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£AUSTRALIA

@A criminal justice system weighted against Aboriginal people

1. BACKGROUND

In May 1991 the Final Report of the Royal Commission Into Aboriginal Deaths In Custody (from now on referred to as the Commission) was released after a three-year investigation (1988-1991) into the deaths of 99 Australian Aboriginal[1] people who died between 1980 and 1989 in police lock-ups, prisons and juvenile detention centres.

The Commission concluded that Australia's Aboriginal people are incarcerated in police custody at a rate 29 times greater than that of the general population. This suggested that the large number of Aboriginal deaths in custody is due to the disproportionate number of Aboriginal people in prison or police custody. However, the Commission further concluded that, once in custody, Aboriginal people die at the same rate as other prisoners in Australia, and that none of the 99 deaths had resulted from unlawful, deliberate killing, as had been alleged in some cases. Instead, it found that there were "glaring deficiencies" in the standard of care afforded to many of the deceased which in some cases directly contributed to their deaths. The Commission also found "that, generally, there appeared to be little appreciation of and less dedication to the duty of care owed by custodial authorities and their officers to persons in custody." (See Appendix A regarding non-Aboriginal deaths in custody).

The Commission did not recommend that charges be brought against any police or prison officials but in the final report Commissioner Johnston "strongly suggested" that the reports of all 99 deaths should be carefully studied and that, where appropriate, action should be taken against officials. Some commissioners recommended that their reports into individual deaths in custody be forwarded to the appropriate authorities to decide whether criminal proceedings or disciplinary action should be taken against officials. The different state authorities have reportedly considered the cases relevant to them but to Amnesty International's knowledge no legal action has been taken against any prison or police official. In March 1992 the Australian Government released a three volume response to the findings and recommendations of the Commission.

In April 1992 Amnesty International sent a three-person delegation to Australia. The delegation visited 24 police lock-ups, juvenile detention centres and prisons located in the Northern Territory, and in the states of Western Australia, Queensland and New

South Wales. They met several federal and state level officials including the Federal Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, and individuals and representatives of non-government organizations. Specifically, the delegation looked into conditions in prisons and police lock-ups and inquired into how Australia's criminal justice system operates, particularly in its dealings with Aboriginal people.

1In this report, the term Aboriginal people is also meant to include the Torres Strait and Islander people. According to the 1986 census, the Aboriginal population amounted to 228,000.

Amnesty International is concerned that conditions in certain detention facilities may amount to cruel, inhuman or degrading treatment. It is also concerned that the criminal justice system functions in such a way as to make Australia's Aboriginal people a group that is distinctly vulnerable to highly disproportionate levels of incarceration and to cruel, inhuman or degrading treatment. Amnesty International is further concerned that the criminal justice system makes Aboriginal people in Australia a group that is particularly vulnerable to the violation of their right "to be treated with humanity and with respect for the inherent dignity of the human person", as set out in Article 10 of the International Covenant on Civil and Political Rights (ICCPR).

2. CONDITIONS OF DETENTION

2.1 Police custody

Though the law relating to police powers regarding custody varies a good deal from state to state in Australia, on one issue there appears to be common ground. Unlike many other jurisdictions, the Australian police arrest and detain suspects in cells only when there is prima facie evidence of an offence sufficient to charge. In theory, any person assisting the police through questioning in a police station is free to leave at any time and no record is kept of what some might interpret as his or her custody other than written accounts or audio or video tapes of interviews made by the police. Police questioning at this stage does not involve the use of cells; suspects are taken to cells only when they are to be charged following arrest after questioning.

Police custody in Australian police cells therefore is supposedly a short-term matter governed by the simple rule of thumb that prisoners are persons denied police bail awaiting appearance at the next available court - generally the next day or, if detained over a weekend, on Monday morning. The only exception to this rule is the provision in each state whereby persons found drunk, a condition now decriminalised in all states except Queensland and Victoria, may be held in a police station for their own protection until sober.

This apparently simple rule of thumb is in fact nearly everywhere belied in practice by the absence of a clear demarcation between police and prison custody. In every jurisdiction visited by Amnesty International in mid-1992 - New South Wales (NSW), Queensland, Western Australia (WA) and the Northern Territory (NT) - police accommodation was to some degree used to back up prison accommodation. Police cells were employed whenever: prison accommodation was full; or pending (in remote locations) intermittent escorts to prisons; or by arrangement with the prison authorities because it was judged more economical or humane to let prisoners remain in police accommodation nearer to their

community rather than remove them to considerable distances to prisons. In the northern "outback" of Western Australia, for instance, it is normal for remand or short sentence prisoners, particularly those serving a brief custodial sentence for defaulting on fines, to remain in small police lock-ups. The same appears to be true in the Northern Territory. In all of the four states or territories visited, Amnesty International encountered prisoners in police accommodation who had been held there for days or weeks because the nearest available prison was full or a prisoner escort to the nearest available prison was not immediately available. In those police stations where no such prisoners were found Amnesty International was told by officials that the excess prison population was accommodated in the police station from time to time. This was reported at Wyndham in WA, Cairns, Townsville, Rockhampton and Brisbane in Queensland and Sydney in NSW.

