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Exchanging ideas about Aboriginal contact with the criminal justice system

Kate Lumley* and his Honour Judge Stephen Norrish QC**

Aboriginal contact with the criminal justice system continues to be an area of law which requires an urgent exchange of ideas. So the Chief Justice of NSW, the Honourable Tom Bathurst, observed as he opened the “Exchanging Ideas II” conference,[†] attended by almost 90 people over the weekend of 10–11 September 2011. Participants included judicial officers from all NSW jurisdictions, the Northern Territory, Victoria and Western Australia, Aboriginal Elders, community members and organisational leaders, as well as leading academics and professionals in the areas of legal service, justice delivery and social sciences. The Judicial Commission’s Ngara Yura Committee organised the conference with the generous support of the National Judicial College of Australia. The following article outlines the conference’s major themes.

The domestic and international context

In 1991, the *Royal Commission into Aboriginal Deaths in Custody* report (the RCIADIC) made recommendations to address, among other issues, the high incarceration rates of Aboriginal people.

Twenty years later, the rate has increased. Indigenous Australians comprise 2.3 per cent of the general population but 25 per cent of the adult prison population and 59 per cent of young people detained, rising to 80 per cent of young people in western NSW.¹ A federal Parliamentary committee has



(l-r) The Honourable Tom Bathurst, Chief Justice of NSW; Redfern Elder Uncle Max Eulo, Ms Cathy Slater, Mr Ernest Schmitt PSM, Chief Executive, Judicial Commission; his Honour Judge Stephen Norrish QC, Chair, Ngara Yura Committee.



recently described this situation as “a national disgrace”.² The causes for the gap are historic and contemporary, varied and complex, and conference presenters explored the reasons for these.

Judicial officers bear the ultimate responsibility for bail determinations and sentencing offenders, so they have a vital interest in considering the causes for the disproportionate interactions. Chief Justice Bathurst emphasised the need for judicial officers to educate themselves about the social and legal circumstances of Aboriginal people. The weekend conference provided the opportunity for judicial officers to reflect on their attitudes to and values about Aboriginal offenders and for the community to identify better strategies for dealing with offenders to prevent the cycle of offending and reoffending.



Professor Megan Davis giving the opening address to the conference.

The experience of Australian Aborigines is part of a wider narrative about the international treatment of Indigenous people. This was highlighted in the opening address by Professor Megan Davis.³ Professor Davis is Australia's first Expert Member of the United Nations Permanent Forum on Indigenous Issues. Professor Davis spoke of the common negative experiences of Aboriginal people around the world with their mainstream criminal justice systems. This is manifested in a sense of isolation, dislocation and having no clear sense of how mainstream legal systems fit within their own lives, cultures and traditional legal systems. Professor Davis highlighted Article 34 of the United Nations' *Declaration on the Rights of Indigenous Peoples*, adopted in 2007 by the United Nations General Assembly. This provides that:

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

Article 34 grew out of an awareness of the impact of the criminal justice system on Indigenous lives throughout the world. It emphasises the importance of finding alternative ways to prevent Aboriginal contact with it, minimise its impact, and where offending occurs, to divert Aboriginal offenders from custody, and foster rehabilitation and mentoring that may involve Aboriginal culture and practices.

Within Australia, there remains an unacceptable gap in understanding between Indigenous and non-Indigenous Australians and race relations are not as healthy as one would hope, post-apology. These observations arise from Professor Davis' community consultations undertaken as a member of the Expert Panel on the Recognition of Indigenous Australians in the Constitution. The consultations, with more than 200 communities throughout Australia, have revealed a depth of isolation and dislocation experienced particularly by young Indigenous Australians. A sense of belonging was engendered by the national apology made by Prime Minister Rudd in 2007, but this has not been sustained.

The conference's objectives

The conference aimed to:

- identify current issues in the criminal justice system, and in the wider social context, that impact upon Aboriginal people and contribute to offending and the penalties imposed
- understand the impact that custody has upon people who are detained and their families and communities, as well as the factors that contribute to current significant recidivism rates
- identify strategies for diverting people from custody and assisting people post-custody to better cope in the wider community and, where need be, progress rehabilitation, reform and social improvement.

