Submission No 132

INQUIRY INTO HIGH LEVEL OF FIRST NATIONS PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF DEATHS IN CUSTODY

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Closing the Gap – reducing Indigenous incarceration rates by 15% requires making the purposes of sentencing more relevant to the Twenty-First Century.

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Australia's First Nations peoples are the most incarcerated peoples on the planet. Governments and the ATSI peak organisations have set a Closing the Gap Outcome that requires a massive reduction in the incarceration rates of First Nations peoples. The thesis of this article is that no reduction in the numbers of Aboriginal persons is possible in NSW without changes to the existing legislative provisions that have applied for the past four or more decades, and brought about the current disproportionate incarceration rates of NSW First Nations peoples. Moreover the targeted 15% reduction over ten years in current incarceration rates is illusory if the desired outcome is a reduction in the numbers of Aboriginal persons held in custody. A 15% rate reduction over ten years averages as a 1.5% reduction annually. This translates currently as a 0.4% annual reduction in the numbers of incarcerated Aboriginal persons. Meanwhile under current legislation the increase in the numbers of incarcerated Aboriginal persons (as distinct from the rate of incarcerating) over recent years has been growing annually by 24% for men and 40% for women. The failure of the current legislation centres on those sections dealing with the purposes of sentencing and the appropriate tests to apply when considering whether or not to impose a sentence of imprisonment. The article argues the purposes of sentencing and the tests for imprisonment need to be reconsidered, and suggests an alternative paradigm.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

Uluru Statement from the Heart

The most incarcerated people on the planet

1. On the 24th August 2020 a respected Sydney newspaper concluded a three-part series, which it claimed showed the police, the courts and the prison system are stacked against Australian Indigenous people just as badly as they are for African Americans[1].

2. It has been obvious for some time[2] that there is an urgent need for greater legislative recognition of the alarmingly disproportionate incarceration of New South Wales based Aboriginal persons and the need to have in place a legislative framework that will contribute to a Closing of the Gap.

3. Since 1982 the percentage of Indigenous persons incarcerated in NSW prisons has increased from 5.8% (216 prisoners)[3] to 26% (3638 prisoners)[4]. The corollary of this is that the incarceration rate for non-Aboriginal persons

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[1] *The Sydney Morning Herald*; Editorial 24 August 2020; p.20

[2] See for example *R v Fernando* (1992) 76 A Crim R 58 at p.62-63; *R v Russell* (1999) 84 A Crim R 384 at 392; *R v Leonard* [2000] NSWCCA 318; *R v Welsh* Supreme Court – Sentence – Unreported, 14 Nov. 1997; Fernandez L. *Sentencing Aboriginal Offenders* Legal Aid Commission of NSW, March 2004, www.legalaid.nsw.gov.au_data/assets/pdf_file/0020/6491/Sentencing-Aboriginal-Offenders.pdf

[3] S. Corben; *NSW Inmate Census 2016: Summary of Characteristics*; Corrective Services NSW p.52

[4] Australian Bureau of Statistics; *Corrective Services, Australia, March Quarter 2020*; https://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0. p. 4/11

within the NSW prison system has fallen from 94.2% in 1982 to 74% in March 2020. It is generally acknowledged that Indigenous persons comprised about 3% of the NSW population.

4. It is generally conceded these figures scream Aboriginal persons are seriously overrepresented in NSW prisons, and the overrepresentation becomes greater year by year.

5. In July 2020 an agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and each of the State, Territory and Federal Governments settled on a new Outcome area in which it was determined a specific area of social reform was urgently called for – namely the growing incarceration rates at which Indigenous adults are being locked into prisons. Thus was formalised an important social aspiration, Outcome 10 –*Aboriginal and Torres Strait Islander people are not overrepresented in the criminal justice system.*

6. The first target set for this Outcome of Closing the Gap in Partnership is: *By 2031 reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent.*[5] In NSW that means a 15% reduction in the current 26% NSW Indigenous incarceration rates becomes a 22% incarceration rate by 2031. That is a 4% overall rate reduction from 26% to 22%. Sadly however, it would not be until the decade after 2041 that the incarceration rate of ATSI prison population falls below 20% - still an alarmingly high rate. Assuming a final incarceration rate sought for Aboriginal and Torres Strait Islander adults sits at something less than 6%, using a 15% rate reduction every decade, means that a 6% target will not be reached until 2111. The irony of this should not be lost upon thinking Australians. Prior to arrival of the non-Aboriginal intruders, the various Aboriginal communities throughout Australia had lived using customs and practices that did not require a single prison for 60,000 years. Aboriginal and Torres Strait Islander peoples are well known for their patience having already extended their patience for more than two centuries – but extending patience for yet another century for these reduction rates to be effective is beyond absurd.

7. Throughout more than 200 years of non-Aboriginal settlement in NSW the dislocation of Aboriginal people has taken several different forms. Survivors are still alive and suffering from the Stolen Generations; an unwelcome long-lingering legacy of the State's kidnapping of young children from Aboriginal families and communities. That form of dislocation has been supplanted by an Incarceration Generation that focuses particularly on incarceration of

[5] *National Agreement on Closing the Gap – July 2020; Closing the Gap In Partnership;* Outcome 10; p.26; https://coalitionofpeaks.org.au/wp-content/uploads/2020/07/Final-National-Agreement-on-Closing-the-gap.

Aboriginal males between 18 to 55 years of age (2903 Indigenous men in 2018[6] - and remember it has been going on at least since 1982)[7]. Those ages are significant – they are the prime years for fathering children, parenting, employment, and gaining economic stability.

8. Confining examination of the statistics between March 2016 and March 2018 reveals, while the percentage of incarcerated Aboriginal males within the cohort of the incarcerated male prison population hovered at 23% the percentage of incarcerated Aboriginal females within the cohort of females prisoners climbed from 32.8% to 35.1%[8]. More alarmingly the rate of female Aboriginal incarceration increased from 340 in March 2017[9] to 376 in March 2018[10], an increase of 36 women – something slightly more than a 10% increase in one year. A longer-term perspective indicates that between 2011 and 2017 the number of Aboriginal female prisoners increased by 74% from 195 to 340; by comparison the growth rate for non-Aboriginal women was 40% [11]. Instead of closing the Gap by 2031, if the current rate of increase remained at 10%, by 2031 the female Aboriginal population in NSW would be approaching 1200 mark – three times the current number.

9. What is important to understand under the present regimes applying within the criminal justice system is the enormous social damage these incarceration rates are doing to Aboriginal communities scattered throughout NSW. It is also important to understand in an environment where incarceration rates for Aboriginal persons have been increasing – so too must social damage caused by incarceration also increase. If the adult Aboriginals in custody (3683 in March 2020) were receiving a New Start allowance of only $240 per week, the loss of cash flow or income to the Aboriginal communities would amount to $50,000,000 annually. Many of the Aboriginal women are mothers; many of the Aboriginal men are fathers, most of the Aboriginal men and women have partners. Families are missing important people in their lives. Children are missing at least one parent; on a best-case scenario they may be placed with extended family; on a worst-case scenario they may be placed in out-of-

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[6] S. Corben, H Tang; *NSW Inmate Census 2018 – Summary of Characteristics;* Statistical Publication No. 47, August 2019; Corrective Services, at p. 20.

