Introduction

Aboriginal people have no reason to believe in the capacity of our legal systems to provide protection or justice, nor in the willingness or ability of the administrators of justice to act in an even-handed manner. As a result of European occupation of this country, the original owners have not only been dispossessed of their land but have also been mistreated by the very legal systems which were supposed to bring them enlightened forms of justice. Australia’s adoption of British legal systems led to the false impression that justice would be administered in an equitable manner to all Australians. Yet the position of Aborigines before the law does not support this belief. In fact it casts doubt on many aspects of the judicial system as it operates in the lives of deprived or disadvantaged persons generally.

In two hundred years we have failed to come to grips with the essential causes of this injustice. As one Australian colony after another was occupied, official speeches full of idealism offered worthless promises to Aboriginal residents. In 1839, for example, Governor Gipps wrote:

As human beings partaking of our common nature — as the Aboriginal possessors of the soil from which the wealth of the country has been principally derived — and as subjects of the Queen, whose authority extends over every part of New Holland — the natives of the colony have an equal right with the people of European origin to the protection and assistance of the law of England (Public notice of Governor Gipps, N.S.W., 21 May 1839).

The proclamation read by Governor Hindmarsh to establish the colony of South Australia on 28 December 1836 dealt almost entirely with Aboriginal justice. The same proclamation is still read each year with due pomp and ceremony on 28 December at the site at which it was first read:

It is also, at this time, especially my duty to apprise the Colonists of my resolution to take every lawful means for extending the same Protection to the Native population as to the rest of His Majesty’s Subjects and my firm determination to punish with exemplary severity all acts of violence or
injustice which may in any manner be practised or attempted against the Natives who are to be considered as much under the safeguard of the law as the Colonists themselves, and equally entitled to the Privileges of British Subjects.

Yet these first pompous speeches about British justice for all Australians were not translated into action, although their regular reiteration might give the pretence of their being so. Instead, injustice of the worst kind was meted out by agents of the law. Accounts of gangs of Aborigines bound together in leg irons, of children snatched from their parents, of families massacred, these atrocities are only now being brought into the open. It was the official protectors, the police, who were often given the task of rounding up Aboriginal groups and forcibly taking them to their destruction.

Whilst Australians are now coming to accept the injustices of the past, they are less willing to accept that a similar situation still exists. Yet past injustices continue, albeit in more subtle forms. Young Aboriginal men are still dying at the hands of the law, often in police cells for crimes which they did not commit or for behaviour which would go unmarked and unpunished if perpetrated by a white person. Much of the unjust treatment is unwitting or unintentional, done in the best interests of society and entirely in accordance with the law. But so were many past atrocities.

The reasons for Australia’s abject failure to give British justice to Aboriginal people are still little understood. Research into Aboriginal entanglement with the criminal justice system in this country is still in its infancy. The area of juvenile justice, the focus of this book, has been almost entirely neglected. Yet it is precisely this area about which Aboriginal people are most concerned. The distinctive features of the juvenile system, with its structural alternatives to formal court procedures and its heavy emphasis on the rehabilitation of the individual offender, give ample scope for differential treatment. Furthermore, when young Aborigines are disadvantaged by their contact with the law at this early stage, serious repercussions are felt well into their adult lives. There is absolutely no doubt that such disadvantage exists and that its consequences are extremely serious — indeed, for some even fatal. In view of this, it is surprising that the little research into criminal justice which has been carried out in Australia has concentrated on adults. The whole process of disadvantage before the law has been set in train long before Aborigines ever reach the adult courts. Even to begin to come to grips with the problems of injustice to adult Aborigines or issues such as black deaths in custody, it is essential to study first the roots of the process, namely the differential treatment meted out by the juvenile system.

This book presents a thorough examination of the degree of involvement of Aboriginal youth in the juvenile justice system, using one State in Australia — South Australia — as the case study. The nature of the official data available in this State permitted an empirical study in a breadth and detail not hitherto attempted within Australia in this field. Whilst official crime statistics are not reliable indicators of real levels of offending
behaviour, they do present an accurate picture of the operation of the official justice process and the treatment received by minority groups as they pass through it. It was therefore possible to monitor the effects, over the long-term and over a broad geographical perspective, of well-intentioned legislative and welfare reforms. The results were sometimes far from expected. In many instances the wording of recent legislation is not unlike the high-sounding moral phrases of the earlier declarations, and equally impractical in terms of achieving real justice.

