Justice for Aboriginal People in the Justice System

A paper for the National Aboriginal and Torres Strait Islander Legal Summit 2010

Judge Stephen Norrish QC

"Only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture. The high incidence of imprisonment of aboriginal people, and the often deleterious and sometimes tragic effects it has upon them, are of justifiable concern to the community:.... To recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic." (**R v Welsh** (unrep, 14/11/97 per Hidden J. NSW Supreme Court.)

INTRODUCTION

I am a lawyer and a judge, not a politician or a bureaucrat, policy maker, statistician or a social scientist. I am not an anthropologist or a linguist. I have no real expertise in relation to any particular social or political science. I am not an 'expert' about matters pertaining to Indigenous Australians. I draw my opinions from my experience and from my reading of the burgeoning literature and learning on the relationship of the Indigenous community and the legal system in its myriad forms, as well as numerous Reports and Inquiries since the Final Report of the Royal Commission into Aboriginal[·] Deaths in Custody released in 1991.The views expressed are not those of the Judicial Commission of NSW nor its Ngara Yura Committee.

This paper was largely prepared before I saw the Conference program. I expect that many of the issues I refer to, or address, will be covered by other speakers, no doubt with greater eloquence and detail than I can muster. I apologise in advance should there be any repetition of what has gone before, I have not read the other papers. Any repetition is unintended but inevitable,

---

[·] References to 'Aboriginal' Australians (or people) may be taken to be references to all Indigenous Australians and the terms are used interchangeably with no disrespect to Torres Strait Islanders.

given the common issues we are addressing and the underlying themes at work.

Indigenous Australians have been treated unfairly by the 'justice system' imposed upon them since 1788 up to the present time in a range of ways. By justice system I refer not just to courts, but also law enforcement, legal services, corrections and child welfare authorities and related matters. Even if many of the injustices suffered on occasion have not been intentional or necessarily borne of 'bias' or discrimination, they are nevertheless hurtful and damaging. The 'justice system' remains a constant reality for Aboriginal Australians, whether it be the laws that affect everyday living in a range of ways, the involvement and intervention by government agencies in Aboriginal community life, policing policies and law enforcement and/or the court system and the way it deals with Aboriginal people.

Today I propose to concentrate on the 'justice system' as it is reflected by the operation of courts and the conduct of judicial officers and related matters. Usually, but sadly, it arises in the application of the criminal law and particularly in sentencing. But I acknowledge the importance of recognising the wider effects of the justice system upon Indigenous Australians as victims of crime (where they are disproportionately represented), witnesses, litigants seeking redress or compensation, support people and the like.

I appreciate that Indigenous Australians may feel more aggrieved by the way the 'law' is applied by governments and their agencies than by courts particularly. Policing policies may be claimed to be tantamount to harassment or discriminatory in their conception and application, Child protection policies (such as the Northern Territory 'Intervention') may be viewed the same way. These may unfairly or improperly lead to unnecessary court intervention, however, time and contemporary expertise, or lack of it on my part, prevent an examination of those related matters now.

The 'justice' provided by Courts, trapped as they are to a large extent by the conduct of the parties is, or arguably is , the most transparent of the instruments of justice and, to my mind, the most amenable to change for the better. Primarily, because we expect judicial officers always to act fairly and

with integrity. One would also expect that judicial officers would be quite intelligent and worldly, at least. The open mindedness of judicial officers is something that can be readily used to bring appropriate change.

In this paper I wish to address a number of ways in which the justice system, particularly the court system, can better serve Aboriginal people, mechanisms for indigenous communities to engage with the justice system and/or its participants and ways of encouraging indigenous people to develop appropriate programs for community justice initiatives, in the context of wider action and reform.

Whilst the justice system is not infallible, in fact very human, because of the widespread integrity, good faith and professionalism of judicial officers, the safety net of the appeal process and the generally widespread availability of legal representation, generally speaking the right to 'fair hearing' is respected and applied by judicial officers. The problems arise, by and large, because of the manner in which matters are brought to court and the legislative constraints imposed upon courts, particularly in the area of sentencing, as well as what happens **after** people pass through the sentencing phase.

JUSTICE – WHAT IT MAY MEAN

When one discusses the concept of 'justice' or making a system more 'just' for a particular group within society, a host of significant ethical and philosophical issues come into play.

'Justice' is sometimes regarded as done when individuals receive equal treatment or achieve equal outcomes in court proceedings untrammelled by bias, unfairness and/or discrimination. However, 'justice' for one person may not seem like justice to another. Generally speaking, people would regard a court system as 'just' if it acted impartially and objectively, treated participants fairly and produced an outcome that can be respected by the parties, if not necessarily satisfying some or all of them. The treatment of people in the court system and, more particularly, the outcomes of those proceedings, may be fashioned by forces or influences that courts and judicial officers have little or no control over. The 'court system' does not commence

litigation nor usually determine the issues to be litigated, or the evidence sought to be adduced. It has no control over the quality of representation, nor indeed whether people are represented at all.

The problem for lawmakers, and those applying the law, is to ensure that 'just' outcomes can be provided ethically and consistently, absent discrimination and/or bias.

The concept of 'justice' of course may involve something more than what courts may deliver or are capable of delivering. There are wider aspects of justice that need to be considered that are intimately bound up in an understanding of the narrower concept of just outcomes in legal proceedings. These aspects include concepts such as 'social justice', 'economic justice', and the like.

'Discrimination" presents particular challenges as to its identification and removal from the justice system.

As McHugh J succinctly explained:

> *"...discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different."* (**Waters v Public Transport Corporation** (1991) 173 CLR 349 at 402)

'Equal justice' is a concept that has found its way into general sentencing law, particularly in the area of 'parity' of sentencing of co-offenders. It was recognised by the High Court in **Postiglione v The Queen** (1997) 189 CLR 295, particularly by Justices Dawson and Gaudron, when they noted that "equal justice", required "like to be treated alike and difference in treatment be rational"(at 301). In **R v Jimmy** [2010] NSWCCA 60 Justice Stephen Rothman recently noted with approval, at [255] [256], the adoption into Canadian jurisprudence the 'Aristotelian principle' of 'formal equality' namely, that "things that are alike shall be treated alike, while things that are unalike

should be treated unalike in proportion to their unalikeness", and encouraged the same approach in New South Wales.

Former New South Wales Acting Chief Justice Mahoney observed in **Kable v DPP** (1995) 36 NSWLR 374 (at 394) that: "... If justice is not individual, it is nothing". Chief Justice Spigelman in the guideline judgment of **R v Henry** (1999) 46 NSWLR 346 (at [9]) seeing those words in "context" noted that: "If justice is inconsistent, it is nothing." These two views are not inconsistent, if one has regard to the factors that distinguish individuals.

The Courts, without parliamentary assistance, have tried to address the inherent inequalities that contribute to offending by Indigenous Australians. In **R v Fernando** (1992) 76 A Crim R 58, Justice Wood of the Supreme Court of New South Wales, asserted that general sentencing principles apply in all cases, irrespective of the racial identity of an offender, but that a Court cannot ignore those facts which exist only by reason of the offenders membership of a particular 'ethnic group'. 'Aboriginality' may throw light on the particular offence or the circumstances of the offender. Problems of alcohol abuse and violence within communities, contributing to offending require "more subtle remedies than the criminal law can provide by way of imprisonment" and a lengthy period of imprisonment may be "unduly harsh" when served in a foreign environment. He set out a number of 'principles' to be considered in particular cases involving Aboriginal offenders, particularly from disadvantaged communities charged with acts of alcohol related violence.

In **R v Fernando** [2002] NSWCCA 28 (another defendant) Spigelman CJ observed, in the context of considerations of personal and general deterrence relating to an Aboriginal offender:

> *"It is, however, often the case that such considerations of deterrence are properly tempered by considerations of compassion which arise when the court is presented with information about the personal circumstances which have led an individual into a life of crime."*

Compassion can only go so far and may be unevenly applied by different judges.

In **R v Morgan** (2003) 57 NSWLR 533; at [20],Wood J, revisiting his principles in the earlier **Fernando** case, reiterated that it was not intended as "an exhaustive statement of sentencing practice, or as justifying any special leniency in relation to aboriginal offenders of the class to whom they applied". Reference was made by him to the decision of **R v Ceissman** [2001] NSWCCA 73, involving the sentencing of an Aboriginal offender, for serious Customs Act offences, as the type of case where 'Fernando principles' had no relevance (see also the majority judgment in **R v Newman** [2004] NSWCCA 102).

In **Morgan**, Wood J at [21], said of his earlier judgment:

> *"...(The principles) were intended to reflect an understanding of some of the factors which can lead a person of this racial background into offending behaviour, and which, in appropriate cases, may have a particular relevance for the way in which a sentencing order may suitably be framed. They can have also a particular relevance for persons appearing before the courts who come from remote parts of the country, and who have particularly disadvantaged backgrounds, or when the offence is alcohol-related."*

The 'principles' are ultimately of limited effect and application. The Western Australian Aboriginal Benchbook (2nd Edition) notes that principles of 'substantive equality' may support a 'special approach' to the sentencing of Aboriginal offenders, that is not discriminatory. Features of Aboriginal life in Australia held to be mitigating factors or otherwise relevant identified in the Benchbook include; emotional stress from interracial relations (**Neal v The Queen** (1982) 149 CLR 305) difficulties arising from adjustment to urban life (**Harradine v R** (1992) 61 A Crim R 201): forced or arbitrary removal from family at a young age (**R v Fuller-Cust** (2002) 6 VR 496): social-economic disadvantage (**R v E:** (1993) 66 A Crim R 14): the impact of imprisonment upon an aboriginal person in the context of cultural and social background (**WA v Rogers** [2008] WASCA 34), amongst other matters peculiar to Aboriginal social life. No doubt there are many decisions across jurisdictions recognising aspects of Indigenous disadvantage contributing to offending

behaviour. The case law, unfortunately, is sporadically applied and lacks sufficient cohesion to have any real impact upon the current blight of over incarceration of Indigenous Australians.

