

Institutional Racism and (In)Justice: Australia in the 21st Century

*Chris Cunneen*¹

Abstract

This article focuses on systemic and institutionalised racism against Indigenous people as a contemporary feature of the Australian social and penal landscape and its implications for justice. There has been ongoing concern with institutional racism within the criminal justice system, however, this article concentrates on the intersection between institutional racism in non-criminal justice settings and their compounding effect on criminalization. Despite legal prohibitions on racial discrimination, various forms of institutional racism continue unabated. Indeed, part of the argument is that broader political changes particularly associated with the influence of neoliberalism on social policy have exacerbated the problem of institutional racism and redefined and reinforced the link between welfare and criminalization. Indeed, social welfare has come to be informed by the same values and philosophies as criminal justice: deterrence, surveillance, stigma and graduated sanctions or punishments. How might we understand these broader shifts in the public policy environment, to what extent do they reflect and reproduce institutional racism, and how do they bleed into increased criminalization? I endeavour to answer this question through the consideration of two specific sites of social welfare policy – child protection and social housing – and to consider how systemic and institutional forms of racism play out in daily life for Indigenous people and how they interact with criminal justice.

¹ Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, Australia

Introduction

In early 2019, the Australian Broadcasting Commission (ABC) exposed the racial segregation of Aboriginal people staying in the Ibis Hotel in Alice Springs. The Ibis chain of hotels is owned by Accor which is the largest hotel group operating in Australia, and the fourth largest operator in the world. According to the ABC investigation, staff at the hotel were routinely directed to segregate Aboriginal people into inferior rooms while charging the same nightly rate as other non-Indigenous guests allocated to superior rooms. The rooms allocated to Aboriginal guests were dirty with food scraps, had stained linen, exposed wiring, clothing belonging to former guests and other deficiencies (Gordon & Mitchell, 2019). The segregation of Aboriginal people at the hotel was reminiscent of the systemic racism which occurred throughout Australia during much of the twentieth century where Aboriginal people were separated in various social spaces from hospitals to movie theatres, from housing to cemeteries, and where denial of service was commonplace.

While being relegated to substandard accommodation at the Ibis hotel might be seen as the almost unexceptional racism that pervades Australian society, the racist effects can be far more lethal in other circumstances where, for example, discriminatory treatment in hospitals because of a person's Aboriginality leads to their death in circumstances which would have been preventable with earlier appropriate treatment. For example, 27-year-old Naomi Williams, who was six months pregnant, died along with her unborn baby of sepsis in 2015 without receiving a proper diagnosis or treatment at her local rural hospital. The Coroner stated that "Naomi Williams went to a doctor many, many times and never got a specialist referral... If I look at it from my own experience as a [white] middle-class woman in the Eastern suburbs in Sydney my perception is I would have got a referral and that is my strong perception. I would not have gone in 18 times and not got a referral". Expert evidence to the inquiry noted that identification of a person as Aboriginal leads to worse treatment (Rushton, 2019). Lack of proper diagnosis and treatment for Aboriginal patients at the hospital where Ms Williams attended has been implicated in other Aboriginal deaths or disabilities (including the amputation of limbs arising from untreated septicaemia) (Murphy-Oates, 2018).

This article focusses on systemic and institutionalised racism against Indigenous people as a contemporary feature of the Australian social and penal landscape and its implications for justice. There has been ongoing



concern with institutional racism within the criminal justice system (e.g. Blagg et al., 2005) and the effect of institutional racism continues to be of central concern in understanding Indigenous deaths in custody – for example the death of Tanya Day in police custody in Victoria (Perkins, 2019). As noted in other work, the concepts of institutional racism and systemic racism (or systemic discrimination) are often used interchangeably (Cunneen, 2006). However, as I note further below institutional racism, in particular, draws our attention towards the institutional processes through which racism is enacted. In this article I am particularly interested in two social processes: the intersection between institutional racism in *non-criminal justice settings* and its compounding effect on criminalization; and the relationship between neoliberalism and institutional racism. Since 1975 racial discrimination has been prohibited by the Federal *Racial Discrimination Act*, yet various forms of institutional racism continue unabated. Indeed, part of the argument of this article is that broader political changes particularly associated with the influence of neoliberalism on social policy have exacerbated the problem. What does this have to do with criminology and criminal justice? As has been noted previously there has been a tendency in criminology, and more particularly in administrative criminology, to steer as far away as possible from analysing institutional racism and human rights abuses (Cunneen, 2006; also Tauri, 2012; Cunneen & Tauri, 2016).

