

## **RACIALISATION, CRIMINALISATION AND PUNISHMENT IN THE CONTEXT OF AUSTRALIAN NATIONHOOD AND CITIZENSHIP | 24 MAY 2001 | *Draft only***

**CHRIS CUNNEEN | Institute of Criminology, University of Sydney Law  
School**

Racialisation, criminalisation, punishment, nationhood and citizenship and their intersections have a long history in Australia. In particular, we can see the processes of racialised punishment as a process to exclude people through particular state policies applied to Aboriginal peoples. The development of the nation state in Australia was built around the exclusion of Indigenous peoples and other racial minorities, and this was achieved through constructions of the law and practices of punishment.

### **Colonial Politics**

A key process of colonialism in Australia was the denial of the pre-existing rights of Indigenous people. Most fundamentally this abrogation of rights included the denial of political sovereignty, the right to land, and the right to exercise authority derived from Indigenous law.

Two points of relevance to the current discussion on racialised punishment flowed from this political position of denying Indigenous legal rights.

Firstly, there was the dominant view of the racial inferiority of Aboriginal peoples. A fundamental ideological tenet which underpinned the usurping of Indigenous rights was that Indigenous people were inferior peoples without settled law or custom. Within this view Indigenous people were without claim to either land nor the exercise of political and legal authority. The legal absence of Indigenous people's rights was justified through terra nullius. In brief, Indigenous people were not seen as having reached a stage of civilisation where their presence needed to be considered in its own right by the developing Anglo-Australian law. Indigenous peoples became subject to the imported law - formally at least they were seen as British subjects.

Secondly, Aboriginal resistance to the process of colonisation was criminalised. In practice Indigenous resistance was often seen as falling between criminal activity and resistance to invasion. However, the view of the law was that the activities were criminal and without political content. Savage repression on the part of colonial authorities was justified both as a response to the 'criminal' activities of Indigenous people, and as a response to their perceived inferiority.

The needs of the colonial project resulted in a system of racialised punishment:

+ Summary executions by punitive police parties until well into the 20th century.

+ Public executions of Aboriginal people decades after the public execution of non-Aboriginal people ceased, justified because of the need to 'teach' Indigenous people (cf Western Australia, 1890s).

+ Corporal punishment such as flogging until the middle of the 20th century in some states, well after it had ceased as a punishment for non-Aboriginal people.

+ A separate regime of law, policing and punishment was established on reserves through the protection legislation in various states justifying excessive punishments for offences that only Aboriginal people could commit - as Charles Rowley noted, in Queensland there were two reasons a person might be sent to gaol: one was for committing an offence, the other was for being Aboriginal.

Nation-building proceeded on the assumption that Aboriginal people were to be excluded as citizens, as indeed were other ethnic and racial minorities, particularly from Asia and the Pacific. This was the period of overt racial discrimination legitimised through the law. Nation-building proceeded on the basis of the systematic exclusion of racialised minorities from the developing concepts of Australian citizenship. A key strategy in this exclusion was the development of a racialised justice system predicated on particular forms of policing and punishment.

### **Racialised Punishment in the Neo Colonial and Post Colonial Period**

Racialised punishment did not disappear in the latter part of the 20th century. Arguably, however, it did take on a different form during the period of greater claims to racial equality. During the period of the 1960s and later there is the demise of legislated racism and discrimination - in particular the formalised racial discrimination embedded in legislation such as various State and Territory Protection Acts disappeared. Overt discrimination became outlawed - particularly after the 1975 passage of the Commonwealth Racial Discrimination Act.

However, we need to analyse the way in which the coupling of racialisation and criminalisation continued during the period of formal racial equality. Indeed it could be argued that with the demise of overt legalised racial discrimination, the joint processes of criminalising and racialising become more important in excluding Indigenous people and members of minority groups from the benefits of citizenship and nationhood. During the period of racial equality, the law appears as facially neutral but is differentially applied and/or has differential impacts which serves to separate out and construct particular groups as both racialised and criminalised.

### **Differential policing**

The differential impact of policing along racialised lines has been seen over and over since the 1960s. It can be seen in the use of public drunkenness laws during the 1970s in New South Wales and much more recently in other

jurisdictions like Queensland, Victoria and so on. It can be seen in the use of summary offences and police offences throughout Australia in such areas as vagrancy, loitering, offensive language, offensive behaviour and so on.