Recognition of the inherent inequalities of life for the vast majority of Indigenous Australians is a starting point for what I suggest as, at least, a speeded up 'evolution' of treatment of Aboriginal people within the court system to try and achieve a more consistent 'justice' in the 'Aristotelian' sense. Indigenous Australians generally do not come into the 'justice system' from anything like a 'level playing field' of social, economic, educational, or political circumstances. 'Equality' of outcomes in court may not evidence 'equal treatment'.

No examination of the 'the justice system', including the operation of courts, can ignore the relationship of it to the wider social context and the various forces, be they historic, governmental, political, economic, administrative, geographic etc, that shape the current social, economic and political position of Indigenous Australians, either as individuals' or in communities across Australia. Of course, when discussing the circumstances of individual Indigenous Australians, generalisations must be viewed with some circumspection, recognising that the individual circumstances of Indigenous Australians, and the circumstances of indigenous communities, are not homogenous.

Further, looking at the situation as currently pertaining at the end of 2010, one must recognise that in the narrow legal context, there have been constitutional, legislative, administrative, executive and political developments in the last 50 years that have substantially changed the legal landscape for Indigenous Australians in a range of ways.

Some examples that immediately spring to mind include:

i) the 1967 constitutional amendment recognising Indigenous Australians by amendment of s.51(xxvi), of the Australian Constitution Act 1901, and consequently granting civic rights and protections previously denied.

ii) The creation of Federal and State Departments of Aboriginal Affairs from the late 1960s onwards.

iii) The passing of 'Land Rights' legislation, in Federal and various State and Territory legislatures from the mid 1970s onwards, and the consequent creation of various Land Councils.

iv) The enactment of the Commonwealth **Racial Discrimination Act** 1975 and subsequent related State legislation and the creation of a Human Rights and Equal Opportunities Commission, particularly the creation of the position of Aboriginal and Torres Strait Islander 'Social Justice' Commissioner, which position has been held by distinguished Indigenous Australians such as Professor Michael Dodson and Dr Tom Calma, amongst others.

v) The creation of the Royal Commission into Aboriginal Deaths in Custody in 1988 and its various inquiries culminating with the 'National Report' and recommendations in 1991, along with governmental responses.

vi) Various reports of the Human Rights Commission, including land mark reports such as the "Stolen Generations" Report.

vii) The creation of various 'Aboriginal Legal Services' across the country, or the widening of accessibility to legal services through Legal Aid Commissions and their equivalent throughout the Commonwealth of Australia.

viii) The creation and development of community services such as 'Aboriginal' Children Services, 'Aboriginal' Medical Services, Aboriginal housing companies, pre schools, transport services and the like.

ix) Decisions of the High Court of Australia, recognising 'Native Title' and related issues such as **Mabo v The State of Queensland [No2]** (1992) 175 CLR 1, **Wik Peoples v The State of**

Queensland (1996) 187 CLR 1 and related, or consequent, legislation, including the Commonwealth **Native Title Act**.

x) The creation of ATSIC (subsequently abolished) and the election of regional representatives only by Indigenous Australians to that body's Councils.

xi) Amendment to State Constitutions and proposed amendment to the Australian Constitution to recognise Aboriginal and Torres Strait Islander occupation of the land before European occupation.

This is not to say that the change in the 'legal' and 'constitutional' landscape has been matched by significant improvements in outcomes for indigenous people either in the court system, or by any other economic measure, or in the treatment of Indigenous Australians by Governments, their departments, private corporations, law enforcement and correctional agencies and the like. There have been set backs, such as the suspension of the Federal Racial Discrimination Act for the 'Intervention' in the Northern Territory in 2006, the unilateral abolition of ATSIC etc. However, the formal gains have outweighed them, at least in theory.

I acknowledge that parallel with the major legislative changes, many government agencies, particularly in the area of law enforcement and 'corrections' have, in good faith, sought to implement changes to systems, programs and services, either to overcome disadvantages suffered by Indigenous Australians, to correct unjust practices from the past or to provide some accommodation for historical anomalies and the like. On the other hand, the continuing disproportionate under representation of Indigenous Australians amongst the ranks of police officers, corrections officers, probation and parole officers, lawyers, social workers and in the judiciary reflect the fact that at the very least, a wider and better understanding of the lives of Indigenous Australians, the challenges they face, the cultural forces that inform behaviour and attitude, and the like, are, by and large, left to those who are prepared to take the trouble to education themselves about such matters and/or are prepared to pay heed to the lessons learnt from such education or experience.

The wider Context in which the 'justice system' needs to be examined

Whilst I speak about the current matters with a New South Wales perspective, with limited experience of interstate issues affecting Indigenous Australians, it is worthy of note that as of the latest figures from the Australian Bureau of Statistics from 2009, New South Wales has (and has had since at least before the Royal Commission into Aboriginal Deaths in Custody) the largest Indigenous Australian population of all the States and Capital Territories (29.4% of the total indigenous population). Queensland is next (28.4%), followed a long way behind by Western Australia (13.6%), the Northern Territory (12.2%), Victoria (6.5%), South Australia (5.4%), Tasmania (3.6%) and the ACT (0.8%). I appreciate that statistical information on identification of Indigenous Australians may not be completely accurate, given underreporting and misreporting of indigenous heritage.

The current urbanisation of Indigenous Australians should not be underestimated. According to the Australian Bureau of Statistics in its 2009 analysis, 32% of Indigenous Australians live in major cities, 21% in "inner regional areas", 22% in "outer regional areas", 10% in remote areas and 16% in "very remote areas". Reflecting a very different demographic from the rest of the Australian population, 37% of the Indigenous Australian population is 15 years of age or less (compared to 19% for non-indigenous Australians) and 3% are aged over 65 (13% of non-indigenous Australians).

The Aboriginal and Torres Strait Islander Social Justice Commissioner's "**Social Justice Report**" (2009) reported upon very significant areas of disadvantage in a number of areas, including, education (Indigenous children half as likely to finish Yr. 12 than non indigenous children) employment (3 times as many Indigenous children aged 15-24 years not working or studying as non indigenous children) and housing (Indigenous people 4.8 times more likely to live in overcrowded accommodation than non indigenous people).

The **'Summary of Australian Indigenous Health'** released by the Australian Department of Health and Aging in 2009, identified the major causes of death amongst Indigenous Australians to be in descending order,

cardio vascular disease (including heart disease and strokes), accidents and self harm followed by cancer.

Diabetes is disproportionately represented, being three and a half times more common amongst Indigenous Australians than the general Australian population, with death as a result of complications from diabetes being 23 times more common for indigenous males than non-indigenous males, 37 times more common for indigenous females than non-indigenous females. Kidney disease is 31 times more common for indigenous males over non-indigenous males and 51 times more common for indigenous females over non-indigenous females. The 'Summary' reported that males were 5.8 times more likely and females 3.1 times more likely, within Indigenous Australian communities, to die from mental health disorders in the period 2001 to 2005 than non-indigenous people.

An analysis of death and injury from accident or intentional harm shows that of indigenous males suffering death and injury in 2008, 35% did so from intentional self-harm, 27% from traffic accidents, 8% from assaults. Indigenous females suffering injury or death comprise 30% caused by transport accidents, 18% from intentional self-harm, 16% from assault. The rate of death from such type of "injury" was 3 times the rate for the total Australian population amongst indigenous males and was the second most common cause of death for them.

The 'Summary' also reported upon disproportionately elevated incidence of eye disease, hearing loss, oral disease and infectious diseases such as tuberculosis, hepatitis-B and meningococcal.

In the context of current health issues, including drug and alcohol dependence, the current dire situation for Aboriginal people, both socially and in the way public policy fails them, is summarised in a Report published in June 2009 by the National Indigenous Drug and Alcohol Committee (NIDAC) – **"Bridges and Barriers"**. This report "addressing indigenous incarceration and health" discusses a range of topics including,

(i) the incidence of particular health issues for Aboriginal people in custody, particularly HIV and hepatitis C,

(ii) "co morbidity" of conditions such as mental health problems, alcoholism and the like,

(iii) an up-to-date profile of indigenous prisoners and detainees,

(iv) substance abuse issues for Aboriginal people, within the community, within the correction system and on release,

(v) reasons for indigenous over representation in the correction system, such as socioeconomic factors, alcohol and other drug misuse,

(vi) barriers to access to diversionary programs, morbid conditions such as acquired brain injury and foetal alcohol spectrum disorders and a summary of intervention opportunities within the criminal justice system.

The evidence gathered in that Report paints a disturbing picture of disadvantage and denial of opportunity at all levels of Aboriginal society and at all levels of the 'criminal justice system', including most intensely at points of prevention and early intervention.

The NIDAC Report cites evidence of a lack of equal (or any) access to educational opportunities, economic opportunity, appropriate medical treatment and mental health services, drug and alcohol counselling and the like.

On the issues of substance abuse, including alcohol, particular individuals and communities present particular challenges. The problems and solutions identified for Alice Springs and elsewhere in the Northern Territory by Russell Goldfam, Principal Legal Officer of the Alice Spring office of the Northern Territory Legal Aid Commission, in his paper 'Damming the Rivers of Grog' presented at the NIDAC Conference in Adelaide in June this year, may be commended for Alice Springs but not appropriate in other communities. That

paper includes a thoughtful analysis of the relationship between alcohol abuse, and availability, and serious offending, as well as upon government polices on alcohol sale and distribution and the impact of alcohol on the health of citizens. I have no solution to the important social question of balancing civil liberties, civic responsibility and restricting the availability or use of substances legally available, but severely damaging to the health and safety of users and their victims. Certainly, tough decisions as advocated by Mr Goldfam in particular instances may be the only choice, if only to protect those unable to protect themselves.