South Australia has a long history of law reform in juvenile justice and is widely regarded as a leader in this field. This State was a pioneer in the creation of a separate system of juvenile justice for young persons a century ago. It was one of the first jurisdictions in the Western world to incorporate a welfare approach to the child, and it was also one of the first to question and modify it. Yet despite concerted efforts to improve the juvenile justice system in South Australia, its operation in practice for young Aborigines remains far from ideal. Moreover, the positive steps that have been taken to assist Aborigines, such as the provision of a special legal aid service, appear to have had little impact in reducing the degree of Aboriginal involvement with the law.

Aboriginal youth is over-represented at every level of the juvenile justice system throughout Australia, from the point of apprehension through the various pre-trial processes to the ultimate stage of adjudication and disposition. In South Australia, the harshest path through the juvenile system begins with a police arrest, followed by referral to the Children’s Court, and culminating in a sentence of detention. The ‘easiest’ path entails being reported by police, followed by diversion to a Children’s Aid Panel where, in most cases, a simple warning and counselling results. A far greater proportion of Aboriginal than other young people follow the harshest route. In other words, at each point in the system where discretion operates, young Aborigines are significantly more likely than other young persons to receive the most severe outcomes of those available to the decision-makers.

During the five-year period, July 1979 to June 1984, analysed in this book, some 43.4 per cent of young Aborigines who were brought into the system came by way of an arrest rather than a police report. In contrast, only 19.7 per cent of non-Aborigines were apprehended by means of an arrest, whereas 80.3 per cent were reported. Once in the system, almost three-quarters (71.3 per cent) of Aboriginal youth were referred to the Children’s Court rather than diverted to Children’s Aid Panels. The corresponding figure for young non-Aborigines was 37.4 per cent. Finally, at the point of disposition, the Children’s Court sentenced some 10.2 per cent of young Aborigines to detention compared with only 4.2 per cent of other youth.

The disparity in outcomes between the two groups at the various discretionary points in the system is illustrated in Figure 1. As shown, Aboriginal youth were more likely to be arrested, more likely to be referred to Court and, once before the Court, more likely to be sentenced to detention than other youth.
As a result of this discrepancy in treatment at each level of decision-making, the extent of Aboriginal disadvantage actually increases as they move deeper into the system. During the period 1979–1984, members of this group accounted for a mere 1.2 per cent of South Australia’s youth population. However, during that time they represented 7.8 per cent of all youth apprehended, 13.9 per cent of all Court referrals and a substantial 28.1 per cent of all detention orders. Figure 2 clearly illustrates this

Figure 1: Comparison of outcomes for Aboriginal and non-Aboriginal youth at the point of arrest, referral to court and detention.
Figure 2: Proportion of Aboriginal youth at each discretionary stage in the South Australian juvenile justice system.
process of bias amplification as accused Aboriginal youth pass from one stage of the juvenile justice process to another. Primarily these are young Aboriginal males, since males outnumber females in all juvenile statistics. Nevertheless, the term ‘Aboriginal youth’ includes females as well as males. Although young Aboriginal women represent only a small proportion of the young Aborigines who move through the criminal justice system, they also are over-represented in comparison to young white women.

These statistics do not prove that Aboriginal youth commit more crimes than white youth, but they do raise the possibility that the law is applied differentially by law-enforcement agencies. The official crime statistics reflect the process whereby certain individuals or groups of individuals are selected for formal treatment by the criminal justice system. The essential selectivity of this process is both inherent in, and facilitated by, the element of discretion which exists at every level of any juvenile justice system. As two commentators in the United Kingdom have noted:

The correlation between crime and disadvantage may well reflect the differential reaction of social control agencies (Freeman, 1983: 82).

The relatively high concentration of socially disadvantaged children amongst identified delinquents may reflect little more than the selective attention that police officers give to deprived areas (Martin, 1982: 148).

These observations apply with equal force to the apprehension and subsequent treatment of Aboriginal youth in South Australia.

Although there is evidence that racial identity may play some role in the decision-making processes operating in the South Australian juvenile justice system, the explanation for the disparity in treatment accorded members of this group is by no means as simple as this. Class bias also seems to be operating, with certain groups in the broader community, such as the unemployed or those living in areas of lower socio-economic status, being singled out for consistently harsher treatment. The fact that Aboriginal youth are concentrated within such groups contributes to their different treatment. Numerous other studies conducted in North America and Great Britain have pointed to the operation of race and/or class bias in the way the law operates, and to that extent, this study simply reiterates such findings. However, what other studies have not generally demonstrated is that a decision taken at one level of the system can, in itself, become a crucial factor influencing decisions taken at subsequent levels. This book clearly establishes that the initial decision made by police at the very gateway into the formal justice system — whether to arrest or summons a child — has significant repercussions for the child’s subsequent passage through the system. More specifically, the very fact of being arrested rather than reported by police proved to be one of the main determinants of a referral to Court, with all the negative consequences which that entailed. The fact of being referred to Court usually resulted in the young person’s acquisition of a criminal record, which in turn, was a
primary determinant of the Court's decision to sentence him or her to detention.

