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Lecture

Our first nations people in custody: a national disgrace
The Paul Byrne Memorial Lecture
24 October 2018

Phillip Boulten SC

Forbes Chambers, Sydney

Tonight's topic leads immediately to an acknowledgement to the traditional owners of what we now call Sydney: the Gadigal; the Eora. You are from here and have always been the first people. This is your nation. I pay my respects to you; and particularly to your leaders and elders.

Whilst those of us from other places or other cultures have been developing our own sense of identity and our own cultural practices and philosophies, you have been living here according to your own laws and lore for many millennia.

I acknowledge I speak as an outsider; I am walking on your territory. I find myself here through an accident of birth and a process of colonisation that brought my forebears here as criminals 228 years ago.

I have not seen the world through the eyes of First Nations people. My analysis of the problems of Aboriginal and Torres Strait Islanders people's over-representation in the criminal justice system is necessarily from the point of the view of a senior, white, male, legal professional. I understand that this area of discourse is not about me. I will be speaking of things that I know little about in reality. For many insights, I thank my colleagues at NAAJA (North Australian Aboriginal Justice Agency) in Darwin for generously sharing their caseload with me this year.

But I acknowledge that the disgraceful state of affairs whereby a massive proportion of First Nations people are oppressed by a pointless incarceration regime is my responsibility as a criminal lawyer. As is the unacceptable pattern of detention of Aboriginal teenagers. As is the growing number of Aboriginal girls and women and custody. So too is the continuing removal of Aboriginal and Torres Strait Islander kids from their families and communities. We are all complicit in this through the criminal justice system and legal education.

Part of our wider collective responsibility is the regional and remote community housing crisis and the level of chronic childhood diseases and widespread health issues. These key issues are intertwined with the legal system.

As a nation, we have become adept at recognising these problems. But we are yet to achieve significant action. The responses have been tentative, inadequate and fitful. There has been little sustainable movement except in the wrong direction. Symbolically we continue to turn our backs or avert our eyes.

Tonight, I will examine the parameters of the criminal justice system dysfunction and discuss some potential ways ahead. The problems are endemic, systemic and chronic.

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I wish to make further acknowledgements. Thank you to the Institute of Criminology for your invitation to deliver this important lecture. The annual Paul Byrne Memorial Lecture is an important opportunity for people with an interest in criminal law to consider significant issues. It provides a rare meeting point for practising criminal lawyers and academics and students.

I am profoundly grateful to the Byrne family for inviting me to speak tonight. Thank you for thinking of me as worthy for the role. When Jack Byrne first presented me with the idea of giving this year's lecture, I was honoured and nervous to be considered amongst the previous eminent presenters of his father's memorial oration. After all, despite my seniority now, I am essentially a rank and file criminal lawyer, seen at the Downing Centre as much as in Queen's Square.

But, principally, I am honoured because tonight is a memorial to Paul.

Paul was my friend and my floor colleague. He was the very model of a modern criminal defence barrister; a compelling jury advocate with the insight of a master, able to challenge people's initial perceptions and to persuade them with logic and, when necessary, with acerbic rhetoric.

He was a law reformer who contributed much to the construction of fairness in criminal law during his lifetime.

He was an amazing legal strategist who could identify the winning point and then have the forensic capacity to exploit it to his client's advantage. I love the way he regarded all of his clients' cases as important, and indeed they were, not the least reason being that he was representing them. Paul appeared everywhere for everyone. As a young public defender, he was continually on circuit. His blue bag carried the signs of constant travel with dozens of old baggage bag stubs gathered around the courts – evidence of his extensive bush perambulations.

In his younger years he was the junior criminal lawyer of choice. Chester Porter and he worked on numerous cases, and they both absorbed much of each other's essence. As Silk, Paul was the pre-eminent criminal advocate of his time. He was as often to be seen in the Magistrate's Court as in the High Court appearing before a Bench of five or seven and was as comfortable and successful in one as he was in the other. He was versatile and gifted – driven by a sense of justice and fairness. He was always mindful of the imbalance between the state and the individual accused. He had no inclination to prosecute and as far as I know he never did.

Paul Byrne's cases were often monumental. The forces arrayed against him were seemingly unassailable. His clients were usually unpopular – priests and others charged with paedophilia; armed robbers and dysfunctional drug addicts, especially early in his career; drug lords and industrialists later in his career. It didn't matter to Paul. He cast no personal judgements.

He viewed their cases from the vantage point of a technician, identifying the issues, formulating the arguments, researching the law and executing his court room performance with authority and mastery – all underpinned by an inherent drive to even up the playing field.

In one of his last cases, Paul identified the weakness in the prosecution charges against his client, JS. JS was a prominent businessman who ran a well-known pharmaceutical company and was charged with Commonwealth offences related to the alleged intentional

destruction of computer data that may have been required in evidence in a judicial proceeding.

Paul argued successfully that the prosecution was required to prove that the accused knew that the computers may be required to be used in Commonwealth proceedings – not state proceedings.

This argument involved statutory interpretation. The trial judge agreed and directed an acquittal. The Commonwealth DPP were unimpressed. They appealed against the acquittal which, in turn, spurred Paul on. The sanctity and finality of an acquittal is a fundamental tenet of criminal justice. Paul abhorred the prosecution's attempts to overturn his client's acquittal and redoubled his efforts on appeal.

Eventually, Paul won that appeal for JS – certainly a very satisfactory outcome for JS. But it was of immense satisfaction to Paul, who saw the battle as a clash involving the skewed strength of the state in its fight against an individual and as a battle over a fundamental plank of criminal procedure – the finality of a jury verdict of acquittal.