Our State's Department of Aboriginal Affairs' **'Two Ways Together'** Report, published this year, is a strong indication of governmental determination to identify and address areas of disadvantage, as is the Australian Government's **Social Inclusion Agenda** of 2009, incorporating the "Closing the Gap" strategy from the 'Council of Australian Governments' (COAG) 2007 agreement.

In November 2009 Australian and State and Territory governments formulated the "**National Indigenous Law and Justice Framework 2009-2015**", to build a "government and community partnership approach to law and justice issues". The Framework has a number of goals, including addressing over representation of (Indigenous) offenders, defendants and victims, expansion of diversionary programs, recognising and strengthening Indigenous Community responses to justice issues, promoting partnerships between communities, government organisations and other stakeholders "to achieve sustained improvements in justice and community safety", amongst other matters.

It must be remembered that the multigenerational experience of Aboriginal people of 'government agencies', whether it be contact with Child Welfare agencies, Police or Correctional Services, has been negative, notwithstanding enormous strides taken by these various agencies, to varying degrees across the States and Territories, to improve and make more relevant their services, to recognise Aboriginal cultural diversity and to acknowledge the relevance of historical factors in contributing to social conditions and Aboriginal

perceptions. The negative perceptions by Aboriginal people of these authorities are recognised in reports of the **Human Rights Commission** (eg the so called "Stolen Generations" Report) and the RCIADC, as well Judicial "Bench Books", such as "Equality before the Law" in New South Wales.

Another contextual matter is the disproportionate numbers of Aboriginal children in New South Wales the subject of 'Care and Protection' proceedings ultimately leading to displacement from family and placement in State care or foster homes. The crisis in this area currently is worthy of a separate paper, but generally speaking the correlation between removal from family and entry into the criminal justice system has been long recognised. Of the total number of children the subject of care proceedings, approximately 24% are currently identified as Indigenous in New South Wales as I understand the situation. The '**Overcoming Indigenous Disadvantage** 2009' Report reported that approximately 30% of children in 'out of home care' were Indigenous children, they comprising 4% of the child population. The number of children removed from Aboriginal families in New South Wales has increased 15% between 2008-2009. 'Child protection' was the purported reason for the 'Intervention' in the Northern Territory, which led to an extraordinary suspension of the civil rights and protections of Indigenous Australians accompanied by wide scale police and military personnel intervention. Those matters, of course, reflect a number of social issues for which Indigenous Australians must also take responsibility as individuals and communities, they also reflect family dysfunction and inter and multi generational issues centring around poverty and disadvantage, created by failed methods of social engineering for which those people still pay the price, whether it be the past forced removal of children from their families, or mass deportations to artificially created 'missions', with no economic or education opportunities.

A paper by Dr. Don Weatherburn, from the Bureau of Crime Statistics, and his colleague Jessie Holmes – "**Indigenous overrepresentation in prison**", from October 2010, concludes that strategies that address that situation would need to focus on four areas particularly;

i) parenting,

ii) drug and alcohol abuse,

iii) school retention/performance and

iv) employment.

In other words, not matters directly concerned with criminal justice reform, but social, familial and/or economic strategies directed at families and/or the benefit of the young before entrenched attitudes develop. This paper shows the multidimensional character of strategies that reasonable minds may conceive to redress the current crisis of over-representation of Indigenous people in custody.

The Royal Commission into Aboriginal Deaths in Custody in its final report noted that changes to the operation of the criminal justice system alone, "*will not have a significant impact on the number of Aboriginal persons entering custody or the number who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant factors in overrepresentation*".

Weatherburn and Holmes state that recommendations by the Royal Commission in 1991 to reduce overrepresentation in custody such as, use of arrest as a last resort, additional funding for Aboriginal Legal Aid, greater use of police cautions and alternatives to arrest, decriminalisation of public drunkenness, use of non custodial options for commencement of proceedings, imprisonment as a last resort, increased funding for community based alternatives to imprisonment etc, have had "*no effect on the disparity between indigenous and non indigenous rates of imprisonment*". They set out reasons for this to be so. They state that there "i*s only one area where criminal justice reform has significant potential to reduce Indigenous imprisonment*", and that is, in the context of the very high percentage of indigenous prisoners returning to custody (74% in New South Wales), to reduce the rate of indigenous recidivism through "*appropriately targeted rehabilitation*

programs". I believe the learned authors have underestimated the extent to which the RCIADC examined the "underlying issues", including matters concerned with socio-economic factors .Any examination of the Royal Commission's findings must always consider the limitations of its Terms of Reference.

On the issue of effectiveness of court orders the learned authors note amongst other things "*particular attention needs to be give to measures that increase Indigenous compliance with community based sanctions and orders*", with the key groups of concern being Indigenous juvenile offenders making their first court appearance, indigenous adult offenders who are on bail or are subject to some conditional release order such as parole.

The authors' analysis of programs since the Royal Commission report note that the Council of Australian Governments (COAG), by 2009 had concluded that "*reporting on indigenous disadvantage recognises the interconnection between substance abuse, poor parenting, poor school performance and unemployment*".

The authors conclude:

> "*It is to be hoped that this recognition prompts State and Territory Governments to recognise that in the long term, the solution to indigenous overrepresentation in prison lies not in changes to law and order policy but in changes to policies that affect the economic and social wellbeing of indigenous families and communities*".

There is other research, such as from Debra Snowball and Don Weatherburn, published in 2006, (**'Indigenous over representation in prison: The role of offender characteristics', Crime and Justice Bulletin No 96**) that reflects the fact that there was no statistical evidence of bias on the part of the judiciary when sentencing indigenous adults. An earlier study of sentencing juveniles in 2000 reflected the same results. They concluded in their 2006 paper that persistent features, or commonly found features reflecting reasons for incarceration in individual cases included:

i) longer criminal histories,

ii) convictions for multiple offences committed at the one time,

iii) likelihood of having previously breached court orders,

iv) increased likelihood of re-offending after the “non custodial order”,

v) greater likelihood of a previous conviction for a serious offence of violence.

Snowball and Weatherburn in their 2006 study identified (from a previous study) conditions that place offenders at risk generally speaking, not just amongst indigenous Australian communities as being:

i) childhood neglect and abuse

ii) parental mental health issues,

iii) family dissolution and violence,

iv) poor school performance,

v) early school leaving,

vi) unemployment,

vii) drug and alcohol abuse or dependency.

Economic and social ‘disadvantage’ or ‘opportunity’ is clearly a contextual matter for these matters. Economic stress will disrupt capacity for proper parenting and in conjunction with social isolation and lack of social support there will be increased risk that persons with parental responsibility will loosen or diminish parental support or control, increasing the risk particularly of juvenile involvement in the commission of crime or ‘antisocial’ behaviour. These matters are, of course, not peculiar to Indigenous communities. For Aboriginal people, however, legitimate use of public areas and spaces has often been misinterpreted by policing authorities and Aboriginal people have often had their reasonable use of public areas unfairly constrained by those

authorities. Local government restrictions on public parks, often solely directed at Aboriginal people .are an example of this.

Research has shown that individuals with a higher risk of recidivism normally require more intensive levels of treatment services. Such treatment can target "crimogenic needs" to reduce the risk of further offending. Crimogenic needs being individual characteristics that contribute to offending, such as poor impulse or anger control, poor social skills, antisocial associations, substance dependency and the like. On the other hand there is a need to assess factors or characteristics which will affect or limit a persons capacity to respond to treatment strategies, which will include social and cultural factors, cognitive capacity, communication skills, motivation for treatment, intellectual impairment and other relevant psychological pathology. (**Andrews and Bonta** – "The Psychology of Criminal Conduct" (4th edition) – 2006). These empirical studies highlight the fact that the depth and intensity of factors that contribute to offending, must be matched by a commensurate depth and intensity in treatment programs.

It is better to have better methods of rehabilitation than better jails, particularly if 'better jails' sometimes produce better criminals. On the other hand, as the '**Social Justice Report 2009**' of the Social Justice Commissioner noted:

> *"(t)he bottom line is that you can put an individual offender through the best resourced, most effective rehabilitation program, but if they are returning to a community with few opportunities, their chances of staying out of prison are limited".*

THE SENTENCING CONTEXT FOR INDIGENOUS AUSTRALIANS

The most eloquent measure of how Indigenous Australians are treated by the 'criminal justice system', is the current shame of Indigenous over representation in custody. Between 2000 and 2009 the 'age standardised' national indigenous imprisonment rate has risen from 1,248 to 1891 indigenous prisoners per 100,000 indigenous adults. By contrast the non-indigenous rate increased from 130 to 136 per 100,000 adult non indigenous

persons. As at 30 June 2009 the rates of indigenous to non indigenous rates of imprisonment on an age standardised scale varied from 3 times in Tasmania, to 20 times in Western Australia, 13 times in New South Wales, 15 times in South Australia and 12 times in the Northern Territory, with a national figure of 14 times higher. There were 5,811 sentenced indigenous prisoners in Australia as at 30 June 2009, a 13% increase on 2008.

As at 30 June 2009, 74% of indigenous prisoners in NSW serving terms of imprisonment had previously served at least one term of adult imprisonment, compared to 50% of adult non-indigenous prisoners. New South Wales, as at 2008, had the highest rate of age standardised imprisonment for indigenous adults in Australia (32%), compared to 23% for Western Australia, 22% for Queensland, 12% for the Northern Territory. Over 80% of sentenced inmates in the Northern Territory are indigenous.

The census of New South Wales prisoners conducted on 30 June 2007, revealed a total of 10,318 inmates, of which 92.4% were male and 7.6% were female. 20.1% were Aboriginal. Of the total of inmates in custody, 22.4% were on remand.

As at 6 August 2010 10163 inmates were in custody. As at 6 June 2010 26.5% of inmates were 'unsentenced', bail refused, or unable to get bail.

The deterioration of the situation for Aboriginal people is self evident from statistical trends.

- In 1982 in NSW the total of full time custodial inmates both male and female was 3,466 and the percentage of persons who identified themselves as Aboriginal was 5.8%.