Beyond this disciplinary blindness, there is the need to understand the inter-relatedness between racism, social policy outcomes and criminalisation more generally. Nearly 30 years ago, the Royal Commission into Aboriginal Deaths in Custody identified that racism was a fundamental issue: racism is “institutionalised and systemic, and resides not just in individuals or in individual institutions, but in the relationship between the various institutions” (Johnston, 1991b, p. 124). The Royal Commission was also interested in understanding how institutional racism had changed over time within the broader context of colonialism. The earlier protectionist and assimilationist periods of the late nineteenth and twentieth century were perhaps more easily identifiable as institutionally racist, however, according to the Royal Commission institutional racism in the contemporary period is more subtle and not always obvious. Institutional racism was defined as: “An institution, having significant dealings with Aboriginal people, which has rules, practices, habits which systematically discriminate against or in some way disadvantage Aboriginal people, is clearly engaging in institutional

discrimination or racism” (Johnston, 1991a, p. 161). Arguably the problems associated with institutional racism have also changed somewhat since the Royal Commission reported in the early 1990s, with the growing influence of neoliberalism and the ‘new paternalism’ on social policy. These changes have given rise to particular policy, administrative and legislative changes which compound racist harms, and negatively impact on the likelihood of further criminalization.

Neoliberalism and Indigenous Social and Penal Policy

The development of neoliberalism has coincided with both a decline in the welfare state and a rise in the penal state. In other words, the welfare functions of the state have contracted with more limited and conditional access to welfare support, at the same time as the criminal justice system has expanded significantly in its reach and become more punitive in its approach. Wacquant has argued that the USA has led the global spread of neoliberalism, with key ingredients of an expanding penal system and retrenchment of welfare provisions (Wacquant, 2009). The differential impact of more punitive laws, harsher criminal justice policies and practices, and tighter welfare eligibility and policing of welfare compliance have been noted in countries such as the USA (Beckett & Western, 2001; Kruttschnitt, 2010), the UK (Player, 2014), Australia (Cunneen, et al., 2013), and Canada (Chunn & Gavigan, 2006). According to Wacquant (2009), there is a need to conceptually and critically relink our analysis of social welfare and penal policies. Wacquant (2009) argues further that “the concomitant downsizing of the welfare wing and upsizing of the criminal justice wing... have not been driven by raw trends in poverty and crime, but fueled by a politics of resentment toward categories deemed undeserving and unruly” (p. 74).

This raises the question of how we understand the categories of those ‘deemed undeserving and unruly’ and more specifically how we interpret the impact of neoliberalism on Indigenous peoples who historically have been systematically socially, economically and politically marginalized through various colonial policies and practices. In this context, it is not surprising that neoliberalism has heightened the criminalization of Indigenous peoples, while at the same time reducing Indigenous access to social services. More prosaically, several decades of neoliberalism have failed to significantly shift the entrenched levels of Indigenous marginalization and inequality indicative across a range of housing, health, educational, income and employment indicators. Much of the discussion on the impact of neoliberalism on



Indigenous peoples has focused on the negative impacts and costs to Indigenous peoples of the increased role of privatization, 'free markets', trade liberalization, and so forth, and particularly with the loss of traditional lands and environmental degradation (Permanent Forum on Indigenous Issues, 2010). However, neoliberalism is not simply about particular economic imperatives such as marketization, privatization and a reduced role for the state. The emergence of neo-liberalism has coincided with the re-alignment of approaches in punishment, which emphasise deterrence, retribution, and accountability. The resulting intensification of punitiveness has impacted significantly on Indigenous peoples with dramatically rising imprisonment rates (Cunneen, et al., 2013; and for impact on Indigenous policy generally, Strakosh, 2015).