Pathways to contact with the criminal justice system

The complex and interwoven causes for the overrepresentation of Aboriginal people in the criminal justice system were clearly articulated by the RCIADIC in 1991 and the plethora of inquiries, reports and research published since then. With so much information at hand, Chief Justice Bathurst observed that we still do not necessarily know how best to address the issues. Last month, the NSW Ombudsman released a major report into Aboriginal disadvantage in NSW, urging the government to work with Aboriginal leaders to adopt a “new roadmap” to tackle systemic disadvantage as Aboriginal people continue to experience poorer outcomes than non-Aboriginal people across almost every economic, health and environmental measure.⁴

One of the Commissioners to the RCIADIC, the Honourable Hal Wootten AC QC, and the then Senior Counsel assisting the National Commissioner of the RCIADIC, the Honourable Geoff Eames AM QC,⁵ examined the ongoing legacy and relevance of the RCIADIC.



(l-r) the Honourable Hal Wootten AC QC; the Honourable Geoff Eames AM QC; his Honour Judge John Nicholson SC, Ngara Yura Committee member.

They both strongly rejected recently published criticisms made of the RCIADIC, including the suggestion that the Royal Commission's analysis of the causes of Indigenous overrepresentation in the criminal justice system narrowly attributed this to "a combination of systemic bias in the operation of the criminal justice system and economic and social disadvantage".⁶ Dr Don Weatherburn⁷ has argued that the four factors identified as critical influences on offending are child neglect and abuse; drug and alcohol abuse; poor school performance and early school leaving; and unemployment.⁸ Further, the leading proximate cause of Indigenous overrepresentation in prison is Indigenous overrepresentation in serious crime, particularly intra-communal violence.⁹ Dr Weatherburn suggested that the RCIADIC did not "plausibly conjecture" that Indigenous economic and social disadvantage is the result of substance abuse, child neglect and abuse, poor school performance and unemployment.¹⁰

Geoff Eames countered that the RCIADIC had identified as a dominant issue the devastating impact of alcohol and drug abuse and its links with Indigenous domestic violence and sexual abuse.¹¹ He noted the breadth of the RCIADIC's research, with significant input from Aboriginal Issues Units directed by eminent Aboriginal academics and researchers. This dealt with a range of underlying issues and not just a narrow approach to the short term explanation for a person's presence in custody and the nature and circumstances of the death in custody, the subject of investigation. Both Hal Wootten and Geoff Eames commented that criticisms that the Royal Commission's focus was only on "symptoms", rather than "causes", was misconceived. They spoke of the continuing monumental relevance, not just of many of the Commission's recommendations, but its research. The Commission had anticipated an improvement, not the resultant deterioration, of the social circumstances of Aboriginal people, particularly in remote and regional Australia. Geoff Eames suggested that the differences between Dr Weatherburn's and the RCIADIC's analysis of the causes of Indigenous overrepresentation "are much less than they appear". There was no dissension about

the need to address substance abuse and that Aboriginal people had to take responsibility for the fact that the high rates of detention and imprisonment reflected high rates of offending within Aboriginal communities.¹²

The links between substance abuse and Indigenous violence, offending and incarceration were comprehensively explored in the *Bridges and Barriers* report of the National Indigenous Drug and Alcohol Committee. This report acknowledged the critical need for interventions to address alcohol and other drug misuse to "significantly reduce the over-representation of Indigenous Australians in our correctional system".¹³

A much overlooked and chronically underfunded problem which requires a multi-agency response is mental health within Aboriginal communities and the relationship of mental health problems with the social and economic circumstances of Aboriginal people. In particular, the continuing negative impact of unresolved and untreated trauma on Aboriginal lives and its association with substance abuse was noted by a number of presenters.¹⁴

The keynote address by Dr Leanne Craze, "Mental Health Issues in Aboriginal Communities – a crooked pathway to the prison door" examined this issue. The presentation reflected upon the disproportionate level of mental health problems and substance abuse within Aboriginal communities, alongside disproportionate rates of hospitalisation and medical treatment. These strongly correlate with the disproportionate representation of Aboriginal people in custody. Suicide and self-harm rates within Aboriginal communities are many times greater proportionally than amongst non-Aboriginal communities. Dr Craze noted the need for a holistic treatment of mental health, including proper recognition of cultural and spiritual matters, observing that a starting point for any medical treatment was social and emotional wellbeing. She argued for government funding approaches to be turned "upside down" to fund an early intervention approach to mental health with treatment a necessary component of any service delivery as well as community control of problems. Dr Craze advocated a series of strategies at the social, community, family and individual level to ensure the most effective detection and culturally appropriate treatment of Indigenous mental health matters.

