aboriginal people specifically. On the latter, Cunneen (1991a, p. 212) concluded that the policing of Aboriginal people in public places arises from wider historical, economic and cultural factors. Historically, police have been called upon to enforce the dispossession, relocation and maintenance of control over Aboriginal people. More particularly as it relates to juveniles, police were instrumental in implementing the policy of removing Aboriginal children from their families, often through the use of force and violence. This particular policy has been described elsewhere as falling within the United Nations definition of genocide (Coe, 1982, p. 14; Bird, 1987, p. 57; Wootten, 1989; HREOC, 1997, p. 266).

While Cunneen (1991a, p. 213) admits there is no evidence in the current research to suggest allegations of police violence are either more or less common among Aboriginal youth than among non-Aboriginal youth, there are compelling reasons for considering the use of violence against Aboriginal youth as part of an institutionalised form of racist violence. Furthermore, if violence has had an historical acceptance in policing generally, how much more so is this the case with policing Aboriginal people? Arguably, the dispossession of Aboriginal people, to the extent that it was enforced and secured by police, was built upon violence. Similarly, the ongoing maintenance of ‘order’ often explicitly refers to more draconian policing of Aboriginal people. Thus by definition ‘order maintenance’
apparently demands and justifies surveillance and intervention (Cunneen, 1991a, p. 213).

Cunneen (1991a, p. 214) is quick to point out that he is not suggesting that individual police officers who subject Aboriginal youth to violence are necessarily individual racists – they may or may not subject other youth to the same treatment.

Rather, it is to argue that the wider police processes which bring such a massively over-representative number of Aboriginal youth into the juvenile justice system has the effect of subjecting those youth to violent treatment: the violence which is part of the routine practices of policing (Cunneen, 1991a, p. 214)

Subsequently, it can be argued such over-representation has racist outcomes. In addition, there is also the vocabulary of racism which attends the violence, and transforms what may be a simple violent act into an action which constitutes racist violence. In other words, the processes of criminalisation entail subjecting individuals to varying degrees of violence and those same processes selectively discriminate against Aboriginal youth. Thus, while there was sufficient evidence to indicate that the treatment of Aboriginal youth by police is ‘of national concern’ (HREOC, 1991, p. 96), there are structural reasons for regarding police violence against Aboriginal youth as being racist (Cunneen, 1991a, p. 214).

In research conducted in South Australia some years before the National Inquiry into Racist Violence, Gale, Bailey-Harris & Wundersitz (1990) found that forty-three per cent of young Aborigines who were brought into the South Australian criminal justice system came by way of an arrest. In contrast, only nineteen per cent of non-Aboriginal young people were
apprehended by means of an arrest, whereas eighty per cent were reported
(Gale et al., p. 3). Once in the system, almost three quarters (71.3%) of
Aboriginal youth were referred to the Children’s Court rather than being
diverted to Children’s Aid Panels. The corresponding figure for young non-
Aboriginal people was thirty-seven per cent. Finally, at the point of
disposition, the Children’s Court sentenced some ten per cent of young
Aborigines to detention compared with only four per cent of other youth
(Gale et al., 1990, p. 3).

Although reference to Gale, Bailey-Harris and Wundersitz’s (1990) research
is fleeting here, it is considered valuable to this study for a number of
reasons. First and foremost, it acknowledged that the motivation for the
study arose out of requests from Aboriginal community leaders to find out
‘why our kids are always in trouble’ (Gale et al., 1990, preface). Second, it
constituted the first empirical research in Australia to examine the degree of
involvement of Aboriginal youth in the juvenile justice system. As a
consequence, it introduced the notion that when young Aborigines are
disadvantaged by their contact with the law at this early stage, serious
repercussions are felt well into their adult lives (Gale, et al., 1990, p. 2).
Third, it reaffirmed the fact that obtaining ‘hard empirical evidence’ to
document the extent of Aboriginal over-representation had been made
difficult for researchers due to ‘Aboriginality’ not being recorded in most
official crime records throughout the country (Gale et al., 1990, p.10).
Although it was argued that South Australia was used as a case study
because it was the only State where detailed long term statistics were
available, Gale et al., (1990, p. 123) are adamant that the ‘extremely
disadvantaged’ position described for Aboriginal youth in that State ‘is in no way atypical; in fact from what comparable information was available, it was likely that the position in many other States may be far worse’. Fourth, and as a consequence of the third reason, it argued little empirical research had been conducted on the specific question of racial bias in the exercise of police discretion. Finally, it was unequivocal in its conclusion that:

Aboriginal youth is over-represented at every level of the juvenile justice system throughout Australia, from the point of apprehension, through the various pre-trial processes to the ultimate stage of adjudication and disposition. (Gale et al., 1990, p. 3)

6.9 Conclusion

This chapter continued the development of a chronological account of criminological explanations regarding the circumstance of Aboriginal over-representation in the criminal justice system. Apart from an introduction to the major findings of the Royal Commission into Aboriginal Deaths in Custody, the chapter examined research from the Human Rights and Equal Opportunity Commission’s Inquiry into Racist Violence and follow-on commissioned studies of Cunneen (1990; 1991a, 1991b) into the Redfern Raid of 8 February 1990 and racist violence towards Aboriginal juveniles. As well, the chapter provided a cursory overview of the research conducted by Gale, Bailey-Harris and Wundersitz (1990) into the over-representation of Aboriginal juveniles in the South Australian criminal justice system.

In a brief examination of the establishment of the Royal Commission into Aboriginal Deaths in Custody it was found that, initially, the number of Aboriginal deaths in custody prior to 1988 was thought to be forty-four.
Following an amendment to the Commission’s original Terms of Reference of October 1987 to examine the underlying issues associated with Aboriginal deaths in custody, the total number of deaths rose to 124 and the timeframe for reporting was extended from 31 December 1988 to 30 June 1989 but owing to the comprehensive nature of its inquiries into underlying issues, the Commission did not complete its Report until May 1991.

After discounting twenty-five deaths that fell outside the Terms of Reference for the Inquiry, the Commission eventually reported on a total of ninety-nine Aboriginal deaths in custody, producing evidence to support the fact that thirty per cent of the deaths were caused by suicide, twenty-five per cent by external trauma and forty-five per cent by substance abuse or natural causes. Many, if not all of the ninety-nine deaths were found to be avoidable. In addition, the Inquiry found that Aboriginal people were twenty-seven times more likely than non-Aboriginal people to be arrested and placed in custody. On this point, the Commission concluded that the most significant factor contributing to the circumstance of over-representation was Aboriginal people’s disadvantaged and unequal position within the wider society: economically, culturally and socially. Ultimately, the Commission found that no person had deliberately caused a death or deliberately inflicted harm, although it was clear there were a number of instances where there was little understanding of the duty of care owed by custodial authorities.

In a brief examination of the other significant national event of 1988 - the Bicentenary of white settlement – it was suggested that the rhetoric of the
Bicentennial was heavily biased towards the language of multiculturalism, which stressed Australian ethnic diversity, and which also had the effect of consigning Aboriginal Australia to a footnote within the celebrations. Equally importantly, it was argued that the Bicentennial celebrations formed the perfect showcase for the idea of benign whiteness, providing a chance to display Australian society as a mix of cultures brought together by the goodwill of whites who, unlike Aborigines and immigrants, naturally and automatically embody the values of freedom and tolerance.

From the Human Rights and Equal Opportunity Commission’s (1991) Inquiry into racist violence, it was found that the ill-treatment of Aboriginal people by police was an issue of national significance, was racist in many instances, and that police racist violence took a number of forms, including verbal abuse, physical assault, provocation and harassment.

Of particular importance to this study was the Inquiry’s articulation of a concept of ‘overpolicing’. In this regard, the Inquiry proposed that ‘overpolicing’ referred to both the degree of police intervention and the nature of that intervention. The Inquiry argued that the degree of intervention can be demonstrated through the number of police stationed in areas with large Aboriginal communities and through the type of specialist police used to control Aboriginal communities. The nature of these interventions occurs through particular policing practices and may refer to a whole range of discriminatory activities, such as spotlighting, the use of particular legislation or incessant surveillance. Ultimately, and conclusively, the Inquiry concluded that ‘overpolicing’ and racist violence revolved
around the issue of structural racism.

Similarly, from Cunneen’s investigation of the Redfern Raid on behalf of the National Inquiry into Racist Violence, the Inquiry found the raid constituted an act of racist violence. Again, from Cunneen’s investigation into racist violence against Aboriginal juveniles as part of the same Inquiry, it was found that overall, eighty-five per cent of juveniles interviewed reported being hit, kicked or slapped by police. Of these sixty-three per cent reported being hit with objects by police. The range of objects used by police in their ill-treatment of juveniles was reported variously as being police batons, telephone books, torches and other objects, such as bats, golf clubs and brooms. A particularly disturbing aspect surrounding the circumstance of Aboriginal juveniles’ over-representation in the criminal justice system and highlighted through Cunneen’s investigation was the impact of police violence or threats of violence to elicit admissions of guilt.

Although Cunneen admits there is no evidence in the current research to suggest allegations of police violence are either more or less common among Aboriginal youth than among non-Aboriginal youth, there are compelling reasons for considering the use of violence against Aboriginal youth as part of an institutionalised form of racist violence, a view accepted by the Racist Violence Inquiry.

Finally, the chapter briefly considered the 1990 study by Gale, Bailey-Harris and Wundersitz (1990) of the degree of involvement of Aboriginal juveniles in the South Australian criminal justice system. While the study noted specifically the difficulty of obtaining hard, empirical evidence to
document the extent of Aboriginal over-representation due to ‘Aboriginality’ not being recorded in most jurisdictions throughout the country, the unequivocal conclusion reached was that Aboriginal youth is over-represented at every level of the juvenile justice system throughout Australia, from the point of apprehension, through the various pre-trial processes to the ultimate stage of adjudication and disposition.

In summary, this chapter highlighted a number of examples of the way in which Australian criminological literature continued to discuss ‘overpolicing’ as a significant contributing factor in explanations concerning Aboriginal people’s over-representation in arrest and custody rates. While at attempt was made by the HREOC Inquiry into Racist Violence to better articulate the constituent elements of ‘overpolicing’, no clear methodology has been proposed which suggests how the nominated indicators of ‘overpolicing’ might be clarified or calculated.
7

THE MORE THINGS CHANGE....

The more things change, the more they stay the same.

A proverb attributed to French novelist Alphonse Karr (1808-90).

7.1 Introduction

This chapter examines the final period in an historical analysis where key socio-political and legal moments are identified and discussed in order to contribute to an understanding of the relationship between policing and Aboriginal people’s over-representation in police arrest and custody rates. The period examined is 1992 to 1996 which is categorised in this thesis as the Post-Royal Commission period. It commences with an account from the Australian Section of the International Commission of Jurists’ (ICJ) visit to Bourke, Brewarrina and Walgett in north-west NSW to report on the administration of criminal justice, particularly as it related to Aboriginal people. Following that, the chapter examines Aboriginal commentary arising from a seminar on Aboriginal people and the criminal justice system, convened by the Institute of Criminology, Sydney. There, Aboriginal Magistrate Pat O’Shane and Aboriginal lawyer Kevin Kitchener provide critical commentary about the administration of the criminal law, particularly as it relates to the continuing circumstance of Aboriginal over-representation in police arrest and custody rates. Next, the chapter examines commentary by Eades (1992, 1994, 2004) on the disposition of Aboriginal English in the criminal justice system, followed by Pirie and
Cornack’s (1992) examination of the nature of obscene language laws. Next, the chapter explores the views of the former Commissioner to the Royal Commission into Aboriginal Deaths in Custody and inaugural chair of the NSW Aboriginal Legal Service, Hal Wootten (1993), who provided a critical appraisal of police/Aboriginal relations in NSW. Moving overseas to Canada, the chapter explores the conduct of several Canadian inquiries into the policing of Canadian Aboriginal peoples and draws comparisons between the policing of Canadian Aboriginal and Australian Aboriginal people. Finally, the chapter provides an evaluation of census data from previous chapters and the 1996 census data set out in Table 7.1, to consider whether any correlation exists between Aboriginal population growth or decline and increases or decreases in Aboriginal over-representation rates.

7.2 Post Royal Commission

7.2.1 On the outside looking in

During November 1990, five members of the Australian Section of the ICJ visited Bourke, Brewarrina and Walgett in north-west NSW to report on the administration of criminal justice, with particular reference to Aboriginal people (Cunneen, 1992c, p. 186). Referring to Cunneen and Robb’s (1987) previous investigation of the north-west region of NSW, the ICJ reported that the issues previously identified in that research - such as the over-representation of Aboriginal people in the criminal justice system, the high number of police stationed in particular towns and the use of certain public order offences - were still factors which manifested themselves in the
region. However, a major issue that emerged from its own inquiries was the level of prosecutions for street offences under the *Summary Offences Act 1988*. In this regard, evidence in the ICJ’s report showed clearly that considerable police resources and court time were involved in the prosecution of Aboriginal people for relatively minor offences (Cunneen, 1992c, p. 186).

Referring to the charge list for Walgett Local Court for the 6th of November that year, the ICJ report noted that of the total of 114 charge matters that day in which an Aboriginal person was the defendant, fifty percent could be reasonably categorised as ‘street offences’. Overall, one third of the total charges related to ‘offensive conduct’ or ‘offensive language’ under Section 4 of the *Summary Offences Act*, with a similar breakdown in charge patterns being identified in Brewarrina and Bourke (Cunneen, 1992c, p. 186). The ICJ report noted it was evident that ‘the use of such street offences considerably affected the administration of the justice system’ and Aboriginal perspectives on the way the system operated (Cunneen, 1992c, p. 186). For its part, the ICJ was supportive of calls for the repeal of the ‘offensive language’ provision and imprisonment as a punishment, and referred to the second reading speech on the introduction of the *Summary Offences Act* by then Attorney-General, Mr John Dowd, who stated:

> Police must be extremely careful……particularly in some of the large country towns where a significant number of Aboriginals are arrested. All I ask is that arrest be the last resort. That is the structure of this measure (Cunneen, 1992, p. 186).

There was considerable evidence presented in the report that demonstrated how different the reality of policing public order was from the sentiments
expressed in the second reading speech. Of particular importance was the NSW BOCSAR (1974) study which showed that when imprisonment was a sentencing option for offensive behaviour under the 1970 Summary Offences Act, defendants in Aboriginal towns were six to seven times more likely to be sentenced to imprisonment than their counterparts throughout the rest of NSW (Cunneen, 1992c, p. 187). Reference was also made again to Cunneen and Rob’s (1987) study, which indicated at that time that eighty-nine per cent of persons charged with offensive behaviour in Bourke, Brewarrina and Walgett, were Aboriginal (Cunneen, 1992c, p. 187). By reference to the 1974 BOCSAR study and Cunneen and Robb’s (1987) study, together with Cunneen’s (1992c) later study, the ICJ was able to highlight the fact that Aboriginal over-representation for public order offences in Aboriginal towns had remained inordinately high throughout the eighteen year period.

The ICJ report examined a number of issues related to policing and noted that ‘there is a heavy police presence in each of the towns of Bourke, Brewarrina and Walgett’ and that there was ‘a high proportion of inexperienced police officers’ stationed at the three locations. The view reached by the ICJ was that ‘inexperience may contribute to a lack of tolerance by police and a greater risk of confrontation’ (Cunneen, 1992c, p. 187). Further, that it was ‘inevitable practice’ for police to arrest and charge persons for summary offences, rather than proceed by way of summons, commenting that it was apparent that summonses were used ‘infrequently by police in summary prosecutions in north west NSW’ and that this
‘inflexible approach is contrary to law and practice’ (Cunneen, 1992c, p. 187).

Continuing this argument, Cunneen (1992c, p. 187) highlighted the fact that superior courts in NSW had previously stipulated that summary prosecutions should generally be commenced by summons, unless there was a real concern that a person would not appear to answer the summons. As the Aboriginal communities under discussion were ‘relatively small’ and many of the alleged offenders were known to police, Cunneen (1992c, p. 187) was adamant that ‘such a concern seemed unwarranted’.

Finally, the ICJ report also commented on the practice of charging a person with multiple offences arising from a single incident. An example cited was the use of ‘offensive behaviour’ charges and (depending on the number of police involved, possibly multiple) charges of ‘assault police’, ‘resist arrest’ and ‘hinder police’ charges. The report suggested that the number of offences charged ‘far outweighs the true criminality arising from the incident’ and that there was ‘little legal or practical justification for overcharging and over-prosecuting in this way’ (Cunneen, 1992c, p. 188).

The ICJ concluded that while the level of concern about law and order was ‘disproportionate to the level of serious crime in the communities in question’, there was also minimal concern about the underlying causes of the perceived ‘law and order problem’, noting that while many non-Aboriginal people disclaimed any desire for harsher punishment, the suggested solutions from the white community ‘generally entailed greater
powers for the authorities over the lives of Aboriginal persons’ (Cunneen, 1992c, p. 188). Overall, the ICJ report concluded with a depressing picture of the relationship between Aboriginal people and the white Australian criminal justice system stating:

The criminal justice system is of doubtful relevance to the Aboriginal community……what was observed was a series of small communities which were heavily policed and in which street offences were the subject of arrest and prosecution even in circumstances where no useful purpose could be served by intervention of the criminal process. (Cunneen, 1992c, p. 190)

7.2.2 Aborigines and the Law: Aboriginal perspectives

A year after the publication of the Final Report of the Royal Commission into Aboriginal Deaths in Custody, Cunneen (1992a) published the proceedings from a seminar on Aboriginal people and the criminal justice system, under the auspices of the University of Sydney’s Institute of Criminology Monograph series. In total, eleven authors contributed papers to the publication which was supplemented by poetry and photographs. In relation to the supplementary material, Cunneen (1992a, p.1) argued it was important to recognise the fact ‘that Aboriginal perspectives on criminal justice transcend the genre of academic papers’. In this regard, Cunneen (1992a, p. 1) draws attention to the format of the Monograph where text is interspersed with photography and works of poetry, as ‘the palpable emotive power; the sense of anger, injustice, sorrow and frustration that emerges from these works, speak for themselves’ and constitute ‘an equally valid perspective on Aboriginal people’s experience of criminal justice’ (Cunneen, 1992a, p. 1). Although in agreement with Cunneen on this point, the supplementary works, together with the remaining papers that comment
on particular aspects of courts and corrections administration, are not relevant to this study and as a result, only O'Shane’s (1992) and Kitchener’s (1992) commentaries about policing will be examined in this section. Despite the fact that the seminar also provided Cunneen (1992a, p. 76) with the opportunity to expound upon the usefulness of a concept of ‘overpolicing’, it is considered appropriate to defer examination of his commentary on that issue until the usefulness of ‘overpolicing’ is specifically discussed at section 8.5 in Chapter 8.

By way of introduction, O'Shane (1992, p. 3) began her presentation by restating public comments she made fifteen years previously that ‘The Law’ is ‘inherently unjust’ and that Aborigines were victims of ‘The Law’. In revisiting the major finding from Eggleston’s (1976) study, which concluded that Aborigines were victims of racism in the criminal justice system, O’Shane (1992, p. 3) argued that such racism was manifested by police, magistrates, judges and prison authorities and was reflected in the disproportionately high rates of Aboriginal involvement at every level of the system. O’Shane (1992, p. 3) then went on to argue that as a result of follow-up studies by other researchers in other parts of the country confirming Eggleston’s (1976) finding, it was well-established by 1976 that Aborigines were more likely than non-Aborigines to be arrested and charged by police in relation to certain offences, and eventually more likely than non-Aborigines to be convicted and sentenced to terms of imprisonment.

