ARE INDIGENOUS PEOPLE LIKELY TO RECEIVE GREATER PENALTIES THAN NON-INDIGENOUS PEOPLE IN THE COURTS?

What should be done about it?


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District Court of New South Wales

Introduction

Are Indigenous people* over represented in the criminal justice system? - Yes.

Are they over represented in custody? – Yes.

Are the courts responsible? – Ultimately, yes. They impose the sentences of imprisonment.

Are they likely to receive ‘greater penalties’ than non-indigenous people? The answer to this question is not straight forward. In short, the “evidence” suggests “it depends”.

* In this paper (based in part on a paper given to the National Indigenous Legal Conference (2011)’-‘Equal Treatment in Sentencing of Aboriginal People’) I refer interchangeably to Indigenous Australians and Aboriginal/Torres Strait Islander peoples. I intend no offence by interchanging these shorthand references to the First ‘Australians’.
It depends on which jurisdiction the sentencing occurs, both within States and Territories and across States and Territories.

It depends on individual sentencers. It depends on the categories of offences for which people are sentenced. It depends on the exercise of individual and organisational discretions in policing and prosecuting.

Most times the comparison of the sentencing of different offenders is one of comparing “apples” and “lemons”, so to speak. No two crimes are the same, no two offenders have the same criminal histories, employment histories, family support, etc. Even where two offenders commit the same crime together different outcomes may occur depending upon criminal history, as well as parole and probation circumstances at the time of offending and other subjective differences.

But the real measure of equal, or unequal treatment, particularly in the objectively measurable exercise of sentencing, cannot be made simply by examining actual terms of imprisonment imposed, or whether imprisonment is preferred to other options. Socio-economic, educational, employment and historic inequalities, as well as limited, or non-existent access to services, resources, housing etc remain hidden contributors to the unseen, or ignored, uneven ‘playing field’ upon which Indigenous Australians ‘participate’ in the justice system.

The majority of the High Court said, in the decision of Hili (and another) v The Queen [2010] HCA 45: “Consistency (in sentencing for ‘Commonwealth’ offences) is not demonstrated by, and does not require numerical equivalence” (at [45]). The same can be said of ‘equal treatment’ of Indigenous Australians.

An Indigenous person may be gaoled because of the fact that where he, or she, is sentenced there are no other, or fewer, options to gaol available because of the remoteness of the location. Or because the nature of the offence requires that the offender be separated from family or community support, or else the infrastructure (or accommodation) of either family or community cannot permit an immediate return. These factors in sentencing outcomes are less
likely to be present for non Indigenous and Indigenous offenders living in urban or regional areas.

A sentence of six months imprisonment for an Indigenous person from remote NSW (or South Australia, the Northern Territory etc) can bear more harshly than such a sentence imposed on an non Aboriginal person from a major city or regional area, given the greater access to family support from outside the gaol, or contacts within the prison population.

An Indigenous person released to parole after a period in custody, may be released to a family or community environment that is unable to support him or her to as great a degree as that exists for a non Indigenous parolee. The access to supervision and other services may be inequitable or uneven. Homelessness might deny a person parole while a like offender may be released only because of better material support.

Then there is the spasmodic geographic availability for Indigenous Australians of professional support services and specialised resources, and the like, that contribute to offenders’ inability to resume or commit to community living, address alcohol/substance abuse and/or treat mental illness, which almost inevitably lead to further offending, parole/probation violations and/or social/family instability.

The words “vicious circle” are sometimes overused in the criminal justice context and elsewhere, but are apt for many offenders and offences involving Indigenous Australians. This “vicious circle” permeates charging practices, bail conditions and remands in custody, as well as guilty findings. But it particularly affects sentencing.


“(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”.

At the moment not enough attention is given in sentencing particularly to the social context and disadvantages (intergenerational usually, and multigenerational) that contribute to the ‘participation’ of Indigenous Australians in the criminal justice system. In part, because much of this is not understood, or known, by the criminal justice system, including the judiciary. Little wonder, as the impact of the destruction of kinship systems and language in many areas of Australia, and the consequences of ‘forced migrations’ and settlements is not fully understood, or appreciated, at all levels of Australian society. To recognise these matters, to make proper allowance and endeavour to address them, as Justice Peter Hidden said in 1997, “is neither discriminatory nor paternalistic”. But much has to be done, by judicial officers, the legislatures and governments across the country to address the national shame of the current situation.

The focus of this paper is upon sentenced persons and sentencing practices. I am not able to comment upon the incidence of racism, discrimination or inappropriateness of charging and policing practices in many jurisdictions involving Indigenous Australians. I see only indictable matters (that have passed through the Magistrates Courts, sometimes peremptorily) and matters dealt with in Magistrates’ Courts which are subject to appeal. In New South Wales this acts as a “screening process”, to some extent, of inappropriate arrest and charging. But not always. Even then, people inappropriately arrested and charged may be found guilty at the Local Court or in the ‘Children’s Court’ and not appeal for various reasons.

In the last 12 years also as a Judge I have not personally witnessed a verdict of guilty from a judicial officer which involved obvious racism or discrimination. I have seen such findings that were wrong in law, or fact, but could not detect racism or discrimination as obvious features in the decision making. But racism and discrimination can work in very subtle ways. People may speak and act in a particular way that is racist and not appreciate the fact. An
opportunity to exercise a discretion, as a reasonable choice, may not be taken because of prejudice or other discriminatory behaviour.

A “survey” in 2011 by Drs Jeffries and Bond from Queensland University of Technology, upon sentencing of Indigenous Australians, in South Australia, New South Wales and Western Australia, concluded that they are sentenced no more harshly than ‘non’ Aboriginal Australians. The results for this survey released in April 2011 compared outcomes for purportedly similar offences involving offenders with similar criminal histories and other characteristics.