[7] The Aboriginal and Torres Strait Islander incarceration rate for the 2020 March quarter was 4682 persons per 100,000 Aboriginal and Torres Strait Islander adult male population, almost nine times the rate for females (523 persons per 100,000 adult Aboriginal and Torres Strait Islander female population. That is the rate of incarceration in Australia during the 2020 March quarter equalled a fraction more than one in every 21 Aboriginal and Torres Strait Islander men being in a prison located in Australia. See F.N. 4 p. 5/11.

[8] See F.N 3 at p.4 and F.N.6 at p.4/11.

[9] *Recent trends in the NSW female prison population;* BOSCAR, 21 March 2018; <www.boscar.nsw.gov.au/Pages/boscar_media_releases/2018/mr-Recennt-trends-in%C2%AD%C2%AD%C2%AD-the-NSW-female-prison-population.aspx.

[10] See F.N. 6 at p.4.

[11] Ibid.

home care, which has a strong correlation to future offending. The Uluru Statement from the Heart captures the obscene poignancy of their situation – *children are aliened from their families at unprecedented rates. That cannot be because we have no love for them.*

Four decades of incarceration rate increases is unique.

10. In the 38 years period between 1982 and 2020 there have only been three years when there was a small percentage decline in the number of Aboriginal prisoners housed in NSW prisons. For thirty-four of the remaining years the numbers of incarcerated Aboriginal men and women increased[12]. Without legislative changes the current Closing the Gap target cannot succeed in the face four decades of ATSI custodial history. It cannot be achieved under the existing paradigm.

11. Over the 38 years, the yearly increase ATSI custodies averages out at about 90 Aboriginal persons per year. However, the average yearly intake increase in the ten-year period between 2010 and 2020 is 135 Aboriginal persons – that is a 50% increase by comparison with the 38 years average. In the five years period between 2015 and 2020 the average yearly increase intake is greater still – 167 Aboriginal persons, that is, an 85% increase on the original average increase of 90 Aboriginal persons per year. When considering the impact of a 15% reduction in the current 26% NSW ATSI incarceration rate, it is important to understand the annual growth rate of the total adult NSW prison population is likely to have an adverse impact on the effect of the proposed 15% reduction rate. That would not mean a 15% reduction (nor a 4% reduction) in the number of ATSI prisoners. The full-time adult prison population has grown from 3466 in June 1982 to 13991 in Mach 2020. True the total adult prison population has fluctuated sometimes down, but mostly up; the average growth rate over the 38 years is 8%.

12. The only conclusion to be drawn from these figures is that Aboriginal persons are being incarcerated, and if the present legislative system continues will continue to be incarcerated, at ever increasing numbers annually[13]. It would also be hard to resist the proposition that Aboriginal men in particular are being targeted. It is absurd to accept that 26% of NSW crime meriting adult custody is currently being committed by NSW's Aboriginal persons who, in total, make up only 3% of NSW's population. But that is the reality any analysis of the figures gives.

13. Within the current NSW's criminal justice system this acceleration of Aboriginal incarceration is not only alarming it is unique. There is no other

[12] See F.N.6 at p.52, together with F.N. 4. In 2009 and 2010 there was no increase. The percentage of ATSI prisoners in those two years was 21.3% - refer F.N. 6 at p.52.

[13] The rise (257) between June 30 2018 and March 2020 amounts to a 7.75% increase on the 2018 Aboriginal prison population. – See F.N 6 together with F.N.4 p. 4/11.

cultural or social group experiencing this level of acceleration[14]. There is a catch-cry reverberating through countries around the world that share our democratic and social values – "Black lives matter!" When voiced in response to the deaths of so many black and brown persons killed by those sworn to protect them that cry becomes most overwhelming. Nonetheless it should also have a resonance for the living persons of colour whose quality of life is robbed from them through unnecessary incarceration brought about by failures within the criminal justice system. Aboriginal men between the ages of 18 and 50 years who, unnecessarily have had taken from them precious years, have a right to say: "From my life you have taken the best years that matter."

Unique and unfair.

14. The same Sydney paper makes a case that Aboriginal persons have been treated unjustly at the hands of the NSW criminal justice system. It points the finger at the police, the courts, and the prison system[15]. Clearly incarceration is not working as a deterrent or a rehabilitator[16]. The paper points out that prisons are increasingly becoming schools for crime. Those with any lengthy experience in the law well know prisons have always been schools for crime.

15. The paper informs that more than half the Indigenous adults leaving prison between 2017 and 2018 reoffended within the next 12 months. The recidivism rate is much higher. Ninety percent of Aboriginal prisoners housed in NSW prisons on the night of the 2016 census had known prior imprisonment as an adult[17]. If, added to that figure were those Aboriginal prisoners who were having their first experience of adult prison but also had a history of juvenile detention, the figure of those who had known custody (as distinct from adult custody) at the hands of the State would have been closer to 93%.

16. An overview of the Aboriginal male population is useful. While the numbers of Aboriginal females (376) in the prison system is significantly less than the male population, in other respects the general overview for women does not differ much.

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[14] True, persons with mental health issues represent a very solid percentage of inmates – including ATSI inmates; but that percentage was always solid and has not increased at rates equivalent to those experienced by the Aboriginal communities.

[15] See F.N. 1

[16] See D Richie, *Sentencing Matters – Does Imprisonment Deter? A Review of the Evidence,* Sentencing Advisory Council, Victoria (April 2011) www.sentencingcouncil.vic.gove.au/sites/default/files/publications/docs/DoesImprisonmentDeter. See also generally work off Emeritus Professor David Brown, Professor Eileen Baldry, Professor Chris Cunneen, Professor Mirko Bagaric. Nicholson J *Reconsidering traditional custodial sentencing policies and practices – current sentencing policies and practices have created a multitude of social, economic and moral problems;* Precedent – Issue 147, July/August 2018 p. 4 at p.7

[17] See F.N. 3 at p.20

17. A 2018 NSW Corrective Services census was taken on the night of 30th June 2018. Of the 3381 Aboriginal persons housed in correctional centres on that night, 89% (3005) were males[18]; 95% (2819) of those Aboriginal males were aged between 18years and 49 years[19].

18. A third (964) of the Aboriginal male prison population was unsentenced; presumably that third were on remand/trial. Another third were sentenced to less than 2 years imprisonment[20]; indeed 14% (390) were sentenced to less than a year. The District Court was dealing with, or had finalised, 42% (1250) of the males cases, and another 41% (1224) had their matters before, or finalised, in the Local Court[21].

An overview of Indigenous incarcerations and offences

19. The most serious offence for 14% (412) of the Aboriginal males was an "Offence against justice procedures"[22]; 358 (12%) of these justice procedure offences were breaches of community based court orders.

20. Comparisons of criminal offending engaged in by Indigenous persons against the criminal offending of the total prison population may offer some insight into areas where justice reinvestment might be usefully harnessed. The comparisons may lack some precision because they are based only upon the most serious offence the relevant prisoner was charged with.