- In 1990, the year after the introduction of the Sentencing Act 1989(NSW), which abolished remissions upon sentences in New South Wales, the full time custodial population was 5,538, of which 9.1% were Aboriginal.

- In 2001, 7,801 were in full time custody, of which 15.1% were Aboriginal.

- In 2002, when there was a slight change in the identification of aboriginality, there were 8,154 persons in full time custody of which 17.2% were identified as Aboriginal.

Juvenile justice custodial figures in New South Wales are even more disheartening with propositions of Aboriginal detainees in 'Juvenile Justice' Detention varying between 50 to 60% over the last number of years. A 2007-2008 survey of juveniles in custody in a particular period revealed 200 out of 390 were Aboriginal at a particular time!

These statistics might be seen in context of wider census particulars. In the 2006 National Census 138,000 Indigenous people were identified as resident in New South Wales (2.1% of the state wide population), of which there were slightly more indigenous women than men.

Some reasons of a general character contributing to the increase in the proportion of Aboriginal people in custody in New South Wales include:

i) Greater restrictions on grants of bail over the last 10 years (the changes to "presumption against grant of bail" and other limitations upon grants of bail would require a separate paper);

ii) Legislative articulation of matters, or principles, which may inhibit sentencing discretion or may direct sentencing practices in a particular direction (eg ss 3A, 21A, 44, 54A-D **Crimes (Sentencing Procedure) Act** 1999). These provisions include 'standard non parole periods' (see **R v Way** (2004) 60 NSWLR 168).

iii) Guideline judgments (ie decisions of the New South Wales Court of Criminal Appeal structuring sentencing discretion, eg **R v Henry (& Ors)** (1998) 48 NSWLR, **R v Jurisic** (1998) 45 NSWLR 209).

iv) Lengthier sentences and more limited sentencing options, such as the recent abolition of 'periodic detention' and limited

opportunity to serve 'non full time' custodial penalties in the areas of 'home detention' and 'Intensive Correction Orders'

These matters of public policy are not, of course, just directed at Aboriginal people. Current 'bail laws' in New South Wales discriminate against all people in situations of socio-economic disadvantage. They are less able to make cash deposit, or to find surety, usually have no employment to underline 'community ties' and have less access to permanent or acceptable accommodation. As many offences for which Aboriginal people are charged are 'intra-communal', or within family, immediate support for bail conditions is not as readily forthcoming. The earlier mentioned percentage of unsentenced indigenous inmates of the total inmate population (26.5%) reflects the effect of current bail laws upon Aboriginal people. In Juvenile detention the figures are far worse. Many people who spend time in custody without bail end up unconvicted or sentence to non custodial orders, although those sentences no doubt take into account pre-sentencing custody. Lack of employment and stable accommodation reflects adversely upon the suitability of offenders for 'non custodial' options such as 'home detention', should it be even available given its geographic limitations.

The **Bureau of Crime Statistics and Research (NSW) Issues Paper (No 41) "Why are indigenous imprisonment rates rising' (2009)** stated that the 48% increase in Aboriginal prisoner numbers between 2001 and 2008 is because of increased sentences and more frequent imprisonments, despite no "overall increase in the number of Indigenous adults convicted".

Policing policies have their role to play. The Australian Institute of Criminology Report: "Juveniles' contact with the Criminal Justice System in Australia", released in September 2009, reported the "disproportionately" high number of Aboriginal contacts and particularly the disproportionate referral of Aboriginal children to Court, rather than diversionary schemes, such as cautioning. In 2007/8, 48 percent of Aboriginal children were referred to Court, compared to 21 percent of 'non Aboriginal' children. Thirty two percent of non indigenous children received cautions, compared to 18

percent of indigenous children. The complexities of policing practices, however, are beyond the scope of this paper.

An illustration of current sentencing policies impacting upon Aboriginal over representation in custody is given in the **Bureau of Crime Statistics Issues Paper No 48** – "**Factors which influence the sentencing of domestic violence offenders**" (2010).

Of all offenders convicted of "domestic violence – related" assaults and other offences between January 2008 to June 2009 the following figures emerge:

"All offenders" for the period numbered 10,997, of which 1,220 (11.09%) were imprisoned.

Of these – **8,922 were "non-indigenous" of whom 7.13% were imprisoned**.

- **2075 were "indigenous" of which 28.14% were imprisoned**.

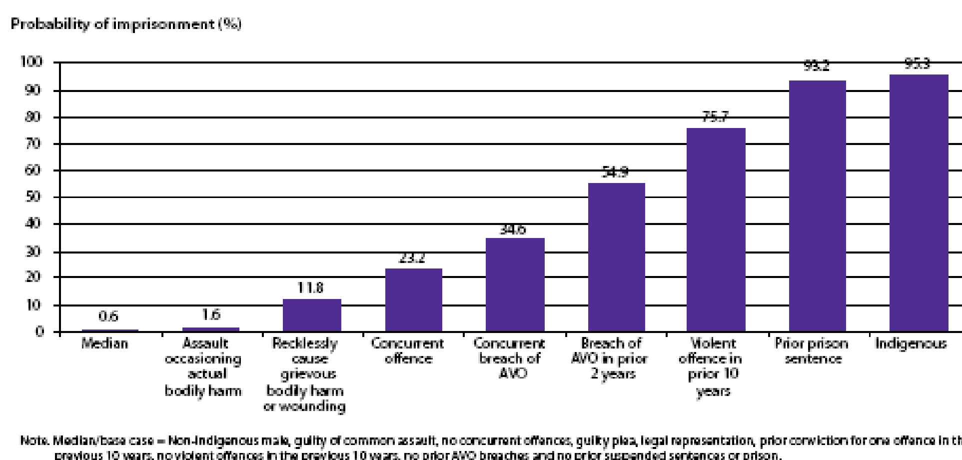
The Issues Paper concluded in part:

> "In terms of demographic characteristics, after controlling for other factors, the ... odds of an indigenous person receiving a sentence of imprisonment were 1.46 times the odds of a 'non-indigenous person."

'Domestic violence' offences, with their omnipresent contributing underlying factors of socio-economic pressures provide a clear example of cause and effect, not only of social circumstances contributing to offending, but how social circumstances can impact upon outcomes within the criminal justice system.

The following table from Issues Paper No 48 shows the startling reality in this area of sentencing.

Figure 1. Probability of imprisonment for domestic violence-related assault as a function of various characteristics



Note. Median/base case = Non-Indigenous male, guilty of common assault, no concurrent offences, guilty plea, legal representation, prior conviction for one offence in the previous 10 years, no violent offences in the previous 10 years, no prior AVO breaches and no prior suspended sentences or prison.

In relation to the table above, true it is that 'Indigenous' offenders may incorporate a number of the 'characteristics' elsewhere referred to in the table compounding the situation represented, but the presence of those features disproportionately (eg 'prior prison sentence', 'concurrent breach of AVO' etc) underlines the existence of cyclical factors contributing to the current abysmal and unacceptable situation and/ or the self fulfilling outcomes of current sentencing policies and attitudes.

Issues Paper No 41 of 2009 from the Bureau of Crime Statistics, earlier referred to, identifies the fact that between 2001 and 2007, the increase in numbers of indigenous people on remand explains a quarter of the increase in the general figures, whilst sentenced indigenous prisoners represent three quarters of the increase.

The analysis of that Paper shows that so far as remand or unsentenced prisoners are concerned the increase is not because of an increase in the number of offenders charged, as between 2001 and 2007 the total numbers **fell** from 21,156 to 19,601. However, the proportion of offenders remanded in custody by the time of the conclusion of the proceedings has **increased**. In 2001 it was 12.3% of alleged offenders, by 2007 15.5%. Another contributing factor in New South Wales has been the increased period of time spent in custody on remand. In 2001 it averaged 3.3 months, in 2008 it averaged 4.2 months.

So far as the increase in the sentenced indigenous population, the numbers of persons found 'guilty' in New South Wales between 2001 and 2007 has **decreased** from 15,023 to 14,701. However, there have been increases in convictions in relation to particular categories of offences: for infliction of "serious injury" the increase has been from 19.6% to 26.4%: offences "against justice" has seen an increase in convictions from 17.7% to 27.6%: for "burglary" i.e. break and enter offences, convictions increased from 60.7 to 62.4% and "traffic" offences there has been an increase from 8.2% to 9%.

This is not solely a New South Wales problem; the rate of incarceration of adult Aboriginal men in Western Australia in June 2008 was one in fifteen (one in fifteen adult Aboriginal men will at any given time be in custody). Chief Justice Martin, in a paper delivered on 17 September 2009 to Western Australian Correctional officers, pointed out that this was "equivalent to the highest incarceration rate (of a class of people) within the country having the highest incarceration rate in the (western) world" (the United States!).

THE SENTENCING SITUATION CONFRONTING JUDICIAL OFFICERS

Time does not permit wider examination of the issues of policing, prosecutorial discretions, legal representation, court processes, and the like, so I concentrate on this aspect. All these matters have a significant effect upon the character of the work done by courts. As earlier noted judicial officers have limited or no control over aspects of court processes. Sentencing is the area where judicial officers have the most direct impact in the 'justice system'.

One must however be realistic about certain matters in relation to sentencing. I acknowledge that particular Aboriginal people will commit crimes that will require greater weight to be given to punishment, deterrence, denunciation and those more "punitive" purposes of sentencing that may be seen for example in s 3A **Crimes (Sentencing Procedure) Act** (NSW), s 21A of the same Act or s 16A **Crimes Act** 1914 (Cth), State and Commonwealth legislation with which I am most familiar at the present time. No doubt other

States and Territories have similar, if not identical provisions, setting out both the "purposes of sentencing" and relevant "factors" for sentencing.

Furthermore:

- Not all Aboriginal people in Australia have the same background or contemporary experience of disadvantage, discrimination, dislocation.

- Not all separate Aboriginal communities or groups have the same social circumstances, problems, disadvantages and the like.

- Not all Aboriginal offending is of the same type, and, where the same type, has the same causes or explanations.