However, there are localised surveys concentrating on particular courts, or particular regions, where individual sentencing approaches suggest ‘harsher’ treatment of Indigenous offenders, compared to on Indigenous offenders. The survey by the Aboriginal Legal Service(NSW/ACT) of sentencing practices at Dubbo, in western NSW, from 2006-2012 suggests this is so for particular types of offending.

Even if an Aboriginal person is treated apparently MORE leniently than a supposed ‘comparative’ person on one occasion proves little, given the different ways in which people are treated beforehand and on arrest, the use, or non use, of charging discretions, environmental circumstances that contribute to making bonds and parole work after sentence, the time spent in custody on remand before sentence unable to obtain bail, or meet bail conditions, comparative employment and educational opportunity, economic and social factors contributing to recidivism, and the like.

As for jury verdicts the evidence is less clear. Assuming a ‘fair’ screening process through the Magistrates’ Courts and by the local Director of Public Prosecutions (if aided by adequate legal representation for the defendant/accused), the resolution of factual issues by largely ‘non Aboriginal’ juries leaves the judgment of the facts to the sense of fairness of individual
jurors, aided (hopefully) by appropriate direction by the trial judge, particularly on matters such as potential prejudice, prejudgment and the like. That racist attitudes exist in the wider community there can be no doubt. As to the extent of their incidence across particular communities, we can only rely upon our own anecdotal experience and perception.

However, jury composition remains a problem, or a challenge, particularly in regional or country areas in some jurisdictions. Clearly, it is also potentially a major problem in large urban centres (such as the capital cities), but assuaged (perhaps) by more ‘liberal’ or sophisticated attitudes. One should not underestimate the sense of justice and fairness regularly demonstrated by juries across Australia, even in the face of significant prejudicial reporting of alleged crimes, or alleged notoriety of alleged offenders.

The unknown, or unmeasurable racism, or discrimination that needs to be addressed is that which may exist against Aboriginal/Torres Strait Islander victims (or prosecution witnesses), whether the accused is Aboriginal or not. I have a ‘sense’ that on occasions Aboriginal victims/complainants/witnesses are undervalued by juries, despite appropriate direction. But this does not lead, directly at least, to over representation in custody, which is the focus of this paper.

**Some of the empirical data**

**Rates of offending (in NSW)**

In this preliminary context, and in the later context of this paper, it is to be noted that the vast majority of convicted defendants (at least in NSW) are sentenced in the Local Court, but the longest sentences are imposed (because of the more serious offending) in the District (County) and/or Supreme Courts (some states and/or Territories not having a District/County Court).

The figures currently available from the Judicial Commission of New South Wales (for the courts of that State), probably representative of the more
populous states, but perhaps not Northern Territory and Western Australia, are as follows:

In 2010, for indictable matters in New South Wales, 2911 offenders were sentenced for 6,678 offences in the District and Supreme Courts. 97.7% of matters were finalised in the District Court, 2.3% in the Supreme Court, of these matters 92.6% of offences were contrary to New South Wales law, 7.4% contrary to Commonwealth law.

The breakdown of offences in these ‘higher’ courts was:

- 17.5% for “illicit” drug offences (supply, import, manufacture)
- 15.3% - sexual assault and related offences.
- 12.6% - solely extortion and related offences
- 10.5% - fraud, deception etc
- 10.4% - intentional injury (including ”assault” type offences)
- 10.0% - burglary, unlawful entry with intent.

“Aboriginal” people constituted 20.19% of offenders. 90% of all offenders pleaded guilty and 70% of offenders were gaoled.

In the Local Court of NSW in 2010, 127,947 offenders were sentenced for 219,527 offences: 97.8% were contrary to New South Wales law, the balance contrary to Commonwealth law. In this jurisdiction 10.5% of offenders were “Aboriginal”. 58.9% of offenders were dealt with in Metropolitan Sydney, 31% in “rural NSW” and the rest in Newcastle and Wollongong. 75.5% of offenders pleaded guilty. Of the total numbers of offenders, 6.2% were in custody at the time of sentencing.

For “statutory offences”, of 103,584 offenders, 43.7% were fined, 6.9% were sentenced to full time custody. The rest of the sentences imposed were bonds or conditional custodial sentences, such as community service, home
detention and the like. A total of 7160 offenders were imprisoned. The median prison term was 9 months (compared with 8 months in 2007 and 6 months in 2002). The median non parole period was 6 months. 44.3% of sentences of imprisonment are did not have a non parole period, either because the sentences were less than 6 months, or the sentences were concurrent with other terms of imprisonment with a non parole period.

The range of statutory offences, in generally recognisable categories, and their incidence were as follows:

- PCA (of various types) 20.5%
- Common assault and assault occasioning actual bodily harm 11.4%
- Possess drugs 6.5%
- Driving suspended/unlicensed or disqualified 15%
- Contravene (apprehended) domestic violence orders 3.6%
- Larceny (and related offences) 3.5%
- Stalk or intimidate offences 2.2%
- Destroy or damage property 3.5%

**Aboriginal custody figures across Australia**

Since the Royal Commission into Aboriginal Deaths in custody released its final report in April 1991 the number of Aboriginal people in prison (and juvenile detention), as opposed to police custody have risen significantly as have their proportions of prison custody and within the general population.

Before the Royal Commission finished its work in 1991;

- 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.

After the Royal Commission delivered its Final Report in April 1991;

- In 2001, 7,801 persons 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.

The situation of Indigenous juveniles in custody is more startling. A 2007-2008 survey of juveniles in custody in NSW, in a particular period, revealed 200 people out of 390 in custody were Aboriginal. No doubt many were unsentenced unable to obtain bail. The general situation for Indigenous youth and their contact with the criminal justice system brings into sharper focus the wider social factors impacting on lifestyle and opportunity for young people, their families and their communities, as discussed later in this paper. They are seemingly more adversely impacted by bail laws, policing policies, governmental ‘welfare’ policies and the like, notwithstanding legislative sentencing provisions aimed at directing them away from custody when sentenced.