Neoliberalism reflects and promotes particular values and principles. These include the individualisation of rights and responsibilities; the extolment of individual autonomy; a belief in free and rational choice which underpins criminal liability, penalty and access to welfare; a denial of welfare as central state policy; the valorisation of a free market model and profit motivation as a core *social* value; and the denial of cultural values which stand outside of, or in opposition to, a market model of social relations (Findlay, 2008). The ascendancy of these values has reinforced a particularly negative view of cultural difference and runs counter to Indigenous values that are based on collectivity, spirituality, and inter-relatedness among people and between people and nature. Neoliberalism has also seen a disavowal of colonialism in understanding both welfare and justice needs and responses and undermines Indigenous claims to self-determination by oppressing Indigenous values and Indigenous laws based on these values (Strakosh, 2015). Furthermore, neoliberalism is fundamentally assimilationist when it comes to Indigenous peoples because a free-market model of social relations eschews cultural values that do not rest on a belief in unbridled individualism and are instead built on social reciprocity and communal responsibilities. Indeed, cultural difference itself is used to explain dysfunctionality, crime and welfare dependency and the need for particular types of punishment and control, with a focus on changing Indigenous culture and promoting assimilationism – see for example the limitations placed on criminal courts in the Northern Territory (NT) in taking into account Aboriginal customary law when considering bail and sentencing (Anthony, 2013; Cunneen, 2007).

Neoliberalism seeks to redefine the self as *entrepreneurial* and to integrate the self into the practice of government. Indigenous culture is defined as dysfunctional because it represents a *failure to make the right choices*: the failure to engage in the (neoliberal) world of ‘real jobs’ and the acquisition of property, and the failure to abandon reciprocity and ‘welfare dependency’ (Garond, 2014). As McMullen has written in the Australian context, “neoliberals focus their attack on Aboriginal culture... remote communities are written off as cultural relics, museum pieces and ghettos of poverty and pointlessness” (McMullen, 2013, p. 112). Despite this, Indigenous commentators have noted that the neoliberal free-market economy “just doesn’t work in Aboriginal communities. The principles of self-interest and individualism remain too oppositional; they threaten the values and collective consciousness that sustain Aboriginal communities” (Waters, 2015).

Neoliberalism has also led to particular discursive constructions of those who are ‘welfare-dependent’ and ‘criminal’: welfare dependency and criminality are manifestations of dysfunctionality and “individual pathologies and cultural deficits” (Crenshaw, 2012, p. 1418) – which is a discursive disavowal of the importance of historical and structural causes of marginalization. The neoliberal approach to poverty is to “eschew major redistribution and emphasize moral discipline and markets” (Moran, 2008). The neoliberal solution for Indigenous peoples in Australia is to replace self-determination with a free market and privatization, which, for example, is demonstrated in the approach to housing: Indigenous communal title to land is to be replaced by private land ownership, and social housing in remote communities is to be provided at ‘market’ rent. Indeed, among Australian neoliberal proponents such as Hughes (2005), self-determination policies from the 1970s are the cause of the continuation of dysfunctional Indigenous cultures and the current ‘apartheid’ of remote communities.

The broader changes in economic and social policy brought about through neoliberalism have coincided with the rise of *responsibilization* – that is a shift towards a mode of governance under which individuals, families and communities are increasingly held responsible for their own safety, economic security and social and physical wellbeing – which is no longer seen as the responsibility of the state. A dramatic shift in the area of social policy has been associated with the rise of what is commonly referred to as the ‘new paternalism’ through which welfare policies have been aimed at actively changing the behaviour of welfare recipients by way of coercion.



Governments justify coercive interventions on the basis that they are beneficial to the recipients. As Bielefeld (2014) argues, Indigenous peoples are ‘a ripe target’ for new paternalist policies because of long-standing colonial narratives of the need to control and change Indigenous culture to fit with the demands of colonial governance. Much of the new paternalism relies on a ‘deficit-discourse’ whereby Indigenous peoples need to be ‘raised’ to the non-Indigenous norm or standard (Walter & Andersen, 2013). It is “a mode of language that consistently frames Aboriginal identity in a narrative of deficiency” (Fforde, et al., 2013, p. 162).

This paternalist shift in welfare to principles of conditionality and responsabilization is shown in various policies. Compulsory income management is the probably the most well-known of the paternalist policies affecting Indigenous peoples since the controversial introduction of the Northern Territory Emergency Response (NTER) in 2007, the Stronger Futures policy and legislation in 2012, and the subsequent expansion of various forms of income management across the nation. Compulsory income management for welfare recipients is paternalistic because, as Thomas and Buckmaster (2010) note, by definition people who meet the criteria for participation must participate, and it is imposed in what the Government regards as the best interest of individuals (and their dependents). Nationally, nearly 80% of people subject to income management are Indigenous (SCROGSP, 2016). There is little evidence that income management has achieved its stated (neoliberal) outcomes of promoting independence and building skills or changing long-term behaviour to break ‘welfare dependency’ (SCROGSP, 2016). However, what it has achieved is much greater direct control over Aboriginal peoples’ lives through welfare policy.