- Not all Aboriginal offending is a reflection of the social, economic, community or historical circumstances of the individual and/or his community.

- Aboriginal offenders may commit crimes not in an 'Aboriginal context', but as participants of the wider criminal milieu. There are some Indigenous offenders who are simply 'professional criminals' who commit crimes for the same reasons as non-Aboriginal people, who themselves are professional criminals (although some of these people may have been 'steered' into crime by socio-economic).

- There are Aboriginal offenders who have psychiatric, psychological or other disabilities which contribute to offending that may not have necessarily any relationship to, or origin in, their cultural or social context.

Many offences are committed where the victims involved are Aboriginal people themselves. Aboriginal people are entitled to, and deserve the protection of, the law as much as all other people in the community and society must be protected from persons who are violent or damage or steal the property of others. The 'truisms' of sentencing law generally set out in the

case law, such as **Veen (No 2) v The Queen** (1988) 164 CLR 465, and also reflected in legislation, have to be respected by judicial officers.

I am also mindful of the fact that there are particular Aboriginal offenders, either because of their threat to their own, or the wider, community, or because of the particular crimes they commit, with whom society cannot reasonably deal other than by deprivation of liberty, sometimes for lengthy periods of time. There are crimes committed by Aboriginal people of such seriousness that no significant 'distinction' can be drawn from non Aboriginal co offenders, or other non Aboriginal offenders, without engendering in the view of 'non Aboriginal' offenders a 'justifiable sense of grievance', or an objectively measurable unfairness on any view.

There are other realities that need to be considered or addressed. These include the following issues, some of which are of much wider relevance to the community:

- Unless acts of 'affirmative action' at stages of the interaction of the criminal justice system with individuals are formally recognised, not only will the disproportionate number of Aboriginal people in the criminal justice system continue, but it will increase to this nation's greater shame. To sever the 'Gordian knot' of 'cause and effect' will take too long to arrest the current trends given the slow progress of improvement of social conditions for Indigenous Australians.

- The more serious the offending where greater weight must be given to deterrence and denunciation/retribution usually, the less likely that the 'needs' of the offender will be addressed or met in the sentencing process.

- The public interest policy in punishment over rehabilitation in a particular sentencing exercise will rarely address the causes of offending. In some more serious matters, this may be academic. Many causes of offending will never be met by conventional sentencing procedures, either because of limitations of options

and sentencing law or simply because sentencing is not the appropriate mechanism for reform.

- The capacity of judicial officers to meet the needs of offenders is constrained considerably by circumstances beyond their control. The role of the judicial officer is not necessarily central or pivotal to sentencing outcomes that meet the needs of offenders and their community.

- Many offenders will have underlying causes contributing to offending or subjective features (ie mental health alcohol, drug addiction, homelessness, victim of sexual or physical abuse) only able to be met outside sentencing processes or the custodial setting, that can never be met by the sentencing process, even where those needs ordinarily do not take a back seat to considerations of punishment, general deterrence and the like.

- The better informed the sentencer, the more able he or she will be to satisfy those purposes of sentencing that address the underlying causes of offending. The capacity or resources of the prosecution and/or the defence to obtain relevant information will be on many occasions limited, if not "non existent".

- Greater resources for custodial and supervision agencies and greater flexibility of sentencing options will enhance the capacity for Courts to meet the need for rehabilitation of offenders where that is relevant. Punishment is well resourced, programs for rehabilitation reform are usually not, both within the custodial setting and outside. Under New South Wales law (applied also to the execution of Commonwealth sentences) options (both custodial and non custodial) are limited by reason of availability of resources, geography or characteristics (including age of the offender).

- Alternative sentencing models, intensive treatment regimes, and the like, provide opportunities that conventional sentencing regimes cannot match or provide.

- There are characteristics of offenders, or the offending, that will require attention to solutions that put as a priority protection of the victim, or the community, in the short to long term.

The ultimate determination of matters from the perspective of punishment and deterrence usually involve the deprivation of liberty. Custodial penalties should be, under NSW law, a 'last resort' (s5 **Crimes (Sentencing Procedure) Act** 1999). Full time custodial penalties are the most expensive alternative for the community in "treating", or "punishing", offenders. That deprivation of liberty, in the case of Aboriginal people, ultimately leads to the return of people to their communities which remain unchanged. The 'revolving door' of which many speak. There appears no hard evidence that imprisonment changes individual and/or community behaviour amongst disadvantaged people and communities, or acts as much of a deterrent. The escalating incarceration rates of Aboriginal people over the last 20 years are testament to that, particularly in the areas of domestic violence and 'public (dis)order' sentencing.

SOME STRATEGIES AND ISSUES THAT REQUIRE ATTENTION

'Justice Re – Investment'

This concept has been introduced across a number of state jurisdictions in the United States, even Texas! In recent times it has been raised in public debate in Australia, most recently by Dr Tom Calma at the NIDAC National conference at Adelaide in June this year (See also "**Investing in Indigenous Youth and Communities to Prevent Crime**", Dr Tom Calma – Australian Institute of Criminology Conference, 31 August 2009), and recently detailed in an article in Indigenous Law Centre's '**Australian Indigenous Law Review**' (Vol 14 No.1), '**Building Communities – Not Prisons**' which I recommend.

The philosophy at the heart of this strategy approaches detention as a measure of last resort for dangerous and serious offenders, but shifts the ‘culture’ away from of prison based programs and incapacitation to providing community wide services that will prevent offending, from the same resources currently spent on incarceration. Even with intensive services the costs are substantially lessened. This strategy was commenced in the United States, from which the phrase comes. Twelve States of the United States have commenced this program or are investigating its potential. Texas, which commenced this program in 2006, reported a decline of 1257 prisoners in that first year, albeit 0.6% of the prison population. Three out of five of the biggest reductions in prison populations in States of the United States, reported upon by the ‘Pew Centre of the States (2010)’, for the period 2008-2009, were States with ‘Justice Reinvestment’ programs. The ‘Justice Reinvestment’ model was approved by a Great British House of Commons Justice Committee Report “**Cutting Crime: The Case for Justice Reinvestment**”, released in January 2010.

American studies have shown that a large number of offenders come from a relatively small number of disadvantaged communities. Dr Tom Calma gives the example of a community in Connecticut in the USA known as “The Hill”, where the government spends $20 million a year on incarceration of 387 people. Studies have shown that there are “blocks” in major urban areas that are known as “million dollar” blocks where huge sums of money are spent on incarceration.

Justice reinvestment can create a number of options, for example as identified in Dr Calma’s paper from particular US experience:

i) substance abuse programs,

ii) ‘Nurse Family Partnership’ programs, focusing on the early years of children,

iii) job placement programs

iv) support for children of incarcerated parents,

v) ‘healthy body’ programs,

vi) ‘summer’ employment and training,

vii) proper supervision in the community,

viii) programs identifying “cause and effect”.....amongst many other programs.

‘Justice Reinvestment’, in conjunction with other strategies, has a potential to rebuild communities in a way that may diminish or remove the causes of offending or change the environment in which offending currently occurs.

JUDICIAL EDUCATION

In the Final Report of the **Royal Commission into Aboriginal Deaths in Custody (1991)**, Recommendation 96 stated:

> *“That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasize the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.”*

Throughout Australia, the various State and Territory jurisdictions have committees providing education and training programs for judicial officers, generally in accordance with the recommendations of the Royal Commission. There are also National Indigenous Justice or Cultural Awareness Committees convened by the National Judicial College of Australia (NJCA) and the Australian Institute of Judicial Administration (AIJA). The various Committees comprise judicial officers, academics, court officials, educators and others involved in government decision making on justice issues. Most

have indigenous representation. The NJCA has developed a "Curriculum framework for professional development" (of judicial officers) applicable in the context of cultural awareness training. The Curriculum considers including addressing the cultural diversity of indigenous Australia, the requirement of consultation in designing and conducting education programs, providing judicial officers with information about matters in which the role or involvement of Aboriginal people may call for particular skills, knowledge or approaches.

The State Committee in New South Wales is called the Ngara Yura Committee, comprising not only judicial officers and executive officers of the Judicial Commission, but also Megan Davis the first indigenous Australian elected to the United Nations Permanent Forum on Indigenous issues and Terry Chenery, Director of "Legal, Land and Culture" of the Department of Aboriginal Affairs (NSW). The Committee's work is essentially assisted by the insight, energy and wisdom of its Aboriginal Project Officer, Tammy Wright.

The programs developed by these committees cannot compulsorily educate judicial officers, nor can they cure or remove all ignorance and misunderstanding existing amongst judicial officers. Further, the work of the committees is very dependant on the cooperation of community elders and members as well as those organisations that serve indigenous Australians. Individual Committees may labour from the absence of administrative support, a problem not experienced in New South Wales. Speaking from my experience I have been much impressed by the breadth of the interest and concern of judicial officers for the consequences of the decisions the law requires them to make as they affect Indigenous Australians.

Activities organised in New South Wales, but also occurring in other States and Territories have included:

i) evening seminars involving instruction or discussion upon matters as diverse as strategies for defeating domestic violence, "Aboriginal English", the history of the Eora peoples of the Sydney Basin, profiles of juvenile offending, custodial classification, the role and function of Circle Sentencing etc.

ii) Community visits by judicial officers and Judicial Commission staff to areas and communities across New South Wales including Dubbo, Nowra, Kempsey, Taree, Walgett, Wallaga Lake.

iii) Developing protocols for "Welcome to Country Ceremonies", community visits.

iv) Publishing articles and papers in Judicial Commission publications such as the Judicial Officers Bulletin and the Judicial Review.

v) Organising conferences to discuss social, cultural and/or legal issues relating to indigenous Australians, such as the "Exchanging Ideas Conference" in May 2009.

vi) Instructional material, such as a DVD released last year relating to the function and procedures for "Circle Sentencing" Courts in New South Wales.

vii) Contributing to judicial education through Bench Books such as the "Equal Treatment" Bench Book.

viii) Developing a website for the Committee's activities and related activities.