After Paul passed away, the decision in JS lived on and in circumstances that were far removed from the facts of that case and in ways that nobody forecast at the time of the judgement. Between 2010 and 2013 dozens of very impoverished Indonesian seafarers were prosecuted in Sydney on people smuggling charges. All faced mandatory minimum sentences if convicted. Unsurprisingly, none of them were interested in pleading guilty. Many gave evidence that they had been manipulated by organised criminals in Java who told them that they were to take a boatload of passengers to Christmas Island but were not told that Christmas Island was, in fact, part of Australia.

The fault element for people smuggling was interpreted by the courts in the light of the Court of Criminal Appeal decision in JS. The prosecution had to prove beyond reasonable doubt that the accused knew that the destination was Australia and that they intended to bring their passengers to what they knew was Australia rather than, as the Crown had argued, merely that they had intended to bring the passengers to an island which just happened to be part of Australia.

Many were acquitted on the back of Paul's argument in JS – something that would have given Paul significant professional satisfaction.

Paul Byrne was a true friend to his floor colleagues – always available for advice and counsel; never haughty or proud. Equally at home in the auditorium of the Revesby Workers Club Gene Pitney concert as he was at an art auction chasing an early twentieth-century Australian landscape, Paul was a lover of fine living and outfitting – he always looked immaculate both in and out of court. He had a passion for fast cars and Formula 1 racing. He had the most expensive fountain pens, the best stationery and the world's largest collection of highlighters and multi-coloured post-it notes.

We all benefited from Paul's preparedness to share his knowledge and experience. He was never proprietorial or territorial, always encouraging and supportive of younger practitioners. His solicitors could always count on him – some were devoted to him almost to the point of obsession. His written work (more often than not late arriving) was consummate and compelling.

I still miss him.

I have his photo on the wall in my chambers. He is smiling broadly – dressed in a white suit and matching white, broad-brimmed hat – standing beside a racing car.

My concerns about the over-representation of Indigenous people in the criminal justice system would be Paul's concerns now too. He was often in court appearing for Aboriginal clients – especially as a public defender in country circuits. As a law reformer who contributed much to the construction of fairness in criminal law during his lifetime, he walks beside us.

The statistics

In 2016, Aboriginal and Torres Strait Islander people constituted just 2% of the Australian adult population but comprised more than one-quarter (27%) of the national adult prison population. The national imprisonment rate for Aboriginal and Torres Strait Islander peoples was 2039 per 100,000 persons whilst the non-Indigenous rate was 163 per 100,000. They are about 13 times more likely to be imprisoned than non-Indigenous Australians. Aboriginal and Torres Strait Islander children are 24 times more likely to be detained in a juvenile detention centre than non-Indigenous children.

In WA and the NT, the situation is especially dire, where the rates were 3383 per 100,000 and 2504 per 100,000 respectively.

For these figures I point to the important ALRC Report, 'Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait People' (2017).

This means the imprisonment rate for Aboriginal and Torres Strait Islander people has increased 41% over 10 years, whilst for non-Indigenous people the imprisonment rate has increased by 24% over the same period. The over-representation of Aboriginal and Torres Strait Islander people in prison has increased from a factor of 11 to 12.5.

The gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over the decade has widened. The trend is continuing. According to the Australian Bureau of Statistics, as at 30 June 2017 there were 11,307 prisoners who identified as Aboriginal and Torres Strait Islander, a 7% increase (711 prisoners) from 30 June 2016. The number of non-Indigenous prisoners increased by 6% (1654 prisoners). These figures are also representative of a broader trend in sentencing, that is, the over-use of imprisonment as a sentencing option.

Just over three out of four Aboriginal and Torres Strait Islander prisoners (76% or 8622 prisoners) had been imprisoned previously, compared to nearly one in two non-Indigenous prisoners (49% or 14,638 prisoners).

The statistics concerning women are worse still. Indigenous women are 21.2 times more likely to be imprisoned than non-Indigenous women. The rate of imprisonment of Indigenous women (464.8 per 100,000) is not only higher than that of non-Indigenous women (a mere 21.9 per 100,000) but is also higher than the rate of imprisonment of non-Indigenous men (291.1 per 100,000).

However, the statistics concerning young people are the most alarming. According to the Australian Institute of Health and Welfare Report on Youth Detention (2017), 53% of all young people in detention on an average night in the June quarter 2017 were Aboriginal or Torres Strait Islanders. Indigenous young people aged 10–17 were 24 times as likely as non-Indigenous young people to be in detention on an average night, and this fluctuated between 23 and 27 times the non-Indigenous rate over the 4-year period. Indeed, these figures have been virtually unchanged since 2004.

It is not uncommon in the Northern Territory for every single kid in detention to be Aboriginal.

The problem is evident and obvious. It is a disgrace.

The legal profession and the judiciary are centrally placed to understand how this state of affairs has come about and why it is continuing. We are present every time someone appears in court, is refused bail, is sent to prison and when their release from gaol is blocked. We are participants in this process. In that sense we must take responsibility for the system which causes such oppressive outcomes. If judges and lawyers do nothing about this, we are in no position to criticise inaction by others.

Having said that, the legal profession has usually been at the forefront of policy formulation and advocacy on issues affecting Aboriginal people in the criminal justice system. We are strategically placed. We are central role players.

So it continues. The Law Council of Australia has recently completed its comprehensive review of access to justice in this country: The Justice Project (2018). Under the leadership of the then Law Council of Australia President, Fiona McLeod, and the working group leader, former Chief Justice French, the Law Council has identified problems and has made many recommendations for reform.

The NSW Bar Association has a Working Group on the over-representation of Indigenous people in incarceration. I chair the Working Group with my colleague Sarah Pritchard. Our Working Group is composed of practising barristers with expertise in criminal law and human rights law. We also have the assistance of judges with specialised knowledge of the field and academic lawyers who are well equipped to guide us. The Law Council and the Australian Bar Association both have Indigenous Affairs Committees contributing to the work in this policy space.

