CONFLICT, POLITICS AND CRIME

ABORIGINAL COMMUNITIES and the POLICE

CHRIS CUNNEEN

ROUTLEDGE

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List of Acronyms

AAPA	Australian Aboriginal Progressive Association
ABS	Australian Bureau of Statistics
ACLOs	Aboriginal Community Liaison Officers
ADB	Anti-Discrimination Board (New South Wales)
ALRC	Australian Law Reform Commission
ATSIC	Aboriginal and Torres Strait Islander Commission
CAT	Convention Against Torture and Other Cruel or Degrading Human Treatment
CDEP	Community Development Employment Program
CEDAW	Convention for the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CROC	Convention on the Rights of the Child
EAC	Ethnic Affairs Commission
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
NAALAS	North Australian Aboriginal Legal Aid Service
NATSIS	National Aboriginal and Torres Strait Islander Survey
NISATSIC	National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families
OCR	Operations and Crime Reviews
PTSD	Post Traumatic Stress Disorder
SWOS	Special Weapons and Operations Squad
TRG	Tactical Response Group
WGIP	[United Nations] Working Group on Indigenous Peoples

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Introduction

This book is an analysis of policing in Indigenous communities. (I have used the terms 'Aboriginal', 'Indigenous' and 'Aboriginal and Torres Strait Islander' interchangeably throughout the text.) The book is not concerned with the institution of policing per se, nor does it rest on an essentialist view of the inherent 'nature' of Indigenous societies or cultures as monolithic or static. Rather it seeks to explore what is particular about the *relationship* between the institution of policing and Indigenous communities in Australia within a historical and contemporary framework.

Poor relations between police forces and Indigenous communities throughout Australia have been a regular source of local, national and international criticism of the failure of governments to improve standards of policing and eradicate racist behaviour in public institutions.[1] One of the most extensive royal commissions in the history of Australia—the Royal Commission into Aboriginal Deaths in Custody—was established after numerous deaths in police and prison custody. After an exhaustive inquiry into 99 deaths (63 of which were in police custody) Commissioner Elliot Johnston concluded the following:

> Let me say at once, it is my opinion that far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent. There is absolutely no doubt in my mind that the antipathy which so many Aboriginal people have towards the police is based not just on historical conduct but upon the contemporary experience of contact with many police officers (Johnston 1991a, vol. 2, p. 195).

It is perhaps a similar point that Aboriginal writer and ex-prisoner, Kevin Gilbert, had made a decade and a half before the Royal Commission: 'The real horror of Aboriginal Australia today is locked away in police files and child welfare reports. It is a story

of private misery and degradation, caused by a complex chain of historical circumstance, that continues into the present' (Gilbert 1978, pp. 2–3).

Numerous government inquiries over recent years have investigated the factors impacting on relations between Indigenous people and the police. Indeed, the issue has been widely canvassed since the early 1980s. Many of these reports involved substantial recommendations—the most extensive of which was the Royal Commission into Aboriginal Deaths in Custody and its 339 recommendations, many of which were directly related to policing matters.[2] There is also a substantial and growing body of academic literature which refers to various aspects of Indigenous–police relations. While there are gaps in the research which need to be remedied, overall it is clear that considerable resources have gone into identifying various aspects of the relationship between Aboriginal and Torres Strait Islander people and criminal justice agencies. Yet, despite the plethora of inquiries, reports and their respective recommendations, the level of over-representation of Indigenous people in the criminal justice system has not significantly improved, and the issue of poor relations between police and Indigenous people remains as significant as ever.

Given the body of existing literature, what can another book contribute that is new to our understanding of policing in Indigenous communities? The answer to this question lies, first, in the theoretical framework which is used to consider the role of policing Indigenous communities; second, in the detailed examination of particular policing practices which provide an insight into the distinct nature of the relationship between police and Indigenous people; and, third, in delineating the requirements for effective political change to provide for the realisation of Indigenous human rights.

The central argument of this book is that the fundamental right of Indigenous self-determination is the foundation for developing respectful and effective policing in Indigenous communities. It is also argued that the relationship between police institutions and Indigenous communities has been one which has denied the human rights of Indigenous people in a number of areas besides the right to self-determination. In particular, rights to racial equality in legal processes and rights designed to protect individuals caught up in the criminal justice system have been routinely ignored in the policing of Indigenous people.

At a broad level, policing is a state activity fundamentally

captured within the wider historical trends of colonisation and nation-building, which occurred at the expense of dispossessed Indigenous peoples. Thus the effective expression of Indigenous self-determination is intimately connected with the process of decolonisation. The relationships created between institutions of the nation-state and Indigenous peoples have been forged within the context of a colonial political process and a colonial 'mentality'. Those processes have relied on treating Indigenous people as people to be excluded from the nation-state. Particularly in more recent periods, criminalisation has played an effective role in this process. Ultimately, self-determination is thus directly linked to a process of decolonisation: both decolonisation of institutions and decolonisation of the colonial construction of Indigenous people as 'criminals'.