Figure 1- Characteristics of Aboriginal prisoners' offending history[23]

Type of offences	Grand Total	Aboriginal Offenders	Per cent
Murder, Attempt Murder and Manslaughter	923	163	18%
Acts intended to cause injury	3083	1067	35%
Sexual Assault and related offences	1814	275	15%
Dangerous or Negligent Acts endangering others	381	123	32%
Abduction, harassment and other offences	194	46	23%
Robbery, extortion, and related offences	892	289	32%
Unlawful entry with intent/burglary B&E,	1055	391	37%
Theft and related offences	509	135	27%
Fraud, deception and related offences	367	71	19%
Illicit drug offences	2364	164	7%

[18] See F.N. 6 at p.19.
[19] See F.N. 6 at p.20
[20] See F.N. 6 at p.23.
[21] See F.N. 6 at p.21.
[22] See F.N. 6 at p.22. Offences against justice procedures include: Breach of custodial order (0.1%); breach of community based order (12%); breach of violence and non-violence orders (1%); offence against justice procedures (0.6%).
[23] See F.N. 6 at p.22.

Prohibited and related weapons	296	61	21%
Property Damage and Environmental pollution	141	40	28%
Public Order Offences	121	44	36%
Traffic and vehicle regulatory offences	275	57	20%
Offences against justice procedures	1262	453	36%
Breaches of Community -based Orders	*1006*	*396*	*39%*
Other Offences Against Justice	*256*	*51*	*19%*

21. Figure 2 collects from Figure 1 the eight offences scoring the highest Indigenous participation rate in the particular category of offending. These offences counted for 2485 Aboriginal persons out of a total of 3381 Aboriginal persons. Justice Reinvestment should focus on reducing areas where the participation of Aboriginal persons is highest in that category of offending.

Figure 2. – Highest Aboriginal prisoners' participation rate

Type of offences	Total	Aboriginal	Per cent
Breach of Community-based orders	1006	393	39%
Unlawful entry with intent	1055	391	37%
Public Order Offences	121	44	36%
Acts with intent to cause injury	3083	1067	35%
Dangerous and Negligent Acts endangering persons	381	123	32%
Robbery and extortion related offences	892	289	32%
Property Damage and Environmental pollution	141	40	28%
Theft and related offences	509	135	27%

22. Figure 3 collects from Figure 1 the eight offence categories capturing the highest numbers of Aboriginal persons sentenced to custody. When considering rates of incarceration it should be remembered sentence length may impact on the numbers of Aboriginal persons in custody – but rates are determined by the increases in annual incarcerations. For example those whose major offence is breach of community-based orders are likely to be persons whose incarceration period is in single digits so the turn-over of that cohort will be faster than for those incarcerated for murder or serious homicide offences with sentences in double digits. The Figure 3 group amounts to 2880 (74%) of the 3881 Aboriginal persons participating in the 2018 NSW Inmates Census. Again, rich areas to target Justice Reinvestment programs.

Figure 3. – Offences with highest numbers of Aboriginal custodies

Type of Offence	ATSI persons	Per Cent of total
Acts intended to cause injury	1067	35%
Breach of community-based orders	396	39%
Unlawful entry with intent	391	37%
Robbery, extortion and related offences	285	32%

Sexual assault and related offences	275	15%
Illicit drug offences	164	7%
Murder	163	18%
Theft and related offences	135	27%

None of these participation percentage rates in terms of the gaol population is anywhere near the 3% representation of the NSW population constituted by First Nations people. Indeed the highest participation in an area of offending (39% Breach of community based orders) is thirteen times greater than the 3% First Nations people within the NSW population. The 26% Aboriginal persons in custody is nearly nine times greater than the 3% found in the NSW general population. Because the disparity is so great, it is difficult to accept these figures represent the true situation. But assume they do – what does that say about the enormous social problem revealed by the statistics. And given this rise in the rates of Aboriginal incarceration has occurred in 34 of the past 38 years, what does it say about governments of both persuasions that have tolerated this growth[24]. In fairness some judgments of the NSW Supreme Court noted the problem of Aboriginal numbers in prison without detailing the growing trend. The Royal Commission into Aboriginal Deaths in Custody also drew federal and state governments' attention to the numbers of incarcerated Aboriginal persons[25].

Changes, including legislative changes are urgently needed

23. It is worth noting positive changes in policing in some police centres in recent times. Particular mention should be made of policing changes in Redfern and in Bourke. A few other police stations have also made efforts to reduce offending in their area through seeking better personal relations and cooperation between Aboriginal communities and police. It is crucial that leaders in Aboriginal communities participate in formulating policing policy with police in seeking to reduce Aboriginal incarceration rates.

[24] If not before, certainly by 1992 (when the Aboriginal incarceration was 8.7%) Supreme Court, Justice Wood identified with some emphasis in R v Fernando (1992) 76 A Crim R 58 at pp. 62-63 particular principles of consideration when sentencing Aboriginal offenders. In 1999 Acting Chief Justice Kirby referred to a *general concern of the community, shared by the judiciary that there are extremely high proportions of Aboriginals in prison* (then 15%). He continued: *present sentencing law does little to alleviate this problem or indeed to lessen the rate of offending."* The Acting Chief Justice also noted "…. *the usefulness of long custodial sentence for Aboriginal offenders must increasingly be called into question in the light of the Royal Commission [*into Aboriginal persons deaths in custody] *and other reports produced in recent years." R v Russell* (1999) 84 A Crim R 384 at 392. See also F.N. 2.

[25] Indeed since the Royal Commission into Aboriginal Deaths in Custody there have been numerous inquiries into the disproportionate rate of Aboriginal persons incarcerated in the criminal justice system, all coming to the same recommendations which have been largely ignored. See for instance the ALRC Pathways to Justice Report – March 2018; and the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report on Aboriginal incarceration rates and its 40 recommendations.

24. However, as noted above the acceleration rate of incarceration of Aboriginal peoples is unique and is continuing upwards. That it is unique does not mean the situation is without remedy. The decision of the Federal and State governments to engage in Closing the Gap from one in twenty-one Aboriginal males down to the NSW average of one in two hundred and forty NSW males[26] cannot be achieved under existing sentencing legislation or philosophic parameters. Frankly, if current practices and parameters are maintained the NSW government has absolutely no chance of achieving any of the very modest progress aimed for between now and 2031 or beyond.

25. Legislative and philosophic changes are not only necessary but also urgent. While politicians and parliaments fiddle and dither, whether out of fear of criticism from rating-seeking shock jocks or simply because they are bereft of ideas or lack the political will to take up ideas of the various organisations concerned about the disproportionate incarceration of First Nations peoples – Aboriginal incarceration will maintain in the current pattern of the J-curve increase. Nor should change be confined to police, courts and the prison system. Massive commitment to justice re-investment programs focused at avoidance of law breaking and police involvement at the front-end, and post-custodial rehabilitation and support at the back-end are also called for. Indeed, as it is with Corrective Services so it should also be with Justice Reinvestment. That is it should have its own Ministry within the DCJ. The medical profession has learnt the value of prevention rather than treatment – that same concept is vitally needed within the criminal justice system.