In asking the question ‘What have been the outcomes since then?’, O’Shane (1992, p. 4) is insistent that in general terms, the picture at the time of
writing was as bleak as it was fifteen years ago. She argued that research studies continued to show Aboriginal people were over represented in the criminal justice system, not only in comparison with non-Aboriginal Australians, but also in comparison with the world’s other indigenous populations. O’Shane (1992, p. 4) then argued that when considering the issues of Aboriginal involvement in the criminal justice system, we need to look at a broader picture. In this regard, she referred to Wilson’s (1976) study that examined the background of Alwyn Peter, an Aboriginal man from Cape York Peninsula, who was charged with the murder of his de facto wife. In that study, Wilson (1976) found ‘there is extreme poverty, despair, alienation and violence in Aboriginal communities where dispossession of land has occurred – which is everywhere’ (O’Shane, 1992, p. 4). Expanding on this point from Wilson’s study, O’Shane (1992, p. 5) declared that violence and social disintegration are typically marked in areas where dispossession has been most completely effected, and that a correlation exists between lack of land rights and sense of identity on the one hand, and the extreme levels of violence and alienation on the other. For O’Shane (1992), the juxtaposition of dispossession-despair/violence-alienation points to the fact that the problems underlying the over-representation of Aboriginal people arise out of the prevailing social systems, a claim borne out not only by the continuing experiences of Aboriginal people, but also by the myriad research reports and inquiries which have been undertaken to ascertain the problems. In this regard O’Shane (1992, p. 5) is adamant that every report, every inquiry, every commission, reveals the same things. Notwithstanding, it remains a fact that ‘while governments sometimes acknowledge those reports, and
sometimes bury them, seldom do they implement practical programs for change’ (O’Shane, 1992, p. 5). To the extent that programs are implemented at all, ‘those same programs are usually piecemeal, under-resourced, and short-lived’ and, above all, ‘such programs have little Aboriginal involvement in their planning, design, and management’ (O’Shane, 1992, p. 5).

Similar to O’Shane (1992), Kitchener (1992, p. 19) highlighted previous research that demonstrated the nature and extent of Aboriginal over-representation in the criminal justice system over the previous twenty years, arguing that ‘over-representation was now perhaps an idiosyncratic feature of Aboriginal community life in country areas of NSW’. To illustrate this point, Kitchener (1992, p. 19) referred to the Anti-Discrimination Board’s study on *Aborigines and Street Offences* (1982) and the BOCSAR report on *Criminal Justice in North West New South Wales* (1987), which both concluded that Aboriginal people are more likely to be arrested for street offences under summary offences charges than any other group within the community. More pointedly, Kitchener (1992, p. 19) asserted that comparisons between arrest and detention figures in rural communities with significant Aboriginal populations under the former *Summary Offences Act* (1970) and the current *Offences In Public Places Act* (1979) showed no appreciable variance in the number of Aboriginal people who were arrested or detained under the respective acts.

With reference to research conducted by the Royal Commission into Aboriginal Deaths In Custody, Kitchener (1992, p. 20) noted that three main
points arose out of the many discussions held with members of Aboriginal communities in relation to the high number of Aboriginal people who are arrested on ‘offensive conduct’ charges. First, Aboriginal people claimed that ‘police invariably concentrate their attention on licensed premises or public places where Aboriginals drink’, often in a manner which promotes incidents that lead to arrests. Second, ‘police rarely proceeded by way of summons against Aboriginal people where there is no danger to property or persons’. On this point, Aboriginal commentary supposed that this circumstance was an illustration by police of their intention to show that they can ‘control’ Aboriginal people in the community (Kitchener, 1992, p. 20). Third, Aboriginal people observed time and again that ‘police turn a ‘blind eye’ to both the behaviour of non-Aboriginal people acting in a fashion which would lead to Aboriginal people being arrested’, and to the attitudes and behaviour of licensees or publicans toward Aboriginal people.

Kitchener (1992, p. 21) then states that another issue raised by Aboriginal communities during the Royal Commission consultations was the level of policing in areas with large Aboriginal populations. In this regard, Aboriginal commentary suggested police numbers might be up to three or four times higher in those locations than in urban or non-Aboriginal rural locations. In addition, Kitchener (1992, p. 24) states that the consultations revealed a recurring criticism that police do not appear to believe Aboriginal people who allege non-Aboriginal people have committed offences against them, and, even where police have witnessed such offences, they refuse to act upon them.
Kitchener (1992, p. 24) concluded that as a result of these observed police attitudes, and also their lack of assistance to Aboriginal communities, a large proportion of the Aboriginal population see the police as a white organisation set up only for the benefit of ‘whites’ and one from which they can expect no effective help. Both issues may be viewed as elements of what has been referred to elsewhere as ‘under policing’ of Aboriginal communities. For example, in providing strong empirical evidence of ‘overpolicing’ of the Mardu groups in Wiluna, Western Australia, Leicester (1995, p. 14) also identified police practices which seemed to represent ‘under policing’ (no action taken against licensees for serving intoxicated persons), arguing that the two concepts, rather than being mutually exclusive, can be mutually co-existent. In this regard, Leicester (1995, p. 15) concluded that the co-existence of under and overpolicing is best explained as ‘a continuation of the historical perception that police have had, that their role within Aboriginal communities is to contain a cultural minority’. As a result, it demonstrates that the police are not accountable to the community and do not share its priorities. In this context, Leicester (1995, p. 15) argued that ‘community disenchantment with overpolicing may actually reinforce a culture of under policing’.

Ultimately, Kitchener (1992, p. 24) proposed that if arrest rates for Aboriginal people increase, or at least remain static, the gulf between Aboriginal communities and police will only widen. For Kitchener (1992, p. 24), it is apparent that the continuing use of public order legislation by police is not aimed at combating crime, but rather, ‘to exercise social control

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1 McMullen & Jayewardene (1995, p. 39) describe ‘under policing’ to refer to both police delays in responding to Aboriginal peoples’ calls to the police, and police apathy in the investigation of crimes committed against Aboriginal people.
over Aboriginal people’ (Kitchener, 1992, p. 24).

O’Shane’s (1992) paper is significant in that it reaffirmed Aboriginal perceptions that ‘The Law’ is fundamentally racist and that it continues to operate against the interests of Aboriginal people. Equally importantly, O’Shane asserts that while numerous reports, inquiries and investigations into the reasons why Aboriginal people continue to be over-represented in the criminal justice system have sometimes resulted in government responses to address this continuing circumstance, ‘such responses have usually been piecemeal, under-resourced, and short-lived’ (O’Shane, 1992, p. 5). Above all, such responses have had little Aboriginal involvement in their planning, design, and management. Ultimately, O’Shane’s (1992) paper clearly resonates with Karr’s allegorical proverb that the more things change the more they stay the same.

Kitchener’s (1992) paper also reaffirms the fact Aboriginal over-representation is both an historical and contemporary feature of Aboriginal community life and that left unchanged, police attitudes, behaviours and use of ‘controlling’ legislation, in particular, will continue to act as ‘triggers’ in the tense relationship between Aborigines and police. Importantly, Kitchener’s (1992) observations and conclusions on these issues are perhaps tentative examples of what a number of the constituent elements of a concept of overpolicing might look like.
7.2.3 Aborigines and the law: language issues

This section features two studies that inquire into Aboriginal peoples’ use of English and how such usage has been construed by police and the courts in particular, to justify a perception that Aboriginal people do not use English in a proper manner. The implication flowing from such improper usage is, at the least, insulting to Standard English speakers, and at worst, ‘criminal’. In this regard, Eades’ (2004) analysis of Aboriginal English usage demonstrates that although it is essential to the proper administration of the criminal justice system that police and judicial officers have knowledge of Aboriginal ways of communicating, such knowledge does not always lead to better justice outcomes for Aboriginal people of and by itself. Next, the section provides a brief excursion into the nature of ‘obscene language’ laws where Pirie and Cornack (1992) ask the question, ‘what is obscene – the language or the arrest that follows?’

In a retrospective of her earlier work to develop a Handbook for Lawyers in Queensland, Eades (2004) reviewed sociolinguistic research which has addressed the provision of justice for Aboriginal English (AE) speakers in Australia to question the assumptions about cultural and linguistic diversity and inequality that underlie such work. Starting from a stated belief that Aboriginal people are seriously disadvantaged in those formal situations where success in an interview is crucial to an individual’s rights and benefits, Eades (2004, p. 496) argued the explanatory inadequacy of the ‘difference’ approach to understanding Aboriginal English she had

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2 Eades (1992), Aboriginal English and the law: communicating with Aboriginal English speaking clients: A handbook for legal practitioners.
previously adopted for the Lawyers’ Handbook. She now proposed that the ‘difference’ approach be substituted with a ‘critical sociolinguistic’ approach, which draws on social theory in the analysis of how language is involved in the failure of the legal system to deliver justice. In essence, Eades (2004, p. 496) contended that the ‘difference approach emphasises the integrity and autonomy of the language and culture of subordinate groups’, and ‘the need for institutions to be hospitable to diversity’. The major criticism of this approach was that it ignored the ‘social inequality and power relations present in intercultural encounters’ (Eades, 2004, p. 496). While the analysis itself is not specifically relevant to this study, the issues surrounding the circumstance of cultural, linguistic diversity and inequality for Aboriginal English speakers, as highlighted in the 1992 Lawyers’ Handbook, do have a bearing as a likely factor in Aboriginal over-representation in the criminal justice system, and it is these matters from Eades (2004) account that will be examined.

Before beginning the main analysis, Eades (2004, p. 491) restated the broad facts regarding the nature and extent of Aboriginal English. Here, she made the case that while there are still a number of communities in the remote northern and central areas of Australia where people speak ‘traditional languages’ as their first language, the great majority of Aboriginal people speak Aboriginal English as their first language (lingua franca), or one of the English-lexified creoles. In their dealings with the law, most Aboriginal people speak a variety of Aboriginal English, or an inter-language (Eades, 2004, p. 491). Further, Aboriginal English is the name given to dialects of English spoken by Aboriginal people throughout Australia, ‘which differs
from Standard Australian English (SE) in grammar, phonology, lexicon, semantics and pragmatics’ (Eades, 2004, p. 491). Overall, there is considerable variation in the varieties of AE spoken with the heaviest (or furthest from SE) varieties being spoken in more remote areas, and the lightest (or closest to SE) being spoken most in urban and metropolitan areas. ‘Aboriginal English has a complex history of multiple origins, including ‘de-pidginisation’ in some areas, as well as the ‘Aboriginalisation’ of English, and possibly ‘de-creolisation’ in some remote areas’ (Eades, 2004, p. 492).

In previous research into the differences between AE and SE in NSW, Eades (1994, pp. 369-371) admits she was unable to estimate the percentage of Aboriginal people in NSW who have bicultural competence, that is, people who can communicate in an Aboriginal way in Aboriginal interactions, and in a non-Aboriginal way in non-Aboriginal interactions. While noting the number would be quite small and dependent on an individual’s experiences in mainstream education and employment, it remained a fact that the greatest area of concern for most speakers of Aboriginal English in NSW, particularly in the legal interview environment, was the area of ‘language use in context, or pragmatics’ (Eades, 1994, p. 369).

Returning to Eades’ (2004, p. 495) critical sociolinguistic research, a summary is then provided of two instances in Queensland where lack of understanding within the criminal justice system about Aboriginal English disadvantaged Aboriginal defendants: the Robyn Kina case, and the
Pinkenba case. In the first matter, Robyn Kina³ was found guilty in 1988 of the stabbing murder of her de-facto husband in Brisbane and was sentenced to life imprisonment. Interactional sociolinguistic evidence about misunderstanding between Kina and her lawyers was part of the evidence in her appeal in 1993 and in finding that Kina’s trial had involved a miscarriage of justice, the appeal court cited ‘cultural, psychological and personal factors’ which presented exceptional difficulties between her legal representatives and the appellant (R v Kina, ALR 35, 6, cited in Eades, 2004, p. 496). The misunderstanding, it was argued, was rooted in cultural differences in their uses of English, for example in the use of silence and gratuitous concurrence.⁴

Briefly, in the Pinkenba case, three Aboriginal boys aged twelve, thirteen and fourteen were walking around a shopping mall near downtown Brisbane some time after midnight on the 10th of May, 1994. The three boys were approached by six police officers who told them to get into three different police vehicles where they were driven fourteen kilometres out of town to an industrial wasteland in Pinkenba near the mouth of the Brisbane River and then told to find their own way home (Eades, 2004, p. 499). The three boys were not charged with any offence nor were they taken to any police station.

After a complaint was laid by the Aboriginal Legal Service on behalf of the boys, the Queensland Criminal Justice Commission recommended the six


⁴ ‘Gratuitous concurrence’ is argued as a tendency in Aboriginal communication in freely saying ‘yes’ to a question, regardless of the belief of the truth or falsity of the proposition questioned (Eades, 2004, p. 493).
police officers be charged with ‘unlawfully depriving each of the boys of his personal liberty’ (Eades, 2004, p. 499). As prosecution witnesses in the charges against the police, the three boys were submitted to ‘a lengthy barrage of cross-examination’, which Eades (2004, p. 499) described as ‘devastating’, in which the two barristers representing the police consistently harassed, harangued and belittled the witnesses. Eades’ (2004, p. 500) argued that the two defence counsel had manipulated and exploited Aboriginal ways of using English, particularly ‘the use of silence’ and ‘gratuitous concurrence’ (gained from the content of Eades ‘Handbook for Lawyers’), to convince the Magistrate to drop the charges as the ‘victim-witnesses’ were ‘criminals’ who had no regard for the community and who had voluntarily given up their liberty. Subsequently, Eades (2004, p. 502) concluded that ‘this clearly evident language awareness’ was unfairly used to subvert the evidence of the Aboriginal witnesses and that ‘awareness of cultural difference is, by itself, not sufficient to promote justice in the adversarial system’.

Returning to the central feature of her analysis, Eades (2004, p. 503) argued there was good evidence that the descriptive account of Aboriginal ways of communicating provided in the Lawyers’ Handbook became a powerful instrument in the denial of justice in the Pinkenba case and ‘that it shows that despite the attempted neutral and apolitical stance of the difference approach, such neutrality is unachievable’. In this case, the whole criminal justice system worked to legitimise the actions of the police officers. In this way, the boys’ claims to freedom from harassment were denied through a process which Eades’ (2004, p. 507) argued ‘Cunneen has found to typify
much of the policing of Aboriginal people’, namely, establishing them as a ‘law and order problem’ and therefore ‘the legitimate subjects of surveillance, intervention, and in more extreme cases, terrorisation’.

In their examination of a number of appeals to the Townsville District Court concerning ‘obscene language’ charges under Section 7 of the Vagrants, Gaming and Other Offences Act 1931 prohibiting the use of obscene or insulting language and disorderly conduct in a public place, Pirie and Cornack contend that:

on any day in any place in Australia, people are likely to hear the words ‘fuck’ and ‘cunt’ used freely in everyday conversation in many different contexts and circumstances. The use of these words may once have caused affront and alarm…the limits of what words may be used in conversation without social stigma or disgrace have now greatly expanded. (Pirie & Cornack, 1992, p. 1)

Nevertheless, Aboriginal people were still far more likely than non-Aboriginal people using the same words to be arrested, charged and brought before the courts to be dealt with for their use of obscene language (Pirie & Cornack, 1992, p. 1). In this regard, Pirie and Cornack (1992, p. 1) argued that the appeals examined in the study generally revolved around cases concerning language used by Aboriginal people in exchanges with police and that many resulted in charges comprising the ‘Aboriginal Trifecta’ of offences. In these instances, the ‘annoyed’ police officer arrests the Aboriginal person for obscene language, the Aboriginal person may struggle against the arrest, and the Aboriginal person ends up being charged with resisting arrest, hindering police, and assaulting police (Pirie & Cornack, 1992, p. 1). Echoing the sentiments expressed in Clifford’s (1982), Bird’s (1987) and Cowlishaw’s (1987) studies, Pirie and Cornack (1992, p. 3)
suggest that often, the use of ‘obscene words’ is little more than the exasperated and frustrated cries of people powerless in the criminal justice system.

Pirie and Cornack (1992, p. 4) argue that as a general principle, charges of obscene language are usually preferred because members of the community are sensitive to the language and offended by the use of such language. Paraphrasing Judge Wylie’s ratio decidendi from the appeals, Pirie and Cornack (1992, p. 4) argue that notwithstanding this general principle, the proper test however, ‘is whether the current standards of the community as a whole would be offended’. On a criminal charge, ‘the community standards of the majority must be proved to have been offended beyond reasonable doubt’ (Pirie & Cornack, 1992, p. 4).

Again, referring to Judge Wylie’s reasoning in upholding the appeals, Pirie and Cornack maintain the test for obscene language is:

whether the language so offends the current community standards of decency that the conscience of the community as a whole is offended by its indecent, repulsive, lewd, depraved, abominable, immodest or disgusting nature...however, there is no definitive list or category of words proscribed by parliament as obscene or indecent and those terms are not statutorily defined. (Pirie & Cornack, 1992, p. 3)

Continuing the argument, Pirie and Cornack (1992, p. 3) maintain that it is important to look at the community as a whole, and not just a portion of it. That community ‘as a whole’ includes members of the Aboriginal community and it also includes many people who regularly use similar words. While there is a broad range of community reaction to the words ‘fuck’ and ‘cunt’, these words appear in poetry, drama, and literature and
may be used as terms of abuse, or terms of endearment. However, in all the matters before the appeal court, the words were spoken to a police officer, and the arrest followed disobedience to a police direction, irrespective of whether that direction was legally based (Pirie & Cornack, 1992, p. 4). Consequently, it can be argued that ‘it is the disobedience that leads to the arrest, not the language or the behaviour itself’ (Pirie & Cornack, 1992, p. 4). In most cases there were no other members of the public in the near vicinity, or those that were appeared unconcerned at the language, leading Judge Wylie to conclude whimsically, that these offences may amount to ‘a punishment for illiteracy or deficient vocabulary’, not criminality (Pirie & Cornack, 1992, p. 4).

Referring to Recommendation 60 and 66 of the RCIADIC, Pirie and Cornack (1992, p. 5) noted it was the experience of the RCAIDIC that the recorded criminal history of many Aboriginal offenders included repetitive public order offences, including obscene or offensive language convictions. More often than not, the ultimate penalty for use of bad language usually directed at police was repetitive imprisonment. However, as Commissioner Hal Wootten argued in the RCIADIC Inquiry into the police shooting death of David Gundy, ‘surely it’s time that police learnt to ignore mere abuse, let alone simple bad language’ (Pirie & Cornack, 1992, p. 5). Further:

in this day and age so many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people. Maintaining the pretence that they are sensitive persons offended by such language…does nothing for respect for the police. (Pirie & Cornack, 1992, p. 5)

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5 Recommendation 60: ‘that police services take all possible steps to eliminate violent or rough treatment or verbal abuse of Aboriginal people by police officers and to eliminate the use of racist or offensive language by police officers’ (Johnston, 1991a, p. 44).

6 Recommendation 86a: ‘the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge’ (Johnston, 1991a, p. 50).
Pirie and Cornack (1992, p. 6) conclude that language charges have become part of an oppressive mechanism of control of Aboriginal people where, too often, police attempts to arrest or charge an Aboriginal person for offensive language sets in train a sequence of offences by that person and others, none of which would have occurred if police were not so easily offended. Ultimately, the motives for using the power of arrest in these situations may include the wish to quickly remove Aboriginal people from public view to resolve a disturbance. It is also likely however, that the motive includes an element of instant punishment for what the police perceive as disrespect (Pirie & Cornack, 1992, p. 7).

7.2.4 Commentary on Police-Aboriginal relations

In setting out the context for a journal article that was generated in his role as Honorary Visiting Professor of Law, University of NSW, Hal Wootten AC, QC, noted that the ‘modest aim’ of the article was to record and discuss some of his observations and experience, mainly concentrated in two periods. The first period was from 1970 to 1973, as the inaugural President of the first Aboriginal Legal Service in Australia and the second, from 1988 to 1991, as a RCIADIC Commissioner inquiring into the deaths of Aboriginal people who had died in custody in NSW, Victoria and Tasmania (Wootten, 1993, p. 266). As the circumstances concerning the establishment of the Redfern Aboriginal Legal Service were examined in Chapter Three, it is the second period as Commissioner of the RCIADIC and the observations in that role relating to the disproportionate arrest and imprisonment of

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Aboriginal people that will feature in the following discussion. However, before that discussion it is worthwhile to restate Wootten’s (1993, p. 265) introductory comments concerning relations between Aboriginal people and police to establish the context for his later commentary.