Aboriginal women: particular issues

Aboriginal women are the most rapidly increasing group of the Australian prison population, comprising 30 per cent nationally and 33 per cent in NSW. This is "one of the worst statistics you could possibly have" in this State.¹⁵ Indigenous women are 16 times more likely to be imprisoned than a non-Indigenous woman.¹⁶

Rowena Lawrie¹⁷ spoke of her findings from the profile of Aboriginal women in custody reported in the *Speak Out, Speak Strong* survey and interviews which she conducted with others.¹⁸ Common features of women in custody were a lack of formal education, an absence of financial support

from third parties, sometimes no access to welfare benefits, drug and alcohol addiction, homelessness, the majority (70 per cent) had suffered physical and child sexual abuse which was untreated and unresolved, and separation from families in the context of intergenerational disadvantage. The survey revealed the urgent need to address the physical and sexual abuse suffered by the women, the symptoms of that trauma including drug and alcohol abuse, and the clear and significant link between untreated trauma and interactions with the criminal justice system. Eighty-two per cent of the women were substance abusers at the time of their offending; 98 per cent of the women who were victims of domestic violence were also sexually abused as children. The survey also drew a clear link between limited formal education and involvement in the criminal justice system and a concomitant need for educational opportunities in detention, diversion or post-release programs.

The survey also showed that when women are incarcerated, an important link within families is broken. Rowena Lawrie noted that 68 per cent of the women in custody were under 30, 86 per cent were mothers, 29 per cent had cared for children other than their own, another 29 per cent had care of other people and 54 per cent at the time of incarceration were single, many providing family support for others without their partner's assistance. Families are left to pick up the pieces when a mother/primary carer is detained; children "are the indirect recipients of adult justice".¹⁹ All efforts to divert women offenders should therefore be exhausted before a custodial sentence is imposed.²⁰ A major concern for women is the post-release period when reunions with family occur and suitable accommodation and support services are crucial.

The *Speak Out, Speak Strong* survey established a "road map" for change to address these and other issues that contribute to female offending. In response, the NSW government established the Aboriginal Child Sexual Assault Taskforce which led to the 2006 *Breaking the Silence* report and a number of its recommendations have been implemented.²¹ Rowena Lawrie noted that any workable solutions have to be within an Aboriginal framework with Aboriginal ownership of solutions. This theme strongly emerged from the "Exchanging Ideas I" conference held in May 2009²² and is echoed in the NSW Ombudsman's October 2011 report to Parliament which cogently argues for Aboriginal communities to have genuine involvement in decision-making about the solutions to their problems.²³ Rowena Lawrie concluded that the flipside of Aboriginal disadvantage is non-Aboriginal privilege. She illustrated from her own experience that systemic bias and discrimination remained a problem.

Circle Sentencing

Aboriginal women are also overrepresented as victims of violent crime. Professor Elena Marchetti²⁴ explored whether Circle Sentencing proceedings have had more positive outcomes for victims and offenders than specialist family

violence courts based on her findings from interviews of victims and offenders of intimate partner violence who have appeared before Circle Sentencing Courts in Nowra and Kempsey. She noted that there are now over 50 adult and children's Indigenous sentencing courts operating in all States except for Tasmania. A significant purpose of these courts is to involve Elders and community representatives to assist judicial officers in sentencing. There are different practices between the circle sentencing model in NSW, the South Australian Nunga Court model, the Koori Courts in Victoria, and the Murri Courts in Western Australia. Allowing for the different practices across the States, such as, for example the less influential role of Elders in the Nunga Court system, she concluded that Indigenous courts were in a category of their own compared to therapeutic courts, designed with a rehabilitation aim, and restorative courts, designed to be victim-centred. Indigenous courts were "transformative and participatory", being offender-centred, but increasingly involving the victim, Elders, community representatives and Indigenous project officers.