While much has been written in Australia on Indigenous people and the criminal law, little of that literature has concerned itself with theorising the relationship between the processes of colonisation and criminalisation, and in particular the role of police in this process. It has been the work of a few historians, rather than criminologists or sociolegal theorists, which has contributed most to our understandings in this area (see for example, Finnane 1994; Goodall 1982, 1990b, 1996; Haebich 1992; McGrath 1993). Certainly, some Indigenous writers have also drawn the links between crime, criminality and colonialism. Paul Coe noted two decades ago:

> Before dealing with specific aspects of the relationship between Aboriginals and the police, it is necessary that I emphasise to you how an understanding of the 200 year history of the oppression of Aboriginal people by Europeans is vital to understand Aboriginal relationships with the criminal law [today]. Almost 200 years ago the Europeans invaded this continent, stole the land from Aboriginal people without compensation, obliterated our culture and began a systematic and sustained campaign of oppression of our Aboriginal people (Coe 1980, p. 14).

Integral to an understanding of that history is the policy of genocide in its various manifestations, including mass murder, the removal of children and the policy of assimilation. 'The reason for emphasising genocide . . . is to reinforce the point that the present relationships between Aboriginal people and the legal system with the police as agents can only be understood in the

light of two centuries of oppression of Aboriginal people' (Coe 1980, p. 15).

Roberta Sykes has also referred to the way questions of crime and criminality take on a very different perspective for Aboriginal and Torres Strait Islander people (Sykes 1989). When theft of the land, dispossession and discriminatory legislation are considered, the answers to the questions of 'Who is the criminal?' and 'What is justice?' take on a different meaning. As Sykes notes, even if one accepts western definitions of crime, it is necessary to analyse how criminogenic conditions in Aboriginal communities were created. At least part of the answer can be found in the practices and policies of colonisation. Similarly, the contemporary denial of human rights and the extraordinary rate of imprisonment can be related to social, economic and political processes established as a result of colonisation.

Within such an interpretive framework, Aboriginal people can be regarded as political prisoners. As the Queensland Aboriginal Coordinating Council stated in a submission to the Royal Commission into Aboriginal Deaths in Custody:

> In fact, many Aborigines feel they are political prisoners—gaoled by the discriminatory laws of a racist society. A society that's very foundation is illegal . . . Traditional Aboriginal lore has largely been replaced by white law, Aboriginal custom and religion much interfered with by white society's rules, priorities and lifestyle, traditional economies have been destroyed by the theft of Aboriginal land, and Aboriginal sovereignty and self-determination has been denied (Aboriginal Coordinating Council 1990, p. 44).

It has also been argued (unsuccessfully) that Australian courts have no jurisdiction to determine matters involving Aboriginal people. Legal precedent establishing Anglo-Australian jurisdiction over Indigenous people stretches back in time from the *Murrell* case in 1836 to the more recent matter of *Walker* before the High Court in 1994.[3] The arguments presented by Indigenous people in these matters have fundamentally questioned the jurisdiction of Australian courts and inevitably lead to a consideration of the competing claims for Commonwealth and Indigenous sovereignty. Thus the process of colonisation and dispossession, and the lack of recognition of Indigenous customs and law, unavoidably politicises the relationship between Indigenous people and the criminal justice system. Irrespective of Commonwealth assertions of legitimate sovereignty, the criminal justice system is *seen* by

many Indigenous people as the justice system of the colonial society.

Outside Australia there has been some criminological literature which links crime and criminality with politics and power. While it is not the place to review that literature here, it is worth noting that writers such as Bottomley (1979) and Platt (1975) have argued that 'crime is political' in the sense that the legal system is based on power and privilege. Platt noted that the 'state and legal apparatus, rather than directing our investigations should be the central focus of our investigation as a criminogenic institution, involved in corruption, deception and crimes of genocide' (Platt 1975, p. 103). More recently, Cohen has called for a change in the criminological agenda to take account of the subject of crimes of the state and the violation of human rights (Cohen 1993, pp. 97–115). Such a call has particular resonance in Australia with the finding of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families that the forced removal of Indigenous children constituted genocide (NISATSIC 1997).

Some writers on law and crime have theorised the state as an instrument of colonialism (Lopez-Rey 1970; Sumner 1982; Bird 1987). Sumner argued that an historical perspective on criminal law 'must inevitably turn us towards colonialism . . . crime is not behaviour universally given in human nature and history, but a moral-political concept with culturally and historically varying form and content' (Sumner 1982, p. 10). Similarly, Lopez-Rey noted that the serious crimes of genocide, war crimes and crimes of the state are neglected as subjects for analysis. In addition, contemporary criminology tends to define crime as a socio-economic or psycho-psychiatric entity rather than as primarily a sociopolitical entity (Lopez-Rey 1970, p. 234). One of the few Australian studies to directly link Aboriginal over-representation in the criminal justice system with colonialism has been that of Bird. She has argued that Aboriginal crime is a sociopolitical construct within the context of colonisation (Bird 1987), thus placing the question of colonialism central to any understanding of the relationship between Aboriginal people and Anglo-Australian law (see also, Bird and O'Malley 1990).

