Royal Commissions and Omissions : What was left out of the Report on the Death of John Pat

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Background

The Royal Commission into Aboriginal Deaths in Custody was established in October 1987, in order to investigate the deaths of Aborigines and Torres Strait Islanders occurring in the custody of the police, or of prison and juvenile detention authorities. The Commission investigated 99 such deaths occurring over the almost eight and a-half years from 1 January 1980 to 31 May 1989.[1] Amongst the many findings and recommendations made, the National Commissioner, Mr Elliott Johnston Q.C., quoting his predecessor, Commissioner Muirhead, noted that in Australia, Aborigines are ten times more likely to die in prison than non-Aboriginal people, and twenty times more likely to die in the custody of the police (NR 3.5.3).

Of even more concern are the findings relating to Western Australia, the state which despite having only the third highest Aboriginal population, recorded 32 deaths over the relevant period; almost one third of the total number of deaths and the highest number for any state or territory (NR 2.1.1). Findings indicate that in Western Australia Aborigines are 26 times more likely to be in prison than non-Aboriginals, and 43 times more likely to be in the custody of the police. Again both statistics are higher than that recorded for any

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1 *National Report of the Royal Commission into Aboriginal Debates in Custody*, AGPS, Canberra, 1991. Hereafter references to the National Report will appear in the text as NR.

other state or territory (NR Table 9.3; 9.3.3; Table 9.1; 9.2.4). A great deal has been made of the fact that once in custody, an Aboriginal prisoner faces the same likelihood of dying as a non-Aboriginal prisoner. This is only part of the story. Because of the totally disproportionate rates at which Aboriginal people are taken into custody, in 1987, the year the Commission was announced, an individual Aborigine in Western Australia was not only twenty-seven times more likely to ultimately die in prison than a non-Aboriginal Western Australian, but was also three times more likely to die in prison than a black South African.[2]

It is stated in the National Report that despite the expectation of many Aborigines and their sympathisers that: "Aboriginal people would suffer and die from the same discrimination and brutality as they had experienced during life", the Commissioners did not find that even one of the 99 deaths investigated was "the product of deliberate brutality or violence by police or prison officers" (NR 1.1.3; 1.2.2). One might wonder what it was that made these officers in whose custody Aboriginal people were dying seemingly unique amongst those who interacted with Aboriginal people. What makes these officers different is not that they do not resort to violence and brutality, but that they are authorised to do so by law.

I look at just one of the reports issued by the Commission concerning individual deaths, the *Report of the Inquiry into the Death of John Peter Pat*, who died in Roebourne Western Australia on 28 September 1983. First, I make some comments relating to the history of this case and my methodology.

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2 The imprisonment rate for Non-Aboriginal Western Australians was 78.2 per 100,000; for Western Australian Aborigines it was 1331.1 per 100,000 (*RP* No 6 p 9); and for Black South Africans it was 429.3 per 100,000 (*RP* No 15 p 19). In Western Australia, Non-Aboriginal people died at a rate of 1.8 per 1,000 Non-Aboriginal prisoners, and Aborigines died at the rate of 2.9 per 1,000 Aboriginal prisoners (*RP* No 11 p 6); in South Africa prisoners died at the rate of 2.76 per 1,000 (There is no breakdown of figures as to race re prison deaths in South Africa; *RP* No 15, p 17). No data is available on rates for a comparison with South Africa of police custody and deaths occurring in police custody (*RP* No 15 p 2). However, it is of note that in Western Australia, Non-Aboriginal people were imprisoned at a rate of 180 per 100,000; Aborigines at a rate of 7,730 per 100,000 (*RP* No 13 p 7). References identified as RP refer to Research Papers issued by the Royal Commission thus: Research Paper No 6 Aboriginal Imprisonments : A Statistical Analysis, July 1989, Research Paper No 11, Aboriginal deaths in Prisons 1980-1988 : Analysis of Aboriginal and Non-Aboriginal Deaths, November 1989, Research Paper No 13, National Police Custody Survey August 1988, March 1990, Research Paper No 15, International Review of Deaths in Custody, June 1990.

History of the Pat Incident

* Police : Aboriginal Relations in Roebourne

In 1983, if you were an Aborigine living in the remote north-western town of Roebourne, known to the local Aboriginal people as Ieramugadu, the surveillance of your activities by uniformed police officers in marked police vans would occur as much as hourly between 8 am and midnight.[3] During the night hours, your home might be spotlighted during these routine police patrols of the area known as the Aboriginal Village.[4] One officer stationed in Roebourne at that time referred to the purpose of police patrols as being "Just to show the flag".

During these patrols, it was nearly always Aboriginal people who were arrested (*PR* p 44).[5] To give some idea of the extent of intrusion into Aboriginal people's lives, police records indicated approximately one in every three Roebourne Aborigines were arrested in just three and a-half months from August to mid-November 1983. Many of these people were arrested on more than one occasion over that period; for example, one individual was arrested seven times in just 27 days during August alone.[6] In nearly all instances, Aboriginal people who were arrested were not released on bail,[7] and often were incarcerated in the police lock-up for periods in excess of 24 hours (NR 21.1.60). The majority of these arrests were for drunkenness (*PR* p 44)[8] and the testimony of the officers stationed in Roebourne at the time was such arrests were only effected if a person was "semi-conscious", "out of it" and "incapable of taking proper care and control of themselves".[9] In other words, this was supposed to be some form of protective custody. The reality of this protective custody included locking these semi-conscious and incapacitated people into cells for at least six hours overnight, during which time no one would be in attendance at either the lock-up or the police station

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3 Submissions made on behalf of the Committee to Defend Black Rights (CDBR) pp 112-113; Pat Report (PR) pp 42-44). Hereafter references to Pat Report will appear as PR in text.

4 Exhibit before the Commission inquiring into the death of John Pat (Ex) W/19/187t. Transcript of the Pat Inquiry (trans.) p 3382.

5 W/19/171 Occurrence Book Statistics 21.6.83 to 31.12.83 and Roebourne population statistics.

6 W/19/171 Occurrence Book Statistics 21.6.83 to 31.12.83 and Roebourne population statistics.

7 W/19/19 Roebourne Police Station Occurrence Book.

8 W/19/171 Occurrence Book Statistics 21.6.83 to 31.12.83 and Roebourne population statistics.

9 Trans. pp 3692, 4296, 4551; CDBR p 127.

(*PR* p 86).[10] One senior officer who was sent to Roebourne in 1983, said of this police station:

> you'll see an enormous amount of blood splattered all over the place ... it's unbelievable how some of these natives come in there beaten up and bleeding.[11]

It was such people who were left unattended for hours in the Roebourne cells.

* The Death

If you were an Aborigine in Roebourne in 1983, you would know that one night a number of Aboriginal males, including a sixteen year old boy, had been involved in a fight with off-duty police outside the only hotel in Roebourne. A number of Aboriginal witnesses claimed to have seen an off-duty officer kick the boy in the head while he was lying on the road (*PR* p 162).[12] Later, the boy was carried to one of the police vans and taken, along with four other Aboriginal males, to the police station by the off-duty police and other uniformed officers who had intervened in the fight. There were claims made that at least some of the prisoners were beaten by police when they were removed one at a time from the police vans. Some of these officers then proceeded to complete the paperwork charging the Aboriginal prisoners for a variety of offences relating to the fight. These were the same off-duty officers who had themselves been active in the fight (*PR* pp 6, 7).

That night had not been Pat's first encounter with the law in Roebourne. At fourteen, he had been convicted on two charges of assault against police officers; one charge relating to Pat's having kicked an officer in the testicles when he was being removed from a police van. At fifteen, Pat was again convicted for aggravated assault - this time for having struck an officer while at the lock-up (and in fact involving one of the officers subsequently tried

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10 W/19/19 Roebourne Police Station Occurrence Book.