Of course judicial education is not without its challenges. These include, developing appropriate protocols for dealing with elders in communities, devising interesting programs that encourage all participants to have their say, not disappointing indigenous participants by the limitations of judicial participation, reporting meaningfully to a wider audience than those who actively and directly participate, encouraging changed attitudes which reflect greater respect for indigenous culture, coordinating activities with other States and Territories, government departments and local government activities and, of course, funding! We are blessed in New South Wales by the material support of the Judicial Commission.

An obvious limitation of judicial education is that education of other participants in the system, particularly police, corrections and related staff

may not necessarily keep abreast of the extent of education provided to judicial officers. National coordination of 'education programs' for the contributors to the 'court justice system' is an issue yet to be addressed. On the other hand judicial leaders, such as Chief Justice Martin of the Western Australian Supreme Court, have stepped up to bring to the attention of the body politic and other 'players' in the system, some of the consequences of current policies and judicial decisions.

INDIGENOUS AND THERAPEUTIC COURTS

'Indigenous Courts' have existed in Australia since 1999 as a means of the conventional court system applying criminal laws, but allowing elders to participate in the process in various ways, regulated by legislation or local practice. The courts do not apply customary law. They operate in relation to indigenous people, who consent to participate (as usually must victims) for sentence proceedings only, with the presiding judicial officer having the final say.

New South Wales has "Circle Sentencing" Courts, regulated under the **Criminal Procedure Regulation** 2005. The program commenced in 2002 at Nowra and now operates in a range of locations across the State, but only in the jurisdiction of the Local Court and the Children's Court. Its aims are to include members of the Aboriginal community in the sentencing process, increase confidence in that process, reduce barriers between Aboriginal communities and the courts, provide appropriate sentencing options for Aboriginal offenders and effective support for victims of offences and provide greater participation of both offenders and victims in the sentencing process, as well as reducing recidivism. The process is labour intensive (much more than conventional court processes) and involves referral from the Local Court to the Circle, which comprises the Magistrate, police prosecutor, defence counsel, offender, victim, victim and offender support persons and usually four elders of the local community. The Judicial Commission has produced a DVD on Circle Sentencing, providing guidance for the conduct of Circle Courts in New South Wales, but also illuminating the attitudes of the participants and the lessons learned. Whilst it can be fairly said that the potential of Circle

Sentencing to empower Aboriginal communities, offenders and victims is self evident, queries have been raised as to a number of matters, including the effect upon recidivism rates, particularly compared to recidivism rates of offenders treated in the conventional way.

Other States have other types "Indigenous Courts", such as the Koori Court in Victoria, which operates at various Magistrates Courts and in the County Court sitting at Morwell, the Nunga Courts in South Australia, where Indigenous Courts started and Murri Courts in Queensland (apparently similar to the Nunga Courts). There are about 50 such courts across all the States and Territories, except Tasmanian. The Koori Court system has operated since 2002 in the Local Court, in the County Court since 2008. The Courts in other States and Territories operate in similar ways though the involvement of elders, their number and the participation of the parties varies from State to State and even court to court.

Koori Courts have, at least at Local Court level where measurement can be more readily made given longer operation, demonstrated established decreases in recidivism rates, but the figures from Circle Sentencing courts in New South Wales do not show the same results.

The efficacy of Indigenous Courts and the issues that they throw up, such as an effective mechanism of deterrence and ethical issues for the choice and participation of elders with clan and family connections to participants, are issues beyond the scope of this paper but have been examined by the Australian Institute of Judicial Administration.

There are concerns about 'power imbalances' at these proceedings where they relate to family violence matters, particularly between partners and related issues. A recent paper by Dr Elena Marchetti, (**The Australian and New Zealand Journal of Criminology** (2010) Vol.43 No2 pp263-81) called "**Indigenous Sentencing Courts and Partner Violence**" discusses this issue and, in the context of a coverage of other literature on domestic violence and court proceedings involving Indigenous Australians, surveys the results of her researches from interviews and case studies from five such courts in Queensland and New South Wales. She concluded that while the courts she

surveyed were 'not well equipped to eradicate the imbalances ... (they) do attempt to do so by 'shaming' the offender ... (providing) a forum more ... meaningful ... humbling ... than mainstream court proceedings. Victims get the chance to open up about the effect of them of the offenders behaviour " ... everything (is) out in the open". But more research as required to determine the impact on victims and offenders (278).

Whilst I note recent discussions about the comparative virtues of different models in different States, particularly concentrating on comparative recidivism rates, (such as the New South Wales Sentencing Council 'Discussion Paper' by Janet Manuell SC (2010)), I am not sure that the statistics currently quoted necessarily reflect sufficient truths about the comparative systems to suggest one model is better than another for a particular community. There are many factors that affect the prospects of recidivism beyond the outcome of a particular court case. Social and personal factors so relevant to recidivism are not capable of analysis in the studies conducted thus far in relation to Indigenous Courts.

One important aspect of these Courts is the engagement of local communities in the administration of justice in a way not possible with the conventional court system. This engagement by participation and part "ownership" of outcomes can only help to overcome the disengagement of Aboriginal people from the justice system through past injustices. The enthusiasm of the participants at the AIJA Conference for Indigenous Courts held at Rockhampton in August 2009 reflects the positive perception by the Community to Indigenous Courts. Indigenous Courts are not a panacea or 'cure all', but one important strategy, in conjunction with many others, that can make differences beyond the impact of offending behaviours. Whether they are on appropriate forum for particular offenders and/or particular offences will need to be assessed on a case-by-case basis. A conscientious effort to do this is undertaken most of the time by most of these courts. Some, in fact, exclude consideration of particular offences, as I understand the situation.

Other Therapeutic Courts

The role of alcohol and drug abuse and the increased levels of offending amongst Aboriginal males particularly in the areas of domestic violence and infliction of harm are undeniable. These contributing factors or categories of offending are capable of being addressed and current trends reversed with appropriate resources for counselling, diversion and correction. There are already operating in some States "Drug Courts" and their equivalents, based largely on American models, which provide, albeit in limited circumstances, intensive environments for reform. The Drug Court experience in New South Wales for adults and juveniles, limited though it is, whilst not always successful, has proven long term beneficial outcomes for individuals, albeit by largely implementing the "carrot and stick" approach. I would advocate, in addition to the operation of "Indigenous Courts" in their various forms appropriate to particular communities, an expansion of "therapeutic courts" to approach fundamental causes of major areas of offending, drug abuse, alcohol dependence, anger management and "socialised behaviours", largely arising from lack economic and education opportunity.

The problem with current 'court' directed mechanisms for assistance to offenders, whether it be probation, parole, community service and the like, is that the supervision of these matters is uneven and sporadic in its application, the resources available are uneven and, frankly, neither intensive enough, nor closely monitored enough, in individual cases, to provide confidence in positive outcomes. In New South Wales, for example, there has recently been an increased emphasis on enforcement of such supervision which is a good thing, but the reality is that the availability of resources to assist offenders, that are professionally run, adequately resourced programs, is nowhere near the demand. It is difficult to find a placement in a residential drug and alcohol rehabilitation centre in western New South Wales. Recently I learnt that the choice in Broken Hill was limited to an establishment, in or near Wentworth, and one in Moree, each with limited openings for new residents. Each hundreds of kilometres away.

The development of therapeutic court systems in relation to the above mentioned areas should be accompanied by the development of either government funded and controlled, or privately run, but Government supported programs, residential or otherwise, should actually meet the real demand, not meet that demand sporadically.

Commensurate with this has been the traditional difficulty of equal access to government programs, particularly counselling and supervision services and sentencing options across the States. I am not suggesting that this is deliberate government policy or anything of the type, but the capacity to provide intense supervision to remote and semi-remote districts is inhibited by the 'tyranny of distance'. The now repealed 'periodic' or 'weekend detention' was not available in every court location across the State of New South Wales. Recently introduced Intensive Correction Orders (from October 2010) in lieu of full time custodial sentences of two years or less, are being rolled out across particular districts, but not all, across the State in limited numbers. For example, 20 places at Broken Hill, 200 places in Sydney. Likewise 'home detention' is limited to particular districts across the state.

THE ROLE OF 'CUSTOMARY LAW' IN TRADITIONAL COURT PROCESSES.

In 2007 the Federal Parliament amended the Commonwealth **Crimes Act** by passing s.16A(2A) of that Act, which prohibited Courts from taking into account cultural background in sentencing any persons pursuant to that Act. As a result, customary law, or customary practice, must not be taken into account to excuse, justify, authorise or lessen the seriousness of criminal behaviour alleged, or aggravate that criminal behaviour (s.16A(2A)(a)(b)). Twenty one years earlier the Australian Law Reform Commission, in 1986, in it's Report concerning customary law acknowledged the importance of customary processes in resolving disputes within Aboriginal communities and concluded that the promotion of customary practices and processes should be "encouraged" as a "preferable alternative", to reliance on main stream legal systems where appropriate.

In Western Australian an inquiry into customary law was undertaken by its Law Reform Commission with its **Inquiry into the Recognition of Aboriginal Law and Culture**. Its final report was published in 2006. Professor Michael Dodson, a past 'Australian of the Year', was one of the Commissioners conducting the Inquiry. He had been previously the Aboriginal and Torres Strait Islander Justice Commissioner of the Human Rights Commission and had been counsel assisting the Royal Commission into Aboriginal Deaths in Custody, during its inquiries in the Northern Territory. The inquiry was concerned with ascertaining whether there was a need to recognise the existence of, and take into account within the legal system, Aboriginal customary laws.

Ultimately, that inquiry concluded that customary law in Western Australia embraced many of the features typically associated with the conventional view of the law within European society, that is, a defined system of rules for the regulation of human behaviour. 'Customary law' dealt with a number of matters including the relationship of people between each other, who particular people may marry, where a particular person may be permitted to travel, limitations upon the character of cultural knowledge that a person may possess amongst other matters. Whilst there was recognised "common threads" in West Australian customary law there was also a diversity that reflected the diversity of clan and community groups and their circumstances. This diversity denied "legal precision" in identifying particular customary rules in general terms.

