UNIVERSITY OF TECHNOLOGY SYDNEY

Jumbunna Indigenous House of Learning

Response to NSW Law Reform Commission – "Sentencing – Preliminary outline of the review".

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Research Unit
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1 November 2011

Dear Sirs,

RE: SUBMISSION REGARDING THE REVIEW OF THE *CRIMES (SENTENCING PROCEDURE) ACT 1999* (NSW)

We welcome the opportunity to comment on the NSW Law Reform Commission's reference into the operation of sentencing law in New South Wales (the "**Review**").

As you may be aware, Jumbunna Indigenous House of Learning, Research Unit ("**Jumbunna**") undertakes research and advocacy on Indigenous legal and policy issues of importance to Indigenous people, their families and their communities. Our current projects explore, inter alia, issues related to Indigenous people's contact with the criminal justice and legal system. Jumbunna staff have experience as researchers, academics and practicing solicitors.

Currently, one of the projects that Jumbunna is engaged in is an ARC funded research project aimed at identifying factors – positive and negative that impact on rates of crime in certain Aboriginal communities in New South Wales. That project has involved substantial consultation with community members, legal service providers, local government representatives and police in those communities and it is from these consultations that the below comments are drawn. In accordance with the Preliminary outline of the Review provided by you, the below submissions are limited to issues that should, in our opinion, be considered within the scope of the Review and do not represent the totality of our views on those issues. We look forward to providing more substantial submissions on the Review as it proceeds.

Scope of Review

In our view, the Review should be broad, open to recommending significant change in sentencing law and procedure in New South Wales in relation to Indigenous people. Twenty years on from the *Royal Inquiry into Aboriginal Deaths in Custody* ("**RCIADIC**") Indigenous people across Australia are 14 times more likely to be in prison than non-Indigenous Australians. The position is acute in New South Wales, which gaols more Indigenous people than any other state in Australia, and in particular amongst Indigenous youths, who are 28 times more likely to be incarcerated than non-Indigenous youth. The effect of incarceration upon prisoners is extreme and the uniquely deleterious effect of incarceration upon Indigenous people has been recognised since the release of the RCIADIC findings. The incarceration of generation after generation of Indigenous people has led to the mass disruption to, and trauma within, Indigenous communities and contributed significantly to the stress placed upon the culture.

In our view the following issues should form part of the Review. Save for the issue raised at point 1, the following issues are not raised in any particular order of priority or importance:

1. First and foremost, the Review should inquire as to whether a separate sentencing regime should be legislatively enacted in relation to Indigenous offenders. In our view, a radical departure from 'business as usual' in sentencing in New South Wales is required

for Indigenous offenders. Successive governments have failed to stem the outrageous over-representation of Indigenous people within New South Wales' prisons. In our view the Commission should undertake consultations with Aboriginal communities in New South Wales in which the entire sentencing regime is open for discussion. The explicit purpose of this consultation (and any consequent legislative scheme) should be to strengthen the authority of Indigenous communities to determine the relevant considerations in sentencing an Indigenous offender, and the suitable sentence for such an offender. Relevant considerations might include:

a. The addition of new 'purposes' of sentencing such as 'maintaining/encouraging respect for and the authority of culture', 'ensuring the offender is answerable to the community', 'reintegrating the offender into the community', 'ensuring the social cohesion of the community', 'recognising the historical and contemporary disadvantage suffered by Aboriginal and Torres Strait people', 'healing', 'rehabilitation', 'accountability' and 'self-determination'.

b. Aboriginal communities should be consulted on what factors should mitigate an offence (for instance the fact the offence was conducted in accordance with a cultural imperative) and what considerations might aggravate an offence (for example that the offence was a breach of culture or law).

c. The removal of 'general' and 'specific deterrence' from the purposes of sentencing. A BOCSAR study conducted in December 2010[1] noted that "if the penalties imposed by courts exert any deterrent effect, that effect is comparatively small", a conclusion supported anecdotally by the experience of solicitors, police and the Courts. Indeed, in the course of the research conducted by Jumbunna with Magistrates, Registrars, Legal Aid Solicitors and Police Prosecutors, a recurrent theme was that there was no stigma attached to imprisonment within these communities. Rather, in many cases, imprisonment was seen as part of growing up in families in which parents and brothers had also been incarcerated. One reason for this is undoubtedly because Indigenous communities experience high incidents of those things that contribute to criminality including interpersonal conflict and personal stress, drug and alcohol abuse, early school leaving and unemployment. Many of these are complex socio-economic issues that affect communities and individuals and to suggest that Court imposed punishment will have a significant effect where these underlying factors are not addressed is naïve. Furthermore, in relation to drug and alcohol dependency, many rural communities with large Indigenous populations have little, if any, access to effective treatment programs for such addictions. The continuation of such abuse then becomes influenced by a lack of support to break cycles of addiction.