Then, of course, lawyers have been central players in the numerous Royal Commissions, Commissions of Inquiry, studies, analyses and reports that have all dealt with key aspects of the impact of the criminal justice system in one way or another on Aboriginal and Torres Islander people. Indeed, the super-abundance of lawyers' reports, recommendations and policy statements points towards the chronic nature of the problems that beset Aboriginal people in the criminal justice system.

In his opening speech to the Royal Commission into the Protection and Detention of Children in the NT (the Don Dale Royal Commission), Counsel Assisting, Peter Callaghan SC, pointed out that there had been more than 50 reports touching on matters covered by that Commission's terms of reference, with most produced in the previous 10 years. In fact, on the night of the *Four Corners* piece disclosing the abuse in Don Dale, the Australian Bar Association executive spoke in a telephone hook-up after the show. Everyone was shocked. We thought about calling for an inquiry but concluded that there had been far too many already. Action was required. The next morning, the Prime Minister called a Royal Commission.

The plethora of inquiries has itself become a hallmark of the crisis. Governments routinely fail to respond – or at least fail to adequately respond – to the demonstrable problems. Even this year, the ALRC Report (2017) tabled in Parliament in March 2018 has left no impression on the government. There has been no response from Canberra. It seems entirely likely that the current government intends not to respond, let alone to implement any of its recommendations.

In the NT, the response to the Don Dale Royal Commission has yet to result in substantial legislative reform. The mechanism for the government's response is still working its way through the minefield of NT politics with legislation expected soon. But the shape of that legislation and the breadth of the reforms are difficult to discern.

Meanwhile, the Commonwealth Government, who called the Don Dale Royal Commission jointly with the NT, has washed its hands of any financial responsibility for any changes to the system. The Commonwealth won't even commit to a contribution to the costs of a new Youth Detention Centre even though the current Don Dale is totally unfit for purpose. It was abandoned as unfit to be the adult prison, only to be taken up as the Youth Detention Centre when the original Don Dale was found to be even worse.

How did we arrive at this point?

It is unrealistic to view our modern criminal justice system and our First Nations peoples' involvement in it in any way other than through the prism of the impacts of colonisation – a word and concept which is central to academic consideration of this topic, but which rarely sees the light of day in court rooms in this country.

The Australian criminal justice system is, of course, a construct of British colonial policies that arrived with the first settlers on the first few fleets. The very nature of Australian colonisation was punitive. We transformed Gadigal country into another, quite different, place marked by two words: 'penal' and 'colony'. The colony's *raison d'etre* was penal. Soon the colony developed the trappings of British justice – police constables, magistrates, courts, gaols, tickets of leave and gallows. But Gadigal country was not *terra nullius*.

Twenty-five years after Mabo, we are all quite familiar with the concept of continuing customary law. But it is not just relevant in the realm of land rights.

In 1788 there was already in existence in Port Jackson and Botany Bay a timeless and continuing culture that governed every aspect of human interaction: birth, death, marriage, kinship, the nature of retribution, the role of healing. This culture was unwritten but real and enduring. It was spoken, sung and danced. It was practised uniformly. Hunting, trade, every aspect of human life was governed by it.

But to the colonisers, it existed in the background – ignored – and, if acknowledged, it was either disregarded or despised.

British justice dealt with the First Peoples badly. There was little, if any, British justice for Gadigal and all First Nations people. It continues in the same way today.

Lyndall Ryan's ongoing work on Massacre Maps (1788 to 1932) at the University of Newcastle is central to a true understanding of the systemic impacts of colonisation on Aboriginal people. Contact meant conflict. Massacres occurred here in the Sydney Basin. The Hawkesbury River area was a hotspot. I cannot help but personalise this. I look at it through my own family history.

Three of my forebears arrived in Sydney Cove in 1790 – all of them convicts. I wonder how my mob staked out their claims. How did they deal with Aboriginal people in order to stake their land claims?

Aboriginal people's experience of colonisation in the Sydney Basin centred on violence, disease, dispossession and disruption of cultural practices. As the Massacre Map project forcefully demonstrates, the pattern was replicated in every corner of the continent.

The impacts of colonisation on Indigenous people are all too familiar – socio-economic disadvantage, health disadvantage, educational disadvantage and widespread interpersonal dysfunction result from psychological and cognitive trauma across multiple generations. Indigenous people are still dealing with harms that were generated by early colonial contact and which have been perpetuated by colonial and racist thinking over generations. There is a link between our history and modern dysfunction in Indigenous communities. Dysfunction, in turn, has surrounded offending.

All of the Royal Commissions and inquiries into Aboriginal people's dealings with the justice system have recognised that systemic community dysfunction is a driving cause of offending and then of incarceration.

My own experiences appearing as counsel for the North Australian Aboriginal Justice Agency in the Don Dale Royal Commission convinced me that there is no one way into this problem. There is no single correct starting point to solve the issue. There are so many ways in which our system deals inadequately with Indigenous people.

Our nation needs to respond in many ways and with energy and political will. Action is necessary to address the underlying causes of crime arising from dysfunctional life in dysfunctional communities. It is almost certainly true that policy action on Aboriginal health, housing, education and income levels will be likely to have a much greater impact on the rates of Aboriginal incarceration than any policy changes in the justice or court systems. The top-down, paternalistic, NT Intervention (The NT Emergency Response) now in its second decade has failed to address the myriad ways in which ATSI people are disadvantaged:

- Education levels and opportunities;
- Skills training;
- Overcrowded housing;
- Health problems, including pervasive hearing difficulties, the astounding incidence of rheumatic fever, poor diet leading to high levels of obesity and diabetes, kidney disease and the high incidence of glaucoma;
- Widespread issues relating to impaired cognitive functioning including developmental disorders and brain damage from substance abuse such as petrol sniffing – and now we are beginning to understand the significance of FASD;
- Not to forget the huge and growing problem of drug and alcohol dependence, including a surge of ice.