The problem of differential policing can also be seen in the 'new generation' of police powers which have developed in the 1990s:

+ Police and Public Safety Act relating to knife and prohibited implements searches, and move on powers. For example police use 'move on' powers 30 times more in the northwest of New South Wales than they do generally across the State. Search powers of juveniles are also used more frequently in Aboriginal areas of the State and in nearly 90% of cases they are 'unsuccessful' in the sense that the young person was not carrying a prohibited implement.

+ Evaluations of the Children (Protection and Parental Responsibility) Act shows that in areas like Moree over 90% of children removed under the legislation are Aboriginal. This discriminatory use of the law by police has led to a complaint under the Racial Discrimination Act.

Perhaps the most dominant rhetoric in policing during the 1990s was the notion of zero tolerance policing. Generally the move towards a zero tolerance approach in policing is one that is built on harassment and proactive arrest policies for minor offences. It involves targeting known and suspected offenders, and this targeting is often based on racial and ethnic assumptions. Its adoption in Australia has led in practice to what the Americans refer to as 'racial profiling' in policing. Racial profiling involves the targeting of suspected offenders on the basis of racial assumptions about criminal behaviour. Perhaps more than any other policy or practice in the criminal justice system it shows the intersection between racialisation and criminalisation.

### **Sentencing Legislation: Mandatory Sentencing of Imprisonment**

Mandatory sentencing of imprisonment is a concrete way of thinking about the connections between criminal justice system policies and the policies adopted towards immigration detainees and asylum seekers. Over recent years there has been substantial work in articulating the way in which mandatory sentencing is discriminatory against Indigenous people, particularly by Aboriginal Legal Services, AJACs and ATSIC. It may be worth considering how these arguments might relate to the mandatory detention of asylum seekers.

Basically the argument that mandatory sentencing is racially discriminatory falls under the following headings:

... Indigenous young people are more harshly dealt with by the juvenile justice system prior to their appearance in court. Discriminatory treatment through the adverse use of discretion within the justice system means that Indigenous young people are more likely to appear court, are more likely to have a prior record, and they are more likely to fall within the mandatory sentencing

regimes. These issues directly affect the impact of mandatory sentencing. For example in Western Australia if a child receives a police caution or is referred to a juvenile justice team (conference), then the matter does not count as a 'strike' under the three strikes mandatory imprisonment legislation.

... Northern Territory court data shows clearly that mandatory sentencing will have an overwhelming impact on Aboriginal rather than non-Aboriginal people. The vast majority of both adults and juveniles appearing before the courts for the principal offences which fall under the mandatory sentencing regime are Aboriginal. For example in 1996, 84% of all court appearances for 'steal motor vehicle' offences involved Aboriginal defendants; and 77% of all juvenile court appearances for break and enter involved Aboriginal young people.

... Conversely, the types of property offences (fraud) excluded from the mandatory sentencing regimes are precisely the offences where the majority of both adult and juvenile offenders are non-Indigenous. For example 77% of adult fraud cases involved non-Indigenous defendants.

... Aboriginal adults and juveniles appearing in court are significantly more likely to have a previous offending history and are more likely to be among those with extensive offending histories, than non-Aboriginal people.

... A further discriminatory factor is the location of detention centres and the removal of Indigenous children and young people from their families and communities. Most detention centres in Western Australia and Northern Territory are potentially hundreds, if not thousands of kilometres away from many Aboriginal communities they service. It is an issue that particularly affects Indigenous children and young people because they are more likely to come from a non-urban background.

... The recent amendments which allow an offender to avoid mandatory sentencing because of 'exceptional circumstances' will further disadvantage Indigenous defendants and entrench the discriminatory aspects of the law. 'Exceptional circumstances' have been introduced purely to avoid the embarrassing situations where middle-class respectable and non-Indigenous people have been caught-up in the mandatory sentencing regimes.

Thus mandatory sentencing regimes, although they appear to be facially neutral, are foreseeably discriminatory in their impact. The provisions of mandatory sentencing seem to be so skewed that a challenge under the Commonwealth Racial Discrimination Act (1995) may be available.

The potential discriminatory impact has been noted by the relevant UN Committees. In October 1997 the Committee on the Rights of the Child noted in its Concluding Observations that

*The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The*

*Committee is particularly concerned at the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.*

In March 2000 the Committee on the Elimination of Racial Discrimination made the following comments in its Concluding Observations:

*The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by Indigenous peoples within Australia, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends the State party to review all laws and practices in this field.*

In July 2000 the Human Rights Committee noted in its Concluding Observations that:

*Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles in the Covenant.*

*The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.*

In November 2000 the Committee Against Torture in its concluding observations on Australia expressed its concern about legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system.