a. The legislative enactment of imprisonment as a last option for Indigenous people. Where the Court is of the view that imprisonment is the only available

[1] Berange, Weatherburn and Moffat; New South Wales Bureau of Crime Statistics and Research, *'Reducing Indigenous Contact with the Court System'*, Issues Paper no. 54, December 2010.

option, the Court should direct that the Offender serve that sentence in culturally appropriate custody with access to culturally appropriate custodial rehabilitation programs (for an example of potential models the Review might consider Balund-A or Yetta Dhinnakkal).

b. Elders should have a role in mentoring the offender outside the courtroom and in advising the Court as to the cultural considerations relevant to the sentencing of an Indigenous offender. This role should extend to advice on any factors considered by the elders to be relevant to the offending and/or sentence (including considerations on behalf of the victim and any third party who will be affected by the sentence).

c. An evaluation of the benefits of Circle Sentencing/Koori Courts and an expansion of the scheme to ensure its availability in all NSW local courts.

d. An evaluation and review of diversionary or sentencing options directed to connecting the offender to support services, mentoring services and cultural support with the offender's community. One comment made repeatedly to Jumbunna researchers was that offenders (and particularly young offenders) are sent away to detention centres were they have access to counselling and education services that do not exist in the communities to which they return. One possible model for the development of such programs are the 'bush camps' that have been run successfully with young offenders throughout Australia. In these programs, offenders are taken 'bush' for periods of between 3 and 12 months and supported by mentors, teachers and service providers from within their local communities.

e. The increase in the availability of flexible sentencing options so that Offenders serve the least possible amount of time in custody. In this, and many regards, we endorse the submissions of the NSW Bar Association contained in its Criminal Justice Reform Submission released prior to the most recent NSW Election (a copy of which is **attached** for your consideration) and, in particular, the recommendations in relation to 'mix and match' sentencing options and the service of sentences of 6 – 12 months imprisonment by way of community service orders or rehabilitation. One issue raised consistently with Jumbunna researchers is the benefits in 'sentencing' offenders to education or training programs rather than the more punitive traditional punishments. Such an approach allows the Court to assist the offender to address circumstances of the offending in order to reduce the possibility of future offending, rather than merely punishing the offender for past offending. One example would be where an offender is being sentenced for driving unlicensed because their licence was suspended for non-payment of a fine, that offender may be 'sentenced' to a requirement to attend at a motor registry and obtain a new licence, or to the performance of community service in 'payment' of the outstanding fine.

In addition to the substantial consultation process recommended above, the following issues should also be addressed as part of the Review:

2. The Review should include an audit of the implementation within New South Wales of the recommendations of the RCIADIC (we understand such an audit is currently being undertaken by the NSW Aboriginal Legal Service). Any review of sentencing law in New South Wales should recommend the implementation of these recommendations and should consider the impact to date of respective Government's failure to implement those recommendations.

3. The Review should address the availability of sentencing options in rural and remote courts in NSW. Numerous submissions have raised the 'geographical tyranny' that leaves many magistrates without non-custodial sentencing options. In discussions with Jumbunna staff, comments such as the following were consistently made by Lawyers, Magistrates and Police:

> *A number of people we spoke to who worked in the criminal justice system identified the lack of available and appropriate options – both in terms of prevention and diversion in sentencing – as a serious shortcoming in Wilcannia.*[2]

...

> *As reported in other rural communities, magistrates are limited in their sentencing options as diversionary programs are largely not available and incarceration is a regular outcome.*[3]

This has been a concern raised also by NSW Magistrate David Heilpern, who has stated

> "*it is simply unfair that a crime committed in Bega has less sentencing options than a crime committed in Manly. It is just wrong. We should have same crime, same time everywhere.*"[4]

The Review should conduct an audit of all NSW Local Courts to determine what sentencing options are available in each Court, and should recommend that all sentencing options be available in each Court. In addition, given that it is a duty of the state to ensure that suitable sentences can be imposed in each case, the Review should investigate the insertion into the *Crimes (Sentencing Procedure) Act 1999* (NSW) of a section directing that, where the suitable sentence is unavailable to a Court because of a lack of resources, the Court is not to impose a harsher sentence, but must impose a lessor sentence. It is simply unfair that an Offender should be punished to an extent greater than that allowed at law because the Government has not resourced the Court properly.

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[2] McCausland, Ruth and Vivian, Alison, *Factors affecting crime rates in Indigenous communities in NSW; a pilot study in Wilcannia and Menindee; Community report,* June 2009, Jumbunna Indigenous House of Learning, Research Unit, University of Technology, Sydney, , page 26.

[3] Ibid.