There is no one particular point of entry. Health solutions are pressing, but no use without hygienic housing. Education opportunities provided through increased attendance at primary school and greater rates of high school graduation cannot be achieved if there are chronic health issues in the community.

But it is vital that policy makers do understand that Indigenous communities are not one-dimensional pools of helplessness and dysfunction. Despite all the problems that exist, First Nations people continue with strong cultural traditions and practices. Indigenous laws, community relationships and programs conceived by communities are great assets that can enable ATSI people to take control of the problems in their midst.

Many Indigenous witnesses in the Don Dale Royal Commission gave evidence about the strengths and skills of Aboriginal people. Pat Anderson, the co-author of the defining report

on Child Protection in the Northern Territory, 'Little Children are Sacred' (2007), told the Royal Commission that Indigenous communities know the answer for promoting their well-being. She called for Indigenous people to be respectfully engaged in research and policy making within their own communities (Anthony and Sherwood 2018, p. 9).

I also agree with Thalia Anthony and Juanita Sherwood, who recently expressed the view that many of the answers to the problems that have been created by the justice system must come from outside of the punitive and risk concepts of the criminal justice system itself. 'Rather than seeing Indigenous people through a policing and carceral lens', there needs to be 'post disciplinary approaches [that] engage Indigenous concepts of injury prevention, self-determination and social, emotional and cultural well-being to identify sources of trauma, including in the criminal justice system and its processes' (Anthony and Sherwood 2018, p. 11).

There needs to be a decolonising process in law and legal education. It is time to recognise that the current dominant system of punitive, white discipline, law enforcement and state-controlled detention is not working. It is time, in my opinion, to empower and involve Indigenous communities in every aspect of the criminal justice system:

- in policing strategies;
- in the development and exercising of diversion programs;
- in bail programs;
- in sentencing;
- in therapeutic engagement with alternative, non-custodial sentencing options;
- in the detention of Aboriginal offenders;
- in guidance towards constructive release from prison; and
- in the re-integration of offenders into the community after their release from prison.

The same applies equally to men and women and also to children and young people where there is significant crossover with issues that relate to care and protection.

Australia needs to invest heavily in the richness of Aboriginal community assets to support Indigenous people to develop their own solutions for their own people. We need to recognise that post-colonial, white systems of punishment and detention are not working well, if at all – especially in Indigenous communities.

With all this in mind, there are four aspects of justice reform which I intend to focus upon. None of these proposed reforms will provide a panacea, not even in the limited setting of reforms to the justice system. But they could all play an important role leading to a decline in numbers of Aboriginal people being incarcerated and increasing the numbers of Indigenous people engaging more meaningfully in the process of reforming their own lives. I will deal with:

1. Sentencing reform, including specialist courts;
2. Bail reform;
3. Justice reinvestment; and
4. The age of criminal responsibility.

My thoughts are not just mine. I have drawn heavily on the work of my colleagues on the NSW Bar Association Working Group. There is a clear consensus among us about

what is likely to work. It seems that sentencing laws are central to the problem. Many of the proposals that will work for Indigenous offenders are also likely to impact on the levels of incarceration generally across the board. But some are specific to Indigenous offenders.

Sentencing reform

The prevailing mood for reform in criminal law – both substantive law and procedural law – is punitive. For decades, there has been a push for more severe penalties for nearly every category of offending. The overwhelming number of changes to the law in the last 40 years have been to the detriment of the accused. Penalties that are imposed in modern courts are much harsher than they were when I was a young lawyer – at least that is my experience in NSW. The politics of sentencing has been to favour harsh and repressive patterns of sentencing. Insofar as the courts are required to follow the law, they are not solely to blame for the pattern of sentencing.

But the stark reality is that Australian sentencing courts have failed to check the increasing imprisonment rates of Indigenous offenders and, given that the courts provide the mechanism for imposing each sentence, it follows that the courts are central to the problem. They can also be central to the solution.

And central to our courts' sentencing practices is the concept of 'individualised justice'. Each offender must receive a personalised, case-specific sentencing outcome based on the evidence in that particular case of the offending conduct and the offender's own personal circumstances. This, in theory, leads to a sentence that is proportionate to both the harm caused and to the individualised circumstances of the offender's life and background. Parity and proportionality are the hallmarks of individualised sentencing. Disparity is an abhorrent sentencing outcome – even when the particular sentence may be thought to be otherwise unremarkable.

A problem has developed, though, in the way in which the courts have identified the perimeters of 'individualised justice'. Australian courts do not give weight to the impacts of dispossession and colonisation unless there can be very specific factual links made to the individual offender being sentenced. There is no scope for the court to take into account, by way of some form of judicial notice, broad and systemic issues affecting the 'gap' areas of health, mental health, life expectancy, mortality rates, suicide and self-harm rates, educational attainment, home ownership and employment.

As early as 1982, Justice Brennan in *Neal v The Queen* considered the relevance of Aboriginality in a sentencing exercise, saying:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts which exist only by reason of the offender's membership of an ethnic or other group (326).

Likewise, in Justice Wood's judgement in *Fernando* in 1992, he set out a series of eight propositions which apply to the sentencing of Indigenous offenders (62, 63). They included, relevantly:

1. the same principles apply in every case but not by ignoring facts that relate to an offender's membership of an ethnic or other group; and
2. Aboriginality is relevant to explain the circumstances of the offence and the offender.