The recently released Australian Bureau of Statistics 2012 survey of “Prisoners in Australia”, in summary, contains the following findings:

The “indigenous” population of Australia represents 2.5% of the Australian population. There were 7,979 prisoners who identified as Aboriginal and Torres Strait Islander at 30 June 2012. This represented just over one quarter (27%) of the total prisoner population. Aboriginal and Torres Strait Islander prisoner numbers increased by 4% between 2011 and 2012.
The Aboriginal and Torres Strait Islander prisoner population in the Northern Territory comprised 84% of the total prisoner population, while Victoria had the lowest proportion of Aboriginal and Torres Strait Islander prisoners (7.6%). But the ‘Aboriginal’ population in Victoria is 0.7% of the total population.

The age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners at 30 June 2012 was 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 of the adult Aboriginal and Torres Strait Islander population. The equivalent rate for non-Indigenous prisoners was 129 non-Indigenous prisoners per 100,000 adult non-Indigenous population.

The rate of imprisonment for Aboriginal and Torres Strait Islander prisoners was 15 times higher than the rate for non-Indigenous prisoners at 30 June 2012, an increase in the ratio compared to 2011 (14 times higher). The highest ratio of Aboriginal and Torres Strait Islander to non-Indigenous imprisonment rates in Australia was in Western Australia (20 times higher for Aboriginal and Torres Strait Islander prisoners). Tasmania had the lowest ratio (four times higher for Aboriginal and Torres Strait Islander prisoners).

**Between 2002 and 2012, imprisonment rates for Aboriginal and Torres Strait Islander Australians increased from 1,262 to 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. In comparison, the rate for non-Indigenous prisoners increased from 123 to 129 per 100,000 adult non-Indigenous population.**

Aboriginal and Torres Strait Islander males comprised 91% (7,233) of the Aboriginal and Torres Strait Islander prisoner population at 30 June 2012, similar to the proportion of non-Indigenous males who accounted for 93% of the non-Indigenous prisoner population. The number of Aboriginal and Torres Strait Islander male prisoners increased by 3% while the number of non-Indigenous male prisoners decreased by 1% from 30 June 2011. There were 746 Aboriginal and Torres Strait Islander female prisoners, comprising
9% prisoner population. There was an increase of 20% in Aboriginal and Torres Strait Islander female prisoners from 30 June 2011. This compares with a 3% increase in the non-Indigenous female prisoner population.

The largest proportion of Aboriginal and Torres Strait Islander prisoners (21%) was in the 25–29 year age group. For non-Indigenous prisoners, the age groups with the highest proportion of prisoners were 30–34 years, and 25–29 years (both 17%).

Just over one third (34% or 2,673) of all Aboriginal and Torres Strait Islander prisoners were sentenced/charged for acts intended to cause injury, and a further 15% (1,231) for unlawful entry with intent. Illicit drug offences were the offences that accounted for the highest proportion of non-Indigenous prisoners (15%), followed by acts intended to cause injury (14%) and sexual assault (13%).

There were proportionally more Aboriginal and Torres Strait Islander prisoners than non-Indigenous prisoners with prior imprisonment. Nearly three-quarters (74%) of Aboriginal and Torres Strait Islander prisoners had a prior adult imprisonment under sentence, compared with just under half (48%) of non-Indigenous prisoners.

Excluding prisoners with indeterminate, life with a minimum term and periodic detention sentences, the median aggregate sentence length for Aboriginal and Torres Strait Islander prisoners was unchanged from 2011 at 2.0 years (24 months), while for non-Indigenous prisoners it was 3.9 years (47 months), unchanged since 2011.

The proportion of prisoners who were unsentenced was slightly higher for Aboriginal and Torres Strait Islander prisoners (24%) than for non-Indigenous prisoners (23%). These proportions are unchanged since 2011.

Time in custody on remand is influenced by a number of factors, particularly the time it takes for a case to come before a court. The median number of months spent on remand by unsentenced Aboriginal and Torres Strait
Islander prisoners in custody at 30 June 2012 was 2.2 months, a slight increase from 2.0 months at 30 June 2011. For unsentenced non-Indigenous prisoners the median number of months spent on remand was 3.1 months, a slight decrease from 3.2 months at 30 June 2011.

Then there are the ‘deaths in custody’ which reflect the figures above. According to the latest Australian Institute of Criminology Report on ‘Deaths in Custody to 30 June 2011’ (released in May 2013), between 1 January 1980 and 30 June 2011, there have been 2325 deaths in total of which 450 are Aboriginal/Torres Strait Islander peoples (19% of the total). Of these 1397 have been in ‘prison’ custody (17% Aboriginal/Torres Strait Islander), with 18 deaths in ‘juvenile justice’ custody, of which 8 were indigenous youth (44% of the total).

In 2009-2010 – 24% of deaths in prison custody were Indigenous Australians. In 2010-2011, 21% of deaths in prison custody were Indigenous Australians. In each calendar year the total deaths were 58. Deaths in custody of indigenous peoples rose to a peak in the mid 1990’s then declined each year until a 2005. Although ‘deaths in custody’ are not the subject of this paper, as was found 22 years ago by the Royal Commission into Aboriginal Deaths in Custody, these figures are to be seen in the context of the figures for the increase in Aboriginal/Torres Strait Islander numbers in prison custody over the last 20 years. These figures are also to be considered in the context of decreased numbers of people held in police custody in most States, particularly in urban and regional areas, as opposed to remote areas. The Royal Commission into Aboriginal Deaths in Custody concluded that the rates of ‘Aboriginal’ deaths in custody were not because ‘Aboriginal’ people were “more likely to die in custody but because that population was grossly over represented in custody” (RCIADIC Final Report (1991) 1.3.3).

