

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

Inquiry Into The Incarceration Rate of Aboriginal and Torres Strait Islander Peoples

As an Aboriginal elder with professional and academic experience in the application of the law as it relates to Aboriginal and Torres Strait Islander people I provide this submission to the ALRC Inquiry. My experience includes articles and publications on Aboriginal Women and the Law, Indigenous Deaths in Custody and Indigenous Cultural Guide for ACT Law Practitioners. I have instigated or been instrumental in the establishment of three circle sentencing courts, including drafting practise directions and training the panel members/elders. As a current member of the Galambany Circle Sentencing Court in the ACT I bring insights and examples of how cultural competency benefits the application of the law. Furthermore my current doctoral research in neuroscience has enabled a better understanding of the unconscious biases that influence the decision-making of those in the criminal law system.

I make this submission in the firm belief that any law reforms will be at best tinkering with a system that is itself inherently flawed. As Einstein said 'you don't solve a problem by using the same thinking [that was] used to create it'. In his book, *Unfair: The New Science Of Criminal Injustice*¹, Associate Professor of Law Adam Benforado looks at the neuroscience that informs the US criminal law system which has many similarities with Australia. His research reveals that not only do race, colour and class have a tremendous impact on access to justice, issues such as the life experience of judges, prosecutors or jury members even their fatigue level can mean the difference between freedom and incarceration for those caught up in the system.

The broad discretion whether or not to arrest, charge, convict and/or incarcerate coupled with an apparent lack of awareness by those in authority about how their 'thinking' actually works, means that little if anything will change. And if history is any indicator, there will be a pushback and things will actually get worse. As Benforado urges, *'I am asking that we rely much less on hunches, ... I want judges to give up this notion that they're infallible, that their memories work the way they think their memories work, that they make good calls based on objective factors. I think we need to control for our human limitations.'*

Knowing how little control we have over the many automatic processes in our brains, directives to or not to take certain things into consideration when making decisions are nonsensical. Knowledge and understanding of how these influence our decisions, (e.g. determining a person's in-group within 50 milliseconds based on their facial features significantly influences how we perceive all other information about the person) is the most likely way to lower Indigenous incarceration rates and eliminate the unfairness within the criminal law system.

Biases that are developed beyond our conscious awareness from pre-birth throughout our lives hijack the cognitive processes and as Benforado points to, issues around judicial bias arise. Not just the fact that implicit racial bias exists, but also the particular way that the homogeneity of those tasked with deciding the fates of the accused manifests. *'The worst possible thing is when everyone is biased and everyone is biased in the same way. ... That's a problem because all of their biases are going to tend to a line. And that's going to be exacerbated by the fact that our legal system and all of our laws ... have been*

¹ Benforado, 2015

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developed by older, white, highly educated men....[so we need] efforts to ensure a diverse set of judges, that's another way to get at this problem of bias.' (See ATTACHMENT A).

I therefore offer the following comments in response to the ALRC Inquiry's 'Proposals and Questions', in light of the above. For instance:

2. Bail and Remand Population

While the intention for other jurisdictions to adopt provisions similar to Victoria's is reasonable, the priority for 'community safety' is problematic, given that what constitutes 'safety' is subject to the perceptions of bail authorities.

The test for adopting the provisions should be whether they have had a positive impact on Aboriginal people receiving bail; the additional effort and resources required to convince the court that the special provisions apply in their case (and the ability of services to provide them); and in the long term, a reduction in incarceration rates (given that being remanded in custody is an indicator of likelihood of further imprisonment). Unfortunately present statistics shows otherwise, that many good intentions it is the way they are applied that is the crucial factor.

Peak and local Aboriginal and Torres Strait Islander organisations currently work with government agencies to provide a range of services. The lack of adequate resources and funding however means that programs cannot achieve their potential and are often the first to be cut when fiscal management becomes government priority. Justice re-investment is required in such options as bail houses (to overcome problems with accommodation) and other factors that reduce the chance of Aboriginal and Torres Strait Islander offenders receiving bail. The most effective are those that offer a suite of services, including programs that address an offender's homelessness and/or unemployment.

