



Law Council
OF AUSTRALIA

ADDRESSING INDIGENOUS IMPRISONMENT

National Symposium

DISCUSSION PAPER

November 2015

TABLE OF CONTENTS

Introduction	4
Background.....	5
1 The Numbers	8
Overview.....	8
Speaker profiles.....	10
2 The Drivers	11
Overview.....	11
Cognitive disability	13
Youth Imprisonment.....	14
Indigenous women.....	15
Speaker profiles.....	15
3. Short-term solutions	17
Overview.....	17
Speaker profiles.....	20
4. Buy-in	22
Overview.....	22
Speaker profiles.....	23
5. Existing Programs.....	25
Overview.....	26
Speaker profiles.....	27
6. Working Together	29
Overview.....	29
Speaker profiles.....	30
Attachment A: Profile of the Law Council of Australia.....	32



INTRODUCTION

Numerous reports over the last 20 years have indicated that Indigenous incarceration rates are extremely high and have been steadily rising. Most recently an Australian Institute of Criminology report¹ found that the proportion of Indigenous prisoners has almost doubled over the 20 years since the Royal Commission into Aboriginal Deaths in Custody (RCADC). In 1991, Indigenous people represented around 1 in 7 people in Australian prisons (14 percent). Currently, Indigenous people are over 14-times more likely to be imprisoned, representing 26 per cent of the prison population and 1 in 5 deaths in custody, but only 2.5 per cent of the adult population.

Perhaps the most alarming factor is that Aboriginal and Torres Strait Islander women and juveniles are the fastest growing cohort. Since the year 2000, the imprisonment rate for Indigenous females increased by 58.6 per cent, compared to 35.2 per cent for Indigenous males, while Indigenous juveniles are now 31 times more likely to be in detention than non-Indigenous juveniles.

The Law Council of Australia considers that this issue represents one of Australia's most pressing national social justice concerns.

The "Closing the Gap" initiative, commenced in 2008 by the Council of Australian Governments (COAG), commits to achieving six targets² to reduce the gulf in life-expectancy and living standards between Indigenous and non-Indigenous Australians. The Federal Opposition has recently confirmed that it will implement an additional "justice target" if elected.³ However the Federal Government has rejected a justice target in favour of measures addressing the 'underlying causes of imprisonment,'⁴ and has characterised over-representation of Indigenous Australians in imprisonment as a State and Territory Government responsibility.⁵

1 Matthew Lyneham and Andy Chan, *Deaths in Custody in Australia to June 2011: Twenty years of monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody*, 2013, AIC Monitoring Reports 20, Australian Institute of Criminology.

2 Close the life expectancy gap within a generation (by 2031); halve the gap in mortality rates for Indigenous children under five within a decade (by 2018); ensure access to early childhood education for all Indigenous four year olds in remote communities within five years (by 2013); halve the gap in reading, writing and numeracy achievements for children within a decade (by 2018); halve the gap for Indigenous students in year 12 attainment rates (by 2020); halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade (by 2018).

3 Bill Shorten MP, Interview with Sky News on 26 October 2015. See also <http://www.sbs.com.au/news/article/2015/10/26/labor-set-close-gap-justice-target> (accessed 27 October 2015).

4 Michael Gordon, 'Indigenous Affairs Minister Nigel Scullion rejects justice targets for Indigenous people', 19 November 2014, *Sydney Morning Herald*. Available here: <http://www.smh.com.au/federal-politics/political-news/Indigenous-affairs-minister-nigel-scullion-rejects-justice-targets-for-Indigenous-people-20141119-11pykc.html> (accessed 27 October 2015); Anna Henderson, 'Bill Shorten pledges to end 'national shame' by reviving Indigenous imprisonment reduction targets', 19 November 2015, ABC News Online. Available here: <http://www.abc.net.au/news/2015-11-19/labor-pledges-to-revive-indigenous-justice-targets/6953032> (accessed 20 November 2015).

5 Senate Legal and Constitutional Affairs References Committee, *The Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, Minority Report by Coalition Senators, 20 June 2013, Parliament of Australia, noting at 1.12: "The fact is that the cockpit for implementation and reform on JR is the states and territories, not the Commonwealth." Available here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/d01



Criminal justice policies have been identified as a key factor contributing to disproportionate and growing rates of Indigenous imprisonment.⁶ However, while crime rates, generally, have decreased over the last 20 years, Indigenous imprisonment rates have continued to rise and non-Indigenous imprisonment has remained steady, in per capita terms.⁷ The highest proportion of people held in custody or corrections is comprised of those returning to prison.⁸

The Law Council considers these facts alone demonstrate a clear disconnect between criminal justice policy objectives and outcomes. It is not a sufficient response by governments to highlight constitutional demarcation of legislative power between different levels of government as a reason to eschew a national approach, as has been achieved in respect of public health, education, housing, the environment, resource management and other areas of shared Federal-State responsibility.

The Law Council has convened a National Symposium on Indigenous Imprisonment on 26 November 2015, to contribute to a national conversation about addressing high rates of imprisonment of Aboriginal and Torres Strait Islander people.

In accordance with the proposed structure of the Symposium, this discussion paper has been prepared to aid discussions on key issues with respect to:

The numbers: how can consistent data collection inform strong policy responses to crime and recidivism?

The drivers: what are the key factors driving increasing rates of Indigenous imprisonment, including among men, women and youths?

Short-term solutions: what can be done that will have an immediate impact?

Buy-in: facilitating Indigenous involvement in more effective justice outcomes.

Existing programs: what is being done in Australia and overseas to address high imprisonment rates?

Working together: devising a national approach and a more effective national justice framework.

6 Dr Don J Weatherburn, 2014, *Arresting Incarceration – Pathways Out of Indigenous Imprisonment*, Aboriginal Studies Press.

7 Associate Prof. Bronwyn Naylor, 'The evidence is in: you can't link imprisonment to crime rates', *The Conversation*, 23 April 2015. Available here: <http://theconversation.com/the-evidence-is-in-you-cant-link-imprisonment-to-crime-rates-40074> (accessed 27 October 2015). See also Brent Davis and Kym Dossetor, (Mis)perceptions of crime in Australia, Trends and Issues in Crime and Criminal Justice, No. 396, July 2010, Australian Institute of Criminology. Available here: http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi396.pdf (accessed 27 October 2015). See also Deloitte Access Economics, 2012, *Prison v Residential Treatment: an economic analysis of for Aboriginal and Torres Strait Islander offenders*, ANCD Research Paper 24, National Indigenous Drug and Alcohol Committee, Australian National Council on Drugs, Commonwealth of Australia, vii, which notes: "Around 70 per cent of Indigenous prisoners convicted of a violent offence had been previously convicted, and 81 per cent of Indigenous prisoners convicted of a non-violent offence (Australian Bureau of Statistics 2011a)."

8 Deloitte Access Economics, 2012, *Prison v Residential Treatment: an economic analysis of for Aboriginal and Torres Strait Islander offenders*, ANCD Research Paper 24, National Indigenous Drug and Alcohol Committee, Australian National Council on Drugs, Commonwealth of Australia, vii, which notes: "Around 70 per cent of Indigenous prisoners convicted of a violent offence had been previously convicted, and 81 per cent of Indigenous prisoners convicted of a non-violent offence (Australian Bureau of Statistics 2011a)."



BACKGROUND

Indigenous Australians, human rights advocates, legal practitioners, health professionals and a broad range of Australian and international bodies have expressed strong concern, over a long period of time, about the increasing rate at which Australia imprisons its first peoples.

A number of recent developments have brought this to the forefront of national and international human rights concerns, including the identification of the extreme socio-economic and human cost of imprisonment; evidence that deterrence theory is increasingly ineffective in achieving reductions in crime and improving community safety; the role of imprisonment in compounding disadvantage and associated propensity to commit crime; and the emergence of new criminogenic responses overseas, driven by the increasing cost of criminal justice and corrections.

The complexity of this issue cannot be overstated. Politically and in policy terms, the challenge is usually framed in terms of community safety and deterrence, which has resulted in regular changes to criminal laws, firmer sentencing, an increasing number of minor offences and significantly enhanced law enforcement capability.

In Australia, the evidence demonstrates that corrections policies that favour imprisonment have a disproportionate impact on the Indigenous population. This is not just a matter of numbers, but has a significant destructive effect on Indigenous communities and families. As noted by Weatherburn:

*"From the data it is clear that Indigenous Australians fare much worse than non-Indigenous Australians in terms of four critical factors known to play a significant role in the onset, seriousness, duration and frequency of involvement in crime. The insidious thing about these factors is that they form a vicious cycle. Parents exposed to financial burden or personal stress, or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school. Poor school performance increases the risk of unemployment, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the chances of legitimate employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next."*⁹

Something in our social makeup in Australia is resulting in this disproportionate impact of corrections policies on our Indigenous population.

The burgeoning cost of increased tough on crime policies has forced policy makers to rethink their strategies. Higher rates of imprisonment have led to a significant blowout in the cost of administering the justice and corrections system. Moreover, the social cost of policies that lead to increased rates of imprisonment has now become obvious.

Internationally and in Australia there is growing recognition that tried and tested criminal justice policies are proving ineffective and may be counterproductive, perpetuating the "vicious cycle."

9 Weatherburn, *Ibid*, *op cit* 6, p. 86-87.



In the United States, several jurisdictions have already implemented justice reinvestment programs, with some astonishing success stories.¹⁰ Justice reinvestment is being trialled in Canadian Provinces and in the United Kingdom,¹¹ with similar success. In Australia, a trial is underway in Bourke, New South Wales,¹² and a further trial is being considered for two sites in South Australia.¹³

These are just two responses to the imprisonment phenomenon. While it is important that these trials be implemented and supported, much more needs to be done to understand why corrections policies impact on the Indigenous population disproportionately to the larger population, and whether that reveals a need for systemic change.

The Law Council recognises that this extremely complex issue is not amenable to abstract definition or simple solutions. The objective of the Symposium is to examine aspects of Indigenous imprisonment in detail with the objectives of:

1. gaining an understanding of some of the problems driving the dramatic increases in Indigenous imprisonment; and
2. identifying policy responses from governments to break the cycle of imprisonment of Aboriginal and Torres Strait Islander Australians.

10 Council of State Governments Justice Centre, *Reducing Recidivism – States Deliver Results*, July 2014. Available here: https://csgjusticecenter.org/wp-content/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf. See also Urban Institute, *Justice Reinvestment Initiative State Assessment Report*, 2014, United States Bureau of Justice Assistance. Available here: <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.PDF>

11 Kevin Wong, Linda Meadows, Frank Warburton, Sarah Webb, Helen Young, Nicola Barraclough, *The Development and Year One Implementation of the Local Justice Reinvestment Pilot*, Hallam Centre for Community Justice Analytical Series 2013, United Kingdom. Available here: <https://www.shu.ac.uk/research/hccj/sites/hccj/files/year-one-local-justice-reinvestment-pilot.pdf>. See also https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261843/local-justice-reinvestment-yr2-results.pdf

12 <http://www.justreinvest.org.au/>

13 <http://www.agd.sa.gov.au/initiatives/more-our-initiatives/justice-reinvestment>

1. THE NUMBERS

The data clearly reflects that Indigenous imprisonment rates are catastrophically high and continue to increase, year by year. However, is a lack of available, comprehensive and consistent data impeding rational policy responses to this crisis? Some of Australia's most esteemed statisticians and forensic analysts discuss the nature of the existing data and the future direction needed.

