INTRODUCTION AND OVERVIEW

(a) The Present State of Research

"In Queensland Aboriginal legislation, there is undoubted coercion: a strong penal flavour in the legislation and regulations, together with a possible stronger penal flavour in actual administration of the law." 1 "Queensland has the most comprehensive legislation for controlling the residents of Aborigines reserves". 2 Aboriginals and Torres Strait Islanders throughout the State and in particular those on Aboriginal and Torres Strait Island reserves are discriminated against by policies, laws and practices of the Queensland Government ..." 3 The above three quotations are representative of many encountered in studies from the 1960s onwards of the legal problems facing Aboriginal people in Queensland. [In general, "Aborigine" will be used as a noun throughout this paper to include Aborigines and Torres Strait Islanders, except in quotations or where a distinction has to be drawn.] 5 The legislative provisions referred to in the opening quotations have been examined in substantial detail, in particular in two books by Nettheim. 6 However, despite recognition of the particular discrimination to which Queensland Aborigines are subject, there does not appear to be any major fieldwork study of the involvement of Aborigines in the Queensland criminal justice system. This article is based on published sources and is intended only as a preliminary examination prior to such fieldwork being done. As such, its principal focus is the court system. Obviously, such an approach is selective in a distorted way: it only looks at the tip of an iceberg and any conclusion must be limited in accordance with these considerations.

One notable exception to the relative dearth of research is Paul Wilson’s study of the proceedings in R v. Peter, 7 Black Death, White Hands, 8 which contains a substantial amount of information on social conditions on Aboriginal reserves, the rate and pattern of various types of offences and information on sentencing. This material had been assembled for the purpose of sentencing in R v. Peter. Extensive consideration was given to this material by the Australian Law Reform Commission in its Report on Aboriginal Customary Laws as to the situation of Aborigines in the criminal justice system in

2 R. Sackville (Commissioner), Law and Poverty in Australia, (Canberra, 1975) pp.269.
4 C. Tatz, "Queensland’s Aborigines: Natural Justice and the Rule of Law" (1963) 35(3) Australian Quarterly 33 was the first investigation of this area.
7 Unreported, Supreme Court of Queensland, (19/9/81).
8 P. Wilson, Black Death, White Hands, rev ed (Sydney, 1985).
Queensland. In addition to these materials, together with anecdotal evidence, there is a growing body of case law, particularly in relation to questions of sentencing and criminal responsibility of reserve dwellers having regard to their social conditions.

In addition, the case law on observance of the specified procedures relating to police questioning and admissibility of confessions are reviewed.

Further material relating to Aborigines and the police and Aborigines and the prison system, has been revealed in the Royal Commission, *Reports on Black Deaths in Custody*. This document clearly establishes that major problems exist in the Queensland criminal justice system, particularly in Aboriginal-police relations and the treatment of sentenced Aboriginal prisoners. Such problems are not evident to such a substantial extent in the decisions of superior courts upon which this article is based. This caution is issued against any suggestion that this article presents the criminal justice system too favourably: only a particular limited aspect of the Queensland criminal justice system, from the perspective of the court system, is under detailed examination here.

(b) Overview on Social Issues

The 1981 Census recorded 44,698 Aboriginals and Torres Strait Islanders dwelling in Queensland, with a total Australian population of 159,897. This represented the largest indigenous population of any State or Territory, with some 28 per cent of the Aborigine and Torres Strait Island population. General works on Aborigines and the law contain statistical details on Aborigines which vary widely, and would appear to bear out the views of the Australian Bureau of Statistics, which identified problems of reporting on this area with aspects to census coverage, definition of an Aborigine and reporting of racial background. A non-legal source gives a figure of 65,887 Aboriginals and Torres Strait Islanders in Queensland, of whom 31,000 lived on reserves, missions and settlements and the local government shires of Mornington and Aurukun.

A number of studies have noted, particularly in the context of recognition and application of Aboriginal tribal law, that there is a great diversity of ways of life and social organisation amongst Aboriginal people and that such diversity of cultural factors should

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10 The question of Aboriginality as a factor in sentencing is not discussed in J.E. Newton, *Cases and Materials on Sentencing in Queensland* (Canberra, 1979)
12 R v. Peter (unreported Supreme Court of Queensland 19/9/81
13 R. v. Friday (1985) 14 A. Crim R. 471
15 This document clearly establishes that major problems exist in the Queensland criminal justice system, particularly in Aboriginal-police relations and the treatment of sentenced Aboriginal prisoners. Such problems are not evident to such a substantial extent in the decisions of superior courts upon which this article is based. This caution is issued against any suggestion that this article presents the criminal justice system too favourably: only a particular limited aspect of the Queensland criminal justice system, from the perspective of the court system, is under detailed examination here.
18 Australian Bureau of Statistics, *op. cit.* p.120.
be taken into account when considering the operation of the criminal law.\textsuperscript{16} It is possible to identify three main groups: traditionally oriented Aborigines (there being now, effectively, no Aboriginal people without European contact);\textsuperscript{17} urban Aborigines;\textsuperscript{18} and an intermediate residual category which may be identified as "fringe dwellers".\textsuperscript{19} It is apparent that the majority of Queensland reserve dwellers will fall into the "fringe dwellers" category, although, within this category, there will be a diversity of social and individual orientation, from those who remain strongly influenced by traditional tribal culture, to those who are approaching the lifestyles of urban Aborigines generally, though without essential services and housing of a standard comparable to the general community.\textsuperscript{20} It will become apparent that the problems characteristic of North Queensland reserves are generated by social and individual behaviour patterns which strongly indicate a breakdown of traditional orientation, but without successful adaptation to European Australian social values. The consequences of this loss of social identity will be reviewed further and its implications for the criminal justice system, as reflecting dominant cultural values, will be examined in discussion of specific criminal justice issues. Such social and cultural issues are central to drawing some tentative conclusion and making recommendations as to future investigation and action.

\section*{Reserve Dwellers: Sentencing and Criminal Responsibility}

(a) \textit{The Alwyn Peter case}.\textsuperscript{21}

On 7th December 1979, Alwyn Peter, aged 24, killed his de facto wife, Deidre Gilbert, at the Weipa South Aboriginal reserve by a knife wound in her back which penetrated her heart and lung. At the time, he had been drinking heavily and was substantially affected by alcohol. Although he had told the police that he had wanted to "stick her but not kill her", in court he could not remember much of his statement to police. At the trial, where the prosecution accepted a plea of guilty to manslaughter in discharge of an indictment for murder, the defence led evidence from anthropologists, sociologists, psychologists and psychiatrists, as well as white and black people who had known Peter. The evidence, which will be discussed in greater detail below, disclosed that the homicide rate on Aboriginal reserves was ten times the national or Queensland average. The reasons for this were complex, but included: a large number of people from different tribes being displaced from their traditional lands, the institutionalising effect of paternalistic administrative controls; substantial problems with alcohol; poor educational opportunities and a high rate of unemployment.