[4] David Helipern, 'A View from the Bench' in Elaine Barclay (Ed), *Crime in Rural Australia* (Federation Press, 2007) 182.

4. The Review should investigate the unintended consequences of the fine system in New South Wales. In a December 2010 BOCSAR paper it was noted that nearly a quarter of Indigenous people's appearance in Local Courts in NSW at the time were for road traffic and motor vehicle registry offences, many of which were for driving a motor vehicle after the offender had had their licence suspended for non-payment of fines.[5] The same concerns have been raised in the Northern Territory. The Review should give consideration to the unintended effects of the fine regime in its application to Aboriginal and Torres Strait Islander people and develop a range of alternatives to the payment of a fine, tailored to the individual offender, or a system whereby fines that are imposed can be 'paid off' by offenders, by mandating attendance at adult community service and/or education and training programs.

5. The Review should investigate the benefits of the adoption in NSW of a Justice Reinvestment approach to crime in Australia. We **enclose** for your information a letter endorsed by Jumbunna setting out the arguments for, and parameters of, a justice reinvestment approach. The Review should investigate the ways in which such an approach might be implemented in NSW, including by reviewing the 'purposes' of sentencing and the factors to be taken into account on sentence.

6. The Review should also examine the principles outlined in *R v Fernando* (1992) and consider the benefits of enshrining these principles in legislation. In particular, the Review should consider the benefits of reversing the line of case law that has resulted in a narrowing of the circumstances in which those principles apply to offences by Indigenous offenders (see for example R v Pitt (2001) and R v Walter & Thompson (2004)).[6]

7. Finally, acknowledging the limited terms of reference, we reiterate our comments made in relation to the prior Bail review conducted by the Commission, and in particular the comments regarding the role that Police play in the criminal justice system and the need to establish protocols regarding the interaction of Police and Indigenous people.

Craig Longman on behalf of Jumbunna prepared these submissions. The author would be happy to provide the committee with further information on any of the matters raised above.

Yours Sincerely,

Professor Larissa Behrendt.

Craig Longman.

[5] Berange, Weatherburn and Moffat; New South Wales Bureau of Crime Statistics and Research, '*Reducing Indigenous Contact with the Court System*', Issues Paper no. 54, December 2010, page 3.

[6] For a summary of the case law on the application of the Fernando principles, and a general overview of case law developments relating to the sentencing of Indigenous offenders, see Anthony, Thalia; Indigenous Justice Clearinghouse, '*Sentencing Indigenous Offenders*', Brief 7, March 2010.

The New South Wales Bar Association

Criminal Justice Reform Submission

Mental illness

The New South Wales Law Reform Commission has examined in detail the regime for dealing with persons found unfit for trial, found not guilty by reason of mental illness ('forensic patients') or found to be mentally ill whilst detained, bail refused or on sentence ('correctional patients'):

> *Consultation Paper 5*: People with cognitive and mental health impairments in the criminal justice system: an overview
>
> *Consultation Paper 6*: People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences
>
> *Consultation Paper 7*: People with cognitive and mental health impairments in the criminal justice system: diversion
>
> *Consultation Paper 8*: People with cognitive and mental health impairments in the criminal justice system: forensic samples

As a result of that examination, it is appropriate that the following reforms occur in respect of such mentally ill persons:

> (i) Revision of unfitness criteria, special hearings and limiting term concepts and processes to ensure potential release to a supported environment with assistance for employment etc rather than detention in prison.
>
> (ii) Joint responsibility of parole authorities and health facilities for mentally ill persons.
>
> (iii) The Metropolitan Remand and Reception Centre at Silverwater be designated as a screening unit and clinic under the *Mental Health Act 2007* (NSW) to enable involuntary treatment in that facility.
>
> (iv) Extend the diversion provision in ss 32 and 33 *Mental Health (Forensic Provisions) Act 1990* (NSW) ('MHFPA') beyond the Local Court to higher courts and increase their ambit to persons capable of being treated and rehabilitated (that is, remove or lessen the culpability restrictions).
>
> (v) Abolish the verdict of 'not guilty by reason of mental illness' and replace it with a verdict of 'not responsible in law by reason of mental illness'.
>
> (vi) Develop proper policies consistent with the role of the Mental Health Review Tribunal ('MHRT') to determine care, detention, treatment, leave and release for forensic patients to enable such patients to be released from prison when their condition may be safely and effectively treated under a less restrictive regime in the community.

In addition, a legislative framework should be introduced for fitness to be tried to be determined in summary matters. Such a scheme should be available because of the very wide jurisdiction of the

Children's Court, and the expanding jurisdiction of the Local Court. Currently, if a person is unfit to be tried in respect of a summary matter they must be discharged: *Mantell v Molyneux* (2006) 68 NSWLR 46. If this happens it is possible for the Crown to lay an ex officio indictment: *Police v AR* (Marien P, Children's Court, 19.11.2009) at [61]. This demonstrates why a legislative framework is required.

