Criminal Lawyers' Association of the Northern Territory

Biennial Conference - 2017

Unequal Justice for Indigenous Australians

address

by

The Honourable Wayne Martin AC
Chief Justice of Western Australia

Bali
June 2017

Introduction

I am very pleased and greatly honoured to have been invited to address this conference of the Criminal Lawyers' Association of the Northern Territory

- not only because your President, Russell Goldflam, and I were at school together;
- not only because I was admitted to practise in the Northern Territory more than 30 years ago, and enjoyed appearing in a number of very interesting trials in the Territory;
- not only because I have had the pleasure of attending two previous CLANT conferences while in legal practice;
- but also because Western Australia and the Territory have so much in common.

Western Australians and Territorians can each boast of large tracts of extraordinarily beautiful natural scenery. That is because we can also boast of being home to members of one of the longest unbroken cultural groupings on the planet, for whom respect for country is a fundamental article of faith and who developed over countless millennia sustainable living practices from which we could learn a lot. Tragically, another characteristic which Western Australia and the Territory share is our propensity for incarcerating the descendants of the original inhabitants of the land colonised by our forebears at a rate which shocks the conscience.

Imprisonment rates

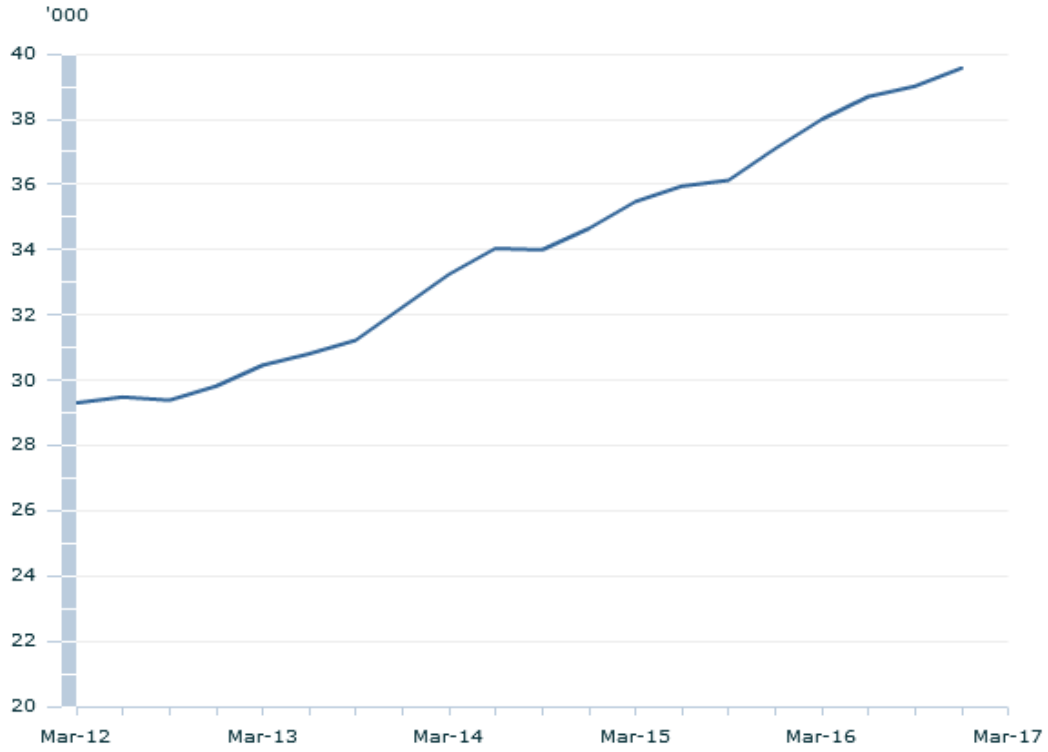
I am sure that delegates to this conference will be only too well aware of the gross over-representation of Aboriginal people in the criminal justice systems of Australia generally, and the Territory and Western Australia in particular. However, data recently published by the Australian Bureau of Statistics (ABS) reveals some interesting trends in relation to rates of imprisonment generally, and rates of Indigenous imprisonment in particular.

Persons in custody - Australia

In the last 5 years (from the March quarter in 2012 to the March quarter in 2017), the number of people in custody in Australia has increased 38%, or by 11,274 people.[1] The increase over that 5-year period is depicted in this graph:

[1] ABS, *Corrective Services, Australia, March quarter 2017* (Cat No 4512.0) (2017).

Graph 1: Number of full-time prisoners, Australia, March 2012 - March 2017[2]



This extraordinary increase has occurred over a period during which rates of serious crime have generally declined in most Australian jurisdictions. Criminologists are generally agreed that the decrease in reported crime is unlikely to be attributable to the increase in imprisonment, because incapacitation by incarceration has never been demonstrated to have a significant long-term effect upon the rates of reported crime.