Dunn J. accepted the argument that social conditions lay behind Alwyn Peter's actions and imposed a sentence of 27 months' imprisonment. As he had been in custody for 21 months awaiting trial, a recommendation was made that he immediately be released on parole, upon condition that he undertake an alcohol rehabilitation programme. In fact, Peter was not released until January, 1982, after the Courier-Mail newspaper had drawn


\textsuperscript{17} Australian Law Reform Commission, \textit{op. cit.}, vol. 1, pp.29-30 para 34; E. Eggleston \textit{op. cit.}, p.282, and compare comments as to Aboriginals without white contact.

\textsuperscript{18} Australian Law Reform Commission, \textit{op. cit.}, vol.1, p.30, para. 35.

\textsuperscript{19} Australian Law Reform Commission, \textit{op. cit.}, vol. 1, pp.30-31, para. 36.


\textsuperscript{21} Although it contains a comprehensive account of material placed before the court in \textit{R v. Peter} (unreported, Supreme Court of Queensland, 18/9/81), P. Wilson, \textit{op. cit.}, does not contain a detailed account of the trial. The following account is based on R. Fitzgerald, \textit{A History of Queensland from 1915 to the 1980s}. (Brisbane, 1984) pp.530-532.
attention to his continued imprisonment, notwithstanding the Court's recommendation of immediate release on parole.

(b) **Reserve Conditions: Background to Crime**

As part of the research for the Alwyn Peter case, information was sought through the Aboriginal and Torres Strait Islander Legal Service, as to the incidence of crimes of violence on Aboriginal reserves. Although it was clear that records were incomplete (and, in any event, such records did not disclose the full extent of violence, through incidents not reported to the police or other agencies), a pattern was disclosed which could be described as alarming. A homicide rate of 39.6 per 100,000 was obtained, compared with 3.28 per 100,000 for Queensland as a whole. This figure compared unfavourably with supposedly crime-ridden United States cities. In a study of cases on reserves over the period 1978-1981, 82 matters involving charges of murder, manslaughter, grievous bodily harm, unlawful wounding and assault occasioning bodily harm were reported on the 17 Aboriginal reserves and communities studied. The rate of serious assault charges on the reserves studied was 226.05 per 100,000, compared with the Queensland figure of 43.85 per 100,000. Wilson points out that, while this reported rate is some 5 times the State average, the level of unreported assaults means that, probably, the true rate is some 10 to 15 times the State or national figure. An analysis of these reported matters showed that, in 82 per cent of them, the offender had previously been involved in brawls, gang fighting or wife-beating. A similar proportion of victims had been involved in such incidents.

The explanations for this level of violence are complex. On an individual level, in cases of homicide and serious assault, there were two main elements: alcohol and jealousy. When examining communities as a whole, violence was more prevalent in communities where there was a lack of community cohesion, a high degree of mobility and tribal disharmony, in particular where there was removal from original tribal areas.

The correlation between alcohol and crime in North Queensland reserves would appear to be substantial. Walton's 1981 study for the Alwyn Peter case found that 81.5 per cent of Aboriginal prisoners were drinking at the time of the relevant offence. Of the cases of homicide and serious assault studied by Wilson, consumption of large amounts of alcohol was involved in 95 percent of cases, and, in 50 per cent of cases, both the assailant and victim had been drinking. This figure appears higher than that disclosed in the statistical compilation by McCorquodale, but the trend in the 1970s and 1980s towards alcohol related homicides and serious assaults, is evident from that material.

Levels of alcohol consumption appear to be substantial. A survey at Weipa South in 1981 reached the result that, in a four-hour period the canteen was open, the average amount of beer consumed per person was two and a half gallons.

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22 P. Wilson, *op. cit.*, pp.3-4.
23 P. Wilson, *op. cit.*, pp.4-5.
24 P. Wilson, *op. cit.*, p.5.
26 P. Wilson, *op. cit.*, p.16.
which tissue damage occurs, high levels of physical and psychological dependence develop and high levels of alcohol related disabilities occur.  

The alcohol culture arises, as Wilson points out, from a need to escape from depressing social and economic conditions and, also, temporarily raises self-esteem.  

However, this feeling of self-esteem wears off and is further eroded after heavy drinking and violence.  

Aboriginal drinking behaviour is a focal activity for social occasions, not merely mass intoxication but a specific culture, which provides a new means of social relationships as a substitute for displaced traditional culture and a means of escape from white domination. Although alcohol may be a problem as an individual factor in relation to violent crime, excessive drinking has its roots in the social conditions found in Aboriginal reserves.

In 55% of the cases studied by Wilson, the assailant was the husband or the de facto partner of the female victim. In all homicide cases in this category, the offender expressed jealousy or a feeling that the woman had not been faithful.

As noted, the level of social dislocation experienced by reserve dwellers bore a strong correlation to the level of violence. Social dislocation was rated by anthropologists, taking into account factors such as the density of population, the degree of isolation from white communities, the presence of traditional culture, the availability of alcohol and the origins of the reserve dwellers. Communities with high levels of violence included Palm Island, Weipa South and Yarrabah, where the average rate of violence was 7.07 incidents per 1000 people, while those in the low violence group with a rate of 2.31 per 1000 people included Lockhart, Doomadgee and Aurukun. The reserves described as having a high violence level were characterised by high populations, legal availability of alcohol, low to medium levels of traditional culture, high population levels and, in particular, were reserves that had received Aboriginals from other areas. In the case of Weipa South, where Alwyn Peter came from, there were 130 Torres Strait Islanders, 11 people from Mapoon, 215 from Weipa, 9 from Aurukun and 78 from other areas. The family of Alwyn Peter had been removed from Mapoon in 1963 and retained their connection with that area by regular visits on an annual basis. There was frequent conflict between different tribal groups, particularly between Aborigines and Torres Strait Islanders.

In discussion of social conditions, Wilson notes the following indicators: economic deprivation, characterised by 53 per cent of offenders being unemployed (those who were employed receiving low incomes); educational and social disadvantages, as 70 per cent were educated to Grade Seven (primary) level only; overcrowded and inadequate housing, with no washing facilities; and approximately 70 per cent of offenders had poor health.

A point developed at length by Wilson, as illustrative of the nature of reserve society, is the extent of self-mutilation, unrelated to traditional or ritual self-injury. The importance of this factor is its demonstration of the level of frustration experienced by reserve dwellers and the extent of violence as an outlet.