Reaffirming Sturma’s\(^8\) earlier conclusions concerning the development of ‘frontier’ policing in Australia’, Wootten (1993, p. 265) submits that at the time England first settled Australia, it had no professional police force and that this remained the case until forty years later when the London Metropolitan Police Force was established in 1829. ‘Australian police began with no professional traditions’ and they also had a major role that had no counterparts in England, and which in North America had fallen to the military (Wootten, 1993, p. 265). In Australia, the suppression of Aboriginal resistance to white settlement, insofar as it was a state function, fell largely to the police. Citing Rowley, Wootten (1993) reaffirms the major function of police at that time was:

> primarily to protect white settlers and when they were called in, the expectation was often not that they would identify and arrest suspects, but they would conduct punitive expeditions and wipe out the troublesome blacks. (Rowley, 1970, p. 155, cited in Wootten, 1993, 265-366)

Further, when Aboriginal resistance was overcome and policy changed from military style ‘suppression’ to other forms of control, much of it under the banner of ‘protection’, ‘police long remained the enforcing instrument of the dominant white society’ (Wootten, 1993, p. 266). For example, they were often associated with the taking of Aboriginal children from their mothers to be brought up in institutions or foster homes. Wootten (1993, p. 266)

speculates that even today ‘it is still difficult for many Aboriginal people and police to see each other in non-adversarial roles and for some – on both sides – violence is still anticipated as a likely concomitant of arrest’.

Within the introduction, Wootten (1993, p. 266) makes two further salient points. The first is that across Australia, there are six state police services and a territory and a Commonwealth service, each with significant variations of style, policy and tradition, and each accountable to a different government. ‘Even within one service, attitudes and practices can vary from town to town, and Aboriginal communities also differ considerably’ (Wootten, 1993, p. 266). The second point he makes is that despite a degree of resistance to change in both Aboriginal cultures and police culture, rapid change is remaking both. Nevertheless, ‘any general statements about Aborigines or about police can at the most refer only to widespread or significant, not universal, characteristics or tendencies’ (Wootten, 1993, p. 266).

After outlining his role as Royal Commissioner into Aboriginal Deaths in Custody and commenting briefly on the frequency and nature of Aboriginal deaths in police custody from the early 1980s, Wootten (1993, p. 279) then asks, ‘What then was the reason for the extraordinarily large numbers of Aboriginal deaths?’

With reference to Rowley’s (1972, pp. 354-56, cited in Wootten, 1993, p. 279) earlier research in sample police areas in New South Wales, Victoria and South Australia, Wootten (1993) highlights the fact that at that time, no
precise comparisons between Aboriginal and non-Aboriginal arrest rates could be made because there were no figures for Aboriginal populations in the particular areas. Even so, it was clear that the Aboriginal arrest rate was ‘very high’. In 1988 however, evidence became available from the conduct of the first national police custody survey to show that ‘in Australia as a whole, Aboriginal people were arrested at twenty-eight times the rate of non-Aboriginal people’ (Wootten, 1993, p. 279). Leaving aside those states where ‘drunkenness’ was still an offence or where non-police facilities for receiving drunks were deemed ‘inadequate’, the inaugural police custody survey also showed that there were significant differences between the states with Aboriginal arrest rates being the highest in Western Australia (43 times), followed by South Australia (26 times), New South Wales (15 times), Victoria (13 times), Queensland (17 times), the Northern Territory (11 times) and the ACT (11 times) (Wootten, 1993, p. 279). Alarmingly, Aboriginal women made up nearly fifty per cent of the female custodies, although they comprised less than one point five per cent of the national female population (Wootten, 1993, p. 279).

When the national police custody survey was repeated in 1992, one year after the Royal Commission published its Final Report, the national over-representation rate of Aboriginal people had fallen slightly from twenty-eight times, to twenty-six times. In the States and Territories, there were slight fluctuations on the 1988 levels as follows: NSW (15.8 times; up 0.8); Victoria (10.2 times; down 2.8); Queensland (13.3 times; down 3.7); Western Australia (51.9 times; up 8.9); South Australia (20.9 times; down 5.1); Tasmania (3 times; down 2); Northern Territory (14.3 times; up 3.3);
and ACT (4.4 times; down 6.6) (Wootten, 1993, p. 300). Posing a further question, Wootten (1993, p. 280) asked ‘What was the explanation for the high arrest rate of Aboriginal people?’

In responding to the above question, Wootten (1993, p. 280) declares that many police would argue that the high arrest rate of Aboriginal people simply means that Aboriginal people commit more offences than non-Aboriginal people and that the solution lies in the hands of Aborigines – they should obey the law! Conversely, some Aboriginal people would say that the high arrest rate is due to police racism – Aboriginal people do not commit more offences than other people, but police discriminate against them (Wootten, 1993, p. 280).

Extending the last argument, Wootten (1993, p. 280) remarks that other commentators would contend that ‘racism’ was not confined to just police. In support of this view, Wootten (1993, p. 280) draws on McRae, Nettheim and Beecroft’s (1991, p. 240) analysis of contemporary Aboriginal legal issues where they assert ‘the main cause of Aboriginal over-representation is the discrimination, probably based on poverty as well as race, that permeates the criminal justice system’. Under this view, the suggestion that Aboriginal people commit more offences than non-Aboriginal people was rejected ‘on the grounds that researchers doubt (although they have no evidence) that this is so’, and that any explanation ‘which indulges in ‘blaming the victim’ deflects attention away from the inadequacies of the system where the problems really lie’ (Wootten, 1993, p. 280).
However, in what might be considered as an attempt to provide a sense of balance to that argument, Wootten (1993, p. 280) claims that these grounds, ‘avowedly without empirical basis, reflect a widespread tendency to allow ideology to affect conclusions’, which in this instance has meant that it is not ideologically or politically correct to admit the plain fact that in many areas Aborigines as a group do commit offences at a greater rate than the community average. Continuing with this reasoning, Wootten (1993) avers to Commissioner Johnston’s commentary in the Final Report of the Royal Commission into Aboriginal Deaths in Custody where he declared:

It is a mistake, in my view, to pretend that because Aboriginal people are disproportionately policed with regard to some laws it must follow that either the laws are unjust or that the policing of those laws is discriminatory. There seems to be a great reluctance among some commentators to recognize this fact. It must be recognised that much of the behaviour which leads to detention of Aboriginal people by police is equally unacceptable to Aboriginal people as it is to non-Aboriginal. (Johnston, 1991a, pp. 196-197)

In contrast to the above explanation, Wootten (1993, p. 281) acknowledges there are also police practices and attitudes that contribute markedly to the high arrest rate of Aboriginal people and by way of example, refers to the town of Wilcannia in far-west NSW to illustrate the point. There, a population of approximately 1,000 people – 800 of whom are Aboriginal – is serviced by eleven police; a ‘police to population ratio’ nearly six times that of the State as a whole. Put another way, Wootten (1993, p. 281) cites the State-wide police/population ratio as being 1:432 and compares that ratio with Chatswood, a white middle-class North Sydney suburb with a ratio of 1:926; Redfern, an ‘Aboriginal inner city’ Sydney suburb with a ratio of 1:353; Bourke, a rural ‘Aboriginal town’ in far-west NSW
proximate to Wilcannia with a ratio of 1:142; and Wilcannia with a ratio of 1:77.

Subsequently, Wootten (1993, p.281) restates data relating to the arrest rate for Aboriginal people which showed Aboriginal people were seven times more likely than non-Aboriginal people to be arrested in Redfern, sixty-seven times more likely in north-west NSW and 223 times more likely in far-west NSW. As a final point, Wootten (1993, p. 281) then mentions the fact that in Wilcannia, most Aboriginal people are unemployed.

Referring once more to his role as Royal Commissioner, Wootten (1993, p. 281) states that during the conduct of the Royal Commission, he criticised the NSW Police Service for what was termed ‘the overpolicing of Aboriginal people in Wilcannia’. For his part, Wootten (1993, p. 281) declared at that time that ‘overpolicing’ was ‘an example of practices leading to higher arrest rates that does not depend for its effects on any racist attitudes in individual police’. In response to the Royal Commission’s criticism, the NSW Police Service argued that a major factor in the high rate of Aboriginal offending in Wilcannia was ‘the high level of Aboriginal unemployment and almost total lack of employment opportunities’ (Wootten, 1993, p. 281). However, given the above police/population ratio for Wilcannia (1:77), the Aboriginal arrest rate (233 times higher), and also the high level of Aboriginal unemployment, Wootten (1993, p. 281) suggested bluntly that perhaps ‘the major source of employment in Wilcannia continues to be policing the unemployed’.
Wootten’s (1993) reflections of his observations and experience as a Royal Commissioner are significant for two reasons. First, he speaks from the authoritative position of a person who was responsible for both gathering and examining all pertinent information concerning the deaths in custody of those Aboriginal people who died in custody in the States of NSW, Victoria and Tasmania during the eight year period covered under the Royal Commission’s Terms of Reference. In this regard, he carefully analysed the historical continuities in the relationship between police and Aborigines, particularly in NSW, and was able to draw a number of reasonably specific conclusions about policing, including its impact as a contributing factor in the over-representation of Aboriginal people in arrest rates.

Second, through this lengthy and comprehensive examination, he became aware of the notion of ‘overpolicing’ and expounded a particular view concerning its application in what might be called ‘Aboriginal towns’; a view similar to what had previously been articulated by Cunneen and Rob (1987), Cowlishaw (1987), the NSW Anti Discrimination Board (1982), and the Human Rights and Equal Opportunity Commission (1991) in their individual examinations of the circumstance of Aboriginal over-representation in police arrest and custody rates. Specifically, Wootten (1993) argued that ‘overpolicing’ can be demonstrated by the excessive numbers of police stationed in locations having significant Aboriginal populations, and introduced the view that ‘overpolicing’ is not dependent on the existence of racist attitudes in individual police. Although Wootten’s last point infers individual police racism does not lead to overpolicing, he only mentions ‘racist attitudes’, not racist behaviours which, if such
constituted common police practice in the treatment of Aboriginal people, could lead to overpolicing.

7.3 Overpolicing: Later overseas references

This section examines research and commentary arising from a number of Canadian government inquiries into the policing of Canadian Aboriginal peoples during the early 1990s and also comparative research conducted by Australian and Canadian criminologists regarding the impact of the criminal justice system on the Aboriginal populations of both countries. From this comparison, a number of conclusions are made concerning the nature and extent of ‘overpolicing’ within both the Canadian Aboriginal and Australian Aboriginal populations. Prior to that however, some basic demographic information concerning the position and disposition of Canadian Aboriginal peoples within Canadian society is presented to provide a context for subsequent discussion on the circumstance of policing.

7.3.1 Canadian Aboriginal over-representation

Similar to Australia, Canada’s history is one marked by colonisation, first by France then by Britain. In this regard, both countries have a similar legacy of ‘legislative acts, agents and policies used against Aboriginal people in the hope that they would cease to exist’ (Samuelson, 1993, p. 14). Where Australia forcibly segregated its dwindling Aboriginal population onto reserves and missions under the Aborigines Protection and Restriction

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9 Section 35 of the Canadian Constitution Act 1982 refers to the ‘Indian, Inuit and Metis’ people as comprising the Aboriginal peoples of Canada (McMullen & Jayewardene, 1995, p. 49).
of Opium Act 1897, Canada legalised paternalistic control and population decline through the Act for the Gradual Civilisation of the Indian Tribes 1857 and later, the Indian Act, 1876 (Samuelson, 1993, p. 13).

While also having a federal parliamentary system, the second tier of Canadian government comprises Provincial and Territorial governments, as opposed to Australia’s State and Territory geo-political configuration. In terms of the former, Provincial governments are situated in Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. On the latter, Territorial governments similar to Australia’s Northern Territory and Australian Capital Territory administrations are situated in the Yukon, the North West Territories and the Atlantic Territories, which includes Newfoundland, Nova Scotia, Prince Edward Island and New Brunswick (Samuelson, 1993, p. 19).

In comparison with the Australian Aboriginal population, there are twice as many Canadian Aboriginal peoples and their percentage of the national population is twice that given for the total Australian Aboriginal population. Transposed numerically, this suggests there are about 700,000 Canadian Aboriginal people (Samuelson, 1993, p. 2). According to StatsCan\textsuperscript{10} the Canadian Aboriginal population in 1995 represented 10.6% of the general population in Manitoba, 4.9% in Alberta, 10.5% in Saskatchewan, 3.6% in British Columbia, 1.4% in Ontario, 18.2% in the Yukon and 62% in the North West Territories (Rudin, 2005, p. 15).

\textsuperscript{10}StatsCan is Canada’s equivalent to the Australian Bureau of Statistics.
Importantly, StatsCan’s analysis of Aboriginal imprisonment rates in Provincial correctional facilities concluded that the level of over-representation for Aboriginal people was 7.3 times higher in Alberta, 6.9 times higher in Saskatchewan, 5.7 times higher in Ontario, 5.2 times higher in Manitoba, 4.7 times higher in British Columbia and 4.6 times higher in the Atlantic Territories compared with non-Aboriginal imprisonment rates in those locations (Rudin, 2005, p. 15). Put differently, while constituting less than three per cent of the Canadian population, Canadian Aboriginal peoples made up 18% of provincial and 11% of federal corrections’ admissions (Samuelson, 1993, p. 20).

In an examination of the status of Canadian Aboriginal over-representation up to the late 1990s, Rudin (2005, p. 13) acknowledged that Canadian Aboriginal over-representation first emerged as an issue following the Second World War and that ‘it did not become a matter of significant public policy until the late 1980s’. However, similar to the circumstance of Aboriginal people in Australia during the 1990s, Rudin (2005, p. 15) declared that ‘Canadian Aboriginal over-representation now appeared to be a Canada wide phenomenon’.

In a comparison of Canadian Aboriginal and Australian Aboriginal over-representation to explore the development of a ‘cross cultural theory of Aboriginal criminality’, Smandych, Lincoln and Wilson (1995, p. 251) argue that attempts to explain these phenomena have resulted in a cluster of explanations ‘that focus on some form of direct racism and discrimination within the criminal justice system that results in such over-representation’.
Further, when analysed more closely, ‘the findings centre on racist bias, visibility, cultural factors, legal and extra-legal considerations and overpolicing’ (Smandych et al., 1995, p. 251).

Viewed from a different perspective, Rudin (2005, p. 24) argues that research conclusions from the 1995 Royal Commission on Aboriginal Peoples (RCAP)\textsuperscript{11} showed there are three substantive explanations to account for Canadian Aboriginal over-representation: ‘culture clash, socio-economic and colonialism’. Briefly, ‘culture clash’ theory was one of the first theories advanced to explain the over-representation phenomenon and started from ‘the undeniably correct thesis’ that Aboriginal concepts of justice and Western concepts of justice are very different. Put simply, ‘culture clash’ theory concludes that when Aboriginal people are required to ‘fit’ into a system that does not recognise their values, over-representation occurs (Rudin, 2005, p. 24).

The second theory – socio-economic theory – is grounded in the incontrovertible reality that if you want to know what group in society is at the bottom of the ladder, all you have to do is look who is in prison (Rudin, 2005, p. 27). Proponents of this theory would argue that Aboriginal people are over-represented in gaol because they are over-represented in terms of social dislocation, having lower life expectancies, higher rates of infant mortality, lower levels of education, lower levels of income, and higher incidences of poverty and disease. ‘It is these facts that explain Aboriginal over-representation’ (Rudin, 2005, p. 27).

\textsuperscript{11} Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide (Canada Communication Group, Ottawa, 1995).
In restating a conclusion from the RCAP that ‘Aboriginal people are poor beyond poverty’ and that the process of addressing over-representation is not as one dimensional as shifting focus to look at economic self-sufficiency, Rudin (2005, p. 2) agrees with commentary from the RCAP that ‘the best explanation for the persistence of disadvantage among Aboriginal people, and thus the best explanation for Aboriginal over-representation, was the impact of colonialism’. In this regard, and similar to the circumstance of Australian Aboriginal people, British government policy in Canada in the early 1800s was governed by the belief that over time ‘Aboriginal people would simply be eradicated as a people due to the impact of settler migration’ (Rudin, 2005, p. 28). When that did not occur, colonial governments prior to 1867, and Canadian governments since that time, ‘pursued a generally single-minded policy aimed at ensuring the disappearance of Aboriginal people in Canada’ (Rudin, 2005, p. 28).

That Canada’s express policy with respect to Aboriginal people was to hasten their disappearance was never really in question as the Deputy Superintendent General of Indian Affairs, Duncan Campbell-Scott stated in 1920:

> Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question. (Leslie & Maguire, 1978, p. 115, cited in Rudin, 2005, p. 28)

Included in the colonisation process aimed at the destruction of Canadian Aboriginal people was the relocation of Aboriginal people to often marginal land bases, criminalisation of spiritual practices, and severe restrictions on fundamental rights and liberties with respect to freedom of speech and assembly, mobility and voting (Rudin, 2005, p. 29). One of the most
invidious of Canada’s colonising processes, not replicated in Australia, was the development of the ‘residential school system’.

Similar in intent to Australia’s ‘assimilation’ policies, the ‘residential school system’ operated on the basis that Canadian Aboriginal children could only be assured of a future if their identity of themselves as Aboriginal people was removed. This system remained in place until the 1970s, ‘alienating thousands upon thousands of Aboriginal people from their communities and from their sense of themselves’, being replaced by what is referred to as the ‘60s sweep’ or ‘60s scoop’ (Rudin, 2005, p. 29). Similar to the activities of police and child welfare agencies during the assimilation era in Australia, Canadian police and child welfare officers ‘lawfully’ removed Canadian Aboriginal children from their families and placed them within the residential school system. Under the ‘60s sweep’ strategy, the jurisdiction of provincial government child welfare agencies was expanded to include Aboriginal reserve communities, permitting the loss of most, if not all, Aboriginal reserve community children to the care of child welfare agencies.

Again, similar to Australia’s ‘assimilation’ policies, those Canadian Aboriginal children successfully placed for adoption were almost never placed in Aboriginal homes and those who were not adopted often found themselves in a succession of foster or group homes, often neglected, often abused (Rudin, 2005, p. 29). While such colonial practices did not result in the disappearance of Aboriginal people, it did lead to great harm to Aboriginal people who were the victims of such practices, to their children.
and to their communities. As the Aboriginal Justice Inquiry of Manitoba concluded in its summing up of the history of Aboriginal people in Canada:

Aboriginal people have experienced the most entrenched racial discrimination of any group in Canada. Discrimination against Aboriginal people has been a central policy of Canadian governments since Confederation (Aboriginal Justice Inquiry, 1990, p. 96, cited in Rudin, 2005, p. 29).

In an attempt to clarify the current state of theorising about the causes of over-representation, LaPrairie (1990, p. 430-31, cited in Smandyche et al., 1993, p. 255) points out that there are three basic ‘competing but not mutually exclusive explanations’ for the disproportionate representation of Aboriginal people, namely: differential treatment by the criminal justice system; differential commission of crime; and differential offence patterns. Importantly, LaPrairie (1990, p. 430-31, cited in Smandyche et al., 1993, p. 255) makes a case for the argument that focusing attention exclusively on the alleged discriminatory processing of Aboriginal people in the criminal justice system does little to advance the level of theoretically-based knowledge of the causes of over-representation.

According to LaPrairie (1990, p. 430-31, cited in Smandyche et al., 1993, p. 255) what is needed is ‘for the criminal justice system to re-direct the issue to where it belongs – in the social, political and economic spheres’. According to Smandyche et al (1995, p. 256), LaPrairie’s views are for the most part, consistent with other critical criminologists who, operating either implicitly or explicitly from a Marxian World System perspective, base their analyses of the problems of crime and justice experienced by Aboriginal people on more in-depth critical and historical research.
7.3.2 Canadian ‘overpolicing’

Apart from North America, Britain and Australia, Canada is the only other western country where criminological literature refers to the term ‘overpolicing’. There, the concept was not employed until 1987 where it featured in the Quebec Human Rights Commission’s inquiry into relations between police and ethnic minority groups (Bellemare, 1988). The next year, following confrontations between Blood Tribe members, the people of the town of Cardston and the Royal Canadian Mounted Police (RCMP), the Alberta Commission of Inquiry into Policing in Relation to the Blood Tribe was established to inquire into concerns about the manner in which police handled sudden deaths of Blood Tribe members (Rolfe, 1990). In the same year, the Aboriginal Justice Inquiry of Manitoba was established to ‘inquire into, and make findings about, the state of conditions with respect to Aboriginal people in the justice system in Manitoba’ following the shooting death in March 1988 of an executive member of the Island Lake Tribal Council, together with calls for a judicial inquiry to investigate police ineptitude in the murder investigation of a young Aboriginal women sixteen years previously (Government of Manitoba, 1990, p. 2).

