CROSSCULTURAL ISSUES

ROYAL COMMISSIONS AND OMISSIONS

The Royal Commission

The Royal Commission into Aboriginal Deaths in Custody was established in October 1987, to investigate the deaths of Aborigines and Torres Strait Islanders occurring in the custody of the police, or of prison and juvenile detention authorities. The Commission investigated 99 such deaths occurring over the almost eight and a half years from 1 January 1980 to 31 May 1989. Among the many findings and recommendations made, the National Commissioner, Mr Elliott Johnston QC, quoting his predecessor, Commissioner Muirhead, noted that in Australia, Aborigines are ten times more likely to die in prison than non-Aborigines, and 20 times more likely to die in the custody of the police.[1]

Of even more concern are the findings relating to Western Australia, the State which despite having only the third highest Aboriginal population, recorded 32 deaths over the relevant period; that is, almost one third of the total number of deaths and the highest number for any State or Territory. Findings indicate that in Western Australia, Aborigines are 26 times more likely to be in prison than non-Aborigines, and 43 times more likely to be in the custody of the police. Again both statistics are higher than those recorded for any other State or Territory. A great deal has been made of the fact that once in custody, an Aboriginal prisoner faces the same likelihood of dying as a non-Aboriginal prisoner. But this is only part of the story. Because of the totally disproportionate rates at which Aboriginal people are taken into custody, in 1987, the year the Commission was announced, an individual Aborigine in Western Australia was not only 27 times more likely ultimately to die in prison than a non-Aboriginal Western Australian, but was also three times more likely to die in prison than a Black South African.

It is stated in the National Report that despite the expectation of many Aborigines and their sympathisers that 'Aboriginal people would suffer and die from the same discrimination and brutality as they had experienced during life', the Commissioners did not find that even one of the 99 deaths investigated was 'the product of deliberate brutality or violence by police or prison officers'.[2] One might wonder what it was that made these officers in whose custody Aboriginal people were dying seemingly unique among those who interacted with Aboriginal people. I would argue that what makes these officers different is not that they do not resort to violence and brutality, but that they are authorised to do so by law.

The death of John Pat

One of the major inquiries conducted by the Royal Commission was into the death of John Pat.[3] On 28 September 1983, a number of Aboriginal males, including the 16-year-old Pat, had been involved in a fight with off-duty police outside the only hotel in Roebourne, a remote north-western town in Western Australia. A number of Aboriginal witnesses claimed to have seen an off-duty officer kick the boy in the head while he was lying on the road (*Report on the Inquiry into the Death of John Peter Pat* (PR p.162). Later, the boy was carried to one of the police vans and taken, along with four other Aboriginal males, to the police station by the off-duty police and other uniformed officers who had intervened in the fight. There were claims made that at least some of the prisoners were beaten by police when they were removed one at a time from the police vans. Some of these officers then proceeded to complete the paperwork charging the Aboriginal prisoners for a variety of offences relating to the fight. These were the same off-duty officers who had themselves been active in the fight (PR pp.6-7).

That night had not been Pat's first encounter with the law in Roebourne. At age 14, he had been convicted on two charges of assault against police officers: one charge relating to Pat's having kicked an officer in the testicles when he was being removed from a police van. At 15, Pat was again convicted for aggravated assault — this time for having struck an officer while at the lock-up (and in fact involving one of the officers subsequently tried over Pat's death). At 16, John Pat was dead; his body found that night of the fight on the cement floor of the juvenile cell. Another of the men arrested that night spent five days in hospital. And yet another, Peter Coppin, had bald patches on his head where he claimed that an off-duty officer had torn out his hair while dragging him to a police van (PR p.165). The officers claimed to have been injured during the brawl also. One had severe bruising and some lacerations to his face, as well as body bruises. Another two officers sported injuries to their knuckles and hands.

The morning after the fight, those prisoners who were not dead or in hospital were taken before a magistrate. The charges and the 'facts' presented to the court were formulated by the officers involved in the fight. The prosecutor that day was the officer with the bruising and lacerations to his face (PR p.240). The magistrate said that none of the prisoners complained about their treatment.