Of particular importance in her research was the role of power imbalances in domestic violence matters. In circle sentencing, the role of Elders in being familiar with the offender and being able to candidly "shame" the offender for their offending behaviour, and the opportunity for the victim to be able to tell their story, generally permitted potential power imbalances to be avoided. The overwhelming majority of victims participating in the circle sentencing program surveyed by Dr Marchetti expressed the view that circle sentencing provided a better experience than mainstream courts as they felt recognised and supported in the process. The vast majority felt "safe", were pleased to have had an opportunity to tell their story, appreciated the role of Elders and were more satisfied with the way that relationship problems were resolved. They felt that they had "power" in the proceedings and appropriate "backup".

The majority of people surveyed also felt that the circle sentencing process had a positive effect upon relationships, with eight out of 10 persons surveyed reflecting upon a positive effect upon the offenders, many changing their habits. The selection of Elders in the process was a problematic issue, with potential for bias. However, generally, the respect for Elders outweighed these concerns.

Juveniles: particular issues

"The true measure of a nation's standing is how well it attends to its children".²⁵ Children and young people are the leaders, Elders and custodians of the future.²⁶ Like adults, Aboriginal young people are overrepresented in the juvenile justice system. One reason for this, explored by Anthony McGuiness,²⁷ is due to a lack of differentiation between adults and children particularly in relation to the impact of the *Bail Act* 1978.²⁸ While the primary purposes of bail are to ensure an offender appears in court and to prevent reoffending, the recent *Bail me out* report found that bail conditions imposed on juveniles were focussed on addressing behaviour (eg curfew, obeying reasonable directions, non-associations,

report to police) and welfare (eg reside as directed, attend school).²⁹ Principally, homelessness of young people and an over rigorous enforcement of bail by police makes it extremely difficult for juveniles to meet enhanced and more stringent criteria for grants of bail and/or bail conditions, leading to breaches of bail conditions and a significant number of Aboriginal children and young people being held on remand.³⁰ The NSW Law Reform Commission currently has a reference to examine the *Bail Act* including whether the Act should make a distinction between young offenders and adults and also whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness.³¹

Laurel Russ and Jane Madden, from the Aboriginal Unit of the NSW Ombudsman, agreed that the lack of safe or adequate accommodation was the greatest contributor to the breakdown of bail conditions and the circumstances of re-offending. The NSW Ombudsman is seeking to improve the operation of the *Young Offenders Act* 1997 and the relationship of police with Aboriginal juveniles. As noted above, the NSW Ombudsman's office has recently published a major report into Aboriginal disadvantage in NSW and has particularly emphasised the need for government to take action in relation to children and young people "in the priority areas of education, building economic capacity and protecting vulnerable children in Aboriginal communities".³²



Professor Dianna Kenny, Professor of Psychology, Sydney University, with Mr Terry Chenery, Ngara Yura Committee member.

An underrepresented factor in the debate about young offenders is their "extremely challenged" cognitive ability. Professor Dianna Kenny³³ has conducted a comprehensive study of 242 young people in custody and 800 young offenders serving community orders with the NSW Department of Juvenile Justice, 20 per cent of whom were Aboriginal.³⁴ On her empirical psychological testing using the "risks, needs, responsivity" principles, intellectual disability, regardless of Indigenous status, indicates a larger number of court appearances, more recorded offences, a

younger age for offending, and is a higher risk factor for reoffending. There is therefore a clear need to screen for intellectual disability when young people enter the criminal justice system. Indigenous status, regardless of intellectual disability, indicates a younger age for offending compared to non-Indigenous offenders. Aboriginal young people with an intellectual disability enter the criminal justice system younger than other offenders and have a greater risk of re-offending. Therefore, an offender who is both Aboriginal and intellectually disabled, is in an extremely high risk, high needs group and, based on Professor Kenny's findings, will probably remain in contact with the criminal justice system for a very long time, if not lifelong.