Consequently, the high level of Aboriginal over-representation at the ultimate stage of the juvenile justice process — detention — proved to be largely the result of a compounding effect of discrimination (both racial and class-based) suffered at earlier steps in the criminal process. Thus, as disturbing as are detention rates for young Aborigines, the problem of differential treatment in fact begins at a far earlier stage in the criminal justice process, and its effects are compounded as that individual passes further into the system.

These findings highlight the fact that any study of criminal justice must take a broad perspective by analysing the operation of the system at all of its stages, and not to concentrate, as most earlier studies have done, solely on its sentencing conclusion. As Feeley (1979) has argued, the pre-adjudication process may constitute the real punishment for the accused individual.

In *The Process is the Punishment* (1979: 241) Feeley observed that:

Liberal legal theory directs attention to formal outcomes, to the conditions giving rise to the application of the criminal sanction of adjudication and sentence. Most social science research has followed this lead, searching for the causes of sanctioning at these stages. But this emphasis produces a distorted vision of the process and the sanctions it dispenses. The real punishment for many people is the pre-trial process itself . . .

In his study of the operation of a lower criminal court in New Haven, Connecticut, Feeley developed this thesis by examining the real costs to the accused individual of the pre-trial process, namely pre-trial detention, the awarding of bail, obtaining legal representation, adjournments, delays and pre-trial diversion. He found that (1979: 31–2):

when we view criminal sanctioning from this broader functional perspective, the locus of court-imposed sanctioning shifts dramatically away from adjudication, plea bargaining and sentencing to the earlier pre-trial stages. In essence, the process itself is the punishment. The time, effort, money and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence. Furthermore, pre-trial costs do not distinguish between innocent and guilty; they are borne by all, by those whose cases are . . . dismissed as well as by those who are pronounced guilty.

Feeley's thesis has a particularly poignant application in light of the current debate surrounding Aboriginal deaths in custody in Australia. Over one hundred such deaths have occurred in the last decade, many of them involving pre-trial remand in police custody.

The fact that conventional explanations for the extent of Aboriginal over-representation do not prove to be satisfactory raises an unpalatable question: is racial discrimination such an integral part of Australian society that no justice system can deliver equity to Aboriginal people? In saying this we realise that one of the major factors circumventing justice
lies in the nature of the juvenile justice system itself. Discretion is an essential part of any such system. Yet the exercise of discretion provides the opportunity for differential treatment of racial minorities. The element of discretion is essential if rehabilitation rather than punishment is intended. In juvenile justice therefore, all agents of the law are given freedom to determine which measures will best promote the future rehabilitation of the individual offender concerned. Later chapters of this book, however, demonstrate that the exercise of such discretion largely determines the extraordinarily high incidence of Aboriginal youths being processed by the juvenile justice system. Whilst we would in no way advocate the removal of discretion from the system, essential as it is to the rehabilitative goal, it must be realised that the very use of discretion produces injustice. For this a remedy, however elusive, must be sought. It may be that the discretionary decision-making process reveals the profound racial biases endemic in contemporary Australian society, and that those biases, rather than the legal system itself, should be the target of future reformers.

This book, in taking a long-term look at the broad effects of legislative and welfare reforms, shows that the position of Aboriginal youth, far from being improved by such reforms, has worsened. Changes in the law and in the welfare structures, however well-meaning, have totally failed to improve the disadvantaged position of young Aborigines brought into the justice process. A major reason for this lies in the fact that the differential treatment experienced by Aboriginal youth is entirely legal and well within the guidelines of each sector of the justice system. This book shows that by and large, the decision-makers at each level of the system operate quite legally, even when being apparently discriminatory. In fact, a high proportion of the operators of the system go to extreme lengths to try to give Aboriginal youth a fair opportunity for both justice and rehabilitation. Most providers are extremely frustrated at their own inability to deliver equity to Aboriginal youth. It is quite clear that the roots of injustice lie within the justice system itself as much as with individual agents of the law. Therefore, because any justice system is a reflection of the cultural values of the society in which it operates, it is impossible to avoid the conclusion that the discrimination patently suffered by young Aborigines within the juvenile justice system, even one that is highly welfare-oriented, can be explained only by causes lying deep within contemporary society — the unacceptable face of social, cultural and racial bias.