Our panel includes:

- Jonathon Hunyor (Chair) (North Australian Aboriginal Justice Agency)
- Lisette Aarons, (Australian Bureau of Statistics (ABS))
- Professor Stuart Kinner, (Griffith University)
- Dr Fadwa Al-Yaman PSM, (Australian Institute of Health and Welfare (AIHW))

Overview

- 1.1 Recently published ABS data indicate that overall imprisonment in Australia increased by 1,915 prisoners (6 per cent) between June 2014 and June 2015;¹⁴ while the number of unsentenced prisoners increased by 11 per cent in 2014-15. Further:
 - 1.1.1 Aboriginal and Torres Strait Islander prisoners represented 28 per cent of the total full-time adult prisoner population, and accounted for approximately 2 per cent of the total Australian population aged 18 years and over.¹⁵
 - 1.1.2 In 2014-15, the imprisonment rate for Aboriginal and Torres Strait Islander males increased by 2 per cent (to 4,127 prisoners per 100,000 adult male Aboriginal and Torres Strait Islander population), and females increased by 6 per cent (to 451 prisoners per 100,000 adult female Aboriginal and Torres Strait Islander population).¹⁶
- 1.2 However, this provides only a small snapshot of a much more complex problem. At present, it is very difficult to obtain or compare accurate and complete statistics indicating why Aboriginal and Torres Strait Islander people are being imprisoned, why those released are more likely than not to re-offend, how many people enter or leave the corrections system each day, month or year, or what impact imprisonment has on the propensity to commit crime. For example, Weatherburn notes:

*"It is impossible to obtain data on persons proceeded against (charged) by Indigenous status for all states and territories, but data do exist for New South Wales, Queensland, South Australia and the Northern Territory."*¹⁷
- 1.3 Available data suggest that custodial sentencing has a minimal impact on juvenile reoffending compared to community based corrections orders.¹⁸ However, there is limited available evidence supporting effective alternatives to juvenile incarceration.
- 1.4 Further, a recent study concluded that:

*"The annual 'flow' through Australia's prisons is well in excess of the daily number, but information on those moving through prison systems is not yet publicly available. The characteristics of those released from prison differ meaningfully from those of people in prison. Routine, national reporting of prison separations is critical to informing upscaling and targeting of Throughcare services for this profoundly vulnerable population."*¹⁹

14 ABS, 4512.0 - Corrective Services, Australia, June Quarter 2015, 10 September 2015. Available here: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4512.0Main+Features1June%20Quarter%202015?OpenDocument>

15 Ibid.

16 Ibid.

17 Weatherburn, Ibid, op cit 6, 55.

18 Don Weatherburn, Sumitra Vignaendra, Andrew McGrath, *The specific deterrent effect of custodial penalties on juvenile reoffending*, 2009, Australian Institute of Criminology, Technical and Background Paper no. 33, v. Available here: <http://www.aic.gov.au/publications/current%20series/tbp/21-40/tbp033.html>. The paper concludes that: "The study found no significant difference between juveniles given a custodial penalty and those given a non-custodial penalty in the likelihood of reconviction."

19 Kinner, S., Avery, A., A robust estimate of the number and characteristics of persons released from prison in Australia (2015) ANZJPH, 39:4, 315-318. Available here: <http://onlinelibrary.wiley.com/doi/10.1111/1753-6405.12346/abstract>

- 1.5 This lack of available and comparable data is in stark contrast to other areas of major public expenditure, such as education and health:

*"In other large, state-based systems such as public hospitals and schools, accurate throughput data are readily available to the general public. Yet, despite a recurring public investment of more than \$3 billion a year, equivalent data are not available for Australia's correctional systems."*²⁰

- 1.6 Data published by the AIHW indicate that a substantial proportion of Indigenous prisoners, in particular, may be entering the system with undetected prior cognitive and other mental disabilities.²¹ However, these data are not apparently being used, or used effectively, in development of criminal justice and corrections policies.

- 1.7 Each year, at least one new study, survey or report, usually either funded or commissioned by government, confirms what we already know: that Indigenous Australians are among the highly imprisoned racial or ethnic communities in the developed world. Currently, we know, but do not know why:

- 1.7.1 One in four deaths in custody is Indigenous;
- 1.7.2 Twenty-seven per cent of the prison population is Indigenous, while comprising just 2.5 per cent of the national census;
- 1.7.3 Indigenous youths comprise over 50 per cent of juveniles in detention;
- 1.7.4 The rate of imprisonment of Aboriginal people has increased by over 57 per cent since the year 2000;
- 1.7.5 Aboriginal and Torres Strait Islander women are the fastest growing cohort of people who are both victimised and imprisoned for violent offences (with Indigenous men not far behind);²² and/or
- 1.7.6 the overall crime rate in Australia has fallen substantially over the last twenty years, over a period in which the rate of imprisonment for the general population increased and the rate of Indigenous incarceration doubled.²³

- 1.8 Weatherburn has noted that:

"Shocking as they are, these figures hardly begin to convey the true magnitude of Indigenous contact with the criminal justice system..."

*"By the time they have reached 23, more than three-quarters (75.6 per cent) of the New South Wales Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a New South Wales criminal court. The corresponding figure for the non-Indigenous population of New South Wales was just 16.9 per cent."*²⁴

- 1.9 Therefore, while the case for change in criminal justice and corrections policies is very apparent, the capacity to identify and evaluate policy responses remains limited by the unavailability of comparable data. This is remarkable, given corrections alone costs governments a total of \$3.4 billion annually,²⁵ which is a fraction of the additional cost of criminal justice administration and enforcement, as well as the broader costs rippling into to the community and government sectors from crime and associated disadvantage.

20 Ibid.

21 See <http://www.aihw.gov.au/prisoner-health/mental-health/>.

22 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage 2014*, Productivity Commission, Canberra, Chapter 4.12. Available here: <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014>

23 Bagaric, M., Pathinayake, A., *Jail up; crime down does not justify Australia becoming an incarceration nation* (2015) 40 Aust Bar Rev 64

24 Weatherburn, *ibid*, *op cit*, 5, 4-5.

25 Productivity Commission, *Report on Government Services 2015*, Australian Government, 8.3. Available here: <http://www.pc.gov.au/research/ongoing/report-on-government-services/2015/justice/factsheets/rogs-2015-volume8-chapter8-factsheet.pdf>

- 1.10 One immediate, concrete suggestion is that COAG should commit to commissioning and appropriately funding a central body to coordinate the collection, evaluation and reporting on criminological data from police, youth services, legal assistance bodies, prosecuting agencies, courts, corrections, parole supervisors and associated service providers to develop detailed analysis of effective criminal justice responses. A primary objective of this body would be to inform criminal justice policy development, with the objective of reducing primary offending and recidivism. The data should be capable of informing and supporting local, regional and community controlled programs directed toward these objectives.

Speaker profiles

1.11 *Lisette Aarons*

Lisette Aarons is an Assistant Director in the Australian Bureau of Statistics' National Centre for Crime and Justice Statistics (NCCJS). A criminologist and survey methodologist, she is responsible for the analysis and dissemination of Australian crime and justice survey data, including the Crime Victimisation Survey, Personal Fraud Survey and Personal Safety Survey. She is also overseeing projects being undertaken by the NCCJS to: build the evidence base about Family and Domestic Violence and Identity Fraud; improve Aboriginal and Torres Strait Islander data in crime and justice collections; and improve comparability of the inter-jurisdictional data in crime and justice administrative collections. For the last couple of years, Lisette has been responsible for the national Crime Victims and Offenders administrative data collections, including the first release of experimental statistics about family and domestic violence-related offences in September 2015.

Recent ABS publications:

- Prisoners in Australia 2014

1.12 *Jonathon Hunyor*

Jonathon Hunyor is the Principal Legal Officer of the North Australian Aboriginal Justice Agency in Darwin, a position he has held since 2010. He was previously the Director of Legal Services at the Australian Human Rights Commission and has worked as a lawyer with the Central Land Council in Alice Springs and the NT Legal Aid Commission in Darwin. He has published articles in academic and professional journals on topics including criminal law, refugee law, coronial law, discrimination and human rights.

1.13 *Professor Stuart Kinner*

Professor Stuart Kinner is an NHMRC Senior Research Fellow with appointments at the Griffith Criminology Institute and Menzies Health Institute Queensland. He also holds Honorary appointments at The University of Melbourne, University of Queensland, Monash University and Murdoch Children's Research Institute. Stuart has a PhD in forensic psychology and over the past 15 years has led a program of research focussed on the health of justice-involved populations. He sits on the Board of Directors for the Academic Consortium on Criminal Justice Health, co-convenes the Justice Health Special Interest Group in the Public Health Association of Australia, and serves on Australia's National Prisoner Health Information Committee.

Recent publications:

- Avery, A., and Kinner, S., *A robust estimate of the number and characteristics of persons released from prison in Australia*, Aust NZ J Public Health. 2015; Online; doi: 10.1111/1753-6405.12346 (forthcoming)

1.14 *Dr Fadwa Al-Yaman PSM*

Dr Al-Yaman is responsible for the Australian Institute of Health and Welfare's (AIHW's) data collection, development, reporting activities and stakeholder relationships in the areas of the health and welfare of mothers, children, youth and families, and Aboriginal and Torres Strait Islander peoples. She also has responsibility for the Closing the Gap Clearinghouse and the online Indigenous observatory.

Dr Al-Yaman has wide ranging experience in statistical analysis and reporting, demographic techniques, data development, data quality assessment and improvement activities, and in building strong collaborative relationships with key stakeholders. She has a strong research background in health and a keen interest in knowledge translation and the link between research, policy and practice. She holds a PhD in Immunology from the John Curtin School of Medical Research and a Masters of Population Studies from the ANU. Dr Al-Yaman was awarded a Fulbright Fellowship in 1990 and the Australian Public Service Medal in 2008.

