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8 September 2017

The Executive Director
Australian Law Reform Commission
Level 40, MLC Tower
19 Martin Place, Sydney NSW 2000

By email: info@alrc.gov.au

Dear Australian Law Reform Commission,

RE: UNSW LAW SOCIETY SUBMISSION TO THE ALRC INQUIRY ON INCARCERATION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Australian Law Reform Commission (ALRC).

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The UNSW Law Society is proud to represent students from a diverse mix of cultures, backgrounds and passions, including those who come from an Aboriginal and Torres Strait Islander background. As young Australians, we are concerned about the wrongs that were committed against the Indigenous people in the past and today, and would like to see the mistakes of the past rectified in the present and future.

Our enclosed submission reflects the opinions of the students of the UNSW Law Society. It addresses all of the terms of references of the ALRC inquiry. The submission's key findings are that:

- Indigenous Australians are overrepresented in prisons in Australia, by any measure or standard;
- overrepresentation in prisons are a result of a culmination of factors, originating from the disadvantage created in Indigenous communities by historical government policies that were either discriminatory or ill-planned;
- imprisonment can entrench a cycle of disadvantage for Indigenous Australians;
- there is a need for diversionary pathways in the justice system to redress the overrepresentation of Indigenous Australians; and
- there is also a need to decriminalise and otherwise make consistent the laws surrounding minor offences, and how they are applied to Indigenous Australians.

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The enclosed submission elaborates on the above key findings through being structured into distinct sections. In particular, we deal with four issues in detail:

- the overrepresentation of Indigenous Australians in prisons generally;
- the overrepresentation of Indigenous women;
- the problem of selective policing; and
- language barriers and law enforcement procedures.

We thank you for considering our submission and should you require any further information, please do not hesitate to contact us.

Yours faithfully,

Johnson Man
Policy Submissions Director

Angad Randhawa
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Submission to the ALRC on Indigenous Incarceration

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Overrepresentation of Indigenous Australians in Incarceration

Issue

There exists a widely held perception in Australia that legally administered, direct and overt discrimination is an artefact of the past, having been banished with the advent of a comprehensive series of anti-discrimination legislation enacted in the post-war decades of Australia. The importance of these acts should not be discounted, having achieved broad integration into both state and federal legal structures. However, the situation of Australia's Indigenous peoples has continued to defy the expectations of proponents of this view. Despite the rule of law being paramount, Indigenous Australians are incarcerated at rates disproportionate to their representation in Australia's population. There are many hypotheses as to this phenomenon – demographic attributes, socioeconomic patterns and cultural reactions (both Indigenous and that of Anglo-Saxon Australia at large). The common thread, however, is that of the law itself, and thus deserves primacy in examining incarceration rates of Australia's Indigenous.

Background

Aboriginal offenders are significantly overrepresented in the criminal justice system, particularly in prisons around the country.

At 30 June 2016, there were 2,346 Aboriginal and Torres Strait Islander people imprisoned per 100,000.[1] At the same time, there were only 156 non-Indigenous Australians in prison per 100,000.[2] Within the Aboriginal and Torres Strait Islander women's population, which only consists of 2% of the entire Australian population, they represented one third of the women's prison population.[3] Combined, Aboriginal and Torres Strait Islander people make up 27% of the entire prison population, but only 3% of the Australian population.[4] This is expected to reach 50% by 2020 if the current system remains in place, and thus is a major and ongoing human rights concern.[5]

Currently, Indigenous Australians are overrepresented in the prison system by a factor of 12:1.[6] Whilst there are numerous contextual and legal factors that have influenced this outcome, it demonstrates that the Royal Commission into Aboriginal Deaths in Custody has been largely ineffective.[7] This is further validated by the fact that the incarceration rate amongst Aboriginal and

[1] Australian Bureau of Statistics, 'Prisoners in Australia' (2016), available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12.
[2] Ibid.
[3] Lucy Jackson, 'Sentencing Indigenous Women after "Bugmy"' (2015) 40(3) *Alternative Law Journal* 171, 171.
[4] UN Special Rapporteur on Aboriginal Incarceration 2017 End of Mission Statement.
[5] Ibid.
[6] Note, 'Taking Indigenous Over-Imprisonment Seriously: Time for Concrete Solutions not More Good Intentions' (2015) 39 *Criminal Law Journal* 231.
[7] Ibid 239.

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Torres Strait Islander people has nearly doubled since the commission.[8] Interestingly, one of the recommendations from the Royal Commission involved using incarceration as a last resort.[9] Whilst this notion has been emphasised, the alarming incarceration rate amongst those with Indigenous background indicates that there has been a lack of adherence to that principle.

The High Court case of *Bugmy* [10] does little to deal with these markers of social status and lifestyle, adopting a neutral approach to the consideration of Aboriginality when determining appropriate sentences. Insufficient regard to these factors creates a systemic and cyclical pattern of offending and imprisonment within Aboriginal communities and fails to address the increasing number of Aboriginal and Torres Strait Islander people in custody. There are few options available in determining sentences for Aboriginal and Torres Strait Islander people where the equality principle, as stated by Brennan J in *Neal*, requires the same principles to be applied in every case. Here, the race of a particular offender is only to be considered insofar as the circumstances of the individual warrants subjective considerations to be factored in on sentencing.[11]

Aboriginal and Torres Strait Islander people who experience the judicial system tend to be imprisoned for minor offences such as driving offences, public drinking, fine defaults, or being unable to meet bail requirements.[12]

[8] Online article, 'A national crisis': Indigenous incarceration rates worse 25 years on' SBS (online), 15 April 2016 <http://www.sbs.com.au/news/article/2016/04/15/national-crisis-indigenous-incarceration-rates-worse-25-years>.
[9] Note, above n1 231.
[10] *Bugmy v The Queen* [2013] HCA 37
[11] *Neal* (1982) 149 CLR 305, 326 (Brennan J).
[12] Lucy Jackson, 'Sentencing Indigenous Women after "Bugmy"' (2015) 40(3) *Alternative Law Journal* 171, 171. Also BOCSAR, NSW Criminal Court Statistics 2014 (May 2015). 35-38.

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Causes

Limited alternatives to custody

The lack of adherence to the principle that incarceration should be the last resort is hindered by the limited availability of alternatives. Although there are several contextual factors that explain the incarceration rate, it should not be underestimated that the trend is partially due to the courts being constrained in their ability to allow for diversionary or non-custodial outcomes.[13] A prominent aspect is that almost two-thirds of the Aboriginal and Torres Strait Islander population do not live in metropolitan areas.[14] Since alternatives to custodial sentences are limited in areas outside of the metropolitan area, [15] many Aboriginal offenders are unable to receive a truly appropriate sentence due to the lack of options.