Surveys and statistical comparisons may, of course, not tell us much because non-aboriginal and Aboriginal people with similar criminal histories are not the 'same' or even 'similar' in a raft of ways, not just in the detail of criminal history and ostensible subjective details.
It is also to be remembered that Aboriginal people may not have the same opportunity to get bail, or maintain bail conditions, as others. Thus, a bond after 6 months in custody is not the same as a bond after being on bail from the date of charge.

**Some explanations for the increase in prison custody numbers**

The Victoria Sentencing Advisory Council in its recent (2013) report “Comparing Sentencing Outcomes for Koori and Non Koori Adult offenders in the Magistrates Court in Victoria”, cited a NSW Aboriginal Justice Advisory Council report prepared by Professor Chris Cunneen, from 2002, setting out the “substantial” factors related to overrepresentation in custody, as still valid. Those matters included in summary:

- offending patterns
- impact of policing
- legislation (particularly the impact of laws giving rise to ‘indirect’ discrimination, such as bail laws)
- factors in judicial decision making (bail conditions, absence of sentencing options)
- cultural differences (role of ‘Aboriginal English’, child rearing practices, vulnerability during police questioning)
- impact of past policies (forced removal of children, creation of missions and mass displacement)
- marginalisation (drug and alcohol and other substance abuse, family and community separation)
- socio-economic factors (unemployment and limited employment opportunities, health issues, housing, lack of educational and training opportunities).
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 was because of increased sentences and more frequent imprisonments, despite no “overall increase in the number of Indigenous adults convicted”.

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.

Debra Snowball and Dr Don Weatherburn, in their paper: ‘Indigenous over representation in prison: The role of offender characteristics’, Crime and Justice Bulletin No 96 (2006), concluded that persistent 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.

The authors identified (from a previous study) conditions that place offenders at risk of recidivism generally speaking, not just amongst indigenous 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.

Local community studies result in similar findings. The Jumbunna Indigenous House of Learning (University of Technology Sydney) “Community Report” – “Factors affecting crime rates in Indigenous communities in NSW a pilot study in Bourke and Lightning Ridge”-Nov. 2010 (written by Alison Vivian and Eloise Schnierer) identified the primary causes of ‘adult crimes’ as:-

i) alcohol and drugs,

ii) unemployment and lack of purposeful activity,

iii) intra communal conflict,

iv) the impact of historical racism and dispossession,

v) lack of adequate housing and overcrowding,

vi) police/community relationships and over policing.

Youth crime was impacted by:-

i) ‘boredom’,

ii) neglect and family evidence and alcohol and drug abuse,

iii) educational opportunity and policies, particularly in discipline,
iv) intergenerational offending,

v) community belief that the authority to discipline has been removed,


The report noted that underlying these matters, or at the forefront, are “socio-economic disadvantage from declining rural towns and economies, racism and segregation, the disconnect between “Aboriginal and non Aboriginal” worlds, lack of self determination, the undermining of Elder authority, the absence of adequate support systems, problems with ‘local government’.

One must further consider the consequences of anger, frustration, resentment, and the like held by individuals from multigenerational ‘injustice’, legal, political and economic.

These various studies and Reports, but for minor detail, speak as one voice on the underlying issues relevant to explaining the over-representation of Aboriginal people in custody and reiterate the findings of the Royal Commission 22 years ago.

As the Victorian report earlier mentioned notes, it is also to be remembered that Indigenous Australians are more likely, on a ‘pro rata’ basis, to be victims of crime. A study by Dr Weatherburn and a colleague from 2007 of Police records of convicted people in NSW from before 2001 showed that Indigenous people were “three times more likely to be the victims of assault and five times more likely to be victims of family violence assaults.” Where the victim was Aboriginal, the offender was also Aboriginal in 85% of assaults, 73% of sexual assaults of adults and 72 % of sexual assaults of children ( cited in the Report of the Victoria Sentencing Advisory Council: “Koori sentencing in Magistrates Courts” (2013) at p. 3 ).

**Dr Weatherburn and Jessie Holmes** in their paper, “Indigenous Over-representation in Prison” (2010), stated 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 “is 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”.

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”.

A critical issue referred to the above is recidivism and/or re-offending rates. The Victoria Sentencing Advisory Council has also released recently a report
called: “Re-offending following sentencing in the Victoria Magistrates’ Court” (June 2013). That report concluded from its research and statistical models that: “Having more previous sentences increases the chance of re-offending, as does having previously been sentenced to prison”, people younger than 25 are more likely to re-offend than those older and men more likely than women.

The report concluded that imprisonment is more likely to lead to re-offending than the imposition of fines or suspended sentences, but not (Victorian) ‘Intensive Correction Orders’ and that people imprisoned in the Magistrates’ Courts will more quickly re-offend than those given the benefit of “Diversion Program” dispositions, who will be “least likely to re-offend and “will refrain from offending the longest” (at p ix). Intimately bound up in this research is the issue of whether (for particular offences) imprisonment deters, or not. The “Resources” index of this Report contains details of the plethora of papers and reports from the last decade which, like the “purposes of sentencing” discussed by the majority of the High Court in Veen (No 2) v The Queen (1988) 164 CLR 465 “sometimes ....point in different directions( at 476)” on this vexed issue.

THE SENTENCING SITUATION CONFRONTING JUDICIAL OFFICERS

There are, however, a number of realities for all judicial officers that need to be considered in the context of the fundamental question sought to be answered in this paper. These include:

- 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 capacity of judicial officers to meet the individual 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 promote rehabilitation.