The evidence as to personal and group disorientation was summarised by the late Professor W. Stammer in a statement made in the Alwyn Peter case, that the creation of large

32 P. Wilson, op. cit., p.61.
33 P. Wilson, op. cit., p.56.
35 P. Wilson, op. cit., pp.16-17.
39 P. Wilson, op. cit., Ch.3.
settlements of Aborigines, who had little in common except their subjugation by whites, and their position of dependence in a power relationship, resulted in a situation from which the Aborigine can find no tolerable exit.\textsuperscript{40} The escape route by way of violence and alcohol has only created an intractable problem for the criminal justice system, and, as will be seen, a divergence of attitudes and approaches by sentencing judges.

(c) Sentence Policy in the Queensland Court of Criminal Appeal

A number of recent decisions of the Queensland Court of Criminal Appeal have reviewed sentences imposed on Aborigines, particularly where relatively lenient sentences have been imposed on reserve dwellers.

In \textit{R v. Friday},\textsuperscript{41} the defendant was an Aboriginal female aged 27, who was the mother of two children. She was charged with the murder of her brother at Palm Island on 20th January 1984. At her trial, she was found guilty of manslaughter — a defence of self-defence was rejected, but the jury’s verdict was interpreted as an acceptance of the defendant’s evidence that she had no intent to kill or commit grievous bodily harm. Prior to the incident with which she was charged, the defendant was stated to have consumed some 18 cans of beer. On sentence, the trial judge had remarked that the defendant was a victim of circumstances in which life had placed her and sentenced her to two year’s imprisonment, with a non-parole period of six months. The Crown appealed against this sentence.

Campbell CJ pointed out that crimes of violence by Aborigines on reserves after the consumption of alcohol, had been dealt with more leniently or sympathetically than had been the case with offences of a similar nature committed by non-Aborigines. In addition, these sentences were frequently imposed upon the basis that early release on parole was recommended. He states that “... the circumstances of the respondent’s life as an Aborigine living in a community such as Palm Island are similar to circumstances which have been taken into account by other judges of this Court on many occasions”.\textsuperscript{42} While upholding this general approach to sentencing, the Chief Justice noted that the Court had been informed by counsel that sentences being imposed on Aborigines for crimes of violence where they had been affected by alcohol were not having any deterrent effect. In the light of this information, he warned that “... the courts will have to consider this matter in the future with a view to seeing whether perhaps heavier sentences than those which have been imposed in the past for these type of offences should be imposed.”\textsuperscript{43}

Connolly J agreed that the fact the offender was an Aborigine and female was relevant to the level of sentence, but pointed out that the range of sentences for this type of offence was imprisonment for four to six years. He added the comment that compassion for Aboriginal and Torres Strait Islander offenders had to be balanced against compassion for Aboriginal and Torres Strait Islander victims. Williams J agreed. A sentence of 5 years imprisonment with an 18 month non-parole period was substituted.

In \textit{R v. Bulmer and ors},\textsuperscript{44} the Queensland Court of Criminal Appeal had four Crown appeals before it, which were argued together and provided the occasion for a review of sentencing principles in relation to crimes of violence. The first case, Bulmer, involved a female accused who was verbally abused and threatened by her drunken father. She struck him with a piece of wood that fractured his ribs and ruptured his spleen. She was not affected by alcohol, and had no previous convictions. A sentence of twelve months’ probation was imposed and the appeal against this sentence was dismissed.

\textsuperscript{40} R. Fitzgerald, \textit{op. cit.}, pp.530-1.
\textsuperscript{41} (1985) 14 A. Crim. R. 471.
\textsuperscript{42} (1985) 14 A. Crim. R. 471 at p.472.
\textsuperscript{43} (1954) 14 A. Crim. R. 471 at p.472-473.
\textsuperscript{44} (1987) 25 A. Crim R. 155.
Barlow, a 22 year old man residing at Yarrabah Settlement, was charged with wounding as a result of an incident in which he slapped and then stabbed a 9 year old child, causing a wound to the back of the child’s head with a blunt part of the knife. Barlow was drunk at the time. He was sentenced to 6 months’ imprisonment but, on appeal, a sentence of two years was substituted.

In the case of Mitchell, the defendant was a 34 year old male who inflicted three stab wounds on the woman with whom he was living. He had a good work record and his criminal history indicated that he was maturing. On a charge of wounding, a sentence of six months’ imprisonment was imposed, which was increased on appeal to two years.

Graham was a 21 year old resident at Yarrabah Settlement. After a session of heavy drinking, he stabbed his de facto wife with a kitchen knife, with three wounds being inflicted and then, after threatening to “rip her guts open”, rushed toward her but, as she defended herself, only cut the fingers of her left hand. Although Graham had prior convictions, none were for violent offences. A sentence of two years’ imprisonment was substituted for the initial three months imprisonment imposed by the trial judge.

In the cases of Barlow, Mitchell and Graham where the Crown appeal was allowed, the majority (Connolly and McPherson JJ) increased the sentences to two years’ imprisonment, whereas Derrington J was of the view that 18 months was the appropriate period of imprisonment.

Connolly and McPherson JJ referred to a number of cases in 1981, where deterrent sentences imposed by a trial judge had been upheld in cases of unlawful wounding by Aboriginals, who lived in communities or settlements. Reference was also made to a 1985 case, where a similar warning as to a possible change of sentencing policy in relation to Aborigines, as was made in R v. Friday, was given. They referred to R v. Watson, discussed later, and it was pointed out that the view that men had a right to discipline women and children with a knife was unacceptable. Connolly and McPherson JJ continued:

“If this type of crime of violence does indeed reflect the view that it is legitimate to discipline women and children in this fashion then, far from calling for leniency in sentencing, it represents an attitude which the courts must be vigilant to discourage.”

Derrington J took a similar approach:

“...there must be seen to be strong deterrence of this domestic and social violence in the Aboriginal community, particularly with weapons. With a proper recognition of this man’s (Graham’s) claims to mitigation of sentence, one must still be heavily influenced by the grave need to protect the weaker members of the community, particularly women and children, from excessive violence, a problem which is becoming endemic.”