For example, in New South Wales, a parliamentary report found that sentencing options were not available in rural areas, specifically, supervised bonds, community service orders, periodic detention and home detention.[16] This is further evidenced by interviews with judicial officers that reveal that more than 70% of judges and 53% of magistrates mentioned that periodic detention was not available as an option when sentencing Indigenous offenders due to the lack of facilities. [17]

Rehabilitation

In some respects, incarceration is considered to be a form of rehabilitation, an experience meant to deter offenders in the future from re-offending. However, it appears that incarceration has not been effective in this mission In particular, one study has noted that "prison exerts no significant effect on the risk of recidivism for burglary … [and] … the effect of prison on those who were convicted of non-aggravated assault seems to have been to increase the risk of further offending".[18] This trend has prevailed with the Indigenous incarceration rate, with Indigenous Australians twice as likely to be imprisoned again within a decade.[19] Therefore, incarceration does very little to prevent reoffending which necessitates stronger rehabilitation initiatives.

Rehabilitation is expressly set out as a mitigating factor in sentencing,[20] pursuant to s 21A(3)(h) of the *Crimes (Sentencing Procedure) Act 1999 (NSW).* This involves the completion of court diversion

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13 Chris Cunneen and Schwartz 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equality and Access' (2008) 32 *Criminal Law Journal* 38, 47.
[14] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* < http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>
[15] Australian Law Reform Commission, '*4. Sentencing Options'* (19 July 2017) http://www.alrc.gov.au/publications/availability-community-based-sentencing-options.
[16] Standing Committee of Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) 32.
[17] New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96 (2000).
[18] Don Weatherburn D, *The Effect of Prison on Adult Re-offending* (August 2010) <http://www.bocsar.nsw.gov.au/Documents/CJB/cjb143.pdf> .
[19] Australian Bureau of Statistics, *An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007* (30 August 2010) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1351.0.55.031>
[20] Mirko Bagaric and Theo Alexander 'The capacity of criminal sanctions to shape the behaviour of offenders: Specific deterrence doesn't work, rehabilitation might and the implications for sentencing' (2012) 36 *Criminal Law Journal* 150.

programs such as the Court Referral of Eligible Defendants Into Treatment (CREDIT) and Magistrates Early Referral into Treatment (MERIT) which adjourn the matter until the defendant receives drug education and/or treatment. It appears that these rehabilitation programs have generated positive outcomes For example, a study on the New South Wales MERIT program found that recidivism for any offence was decreased by approximately 12%.[21] This success has also been found in Western Australia, in particular with their the Presentence Opportunity Program (POP), Supervised Treatment Intervention Regime (STIR) and Indigenous Diversion Program (IDP) programs whereby it has found to decrease reoffending.[22]

Whilst this is beneficial in incentivising wrongdoers in completing such programs and increasing their chances of rehabilitation, it is normally only given to offenders with little or no criminal history.[23] Hence, there should be efforts to follow the recommendation in 2009 report from the National Indigenous Drug and Alcohol Committee (NIDAC). That is, amending the eligibility criteria of diversion programs to include those with prior convictions, multiple charges and co-existing mental illness and/or health *problems*. [24]

Recidivism

Long standing evidence suggesting that over-representation of Indigenous Australians in minor offence charges strongly influence higher recidivism rates and over-proportionate Indigenous incarceration levels is well documented and widely accepted.[25] The most recent statistics from the Australian Institute of Criminology (AIC) reports that 76% of all Indigenous Australians have been previously imprisoned, with 60% having recorded their first conviction as juveniles.[26] These figures are significantly higher than the non-Indigenous recidivism average of 40%.[27] Similarly, since the 1980s, the link between socio-economic disadvantage, minor offences and higher recidivism rates by Indigenous Australians has been acknowledged in government reports.[2829] From a criminology perspective, it is not a fanciful conclusion to assert that these statistics strongly support a causal link between harsher treatment by law enforcement authorities for minor offences, and the rise of a highly recidivist Indigenous prison population.

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[21] Rohan Lulham, *The Magistrates Early Referral into Treatment Program: Impact of Program Participation on Re-Offending by Defendants with a Drug Use Problem* (July 2009, NSW Bureau of Crime Statistics and Research) < http://www.bocsar.nsw.gov.au/Documents/CJB/cjb131.pdf> cited in Michael S King 'Therapeutic jurisprudence initiatives in Australia and New Zealand and the overseas experience'(2011) 21 *Journal of Judicial Administration* 21, 26.

[22] Crime Research Centre, *WA Diversion Program - Evaluation Framework Final Report* (Crime Research Centre, University of Western Australia, 2007) http://www.dao.health.wa.gov.au/AboutDAO/ClientServicesDevelopment/WADiversionProgram/tabid/219/Default.aspx> cited in King above n13.

[23] King above n 13.

[24] Australian National Council on Drugs, Parliament of Australia, *Bridges and Barriers* (2009) 14.

[25] Standing Committee on Aboriginal Affairs, Aboriginal Legal Aid, AGPS, Canberra, 1980, 40-4.

[26] Australian Institute of Criminology, Recidivism Rates, AIC, Canberra, 2008, 100-120.

[27] Australian Institute of Criminology, Chapter 5: Corrections- Australian Crimes: Facts and Figures, AIC, Canberra, 2014, 1-20.

[28] C Ronalds, M Chapman & K Kitchener, 'Policing Aborigines' in M Findlay, SJ Egger & J Sutton (ed) Issues in Criminal Justice Administration, George Allen & Unwin, Sydney, 1983, 168, 172.

[29] Standing Committee on Aboriginal Affairs, Aboriginal Legal Aid, AGPS, Canberra, 1980, 40-4.

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Failure to Expand Indigenous Crime Prevention Policies

The obvious implication that burgeoning Indigenous incarceration rates are a result of failed prevention initiatives by the government is a conclusion without insight. Contrary to this assertion, multiple approaches have proven successful based on factors including reduced offending, cost-effectiveness and ease of implementation. Rather, the issue arguably exists in the reluctance of governments to expand Indigenous crime prevention initiatives beyond their trial communities despite positive inroads.

According to the Indigenous Justice Clearinghouse, 'over-policing' of minor offences concerning intoxication and failure to pay fines are the drivers of recidivism.[30] Efforts to decriminalise public intoxication described in the 1980 report had, by 2009, developed into alcohol distribution restrictions and rehabilitation schemes and community justice groups. While these community initiatives implemented in isolated areas including Fitzroy Crossing and Halls Creek were successful, there still appears an unwillingness to allow a broadening of support for establishing groups and providing resources to implement programmes on a wider level.[31] This trend of not endorsing successful decriminalisation initiatives in Indigenous communities has been noted in multiple reports.[32] Successful programs proposed and trialled by governments in Australia to reduce Indigenous recidivism rates have continuously failed to continue expanding beyond isolated testing areas, and statistically have had no larger effect beyond the targeted trial communities. Therefore, any findings from this inquiry must note that previous attempts to engage in reforms have shown promise, but overall have failed to deliver because of its limited application, lending itself to inconsistency in policy objectives.