26. The NSW State Parliament's role in Closing the (Justice) Gap requires significant changes in the sentencing law bringing the sentencing law into the 21 Century. This needs to happen – and happen speedily[27]. Modification of policies around the purposes and practices related to the setting of sentences is essential. Without those fundamental changes there can be no philosophic change in sentencing outcomes. While there is still a need for custodial sentences, in the 21st Century it is generally understood the imposing of a sentence needs to happen in circumstances where the sentencers are aware of the terrible damage a term of imprisonment can, and usually does inflict upon an offender, and that gaol generally fails.

27. Notwithstanding that potential for damage, if an offence calls for incarceration punishment then so be it. However, at the moment it is impermissible for a judicial officer to turn his/her mind to the consequences of imprisonment life

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[26] The imprisonment rate for NSW men appears to be close to the Australian figure of 417 per 100,000 adult males. I have calculated on that assumption. See F.N. 4 at p. 3/11.

[27] Nicholson J, *Reconsidering traditional custodial sentencing policies and practices – current sentencing policies and practices have created a multitude of social, economic and moral problems;* Precedent – Issue 147, July/August 2018 p. 4.

and culture upon an offender; or that his/her community's welfare is actually being adversely impacted as a consequence of the offender's imprisonment[28].

28. Nor is the sentencer generally entitled to consider the damage to family or community when the imposition of a sentence takes the income earner, or the father, or the man with institutional memory of the organisation he works for, or the elder or any community member that contributes from that family or community. Only in the rarest of cases can the sentencing Court consider the impact a term of imprisonment may have upon others close to the offender.

Identifying needed changes to legislation.

29. The task of the sentencer is limited to assessing the nature of the offence, its objective seriousness, general deterrence and subjective features personal to the offender. It is assumed the public interest stops at the prison gates and does not take account of the effects upon a rural community missing a provider, a worker, a spender, and so on. In the 21st Century we should be widening our vision to the fact a sentence impacts (usually adversely) not only in the short term but also in the long term on the offender, his/her family and community. One of the purposes of sentencing should require sentencers to consider the short-term and long-term impact upon the public interest[29] in any decision to incarcerate an offender. This is particularly so in smaller communities, particularly rural communities.

30. Another factor that needs to be taken into account is a pattern of historical impacts upon persons who offend – particularly upon, although not limited to, Aboriginal persons, because their whole upbringing and life cycle is lived through the prism of an historical torrid, traumatic and unwholesome past; particularly where the cultural deficits resulting from that environment have resulted in influences predisposing a present day offender to vulnerability, which in turn exposes him/her to criminal conduct.

31. It is true this very issue was rejected by the High Court in *The Queen –v- Bugmy*[30]. The Court's view was there was no warrant in sentencing an Aboriginal offender in NSW by applying a method of analysis different from that which applies in sentencing non-Aboriginal offenders[31]. Nor, held the Court, is there any warrant to take into account the high rates of incarceration

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[28] "Locking people up may look like the solution but it simply generates further disadvantage, inequality and public disorder." Calma T, *Justice Reinvestment – Key to reducing Indigenous incarceration*, Precedent Issue 147, July/August 2018, p12 at p.13. See also '[T]here was a 'plethora of studies confirming the common-sense conclusion that prison is damaging for individuals at a psychological level, especially in the absence or rehabilitative services.' Debus B, *Jail Ruins lives without improving safety,* The Sydney Morning Herald 23 August 2019.

[29] "The expression "in the public interest" imports a judgment to be made by reference to the subject scope and purpose of the Act. *Hogan v Hinch* [2011] HCA 4 at para 60; see also para 31-32. See also *obiter* in *R v Pullen* [2018] NSWCCA 264 at [67-68] and the ultimate outcome of the appeal.

[30] *Bugmy –v- The Queen* [2013] HCA 37

[31] See F.N. 30 at para 36.

of Aboriginal people when sentencing an Aboriginal offender. The High Court noted that consideration of Aboriginal offenders' incarceration rates would cease to involve individualized justice.[32]

32. Three things need to be said in considering the High Court's comments about the rates of incarceration. Firstly, the High Court in determining the outcome of the appeal was confined solely to the judicable issues of the appeal and the material (including the Crimes (Sentencing Procedure) Act) it had before it. It did not have any of the material available to practitioners, academics or researchers, including material that has led some to conclude that it is open to believe some judges located in certain courts were tougher on sentencing Aboriginal persons than they were when sentencing non-Aboriginal persons. Secondly: the appellant's arguments were focused on changing the common law of NSW. Finally, the High Court is not a forum responsible for drafting or enacting legislation. What is sought here is legislative change.

33. Notwithstanding what the High Court held in respect of the common law of NSW, the NSW Parliament has the power to put in place legislation knowing that in so doing, Aboriginal offenders may be the only persons to gain benefit from that legislation. Indeed, the NSW Parliament has already done so by establishing Aboriginal Circle Sentencing intervention programs presided over by a Magistrate, but comprised of at least three Aboriginal persons, appointed by the Attorney General, to act as the circle sentencing group[33]. It is also possible to do so, without weakening the concept of individualised justice in sentencing[34]. Likewise legislation can be framed so as to avoid any conflict with Section 10 Racial Discrimination Act 1975 (Cth)[35]. Indeed, if there is to be equality before the law, which included equality before the courts in sentencing – then where discrimination is obvious – as in spiraling incarceration rates for one race, but none others, then surely the law, or if

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[32] Ibid.

[33] Generally called Aboriginal sentencing courts. Division 2 of Part 4 of the Criminal Procedure Act 1986 permits the Regulations to declare a program of measures for offenders as an intervention program. The Act provides the purposes of an intervention program may promote rehabilitation, respect for the law and maintenance of a just community, acceptance of accountability, reintegration into the community and encourage and facilitate appropriate remedial actions to victims of the community. Schedule 4 of the Criminal Procedure Regulation 2005 sets out all procedures governing the Circle Sentencing Intervention Program, including the creation of a Project Officer and the appointment of members of the circle sentencing group, the creation of a participating court presided over by a Magistrate and the procedures governing the Circle Sentencing program.

[34] *R v Lattouf*; Unreported? NSWCCA 12 December 1996 per Mahoney J.A. "If a sentencing process does not achieve justice it should be set aside. As I have said elsewhere: "*If justice is not individual it is nothing."*

[35] Assuming (which may not be a sound assumption when legislating in the Criminal Law) a sovereign State Parliament can offend against the Racial Discrimination Act 1975. . Inconsistency between state and commonwealth laws may also be an issue given the history of First Nations Peoples welfare and the Australian Constitution.

existing laws are inadequate the lawmakers, have a role in restoring equality before the courts.

Reform the purposes of sentencing.