Recent AIHW publications:

- [The Health of Australian Prisoners 2012](#)²⁶
- [Mental health of prison entrants in Australia 2010](#)

2. THE DRIVERS

There is broad consensus among policy makers that the 'drivers' of Indigenous imprisonment rates are complex and inter-related, with widespread disadvantage, low school completion, high rates of alcohol and drug abuse, family violence, homelessness, unemployment and poor health. Intertwined in this is a mix of policy responses, including tough bail laws and parole conditions, punitive sentencing and inadequate treatment and diversion. Our panels looks at laws and policies which may be contributing to perceived unjust or unnecessary imprisonment:

- Professor Patrick Keyzer (Chair) (Dean of Law, La Trobe University)
- Dr Thalia Anthony (University of Technology, Sydney)
- Damian Griffis (CEO, First Peoples Disability Network)
- Judge Peter Johnstone (President, Children's Court of New South Wales)
- Judge Dina Yehia SC (District Court of New South Wales)

Overview

- 2.1 The Senate Legal and Constitutional Affairs References Committee reported on justice reinvestment in Australia in 2012, providing the following summary of Australia's prison and custodial arrangements:²⁷
- 2.1.1 There were 114 custodial facilities across Australia at 30 June 2012 of which 87 are government-operated prisons, eight are privately operated prisons, four are transitional centres, one is a periodic detention centre and 14 are 24-hour court-cell complexes.²⁸ In addition, all jurisdictions provide community corrections services which are responsible for non-custodial sanctions and deliver post-custodial interventions.
- 2.1.2 On average, 29,213 people per day (excluding periodic detainees) were held in Australian prisons during 2011–12. This was an increase of 1.7 per cent over the average daily number in 2010–11. The daily average prison population in 2011–12 comprised 92.9 per cent males and 7.1 per cent females.²⁹
- 2.1.3 The number of unsentenced (those on remand) prisoners comprised 23 per cent of the total prison population at 30 June 2012. Over half (55 per cent) of all prisoners had served a sentence in an adult prison prior to the current episode.³⁰
- 2.1.4 As at 30 June 2012, Aboriginal and Torres Strait Islander prisoners comprised just over a quarter (27 per cent or 7,982) of the total prisoner population. The age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners was 1,914 per 100,000 adult Aboriginal and Torres Strait Islander population. This was 15 times higher than non-Indigenous prisoners for whom the age standardised imprisonment rate was 129 per 100,000 adult non-Indigenous population.³¹

26 AIHW 2013 *The health of Australia's prisoners 2012*. Cat. no. PHE 170. Canberra: AIHW

27 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2012, Commonwealth of Australia, Ch 2. Available here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index

28 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2013*, Vol. 1, p. 8.5.

29 Ibid.

30 Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2012*.

31 Ibid.

- 2.1.5 The most common offences for sentenced male prisoners were acts intended to cause injury (17 per cent) and sexual assault (15 per cent), while for females the most common were illicit drug offences (17 per cent of female prisoners) and acts intended to cause injury (14 per cent).³²
- 2.2 More recently, the ABS reported that raw numbers of Indigenous prisoners in Australia nearly doubled from 2004 – 2014, from 5048 to 9264,³³ and there was a 10 per cent increase in 2013-14 (8430).³⁴ This compares with an increase in the general prison population (sentenced and unsentenced) of 9.8 per cent between June 2013 and June 2014.³⁵
- 2.3 Remarkably, these substantial increases in the rate of imprisonment appear to be occurring at a time when the overall crime rate is falling.³⁶ It has been argued that trends in imprisonment are therefore driven, to a significant extent, by policy settings, which in most jurisdictions are increasingly punitive.³⁷
- 2.4 Imprisonment is considered to be a measure of last resort,³⁸ for good reason:
- “Imprisonment has at least two incontestable disadvantages. The first is that it involves the infliction of hardship on offenders. The second is that it comes at a considerable fiscal cost to the taxpayer. Given these concrete and significant burdens, the use of imprisonment should only be increased if there are clear off-setting benefits.”*³⁹
- 2.5 One of the assumed benefits of a strong policy of deterrence in criminal justice is a reduction in the rate of offending and improvements in community safety. It is not the purpose of this discussion paper to summarise available data with respect to crime and offending behaviour. However, the Law Council makes the following observations:
- 2.5.1 The rate of crime in Australia has been trending downwards since the 1990s, while over the same period rates of imprisonment have been trending upwards;⁴⁰ and
- 2.5.2 There is no clear evidence that would attribute the reduction in crime with increased penalties or other policies based on deterrence, such as mandatory sentencing.⁴¹
- 2.6 It has been suggested that the reduction in crime in Australia over the last two decades is likely to be attributed to a number of factors, which are linked to observable trends in other jurisdictions. For example, in the United States, a recent major study concluded that the largest single factor contributing to a reduction in the crime rate (in a corresponding environment of increasing rates of imprisonment, concentrated amongst largely disadvantaged minority groups) was the implementation of new policing technology and investigative techniques, which enabled better targeting of law enforcement efforts.⁴²
- 2.7 Evidence also suggests that Indigenous Australians are particularly affected by a number of factors which are significant predictors of contact with the justice system, such as disability, community dysfunction and high rates of drug and alcohol dependency and abuse, youth delinquency and a lack of alternatives to imprisonment. Some relevant factors are outlined below.

32 Ibid.

33 ABS, Prisoners in Australia 2014. Available here: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>

34 Ibid.

35 Ibid.

36 Senate Legal and Constitutional Affairs References Committee, *ibid*, op cit 34, [2.23]

37 Ibid, [2.25]-[2.33].

38 For example, Judicial Commission of NSW, *Sentencing Bench Book – Terms of Imprisonment*, [3-300] Imprisonment as a Sanction of Last Resort: “Section 5(1) Crimes (Sentencing Procedure) Act 1999 entreats sentencers to use imprisonment only after being satisfied that no other penalty is appropriate. It provides that:

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

This reflects the common law principle that imprisonment should be used as a sanction of last resort: *R v Way* (2004) 60 NSWLR 168 at [115]. A sentence of imprisonment should only be imposed if no other sentence is appropriate. In *R v Zamagias* [2002] NSWCCA 17 at [25]-[26], Howie J, Hodgson JA and Levine J agreeing, set out how a court should approach the imposition of a sentence of imprisonment.” Available here: http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/penalties_of_imprisonment.html

39 Bagaric and Pathinayake, *Ibid*, op cit 23.

40 Ibid, 81-82

41 Ibid, 83

42 Dr. Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, *What Caused the Crime Decline?*, Brennan Centre for Justice, NYU Law School, 4. Available here: <https://www.brennancenter.org/publication/what-caused-crime-decline>

Cognitive disability

- 2.8 Researchers are finding increasingly evidence of a link between disproportionate contact with the criminal justice system and cognitive or other impairment among offenders and their victims, which is often undetected.
- 2.9 Most recently, the UNSW released a report, noting that:
- "Aboriginal and Torres Strait Islander peoples with mental and cognitive disabilities are significantly over-represented in Australian criminal justice systems. However there has been a lack of critically informed evidence, analysis and co-ordinated policy and service response on this most pressing human rights issue."*⁴³
- 2.10 A common theme emerging from such studies is that:
- "...pathways into and around the criminal justice system for many Aboriginal people with mental and cognitive disabilities is ... embedded and entrenched by the absence of coherent frameworks for holistic disability, education and human services support. Aboriginal people with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways."*⁴⁴
- 2.11 The Australian Human Rights Commission undertook extensive consultation to identify the barriers for people in accessing justice. Its report, *Equal Before the Law: Towards Disability Justice Strategies (2014)*, found that:⁴⁵
- 2.11.1 Community support programs to prevent violence and disadvantage do not necessarily exist for people with disability.
- 2.11.2 Negative attitudes and assumptions about people with disability affect how they are treated within the justice system.
- 2.11.3 Specialist support, accommodation and programs are not adequately provided to people with disability when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead').
- 2.11.4 Support is not provided to prisoners with disability so that they can meet basic human needs whilst in prison.⁴⁶
- 2.12 Further, a strong link has been found between the prevalence of sensory impairment in particular communities and the increased likelihood of contact with the criminal justice system, particularly among youths. In 2010, the Senate Community Affairs Reference Committee noted that:
- The committee is gravely concerned about the potential implications of hearing impairment on Indigenous Australians' engagement with the criminal justice system. Those most vulnerable are Indigenous people from remote areas who do not have English as their first language, or indeed who, due to early onset untreated hearing loss, have little means of communication at all.*⁴⁷
- 2.13 However, while early-intervention is an objective of COAG's Closing the Gap initiative, hearing impairment among Indigenous prisoners is estimated to be extremely high – affecting 80-95 per cent of Indigenous prisoners.⁴⁸

43 Baldry, *Ibid*, op cit 14, 9.

44 *Ibid*, 12.

45 Australian Human Rights Commission, *Equal Before the Law: Toward Disability Justice Strategies*, February 2014, Available here: https://www.human-rights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf

46 Referred to in the First Peoples' Disability Network submission to the review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), available here: <http://www.fpdn.org.au/justice-system-policy-reform-unwarranted-detention-mentally-impaired>

47 Senate Community Affairs Reference Committee, *Hear Us – Inquiry into Hearing Health in Australia*, Report, May 2010, Australia, [8.102]. Available here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/hearing_health/report/index

48 *Ibid*, 141-

- 2.14 Similarly, Fetal Alcohol Spectrum Disorder (FASD), which refers to a range of cognitive disabilities arising from misuse of alcohol during pregnancy, has been identified as particularly prevalent in Aboriginal and Torres Strait Islander communities.⁴⁹ However, the actual incidence of FASD is not known and often cases go undiagnosed until after individuals have a history of involvement with the criminal justice system.
- 2.15 The lack of suitable programs and facilities for treating and managing offenders with cognitive impairment has attracted regular commentary.⁵⁰ However, to date, there is no concerted strategy in place to address this significant human rights issue.

Youth imprisonment

- 2.16 Johnstone J notes that:

“One of the most effective ways of reducing juvenile offending is to begin prevention efforts as early as possible and to intervene aggressively with those already offending.”⁵¹

- 2.17 Strategies to address youth delinquency, crime and incarceration must be at the core of responses to Indigenous imprisonment, having regard to the astonishing rate of Aboriginal and Torres Strait Islander youth detention, referred to above.
- 2.18 One of the major challenges facing judicial officers and police in managing young people who are either in trouble or danger is a lack of suitable non-custodial or institutional options for young offenders.⁵² In all jurisdictions, sentencing a child to a period of detention is generally required where there are no other suitable options.⁵³ For a range of reasons Indigenous juvenile offenders more often fall into the category of those for whom non-custodial options are limited by the availability of appropriate supervision.
- 2.19 Further, it is reasonably apparent that mandatory sentencing and three-strikes policies disproportionately impact on Indigenous youths. For example:
- “Research indicates that 81% of the juveniles dealt with under the laws [in Western Australia] are Aboriginal, and there is clear evidence that Aboriginal youth are less likely to access diversionary options and more likely to be processed through the courts than non Aboriginal youths.”⁵⁴*
- 2.20 This is concerning given available evidence suggests youth incarceration lacks any specific deterrent effect when compared with non-custodial orders.⁵⁵

49 Australian Institute of Health and Welfare, *Fetal alcohol spectrum disorders: a review of interventions for prevention and management in Indigenous communities*, Closing the Gap Clearinghouse, February 2015, Resource Sheet no. 36. Available here: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550296>

50 For example, Department of Justice, (2006) *Intellectual Disability in the Victorian Prison System Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Corrections Research Paper Series, Paper No.2, September 2007, Victorian Government; Mindy Sotiri, *No End in Sight – the imprisonment and indefinite detention of Indigenous Australians with a Cognitive Impairment*, Sept. 2012, UNSW, Sydney. See also multiple publications by Australian Institute of Health and Welfare, Australian Institute of Criminology, etc.

51 Judge Peter Johnstone, “Emerging developments in juvenile justice”, 5th Annual Juvenile Justice Summit, Melbourne, 25 March 2014.