3 Sentencing and Aboriginality

The experience for some Aboriginal and Torres Strait Islander offenders is for courts to include 'cultural factors' in their deliberations, even though their exposure to culture has been severed by colonisation. The provision for **Gladue type reports**² that properly reflect the experience of Aboriginal or Torres Strait Islander offenders as colonised peoples subject to assumptions based on ignorance and bias, is clearly warranted. This should be a sentencing factor embedded in legislation requiring courts to ensure that all matters affecting Aboriginal or Torres Strait Islander people are properly taken into consideration.

These reports need to be prepared by specialists in psychology and 'Aboriginal history', looking at the particular way trans-generational and/or post traumatic stress has contributed to so called offending behaviour/s. They would also serve an educational role for courts to understand the unique historical and contemporary position of Aboriginal and Torres Strait Islander Australians and the impact on individual defendants.

4. Sentencing options

² From R. v. Gladue, [1999] 1 S.C.R. 688. A type of pre-sentence or bail hearing report that Canadian courts can use when considering an offender of Aboriginal background. (See also R. v. Ipeelee, 2012 SCC 13)

Imprisonment disconnects offenders from family, friends and society and is therefore counterproductive to preventing further crime. Short term incarceration is especially so as a deterrent, and likely to not only impact on individuals long term, but also on future court decisions (e.g. by taking records of imprisonment into consideration – 'a short one didn't work so let's give them a longer one').

It should be noted also at this point that the ACT has the most flexible sentencing options generally of all jurisdictions while at the same time has one of the highest incarceration rates of Aboriginal people. The abolition of all sentences under six months should be considered a priority, with resources then used for suitable community based options that actually lessen the likelihood of re-offending.

5. Prison, parole and unsupervised release

There are a number of short term educational and personal development programs that could be provided to Aboriginal and Torres Strait Islander remandees or those with short-term prison sentences. Indeed it would be advantageous to provide inmates with opportunities to engage their brains, practise mindfulness and meditation to counter depression and anxiety and so on. The ongoing feelings of rejection, boredom and uselessness that may arise as a result of even short-term incarceration will be lessened somewhat.

Current statistics reveal that Aboriginal women present particular and unique challenges to the systems that deal with them. Interaction with the criminal justice and related systems occurs in a variety of ways as victims of crime, perpetrators of crime, and increasingly at the coalface of the intrusion of the child protection system as a result of being victims and offenders. Emphasis on self-esteem and life skills to build confidence and reject labels of disadvantage and poor character are strongly recommended for long or short term inmates.

6 Fines and driver licenses

Imprisoning those who are unable to pay fines due to hardship rather than assist them find paid employment or working off through community service order type arrangements is economically unsound apart from the other negative outcomes. It makes sense to provide someone who hasn't a license with the means to acquire one, rather than fining them and conceivably reducing their chances.

The notion that some words are inherently bad or offensive therefore deserving of criminal sanction is unreasonable in modern society. It is impossible to justify offensive language remaining a criminal offence in any jurisdiction, particularly for Aboriginal and Torres Strait Islander people who have long endured so called offensive language and racial vilification.

Other opportunities exist to provide alternatives to court ordered fines with some fines having no time to pay and others capped or removed altogether where there is no demonstrated benefit. The NSW Work and Development Orders can be adapted to suit remote and rural areas as well as to link with other existing initiatives in individual jurisdictions.

13. Justice Re-investment

At present, there are a number of trials of justice re-investment in different jurisdictions, although they have found additional funds while expenditure on arresting and incarcerating people remains constant or is growing. Trial sites are carefully selected so as not to impact local businesses whose profits depend on maximum incarceration rates. However if jurisdictions are serious about tackling offending/imprisonment rates notwithstanding such vested interests, there are a number of successful approaches that only require leadership by government to transfer funds from policing and prisons.

For instance, nearly fifteen years ago, Portugal had one of the worst drug problems in Europe. They had tried a drug war, and the problem just kept getting worse. So they decided to do something radically different. They resolved to decriminalise all drugs, and transfer all the money they used to spend on arresting and jailing drug addicts, and spend it instead on reconnecting them to their own feelings, and to the wider society. The most crucial step was to provide secure housing, and subsidised jobs so they have a purpose in life, and something to get out of bed for. They are helped, in warm and welcoming clinics, to learn how to reconnect with their feelings, after years of trauma and stunning them into silence with drugs. An independent study by the British Journal of Criminology found that since total decriminalisation, injecting drug use is down by 50 percent.