Coercive intervention spreads out from income management into other areas of social policy. For example, child protection matters can be directly linked to income management requirements, as can school attendance and other behavioural controls over income expenditure. A raft of new legal problems for Indigenous peoples has emerged as a result of these changes. This should not be surprising because paternalism and welfare conditionality are governed through increased state regulatory processes. Paternalist policies which are based on coercion, by their very nature, require increased intervention and *penalties* for those who do not comply. As Wacquant (2009) has noted, social welfare has come to be informed by the same values and philosophies as criminal justice: deterrence, surveillance, stigma and graduated sanctions or punishments.

Institutional Racism in the Neoliberal State

Thus, the rise of welfare conditionality imposes greater obligations on individuals as a condition of receiving various forms of welfare support. These obligations are both performative and legal. They require people to modify their behaviour and undertake various activities (such as school attendance, job interviews, training, counselling); prohibit or restrict other activities (for example, what can be purchased and where when using cashless welfare cards; 'three-strikes' social housing eviction policies); and have various legal consequences including both criminal and civil sanctions (for example, penal sanctions for failing to report income; civil consequences for breaching various legally binding agreements, including removal of children, eviction, and so on). How might we understand these broader shifts in the public policy environment, to what extent do they reflect and reproduce institutional racism, and how do they bleed into increased criminalization? I endeavour to answer this question through the consideration of two specific sites of social welfare policy – child protection and social housing – and to consider how systemic and institutional forms of racism play out in daily life for Indigenous peoples and how they interact with criminal justice.

Child Protection

In recognition of the contemporary crisis in the removal of Indigenous children from their families by state authorities, the Australian Law Reform Commission (ALCR, 2017) recently recommended the establishment of a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children. Twenty years previously, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC, 1997) had found that:

Welfare departments in all jurisdictions continue to fail Indigenous children. Although they recognise the Aboriginal Child Placement Principle, they fail to consult adequately, if at all, with Indigenous families and communities and their organisations. Welfare departments frequently fail to acknowledge anything of value which Indigenous families could offer children and fail to address children's well-being on Indigenous terms (NISATSIC, 1997, p. 453).



The Inquiry made comprehensive recommendations to repair the harm caused by past removals (which the Inquiry found at particular historical moments constituted genocide) and to prevent contemporary removals. In the twenty-plus years since the Inquiry the opposite has occurred: the number and rate of removals of Indigenous children have increased significantly. For example, over the period 2001-2010 the number of Aboriginal children in out of home care in Victoria increased by nearly 80% (Victorian Department of Premier and Cabinet, 2012), in Queensland the rate of Indigenous children taken into out-of-home care more than tripled between 2002 and 2012 (Queensland Child Protection Commission of Inquiry, 2013), and in Western Australia (WA) the number of Indigenous children removed more than trebled in the 10 years from 2003 to 2013 (SNAICC, 2014). This has been further exacerbated as state and territory policies have moved towards earlier permanent removal and adoption of children.

In 2018 in Australia, 56,000 children were placed on child protection orders, of these 20,000 were Indigenous children. They were 10 times more likely to be on an order than non-Indigenous children. They were also more likely to be on the most serious order involving the transfer from the family of guardianship and/or custody of the child (AIHW, 2018), and were nine times more likely to be placed in out-of-home-care than non-Indigenous children (AIHW, 2018). The difference in intervention rates points to whether systemic or institutional racism is at play in creating these significant disparities, and the role neoliberal ideology and paternalist policies have played in the intensification of removal.

The child protection sector saw from the late 1990s the escalation of risk-thinking tied to greater regulatory intervention and the growth of public sector managerialism, arising from the impact of neoliberalism more generally (Rogowski, 2014). In child protection, risk assessment has:

focussed on the forensic gathering of evidence in situations of suspected child abuse and neglect. Managerial risk-management responses, which aimed at controlling and prescribing child protection practices, contributed to the development of risk-averse practices that were generally event driven and focussed on issues of immediate safety. Family supportive practices [have] struggled to co-exist (Connolly & Cashmore, 2009, p. 275).

