

Reducing Aboriginal Over-representation in Prison: A rejoinder to Chris Cunneen

Three years ago we published an article (Weatherburn, Fitzgerald & Hua 2003) on Aboriginal over-representation in prison, in which we argued:

1. That the leading cause of Aboriginal over-representation in prison is Aboriginal over-representation in crime.
2. That, although the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) reports gave attention to both systemic bias and Aboriginal offending as causes of Aboriginal over-representation in prison, the dominant focus of scholarly attention since the RCIADIC report has been upon systemic bias in the law, the exercise of police discretion and the operation of the criminal justice system.
3. That much of the money allocated by the Federal government to State and Territory governments in response to the Royal Commission recommendations has been directed at programs designed to alter police procedure or the operation of the criminal justice system.
4. That diversionary policy has limited potential to reduce Aboriginal over-representation in the criminal justice system.
5. That the best way to reduce Aboriginal over-representation in the criminal justice system is to tackle the underlying causes of Aboriginal involvement in crime (eg poor school performance, unemployment and substance abuse).

Cunneen (2006) has recently dismissed these claims as 'simplistic' (p 334) and accused us of: 'serious distortion' (p 334), 'gross misrepresentation' (p 338), 'reckless disregard for the truth' (p 341) and of making 'hollow claims' (p 331). The purpose of this comment is to offer a brief reply to these accusations. To assist the reader in understanding our response we cite each of the main criticisms put forward by Cunneen before explaining our response.

Cunneen (2006) begins by contending that our account of the possible causes of Aboriginal over-representation in prison is simplistic in that it 'constructs a simple binary explanation for 'Aboriginal over-representation in prison' as either the result of systemic bias *or* (italics in original) offending levels among Indigenous people' (Cunneen 2006:334). At no stage, however, did we argue that these two broad classes of explanation are mutually exclusive. Nor did we argue that the causes of Aboriginal offending are simple or, indeed, that systemic bias doesn't exist. We pointed out that: 'The history of Aboriginal contact with police and the criminal justice system. ... is replete with evidence of racial bias' and cited researching showing that police harassment of Aboriginal people is widespread (Weatherburn, Fitzgerald & Hua 2003:66). Furthermore we went to some trouble to highlight the complex range of distal factors (eg colonisation, dispossession, disadvantage, substance use) that influence rates of Indigenous involvement in crime (Weatherburn, Fitzgerald & Hua 2003:66). Our purpose in distinguishing between the two *broad classes* of explanation was simply to lay the groundwork for arguing that: 'Scholarly discussion of Aboriginal over-representation *in prison* (italics not in original) ... has paid far more attention to factors associated with systemic bias than to factors associated with Aboriginal offending' (Weatherburn et al 2003:66).

One of the works we drew attention to in support of this claim was a report by Cunneen and McDonald (1997) entitled *Keeping Aboriginal and Torres Strait Islander People out of Custody*. In his reply to this part of our argument Cunneen maintains that his report '... was never meant to be either a comprehensive explanation of over-representation, nor an explanation of systemic bias'. Perhaps not, but Cunneen and McDonald did include a whole chapter on explanations for Aboriginal over-representation in custody. Moreover, while they freely admit in this chapter that 'The simplest explanation for the level of Aboriginal over-representation in police custody, courts and prison would be that over-representation actually reflects offending levels' (Cunneen & McDonald 1997:44), for reasons that are hard to fathom, they never actually give this issue any serious consideration. Instead, the bulk of the chapter is taken up with a discussion of ways in which bias in policing, the criminal law and the courts might cause Aboriginal over-representation in the justice system.