There is a widespread understanding that police in Australia have acted as the 'hard edge' of colonial power in terms of enforcing non-Indigenous legal relations. This in itself provides us with only limited understanding of how such power is utilised,

or indeed how it might be resisted, nor does it address the broader theoretical concerns of the nature of policing in Aboriginal and Torres Strait Islander communities. While this book argues for recognition of the continuities in policing from an earlier colonial period, it does so within the development of a particular theoretical framework. The development of that theoretical framework begins with the posing of a number of questions. How do we conceptualise the policing function as a mediatory activity between the nation-state and Indigenous peoples? How do we describe the relationship: Is it colonial? neocolonial? postcolonial?

Colonisation is the process of subjecting a particular cultural or territorial group of people to the control of another group. It is a process which necessarily involves the exercise of power and a range of political strategies to ensure subjection. It is a process which implies exploitation, violence and cultural domination. It is a process which implies resistance on the part of those being dispossessed and expropriated. Finally, colonisation is an *ongoing* process. The colonisation of Australia did not simply happen when the British landed in Australia at the end of the eighteenth century. That was when European colonisation began in Australia. The process has evolved and developed, not without change, through the nineteenth and twentieth centuries.

Colonialism set in motion a process of invasion, settlement and nation-building which fundamentally altered the lives of those people living in Australia who became known as Aborigines. These processes disrupted existing economies, political and religious institutions and cultures, and disrupted the modes of governance through which the Indigenous peoples of Australia lived. This colonial framework has profound implications for understanding both who Indigenous peoples are and their relationship with the Australian nation-state today. In the Australian context, 'indigenous' refers to the descendants of the inhabitants of pre-invasion Australia, who constitute culturally distinct groups which are a minority in the society which was born of colonisation. Indigenous status derives from the ancestral roots with land and culture which predate the dominant society. They are *peoples* by virtue of distinct cultures, languages and laws which tie individuals into socially cohesive units of extended families, tribal groups and nations.[4] The concept of colonialism provides an overarching framework for this book, the conceptual tool for understanding the relation-

ship between Indigenous people and the institutions of the Australian nation-state.

I have used the notion of 'neocolonial' to refer to a particular moment in the transformation of colonial practices. Between the first Commonwealth/State Native Welfare Conference in 1937, when 'absorption' (assimilation) became the accepted principle underpinning government policy, and the 1967 referendum, where constitutional amendments permitted the Commonwealth Government to make laws for Aboriginal people, Indigenous people became 'citizens' of the nation-state known as the Commonwealth of Australia. Of course, in a formal sense Indigenous people had been British subjects by virtue of having been born in Australia, and after Commonwealth legislation in 1948 were automatically Australian citizens. Yet, as Chesterman and Galligan (1997) have forcefully argued, this citizenship amounted only to a 'formal shell' under which lay the systematic exclusion of Aboriginal people from the rights, entitlements and privileges of citizenship through a mosaic of discriminatory laws and administrative practices.

However, during the 1950s and 1960s overtly discriminatory legislation which denied active citizenship to Aboriginal people began to disappear. The 1967 referendum provides a convenient marker in the process of dismantling the racist legislative regimes which had excluded Indigenous people from the rights and entitlements which most other inhabitants of Australia took for granted. My argument is that this transformation over a number of years had particular ramifications for understanding policing. Full citizenship rights for Aboriginal people implied at the very least the application of the principle of equality before the law.[5] 'Aborigines' were no longer to be viewed as a race apart in the legislative framework which governed the behaviour and entitlements of individuals, and during this period became citizens with rights to be treated in a non-discriminatory manner. Some aspects of policing also changed. White (1997) has argued that it is the apparently rational and formally 'racially neutral' character of modern policing which differentiates it from previous involvement in warfare and protection policies. Although Aboriginal reserves and settlements have been 'deinstitutionalised' in the post-protection period, in practice police surveillance and intervention have provided for a new form of institutionalisation where the community itself comes to resemble a 'total institution' (Edmunds 1989, pp. 104–5). In a slightly different context, Rose

(1996) has referred to this process as 'deep colonising'. She notes that although the formal relations between Indigenous people and the colonial state have changed since the 1960s, colonising practices are still deeply embedded within institutions—even in those institutions which are meant to reverse the processes of colonisation. Rose is specifically referring to land rights legislation. However, her argument that 'colonising practices embedded within decolonising institutions must not be understood simply as negligible side effects of essentially benign endeavours' has resonance for understanding policing during the contemporary period of formal equality (Rose 1996, p. 6).

Similarly, Bird and O'Malley (1990, p. 40) have noted that although 'official' colonialism has been replaced by new government policies of self-determination, the 'colonial relationships of superiority and inferiority established over a long period are still powerful'. Colonial practices are not simply past behaviours, they have resonance in current practices.

Although there have been formal changes in the police role after the demise of the protection period, particular practices of colonial policing were continued, even if in a modified form, throughout the remainder of the twentieth century. Part of the continuities in policing derived from the demands made by an active policy of assimilation, a process demanding intensive surveillance of Indigenous individuals, families and communities by the standards of non-Indigenous society.[6] Thus while assimilation implied an end point of formal equality, the process of getting there involved significant state supervision.

Day-to-day discrimination, racism, violence and terror also continued to be employed as strategies for the maintenance of a law and order which saw the massive criminalisation of Indigenous people through the formal processes of the criminal justice system. I have used the concept of 'neocolonialism' as a way of bringing together both the continuities of policing in the colonial period with an understanding of the political changes which have occurred in the legal context of citizenship, equality and the rule of law. It is my argument that current levels of criminalisation and the role police play in this process can be understood as an historical moment of neocolonial relations.