11 Trans. p 4934.

12 Ex W/19/36, Evidence of S Churnside; W/19/42, Evidence of A Douglas; W/19/62, Evidence of M Lockyer; W/19/84, Evidence of J Sandy; W/19/133, Evidence of J Tucker; W/19/41 Evidence of R Dale.

over Pat's death).[13] At sixteen, John Pat was dead; his body found that night of the fight on the cement floor of the juvenile cell. Another of the men arrested that night spent five days in hospital.[14] And yet another, Peter Coppin, had bald patches on his head where he claimed that an off-duty officer had torn out his hair while dragging him to a police van (*PR* p 165). The officers claimed to have been injured during the brawl also. One had severe bruising and some lacerations to his face, as well as body bruises. Another two officers sported injuries to their knuckles and hands.[15]

An independent witness testified after Pat's death had been discovered that night, he had been told by the police they believed Pat had died as a result of being kicked in the head. In a theme that becomes depressingly familiar, they claimed it had been an Aborigine who was responsible for Pat's death, as this person had allegedly kicked Pat in the head, albeit accidentally, in the course of the fight.[16]

The morning after the fight, those prisoners who were not dead or in hospital were taken before a magistrate. The charges and the "facts" presented to the court were formulated by the officers involved in the fight.[17] The prosecutor that day was the officer with the bruising and lacerations to his

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13 Refer to the Pat Report for a fuller account of Pat's criminal record. Note that in respect of Pat's first encounter with the police, it seems that he was with some friends when he was approached by police (about enquiries relating to an unidentified matter according to the police), when Pat became angry and struck an officer with an unopened bottle of beer. It was recorded in a Department of Community Welfare file that Pat claimed that he had then been thrown into the police van so roughly that he had almost been knocked unconscious; he had kicked the officer responsible on alighting from the van. The court records indicate that Pat, at fourteen years of age, appeared before the Magistrate on two charges of aggravated assault, without legal representation, and pleaded guilty. With reference to the later charge of aggravated assault, Pat again apparently claimed to the Department of Community Welfare that he had been assaulted by police, this time claiming that he was kicked. It was noted in the file that Pat had a graze over his left eye. Pat again appeared in Court unrepresented and pleaded guilty (*PR* p 33, 34).

14 W/19/170(B)(b) Evidence of G Rigby (Medical Doctor).

15 Ex W/19/170, Evidence of G Rigby (Medical Doctor); W/19/16C, book of photographs with index Nos 127-132).

16 Ex W/19/129, Evidence of R Hart (Dept Community Services Officer).

17 Ex W/19/147 Evidence of S Bordas - Complaints by PC Bordas (a) L James Unlawful Assault on Armitt, (b) L James Hinder Holl, (c) J Pat Disorderly Conduct, (d) J Pat Aggravated Assault Armitt, (e) R Smith Hinder Holl, (f) P Coppin Hinder Armitt, (g) B Munda Hinder Armitt; W/19/148 Facesheets completed by PC Armitt, (b) B Munda Hindering Police, (e) P Coppin Hindering Police, (k); W/19/151 Evidence of T Holl, Facesheets signed by PC Holl (a) L James Aggravated Assault & Resist Arrest, (b) R Smith Hindering Police, (c) J Pat Disorderly Conduct & Aggravated Assault.

face (*PR* p 240). The magistrate said that none of the prisoners complained about their treatment (*PR* p 240).[18]

Four white officers and an Aboriginal police aide were eventually charged in February 1984 with the manslaughter of John Pat (*PR* p 12). If you were an Aborigine in Roebourne you would know they were all acquitted by an all white jury (*PR* p 273),[19] and that John's step-father died shortly after that verdict was handed down (*PR* p 33). Medical science said he died of pneumonia; Aborigines say that Mick Lee died of a broken heart.

Almost seven years after the death of John Pat, and after a number of court proceedings involving the events of the night of 28 September 1983, the Royal Commission came to Roebourne. By 1990, not one member of the police force had been successfully prosecuted or even disciplined in relation to the incidents of that night. This was in spite of the belief by the officer in charge of internal police discipline that assaults had been committed by one or more of the officers; and the opinion of the Crown Prosecutor that there was ample evidence for internal police action (*PR* pp 248, 249). Indeed the only disciplinary action initiated was against an officer who had no involvement in either the fight or the unloading of the vans.[20] And, according to the police, as all copies of the file and complaint had been lost, even this action was never finalised (*PR* p 219). Apart from one officer who had retired and the police aide, all of the officers involved in the fight and the unloading of the vans that night - and their police investigators - have been promoted. The officer in charge of internal police discipline referred to earlier is Mr Brian Bull, now the Commissioner of Police in Western Australia (*PR* p 248).

* The Royal Commission

When the Royal Commission came to Roebourne and called its first witness, a woman was seated in the public gallery; as soon as the questioning commenced, she started crying out "My son is not a murderer". She was

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18 W/19/181 Evidence of K Nicolson.

19 M Edmunds, *They Get Heaps: A study of attitudes in Roebourne Western Australia,* Aboriginal Studies Press, Canberra, 1989, p 155.

20 The officer was charged with falsely having made an entry in the Station Occurrence Book on the night of Pat's death that there had been a cell check conducted and "No complaints", prior to the cell check taking place. When the check was made and Pat's body discovered by an Aboriginal police aide, the officer deleted the "No complaints" entry. The officer had indicated that he had intended to plead not guilty (*PR* p 219).

ordered to keep quiet, but persisted in calling out until she was allowed to sit in what might properly be called "the dock" with her son.[21] By the time the Commission hearing commenced it was in a very real sense her son who was on trial for Pat's killing.

Despite what people might assume, given the circumstances out of which the Commission inquiry arose, this woman's son was not a member of the police force, but a local Aboriginal man, Ashley James. James had been singled out by the police since that night, so many years earlier, as the person responsible for starting the fight;[22] he had not "pissed off" when told to do so by the off-duty officers (*PR* p 289). And he was now implicated as the killer of John Pat. It is revealing to recount how this situation came about.

The death of John Pat had been a major focus of demands for an inquiry into Aboriginal deaths in custody, and the Royal Commission was eventually announced in October 1987.[23] Despite the fact that Pat had died in 1983, and his alleged killers were tried and acquitted in 1984; in November 1987, just to labour the point, i.e. within a month of the Commission being announced, the Sergeant of the Roebourne Police Station had obtained startling new evidence from an Aboriginal witness implicating an unidentified Aboriginal man in the death of John Pat.[24] The witness claimed to have seen a fight immediately before the fight involving the police officers, in which an Aboriginal man had brutally punched and kicked Pat. In March 1988, the witness was reinterviewed in a pub by the now Assistant Commissioner (Crime) in Western Australia, Mr Bruce Scott. Mr Scott, incidentally, had been responsible for the original investigation into the criminal aspects of the Pat incident. While the witness was being bought

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21 Trans. pp 56, 60.

22 Ex W/19/151 Evidence of T Holl, Facesheets signed by PC Holl (a) L James Aggravated Assault & Resist Arrest, (b) R Smith Hindering Police, (c) J Pat Disorderly Conduct & Aggravated Assault; Trans. p 4702.

23 G Cowlishaw, "Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission", Vol 4 (1991) in *Politics, Prisons and Punishment - Royal Commissions and 'Reforms' : Journal for Social Justice Studies* (Special Issue Series) 101.

24 W/19/55 Evidence of T McPhee (a) Statement to Snr Sgt Court 25.11.87. The witness claimed that he had first raised this evidence with police in 1985. Assistant Commissioner Scott testified that the senior officer who had been advised of the evidence in 1985, had been well-known to him, and that within three months of receiving this information, that officer had been "boarded out" of the police force and had died three to four months after that. As Assistant Commissioner Scott's recollection as to the timing of his friend's retirement and death was significantly wrong, no finding was made as to the reason why there was no investigation of the witness' account of the earlier fight in 1985 (*PR* p 268).

drinks by Mr Scott a statement was taken (*PR* p 269). It was put to the witness by Mr Scott that the man he had seen fighting Pat was Ashley James. The witness agreed[25].

When the Commission hearing commenced in 1990, much time was spent following up the evidence of this alleged earlier fight. It was revealed by the witness he did not know who Ashley James was; indeed as it eventuated, he did not know John Pat either. The only other person to corroborate the details of the alleged earlier fight also did not know John Pat; and it became evident both witnesses must have been referring to fights on other nights, if in fact these occurred at all (*PR* pp 79-84).[26] But despite the almost total lack of substance to the allegation, it was common knowledge amongst the Roebourne Aboriginal community Ashley James had been identified as Pat's killer. And so it was James' mother who sat in the hearing room crying out, "My son is not a murderer".

Now I do not think this matter can be overstated, despite the fact the implications are certainly not stated in the Pat Report. The Aboriginal people of Roebourne had initially supported the Royal Commission into deaths in custody (*PR* p 1)[27]. By the time that Commission came to Roebourne, evidence had been produced by police investigations which constituted a Roebourne Aborigine as Pat's killer.