In recalling commentary from section 6.1 of this thesis, it can be seen that at the same time Canada was conducting Commissions of Inquiry into Canadian Aboriginal peoples’ treatment by the Manitoba and Alberta criminal justice systems, the Australian government was conducting a Royal Commission to investigate the reasons why so many Australian Aboriginal people had died in police and other lawful custody in Australia throughout
the previous eight years. While this fact could be construed as yet another ‘similarity’ connecting Canadian Aboriginal and Australian Aboriginal peoples’ treatment by their respective criminal justice systems, McNamara (1993, p. 310) is unambiguous in the claim that ‘the issue of deaths in custody is a phenomenon which has no direct parallel in Canada’.

Subsequent to the Manitoba Aboriginal Justice Inquiry and the Alberta Inquiry, ‘overpolicing’ featured in three further (provincial) government inquiries, all of whose primary objective was to examine issues surrounding the policing of Canadian Aboriginal communities. These included the Royal Commission into the Nova Scotia Justice System (Hickman, Poitras & Evans, 1989); the Inquiry into the Behaviour of the Winnipeg Police (Hughes, 1991); and the Alberta Aboriginal Justice Inquiry (Cawsey, Little Bear, Franklin, Bertolin, Galet, Cooper & Gallagher, 1991)\(^\text{12}\) In strikingly similar conclusions, all mentioned inquiries acknowledged the existence of evidence of ‘differential policing’ generally, and more specifically, of ‘overpolicing’, of over-surveillance, of over-charging, and the over-use of pre-trial detention (McMullen & Jayewardene, 1995, p. 38).

With respect to ‘overpolicing’, the term is articulated in the Canadian policing context to mean:

the practice of police inordinately targeting people of particular ethnic or racial backgrounds or people who live in particular neighbourhoods...Governments in Canada have historically used the police to pre-emptively attempt to resolve Aboriginal rights disputes by arresting those attempting to exercise those rights...and in addition, police have been used to further the objectives of governments in terms of assimilation through apprehension of children in order to have them attend

\(^{12}\)A list of the major inquiries, including twelve Royal Commissions, into the NSW Police -1867 to 1996, is set out at Appendix J for information and comparison with inquiries into Canadian policing.
residential school, and later, to support child welfare agencies…police were also used to support many of the most egregious provisions of the Indian Act (Rudin, 2005, p. 2).

Further, Rudin (2005, p. 2) argues that overpolicing also leads to the police forming attitudes that view Aboriginal people as violent, dangerous and prone to criminal behaviour. Ultimately, he concludes that:

Aboriginal people have experienced a type of overpolicing that is unique – overpolicing in furtherance of government goals for the assimilation and colonisation of Aboriginal people. (Rudin, 2005, p. 32)

All five inquiries also found evidence of ‘under policing’, of delays in responding to Aboriginal peoples’ calls to the police, and of apathy in the investigation of crimes committed against Aboriginal people (McMullen & Jayewardene, 1995, p. 39). Based on the complaints made against police to the different inquiries, McMullen and Jayewardene (1995, p. 39) conclude four types of police behaviour exist that could be considered ‘not only unnecessarily obnoxious and definitely discriminatory, but even racist: verbal abuse; physical abuse; trivialisation of victimisation (resulting in under-policing); and unwarranted suspicion of involvement in criminal activity resulting in active harassment (McMullen and Jayewardene, 1995, pp. 39-41). These conclusions echo the conclusions reached in the NSW Anti-Discrimination Board’s (1982, p. 77) study, the Australian Law Reform Commission’s Inquiry (1996, p. 107), the Australian Human Rights and Equal Opportunity Commission’s (1991, pp. 89-94) Inquiry, and Kitchener (1992) and Wootten’s (1993) commentaries.

The final overseas reference to ‘overpolicing’ occurs in a Canadian Journal of Criminology article by Henry, Hastings and Freer (1996) where the
relationship between race and criminality is considered. Briefly, the article highlights the fact that despite the media producing and reinforcing an alleged connection between race and crime, there is no direct empirical evidence from Canada to show that blacks commit more crimes than members of other racial groups (Henry et al., 1996, p. 469). Nevertheless, the belief is reinforced by the alleged ‘overpolicing’ of the black community generally, and Jamaican people specifically, particularly with respect to drugs and the drug culture (Henry et al., p.470). In this context, the strong surveillance of black clubs and most social events frequented by large numbers of black people is argued as constituting ‘over policing’(Henry et al., 1996, p. 470).

Apart from the Quebec Human Rights Commission (1987) and Henry, Hastings and Freer’s (1996) references to the ‘overpolicing’ of ‘black’ and ethnic minority (Asian and Jamaican) communities, this thesis has shown that there are only four other ‘non-Indigenous community’ related references in the literature to ‘overpolicing’ throughout the period examined: Watson (1966) and Mehay (1979) in North America; and Ryan (1979) and Scarman (1981) in Britain.

This section has shown that the colonial experiences of Canadian Aboriginal peoples were similar to Australian Aboriginal peoples’ experiences and that the literature of both countries details the fact of Indigenous peoples over-representation in their respective criminal justice systems from the early 1980s. Notwithstanding Canadian literature arrived at similar conclusions a short time after Australian literature about a concept of ‘overpolicing’, there
are sufficient similarities in the purpose and application of the term to the policing of Australian Aboriginal people and Canadian Aboriginal peoples to warrant a tentative conclusion that ‘over policing’ may be viewed as an ‘Aboriginal specific phenomenon’. However, this tentative conclusion is tempered by Rudin’s cautionary note that while over-representation and ‘over policing’ are equally serious examples of the problem Aboriginal people have with the criminal justice system, over policing is more difficult to demonstrate statistically (Rudin, 2005, p. 2).

Although Rudin (2005) offered no reason why it was more difficult to demonstrate over policing statistically, I would argue that the lack of a definition, or at the very least consistency in the articulation of the constituent elements of over policing, was perhaps the most important factor why over policing was difficult to demonstrate.

7.4 1996 Census data

Section 3.3 highlighted the fact that the first official Australian census was held in 1828 and that thereafter, up to 1966, there were eighteen Australian census conducted to establish State, Territory and national population totals. In addition, it was noted that the census was conducted at different intervals over that period with the first three census (1828; 1833; 1836) being conducted at three-yearly intervals, the next four (1841; 1846; 1851; 1856) being conducted at five-yearly intervals; and on adoption of the British decennial census system in 1856, every ten years (1861; 1871; 1891; 1901; 1911) until 1921. Thereafter, there was a twelve-year interval to the next census (1933) and two fourteen-year intervals between the 1947 and 1954
census. Between 1954 and 1966, censuses were conducted at seven-yearly intervals.

Throughout this period, Section 3.3 also noted, all Aboriginal people, whether described by the vernacular of that period as either ‘full-blood’ or ‘part-Aboriginal’, were not counted in the official census but were enumerated in an unofficial ‘count’. In explanation for this omission, it was further noted that section 127 of the *Australian Constitution Act* specifically excluded Aboriginal people from being counted in the census, and that this remained the case until a successful Referendum in 1967 annulled the exclusionary provisions of section 127.

While Table 3.1 showed that the NSW population total over the period 1828 to 1966 increased at every census, Table 3.2 showed that the Aboriginal population in that State rose and fell inexplicably from 1901 when first counted, until 1966 when included in the first unofficial ‘count’ of the Australian population total. In this regard, the NSW Aboriginal population in 1901 was estimated at 93,000, falling in 1921 to 72,000, then rising in 1933 to 81,000, falling again in 1947 to 76,000, declining further in 1954 to 75,000, rising in 1961 to 84,000 and declining once more in 1966 to 80,000.

Regarding the ‘unofficial count’ in 1966, Table 2.2 presented Indigenous census data adapted from the ABS that showed the total Australian Indigenous population numbered 80,207. It was noted in that table that as Torres Strait Islander people were not counted together with Aboriginal people at that time, the ABS heading of ‘Indigenous Census Count’ was a
misnomer and, to be correct, should have referred to an ‘Aboriginal Census Count’. Leaving that detail aside, the same table showed that the total Indigenous population in NSW was 14,219.

Over the thirty year period examined in this thesis, there were six Australian censuses in which State and Territory Indigenous populations were enumerated. In chronological order of occurrence, a census was conducted in 1971, 1976, 1981, 1986, 1991, and 1996. The last census collection for the period is set out in Table 7.2 below.

**Indigenous Census Count – 1996**

<table>
<thead>
<tr>
<th>State</th>
<th>Number (no.)</th>
<th>Change in % from 1991</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>101,485</td>
<td>45.0</td>
</tr>
<tr>
<td>Victoria</td>
<td>21,474</td>
<td>28.4</td>
</tr>
<tr>
<td>Queensland</td>
<td>95,518</td>
<td>36.3</td>
</tr>
<tr>
<td>South Australia</td>
<td>20,444</td>
<td>26.0</td>
</tr>
<tr>
<td>Western Australia</td>
<td>50,973</td>
<td>21.6</td>
</tr>
<tr>
<td>Tasmania</td>
<td>13,873</td>
<td>56.2</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>46,277</td>
<td>16.0</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>2,899</td>
<td>82.1</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>352,970</strong></td>
<td><strong>33.0</strong></td>
</tr>
</tbody>
</table>


Table 3.3 showed the 1971 census data – the first census after the 1976 Referendum to count Indigenous people – recorded an Indigenous population total of 106,000, an increase of 44.6% on the 1966 ‘estimate’. For NSW, the Aboriginal population total was recorded as 23,876, an increase of 67.9% on the 1966 figure of 14,219. In the same chapter, Table 3.4 presented population totals from the 1976 census which showed that overall, the Indigenous population numbered 160,915, an increase of 38.8% on the 1971 census figure. For NSW, the Aboriginal population total was
40,450, an increase of 69.4% on the 1971 census figure. Chapter Four presented Table 4.1 which showed the 1981 Indigenous population total as 159,897, a slight decrease of 0.6% on the 1976 census figure. For NSW, there was a recorded decline in the Aboriginal population of 12.6% on the 1976 census figure from 40,450 to 35,376. Chapter 5 presented Table 5.1 which showed the Indigenous population from the 1986 census totalling 227,593, an increase of 42.3% on the 1981 census figure. For NSW, the Aboriginal population totalled 58,999, an increase of 66.8% on the 1981 census figure. The 1991 census recorded a total Indigenous population of 265,371, an increase of 16.6% on the 1986 total and for NSW, a total of 69,999, an increase of 18.6% on the 1986 census total. Table 7.2 above shows that overall, the Aboriginal population increased 33% on the 1991 census figure and in NSW, the Aboriginal population almost doubled in the five year period since the 1991 census.

Taken together census data (whether ‘unofficial’ or official) between 1901 and 1996 shows that, unlike the non-Indigenous population, the Aboriginal population has had significant declines and also rapid increases not easily explained by definitional adjustments in census calculation methods, or ABS ‘high’ or ‘low’ series projections for ‘natural growth’. Any attempt to map Aboriginal population declines (1921; 1947; 1954; 1966; 1981) against cataclysmic events in the Australian social milieu (the ‘Great Depression’ of the 1930s; Two World Wars; 1914-1918, 1939-1945), natural disasters or deadly diseases appears futile. Any attempt to find correlations between census data denoting population declines with increased rates of infant mortality and morbidity, decreases to the average age at death for Aboriginal men and women, or perhaps accidental deaths or deaths in
custody, would also prove meaningless. Similarly, it appears futile to attempt to examine available census data to find reasons for the often significant increases to national and NSW State Aboriginal populations.

Ultimately, an examination of census data does nothing to contribute to a better understanding of the circumstance of Aboriginal over-representation in arrest and custody rates. The only rational inference that can be made from the census data presented is that increases or declines in the Aboriginal population seemingly have no bearing on Aboriginal arrest rates or over-representation rates. Whether the Aboriginal population decreases or increases between census periods, Aboriginal people have been over-represented in arrest rates throughout the thirty year period examined in this thesis.

7.6 Conclusion

This chapter examines the final period in a historical chronology committed to discovering the key socio-political and legal moments in the literature that contribute to an understanding of the relationship between policing and Aboriginal people’s over-representation in police arrest rates. The period examined was 1992 to 1996 which constitutes what is referred to in this thesis as the ‘Post-Royal Commission’ period; the last period in a tripartite classification system developed to distinguish the literature associated with the research problem and questions set out as section 1.2
The chapter commenced with an account from the Australian Section of the International Commission of Jurists’ (ICJ) visit to Bourke, Brewarrina and Walgett in north-west NSW which, apart from reinforcing the major findings from Cunneen and Robb’s (1987) earlier research, also showed that considerable police resources and court time were involved in the prosecution of Aboriginal people for relatively minor offences. More importantly, the ICJ (1992b) report found it was ‘inevitable practice’ in north-west NSW for police to arrest and charge Aboriginal people for summary offences, rather than proceed by way of summons, and that such an inflexible approach was contrary to law and practice.

Following that, the chapter examined Aboriginal commentary arising from a seminar on Aboriginal people and the criminal justice system convened by the Institute of Criminology, Sydney. There, Aboriginal Magistrate Pat O’Shane made the point that in terms of Aboriginal people’s treatment by ‘The Law’, not a great deal had changed since she had last made public comment on this issue almost fifteen years previously. On this point, O’Shane (1992) maintained that while research studies have shown time and again that Aboriginal people continue to be over represented in the criminal justice system, the magnitude of such over-representation is much broader than simple comparisons with non-Aboriginal Australians: Australian Aboriginal people’s over-representation rate is higher than any of the world’s other indigenous populations. Equally importantly, O’Shane insisted that even when governments do acknowledge the research findings and implement programs for practical change, those same programs are
usually piecemeal, under-resourced, short-lived, and above all, have little Aboriginal involvement in their planning, design, and management.

Similar to O’Shane, Aboriginal lawyer Kevin Kitchener (1992) reaffirmed the fact that Aboriginal over-representation is both an historical and contemporary feature of Aboriginal community life. On this point, Kitchener proposed that in country areas of NSW, over-representation could even be considered as idiosyncratic to Aboriginal community life. Referring to a number of criticisms about police practices that arose in the course of Aboriginal community consultations conducted by the Royal Commission into Aboriginal Deaths in Custody, Kitchener argued that left unchanged, police attitudes, behaviours and use of ‘controlling’ legislation in particular, will continue to act as ‘triggers’ in the tense relationship between Aborigines and police. It was argued there that Kitchener’s observations and conclusions on those issues could be viewed perhaps as tentative examples of what a number of the constituent elements of a concept of ‘overpolicing’ might look like.

Next, the chapter examined commentary by Eades (2004) who, starting from a stated belief that Aboriginal people are seriously disadvantaged in formal situations where success in an interview is crucial to an individual’s rights and benefits, argued the explanatory inadequacy of the ‘difference’ approach to understanding Aboriginal English she had previously adopted for a Lawyers’ Handbook. Eades made it clear that the ‘difference’ approach should now be substituted with a ‘critical sociolinguistic’ approach, which draws on social theory in the analysis of how language is
involved in the failure of the legal system to deliver justice. On this point, Eades (2004, p. 496) argued that the major criticism of the ‘difference’ approach is that it ignores the social inequality and power relations present in intercultural encounters, and she presented an analysis of the Kina and Pinkenba cases to illustrate the inadequacy of this approach. In the Kina case, ‘interactional sociolinguistic’ evidence presented at Kina’s appeal against the ‘guilty’ verdict at her trial conceded there were gross misunderstandings between Kina and her lawyers leading to a finding that Kina’s trial had involved a miscarriage of justice. In the Pinkenba case, knowledge of Aboriginal ways of communicating gained from Eades’ Lawyers Handbook was used by the defence counsel acting for police officers charged with unlawful detention of three Aboriginal youths, to bully, harass and belittle the Aboriginal witnesses and convince the Magistrate the charges against police be dropped. Eades contended that this clearly evident language awareness was unfairly used to subvert the evidence of the Aboriginal witnesses and that awareness of cultural difference is, by itself, not sufficient to promote justice in the adversarial legal system.

Next, the chapter introduced Pirie and Cornack’s (1992) examination of the nature of obscene language laws where it was reaffirmed that Aboriginal people were still far more likely than non-Aboriginal people - using the same words - to be arrested, charged and brought before the courts to be dealt with for their use of obscene language. From an analysis of appeals in the Townsville District Court, brought by the Aboriginal Legal Service on behalf of their Aboriginal clients against their convictions for ‘obscene
language’, Pirie and Cornack found that the alleged obscene words used by
the Aboriginal appellants were spoken to a police officer, and that the arrest
followed disobedience of a police direction, irrespective of whether that
direction was legally based. Consequently, Pirie and Cornack concluded it
could be argued that it is the disobedience that leads to the arrest, not the
language or the behaviour itself.

Subsequently, the chapter explored the views of former Commissioner to
the Royal Commission into Aboriginal Deaths in Custody, Hal Wootten
(1993), who provided a critical appraisal of police/Aboriginal relations in
NSW. From that examination, Wootten made several observations
concerning the historical role of policing in Aboriginal community life and
declared that today, it is still difficult for many Aboriginal people and police
to see each other in non-adversarial roles and that for some, on both sides,
vio\textcolor{red}{lence} is still anticipated as a likely concomitant of arrest. After
reproducing statistical data from his Regional Report as Royal
Commissioner, Wootten reinforced the fact that in Aboriginal towns, the
police to population ratio is significantly higher than in non-Aboriginal
towns and that in Australia as a whole, Aboriginal people are up to twenty
seven times more likely than non-Aboriginal people to be arrested. After
introducing an argument supporting opposing views as to the likely reasons
for Aboriginal people’s over-representation in arrest rates – that Aboriginal
people do in fact commit more crimes versus police practices lead to the
higher arrest rate - Wootten introduced the concept of ‘overpolicing’. Based
on the police to population ratio and arrest rates for Aboriginal towns in far-
west NSW, as well as the high levels of Aboriginal unemployment in those
locations, Wootten became the first to make the observation in the literature that ‘overpolicing’ did not depend for its effects on any racist attitudes in individual police.

Moving overseas to Canada, the chapter explored the conduct of several Canadian inquiries into the policing of Canadian Aboriginal people and drew comparisons between the policing of Canadian Aboriginal and Australian Aboriginal people. Essentially, this comparison revealed the fact that in most respects the position and disposition of Canadian Aboriginal people and Australian Aboriginal people is remarkably similar, even to the extent of the application of a concept, *albeit*, undefined, of ‘overpolicing’ to explain Aboriginal over-representation in police arrest and custody rates.

In the final section of the chapter, ‘unofficial’ counts and official census data for national and NSW State Aboriginal population totals was presented to illustrate population movements between 1901 and 1996. However, no ready explanation could be developed to show why there were so many significant declines and increases in the Aboriginal population over that period. More importantly, the census data did not lead to any conclusions concerning a possible causal relationship between decreases or increases in the Aboriginal population and Aboriginal over-representation rates. The analysis of population data and Aboriginal over-representation rates is a matter for further research and much dependant on the availability of arrest and custody data collected more frequently than the current National Police Custody Surveys.
SUMMARY AND CONCLUSIONS

8.1 Introduction

The primary purpose of this study was to respond to the question, ‘How did the concept of overpolicing become established in criminological accounts about Aboriginal over-representation in police arrest and custody and how useful is it?’ In responding to that question, the study developed a chronological account of extant literature that attempted to explain the causes for Aboriginal over-representation in police arrest and custody rates and, as a result, established that ‘overpolicing’ was first employed in Australian criminological literature in 1982 in a study conducted by the NSW Anti-Discrimination Board (ADB). However, from the ADB study, it became apparent that the term ‘overpolicing’ had been employed in earlier research conducted outside Australia, which in turn, led to further research being conducted to locate the earliest reference to the term in overseas criminological literature.

From the further inquiry, it became evident that the term ‘overpolicing’ was first used in the USA in the mid-1960s, as a descriptor for the manner in which ‘black communities’ were being policed in that country. Having identified the earliest mention of the term in the literature and, subsequently, several more overseas references prior to its use by the ADB (1982), the
study then explored the term’s adaptation within Australian criminological literature to show how it had been used to both illustrate and describe the manner in which Aboriginal people are policed. That examination also considered whether the literature has adequately demonstrated the term’s relevance as a descriptor in explanations concerning Aboriginal over-representation in police arrest and custody rates.