The concept of neocolonialism in this context draws attention to the 'deep colonising' effects of criminalisation and the practices embedded in policing. For example, the individual, social and economic effects of high levels of Aboriginal juvenile

criminalisation almost ensures exclusion from social participation. Criminalisation and incarceration impact negatively on the individual young person, as well as causing social disruption to communities and families. There are also economic effects on both the family and the young person as he or she is removed from any of the few employment opportunities that may exist. Second, there is the creation of a new generation of Indigenous people constructed as criminal. These long-term effects impact on the young people as they proceed into adulthood with a criminal record. The criminal record will ensure ongoing police surveillance; it will also justify more punitive intervention by the courts, and the use of imprisonment, resulting in the criminalisation and exclusion of another generation of Indigenous people.

The extent of the criminalisation of Aboriginal young people should not be underestimated. A longitudinal study in South Australia found that seven out of ten Aboriginal boys and four out of ten Aboriginal girls had formal contact with juvenile justice agencies at some time during their adolescence (Morgan 1993, pp. 173–4). Similarly, a study in New South Wales found that in any one year 13 per cent of the Indigenous youth population had formal contact with police and courts (Luke and Cunneen 1995, p. 8). Finally, it is worth considering what the criminalisation and incarceration rates tell us about the character of a nation which is 98 per cent non-Indigenous, yet in many jurisdictions the majority of young people in detention centres are Aboriginal and Torres Strait Islander and in all states they are grossly overrepresented. High levels of criminalisation and imprisonment point to a country where the relationship between the state and its Indigenous minority is still overwhelmingly structured on a neocolonial basis of exclusion and dominance.

In the various arenas of political science, international relations and history there is considerable discussion of the relationship between nation and the 'imagined community' (Anderson 1996; Pettman 1996). The state defines itself as synonymous with the nation. Nationalism constructs the 'people', but does so through a process of excluding and forgetting. The limits of belonging to the nation can also become the boundaries of the moral community (Pettman 1996, p. 47). To be outside the moral community is to be susceptible to the violence of the state.

There has been little consideration of the issues of nationalism and the state in the development of criminological theory. To some extent I have followed Sumner's (1990) argument

concerning the link between 'crime' and national unity, which posits that the censure of crime attempts to unify and publicise a vision of the nation and its morality. Criminalisation is a key part of the building of the nation and the nation-state through processes of exclusion. Thus, 'notions of crime control, the crime wave, the crime zone, crime as a social problem, and the breakdown in law and order, [are presented] as signs of a moral malaise threatening the constitutional integrity of the state' (Sumner 1990, p. 49). This is particularly pertinent to understanding how criminalisation excludes and isolates Indigenous people from the assumed national consensus, and undermines both citizenship rights *and* Indigenous rights. Criminalisation legitimates excessive policing, the use of state violence, the loss of liberty and diminished social and economic participation. Criminalisation also permits an historical and political amnesia in relation to prior ownership of the land, contemporary land rights and Indigenous rights to self-determination. The political rights of Aboriginal and Torres Strait Islander people as Indigenous peoples are easily transformed into seeing Aboriginal and Torres Strait Islander people as a 'law and order' threat to national unity.

Finally, it is important to engage with the concept of postcolonialism. Postcolonialism and postcoloniality are not concepts with settled meanings. I have used postcolonialism in this book to indicate a (future) moment in the relationship between Indigenous people and the nation-state: a moment when the nation-state devolves power through recognition of the principle of Indigenous self-determination. Thus an important part of this book is about the process of decolonisation, about decolonising the particular institution of policing, about the struggle towards the postcolonial.

A number of other concepts help provide the theoretical framework within which this book has developed. They include self-determination, governance, sovereignty, coexistence and reconciliation. The principle of self-determination provides a key context through which policing in Indigenous communities is likely to evolve. Indigenous self-determination is both a complex legal doctrine implying particular rights[7] and a political principle which implies certain political *tasks* which must be accomplished. In other words, Indigenous self-determination provides both a theoretical framework for understanding Indigenous political aspirations within the framework of international law, as well as a requirement for a practical set of institutions for governance. If

policing is considered a central part of the maintenance of social order and, by extension, a key part of cultural institutions, it is apparent that Indigenous communities will demand greater control over policing matters when issues of self-determination arise.

I have utilised the conceptual language of 'governance' to draw attention to the forms of social regulation which bind individuals and communities together. 'To govern individuals is to get them to act and align their particular wills with ends imposed on them through constraining and facilitating models of possible actions' (Burchell, 1991, p. 119; Hunt and Wickham 1994). In the way it is used in this book, governance can be thought of in two interconnected forms. First, as the governance of the state: these are practices and discourses of governmentality which regulate the social life of individuals within the administrative and legal frameworks of the state. Clearly, the police are a key institution of governance. Second, governance can be thought of as Indigenous governance, which continues to operate in Australia and has reflected quite different forms from the discourses and practices of liberalism.