This blurred boundary between police and prison accommodation has important consequences for the adequacy of police accommodation. None of the police stations visited by Amnesty International was designed for the accommodation of prisoners on a long-term basis. All were designed with a view to prisoners being held for a matter of hours following charge and pending the first court appearance. The police stations did not have the facilities to allow prisoners to move around or exercise adequately; or did not have the privacy which a prisoner of more than a few hours is entitled to expect; or did not have provisions which would allow prisoners adequately to occupy their minds. That police stations in Australia are not designed for long-term use is not denied by either the police or prison authorities.

The geographical enormity of Australia and the concerns prompted by the Commission have, therefore, created a dilemma regarding the design and use of police accommodation. It will seldom be humane or cost-effective to remove remand or short-sentence prisoners to the nearest available prison as this may often involve distances of hundreds of miles. If persons must be held in custody then it is clearly desirable that they should remain in locations where they can receive visits from relatives and friends. In many remote parts of Australia that will generally mean prisoners remaining in police cells. There is much to be said in favour of such an arrangement.

By the same token, however, the statistics unearthed by the Commission demonstrate that the number of deaths in police cells, particularly of Aboriginal people in comparison with non-Aboriginal persons, is high and that this incidence has been the result of a combination of: police attitudes to prisoners which have sometimes been characterised by brutality, contempt or lack of care; chronically bad physical conditions; and the lack of adequate systems for the protection of vulnerable prisoners (eg. absence of surveillance for drunken or ill prisoners, absence of alarm bells, etc).

Government pressure has been put on the police greatly to improve all conditions and procedures and the available evidence suggests that they have responded positively. Amnesty International found evidence of considerable recent capital spending on police cells, particularly in Queensland and the NT, and the adoption of procedures (documentation, standing orders, etc) designed to alert officers to the presence of vulnerable prisoners. The result has been the adoption of arrangements appropriate for the detention of prisoners for a few hours but not always humane for longer periods.

The new police stations at Innisfail in Queensland and Katherine in the NT may be cited as examples. Both police stations provide spacious cells, most of them designed
for multiple occupation. They are well lit and ventilated and protected from the hot sun. Both employ closed circuit television, are fitted with cell alarms, are manned for 24 hours, are clean and well

decorated, and are fitted with lavatories, drinking fountains and showers. However, neither provides any natural light, nor has an outside exercise area, nor offers even a semblance of privacy. Neither police station has facilities to employ the minds or bodies of prisoners who might be detained there for more than a day or two. It is doubtful whether prolonged custody in such cells could be described as humane. Similar criticism could be applied, for example, to the lock-up at Sydney Central Police Station, built in 1987 to accommodate up to 150 inmates. All cells are underground. Its shortcomings are similar to those described for Innisfail and Katherine, and visiting hours and personal possessions allowed in the cells are subject to the most severe restrictions.

Many remote police stations in WA and no doubt elsewhere in Australia are undoubtedly run very flexibly. During the course of its visit, Amnesty International saw remote, rural police lock-ups in which: prisoners are allowed to cook for themselves (eg. Fitzroy Crossing, WA), and can be visited almost at will (eg. Kununurra, Halls Creek, Fitzroy Crossing, all in WA). The standards of accommodation at these rural police stations are often poor, however, and police officers themselves testify that until recently many rural lock-ups could only be described as "disgraceful" (the chicken coop, now burnt down and replaced, at Yarrabah in Queensland, for example).

Some police lock-ups are left unattended by custodial staff for extended periods. Amnesty International visited a number of police lock-ups where prisoners do not have access to an alarm bell and would find it most difficult, if not impossible, to raise an alarm when the lock-ups are unattended. Some cells visited by Amnesty International -- old and new ones alike -- lacked mattresses and blankets. A case in point is the police lock-up at Halls Creek, WA. In his report on the death of a young man at Halls Creek, Commissioner O'Dea made some comments about the state of the Halls Creek lock-up. He was particularly concerned about the fact that there is no intercom between the lock-up and the police station or the sergeant's house next door. The police station is operated only from 7 am until midnight. The Coroner who investigated the death recommended that the Commissioner of Police consider: (1) changes in the lock-up and cell design in Halls Creek and similar police stations to facilitate discovery of a medical emergency; (2) installation of an appropriate alarm system which will enable rapid assistance even when a police station is unmanned. The Coroner made these recommendations in June 1989. When Amnesty International visited the Halls Creek lock-up, almost three years after these recommendations had been made, the recommendations still had not been implemented.

2.2 Prison conditions

The definition of prison conditions which may constitute "cruel, inhuman or degrading" treatment or punishment can, at times, be difficult. It may, therefore, be helpful to examine the use of these terms before exploring its applicability to the prisons which Amnesty International visited in Australia.