In Neal v. R, all members of the High Court considered that the reserve conditions, in which the accused was living, were relevant to the question of sentence, but Gibbs CJ and Wilson J held that those conditions had been taken into account by the magistrate and the Court of Criminal Appeal. Murphy J reviewed the position of Aborigines in the criminal justice system, generally, and would have substituted a fine for the sentences of imprisonment originally imposed. Brennan J referred to two major matters which indicated

45 R v. Lalara, unreported, Queensland Court of Criminal Appeal, 1981, R v. Holroyd, unreported, Court of Criminal Appeal 1985 (An appeal was allowed in the case of R v. Choikee, unreported, Queensland Court of Criminal Appeal, 1981) All cases arose from one sitting of the District Court at Cairns.
the sentencing discretion had miscarried. Firstly, there was nothing to indicate that the magistrate or the Court of Criminal Appeal had taken the emotional stress of living in reserve conditions into account. Brennan J quoted the remarks of Dunn J in *R v. Peter*,\(^{52}\) that, even in the absence of expert evidence, the courts make allowance for the problems in Aboriginal reserve communities. In addition, it appeared that the magistrate had improperly taken into account the fact that the defendant had advocated self management of the Yarrabah Aboriginal Reserve, insofar as such advocacy was for legitimate political change. The High Court, ultimately, with the opinion of the Chief Justice prevailing, held that the Queensland Court of Criminal Appeal had taken an inappropriate course in not permitting the appellant to withdraw his appeal against sentence before the Court exercised its power to increase that sentence.

In *R v. Yougie*,\(^{53}\) the accused was a 21 year old female Aborigine who was convicted of assault occasioning grievous bodily harm, as a result of throwing a soft drink bottle at her boyfriend. She intended to hit, but not to wound him. On appeal from a sentence of 2 year’s imprisonment, the Court of Criminal Appeal substituted a sentence of 2 months’ imprisonment (already served pending appeal) and 18 months’ probation.

It was clear that the sentencing judge had taken a different approach to his brother judges in the District Court and had imposed a deterrent sentence. This approach was rejected. Derrington J said “it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals in this context when poor self image and other demoralising factors have placed heavy stresses on them leading to alcohol abuse and consequential violence”.\(^{54}\)

The Australian Law Reform Commission concluded, on the available information, that there was no evidence of discriminatory sentencing practices at Supreme Court or District Court level in the past 20 years.\(^{55}\) However, sentencing policy in the cases discussed above has operated on a somewhat inconsistent basis, with some trial judges exercising their discretion by imposing lenient sentences which took reserve conditions and alcohol abuse into account as a mitigating factor, but with the Queensland Court of Criminal Appeal often reduced the weight of those factors in reviewing those sentencing discretions and placed additional emphasis on the requirement of deterrence in its substitution of more severe sentences. The question of whether deterrent sentences are an appropriate response by the judiciary will be reviewed later.

**(d) Criminal Responsibility**

In the cases of *R v. Peter*,\(^{56}\) and *R v. Friday*,\(^{57}\) it was noted that pleas of guilty of manslaughter were accepted where a murder charge was otherwise available, on the basis that there was no intent to kill. It was noted by Wilson that, in the cases surveyed, there was a well-defined pattern of lack of intent to kill or seriously injure.\(^{58}\)

In *R. v. Watson*,\(^{59}\) the accused, a resident of Palm Island, was charged with the murder of his de facto wife by inflicting a knife wound to the abdomen. At the trial, the defence sought to lead evidence from a sociologist, Mr Walkley, and from the accused as to the way in which knives were used on Palm Island, the effect of which was summarised from the appeal as follows:-

\(^{52}\) Unreported, Supreme Court of Queensland, 18/9/81.

\(^{53}\) (1986) 35 A Crim. R. 301.

\(^{54}\) *Ibid* at p.304.


\(^{56}\) Unreported, Supreme Court of Queensland, 18/9/81.

\(^{57}\) (1985) 14 A. Crim. R. 471.

\(^{58}\) P. Wilson, *op. cit.*, p.13.

\(^{59}\) (1986) 69 A.L.R. 145.
"(a) evidence by the appellant that he had received serious knife and bottle wounds in the past and that he had personally made light of same;

(b) evidence by the appellant that the inflicting of knife wounds as a process of domestic discipline was wide spread in the Palm Island community;

(c) evidence by Mr Walkley that a large section of the Palm Island community believe that a male person has a right to discipline the female person with whom he shares a domestic relationship by the infliction of a knife wound;

(d) that for that section of the community such discipline is associated with a firm belief that the person inflicting the discipline does not intend to seriously harm or kill the object of the knife wound; and

(e) that injuries inflicted in this way are readily accepted by the community and are not considered serious." 60

The defence case had been presented on the basis that the knife attack was only intended to discipline the victim and not to cause her any serious harm and the evidence, referred to above, was designed to advance this case. However, the Court of Criminal Appeal upheld its rejection. McPherson J pointed out that the proposition in paragraph (e), in relation to consent or acceptance of injury, did not constitute a defence and that the propositions contained in paragraphs (b) and (c), in relation to domestic discipline, probably could not be established as a custom and were in conflict with both the Criminal Code (Qld) and the Racial Discrimination Act (Cth). It was conceded on behalf of the appellant that these were not major submissions in his appeal. 61

The major issue related to the admission of evidence under the propositions in paragraphs (a) and (d). McPherson J pointed out that, in relation to paragraph (a), the mere fact that the appellant personally made light of his wounds, could not establish an entitlement to wound others, sure in the knowledge that they would react in the same way, but that it was linked with the opinion evidence in paragraph (d). A number of cases were cited in which evidence was admitted to establish particular customs, practices and beliefs; however, these were distinguished on the basis that the evidence to be given here was within the ordinary capacity of jurors to decide and, therefore, not the subject of expert evidence. 62 Dowsett J took a similar approach and, in addition, referred to the case of R v. Yildiz, 63 in which evidence was sought to be led by the Crown as to the attitude of the members of the Turkish community to matters relating to homosexual behavior and such evidence was admitted on the basis that the person called (an interpreter) was qualified to give opinion evidence, although he was not an expert. Dowsett J took the view that the question of admissibility of such opinion evidence from the cases cited depended upon whether the circumstances surrounding the incident could be proven and whether they would distinguish the behaviour of the accused from other people in the community. He stated that here the evidence was not of that kind. 64 Derrington J adopted a more direct approach, in which he pointed out that much of the evidence was self-serving and a rationalisation of past events that could seriously distort the analysis of the factual situation in the case under consideration. He pointed out that, on the evidence as it was presented, it was open for the jury to allow for the possibility that the knife attack was only for the purpose of imposing his will upon the victim and that, while not intending to kill or cause serious injury, the acts were more harmful than they were intended by

the accused. He concluded that, in fact, the opinion evidence was not logically probative of the appellant's case on intention and, therefore, not relevant. 65

A number of matters emerge from this case which require further consideration. In the light of the course which trials such as R v. Peter 66 and R v. Friday 67 took and, given the circumstances of the present case as disclosed in the record of interview, it would be interesting to know why the prosecution persisted in proceeding on a murder charge. If the defence sought to adduce this evidence in the belief that it would secure an outright acquittal, it may be asked why a more cogent selection of material for presentation as opinion evidence by a qualified witness was not undertaken.