Notions of self-determination and governance inescapably lead to the issue of sovereignty. The concept of sovereignty, how it is exercised and its political and legal interpretations, is a central theme underpinning the arguments in this book. Sovereignty can be defined as the power and supreme authority in an independent political state. In a formalist definition, sovereignty is seen as authority which is absolute, indivisible and illimitable within the territorial jurisdiction of the state. In reality, sovereignty is divisible and shared. As McRae et al. (1997, p. 147) note, the Australian Commonwealth Constitution shares sovereignty between the Commonwealth and the states. In such a federal system, the potential to consider a share in sovereignty that involves Indigenous people is not difficult to imagine. The notion that Indigenous people can maintain a remnant sovereignty that survives the assertion of colonial sovereignty has been well established in US Supreme Court cases which characterised native American peoples as 'domestic dependent nations'.[8] In regard to Australia, I have been influenced by Reynolds' (1996) argument that *Mabo (2)* has, despite its intention to do otherwise, reopened the serious consideration of Aboriginal sovereignty. In brief, Reynolds argues that the High Court found that Indigenous proprietary rights (native title) continued to exist after colonisation and the assertion of British sovereignty. If law and custom

relating to land continued to exist, why didn't other elements of Indigenous law, custom and politics? The logic of the *Mabo (2)* decision points in the direction that Indigenous people exercised, at the very least, some rudimentary form of sovereignty. If Indigenous people did exercise sovereignty, when and how did they lose it? Does some form of sovereignty still reside with Indigenous people? As Reynolds notes, these questions go to the core of Australian jurisprudence (1996, p. 13). For present purposes, they also pose serious issues in relation to the contemporary role of state police in Indigenous communities and the rights of Indigenous people to develop and maintain their own forms of social regulation.

Finally, the arguments presented in this book are conceptualised within notions of reconciliation and coexistence. The Royal Commission into Aboriginal Deaths in Custody recommended in the last of 339 recommendations that a process be established to facilitate reconciliation between Indigenous and non-Indigenous Australians. Reconciliation was seen as essential if community discord and division were to be avoided. The process of reconciliation presupposes the development of political processes which allow for coexistence and the recognition of Indigenous rights—in particular the right to self-determination. As a result a significant part of the work of the Council for Aboriginal Reconciliation (along with ATSIC and the Aboriginal and Torres Strait Islander Social Justice Commission) has been around issues relating to constitutional reform, self-government, regional agreements and the need for an instrument (treaty) of reconciliation. These issues are not peripheral to the issue of policing. Indeed, like the interrelated issues of sovereignty and self-determination, they go to the heart of developing institutions of governance which are negotiated between government and Indigenous people, institutions of governance which are seen as legitimate by, and accountable to Indigenous communities. Thus a major reason for writing this book was to provide a foundation for radically rethinking the relationship between the institution of policing and Indigenous communities.

The particularity of policing in Indigenous communities is explored here through a number of sites. The relationship is first considered with an examination of the contemporary empirical data on the extent to which Aboriginal and Torres Strait Islander people are brought into the criminal justice system (Chapter 2). There is no doubt, on the basis of the evidence, that Indigenous

people are numerically over-represented on a range of justice indicators. A key question is why does this over-representation occur? Is it simply a case that high levels of Indigenous offending lead inevitably to over-representation in the criminal justice system? And, is it the case that criminal behaviour by Indigenous people then inevitably triggers a policing response? A major theoretical problem which emerges in a discussion of Indigenous over-representation in the criminal justice system is the extent to which the activity of policing itself contributes to the number of individuals and types of social groups which find themselves enmeshed within the criminal justice system.

The nature of policing in Indigenous communities needs to be placed within an historical perspective. It has become generally accepted that police forces in Australia have provided a consistent and generally oppressive point of contact between Indigenous people and colonial society. The police role involved armed conflict during the early period of colonisation. During the latter part of the nineteenth century and for most of the twentieth, the police acted directly in the administration of the government's policies of 'protection', which included maintaining order on the reserves, ensuring compliance with child removal policies and regulating Indigenous movement in country towns.

The nature of this contact is not only of historical interest, it is also widely seen as influencing the structure of contemporary relations between police and Indigenous people (Ronalds, Chapman and Kitchener 1983; Foley 1984; Cunneen and Robb 1987; Johnston 1991a, vol. 2, p. 21). Chapter 3 examines the history of policing in Indigenous communities to draw out the continuities with contemporary policing. Indeed, it is a central argument that there are continuities in the policing of Aboriginal and Torres Strait Islander people in Australia which have carried on from the earlier colonial period.

Drawing the link between the history of colonial policing and contemporary policing in Aboriginal and Torres Strait Islander communities raises a complex set of theoretical and empirical questions. One paradigm that has been suggested is the concept of 'over-policing'. Historically, police functions were expanded specifically and significantly in relation to controlling Indigenous people, and police powers derived from a legislative regime aimed at their 'protection'. The administration of the regulations formulated under the various Acts provided enormous day-to-day power to police to control the fundamental rights and liberties of

Indigenous people. The argument developed in Chapter 4 is that the extent and nature of policing in Indigenous communities is at a level and a type which is not found in other communities in Australia. Issues which arise in the discussion of over-policing include the allocation of policing resources, the use of specialist squads, and the use of particular types of legislation, particularly in the arena of policing public places. A new manifestation of over-policing can be found in contemporary debates about 'zero-tolerance policing'. Perhaps it is no coincidence that the government with the largest proportion of Indigenous people in its population, the Northern Territory, has been the most vocal in its support for zero-tolerance policing.