In a number of cases of international monitoring of prison conditions which may amount to cruel, inhuman or degrading treatment it has been found useful to adopt a cumulative or "totality of conditions" view of prison conditions. Conditions which are not in themselves judged to be cruel, inhuman or degrading treatment may become so if they are found in combination with other such conditions.

Amnesty International observed extremely varied conditions of detention in Australia ranging from the excellent to the quite bad. With one exception we saw no conditions which, when considered within the

framework of the "totality of conditions" concept noted above, may clearly constitute cruel, inhuman or degrading treatment according to international standards. We reached this conclusion on the grounds that, in most cases, poor or crowded cell conditions were combined with a regime requiring minimal confinement in cells or providing access to facilities enabling prisoners a good deal of freedom of association, access to the media or reading materials and resort to lavatories and washing facilities with a reasonable degree of privacy. For instance, the remand special protection wing at Long Bay Gaol, Sydney, was grossly overcrowded with many prisoners living three to a cell measuring about 10 feet x 7 feet. But, prisoners were locked in their cells for only eight hours a day, between 11.30 pm and 7.30 am. During the rest of the day, they were free to associate within the hall with other prisoners. In the 19th century wing for sentenced prisoners at Long Bay Gaol, prisoners were confined to their cells for longer periods (normally 4.30 pm to 7.00 am) but they had screened lavatories within their cells as well as electricity outlets to operate radios or television sets. Further, many prisoners had individual cells while some shared a cell with one other prisoner.

At Townsville Prison (Stuart Gaol) in Queensland very good new accommodation had largely displaced a large dormitory, now not used at all, and "unsewered" 19th century cells, a few of which were still in use. But the latter were occupied by single prisoners and were being phased out. At Wyndham, WA, the low security prison largely comprised a cramped dormitory with bunk beds in which there was virtually no privacy or space for personal belongings. However, it was readily apparent that prisoners were required to occupy the dormitory only at night. By day they were relatively free to move about the prison compound and many of them were employed at jobs outside the prison itself.

2.3 Alice Springs Prison

In one prison Amnesty International did observe conditions which could well be judged unacceptable according to international standards. Alice Springs Prison in the Northern Territory is a generally miserable and cramped prison which is significantly overcrowded. According to the Director of Correctional Services for the NT there are plans for it to be replaced.

The bulk of the accommodation comprises three dormitories with places for about 40 prisoners in each. Amnesty International visited one of these dormitories at midday on a Sunday when the staff shift change was taking place. The prisoners were all locked up and only a skeleton staff was present. We were informed that the two other dormitories were of a similar character.

The dormitory Amnesty International visited occupied a whole building beneath a single roof with solid walls but spaces below the eaves for ventilation. The interior was entirely open plan but was sub-divided by wire mesh into seven or eight discrete sections in each of which were six or seven beds (bunks and singles), an unscreened urinal and a cold water tap. There were no facilities, nor indeed space for prisoners to keep personal possessions. Because the sub-divisions were made of wire it was possible for prisoners to see and have contact, if they shouted, with any other prisoner in the building. The dormitory we saw contained approximately 40 prisoners, all of them Aboriginal people.

Amnesty International was informed that about 80 per cent of the Alice Springs Prison population is Aboriginal. It was hot and, despite the open eaves, smelled strongly of sweat and urine. The Alice Springs Prison is designed to accommodate about 120 prisoners, but it reportedly is often significantly

overcrowded. It reportedly holds more than 150 inmates at certain times. Prisoners are confined to the dormitories for 16 hours a day, from 5 pm to 8 am and from 12 pm to 1 pm. During these periods of confinement prisoners are obliged to use toilet facilities within their caged sub-divisions with little or no privacy. Amnesty International is concerned that conditions of detention in Alice Springs Prison may violate the rights of Aboriginal people "to be treated with humanity and with respect for the inherent dignity of the human person", as set out in Article 10 of the ICCPR, and that in some cases this may amount to cruel, inhuman or degrading treatment.

The Commission unequivocally condemned the use of dormitories of the sort still in use at Alice Springs and Wyndham prisons, and being phased out but still in existence at Townsville and Broome prisons. However, some prison administrators told Amnesty International that such dormitories are eminently suitable for Aboriginal prisoners because, they said, Aboriginal people prefer to sleep communally and are reluctant to be alone in a cell. In fact, most prisons catering largely for Aboriginal people relied heavily, if not exclusively, on dormitory accommodation until very recently. At the same time, one prison superintendent stated that a non-Aboriginal prisoner would not be able to cope with such prison conditions. Whatever may be the validity of these assertions, Amnesty International is concerned that such cultural suppositions should not be used as an excuse to provide grossly inadequate, overcrowded or degrading communal accommodation specifically for Aboriginal people.

3. THE CRIMINAL JUSTICE SYSTEM

3.1 Prison incarceration rates

The Commission established that the major issue to be addressed in dealing with the high incidence of Aboriginal deaths in custody is the gross over-representation of Aboriginal people before the criminal justice system. It has been noted above that the Commission found that Aboriginal people are arrested at a rate 29 times that of the general population.