The goals of any scheme for determination of fitness to be tried in summary courts should be:

(i) consistency as far as possible with the operation of MHFPA in higher courts;

(ii) determination of criminal responsibility;

(iii) avoidance of unnecessary delays; and

(iv) simplicity.

The scheme proposed for fitness to be tried in summary matters has the following major elements:

(i) Fitness to be tried can be raised by the Court, prosecution or defence, and at any stage of proceedings, although preferably before commencement of hearing.

(ii) Once raised, the hearing is suspended until fitness is determined.

(iii) A Court can direct preparation and service of expert reports.

(iv) If an expert assesses a person as unfit to be tried, the expert must address the likelihood of the accused becoming fit in the next 12 months, as well as recommending a treatment plan.

(v) After service of expert reports by one party on the other, the other party can decide if they want an expert report prepared.

(vi) When the matter comes before a Court, the first determination will always be whether s 32 or s 33 MHFPA is appropriate. If it is not, then a fitness inquiry is to take place.

(vii) Sections 12, 13 and 15 MHFPA apply to the fitness enquiry. Fitness enquiries can be contested, uncontested, or with consent of parties.

(viii) A Court can inform itself as it considers appropriate.

(ix) If a Court finds a person unfit, it is to decide if the person is likely to become fit during the next 12 months. If the person is not, a special hearing is to be held.

(x) The procedure for a special hearing is to follow s 21 MHFPA as closely as possible and the verdicts available are those contained in s 22 MHFPA.

(xi) After a special hearing a Court can make any order currently available: s 23(2) MHFPA. In addition, there should be a new power for a Court to make a Community Treatment Order (which a Court can currently only make under s 33(1A) MHFPA).

(xii) If a limiting term is imposed the person is to be referred to the MHRT and consequent orders will be made to advise the MHRT of the person.

(xiii) A Court can monitor progress and deal with variation or breach of community-based orders that are imposed: s 32A MHFPA.

(xiv) Appeals lie to the District Court in relation to all stages of this process.

The general proposals made above derive from a paper delivered by G James QC at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010. The specific proposal to introduce a legislative framework to determine fitness to be tried in summary matters derives from a paper delivered by L Fernandez at the same conference.

Subpoenas to produce

There is confusion and conflict as to the test that should apply when a subpoena is challenged and a Court is asked to rule whether documents must be produced, or rule whether access should be granted to documents that have already been produced. There is conflict as to the appropriate test for determining whether documents should be produced and access granted. Further, the predominant test for getting hold of documents employs an enigmatic metaphor ('on the cards') that is ambiguous and open to subjective interpretation. The same is true in respect of the commonly stated proposition that a subpoenaing party is not entitled to go on a 'fishing expedition'. Legislation should be enacted, clarifying the position. The same test should apply to civil and criminal proceedings, although it would be appropriate that more latitude should be given in criminal cases within the scope of that test.

These proposals derive from a paper delivered by Ian Bourke at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010.

Sentence Indication Hearings

It is proposed that, notwithstanding the decision made in 1996 not to proceed with the Sentence Indication Hearings Pilot Scheme introduced in 1993, amendments should be made to the *Criminal Procedure Act 1986* (NSW) to permit sentence indication hearings.

A system of sentence indication has obvious potential benefits:

(i) It would permit the accused to make a better informed decision whether to plead guilty, or not;

(ii) It may result in more guilty pleas, with a consequent reduction in the number of trials; and

(iii) If the sentence indication is provided well in advance of trial, it may result in more early guilty pleas.

Section 139 should be amended to permit sentence indications at a pre-trial hearing, to provide that an indication would be binding for a reasonable time and to provide that any reference to a request for a sentence indication would be inadmissible in any subsequent trial. A guideline judgment from the Court of Criminal Appeal should indicate appropriate procedure and the nature of the indication. The guideline might be based on the current English procedure established by the English Court of Appeal in *R v Goodyear* [2005] EWCA Crim 888, which may be summarised as follows:

(i) The judge should only give an indication where one has been sought by the accused (at [55]). However, the judge may remind the defence advocate that the accused is entitled to seek an indication. Guidance is given to defence lawyers regarding their ethical responsibilities (at [65]).

(ii) It would normally be sought at the plea and case management hearing (although it may be sought at a later stage) (at [73]-[74]).

(iii) The judge has an unfettered discretion to refuse to give an indication (guidance is provided

on circumstances where it would not be appropriate) or to postpone giving one (until, for example, more information is available) (at [57]-[58]).

(iv) An indication should not be sought on a basis of hypothetical facts but on agreed facts in writing (at [62]).