34. The existing legislated purposes of sentencing for breaches of the criminal law have seen too many peoples unnecessarily incarcerated. That fact does not appear to be contested by many experienced in the criminal law, including many involved in Corrective Services. No doubt various factors have lead to higher or tougher sentences than were necessary, including the 'law and order' campaigns conducted by politicians; the impact of the unqualified, inexperienced and rating-seeking 'shock-jocks' (many of whom, privately, don't believe in high incarceration rates); poor legal representation given to too many impoverished offenders; and judges, who have forgotten they should not be involved in ridding the community of criminals[36], but rather dealing only with the judicable issues raised by the facts of the offence, circumstances of the individual case they are dealing with, and the provisions of the legislation providing jurisdiction to sentence.

35. The legislated purposes of sentencing are to be found in Section 3A of the Crimes (Sentencing Procedure) Act 1999 [CSP Act]. These purposes were introduced in 2002. The impact of these purposes seems generally to be punitive and retributive. A fair question to ask as we approach the third decade of the 21st Century is whether this is the most effective and appropriate way to reduce crime – and to deal with the overwhelming bulk of prisoners who have themselves experienced trauma, poverty, dislocation, rejection, mental health issues and vulnerability.

> **3A Purposes of Sentencing**
> The purposes for which a court may impose a sentence on an offender are as follows:
> (a) to ensure that the offender is adequately punished for the offence,
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
> (c) to protect the community from the offender,
> (d) to promote the rehabilitation of the offender,
> (e) to make the offender accountable for his or her crimes,
> (f) to denounce the conduct of the offender,
> (g) to recognise the harm done to the victim of the crime and the community.

36. The introductory words of one of the most important sections in the Crimes (Sentencing Procedure) Act [CSP Act] give no context or overview of the role of sentencing and how its purposes play out in the criminal justice system.

[36] Surely that is the job of the executive branch of government within a framework created by the legislature. See also F.N. 39 and F.N. 40 ante.

By comparison the Canadian Criminal Code introduces the various purposes of sentencing by giving an overview of what sentencing is all about:

> *The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:*

Thereafter the Canadians set out six purposes of sentencing[37] having some similarity with some of the seven purposes identified in s.3A CSP Act.

37. As to s.3A (a), the question to be asked is: Is the concept of "adequate punishment", the appropriate one? Punishment is certainly not an agent of rehabilitation. Nor is punishment an agent for identifying the causes of crime. It is not even a tool of deterrence. It is language of the 19th Century. As noted above the Canadian Code speaks of "sanctions"[38]. The impact of a word can influence the intellectual and emotional response to the meaning of an instruction. "Punishment" is more emotive than "sanction" and focuses the mind on retribution, which may have been a purpose of sentencing in the 19th Century but surely the State is no longer seeking retribution towards it wayward citizenry. Retribution is certainly not identified as one of the purposes of sentencing in s. 3A, which one would expect if retribution was intended as a purpose of sentencing.

38. Punishment or sanction – whatever the form a sentencing order takes – is an interference with an offender's honour, freedom, interests, and rights, including association rights and property rights. It may take the form of submitting to a term of imprisonment, or an intensive corrections order, or a good behaviour bond or a fine. But any form of punishment/sanction is an intrusion upon an offender's freedom and/or property. If that be so, and if rights are to be respected by the State, and surely it is in the public interest that the State do so, then that interference should be the "minimum the law permits", rather than "adequate in the eyes of the law". "Adequate" allows for flexibility in the quantum of sentence unrestricted by the concept of minimum; "minimum" requires a narrower target in quantum of sentence. More importantly "minimum" permits a quantum that may be less than a quantum that qualifies as "adequate".

39. When appeals against severity or inadequacy of sentence are considered – putting to one side errors of law or fact – the determinative factor in the sentencing appeal outcome is: "was the sentence manifestly inadequate" or "was the sentence manifestly excessive." Thus, the concept of 'adequacy' is

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[37] *Canadian Criminal Code* RSC 1985 s.718 (2).

[38] The Macquarie Dictionary defines "*punish":* to subject to penalty or to pain, loss, confinement, death, for some offence. "*Sanction"* when used in respect to the law is defined: a provision of a law enacting a penalty for disobedience.

whether the sentence fitted within a range, bordered at the lower level by 'manifestly inadequate' and at the upper end "manifestly excessive".

40. However, there are no set limits, nor could there possibly be any set limits, for "manifestly inadequate" or "manifestly excessive" in respect of any of the thousands of criminal offences that reflect antisocial criminal behaviour. But a moment's thought will reveal that 'adequate' for twin identical offences by different offenders, before different judicial officers in different locations is a real variable. And that variability can be measured by several years of incarceration without being either manifestly inadequate, or manifestly excessive.

41. If, added to the considerations listed above, is that one of the offenders is an Aboriginal person, the race issue may become a hidden part of the sentencing disparity. The race issue may be disguised as an intolerance tendency on the part of the judicial officer. If the Aboriginal person being sentenced is from a community where many of its Aboriginal persons come before the Court – say, for example, they are from the mission (an area of more intensive Aboriginal population than elsewhere in the town) a judicial officer may have developed a tendency; namely an intolerance to multiple offenders repeatedly coming from the mission location for the same offending (say domestic violence, or break and enters). The Magistrate's intolerance leads him/her to a belief that it is important for <u>them</u> (would-be offenders within the community) to get the message that the Court will not tolerated that offending, so extends the Aboriginal person's sentence against what a non-Aboriginal person might receive (my emphasis). Such a magistrate fails to recognise the distinction between the legal judicial issues between prosecutor and defendant standing for sentence raises and the executive government issues the frequency of offending within a given community raises[39].

42. This is a case of judicial officers using their sentencing powers – seeking to influence persons not before the courts, and also persons who have previously been before the courts – rationalised by the judicial officers in the name of general deterrence. It is argued judicial officers seeking to use judicial power to influence unknown persons not directly involved in litigation confined only to prosecution and offender, are using judicial power for a purpose way beyond the judicial function[40]. Putting to one side the fact that deterrence doesn't work; apart from belittling judges into pursing a hollow reality, surely, deterring, if it is to be done, is work for the executive not for the judges.

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[39] It is accepted that s.3A CSP Act sets out as a purpose of sentencing "deterrence to other persons from committing similar offences". In so doing the Parliament is requiring judicial officers when sentencing to intrude into matters that are properly the province of the Executive arm of government. That is one reason why this is an area where legislative reform is necessary.

[40] Except, of course, the law allows them – indeed requires them to do it. See s. 3A (b) "prevent crime by deterring …and other persons from committing similar offences." See also F.N.39.

43. Add to that, the fact that imposing an increase in sentence as a general deterrence through sentencing does not work (see below) and the concept of 'adequacy of punishment becomes a very amorphous but elastic concept. Frankly an "adequate" sentence allows for greater than necessary punishment and/or retribution beyond what the State should be imposing.

44. The better concept is minimal. Thus the s.3A (a) provision should read: *The purpose for which a court should impose a sentence for an offence should be to ensure that the sentence set takes into account the need to sanction the offender for his criminal conduct, but such sanction must be to the minimum extent the law allows*[41]. True, for identical twin offences, what is minimal to one judge may not be the same as to another judge. But the focus is more exact – and more demanding of thought. The range for minimal sentences would necessarily be tighter than the ranges of sentences presently are for an adequate punishment sentence. The minimum range would also be lower than the present range catering for "adequate' punishment. Not least important, a "minimum the law allows" approach is more morally sound by being more in keeping with the State's recognition of an offender's honour, rights and interests.