The seminal case on sentencing of Indigenous offenders is *Bugmy v The Queen* (2013) which emphasised the importance of demonstrating an evidential link between an offender's 'profound childhood deprivation' and the seriousness of the offender's conduct, stating: 'because the effects of profound deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision' and 'the circumstances that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way'.

This was all acknowledged to be relevant irrespective of whether the social and economic disadvantage occurred in an urban, rural or remote environment.

But the court refused to 'take judicial notice of the systemic background of deprivation of Aboriginal offenders' which was regarded as being 'antithetical to individualised justice'. Consequently, the over-representation of Indigenous offenders in custody is not a relevant factor to be considered in the context of an offender's background and circumstances of deprivation.

This is not the case in Canada where there is statutory recognition of Aboriginal over-representation in custody in the form of s 718.2(e) of the *Canadian Criminal Code* which elegantly and simply provides that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders'.

In its 1999 decision of *Regina v Gladue*, the Canadian Supreme Court explained that s 718.2(e) was 'remedial in nature'. Its purpose is to ameliorate the serious problem of over-representation of Aboriginal people in prison, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provisions' remedial purpose real force.

In 2012 in *Ipeelee*, the Canadian Supreme Court emphasised that Aboriginal offenders' circumstances are to be given full consideration, irrespective of the seriousness of the offence. There the court acknowledged the realities of colonisation and the need to sentence Aboriginal offenders differently, saying: '[t]he history, colonialism, displacement in residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance of abuse and suicides, and of course high level of incarceration for Aboriginal peoples' are all necessary factors for judges to take judicial notice of. This was so whether or not an offender could establish a 'direct causal link'.

I believe that Australian parliaments should enact similar provisions. The NSW Bar Association is of the view that legislation should commonly provide for recognition, when sentencing an individual Aboriginal or TSI person, that such people are:

(a) over-represented in the gaol population;
(b) have a cultural history of dispossession and colonisation;
(c) have far worse whole-life indicators than the non-Indigenous population insofar as health, mental health, life expectancy, mortality rates, suicide and self-harm rates, educational attainment, home ownership and employment are concerned; and
(d) particularly in the case of female offenders, often suffering from trauma and complex trauma resulting from isolation, family and sexual violence and child removal.

These kinds of provisions would promote proportionate and individualised sentences that properly reflect the circumstances of both the offence and the offender. They would also promote equality before the law by promoting sentencing that is adapted to the real and established differences that relate to the experience of Indigenous offenders. It is a form of deconstructing the effects of colonisation.

In a paper analysing the *Bugmy* decision, Justice Stephen Rothman of the NSW Supreme Court noted:

> Every individual before the courts for sentencing must be treated equally … and as an individual. Any non-Aboriginal who has suffered as a part of a 200 year history of dispossession from their own land; exclusion from society; discrimination; and disempowerment is entitled to have such circumstances considered. In Australia, such persons are confined to the Indigenous population. To treat Aborigines differently in Australia by taking account of such factors is an application of equal justice; not a denial of it. (2014, 10)

Gladue *reports*

However, sentencing of Indigenous offenders need not depend on judicial notice of important historical and cultural matters. Sentencing Courts ought to be properly informed about these issues. The ALRC Report (2017) recommended the introduction of legislation requiring courts to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples and for courts to receive 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

In Canada, the courts have developed the use of specialist Aboriginal sentencing reports to facilitate s 718.2(e). Named after the court case, *Gladue* reports have been part of the sentencing process for some years. They are intended to provide the court with an understanding of the underlying causes of offending, including the historic and cultural context of an offender.

Gladue reports are prepared 'with the help of someone who has a connection to and understands the Aboriginal community'. They assist to weigh the contextual relevance of issues of an historical and cultural nature that are unique to, and prevalent in, Canadian Aboriginal communities, including intergenerational trauma, alcohol and drug addiction, family violence and abuse and institutionalisation.

Efforts are being made to develop *Gladue*-style reports in Australia. The Aboriginal Legal Service NSW/ACT is currently developing a 'Bugmy Evidence Library' for use as evidence in sentencing matters. This is proving to be a painstaking and exhaustive effort. Meanwhile in the NT, the Law and Justice Group is undertaking 'reference writing processes', writing reports for use in individual cases.

Courts need to be informed about the cultural context of a case. Written reports are likely to be the most common source of that information. But cultural background knowledge does not have to come from formal reports – or from expert witnesses.

In 2017, the Kurdiji Law and Justice Group in Lajamanu extended this work to include members sitting in court with the judge and providing input to the court system where appropriate. Kurdiji members have reported an increase in community support since they began sitting in court with the judge. Their presence has symbolic importance to Warlpiri offenders. The Kurdiji's presence on the bench is seen by defendants as sitting

alongside the judge (and as being respected by the judge as a source of authority) and have spoken very positively about the possibility of Kardia (Western mainstream legal system) and Yapa (Warlpiri) laws working together.

But it is vital that *Gladue* Reports and the work of Elders be properly funded by government and have legislative authority – or at least be formally recognised in the governing Practice Notes of the court. Further, these reports should be prepared by Indigenous caseworkers with an understanding of the unique systemic factors relevant to the offender and the offender's community. They should be prepared by caseworkers in Aboriginal or Torres Strait Islander organisations such as Aboriginal Medical Services, Aboriginal Land Councils, or in an independent unit of Aboriginal Legal Services. They should not be prepared by community corrections type services.

Sentences of six months or less

Many Indigenous offenders end up in prison serving quite short prison terms. Short sentences do not measure up on any qualitative assessment of their utility. They are costly and ineffective in rehabilitating offenders and in reducing recidivism. They are too short to provide any effective form of community safety. People in prison for short periods often do not have access to rehabilitative and other programs in custody, while at the same time they are disconnected from employment, education, family and social connections. Further, there is little or no supervision or support on release.