(v) Guidance is provided regarding the approach of the prosecution to indications (at [69]-[70]).

(vi) Any indication 'should normally be confined to the maximum sentence [that would be imposed] if a plea of guilty were tendered at the stage at which the indication is sought' (at [54]).

(vii) Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case (at [61]). However, if, after a reasonable opportunity to consider his or her position in the light of the indication, the accused does not plead guilty, the indication will cease to have effect.

(viii) Any reference to a request for an indication, or the circumstances in which it was sought, would be inadmissible in any subsequent trial (at [76]).

(ix) The procedure would not affect the right of the accused or the Crown to appeal against sentence (at [71]-[72]).

Alternatively, the current Victorian procedure (limited to an indication as to whether the sentence would be custodial or not) might be adopted. Whatever model is adopted, the system must be designed in such a way as to avoid the creation or appearance of judicial pressure on the accused to plead guilty. Further, the problems apparent with the New South Wales Pilot should be avoided. In particular, the major problem with that Pilot arose from the selection of particular judges allocated the task of sentence indication. This resulted in disproportionately low sentences compared with sentences where the plea of guilty occurred in the Local Court. A revised New South Wales scheme operating along the lines of the English model would avoid this danger by being more generally available, avoiding the need to allocate particular judges to the task of sentence indication.

These proposals derive from a paper delivered by C Loukas and S Odgers SC at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010.

Sentencing of Aboriginal Offenders

The disproportionate representation of Aboriginal people in prison is a national shame. There was a 48 per cent increase in indigenous prisoner numbers in New South Wales between 2001 and 2008, despite the fact that there has been no increase in the number of indigenous adults convicted. As at 30 June 2009 the rates of indigenous to non-indigenous rates of imprisonment on an age standardised scale varied from three 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 per cent increase on 2008. New South Wales, as at 2008, had the highest rate of age standardised imprisonment for indigenous adults in Australia (32 per cent), compared to 23 per cent for Western Australia, 22 per cent for Queensland, 12 per cent for the Northern Territory. The time has come for radical action to address this current sentencing reality. It is proposed that:

(i) Statutory provisions be introduced in respect of Aboriginal people (subject to appropriate definition of relevant persons, the character of the offending and relevant subjective matters)

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) The current legislative framework in which sentencing proceeds both at a Commonwealth and a State level should be changed. This would require, for example, amendments to s 16A *Crimes Act 1914* (Cth), 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 *Crimes (Sentencing Procedure) Act 1999* (NSW)) concepts such as 'ensuring (social) justice', 'reducing Aboriginal disadvantage', 'recognising Aboriginal social and economic disadvantage', 'healing' should be added as general matters to concepts of 'punishment', 'denunciation', 'accountability' etc.
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> (b) Other 'purposes of sentencing' should be recognized, 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'.
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> (c) There should be 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) *Crimes (Sentencing Procedure) Act 1999* (NSW)). Other, or additional, terms may be more appropriate.

(iii) In relation to provisions such as s 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (and similar provisions elsewhere in the Commonwealth), which purports to identify 'imprisonment' as an option of 'last resort', there should be express reference to the sentencing of Aboriginal people in this context and express promotion of alternatives to imprisonment which will address both restoration of the offender and restoration of the offenders community where that can be addressed in the sentencing context.

(iv) 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) 'Justice reinvestment', an American concept involving diversion of funds spent on imprisonment to local communities with high rates of offending, to develop programs and services to divert offenders and prevent offending, should be implemented in appropriate communities (See *Investing in Indigenous Youth and Communities to Prevent Crime*, Tom Calma (former Aboriginal and Torres Strait Islander Social Justice Commissioner) – Australian Institute of Criminology Conference, 31 August 2009).

(vi) Where incarceration or deprivation of liberty is the only option, for the appropriate offender (subject to security risk and the like), there should be diversion of Aboriginal people from the mainstream gaol system to programs of the type such as Balund-A or Yetta Dhinnakkal, run by New South Wales Corrections, which accommodate Aboriginal people in a culturally

appropriate or relevant setting with options available for 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.

(vii) 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.

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

(ix) There should be encouragement of the involvement of Elders in the 'traditional' sentencing exercises.

(x) Therapeutic justice models should take priority over punitive models in appropriate cases.

(xi) There should be greater legislative freedom to recognise the rights and interests of third parties dependent upon, or related to, the offender. To sentence particular individuals may have an effect upon the human rights of 'innocent third' parties, a concept recognised recently by the South African Constitutional Court in 2007 in *M v The State* [2007] SACC 18.

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

(xiii) Greater attention in legislation to the rights of children to protect them from incarceration in adult prisons and to prevent juvenile offenders finishing their sentences in adult prisons.