This severe over-representation extends also to rates of incarceration. Furthermore, according to the Australian Institute of Criminology (AIC), the rate of imprisonment of Aboriginal people has actually increased since the Commission began its work. In 1987, Aboriginal people were incarcerated in prisons at a rate of 1,418 prisoners per 100,000 of their population, and this figure increased to 1,739 per 100,000 in 1991. These figures compare with incarceration rates among the non-Aboriginal population of 80 per 100,000 in 1987 and 97 per 100,000 in 1991. Now, as in 1987, Aboriginal people are imprisoned at roughly 17 times the rate of non-Aboriginals.

The trends, however, with respect to both general incarceration rates and the ratios for Aboriginal people to non-Aboriginals vary from one jurisdiction to another. The position in Tasmania, the Northern Territory and South Australia appears to be fairly stable. In Queensland incarceration rates, overall and for Aboriginal people and non- Aboriginals respectively, have fallen. In Western Australia and Victoria the incarceration rate appears to be stable for non-Aboriginals but increasing for Aboriginal people, who are 27 times more likely to be imprisoned than whites in relation to population.

Statistics about incarceration rates in New South Wales (NSW) remain unclear. According to the AIC, incarceration rates for both Aboriginal and non-Aboriginal populations have dramatically increased in the

state. New South Wales prison authorities maintain that these figures do not accurately reflect the situation since they include as prisoners those serving weekend or intermittent sentences at special institutions oriented toward community service.

According to Chris Cunneen of the School of Law at Sydney University, prison census figures show that the number of Aboriginal prisoners in NSW rose from 369 on 30 June 1987 to 664 on 30 June 1991, an increase of 80 per cent (this might or might not include weekend prisoners). During the same period in Victoria, the number of Aboriginal prisoners rose from 52 to 91, an increase of 75 per cent, while in Western Australia there was an increase of 24 per cent from 503 Aboriginal prisoners to 624.

3.2 Disproportionate criminalization of Aboriginal people

Whatever trends and local variations are revealed by such statistics, the basic fact remains that Aboriginal people are grossly over-represented in the Australian prison population. Public debate in Australia has focused on determining whether Aboriginal people are over-represented because: they are discriminated against by the criminal justice system, that is arrested, prosecuted and punished for offences which would not elicit the same response if committed by non-Aboriginals; they commit serious crimes at a much higher rate than non-Aboriginals; or they commit offences different from non-Aboriginals which the police react to and the courts punish relatively severely. There is almost certainly some substance and thus explanatory power to be derived from each of these hypotheses.

It is apparent, for example, that Aboriginal people are much more likely than non-Aboriginals to be arrested or detained by the police for relatively minor alcohol-related public order offences. It is also clear that many provisions in legislation or in by-laws concerning drunkenness or drinking in public are, when socio-economic conditions and social prejudice (eg. explicit hostility to Aboriginal people in many licensed premises and public disapproval of Aboriginal traditions regarding socializing in public spaces) are taken into account, racially discriminatory. Partly as a consequence of this, it appears that Aboriginal people are much more likely than non-Aboriginals to be imprisoned for minor offences. Were sentences served in police lock-ups to be included in the prison statistics (which generally they are not), this pattern would be even more pronounced. However, both the AIC and the NSW authorities also noted that many Aboriginal people are in prison for serious criminal offences and there is evidence that personal violence, particularly domestic violence, occurs at a high rate within the Aboriginal community.

Indeed, it would appear that these hypotheses are not so much alternative explanations as related factors that describe a self-perpetuating spiral of the criminalization and victimization of Aboriginal people. Numerous studies indicate that the relatively greater incidence of serious crime within the Aboriginal community is linked to the marginal status and alienated character of the Aboriginal people within Australian society. This phenomenon is in turn reinforced by the repeated criminalization of large numbers of Aboriginal people for relatively minor offences. An important part of any strategy to reduce the over-representation of Aboriginal people in prison, and thereby to addressing the issue of their special vulnerability as prisoners that is indicated by their disproportionate deaths in custody, must involve reducing the scope of the net which drags so many Aboriginal men and women into the criminal justice system in the first place, particularly those aspects which tend to be discriminatory in nature or practice. Three key examples of institutional responses that appear to perpetuate the disproportionate criminalization and incarceration of Aboriginal people are to be seen in laws pertaining to alcohol-related

offences, in the NSW Summary Offences Act, 1988, and in policies related to the treatment of juveniles.

3.2.1 Alcohol-related offences and criminalization

The social and economic reasons that make so many Aboriginal people vulnerable to alcohol and excessive drinking shall not be discussed here. It should be noted, however, that while drinking may be more visible in the Aboriginal community, it is not necessarily more prevalent among Aboriginal people than among other Australians.