The attempt to distinguish other cases as to evidence of intention by McPherson and Dowsett JJ appears to present some difficulties, as a distinction is asserted rather than established. In fact, the most compelling grounds for rejection of the evidence were those by Derrington J, that the particular evidence was not logically probative of the alleged intention. 68 It is suggested that evidence directed towards establishing community attitudes on the acts in question, which may be derived from psychological tests and questionnaires, could be admitted in an appropriate case.

The final matter to which attention should be drawn is the great degree of scepticism evinced by the court towards the proposed evidence, for example, the comment by McPherson J as to the ability of the inhabitants of Palm Island to foresee the consequences of their acts and the view expressed by Derrington J that the evidence was "a semantic distinction owing more to a pre-existing desire to protect Aboriginal people from the rigours of our criminal law than to any properly observed distinctions between backgrounds and cultures". 69 Even if relevant evidence as to intention can be submitted, as outlined above, judicial rationalisations of a similar kind may be invoked to give limited effect to evidence of cultural matters, in particular where they conflict with the norms of the criminal law, as perceived by a judiciary remote from such cultures.

Investigation of Criminal Offences

(a) Confessional Statements

From 1939 to 1971, Queensland had special legislation requiring additional conditions to be fulfilled, before a confessional statement by an Aborigine was admitted into evidence. 70 Section 34 of the Aboriginals Preservation and Protection Act 1939 provided that a confession from an Aborigine, charged or suspected of any offence, was not admissible, unless a judge in chambers was satisfied that the Aborigine understood the meaning of his statement or his confession was obtained voluntarily, without duress or pressure of any sort. In 1965, this legislation was repealed, but it was partially replaced by ss.38 and 39 of the Aborigines and Torres Strait Islanders Affairs Act 1965, providing that a district officer could give evidence whether, in his opinion, it is likely that the accused did not understand such admission of guilt or confession, having regard to his stage of development. If such evidence was given, the confession could not be admitted in evidence unless the court was satisfied that the accused understood the confession at the time it was given. In 1971, this provision was replaced by the Aborigines Act 1971 and the Torres

66 Unreported, Supreme Court of Queensland, 18/9/81.
Strait Islanders Act 1971, which contain no provisions directly affecting the admissibility of confessions.\footnote{M. Foley, \textit{op. cit.}, p.173.}

The Lucas Committee Report in 1977 (Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland) made general recommendations setting out guidelines for police interrogation of persons under disability. It was stated that most Aborigines were to be regarded as under a disability because of educational and linguistic disadvantages, cultural differences and, in some cases; excessive deference to authority and physical disability.\footnote{Australian Law Reform Commission, \textit{op. cit.}, vol 1, p.406 para.547.} As a result of these recommendations, the Police Commissioner first issued an administrative direction to police officers concerning questioning of Aborigines, which was subsequently formalised as police instruction 4.54A. This instruction provides that when an Aborigine or Torres Strait Islander is being questioned by a police officer about his implication in an offence for which he may be arrested or held in custody, the interrogating officer will only question in the presence of an independent adult person concerned with the welfare of those races, in whom the person being questioned has confidence and by whom he feels supported and who can act as interpreter during the period of interrogation. This applies to Aborigines with language, educational, cultural or ethnic handicaps or differences and contains a general requirement that interrogation not be carried out in circumstances where the Aborigine is overborne or oppressed in any way.\footnote{M. Foley, \textit{op. cit.}, p.173.}

A number of cases reviewed below, have arisen where confessions by Aborigines have been considered and, in a significant proportion of those cases, rejected. It is noteworthy that the accused, in all of those cases, suffered the additional disability of being juveniles or could be regarded as children in an intellectual sense, the oldest accused being 20.

Environmental and health factors also present problems in the interrogation of Aborigines. It has been noted that there is a substantial level of middle ear disease amongst Aboriginal children, with 47.2 per cent of children between five and fourteen suffering significant hearing loss. While the disease tended to affect children more than adults, it was noted that, as a result of impairment of the auditory processing mechanism, adults continued to have difficulty in constructing meaning out of auditory sensations.\footnote{Australian Law Reform Commission, \textit{op. cit.}, pp.170-1, citing study by Lewis et al., (who gave evidence to the Lucas Committee). Alwyn Peter suffered from ear diseases. P. Wilson, \textit{op. cit.}, .77.} As Foley points out, the prevalence of this condition will place Aboriginal children being interrogated at a substantial disadvantage.\footnote{M. Foley, \textit{op. cit.}, p.17l.} The implications, however, are more far-reaching. The Lucas Report pointed out that hearing impairment may not become apparent through use of lip-reading and responding to gestures, or, if it does, silence and delay in responding may be regarded as indicating an unco-operative attitude or interpreted as consciousness of guilt.\footnote{Cited in Australian Law Reform Commission, \textit{op. cit.}, vol. 1, p.405 para.546.} Hearing problems also require that any caution or other statement made by police in the course of interrogation be explained with care and a clear acknowledgment of the caution be given before admission of any confession. Similar considerations apply to the conduct of any committal proceedings and trial. The requirement for a prisoner’s friend to be present will redress the disadvantage suffered by a hearing-impaired Aborigine to some extent, but, again, in the courtroom, it may result in an accused not being able to effectively present a defence.

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stabbed his father. The police attended the school and took the boy to the police station. There was no conversation as to whether he was willing to accompany the police. It was held that the police officer was obliged to inform the child that he does not have to accompany the police and steps have to be taken to ensure that the caution is understood. The trial judge, Kneipp J, considered that the present circumstances were such as to give the child the impression that guilt was assumed and that anything said about the matter would not make his position worse. It was also noted that the independent person or prisoner's friend should not be an authority figure such as a school teacher.

In *R v. Coleman, Johnson, Cobbo and Cobbo*, Judge Gibney in the Queensland District Court excluded confessions by Aboriginal juveniles. It was noted that the accused were described as young immature boys of Aboriginal extraction who had a low level of literacy. It was stated that parents ought to be notified and, in the absence of exceptional circumstances, ought to be present when interrogation took place. When a parent was not available, the trial judge suggested that a representative of the Aboriginal and Torres Strait Islander Legal Service ought to be notified. The purpose of the independent adult at the interview, as described in the Lucas Report, was to have a responsible person present who understands the problems of a person under disability and can do what the person would have done if possessed of normal and mature faculties. A greater effort had to be made to ensure that a child is not overborne and understands the proceedings and because of the susceptibility of children to threats, inducements and promises by police and other persons in authority, such threats should not be made. A similar approach was taken in the District Court of Queensland in 1978 in the case of *R v. Arthur, Coleman and Tranby* (where one of the three children accused was Aboriginal and all were aged either 11 or 12). The requirement that an independent adult be present was emphasised, as was the need for extra precautions in questioning disadvantaged youth. The requirement that the Crown establish the voluntariness of any confessional statement was reiterated.