(xiv) Legislative recognition of wider options and greater flexibility in the execution of penalties, particular imprisonment, such as pre-release to halfway houses (or rehabilitation centres) before non parole periods expire, or short sentences expire where there is no non parole period. There are many creative models available from overseas (eg. in Canada, particularly Alberta, dealing with 'First Nation' offenders) to provide inspiration.

(xv) 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.

(xvi) Where imprisonment or detention is the last and only option, more 'special prisons', or places within them, 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.

(xvii) Judicial education bodies must provide specialist sentencing checklists and programs to alert the sentencing 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.

(xviii) There should be wider and more creative use of restorative justice models, or alternative court models for the drug and alcohol addicted in summary and indictable matters. The Drug Court in New South Wales is such a 'model'.

(xix) 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.

(xx) 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.

(xxi) 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.

(xxii) 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.

(xxiii) 'Healing' should be as much part of the process as 'punishment' and 'retribution'.

(xxiv) Mentoring by elders should be encouraged at every opportunity outside the court processes.

(xxv) Where 'incapacitation' or 'incarceration' is the only option, the programs within prisons must be revolutionised to ensure that the person incarcerated is a better person on release and better able to cope in the wider community.

It goes without saying that these proposals require government and non-government (including local community) agencies having adequate resources and services to address treatment and counselling for mental and general health issues within communities and families, drug and alcohol dependence, anger management and non punitive strategies to reduce domestic violence.

These proposals derive from a paper delivered by Judge Stephen Norrish QC, District Court of New South Wales, at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010.

December 2010

ATTACHMENTS

ANTaR
Australians for Native Title and Reconciliation
Sea of hands

JOINT NATIONAL CALL TO ACTION

To reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system

For release: Friday 15 April 2011

As community organisations and individuals committed to human rights and equal life opportunities for all Aboriginal and Torres Strait Islander peoples, we:

1. note that today marks 20 years since the Royal Commission into Aboriginal Deaths in Custody handed its final report to the Governor-General and express concern at the failure of Australian Governments to implement most of the report's recommendations;

2. recognise that genuine equality for Aboriginal and Torres Strait Islander people in Australia will not be achieved until the serious over-representation of Aboriginal and Torres Strait Islander people in our prisons, detention centres and criminal justice system is addressed;

3. commit to working together to bring about necessary changes in law, policy, funding, training and attitudes to rapidly reduce the imprisonment rates of Aboriginal and Torres Strait Islander people; and

4. call for cross-party support at federal, state and territory levels to targets, reforms, programs and funding which will reduce and subsequently eliminate the over-representation of Aboriginal and Torres Strait Islander people within the criminal justice system by:
   - agreeing to targets (including in the COAG Closing the Gap framework) to reduce and eliminate over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system;
   - committing sufficient upfront funding to evidence-based, place-based programs (including non-custodial diversionary options) in order to meet these targets, using a Justice Reinvestment framework; and
   - reforming law and policy to improve police accountability and standards in all places of detention through the introduction of independent investigations of police conduct (including deaths in custody) and independent inspections of all places of detentions, such as the model of National Preventative Mechanisms that are required to be established on ratification and implementation of the Optional Protocol to the Convention Against Torture.

BACKGROUND

The current situation

> *The Indigenous re-imprisonment rate (66 per cent within 10 years) is much higher than the retention rate for Indigenous students from year 7 to year 12 of high school (46.5 per cent) and higher than the university retention rate for Indigenous students (which is below 50 per cent). In other words, Indigenous people are returned to prison at a higher rate than they are retained in either high school or university.*[1]

The serious over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system has been widely known by governments for many years. Recent statistics indicate that the number of Indigenous people imprisoned in Australia comprises 26 per cent of the total prison population, with the Indigenous rate of imprisonment 14 times higher than the non-Indigenous rate.[2]

Statistical trends indicate that the problem has deteriorated over the last decade, with the imprisonment rate of Aboriginal and Torres Strait Islander Australians increasing by 34.5 percent between 2000 and 2008.[3]

The statistics relating to recidivism are just as concerning. For example, of the adult male Aboriginal prisoners who were released from prison between 1998 and 2008, approximately 70 per cent returned to prison.[4]

We recognise the need to implement the right of self-determination for Aboriginal peoples and communities, and the effectiveness of criminal justice programs developed and implemented by and/or in consultation with, the community.

The final report of the Royal Commission into Aboriginal Deaths in Custody 1991 stated that there are "disproportionate numbers of Aboriginal people in custody, compared with non-Aboriginal people"[5] and that "too many Aboriginal people are in custody too often."[6] Despite an entire section and many of the report's 339 recommendations being directed towards addressing this central problem, overall progress to eliminate this over-representation has been minimal.