A recent study[2] shows that a lower overall prevalence of drinking is found among Aboriginal people than in the wider society, but that there is a higher incidence of consumption of harmful levels of alcohol among Aboriginal people, particularly among younger males. Regarding the Kimberley Aboriginal population, for example, it was found that 76 per cent of adult Aboriginal males are current drinkers, equally divided between constant, intermittent and episodic drinkers, while 46 per cent of Kimberley Aboriginal women are identified as drinkers. These figures can be compared with those for the wider Australian population, where 87 per cent of men and 75 per cent women are identified as being alcohol consumers. The study also found a positive correlation between frequency of drinking and increased incarceration rate for Kimberley Aboriginal people, with the risk of being incarcerated in a police lock-up being 183 times greater for a constant drinker than for a lifetime abstainer.

Drunkenness no longer constitutes a criminal offence in most of Australia, with the exception of Queensland and Victoria. Evidence from some states indicates that decriminalization has helped to break a vicious cycle of repeated incarceration, in which an arrest for drunkenness resulted in short-term detention, which usually led to a fine which often was not paid and in turn led to a further jail sentence for non-payment. However, the positive effects of decriminalization appear to have been counteracted in many localities by the adoption of substitute legislation or inadequate provision of alternative facilities. In these situations, minor alcohol-related offences, such as the consumption of alcohol in public, continue to account for a large and increasing number of Aboriginal arrests and detentions. This is exacerbated by discriminatory social practices such as dress regulations which conspire to place severe restrictions on Aboriginal peoples' access to licensed hotels, bars, pubs and even theatres.

Police attitudes and community regulations differ widely in how and to what extent Aboriginal people are taken into custody for alcohol-related offences, as the following examples illustrate:

(a) Police officials in Darwin, the capital of the Northern Territory, stressed to Amnesty International that alcohol-related problems were particularly severe in NT. They also noted that these problems pertained to both Aboriginal people and non-Aboriginals in Darwin. Darwin has set aside some areas where the so called "long grass people" and other people who wish to drink in public can do so and are left alone by the police if they remain non-violent. This rule applies equally to the Aboriginal and to the non-Aboriginal Darwin population. In Darwin, a sobering-up shelter has been operating since November 1991. It can accommodate 32 clients but the average number of clients is only 8 or 9 a night. About 50 per cent of the users are Aboriginal people.

(b) Alice Springs, the second largest town in the NT, has not set aside any area where people are allowed

2Ernest Hunter, et. al., Alcohol Consumption And Its Correlates In A Remote Aboriginal Population, Aboriginal Law Bulletin, August 1991.

to drink in public. The Tyeweretye Social Club, the only Aboriginal social club in Alice Springs, has been trying for several years without success to get a licence. One of its principal aims is to teach Aboriginal people to drink socially. Just recently, after having waited for a reply to their repeated applications for 10 months, they were again refused even a beer-only licence. Not being allowed to drink alcohol in their own club, and not being welcome as guests in many of the Alice Springs pubs and hotels, many Aboriginal people in Alice Springs resort to sitting in small groups in the dry bed of the Todd River to drink and socialize. Though the Northern Territory has decriminalised drunkenness, an Alice Springs by-law makes it illegal to drink in public within two kilometres of any liquor outlet. Considering the density of Alice Springs pubs, hotels, and bottle shops, such a place is almost impossible to find within the town boundaries. Thus, Aboriginal people drinking peacefully in the river bed are regularly picked up by the police. As the local drying up shelter is notoriously overcrowded, many of those detained end up in police cells.

It is generally recognized that the decriminalisation of drunkenness has been an important step in reducing the number of arrests of Aboriginal people in parts of Australia. In Halls Creek, for example, Amnesty International was told that whereas in previous years some 50 to 60 Aboriginal people would have been arrested every night, now there were about only 2 to 3 arrests every second night. This reduction was partly attributed to the decriminalisation of drunkenness in WA, as well as to a gradual improvement of police relations with the Aboriginal community.

It would appear, however, that the decriminalization of drunkenness of itself may have little impact on the incarceration levels of Aboriginal people if they continue to be detained in police stations for want of alternative facilities or if local by-laws criminalize drinking in public without provision for alternative drinking sites or if licensed premises are not freely and equally available to Aboriginal people.

3.2.2 The New South Wales Summary Offences Act, 1988

According to the AIC, there has been a dramatic increase in use of imprisonment for both Aboriginal people and non-Aboriginals in NSW. This is especially significant since NSW is the most populous state and has by far the largest prison population. Almost half the total Australian prison population is in NSW. The New South Wales Summary Offences Act (SOA), introduced in July 1988, appears to be one of the key factors leading to an increase in arrests, mostly for minor offences. These arrests have taken place at a disproportionate level among the Aboriginal population, leading some observers to allege that the SOA is specifically targeted against Aboriginal people.

Section 4 (offensive conduct or language) of the SOA, states that:

4. (1) A person shall not:

(a)conduct himself or herself in an offensive manner in or near, within view or hearing from, a public place or a school; or
(b)use offensive language in or near, or within hearing from, a public place or a school.