It was concluded that the issue of what constituted Aboriginal customary law should be left to Aboriginal people themselves particularly those with responsibility to pronounce upon, and pass on to others, relevant customary law. However, the existence of customary law was a variable "daily reality", depending, in part, upon the remoteness, mobility, homogeneity or otherwise of particular individuals in communities. Even in urban areas customary law was considered as still "strong in the hearts" of Aboriginal (people). The Inquiry made various recommendations, but within the framework of existing West Australian laws relating to the power of sentencing courts to "inform" themselves in any manner they think fit, these included recommendations

that consideration be given to addressing the need for reliable evidence or information about customary law as part of the culture background of an offender, and that this material whilst obtained informally may come from sources other than the defence. It noted sentencing practice in Western Australia already recognised this and that courts had in particular cases received expert evidence from elders, oral evidence from Aboriginal people, written statements from Aboriginal people and even submissions from counsel which have been on occasions accepted or verified by the prosecution.

The recommendations of the Inquiry included widening the breadth of persons who might make submissions or given evidence about customary law matters including community justice groups, elders or respected members of Aboriginal communities, and submissions be received from such persons, with each party having a reasonable opportunity to respond. Persons providing information had to disclose any relevant relationship and that, of course, appropriate weight be given to any material put before the court by the victim, or members of the victims community, on such matters where the victim was an indigenous Australian.

Of course, the existence, the intensity, the role and the detail of customary law in particular communities will vary enormously across Australia, but ultimately the relevance of customary law to particular proceedings could and should be addressed on a case by case basis irrespective of jurisdiction.

The wider issue that arises from this Inquiry and its recommendations is the recognition of courts being informed, not necessarily in accordance with the rules of evidence or by accredited 'experts', but by other means, including receiving information from 'third parties' with appropriate knowledge of relevant matters, subject to procedural fairness.

The actions of the Commonwealth Parliament in amending s.16A of the Commonwealth Crimes Act reflected the irrational 'hysteria' more likely to be found in talk-back radio than the sober consideration, in most instances, of cultural matters previously by Courts. Perhaps also it represented the deep-seated fear, of measures or actions that recognise or reflect 'self determination', by Indigenous Australians. But the reality is that the

widespread recognition and application of relevant 'customary law' will largely arise under Court sanction, subject to reliable methods of establishing its appropriateness to particular situations, not people taking the law into their own hands.

MENTORING

I am a great believer in the positive benefits of 'mentoring' people. Mentoring, of course, can take many forms. Essentially I refer to support for individuals by people with relevant professional experience or cultural knowledge, providing direction, advice and opportunities that would otherwise not be available. Practically everybody who practises law has benefited from some form of mentoring, usually by a more experienced professional, who can not only provide direction and advice, but most importantly provide opportunities that would otherwise be denied. So far as Indigenous Australians are concerned, many educational opportunities are denied or unavailable because individuals lack encouragement, or are simply unaware of what is available.

There are some mentoring programs in the area of education and training already in existence, but I understand their application is sporadic and again very much inhibited by the remote or semi remote location of particular Indigenous communities. The New South Wales Bar Association has a mentoring program for Indigenous law students and lawyers and there is a program sponsored by the Tribal Warrior Association in Sydney in conjunction with the Local Area Commander at Redfern Police Station. This program started out for offenders on parole but has developed into one drawing participants, children and adults, from across the community. The current program was begun in 2009. A 'spin off' had been the development of a 'mentoring' educational certificate, by a professional development organisation, to be undertaken by trainee mentors within the local Aboriginal Community. A number of mentors have already been trained. Other community events have arisen from the program, such as a monthly 'Family and Culture' Day at the Block in Redfern which has grown significantly in popularity. Educational mentoring of Indigenous and other children of school age in major urban areas is already in place through programs run by

organisations such as the Australian Business and Community Network, (www.abcn.com.au) but largely run in urban areas.

There is a mentoring program of law students conducted in Victoria by the legal profession apparently reaping positive results. No doubt there are other programs across the Commonwealth.

I would like to see a widening of mentoring programs beyond offenders. I envisage a system across the Commonwealth of Australia of professional organisations in the law (including, I hasten to say, law enforcement and corrections), courts and judicial officers, involving themselves in a structured mentoring program, to school age Indigenous children and those recently left school to provide some insight into how courts and the law operate generally.

I am mindful of the fact that mentoring 'non offenders' might not necessarily lead to employment opportunity, or even training opportunity. For example, being mentored by a particular judge will not necessarily mean that the beneficiary of the mentoring will become a legal professional or work in legal areas. But appropriately handled, these types of programs can break down barriers currently existing, provide information and insights that will be of benefit in the future and increase confidence and self esteem, very important qualities in all individuals.

Canadian sentencing law in relation to 'aboriginal peoples'

Part XXIII of the Canadian Criminal Code (1985) codifies the fundamental purposes and principles of sentencing which are required to be taken into account in sentencing offenders across Canada.

The purposes and principles reflect in general terms a number of the 'purposes' of sentencing identified in s.3A **Crimes (Sentencing Procedure) Act** 1999(NSW) and other relevant factors set out in s.21A of that Act, reflected in similar legislation across Australia, in the various State ,Territory and Commonwealth jurisdictions , such as s.16 A Crimes Act(Cth) 1914.

The ‘purpose’ of sentencing in Canada and its ‘objectives’ are set out in s.718 of the Canadian Act. The fundamental “principle” of “proportionality” is set out in s.718.1. “Other sentencing principles” are set out including at s.718.2, aggravating or mitigation “circumstances” (s.718(2)(a)) and other principles such as ‘parity’ (2)(b), totality (2)(c), considering alternatives to full time custody (2)(d) and (at (2)(e)):

> *“All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders,* ***with particular attention to the circumstances of aboriginal offenders****”. (emphasis added).*

(See also s.718(3) as it relates to “Punishment”).

These provisions are to be construed in accordance with the provisions of the Canadian Interpretation Act.

That Act provides at s.12:

> *“Every enactment is deemed remedial and shall be given such fair large and liberal construction and interpretation as best ensures the attainment of its objects”.*

The Canadian Supreme Court, in an appeal from the Court of Appeal of British Columbia, in **Gladue v The Queen** [1999] 1 S.C.R. 688, held, inter alia, that s.718(2)(e) of the Criminal Code **mandatorily** requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of ‘aboriginal offenders’. As the provision is “remedial” in nature and its purpose is to “ameliorate” the serious problem of “over representation of aboriginal people in prisons”, and “**to encourage sentencing judges to have recourse to a restorative approach to sentencing** , there was a judicial duty to give the provision’s remedial purpose **real force** (emphasis added)” at [93] .

Their Honours went on to hold further at [93]:

> *“ ... Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s.*

718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.

... Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

> *(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and*
>
> *(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.*

... In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

... If there is no alternative to incarceration the length of the term must be carefully considered.

... The section is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

... The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

... Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

... Based on the foregoing, the jail term for an aboriginal offender

may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

... It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal."

These statutory provisions, in this interpretation, go a considerable way to addressing the principle of "equal justice" espoused in Justice Rothman's judgment in **Jimmy** [2010] NSWCCA 60 (at [255] – [256]), by the simple mechanism of requiring particular attention to 'aboriginal offenders' when being sentenced, in a rational framework of "principles" and "purposes" of sentencing. There is absolutely no rational reason to distinguish between the Canadian and the Australian situations given the many similarities between the historical and contemporary social and legal circumstances of Canadian and Australian 'aboriginal people' over the last two centuries .

SOME PROPOSALS

A number of the particular proposals I include in this paper require both governmental and local community agencies having adequate resources and services to address the issues arising in each community.

These proposals proceed on the assumption that a concerted effort will be made:

- to provide equal opportunity to all to have access to services regardless of race or geographic location,
- to provide resources, services, strategies in place in every community to divert people from offending behaviours or situations,
- by individuals within their communities to take responsibility for their actions and those dependant upon them,

- to promote pride in culture, language and family that is encouraged and supported by the institutions of the state,
- to set up systems for the protection of children, victims of domestic violence and other crime, which are respected, encouraged and supported by all in the community and that secure accommodation for all be available,
- to ensure greater Indigenous involvement in judicial office, the legal profession, the "justice professions", including police and corrective services be addressed,
- to achieve greater involvement of the government departments concerned with Aboriginal communities, the professions, business leaders, trade unions and the like, in mentoring young Indigenous Australians.

In the narrow context of the 'legal reform', I suggest the following issues be addressed sometimes with appropriate parliamentary draftsmanship:

(i) Statutory provisions be introduced in respect of Aboriginal people which displace the existing requirements to approach sentencing from the perspective of "punitive" purposes as statutorily defined, unless there are special or "appropriate" circumstances for so doing.

(ii) Change parts of the current legislative framework in which sentencing proceeds both at a Commonwealth and a State level. This would require, for example, amendments to s 16A **Crimes Act (Cth)** 1914 and other legislation operating in State and Territory law concerned with both the 'purposes of sentencing' (example s 3A **Crimes (Sentencing Procedure) Act** 1999 (NSW)) and "factors" to be taken into account in sentence (example s 21A of that Act).

(a) In relation to the 'purposes of sentencing' (such as contemplated in s 3A (NSW)) I would suggest adding

concepts such as ‘ensuring (social) justice’, ‘reducing Aboriginal disadvantage’, ‘recognising Aboriginal social and economic disadvantage’ and ‘healing’ as some general matters that could be added to concepts of ‘punishment’, ‘denunciation’, ‘accountability’ etc.

(b) Other ‘purposes of sentencing’ be recognised such as ‘restoration of offenders to their community’, ‘restoration of stability and harmony to the offender’s community’, ‘restoration of the offender to his or her family’.