Earlier I referred to the evidence of a witness that on the night of Pat's death, police were blaming an Aboriginal man for the death, because they alleged the man had kicked Pat in the head. Some four years later, when the circumstances of Pat's death were to be re-examined, an Aboriginal man was again implicated according to the evidence obtained by police. Although there seemed to have been little substance to either allegation, both are significant as attempts to deflect responsibility for the violence perpetrated against an Aborigine onto individual members of that same ethnic group. It is also significant to compare these reactions to that of the Royal Commission.

On the morning after the release of the Commission Report, the hoardings for the only state-wide daily newspaper in Western Australia read, "John Pat

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25 Trans. 1550,1551; Ex W/19/55 Evidence of T McPhee, (b) Statement of Det Sgt Scott 22.3.83.

26 Ex W/19/55 Evidence of T McPhee (c) Statement to Royal Commission 5.2.90.

27 Ex W/19/176.

Death : No-one to Blame" (*West Australian*, 8 May, 1991).[28] Indeed the Commission had found that Pat's death was not the result of deliberate violence or brutality by the officers, as it had found in respect of every other death it investigated. But while the Commission did not find any criminal act had caused Pat's death, it did find that assaults had been committed against Aboriginal prisoners in the custody of the police, including John Pat. On my reading of the Report it would seem there is only one member of the police force who is now liable to prosecution for violence against Aboriginal people - and that is an Aboriginal police aide.

Methodology

* Discourse v. Coercion

In *Principles of Policing*, Sir Robert Peel stated:

> ...the extent to which the co-operation of the public can be secured, diminishes proportionately, the necessity of the use of physical force and compulsion for achieving police objectives.[29]

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28 In fact, what the Commissioner found was that "it was the whole process of European domination of the Pilbara that had brought about the situation [in Roebourne]" (*PR* p.46). Refer to D Brown, "Some Preconditions for Sentencing and Legal Reform" in *Social Theory and Legal Politics*, G Wickham (ed) Local Consumption Publications, Sydney, 1987, p 101 for comments as to how the attempt to shift accountability for crime to higher levels of social structure can produce abstentionism. It is also of note that Peter Coppin, the man who had claimed to have had his hair ripped from his head by police on the night of the fight, had been subpoenaed to give evidence before the Royal Commission. When I spoke to him at that time, it was clear the he was an alcoholic, but he told me proudly how he had given up drinking for five days so that he could give evidence before the Commission. As he had been threatened with perjury when he testified at the officers" trial, (Ex W/19/56f Testimony of P Coppin Trial of the Five Officers) this must have taken a great deal of courage and effort. Although no arrangements were made by the Royal Commission to have its Report on the death of John Pat delivered or explained to the Aboriginal community of Roebourne, there can be little doubt that the community was aware of the findings given its high media profile in W.A. Peter Coppin was reported missing some three weeks after the release of the Pat Report. A body found by prospectors near a station road north of Karratha ten days later was believed to be Peter Coppin. He was 41 years old (*West Australian*, "Autopsy on body", 11 June 1991).

29 Quoted in CDBR, p 111.

As co-operation diminishes the experience and awareness of law as being constituted by physical surveillance, coercion and brutality,[30] it likewise engenders a perception of law as rules or discourse. Because it is the operation of law in Roebourne that concerns me, I do not regard it as useful or accurate to conceptualise law as either rules of conduct or discourse. It is not to say law cannot or should not be conceptualised in such terms, but the utility of so doing will depend upon the context of the study undertaken. To conceptualise law as a system of rules may be useful to understand lawyers, judges and legal reasoning.[31] It is also true that law is often thought of as constituted by the words and principles found in statutes and judgements, and I would not deny one of the artefacts of legal processes is discourse - usefully analysed by theorists such as Burton and Carlen.[32] I do not think such an understanding is adequate to comprehend the operation of law in relation to those who do not conform to certain dominant social norms and behaviours.

To put it another way, unless someone has an internalised perspective of law, law is nothing other than the coercive power of its enforcers.[33] It would only follow that law is not known to such "outsiders", if one was prepared to acquiesce to the image of law projected by its own rhetoric. That is, an image of law as an essentially discursive practice; and an image employed by many legal practitioners. There is no reason why an internalised perspective of law should be privileged as being the only correct view of law, or the only view worthy of attention. Although analysts such as Burton and

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30 Of course, if one considers "the law" to be the preserve of the judiciary, what I am arguing runs counter to the traditional Westminster separation of powers doctrine. I would not deny the utility of recognising the division between the three arms of the State, particularly in so far as it denotes a power struggle between them. But to the extent that the doctrine occludes recognition of the very extensive commonality of interest which can exist between all arms of the State, it may also be ideological in a negative sense. In any event, I would very much doubt the pertinence of the distinction between "the law" and its enforcers to the Aboriginal experience outlined earlier.

31 V Kerruish, "Epistemology and General Legal Theory", in *Social Theory and Legal Politics*, G Wickham (ed), Local Consumption Publications, Sydney, 1987, p 18.

32 F Burton and P Carlen, *Official Discourse: on discourse analysis, government publications, ideology and the state*, Routledge & Kegan Paul, London, 1979.

33 An example, cited in Edmunds' work, is an account of the change of laws relating to Aboriginal drinking rights. One long-term Roebourne resident recalled when, "...drinking rights were out and everybody was, they're standing round down the town, the guys, they're pushing each other to see who was going to go into the hotel and get chucked out first." Once one man had gone in and been served without being "chucked out", there was "a mass exodus for the pub". Edmunds, above, n 19, p 107. The change in law, of itself, was not meaningful to the Aboriginal people; the criterion was whether they would be "chucked out" or not.

Carlen do not share altogether in a lawyer's perspective of the law, their analysis does coincide in significant ways with what might be called law's image of itself.

Burton and Carlen postulate that delegitimised modes of experience can be accessed by deconstructing official discourse.[34] By claiming the lived experience of marginalised groups can be accessed via the medium of official discourse, and like the authors of legal reports and judgments they criticise, Burton and Carlen themselves marginalise the discourses of "officially" marginalised people. They too make them redundant. Moreover, by also accepting the primacy of discourse over lived experience, the standpoint of such analysts coincides with a lawyer's view of law, in that both engender the attitude that law is best (or only) known through its own discourse. Such a position implicitly downgrades the knowledges of people whose contact with law is primarily experiential rather than intellectual. By concentrating on the rhetoric of law largely to the exclusion of its practice, analysts and lawyers alike tend to exclude the standpoint of those upon whom "the use of physical force and compulsion" is regarded as a "necessity".

What I hope to do here is indicate how the practices and rules of law combine to create a space in which legal discourse in the form of judgements and reports can be constructed. This space is created not only by the determination of who will be allowed to speak and what they will be allowed to say in the public arena of court proceedings, but also who will be able and prepared to speak and what they will be able and prepared to say. I am not here just referring to the doctrinal rules of relevance and admissibility, although these are significant. I am also concerned with people's lived experience in the form of prior encounters with the law, and the standpoint sensitivity of legal processes and practitioners, including the police. I am talking about history, coercion, intimidation and fear. I am also concerned with first-instance hearings and pre-court interactions as the most significant proceedings in law. As such I am reversing the traditional legal hierarchy.[35]

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34 Burton and Carlen, above, n 32, p 20.

35 I would not claim that in all contexts the earlier proceedings are more significant. In respect of law as ideology, ie. for those who tend to conform, the later hearings, with their concentration on legal argument and reasoning assume a greater importance. However, it should be recognised how much the lower court processes and pre-trial interactions contribute to the construction of legal discourse in higher courts. It is only because of the exclusions that take place at a lower level that this discourse can be manufactured and assume the form that it does. R Hogg, "Policy and Penalty" (1991) 4 *Politics, Prisons and Punishment - Royal Commissions and 'Reforms' : Journal for Social Justice Studies* (Special Issue Series) 1-26.

The end result of legal processes and rules is the curtailment or exclusion of knowledges gained from particular standpoints; that is, the absence of the actual perceptions, understandings and demands of marginalised groups from law. If one artefact of law is discourse, another is silence. And it is this enforced silence or absence which enables the authors of legal discourse to construct the legal fictions which come to represent marginalised groups in official discourse.