We cited a number of other writers, besides Cunneen, who have discussed the issue of systemic bias. In his response, Cunneen cites a number of scholars, not referred to in our article, who he says have discussed Aboriginal offending. Very few of those cited by Cunneen, however, were concerned with the causes of Aboriginal over-representation in prison. Cunneen and Robb (1987) were concerned about crime and policing in North-West NSW. Devery (1991) was concerned with the general relationship between disadvantage and crime. Hunter and Borland (1999) and Hunter (2001) were concerned about the effect of arrest on Indigenous employment prospects. Even the studies on violence prevention in Aboriginal communities cited by Cunneen (some of which, incidentally, appeared *after* our article was published) were not concerned with the contribution that Aboriginal violence makes to Aboriginal over-representation in prison. It is true that a number of authors (including Cunneen) highlight economic and social disadvantage as one of the causes of Indigenous overrepresentation in prison. Few, however, openly discuss or analyse the relationship between Indigenous offending and Indigenous over-representation in prison. The general tenor of most discussions is that Indigenous offending is just one of many factors influencing rates of Indigenous imprisonment. Walker (1987) is the only author to our knowledge who has openly challenged the proposition that Aboriginal over-representation in prison is mainly due to systemic bias. Interestingly enough, in an article entitled 'Judicial Racism' (Cunneen 1992:3) subjected Walker's challenge to the same dismissive treatment as ours.

One of Cunneen's principal criticisms of our claim that too much attention has been paid to the problem of systemic bias is that no one (but us) uses the term 'systemic bias' (Cunneen 2006:330). We happily concede that the term 'systemic bias' is not in common use in this context but that hardly amounts to an admission that the process we are referring to has never been invoked as an explanation for Aboriginal over-representation in prison. Call it systemic racism, racial discrimination, institutional racism or whatever you will, the fact remains that a good deal more attention has been paid to the possibility that Aboriginal over-representation may be due to unfair or discriminatory treatment by the law, the police or agents in the justice system, than to the possibility that it might be due mainly to Aboriginal over-representation in crime. Blagg et al (2006), for example, have just written a voluminous (210 page) report on 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System'. There are no remotely comparable discussions of the way in which Indigenous offending influences Indigenous over-representation in prison.

Our central claim, of course, was that Indigenous offending rates are much higher than non-Indigenous offending rates and that this is the leading cause of Indigenous over-representation in prison. It is hard to work out what Cunneen's position is on this issue. First

he concedes that no one would dispute the claim that Indigenous people commit more offences than non-Indigenous people (Cunneen 2006:340). Then one paragraph later he says 'we simply do not know the "real" level of offending by Indigenous people' and questions whether the real level of Indigenous offending is 'epistemologically ... knowable separate from the agencies that identify and process crime'. Then three sentences later he warns his readers that these epistemological doubts should not be construed as 'an argument that the volume of serious offences is not a significant cause of over-representation (Cunneen 2006:340). Does he think the volume of serious offences is a significant cause of over-representation or doesn't he? The question deserves a straightforward answer.

The paragraphs that follow do little to clarify things. First Cunneen points out that 'neither the arrest data nor the self-report data presented by Weatherburn come near to matching the rate of over-representation in prison' (Cunneen 2006:340). This suggests a belief that, if Indigenous over-representation in crime were the principal cause of Indigenous over-representation in prison, then levels of over-representation in crime and prison should be numerically equal. Later, Cunneen says he is 'not suggesting that the level of offending among Indigenous people is not a problem' but he is 'against simplistic propositions concerning the relationship between the volume of Indigenous offending and their level of over-representation in adult and juvenile prisons' (2006:340). This is a rather odd statement to make given the equation he has just implicitly drawn.

As it happens, the equation implicit in his argument *is* simplistic. Imprisonment rates are determined not just by the rate of offending but also by its pattern. The effects of initial differences in rates of offending on rates of imprisonment are often compounded by other crime-related factors, such as higher rates of re-offending, higher rates of involvement in serious violent crime, higher rates of absconding on bail, higher rates of non-compliance with community-based sanctions and higher rates of re-offending on parole. These patterns of offending will impact on remand rates and sentence lengths and, in so doing, will tend to magnify any initial difference in the rate of arrest for offences such as murder, domestic violence and child sexual assault.

We turn, then, to our claim that diversionary policy has limited potential to reduce Aboriginal over-representation in the criminal justice system. In defence of this claim we drew attention to evidence that Aboriginal offenders have very high rates of recidivism and argued that alternatives to custody that do not produce a reduction in re-offending just end up inserting another step in the ladder of non-custodial sanctions they ascend before ending up in prison. Cunneen presents no evidence to rebut this claim. He simply suggests that what look like diversion schemes from a 'non-Indigenous, orthodox criminological perspective' are, from an Indigenous perspective, 'community control [interventions] with a commitment to actualising self-determination' (Cunneen 2006:343). This is, with all due respect, not relevant to our argument. Aboriginal people may well view measures like community justice groups and circle sentencing in the light claimed by Cunneen. Our point was simply that Governments introduced these measures, at least in part, to help keep Aboriginal (and other) people out of court and prison. In this regard, they have manifestly failed.