52 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time, Time for Doing: Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*, June 2011, Australian Parliament, [7.98]. Available here: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=atsia/sentencing/report.htm

53 Australian Law Reform Commission, *Seen and Not Heard: Priority for Children in the Legal Process*, November 1997, Report 84, Australian Government, [19.47]. See also, *Sentencing Juveniles*, Australian Institute of Criminology - http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/sentencing.html

54 Neil Morgan, Harry Blagg and Victoria Williams, (2001) *Mandatory sentencing in Western Australia & the impact on Aboriginal youth*, Aboriginal Justice Council. Available here: <http://www.indigenousjustice.gov.au/db/publications/253540.html>

55 Weatherburn, Vignaendra, McGrath, *ibid*, *op cit* 18.

Indigenous women

- 2.21 Indigenous women make up around 2.2 per cent of the Australian female population, but around 34 per cent of all female prisoners⁵⁶. As noted previously, the rate of imprisonment of Indigenous women has increased by 73.7 per cent since 2000 and represents the fastest growing cohort of those imprisoned in Australia.⁵⁷
- 2.22 One recent cross-jurisdictional study of available data with respect to Indigenous women's offending patterns noted that:

*"...it is imperative that accurate, detailed and readily accessible data are available. These are essential to ensure governments are fully informed of the situation in relation to Indigenous women's over-representation in Australian criminal justice systems, the offences for which they are routinely charged and convicted and the non-criminal justice options that could readily be implemented."*⁵⁸

- 2.23 Incarceration of Indigenous women is often against a backdrop of physical and sexual abuse from a young age, drug and alcohol abuse and child neglect.⁵⁹ It is argued that imprisonment in this context often has a criminogenic effect, as imprisonment reduces prospects of employment and increases the likelihood of engaging in activities such as alcohol or drug abuse, theft and other factors increasing the likelihood of recidivism and intergenerational transmission of the same criminogenic factors.⁶⁰

Speaker profiles

2.24 Dr Thalia Anthony

Dr Thalia Anthony is an expert on criminal law and procedure and Indigenous people and the law, with a particular specialisation in Indigenous criminalisation and Indigenous community justice mechanisms. Her research is grounded in legal history and understandings of the colonial legacy in legal institutions. She has developed new approaches to researching and understanding the role of the criminal law in governing Indigenous communities and how the state regulates Indigenous-based justice strategies. Her research is informed by fieldwork in Indigenous communities such as Warlpiri communities in central Australia and partnerships with Indigenous legal organisations in Australia and overseas. Dr Anthony's research informs her teaching in terms of advancing strategies for Indigenous cultural competencies in Law curricular, which had its genesis in 2008 when she organised an Australian and New Zealand conference on this theme.

Her research has had an impact on policy development and public debates in relation to remedies for wrongs inflicted on Indigenous peoples. Her work has been referred to in Senate committee reports, parliamentary debates, policy announcements and law reform committee reports. Dr Anthony has also written submissions for United Nations committees, prepared and reviewed research briefs for the Attorney-Generals' Indigenous Justice Clearinghouse, conducted research for the Royal Commission into Institutional Responses to Child Sexual Abuse and appeared before several parliamentary inquiries on Indigenous redress schemes. She has also been involved in preparing litigation for Indigenous stolen wages.

Dr Anthony's scholarship is published in a number of books, including her influential monograph, *Indigenous People, Crime and Punishment* (Routledge 2013) and a forthcoming book with Professor Harry Blagg, *Decolonising Criminology* (Palgrave 2016). She has strong connections with justice and advocacy groups, including UTS' Jumbunna and Aboriginal legal services, and regularly appears in the media to ensure that her research that is centred on social justice has an impact beyond the academy.

56 Ibid, *op cit* 33.

57 Productivity Commission, *ibid*, *op cit* 22.

58 Peta MacGillivray and Eileen Baldry, *Australian Indigenous Women's Offending Patterns*, June 2015, Indigenous Justice Clearinghouse, Brief 19, UNSW, p 11. Available here: <http://www.indigenousjustice.gov.au/briefs/brief019.pdf>

59 Bill Jonas, *Social Justice report 2002*, Human Rights and Equal Opportunity Commission, Australia, Chapter 5. Available here: <https://www.humanrights.gov.au/news/media-releases/incarceration-rates-indigenous-women-national-shame>

60 Weatherburn, *ibid*, *op cit* 6, 8.

Recent publications:

- Addressing the “crime problem” of the Northern Territory Intervention: alternate paths to regulating minor driving offences in remote Indigenous communities - Report to the Criminology Research Advisory Council, June 2012
- Australian Indigenous Women’s Offending Patterns – Indigenous Justice Clearinghouse, Brief 19, June 2015
- Sentencing Indigenous Offenders – Indigenous Justice Clearinghouse, Brief 7, March 2010

2.25 *Damian Griffis*

Damian Griffis, Chief Executive Officer of FPDN, is a leading advocate for the human rights of Aboriginal people with disability. In 2004–05 Damian undertook a major consultative project visiting Aboriginal communities across the state of New South Wales discussing the unmet needs of Aboriginal people with disability directly with Aboriginal people with disability and their carers culminating in the report “Telling it Like it is”.

Damian has been a central figure in the establishment of both the Aboriginal Disability Network NSW and FPDN. Damian continues to represent the views of Aboriginal people with disability and their families in a range of forums at a regional, national and international level.

In 2014, Damian won the Tony Fitzgerald (Community Individual) Memorial Award at the Australian Human Rights Awards.

Recent publications:

- Op Ed. - Closing the gap requires a focus on disability and justice, February 2015

2.26 *Judge Peter Johnstone*

Peter Johnstone is a District Court Judge, currently serving as President of the Children’s Court of New South Wales.

Prior to becoming a judge, Peter was a senior partner in the national law firm, Blake Dawson Waldron (now known as Ashurst).

Peter was a councillor of the Law Society of NSW from 2001, and in 2006 was the President-Elect.

Peter was appointed to the District Court bench in May 2006, where he sat in trials in both the civil and criminal divisions of the Court.

In 2012 he was appointed as President of the Children’s Court.

The Court is comprised of the President and 13 specialist Children’s Magistrates and 10 Children’s Registrars located at Parramatta, Bidura, Broadmeadow, Wyong, Port Kembla and Campbelltown. The President, Magistrates and Registrars also sit at various country locations on circuit, or elsewhere as required.

The President undertakes both judicial and management responsibilities. He sits in both crime and care matters on a regular basis.

Management functions include administering the Court, providing judicial leadership, and conferring regularly with government, community groups and social agencies concerned with the safety, welfare and well-being of children.

2.27 *Professor Patrick Keyzer*

After completing Arts and Law at the University of Sydney, Keyzer worked as a commercial lawyer while completing a Master of Laws part-time and working as a tutor at Sydney Law School. Keyzer joined UTS Law School as a lecturer before working as Executive Associate to the Chief Justice of Australia, Sir Gerard Brennan AC KBE. Keyzer was then called to the Bar, while also serving UTS Law School as its first Director of Research (2000-2002) and Editor of the UTS Law Review. Promoted to Associate Professor in 2003, Keyzer then joined Bond University in 2007 as Professor of Law and Deputy Dean (Curriculum and

Students). In 2009 Keyzer was appointed Foundation Director of the Centre for Law, Governance and Public Policy, a post he served in until April 2014. In April 2014 Keyzer joined La Trobe as Head of School and Chair of Law and Public Policy.

2.28 Judge Dina Yehia SC

Judge Yehia SC was admitted as a solicitor in 1989 and worked with Western Aboriginal Legal Service from 1990 until 1996. Her Honour worked as the Solicitor Advocate with the Legal Aid Commission and in 1999, was appointed as a Public Defender. She appeared in a year-long terrorism trial and in numerous Supreme Court murder trials. Her Honour took silk in 2009 and became Deputy Senior Public Defender in 2013, appearing in the High Court in *Bugmy v R* in 2013 and in the Special Leave application in *Honeysett* in 2014. Her Honour was appointed as a District Court Judge in May 2014.

3. SHORT-TERM SOLUTIONS

Is there anything that can be done in the short term to address imprisonment rates? Imprisonment presents major challenges due to the insidious impact of historical disadvantage on likelihood of offending. However, it is also clear, from available information, that hard-line policy measures can have a significant, immediate and negative impact on imprisonment rates, without a significant corresponding impact on community safety. Eighty per cent of Indigenous prisoners are serving a second or subsequent term. Is it possible to have any impact on imprisonment in the short term and, at the same time, continue to reduce the rate of crime?

- Dr David Neal SC (**Chair**) (Law Council National Criminal Law Committee)
- Dr Allen Benson (Chair, Alberta Family Violence Death Review Committee)
- Chief Justice Wayne Martin AC, QC (Supreme Court of Western Australia)
- Judge Stephen Norrish SC (District Court of New South Wales)

Overview

3.1 It is clear that the factors contributing to high rates of Indigenous imprisonment are complex. Various studies have suggested causal factors including (but not limited to) higher rates of poverty and disadvantage among Indigenous Australians, lower rates of attainment in primary and secondary education, and alcohol and drug misuse. Incarceration, in the absence of effective rehabilitation, arguably contributes to a perpetual cycle of recidivist behaviour due to stigmatisation associated with imprisonment (affecting employment prospects), greater exposure to negative influences, and lack of facilities to treat underlying health issues, among other things.⁶¹

3.2 A number of factors have been identified below, which, if addressed, may provide some short-term success in stemming the tide on the unacceptably high rate of Aboriginal incarceration.

3.2.1 Justice targets

In 2010, the Senate Legal and Constitutional Affairs Reference Committee recommended that:

“...the Commonwealth Government endorse justice targets developed by the Standing Committee of Attorneys-General for inclusion in the Council of Australian Governments’ Closing the Gap strategy. These targets should then be monitored and reported against.”⁶²

61 ‘Inquiry into high levels of involvement of Indigenous juveniles and young adults in the criminal justice system’ (Law Council of Australia, 27 January 2010) 5. Available here: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2200-2299/2226%20Inquiry%20into%20high%20levels%20of%20involvement%20of%20Indigenous%20juveniles%20and%20young%20adults%20in%20the%20criminal%20justice%20system.pdf>

62 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time, Time for Doing: Indigenous youth in the criminal justice system*, June 2011, Australian Parliament, recommendation 2. Available here: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=atsia/sentencing/report.htm

Further, recently the Federal Opposition Leader committed to introducing a justice target to address imprisonment rates, if elected to government.⁶³

3.2.2 Interpreters

Lack of interpreter resources can have a negative impact on Aboriginal people's ability to fairly and efficiently negotiate the justice system. It has also been concluded that: "...access to interpreter services for Indigenous people at any stage of the criminal justice system is a fundamental right."⁶⁴ This issue can be addressed with better training to help police and court staff identify when an interpreter is needed, and more funding for interpreting services.⁶⁵

3.2.3 Driving Offences

Traffic laws fashioned for the metropolitan area can operate unjustly in remote communities. Amendment to traffic laws or funding to assist Aboriginal people to obtain their licence may reduce instances of unnecessary imprisonment for driving without a licence.

3.2.4 Fine default Imprisonment

In 2013:

- 1,358 people who were taken into prison were imprisoned only for fine default and for no other reason.⁶⁶
- 16% of Aboriginal people who entered prison that year were there only for fine default.⁶⁷

Consideration needs to be given to options for more effectively dealing with this complex problem, other than imposing a prison sentence.