Social support has been reduced and become more authoritarian in the child protection sphere where requirements for behavioural change have replaced support services, and social workers have become more like ‘people processors’ managing risk (Rogowski, 2014). Responsibilization in the sector focuses attention on individual failings and inadequacies, and family dysfunction. Failure to exercise responsibility activates more punitive interventions and threats.

The research conducted for the Indigenous Legal Needs Project (ILNP) (Allison, et al., 2012; Allison, Cunneen & Schwartz, 2014; Cunneen, Allison & Schwartz, 2014; Schwartz, Cunneen & Allison, 2013) across Australia showed the systemic failings of the child protection system for Indigenous children and their families. There were complaints of poor departmental practice and a lack of cultural competence among those working in child protection. In this regard, the Victorian Commission for Aboriginal Children and Young People gives a description of how systemic racism occurs in practice:

Many children did not know they were Aboriginal, were split from siblings, and left for years in residential care – isolated from family, culture and country – when they might have been in the loving care of grandparents or other relatives... We had child protection officials tell us they had been unable to trace a child’s Aboriginal family for years when we were able to track them down on Facebook within minutes (cited in the ALRC, 2017, pp. 490-491).

It was a common complaint by Indigenous peoples and Indigenous organisations across Australia that child protection staff were obtaining consent to child protection orders from Aboriginal parents without legal advice, through various threats and without the use of interpreters (see Allison, et al., 2012; Cunneen, Allison & Schwartz, 2014; Schwartz, Cunneen & Allison, 2013). For example, as an Indigenous legal service staff member in Queensland stated, “we sometimes work out that the consent wasn’t exactly informed or in fact, they were sort of browbeaten into it or thought there was no other choice, or the old thing of trading off some older children for some younger children in order to get their signature on some sort of agreement” (Cunneen, Allison & Schwartz, 2014, p.118). The absence of legal information and legal assistance in child protection matters increases rates of child removal. An Indigenous legal service provider in Victoria stated: “half of our



clients do not get legal advice [about child protection]. Many of our clients do not understand all the factors [and] are often tricked into signing documents. They don't know their legal rights" (Schwartz, Cunneen & Allison, 2013, p. 43). Systemic racism flourishes unchecked in these situations where Aboriginal people are unable to assert what rights they might have under legislation.

There have been multiple failures of child protection agencies to engage with Aboriginal childcare organisations in a way that respects their independent decision-making capacity, to ensure that the Aboriginal Child Placement Principle is fully put into practice, and in respective departments fulfilling their own statutory requirements to produce cultural plans for Aboriginal children. The requirement for cultural plans for Indigenous children under protection orders is meant to be a basic protection for the child's Indigenous identity. Yet various research has shown that the requirement for cultural plans is either not complied with or is at best superficial (e.g., Cunneen, Allison & Schwartz, 2014). For example, the Victorian Aboriginal Child Care Agency found that only 20% of Aboriginal children for whom a cultural plan was legislatively mandated actually had such a plan in place (Ombudsman Victoria, 2009). The lack of compliance demonstrates a profound lack of respect for Indigenous culture and well-being. It demonstrates the systemic racism that occurs in day-to-day government practices. The absence of legal information and assistance in child protection matters increases the rates of child removal because Indigenous families are unable to challenge government decisions. In some states there is also a pronounced failure of the courts to scrutinise consent orders or to ensure statutory requirements are met, including formulating and implementing cultural plans and abiding by the Aboriginal Child Placement Principle (Cunneen, Allison & Schwartz, 2014; Schwartz, Cunneen & Allison, 2013). The absence of court scrutiny compounds institutional racism and reinforces the view that the law is not there to protect Aboriginal people.

Institutional racism becomes even more apparent when we analyse the link between the operation of the child protection system and its subsequent interaction with criminalization. There is a well-trodden path between child removal and subsequent criminal justice involvement (ALRC, 2017). Thus, it is widely recognised that being placed in out-of-home-care can lead to criminalization (e.g., McFarlane, 2017; Victoria Legal Aid, 2017). Victoria Legal Aid (2017) found that:

We see cases, where police have been called to a residential facility to deal with behaviour by a young person that would be unlikely to come to police attention, had it occurred in a family home. We have represented children from residential care who have received criminal charges for smashing a cup, throwing a sink plug or spreading food around a unit's kitchen... [F]requently children who may never have had a criminal charge prior to entering care, quickly accrue a lengthy criminal history due to a cycle of 'acting out' followed by police responses which develops in a residential unit (p.1).