* Police Powers

There is one other point to make in the context of legal disputes involving police and marginalised groups. I have indicated earlier how the coercive force of the police is integral to law. It goes without saying police exercise extraordinary powers on behalf of law and which are legitimated by law. I am unable here to go into the vast power differential between police and marginalised groups, although I will give just one example from the Pat incident as I regard it as central to the Commission's findings in relation to deaths in custody. On the night of 28 September 1983, the off-duty officers and Aborigines were involved in what the Commissioner refers to as "at best a common street fight" (*PR* p 126). At some stage, and to quote the Commissioner again, what had been a situation where the "police supported their mates, [and] the Aborigines supported theirs" (*PR* p 136),[36] had become radically altered into a situation where the off-duty officers were effecting arrests, and therefore punching people in the execution of their duty. The Aborigines, who also continued to throw punches, then became subject to criminal prosecution for hindering police in the execution of their duty or resisting arrest.[37] The Commissioner considered that if the off-duty police officers had acted in exactly the same manner, as alleged by Aboriginal and other witnesses, it was likely that they did so as a "show of force...to frighten onlookers into desisting from their behaviour and/or noise" (*PR* p 167), and not in a criminally culpable manner. The Commissioner not only accepts the police power to radically redefine the nature of the events, but himself adopts

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[36] The quote continues "[the Aboriginal] Police Aide ..., who, in a sense, was in both camps supported both sides", in what is a very rare acknowledgment, in the Pat Report, that the position of police aide is not simply assimilable to that of the other officers. The Commissioner refers to the aide's belief that there was no difference between his duties as an aide and those of a police officer, and that the other officers treated him as a constable. What the Commissioner neglects to mention is any of the very major differences between these positions including the glaringly significant fact that as a police aide, this Aboriginal man could arrest Aborigines but never a white person (*NR* 29.7.7).

[37] It is of note that Peter Coppin was arrested, allegedly, for taunting police to fight him and assuming a boxing stance. Ex W/19/98 Evidence of D Patt; W/19/147 see n 17 above.

the same distinction in order to hold that the arrests and associated violence could be regarded as "individual incidents and not part of the fight" (*PR* p 137). Significantly, the power of the police to legitimate violence by reference to "their duty" goes unchallenged in the Report.[38]

* Standpoint

Although I would not doubt police may feel, and sometimes are, frustrated and constrained by laws they do not regard as appropriate, it is nonetheless a mistake to underestimate not only the power but also the practical knowledge police gain from being part of the legal system. They are familiar with laws, legal terminology and court proceedings, and are often able to articulate and justify their actions in terms are comprehensible to the author of legal discourse[39]. Their perspective becomes accessible and therefore may be incorporated into legal discourse.[40]

This accessibility is increased where the author of legal discourse shares the same standpoint as the police. This mutuality may exclude recognition of issues as being contentious which are more likely to appear so from other standpoints.[41] The identification between the Commissioner and some of the officers in the Pat inquiry was particularly and unusually strong. The Commissioner was not only white and male but had working-class sympathies, if not background, being a member of the Communist Party of

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38 R Hogg, "The Politics of Criminal Investigation" in *Social Theory and Legal Politics,* G Wickham (ed), Local Consumption Publications, Sydney, 1987, pp 120-140. Officers are limited in that they cannot use excessive force in making an arrest; however, the crucial point is that there would appear to be no limitation on their ability to bring themselves onto duty and thereby define the nature of their activities - and impose the consequences of this definition on others.

39 Edmunds, above, n 19, p 117.

40 K Carrington and P Morris, "Editorial", in *Politics, Prisons and Punishment - Royal Commissions and 'Reforms' : Journal for Social Justice Studies* (Special Issue Series) Volume 4, 1991, pp ix re the identification between police investigators and their police suspects.

41 An example, taken from the Pat Report, is where the off-duty officers claim to have witnessed a man punching a woman on a public street. The police claimed to have told the couple, whom they knew to be in a defacto relationship, to go home and to "piss off". The Commissioner stated that he could not criticise the officers for the exercise of their discretion in not arresting the alleged assailant; their attitude was "understandable". In the circumstances, which I will not go into here, the decision not to arrest may have been appropriate, but as a woman I find it extraordinary that no comment is made on the practice of dealing with a public "domestic" and allegedly violent dispute by telling the couple to go home or "piss off"(*PR* p 91). One is left with the impression that it is all right to beat a woman so long as it is not done in public.

Australia until 1983.[42] A number of the officers involved in the Pat incident were white, male and had working-class backgrounds.[43] The result apparent in the discourse of the Pat Report is a quite remarkable empathy for at least some of the officers. We are told why they acted as they did, what they were thinking, and indeed at one point the Commissioner claims "one can almost hear" some remark which he imagines these officers to have said to each other that night seven years earlier (*PR* pp 102-105). At the same time, a female witness who was shocked by the officers' behaviour that night is said to have had "an overly high expectation concerning police officers" (*PR* p 101). The officers are rendered explicable and above all human in the resultant legal discourse.[44]

In contrast to the similarity of standpoint shared by the police officers and the Commissioner, the Aborigines were obviously not white, and would not be considered working-class.[45] In orthodox Marxist terms they might be considered part of the non-productive and criminal class of the lumpenproletariat.[46] Such a categorisation might indeed fit easily with the opinions of the Commissioner, who was not only a member of the Communist Party, but who also as a Supreme Court Judge would have overseen the incarceration of many men and women. Be that as it may, where there was little if any mutuality between Aboriginal people and the author of the legal discourse, the inability of Aboriginal people to articulate

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42 P Havemann, "Social Justice in the Corporatist Welfare State" in *Social Justice*, Vol 16, No 3, Fall 1989, pp 167-180 at p 173.

43 The only members of the police force whose work-history is acknowledged in the Pat Report are those with working-class backgrounds - boiler-maker, carpenter, truck-driver. It is also noted that two of the officers were Vietnam veterans. Moreover, on the night of the fight the off-duty police had just attended a union meeting when they had the opportunity to "meet their mates... and have a few convivial drinks" (*PR* p 103). In the absence of any analysis of the role of the police in the repression of the working-class, this sounds like the stuff of which good working-class men are made.

44 Burton and Carlen, above, n 32, p 94.

45 Edmunds, above, n 19, p 29.

46 "First as a parasitic class, living off the productive labour by theft, extortion and beggary ... their class interests are diametrically opposed to those of the workers. They may make their living by picking up the crumbs of capitalist relations of exchange, and under socialism they would be outlawed or forced to work. Secondly, they are open to bribes and blandishments of the reactionary elements of the ruling classes and the State; they can be recruited as police informers ... The 'criminal classes', Marx and Engels argue, are the natural enemies of any disciplined and principled workers' movement ... Their highest forms of political action are mob agitation and street fighting." P Q Hirst, "Marx and Engles on Law, Crime and Morality" in *Critical Criminology*, I Taylor, P Walton, J Young (eds), Routledge & Kegan Paul, London, 1975, pp 203-232 at p 216.

"their side of the story" may well have been finally damning to their cause.[47] Rendered inarticulate and fearful not only by the processes of an oppressive and alien culture, but by a brutal legal system, Aboriginal people are also rendered opaque and inexplicable to the author of legal discourse.[48] Certainly we are rarely told why the Aboriginal people involved in the Pat incident behaved as they did, or what they thought. They are most frequently described in terms of their intoxication, and sometimes as resentful or hostile (*PR* pp 44, 47, 75, 76, 113, 126, 137, 140, 163, 179, 286, 291, 295). The police may have been ill-advised, provocative and so on, but they were knowable and human.

To summarise, the law can be conceptualised as an articulated system in both senses of the word. The police and their activities constitute one part of that system,[49] they are also articulate within that system. Generally, Aboriginal people are neither. It is within this context that the omissions made in the Pat Report can be understood.

The Conduct of the Inquiry

Before getting to the Report, it is important to indicate something of the treatment of Aboriginal people throughout the Commission hearing. The result might aptly be described as variations on the theme of being seen but not heard. A local Aboriginal woman, who was employed as clerk of courts, was ignored while the white lawyers from Perth argued about the correct spelling of Ieramugadu; another Aboriginal employee of the Commission was ignored while the white lawyers from Perth argued about what a witness had said, although the employee, being seated next to the witness, was in the best position to hear him. That this conduct was tolerated by the Commission may

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47 In fact, few Aboriginal witnesses were called in the Pat inquiry (*PR* pp 2,3). Most had given evidence on numerous occasions before, and it was decided little could be gained by calling them at this stage to go over their evidence again (*PR* p 26). It was clear that the Aboriginal people were not eager to again submit themselves to formal court proceedings. Indeed, it was something of a dilemma to insist that any Aboriginal witness be called, given the treatment that they would be subjected to as witnesses in formal proceedings. See p 7; also Trans. pp 218-221, 551-572.