- Many offenders will have underlying causes contributing to offending or subjective features (such as, mental health, alcohol and drug addiction, homelessness, victims of sexual or physical abuse etc), only able to be met outside sentencing processes or the custodial setting, which may never be met by the sentencing process, and will contribute to further offending.

- 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”.

- 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.

- Outside the courts exist other imperatives and restrictions which impact upon what the courts can do or not, and these limitations exist unevenly across the States and Territories dictated by regional or local circumstances. 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 on occasion because of (un)availability of resources, geography or characteristics (including age) of the offender.
Other considerations arise from the dictates of “individualised justice”. That is, ensuring that each individual case is judged on its merits. In individual cases the evidence will show that:

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

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

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

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

- Indigenous offenders may not commit crimes within their own ‘social 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 selfish or self interested reasons as non-Aboriginal people.

- There are Aboriginal offenders who have psychiatric, psychological or other disabilities which contribute to offending that may not necessarily have any relationship to, or origin in, their cultural or social context. Then again these contributing factors may be intimately connected to their cultural environment or background.

On the other hand it may be contended that:

- 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.

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

**Judicial attitudes and education**

I acknowledge the specific effect of judicial ‘idiosyncrasy’ which largely may explain inconsistent outcomes or comparatively severe sentences. This can be addressed, in part, by the appeal processes.

This can also be addressed by judicial education, as exemplified by the role of the AIJA in convening this conference, but also programs under the auspices of the National Judicial College of Australia and within the various State and Territory jurisdictions.

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. Their effectiveness, however, is constrained by limited resources to fund programs in various States and Territories, the enthusiasm of particular judicial officers for educational opportunities and the ‘attractiveness’ and convenience of particular programs. On occasions the bulk of the attendees are the ‘usual suspects’ who do not need the education that particular courses offer. Then again, electronic and hard copy publication of articles, ‘Bench Books’ (particularly the ‘Equality before the Law’ style of Bench Book published in WA, Qld and NSW), reports upon conferences and community visits, and the like, in judicial ‘bulletins’ and other publications, can provide information to the unwilling and those otherwise unable to participate in such activities. Although most judicial education courses are voluntarily attended, there is an element of ‘compulsion’ in annual conferences of various jurisdictions, which provide opportunities for information on Aboriginal and Torres Strait Islander cultural issues to be addressed.

It is conceded that some judicial sentencing attitudes, of different ‘hues’, never change, no matter how many appellate interventions or attendances on educational courses.

**WHAT CAN BE DONE?**

The matters that I raise are largely concerned with what can be done inside the ‘justice system’ by judicial officers, courts and legislating authorities, recognizing that such changes cannot operate in a vacuum and much needs to be done on a wider societal scale. The ‘remedies’, or steps that can be taken, I suggest might fairly be seen as ‘small picture’ matters in one sense. Those are matters that the justice system, through the courts, and with legislative and other administrative assistance, should strive to achieve.

The ‘big picture’ matters that are beyond the control of courts require widespread political and community attention and support, much of which
will have to undo the damage of past failed discriminatory and/or destructive policies. Some such ‘big picture’ matters are discussed in the Jumbunna Learning House ‘Community Report’ to which I earlier referred and were intimately bound up in the National and Regional Reports of the RCIADIC. Some also contributed to the 40 important, commonsense recommendations made by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs “Doing Time – Time for Doing”, in June 2011, building, in part, upon the earlier recommendations of the National Indigenous Drug and Alcohol Committee Report of 2009: ”Bridges and Barriers”- which addressed issues of health contributing to the current justice crisis, such as hearing disabilities and Foetal Alcohol Spectrum Disorder, amongst other matters.

A starting point – “Equal Justice”

‘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.

In R v Jimmy [2010] NSWCCA 60 Justice Stephen Rothman of the NSW Supreme Court discussed, 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 in relation to parity of sentencing.

The principle of equal justice reflects the importance of the need to ensure that ‘individual justice’ is provided on a case by case basis. 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”.

This is not new. It is a concept that is recognised in a number of areas of sentencing. The concept of ‘equal justice’ can be imported into the very ‘fabric’ of sentencing concerning Aboriginal people. I support, as a starting and end point, that the legislatures of Australia, and the courts, on the
evidence in the individual case, strive to achieve ‘equal justice’ for Aboriginal people by proper recognition of the existence and consequences of discrimination, disadvantage, dysfunction, dislocation and other social and legal disadvantages upon Aboriginal people and their contact with the justice system, whatever be their status either as defendants, victims, witnesses and/or support persons.

The case law

‘Case law’ developed by the superior courts provides a means for achieving equal justice, even within the constraints of the various legislative provisions relating to sentencing generally.

In NSW, the case of R v Fernando (1992) 76 A Crim R 58 is of considerable importance. In that case Justice Wood, then 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. His Honour set out a number of ‘principles’ to be considered in particular cases involving Aboriginal offenders, particularly from disadvantaged or remote communities charged with acts of alcohol related violence. Some of these matters go part way to address ‘equal justice’ as has been discussed.

These principles have been subject to various qualifications and clarifications. In R v Fernando [2002] NSWCCA 28, the Court, comprising Spigelman CJ, Kirby P, and Wood CJ CL, explained the position thus,

“[66] The sentencing principles to be applied by a sentencing court apply in every case, irrespective of the membership of the particular
offender of an ethnic or other group. Nevertheless, when imposing sentences courts must take into account, pursuant to those very principles of general application, all of the facts relevant to the circumstances of the offence and of the offender, including facts which may exist by reason of the person's membership of a particular group. (See e.g. Neal v The Queen (1982) 149 CLR 305 at 326.)