Similarly, legislative responses to prevent over-policing by reducing the freedom of police discretion when administering public order offences has had mixed effects due to jurisdictional inconsistency. States have adopted completely different approaches to reducing recidivism rates as part of the greater task of managing Indigenous incarceration. New South Wales has pointed to an expansion of their Intensive Correction Order system, which effectively supplants incarceration under strict conditions, despite a 2014 report questioning its effectiveness.[33] Victoria has entered Phase 2 of the Victorian Aboriginal Justice Agreement, and as such continues the Koori Services Improvement Strategy of establishing community justice groups to prevent the socio-economic markers encouraging over-policing.[34][35] The Northern Territory and Queensland are currently reviewing their existing policies.[36]

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[30] Senate Standing Committee on Finance and Public Administration, Access to Legal Assistance Services, 13 October 2016, Ch 6.
Dr Troy Allard, 'Understanding and Preventing Indigenous Offending' (Brief No 9, Indigenous Justice Clearinghouse, December 2010) 6.
[32] Senate Standing Committee on Finance and Public Administration, Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services, 13 October 2016, Ch 3.

[33] Don Weatherburn, 'Disadvantage, Disempowerment and Indigenous Over-Representation in Prison' (Children's Court Section 16 Meeting, October 2014) 11.
[34] Victorian Deparment of Justice, Victorian Aboriginal Justice Agreement, Victorian Government, 2004, 21.
[35] Dr Troy Allard, 'Understanding and Preventing Indigenous Offending' (Brief No 9, Indigenous Justice Clearinghouse, December 2010) 6.
[36] Law Society NT, 'Review of Indigenous Incarceration Matters in Northern Territory, Phase 1, 26 January 2016' (Letter, Riverview Global Partners, 29 April 2016).

Consequently, it is conceivable that an Indigenous Australian could commit an identical offence in different states and yet receive completely different punishments without any rational justification, apart from the fact that, for example, New South Wales sees punitive imprisonment as the source of high Indigenous incarceration rates, and Victoria targets socio-economic stressors of crime instead. Such an incongruence is alarmingly defiant of a concerted and responsible policy approach to resolving a national issue.

The issues with inconsistency are obvious. As with any other legislation, consistency is essential to upholding the rule of law, and empowers the vital educative element amongst the community to reduce offending. As such, in addition to socio-economic circumstances, the ongoing failure of decision makers in the legal system to cooperatively and consistently approach causes of Indigenous minor offence charges over non-Indigenous individuals contributes to the cycle of recidivism.

Overcrowding

The link between adverse economic conditions and criminality has been suggested at many an interval in Australia.[37] In particular, there exists a significant disparity in household income between Indigenous Australians and non-Indigenous Australians (the former having 62% of the corresponding income for the latter),[38] which correlates with a wider trend of lower socioeconomic status for Indigenous Australians in supplementary indicators such as labour force statistics.[39] Indigenous households are also three times more likely to be overcrowded (as assessed under the Canadian National Occupancy Standard) than other households, with 12.9% of Indigenous households deemed to legally require one or more extra bedrooms.[40]

Reasons for overcrowding in Aboriginal and Torres Strait Islander communities extend beyond a mere lack of financial capacity to make arrangements for more adequate accommodation, although it is an undoubtedly salient factor. Indigenous households under tenancy agreements, according to a case study of Western Australian households, were hesitant in applying for larger housing due to a strong sociocultural sense of obligation towards kin. As a result they do not feel an acute sense of overcrowding.[41] Outside cultural and financial factors, legal limitations have also served to discourage the move to better housing, as applications would have revealed to housing authorities the presence of family members and friends that were not paying rent nor abiding by standard tenancy regulations,[42] lending to legal repercussion which would have possibly entailed eviction.

Overcrowding in Indigenous households can thus be found in jurisdictions across Australia in public housing units as well as conventionally regulated rental properties. Eviction because of breach of

[37] Don Weatherburn, 'Economic Adversity and Crime' (1992) 40 *Trends & Issues in Crime and Criminal Justice* 1.
[38] Dennis Trewin, *Population Characteristics – Aboriginal and Torres Strait Islander Australians* (Australian Bureau of Statistics, 2001) 81.
[39] Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islanders Peoples' Labour Force Outcomes' (Media Release, 4102.0, 20 November 2013).
[40] Australian institute of Health and Welfare, *Housing Circumstances of Indigenous Households: Tenure and Overcrowding* (Canberra, 2014) 18.
[41] Mark Moran, Paul Memmott, Daphne Nash, Chris Birdsall-Jones, Shaneen Fantin, Rhonda Phillips and Daphne Habibis, 'Indigenous Lifeworlds, Conditionality and Housing Outcomes' (Final Report No 260, Australian Housing and Urban Research Institute, March 2016) 7.
[42] Ibid, 47.

overcrowding rules can also be found in equal measure across Australia, which inevitably leads to homelessness. In the aforementioned case study, Indigenous families were fearful of eviction due to an unhappy history with housing authorities, many being listed on the TICA Tenancy Database, available to all subscribed rental authorities across Australia, consequently exacerbating the difficulty of attaining future tenancy after eviction.[43] Furthermore, it is clear overcrowding legislation has been used in the past to discriminatory effect – as *Martin v State Housing Commission (Homeswest)*[44] demonstrated due to overcrowding complaints by a neighbour ill-disposed to Indigenous residents.

There is a strong mutual link between homelessness and incarceration, with 37% of prisoners being homeless prior to incarceration.[45] It is also 13.07% more likely for Aboriginal and Torres Strait Islander peoples to experience both homelessness and incarceration.[46] However, amongst state level legislation such as the *Residential Tenancies Act 2010* (NSW) or the *Housing Act 1980* (WA)[47] provisions for the exceptional circumstances of Indigenous households are not present. Incarceration can be reduced by mitigating risk factors for Indigenous offenders. Homelessness due to overcrowding thus should be highlighted as such a risk.

Move on Powers

"Move-on" powers were adopted by all Australian jurisdictions in the 1990s as part of a nationwide focus on combating public disorder. Instituted via statute, police "move-on" powers do not require any prerequisite offence or conduct to be triggered, unlike the other actions such as arrest.[48] The breadth of these powers have enabled police to effectively subject the most vulnerable sections of society to extra scrutiny – homeless people in particular have been the victims of such powers, with one Brisbane survey finding a total of 76.5% of all respondents had been told to move-on one or more times in the last six months.[49] With Indigenous people making up a plurality of homeless individuals in states and territories across Australia (compounded by tenancy legislation as explored above), it is no wonder that such members of society are subjected to a disproportionate amount of attention from police officers due to their presence in the public space, serving as an entry point into the criminal justice system.[50]

Move-on powers also directly contribute to the rate of Indigenous incarceration; the consequences of disobeying a police directive varies from jurisdiction to jurisdiction, but more than one contains imprisonment as a possible punishment. In Western Australia, the maximum penalty is a $12 000 fine or twelve months imprisonment,[51] in South Australia, a $1250 fine or three months imprisonment,[52]