Through a restatement of the four research questions set out in section 1.2, this chapter summarises the key findings from the main inquiry and draws conclusions about the concept’s explanatory power to articulate how ‘overpolicing’ sustains Aboriginal over-representation. In summarising the key findings from the main inquiry, the chapter also re-visits a tangential issue raised near the end of section 1.1.1 to present a response to the question of whether ‘overpolicing’ developed independently, or contemporaneously, to Criminology’s research on the question of Aboriginal over-representation.

Following that, section 8.3.4 summarises overpolicing’s usage in the literature from the preceding chapters and lists the examples of overpolicing gleaned from the literature in tabular form in Table 8.1. Subsequently, the contents of Table 8.1 are converted into an exploratory, diagrammatic representation of what a conceptual model of overpolicing might look. The ‘model’ is purely illustrative and not intended to correspond to a theoretical model that either defines or contextualises the concept of overpolicing in criminological theory. A prior caveat placed around this study’s central aim was that it would not attempt to either define, or refine, the concept of
overpolicing. Such an ambitious objective is well beyond the resources and capacity of this present project.

After presenting a diagrammatic representation of ‘overpolicing’, section 8.4 summarises what the preceding chapters have argued in terms of the concept’s explanatory power. In the same section, a number of recommendations are offered which suggest possible future research activities aimed at developing appropriate measures to represent the existence of ‘overpolicing’. In conjunction with these recommendations, the study proposes that an opportunity arises for Australian criminologists to consider how, and in what manner, a concept of ‘overpolicing’ might be incorporated into a multi-factorial explanation concerning Aboriginal over-representation. In reflecting on the comments of the inaugural Director of the Australian Institute of Criminology’s call for ‘an Aboriginal Criminology’ over twenty-five years ago, this study also proposes that an opportunity exists for the AIC to progress Clifford’s (1982) historic counsel.

8.2 ‘Overpolicing’: its origins

From a world-wide search of extant literature relating to criminological research on ‘over-representation in the criminal justice system’, section 2.8 established that the term ‘overpolicing’ first appeared in 1966 in a report prepared on behalf of the US Department of Justice’s Office of Law Enforcement Administration. As a result, 1966 was selected as the commencement year for the thirty year period of this study’s examination of the origin, usage and utility of a concept of ‘overpolicing’.
Essentially, the Office of Law Enforcement Administration report was an historical account of police-community relations in the United States up to that time, and coincided with the emergence of the Civil Rights Movement. In that report, Watson (1966) used ‘overpolicing’ - as one descriptor among a number - to denote how black minority districts were policed ‘differently’ by a significant number of the country’s police agencies. It was noted, however, that Watson (1966) did not attempt to define the term or explain its employment in the report and further, that no other reference to ‘overpolicing’ was located in that country until twelve years later.

At that time, Mehay (1979) introduced the term ‘overpolicing’ in the context of a ‘cost effectiveness analysis’ of contract policing service arrangements between Los Angeles County and thirty autonomous municipal governments. Again, the term was neither defined nor discussed and was merely used to convey the idea that the frequency of mobile vehicle patrols specified under the contract service arrangements, may result in ‘overpolicing’ in some of the geographically smaller, municipal government areas. In the same year, Ryan (1979) conducted an assessment of a proposal calling for the introduction of more repressive measures in the British penal system. In discussion on a tangential issue concerning police enforcement of the Children and Young Persons Act 1969, Ryan (1979) alluded to the possibility of ‘overpolicing’ in some areas. In this instance, it appears that Ryan was alluding to the possibility of overpolicing if, or when, the number of police cautions issued to juveniles for trivial misdemeanours, increased beyond some arbitrary, un-stated target number.
Two years after Mehay (1979) and Ryan’s (1979) brief pronouncements about ‘overpolicing’, Ashton (1981) referred to the term in a PhD thesis that explored the relationship between race and class in contemporary U.S. society. Briefly, Ashton (1981) examined the implications of the election of a black mayor (Coleman Young) on the social organisation of the Detroit police department and the conduct of policing in that city. Ashton (1981) stated that the institution of policing was chosen as the focus of the analysis because the conduct of policing in any large city articulates the issues of race and class, and that traditionally, the black community has had an antagonistic relationship with the police, resulting in black grievances about police brutality, harassment and ‘overpolicing’. In an examination of the substance and implications of what Mayor Coleman Young did in Detroit between 1974 and 1977, Ashton (1981) paid particular attention to the context in which the Mayor was elected, a context which involved explicit controversy and debate over the role of police in the black community. Again, ‘overpolicing’ was not defined although Ashton (1981, p. 1) infers the existence of the opposite of ‘overpolicing’ – ‘under policing’ - in referring to complaints from the black community that police fail to pay sufficient attention to crime in black communities. Ultimately, Ashton’s study does not contribute to a better understanding of the concept of ‘overpolicing’.

While Watson’s (1966) employment of the term ‘overpolicing’ occurred at the beginning of the Black ‘civil rights movement’, the two remaining U.S. references to ‘overpolicing’ emerged during the time of the country’s ‘War on Crime’: a federal level social policy launched in 1967 and abandoned in
1981. In effect, America’s ‘War on Crime’ endowed policing with a new prerogative to actively attack ‘street crime’ and lower class criminals with the result that ‘proactive policing’, or ‘hard’ policing, became the cornerstone in America’s ‘fight against crime’ (Hagan, 1990, p. 575). The most noticeable outcome from ‘proactive policing’ methods was that unemployed and urban black males were targeted even more perniciously by police, giving rise to complaints from black communities that their communities are ‘overpoliced’ (Barak, 1994, p. 281).

In the same year as Ashton published his thesis, the British Home Office appointed Lord Scarman to conduct a Commission of Inquiry into the cause of three days of race riots in April 1981 in the towns of Brixton and Toxteth (ADB, 1982, p. 111). From his inquiries, Lord Scarman concluded that the Brixton and Toxteth riots were a direct result of ‘overpolicing’. In this instance, ‘overpolicing’ was said to have occurred as a consequence of the high level of police harassment of working class, unemployed youth: particularly Asian and West Indian minority groups. In other words, ‘high level police harassment’ was viewed by Scarman as a ‘practice’ element of ‘overpolicing’.

Although Lord Scarman brought the notion of ‘overpolicing’ to the public gaze, he did not attempt to define the concept, nor did he allude to its origins or prior use. More importantly, Lord Scarman limited the term’s application to the immediate policing environment of Brixton and Toxteth, and did not argue whether the concept was applicable in other locations with similar racial tensions between police and minority groups.
The foregoing references (Watson, 1966; Mehay, 1979; Ryan, 1979; Ashton, 1981; ADB, 1982) drew attention to the fact that the term ‘overpolicing’ originated in American criminological literature in 1966. Further, it is apparent the term was originally employed in a study that examined the relationship between police and ‘black minority districts’ in the US. After that, the term was employed in the four remaining references to denote: a possible outcome from contract policing arrangements in Los Angeles, California; a possible outcome from the enforcement of the Children and Young Persons Act 1969 in Britain; a descriptor of the way in which black communities are policed in Detroit; the principal ‘cause’ for race riots in Britain in the towns of Brixton and Toxteth, as well as a descriptor for the way in which Asian and West Indian youth were policed in those two communities.

In summarising the literature reviewed in this study to determine the origins of the term ‘overpolicing’, this section has shown that it first appeared in American criminological literature in 1966. Equally importantly, this study has not been able to discover any prior references to ‘overpolicing’ before Watson’s (1966) report, or the reasons why it was subsequently accepted in the literature as a self evident state of affairs, not requiring verbalisation or clarification.

In conclusion, this study has shown that the term ‘overpolicing’ was employed in the literature on five separate occasions in America and Britain, prior to its introduction in Australian criminological literature in 1982. It was apparent that there was no consistency in the application of the
term to a variety of policing contexts and that the likely reason for the disparate usage was that neither the term, nor its application, was explained, nor defined.

8.3 ‘Overpolicing’: its usage

As stated in the previous section, references to ‘overpolicing’ in criminological literature prior to 1982 were few, and dissimilar, in their application or intent. This section comprises a summary of all references to ‘overpolicing’ presented in this study’s examination of Australian criminological literature during the period 1982 to 1996. In addition, the section summarises the nature and context of ‘overpolicing’ as elaborated in a number of Canadian government inquiries in the early to mid-1990s. The commencement date for the summary corresponds with the first mention of ‘overpolicing’ in Australian criminological literature, and concludes in 1996 to correspond with the end-date of the period examined in this thesis.

Chapter Three acknowledged that Eggleston’s (1976) study was the first empirical research in Australia to establish the fact that Aboriginal people are not only arrested, but also imprisoned, at a greater rate than non-Aboriginal people. In addition, her research was able to clearly demonstrate that Aboriginal people are subject to ‘differential policing’ and also that ‘police prejudice’ is a significant contributing factor to Aboriginal over-representation rates and police treatment of Aboriginal people. On the last point, Eggleston (1976) concluded that police prejudice against Aboriginal
people was more pronounced in country policing than in metropolitan policing.

In the same way, Chapter Four highlighted Clifford’s (1982) commentary regarding the discriminatory operations of the criminal justice system where Clifford (1982) argued police were too ready to arrest Aboriginal people, and the courts too prone to imprison them, leading him to conclude that the history of the discriminatory treatment of Aboriginal people by police was a form of ‘institutionalised racism’. Within that discussion, it was stated that Clifford remains the only Criminologist to argue directly that Criminology should look to causes other than those offered through dispositional theories in explaining the circumstance of Aboriginal crime and criminality.

In the same chapter, it was argued that both Coe (1982) and O’Shane (1982) had made implicit references to some of the substantive elements of an as yet undefined and unstated concept of ‘overpolicing’. In this regard, Coe (1982) argued that the present relationship between Aboriginal people and the legal system, with the police as agents of that system, can only be understood in the light of two centuries of oppression of Aboriginal people. Against this background, Coe (1982, p. 14) introduced what was arguably the first public pronouncement that equated the systematic and sustained campaign of oppression of Aboriginal people with the crime of genocide.

In drawing attention to the fact that there are a number of historical continuities in the relationship between police and Aboriginal people, Coe (1982, p. 15) made specific reference to the appalling situation that existed
in certain NSW Aboriginal towns where it appears that police adopt a ‘frontier mentality’. Citing a number of examples of police discrimination in the towns of Walgett and Taree, Coe (1982, pp. 21-22) forcefully argued that ‘police discretion is constantly exercised against Aboriginal people’ and that ‘police rarely use their discretion not to proceed against Aboriginal people’. Importantly, Coe (1982) argued that Aboriginal towns, such as Walgett and Taree, appeared to have a higher level of policing because those towns had a higher number of police.

In Chapter Four, O’Shane (1982) argued that the over-representation of Aboriginal people in arrest and imprisonment rates represented clear evidence that Aboriginal people are subject to ‘systemic discrimination’ and, as a result, they have a different experience from the rest of the population at the hands of the criminal justice system (O’Shane, 1982, p. 31). In reinforcing the fact that, contrary to non-Aboriginal perceptions, the majority of Aborigines in NSW lived in the metropolitan area and not in rural locations, O’Shane (1982, p. 33) argued it was irrelevant where an Aboriginal person lived as they are far more visible than any other community group, not only because of their skin colour, but more importantly, because of their utterly depressed socio-economic conditions and their state of dispossession. Referring to Eggleston’s (1976) finding that many police in country and outback towns expressed prejudice against Aborigines, O’Shane (1982) agreed with Eggleston’s conclusion that such attitudes appear to be a carry-over from an earlier period, when frontier conditions produced direct conflict between the two races.
At the time Eggleston (1976), Clifford (1982), Coe (1982) and O’Shane (1982) published their observations about the societal and institutional factors contributing to the continuing circumstance of Aboriginal over-representation in the criminal justice system, the term ‘overpolicing’ was not yet employed in Australian criminological literature. However, it becomes clear in section 8.3.1 that each of their contributions tentatively identified a number of the constituent elements of what was still a nebulous and unnamed notion of ‘overpolicing’. In this regard, Eggleston (1976), Clifford (1982), Coe (1982) and O’Shane identified the following as contributing factors that explain Aboriginal over-representation:

- Differential policing
- Police prejudice
- The history of discriminatory treatment of Aboriginal people by police as a form of ‘institutionalised racism’
- Police discrimination
- A higher level of policing in Aboriginal towns
- A higher number of police in Aboriginal towns
- Systemic discrimination
- The high ‘visibility’ of Aboriginal people because of their utterly depressed socio-economic conditions and their state of dispossession.
- Particular police attitudes which have been carried over from the frontier period of direct conflict with Aborigines

8.3.1 How is ‘overpolicing’ deployed in Australian criminological literature?

In 1982, the NSW ADB published its study on Aborigines and street offences and, through that, introduced Australian criminological literature to
the concept of ‘overpolicing’. From an examination of policing in the far-west and north-west NSW towns of Boggabilla, Brewarrina, Bourke, Cobar, Condobolin, Enngonia, Lightning Ridge, Moree, Walgett and Wee Waa, the ADB (1982, pp. 113-4) found that Aboriginal people in those towns were subject to continuous police surveillance, amounting to harassment. The result of this form of harassment was that a high proportion of Aboriginal people in those towns were continuously and repeatedly arrested for trivial offences, with ‘unseemly words’ and ‘fighting’ comprising over two-thirds of all arrests (ADB, 1982, pp. 40-43). The ADB (1982, p. 77) argued that this indicated that police believed, and acted to implement the belief, that Aboriginal people warranted considerably more of their time and attention than did non-Aboriginal people.

Further, in an examination of police strengths in those Aboriginal towns the ADB (1982, p. 77) found that, compared to the rest of the State, the Aboriginal community is subjected to a greater degree of supervision over their lives and lifestyles, wholly disproportionate to that experienced by any groups in the non-Aboriginal community. The ADB study was also important for making one of the first attempts to quantify the rate of police per head of population in areas with large numbers of Aboriginal people. In comparing the rate of police per 1000 of population between NSW as a whole, and a number of other centres, the ADB (1982) found the rate to be twice or greater than the State average in the towns of Bourke, Moree, Walgett, Brewarrina and Central Darling (Wilcannia). Both matters – greater degree of supervision and the quantification of police per head of
population – were determined by the ADB to be indicators of ‘overpolicing’.

The ADB (1982, p. 42) study was also centrally concerned with the use of particular legislation by police and how that legislation was used to maintain police authority. The study found that the majority of charges for offensive behaviour were related to language, and in the vast majority of cases the language complained of was directed at police officers. In an immediate sense ‘over-policing’ was related to the use of particular legislation and the criminalisation of Aboriginal people. However, the ADB also stressed the significance of historical continuities in the use of particular legislation and the maintenance of police authority in the ‘political’ order, arguing:

Enforcement of street offences legislation in these towns can be seen as a continuation and contemporary expression of the historical role played by the police in the construction and maintenance of this order. Aborigines are often regarded as a ‘problem’ insofar as they are actively un-accepting of ‘their place’ in this order. (ADB, 1982, p. 128).

Although the ADB (1982) did not attempt to define a concept of ‘overpolicing’, it inferred the following events, activities or police practices constituted ‘overpolicing’ in Aboriginal communities:

- Aboriginal communities being subjected to continuous police surveillance
- Aboriginal people being continuously and repeatedly arrested for trivial offences
- Higher police numbers than comparable non-Aboriginal locations
- Use of particular legislation by police to maintain their authority
• Historical continuities in the relationship between police and Aborigines in the maintenance of police authority in the political order.

8.3.2 Subsequent Australian references to ‘overpolicing’

In Chapter Five, the study articulated how the concept of ‘over-policing’ became a major part of the explanation for Aboriginal over-representation in arrest and custody rates in the NSW BOCSAR report titled, *Criminal Justice in North West NSW* (Cunneen & Robb, 1987, p. 78). The report paid considerable attention to the history of police intervention in north-west NSW, as well as the then current level of intervention, and argued for an explanation of Aboriginal over-representation in the criminal justice system which recognised both the persistent and extensive nature of that intervention. In this regard, the report stated:

> In essence there is a dual explanation for the over-representation of Aboriginal people. Part of that explanation accepts a higher rate of the commission of offences by Aboriginal people and seeks to explain that through socio-economic factors. The other part of the explanation rests on an acceptance of over-policing. That is, Aboriginal people are policed in a way different from, and at a higher level, than that for non-Aboriginal people. Both parts of this explanation rest on a strong historical continuity in the position of Aboriginal people in white society. (Cunneen & Robb, 1987, p. 220)

Although the term ‘overpolicing’ was nowhere actually defined or described in the report, it was introduced at various points ‘as a state of affairs that can be deduced through particular events’ (Cunneen & Robb, 1987, p. 220). In this regard, instances were provided which pointed to what the concept was meant to convey as an explanation for Aboriginal over-representation. First, it proposed as axiomatic, that any community that is overpoliced will show high statistics for crime. This was certainly the case for the majority of Aboriginal communities, and specifically for those examined in northwest...
NSW, with Cunneen and Robb (1987) arguing that Aboriginal people were ‘grossly over-represented’ in all offence categories. At another level, attention was drawn to the relationship between ‘overpolicing’ and the charges of ‘assault police’; ‘hinder police’; and ‘resist arrest’: a police-initiated group of charges (otherwise known as the ‘Aboriginal Trifecta’) in which levels of Aboriginal over-representation reached their peak. A third instance related to what Cunneen and Robb (1987, p. 221) referred to as ‘the mundane and obvious’ expression of ‘overpolicing’. The example given of this instance was the sheer number of police stationed in small communities, such as the north-west NSW communities examined.

‘Overpolicing’ was also demonstrated in the use of particular legislation. The report detailed increased police use of the common law offence of ‘riotous assembly’ against Aboriginal people as opposed to less serious charges of ‘unlawful assembly’ and ‘affray’ after civil disturbances. (Cunneen & Robb, 1987, p. 222). Finally, mention was also made of the police response to collective disturbance where, in Bourke for instance, a ‘quick fix’ was to fly in Tactical Response Group (TRG) police from Sydney. Once the TRG had restored order, they were returned to Sydney having had no connection to, or understanding of, whatever tension, conflict or historical factors led to the disturbance in the first place (Cunneen & Robb, 1987, p. 222).

From the above, it becomes clear that ‘overpolicing’ was only considered as part of the explanation for Aboriginal over-representation and that in this instance, the term is used as an allegorical device to represent a combination
of factors that give effect to Aboriginal over-representation. Although Cunneen and Robb (1987, p. 220) admit ‘problems remained in distinguishing over-commission of offences and over-policing’, their study identified the following events, activities or police practices as constituting ‘overpolicing’:

- There are strong historical continuities in the relationship between police and Aboriginal people in the particular location
- There is both persistent and extensive police intervention in Aboriginal community life
- Aboriginal people are policed differently than non-Aboriginal people
- Aboriginal people are policed at a higher level than non-Aboriginal people
- There are high statistics for crime
- High levels of Aboriginal over-representation are generated through police-initiated charges of ‘assault police’, ‘hinder police’, and ‘resist arrest’
- The sheer number of police stationed in small communities (what is described as the mundane and obvious expression of ‘overpolicing’)
- The use of particular legislation by police to stimulate more serious charges
- The use of metropolitan-based TRG police to resolve collective disturbances in rural locations.

In Chapter Five, reference was made to what could be called the ‘obverse’ of ‘overpolicing’: ‘under policing’. In this regard, Beecroft (1987, p.7) suggested that the high arrest and imprisonment rates for ‘disorderly conduct’ type offences in Queensland Aboriginal communities was indicative of ‘overpolicing’. However, those communities also complained that, similar to Ashton’s (1981) illustration, police were slow to respond to
Aboriginal complaints, particularly Aboriginal women’s complaints concerning interpersonal family violence, and as a result, Aboriginal communities were ‘underpoliced’ on their own land.