The SOA does not define "offensive conduct" or "offensive language" nor does it indicate in what

circumstances the use of offensive language could be so serious as to warrant imprisonment the prescribed maximum of three months. The wording of section 4 of the SOA appears to be so broad that it offers much opportunity for arbitrary use.

The NSW Bureau of Crime Statistics and Research noted a 293 per cent increase in the number of reported incidents of offensive conduct in the six months following the introduction of the Summary Offences Act (22 July 1988 to 22 January 1989), compared to a six month period two years earlier (22 July 1986 to 22 January 1987).

John Marsden, President of the Law Society of NSW, expressed similar concerns about the SOA in his letter of 24 March 1992 to NSW parliamentarians. He said that "the legislation is too broadly worded ... in effect it makes illegal the sort of trivial behaviour that should not be of concern to the criminal law. I am particularly concerned with the crime of offensive language. I believe it is entirely inappropriate that a person can be sent to gaol for swearing ... You must be aware of the way this law is arbitrarily applied to control sections of the community, particularly Aboriginal people." Amnesty International is concerned that the broad formulation of the SOA makes it vulnerable to arbitrary usage and that, in practice, the SOA may discriminate against Aboriginal people. Amnesty International is especially concerned that the SOA has contributed to the disproportionate rates of arrest and incarceration of Aboriginal people.

3.2.3 Juveniles and the criminal justice system

Aboriginal elders and organisations as well as Aboriginal and non-Aboriginal scholars have expressed repeated concern about the continued consignment of Aboriginal youths to corrective institutions and about the continuing and, in some areas, increasing criminalization of Aboriginal juveniles. In fact, according to Chris Cunneen of the Law School of Sydney University, the number of juveniles appearing in NSW Children's Courts for offensive behaviour rose from 336 to 1192 between 1985-86 and 1989-90, an increase of 255 per cent in five years.

The nature of some bail conditions imposed on juvenile offenders is one reason that may have contributed to criminalization of Aboriginal juveniles. Some bail conditions, often imposed on juveniles for minor offences, may be regarded as provocative and almost bound to be breached, thus increasing the probability of imprisonment. Such bail conditions also place unreasonable limits on the personal freedom of persons not yet convicted of a crime in an apparently arbitrary manner.

In certain cases, bail conditions establish a de facto curfew, prohibiting persons on bail from leaving their houses between 7.00 pm and 7.00 am. Taking into account climatic conditions in Bourke and Dubbo, NSW (where these bail conditions were imposed) and the social demands and practices of juveniles, such bail conditions are almost bound to be breached.

In its report about the death in custody of Lloyd James Boney, the Royal Commission says regarding bail conditions: "... An example of such unrealistic condition in the present case was the condition repeatedly imposed on Lloyd's bail during 1987 that he not partake of intoxicating liquor. In the circumstances of Lloyd's life in remote communities in western New South Wales, the limited opportunities for social life revolve around social drinking, very frequently in public under the gaze of police. Another very onerous condition which seems to be much too readily imposed is one requiring the defendant to stay out of his

own town."

4. ABORIGINAL-POLICE RELATIONS

The tensions of Aboriginal-police relations are part of the legacy of Australian history. The police were involved in early massacres of Aboriginal clans and peoples, in enforcing "white man's law" and in the enforced relocation of Aboriginal people. Right from the beginning of the European conquest of Australia, the military and the police have been often identified with enforcing settlers' rights. As official `protectors' of the Aboriginal people, the police had control over virtually all aspects of Aboriginal life. Police were the most prominent agents involved in the forceful removal of Aboriginal children from their parents, which was an aspect of government policy up to the 1960s.

Up to the present, the degree and kind of control exercised by the police over Aboriginal life extends far beyond the degree of police control over the non-Aboriginal Australian community. The tensions inherent in the relationship between the police and the Aboriginal community appear to contribute in a variety of ways to the disproportionate arrest and incarceration rate of Aboriginal people. Some of the ways in which this dynamic is evident are in such phenomena as the over-policing of Aboriginal communities and the numerous allegations by Aboriginal people of incidents of police harassment and provoked arrest.

4.1 Over-policing of Aboriginal communities

Over-policing refers to very high levels of police presence and intervention in certain communities. It is reflected in the number of police stations and officers in a community, the frequency of police visits in an area, and the exercise of police presence in such a way as to project an intimidating display of force. The HREOC has reported the over-policing of Aboriginal communities in the Pilbara region of WA and in north-west New South Wales. For instance in two small towns in north-west NSW with a high proportion of Aboriginal people, the police to population ratio in 1990 in Wilcannia was 1/73 while in Walgett it was 1/96. In comparison with NSW as a whole, where Aboriginal people are a small minority, the ratio was 1/459. Many observers have argued that one reason for the glaring disproportion in the number of arrests of Aboriginal people is the enormity of the police presence in Aboriginal communities.