Four white officers and an Aboriginal police aide were eventually charged in February 1984 with the manslaughter of John Pat. They were all acquitted by an all white jury.

Almost seven years after the death of John Pat, and after a number of court proceedings involving the events of the night of 28 September 1983, the Royal Commission came to Roebourne. By 1990, not one member of the police force had been successfully prosecuted or even disciplined in relation to the incidents of that night. This was in spite of the belief by the officer in charge of internal police discipline that assaults had been committed by one or more of the officers; and

the opinion of the Crown Prosecutor that there was ample evidence for internal police action. Indeed the only disciplinary action initiated was against an officer who had no involvement in either the fight or the unloading of the vans. And, according to the police, as all copies of the file and complaint had been lost, even this action was never finalised. In fact, apart from one officer who had retired and the police aide, all of the officers involved in the fight and the unloading of the vans that night — and their police investigators — have been promoted. Indeed, the officer in charge of internal police discipline referred to earlier is Mr Brian Bull, now the Commissioner of Police in Western Australia.

Some eight years after the death, and on the morning after the release of the Royal Commission Report, the hoardings for the only statewide daily newspaper in Western Australia read, 'John Pat Death: No-one to Blame' (*West Australian*, 8.5.91). And indeed the Commission had found that Pat's death was not the result of deliberate violence or brutality by the officers, as it had found in respect of every other death it investigated. But while the Commission did not find that any criminal act had caused Pat's death, it did find that assaults had been committed against Aboriginal prisoners in the custody of the police, including Pat. On my reading of the Report, however, it would seem that there is only one member of the police force who would now be liable to prosecution for violence against Aboriginal people on the basis of findings made in that Report — and that is an Aboriginal police aide.

Coercion and discourse

In *Principles of Policing*, Sir Robert Peel stated:

> . . . the extent to which the co-operation of the public can be secured, diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
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> [Quoted in Submissions on Behalf of the Committee to Defend Black Rights 1990: p.111]

I would argue that as co-operation diminishes the experience and awareness of law as being constituted by physical surveillance, coercion and brutality, it likewise engenders a perception of law as rules or discourse. But because it is the operation of law in Roebourne that concerns me, I do not regard it as useful or accurate to conceptualise law as either rules of conduct or discourse. That is not to say that law cannot or should not be conceptualised in such terms, but that the utility of so doing will depend on the context of the study undertaken. For example, to conceptualise law as a system of rules may be useful to understand lawyers, judges and legal reasoning.[4] It is also true that law is often thought of as constituted by the words and principles found in statutes and judgments, and I would not deny that one of the artefacts of legal processes is discourse — usefully analysed by theorists such as Burton and Carlen.[5] However, I do not think such an understanding is adequate to comprehend the operation of law in relation to those who do not conform to certain dominant social norms and behaviours. For such people, law is essentially physical force and compulsion; it is inextricably bound to the activities of the police.

I would argue that both the practices and rules of law combine to create a space in which legal discourse in the form of judgments and reports can be constructed. This space is created not only by the determination of who will be allowed to speak and what they will be allowed to say in the public arena of court proceedings, but also who will be able and prepared to speak and what they will be able and prepared to say. I am not here just referring to the doctrinal rules of relevance and admissibility, although these are significant. I am also concerned with people's lived experience in the form of prior encounters with the law, and the standpoint sensitivity of legal processes and practitioners, including the police. I am talking about history, coercion, intimidation and fear. I am also concerned with first-instance hearings and pre-court interactions, particularly those involving the police, as the most significant proceedings in law. And as such I am reversing the traditional legal hierarchy.[6]

The end result of legal processes and rules is the curtailment or exclusion of knowledges gained from particular standpoints; that is, the absence of the actual perceptions, understandings and demands of marginalised groups from law. If one artefact of law is discourse, another is silence. And it is this enforced silence or absence which enables the authors of legal discourse to construct the legal fictions which come to represent marginalised groups in official discourse.

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