[43] Ibid, 55.
[44] *Martin v State Housing Commission (Homeswest)* (1997) 4 EOC 83.
[45] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2012* (Canberra, 2013) 37.
[46] Queensland Council of Social Service, *The Link Between Incarceration and Homelessness* (7 March 2015) < https://www.qcoss.org.au/link-between-incarceration-and-homelessness>.
[47] Specific reference to overcrowding in WA can be found in the Rental Policy Manual administered by the Housing Authority established under the Act.
[48] Simon Bronitt, 'The New Public Disorder Laws: The Rise of Move-On Powers' [2011] *Legal Date* 5, 5-6.
[49] Megan Breen, Binny de Saram, Lindsay Nicholson, Hillary Nye, Marianna O'Gorman and Davina Wadley, 'Nowhere to Go: The Impact of Police Move-On Powers on Homeless People in Queensland' (Report, University of Queensland, November 2006) 51.
[50] Ibid, 72.
[51] *Police Act 1892* (WA) s 50(6).
[52] *Summary Offences Act 1953* (SA) s 18(2).

and in the Northern Territory, a $2000 fine, six months imprisonment, or both.[53] Indigenous people have reported being subjected to discriminatory targeting by the police, accompanying their move-on directives with threats of arrest should they return to the public space in question, and some ending up in detention due to lingering in a public space even after being issued with a move-on order.[54] In fact, research suggests that Indigenous people (especially juveniles) are consistently the subjects of move-on orders issued by police at massively disproportionate rates.[55]

Young Aboriginal and Torres Strait Islander people are still very much over-represented in detention rates,[56] and in NSW, Indigenous youth reflect the most targeted demographic of police stoppage and move-on orders.[57] In 90% of these cases, young people obeyed all reasonable orders given by police, and yet the frequency of police interference has only continued to increase.[58] It has been suggested that young Indigenous youths are targeted due to their propensity to socialise in large groups as well as boisterous behaviour; similarly, Indigenous adults have been seen in the public consciousness as being drunk and disorderly, leading to a confluence of statutes and regulations designed to restrict such behaviour – and also the incarceration resulting from a breach of alcohol consumption laws.[59]

Thus, the discretionary scope of move-on powers directly creates the potential for discrimination by law enforcement officers against Indigenous people. While the intention of the laws was to remedy disorderly and violent conduct in public spaces, it has served to reinforce the disadvantaged status of society's most disadvantaged minorities, and furthermore, has been an overt source of Aboriginal and Torres Strait Islander imprisonment. Where a group of people cannot mitigate their exposure to the criminal law due to their circumstances such as homelessness, then expanding rates of incarceration are undoubtedly a resultant aspect of its continuance.

Statement of the Problem

Imprisonment is generally meant to be a last resort after being satisfied that no other punishment is appropriate.[60] It is also to be reserved for the most serious criminal offences when determining objective seriousness. This creates tensions where the criminal justice system is incompatible with Aboriginal and Torres Strait Islander peoples' lifestyle and circumstances. Aboriginal and Torres Strait Islander peoples' culture involves spending large amounts of time in public places within the community as a social norm. This can lead to repeat offending with regard to drinking offences. Aboriginal and Torres Strait Islander people are more likely to be arrested by police and therefore more likely to end up in the criminal justice system. When navigating this system, surety or a

[53] *Summary Offences Act* (NT) s 47A(2).
[54] Tamara Walsh and Monica Taylor, '"You're Not Welcome Here": Police Move-On Powers and Discrimination Law' (2007) 30(1) *UNSW Law Journal* 151, 163.
[55] Chris Cunneen, 'Federal Programs for Access to Justice under a Conservative Australian Government' (2008) 20(1) *Current Issues in Criminal Justice* 43.
[56] ABC Radio National, 'Young Indigenous Australians Remain Over-Represented in Detention: Report', *AM*, 10 December 2013 (Simon Lauder) <http://www.abc.net.au/news/2013-12-10/young-indigenous-australians-still-over-represented-in-detention/5145944>.
[57] Helen Punter, 'Move-On Powers: New Paradigms of Public Order Policing in Queensland' (2011) 35 *Criminal Law Journal* 386, 391.
[58] New South Wales Ombudsman, 'Policing Public Safety' (Report, NSW Government, November 1999) 35.
[59] Peter d'Abbs, 'Restricted Areas and Aboriginal Drinking' in Julia Vernon (ed), *Alcohol and Crime* (Australian Institute of Criminology, Canberra, 1990) 121.
[60] Section 5(1) *Crimes (Sentencing Procedure) Act 1999*; *R v Way* (2004) 60 NSWLR 168 at [115].

permanent place of residence is often required to in order to be granted bail for minor charges such as these. Fines are also unable to be paid due to their lower socioeconomic status, and repeat defaults lead to no alternative other than incarceration and therefore high imprisonment rates for Aboriginal and Torres Strait Islanders people, creating a vicious cycle.

Potential Solutions

Eliminating structural differences across states in targeting minor offences

In considering this within the context of the legal system, solutions must no longer be viewed from the perspective of small trials, but with a view to expanding community and legislative responses simultaneously on a consistent footing with some degree of national consensus. Inconsistency and a lack of implementation are the recurring issues with past responses to dealing with recidivism and Indigenous incarceration rates.

The argument that community responses to address the socio-economic and educational stressors of minor offence implications in the 'recidivist cycle' cannot be replicated nationally because of its specificity is largely misguided. Rather, the government has enjoyed similar successes, and has committed new funding in the recent federal budget to establishing Headspace Mental Health Networks that serve and exist within local communities under an umbrella administrative body.[61] Victoria's Koori initiatives reflect this stance, and have demonstrated that ongoing efforts to expand community responses across a uniform umbrella body. By educating individuals and providing alternatives to 'over-policing' in interactions between the community and the legal system, social and health-related factors of criminality can and have been proven to be reduced, as evidenced in numerous trials mentioned earlier.

Further, as per the wording of a NSW report, the use of 'back-end' strategies to target recidivism in addition to proactive initiatives demonstrate more tangible and statistically supportable processes to address high incarceration rates. Nevertheless, existing approaches have not been consistent across states, and cannot be realistically be expected to solve a national issue when there is no readily available and straightforward binding authority that limits the discretion of police officers when dealing with minor offences.

Therefore, decision makers across states must learn from previous mistakes and bring consistency to state legislation. From a federal perspective, such a recommendation alleviates any argument of ultra vires. This provides huge benefits in efficiency within the legal system, reporting, application by legal officers, and education, which can be standardised to an even greater degree. Most importantly, such a recommendation encourages better engagement and a more positive interaction with individuals and police at first instance.

[61] Mark Booth, Graham Hill, *View from the Australian Government Department of Health* (28 January 2016) Public Health Research & Practice <http://www.phrp.com.au/issues/january-2016-volume-26-issue-1/the-new-australian-primary-health-networks-how-will-they-integrate-public-health-and-primary-care/>.

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Increased use of police cautions and conferencing

Indigenous over-representation could be reduced through increased use of police cautioning and conferencing. Cautioning and conferencing may divert first time and non-serious offenders away from more formal criminal justice interventions.[62] In particular, studies have shown that young people who are diverted through cautions and conferencing are less likely to reoffend.[63] This is because the stigmatisation and negative labelling caused by more formal criminal justice sanctions may adversely redefine an individual's self-concept and lead to further offending.[64] Statistics show that Indigenous offenders are less likely to receive a caution or be diverted to conferencing compared to non-Indigenous offenders.[65] One reason for this discrepancy may be racial bias in the exercise of police discretion.[66] Therefore, increased police accountability is required to monitor the use of police discretion.