Deterrence – if it doesn't work, isn't it unfair to all to pretend it does?

45. As to s.3A (b), which requires judicial officers to take into account personal and general deterrence as a fact impacting upon the severity of the sentence, there is a strong case for arguing it should be repealed. In all matters, other than general deterrence – proof of a mitigating or aggravating feature is required. But no proof of any need for, or the efficacy of tougher sentences is required to establish the application of general deterrence[42]. As to personal deterrence – earlier pointed out is the fact that 90% of Aboriginal inmates on census night 2016 had known personal custody before. Clearly that 90% had not been personally deterred – nor had they responded to general deterrence[43].

46. To deter is to seek to create a fear or concern triggering doubt, or unwillingness to undertake a specified action – in this case a crime of one kind or another. What is the quantum of sentence that will act as a personal or a general deterrent? No judicial officer can identify with any precision what the accurate figure is for any offence[44]. It is handed off as: "Deterrence is one of the many factors taken into account on sentence." However, analysis of some

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[41] Power v The Queen (1974) 131 CLR 623; para 7- 10.

[42] There are occasions when judicial officers determine taking general deterrence into account is not appropriate – for example where mental illness as played an important part in the criminality. But that falls within the discretion of the sentencer.

[43] It is also interesting to note in the 2018 census that figure was 89%. See F.N. 15.

[44] General deterrence is regarded as an important factor in sentencing. See: R v Manok [2017] NSWCCA 232 at para 78-79 and R v Pulllen [2018] NCWCCA 264 at [44] both citing R v Paul Musumeci; Unreported, Court of Criminal Appeal (NSW) 30 October 1997 per Hunt CJ at CL.

Court of Criminal Appeal decisions might give some insight. That Court has overturned sentences given by courts below on the basis insufficient weight being given to general or personal deterrence. The increased sentence can vary from months to years.

47. S.3A (b) also prescribes as a purpose of sentencing the prevention of crime by deterring other persons from committing similar offences. Overwhelmingly academics – who have done the research – have with one voice cried: "General deterrence doesn't work!" Firstly, general deterrence does not address any cause of criminal offending.

48. Worse – a severer sentence caused by the application of general deterrence is a tax or levy disguised as a sentence increase, imposed upon an offender, but has no specific benefactor other than being aimed at some "other persons" who might commit similar offences[45]. But none of the "other persons" are otherwise identified or served with any copy of the sentence imposed, or have explained to them the loading of the sentence for this purpose – or in anyway approached personally with the information about the increase in sentence the offender paid to keep that other person out of trouble. Nor, if they had all that detail, would the sentence increase on the offender have the desired effect on any of them. Nor do prisoners in custody seek out earlier offenders and tell them they wish they had known about sentences earlier imposed for their offence. They don't draw the link s.3A (b) is predicated upon.

49. Of course in the moments when a crime is being contemplated, or about to be committed, there must be a range of other emotions and drivers urging upon the would-be offender the criminal action he is willingly about to participate in. Truth be told, even if they ever knew what sentences[46] had been imposed on sentenced offenders for the similar offence they were intending to commit, it is likely no consideration by the would-be offenders is given to those earlier sentenced. It was always thus – that deterrence – where it was considered – would have to compete with other drivers – some or all of which were more compelling than the possibility of detection and punishment.

50. Deterrence of other would-be offenders is predicated upon detection of the would-be offender's crime – and frankly everyone knows only a minority of criminal offending is detected. But judges are, it is argued, required to assume a high if not perfect rate of detection in respect of the offence they are dealing with when applying both personal and general deterrence. Otherwise, judicial officers are being asked to apply a weight to a sentence component that can

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[45] See R v Radich [1954] NZLR 86 applied in R v Rusby [1997] NSWLR 594 "[Offenders] will meet with severe punishment" – as distinct from "adequate" or "minimum extent".

[46] Two aspects of the sentence – the fact that a sentence of imprisonment had been imposed, and the quantum of the imprisonment (including non-parole and parole periods) would seem to be what the legislators and the judicial officers were anticipating the would-be offenders took into account as a deterrence.

only ever impact upon the tiniest minority of those engaged in criminal conduct.

51. So ineffective is general deterrence that in tough times – however an offender may define and experience tough times – his return to full-time custody may be a deliberate choice. Rather than sleeping rough on cold and wet nights, or wandering around garbage bins looking for eatable scraps, or enduring sustained loneliness, or hearing voices that won't be silenced, custody may seem a sensible – or the only solution. This is particularly so for a cohort of men who have spent more time in custody than out of it –and that includes a significant number of Aboriginal men. So much for personal deterrence! Here is another area ripe for Justice Reinvestment.

52. Increasing the severity of a sentence on account of achieving the purpose of general deterrence – even when aimed at other persons likely to commit similar offences – is immoral, illogical and unachievable. Arguably it is also inconsistent with s.3A (a) setting a sentence that is "adequate". It is certainly inconsistent with "the minimum extent the law allows". Section 3A (b) should be abandoned as a purpose of sentencing[47]; that could easily be done by repealing that section. Adding a tariff to one individual's sentence on the remote and highly unlikely basis of deterring other individuals from committing similar offences is an egregious inconsistency with the concept of individualised justice. True there may be cases where an individual standing for sentence is deemed an unacceptable vehicle for general deterrence – but the effect of that decision is to confine all matters taken into account in that sentence as being only matters limited to individualised justice. Consideration of other party's interests, or potential conduct because of the application of general deterrence is excluded from consideration.

53. It is argued the very existence of a criminal justice system – focusing as it does on prohibiting criminal conduct; detecting and arresting persons who engage in criminal conduct, placing those accused of engaging in criminal conduct before the courts; sanctioning those who are guilty of engaging in criminal conduct; and supervising through custody, parole and community service orders those sanctioned for engaging in criminal conduct – is the true source of deterrence in respect of would-be offenders. While a specific custodial sentence, correction order or fine given to an offender for this offence or some other offence – apart from the fact it represents the criminal justice system at work – makes no personal impact upon another would-be offender about to engage in criminal conduct for reasons and drivers personal to him.

[47] See also F.N 39.

Protection of community and offender responsibility.

54. S. 3A (c) stipulates as one of the purpose of sentencing: *to protect the community from the offender*. Not all offenders present to the court as a threat to the community generally, or specifically their own community. True there are offenders – such as those engaged in Break and Enters, those with extensive records of offending, and those with sociopathic mental health issues who may present as a threat to their community. The Canadian purpose of sentencing geared at community protection namely – *to separate offenders from society, where necessary*[48] (my emphasis) is to be preferred. The phrase "where necessary" raises an issue of whether the offender's separation from the community is necessary or in the public interest. It also encourages the sentencer to consider whether some sentencing order other than incarceration can achieve the requisite level of community protection.