In *R v. Matthews*, Judge Helman dealt with a case where an Aboriginal and Torres Strait Islander Legal Service Solicitor attended a police station and requested to see his client, the accused. A police sergeant stated that, as far as he was concerned, his client was not there. Judge Helman said that it was clear, at the time this response was made, the accused was in fact present at the police station. He referred to the English Judges' Rules which entitled an accused person a right to communicate with and to consult privately with a solicitor and applied those principles by ruling that the confession was unfairly obtained and should be rejected. In this case the accused was aged 19.

In *R v. Murray*, Andrews J of the Supreme Court of Queensland dealt with a case where the accused had just turned 17 and submissions were made that he was functioning at a much lower level of understanding. Andrews J ruled that, if the accused possessed the personality, mentality and other features of a younger person, he would regard the process of questioning in the same light as if he were a younger person. He directed preparation of a psychological profile. These tests showed Murray had a full-scale IQ of 66, which put him in the category of mild mental regardation, or the level of a 9 or 10 year old school child.

In *R v. Henry and others*, Judge Shanahan excluded confessions obtained from Aboriginal juveniles in the absence of an independent adult person. He stated “It is a

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78 Unreported, District Court of Brisbane, 7/6/78 in J. McCorquodale, Digest., p.385, case C254.
79 Unreported, District Court of Brisbane, 1978 in J. McCorquodale, Digest, p. 373, case C223.
81 Unreported, Supreme Court of Queensland, 1979 in J. McCorquodale, Digest, p.417, case C366.
82 Unreported, District Court of Rockhampton, 1979 in J. McCorquodale, Digest, p.395, case C292.
notorious fact that persons with this background are at a more serious disadvantage in dealing with persons in authority than would be their counterparts of similar age drawn from a European culture”.

In *R v. Barry*, the accused, on trial for rape and unlawful wounding sought to call evidence from a clinical psychologist in relation to his intellectual capacity and personality. There was little specific challenge to the confessional evidence tendered and no direct evidence as to the understanding by the accused of his confession. The accused did not give evidence and the psychologist’s evidence was rejected. On appeal, DM Campbell J ruled that the evidence was correctly excluded as irrelevant, or at best it was directed to peripheral matters which the jury could decide, unaided by expert evidence. McPherson and Thomas JJ were prepared to give greater weight to the psychological evidence. McPherson J held that the evidence of the psychologist was relevant to the truth or reliability of the confessional statements, and thus held that there was a substantial miscarriage of justice in respect of the rape charge, but not on the conviction for unlawful wounding. Thomas J held the evidence as to the mental capacity of the accused should have been admitted as tending to show that the confession was unreliable. However, evidence as to personality was not admissible. It was held by Thomas J that no substantial miscarriage of justice had occurred despite the improper exclusion of some of the psychological evidence. The appeal against conviction was, therefore, dismissed. However, the psychological evidence was held admissible on the question of sentence and the term of imprisonment was reduced. The accused was approximately 20 years old and had spent all his life on the Palm Island reserve. The tests indicated that Barry was on the borderline between dull-normal intelligence and a mental defective, had a reading range of a six year-old and the lowest possible score for reading comprehension. This appears to be a case with many similarities to *R v. Murray*. Although the effect of the psychological evidence upon admission of the confession in that case is unclear from the report, Andrews J appeared to be prepared to give greater weight to that psychological evidence than certainly DM Campbell J and, possibly, McPherson and Thomas JJ would in relation to the confession in the present case.

A confession was admitted in *R v. E Watson* where, after a four day voir dire, Judge Ambrose held that the defendant, a Palm Island resident, was not under a disability by reason of cultural differences within the meaning of Police Instruction 4.54A. The confession was thus admitted, although the prosecution failed on other grounds. This case would appear, upon the information given, to be one where cultural factors were examined and evaluated before the police instructions were held to be inapplicable.

In *R v. Williams and ors*, confessions made by five Aboriginal boys on trial for rape were rejected as inadmissible, after consideration by Dowsett J, in the Supreme Court, of the circumstances in which they were taken and of the psychological impact of those circumstances. It was held that there was no meaningful caution and the circumstances, in which the accused was taken to the police station, were described as oppressive. Further, the relevant police rules directing police to question juveniles in the presence of a parent or guardian had not been complied with. Dowsett J placed some useful limitations on the use of psychological evidence, in relation to the admission of confessions. Its relevance was limited to the external circumstances which related to the voluntariness of the con-
fession, so that evidence of a tendency to respond to questions was not of itself sufficient to make a confession not voluntary.

In the well known case of *R v. Condren*, the accused was on trial for murder. Another man, Albury, had confessed to the murder to police, but, at the trial, denied making such a confession. Further, expert evidence of the speech habits of Aborigines, which cast doubt on the authenticity of the confession made by Condren, was not admitted. In the Court of Criminal Appeal, these matters were held not to warrant appellate intervention. An application to call fresh evidence was also rejected. The fresh evidence was to the effect that the deceased had been seen alive by witnesses at a time when the accused was already in custody and that he could not have committed the crime with which he was charged. On an application for special leave to appeal to the High Court, concern was expressed at this rejection of the fresh evidence. It was suggested that the matter be remitted to the Court of Criminal Appeal for it to take the fresh evidence into account. After these steps were taken, Condren was subsequently released.

This is a significant case in that it presents, in a particularly striking way, the problems which exist in the criminal appeal system, where an apparently incorrect factual decision is reached by a jury. Such errors can only be taken into account on appeal where it can be said that the verdict was dangerous and unsafe. Often redress for a convicted person can only be achieved by executive intervention. However, the broader implications of this defect in the appellant process cannot be considered here.

Aborigines can be placed at a disadvantage in giving evidence and in the trial process, generally, because of the social and cultural factors which give the impression that their testimony in court is lacking in reliability. However, such social and cultural factors are often excluded by the courts or given minimal weight in determining whether to admit confessional statements made out of court, which lends further credibility to the prosecution case.

While the range of material surveyed does not enable any wider conclusions to be drawn, the Queensland courts have generally been vigilant to ensure that fair procedures are followed in obtaining confessions where an Aborigine is involved. However, this judicial protection is most evident where a person suffers a double handicap, as was expressly considered in the cases of juveniles discussed above, particularly in *R v. Coleman, Johnson, Cobbo and Cobbo*, *R v. Arthur, Coleman and Tranby* and *R v. Henry and others*.