Reforms to the use of conferencing

Youth Justice Conferencing has had lower rates of effectiveness on Indigenous juveniles compared to non-Indigenous juveniles.[67] To address the disparity in effectiveness, current schemes could be improved through increased consultation with Aboriginal communities in the design and administration of schemes to promote cultural sensitivity and empower the community. Increased flexibility in the design of schemes may also permit more meaningful participation by offenders.[68] In addition, studies illustrate that Indigenous offenders are less likely to be diverted to conferencing. One reason for this may be the lack of diversionary alternatives in regional or remote rural areas where Indigenous families reside.[69] Thus, increased funding and allocation of resources are needed to encourage the referral of Indigenous youth to conferencing.

Furthermore, as trials for Circle Sentencing and Adult Conferencing have proved effective,[70] these schemes should be given a legislative basis to ensure consistency and procedural fairness.[71] The incorporation of Circle Sentencing and Adult Conferencing into sentencing options would allow greater recognition of therapeutic jurisprudence and the principles of restorative justice.

Increased use of community-based and custodial rehabilitation programs

Programs such as violent offender programs, family violence programs, alcohol and drug treatment, functional family therapy and employment services aim to deal with an offender's criminogenic needs.[72] Greater funding and resources for these programs and services are required to effectively

[62] Troy Allard, Anna Steward, April Chrzanowski, James Ogilvie, Dan Birks and Simon Little, 'Police diversion of young offenders and Indigenous over-representation' (2010) 390 *Trends and Issues in Crime and Criminal Justice* 1, 1.
[63] Ibid 2.
[64] Ibid 1.
[65] Lucy Snowball (2008) 355 *Trends and Issues in Crime and Criminal Justice* 1, 5.
[66] Ibid 2.
[67] New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000) 120.
[68] Ibid 122.
[69] Snowball, above n 4, 6.
[70] New South Wales Law Reform Commission, above n 6, 130.
[71] Ibid 131.
[72] Senate Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarcerations and the Criminal Justice System* (2010) 44-49.

address the underlying causes of Indigenous offending. Furthermore, an increase in Indigenous-specific programs and services may improve the effectiveness of intervention by enhancing the responsiveness of Indigenous offenders to treatment.[73] To increase the relevance of programs for Indigenous offenders, programs should not be based on a Western perspective that emphasises self-disclosure, self-awareness and individual responsibility.[74] Instead, programs should demonstrate an understanding of Indigenous society and its collectivist approach, and the resistance of many Indigenous peoples to disclose information about themselves.[75] Addressing issues such as anxiety, anger and resistance, and overcoming any language and literacy barriers may increase the responsiveness of Indigenous participants.[76] To ensure that programs and services are tailored to the needs of Indigenous offenders and communities, the program development should be made through consultation and partnership with Indigenous community leaders.[77] Specific treatment plans should also be developed with the Indigenous offender to boost offender commitment and motivation.[78] Aside from improving the nature of the programs and services, input from the Indigenous community allows for empowerment and greater participation in the justice system.

Building self-esteem in Indigenous youths

A report by the Australian institute of Health and Welfare showed that Indigenous youths between the age of 10 and 17 were four to six times more likely to have encountered the police, 18 times more likely to be in detention and 14 times more likely to be held under supervision compared to non-Indigenous youths[79]. It was found that the continual social and economic disadvantages faced by Indigenous youths, such as family violence, child abuse and alcohol abuse, has led to a detrimental loss of cultural identity and resilience[80]. To combat this program, the report suggested Indigenous-specific protective factors to improve the self-esteem of Indigenous peoples and to strengthen social and family relationships in the communities.[81]

Hence, a possible recommendation to improve Indigenous incarceration rates is to combat the problem from the bottom up, by aiming to improve the self-esteem of youths, to instil a strong sense of cultural identity and to provide a safe and conducive environment for Indigenous youths to learn, ask questions and develop as strong members of their communities.

[73] Matthew Willis, 'Reintegration of Indigenous prisoners: key findings' (2008) 364 *Trends and Issues in Crime and Criminal Justice* 1, 5.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Robin Jones, 'Indigenous Programming in Correctional Settings: A National and International Literature Review' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference, Sydney, 8-9 October 2001) 5.
[78] Ibid 9.
[79] 'Indigenous Young People in the Juvenile Justice System' (2012) *Australian Institute of Health and Welfare* 1.
[80] Ibid 4.
[81] Ibid.

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Overrepresentation of Indigenous Women in Incarceration

Background and Statement of the Problem

This section will focus on the incarceration rates of Aboriginal and Torres Strait Islander women, who comprise 34% of women in prison, but only 2% of the adult female population.[82]

The statistics on the incarceration rates of women are well cited.[83] However, any reforms implemented to address these numbers must acknowledge the impact of previous policies in Australia. It is suggested that the increase in incarceration rates is a reflection of Australia's colonial patriarchal past,[84] and that once other segregated institutions such as the Cootamundra Girls House closed down, the rate of imprisonment increased. The increasing rates of imprisonment are thought not to reflect increasing crime, but an increasing use of imprisonment.[85] In accordance with a theoretical framework of a colonial patriarchy, Indigenous women find themselves 'at the crossroad of gender and race'[86] and the 'lowest on the class ladder'.[87]

Furthermore, the children of imprisoned parents have a higher risk of juvenile offending.[88] This emphasises the importance for policies to prevent inter-generational criminalisation through reducing the opportunities for mothers to be separated from their families. Additionally, 80% of women in prisons are mothers,[89] who are also often carers for the sick and elderly in Indigenous communities.

To avoid any reform reflecting a colonising process, or a 'token' development, reforms should be built upon a foundation of Indigenous values and beliefs. As there is great discrepancy between Aboriginal and Western perspectives of punishment, the purpose of incarceration is more likely to be achieved if it is in greater alignment with the Indigenous culture. It is recommended to implement innovative qualitative methodologies such as 'appropriate interviews', which are designed to

[82] Human Rights Law Centre, 'Over-represented and over-looked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment', May 2017.
[83] MacGillivray, Baldry & Issuing Justice Clearinghouse, 'Australian Indigenous women's offending patterns' (2015) *Law, Crime and Community Safety Council & Australian Institute of Criminology.*
[84] Cuneen C and Baldry E, 'Imprisoned Indigenous women and the shadow of colonial patriarchy' (2014) *Australian & New Zealand Journal of Criminology*, Vol. 47, No. 2, 276-298
[85] J Fitzgerald, 'Why are Indigenous imprisonment rates rising?' (2009) *Sydney, Australia: NSW Bureau of Crime Statistics and Research*, 41.
[86] W Jonas, 'Social justice report 2002', (2002) Sydney, *Australia: Human Rights and Equal Opportunity Commission*
[87] MacGillivray & Baldry, above n 2.
[88] T Clear, 'Imprisoning communities. How mass incarceration makes disadvantaged neighbourhoods worse,' (2007) *New York, NY: Oxford University Press.*
[89] J Stubbs, 'Indigenous women in Australian criminal justice: Over-represented but rarely acknowledged.' (2011) *Australian Indigenous Law Review* 15(1): 47–63.

simultaneously collect data and establish long term relationships.[90] This approach is beneficial due to its similarity to cultural conversation within Aboriginal communities and should be considered as a tool in determining principles to base further reforms upon.