Aboriginal young offenders are more likely to have an intellectual disability than non-Aboriginal young offenders (27 per cent and 11 per cent respectively).³⁵ Correlating strongly with cognitive disability amongst Aboriginal young offenders is the disadvantaged background of poor socio-economic status, trauma and substance abuse particularly amongst the rural and remote population. Trauma and substance abuse have a significant impact upon brain development in early life and cognitive performance in psychometric testing. Persons with intellectual disabilities are at enhanced risk of offending, and these intellectual disabilities are often not identified by courts, or other agencies servicing the justice system. Professor Kenny stressed that, based on her findings, priority needs to be given to early intervention and prevention programs that address the learning needs and motivation of Aboriginal and intellectually disabled young offenders and Aboriginal offenders with an intellectual disability.³⁶

Several presenters agreed that there is an urgent need for targeted early intervention programs as a more effective way to deal with, if not prevent, juvenile offending rather than imposing onerous bail conditions and detention.

Strategies to minimise incarceration

The "Exchanging Ideas I" conference in May 2009 presented findings from a study conducted by the Jumbunna Indigenous House of Learning³⁷ that compared the two remote communities of Wilcannia and Menindee, each with significant Aboriginal populations. The study aimed to identify why Menindee had a far lower crime rate and lower policing than Wilcannia, notwithstanding the two communities are similar demographically and geographically. In part, this was due to the role of community policing and the presence of a very strong group of women providing leadership and a form of social control. A key theme of the first "Exchanging Ideas" conference was "local solutions for local problems", with the solutions needing to engage the Aboriginal community and provide some social control.

"Exchanging Ideas II" heard from Alison Vivian about the continuation of this study expanded to examine the other comparable localities of Brewarrina and Lightning Ridge, Kempsey and Gunnedah. The study found that in some towns the concept of a separate Aboriginal

community barely existed. In Lightning Ridge, with an Aboriginal population of about 21 per cent of the local area's population, the "multiculturalism" of the township appeared to have absorbed the Aboriginal community. This was in contrast to Kempsey, where the Aboriginal community live a very distinct existence. The study found that Kempsey had ingrained racism and discrimination and far less integration than in other townships. Alison Vivian echoed the theme from the earlier conference that the key to improved outcomes for Aboriginal people was "local solutions for local problems" such as night patrols, safe housing, juvenile diversions, community justice groups and Aboriginal courts.³⁸

Reducing Indigenous drug and alcohol abuse is a key priority to minimising incarceration, given that substance abuse is "by far, the strongest correlate of Indigenous contact with the criminal justice system".³⁹ Tackling substance abuse can be done at the community level through measures that strengthen the capacity of Aboriginal people to restrict the sale of alcohol in their communities and also needs to be a whole-of-government response to Indigenous crime and justice, as discussed by Dr Don Weatherburn and other presenters.⁴⁰

Alternatives to custody

Several presenters noted international and national research that demonstrated the counter-effectiveness of custody as a deterrent, as a rehabilitation tool, or even as an instrument of retribution, despite the massive growth in the prison population in NSW since the 1989 truth in sentencing legislation.⁴¹ Assistant Commissioner Luke Grant⁴² referred to the research of Professor James McGuire⁴³ who has examined 25,000 criminological references which show that punishment is an ineffective way to change behaviour. The most effective purpose of imprisonment is "incapacitation". Luke Grant noted that there is no empirical evidence to show that deterrence has an effect, that it rehabilitates offenders, and some evidence to show that imprisonment is itself criminogenic, in the absence of effective treatment programs. For example, research conducted by Dr Don Weatherburn in 2010 showed that there is some evidence that prison increases the risk of offending among offenders convicted of non-aggravated assault.⁴⁴ Luke Grant noted that there is evidence that correctional treatment programs have greater efficacy when offered in community-based programs rather than the artificial confines of custody.

Custody is also inefficient purely in economic terms. Luke Grant noted the enormous capital cost of incarceration was \$197 a day per person compared to \$21 per day spent on offenders serving community orders. NSW Corrective Services spends about \$70 million on treatment programs for 10,000 offenders compared to \$5 million on the 18,000 offenders serving community-based orders. Further, corrections psychologists/therapists spend about 80 per cent of their time working with offenders to deal with the consequences of incarceration rather than being able to address their offending behaviour and effect change.