Amnesty International witnessed an example of over-policing in Redfern, a Sydney precinct with a high proportion of Aboriginal residents. While sitting at a public square on a Sunday morning for less than an hour, talking with some members of the Aboriginal community, Amnesty International's delegates witnessed at least three police cars patrolling the area. This was not regarded as anything unusual by the members of the community who said that at times a police car would patrol the area every ten minutes. One of the police cars, driving along a very narrow street at a speed of about 10 kms/p/h suddenly raced off at high speed without any apparent regard whatsoever for a little child playing on the pavement. Amnesty International's delegates raised this incident later at a meeting with the Redfern police, who said that it was not one of their cars and that they did not know what the car which had been observed was doing in Redfern. They gave assurances that they would follow up the case. Redfern residents are apparently accustomed to such incidents and told Amnesty International of other similar events.

Over-policing of Aboriginal communities may in some circumstances may contribute to a sense of

provocation within the context of the tensions that often characterize Aboriginal-police relations. Amnesty International is concerned that such tensions have exacerbated the tendency toward highly disproportionate levels of incarceration of Aboriginal people.

4.2 Provoked arrests and police harassment

Many Aboriginal people and non-Aboriginal scholars have alleged that provoked arrests are common in both urban and rural areas of Australia. Amnesty International received reports of provoked arrests in Kununurra, Fitzroy Crossing, Alice Springs, Rockhampton, Brisbane and in Redfern in Sydney.

The pattern described was similar in all places: one or a number of Aboriginal people were reportedly provoked by the police by being addressed in a rude or hostile manner, sworn at or accused of being drunk. Sometimes the people were drunk but causing no offence, nuisance or harm to themselves or to anybody else; often, the people were sober. The Aboriginal person provoked responded by swearing at the police often using the same language as the police had just used. The police would then try to arrest the person for offensive language, drunk and disorderly conduct or a similar street offence. The Aboriginal person in some cases attempted to resist arrest, which then brought about further charges.

Some families of Aboriginal people who died in custody or who were shot by the police during a raid have complained about subsequent police harassment. For instance, Arthur Murray, whose son died in police custody 11 years ago, has repeatedly moved house and town because of what he alleges is harassment. In October 1992, Arthur Murray was arrested by a detective from the Glebe police station in Sydney for allegedly breaking the window of a neighbouring house. The policeman allegedly said to him: "All you blacks are the same...I may as well give you a sock so you can go and hang yourself." Murray, who is the organizer of the Aboriginal Deaths in Custody Watch Committee, denied the charge of breaking the window and was released on conditional bail. He has lodged an official complaint against the police.

Allegations of harassment by police of families of people who died in custody which have been brought to Amnesty International's attention include those of: Leedham Cameron (father of Edward Cameron and Darryl Cameron, who both died in custody in the town of Geraldton, WA); Charlotte Szekely (sister of Robert Walker, who died in custody in Fremantle Prison in 28 August 1984) and Ray and Roslyn Tilbury (parents of Stephen Wardle, a young non-Aboriginal man who died in the East Perth police lock-up in 1988).

Leedham Cameron, who campaigned actively after his son, Edward, was found hanged in his cell with a single bootlace in the Geraldton police lock-up in July 1988, left Geraldton, his home town, on 16 February 1989 because of what he alleges was continuous police harassment. Soon after Edward's funeral, where he helped the police to calm community anger, Leedham Cameron was picked up by the police and locked up for a few hours in the same police lock-up, though not in the same cell, where his son was found hanged. In the following months, he says the police stopped his car on countless occasions, ostensibly to check for roadworthiness, followed him around regularly, parked police cars opposite his house and shone police spotlights into his bedroom window at night. He moved to the little town of Cue, WA, about 250 miles from Geraldton. On 17 December 1991, another son, Darryl, was found hanged in the Greenough Regional Prison, Geraldton.

During the course of a community meeting in Fitzroy Crossing, WA, Amnesty International was initially told that Aboriginal people there had no complaints about the police, only to learn a short while later as the meeting progressed that sometimes the police were "a bit rough" and that just recently a man had had his arm broken by the police while being arrested; he was presently a patient at Derby hospital. Apparently, he had not registered a complaint and was unsure what to do. Reasons for this were his uncertainty about his rights and fear of adverse consequences such as harassment by the police. Many such cases of violence and harassment by the police against Aboriginal and Torres Strait Islander people were reported by the Human Rights and Equal Opportunities Commission (HREOC) in its 1991 report.

The prevalence of such practices by the police which result in perceptions of harassment and provocation may also lead to a situation in which Aboriginal people accept as normal an unusually high level of violence at the hands of the authorities. Amnesty International is concerned that this tendency may reinforce the vulnerability of Aboriginal people within the criminal justice system.

5. CONCLUSION

In March 1992, the Commonwealth, State and Territorial Governments in Australia issued a detailed response to the recommendations of the Report of the Royal Commission into Aboriginal Deaths in Custody. In expressing support to 338 of the Commission's 339 recommendations, the governments committed themselves to a significant program of remedial measures addressing a wide range of social and legal issues related to the status of Aboriginal people in Australia. These included measures to enhance training of police, judges and others involved in the criminal justice system, increased assistance to Aboriginal Legal Services and a number of steps to prevent alcohol abuse and improve custodial conditions and practices.