Proposed Solutions

Funding for prevention and early-intervention

As existing programs such as MERIT and the *Fernando* principles have not been tailored to the particular requirements of Indigenous women, it is necessary to determine these specific needs.[91] It is recommended that these needs be identified through a similar process to collecting data on the prison experience through 'appropriative interviews' as outlined above. An Indigenous woman in a rehabilitation diversion program has been shown to less likely to reoffend compared to an individual with a prison sentence and more cost effective.[92]

It is recommended to implement programs to educate police and judicial officers on the gendered impacts of colonisation and inter-generational family disruption. It would also be beneficial to recruit Indigenous women to contribute to such programs and seek employment in the criminal justice system.[93] Furthermore, reforms should ensure historical and systematic factors are considered in bail and sentencing decisions.

Decriminalise minor offences

It has been suggested to implement alternatives to incarceration for low-level offending and public drunkenness.[94] Based on the available data, assault and driving offences are the two most serious offences across Australian jurisdictions for Indigenous women. It is noted that data collection is hindered by inconsistent and incomparable reporting methods between jurisdictions and an understanding of the offences Indigenous women are convicted for would be enhanced by a uniform process.[95] It would be beneficial to propose a consistent framework across all jurisdictions to obtain accurate information on the crime levels between race and gender.

A 2001 report on Western Australia imprisonment indicated the reason for 40.5% of all Indigenous women entering prison in 2000 was fine default,[96] highlighting the low level crimes that lead to incarceration and the potential burden monetary fines can place on disadvantaged families. This illustrates the importance of Indigenous women having employment, and a more lenient response to the default of fines such as community service if data continues to reflect this trend.

[90] S Leeson, J Rynne, C Smith, and Y Adams, 'Incarcerating aboriginal and Torres Strait Islander women in Australia: Finding a balance in defining the 'just prison' [online]. (2016) *Australian Indigenous Law Review,* Vol. 19, No. 2, 76-96.
[91] Ibid.
[92] Victorian Equal Opportunity and Human Rights Commission (VEOCHR), 'Unfinished Business: Koori Women and the Justice System' (2013) 29; Ibid 81.
[93] Human Rights Law Centre, above n 1. .
[94] Ibid.
[95] MacGillivray & Baldry, above n 2.
[96] A, Ferrante, J Fernadez, & Loh, NSN 'Crime and justice statistics for Western Australia',(2001) *Crime Research* Centre, University of Western Australia, Perth, Australia, 2000.

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Providing Support to Indigenous Women Post-Incarceration

Special consideration must be given to provide Indigenous women with housing, appropriate support with mental health, drug and alcohol problems once they are released as women have shown greater difficulty in accessing these facilities than Indigenous men.[97]

The lack of available facilities can result in prison providing an avenue for Indigenous women to access services they do not have in their community.[98] This highlights the necessity to improve accessibility in Indigenous communities for specific female needs, such as escape from domestic violence. Indigenous women remaining in their communities with access to services reduces the risk of an inter-generational impact. It is a great injustice for an Indigenous woman to be denied diversion and placed in prison on remand in order to be provided 'with stability, safety and support'.[99]

These findings illustrate the importance for Aboriginal and Torres Strait Islander women to have stable employment, which is also relevant as a prevention tool. Therefore we recommend programs to promote employment within the community to lower the possibility and consequences of incarceration.

[97] Cuneen & Baldry, aboven 2.
[98] MacGillivray & Baldry, above n 2.
[99] Human Rights Law Centre, above n 1.

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Selective Policing

Background

'Selective policing' refers to the biased use of law enforcement discretion by Police Officers. 'Selective policing' occurs where a police officer has the discretion to choose whether or how to punish a person who has violated the law and the officer uses this discretion based on the person's membership to a particular social group.[100]

In Australia, 'selective policing' controversially refers to the selective policing of Indigenous people with respect to criminal activity. The statistics seem to support the assertion that Indigenous people are more heavily policed than non-Indigenous people,[101] and that Indigenous people are less likely to be let off under police discretionary power as opposed to non-Indigenous people.[102]

One reason proposed for the selective policing of Indigenous people and the subsequent increases in Indigenous incarceration rates is racism on the part of police.[103] This reason seems most pronounced when speaking on the enforcement of offensive conduct and offensive language laws. Offensive conduct and offensive language offenses are amongst the most obvious of offenses where Indigenous people are statistically more likely to be arrested than non-Indigenous people.[104]

Another reason proposed for this selective policing relates to the relevant legal framework. Dr Thalia Anthony, a criminal law expert at the University of Technology Sydney who has spent time researching intervention in the Northern Territory, while speaking of the regulation of alcohol in the Northern Territory has said that selective policing is only possible because of laws that extend the power of police to be able to target Aboriginal people.[105] Dr Anthony argued, for example, that new laws in relation to the policing of alcohol have given 'police distinct powers in relation to Indigenous

[100] *Selective Enforcement* (2 November 2016) Wikipedia <https://en.wikipedia.org/wiki/Selective_enforcement>.
[101] Amy Simmons, ''Over-policing to blame' for Indigenous prison rates', *ABC News* (Online), 25 Jun 2009 <http://www.abc.net.au/news/2009-06-25/over-policing-to-blame-for-indigenous-prison-rates/1332486>; Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?' (NSW Bureau of Crime Statistics and Research, 2016).
[102] Korff, Jens, *Aboriginal Prison Rates* (2017) Creative Spirits *<https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz4mJzsOrFD>*.
[103] Gerry Georgatos, 'Australian Bureau of Statistics on prison rates', *The Stringer Independent News* (Online), 12 April 2013 <http://thestringer.com.au/australian-bureau-of-statistics-on-prison-rates-1928#.WXReYIh97IU>.
[104] Korff, Jens, *Aboriginal Prison Rates* (2017) Creative Spirits *<https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz4mJzsOrFD>;* Korff, Jens, *12 Ways to Reduce Aboriginal Incarceration Rates* (2017) Creative Spirits <https://www.creativespirits.info/aboriginalculture/law/reducing-aboriginal-incarceration-rates#axzz4mJzsOrFD>.
[105] Max Chalmers, 'Police Checks Targeting Aboriginal People in the NT', *New Matilda* (Online), 24 April 2014 <https://newmatilda.com/2014/04/24/police-checks-targeting-aboriginal-people-nt/>.

people and communities, especially when it came [sic] to powers surrounding alcohol and also powers relating to seizure of vehicles where there is alcohol'.[106]

Why is selective policing problematic?