Luke Grant also noted that the reoffending rate for people in NSW who completed a community program is far less than in other States. Community based programs such as the sober driver's program (leading to a 50 per cent reduction in reoffending) and domestic abuse perpetrator's programs have yielded excellent results in NSW. Many treatment programs offered in custody are also successful. For example completion of the intensive CUBIT program for high risk sex offenders equates to only an eight per cent chance of reconviction. Luke Grant urged for incarceration to be used as a punishment/deterrent only for those offenders who need to be in custody for example, high risk sex offenders and high risk violence offenders. Money which would otherwise be spent on custody for offences such as licence disqualifications can be reinvested into community programs which have far more successful outcomes in terms of addressing offending behaviour.



Dr Tom Calma, National Coordinator for Tackling Indigenous Smoking (l), with Mr Sean Choolburra.

Diverting money from corrections to community programs is the goal of "justice reinvestment", a policy developed in the United States and referred to by a number of presenters. Dr Tom Calma⁴⁵ outlined to the conference this policy that targets high risk communities and invests money that would have otherwise been spent on custody to deliver a multidimensional range of services to address the underlying causes of offending to prevent people, particularly young people, from offending.⁴⁶ Justice reinvestment programs that target whole communities are working successfully in 16 States of the United States. Community capacity development is the key to transforming behaviour through justice reinvestment. Dr Calma observed that if offenders return to disadvantaged communities there is little hope for individual change. The House of Representatives Standing Committee on Aboriginal Affairs' recent report: *Doing time – time for doing* has recommended that governments focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate justice reinvestment.⁴⁷

Peter Townsend, the Manager of Indigenous Classifications for NSW Corrective Services, discussed the classification system and the issues that particularly faced Aboriginal inmates in obtaining classification and ultimately release under parole.

Personal stories about contact with the criminal justice system

For all the policies, programs and statistics outlined at the conference, there is an underlying human story. The conference's final session heard from Aboriginal people about their experiences in custody and post-release, and about strategies available to divert people from custody, or provide pathways from offending. Albert Ryan, a Wiradjuri man imprisoned for 20 years for homicide, spoke of his journey, re-emerging from prison as a community leader. While in custody, Albert educated himself, acted as a spokesperson for Aboriginal prisoners, and pursued observance of the RCIADIC recommendations. When released, he took his place within his community as a mentor for others and instrument for change. Gary Taylor, a graduate of the Drug Court and a developing artist, was interviewed by Sue Jeffries, a Drug Court nursing sister. They discussed his journey through custody to the Drug Court and to the position he now finds himself, drug free, a husband and father of four, and attempting to establish his career as an artist.

Shaun Grace, Manager of the Balund-a Residential Program run by the Department of Corrective Services at Tabulum (west of Lismore) explained how Balund-a offers cognitive skills programs to specifically target a resident's offending behaviour as well as educational, vocational and cultural training. The Ngara Yura Committee and other judicial officers visited Balund-a in February 2011.⁴⁸ Shaun brought with him a graduate of the program, Melanie Williams, who bravely spoke of her experiences before, during and after the six months she served at Balund-a and how this experience has given her the capacity to turn her young life around from the cycle of substance abuse and offending she had been on.

Shane Phillips, Chief Executive of the Tribal Warrior Association and Superintendent Luke Freudenstein, Acting Commander of Metropolitan Local Area Commands, spoke of their partnership in establishing a creative and positive relationship between the local Aboriginal community and the Redfern Local Area Command. Principally their work has centred on the mentoring program developed through the Tribal Warrior Association⁴⁹ and the steps taken to establish a dialogue between the community and the police, leading to a dramatic reduction in serious crime in Redfern since 2009. The enthusiasm of young people to become involved has had a significant positive effect upon the community. Shane spoke passionately of the need ultimately for mentors to fade away, enabling young people to take control of their own lives. Importantly, he stressed that community control of the program and a "local solutions for local problems" approach is essential for any real reform to occur.