WHAT IS NEEDED

1 Clear Targets within a National Plan to reduce imprisonment rates

Federal, state and territory governments have committed to health, education and employment targets as part of the COAG commitment to 'Closing the Gap on Indigenous Disadvantage'.[7] However, while high imprisonment rates impact directly on all of these targets, there is currently

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[1] "Fear: Crime and Punishment", Prof Chris Cunneen, *Dialogue*, Vol 29, No 2, 2010. The Academy of Social Sciences in Australia.
[2] ABS (2010a). Corrective Services, March 2010. Canberra: ABS: Catalogue No 4512.0: 23.
[3] Australian Institute of Criminology, July 2009. http://www.aic.gov.au/publications/current%20series/cfi/181-200/cfi195.aspx.
[4] P Papalia MLA, Shadow Corrective Services Minister, Justice Reinvestment: An option for Western Australia?, Brief, September 2010, p 20 .
[5] Introductory paragraph, Chapter 5 – The Disproportionate Numbers in Custody. Report of the Royal Commission into Aboriginal Deaths in Custody, http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/124.html
[6] ibid. Para 1.3.3
[7] [7] See http://www.fahcsia.gov.au/sa/indigenous/pubs/general/Documents/closing_the_gap/foreward.htm

no target or national plan to reduce imprisonment of Aboriginal and Torres Strait Islander peoples.

The National Indigenous Law and Justice Framework adopted by the Standing Committee of Attorneys General (SCAG) does contain a goal to "reduce over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system"[8]. However, whilst SCAG agreed in 2009 to "develop 'Justice *Closing the Gap* targets' with the view to including such targets in future COAG reform packages", no plan or targets have yet been developed or adopted.[9]

2 Justice Reinvestment: a new direction

Justice Reinvestment is gathering a growing and diverse range of supporters looking for a fresh approach which can break an entrenched cycle of failure. It is an evidence- and place-based, holistic approach to justice which can deliver reduced imprisonment, safer communities and reduced net public expenditure on prisons and crime related costs.

The Justice Reinvestment approach has been described as "calculating public expenditure on imprisonment in localities with a high concentration of offenders, and diverting a proportion of this expenditure back into those communities to fund initiatives that can have an impact on rates of offending."[10]

Fourteen US states are currently exploring or implementing Justice Reinvestment approaches.[11] Within its Coalition Agreement, the new Conservative/Liberal Democrat Government in the United Kingdom committed to, "introduce a 'rehabilitation revolution' that will pay independent providers to reduce re-offending, paid for by the savings this new approach will generate within the criminal justice system."[12] Its Justice Green Paper flagged the need for initial reinvestment grants, with anticipated corrections savings over time.[13] The focus on reducing the use of custody and encouraging better use of prevention activities and alternatives to custody clearly reflects aspects of a Justice Reinvestment approach.

There are also a growing number of Australian reports urging Australian governments to adopt or at least explore a Justice Reinvestment approach, drawing on positive results from overseas. For example:

a) The Australian Human Rights Commission's Social Justice Report of 2009 recommended that "the Standing Committee of Attorneys General Working Party identify justice reinvestment as a priority issue under the National Indigenous Law and Justice Framework", and "the Australian Social Inclusion Board, supported by the Social Inclusion Unit, add justice reinvestment as a key strategy in the social inclusion agenda",

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[8] National Indigenous Law and Justice Framework 2009-2015, endorsed by the Standing Committee of Attorneys General, November 2009.
[9] SCAG: Current Projects and Achievements. See http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/vwPrint1/scag_achievements#Indigenous%20Justice
[10] "Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment", Melanie Schwartz, Australian Indigenous Law Review, Vol 14 No 1, 2010.
[11] See http://justicereinvestment.org/.
[12] 'The Coalition: Our program for Government', accessed at: http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf on 1/4/2011.
[13] UK Government, 'Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders', December 2010.

and "all state and territory governments consider justice reinvestment in tandem with their plans to build new prisons".[14]

b) The Final Report of the Senate Select Committee on Regional and Remote Indigenous Communities suggested that further work be undertaken on the "potential for justice reinvestment in regional and remote Indigenous communities".[15]
c) The Senate Legal and Constitutional Affairs Reference Committee's report on their inquiry into access to justice recommended that "the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system."[16]
d) A strategic review of New South Wales' Juvenile Justice system explicitly recommended a Justice Reinvestment approach "because it provides the greatest long term return on investment through tangible benefits such as reduced crime, reduced re-offending and cost savings."[17]
e) A report by the Community Development and Justice Standing Committee of the Western Australia Legislative Assembly recommended "that the government initiates a properly funded, evidence based, collaborative Justice Reinvestment strategy in one metropolitan and one regional 'high stakes' community identified by the recommended mapping exercise, as a pilot, to be evaluated against adequate performance measures.[18]"

With this growing support for a Justice Reinvestment framework in Australia, there is a need for Australian modeling of program design and economic impacts.