The remand population - Australia

Much of this increase has occurred in the remand population - that is, unsentenced prisoners. Over the same 5-year period, unsentenced

[2] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above (average daily number).

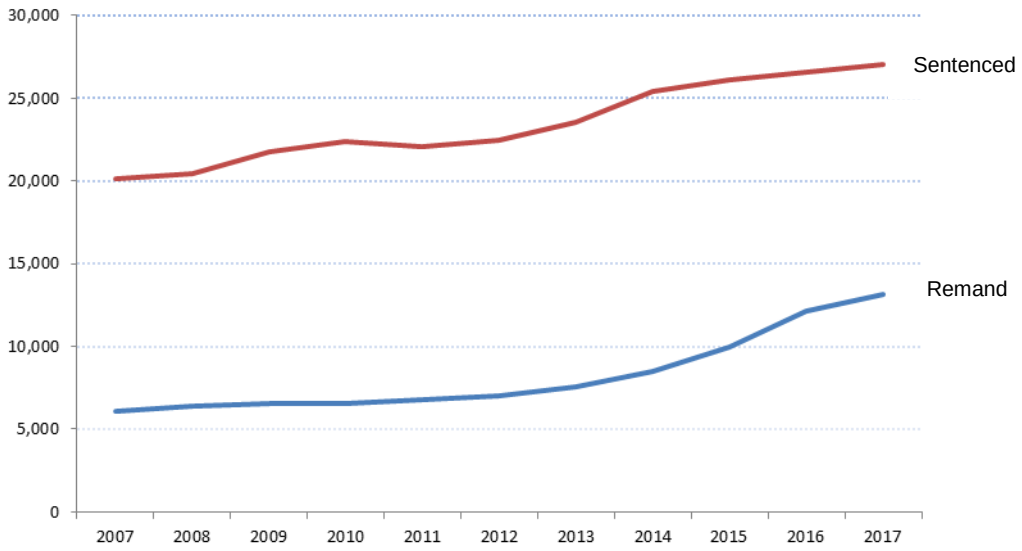
prisoners increased by a staggering 87%, or by 6,125 persons.[3] The rate of increase is shown in the graph below:

Graph 2: Number of unsentenced prisoners, Australia, March 2012 - March 2017[4]

Growth in the number of unsentenced prisoners over the last decade can be compared to the growth in the number of sentenced prisoners in the following graph:

[3] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above.
[4] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above (average daily number).

Graph 3: Number of sentenced and remand prisoners, Australia, 2007 - 2017[5]



As can be seen from the graph, since about 2013, the number of unsentenced prisoners in Australia has increased at a significantly greater rate than the number of sentenced prisoners. 10 years ago, just over one in four prisoners was unsentenced, whereas today almost one-third of the prison population is in custody on remand.

Imprisonment rates by jurisdiction

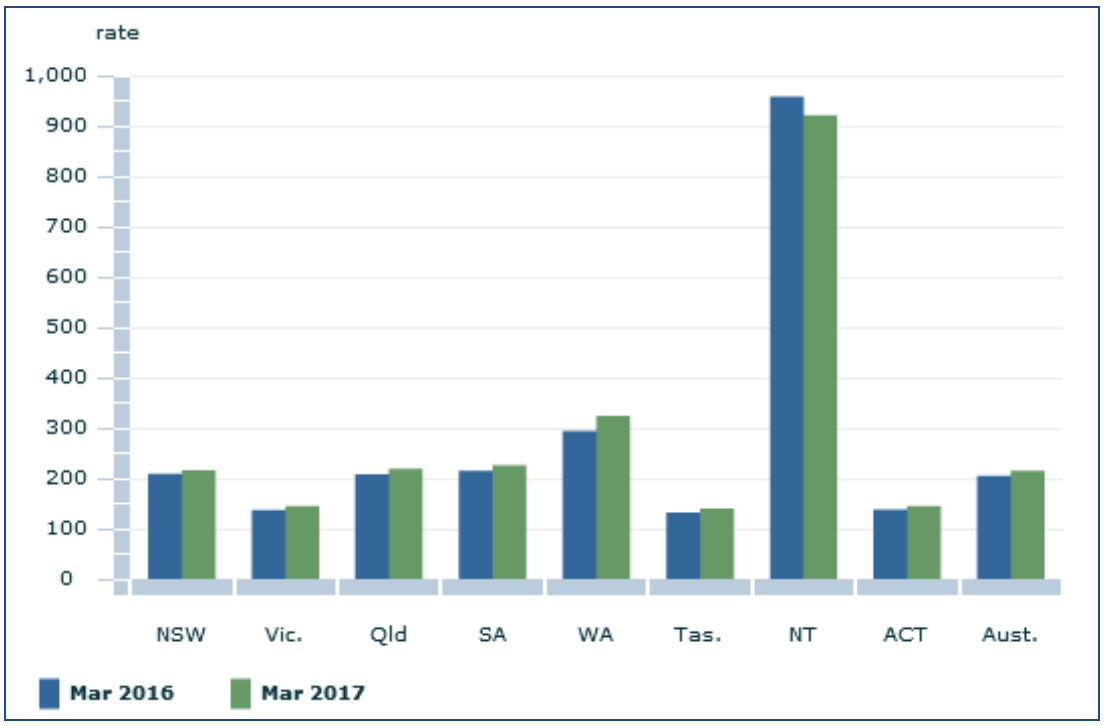
Imprisonment rates[6] vary widely. However, the most recent published data[7] shows that jurisdictions can be grouped by reference to those rates. Victoria, Tasmania and the Australian Capital Territory form a group with the lowest imprisonment rates - all having rates of between 140 and 150 people per 100,000 adult population. The next group comprises New South Wales, Queensland and South Australia, all of which