The Committee recommended that

*The State Party keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instrument, particularly with regard to the possible adverse effect upon disadvantaged groups.*

*Observations by the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Human Rights Committee show the incompatibility of the mandatory sentencing regimes with Australia's international human rights obligations. The Committee Against Torture was*

*less forthright but still makes clear its concern with potential lack of compliance.*

### **The Rise and Rise of Imprisonment: Does Mandatory Sentencing Matter?**

We should also keep in mind that high levels of imprisonment are not dependent on mandatory sentencing. Imprisonment has become a favoured option in a range of Australian jurisdictions without mandatory sentencing. In 1998 Indigenous imprisonment rates were higher in New South Wales, Queensland, South Australia and Western Australia than they were in the Northern Territory. This observation does not mean that mandatory sentencing is not important. Mandatory sentencing is important because it reflects a fundamental breach of human rights. However, we should acknowledge that other parts of Australia have worse records on Indigenous imprisonment, and they manage to achieve this without mandatory sentencing.

The shift during the 1990s was to a greater use of imprisonment as a sentencing option - whether through 'truth in sentencing', tougher penalties, sentencing guidelines or other legislative and policy changes. Inevitably politics and policies which favour imprisonment impact on minority groups. Punishment is racialised at an institutional level without any necessary appeal to overt racist ideologies.

The problematic relationship between the criminal justice system and Indigenous people is most graphically illustrated in the climbing imprisonment rates throughout the 1990s. A couple of figures illustrate the point. In 1988 the general rate of imprisonment in Australia was 100 per 100,000, but for Indigenous people it was 1,234. In 1998 the general rate had climbed to 139 per 100,000. For Indigenous people it had increased to 1,558. Imprisonment levels rose for everyone in Australia during the 1990s, but for Indigenous people the increase was on top of an already astronomically high rate. Indeed the increase in the rate of Indigenous imprisonment between 1988 and 1998 (324) alone is more than double the total rate of non-Indigenous imprisonment in 1998 (139).

### **Corporatisation and Privatisation of Punishment**

The corporatisation/privatisation of punishment also directly links issues relating to the administration of the criminal justice system with the mandatory detention of refugees and asylum seekers. We can see this link with specific corporations such as ACM and the movement of personnel between both types of centres: prison and detention centres.

Yet we also need to exercise some caution on the actual impact of privatisation on imprisonment rates. For example Victoria's imprisonment rate rose during the 1990s, and it also had the greatest proportion of prisoners serving time in private correctional facilities in Australia and, reportedly the western world. At the height of privatisation about half of Victoria's prisoners

were in private prisons. However, by 1998 Victoria had the lowest imprisonment rate in Australia (about half that of New South Wales).

There needs to be analytical clarity about the relationship between privatisation and rising levels of imprisonment. There may be very sound arguments for questioning privatisation of punishment. However, we cannot assume an automatic link between privatisation and high rates of imprisonment.

This also has impacts on political strategy: state-controlled imprisonment as an alternative to corporate controlled imprisonment does not necessarily lead to lower imprisonment rates. Privatisation is about cost effective repression. However, we shouldn't forget that repression is not only related to cost effectiveness. Indeed the margins on cost between public and private are not necessarily that great that they will impact on the size of a prison population. Of course separate to this there is no doubt that the private sector will do what it can to 'promote' imprisonment.

### **Conclusion: How to engage and confront racialised punishment?**

The boundaries of the nation are drawn by citizenship. Active citizenship is still denied those that are criminalised. To be a criminal is still to be placed outside the nation of citizens, and being criminal is still seen with the context of race and ethnicity. Yet one of the problems is to confront and challenge 'law and order' populism which justifies repressive punishments against minorities and Indigenous peoples.

How do we conceptualise these issues of racialised punishment within 'liberal democracies' (democracies which are perhaps better characterised as neo-colonial and neo-liberal). The majority appear to support the use of the law to violates human rights when it is the human rights of minority groups which are violated. They appear to support the use of the criminal justice system as a crude instrument of control directed at minorities. Indeed traditional liberal appeals to legal principles like the rule of law are seen as inconsequential or irrelevant to the development of criminal justice policy, and increasingly, policies aimed at refugees and asylum seekers. Western Australia and the Northern Territory are popularly elected Governments where mandatory sentencing policies are a popular part of electoral politics. Indeed despite domestic and international controversy the laws are still popular.

Perhaps the greatest challenge for a political campaign is how to turn around the current view which appears to be that abusing the human rights of racial and ethnic minority groups is a successful electoral strategy.

Email [chriscu@law.usyd.edu.au](mailto:chriscu@law.usyd.edu.au)

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