3.2.5 Legal assistance

In 2014, the Productivity Commission recommended the immediate injection of \$200 million per year into legal assistance services.⁶⁸ This followed a previous recommendation by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, that:

*"...the Commonwealth Government increase funding for Aboriginal and Torres Strait Islander Legal Services to achieve parity per case load with Legal Aid Commission funding in the 2012-13 Federal Budget, with appropriate loadings to cover additional costs in service delivery to regional and remote areas."*⁶⁹

Neither of these recommendations has been implemented, despite a direct connection between the provision of adequate legal assistance and the rate of over-incarceration of Aboriginal people.⁷⁰ Immediate additional legal assistance funding is required, particularly for Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services, which provide the largest share of legal services to Indigenous Australians.

63 Bill Shorten MP, *Closing the Justice Gap*, Speech to the Melbourne University Law School, 19 November 2015. Available here: <http://billshorten.com.au/category/speeches>

64 Ibid, *op cit* 52, [7.58]

65 Courtney Bembridge, 'WA Chief Justice Wayne Martin fears language barriers putting innocent people behind bars', *ABC News* (online) 27 September 2015 <<http://www.abc.net.au/news/2015-09-27/language-barriers-putting-innocent-people-in-jail,-judge-fears/6803004>>

66 Western Australia Legislative Assembly, 'Details of Incarceration Figures, for Fine Defaulters for the Years 2008 to 2013', Tabled Paper LA2027 (2014).

67 The Honourable Wayne Martin AC Chief Justice of Western Australia, 'Indigenous incarceration rates: Strategies for much needed reform' (Speech delivered at the Western Australian Law Summer School 2015, 20 February 2015) 11 <http://www.supremecourt.wa.gov.au/files/Speeches_Indigenous_Incarceration_Rates.pdf>

68 'Access to Justice Arrangements', Productivity Commission (2014) Recommendation 21.4. Available here: <http://www.pc.gov.au/inquiries/completed/access-justice>

69 Ibid, *op cit* 63, Recommendation 26.

70 Chief Justice Wayne Martin AC (WA), 'Indigenous incarceration rates: Strategies for much needed reform' (Speech delivered at the Western Australian Law Summer School 2015, 20 February 2015) 13 <http://www.supremecourt.wa.gov.au/files/Speeches_Indigenous_Incarceration_Rates.pdf>

3.2.6 Mandatory sentencing

Mandatory sentencing laws almost certainly magnify the problem of incarceration of Aboriginal people.⁷¹ There is also little evidence that mandatory sentencing is effective in reducing crime or improving community safety. Legislatures could remove existing mandatory minimum sentences and commit to not introduce new mandatory sentencing penalties.

3.2.7 Employing innovative justice practices

Employing innovative justice practices with 'solution focused' courts such as drug courts or Indigenous sentencing courts may better address the causes of, and offer more effective solutions to, offending behaviour.⁷²

3.2.8 Re-Entry Programmes

Providing re-entry programs to ensure that offenders successfully transition from in-custody to out-of-custody life can reduce recidivism, save money, and prevent crime. It can help to break the cycle of recidivism and support, particularly, non-violent Indigenous offenders, getting their lives back on track.⁷³

3.2.9 Judicial Notice

Norrish J notes that, within current legislative constraints and legitimate sentencing discretion, more extensive use of judicial notice is required to be taken of the systemic background of deprivation of Aboriginal offenders, to properly assess both the objective and subjective circumstances of offending and offenders and enhance 'individualised justice'. His Honour notes that such action would have a substantial impact upon the length and structure of sentences.⁷⁴

- 3.3 In Canada, factors driving imprisonment were recognised in the landmark case of *R v Gladue*,⁷⁵ Section 718.2 of the Criminal Code of Canada, introduced in 1996, provides that:

*"...all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders"*⁷⁶

- 3.4 In the subsequent case of *R v Ipeelee*, the Canadian Supreme Court observed that the *Gladue* principle and s 718.2 had not resulted in any reduction in Aboriginal imprisonment and, if anything, matters were worse, 15 years on. The Court issued guidance that these factors should be considered in every case involving sentencing of Aboriginal offenders, resulting in the requirement for pre-sentencing "Gladue" reports to be filed, addressing factors relating to aboriginality which may have contributed to the offending.

71 Ibid, 14.

72 Elena Marchetti, 'Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' Law & Policy, Vol. 36, No. 4, October 2014.

73 Hon. Kamala D. Harris, 'Shut the Revolving Door of Prison' in Inimai Chettiar and Michael Waldman (eds) *Solutions: American Leaders Speak Out on Criminal Justice* (Brennan Centre for Justice, 2015), 41.

74 Judge Stephen Norrish QC (District Court of NSW), 'Sentencing Indigenous Offenders - Not enough 'judicial notice'?' (Speech delivered at the Judicial Conference of Australia Colloquium, Sydney, 13 October 2013) 3

75 [1999] S.C.J. No. 19

76 Criminal Code of Canada, s 718.2(e).

- 3.5 In practice, this appears similar to the position reached in New South Wales, in *R v Fernando*, where the NSW Court of Appeal set down principles for the Court to be considered in sentencing Aboriginal offenders.⁷⁷ *Fernando* was again considered in *Bugmy v the Queen*, where the High Court also considered specifically whether Australia should adopt the position of the Canadian Supreme Court in *Gladeu and Ipeelee*:⁷⁸
- “...requiring sentencing courts to take into account the unique systemic and background factors which have played a role in bringing Indigenous offenders before the court.”⁷⁹
- 3.6 The High Court in *Bugmy* distinguished NSW sentencing principles from common law developments in Canada.⁸⁰ However it was found that the relevance of the *Fernando Principles* does not diminish over time. In doing so, the Court approved Simpson J’s statement in *Kennedy v the Queen*, that:
- “Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.”⁸¹
- 3.7 The question of whether indigeneity should be a factor in sentencing is important, however it cannot be left to the courts to address the imprisonment epidemic in Australia. The Court’s discretion is generally bound by legislative guidelines and principles, which in the last twenty years have trended only toward lengthier and more punitive sentencing requirements.⁸² As noted earlier, the evidence is clear that Indigenous people are profoundly and disproportionately affected by criminal laws and sentencing.

Speaker profiles

3.8 Dr Allen Benson

As Chief Executive Officer of Native Counselling Services of Alberta and Chief Executive Officer of BearPaw Communications Limited, Dr. Allen Benson, LLD has spearheaded the development of many groundbreaking programs, particularly in the areas of corrections, restorative and social justice, health, housing and homelessness. Allen has received the following recognition: the Alberta Centennial Medal, the Alberta Aboriginal Role Model Award in Justice, the Rotary Foundation of Rotary International Paul Harris Fellow, an Honorary Doctorate of Laws from the University of Alberta and the International Community Corrections Association’s highest honor: the Margaret Mead Award. In 2013, Allen was appointed Chair of the Alberta Family Violence Death Review Committee and is the current President of the National Association Active in Criminal Justice.

3.9 The Hon Wayne Martin AC, QC

Wayne Stewart Martin was appointed to the Supreme Court of Western Australia on 1 May 2006. He was appointed as a Judge of the Court, a Judge of the Court of Appeal and as the Chief Justice of Western Australia. Chief Justice Martin was appointed a Companion in the General Division of the Order of Australia on 11 June 2012.

He was born on 28 December 1952 and attended North Perth Primary School and Christchurch Grammar School.

He graduated with a Bachelor of Laws (First Class Honours) in 1973 from the University of Western Australia and was an articled clerk with Lavan & Walsh, Perth.

77 *R v Fernando* (1992) 76 A Crim R 58. See also *Bugmy v the Queen* [2013] HCA 37 (2 October 2013). See also NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, Oct 2000, Report 96.

78 *Writing a Gladue Report*, Bearpaw Education and Resource Centre, Native Title Counselling Services of Alberta. Available here: <http://ncsa.libguides.com/gladue>

79 Thalia Anthony, *Indigenising Sentencing? Bugmy v the Queen*, (2013) SydLawRev 35:451, 452.

80 *Bugmy v the Queen* [2013] HCA 37 (2 October 2013), at [35]-[36].

81 *Ibid*, [37]. Referring to *Kennedy v the Queen* [2010] NSWCCA 260, at [53].

82 Bagaric, M., 2015, *Three things that a baseline study shows don't cause indigenous over-imprisonment; three things that might but shouldn't and three reforms that will reduce indigenous over-imprisonment*, (awaiting publication, as at 20 November 2015).

He completed a Master of Laws from the University of London in 1975 and was admitted to practice in Western Australia in 1977.

After being a Senior Litigation Partner with Keall Brinsden, Perth, from 1984 - 88, he joined the Independent Bar in 1988 and was appointed a Queens Counsel 1993. From 2001 - 2003, he was Counsel assisting the HIH Royal Commission in Sydney.

He served as President of the Western Australian Bar Association from 1996-1999, Chairman of the Law Reform Commission of Western Australia from 1996-2001, President of the Law Society in 2006 and Director, Law Council of Australia in 2006.

Recent publications:

- Indigenous incarceration rates - strategies for much needed reform, Speech to the WA Law Summer School, January 2015

3.10 *Dr David Neal SC*

David Neal is senior counsel at the Victorian bar. He has a Ph D in Jurisprudence and Social Policy from the University of California at Berkeley and a Master of Laws degree from Melbourne University. He was a senior lecturer in law at the University of New South Wales from 1981-87, a Law Reform Commissioner at the Victorian Law Reform Commission from 1987 to 1990, and then headed the legislation branch of the Victorian Attorney-General's Department from 1990 to 1992 where he was involved in the passage of a wide range of legislation. He was the foundation chair of the national Model Criminal Code Committee.

David has authored books on the rule of law and criminal law, as well as a number of law reform reports on criminal justice and legal aid.

He has represented the Victorian Bar and the Law Council of Australia over many years in negotiations with government on criminal law and access to justice issues.

3.11 *The Hon Stephen Norrish QC*

Judge Norrish was admitted as a solicitor in March 1974 and practised for five years with the Aboriginal Legal Service in country NSW and at Redfern, where he was Principal Solicitor from 1978 – 1980.

Judge Norrish was admitted to the Bar in June 1980, practising as a Public Defender from 1980 until 1988. He was appointed Queens Counsel in October 1987 and Deputy Senior Public Defender at the same time.

His Honour was senior counsel assisting the Royal Commission into Aboriginal Deaths in Custody, in NSW, Victoria, and Tasmania between June 1988 and December 1990.

On 3 October 2000 he was appointed a Judge of the District Court of New South Wales and an Acting Judge of the NSW Supreme Court in 2008.

Prior to his appointment, Judge Norrish was a Commissioner of the NSW Legal Aid Commission from 1987 until 1996, representing the Commonwealth Attorney General, and was a Member of the National Legal Aid Advisory Committee from 1987 until 1995.

Judge Norrish was a member and then Chairperson of the NSW Judicial Commission's Ngara Yura Committee between 2001 and 2012, promoting Aboriginal cultural awareness amongst judicial officers. He was a member of the National Judicial College of Australia's Indigenous Cultural Awareness Committee and is a member of the Australian Institute of Judicial Administration's Committee.