So, it is not surprising that 48% of children who are under youth justice supervision (either in detention or under a youth justice supervision order) have also been in the child protection system. The percentage is higher for Indigenous children (AIHW, 2018). Children in the child protection system are also more likely than other children to come into the youth justice system at an earlier age, thus also increasing their likelihood of remaining in the criminal justice system through their youth and adult years. This continuum from care to criminalization has a significant impact on Aboriginal children because of their over-representation among children in care, and the more Aboriginal children who are removed from their families, the more likely they are to be criminalized. The systemic racism evident in the child protection system reproduces further racist outcomes in the criminal justice system – the two institutional systems are closely intertwined. As understood by the Royal Commission into Aboriginal Deaths in Custody, it is institutional racism operating across institutional (or carceral) spaces.

Housing and Homelessness

The second example I provide relates to social housing and homelessness. Indigenous peoples are social housing tenants at disproportionate levels compared to non-Indigenous people. Some 22% of Aboriginal people live in social housing provided by a state or territory housing authority and a further 5% live in housing provided by an Indigenous or other community organisation. Social housing rates for Indigenous peoples are *six times* higher than they are for non-Indigenous people (SCROGSP, 2016). By comparison, the proportion of Indigenous adults living in a home owned (with or without a mortgage) by a member of their household is less than half the non-



Indigenous rate. One-third of Indigenous people rent in the private market (SCROGSP, 2016).

The relatively high proportion of Indigenous peoples living in social housing means they are subject to various government policies and their implementation – which can give rise to systemic racism and negatively impact on factors related to criminalization. For example, overcrowding is a key problem which is directly related to the lack of supply of social housing. Nationally, the proportion of Indigenous peoples living in overcrowded households is 21%. However, overcrowding varies according to location and the type of housing tenure. In very remote areas half of Indigenous peoples live in overcrowded houses (SCROGSP, 2016). Further, around 80% of Indigenous peoples living in overcrowded households also live in rental accommodation (SCROGSP, 2016) – which speaks directly to government policies and the lack of housing supply. For example, in places like Darwin, Tennant Creek and Katherine in the NT, the waitlist for a public housing one-bedroom accommodation is 6-8 years.ⁱ Overcrowding can lead to a range of tenancy-related problems such as eviction, repairs and maintenance, as well as debt. Of immediate concern in the context of this article is the relationship between overcrowding and the intersection with institutional racism and criminalization. Overcrowding is a risk factor for child abuse, sexual assault and family and community violence. In addition, it negatively affects life expectancy, child mortality, disability, chronic illness, educational outcomes and employment (NSW Aboriginal Child Sexual Assault Taskforce, 2006; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007; SCROGSP, 2016). Overcrowding also impacts on other justice issues related to the need for stable and secure accommodation, such as the ability of a family to be reunited with their child when subject to a child protection order, the ability to access bail, to apply for parole, and so forth.

Given that Indigenous peoples are more likely to rent a home from public housing providers they are also policed to a greater degree for non-compliance with relevant housing provider policies. These include the ‘three strikes policy’, now in place across a number of Australian jurisdictions (including WA, NSW, QLD and Tasmania) which leads to eviction from a tenancy if a tenant is found to have engaged in ‘disruptive’ or ‘anti-social behaviour’. Whilst on its face these policies appear neutral, they have a disproportionately negative impact on Indigenous peoples. Firstly, Aboriginal people are more likely to reside in social housing properties than

non-Indigenous people and are therefore more likely to be subject to the three-strikes policy. Secondly, other tenants may use the policy in a racially discriminatory way to exclude Aboriginal people from their community. Difficulties in challenging allegations, vague definitions about what constitutes a strike and a lack of procedural fairness in the way the policy is implemented can further aggravate the potential for racial discrimination. Thirdly, the way many Aboriginal households live may cause them to face greater scrutiny, a larger number of complaints and a higher likelihood that they will be breached under the policy. The policies contain assumptions about what constitutes a 'good' as opposed to a 'bad' tenant – assumptions that fail to take adequate account of particular aspects of Indigenous culture. Aboriginal people may, for instance, socialise out of doors with extended family or in bigger gatherings more than others. They also have strong obligations to take family into their home, including as carers for children.ⁱⁱ All of this may lead to what is labelled as disruptive or 'anti-social' behaviour (Equal Opportunity Commission, 2013). The following quote from an Indigenous legal service provider demonstrates the problem.