Chapter Six commenced with a brief review of the conduct of the Royal Commission into Aboriginal Deaths in Custody where, in relation to the frequency of Indigenous deaths in custody, the Royal Commission concluded that Aboriginal people did not die in custody at a greater rate than non-Aboriginal people in custody. However, the Royal Commission determined that what was overwhelmingly different was the rate at which Aboriginal people come into custody, compared with the rate of the general community. On this point, the Royal Commission conducted two national police custody surveys, the first in August 1988, and the second in June 1989, to ascertain the rate at which Aboriginal people come into custody compared to non-Aboriginal people. The level of Aboriginal over-representation in police custody was 27 and 15 times respectively.

Through an analysis of the underlying issues that account for the inordinately high level of Aboriginal over-representation in custody, the Royal Commission determined that the most significant factor contributing to the circumstance of over-representation was Aboriginal people’s disadvantaged and unequal position within the wider society: economically, culturally and socially (ATSIC, 1998, p. 5). The Royal Commission also established from its consultations with Aboriginal communities that Aboriginal people most frequently identified their relations with police
officers as the most serious and constant indicator of the injustice and prejudice which they experience in society (RCIADIC, 1991, Vol 2, p. 207).

In the same chapter, an examination of the HREOC (1991) Inquiry into Racist Violence revealed the existence of a nationwide pattern of serious complaints of racist violence towards Aboriginal people where, overwhelmingly, the complaints concerned police misconduct. According to the Inquiry, racist violence by police officers was found to take a number of forms including verbal abuse, physical assault, provocation and harassment (Cunneen, 1991b, p. 148). On a practical level, racist violence was occasioned through high levels of police surveillance and intervention into Aboriginal social and cultural life, ill-treatment of Aboriginal people in custody and the specific nature of police violence against Aboriginal women and young people (Cunneen, 1991, p. 149). An issue the Inquiry argued as being closely related to the question of police intervention into Aboriginal social and cultural life was ‘over policing’.

‘Over policing’ was taken by the HREOC inquiry to refer to both the ‘degree of police intervention’ and the ‘nature of that intervention’. The inquiry proposed that the ‘degree of police intervention’ can be demonstrated through the number of police stationed in areas with large Aboriginal communities and also through the type of specialist police (such as the Tactical Response Group) used to control Aboriginal communities. With respect to the first type of intervention, Aboriginal people’s complaints that there appeared to be disproportionate numbers of police stationed in Aboriginal towns were followed up by the Inquiry, which produced a table
(6.2 in this study) to illustrate that the Aboriginal towns of Bourke, Brewarrina, Walgett and Wilcannia, did in fact have significantly greater numbers of police per head of population, than the State average.

With respect to the second part of the definition, the inquiry argued that the nature of the intervention can be gleaned from particular policing practices, and may refer to a range of activities such as the discriminatory use of particular legislation, spotlighting, ‘stop and searches’, or patrols which create an atmosphere of surveillance and tension; and the discriminatory policing of particular activities. Ultimately, the Inquiry concluded that the link between ‘overpolicing’ and racist violence revolved around the issue of structural racism, and that ‘over policing’ draws its legitimacy from the conditions of colonialism and the history of the role of the police as an instrument in the maintenance of colonial relations.

In Chapter Seven, Wootten (1993) provided commentary on the circumstances leading up to the establishment of the Royal Commission into Aboriginal Deaths in Custody in 1988, and his role as Royal Commissioner, inquiring into the deaths of Aboriginal persons who had died in lawful custody in NSW, Victoria and Tasmania. In doing so, Wootten (1993) provided a brief history of relations between Aboriginal people and police, noting the extraordinarily high rate of arrest for Aboriginal people following the conduct of two national police custody surveys, and posed the question ‘What was the explanation for the high arrest rate of Aboriginal people?’

Following articulation of the what might be considered the ‘usual’ dual explanation for Aboriginal over-representation in arrest rates – either
Aboriginal people commit more offences than non-Aboriginal people, or Aboriginal people do not commit more offences than other people, but police discriminate against them – Wootten (1993) acknowledged there are police practices and attitudes that contribute markedly to the high arrest rate of Aboriginal people. The example given was ‘overpolicing’. In this regard, Wootten (1993) argued that ‘overpolicing’ can be demonstrated by the excessive numbers of police stationed in locations having significant Aboriginal populations, and for the first time, introduced the view that ‘overpolicing’ is not dependent on the existence of racist attitudes in individual police, inferring racism permeates the whole criminal justice system, not just the police.

### 8.3.3 Canadian ‘Overpolicing’

Chapter Seven (section 7.3.2) revealed the fact that, apart from North America, Britain and Australia, Canada is the only other western country where criminological literature refers to the term ‘overpolicing’. In this regard, it was shown that Canadian criminological literature first employed the concept in that country in 1987, when it featured in the Quebec Human Rights Commission’s inquiry into relations between police and ethnic minority groups, following the shooting death of a black teenager by a Montreal Urban Police officer (Bellemare, 1988). Subsequently, ‘overpolicing’ was referred to in five further provincial government inquiries (Nova Scotia; Alberta; Manitoba; Winnipeg; and Ontario) between 1988 and 1991, where Canadian Aboriginal overrepresentation in the respective government’s criminal justice system was the core issue. In
strikingly similar conclusions, the five Commissions of Inquiry acknowledged the existence of evidence of ‘differential policing’ generally, and more specifically, of ‘overpolicing’, of over-surveillance, of over-charging, and the over-use of pre-trial detention (McMullen & Jayewardene, 1995, p. 38). In the context of the policing of Canadian Aboriginal peoples, it was shown that ‘overpolicing’ meant:

- the practice of police inordinately targeting people of particular ethnic or racial backgrounds or people who live in particular neighbourhoods…Governments in Canada have historically used the police to pre-emptively attempt to resolve Aboriginal rights disputes by arresting those attempting to exercise those rights…and in addition, police have been used to further the objectives of governments in terms of assimilation through apprehension of children in order to have them attend residential school, and later, to support child welfare agencies…police were also used to support many of the most egregious provisions of the Indian Act (Rudin, 2005, p. 2).

More succinctly, Rudin declared that Aboriginal people have experienced a type of ‘overpolicing’ that is unique – ‘overpolicing in furtherance of government goals for the assimilation and colonisation of Aboriginal people’ (Rudin, 2005, p. 32). Parallel with their findings on ‘overpolicing’, all five Inquiries also found evidence of ‘under policing’, of delays in responding to Aboriginal peoples’ calls to the police, and of apathy in the investigation of crimes committed against Aboriginal people (McMullen & Jayewardene, 1995, p. 39).

Section 7.3.2 also showed that the final Canadian reference to ‘overpolicing’ within the period examined in this thesis occurred in a Canadian Journal of Criminology article by Henry, Hastings and Freer (1996), where the relationship between race and criminality was considered. Briefly, Henry et. al., (1996) highlighted the fact that despite the media
producing and reinforcing an alleged connection between race and crime, there was no direct empirical evidence from Canada to show that blacks commit more crimes than members of other racial groups (Henry et al., 1996, p. 469). However, this particular belief is reinforced by the alleged ‘overpolicing’ of the black community generally, and Jamaican people specifically, particularly with respect to drugs and the drug culture (Henry et al., p.470). In this context Henry et al., (1996, p. 470) argued that the strong surveillance of black clubs and most social events frequented by large numbers of black people, constituted ‘over policing’.

Overall, there are nineteen independent references to a concept of ‘overpolicing’ in the literature examined in this thesis. Of these, seven references (Watson, 1966; Mehay, 1979; Ryan, 1979; Ashton, 1981; Scarman, 1981; Bellemare, 1988; Hastings et al., 1996) are not concerned with the policing of Aboriginal people. While these references do contribute to knowledge about the origins of the term ‘overpolicing’, and its usage, they do not contribute to the primary purpose of this study: to ascertain how ‘overpolicing’ established itself in criminological accounts about Australian Aboriginal over-representation in police arrest and custody rates. Consequently, they will not be given any further consideration in this section.

8.3.4. Summary of overpolicing’s usage

Sections 8.3.1., 8.3.2. and 8.3.3. provided numerous examples of the types of police practices, activities or societal conditions that have been used in
Australian and Canadian criminological literature to communicate the existence of ‘overpolicing’. As many of the examples cited are similar or the same, the overall impression is that there is general agreement within the literature on what the concept of ‘overpolicing’ purports to represent, and also that it can be clearly articulated and readily understood. However, in summarising the incidence and usage of the concept in those sections, it becomes obvious that no probative inquiry or significant debate has been conducted to substantiate its meaning, utility or relevance generally, or more specifically, as it relates to explanations about Aboriginal over-representation.

The most expansive explanation of the concept up to this point is the one proposed by Cunneen (1991b, p. 149) who, on behalf of the HREOC (1991) Inquiry into Racist Violence, argued that ‘over policing’ referred to:

> both the degree of police intervention and the nature of that intervention. The degree of intervention can be demonstrated through the number of police stationed in areas with large Aboriginal communities and through the type of specialist police (such as the Tactical Response Group) used to control Aboriginal communities.

> The nature of interventions occurs through particular policing practices, and may refer to a whole range of activities including: the discriminatory use of particular legislation (e.g., the use of public order offences); regular foot or vehicle patrols which create an atmosphere of surveillance and tension; spotlighting by police of houses in Aboriginal settlements; discriminatory policing of particular activities such as stationing of police in front of hotels patronised by Aboriginal people. (HREOC, 1991, pp. 90-91)

Elsewhere, Cunneen and Robb (1987) argued that ‘overpolicing’ could be referred to as a ‘state of affairs that can be deduced through particular events’. These events, could include, for example: high statistics for crime
and high levels of over-representation through police initiated charges of ‘assault police’, ‘hinder police’ and ‘resist arrest’, the mundane and obvious expression of overpolicing (high numbers of police stationed in Aboriginal communities) and the use of particular legislation by police to stimulate more serious charges.

Despite offering some clarity around the term, the above explanations lack a degree of specificity and coherency concerning the substantive elements of a concept of ‘overpolicing’. In addition, both explanations make it clear that ‘overpolicing’ is an inference about a state of affairs that may exist within a particular policing context, and that it is not unequivocal or directly observable.

Having considered the origin and usage of a concept of ‘overpolicing’, it is now possible to respond to the tangential issue raised in section 1.1.1., which sought an explanation to the question of whether ‘overpolicing’ developed independently, or contemporaneously, of criminological research concerning Aboriginal over-representation.

From the above summary and associated commentary regarding how, and in what manner, ‘overpolicing’ has been employed since its introduction into Australian criminological literature in 1982, it is reasonable to suggest that the concept developed contemporaneously to research on Aboriginal over-representation. This being said, however, the only observable ‘development’ of the concept has been its virtual normalisation in Australian criminological explanations for Aboriginal over-representation. As
previously stated, the concept remains ill-defined and only partially explained. Apart from Cunneen’s endeavours to improve articulation of its elusive properties, Australian criminologists do not appear sufficiently interested to satisfy themselves as to the veracity or utility of the concept. More pointedly, until such time as it is defined and contextualised in criminological theory, it appears that ‘overpolicing’ will never be anything more than a discursive device to illustrate or describe the manner in which Aboriginal people are policed.

Returning to the summary of the ways in which ‘overpolicing’ has been used in the literature, there are nineteen discrete police practices that have been identified in this study as indicators of the existence of ‘overpolicing’. However, the literature examined does not reveal whether the existence of a particular indicator, one single indicator, a group of indicators or a combination of indicators, is necessary to warrant the term ‘overpolicing’. Together with the nineteen principal indicators, fifteen ‘social’ and ‘cultural’ factors have been identified in the literature as likely ‘pre-conditions’ that often exist within the context of the policing of Aboriginal people.

Table 8.1 below sets out the indicators and factors associated with ‘overpolicing’ and their assignment under a schema developed in this study to situate them in the context in which they have been discussed in the literature. As this study constitutes the first attempt to identify all the indicators of overpolicing employed within the literature examined and assemble them in a coherent structure, the placement of an individual
indicator or its position in one of the four columns should not be read as implying a rank order or exactitude in the indicator’s location. That task, and perhaps the development of a matrix ordering and further clarifying the indicators, is something for a future research project.  

Table 8.1

Indicators of ‘Overpolicing’

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
<th>Column 4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>First Order Policing Practices</strong></td>
<td><strong>Second Order Policing Practices</strong></td>
<td><strong>Social Factors</strong></td>
<td><strong>Cultural Factors</strong></td>
</tr>
<tr>
<td>Institutionalised racism (Clifford, 1982)</td>
<td>Racism, racist violence (Cunneen, 1991b)</td>
<td>Geographic location of former mission or reserve (Goodall, 1996)</td>
<td>Strength of oppositional culture to dispossession (Cowlishaw, 1987)</td>
</tr>
<tr>
<td>Systemic racism (O’Shane, 1982)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Structural racism (HREOC, 1992; McRae et al., 1991)</td>
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<td></td>
</tr>
<tr>
<td>Police discretion (Coe, 1982; O’Shane, 1982; Pirie &amp; Cornack, 1992)</td>
<td>Individual discretionary decisions (O’Shane, 1982; Pirie &amp; Cornack, 1992)</td>
<td>Social visibility of Aboriginal people because of their depressed socio-economic conditions and their state of dispossession (BOCSAR, 1987; O’Shane, 1992)</td>
<td>Historical continuities in the relationship between police and Aborigines in the maintenance of police authority and the political order (ADB, 1982)</td>
</tr>
<tr>
<td>Continued and repeated arrest of Aborigines for trivial or minor offences (ADB, 1982)</td>
<td>Incessant police Surveillance (ADB, 1982)</td>
<td>History of direct conflict between black and white (O’Shane, 1982)</td>
<td></td>
</tr>
<tr>
<td>Use of good order legislation to maintain police authority (ADB, 1982)</td>
<td>Police attitudes towards enforcement of public order offences (Kitchener, 1992)</td>
<td>Particular police attitudes carried over from the ‘frontier’ period of direct conflict with Aborigines (Eggleston, 1976; O’Shane, 1982; Wootten, 1993)</td>
<td></td>
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<tr>
<td>Use of specialist police squads; TRG, 21 Special Squad, BCI (BOCSAR, 1987; HREOC, 1991)</td>
<td>Under policing (Beecroft, 1987; Leicester, 1995)</td>
<td>Aboriginal over-representation tied to Aboriginal people’s disadvantaged and unequal position within the wider society; economically, socially and culturally (RCIADIC, 1991)</td>
<td></td>
</tr>
<tr>
<td>History of discriminatory treatment of Aboriginal people by police as a form of institutionalised discrimination (Clifford, 1982)</td>
<td>Number of inexperienced young police or problem police stationed in Aboriginal towns (Hazlehurst, 1987)</td>
<td>Attempted genocide (Coe, 1982; Bird, 1987)</td>
<td></td>
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<tr>
<td>High number of police in Aboriginal towns (Coe, 1982; Wootten, 1993)</td>
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<td></td>
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<tr>
<td>Continuous police surveillance, mounting to harassment (ADB, 1982)</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Use of particular legislation (street</td>
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</tbody>
</table>
offences and common law ‘riotous assembly’) to criminalise Aboriginal people (ADB, 1982; BOCSAR, 1987)

Aboriginal over-representation from a police-initiated group of charges – assault police, hinder police, resist arrest (BOCSAR, 1987)

delimitation, it is extremely difficult to disentangle ‘regional’ policing practice indicators and Aboriginal social and cultural factors from their counterparts in what might be termed ‘urban’ or ‘metropolitan’ environments, thus further exacerbating clarity concerning overpolicing’s utility and relevance.

A further caveat that applies to the police practice elements within Table 8.1 is that, although a number of previous studies have utilised quantitative research methods to ascertain the numerical strength of police stationed in a particular geographic location, Aboriginal population totals, police to population ratios, and Aboriginal over-representation rates, it is my contention that the majority of the policing practice indicators listed are not readily measurable or able to be calculated in terms of frequency, rate of recurrence, or significance in demonstrating the existence of overpolicing. On the other hand, it is possible that a number of the policing practice indicators in the Table have the potential to become measurable as a result of ‘Aboriginality’ being a formal reporting requirement in official crime
records. While Western Australia and the Northern Territory provide police arrest data that identifies Aboriginal people, NSW continues to argue that questions put to an arrested person concerning their racial origin is ‘discriminatory’ and therefore, this vital information is not recorded.

A further consideration with respect to the factors listed in columns 3 and 4 is that, although illustrating the historical continuities that still influence the social and cultural milieu for many Aboriginal people or their communities, these factors do nothing to demonstrate a connection to the circumstance of overpolicing. At best, the factors in columns 3 and 4 only contribute to an understanding of the underlying disadvantage that exists within Aboriginal cultures and societies. The real value in considering such factors in explanations concerning Aboriginal over-representation, or as constituent elements within a concept of overpolicing, is their potential accommodation in an Aboriginal Criminology which attempts to explain Aboriginal crime and criminality from a cultural conflict perspective.

Ultimately, the several deficiencies mentioned above detract from the Table’s efficacy to explain how, why or in what manner, the elements listed contribute to a better understanding of the concept of overpolicing. Nevertheless, after due consideration as to the most appropriate identifier for each indicator, I offer that all indicators of ‘overpolicing’ – whether measurable or not - relate to either ‘First Order Policing Practices’, ‘Second Order Policing Practices’, ‘Social Factors’ or ‘Cultural Factors’.
‘First Order Policing Practices’ are taken to mean those institutional or systemic matters that apply across the policing environment, such as strategic and tactical imperatives concerning crime control and crime prevention, police standing orders, the legislative framework within which police operate, prescribed police practices, or the formal culture of policing. In this context, it is suggested that a single ‘First Order Policing Practice’ element may be sufficient to sustain overpolicing, if in fact the identified police practice has become normalised in the policing of Aboriginal people.

‘Second Order Policing Practices’ are taken to mean those activities, actions, attitudes or events emanating from an individual police officer’s interactions with Aboriginal people. More particularly, such practices include those activities, actions or attitudes associated with the informal culture of policing. A single, ‘Second Order Policing Practices’ is not sufficient of and by itself to demonstrate the existence of ‘overpolicing’. However, when a single element from column 2 is combined with one or more elements from column 1, the sufficiency of ‘Second Order Policing Practices’ to demonstrate the existence of ‘overpolicing’ becomes more compelling.

‘Social Factors’ are taken to mean those features which are unique to the social order in which Aboriginal people are located, including the historical continuities in the relationship between Aboriginal people and police. ‘Cultural Factors’ are those matters that are specific to the circumstance of Aboriginal community life and lifestyles, including the historical continuities that have been mentioned. All elements from columns 3 and 4
are insufficient, independently or in combination, to demonstrate the existence of ‘overpolicing’. Therefore, the indicators in column 3 and column 4 constitute what might be termed ‘auxiliary’ indicators, whose value in demonstrating the existence of overpolicing is that they identify the likely pre-conditions that exist for ‘First Order Policing Practices’ and ‘Second Order Policing Practices’ to occur.

In further consideration of the content of Table 8.1, it became obvious that the elements of ‘overpolicing’ could be presented in a different manner to illustrate what might be accepted as ‘an illustrative model of ‘Aboriginal overpolicing’. That model is set out below as Figure 8.1.

The central feature of the diagram is the fractured and translucent representation of the term overpolicing. The imprecise, jagged edged, vacant design is meant to convey the fact that the concept remains ill-defined, vague and amorphous in nature and scope. The use of a solid arrow from ‘First Order Policing Practices’ to the diagrammatic representation of overpolicing suggests a single ‘First Order Policing Practice’ element is sufficient for overpolicing to exist. A solid arrow from ‘Second Order Policing Practices’ to ‘First Order Policing Practices’ indicates that one or more of the former, occurring with one of the latter, is necessary for overpolicing to exist, and that jointly, they are sufficient to demonstrate the existence of overpolicing. Overlapping, inter-connected circles have been used to suggest that the sufficiency of ‘Second Order Policing Practices’, ‘Social Factors’ and ‘Cultural Factors’ to demonstrate
overpolicing is not apparent without there being an explicit connection to a ‘First Order Policing Practices’ outcome.