Recent publications:

- Judge Stephen Norrish QC, Sentencing Indigenous Offenders: not enough 'judicial notice'?, 13 October 2013, Paper given to Judicial Conference of Australia Colloquium 2013.
- Judge Stephen Norrish QC, Are Indigenous People Likely to Receive Greater Penalties than Non-Indigenous People in the Courts? What should be done about it?, Australian Institute of Judicial Administration, Conference, Adelaide, 18-19 July 2013.

4. BUY-IN

Indigenous involvement in justice solutions is a relatively recent phenomenon, but it is already having positive impacts on community empowerment and ownership of justice solutions. Our panellists discuss: appropriate mechanisms for Indigenous designed and community-supported justice mechanisms; and what works, and how we promote greater understanding and support for smarter justice mechanisms.

- The Hon Judge David Parsons SC (**Chair**) (Koori County Court of Victoria)
- Professor Elena Marchetti (University of Wollongong)
- The Hon. Judge John Smallwood (Koori County Court of Victoria)
- Dr Hilde Tubex (University of Western Australia)

Overview

- 4.1 Comparative criminology helps to provide a greater understanding of the Australian situation. For example, the experience of Canada is instructive.
- 4.2 In the case of both Australia and Canada, the problems have their roots in colonialism and historical discrimination, marginalisation and dispossession. The Canadian Criminal Justice Association has stated that historical factors, combined with social-economic conditions, have produced offending behaviours that reflect social – rather than criminal – problems in Aboriginal communities.⁸³ Institutional racism and systematic bias may be difficult to demonstrate, however it has been suggested there is an indirect relationship in a way that colonialism created the conditions for multiple forms of deprivation, leading to criminalisation.⁸⁴
- 4.3 For example, in Western Australia Indigenous people account for only 3 per cent of the population, but make up 40 per cent of the prison population.⁸⁵ More recently, problems have been linked to the economic development of northern Western Australia, where many cattle stations employing Aboriginal people were closed or modernised from the 1950s. This development, in combination with Indigenous people not receiving equal wages, led to many losing their jobs and their home, leaving traditional lands and moving to the cities. This transition combined with multiple disadvantages led to increased Aboriginal contact with the criminal justice system.
- 4.4 Taking these historical factors into account, it is important to look at how judicial systems operate with respect to Indigenous peoples. As noted earlier in this paper, factors relating to disadvantage, including those arising from historical dispossession and marginalisation, can be considered by courts in sentencing Indigenous offenders. Further, a number of jurisdictions have established courts aimed at increasing Aboriginal community participation. In Victoria, the Koori Court provides an informal process in sentencing, engaging the Koori community in the proceedings and allowing them to submit recommendations to the Court.
- 4.5 It has been concluded in a number of evaluations of the Koori Court that it reduces the perceived of cultural alienation of sentencing and, thereby, increases its relevance and impact on offenders and victims. The Koori Court model has also been expanded in Victoria, through the County Court and the Children's Court, and has been more recently introduced in the Children's Court of NSW. The Nunga Courts in South Australia, Circle Sentencing in NSW and the ACT and the Murri Court in Queensland present alternative models based on similar principles, with local variations.
- 4.6 In sentencing Indigenous offenders in Indigenous Sentencing Courts, notions of justice go beyond the need to simply punish and reform an offender's behaviour. It has been found that:
 - 4.6.1 a sentencing court can function as a culturally hybrid domain, allowing for competing narratives and traditions to interrelate and work together in the pursuit of justice;

83 Canadian Criminal Justice Association (2000) *Aboriginal Peoples and the Criminal Justice System*

84 H. Tubex, *The Revival of Comparative Criminology in a Globalised World: Local Variances and Indigenous Over-representation* (2013) 2 (3) *International Journal for Crime, Justice and Social Democracy* 64.

85 H. Tubex, *State of imprisonment: lopsided incarceration rates blight West*, *The Conversation* (2015).

- 4.6.2 new avenues of justice can be formulated through resistance and the acknowledgement of shared histories of disenfranchisement and disempowerment; and
- 4.6.3 a narrative can be provided of what justice within a sentencing framework – that sits within the existing legal structure and system that does not permit Indigenous sovereignty and self-determination – might look like for Indigenous Australians trying to maintain and restore agency and power.⁸⁶
- 4.7 The effectiveness of these courts on particular cohorts of offenders has also been studied. It has been found that for Indigenous offenders convicted of intimate partner violence, perceptions of justice were increased by the opportunity provided to be supported by, understood by and held accountable to respected members of their community for offences that caused offenders ‘shame’.⁸⁷ It has been suggested that one way of trying to change the attitudinal and behavioural outcomes of such offenders is by improving an offender’s experience of procedural justice so that a greater sense of fairness and procedural legitimacy are attached to the ultimate sentence,⁸⁸ while a greater understanding of the impact of their behaviour is instilled in the offender. It has been argued that this may reduce the propensity to reoffend, however to date evidence of a reduction in recidivism among offenders sentenced in the Koori Courts and other Indigenous courts remains inconclusive.⁸⁹ However, this may be due to insufficient funding for the courts and support programs.⁹⁰
- 4.8 One issue critical to the interaction of the justice system and Aboriginal and Torres Strait Islander peoples is cross-cultural competency and awareness. Studies have demonstrated that a disjuncture between the deterrence objective of criminal justice and its effectiveness can arise where participants in the process either do not understand the process or are alienated by cultural barriers.⁹¹ Anecdotally, the Law Council understands that, where judicial and legal cultural competency training exists, there is limited uptake and cultural barriers are able to persist. The true impact of this in terms of sentencing outcomes is unknown, however there is a legitimate concern as to whether sentencing objectives can be achieved when the subject of the proceedings is unable to appreciate that justice has been done.

Speaker profiles

4.9 *Professor Elena Marchetti*

Elena Marchetti was awarded an ARC Future Fellowship grant in 2014 (which she commenced in 2015) to undertake research exploring the development of Indigenous-centric methods for evaluating Indigenous-focused criminal justice programs.

Prior to this, Elena was the lead Chief Investigator of a five-year ARC Discovery Projects Grant, for which she also received an Australian Research Fellowship, to research the efficacy of Indigenous sentencing courts in sentencing partner violence offenders.

Elena’s other research interests include Indigenous and feminist critiques of justice processes, and access to justice for minority groups. She has extensive knowledge of specialty courts, particularly those involving Indigenous offenders and is the author of a number of articles, chapters and reports in the areas of Indigenous justice, and intersectional race and gender analyses of legal processes. Her PhD research, completed in 2005, considered why the Australian Royal Commission into Aboriginal Deaths in Custody was unable to take intersectional race and gender approach in its analysis.

Recent publications:

- E. Marchetti, Indigenous sentencing courts and partner violence: Perspectives of court practitioners and Elders on gender power imbalances during the sentencing hearing (2010) 43 (2) Australian and New Zealand Journal of Criminology 263-281

86 See, for example: E. Marchetti, ‘Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers’ (2014) 36 (4) *Law & Policy* 341. This study looks at Indigenous Sentencing Courts in seven sites in three Australian jurisdictions – New South Wales, Queensland and the Australian Capital Territory. Marchetti’s study examines the perspective of Indigenous and non-Indigenous judicial officers, court workers and elders or community representatives who are involved with these courts.

87 E. Marchetti, ‘An Australian Indigenous-Focused Justice Response to Intimate Partner Violence: Offenders’ Perceptions of the Sentencing Process’ (2015) 55 *British Journal of Criminology* 86.

88 Ibid 101-2.

89 Weatherburn, *op cit* 6, 99-101.

90 Ibid.

91 For example, E. Marchetti, ‘Intersectional race and gender analyses: why legal processes just don’t get it’ (2008) 17 (2) *Social & Legal Studies* 155-174

- E. Marchetti, 'Intersectional race and gender analyses: why legal processes just don't get it' (2008) 17 (2) *Social & Legal Studies* 155-174
- E. Marchetti & K. Daly, 'Indigenous sentencing courts: towards a theoretical and jurisprudential model' (2007) 29 (3) *Sydney Law Review* 415-443.

4.10 *Judge David Parsons, (Chair)*

In 1974, Judge David Parsons moved to Alice Springs to work with the Central Australian Aboriginal Legal Aid Service (CAALAS). He spent the next 8 years working in the Northern Territory - at CAALAS, the Northern Land Council and at the Aboriginal Legal Service in Darwin. In 1982 His Honour returned to Melbourne and signed the Bar Roll in 1982, reading with Robert Richter QC. His Honour developed a practice that included Aboriginal land claims, native title and criminal law. His Honour took silk in 2001. He was appointed to the County Court of Victoria in 2006. He sits in the Criminal Division and in the County Koori Court.

4.11 *Judge John Smallwood*

John Smallwood was appointed as silk in 1999 and as a Judge of the Victorian County Court in August 2001. He has presided predominantly in criminal matters and is currently the judge in charge of the County Koori Court, which sits both the regional area of the Latrobe Valley and in Melbourne.

John acquired a taste for serious criminal cases whilst appearing in armed robbery trials, at the same time developing a mutual respect between himself and the police. He took part in his first murder trial in 1991, as junior to Bob Vernon; he developed an almost exclusive homicide practice over the next decade.

He was born in Foster, Victoria and was educated as a boarder at St Patrick's College in Sale.

4.12 *Dr Hilde Tubex*

Before migrating to Australia in 2007, Dr Tubex had been employed for 15 years as a researcher and lecturer in the Free University of Brussels. She was appointed as an expert to the Council of Europe (CoE), taking part in a number of projects in Central and Eastern Europe between 2000 and 2007. During this period, Dr Tubex was also a substitute parole board assessor, as an expert on the implementation of sentences. She was a member of the Central Inspectorate of Prisons and subsequently an adviser to the Belgian cabinet as an expert adviser and as an adviser on penal policy to the Belgian minister of Justice.

In 2011 Dr Tubex received an ARC Future Fellowship for her current project: "Reducing imprisonment rates in Australia: International experiences, marginal populations and a focus on the over-representation of Indigenous people." She joined the UWA Law School in August 2011 and has conducted fieldwork in NSW, Victoria and WA, as well as overseas (Belgium, Netherlands, the UK). In the period 2007-2011, Dr Tubex worked for the Department of Corrective Services as Team Leader, Research and Evaluation.

Her fields of expertise include criminological theory and penology (prison research), especially in international comparative studies. In a series of research projects she worked on such topics as long-term imprisonment, parole, violence in prisons, sex offenders, the organisation and evaluation of welfare and treatment services for prisoners, female offenders and recidivism.