48 Their evidence is rarely considered reliable; refer to the Pat Report itself. It is of note that the current Assistant Commissioner of Police (Crime) said of one of the few Aboriginal witnesses regarded as credible (*PR* p 179), that he "wouldn't have put her as an Aboriginal"; that he knew she was "part Aboriginal but ... I was speaking more of the uneducated type of person". Trans, p 3277.

49 I am not thereby claiming that what an officer purports to do in the exercise of his/her duty is therefore lawful, any more than I would claim that judges' decisions are always right or proper according to law.

be justified in terms of who had been granted "leave to be heard", but it is nonetheless true that no Aboriginal person spoke during the hearing of the Pat inquiry except as a witness who was first sworn and then interrogated. What might at best be described as the insensitive treatment of Aboriginal people went to such extremes that the clerk of courts was expected to locate and display photographs of John Pat's dead body and autopsy. Not only had this woman personally known John Pat, but according to her beliefs, it was inappropriate even to say his name, let alone be forced to look at images of his dead body and mutilated corpse. Perhaps such conduct was tolerated by the Commission in the interests of equal opportunity.

The treatment of many witnesses during the Pat inquiry, both black and white, must have resembled trial by ordeal rather than what many might like to assume are the more "civilised" processes of our legal system today. Witnesses were made physically ill by stress at being required to face what is euphemistically referred to as "vigorous cross-examination"; some shook and were barely able to speak; some spent hours being interrogated; were accused of lying and had their character impugned.

For Aboriginal witnesses, in particular, the ordeal must have been alienating and inhibiting. I do not doubt the ignorant manner in which Aboriginal witnesses were treated may also be justified in legal terms. But it was, ironically, an exhibit before the Commission which sets out the difficulties for unassimilated Aboriginal people in giving evidence in formal court proceedings.[50] According to the practice of such people, when discussing serious matters, they do not look people in the eye, do not speak loudly, and if repeatedly asked the same question will endeavour to provide a more satisfactory answer to their inquisitor. Yet on the standards of white law, such behaviour would automatically constitute the witness as unreliable and lacking credibility. Returning to Aboriginal practice, individuals are not isolated, made to speak English, sworn on the Christian bible and interrogated.[51] For many Aboriginal witnesses who are required to give evidence according to the formalities of court proceedings, the ordeal must at the very least seem puzzling. If their opinion was really being sought this would hardly be the way to go about obtaining it. It says much about the Royal Commission inquiry into Pat's death that the conduct of the hearing was significantly modelled on the traditional and formal procedures of white

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50 General Exhibition: G/W/6 Dr J Kearins, "Factors Affecting Aboriginal Testimony".

51 Edmunds, above, n 19, pp 117-118.

law.[52] While the Commissioner does make some sympathetic comments about the problems for Aboriginal witnesses in formal hearings (*PR* p 113), it is nowhere acknowledged that this is how he chose to conduct his own inquiry. Nor is it acknowledged how in this hearing, a number of Aboriginal witnesses were virtually rendered mute, and a number of Aboriginal people were removed from the public gallery by order of the Commissioner because they interjected during Commission proceedings.

The Report

* Representation of Aboriginal People

In the Pat Report, the Commissioner emphasises the extent of the evidence before him: 12,000 pages of documents and 42 days of hearings resulting in over 5,000 pages of transcript (pp 23, 24). He points out that there were many issues that could not be dealt with despite the length of the Report. My project is not to criticise that there were omissions made; of course there must be. Rather it is to examine the nature of the evidence included in the Report in the context of what was left out; it is an analysis of what receives public and formal acknowledgment in official discourse, as opposed to what is left unsaid.

Unfortunately, because of the length of the Report, I shall have to largely limit my comments to what the Commissioner refers to as the "essential findings" (*PR* p 13) and then only to those concerning misconduct by the

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52 Although the policy of the Commission was not to recommend the prosecution of any individual, see pp 10-11, in effect, the Commission was conducted very much along the lines of a criminal trial. Evidence of prior internal investigations of officers was not admitted; Trans. pp 3638, 3741, 3742 and nor was witness' evidence as to the behaviour of the particular officers on other occasions. Trans. pp 879-895. Moreover, all Counsel representing police interests were regarded as having an entitlement to all materials available to Counsel Assisting the Commission, Trans. pp 1666-1677. This included witness' statements which had been made to the Commission, and was despite the fact that all officers called before the Commission, bar two, failed to make any statements to the Commission. Certainly, in the current W.A. Inc. Royal Commission, it has been made clear that access to other witness' statements is only available to those who themselves make statements to the Commission (Ruling 11 June 1991). It is also of note that non-police witnesses in the Pat inquiry were not shown the same courtesies. Officers raised allegations against other witnesses, including assertions of improper and criminal conduct, Trans. pp 3834, 3835, 4281 for the first time in the course of their evidence before the Commission. In one instance, the witness impugned had already given evidence, and as these allegations had not been put to her, had been denied any opportunity to respond. When Counsel Assisting subsequently sought to tender a statement from the witness in response to the allegations, Junior Counsel for the Police Officers successfully argued to have the statement excluded, Trans. pp 5192-5204.

police. Before I get to these findings, I first comment briefly on the introductory remarks made in the Report. These are significant in that they, along with the summary of findings, set the context for the following substantive chapters.[53] In his introduction, the Commissioner remarks that he hopes to have provided answers to some of the questions raised by Pat's death, and thereby to have lessened the "anguish, heartbreak and uncertainty" felt by Pat's family and community (*PR* p 24). Indeed, he claims that factual answers were what the Roebourne Aborigines wanted, and that this was what he had tried to provide (*PR* p 30).

I must admit to being sceptical of a claim that what the Roebourne Aboriginal community wanted was factual answers to the questions raised by Pat's death. I find it difficult to imagine that people who had personally experienced or witnessed many of the events of that night had waited seven years for someone who had not been there to come along and tell them what had happened. I am not claiming that Aboriginal peoples' recollections and perceptions were necessarily correct, simply that they would regard them as being so. Indeed, at least as a matter of law, the Commissioner himself should have paid some regard to those recollections and perceptions before arriving at his own conclusions about what happened that night.

In the National Report it is said that many Aboriginal people assumed that "many, if not most, of the deaths [in custody] would have been murder committed if not on behalf of the State or at least by officers of the State" (1.1.3).[54] This would indicate that Aboriginal people at least thought that they already had the factual answers to deaths in custody. There are two matters which were omitted from the Pat Report that would tend to confirm that the Roebourne Aborigines were, in this respect, no different to other Aboriginal people.[55] The first is the fact that a few days after Pat's death in police custody, when an Aboriginal woman was taken into custody by the police, the Roebourne Aborigines rioted, and continued to riot until police released their prisoner. This would indicate to me that the Aborigines held police responsible for Pat's death. However, the Commissioner regarded this incident as beyond the scope of his inquiry.[56]

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53 Burton and Carlen, above, n 32, p 71.

54 Havemann, above, n 42, pp 171, 172.

55 Edmunds, above, n 19, p 155.

56 Trans. pp 2443, 2444.

The second matter, I can refer to only obliquely as it was expunged from the Commission records by order of the Commissioner. During the hearing, a statement from Mavis Pat, John Pat's mother, was tendered as evidence.[57]. Junior Counsel for the Police Officers objected to a comment in that statement and requested that it be deleted. Indeed I am only able to refer publicly to this matter at all because Junior Counsel omitted to request that his application and argument be suppressed from publication, as was normal practice during the hearing. His argument was that the comment identified his clients, the police officers, "and implies some wrong-doing on their behalf". The comment was to be deleted precisely because it indicated Mavis Pat thought she knew what had happened to her son.[58] The Commissioner ordered that the comment be deleted, and if I were to tell you what Mavis Pat said, I would risk a fine of up to $2,000 or 12 months imprisonment (*Royal Commissions Act 1973*, ss. 6D(3),(4)).