We recommend that the Australian Government immediately commit to investigating stage one of the Justice Reinvestment Framework, the identification of high risk communities, in cooperation with state and territory departments responsible for prisons and detention centres. Governments should then develop Justice Reinvestment pilots in several of those communities building on existing programs and creating new ones where necessary. All steps in this process should be conducted in consultation and partnership with affected communities.

3 Potential areas for investment, action and reform

We recognise that within a national approach of agreed targets and a Justice Reinvestment framework, the different jurisdictions and widely varying community circumstances will require differing priorities for action. However, this must be implemented as a part an holistic, coordinated approach which recognises that "the greatest leverage for reducing indigenous imprisonment rates appears to lie in reducing the rate at which indigenous persons appear in court rather than in reducing the rate at which convicted offenders are sentenced to imprisonment."[19] In this vein, we recommend:

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[14] Recommendation 2.2 2.3 and 2.4 Chapter 2, Social Justice Report 2009, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission.
[15] Paragraph 2.54, Final Report of the Senate Select Committee on Regional and Remote Indigenous Communities, 24 September, 2010.
[16] Recommendation 21 (para 6.56), "Access to Justice", Senate Legal and Constitutional Affairs References Committee, 8 December 2009
[17] Noetic Solutions, A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister for Juvenile Justice, April 2010. Accessible at http://www.dij.nsw.gov.au/strategic_review.htm
[18] Recommendation 23, "Making our Prisons Work", Community Development and Justice Standing Committee, Western Australia Legislative Assembly, Report No 6 in the 38th Parliament, 25 November 2010.
[19] Joanne Baker, 'The scope for reducing Indigenous imprisonment rates', *Crime and Justice Bulletin* 55, March 2001, NSW Bureau of Crime Statistics and Research.

i. **Programs for at risk individuals, groups or communities:**
   - the development of new and expansion of existing successful diversionary and rehabilitative programs in at risk communities that address risk factors including homelessness, grief, trauma, mental health, alcohol and drug misuse, poverty and unemployment.

ii. **Improved Police training and accountability:**
   - that Police receive increased cultural competency training,
   - that procedures and laws be reformed to remove powers which are inappropriate or disproportionally impact on Indigenous people,
   - that the number of experienced officers deployed in remote communities be increased
   - that minimum targets be established for numbers Aboriginal Police Liaison Officers, with broadened roles.
   - that there is improved and independent accountability of police misconduct, and
   - that the principle of arrest and incarceration as a sanction of last resort be strongly reasserted, with adequate mechanisms to ensure it is applied, with independent oversight to hold individuals to account when it is not.

iii. **Adequate legal representation:**
   - that Aboriginal and Torres Strait Islander people, especially women and those in remote locations receive adequate legal representation through the increased resourcing of Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Centres.

iv. **Improved court processes and decisions:**
   - that courts are properly resourced with skilled staff who receive ongoing cultural competency training,
   - that there be access to translators for all Indigenous languages, and
   - that laws are reformed to enable better recognition of cultural and social factors including improved sentencing guidelines, improved bail and non-custodial remand options and extension of involvement of Aboriginal and Torres Strait Islander Elders in court processes.

v. **Improved prisons and detention centres:**
   - that Australia ratify and implement the Optional Protocol to the Convention Against Torture to establish National Preventative Mechanisms in all places of detention, and
   - that there be improved rehabilitative programs in areas including education, employment, mental health support (including overcoming grief and trauma), anger management and overcoming family and domestic violence.

vi. **Better post-release transition and (re-)integration:**
   - that there is increased support and assistance for through-care programs pre- and post-release, ensuring assistance is provided in areas including housing, education, employment, health and community re-engagement.

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This statement is endorsed by the following organisations (as at 15 April, 2011):

Aboriginal Legal Rights Movement (ALRM)
Aboriginal Legal Service (WA)
Amnesty International Australia
Australian Lawyers for Human Rights
Australians for Native Title and Reconciliation (ANTaR)
Community Legal Centres NSW
Deaths in Custody Watch Committee WA
Flemington & Kensington Community Legal Centre
Human Rights Alliance
Human Rights Law Centre
Indigenous Policy and Dialogue Research Unit
Indigenous Social Justice Association
Jumbunna Indigenous House of Learning Research Unit
National Association for Community Legal Centres (NACLC)
National Police Accountability Network of NACLC
National Welfare Rights Network
Northern Australian Aboriginal Justice Agency (NAAJA)
Public Interest Advocacy Centre (PIAC)

For more information, see the ANTaR incarceration campaign page or contact:
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