[67] Aborigines who commit crimes of violence are not accorded special treatment by the imposition of lighter sentences than would otherwise be appropriate having regard to all of the relevant considerations, including the subjective features of a particular case. An offender is not entitled to any special leniency by reason of his or her Aboriginality. **The principle of equality before the law requires sentencing to occur without differentiation by reason of the offender’s membership of any particular racial or ethnic group** (emphasis added). Nevertheless, particular mitigating factors may feature more frequently in some such groups than they do in others. (See R v Fernando (1992) 72 A Crim R 58 at 62-63 as further explained in R v Hickey (NSWCCA, 27 September 1994; unreported); R v Stone (1995) 84 A Crim R 218 at 221-223; R v Ceissman [2001] NSWCCA 73, esp. at [29]-[33]; R v Pitt [2001] NSWCCA 156 at [19]-[21].)

[68] The criminal justice system has accurately been described as a “hopelessly blunt instrument of social policy and its implementation by the courts is a totally inadequate substitute for improved education, health, housing and employment for Aboriginal communities” R v Daniel [1998] 1 Qd R 499 at 530 per Fitzgerald P. His Honour outlined the difficulties that arise in this regard at 530-532.”

This view has been affirmed over and over again. However, in **R v Kelly [2005] NSWCCA 280**, at [57] Justice Rothman observed:

“Too little regard has been paid to the effects of discrimination and disempowerment of minority groups, particularly those of Aboriginal descent, and some reactions to it which lead to alcoholism, drug addiction and related or unrelated crime. But the criminal justice system and, in particular, the sentencing of this individual is not the time so to do and there is no material, other than the fact of aboriginality itself, that the applicant suffered discrimination or that there were any relevant consequences of her aboriginality.”

Later in JT v R [2012] NSWCCA 133, at [53], his Honour observed:

“There may come an occasion where consideration of principles that go broader than those adumbrated in Fernando is appropriate. There are many psychological studies that provide much evidence to suggest that acts of discrimination, disempowerment and exclusion, which have been suffered by members of the Aboriginal community, have directly
caused certain behaviour, as opposed to certain behaviour being caused by a history of abuse. Of course, this principle may apply to other groups of people, but it applies quintessentially to the Aboriginal community.”

“Equality before the law”, as cited earlier in the Fernando decision of 2002, does not mean the same as ‘equal justice’ because it does not make allowance for what are now well known and identifiable factors that underlie or contribute to offences and offending and distinguish offenders from each other. The evidence of which ‘judicial notice’ may be taken is overwhelming. In a particular case, if not known to the sentencing court, this evidence, which is readily accessible, should be brought to its attention as a matter of course.

The High Court on 10 May 2013 granted special leave in the appeal from the decision of the NSW Court of Criminal Appeal in R v Bugmy ([2012] NSWCCA 223). The appeal will be heard on 6 August 2012 and has the potential to have important implications for sentencing of Aboriginal offenders, charged with serious indictable crimes with significant criminal records. One issue to be addressed by the High Court at the hearing of the appeal is the limited application of “Fernando” principles, particularly the observation that “with the passage of time, the extent to which social deprivation in a person’s youth and background can be taken into account must diminish”. This proposition followed upon an observation in an earlier judgment of the Court of Criminal Appeal that “mitigating effect of being an Aboriginal person from a disadvantaged background ... loses much of its force where the offender has committed serious offences in the past (Drew v R [2000] NSWCCA 384 – at [21]). The High Court has the opportunity to visit the sentencing of Aboriginal offenders, in the context of the relevant legislative constraints, and consider the development of jurisprudence that permits a more affirmative approach in dealing with Aboriginal people in the appropriate case. In part, the appeal alerts the High Court to Canadian jurisprudence discussed below.
In *Hili and Jones v The Queen*, to which reference was made earlier,(at [47]), the majority of the High Court referred to what Gleeson CJ observed in *Wong v The Queen* [2001] HCA 64 (at [6]):

“All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. *It should be systematically fair, and that involves, amongst other things, reasonable consistency*” (emphasis added),

but went on to observe ( as noted in the ‘Introduction’ herein)that:

“Consistency is not demonstrated by, and does not require, numerical equivalence” (at [48]). “The consistency that is sought is consistency in the application of relevant legal principles. When the search is for ‘reasonable consistency’, what is sought is the treatment of “*like cases alike and different cases differently*” (emphasis added)” [49]. The Court pointed out this was the reason that the High Court struck down ‘guideline judgments’ in Commonwealth matters as inconsistent with the terms of s16A of the Commonwealth Crimes Act.

The challenge for the courts is to apply the notion of ‘equal justice’, *where the evidence justifies it*, to the sentencing of Indigenous Australians, and for the legal representatives of individuals to produce the evidence, if required, to enable courts to act. But the lead must come from the superior courts to prevent, or remove, the idiosyncratic sentencing of which there is rightful complaint, with the aid of judicial education for the uninformed, the ignorant and the bigoted.

The Western Australian ‘Aboriginal Bench Book’ (2nd Edition) states 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 Bench Book include; emotional stress from interracial relations (Neal v The Queen (1982) 149 CLR 305, particularly at 324-325 per Brennan J) 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 over incarceration of Indigenous Australians.

The decisions of superior courts, only in a piecemeal way, approach the reality of the social and cultural circumstances of Aboriginal people. To date the courts, sometimes inhibited by legislative constraints, or perceived constraints, have not comprehensively and decisively taken into account the historic inequality and discrimination suffered by Indigenous Australians, expressed in various forms of disadvantage, such as in the self evident over representation of people in custody. It is surprising to read so few references in the case law to the findings of the RCIADIC and its learned analysis of the historical and socio-economic contexts of the impact of the justice system on Aboriginal peoples across Australia.

**Canadian sentencing law in relation to ‘aboriginal peoples’**

Guidance may be at hand from a nation with comparative issues to consider relating to its First Nation peoples as there are here in Australia. 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.16A **Crimes Act** (Cth) 1914.