While the courts showed substantial regard for the evidence given of educational and cultural background of Aborigines in *R v. Murray* and, it would seem, in *R v. E Watson*, this type of evidence was not regarded as of sufficient significance to warrant intervention by the Court of Criminal Appeal in *R v. Barry*, where it was not admitted at trial in relation to a confessional statement. The courts have sought to address the objectives of the Lucas Report in drawing a distinction between Aborigines of varying levels of cultural sophistication, in order to redress the actual disadvantage that the particular Aborigine being questioned suffers.

88 Unreported, District Court of Brisbane 7/6/78 in J. McCorquodale, Digest, p.385, case C254.
89 Unreported, District Court of Brisbane 1978 in J. McCorquodale, Digest, p.373, case C223.
90 Unreported, District Court of Rockhampton, 22/8/79 in J. McCorquodale, Digest, p.395, case C292.
91 Unreported, Supreme Court of Queensland, 1979, in J. McCorquodale, Digest, p.417, case C366.
92 Unreported, District Court of Queensland, 16-20, 24/7/84 in Australian Law Reform Commission, *op. cit.*, vol. 1, 426, fn.135.
(b) Aboriginal — Police Relations

Foley notes the relative absence of empirical research on Aboriginal police relations, but anecdotal evidence as to the existence of poor relations is abundant. The statement by a Queensland police sergeant that “... the good old days are gone with the blacks. You can’t give them a bloody razzle dazzle like you used to be able to." is perhaps the most remarkable.

The Lucas Report itself concluded “Frequently to the police officer involved to deal with the situations and to the Aborigines involved in them, prejudice seems confirmed by experience.” There is a pattern of riot and affray often involving conflict between Aborigines and police officers, with instances of these being reported at Lockhart River and Aurukun reserves. For homeless town Aborigines, police harassment appears to be a part of everyday life. The sense of outrage at police behaviour towards Aborigines, generally, is evident from the remarks of Harry Penrith, a North Queensland Aborigine, at the 1973 Aborigines Human Rights and the Law conference, although no specific instances of police misconduct are given. The level of hostility and mistrust at this initial area of contact of Aboriginals and the criminal justice system is cause for grave concern.

A 1969 survey of police attitudes by Chappell and Wilson reported that, when asked “which sections of the community do you feel are particularly against you or resentful of you as a policeman”, 14 per cent of the Queensland police officers responded “Aboriginals”. Foley surveyed Aboriginal parents and children on police attitudes in child welfare cases. While parents thought police actions were more fair than unfair (26.2 per cent to 11.8 per cent), children felt that police actions tended to be unfair (31.6 per cent unfair to 17.1 per cent fair). It was noted in the survey, however, that parents were more inclined to regard the court’s action as fair than the police (36.9 to 26.2 per cent). Questions of policing are discussed further in the following section of Aboriginal police and Aboriginal courts. It is difficult to disagree with the proposition that further research is required in this area.

Special institutions: Aboriginal Courts and Aboriginal Police

(a) Queensland Aboriginal Courts

The position in relation to Aboriginal courts has been examined in detail in the Australian Law Reform Commission Report on Aboriginal Customary Laws. Aboriginal courts were originally provided for in the Aboriginal Preservation and Protection Act, 1939 (Qld), under the control of white administrators, until 1965, when Aboriginal justices of the peace or members of the Aboriginal Council could constitute the court. Under the 1984 Queensland legislation, an Aboriginal court can be constituted in a trust area by two justices of the peace who are Aboriginal residents, or if this cannot be complied with, the court can be constituted by the Aboriginal Council, by a majority of its members.
Court has power in relation to breaches of the reserve by-laws, in disputes which are not a breach of any law and jurisdiction conferred by regulation.\textsuperscript{107} It no longer has jurisdiction over civil cases and it also lacks jurisdiction over persons who hold an appointment that requires their residence.\textsuperscript{108} A major criticism of the previous system was the optional provision for appeals to be taken to the district officer,\textsuperscript{109} but this has now been replaced by treating the decision of an Aboriginal Court as if it were the decision of a Magistrates' Court, so that the usual avenues of appeal lie.\textsuperscript{110}

An Aboriginal court now has no power to order imprisonment for breach of by-laws,\textsuperscript{111} but it may require community work be performed in substitution for a fine.\textsuperscript{112} A by-law may specify a penalty not exceeding $500 or $50 per day, but the question of whether imprisonment can be imposed in cases of fine default has not been determined.\textsuperscript{113}

A fieldwork survey by the Australian Law Reform Commission on the work of the Aboriginal Courts disclosed a number of matters of interest. It was noted that, of the 12 communities entitled to conduct Aboriginal courts, the number that regularly do so is unknown, nor are there any statistics showing the nature of offences heard and the penalties imposed.\textsuperscript{114} The fieldwork survey carried out in June, 1984, showed that four offences under the by-laws, of being under the influence of alcohol; behaving in a disorderly manner; assault; and gambling were almost exclusively the source of charges.\textsuperscript{115} The usual penalties for being under the influence of alcohol ranged from $2 to $40 and those for disorderly conduct from $10 to $40.\textsuperscript{116}

A number of criticisms of Aboriginal courts have been noted. In the first place, criticism is directed at the lack of Aboriginal involvement in the courts and on the reserve system generally.\textsuperscript{117} Then, the rules and regulations governing the courts and the practical operation of the courts are questioned, although these problems may be alleviated with the enactment of the \textit{Community Services (Aborigines) Act, 1984 (Qld)}. The Australian Law Reform Commission identified four more basic criticisms: that the courts were inferior institutions; the lack of real Aboriginal influence or control; the court’s inability (or failure) to take into account local customs and traditions; and the general criticism that the courts were part of the reserve system as a whole and as such, an imposition of alien structures and values.\textsuperscript{118}

Despite these criticisms, the Australian Law Reform Commission recognised that there was some support for the Aboriginal courts and that, particularly since the 1984 legislation, there was potential for greater local autonomy.\textsuperscript{119} It was recognised that a


\textsuperscript{109} See comments by G. Nettheim, \textit{Victims of the Law: Black Queenslanders Today}, (Sydney, 1981), p.102, as to the failure of overriding Commonwealth legislation Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth), s.9(2).

\textsuperscript{110} Australian Law Reform Commission, \textit{op. cit.}, vol.2, p.33, para.725.


\textsuperscript{112} Australian Law Reform Commission, \textit{op. cit.}, vol. 2, p.33, para.728.


\textsuperscript{114} Australian Law Reform Commission, \textit{op. cit.}, vol. 2, p.36, para.734.