Amnesty International welcomes the serious commitment reflected in the governments' response to addressing the discrimination faced by Aboriginal people in Australia and which has contributed to the extreme disproportionate levels of incarceration and criminalization experienced by them. It especially welcomes those measures designed to ensure that all detention facilities provide Aboriginal people with adequate protection and standards of care to reduce or prevent the extremely high incidence of Aboriginal deaths in custody. Amnesty International urges that particular efforts be made to address conditions of detention such as those found at Alice Springs Prison which may, in some cases, amount to cruel, inhuman and degrading treatment.

Amnesty International remains concerned that Aboriginal people in Australia continue to be subject to extremely disproportionate levels of incarceration and criminalization, and within this context and that defined by the social relations and conditions of detention to which they are subject, Aboriginal people in detention constitute a group that is distinctly vulnerable to the violation of their right "to be treated with humanity and with respect for the inherent dignity of the human person." While much of this problem may be rooted, as recognized by the governments' response, in social attitudes that are prevalent among both the police and the general community, Amnesty International is concerned that they are also reflected in a range of specific institutions and practices related to the criminal justice system. Amnesty International urges the Australian authorities to closely examine the patterns of incarceration of Aboriginal people, and to give particular consideration to systemic elements - such as the Alice Springs

alcohol by-laws, the NSW Summary Offences Act, or the practice of over-policing -- which appear to discriminate against Aboriginal people, contribute to the extreme levels of incarceration and criminalization they face, and reinforce their status as a vulnerable group.

6. APPENDICES

Appendix A

Non-Aboriginal deaths in custody

White Australians have also died in police or prison custody, sometimes under suspicious circumstances or due to an alleged lack of care. According to one source, there were 73 known deaths in custody in Western Australia between 1980 and 1989, 34 of which were of Aboriginal people. Of the 39 non-Aboriginal deaths, 17 have been classified as self-inflicted. Jennifer Searcy, who regularly compiles an authoritative newsletter on custodial deaths, estimates that of all those deaths that have not been put down as self-inflicted, at least three quarters have to be associated with inadequate medical treatment despite serious illness or injury of the prisoner (Searcy, 1989). According to Searcy, there have been at least 24 Aboriginal deaths in custody Australia-wide between January 1990 and June 1992. The number of non-Aboriginal deaths in custody for the same period appears to be greater than 100, though exact figures are difficult to get.

One of the unresolved deaths in custody of non-Aboriginal Australians was that of 18-year old Stephen Wardle, who died in the East Perth police lock-up on 2 February 1988. Stephen Wardle's death has never been fully investigated. To date all the 17 police officers who were on duty at the East Perth lock-up when he died have refused to give evidence. The Coroner found that Stephen Wardle died of a drug overdose. The drugs had been prescribed to him and to some of his friends by a private medical practitioner. Stephen Wardle's family has alleged that he may have been ill-treated and that his life could have been saved had he been given due care. The Coroner's report confirmed that his life might have been saved had he been given medical attention while he was still breathing. The family has been campaigning for a full investigation into Stephen Wardle's death by a Royal Commission for almost four years.

When his family recently asked for samples of Stephen Wardle's organs in order to have a second autopsy undertaken by an expert in the United States, all other organs, apart from his brain, had disappeared without trace. This happened, despite a specific request being made to the Coroner at the inquest, that all samples be stored so that further tests could be made at a future time.

Appendix B

Places visited by AI delegation in April 1992

Katherine, NT
Timber Creek, NT
Kununurra, WA
Wyndham, WA
Halls Creek, WA
Fitzroy Crossing, WA
Derby, WA
Broome, WA
Darwin, NT
Alice Springs, NT
Yuendumu, NT
Cairns, Queensland
Yarrabah, Queensland
Innisfail, Queensland
Townsville, Queensland
Rockhampton, Queensland
Borallon, Queensland
Brisbane, Queensland
Canberra, ACT
Redfern, NSW
Glebe, NSW
Sydney, NSW

Appendix C

Prisons, police lock-ups and juvenile detention centres
visited by AI delegation

A. Northern Territory

Darwin Prison
Don Dale Juvenile Detention Centre
Katherine Police Lock-up
Timber Creek Police Lock-up
Alice Springs Prison
Alice Springs Police Lock-up

B. Western Australia

Wyndham Regional Prison
Wyndham Police Lock-up
Kununurra Police Lock-up
Fitzroy Crossing Police Lock-up
Broome Regional Prison
Halls Creek Police Lock-up

C. Queensland

Yarrabah Watch-House
Cairns Watch-House
Innisfail Watch-House
Townsville Watch-House
Townsville (Stuart) Prison
Rockhampton Watch-House
Rockhampton Correctional Centre
Brisbane City Watch-House
Borallon Correctional Centre

D. New South Wales

Long Bay Gaol
Redfern Police Lock-up
Sydney Central Police Station

Australia: criminal justice system