The ‘purposes’ 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 **most importantly** (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).

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 SCR 688, held, inter alia, that s.718(2)(e) of the Criminal Code mandates that sentencing judges 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].

In the Bugmy application reference is made to the concept of “equality before the law” to be seen in the context recognised by the High Court in Mabo (No 2) (1992) 172 CLR 1, the National Report of the Royal Commission into Aboriginal Deaths in Custody (1991) and subsequent reports for Commonwealth and State instrumentalities. That application urged the Court to consider the Canadian jurisprudence, including the recent decision of the Supreme Court of Canada in R v Ipeelee [2012] 1 SCR 433, requiring Canadian courts to take into account “the unique circumstances of Aboriginal offenders that bear (up)on the sentencing process as relevant to the moral blame worthiness of the individual, as an aspect of the principle of proportionality in sentencing.” In Ipeelee the majority held that “... a just sanction is one that reflects both perspectives (the gravity of the offence and the moral blame worthiness of the individual) of proportionality and does not elevate one at the expense of the other” (at [37]). That case, and Gladue, urged consideration of the unique circumstances of background of Aboriginal offenders and that sentencing of Aboriginal Canadians required “more creative and innovative solutions” (at [62]). This was not “reverse discrimination” but was necessary to achieve “real equality” [71] – [77]. In Ipeelee the majority stated that courts must take judicial notice of such matters as: “.... the history of colonialism, displacement (social and family dislocation) and how that history translates into lower incomes, higher unemployment, higher rates of substance abuse and suicide and, of course, higher rates of incarceration of Aboriginal offenders ... parity principle requires that any disparity be justified.”

These principles apply to all offenders, including those with (long) criminal histories. This might be compared with the reasoning in Bugmy by the NSW Court of Criminal Appeal. True it is that the Canadian authorities are guided by different legislative ‘rules’ and ‘obligations’, but the matters that Canadian judges are required to take judicial notice of are equally, sometimes more
forcefully, apparent and applicable across Australia. The studies and reports referred to in the earlier part of the paper make this clear. We do not need another Royal Commission, or Parliamentary Report, on these matters. Such venerable sources of information have already spoken voluminously and loudly. The RCIADIC Chief Commissioner Elliott Johnson QC in the Final Report:

“It is important that we understand the legacy of Australia’s history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status ... their attitudes to non Aboriginal people and society ... it is one of the most important underlying issues that assists us to understand the disproportionate detention rates of Aboriginal people” (Vol 2 Pt C).

The use of international law

There is an opportunity for international legal standards and recognized ‘rights’ to be imported into domestic case law. Lawyers and courts need to consider the use of Australia's international treaty and other obligations as a mechanism for the development of case law to provide greater protection for Aboriginal people. The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General assembly on 13 September 2007. Australia voted against its adoption by the General Assembly. It was later endorsed by a different Australian Government in April 2009.

In the context of its ‘Preamble’, reaffirming that Indigenous peoples should be free from discrimination of any kind and be treated equally and noting that Indigenous peoples have suffered from historic injustices, the Declaration in ‘Article 1’ recognises that Indigenous peoples have the ‘right to full enjoyment of all human rights and fundamental freedoms recognised in the ‘Universal Declaration of Human Rights and international human rights law’. In Article 2, it is recognized that Indigenous peoples have the 'right to be free from any kind of discrimination in the exercise of their rights. Article 3 recognises the ‘right to self-determination’, including the ‘right to pursue economic social and cultural development’.

In Article 5 it is recognized that
Indigenous peoples have the ‘right to maintain and strengthen their distinct political, legal, economic social and cultural institutions’. They have the ‘right to life, physical and mental integrity, liberty and security of person’ under Article 7. In Article 18 it is recognized that Indigenous peoples have the ‘right to participate in decision-making and matters that would affect their rights’ as well as ‘maintain and develop their indigenous decision-making institutions’. In Article 19 it is recognised that states shall ‘consult and cooperate in good faith with Indigenous peoples’ concerning their own representative institutions. In Article 35 the ‘right to determine the responsibilities of individuals to their communities’, is noted. These various statements of ‘rights’ of Indigenous peoples and obligations on ‘States’ in the Declaration, have potential implications for the treatment of Aboriginal people in our justice system.

The articulation of these ‘rights’ for Indigenous people in an international ‘Declarations of Rights’, formulated and sanctioned by the United Nations, it is suggested, casts an obligation upon Australia, and its various instruments of legislative and executive power. It may potentially provide another context, or basis, for achieving ‘equal justice’ for individuals so as to give effect to those ‘rights’.

The ‘Declaration’ has not been incorporated into ‘municipal’ (i.e. local) law and thus does not form part of Australian law. It cannot operate as a ‘direct source of individual rights and obligations under the law’ (Simsek v Macphee (1982) 148 CLR 636 (at 641-642): Minister for Immigration v Teoh (1994-5) 183 CLR 273, at 287). But where a statute is ‘ambiguous’ the courts should favour a construction that is in conformity (not conflict) with the established rules of international law (Teoh, at 287 per Mason CJ and Deane J). Although, this proposition has been doubted subsequently by some Judges of the High Court, (see Al-Kateb v Godwin [2004] HCA 37 at [65] per McHugh J), it has been strenuously supported by jurists, such as the Hon. Michael Kirby both on and off the bench. Obviously, the identification of international standards and obligations as relevant to Australian domestic
criminal law will be an exacting, delicate and prolonged task that will require from lawyers great skill and perseverance to influence, or shape, judicial thinking.