We estimate that over 2000 Aboriginal children have been made homeless in the last three years under the three strikes policy [in WA]. It's for cultural reasons. Aboriginal families tend to visit each other a lot. [They] tend to have a lot of comings and goings... Just normal day-to-day life can be disruptive in a street where they are the only Aboriginal family. I am convinced [the policy]... has a disproportionate impact on any big families but most Aboriginal families tend to live that way... There are certainly more Aboriginal people homeless in the parks and the streets than there used to be (Allison, Cunneen & Schwartz, 2014, p. 36).

Evictions due to anti-social behaviour directly feed into homelessness because if someone is evicted for anti-social behaviour they are ineligible to apply to the social housing waitlist for a specified period of time (dependent on the state or territory). Leaving aside the issue of affordability, recognised problems of racial discrimination in the private rental market exacerbate the problem through limiting access to this type of housing (Equal Opportunity Commission, 2013).

The heavy-handed approach by housing authorities to 'anti-social behaviour' is reflective of the rise of welfare conditionality whereby the



provision of welfare is directly related to changing behaviour. The problem for Aboriginal people is that this conditionality is also systemically racist in its conceptualisation and its negative effects. Further, as foreshadowed in the discussion on neoliberalism, the approach is highly punitive, utilising a law enforcement model of managing tenancies of some of the most vulnerable people in the community, including through the employment of ex-police officers, prison guards, court officers and security guards to implement the relevant policy (Allison, Cunneen & Schwartz, 2014). Another public housing policy which shows the interconnection between the use of tenancy agreements, behavioural requirements and subsequent criminalization has been restricted liquor consumption in social housing. In WA for example, tenants can elect to have their properties declared 'dry', with signage to this effect placed on their homes. There have been allegations of undue pressure by police for tenants to adopt this measure, tenants not understanding the effects of these agreements or indeed not consenting to them. It is also difficult to have the signs removed if the tenant wishes to do so (Allison, Cunneen & Schwartz, 2014). When breached, the effects can include substantial monetary fines, criminalization and/or eviction of tenants, even if somebody other than the tenant enters the property and consumes alcohol.

It's compounded legal issues a lot more for families because they didn't realise how it can impact on their lives. There was one lady, for instance, [who had] never, ever been in trouble with the police... She got these signs put on there and in the last two years she's had 20 charges of alcohol related offences against her because someone's been standing in her yard drinking alcohol. Then she's charged... because it's her property (Allison, Cunneen & Schwartz, 2014, p.38).

Housing policies such as the prohibition on the consumption of alcohol clearly exacerbate the vulnerability of Aboriginal tenants in social housing to police surveillance and criminalization. Further, 'three strikes' behaviour management often leads to evictions from public housing which further intensifies problems with overcrowding and homelessness – which themselves compound the likelihood of criminalization.

Homelessness is a relatively common experience for Indigenous peoples. Some 20% of homeless people in Australia are Aboriginal and Torres Strait Islander. They are seven times more likely than non-Indigenous

Australians to be homeless (ABS, 2018). As Russell (2018) has noted there is an interdependent relationship between homelessness and the criminal justice system: experiencing homelessness increases the risk of criminal justice system involvement, and experiencing imprisonment increases the likelihood of homelessness, creating a cyclical link between the two. For example, lack of access to secure, stable housing affects Aboriginal people coming out of prison and has been found to be a significant factor in the likelihood of reoffending, while stable housing can assist in breaking the cycle of offending and re-incarceration (Baldry, et al., 2003). For people experiencing poverty and homelessness, research by Walsh (2007) has shown the reporting of extraordinarily high levels of police harassment and interference; being frequently searched, often unnecessarily and sometimes unlawfully; experiences of physical brutality by police officers; and other forms of discrimination by mainstream society. Indigenous peoples living on the streets have been identified as particularly vulnerable to police interference and harassment (Walsh, 2007).