(c) Express recognition of ‘cultural or social circumstances to offending’ as ‘mitigating’ or ‘relevant’ factors to be taken into account in the appropriate case. For example, where it could be established that a person’s cultural or social environment or circumstances had contributed to the offending behaviour that may be expressly taken into account as a ‘mitigating factor’ (eg s.21A(3) of the NSW Act) and repealing s.16A(2A) **Crimes Act** (Cth) 1914.

The example of the Canadian legislation earlier referred to shows that even a relatively simple legislative provision, such as paying ‘particular attention to the circumstances of aboriginal offenders’, in the context of ‘remedial’ legislative interpretation, can substantially change the paradigm in which sentencing occurs.

(iii) In relation to provisions such as s 5 of the NSW Act (and similar provisions elsewhere in the Commonwealth), which purports to identify ‘imprisonment’ as an option to be pursued unless ‘no other penalty was appropriate’ there should be express reference to the sentencing of Aboriginal people (or the relationship of ‘Aboriginality’ to offending) in this context and express promotion of alternatives to imprisonment which will address both restoration of the offender and restoration of the offender’s

community, where that can be addressed in the sentencing context.

(iv) Practical application of 'Justice Reinvestment' as earlier discussed. There is a need for a national 'cost/benefit' analysis of incarceration to the cost of residential/non residential rehabilitation programs. Resources that are currently being spent on the incarceration of Aboriginal people could be diverted to resources for programs that will permit supervision and direction for Aboriginal offenders outside of custody for many offences currently leading to jail sentences.

(v) Where incarceration or deprivation of liberty is the only option, for the appropriate offender (subject to security risk and the like), diversion of Aboriginal people from the mainstream gaol system to programs of the type such as Balund-A (near Casino) or Yetta Dhinnakkal (near Brewarrina), run by New South Wales Corrections which accommodate Aboriginal people in a culturally appropriate, or relevant setting, with options available of training and/or employment during the period of time that the offender is in custody. There must be change to the manner of imprisonment of Aboriginal people. Not just "Aboriginal prisons" holding indigenous people together, but facilities that are imbued with encouragement of culture, opportunities for the offender to understand what brings that person into custody, concrete strategies to ensure that on release the offender does not go back to where he or she was beforehand. The Canadian province of Alberta has models of this for 'First Nation' people that could apply here.

(vi) Expand the availability of Circle sentencing/Koori Court models for dealing with appropriate Aboriginal offenders at Local Court/District (County) Court jurisdictions.

(vii) There should be encouragement of the involvement of **Elders** in the "traditional" sentencing exercises to inform Courts, not just on

cultural issues, but on wider social issues from particular communities.

(viii) Therapeutic, or restorative, justice models such as Drug and Domestic Violence Courts be expanded and developed across the country, not just in particular urban centres.

(ix) There should be greater legislative freedom to recognise the **rights** and interests of third parties dependent upon, or related to, the offender. A sentence imposed on particular individuals may have an effect upon the human rights of "innocent third" parties.

(x) Legislative changes should be made to provide greater 'mix and match options' on sentencing:

(a) 'community service work' or in house rehabilitation programs as conditions of bonds, home detention, in addition to periodic detention,

(b) power for courts to choose the type of community service work that might be performed, or programs that are available as part of community service work or of imprisonment,

(c) greater power for courts to choose the place of detention, in the appropriate case, rather than make recommendations for such matters.

(xi) Greater attention in legislation to the rights of children to protect them from incarceration, let alone in adult prisons, and to prevent juvenile offenders finishing their sentences in adult prisons unless there is no other practical alternative.

(xii) Legislative recognition of wider options and greater flexibility in the execution of penalties, particularly imprisonment, such as pre-release to halfway houses (or rehabilitation centres) before non

parole periods expire, or before short sentences expire where there is no non parole period.

(xiii) Sentences of 6-12 months imprisonment or less should be served by community service work, or in rehabilitation programs, with the risk of full time detention on failure to perform the work or complete the program. Alternatively, they should be automatically **suspended** to perform community work or complete training, rehabilitation, education, programs.

(xiv) Where imprisonment or detention is the last, and only, option, more 'special' places of detention for the drug addicted, the mentally ill and disabled, aboriginal men and women, domestic violence and repeat serious driving offenders, to protect the individual, to concentrate rehabilitation services and to avoid contact with experienced criminals. Where "incapacitation" or "incarceration" is the only option, the programs within prisons must be developed to ensure that the person incarcerated is a better person on release and better able to cope in the wider community.

(xv) Judicial education bodies must provide specialist sentencing checklists and programs to alert the Court to available options and programs or matters to look out for, as well as focussed programs and publications advising judicial officers of services and programs available to meet specific needs.

(xvi) Specialist sentencing lists, particularly in the Local Court with adequate counselling and advisory resources readily available, for the mentally ill or disabled, aboriginal people, abused women and young people, sex workers and other identifiable disadvantaged groups.

(xvii) A nationally co-ordinated survey of Aboriginal communities to assess the reliability, availability and relevance of government services, welfare, economic enforcement, correctional and the like.

(xviii) Remove restrictions upon the availability of particular non-custodial options and diversion programs at all levels both geographically and/or having regard to the characteristics of the offender. All programs, sentencing options and services should be available to all despite geographical tyranny.

(xix) Once a person becomes involved in the system, putting aside the issue of determining guilt, the initial concerns from charging onwards should usually be diversion, treatment, rehabilitation and/or training. More than statutory lip service should be given to incarceration, sometimes called "incapacitation", as a last resort.

(xx) There should be greater interest in and emphasis upon programs for people after incarceration and expiry of parole and/or probation to provide continuing support for relapse prevention, employment and education opportunities. This must include materially and professionally supported men's, women's and youth groups in appropriate communities.

(xxi) There should be supervised 'bail houses' and 'safe houses' available to particular communities (but not necessarily within particular communities) to provide security of accommodation to assist in reducing the numbers of people in custody on remand, for the protection of families in crisis or under stress and provide post release support.

It goes without saying that these suggestions require government and non government (including local community) agencies having adequate resources for services. Many are not original or new (the NSW Sentencing Council which advises the Attorney General in that State recommended that short jail sentences not be served in custody several years ago) but there is a need for a multi-dimensional approach in conjunction with wider 'social justice' initiatives to turn the current shameful (for our nation) situation around.

Strategies for overcoming current economic and social disadvantage and discrimination are another thing entirely!! 'Healing' should be as much part

of the process as ‘punishment’ and ‘retribution’ in the appropriate case. Mentoring by elders should be encouraged at every opportunity outside the court processes. Mentoring of offenders by Elders and suitably qualified people, in cultural issues, for education and training, drugs and alcohol abuse, domestic violence etc, should be available before, during and after custody.

CONCLUSION

Any consideration of improvement in the treatment of Indigenous Australians by the conventional court system must have, at the outset a concentration upon improving the socioeconomic conditions of all such people, addressing the critical issues relating to Indigenous health and services for the proper care of that population and improving access to, the quality of and the retention in, education facilities and courses, employment opportunity and the like. On the issue of health, of course there is intimately bound the issue of addressing problems of substance abuse and dependency and the treatment of people with substance abuse problems. Family stability and safety are also priorities. There is a need, in a practical way, to address intra communal violence and particularly the issue of domestic violence and the treatment of children.

This all goes without saying from what has been discussed before, but in the debate about providing justice for Aboriginal people, it must be recognised that many of the prevailing social conditions have been forced upon Aboriginal people over many generations, without their consent and without their consultation. If these fundamental social issues are not addressed in depth and across the nation then everything else: the right to a “fair trial”, strategies to address re-offending, Indigenous courts, mentoring, special sentencing arrangements and the like, will just be ‘window dressing’ with no real change in outcomes. The deterioration in the national situation since the recommendations of the Royal Commission into Aboriginal Deaths in Custody, particularly the grossly offensive increase in Indigenous incarceration rates and the disturbing health figures show this to be true. The Commonwealth Government’s ‘Closing the Gap’ strategy and the ‘Framework’ may go some way to address some of the underlying issues.

If we are to achieve "formal equality", that is treating who are "unalike ... in proportion to their unalikeness (sic)" or making the "difference in treatment (of Indigenous people) by the justice system rational", to achieve just outcomes for Indigenous Australians, then we have to act now and we have to act and continue to act with urgency, passion, commitment and relentless enthusiasm at many levels, within and without the justice system.

It is obvious that the 'solutions' to the current national shame of disproportionate incarceration of Indigenous Australians must be sought by a holistic approach, that interrelates all factors, whether they be contextual issues or socio-economic matters, such as economic opportunity, housing, education and employment and also medical and related services to Aboriginal communities, control of natural resources, or strictly 'legal' matters arising before, during and after court processes. The criminal legal solutions do not require a legislative 'apartheid', simply a legislative recognition of measures that address the damage of the past and the inequities of the present to deliver the real 'justice' that the descendants of the original 'Australians' deserve. Who could argue with that?

(This paper is a variation of, and development upon, a submission made in February 2010 to the House of Representatives Standing Committee of Aboriginal and Torres Strait Islander Affairs Inquiry into the 'over representation of Indigenous Australians in Custody', a paper delivered to the New South Wales Bar Association 'Reform the Criminal Law ' Conference in September 2010 and a paper on 'Educating Judicial Officers' for the NIDAC National Conference in Adelaide, June 2010.

Apart from Reports and research material cited in the text I acknowledge the assistance gained from:

Professor Michael Dodson: "Customary law and sentencing of Indigenous offenders" – Judicial Officers Bulletin Vol 20 No.5

Weatherburn, Snowball & Hunter: "Economic factors underpinning Indigenous contact with the justice system" Crime and Justice Bulletin No.104 (Oct 2006)

Janet Manuell SC – 'Fernando Principles: The sentencing of Indigenous offenders in NSW'. Discussion Paper for Sentencing Council of NSW (Feb 2010))

and helpful comments from His Honour Judge Nicholson SC, particularly on Canadian sentencing law.)