55. The S. 3A (e) purpose of sentencing is expressed thus: "*to make the offender accountable for his actions"*. In about 80% of cases offenders plead guilty to their offending conduct. In those circumstances those who are genuinely acknowledging their guilt are taking a step towards being accountable for their actions. Many offenders have taken other steps – attending rehabilitation centres is a form of accountability; recompensing a victim of theft is also a form of accountability; likewise accepting responsibility for the offending conduct; expressions of genuine regret are all forms of taking accountability. What is not made clear in the section is that the imposition of punishment, particularly incarceration, does not make an offender accountable – it simply makes him punished – a purpose already identified in s.3A (a). Again, the Canadian form or words for making an offender recognise and accept responsibility for the antisocial nature of his offending and initiating action to repair the offence is preferable. The Canadian Code formulation is "*to promote a sense of responsibility in offenders, and acknowledgment of the harm done to the victims and to the community*[49].

Recognition of cultural, unique and systemic factors needed.

56. Given the disproportionate representation of Aboriginal and Torres Strait Islanders within the incarcerated population – and the present restraints on sentencers considering wider issues of sentencing than "objective criminality" and "subjective circumstances" the purposes of sentencing should permit consideration be given to antecedent, remote but powerful and indirect causes of criminal offending that play a role, albeit indirectly, in the person standing for sentencing being before a court.

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[48] *Canadian Criminal Code* RSC 1985 s.718 (2)(c). See also Fernandez L. *Sentencing Aboriginal Offenders*, Legal Aid Commission of NSW March 2004, www.legalaid.nsw.gov.au_data/assets/pdf-file/0020/6491/Sentencing-Aboriginal-Offenders.pdf .

[49] See F.N. 33 and in particular Division 2 of Part 4 of the Criminal Procedure Act 1986 where the purposes of intervention programs are set out. Nothing like that appears in 3A Crimes (Sentencing Procedure) Act where it set out purposes of sentencing.

57. Section 3A of the CSP Act should be amended to include a sub-section (h) *to recognise any social, cultural, unique, or systemic background factors that may, or may not, have been experienced by the offender that precedes the commission of the offence, but may have played a part in bringing the offender before the court.* Such a purpose would permit the sentencing court to consider matters such as historical dislocation (Aboriginal persons, migrants groups from war-torn zones, members of a particular religious group) and matters relevant to a particular culture whether arising from membership of a race or specific group (refugees for example) or a group (those with mental health issues) who are disproportionately represented within the prison system.

58. These considerations may raise public interest issues as to whether a sentence of incarceration should be imposed, and if so whether these facts play any part in shortening the full-time custodial period of the sentence.

59. To be clear section 3A should be amended to read:

3A Purposes of sentencing

The fundamental purpose of sentencing is, along with crime prevention initiatives, to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives*:*

a) To ensure that the sentence set takes into account the need to sanction the offender for his criminal conduct, but such sanction must be to the minimum extent the law allows;
b) repealed;
c) to separate, only where necessary, the offender from society;
d) to promote the rehabilitation of the offender;
e) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to the victims and to the community*;*
f) to denounce the conduct of the offender;
g) to recognise the harm done to the victim and if applicable to the community;
h) to recognise any social, cultural, unique, or systemic background factors that may, or may not, have been experienced by the offender that precedes the commission of the offence, but may have played a part in bringing the offender before the court.

Taking account of the public interest in the community.

60. A criminal justice system can clearly be of benefit to the communities it serves. That is not always so. One may look to authoritarian countries where a criminal justice system can be harnessed for corrupt purposes. Some would have it that in NSW the criminal justice system is designed to work for the

benefit of those living in the State. On the other hand, however, the truth is that aspects of the NSW criminal justice system can hardly be described as beneficial. Prisons, while necessary, are over-used with long lasting adverse consequences on those who have unnecessarily been required to endure a prison term. Many First Nations people among the 26% of NSW prisoners would be included among those unnecessarily sent to serve, nay submit to prison life and culture.

61. The Canadians sought to identify the benefits and purposes of its criminal justice system when setting out its purposes of sentencing. Those benefits included respect for the law and maintenance of a just, peaceful and safe society. It is a contradiction in terms to expect those unnecessarily imprisoned to respect the law, or those who played a part in enforcing the laws in a way that treated them unjustly.

62. The principal players within the NSW criminal justice system are the lawmakers, the police through their policing; the legal system of courts and legal representatives for the parties appearing before the courts; those involved in administering the orders of the court post-sentencing; and those involved in rehabilitation post-release from prison. At each level of participation in the criminal justice system the action undertaken by the players in each compartment needs to be in the public interest if the benefits of the system are to be achieved. For too long the focus of public interest by police, courts and legal representatives stopped at the prison gate. The processes of the criminal justice system stop long after the prison gate is shut on the incoming prisoner; and long after the gate is later opened to release the prisoner who has served his term. At every stage – investigation, arrest, trial, sentence, sanction, post-sanction there are public interest issues at play. Consideration of the public interest by players within the criminal justice system should be focused on the impact made by the entirety of those involved in criminal justice.

63. Any close examination of the NSW criminal justice system would show that in reality it serves numerous metropolitan, rural and remote communities. That fact is still recognised by police structure set-up throughout the State, by the District and Local Courts. These courts are allocated communities in which they serve. That fragmentation of practice continues to today. Police likewise serve communities. Reference has already been made above to policing practices in Bourke and Redfern. Major towns have their own police stations. Remote areas are also allocated police stations tasked with answering their needs. Many communities have their own version of Neighbour Watch. Indeed, while it could do much better, many of the Corrective Service Correctional Centres are located in communities where their prisoners come from.

64. It is argued particularly, when the court imposes the most serious sanction the law provides, namely imprisonment, that it is incumbent upon the court to consider the public interest of the particular community, namely how can the community that court is located in be best served by the manner in which that sentence of imprisonment is executed. That is not to say, the court ignores its NSW settings – but rather within that setting considers the local public interest to assess whether and how through the court's part in the criminal justice system that interest can be advanced.

65. Section 5 of the CSP Act provides for the imposition of imprisonment as a sentencing order. The first two sub-sections are of relevance:

> **5. Penalties of Imprisonment**
>
> (1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.
>
> (2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender and make a record of its reasons for so doing, including:
>
> (a) its reasons for deciding that no penalty other than imprisonment is appropriate, and
>
> (b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).

66. It would appear that sub-section 2 is aimed at discouraging the imposition of sentences of six months or less unless the reasons for making an imprisonment order will withstand scrutiny, particularly bearing in mind there may be available intervention or other programs focused on rehabilitation. The tension raised by the section for a sentencer's consideration is whether short sentences really serve the public interest when other options may be available. Even so, in March 2018, 343 persons (169 Indigenous persons – 49%) were sentenced to aggregate prison terms of less than 6 months; 420 (146 Indigenous persons – 34%) to prison terms of less than 9 months; and 478 (144 Indigenous persons – 30%) to prison terms of less than a year[50].

67. The amendments in 2017 to the CSP Act sponsored by Attorney General Mark Speakman S.C. introduced a new framework to sentences of imprisonment. In particular where a sentence imprisonment for 2 years or less[51] or an aggregate sentence of 3 years or less was imposed, the sentence's impact upon the

[50] See F.N. 6 at p.7 and p.23.