Conclusion

As with the "Exchanging Ideas I" conference, a key theme to emerge from "Exchanging Ideas II" was the need for Aboriginal communities to have genuine involvement in decision-making about economic and social issues contributing to offending. Reform must involve a true partnership between government, Aboriginal leaders and communities.⁵⁰

As noted by Dr Tom Calma, courts and judicial officers are part of the solution to Aboriginal overrepresentation in the criminal justice system. The Ngara Yura committee hopes that judicial officers can individually and collectively work towards reducing the numbers of Aboriginal people in custody and reduce their risks of reoffending by developing a better understanding of Aboriginal communities, the issues that contribute to offending and an appreciation of appropriate alternatives to imprisonment. Many of the papers presented at the conference will be available on the Conference Paper database accessible through the Judicial Information Research System (JIRS) in due course.



Mr Shane Phillips, Chief Executive, Tribal Warrior Association (l); Superintendent Luke Freudenstein, Acting Commander, Metropolitan Local Area Commands (r) and Mrs Tammy Wright, Aboriginal Project Officer, Judicial Commission.

Endnotes

- * Publishing Manager, Judicial Commission of NSW.
- ** District Court Judge, Chair, Ngara Yura Committee, Judicial Commission of NSW.
- † For their magnificent efforts in organising the conference, the Chair wishes to acknowledge the Ngara Yura Committee members for their vision and the dedication and industry of Commission staff, particularly Tammy Wright, Ruth Sheard, Tanya Su, Virginia Henson and Lorraine Beal.
- 1 House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing*, Report into Indigenous youth in the criminal justice system, June 2011, at <www.aph.gov.au/house/committee/atsia/sentencing/report.htm>, accessed 27/10/11, [2.5], [2.6]; NSW Ombudsman, *Addressing Aboriginal disadvantage: the need to do things differently*, A special report to Parliament, October 2011, at p 3.
- 2 *ibid* at [1.5].
- 3 Dr Davis is a member of the Ngara Yura Committee and Director of the Indigenous Law Centre of the Faculty of Law at the University of New South Wales.
- 4 Above n 1, at 3.
- 5 Recently retired from the Victorian Court of Appeal.
- 6 D Weatherburn and J Holmes, “Re-thinking Indigenous over-representation in prison” (2010) 45 *Australian Journal of Social Issues* 559 at 569.
- 7 Director, NSW Bureau of Crime Statistics and Research.
- 8 Above n 6, at 564.
- 9 *ibid* at 569.
- 10 *ibid* at 570.
- 11 Final Report, Vol 2, Chapter 15 at [15.2.37].
- 12 G Eames, “The Royal Commission into Aboriginal Deaths in Custody: 20 Years After”, paper delivered to the Judicial Commission’s Ngara Yura *Exchanging Ideas II conference*, 10 September 2011, p 13.
- 13 NIDAC, *Bridges and Barriers: Addressing Indigenous incarceration and health*, 2009, at <indigenousjustice.gov.au/db/publications/282316.html>, accessed 27/10/11, at 1.
- 14 Notably Rowena Lawrie, Professor Dianna Kenny and Dr Tom Calma.
- 15 Assistant Commissioner Luke Grant, Department of Corrective Services, *Presentation to the Exchanging Ideas II conference*, 11 September 2011.
- 16 Australian Bureau of Statistics (ABS) 2010. *Corrective services Australia*. cat. no. 4512.0. Canberra: ABS, cited by R Lawrie at the “Exchanging Ideas II” conference.
- 17 Formerly of the Aboriginal Justice Advisory Council, now Therapist Consultant and Educator, Aboriginal Family Violence.
- 18 Aboriginal Justice Advisory Council, *Speak Out, Speak Strong, Inquiry into the needs of Aboriginal women in custody*, 2003, at <http://ebookbrowse.com/speak-out-speak-strong-rowena-lawrie-ajac-2003-pdf-d138341733>, accessed 27/10/11.
- 19 C Flynn, “Responding to the children of women in prison: Making the invisible visible”, 19 *Family Relationships Quarterly*, Australian Institute of Family Studies, at <www.aifs.gov.au/afrc/pubs/newsletter/frq019/frq019-3.html>, accessed 27/10/11.