The notion of 'terror', which provides an important link between colonial and contemporary policing, is explored in Chapter 5. The use of terror was a component in colonial attempts at control of Indigenous populations. As Morris (1992) has argued in the historical context, the use of violence against Indigenous people was not simply a series of undifferentiated acts, rather it was sustained within a culture of terrorism. 'Terror' also has a place in understanding contemporary policing in Indigenous communities, through the use of police specialist squads and more generally through the use of violence. The discussion on violence is extended to draw in the issue of institutional neglect. In particular, many Indigenous deaths in custody have occurred because of the failure of police to exercise a proper duty of care. Finally, the issue of terror and violence is placed within a human rights context.

Police are constantly called upon to make decisions about how to respond to people and situations. The available evidence shows that police use their discretion in decision-making in a way that invariably disadvantages Aboriginal and Torres Strait Islander people. Discretionary decisions cover a range of matters, including the decision to intervene in the first instance, the decision to charge a person with an offence under particular legislation, the number of charges laid, the decision to proceed by way of arrest rather than summons or attendance notice, and the granting of bail and the conditions which might be attached to bail. The issue of police discretion is discussed in Chapter 6, with a focus on Indigenous young people.

Police decision-making is inevitably tied to the *context* in which decisions are made, a context which can be usefully understood through the notion of police culture. To what extent has contemporary police culture inherited particular practices and beliefs

from the past, and to what extent do contemporary situations in policing Indigenous communities give rise to a set of beliefs and practices which lead to the criminalisation of Indigenous people? The history of the police role in Indigenous affairs influences both police responses to Aboriginal people and Aboriginal responses to police. Contemporary police attitudes to Aboriginal people are also strongly influenced by various aspects of police culture which arguably derives at least partially from historical functions as well as a range of contemporary imperatives. These issues are also discussed in Chapter 6.

A different consideration in the use of police discretion arises when the relationship between police and Indigenous women is considered. For example, the questions which arise in relation to police responses to family violence are complex. The ineffectual responses by police in this regard point, however, to their inability to provide adequate protection when Indigenous women and children are the victims of violence. Indigenous women have also been subjected to particular forms of violence by police themselves. An examination of the deaths of Indigenous women in police custody highlights these issues and is the basis of Chapter 7.

Policing also occurs within a particular spatial dimension, as discussed in Chapter 8. There has been some new scholarship and arguments which consider the spatiality of 'crime' and policing in Indigenous communities (Mackay 1995; Broadhurst 1997; Tyler 1998). The argument presented here considers the contemporary spatiality of policing, particularly within the context of 'community'. The spatiality of policing is also linked to the idea of resistance. In this context resistance is seen as productive and there is an analysis of a new space for policing within what can be called the 'Aboriginal domain' (Rowse 1992). A new policing space is the one being forged by Indigenous organisations, which has various manifestations including night patrols and community justice groups.

The contradictions and tensions between the old space of the colonial order and the creation of a new space for Indigenous policing are played out in many of the current governmental policy responses to policing Indigenous communities. Chapter 9 analyses police policy responses to Indigenous people, particularly in light of the failure to engage in a shift in power relations to Indigenous communities.

The final chapter examines the claim by Indigenous people to the right to self-determination, and the potential consequences of

this to the development of policing in Indigenous communities. The United Nations Draft Declaration on the Rights of Indigenous Peoples is considered as an aspirational document in relation to Indigenous rights, particularly in the areas of cultural survival and self-government. The development of Indigenous ideas in relation to self-determination in Australia is also examined through a consideration of the recommendations from the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. It is argued that the adoption and development of practical measures towards self-determination for Indigenous people in Australia provides the point for the historical transformation to a society that can be considered 'postcolonial'.

In summary, policing needs to be theorised within the context of colonial relations and their evolving forms during the period of formal equality—a set of relationships I have referred to as 'neocolonial'. This book provides a detailed examination of policing practices in Indigenous communities as a way of understanding the *sui generis* relationship which has developed between Indigenous people and the police, and involves consideration of issues such as the use of violence and terror, police decision-making and the role of police culture. The issue of police practices is placed within the context of broader human rights obligations. Finally, this book provides for a new understanding of the political requirements for effective change by arguing for the necessity of the decolonisation of policing institutions through the recognition of self-determination.

2

The criminalisation of Indigenous people

This chapter analyses the extent to which Aboriginal and Torres Strait Islander people come into contact with the police, the courts and the prison system—in other words, the extent to which Indigenous people are subjected to the formal processes of criminalisation. It then considers possible explanations for Indigenous offending with a particular emphasis on the extent to which policing interacts with and contributes to the high level of Indigenous criminalisation.