There is a big difference between safety and peace. Safety is kind of like a surface cleanliness where outward behaviour is the most important thing, like a city that brags about how safe and clean its streets are, meanwhile the jails are filled with the homeless and the poor and the mentally ill. That's very different from a city that is peaceful, where social programs address poverty and mental illness, where housing is provided for those without, and where crime rates are low because of civil community [based] policing.

Put simply, safe communities are not necessarily peaceful, relying on hardware solutions (police, imprisonment etc) to 'keep the peace,' whereas a peaceful community is always safe. It is important therefore that the advocates of safety do not hijack the justice re-investment discussion which is premised on developing peaceful communities.

Overcoming in-group biases

In-group bias is not a result of a modulation of a single brain region. Rather, it develops as a result of a modulation of the neural correlates involved in a specific task. Large networks, such as those involved in Theory of Mind³, perception– action coupling⁴, face perception⁵ and empathy⁶ all seem to be modulated by group membership. These biases seem to happen implicitly⁷, however biases in perceptions and emotions can also be modulated by exerting cognitive control.⁸

The fact that cognitive expertise can even modulate basic emotions involved in affective empathy suggests that the more people become aware of their implicit racial biases, the more they will be able to regulate them. By becoming more aware that subtle modulations in social categorization, action perception, empathy and face perception can lead to in-group bias, we can in turn teach ourselves and others to recognise and control them through our executive functions so that we can create a more egalitarian society.

These insights also have implications for cultural and developmental differences between individuals. For example, people in cultures that score high on *vertical collectivism* see themselves as part of the collective but *accept inequalities within the group*, while people in cultures that score high on *horizontal collectivism* also see themselves as part of the collective but see *all members of the collective the same*⁹. Therefore it is likely that explicit and implicit neural correlates involved in perceiving others will be influenced by the cultural environment. In some cultures negative attitudes toward some individuals or out-groups might be more socially acceptable than in others, which would in turn modulate the individual's executive control over her/his in-group biases.

Developmental differences can also influence the neural correlates involved in group membership perception. **For example, when a child grows up in a family that has strong negative attitudes toward a certain group it will be difficult to inhibit these implicit negative attitudes in adulthood.** In either case neuroplasticity, although less than in children, exists in adults so that cultural and developmental differences that are maladapted to the environment can still be modulated by new experiences and re-categorization¹⁰.

Other particularly relevant biases in the administration of 'justice' include:

³ Carrington and Bailey, 2008; Van Overwalle and Baetens, 2009; Bzdok et al., 2012

⁴ Molenberghs et al., 2009; Van Overwalle and Baetens, 2009; Molenberghs et al., 2012a

⁵ Fusar-Poli et al., 2009

⁶ Fan et al., 2011; Bzdok et al., 2012

⁷ Cunningham et al., 2004; Xu et al., 2009; Molenberghs et al., 2012b

⁸ Richeson et al., 2003; Cunningham et al., 2004

⁹ Singelis et al., 1995

¹⁰ Cheng et al., 2007; Van Bavel et al., 2008; Decety et al., 2010

- **The Above-average Effect:** People evaluate themselves more positively than they evaluate most other people. Individuals will focus on the distinctiveness of their in-group, which can lead to in-group bias, and the perception of having a higher status compared to the out-group. This bias in turn will lead individuals to have a positive view of themselves as members of a higher status.
- **The Truth Illusion:** Where repeated exposure to a message makes it familiar and because of the way our brains work, it seems true as familiar things require less effort to process and that feeling of ease unconsciously signals truth.
- **Confirmation Bias:** The misconception that our opinions are the result of years of rational, objective analysis, when really they are the result of years of paying attention to information that confirms what we believe while ignoring information that challenges our preconceived notions.
- **The Validity Illusion:** When it is difficult to shake a person's belief in their own powers of prediction, or in the validity of the tools they use to make decisions, even when those tools are shown to have no predictive power.
- **The Anchoring Effect:** The misconception that we we rationally analyse all factors before making a choice or determining value when the truth is that our first perception lingers in the mind, affecting later perceptions and decisions.