Substantive Unfairness

Unfairness is an obvious issue when speaking about selective enforcement of the law. 'Selective policing' contributes to the alarming statistics in relation to Australian Indigenous incarceration rates. Indigenous people comprised 27.3% of the total prisoner population in Australia in 2016[107] and are 14.8 times more likely to be imprisoned than non-Indigenous people.[108] Indigenous juveniles in Western Australia, for example, are 52 times more likely to be imprisoned than their non-Indigenous counterparts.[109] Statistics such as these are some of the many statistics that, in 2015, led Former Prime Minister Kevin Rudd to say that "Australia is now facing an Indigenous incarceration epidemic".[110]

These statistics may be alarming, but the unfairness that is hidden by these statistics is far greater. Harsh use of police discretion and selective policing means that many Indigenous people are being sent to jail for trivial offences – for example, not paying fines – and this has sometimes resulted in the loss of Indigenous lives due to the treatment garnered via the Australian Criminal Justice System.[111] Speaking on the issue of Indigenous incarceration, Joan Baptie, Magistrate and convenor of the Youth Drug and Alcohol Court of New South Wales, identified that government departments are using jail as a form of coping mechanism, commenting that "you have government departments who say, 'just lock them up, that will solve the problem'".[112] The obvious effect of sending Indigenous people to jail for matters where non-Indigenous people are far less likely to have similar treatment[113] is the unfair loss of lives These statistics highlight that Indigenous people are also more likely to spend time apart from their families, which not only risks the normalisation of the idea of going to jail in Indigenous

[106] Max Chalmers, 'Police Checks Targeting Aboriginal People in the NT', *New Matilda* (Online), 24 April 2014 <https://newmatilda.com/2014/04/24/police-checks-targeting-aboriginal-people-nt/>.
[107] *4517.0 - Prisoners in Australia, 2016* (8 December 2016) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>.
[108] Gerry Georgatos, 'Australian Bureau of Statistics on prison rates', *The Stringer Independent News* (Online), 12 April 2013 <http://thestringer.com.au/australian-bureau-of-statistics-on-prison-rates-1928#.WXReYIh97IU>.
[109] Inga Ting, 'The Australian children 24 times more likely to face jail than their peers', *SMH* (Online), 30 April 2015 <http://www.smh.com.au/national/the-australian-children-24-times-more-likely-to-face-jail-than-their-peers-20150430-1mx02l.html>.
[110] Latika Bourke, 'Kevin Rudd warns of the emergence of a new stolen generation', *SMH* (Online), 13 February 2015 <http://www.smh.com.au/federal-politics/political-news/kevin-rudd-warns-of-the-emergence-of-a-new-stolen-generation-20150213-13dvvh.html>.
[111] Rebecca Trigger, "Independent inquiry needed' into South Hedland police lockup death', *ABC News* (Online) 28 September 2014 <http://www.abc.net.au/news/2014-09-28/independent-inquiry-into-ms-dhus-death-needed-john-pat-aunt-says/5772272>.
[112] Korff, Jens, *Aboriginal prison rates* (2017) Creative Spirits <https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz4mJzsOrFD>.
[113] Korff, Jens, *Aboriginal prison rates* (2017) Creative Spirits <https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz4mJzsOrFD>.

families, but risks further damage to the continuity of Indigenous cultures due to the lack of family contact, thereby creating a 'new stolen generation'.[114]

The Rule of Law and the Abuse of Discretionary Power

The police play a very important role in society that closely interacts with the concept of the rule of law – they must ensure the enforcement of the law, whilst being held to a particular legal standard. The ideal construction of the rule of law would require police officers to abide by the law, and enforce it 'uniformly and non-discriminately'.[115] The improper use of the wide discretionary powers conferred on Australian police is a threat to the rule of law in Australia as it means police can allow their own biases to affect the use of their police discretionary powers.[116] It is therefore alarming that the statistics suggest that police discriminate towards Indigenous people despite standard practices[117] as it means selective policing is serious issue in Australia.

'Selective policing' is an example of the improper use of those discretionary police powers and is a real threat to the rule of law. United States literature has also tokened discriminatory administration and enforcement of laws as a 'denial of justice and unconstitutional'.[118] Thus highlighting the severity of the problem at a global level and reiterating the need to regulate it effectively to ensure no such breach in the rule of law.

Potential Solutions

Solutions include an increased level of training for police in interacting with Indigenous people,[119] a greater emphasis on the use of discretionary alternatives to arrest such as issuing cautions and warnings,[120] stricter controls on police powers especially with respect to young people,[121] and review

[114] Latika Bourke, 'Kevin Rudd warns of the emergence of a new stolen generation', *SMH* (Online), 13 February 2015 <http://www.smh.com.au/federal-politics/political-news/kevin-rudd-warns-of-the-emergence-of-a-new-stolen-generation-20150213-13dvvh.html>.
[115] Robert Mullins, 'Police misconduct in Queensland: a public wrong' (2015) 34 (2) *University of Queensland Law Journal* 287, 298.
[116] John Kleinig, 'Selective Enforcement and the Rule of Law' (1998) 29 *Journal of Social Philosophy* 117; Tamara Walsh, 'The Impact of Coleman v Power on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland' (2006) 30 *Melbourne University Law Review* 191.
[117] Amy Simmons, ''Over-policing to blame' for Indigenous prison rates', *ABC News* (Online), 25 Jun 2009 <http://www.abc.net.au/news/2009-06-25/over-policing-to-blame-for-indigenous-prison-rates/1332486>; Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?' (NSW Bureau of Crime Statistics and Research, 2016).
[118] Joseph H. Tieger, '*Police Discretion and Discriminatory Enforcement'* (1971) 1971 (4) *Duke Law Journal* 717, 725.
[119] Dr Christine Jennett, 'Policing and Indigenous Peoples in Australia' (Paper presented at the History of Crime, Policing and Punishment Conference, Australian Institute of Criminology, Canberra, 9-10 December 1999) 17; NSW Police Force, *Aboriginal Strategic Direction 2012-2017* (30 January 2015) Police, 7 <http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/105178/ASD_2012-2017_Book_Revised_FA_Proof.pdf>.
[120] Boyd Hamilton Hunter, 'Factors underlying indigenous arrest rates' (NSW Bureau of Crime Statistics and Research, 2001); NSW Police Force, *Aboriginal Strategic Direction 2012-2017* (30 January 2015) Police, 7 <http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/105178/ASD_2012-2017_Book_Revised_FA_Proof.pdf>.
[121] Australian Human Rights Commission, *Bringing them Home* (1997) Chapter 24 <http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.

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of the arresting officer's body-camera footage following the arrest of an Indigenous person to ensure proper procedures were followed.[122]

Further solutions include community legal education for at-risk Indigenous people to ensure that they are aware of their legal obligations and to reduce the likelihood of interactions with the police that may lead to arrest.[123]

[122] Campbell Simpson , 'NSW Police Get Always-On, Body-Mounted Video Cameras', *Gizmodo* (Online), 20 May 2014 <https://www.gizmodo.com.au/2014/05/nsw-police-get-always-on-body-mounted-video-cameras/>.
[123] NSW Police Force, *Aboriginal Strategic Direction 2012-2017* (30 January 2015) Police, 18 <http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/105178/ASD_2012-2017_Book_Revised_FA_Proof.pdf>; Legal Aid New South Wales, 'Annual Report 2012 – 2013' (Legal Aid NSW, 2013) <http://www.legalaid.nsw.gov.au/publications/annual-report/annual-report-2012-2013/client-services/community-legal-education>; North Australian Aboriginal Justice Agency, *Community Legal Education Training and Projects* <http://www.naaja.org.au/our-services/community-legal-education-training-and-projects/>.