Why is a consideration of the nature and extent of Indigenous offending important for an analysis of policing in Indigenous communities? There are both theoretical and policy-oriented responses to this question. Liberal explanations of policing essentially see the police role as a neutral bureaucratic response to individuals who are suspected of violating the criminal law—what Dixon (1997, p. 1) has referred to as the 'legalistic–bureaucratic' conception of policing. The law itself is seen as an embodiment of the popular will formulated through the democratic processes of a parliamentary system and thus as an impartial and universal force for justice. Within this view, offenders are those individuals who step outside a normative legal order which has widespread social and political legitimacy. Police are seen as exercising an independent authority bound by the rule of law and legitimised by popular consent (Hall and Scraton 1981, p. 472), thus exercising a specific mandate to uphold the law through enforcement of the criminal law and the maintenance of order. Specific powers are given to the police officer and they are accountable to the law itself (Brogden, Jefferson and Walklate 1988, pp. 1–2).

An understanding of Indigenous offending goes to the heart of the question of whether police, and the criminal justice system more generally, uphold the rule of law with its principle of equality when dealing with Indigenous people. In other words, is

the level of Indigenous over-representation in police custody, courts and prisons an actual reflection of offending levels? Are there so many Aboriginal people in the criminal justice system simply because they commit more offences than other people? Or alternatively, does policing itself inevitably influence the extent to which particular individuals are drawn into the criminal justice system? Such a moulding of the human material brought before the law might occur through either the 'legitimate' use of police functions (such as maintaining public order) or through extra-legal or illegal police actions (such as racist policing).

POLICE CUSTODY

Police are usually the first point of contact with the criminal justice system, and it is a reasonable place to begin assessing the extent of Aboriginal criminalisation. While data on the use of police custody have been historically difficult to obtain, one outcome of the Royal Commission into Aboriginal Deaths in Custody has been regular recent surveys of its use. Three National Police Custody Surveys, conducted in August of 1988, 1992 and 1995, collected information on all persons detained in police custody and held in police cells for any length of time.[1]

Indigenous people represented 31.8 per cent of all persons held in custody by the police during August 1995, a slight increase over previous years. The fact that during the 1995 survey period nearly one in three people held in police custody in Australia were Aboriginal or Torres Strait Islander shows both the extensive nature of contact between Indigenous people and the police, and the extent to which the loss of liberty of Indigenous people regularly arises from the exercise of police powers. Another way of considering these data is to compare the police custody rates per 100 000 of the Indigenous and non-Indigenous populations. Custody rates based on the 1995 survey were 2228 per 100 000 for Indigenous people, compared to 83 per 100 000 for non-Indigenous people. In other words, Aboriginal and Torres Strait Islander people were 27 times more likely to find themselves in police custody than non-Indigenous people (Cunneen and McDonald 1997a, p. 21).

There were significant differences between states and territories in the use of police custody for both Aboriginal and non-Aboriginal people, as shown in Table 1.

Table 1: Indigenous and non-Indigenous people in police custody, Australia, August 1995

State	Indigenous		non-Indigenous		Over-Representation[b]
	no	rate[a]	no	rate[a]	
New South Wales	684	850	2527	42	20
Victoria	174	907	3413	77	12
Queensland	1858	2327	3767	121	19
Western Australia	1848	3911	1643	99	39
South Australia	802	4841	2384	164	29
Tasmania	43	425	316	68	6
Northern Territory	1330	2889	326	261	11
ACT	26	1473	131	44	34
Australia	6765	2228	14507	83	27

Notes: [a] Rate per 100 000 of the population; [b] Ratio of Indigenous rate to non-Indigenous rate.

Table 1 shows clearly that at the time of the 1995 survey South Australia, Western Australia, the Northern Territory and Queensland were the jurisdictions with the highest rates of custody for Indigenous people. Queensland, Western Australia and the Northern Territory are also significant because they are the jurisdictions with the greatest actual numbers of Indigenous people in custody. Western Australia also had the greatest level of Indigenous over-representation. In that state, Aboriginal and Torres Strait Islander people were 39 times more likely to find themselves in police custody than non-Indigenous people.

The 1995 Police Custody Survey also collected information on the reasons for the use of police custody. Nationally, the reason for being placed in police custody for 31 per cent of Indigenous people was intoxication in public, irrespective of whether it was a criminal offence or not. Some 15 per cent of non-Indigenous custodies were for the same reason (Carcach and McDonald 1997, p. viii). Indeed, the reason for police custody in a quarter of all cases nationally involving Indigenous people was for protective custody in states and territories where public drunkenness is not a criminal offence. Only 2 per cent of non-Indigenous custodies were for the same reason (Carcach and McDonald 1997, pp. 20–1). It is significant that one in four Aboriginal and Torres Strait Islander people placed in police cells are there for a non-criminal matter. In Western Australia and the Northern Territory,

where public drunkenness is decriminalised, some 94 per cent and 92 per cent respectively of 'protective' custodies for public intoxication involved Aboriginal and Torres Strait Islander people (Carcach and McDonald 1997, p. 31).

The major offences for which Indigenous people were placed in custody after being arrested were property offences, public order offences (other than public drunkenness) and public drunkenness (in jurisdictions where it is a criminal offence). The Survey showed that nearly half (48.2 per cent) of all people throughout Australia placed in police cells for public order offences were Aboriginal and Torres Strait Islander (Carcach and McDonald 1997, p. 27).