**Legislative and procedural change**

In addition to the matters noted above, there is required a reappraisal of legislation that governs the sentencing process at a State and Federal level to **alter or add to the purposes and objectives** of sentencing and other fundamental principles that govern sentencing practices and substantial change to sentencing practices and the availability of alternatives to imprisonment, as well as changes in the management of sentenced prisoners, whether in custody, or not. Some suggestions are as follows:

(i) The introduction of specific legislative provisions, of the type discussed above to be found in Canadian legislation, to compel judicial consideration of the underlying causes of offending and charging.

(ii) Changes or additions should be made to 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 ‘purposes’ such as:

- ‘ensuring equal justice’,


• ‘reducing recidivism to be added to the existing concepts of ‘punishment’, ‘denunciation’, ‘accountability’ etc,

• ‘restoration of offenders to their community(and family’),

• ‘restoration of stability and harmony to the offender’s community’,

(b) Express recognition of ‘cultural or social circumstances to offending’ as, at least, ‘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), as well as, repealing or amending s 16A(2A) Crimes Act (Cth) 1914.

(iii) In relation to provisions, such as s 5 of the NSW ‘Sentencing Procedure’ Act, which purport 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) 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 these third parties. As has been recognised by the South African Constitutional Court, admittedly in its national constitutional legal context.
(v) Legislative changes should be made to provide greater ‘mix and match options’ on sentencing:

(a) ‘community service work’, or residential rehabilitation programs, as conditions of bonds, home detention etc,

(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,

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

(vi) Greater attention should be given to in legislation to the rights of children to protect them from incarceration, a ban on any detention in an adult prison and to prevent juvenile offenders finishing their sentences in adult prisons unless there is no other practical alternative.

(vii) There should be legislative recognition of wider options and greater flexibility in serving sentences of imprisonment, such as pre-release to halfway houses (or rehabilitation centres) before parole periods expire, or before short sentences expire where there is no non parole period, with compulsory training and work programs outside the prison environment before a sentence is completed.

(viii) Sentences of 6-12 months imprisonment or less should be served by community service work, or in particular 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 and education, programs.
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. In other words, ‘justice re-investment’ strategies. This concept has been introduced across a number of state jurisdictions in the United States. In recent times it has been raised in public debate in Australia, persistently and eloquently by Dr Tom Calma (See “Investing in Indigenous Youth and Communities to Prevent Crime”, Dr Tom Calma – Australian Institute of Criminology Conference, 31 August 2009), and detailed in an article in Indigenous Law Centre’s ‘Australian Indigenous Law Review’ (Vol 14 No.1), ‘Building Communities – Not Prisons’. It was recognised as a legitimate policy objective in the “Doing Time – Time for Doing” Report, to which I earlier referred, in Recommendation 40. The Senate’s ‘Legal and Constitutional Affairs References Committee’, in June this year, has also published a report, “Value of a justice re-investment approach to criminal justice in Australia”, recommending the ‘Commonwealth’ take a ‘leadership’ role in supporting the implementation of justice re-investment through the Council of Australian Governments (Recommendation 5), with related recommendations for implementing trial schemes, funding and coordination.

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

- substance abuse programs,
- ‘Nurse Family Partnership’ programs, focusing on the early years of children,
- job placement programs
- support for children of incarcerated parents,
- ‘healthy body’ programs,
- ‘summer’ employment and training,
- proper supervision in the community,
- programs identifying “cause and effect”…..amongst many other programs.

What justice reinvestment can achieve is a redirection of funds otherwise used to incarcerate people, usually some considerable distance from their communities, to the establishment of resources and facilities within communities, or, at least accessible to communities, such as ‘bail’ and ‘safe’ houses, to prevent offences occurring, lessen the opportunity for them to occur and diverting people from offending.

(x) 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.

(xi) There should be an expansion of the availability of ‘Circle sentencing/Koori/Nunga’ Court models for dealing with appropriate Aboriginal offenders at Local Court/District (County) Court jurisdictions.

(xii) There should be encouragement of the involvement of Elders in “traditional” sentencing exercises, in the appropriate case, to inform courts, not just on cultural issues, but on wider social issues from particular communities. Consultation with Elders can be conducted with both parties, prosecution and defence given the opportunity to comment or call further evidence.

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

(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, 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 can be a better person on release and better able to cope in the wider community.

(xv) 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).

(xvi) 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.

(xvii) 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.

(xviii) 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.

(xix) Once a person becomes involved in the criminal justice system, putting aside the issue of determining guilt, the initial concerns from charging onwards should usually be diversion, treatment, rehabilitation and/or training.

(xx) 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.

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

**Conclusion**

The training and education of police and correctional officers I have not addressed. Much of this is beyond my experience and knowledge. The recommendations of the RCIADIC still have power and relevance in this area it must be said. Many of those recommendations have been acted upon, but continuing commitment to changes for the better is still important. The “Doing Time – Time for Doing” Report also raises particular recommendations for the attention for these important instruments of the justice system that deserve attention and implementation.

These proposals proceed on the assumption that a concerted effort will be made in accordance with the spirit of the recent recommendations of NIDAC in the ‘Bridges and Barriers’ Report of 2009 and the House of Representatives’ Standing Committee Report earlier mentioned,

- 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,

• 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.

The recently released Senate ‘Legal and Constitutional Affairs References Committee’ report on ‘justice re-investment’ concluded by noting in general terms the need for “incarceration” as “part of the sentencing regime”, but said: “...(incarceration) should be seen as a last resort and only for serious offenders. Incarceration should not be used because of the absence of adequate alternative solutions. The Committee is particularly concerned that people with mental health, cognitive disability and alcohol and drug problems are sent to prison because there are no other options for courts to consider (at p123)”.

The ‘solutions’ to the current national shame of disproportionate incarceration of Indigenous Australians must be addressed with 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 legislative and other recognition of measures that address the ‘damage’ of the past and the inequities of the present to deliver ‘equal justice’ and make the criminal law less the “blunt instrument” that it has been in the past.

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