If it can be proved, as our findings will suggest, that the justice system is unjust to visible minorities who are already socially and economically disadvantaged, then a formidable and urgent task lies ahead for future reformers. This is especially so since, to date, the numerous reforms at both legislative and welfare levels have apparently failed to deliver even the beginnings of equity.
Blacks and the Law

In the international field, the United States has led the way in studies of the disadvantaged legal position of blacks; so much so that a decade ago in 1979, Pope could give his article the title ‘Race and Crime Revisited’. Studies such as those of Axelrad (1952) and Goldman (1963) first highlighted the differential selection of black and white youths for formal Court processing, and numerous researchers since then have provided ample documentation of the over-representation of blacks (and in particular, black males) at every stage of the adult and juvenile criminal justice processes. Nor is there any evidence from recent studies that the situation is improving, despite ‘the revolutionary changes in race relations, brought about by the civil rights movement over two decades ago’ (Chilton and Galvin, 1985: 3). These trends closely parallel those now being observed in Great Britain, where the post-war immigration of Africans and West Indians, coupled with the more recent influx of Pakistanis, Asians and groups from other Commonwealth countries, has now led British researchers to take greater interest in race issues generally, and specifically in the relationship between race and crime.

Yet, despite the wealth of information on the disadvantaged position of blacks before the law which has been available from overseas countries during the past three to four decades, concern in Australia over the plight of the indigenous population has been slow to gather momentum. It was not until the 1980s that studies of the disadvantages suffered by Aborigines in their contact with the white-dominated legal system became more frequent as evidenced, for example, by the publication of volumes such as Ivory Scales (Hazlehurst, 1987), Aborigines and the Law (Hanks and Keon-Cohen, 1984), Aborigines and Criminal Justice (Swanton, 1984), and Justice Programs for Aboriginal and Other Indigenous Communities (Hazlehurst, 1987). No doubt such studies will receive further impetus
from the Royal Commission into Black Deaths in Custody. The Interim Report of this Royal Commission (1988), as well as the findings in specific cases, have attracted considerable media attention and, for the first time, has exposed widespread malpractices amongst a range of persons associated either directly or indirectly with law enforcement including police, prison officers and health workers.

Yet despite the growing body of descriptive or qualitative material now available, research based on the collection or analysis of ‘hard’ empirical evidence has remained slight. Hampered by the fact that most official crime records in this country do not record ‘Aboriginality’ (because, as one Queensland government official indicated to us, ‘it would be racially prejudiced to do so’), the relatively small number of researchers who have sought to document the actual extent of Aboriginal involvement in the justice process have, in the main, been forced to engage in extensive field work or the equally time-consuming task of manually extracting data from existing police and Court files. These studies have therefore been restricted both geographically and temporally. As an indication of the sparsity of quantitative information, even in the one area where statistics are normally readily available — namely, imprisonment rates — it was not until June 1982 that the first National Prison Census was undertaken which provided a breakdown of the numbers of Aborigines being held as prisoners. Even the Royal Commission has been hampered by a lack of hard data. When it was first established, the Government was not even aware of how many Aborigines had died in custody since 1980. Initial figures were put at 44, but in the space of just twelve months, more than 60 additional cases had been identified. Nor was there any information on the number of Aborigines being held in police custody. In fact, the establishment of a data collection system to obtain such basic information became one of the first priorities for the Commission’s research unit (Biles, 1988).

Yet despite this paucity of empirically based research, that which does exist indicates that, as in countries such as the U.S.A. and Great Britain, Aborigines experience disproportionate rates of contact with all facets of the criminal justice system. Elizabeth Eggleston (1976) was the first Australian researcher to document the inequitable position of Aboriginal adults before the law. She found that in Western Australia in the mid-1960s, Aborigines, who represented only 2.5 per cent of the total population in that State, accounted for 11 per cent of all charges laid. Her survey of ten Western Australian country towns also showed that Aborigines were more likely than non-Aborigines to be arrested (they accounted for 63 per cent of all arrests), were less likely to be released on police or Court bail and, once before a Court, were more likely to be sentenced to imprisonment (with 42 per cent being sent to gaol compared with only 19.6 per cent of the non-Aborigines). Partly as a result of this differential sentencing procedure, Aborigines accounted for 24 per cent of Western Australia’s total prison population in 1965–66.

A more recent study conducted in Western Australia by Martin and Newby (1984) indicates little improvement. It was apparent from their