I am not taking issue with the legalities of the Commissioner's rulings to exclude recognition of the riot or Mavis Pat's comment. What I am trying to highlight is how such decisions can facilitate the construction of an image of Aboriginal people in legal discourse as passive and dependent; in contrast to a people who were not only capable of reaching and articulating their own factual answers, unaided by white law; but also capable of actively and independently pursuing strategies of resistance based on these factual answers.

If I am right, the Aboriginal people of Roebourne did not want the Commissioner's factual answers; they had their own. My understanding of the Aboriginal agenda, is, as it was referred to in the National Report, "a belief by Aboriginal people... that foul play or murder was responsible for the deaths and [that] the culprits must be caught" (NR 10.4.1). And yet in the Pat Report there is no recommendation made for the prosecution of any individual; indeed, no such recommendation is made in any Commission Report.[59] I am not thereby claiming the Commission should necessarily

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57 Ex W/19/176.

58 Trans. pp 5206, 5207.

59 It is true, as was noted by Carrington and Morris, that Commissioner Wootten did recommend that prosecution of the police officers involved in the killing of David Gundy be considered. On the face of it, recommending prosecution and recommending its consideration, may not seem all that significant. But where, as was also noted by Carrington and Morris, there is "a demonstrative lack of political will and commitment to securing justice for Aboriginal people", the distinction amounts to much more than pedantry or etiquette. Certainly it means that it can be said in the National Report that all Commissioners were of the view that it would be

have "found" culprits and recommended their prosecution. What I am claiming is this is what Aboriginal people wanted the Commission to do, and it is to misrepresent their position to state otherwise. I would not dispute the Commissioner may well have felt duty-bound to provide his own "factual answers" to the questions raised by Aboriginal deaths in custody; but it is wrong to project this as satisfying Aboriginal demands. By doing so the Commission not only misrepresents Aboriginal demands, but fails to honestly and fairly confront them. In this respect it can be seen as part of a process according to which "Aboriginal people were [considered] inferior and were unable to make decisions affecting themselves, that we knew what was best for them, that we had to make decisions affecting them" (*NR* 1.7.23) - albeit covertly.

If I am right, the Commission neither expressly recognises nor seeks to address Aboriginal demands. The point is not simply that no prosecution was recommended in any Commission Report, it is that the Reports were presented as not even being designed to assess the issue of possible prosecutions. The Commissioner sets out his reasons for declining to recommend prosecutions in the National Report, although he acknowledges he was expressly authorised to make such recommendations (3.5.9). Whatever his stated reasons, and whether one finds them convincing, it is nonetheless highly revealing to determine what prosecutions could have recommended on the basis of findings made in the Pat Report, had the Commissioner considered it appropriate to do so.[60]

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inappropriate to recommend that proceedings be instituted against persons in respect of whom adverse findings had been made (NR 3.5.5). It is of note, too, that of the 339 recommendations made in the National Report, almost one third of them are formulated in terms of recommending "consideration" or "recognition" of the proposals. This, of course, means that the recommendations can be said to have been "implemented" in the absence of any substantive change to policy or practice. Havemann above, n .... discusses the significance of such work as that of the Royal Commission in terms of its capacity to embarrass governments. Certainly this capacity is blunted by a policy of recommending merely that "consideration" be given to its proposals.

60 It should be noted here that criminal prosecution of police officers, quite apart from its significance to Aboriginal people, is also likely to be a matter of particular significance to police officers given the nature of their work. Moreover, the issue of prosecution is not merely theoretical. As a response to the controversy which arose out of the Pat Report, a cabinet sub-committee has been established to assess precisely the issue of what prosecutions can be laid on the basis of findings made in the Royal Commission Reports. Originally conceived by the Premier as an independent task-force, with representation from the Aboriginal Legal Service (*West Australia*, "State to set up inquiry" 10 May 1991) the cabinet of the W.A. Labor Party apparently forced a change, claiming that such a body would not be independent (*West Australian*, "Cabinet split over black deaths probe", 13 May 1991). (Note also the publication in the meantime of a full-page advertisement by the W.A. Police Union of Workers, "NOTICE

* The "Essential Findings"

A brief overview of the "essential findings" made in respect of the police in the Pat Report is as follows. The police activities on the night of the fight were unprecedented and ill-advised (*PR* p 14); one officer was largely responsible for the start of the fight and his actions were "ill-advised, unprofessional and provocative" (*PR* p 15); an off-duty officer caused Pat's fatal injury during the course of the fight (*PR* pp 16, 17); after the fight an unidentified officer kicked Pat, possibly in the head (*PR* p 17, 162); at least three of the five Aborigines arrested were assaulted by officers back at the police station and the Commissioner noted he did not accept the evidence of the officers relating to this incident as being necessarily true (*PR* pp 17-18); one officer sent an Aboriginal police aide to inspect the juvenile cells over an hour after he had discovered the body, although he denied this; and finally, despite medical evidence that the presence of severe injuries to Pat's ribs and aorta were indicative of a resuscitation attempt, and the officers' denial that they had used excessive force against Pat, the Commissioner declined to make a finding that the officers had attempted to resuscitate Pat, saying that he was not at all convinced that the officers' evidence was true (*PR* pp 18-20).

* Appearances and Reality

It is of note that at the conclusion of his introductory comments and summary of findings, the Commissioner specifically makes mention of the allegation by Counsel for the Police, Mr Singleton Q.C., that the Commissioner and Counsel Assisting the Commission exhibited "perceptible bias" against his clients (*PR* p 30). It is interesting to consider the function served by this specific reference to alleged bias against the police in the context of the likely practical outcomes of the Pat Report. Certainly, it adds to the impression that the findings made against the police were harsh on occasion and highly damaging overall. If one was to adopt the criterion of

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to the Premier of Western Australia", putting the Premier on notice that the Union would not "tolerate any member being made a scapegoat to appease the Aboriginal Lobby Group...") The independent sub-committee, as currently constituted, consists of the Commissioner of Police of W.A., Brian Bull, referred to earlier; the Executive Director of Prisons, Ian Hill; and the Crown Solicitor, Peter Panagyres (*West Australian*, "Premier reneges on tough probe stand", 14 May 1991). The conflict of interest for both the Commissioner of Police and the Director of Prisons is apparent; in respect of the Crown Solicitor, refer to the Western Australian Regional Report of the Royal Commission, where Commissioner O'Dea sets out details of the challenges to Commission jurisdiction and authority by the Crown Law Department of W.A., amongst other matters (pp 37-40).

which prosecutions could be recommended on the basis of findings made, as I intend to do, one might find that the differences between Counsel for the Police and the Commissioner would seem more apparent than real.[61]

What is immediately apparent, is that much which sounds highly critical of the police is of little consequence as far as prosecution is concerned. One should not act in a manner which is ill-advised, provocative and so on, and if you claim to be at work, you should not act in an unprofessional manner. Yet none of this would constitute criminal activity. Indeed, no criminal culpability attaches to a finding by a judicial officer that he does not regard a witness's evidence as being necessarily true, or even that he was unconvinced that it is true. An important dichotomy between the apparently critical nature of the findings and their practical implications for the officers involved are those concerning the issue of the attempted resuscitation, and this point, although complicated, deserves some attention.

* The Resuscitation Attempt

Someone not familiar with the evidence in the Pat case would be likely to assume that a finding that there was an attempt to resuscitate Pat would be favourable to the police. As it was only the police who had access to Pat, if there had been an attempt to resuscitate it would show them not only to be concerned and caring; but it would also explain the severe injuries to Pat's ribs and aorta which might otherwise be taken as proof of the officers' brutality during the fight and afterwards. Thus, when it appears the Commissioner bloody-mindedly and against the probabilities established on the medical evidence, refuses to make such a finding, one is likely to conclude at the very least he is treating the officers harshly. In relation to this specific finding (*PR* p 18 (No 14)), the Commissioner's apparent reason for rejecting the resuscitation allegation was he did not necessarily believe the police when they claimed they had not used excessive force against Pat; it seems the Commissioner rejected the allegation because he thought that the police may have been lying when they denied they had been brutal in their dealings with Pat during the fight and afterwards.

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[61] Incidentally, if the name of the Counsel for the Police sounds familiar, it may be because Mr Singleton was named in the notorious *McInnis* case by Justice Lionel Murphy, as the solicitor/barrister who had, according to Murphy J., apparently neglected to apply for legal aid for his client until the day before his appeal trial. When funding was refused, Mr Singleton declined to represent his client, see *McInnis v R* (1979) 143 CLR 575 at 584. Of course this occurred before the legal profession in Western Australia considered it appropriate to honour Mr Singleton by nominating him as Queen's Counsel.