- 20 For a list of diversionary programs for women available throughout Australia see L Bartels, “Diversion programs for Indigenous women”, Australian Institute of Criminology, Research in Practice 13, at <www.aic.gov.au/publications/currentpercent20series/rip/1-10/13.aspx>, accessed 27/10/11.
- 21 NSW Attorney General’s Department, Sydney, 2006, at <www.lawlink.nsw.gov.au/acsat>, accessed 27/10/11.
- 22 See K Lumley and S Norrish, “Lighting the way forward: respect, responsibility, engagement, diversity, local solutions” (2009) 21 *Judicial Officers’ Bulletin* 37.
- 23 Above n 1 at [2.2].
- 24 University of Wollongong, Faculty of Law.
- 25 UNICEF, Child poverty in perspective: An overview of child well-being in rich countries, 2007 UNICEF Innocenti Research Centre, Florence, cited in D Kenny and P Nelson, *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs*, Sydney University Press, 2008.
- 26 Dr Tom Calma, *Presentation to the Exchanging Ideas II conference*, 11 September 2011.
- 27 Senior Consultant, Noetic Solutions.
- 28 Amendments to the *Bail Act*, specifically s 22A, inserted by the *Bail Amendment Act 2007* make it difficult for a young person to make subsequent applications for bail.
- 29 Youth Justice Coalition, *Bail Me Out, NSW Young People and Bail*, 2010, p 16 at <www.ncoss.org.au/content/view/2723/100/>, accessed 27/10/11.
- 30 Breach of bail conditions was found to be the most common reason for a juvenile’s appearance in court: J Bargen, “Juvenile justice: Responding to Australia’s Children and Young People in Trouble with the Law” (2008) 92 *Reform* 28, cited in *Bail Me Out*, *ibid*, at 2.
- 31 The terms of reference for the inquiry are on the NSWLRC’s website at <www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref129>, accessed 27/10/11.
- 32 Above n 4, at p 3.
- 33 Professor of Psychology, the University of Sydney.
- 34 See D Kenny and P Nelson, *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs*, above n 23; D Kenny and M Frize “Intellectual disability, Aboriginal status and risk of re-offending in young offenders on community orders” (2010) 7(18) *Indigenous Law Bulletin* 14.
- 35 Kenny and Frize, *ibid*, at 15.
- 36 Kenny and Frize, above n 33, at 17.
- 37 Based at the University of Technology, Sydney.
- 38 These were all suggested by Dr Tom Calma in his presentation.
- 39 D Weatherburn and J Holmes, above n 6, at 571; Dr Tom Calma, *Presentation to the Exchanging Ideas II conference*, 11 September 2011. See also NIDAC, *Bridges and Barriers*, above n 12.
- 40 Weatherburn and Holmes, *ibid*, at 572; *Bridges and Barriers* report, above n 12.
- 41 Although Luke Grant noted that the prisoner population has reduced since May 2009 (from 10,200 to 9,867 as at 9 September 2011) leading to the State Government announcing the closure of three prisons in the NSW Budget in 2011. While the sentenced population has reduced, the remand population has not.
- 42 Assistant Commissioner, Offender Services and Programs, Corrective Services NSW.
- 43 Professor of Forensic Clinical Psychology, University of Liverpool.
- 44 See for example, D Weatherburn, “The effect of prison on adult re-offending”, (2010) 143 *Crime and Justice Bulletin*, Bureau of Crime Statistics and Research at 10 and references cited therein at 10–11.
- 45 National Coordinator for Tackling Indigenous Smoking, former Aboriginal and Torres Strait Islander Social Justice Commissioner.
- 46 See *Doing Time – Time for Doing*, above n 1, Ch 8.
- 47 Above n 1, at [8.228].
- 48 See “The Balund-a Diversionary Program: A Second Chance by the River” (2010) 22 *Judicial Officers’ Bulletin* 56 and “Training, rehabilitation and diversionary programs for offenders” (2011) 23 *Judicial Officers’ Bulletin* 21.
- 49 See “Mentoring Indigenous young people: the Tribal Warrior program” 23 (2011) *Judicial Officers’ Bulletin* 5.
- 50 NSW Ombudsman, above n 1, at [2.2].