What they do have in their favour is that they are better than long sentences. There has been a fair amount of debate surrounding proposals to abolish very short sentences. I admit to having been cynical about these proposals. There is a deep part of me that fears that magistrates who are prohibited from imposing sentences of, say, six months or less, will be more inclined to impose sentences of seven months or more. But recent data from WA suggests that their courts have so far resisted that temptation since they repealed short sentences.

The NSW Bar Association Working Group supports the introduction of statutory guidelines to limit sentences of less than six months to circumstances where the presence of the offender in the community presents a substantial risk to the community. In their place, there should be a range of community-based alternatives such as expanded versions of Intensive Correction Orders (ICOs).

The recent amendments to the ICO regime in the NSW Crimes (Sentencing Procedure) Act (1999) are generally moves in the right direction. The circumstances in which an ICO can be imposed ought to be fairly wide. The Bar recommended to the ALRC that the ICO model ought to:

(a) include orders to attend rehabilitative programs or violent offender programs as an alternative to the work component;
(b) extend the maximum length of an ICO to capture circumstances where a longer prison term is warranted but the offender has demonstrated positive rehabilitation;
(c) expand ICO availability, requiring significant commitment in recruiting and training a trauma-informed and culturally-competent workforce, as well as investing in the development of local people to ensure a stable and skilled workforce in the longer term; and
(d) ensure that ICOs and other community-based orders should, wherever practicable, be uniformly available in all regions.

Aboriginal-designed and delivered sentencing programs

Alternatives to imprisonment should be many and varied. Experience shows that the more alternatives to gaol exist, the longer it takes for an offender to land in prison. The key concepts to designing workable and successful non-custodial sentencing programs are 'local', 'flexible' and 'relevant'. Sentencing regimes that are imposed by a centralised, 'white fella' government in a 'one-size-fits-all' operation will always work injustice. Individualised justice ought not to be restricted to what happens inside the court room. The form of punishment and the way in which it is delivered ought also be tailor-made to the individual. For Indigenous offenders, this means that the punishment and reform process should be culturally specific and meaningful.

In 2011, a House of Representatives Committee Report entitled *Doing Time – Time for Doing* emphasised the need for Indigenous-designed and -run sentencing programs. They proposed that Indigenous communities be engaged in the design and implementation of programs that address the particular local needs.

This approach was echoed in the Don Dale Royal Commission's recommendations where it was suggested that the Northern Territory Government and the Commonwealth Governments should commit to a 'place-based' approach to sentencing programs in partnerships with local communities built on mutual respect, shared commitment, shared responsibility and good faith. These partnerships need to be driven by the best interest of the child, local solutions for local problems, local decision-making and shared responsibility and accountability.

This all means proper funding. The states have varying capacities to commit to this funding. To finance these programs, the Bar Association has called for the Commonwealth Government to establish a new pool of adequate and long-term funding for young Indigenous offender programs, run by small-scale community groups operating in local areas. The concept of community-based sentences should include low-security, residential 'detention' facilities, supervised and run by corrections departments. These could be in the form of 'halfway' houses for people in the final stages of their sentences but before release on parole, or they may be straight-out alternatives to imprisonment in conventional prisons.

There have been many successful community-based, culturally appropriate programs devised and controlled by Indigenous people.

As in many aspects of First Nations Justice Policies, New Zealand has much to offer. There they have what they call Youth Justice Residences: safe and secure residences where young people can be supported to re-establish their lives. Rooms, meals and clothing are provided as well as educational and sporting facilities. Individualised plans are devised to address social, health and school needs. Residents work with social workers and families to plan re-integration prior to leaving the residence, including preparation for going back to school, entering a training course or applying for jobs. A similar model could be established in Australia for all young offenders.

Mandatory sentencing

The legal profession's representative bodies have consistently called for the abolition of all mandatory sentences. They are the exact opposite of individualised justice. Mandatory

sentences by their very nature obscure the relevance of the individual circumstances of the offending conduct and of the offender.

Mandatory sentencing regimes place unacceptable restrictions on judicial discretion and undermine the rule of law. They contribute to the increase in the imprisonment rate because they:

(a) can increase the length of sentences and hence increase the prison population;
(b) capture all offenders of the specified conduct rather than consider more appropriate or proportionate alternatives to imprisonment where relevant; and
(c) potentially increase the likelihood of re-offending, as periods of incarceration can promote recidivism.

Sixteen percent of Aboriginal or Torres Strait Islander people who entered prison in 2013 were there uniquely for fine default after mandatory sentencing. This is particularly relevant where the cost of keeping one adult offender in gaol is currently up to $120,000 per year. Under mandatory sentencing laws, an accused is less likely to plead guilty, with the resulting implications for court resources and time spent on contested cases. Contested cases tend to have more serious consequences for Indigenous offenders who are generally less able to meet bail conditions and more likely to wait out a contested case in prison.

The disproportionate impact of mandatory sentencing on Aboriginal and Torres Strait Islander people may also have a detrimental effect on reconciliation.

Australia should work towards the complete abolition of mandatory sentencing. But that, by itself, is not enough. The repeal of mandatory sentencing ought to work in conjunction with the creation of alternative forms of sentencing outcomes, both in the form of imprisonment and community-based options.

Sentencing courts should be given a high degree of discretion in determining and delivering appropriate sentences. Courts should be given multiple sentencing options to give effect to culturally appropriate, individualised justice in sentencing.

The problem sentencing areas

Three types of offending are responsible for a high percentage of Indigenous prisoners: property and driving offences and fine default.