**Illustrative Model of Aboriginal Overpolicing**

*Figure 8.1*

Commentary about the usefulness or capacity of a concept of ‘overpolicing’ to become anything more than what it continues to be described as - a discursive device of Australian criminology - will feature in Section 8.4.
8.4 ‘Overpolicing’: its explanatory power

In section 8.3, it was argued that the concept of ‘overpolicing’ remains an ill-defined, nebulous and underdeveloped construct. It was also inferred from a summary of its usage that ‘overpolicing’ has become a significant discursive device in Australian and Canadian criminological literature that seeks to explain Aboriginal peoples’ continuous, and continuing, over-representation in police arrest and custody rates. Up to the time of writing, no research has been conducted to refine or define the theoretical underpinnings of a concept of ‘overpolicing’, or its actual value as a cluster of (mainly) contributory structural factors that point to the causes for Aboriginal over-representation. Although Table 8.1 and Figure 8.1 provide the first comprehensive listing of the constituent elements of overpolicing, as well as a representation of what a concept of overpolicing might look like diagrammatically, it was not the objective of this study to refine or define the concept. Consequently, having regard to what has previously been established from the literature examined in this study, overpolicing’s explanatory power continues to be limited to its ability to illustrate the way Aboriginal people and Aboriginal communities are policed differently.

From this study’s review of Australian criminological literature, it has been shown that the many and varied approaches to explaining Aboriginal over-representation have included:

- Analysis of different treatment by the criminal justice system (Eggleston, 1976; Clifford, 1982; Coe, 1982; Cunneen & Robb, 1987)
• Different offending patterns and different frequency in offending (La Prairie, 1990; Smandych et al., 1995)

• Racism and discrimination (O’Shane, 1982; Cunneen, 1991b, Wootten, 1993)

• Criminogenic factors derived from socio-economic disadvantage (Clifford, 1982; Walker, 1987)

• The effect of cultural conflict (Barak, 1991; Flowers, 1988)

• The differential impact of criminal justice system policies on Aboriginal people because of their socio-economic position (La Prairie, 1997; Rudin, 2005).

From the above, it can be seen that there is a plethora of what could be termed ‘singular causal explanations’ that attempt to explain the circumstance of Aboriginal over-representation. Cunneen (2001, p. 25) has argued, and this study agrees, that what is needed to adequately explain Aboriginal over-representation is a ‘conceptualisation which goes beyond singular causal explanations’. In this regard, he has proposed that an adequate explanation involves analyses of interconnecting issues which include historical and structural conditions of colonisation, social and economic marginalisation and systemic racism. At the same time, these analyses should also be considering the impact of specific and localised practices of criminal justice and related agencies (Cunneen, 2001, p. 25). Taken together, these factors indicate a particular relationship between Aboriginal people, criminal justice agencies and the nation-state. Many of these factors are currently located within the concept of ‘overpolicing’ however, as previously discussed, no analysis has yet been conducted to align the concept with current criminological theories explaining Aboriginal over-representation, or more importantly, with future looking multi-factorial explanations, as suggested by Cunneen (2001). On this last point, it is
essential that the concept of overpolicing become something more than a tool for reflection on a past state of affairs. The real potential for the concept, albeit unrealised at this time, lies in its capacity to predict a future state of affairs; overpolicing. However, as discussed in section 8.3.4, unless valid and reliable measures are formulated to enable calculation of the frequency, duration or preponderance of a substantial number of the indicators of overpolicing, its predictive power is less than that attributed to metaphorical conjecture.

Given the existing limited explanatory power of ‘overpolicing’ and its potential logical fit within (an as yet, undeveloped) multi-factorial explanation for Aboriginal over-representation, this study suggests the following further research activities may contribute to lessening the gap in existing knowledge and recommends that:

1. The Australian Institute of Criminology and Australian Bureau of Statistics take the lead in the development of a national statistical collection, using a similar methodology to that employed in the conduct of the National Police Custody Survey, for the enumeration and periodic analysis of the frequency, location and identity of Aboriginal people arrested for ‘public order offences’. Such collection should also make provision for identifying the police local area command in which the arrest is made.

2. The Commonwealth Ministerial Council for Police and Emergency Management – Police establish, resource, and monitor the outcomes from an ongoing national program that inquires into all arrests and charges brought against Aboriginal people for ‘public order offences’. The Council to provide a report on the program each year to the Commonwealth Parliament that accounts for the circumstance of Aboriginal over-representation in arrest and custody rates for these minor offences.

3. Through the Australian Institute of Criminology’s Research Council, call for expressions of interest from Australian Criminologists for the allocation of research grant funds to:
(a) Conduct a study similar to this study that investigates the usage of the term ‘overpolicing’ in Australian criminological literature, post 1996 up to the present.

(b) Progress the development of a multi-factorial explanation for Aboriginal over-representation that includes consideration of how a concept of overpolicing contributes to that explanation.

(c) Implement the inaugural Director of the Australian Institute of Criminology’s proposal for the development of an Aboriginal Criminology. This perspective within Criminology to be developed within a ‘human rights’ approach, underpinned by theoretical imperatives around the violation of Aboriginal human rights (attempted genocide, racist violence, overpolicing) since 1788 and the postcolonial project wherein such violations were, and still are, permitted to occur.

8.5 Is a concept of ‘overpolicing’ useful?

This final section summarises commentary from this study concerning the usefulness of a concept of ‘overpolicing’. In this regard, Cunneen (1992, 2001) is the only criminologist to date who has attempted to evaluate the usefulness of ‘overpolicing’. Briefly, Cunneen has argued that, although ‘overpolicing’ has gained more widespread currency - as a political tool - in questioning the nature and validity of police activities in Aboriginal community life and lifestyles, it has also become increasingly contentious. Having regard to what the concept purports to achieve – to identify the way Aboriginal people and communities are policed differently – there is no doubt that a great deal of the contentiousness surrounding the concept, originates from policing itself.
While the limitations of the concept have already been addressed in the previous sections leading up to this discussion, it is fitting that the last comment in this study come from Cunneen (1992), who suggests that one of the greatest advantages in the use of the concept of over-policing, is the fact that it is a concept grounded in Aboriginal experience, and one which expresses something simply and directly about the way Aboriginal people experience the criminal justice system. While I am in agreement with Cunneen that the concept has the power to articulate and explain an important part of Aboriginal people’s lived experience, it is reasonable to suggest that, similar to the concept of overpolicing, this eloquent proposition requires further investigation to ascertain Aboriginal people’s views on how, and in what way, overpolicing articulates and explains their lived experience.
**Conventional wisdom**

In the discipline of history, conventional wisdom is usually defined as ‘historical knowledge that is commonly accepted until revised by historians subsequently’ (Williams, 2003, p. 156).

**‘Aboriginal’, ‘Aborigine’ and ‘Aboriginality’**

The word ‘aboriginal’ comes from the Latin *ab origine* (from the beginning) thus is equivalent to indigenous (McRae, Nettheim & Beacroft, 1991). Correct usage according to the Oxford English Dictionary requires ‘Aborigine’ to be used as a noun and ‘Aboriginal’ as an adjective. However, Commonwealth Government usage, official usage in most States and Territories, and contemporary usage is to use the word ‘Aboriginal’ as a noun (McRae et al, 1991). In contemporary oral and written communication, usage among Aboriginal people themselves avoids either noun form and refers to ‘Aboriginal people’, or the specific language group to which a person belongs. In this study, it is proposed to use the terms ‘Aboriginal people’ or ‘Aboriginal person’ where
appropriate and, otherwise, to use the noun form ‘Aborigine’ where necessary for grammatical correctness. Notwithstanding this general principle, some statistical collections do not separate out Aboriginal and Torres Strait Islander populations and refer to both cultural groups collectively as ‘Indigenous’ people. Where this occurs, this research will adopt the same terminology.

For the purposes of this study, the definition of ‘Aboriginality’ as generally accepted by government, is taken from the Constitutional Section of the former Commonwealth Department of Aboriginal Affairs’ *Report on a review of the administration of Aboriginal and Torres Strait Islanders* (1981) which states that:

An Aboriginal is a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community in which he/she lives (Gardiner-Garden, 2000, p. 2).

*Native Welfare Offences*

‘Native Welfare offence’: a generic reference to breaches of regulations or offences under a variety of statutes from the ‘protection’ and ‘assimilation’ eras that proscribed Aboriginal conduct in public or on missions and reserves. They were also
called ‘status offences’, which provided that a person with the legal status of ‘Aboriginal’ who behaved in a certain way was guilty of an offence, whereas anyone else who behaved in the same way was not liable to any criminal sanction (Eggleston, 1976 p. 226).

**Public Order Offences**

Division 13 of Chapter 3 of the Australian Bureau of Statistics Australian Standard Offence Classification (ASOC) defines ‘public order offences’ as offences involving:

personal conduct that involves or may lead to a breach of public order and decency, or that is indicative of criminal intent, or that is otherwise regulated or prohibited on moral or ethical grounds (ABS, 1997, p. 1).

The ‘victim’ of these offences is the public at large. However, some offences such as offensive language and offensive behaviour may occur in a private place.

Offences in this division are classified into the following sub-divisions:

Disorderly Conduct; and

Regulated Public Order Activities.
‘Disorderly conduct offences’ are classified into the following groups:

**Trespass**: An unlawful and unwarranted intrusion upon the land or property of another, not involving any further criminal intent.

**Offensive Language**: The use of abusive, invective or improper language that is likely to be considered offensive by another person.

**Offensive Behaviour**: Behaviour of a non-verbal kind which is likely to be considered offensive by another person.

**Inclusions:**

- Vagrancy
- Begging
- Public drunkenness
- Coarse forms of gesticulation
- Streaking
- Engaging in intercourse in front of a minor/child (unless there is an intention to force the child to watch)
- Busking without a permit

**Criminal Intent**: Associating with criminal offenders, or behaving in a manner, or possessing tools, clothing or other material that indicates an intention to commit a criminal offence.
**Conspiracy:** Conspire or consort with other persons to commit a criminal offence.

**Disorderly Conduct:** Disorderly conduct not elsewhere classified in Subdivision 131.

**Inclusions:**

- Throw stones not causing injury
- Unlawfully use animal/breach of cruelty to animals legislation
- Desecration of graves/interfere with corpse
- Riot and affray
- Incitement to racial hatred/vilification (ABS, 1997, p. 4).

The ABS Australian National Classification of Offences is set out in full at Appendix A.

**Over-representation**

To measure Indigenous (Aboriginal and Torres Strait Islander populations combined) imprisonment in Australia three different indices are used:

- the number of Indigenous prisoners;
- the number as a proportion of the adult Indigenous population (rate per 100,000 adult Indigenous population); and
the comparison (ratio) of Indigenous to non-Indigenous rates of imprisonment.

Imprisonment rates per 100,000 adult Indigenous persons enable the comparison of Indigenous imprisonment across the States and Territories. The ratio indicates the extent to which the imprisonment rates of Indigenous persons exceed the imprisonment rates of non-Indigenous persons (ABS, 1999).

While the ABS uses ‘low series’ data to estimate Indigenous populations, the Australian Institute of Criminology (AIC) has used ‘high series’ data since 1991 as it produces a more conservative estimate of both incarceration rates and over-representation ratios. The essential difference between ‘low series’ and ‘high series’ data is the assumption made regarding annual births, deaths and migration rates, with ‘low series’ data projecting an average increase in the Indigenous populations of only 2.0% per year for natural growth and ‘high series’ data assuming a more rapidly increasing population of 5.3% per year. The AIC policy on calculating rates for Indigenous people is set out at Appendix B.
FIGURE 2 - AUSTRALIAN NATIONAL CLASSIFICATION OF OFFENCES

Offences Against the Person

11 HOMICIDE
111 Murder
112 Attempted Murder
113 Conspicacy to Murder
114 Manslaughter (excluding by driving)
115 Driving Causing Death
116 Homicide, Unspecified

12 ASSAULTS (EXCLUDING SEXUAL ASSAULTS)
121 Assault Occasioning Grievous Bodily Harm
122 Assault Occasioning Actual Bodily Harm
129 Other Assault

13 SEXUAL ASSAULTS AND OFFENCES
130 Sexual Assault
137 Sexual Offences (consent proscribed)
139 Other Sexual Offences

19 OTHER OFFENCES AGAINST THE PERSON
191 Kidnapping and Abduction
192 Abduction of Children
193 High-speed/Endangering Life
196 Defamation/Iidel
199 Other Against Person

Robbery and Extortion

21-22 ROBBERY/EXTORTION
211 Armed Robbery
212 Other Robbery
213 Extortion

Property Offences

31 BREAKING AND ENTERING
311 Breaking and Entering - Dwellings
312 Breaking and Entering - Shops
318 Breaking and Entering - Other and Unspecified

32 FRAUD AND MISAPPROPRIATION
321 Fraud, Forgery and False Pretences
322 Misappropriation
323 Counterfeiting

33 RECEIVING AND UNLAWFUL POSSESSION OF STOLEN GOODS
331 Receiving
332 Unlawful Possession of Stolen Goods
339 Handling Stolen Goods n.e.i.

35-39 OTHER THEFT
351 Motor Vehicle Theft/Illegal Use
352 Bicycle Theft/Illegal Use
353 Boat Theft/Illegal Use
354 Aircraft Theft/Illegal Use
356 Other Vehicle Theft/Illegal Use
359 Unspecified Vehicle/Illegal Use
391 Stealing from the Person
392 Stole Theft
393 Shoplifting
399 Other Theft

41 PROPERTY DAMAGE
411 Annoy (person not therein)
419 Other Property Damage

42 ENVIRONMENTAL OFFENCES
421 Pollution
423 Fumes and Fumes
429 Other Environmental Offences

Offences Against Good Order

51 OFFENCES AGAINST GOVERNMENT SECURITY
511 Offences Against Government Security and Operations

52-54 OFFENCES AGAINST JUSTICE PROCEDURES
521 Breach of Maintenance Order
523 Breach, Other Family Court Order
524 Contempt of Court, Other
525 Possession/Use, Cannabis, All Forms
526 Breach, C.S.O
527 Breach, Other Community Based Order
528 Breach from Custody
529 Periodic Detention, Fail to Report
533 Resist, Hinder Police
534 Conspiracy, (Offence Unspecified)
549 Other Against Justice Procedures

55 UNLAWFUL POSSESSION/USE OF WEAPONS
551 Unlawful Possession/Use Firearms
552 Unlawful Possession/Use, Bomb
558 Unlawful Possession/Use, Other Weapons
559 Possession/Use, Weapons, Other

57-59 OTHER OFFENCES AGAINST GOVERNMENT ORDER
571 Child Pornography
572 Conspicacy
579 Lipstick and Licensing Offences
592 Betting and Gambling Offences
593 Trespassing and Vagrancy
594 Consorting
595 Prostitution and Related Offences
596 Offences Involving Drunkenness
599 Other Offences against Good Order

Drug Offences

61 POSSESSION/USE ILLEGAL DRUGS
613-6 Possession/Use, Narcotics
617 Possession/Use, Cannabis, All Forms
618 Possession/Use, Other Specified drugs
619 Possession/Use, Unspecified Drugs

64-65 DEAL/TRAFFICK ILLEGAL DRUGS
643-6 Import/Export, Narcotics
647-9 Import, Cann.,Other/Unspec.
653-6 Deal/Trade, Narcotics
657-9 Deal/Trade, Cann.,Other/Unspec.

66-69 MANUFACTURE/GROW ILLEGAL DRUGS
663-6 Manufacture/Grow, Narcotics
667-9 Manufacture/Grow, Cann.,Other/Unspec.
699 Other Drug Offences

Motor Vehicle, Traffic and Related Offences

71-72 DRIVING OFFENCES
711 Drink Driving Offences
724 Dangerous/Reckless Driving
735 Negligent Driving

73-75 LICENCE/REGISTRATION OFFENCES
732 Driving, Licence Susp/Cancelled
733 Driving Without Licence
739 Other Driving Licence Offences
749 Traffic Offences, Exp. Parking
751 Registration Offences, Inc. TPI
752 Roadworthiness Certificate Offences

79 OTHER TRAFFIC OFFENCES
793 Parking
799 Other Motor Vehicle Offences

Other Offences

81-88 OTHER OFFENCES
89 OFFENCES IN CUSTODY
Australian Institute of Criminology policy on calculating rates for Indigenous people

The Australian Bureau of Statistics uses two methods to estimate Indigenous populations: “low series” and “high series”. Both employ certain assumptions about births, deaths and migration. The high series assumes a more rapidly increasing population (an annual average rate of 5.3% per year) based on the increasing number of persons who self-identified as Indigenous between 1991 and 2001 as well as natural growth (births and deaths). The low series provides a more conservative population estimate, projecting an average increase in the Indigenous population of only 2.0% per year, which can be attributed to natural growth.

Rates of crime and incarceration for Indigenous people will differ depending on which population estimates are used. High series data provide a larger base population compared with low series data, and will therefore result in lower rates. Analysts must therefore be cautious when calculating rates for Indigenous people, as rates and over-representation ratios will differ depending on whether high or low series data are used.

Arguments can be made for using either high or low series data to calculate Indigenous rates. Whereas the ABS uses low series, the AIC uses high series data as it produces a more conservative estimate of incarceration rates and over-representation ratios. Further, since high series data have been used by the IAC in the calculation of rates since 1991, it is the policy of the Australian Institute of Criminology to continue to use high series population data for the calculation of crime and incarceration rates for Indigenous people for the purposes of maintaining consistency and integrity with previously published data. A shift to low series data in AIC publications, either on a temporary or longer-term basis, would result in difficulties with interpretation and inconsistencies with past publications.

Indigenous population data are derived from the ‘Experimental projections of the Aboriginal and Torres Strait Islander population’ publication (ABS cat. No. 3231.0).

Australian Institute of Criminology: Overview

The AIC was established under section 5 of the *Criminology Research Act 1971* as a body corporate with its functions set out in section 6 of the Act as being:

A. to conduct, or arrange for the conduct of, such criminological research as is approved by the Board of Management or is required by the Attorney-General;

B. to communicate to the commonwealth, the States and the Northern Territory, the results of research conducted by the Institute;

C. to conduct, or arrange for the conduct of, such seminars and courses of training or instruction for persons engaged, or to be engaged, in criminological research or in work related to the prevention or correction of criminal behaviour as are approved by the Board or are requested by the Attorney-General;

D. to advise the Criminology Research Council in relation to needs for, and programs of, criminological research;

E. to provide secretarial and administrative services for the Council;

F. to give advice and assistance in relation to any research performed wholly or partly with money’s provided out of the Fund;

G. to give advice in relation to the compilation of statistics relating to crime;

H. to publish such material resulting from or connect with the performance of its functions as is approved by the Board;

A. to collect information and statistics (without detracting from, and in the context of) the overall collecting and coordinating role of the Australian Bureau of Statistics;

B. to provide information and advice to departments, agencies and authorities of the Commonwealth, of the States, and of the Northern Territory dealing with the administration of
criminal justice;

C. to collaborate, in and outside Australia, with governments, institutions and authorities, and with bodies and persons, in relation to research, or the training of persons, in or in connection with the administration of criminal justice; and

I. to do anything incidental or conducive to the performance of any of the foregoing functions.

http://192.190.66.35/institute/anreport/2001/02.html
1938 Day of Mourning flyer, Anti-Slavery Society, UK.

AUSTRALIAN Aborigines Conference

SESQUI-CENTENARY

Day of Mourning and Protest
to be held in

THE AUSTRALIAN HALL, SYDNEY
(No. 148 Elizabeth Street – a hundred yards south of Liverpool Street)
on

WEDNESDAY, 26th JANUARY, 1938
(AUSTRALIA DAY)
The Conference will assemble at 10 o’clock in the morning.

ABORIGINES AND PERSONS OF ABORIGINAL BLOOD ONLY ARE INVITED TO ATTEND

The following Resolution will be moved:

"WE, representing THE ABORIGINES OF AUSTRALIA, assembled in Conference at the Australian Hall, Sydney, on the 26th day of January, 1838, being the 150th Anniversary of the whitesmen’s seizure of our country, HEREBY MAKE PROTEST against the callous treatment of our people by the whitesmen during the past 150 years, AND WE APPEAL to the Australian Nation of today to make new laws for the education and care of Aborigines, and we ask for a new policy which will raise our people to FULL CITIZEN STATUS and EQUALITY WITHIN THE COMMUNITY."

The above resolution will be debated and voted upon, as the sole business of the Conference, which will terminate at 5 o’clock in the afternoon.