What is not made clear in this context is the officers had themselves always denied they had attempted to resuscitate Pat. It was submitted on their behalf the injuries to Pat were caused during the fight, accidentally, when an officer fell on him (*PR* p 142). Therefore by refusing to find resuscitation had been attempted the Commissioner was in fact acting in accordance with the police submissions.[62] In any event the question remains as to why the officers would deny attempting to resuscitate Pat if in fact they had done so. For the reasons given earlier, it would appear to be in their interest to claim they had attempted resuscitation; if they deny it, this must only be proof of their honesty. Again this is a conclusion one would make only in the absence of an awareness of the issues of the Pat case.

The forensic pathologist who conducted the autopsy on Pat and alerted the police investigators to the likelihood of a resuscitation attempt because of the nature of the injuries to Pat's ribs and aorta, was also surprised by the state of Pat's body; he thought it had been washed (*PR* pp 63, 64, 68).[63] The police investigators, accepting the officers' evidence that they had not interfered with the body, attributed the cleanliness of Pat's body to his being "noticeably clean compared to other Aborigines" and also as proof that witnesses' accounts of how Pat had been savagely beaten by police were exaggerated and false.[64]

The Commissioner himself dismissed the evidence relating to the surprisingly clean state of Pat's body in one paragraph; saying it was cleaned in the process of a large officer falling on Pat twice, brushing against him while pinning him to a van and while dragging him to the cells. Apparently, the Commissioner had no difficulty in finding that a forensic pathologist who he described as "experienced and able" (*PR* p 79), was unable to tell the difference between a body that had been washed and one that had been

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62 The Commissioner declined to make a finding that resuscitation had been attempted, and instead found that the injuries to Pat's aorta and ribs were the result of one of the following: a resuscitation attempt; or being fallen on; or the excessive use of force (*PR* pp 227-228). That is, a finding which is meaningless as far as being a basis upon which to found any criminal prosecution for the infliction of those injuries. The Commissioner also found that at least one white officer and possibly others were aware of Pat's death over an hour before the Aboriginal police aide was sent to inspect the juvenile cells and discovered the body. He does not, however, explain why it was that officer and possibly the others, waited for over an hour before sending the police aide to check the cells, even though this was in direct breach of orders (*PR* p 223). Indeed, the Commissioner does not explain why the officer or officers denied finding the body at all.

63 Ex W/19/150 Evidence of J Hilton (Forensic Pathologist).

64 Ex W/19/156P 21.5.84 Report of Snr Insp. Balcombe to Chief Supt Bull.

incidentally, accidentally and haphazardly cleaned in the process of being fallen on, brushed against and dragged along. It would seem Pat was not wearing a shirt while he was fighting the police, and on police evidence, he had been to the ground on five separate occasions, once when he was rolled over in the dirt. There was blood on his jeans, in his hair and down his throat, but there was no blood whatsoever on his torso and little on his face. There was also a complete absence of grit or dirt on his body (*PR* pp 234, 235).[65] A finding that there had been no illegal tampering with Pat's body in this context strains credibility. This strain would only have been compounded by a finding that resuscitation had been attempted.

On the basis police had attempted to resuscitate Pat, their denial could only be explained as part of a cover-up of some other, less commendable, activity. On the evidence available in the Pat case, it seems that the irresistible conclusion would have to have been that when the attempt to resuscitate failed, one or more of the officers cleaned the body, removing any evidence that Pat had died as a result of trauma and, in particular, as a result of a violent struggle with police. Witnesses claimed when they viewed the body in the cell, it was in a natural sleeping position, and Pat did not look like he had been beaten up (*PR* pp 234, 235).[66]

As I have indicated, the Commissioner declined to find that resuscitation had been attempted or Pat's body had been cleaned. In the end little more can be made of this than that different people will draw different conclusions from the same information. Although I do think it important to be aware of what is omitted; in this context the "editing" and placement that occurs so that the evidence published in the legal discourse fits the conclusions of the author of legal discourse and creates the desired impression.

It would also be a mistake to fail to appreciate the degree of control that is exercised not only over which conclusions are allowed to be made public, but also what information will be allowed to become available at all. As the person responsible for drafting part of the written submissions on behalf of Counsel Assisting the Commission, I was asked to delete the recommendation

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65 Ex W/19/150 Evidence of J Hilton (Forensic Pathologist); W/19/164 Evidence of T Flatko-Rulo (Forensic Analyst).

66 As indicated earlier, the Commissioner found that over an hour after the death had been discovered, the Aboriginal police aide was sent to check the juvenile cells. It was possible that the aide would discover Pat's death, but also, given the appearance of the body, that he may have failed to do so, in which case the Aboriginal aide would be implicated for not conducting an adequate cell check when the death was discovered the next day.

that a finding be made that resuscitation had been attempted. I was told that in an unofficial conversation, the Commissioner had been incredulous that a finding of resuscitation was going to be recommended and referred to it as "the last card in the pack". By the time the final - and public - submissions of Counsel Assisting were formally received by the Commissioner, it was recommended that no finding be made that resuscitation was attempted.[67] Perhaps it was hoped that no-one would raise the allegation publicly and the issue could be avoided.

As it turned out, of the other written submissions received relating to the events of that night, three of which were on behalf of the police, the fourth, from the Aboriginal Legal Service, recommended a finding that resuscitation was attempted. Thus it was that some three months after the hearing concluded, and the police in particular had given their evidence, further medical evidence was obtained. Dr Ross James, Forensic Pathologist of South Australia wrote to me on 2 July 1991, and has authorised me to publish the contents of the letter. He stated he was requested to provide an opinion to the Royal Commission, relating to aspects of the death of John Pat, by letter dated 18 September 1990. He did so on 19 September 1990. If you were to refer to the exhibit list appended to the Pat Report you would find that there is no reference to Dr James' opinion. It was not exhibited and therefore is not a public document. It is true even such apparently relevant evidence may be "properly" excluded without breaching the technical rules associated with the admission of evidence. The point is that when this occurs, as it did in this instance, there will be no public record of the existence of this evidence, let alone the procedures according to which it was excluded and indeed what its contents are. If I were to now divulge the contents of the opinion, I may be in violation of the provisions of the *Crimes Act,* and subject to a penalty of up to two years imprisonment (*s 72*). If you were to seek to gain access to the opinion yourself from the Australian Government Archives, where the Commission documents are currently held, you may be told, as I was, that unless you can obtain the permission of the Prime Minister and Cabinet, you will have to wait 30 years to gain access to it.

My point in referring to these matters is that when it is said in the National Report that "no effort was spared to get to the truth" (NR 1.2.1), it is important to be aware that what is presented as "the truth" in legal discourse

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[67] Submissions on behalf of Counsel Assisting p 403.

should not be accepted at face value.[68] The decision not to make a finding that resuscitation had been attempted is one that could hardly be considered damaging to the police. It should be known that what stands as the Commission's truth is the construct of an institutionalised hierarchy and technical rules which are not normally associated with the pursuit of truth.

* The Fight and the Arrests

Briefly, in relation to other findings made in the Pat Report, it is of note that as for the fight on the night of the 28th, the Commissioner declined to make any finding that the police used any excessive force or committed any criminal act against Pat. He was able to make a finding that it was in this context that Pat received his fatal injury; that is, the injury was inflicted during the fight in circumstances in which criminal liability could not be established. The Commissioner also declined to find that the police used any disproportionate force against any Aborigine in the course of the fight.[69]

As to the arrests, the Commissioner considered that despite the intrusion of violence into the arrest of two Aborigines that night, it was unnecessary to make any findings as these both occurred after the arrest of Pat (*PR* p 166). In relation to Pat's arrest itself, the Commissioner made a finding that an officer had kicked Pat, possibly in the head, although he did not identify the officer because of inconsistencies in Aboriginal witnesses' accounts. Now, there were inconsistencies in the evidence relating to virtually every aspect of the Pat incident, and the Commissioner stated that he would only make findings where corroboration was available (*PR* p 131). While the Commissioner did refer to one of the witnesses to the alleged kicking, who

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[68] Indeed, that reference in the Report continues, "All contemporary documents were subpoenaed and studied. Relevant people were interviewed wherever possible and in the great many instances that was possible. *In many cases postmortem reports were reconsidered by eminent pathologists.*" (My italics). Of course, what is not said was that not all such reconsiderations actually made it into the public records as evidence "before" the Commission.