\textsuperscript{116} Australian Law Reform Commission, \textit{op. cit.}, vol. 2, p.37, para.738.


\textsuperscript{119} Australian Law Reform Commission, \textit{op. cit.}, vol. 2, p.41, para.746.
number of improvements had to be made to the system of Aboriginal courts if they were to continue: (1) the courts must maintain basic standards and be procedurally fair; (2) any decision on the continued operation of the courts should be left to the Aboriginal community; (3) more attention has to be given to training justices and court staff; and (4) the relationship between local government powers and the powers of Aboriginal councils under the 1984 Act required clarification.120 After considering a wide range of submissions, the Australian Law Reform Commission was not in favour of a general system of Aboriginal courts, but supported the continuance of existing programmes, provided the issues referred to above were addressed.121

(b) Aboriginal Police

Aboriginal police had been appointed in Queensland since 1945 as part of the general administration of Aboriginal reserves.122 Now Aboriginal police are appointed under the 1984 legislation and operate on the 14 reserves (trust areas) in Queensland.123 They are not part of the Police Force, but are appointed by the local Aboriginal Council and are paid by the Department of Community Services. They receive training in an informal way only from police stationed on the reserve and are expected to work under the direction of the police.124 The Aboriginal police are only empowered to act in relation to by-law matters.125

The important role of the Aboriginal police in the running of the Aboriginal court was noted, in bringing offenders before the court and presenting evidence, with the effect that nearly all convictions are dependent on the evidence of Aboriginal police.126 An extremely high turnover of Aboriginal police officers was noted, with the major explanation being the difficulty experienced in having to use their authority to arrest a family member and thus reconciling their duties as a police officer with their family and social obligations.127

While the role of Aboriginal courts and Aboriginal police raise some major issues relating to harmonising the criminal justice system and Aboriginal reserve dwellers, in the context of crimes of violence their role is extremely limited. Indeed, the Petty nature of the regulations applying to reserves that Aboriginal courts and police enforce may lead to a greater level of contempt for and alienation from the criminal justice system as a whole.

Conclusion

(a) Criminal Justice and Social Science

One theme that has recurred throughout the literature on Aboriginal criminal justice in reserve situations is the effect of institutionalisation.128 The structure of reserve society, particularly in conditions of material deprivation, overcrowding, removal of groups from traditional areas and the lack of community autonomy, results in what has previously been described as some of the highest levels of violent crime in the world. When coupled with a level of alcohol consumption, that acts both as a release of a sense of frustration

felt by reserve dwellers and also as a disinhibiting factor, the commission of violent crimes by intoxicated individuals is facilitated.

These circumstances are considered by McCorquodale in his paper “Aborigines and Anomie”\(^{129}\) which examined on a broad canvas the pattern of Aboriginal crime and the involvement of alcohol, as it related to social dislocation in Aboriginal society. However, he did not follow through on the implications of the *anomie* theory. This approach, postulated by Durkheim, suggests that some forms of crime are the product of rapid social change and its attendant breakdown of traditional means of social regulation and, as such, crime is a normal feature of social development.\(^{130}\) More extensive research may enable modern criminological theory to be advanced by testing the validity of this hypothesis and its ability to explain criminal behaviour. While the precise relationship between social conditions on Aboriginal reserves, alcohol consumption and crime may not be discoverable, it would appear that there is a strong prospect of establishing some underlying social basis for violent crime in this setting. This was the fundamental assumption which was sought to be relied on as a mitigating factor in *R v. Peter*,\(^{131}\) and as going to the question of coincidence of act and intention in *R v. Watson*.\(^{132}\)

(b) Social Conditions and Sentencing

The issue of deterrent sentencing as a factor to curb excessive violence on Aboriginal reserves was adverted to in *R v. Friday*\(^{133}\) and *R v. Bulmer and ors.*\(^{134}\) The Queensland Court of Criminal Appeal did not direct any real consideration as to whether deterrent sentences would have any effect on the incidence of crimes of violence on North Queensland reserves. It would appear logical to impose deterrent sentences only where the potential offender was able to weigh up in a rational manner his future conduct and to base his actions upon the results of that reasoning process. In summary, deterrence will be most successful where a potential offender is a person of intelligence, mature judgment, and contemplating planned acquisitive crime.\(^{135}\) Yet none of these factors would appear to apply to the typical North Queensland reserve-dweller, with low educational levels, poor social conditions, a substantial alcohol problem and (although this last proposition may be doubtful) a disposition to use knives spontaneously but more forcefully than necessary. In fact, the imposition of deterrent sentences may further alienate Aborigines from the criminal justice system. It would appear that the movement towards deterrent sentencing is an expression of a sense of frustration on the part of the courts that they are not being effective in reducing the level of crime. This may result from their limitations in that they can only address individual cases on a basis which tends to exclude social factors, whereas the problems which require resolution need to be addressed on a broader basis. While the comment that “Judicial recognition of pronounced, or even assumed, cultural differences militates against almost all segments of Aboriginal society other than that tiny minority still in a tribal state,”\(^{136}\) may be an overstatement, judicial responses still display a substantial degree of unwillingness to accept the real problems existing in the Aboriginal communities under consideration, however sympathetic they

\(^{129}\) J. McCorquodale, in B. Swanton (ed), *op. cit.*


\(^{131}\) Unreported, Supreme Court of Queensland, 18/9/81.


\(^{133}\) (1985) 14 A. Crim. R. 471.


may profess to be in individual cases. The more recent case of R v. Yougie\textsuperscript{137} indicates that the court system is becoming aware of the lack of utility of deterrent sentences.

In planning and writing this paper, I sought to develop and elaborate a number of themes treated in my 1974 paper relating to Aboriginal social conditions and the legal system.\textsuperscript{138} The cultural factors giving rise to violence require further investigation, both at the empirical and theoretical level. This paper has sought to draw together scattered, but limited materials from one area, rather than provide any novel insights, but has indicated a number of lines of inquiry that could be pursued and has postulated a basic thesis that the criminal justice process — in Queensland and elsewhere — cannot be adequately understood without a sound social and conceptual underpinning. The key to resolving problems of Aborigines in the criminal justice system may require going beyond recognition of customary laws and reform of the criminal justice system to take account of the special disadvantages faced by Aborigines in these communities and adopting more fundamental solutions involving, firstly, greater autonomy for Aboriginal communities, which will subsequently allow Aboriginal society to establish a new set of relationships with the state and the criminal law, in accordance with Aboriginal cultural values and traditions.\textsuperscript{139}

\textsuperscript{137} (1986) 33 A. Crim R. 301.
\textsuperscript{138} Cited in J. McCorquodale, Digest, p.112, item B36.