Recent publications:

- Tubex, H. (2013), The revival of comparative criminology in a globalised world: Local variances and Indigenous over-representation. *International Journal for Crime, Justice and Social Democracy*, 2013, 2(3) ISSN 2202-8005 <https://www.crimejusticejournal.com/article/view/110>
- Tubex, H. (2014) *Contemporary Penal Policies*. In Oxford Handbooks Online. New York: Oxford University Press
- Tubex H (2014) Book review Don Weatherburn, *Arresting incarceration: Pathways out of Indigenous Imprisonment*
- Tubex H (2015) State of imprisonment: lopsided incarceration rates blight West. <https://theconversation.com/state-of-imprisonment-lopsided-incarceration-rates-blight-west-38986>

5. EXISTING PROGRAMS

States and Territories have implemented various programs intended to address high and increasing rates of Indigenous imprisonment, often offset by tough criminal laws. Our panel looks at the efficacy of existing programs in each jurisdiction, including ‘Sentenced to a Job’ and community corrections innovations in the Northern Territory, Just Reinvest NSW, the suggested ‘behaviour contract’ in Western Australia and planned justice reinvestment trials in South Australia:

- Fiona McLeod SC (President, Australian Bar Association; Executive (Treasurer), Law Council of Australia) (Chair)
- The Hon John Elferink MLA (Northern Territory Attorney-General and Minister for Corrections)
- Ms Sarah Hopkins (Chair, Just Reinvest NSW)
- The Hon. Christopher Kourakis SC (Chief Justice of South Australia)

Overview

- 5.1 One of the major achievements of the RCADC was to focus national attention on the high rates of preventable deaths of Aboriginal and Torres Strait Islander peoples in prison and police custody. A key revelation arising from the Commission’s findings was that the primary cause of high rates of deaths in custody is disproportionate rates of imprisonment.
- 5.2 While many of the recommendations of the RCADC have been implemented, in one form or another, the continuing increase in Indigenous imprisonment urges a rethink of the way in which the criminal justice system responds to Indigenous offending.
- 5.3 There are a number of initiatives which have emerged over the last 10-15 years. Indigenous courts have been regularly cited as a positive mechanism, however critiques on its effectiveness in reducing recidivism remain mixed.⁹² The success of electronic monitoring of parolees is also unclear.⁹³
- 5.4 However, one reason for the ineffectiveness of measures to date to reduce the reoffending rate (notwithstanding other benefits of increased Indigenous involvement in justice) may be the failure by governments to adequately resource programs directed at providing and promoting alternatives to imprisonment.⁹⁴ This is despite strong evidence in overseas jurisdictions that adopting data-driven, evidence-based approaches can result in substantial reductions in both crime and imprisonment, with corresponding savings in corrections.⁹⁵
- 5.5 Justice reinvestment trials have recently commenced in Bourke, NSW, with broad community support.⁹⁶ Trials are now also being proposed in South Australia⁹⁷ and Federal Labor has now committed to supporting an additional four justice reinvestment pilots, if elected.⁹⁸ National focus on more comprehensive quantitative statistics with respect to criminal justice and imprisonment, as proposed in section 1, above, could significantly enhance the evaluation and effectiveness of justice reinvestment trials, compared to more traditional trial and punishment.

92 Early reports on Circle Sentencing in NSW and Koori Courts in Victoria were encouraging: Harris, M. (2006) A sentencing conversation: evaluation of the Koori Courts Pilot Program, Department of Justice, Victoria; Ivan Potas, Jane Smart and Georgia Brignell, Circle sentencing in New South Wales: review and evaluation, Judicial Commission of New South Wales, October 2003, Monograph 23, iv. However more recent studies have refuted any clear evidence of a reduction in imprisonment rates: Weatherburn, *Ibid*, *op cit* 6, 99-101, referring to Fitzgerald, J., 2008, ‘Does circle sentencing reduce offending?’, *Crime and Justice Bulletin* No. 115, NSW Bureau of Crime Statistics and Research.

93 Weatherburn, *op cit* 6, *ibid*, 97-98.

94 Weatherburn, *Ibid*, 98.

95 For example, Council of State Governments Justice Centre, Justice Reinvestment in North Carolina – 3 Years On, September 2014, available here: <https://csgjusticecenter.org/wp-content/uploads/2014/11/JRinNCThreeYearsLater.pdf>. Reports are also produced by the US Council of State Governments Justice Centre in relation to Washington State, Texas, California, Connecticut, Michigan, Arizona and others.

96 See Just Reinvest NSW: <http://www.justreinvest.org.au/justice-reinvestment-bourke/>

97 See SA Attorney-General’s Department website: <http://www.agd.sa.gov.au/initiatives/more-our-initiatives/justice-reinvestment>

98 *Ibid*, *op cit* 63.

5.6 It is worth outlining some of the features of the first and only justice reinvestment trial in Australia:

Just Reinvest NSW

5.6.1 Based in Bourke and taking in the surrounding community, the trial is aimed at developing an evidence-base for the effectiveness of different responses to young people offending. Its website advises that “[f]rom 2014 – 2016, Just Reinvest NSW is working in partnership with Maranguka to develop a justice reinvestment framework for Bourke, including the implementation of the first key phase of that framework.”

5.6.2 The trial has been established with philanthropic funding and relies heavily on volunteers. The lack of public funding for the pilot is concerning, given its objectives and the strong public interest in its success.

5.6.3 The premise for the trial is described in the following terms:

“ABS data (2011) shows that of a total 223 Aboriginal young people / young adults in the Bourke LGA, 21% (47) were on remand or sentenced. This does not include others in contact with the criminal justice system i.e. those charged and on bail, or those on non-custodial orders. Initial research has shown that the cost of incarcerating the 47 Aboriginal and Torres Strait Islander young people last year was \$2.2 million. Reducing the rate of Bourke youth incarceration by 20% would save the NSW Government \$500,000, a proportion of which could be reinvested back into the community.”⁹⁹

5.6.4 The primary commitment sought from government at this stage is agreement to reinvest savings in criminal justice and corrections arising from the pilot back into the Bourke community to support the program.¹⁰⁰

5.7 Some more recent rehabilitation initiatives have included the ‘Sentenced to a Job’ Program in the Northern Territory¹⁰¹ and the suggested “crime contract” in Western Australia.¹⁰²

‘Sentenced to a Job’ (SJ program)

5.7.1 The SJ program offers vocational training and employment to prisoners who meet the relevant criteria, linking them with real-world job opportunities and the opportunity to continue their employment post release. They contribute 5 per cent of their wages to victims of crime support and use the remaining earnings to offset food and board while in prison, as well as paying taxes.

5.7.2 The stated objective of the SJ program is to reduce the rate of recidivism and return to prison.¹⁰³ The former NT Corrections Commissioner, Ken Middlebrook, described the SJ program, as follows:

The program is designed to:

- Give prisoners an opportunity to integrate and adjust to community like prior to release,
- Teach prisoners good work ethics and boost their own esteem and desire to continue in employment after release;
- Assist prisoners to renew their community ties and make new social relationships and take responsibility for their own behaviour through privileges associated with the program;
- Assist the prisoner to financially support his/her family or dependents; and
- Assist the prisoner in the payment of fines and levies.”¹⁰⁴

99 Just Reinvest NSW, *Justice Reinvestment in Bourke: Briefing Paper*, August 2013, p.5-6. Available here: http://justreinvest.org.au/wp-content/uploads/2012/04/Justice-Reinvestment-in-Bourke_Briefing-paper-Aug-2013.pdf

100 Ibid, 6.

101 Erikson, S., *Sentenced to a Job Scheme* (2014) 39(1) AltLJ 14. Available here: <https://www.altlj.org/news-and-views/downunderallover/duao-vol-39-2/711-sentenced-to-a-job-scheme#>

102 ‘WA Police Commissioner champions second chance for minor offenders, ABC Radio National PM, 17 September 2014. Available here: <http://www.abc.net.au/pm/content/2014/s4089691.htm>

103 Department of Correctional Services, *Sentenced to a Job – Prisoner Employment Program*, Brochure. Available here: https://indigenousjobsandtrainingreview.dpmc.gov.au/sites/default/files/get-involved/public-submissions/nt_department_of_correctional_services_redacted.pdf

104 Letter from Corrections Commissioner to Mr Andrew “Twiggy” Forrest, 27 November 2013. Available here: <https://indigenousjobsandtrainingreview>.

- 5.7.3 The program is in its early stages and has not been evaluated in terms of success in reducing rates of return to prison. However, some initial reactions from participants in the SJ program have been positive.¹⁰⁵

‘Crime contract’

- 5.7.4 In September 2014, the Western Australian Police Commissioner suggested the development of a system of “crime contracts” for people charged with minor offences, requiring commitment to not reoffend for a period afterwards. The central premise is to substantially reduce short term imprisonment for relatively minor crimes:

“What I would call offences of stupidity mostly. So they are things like disorderly conduct, they might be minor assaults; providing the victim wants the contract to go ahead.

“Graffiti, those sorts of things. So a whole range of activities. Always first or maybe second offence offenders, so not recidivist offenders.”¹⁰⁶

- 5.7.5 The proposal has not apparently been explored further at this stage. However, given the very high proportion of Western Australian prisoners who are recidivists, significant investment may be needed in programs directed at assisting offenders, particularly Aboriginal youths, to turn their lives around.
- 5.7.6 There is some evidence that recidivism rates in Western Australia are already falling for the general population, however it is not yet clear what the cause of this is, and Aboriginal recidivism in Western Australia continues to rise.¹⁰⁷ From 2004-2014, the rate of return to prison within 2 years fell 15.8 per cent, compared with a slight increase in the return rate Australia-wide. However, it is concerning to note that the rate of sentencing of prisoners with any prior imprisonment increased significantly between 2010 and 2014.¹⁰⁸ Further, the rate of return to prison among Aboriginal offenders increased from 71 per cent to nearly 80 per cent from 2000-2014, a larger increase than the broader Australian trend over the same period (73 to 77 per cent).¹⁰⁹

Speaker profiles

5.8 The Hon John Elferink MLA

John was born in the Netherlands and moved to Australia in 1969, his family settling in Darwin. After graduating from Casuarina High School, John joined the Northern Territory Police Force as a cadet. He rose to the rank of Sergeant and served in both Darwin and Alice Springs.

Whilst in the police force John obtained a Bachelor of Arts (Monash) by correspondence and now holds a Bachelor of Law (New England). In 1997 he was elected to the rural seat of Macdonnell and served there until 2005. In 2008 he was elected to the seat of Port Darwin. John lives with his wife and two daughters in Darwin.

John’s vision for the Northern Territory is for it to be an area of growth and innovation, with a prosperous economy.

John is passionate about reducing crime and recidivism rates in the Northern Territory and since becoming Minister for Correctional Services, has implemented a number of innovative and reforming strategies. John has been instrumental in the development of the “Sentenced To A Job” prisoner employment program initiative. This has seen a large reduction in the re-offending rates and it is the first of its kind in the country. This strategy sees prisoners paying rent for cells and remunerations to the Victims of Crime Levy.

dpmc.gov.au/sites/default/files/get-involved/public-submissions/nt_department_of_correctional_services_redacted.pdf

105 For example, Allison Middleton, ‘Sentenced to a job’, 7:30 NT, ABC News Online, 26 April 2013. Available here: <http://www.abc.net.au/news/2013-04-26/sentenced-to-a-job/4654640>

106 Ibid, *op cit* 102, per Karl O’Callaghan, WA Police Commissioner.

107 Department of Corrective Services, *Recidivism Trends in Western Australia*, September 2014, Western Australia. Available here: https://www.corrective-services.wa.gov.au/_files/about-us/statistics-publications/statistics/DCS-recidivism-trends-WA-October2014.pdf

108 Ibid, 17-18.

109 Ibid, 19-20.

Through John's passion to see reoffending rates drop and to make the Territory a safer place for all Territorians, John has driven the policy and implementation of the Northern Territory Early Intervention Youth Boot Camps. This initiative provides vital assistance and an intervention to youth at risk of entering the justice system, with a view to preventing offending through providing life skills and self-awareness. These youth boot camps are a first for the Territory and have been part of a broader vision by John to prevent offending and incarceration of both Indigenous and non-Indigenous youths.

