**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO THE INCARCERATION RATE OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES**

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**Abstract**

This submission discusses the over-representation of Aboriginal and Torres Strait Islanders (ATSI) in our prison system, some of the reasons behind this and some measures that can be taken to possibly reduce this overwhelming figure. Aboriginal people have been arrested and imprisoned at an increased rate since the findings of the Royal Commission into Aboriginal Deaths in Custody. There has also been no reduction in the numbers of Aboriginal people arrested and imprisoned for less serious offences.

There is a focus in this submission on the offence of disorderly conduct and how this charge and other minor offences contribute to the rate of ATSI offending. An observation will be made on how the application of the law against disorderly conduct conflicts with the Rule of Law. My discussion will expand into a consideration on how the lack of alternatives to incarceration sees Indigenous people being over-represented in prison statistic, many only on relatively trivial charges. This submission is focussed only on the jurisdiction of Western Australia.

**Introduction**

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) yielded not only shocking statistics on Indigenous deaths in custody, but also produced a lot of incredibly important data on Indigenous offending and involvement in the criminal justice system, that had not been so thoroughly gathered before. The 1996 report that followed up, referred to throughout this submission, found that very few of the requirements recommended in the Royal Commission were implemented appropriately, and that Indigenous people were still drastically over-represented in prisons.[[1]](#footnote-1) In the early nineties Western Australia had the worst rates of over-representation, with Indigenous people being 67.9 times more likely to be arrested than non-Indigenous people.[[2]](#footnote-2)

It has now been a quarter of a century since these recommendations were made, and the national Aboriginal imprisonment rates have doubled.[[3]](#footnote-3) Western Australia holds the second highest disaggregated jailing rate in the world, a close second to the incarceration of African Americans in the United States.[[4]](#footnote-4) Western Australia’s prisons are over capacity.

This is obviously not a simple problem, there is no one cause or solution. The Honourable Wayne Martin CJ expressed the issue concisely:

The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police… When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial,  and if they go to trial, they are much more likely to be convicted… they are much more likely to be imprisoned… and at the end of their term of imprisonment they are much less likely to get parole.[[5]](#footnote-5)

The high rates of offending and incarceration is directly related to the dysfunctional environments in which people live.[[6]](#footnote-6) This however is not the subject of this submission, merely a nod to the context of the more specific discussion to follow.

**Trivial arrests**

There is a persistent argument from Aboriginal proponents and legal experts that Aboriginal people are treated differently for trivial offences. Such offences include failure to appear in court, unpaid fines, breach of order or justice procedures and minor driving offences.[[7]](#footnote-7) In contrast, Aboriginal people are underrepresented in more serious offences such as homicide, sexual assault, robbery and drug offences.[[8]](#footnote-8)

There were many recommendations from the report that highlighted the need for arresting and charging someone to be used as a last resort.[[9]](#footnote-9) This is an obvious, common sense approach to reducing incarceration numbers.

**Disorderly Conduct**

**The offence of disorderly conducts is an example of a relatively minor offence that is seeing Aboriginal people being arrested and charged at disproportionate rates. The offence is described as using insulting, offensive or threatening language, or to behave in an insulting, offensive or threatening manner.**[[10]](#footnote-10) **This disorderly behavior must take place in a public place or in a police station.**[[11]](#footnote-11) **It is considered a less serious summary offence, and to be found guilty means to be liable to a fine up to $6000.**

**It was a recommendation of the RCIADIC that offensive language charges in circumstances of interventions should not be occasion for arrest or charge.**[[12]](#footnote-12) **However, charges for offensive language and other public order offences such as disorderly conduct are still incredibly frequent despite claims that Western Australia had fully implemented this recommendation.**[[13]](#footnote-13) **It has been suggested by the Western Australian Aboriginal Legal Services that Indigenous people are often stopped and questioned by police, who may make a derogatory or inflammatory remark, and then that person is arrested for disorderly conduct (or a like charge) upon reaction to the remark.**[[14]](#footnote-14) **The charge of disorderly conduct is not infrequently accompanied with other minor charges of resisting arrest or assaulting a police officer (occasioning no harm), which results in multiple charges being received in one incident where perhaps none were necessary. Peter Collins, Legal Director of Aboriginal Legal Services in Western Australia (ALSWA) expressed the reality of this type of incident:**

Every day of the week we act for Aboriginal people who’ve been charged with disorderly conduct. Their crime: to swear at the police… Often they’re drunk or affected by drugs or both, or they’ve got a mental illness or they’re homeless… But it seems to me the only people in this day and age who are offended by the use of the F word and the C word are police. And so these [Aboriginal] people are hauled before the courts for these incredibly trivial offences.[[15]](#footnote-15)