Arrests

The National Aboriginal and Torres Strait Islander Survey (NATSIS) was conducted in 1994 and asked Indigenous respondents a number of questions relating to police (ABS 1994, 1995). The survey found that 20 per cent of persons aged 13 years and over, and approximately 25 per cent of persons aged between 15 and 44, had been arrested at least once in the five years prior to the survey. Within the male 18–24 years age group almost 47 per cent stated they had been arrested in the previous five years. When broken down to specific jurisdictions, over half of Indigenous males aged 18–24 years in New South Wales, Western Australia and South Australia reported being arrested (ABS 1994, pp. 4–5).

Western Australian research has shown that in 1994 alone, 'nearly 16 per cent of the Aboriginal population were arrested at least once compared to just under 2 per cent of the non-Aboriginal population' (Broadhurst 1997, p. 426). Rearrest statistics for Western Australia between 1984 and 1993 showed that the probability of being rearrested during this period was much higher for Indigenous people than for non-Indigenous people. Some 88 per cent of Aboriginal men were rearrested at least once more during the period, compared to 52 per cent of non–Aboriginal men, while some 85 per cent of Aboriginal women were rearrested at least once, compared to 36 per cent of non–Aboriginal women (Broadhurst 1997, p. 433).

These results confirm the findings of the National Police Custody Survey concerning the high rates at which Aboriginals and Torres Strait Islanders come in contact with police. NATSIS also asked about the reasons for the last arrest, the results sug-

gesting that the largest number of arrests were for 'disorderly conduct' or drinking in public, with almost one in three people giving this as the reason for arrest. This result is also consistent with the findings from the National Police Custody Survey.

In summary, Aboriginal and Torres Strait Islander people are disproportionately likely to be arrested and rearrested. They are also more likely to be placed in police custody, largely for reasons of public order or protective custody.

IMPRISONMENT

The number of Indigenous people in police custody is one measure of the degree of criminalisation. Data on imprisonment provides another measure of criminalisation, at the extreme end of the process. Deprivation of liberty is the strongest sanction available in the criminal justice system and is generally regarded as a sanction of last resort.[2] All of the available data on the use of imprisonment in Australia consistently indicates the over-representation of Aboriginal and Torres Strait Islander people among the prison population.

The 1995 National Prison Census showed that 17.1 per cent of the 17 428 prisoners in Australia were Aboriginal and Torres Strait Islander people—at a time when the Australian Bureau of Statistics estimated that Indigenous people comprised approximately 1.3 per cent of the total population of imprisonable age (ATSIC 1997, vol. 1, p. 62). As shown in Table 2, the Indigenous imprisonment rate was 1682 per 100 000 of the population, compared to a non-Indigenous rate of 107 per 100 000—that is, Indigenous people were 15.8 times more likely to find themselves in prison than non-Indigenous people.

There are significant jurisdictional differences in the rate of imprisonment of Indigenous people, with Western Australia and South Australia having the highest rates, followed by New South Wales. In Western Australia, one in 38 Indigenous people aged 17 years or more was in prison at the time of the 1995 census. Calculation of age and gender-specific rates are equally alarming. Nationally, one in 20 Indigenous men aged between 19 and 24 years old were in prison on 30 June 1995 (ATSIC 1997, vol. 1, p. 65).

Trends in Indigenous imprisonment over the last decade give little cause for optimism. The national picture is one of increasing rates of imprisonment. In 1988 there were 1809 Indigenous people in prison.[3] This figure has steadily increased each year. On

Table 2: Indigenous and non-Indigenous people in prison, Australia, 30 June 1995

State	Indigenous		non-Indigenous		Over-Representation[b]
	no	rate[a]	no	rate[a]	
New South Wales	883	1883	6784	147	12.8
Victoria	128	1102	2339	68	16.2
Queensland	638	1369	2232	93	14.8
Western Australia	258	2629	1143	101	26.2
South Australia	714	2336	1491	118	22.4
Tasmania	14	238	230	66	3.6
Northern Territory	342	1258	129	138	9.1
ACT	8	717	95	42	17.0
Australia	2985	1682	14443	107	15.8

Notes: [a] Rate per 100 000 of the population; [b] Ratio of Indigenous rate to non-Indigenous rate.

30 June 1995 there were 2985 Indigenous prisoners—a national increase of 65 per cent since 1988. The rate of Indigenous imprisonment had increased from 1232 per 100 000 in 1988 to 1682 over the same period (Cunneen and McDonald 1997a, pp. 29–30; ATSIC 1997, pp. 76–7).

Although there are significant differences in the rate of Indigenous imprisonment between states and territories (see Table 2), in not one jurisdiction in Australia was there either a lower number of Indigenous people in prison or a lower Indigenous imprisonment rate in 1995 compared to 1988. While Western Australia maintained its position of having the highest rates in Australia throughout the period, both New South Wales and South Australia more than doubled the number of Aboriginal and Torres Strait Islander people in their gaols during the same period—New South Wales by 91 per cent, and South Australia by 87 per cent.[4] Victoria followed a similar pattern, although the rate there was much less to begin with. Both the Northern Territory and Queensland successfully lessened the rate of Indigenous imprisonment for short periods during the early 1990s, but in more recent years their levels of imprisonment have increased and now exceed the rates of the late 1980s.

Although Australia has gone through a period of increasing use of incarceration overall, increases in Indigenous rates of imprisonment have outstripped increases in the non-Indigenous