TO ALL AUSTRALIAN ABORIGINES! PLEASE COME TO THIS CONFERENCE IF YOU POSSIBLY CAN! ALSO SEND WORD BY LETTER TO NOTIFY US IF YOU CAN ATTEND

Signed, for and on behalf of
THE ABORIGINES PROGRESSIVE ASSOCIATION,
J. T. PATTEN, President.
W. FERGUSON, Organising Secretary.

Address: c/o Box 155KK, General Post Office, Sydney.

The flyer and poster advertising the Day of Mourning in Sydney to mark the sesqui-centenary of British settlement (Anti-Slavery Society)
APPENDIX E

Terms of Reference: Law Reform Commission – The Recognition of Aboriginal Customary Law

I, Robert James Ellicott, Attorney-General, **HAVING REGARD TO** –
(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, of considering proposals for the making of laws to which the Act applies and of considering proposals for uniformity between laws of the Territories and laws of the States;
(b) the special interest of the Commonwealth in the welfare of the Aboriginal people of Australia;
(c) the need to ensure that every Aborigine enjoys basic human rights;
(d) the right of Aborigines to retain their racial identity and traditional lifestyle or whey they so desire, to adopt partially or wholly a European life style;
(e) the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and
(f) the need to ensure equitable and fair treatment under the criminal justice system to all members of the Australian community.

**HEREBY REFER** the following matter to the Law Reform Commission as provided by the Law Reform Commission Act,

**TO INQUIRE INTO AND REPORT UPON** whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular;
(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
(c) any other related matter.

**IN MAKING ITS INQUIRY AND REPORT** the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane.

**DATED** this ninth day of February 1977

Source: ALRC, 1986, xxxv.
List of major claims of the ‘law and order’ lobby of the Dubbo and Orana region (1985/86)

(a) There is a crime wave in Dubbo and the Orana region more generally.

(b) The crime problem is caused by a minority of hard core recidivists.

(c) The police are powerless to intervene to control ‘street crime’ since the repeal of the Summary Offences Act.

(d) There is a lack of police presence (visibility) on the streets.

(e) Penalties handed down by the courts do not reflect the seriousness of the crime.

(f) Gaols are too ‘soft’ for convicted criminals.

(g) The new procedures for dealing with juveniles hamper police power.

(h) Juveniles lacked parental control.

(i) The police are unable to deal with Aboriginal offenders because of Aboriginal Legal Services.

(j) Aboriginal people commit disproportionately more (street) offences than non-Aboriginal people.

(k) There has been a growth in unreported crime in the region as people become more disillusioned with the police and/or court response

Source: Cunneen & Rob, 1987, p. 3.
APPENDIX G

R v Anunga and Others, Wheeler and Another. Supreme Court of the Northern Territory, Forster J, (1976) 11 ALR 412, (1977) Australian Digest 1 (No. 3)

In the course of giving judgement, Forster J said (at pp. 413-14):
Aboriginal people often to not understand English very well and even if they do understand the words, they may not understand the concepts which English phrases and sentences express. Even with the use of interpreters this problem is by no means solved. Police and legal English sometimes is not translatable into the Aboriginal languages at all and there is no separate Aboriginal words for some simple words like ‘in’, ‘at’, ‘by’, ‘with’, or ‘over’ these being suffixes added to the word they qualify.

Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authoritative figure such as a policeman. Indeed, their action is probably a combination of natural politeness and their attitude to someone in authority.

In rejecting the tendering by the Crown of a typewritten record of interview between Aboriginal accused persons and investigating police officers in two cases heard before Forster J of the Supreme Court of Northern Territory, his Honour was joined by Muirhead and Ward JJ in laying down the following guidelines as an expression of the view of the Court.

(1) An interpreter should be present to ensure complete and mutual understanding.

(2) Where practicable, ‘a prisoner’s friend’ should be present during interrogation. The ‘prisoner’s friend’ should be someone in whom the prisoner will have confidence, by whom he will feel supported.

(3) After the interrogating police officer has explained the caution in simple terms, he should ask the prisoner to tell him, phrase by phrase, what is meant by the caution.

(4) Care should be taken in formulating questions so that, as far as possible, the answer which is wanted or expected is not suggested in any way.

(5) Even when an apparently frank and free confession has been obtained, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.

(6) The prisoner, if being interrogated at meal time should be offered a meal, and where facilities so permit, should always be offered tea or coffee. If there are no facilities he should always be offered a drink of water. Further, the prisoner should always be asked if he wishes to use the lavatory.
(7) No interrogations should take place while the prisoner is disabled by illness, drunkenness or tiredness. Further, interrogation should not continue for an unreasonably long time.

(8) If sought, reasonable steps should be taken to obtain legal assistance for the prisoners.

(9) If it is necessary to remove the prisoner’s clothing for forensic examination, steps must be taken to supply substitute clothing.

These guidelines are not absolute rules, but the consequence of their non-observance may be the exclusion of statements of persons questioned.
THE EARLY HISTORY OF THE
ABORIGINAL LEGAL SERVICE LIMITED
IN NEW SOUTH WALES

BY PAUL COE.

The origins of the Aboriginal Legal Service Limited lay in the response of Aboriginal people to the police activities in and around Redfern at the close of the 1960's.

At the start of the year 1970, the police were enforcing an official curfew. This curfew was in existence from 9.30 pm onwards and was against all Aboriginal People. Aboriginal people who were walking the streets in the inner city suburbs of Redfern, Newtown, Alexandria and Chippendale were subject to arbitrary detention and arrest by police and, in particular, police of the 21st Division. On a Thursday and Saturday nights when Aboriginal people congregated at the hotels: the Clifton and the Empress, the police would on numerous occasions block off the streets of Redfern with up to ten police bullwagons at half an hour before closing time, they would then move into the hotels in large numbers and force all Aboriginal people in the hotel out on the streets, then the Aboriginal people would run a gauntlet where police officers would indiscriminately arrest individuals who would then spend that night in the cells. The Aboriginal people arrested were later charged with offences such as drunkenness, offensive behaviour and unseemly words.

These arrests were based upon a piece of repressive legislation that the Askin State Government (Liberal-Country party Government) had enacted - the Summary Offences Act - which was designed to stop large student groups gathering for demonstrations and to remove culturally and racially undesirable people off the streets of Sydney at night.

Against this background, a group of young Aboriginal people who were by name: Gary Williams, Gary Foley, Isabel Coe, Tony Coorey, Bronwyn Penrith, Les Collins, James Wedge, William Craigie and Paul Coe, attempted to organise a vigilance group which had the express aim of photographing and witnessing incidents of police arrests with the intention of passing this factual information on to the media and government agencies in an endeavour to stop repressive police action. The response was nil. This group of Aboriginal people then spoke at university campuses, to trade union group in an endeavour to raise and highlight the problems as perceived by Aboriginal people themselves. As a result of these talks, a number of young White student-lawyers and lawyers offered to give their time and knowledge organising, on a voluntary basis, arranging bail, interviewing clients in lock-ups, and preparing the defence of Aboriginal clients.

In mid 1970, a Professor of Law, now Supreme Court Judge Wooten, was approached by a law student, Mr Peter Tobin, to attend meetings with this group of Aboriginal people to see what help and advice he could give. Justice Wooten enlisted the aid of a number of prominent lawyers to assist in the attempt to change State Government policy towards Aboriginal people, in particular, the police activities around the inner city area. They attended hotels on Thursday, Friday and Saturday nights as observers to ascertain and establish:

1. The truthfulness of the claims being made by Aboriginal people as stated above, and

2. Whether their presence there, would deter the police from arresting large numbers of Aboriginal people arbitrarily.
This failed, however, the failure created an awareness amongst these White professionals and students as to what extent Aboriginal people were being abused and intimidated by the police.

Mr Justice Wooden drafted a submission on behalf of this body to the then Office of Aboriginal Affairs at the end of 1970 for funds to set up a full time store-front legal office.

In early 1971 the Office of Aboriginal Affairs provided the body then known as the Aboriginal Legal Service with a grant to pay for the salary of a full time solicitor, field officer and secretary. The Aboriginal Legal Service was formed into an unincorporated association on the basis that this was to be most flexible and sensible way to structure an organisation that was to be controlled fully by Aboriginal people in the near future. The Aboriginal Legal Service then, in 1973, voted into office its first full Aboriginal Council. From there, the Aboriginal Legal Service grew from one small store-front office in Redfern to cover the whole of the State with regional offices, throughout New South Wales.

One important aspect, however, that must be emphasised, is this Organisation re-introduction of Aboriginal infrastructures. By this I mean the original decision making in an Aboriginal community having been destroyed. The Aboriginal Legal Service deliberately planned and selected men and women who were leaders in their own communities to be the field officers of this Organisation in this area. The Aboriginal Legal Service (N.S.W) has been responsible for the rising expectations and attitudes that Aboriginal people now have themselves. It is responsible for the initiatives that have occurred in the last ten years which can be directly traced as flowing from the formation of this Organisation in early 1971 i.e., all present Aboriginal organisations were brought into existence by people associated with the Aboriginal Legal Service, including the Aboriginal Medical Service, Aboriginal Housing Company, Aboriginal Children's Service, Murrumina and the Black Theatre. They were the natural consequences of the developing self pride and increased sense of dignity of Aboriginal people coupled with the expectation for social and political change which Aboriginal People deemed as necessary as the rights of any people.

In summary, the Aboriginal Legal Service initiative was repeated in other States of the Commonwealth. Thus, the Aboriginal Legal Service is more than a legal office, it was and still is the embodiment of a generation of Aboriginal people's desire to control their own destiny.

It should be noted that this desire is growing rather than diminishing and the expectations of Aboriginal people to control and govern their lives is a fact which this Government and any successive Government must come to grips with and acknowledge the rights of Aboriginal people to the basic human right of self determination.

During its years of operation the Aboriginal Legal Service has always remained accountable to the Aboriginal people despite repeated attempts by the Government to interfere with its workings and to control its activities. The Aboriginal Legal Service has remained fiercely independent of Government control and repeatedly proclaimed its intention to continue the work for which it was created, namely to provide day to day legal assistance to the Aboriginal people of N.S.W. and to act as their spokesmen in the Courts of the State and in the society of the State at large, in order to protect and to promote the intrinsic and legal rights of the Aboriginal people in this State.

Since its establishment the Aboriginal Legal Service has built up a commendable record of achievement. The need for its existence has been acknowledged by members of the Judiciary, by members of the Stipendiary Bench, the Bar Association, the legal profession as a whole and even representatives of the police force and more recently, by the House of Representatives Standing Committee on Aboriginal Affairs.
Outcomes Paper: Ministerial Summit into Aboriginal Deaths in Custody 04.07.97

OUTCOMES STATEMENT FOR THE MINISTERIAL SUMMIT ON INDIGENOUS DEATHS IN CUSTODY

Preamble

Commonwealth, State and Territory Ministers with responsibility for justice, policing, correctional services, and Indigenous affairs, together with representatives of Indigenous communities, met on 4 July 1997 to examine issues relating to the implementation of the Royal Commission into Aboriginal Deaths in Custody.

In coming to this Ministerial Summit on Indigenous Deaths in Custody, Ministers:

(a) agree that the primary issues of concern are the significant over-representation of Indigenous people at all stages of the criminal justice system and the increase in the rate of Indigenous deaths in custody in some States since the release of the Royal Commission's Final Report;

(b) acknowledge the efforts of all Governments, Indigenous peoples and organisations to prevent contact between Indigenous peoples and the criminal justice system;

(c) acknowledge that addressing the underlying issues is fundamental to the achievement of any real, long term solutions to the issue of Indigenous incarceration and deaths in custody; and

(d) recognise that it will take the combined effort of Commonwealth, State and Territory Governments and Indigenous peoples and the wider community to effectively address Indigenous over-representation.

Resolution

To address the over-representation of Indigenous peoples in the criminal justice system Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans for the coordination of Commonwealth, (State and Territory funding and service delivery for Indigenous programs and services) including working towards the development of multilateral agreements between Commonwealth, State and Territory Governments and Indigenous peoples and organisations to further develop and deliver programs.

The focus for these plans will address:

- underlying social, economic and cultural issues
- justice issues
- customary law
- law reform
- funding levels

Outcomes for the Ministerial Summit on Indigenous Deaths in Custody
and will include

- jurisdictional targets for reducing the rate of over-representation of Indigenous people in the criminal justice system
- planning mechanisms
- methods of service delivery
- monitoring and evaluation

This work would take account of issues and best practices raised at this Summit by representatives of the National Aboriginal Justice Advisory Committee and all jurisdictions.

OUTCOMES TO BE SIGNED BY COMMONWEALTH, STATE AND TERRITORY MINISTERS AND INDIGENOUS REPRESENTATIVES ATTENDING THE SUMMIT

[Signatures]

Outcomes for the Ministerial Summit on Indigenous Deaths in Custody
## Summary of Major Inquiries into the NSW Police 1867 – 1996

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1867</td>
<td>Investigation into the conduct of police and magistrates in regard to corrupt relationships with Bushrangers</td>
</tr>
<tr>
<td>1891</td>
<td>Royal Commission of Inquiry into allegations of bribery links between Chinese gambling organisations and police</td>
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<tr>
<td>1912</td>
<td>Royal Commission of Inquiry into the administration of law in regard to Disorderly Houses in Newcastle</td>
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<tr>
<td>1918</td>
<td>Inquiry into whether fictitious evidence was concocted by police</td>
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<tr>
<td>1920</td>
<td>Royal Commission of Inquiry into how the conviction and sentencing of Charles Reeves and others was carried out</td>
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<tr>
<td>1936</td>
<td>Royal Commission of Inquiry into allegations of “framing persons for offences, giving false evidence, wrongfully inducing accused parties to plead guilty, wrongfully entering private premises, using untrustworthy evidence from paid police agents related to Consorting Laws.</td>
</tr>
<tr>
<td>1974</td>
<td>(Moffit) Royal Commission of Inquiry into allegations whether the government and police had covered up the true situation in regard to the link between organised crime and the management of licenced premises and the poker machine industry</td>
</tr>
<tr>
<td>1975</td>
<td>Inquiry into allegations police had conspired to steal large sums of money and an amount of illicit drugs from Mr Mark Kruse and Mr Steven McGill and to assist these men to leave Australia while on bail</td>
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<tr>
<td>1977</td>
<td>Labor Party internal undercover operation to investigate allegations that police, at almost every level of the force, were involved in organised crime and its protection</td>
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<td>1977</td>
<td>Inquiry into the disappearance of</td>
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anti-drug campaigner Donald McKay from the town of Griffith, south west NSW

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>1979</td>
<td>(Woodward) Royal Commission into the assumed murder of Donald McKay and police links to organised crime in the Griffith region</td>
</tr>
<tr>
<td>1979</td>
<td>(Lusher) Royal Commission investigation into the administration of the NSW Police Force including the appropriateness of its structure, organisation and management policies governing recruitment, appointments, promotions, seniority, classification, training and development and relationship between the Police Force and the Government</td>
</tr>
<tr>
<td>1981</td>
<td>Joint State/Commonwealth Royal Commission into Drug Trafficking (Stewart Royal Commission) which found corrupt practices revealed in previous Inquiries was still present</td>
</tr>
<tr>
<td>1982</td>
<td>Police Tribunal dismissal of Deputy Commissioner Bill Allen for bringing discredit upon the Police Force through corrupt activities</td>
</tr>
<tr>
<td>1984</td>
<td>Inquiry into police involvement in the shooting of Detective Mick Drury at his home in June 1984</td>
</tr>
<tr>
<td>1984</td>
<td>ABC Four Corners investigative report on the ‘Mr Asia’ drug syndicate and police involvement in drug trafficking and ‘stand-over’ rackets</td>
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<tr>
<td>1985</td>
<td>The ‘Age Tapes’ Royal Commission into illegal telephone interceptions by police over the previous 20 years</td>
</tr>
<tr>
<td>1985</td>
<td>NSW Police Internal Affairs instituted department charges against Detective Sergeant Roger Rogerson for impairing the efficiency of the Force and improperly associating with known criminals, in particular Neddy Smith</td>
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<tr>
<td>1985</td>
<td>Inquiry into the wrongful conviction of members of the Ananda Marga sect regarding the Hilton Bombing</td>
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<tr>
<td>1986</td>
<td>NSW Select Committee of the NSW Legislative Assembly Inquiry into Prostitution and police corruption in this area</td>
</tr>
<tr>
<td>Year</td>
<td>Event</td>
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<tr>
<td>1987 - 1991</td>
<td>Commonwealth/State Royal Commission of Inquiry in Aboriginal Deaths in Custody</td>
</tr>
<tr>
<td>1988</td>
<td>Internal Policed Security Unit ‘Task Force Flintstone’ investigation into the role police and civilians played in the conversion of stolen motor vehicles and their disposal.</td>
</tr>
<tr>
<td>1990</td>
<td>Police Service Act 1990 passed to consolidate Lusher Inquiry recommendations, including the name change from NSW Police Force to NSW Police Service</td>
</tr>
<tr>
<td>1989</td>
<td>Inquiry into the activity of the TRG and SWOS arising out of the fatal shooting of Mr David Gundy</td>
</tr>
<tr>
<td>1992</td>
<td>Forced resignation of Police Minister (Ted Pickering) after allegations of his inattention to police reports regarding the detention and attempted suicide of a youth in a police cell.</td>
</tr>
<tr>
<td>1993</td>
<td>NSW Independent Commission Against Corruption ‘Milloo’ investigation into police cooperation in the commission of armed bank robberies</td>
</tr>
<tr>
<td>1996</td>
<td>(Wood) Royal Commission into Police Corruption</td>
</tr>
</tbody>
</table>

A chronology of events affecting the Aboriginal Land Rights struggle

1966  Gurindji protest and strike, Wave Hill

27 May 1967  Australian referendum establishes citizenship of Aboriginal and Torres Strait Islanders


1971  Blackburn J. in the Northern Territory Supreme Court affirmed the concept of terra nullius in the case *Milirrpum v Nabalco* (The Gove Land Rights Case)

26 Jan 1972  Establishment of the Aboriginal Tent Embassy, Canberra

1973  *Racial Discrimination Act*

1976  *Aboriginal Land Rights* (Northern Territory) *Act*

1978  Coe brings an action in the High Court of Australia against the Commonwealth and the United Kingdom seeking recognition of Aboriginal sovereignty over Australia. The action fails on the basis that the Crown’s sovereignty could not be questioned in an Australian court

1979  Paul Coe appeals to the full bench of the High Court but the appeal fails when the judges hold that the conquest of Australia entailed acts of state and thus their validity could not be questioned

1979  South Australia enacts land rights legislation for the Pitjantjatjara

1983  New South Wales enacts Land Rights legislation

1983  Newly elected Prime Minister Hawke announces there will be national land rights legislation

1984  Following protracted unsuccessful negotiations with Western Australia, Hawke retreats from enacting national land rights legislation

1988  Barunga Statement promising Hawke government would negotiate a treaty with Aboriginal people

1988  *Mabo v Queensland* (No. 1): High court ruled that Queensland in 1985 had wrongfully over-ruled Eddie Mabo’s claim to his traditional lands, by not taking into account the
Racial Discrimination Act 1975

1989  International Labour Organisation Convention on Indigenous and Tribal Peoples requires recognition of indigenous ownership and possession of lands

March 1990  Formal changeover from the Commonwealth Department of Aboriginal Affairs to the Aboriginal and Torres Strait Islander Commission

10 May 1991  Royal Commission into Aboriginal Deaths in Custody Final Report calls for bi-partisan public support for a process of reconciliation

Sept 1991  Establishment of Council for Aboriginal Reconciliation

27 Jan 1992  National Aboriginal Islander Legal Services Secretariat presented a Declaration of Aboriginal Sovereignty to Minister for Aboriginal Affairs Robert Tickner

3 June 1992  *Mabo v Queensland* (No. 2): High Court of Australia handed down Mabo decision that land was traditionally owned and occupied prior to European occupation and that Aboriginal land title is legally enforceable in areas where new property rights have not been established

Aug 1993  National meeting of Aboriginal and Torres Strait Islander peoples at Eva Valley NT, drafted the Eva Valley Statement calling for the Commonwealth government to establish national standards supporting Aboriginal rights to land

Dec 1993  *Native Title Act*

4 Jan 1994  Commencement of the first Aboriginal land rights claim under the *Native Title Act*

Source: Social Alternatives, Vol 13 No. 1, p. 5
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