Disorderly conduct is an example of an offence that seems to be aimed more often at Indigenous people and therefore contributes to their disproportionate rate of offending. Dr Brian Steel, restorative justice researcher at Murdoch University said ‘in all my years of research in criminal justice, I can tell you it would be very difficult to find a white person charged with shouting or swearing.’[[16]](#footnote-16)

**Rule of Law**

The offence of disorderly conduct does not itself conflict with the Rule of Law, but its seemingly disproportionate application to ATSI people is an issue. One crucial element of the Rule of Law is that the process by which the law is administered and enforced is fair. Being taken into custody for raising your voice does not seem ‘fair’ in the simplest sense of the word. Compound this with the fact that Aboriginal people are much less likely to receive bail due to requirement to have stable accommodation, notwithstanding outstanding fines and warrants, and it becomes clear how a minor misdemeanour can be significantly life-altering for an Indigenous person. Another essential element of the Rule of Law is that the laws are applied evenly. We know from the data that Indigenous people are more likely to be imprisoned for good order offences such as disorderly conduct. [[17]](#footnote-17) It seems inconceivable that such a small population of people are committing drastically more offences of this sort. As explained above there is strong evidence that Indigenous people are (subconsciously or not) targeted for this type of behaviour, which clearly breaches the Rule of Law.

**Alternatives to Imprisonment**

The RCIACIC came to the conclusion that too many Indigenous people are in custody too often, and made many recommendations to address this fact.[[18]](#footnote-18)

When it comes to avoiding imprisonment, rehabilitation is an overarching consideration in the sentencing of young offenders, whereas for adults it is only one of many considerations and is not given as much weight.[[19]](#footnote-19) Where the primary objective of sentencing is to ensure the offender desists from future crime, there is no evidence that imprisonment achieves that more effectively than alternative community-based punishments.[[20]](#footnote-20) In fact studies on the comparative impact of different forms of punishment tend to suggest that serving terms of incarceration makes it harder for offenders to adjust to life back in the community after release, and may contribute to recidivism.[[21]](#footnote-21)

Under the relevant legislation, criminal courts in Western Australia have many alternatives to incarceration available to them, including probation, good behaviour bonds, fines, suspended custodial sentences, sentence deferrals and orders for community service.[[22]](#footnote-22) There are also more creative discretionary options (other ‘diversion’ methods) such as mediation, family group conferencing, circle sentencing and community sentencing panels which have been proven to be especially suited to Indigenous people found guilty of less serious offences. Magistrates sentencing summary crimes have the chance to engage government agencies and service providers to assist people in their early interactions with the justice system.[[23]](#footnote-23) Rehabilitation programs for Indigenous offenders are especially beneficial due to the flow-on effect they can have in their community. Upon successful completion they are no longer contributing to the dysfunction in their community and may even be in a position of education and empowerment to combat it.[[24]](#footnote-24) Here in Western Australia it was found that 30 percent of offenders who completed an Indigenous Diversion Program (or some supervised treatment regime) re-offended in the twelve month period following the program, compared with a 87 percent rate of recidivism of offenders who did not complete any program.[[25]](#footnote-25) This level of diversion requires adequate numbers of prison programs, ideally pre-sentencing programs, which are readily available in regional areas as well as in major cities. If rates of imprisonment are to be reduced, the imposition of terms of imprisonment is to be used as sparingly as possible, both less often and for shorter periods.[[26]](#footnote-26) Judges must have the authority to exercise discretion in sentencing, and should be encouraged to consider alternatives to imprisonment for minor offences.[[27]](#footnote-27)

**Case study: Canada**

In the past Canada, like Australia, had similar issues with increasing prison populations and over-representation of Indigenous peoples in prison. Much like in Australia “the offending circumstances of Aboriginal offenders are often related to substance abuse, intergenerational abuse… low levels of education, employment and income, substandard housing and health care, among other factors”.[[28]](#footnote-28) Canada has managed to reverse this trend, due largely to conscious efforts being made to utilize community-based alternatives to imprisonment.[[29]](#footnote-29) The Canadian Criminal Code requires “that all available sanctions other than imprisonment that are reasonable in the circumstances, should be considered for all offenders, with particular reference to the circumstances of Aboriginal offenders.” [[30]](#footnote-30) Extensive Canadian research has shown that imprisonment has no greater effect of recidivism than community-based sanctions, and the justice system has made increasing use of penalties that see the offender remain in the community under supervision. Canada’s experience with alternative sentencing is still relatively recent, and more studies on its success are needed. However, Canada’s incarceration rate has been one of very few in the world that has decreased since the early 1990’s, suggesting it is definitely worth significant scrutiny.[[31]](#footnote-31)

**Conclusion**

Western Australia is the state that has implemented the least number of recommendations, and is also the state where the rate of Aboriginal incarceration is amongst the highest in the world.[[32]](#footnote-32)

It is estimated that unless more is done to divert Indigenous people from the criminal justice system, Aboriginal people will make up three quarters of the state’s prison population by 2025. Policies need to be applied that best protect the public over the long term, based on evidence of the best way to reduce offending and recidivism. [[33]](#footnote-33) The evidence suggests that imprisonment is relatively ineffective, and yet there are such a disproportionate number of Indigenous people being punished for minor offences regardless, which desperately contravenes the Rule of Law and everything we have learnt since the RCIADIC.

1. Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody: 1989-1996*, October 1996. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Aboriginal Legal Service of Western Australia (Inc), *Annual Report 2016,* ‘Royal Commission into Aboriginal Deaths in Custody, 25 Years On’ [↑](#footnote-ref-3)
4. Gerry Georgatos, ‘New leadership needed in WA to reduce incarceration, build schools in prisons and transform lives’ , SBS NITV (online), 13 March 2017 <http://www.sbs.com.au/nitv/nitv-news/article/2017/03/10/new-leadership-needed-wa-reduce-incarceration-build-schools-prisons-and-transform> [↑](#footnote-ref-4)
5. The Honourable Wayne Martin, Chief Justice of Western Australia, ‘Indigenous Incarceration Rates: Strategies for much needed reform’ (speech delivered at 2015 Law Summer School, Perth). [↑](#footnote-ref-5)
6. Derek Hunter, ‘How the Criminal Justice System can be Best Utilised to Reduce the Increasing Rate of Offending and Imprisonment of Western Australia’s Indigenous Population’ (2008) *Murdoch University Electronic Journal of Law* 134. [↑](#footnote-ref-6)
7. Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 1. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. RCIADIC: Recommendation 87a – Principle of Arrest as a Last Resort; Recommendation 87b – Training in Arrest as a Last Resort; Recommendation 87c – Review of Practices Relevant to Arrest as a Last Resort [↑](#footnote-ref-9)
10. *Criminal Code Act Compilation Act 1913* (WA) s 74A(1) (‘*Criminal Code’)* [↑](#footnote-ref-10)
11. *Criminal Code* s 74A(2) [↑](#footnote-ref-11)
12. RCIADIC Recommendation 86. [↑](#footnote-ref-12)
13. Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 1. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. ‘Freddo Frog case dropped', *Koori Mail* 465, 11. [↑](#footnote-ref-15)
16. 'Selective policing' under fire', *Koori Mail* 393, 14. [↑](#footnote-ref-16)
17. Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 1. [↑](#footnote-ref-17)
18. For example, recommending arresting people only when no other way exists for dealing with a problem (Recommendation 87) and utilising imprisonment only as a sanction of last resort (Recommendation 92). [↑](#footnote-ref-18)
19. Adam Fletcher and Andre Dao, ‘Alternatives to Imprisonment for vulnerable offenders: International Standards and Best Practice’ (2012) *Monash Univeristy Castan Centre for Human Rights Law Report for Australian Government Attorney-General’s Department.* [↑](#footnote-ref-19)
20. United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (Criminal Justice Handbook Series 2007). [↑](#footnote-ref-20)
21. Ibid. [↑](#footnote-ref-21)
22. *Sentencing Act 1994* (WA). [↑](#footnote-ref-22)
23. Adam Fletcher and Andre Dao, above n 19. [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. Derek hunter, above n 6. [↑](#footnote-ref-25)
26. United Nations Office on Drugs and Crime, above n 20. [↑](#footnote-ref-26)
27. Ibid. [↑](#footnote-ref-27)
28. Mann, Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections, OCI 2009: <http://www.oci-bec.gc.ca/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf [↑](#footnote-ref-28)
29. Zubrycki, Community-Based Alternatives to Incarceration in Canada, UNAFEI 2002: <http://www.unafei.or.jp/english/pdf/RS\_No61/No61\_12VE\_Zubrycki.pdf>, 9 [↑](#footnote-ref-29)
30. United Nations Office on Drugs and Crime, above n 20. [↑](#footnote-ref-30)
31. Zubrycki, above n 29. [↑](#footnote-ref-31)
32. Gerry Georgatos, ‘Tackle casues of incarceration now or see Indigenous people make up majority of inmates by 2025’, SBS NITV (online) 14 April 2016 < http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/04/11/gerry-georgatos-time-tackle-causes-incarceration-or-see-indigenous-people-make> [↑](#footnote-ref-32)
33. Professor David Brown, ‘The Limited Benefit of Prison in Controlling Crime’ (2010) 22 *Current Issues in Criminal Justice* 1, 137. [↑](#footnote-ref-33)