(a) *Property offences:* This class of offence tends to be over-represented by vulnerable and disadvantaged groups and as a result is often discriminatory in effect against Aboriginal or Torres Strait Islander people. In Western Australia, for example, mandatory prison sentences of one year are imposed under a so-called 'three strikes' law for those convicted of home burglaries. The provision can operate arbitrarily where the offence of home burglary covers a wide range of circumstances that might include wandering into a neighbour's home in search of food.
(b) *Driving offences:* This class of offence demonstrates how metropolitan laws may operate unjustly in remote areas. Often, Aboriginal or Torres Strait Islander community members have longer distances to travel, minimal access to public transport and face administrative and financial obstacles to obtaining a driving licence. Mandatory minimum penalties for driving while disqualified is not only ineffective in protecting

the community from future offences and preventing an offender from re-offending, but also causes a strain on the criminal justice system.

(c) *Fine default:* Imprisonment in default of fine payment is unjust, unfair to poor offenders, expensive and disproportionate in its effect on Aboriginal or Torres Strait Islander offenders. In 2013, 1358 offenders were imprisoned in Western Australia for fine default only. Sixteen percent of Aboriginal people who entered prison that year did so uniquely for fine default.

Specialist indigenous courts

There are over 50 adult and children's Indigenous sentencing courts in Australia, whose objectives include increasing Indigenous participation in court processes, the provision of a culturally appropriate sentencing context, reduced recidivism and engendering greater trust between communities and judicial officers. But there is great scope for more.

In NSW I regard the implementation of the Walama Court – for adult offenders in the District Court – as a matter of urgency. Judge Dina Yehia and the Working Party are well advanced in their planning to establish the court. The government is yet to allocate funding – even though it will require a very modest increase in the District Court's budget.

Evidence from the evaluation of the NSW Drug Court is that the approach taken to sentencing there – features of which are adopted by the Walama Court proposal – has reduced recidivism rates.

A 2008 BOCSAR and the Centre for Health Economics Research and Evaluation (CHERE) evaluation of the Drug Court showed that when the Drug Court and control group were compared on an as-treated basis, members of the Drug Court group were found to be 37% less likely to be re-convicted of any offence, 65% less likely to be re-convicted of an offence against the person, 35% less likely to be re-convicted of a property offence and 58% less likely to re-convicted of a drug offence. Similar successes have been identified in the Victorian Koori Court.

Even the economic rationalism of the Productivity Commission suggests that a stronger emphasis on therapeutic outcomes such as diversionary programs results in 'a swift and economically efficient response to offending, aimed at reducing re-offending and the negative labelling and stigmatisations of contact with the criminal justice system'.

There is a need for a more widespread roll-out of other specialist courts such as drug courts across all jurisdictions to provide proper and equitable access to Aboriginal and Tones Strait Islander people.

Bail reform

Too many Indigenous accused cannot achieve bail after being arrested. They often spend many months in custody before their matters are finally determined. Very commonly they are immediately released from gaol at the end of their court case, either because they are found not guilty or because the court finds that they have already spent long enough (and sometimes too long) in gaol already. This pattern suggests that many people who ought not be in prison are there because they cannot get bail.

Many accused people fail in their bail applications for reasons related to their background as an Aboriginal or Torres Strait Islander. Much crime stems from the kind of

socio-economic disadvantage that bedevils many Indigenous people. They are disadvantaged in their efforts to be released on bail because of factors like unstable housing, drug and alcohol dependency, mental health problems, a history of earlier bail breaches and the inability to lodge surety.

The ALRC Report (2017) recognised this problem, making a recommendation urged upon them by the NSW Bar Association that state and territory bail laws should include provisions that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place and cultural obligations.

The Bail Act 1977 (Vic) incorporates such a provision.

Bail laws involving such provisions could be drafted to focus on cases involving less serious crimes with a particular 'carve-out' for, say, serious violence offences and with an express statement that the requirement to consider issues that arise due to a person's Aboriginality could not trump community safety. But even with these limitations, a law that made it plain that bail needs special consideration when it relates to Indigenous accused would be likely to cause many magistrates and judges to think more carefully about bail decisions.

The Bar also advocates that Bail Laws ought to:

(a) exclude from consideration of community safety the possible repetition of minor offences (i.e., other than serious or violent offences);
(b) preclude courts from refusing bail on the basis of the unavailability of suitable or adequate accommodation, other than in exceptional circumstances where there is a real and substantial risk of serious offending;
(c) remove financial impediments for acceptable persons or sureties for bail where the amount of money deposited or promised is $1000 or less;
(d) require anyone who has been granted bail but has not been released to bail to be brought back before the court within a maximum of three business days;
(e) stop police from conducting 'curfew checks' at the home of a defendant; and
(f) make community safety the primary consideration of bail.

Courts often refuse bail to children because they do not have adequate accommodation. In my experience in the NT, sometimes – in fact, too often – the responsible officers of the equivalent of the Department of Families and Communities urge the court to keep kids in custody because they do not have anywhere else to go. This is a disgusting abandonment of responsibility by those whose legal duty it is to act to the child's benefit.

Many bail-related problems are caused by unrealistic and overly onerous conditions like curfews and non-association orders. Curfew checks themselves often take the form of some special kind of police menace. They are hard enough for most people to deal with, but where the subject does not have a permanent foothold in the house nominated on the bail slip and where the person concerned has substance abuse issues, curfew checks can be a sure-fire way to foul up on bail.

Likewise, non-association orders need to be considered in the context of their potential impact kinship and community relationships. Whilst the protection of victims and children is a matter of high importance, courts should make individual assessments of each case and restrict these orders to those cases which truly call for them.