John's vision is to reform the prison system in the Northern Territory and to prevent the wider issue of criminality and offending in the community has seen this cross over into the business community. He has driven the establishment of a dynamic Correctional Services Industries that last financial year saw an annual profit of 3.4 million dollars and is on track this year to exceed that amount. These industries provide prisoners with real work-ready experience for when they are released back into the community.

5.9 Sarah Hopkins

Sarah Hopkins is a solicitor with the Aboriginal Legal Service ACT/NSW and a lecturer in criminal law at the University of NSW. She is chair of the Executive Committee of Just Reinvest NSW and also chair of its Strategic Directions Sub Committee.

Sarah is an accredited specialist in criminal law. Sarah has been working with the Bourke community since January 2013 and is now Project Coordinator of the Justice Reinvestment and Bourke Project. Sarah sits on the Steering Committee for the Red Cross 2014 Vulnerability Report and on the Steering Committee for the ANCD Justice Reinvestment Online Tool.

5.10 The Hon Christopher Kourakis SC

Kourakis CJ is the ninth Chief Justice of the Supreme Court of South Australia.

He was educated at Port Lincoln High School and the University of Adelaide (LL B, 1981) before being admitted to legal practice in 1982. He began his career at the Legal Services Commission and joined the bar in 1989. The Chief Justice was President of the Law Society of South Australia in 2001-02, as well as Director of the Law Council and is a former Solicitor-General, holding that position for five years before being appointed to the Supreme Court in 2008.

Recent publications:

- "Indigenous jailing rate shameful, SA Chief Justice Chris Kourakis says" 14 May 2015, ABC News online
- Speech to South Australian Press Club, 14 May 2015

5.11 Fiona McLeod SC

Fiona McLeod has been a Director of the Law Council since 2010. She was elected to the Executive in November 2012. Fiona was a Chair of the Victorian Bar Council and is currently the President of the Australian Bar Association. Ms McLeod practises as Senior Counsel at the Victorian Bar in trials and appeals in administrative and public law, human rights, commercial and common law.

Recognised for her recent high profile work concerning some of Australia's worst natural disasters, she advised and represented the Commonwealth in the Queensland Floods Commission of Inquiry in 2011-12, the Victorian Bushfires Royal Commission in 2009-10.

She has practised at the Victorian Bar since 1991 and took silk in 2003.

Ms McLeod has also been recognised for her work in human rights matters and continues to play a pioneering role in the field of human trafficking which resulted in the prestigious inaugural Commonwealth Government Anti-Slavery Australia Freedom Award and the Ron Merkel QC Award at the Victorian Bar Pro Bono Awards.

Ms McLeod was the Chair of the Law Council Equalising Opportunities before the Law Committee, the Human Rights Committee, the Corporate Governance Committee and the Recruitment and Retention of Lawyers Working Group and has previously been a President of Australian Women Lawyers.

Ms McLeod was inducted onto the Victorian Honour Roll for Women in 2014.

6. WORKING TOGETHER

Leaders of peak organisations discuss the need for a co-ordinated effort to reduce imprisonment, combining: short term solutions with long term solutions; the fundamental role of COAG in driving necessary intergovernmental reforms; the special responsibility of the Commonwealth; and a suggested COAG work plan.

- Tony McAvoy SC (**Chair**)
- Shane Duffy (Co-Chair, Change the Record; Chair, National Aboriginal and Torres Strait Islander Legal Services)
- Jodie Broun (New South Wales Executive Director, Australian Red Cross)
- Fiona McLeod SC (President, Australian Bar Association; Executive, Law Council of Australia)
- Associate Professor Brian Owler (President, Australian Medical Association)

Overview

- 6.1 The Law Council recognises that the causes and impacts of imprisonment are varied and widespread. There are significant cyclical implications for Indigenous health, both physical and mental, as well as worsening outcomes with respect to education, employment and other factors known to affect individual development and propensity toward crime.
- 6.2 In 2006, the Australian Medical Association stated that:
- “Just as the health and life expectancy of Indigenous Australians are far worse than the non-Indigenous population, the effects of prison on the Indigenous population are horrifying, and the statistics bear this out.”¹¹⁰*
- 6.3 The AMA’s 2006 Report Card called on the Australian Government to “keep out of prison those who should not be there, principally those with mental health and substance abuse disorders’, by: setting targets to reduce imprisonment among this cohort; screening all those on remand and following sentencing for mental health problems within 48 hours; and diverting them to best practice treatment and support programs.”
- 6.4 The AMA will shortly release its 2016 Indigenous Health Report Card, ten years later, now in response to a deteriorating situation, *“recommending that Australian governments adopt an integrated approach to reducing Indigenous imprisonment rates and improving Indigenous health through much closer integration of Aboriginal Community Controlled Health Organisations (ACCHOs) and other services and prison health services across the pre-custodial, custodial and post-custodial cycle.”¹¹¹*
- 6.5 The Australian Red Cross put forward 23 recommendations to the Senate Legal and Constitutional Affairs Inquiry into a Justice Reinvestment Approach to Criminal Justice in Australia, including:
- “...that political parties focus on the evidence in relation to the most effective responses and strategic use of limited resources in addressing crime and community safety, rather than the seemingly unproductive and expensive “tough on crime” stance which is prevalent in public policy.”¹¹²*
- 6.6 Change the Record, was launched in April 2015, calling for a new approach to criminal justice to address increasing rates of violence and imprisonment in Indigenous communities.¹¹³ This is the first time Indigenous peak bodies have partnered with peak legal bodies and Indigenous health organisations to engage governments to respond.

110 Australian Medical Association, Undue Punishment? Aboriginal People And Torres Strait Islanders in Prison: An Unacceptable Reality? *Indigenous Health Report Card 2006*, Canberra. Available here: <https://ama.com.au/article/2006-ama-indigenous-health-report-card-undue-punishment-aboriginal-people-and-torres-strait>

111 Australian Medical Association, *Indigenous Health Report Card 2016* (release expected on 25 November 2015), p.6. Available here (from 25 November 2015): www.ama.com.au.

112 Australian Red Cross, submission to the Senate Inquiry into the value of a justice reinvestment approach to criminal justice in Australia, March 2013. Available here: http://www.redcross.org.au/files/2013_March_-_Justice_Reinvestment_Submission_FINAL.pdf

113 www.changetherecord.org. The campaign is steered by a broad coalition of Indigenous and non-Indigenous organisations, including the Law Council of Australia.

- 6.7 Now, more than at any time since the RCADC, public awareness of this crisis is high. However, there remains no clear commitment to leadership from COAG.
- 6.8 This brings into direct question the apparent assumption under the COAG Closing the Gap framework, that crime and imprisonment are symptoms to be addressed by focusing efforts on improvements in health, education, employment and other areas. Since the Closing Gap Initiative was commenced in 2008, Aboriginal and Torres Strait Islander imprisonment has continued to increase, unabated, and even more quickly in some jurisdictions.
- 6.9 The Federal Opposition Leader's announcement that justice targets will be introduced if Labor is elected to government¹¹⁴ is welcome. However, bi-partisanship on this issue has not yet been achieved and remains essential to successful policy outcomes over the long-term. Further, while Federal leadership is extremely important, State and Territory Governments can lead the way, as has been demonstrated in the United States and Canada.

Speaker profiles

6.10 Jodie Broun

Jody Broun has vast experience in program administration and community engagement at the state and national levels, holding a number of senior executive roles throughout her career.

Jody began her career as a teacher at Clontarf Aboriginal College in WA and subsequently held the position of Executive Director Aboriginal Housing and Infrastructure within the Government of Western Australia. She was later appointed Director of Equal Opportunity in Public Employment for Western Australia and then moved to New South Wales to take up the position of Deputy Director General of the Department of Aboriginal Affairs (NSW), and nine months later was appointed as Director General. She worked at the Department of Aboriginal Affairs for a seven year period ending in 2010.

Through all of these roles, Jody was responsible for delivering community and state-wide policy and programs, and was involved in national policy reforms and negotiating national and state agreements on behalf of government. Most recently Jody also completed a two year term as the inaugural elected female Co-Chairperson of the National Congress of Australia's First Peoples.

Jody holds a Diploma of Teaching, Bachelor of Education and a Master of Philosophy. She is also an artist and has exhibited nationally and internationally. In 1998 she won the National Aboriginal and Torres Strait Islander Art Award and in 2005 the Canberra Art Award.

6.11 Shane Duffy

Shane is a descendant of the Kalkadoon people from Mount Isa in North West Queensland. Shane has worked in the human services industry for over the last twenty years, serving as the Chief Executive Officer for the Aboriginal and Torres Strait Islander Legal Service in Queensland for the last 9 years. In addition to being the Chair of NATSILS, the national body for ATSILS, Shane has also been the Australian Legal Assistance Forum Chair and Chair for the Queensland Aboriginal and Torres Strait Islander Human Services Coalition. Shane's experience broadly covers local, regional, state, national and international advocacy on issues that impact disproportionately and adversely upon his people.

Shane has been committed to social justice for his family and his people from a very young age whilst growing up in Mount Isa. His own life experiences of racism and prejudice that impacted on his daily upbringing have moulded the journey he has taken thus far, even though it wasn't truly recognised and understood until his early twenties

114 *Ibid.*, *op cit* 63.

6.12 *Fiona McLeod SC*

(Biographic information provided above)

6.13 *Associate Professor Brian Owler*

Associate Professor Brian K Owler is an Australian trained neurosurgeon.

A/Prof Brian K Owler is a Consultant Neurosurgeon at the Children's Hospital at Westmead, Westmead Private, Sydney Adventist Hospital at Wahroonga and Norwest Private Hospital.

A/Prof Owler has a PhD from the University of Sydney and spent 18 months performing research at the Academic Neurosurgery Unit at the University of Cambridge. He is Associate Professor of Neurosurgery at the University of Sydney.

A/Prof Owler was elected President of the Australian Medical Association in May 2014. He was previously President of AMA (NSW) where he lead numerous campaigns to reduce the incidence of preventable deaths and injuries in children, primarily in the areas of pool safety and falls from residential buildings in NSW and alcohol related violence

A/Prof Owler has a particular interest in public health advocacy. He has worked with the NSW Roads and Maritime Service to develop the "Don't Rush" advertising campaign targeted at reducing speed-related road accidents in NSW. He also has a strong commitment to improving the health of Indigenous Australians.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.



Law Council
OF AUSTRALIA

GPO Box 1989, Canberra
ACT 2601
19 Torrens St. Braddon
ACT 2612

T: (02) 6246 3788
F: (02) 6246 0639

 @thelawcouncil

 @LCAPresident

 Law Council TV