[51] In March 2018 that figure was 1916 prisoners (672 Indigenous – 35%) – see F.N. 6 at p.7 and p.23.

community was of public interest because of new provisions of non-custodial options in respect of such a sentence, even though it remained a sentence of imprisonment. In the second reading speech the Attorney General said:

> The new section 66 of the *Crimes (Sentencing Procedure) Act* will make community safety the paramount consideration when imposing an intensive correction order on offenders whose conduct would otherwise require them to serve a term of imprisonment. Community safety is not just about incarceration. *Imprisonment under two years is commonly not effective at bringing about medium-to-long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this*. That is why new section 66 requires the sentencing court to assess whether imposing an intensive correction order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.[52] (My emphasis).

The last two sentences of that citation make clear the Attorney General was focused upon a longer term public interest than one stopping at the prison gate.

68. The Court of Criminal Appeal categorized this aspect of the amendments thus:

> The result of these amendments is that in case where an offender's prospects of rehabilitation are high and where their risk of reoffending will be better managed in the community, an ICO (intensive correction order) will be available, even if it may not have been under the old scheme. The new scheme makes community safety the paramount consideration. In some cases, this will be best achieved through incarceration. That will no doubt be the case where a person presents a serious risk to the community. In other cases however, community protection may be best served by ensuring that an offender avoids gaol. *As the second reading speech makes plain, evidence shows that supervision within the community is more effective at facilitating medium and long term behavioural change, particularly when it is combined with stable employment and treatment programs*.[53] (My emphasis)

69. Setting a sentence of imprisonment to be served by way of full-time incarceration is a court's response to the purposes of sentencing set out in s.3A and an application of the test posed in s.5 CSP Act. The Canadian Supreme Court in what might be considered a response to a Canadian court's consideration of the purposes of sentencing and a consideration of a sentence of imprisonment had this to say in respect of aboriginal offenders:

> In this case, of course, we are dealing with factors that must be considered by a judge when sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors <u>which may have played a part in bringing the particular offender before the courts</u>. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime

[52] NSW, *Hansard,* Legislative Assembly, 11 October 2011 10:12am (Mark Speakman SC, Attorney General, Second Reading Speech).
[53] R v Pullen; [2018] NSWCCA 264 at para. 89.

> in a sense that may be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.[54] (My emphasis)

While the Canadian Supreme Court intended to confined its comments to aboriginal offenders, if "*unique and systemic"* background factors plays a part in bringing any offender before the court, that offender, regardless of race, should be entitled to have the same considerations made at his sentencing hearing.

70. It is important the issue of the public interest be incorporated into s.5 CPS Act. It is argued sub-section 1 of s.5 Penalties of Imprisonment be amended. The proposed amendment would be:

> **5. Penalties of Imprisonment**
>
> (1) (a) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.
>
> (b) A court must not order that a sentence of imprisonment be served by way of full-time incarceration unless satisfied that the long-term public interest in having the offender serve a period of incarceration is greater than any other penalty.
>
> (c) When determining the greater public interest, the court is to consider whether any unique and systemic background matters played any part in bring the offender before the court; if so, the court is to consider these matters in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member.

Conclusion

71. If the current forces, including the sentencing legislation, continue to have sway, chances of Closing the Gap in Indigenous incarceration are doomed to failure. Keeping the same sentencing regime is never going to impact upon the Gap other than to do what its done for the last 38 years – add small yearly increases and continue widening the Gap. Leadership by the Parliament is desperately needed.

72. All compartments constituting the NSW criminal justice system - police, courts and post-sentencing operatives in custody and community corrections will need to undertake significant changes if the present monumental Gap in Indigenous persons' incarceration rates is to be honed back to the lower levels operating in the last century. The changes advocated above will not be confined only to Closing the Gap; but also other vulnerable groups will benefit.

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[54] *R v Gladue*, [1999] SCR 688 at para 69.

73. A new component – the justice reinvestment component – needs to join the criminal justice system with a budget comparable to the other operatives in the system so it can make its mark. This means serious and significant resources focused on community-based treatment, managed and staffed by those culturally aware and skilled in rehabilitation programs, strategies and skilled technique are beyond essential[55]. Funds used to seed reduced incarceration and funds saved by reduced incarceration must be dedicated to justice reinvestment as is being done in several of the States (including many of the so-called conservative States) in the United States. Justice Reinvestment resources need to be well funded so that case-management becomes manageable rather than be over-loaded, as is the present situation. As is now so common in the medical sphere, prevention must be the primary aim and purpose of the criminal justice system. Prevention that prevents offending, prevention that prevents re-offending, and prevention that leads to respect for the law, maintenance of peace, community growth and better welfare are the primary purposes of justice reinvestment. There is a role for police to play in prevention going beyond profiling to personal social and therapeutic interaction with likely offenders and vulnerable peoples.

74. The vast scope of Justice Reinvestment needs to be evaluated. Frankly the scope is so great that it should have its own Minister and Budget. Post codes marked as hot spots for violation of criminal laws, areas of domestic violence, areas of juvenile misbehavior need to be identified and appropriate supports dedicated to those areas in the hope of crime prevention. Welfare and social services should be harnessed; safe houses – particularly for would-be offenders need to be available so that (usually) he can leave the premises before he becomes physically aggressive and starts belting the wall, or the family. Likewise safe places for the victims – and social workers and welfare workers working with both groups. Overseas strategies should be harnessed where they are successful. Equally other high incident offending should be identified and again analysed for purposes of setting up prevention strategies.

75. Likewise servicing non-custodial options should be strengthened. Currently the present work force is swamped with numbers, unprepared, under resourced and likely unsupported by qualified supervision. Continuity of contact between Community Corrections staff and clients is an issue, particularly in drive-in drive-out regions.

76. Post-custodial support is weak. Currently there are only post-custodial 58 beds for those homeless as well as vulnerable to recidivism – post-release rehabilitation programs apart from parole supervision are only funded for

[55] It should not be thought Parliament should only confine reform to justice reinvestment. For example, legislative changes to the drug laws such as those undertaken by Portugal should also be considered as modernising the law by bringing it to reflect 21Century values.

3months. No long term sentenced prisoner can assimilate successfully into society post-custody in just 3 months. Those post custodial offenders who are returned to the community and subject to parole are on a sausage-factory line through an overloaded parole system.

77. Accommodation – so crucial to factor where recidivism is a risk – is at a premium – and little attention is given after moving into supplied government accommodation to the first six to ten weeks where a recently released offender needs to adjust to living separately and managing for himself.

78. In this presentation the changes urged are changes to the statute law. That, of course is the work of Parliament. Without changes to the existing legislative framework, courts – where decisions are made and orders given for others in the criminal justice system to carry out – those others, as well as the judges and lawyers, will have little to work with. Precedent will bind sentencing and sentencing appeals – and those four decades of a flawed system that has produced a widening of the Gap will continue to operate to such an extent that no one can argue with the words from the *Uluru Statement from the Heart* -

We are the most incarcerated people on the planet.