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Language Barriers and Law Enforcement Procedures

Background

Language barriers between Indigenous peoples and police officers may mean that some Indigenous people may not understand what a police officer wants of them, and/or may not be able to understand how to comply with police officers' instructions.[124] Difficulties with English may also mean being sent to jail or being given community based orders without having understood any of the court processes or the requirements of the relevant community based orders.[125] Language barriers may mean that some Indigenous people are vulnerable to being arrested due to *an inability and failure to understand and comply with police instructions*, as well as vulnerable to breaching orders requiring them to do, or abstain from certain behaviour, because they *do not understand the requirements of those orders.*

The director of the Bureau of Crime Statistics and Research (BOCSAR), Dr Don Weatherburn has stated that Indigenous incarceration has increased due to tougher sentencing and law enforcement procedures. Law enforcement has been tougher for breaches of community based orders and where Indigenous people are less likely than non-Indigenous people to understand the requirements of these community based orders by virtue of these language barriers,[126] it is evident that Indigenous incarceration rates have been higher due to this tougher stance on the enforcement of community based orders.

Why are Language Barriers and Tougher Law Enforcement Problematic?

This tougher stance against breaches of community based orders has caused a drastic increase in the level of incarcerated Indigenous people when compared with Indigenous incarceration levels 15 years ago.[127] As such, it is likely that there is a lack of education and understanding around the requirements of community based orders, and education regarding the general legal obligations of a state citizen

[124] Korff, Jens, Aboriginal prison rates (2017) Creative Spirits <https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz4mJzsOrFD>; Byron Davis, 'The Inappropriateness of the Criminal Justice System – Indigenous Australian Criminological Perspective' (Paper presented at the 3rd National Outlook Symposium on Crime in Australia, Australian Institute of Criminology, Canberra, 22-23 March 1999).
[125] Korff, Jens, Aboriginal prison rates (2017) Creative Spirits <https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz4mJzsOrFD>; Byron Davis, 'The Inappropriateness of the Criminal Justice System – Indigenous Australian Criminological Perspective' (Paper presented at the 3rd National Outlook Symposium on Crime in Australia, Australian Institute of Criminology, Canberra, 22-23 March 1999).
[126] Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?' (NSW Bureau of Crime Statistics and Research, 2016).
[127] Amy Simmons, ''Over-policing to blame' for Indigenous prison rates', *ABC News* (Online), 25 Jun 2009 <http://www.abc.net.au/news/2009-06-25/over-policing-to-blame-for-indigenous-prison-rates/1332486>; Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?' (NSW Bureau of Crime Statistics and Research, 2016).

amongst at-risk Indigenous populations.[128] Therefore the solution to this issue is education, as it stands, the statistics suggest that tougher law enforcement does not assist in reducing Indigenous incarceration rates when language barriers are an active reason for why breaches in the law are occurring.[129]

This linguistic handicap requires leniency on the part of law enforcement to ensure that the offender is aware of their crime, and understands the nature of the breach, as well as what is required or expected of them so as not to re-offend. Tougher law enforcement punishes Indigenous people for not understanding what was required of them by virtue of these language barriers, before punishing them for some actual breach of law. This would inevitably translate to greater rates of Indigenous incarceration.

Potential Solutions

Although tougher law enforcement is not an issue in itself, it does highlight the need for community legal education around the legal obligations of a citizen,[130] and in particular, the obligations of a person who is a party to a community based order (or any other such order). Therefore, the ideal solution would be education in the language of the relevant at-risk Indigenous person to ensure that the requirements of a community based order are made clear to that person at the time of receiving such an order. This may reduce the likelihood of breach of such community based orders and therefore reduces arrests arising out of their breach. Community legal education in the language of the relevant at-risk Indigenous groups may also help to educate Indigenous groups regarding their legal obligations as state citizens.

Furthermore, the implementation of cultural awareness programs within police education curriculums,[131] encouraging the discretionary use of alternatives to arresting and charging individuals,

[128] Amy Simmons, ''Over-policing to blame' for Indigenous prison rates', *ABC News* (Online), 25 Jun 2009 <http://www.abc.net.au/news/2009-06-25/over-policing-to-blame-for-indigenous-prison-rates/1332486>; Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?' (NSW Bureau of Crime Statistics and Research, 2016).

[129] Amy Simmons, ''Over-policing to blame' for Indigenous prison rates', *ABC News* (Online), 25 Jun 2009 <http://www.abc.net.au/news/2009-06-25/over-policing-to-blame-for-indigenous-prison-rates/1332486>; Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?' (NSW Bureau of Crime Statistics and Research, 2016).

[130] NSW Police Force, *Aboriginal Strategic Direction 2012-2017* (30 January 2015) Police, 18 <http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/105178/ASD_2012-2017_Book_Revised_FA_Proof.pdf>; Legal Aid New South Wales, 'Annual Report 2012 – 2013' (Legal Aid NSW, 2013) <http://www.legalaid.nsw.gov.au/publications/annual-report/annual-report-2012-2013/client-services/community-legal-education>; North Australian Aboriginal Justice Agency, *Community Legal Education Training and Projects* <http://www.naaja.org.au/our-services/community-legal-education-training-and-projects/>.

[131] Dr Christine Jennett, 'Policing and Indigenous Peoples in Australia' (Paper presented at the History of Crime, Policing and Punishment Conference, Australian Institute of Criminology, Canberra, 9-10 December 1999) 17; NSW Police Force, *Aboriginal Strategic Direction 2012-2017* (30 January 2015) Police, 7 <http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/105178/ASD_2012-2017_Book_Revised_FA_Proof.pdf>.

such as issuing cautions and warnings,[132] where the situation is non-violent or a risk for anyone involved may be highly beneficial in reducing the rates of Indigenous incarceration.[133] The use of interpreter services[134] immediately following arrest may also ensure that the person of interest is fully aware of their rights and understands the situation fully – this may help to prevent circumstances that cause more harm to the person of interest and may help them comply with orders.

[132] NSW Police Force, *Aboriginal Strategic Direction 2012-2017* (30 January 2015) Police, 7, 28 <http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/105178/ASD_2012-2017_Book_Revised_FA_Proof.pdf>.
[133] Boyd Hamilton Hunter, *Factors underlying indigenous arrest rates* (NSW Bureau of Crime Statistics and Research, 2001) 4.
[134] Ian Dobinson and Thomas Chiu, 'Access and Equity: The New South Wales Court Interpreter Service' (2005) 17(1) *Current Issues in Criminal Justice* 30, 32 <http://www.austlii.edu.au/au/journals/CICrimJust/2005/11.pdf>.