[69] It is interesting to consider why the standard adopted by the Commissioner is one of excessive or disproportionate force. On my understanding of the law this notion is only relevant in consideration of the legal defences of provocation and self-defence, or, as mentioned earlier, in relation to the officers' duty when making an arrest. While the officers may have considered their activities as coming within one of these categories, there is no reason given in the Report as to why the officers' view should be assumed to define the situation at law. Indeed, according to the Commissioner, an officer was held to be largely responsible for the fight; the police, like the Aborigines, were "helping their mates" in what was at best "a common street fight"; and they were not acting in their official capacity and effecting arrests until after the fight. It is difficult to see the relevance of excessive or disproportionate use of force in this context.

was "subjected to long and vigorous cross-examination...and did not resile from her general account of the incident" (*PR* p 164); what he does not mention is that the officer this woman so adamantly identified, had blood on his boots, and that this blood was of the same group as John Pat's.[70] When asked, this officer was unable to explain the presence of the blood on his boots.[71]

* Unloading the Vans

In the result there is no basis for recommending the prosecution of any officer for violence on the findings made in relation to the injuries to Pat's ribs and aorta, the fight or the arrests. There is a number of findings made in relation to the removal of prisoners from the vans which clearly implicate police for criminal assaults. In relation to these incidents, the Commissioner made findings about the removal of all prisoners, whether occurring before or after Pat, as "tending to throw light on the attitude of the officers" (*PR* p 69). These findings are detailed and severe; directly implicating the Aboriginal police aide, and two of the white officers. It is further conceded that the other white officers may have been involved in some rough treatment of prisoners. One of the incidents identified by the Commissioner as assault consisted of the possibly unintentional, but overly authoritarian, removal of Pat from the van (*PR* pp 180-203). Given the severity of such findings, it may seem unnecessary to harp about the lack of findings relating to the other incidents of that night.

There is one crucial difference between the practical consequences of findings made in relation to the unloading of the vans and the other events of the night of the 28th. There is some mention made in the Report of an unsuccessful private prosecution of one of the white officers, during the course of which the other three white officers concerned in the Pat incident were granted immunity from prosecution in relation to the incidents referred to in the course of their evidence (*PR* p 274). What is not made clear in the Report, is that this immunity from prosecution related precisely to the incidents at the police station during the unloading of the prisoners from the vans.[72] The result of the unsuccessful prosecution and the immunities granted is that it would seem not one white officer can now be prosecuted over events relating to the removal of prisoners from the vans; that is, the

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70 Ex W/19/164 Evidence of F Vlatko-Rulo (Forensic Analyst).

71 Trans. p 3613.

72 Ex W/19/4 Court File *Smith v Young* No 1829/84 13.5.85.

specific events about which the Commissioner had made such specific and apparently damaging findings. It would seem it is only the Aboriginal police aide who can now be prosecuted for the violence inflicted on Aborigines in police custody.[73]

What can I say except that Aboriginal people are extraordinarily unlucky? If the Commissioner had considered that the behaviour of the officers throughout the fight and the arrests had reflected on their attitude, instead of just their behaviour while unloading the vans, the outcome may have been very different indeed.

Conclusion

If one function a Royal Commission can serve is in the politics of embarrassment, as posited by Havemann, it may be well to ask who will be embarrassed by this Report? It seems to me that it may be those who seek to complain and deal with police ill-treatment of Aboriginal people. In response to the Aboriginal demands that "the culprits must be caught", the law, this time in the form of the Royal Commission, offers them yet another Aboriginal "culprit". I would not deny that Aboriginal people can be violent; nor that Aboriginal violence is a real problem for Aboriginal societies. Such violence may be aggravated by other white practices, for example, in Roebourne, shifting people to the "Aboriginal Village", "without regard to their wishes or custom, or the regulatory mechanisms implicit in the living

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[73] The Commissioner did find that one white officer had lied (*PR* pp 224, 225), although this is not made explicit in the "essential findings". Given the number of times the Commissioner was unconvinced, did not accept, rejected, and did not find the officers' evidence to be necessarily true, it is interesting to theorise about why this particular officer has been singled out amongst his fellow officers to bear the appellation of liar. Certainly, as the Commissioner notes, this officer was distressed at the Commission hearings, and apparently was particularly distressed on the night of Pat's death (*PR* pp 222, 221). I suppose that this distress might be construed as some sort of sign of a "guilty conscience". But it should also be noted that this officer, unlike the other white officers involved in the Pat incident, had been in Roebourne for three years at the time of the death; that is one year longer than the requisite two year posting. He said that he enjoyed working in the town (Trans. pp 3001, 3002), and I was told that he had previously been liked amongst the Aboriginal community. In fact, the Commissioner himself notes that this officer did not strike him as being the sort of man to commit a particular act, which would have amounted to "deliberate and callous disregard" for the welfare of Aboriginal prisoners (*PR* p 193). The implication is that the other officers present may well have been. In this context the possibility of prosecution, just like the threatened disciplinary action against the officer who was not involved in the fight or unloading the prisoners (refer to note 2), may well act to convince any officer who was not completely emersed in the values of police culture that it was indeed the case that all the officers' fortunes stood or fell together.

arrangements on the old reserve".[74] It is nonetheless true Aboriginal violence is not just a construct of law. What I am claiming is the relation between actual Aboriginal violence and its construction at law can be quite tangential. On a wider perspective, the "truth" reflected in legal discourse highlights and manipulates the violence of Aboriginal society, by removing it from the context of the violence and oppression that is waged against Aboriginal people; in particular by seeking to simultaneously deny and legitimate police violence against Aborigines. On the particular, more doctrinal level, individuals, such as Ashley James and the police aide, can be constituted as criminally violent by law for reasons which are quite unconnected with any violence they may or may not have perpetrated in relation to the facts at issue in the particular case.[75]

If we are to be aware of the processes by which the law, including Royal Commissions, is able to constitute an identity for ethnic minorities, it is essential to reject the image of law as a neutral system of rules according to which alternative views are articulated and arbitrated. The law is not neutral, particularly in a dispute involving police and ethnic minorities. Nor is it a system of rules rather than a coercive force. Finally, it is necessary to be

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74 Edmunds, above, n 19 p 105.

75 It is the same processes which have resulted in a National Report into Aboriginal Deaths in Custody, in which the over-riding impression of police brutality which emerges, where such a phenomenon is recognised at all, is one indelibly coloured by the violent mistreatment of Aboriginal people by Aboriginal members of the police force: No deliberate brutality or violence by officers (NR 1.2.2); Police are said to have *mediated conflict between Aboriginal people and Europeans in Australia* (NR 10.5.3); Police are described as *intermediaries* (NR 10.5.12); and as equivalent to the "hostile blacks" of the frontier days, who are said to have been the Aboriginal version of the police (NR 10.5.5); the emergence of Aboriginal police viewed as adaption and cooperation to changed historical circumstances (NR 10.5.18); Police said to consider Aborigines a *nuisance* (NR 10.5.13); Police as *de facto arbiters of two sets of law in conflict* (NR 10.5.6); Police *had to listen first* to European demands to control Aborigines; as part of Non-Aboriginal community Police risked ostracism if too close with Aborigines; a good officer, according to white community, was one who *knew when to shut his eyes* (NR 10.5.7); Police were *required* to work with the politically powerful (NR 10.5.8); Police ordered around Aborigines *at the request* of Non-Aboriginals (NR 10.5.9); Police as paternalistic and *sincerely wanting to help, but overruled* by employers and government departments (NR 10.5.14); Queensland Native Police as having a reputation for violence; trackers having used their position to attack their own enemies; although they were sometimes the scapegoats of *overzealous* Non-Aborigines (NR 10.5.20); Black Police used membership of the police force to their own advantage; including killing other Aborigines (NR 10.5.19); lawmakers are the ones to be criticised (NR 13.2.5); *it also needs to be noted* that complaints re police officers have not been restricted to Non-Aboriginal Police (NR 13.2.3). (My italics.) Chapter 13 Part 4 of the National Report does appear to offer a diametrically opposed interpretation of police violence and culture, although it is also of note that no recommendations are based on this interpretation in the Report.

sceptical as to how far the legal system facilitates the articulation of alternative views, as opposed to silencing them, and thereby enabling the manufacture of the legal fictions which take the place of marginalised groups and individuals.