The ALRC also recommended that governments should work with Aboriginal and Torres Strait Islander organisations to develop and implement bail support and diversion options. The Don Dale Royal Commission found that the NT has inadequate bail support services, including accommodation services for children and young people. The Commissioners recommended that bail support services for children and young people should be provided in Darwin, Alice Springs, Tennant Creek, Katherine and Nhulunbuy and in other locations which include:

(a) accommodation services in small homelike residences;
(b) bail support plans developed with a specialist youth worker, covering education, employment, recreation and sporting goals;
(c) the engagement of the young person and their family, where possible, in the development of the plan; and
(d) the availability of, and referral to, services and practical life skills support to assist the young person.

This is all laudable and, in my view, very necessary, but the politics of housing troubled youngsters in bail accommodation in (urban) places like Palmerstone on Darwin's suburban fringe is very fraught. Whenever there is a concrete proposal to establish a bail shelter, vigilantism and angry voices dominate.

The politics of bail is difficult. The media, especially the tabloids and the talk-backs, are very quick to pounce on any instance of bail failure. There is hardly ever any public discussion about the true costs of incarcerating offenders – both direct costs and the less direct costs that stem from the dysfunction of prison and its capacity to damage people.

Justice reinvestment initiatives

Which brings me to the true dollar value of alternatives to prison. Justice reinvestment is 'on the money'. It ought to be a very attractive initiative for politicians and for the tax payers. It involves redirecting the money which would normally be spent on gaols to rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration. Gaols are very expensive. The total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were $3.9 billion. The indirect costs flowing from the lives damaged by our hopeless and dispiriting prison systems must be many multiples of that.

In NSW 'Just Reinvest' has been running an enormously successful program in Bourke for some years called the Maranguka Project. Over $4 million each year is spent locking up children and young people in Bourke. Maranguka's focus is to better coordinate support to vulnerable families and children in Bourke through community-led teams working in partnership with service providers. The results are looking good.

The statistics from Bourke show that between 2015 and 2017 there has been:

- 18% reduction in the number of major offences reported;
- 34% reduction in the number of non-domestic violence related assaults reported;
- 39% reduction in the number of domestic violence related assaults reported;
- 39% reduction in the number of people proceeded against for drug offences; and
- 35% reduction in the number of people proceeded against for driving offences.

Other projects are being developed in Katherine where NAAJA (North Australian Aboriginal Justice Agency) and the NTCOSS (Northern Territory Council of Social Service) have received funding from the NT Law Society to develop a local initiative in Ceduna in far western South Australia and in Cowra, NSW. There is cautious but justified optimism that these schemes will work to redress the over-representation of Indigenous people in the formal criminal justice system. Their great beauty is that they are local, specifically crafted, Indigenous-controlled schemes that are culturally appropriate and sensitive.

Small things can make a big difference. Programs like the 'Driving Change' Program run by Sydney mob, Weave, teach young people how to drive and how to pass their licence tests. This helps people steer clear of licence-related offending. Driving whilst disqualified can easily land you in gaol.

The NSW Legislative Assembly recently had a committee investigate the adequacy of youth diversion programs. They have made a range of constructive recommendations. Some are simple, like the idea proposed by some young offenders: to provide kids being released from detention with a free Opal Card for three months – a welcome financial lift that would help people stay out of trouble.

Increasing the age of criminal responsibility and the age of detention

The age of criminal responsibility in Australia is 10 years old. Every year thousands of primary school-aged kids are dealt with in the formal juvenile justice system. This includes children in Years Four and Five. Children that age are not even close to reaching the levels of the adult understanding of moral rights and wrongs that underpins our criminal justice system. Some of these young children are detained, and many of them go on to detention before they turn 14. The majority of these very young offenders are Indigenous.

The median age of criminal responsibility around the world is 14 years of age, as endorsed by international human rights organisations, which base their recommendation on scientific studies showing that, on average, children younger than 14 are not developmentally mature enough to be criminally liable. The UN Committee on the Rights of the Child recommends 12 as the absolute minimum age for a child to be charged with a criminal offence.

The Don Dale Royal Commission made forthright recommendations that the age of criminal responsibility should be raised to 12 and that no child should ordinarily be detained before the age of 14 unless there are serious issues of public safety which require it. The NT Chief Minister fully supported these important recommendations and quickly implemented the arrangements to ensure that the detention of kids under 14 became the exception.

In the next month or so, it will become clear whether the NT Government will actually be able to deliver on its stated support for the increase in the age of criminal responsibility to 12. The legal profession is watching this space closely. It is a fundamental, line-in-the-sand issue. The cruelty of exposing 10- and 11-year-old kids to the harsh reality of courts and state-imposed punishment is a recipe for future problems. Diversion from courts is far to be preferred for the youngest and most vulnerable of our young people.

Governments throughout the country need to take action on this issue. Let us see how the NT goes. They could lead the way.

Conclusion

There are many more steps that can be taken to reduce the far too many First Nations people who land in gaol every year. The ALRC Report (2017) and the Don Dale Report (2017) have dozens of recommendations. So too did the Black Deaths in Custody Royal Commission Report (1991). Indeed, the reports dovetail each other. But the identification of solutions is not enough. It is time for action.

Brave policy makers will, I hope, recognise that this disgraceful state of affairs is steeped in deep colonial attitudes and, I am afraid, often racist perspectives. Lawyers must lead the debate – all of us.

I wish to finish by acknowledging the support I have received from my colleagues participating in the Bar Association Working Group. As I hope I have made clear, these ideas are shared. We will keep working on this project – including in the lead-up to next year's state election when we hope to convince all parties to adopt effective measures to reduce Indigenous incarceration rates in this state.

Thank you, too, to my colleague, Diane Elston, who assisted me with some of the research for tonight's paper. I am very grateful, Diane.

And thank you again to the Institute of Criminology for presenting the Paul Byrne Memorial Lecture each year and for giving me the honour of presenting tonight.

Thank you.

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