In addition, various laws, policies and policing practices impact on homeless people and as a result particularly affect Aboriginal people. As Adams (2017) has noted there are different ways legislation and policing interact with homeless people. Some legislation directly criminalises the activities of homeless people such as sleeping in public places and begging, while other laws and regulations may be neutral but have a disproportionate impact because homeless people undertake the activities in public (e.g. prohibitions on drinking in public places or urinating in public) or undertake the activities as way of coping with homelessness (e.g. public transport offences). There is also the potential for differential enforcement practices because of the visibility of homeless people, including the use of public drunkenness laws, move-on powers, and stop and searches. These differential practices can arise because of attitudes towards homeless people or because of targeted 'crackdowns' (Adams, 2017). Research into criminal justice involvement of homeless people in the USA confirms that they are more likely to be criminalized for more minor offences and that housing and access to various treatment facilities would prevent much of this problem (Gonzalez, et al., 2018). We also know that homeless young people break the law more than other young people, often for offences related to 'survival' (such as, stealing for food or breaking into premises for somewhere to sleep) and that criminal activity increases following homelessness (AIHW, 2018). Irrespective of whether individual police have particular negative attitudes



towards Aboriginal people, the social determinants of homelessness which structurally discriminate against Aboriginal people, mean that they are more likely to face criminalization as a result of their over-representation among the homeless population, further compounding the problem of institutional racism.

There are systemic problems associated with housing which cause overcrowding, evictions and homelessness for Indigenous peoples. Housing policy and practices create these issues through their disproportionate impact which systematically discriminates against Indigenous peoples. At the same time, there is a very strong relationship between housing, homelessness and the criminal justice system: both interacting and intensifying the problem of institutional racism. To return to Johnson's definition of institutional racism referred to previously, it is the relationship between the institutions and their practices that embeds racist outcomes for Indigenous peoples.

Conclusion

Aboriginal organisations such as legal services are unable to respond adequately to the systemic and institutionalized problems which face Indigenous peoples. The needs of Indigenous peoples are intensified because of the *multiple* problems generated by institutional racism. This article has focussed on the inter-relationship between child protection, housing and criminal justice. However, this analysis could be expanded to other areas, for example, institutional racism in the provision of health care and subsequent deaths in custody; education and the problem of the 'school to prison pipeline' where suspensions and expulsions from school lead to greater interventions by the criminal justice systems; and policies related to income management and social security where regulatory surveillance is a condition of receiving social services and can involve criminal or civil penalties. Many of these problems are associated with the rise of welfare conditionality which imposes extra burdens on the most vulnerable people (Neville, 2008).

The assumption of Aboriginal dysfunctionality underpins welfare conditionality and provides a rationale to institutional racism. "Dysfunctionality posits a moral vacuum that needs to be filled by government and the solutions [...] of neoliberal forms of governmentality" (Lattas & Morris as cited in Garond, 2014, p. 7). The 'problem/s' of Indigenous peoples are understood as a deficit, rather than the institutional

forms of racism which force Indigenous peoples into highly marginalized, precarious situations. Dehistoricizing contemporary Indigenous marginalization facilitates a discourse of precarity that blames Indigenous peoples and their cultures as the source of the problem and “emphasizes, in a contrastive manner, the worth of neoliberal values [...] including the rationality of individual responsibility and fate” (Garond, 2014, p. 8).

Colonialism has created and maintained the processes of dispossession and the policies of disenfranchisement and social and economic exclusion. However, these processes change and transform over time. The contemporary discourse of neoliberalism and its focus on dysfunctionality rationalises a new form of assimilationism, and institutional racism plays a fundamental role in remodelling laws, policies and practices which on their face appear neutral and equal in their application. Understanding the intersections between differing institutional responses such as child protection, housing and criminal justice provides decolonial criminological insights into understanding how criminal justice institutions entrap Indigenous peoples into ongoing cycles of arrest, court and re-imprisonment. They re-orient our focus onto institutions and the way they operate, rather than reproducing endless aetiological accounts of Indigenous criminality.

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ⁱ See <https://nt.gov.au/property/public-housing/apply-for-housing/apply-for-public-housing/waiting-list> (Accessed 15 July 2019).

ⁱⁱ For discussion of the obligations on Indigenous grandparents in raising their grandchildren and the problems of social housing policies, see the case of Joan Martin in McGlade and Purdy (1998).