What about our claim that Governments should focus their attention on addressing the underlying causes of Aboriginal involvement in crime? Cunneen says most of the money allocated by the Federal Government in response to the RCIADIC recommendations went to address what he calls 'underlying issues' rather than reforms to policing and the criminal justice system (Cunneen 2006:341).

It is true that only about \$65 million out of the \$400 million went on reforms to policing and criminal justice. It was therefore an exaggeration on our part to say that ‘much’ of the money was spent on these things, although \$65 million is hardly an inconsequential amount. To suggest, as Cunneen does, however, that ‘the overwhelming bulk’ of the money was spent on ‘underlying issues’ is quite misleading. The ‘underlying issues’ we were talking about in our article as of central importance were quite specific: unemployment, early school leaving and substance abuse. If you count funding connected to education and young people’s development in the table provided by Cunneen,¹ it appears that a maximum of about 15 per cent was spent on improving educational outcomes. Direct and indirect expenditure on job creation appears to be about 30 per cent.² Eighteen percent of the funding went to drug and alcohol services. This leaves about 37 per cent of the RCIADIC funds directed at initiatives (eg criminal justice reform, land acquisition and development), which however laudable, were never likely to exert (and, in the event, do not appear to have exerted) any effect on rates of Aboriginal imprisonment. Our point was (and is) that the focus of Government attention should be on school leaving, unemployment and substance abuse.

We wrote our original article because (a) it seemed to us that too much attention had been focussed on alleged defects in the response of the criminal justice system to Indigenous offending and (b) too little attention had been focussed on the specific causes of Indigenous offending. One of the many criticisms Cunneen levels at us is that we have ‘attempted to generate ‘a polarised debate ... where it had largely been absent’ (Cunneen 2006:332). We opened our original article by pointing out that the rate of Aboriginal over-representation in prison was worse than it had been at the time of the Royal Commission into Aboriginal Deaths in Custody. We make no apology for attempting to generate a debate about how best to reduce rates of Aboriginal imprisonment. We think such a debate is long overdue.

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References

Blagg, H, Morgan, N, Cunneen, C & Ferrante, A (2006) *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System*, Report to the Equal Opportunity Commission and Aboriginal Justice Forum, Melbourne.

Cunneen, C (2006) ‘Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues’, *Current Issues in Criminal Justice*, vol 17, no 3, pp 329–346.

Cunneen, C, & McDonald, D (1997) *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, Commonwealth of Australia, Canberra.

Cunneen, C (1992) ‘Judicial Racism’, *Aboriginal Law Bulletin*, vol 44, no 2, pp 1–9.

1 Young people’s development, Aboriginal youth sport and recreation. Aboriginal education workers, 600 additional pre-school places for Aboriginal children.

2 Aboriginal rural resources, Australian National Parks and Wildlife Service contract employment. Aboriginal industry strategies, Community Development Employment, Young people’s employment.

Cunneen, C & Robb, T (1987) *Criminal Justice in North West NSW*, NSW Bureau of Crime Statistics and Research, Attorney General's Department, Sydney.

Devery, C (1991) *Disadvantage and Crime in New South Wales*, New South Wales Bureau of Crime Statistics and Research, Sydney.

Hunter, B (2001) *Factors Underlying Indigenous Arrest Rates*, New South Wales Bureau of Crime Statistics and Research, Sydney.

Hunter, B, & Borland, J (1999) *The Effect of Arrest on Indigenous Employment Prospects*, Crime and Justice Bulletin, No. 45, New South Wales Bureau of Crime Statistics and Research, Sydney.

Walker, J (1987) 'Prison cells with revolving doors: A judicial or societal problem' in Hazelehurst, K (ed), *Ivory Scales*, New South Wales University Press, Sydney.

Weatherburn, D, Fitzgerald, J, & Hua J (2003) 'Reducing Aboriginal Over-representation in prison', *Australian Journal of Public Administration*, vol 62, no 3, pp 65-73.