[5] Derived from Sonia Russell & Eileen Baldry, "Three charts on: Australia's booming prison population", *The Conversation - Australia* (14 June 2017) - figures are based on yearly averages.
[6] Generally the number of prisoners per 100,000 adult population.
[7] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above, Table 3 - Imprisonment rates (March 2017 rates).

imprison between 218 and 227 people per 100,000 adults - a rate which is consistent with the national average of 218. Then comes Western Australia with 332 and then, at the top of the chart, by a long way, the Northern Territory at 935 adults per 100,000.

Imprisonment rates in the different jurisdictions are shown on the attached bar chart:

Graph 4: Average daily imprisonment rates by states and territories[8]



Indigenous imprisonment - Australia

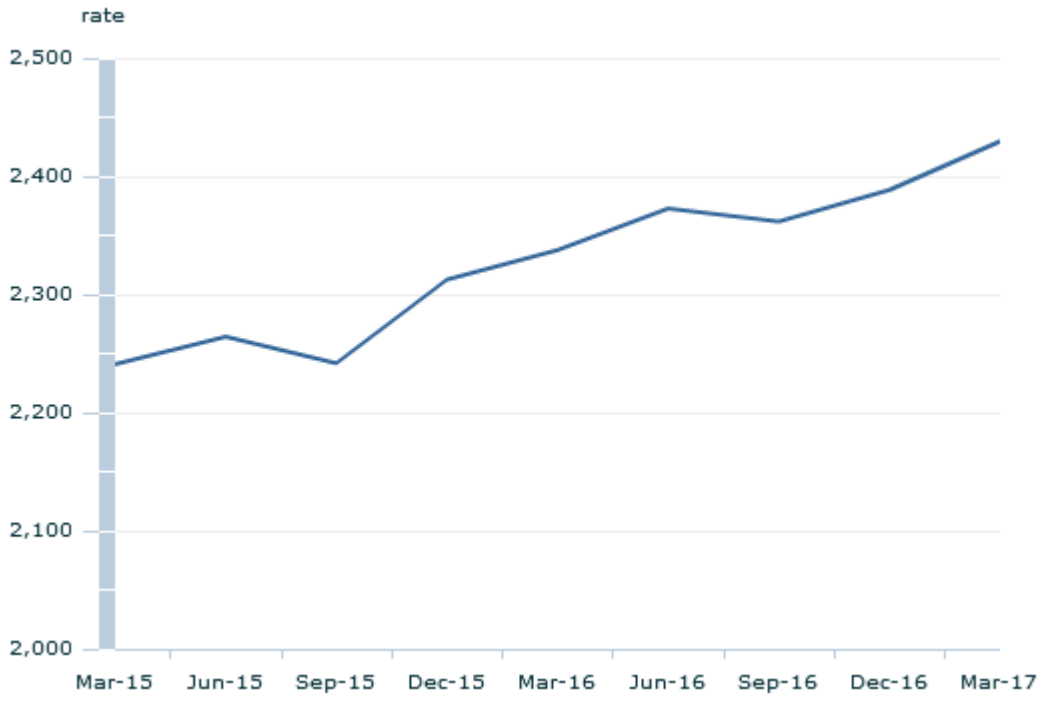
During the March quarter of this year, on average 11,288 Aboriginal and Torres Strait Islander people were imprisoned each day. They accounted for 28% of the prison population, drawn from approximately 2% of the

[8] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above.

total Australian adult population. The number represented an increase of 5% over the quarter, and 7% over the year.[9]

The increasing rate of Aboriginal imprisonment in Australia appears inexorable. The rate of increase over the last 2 years is depicted in the graph below:

Graph 5 Average daily Aboriginal and Torres Strait Islander imprisonment rate, March 2015 to March 2017[10]

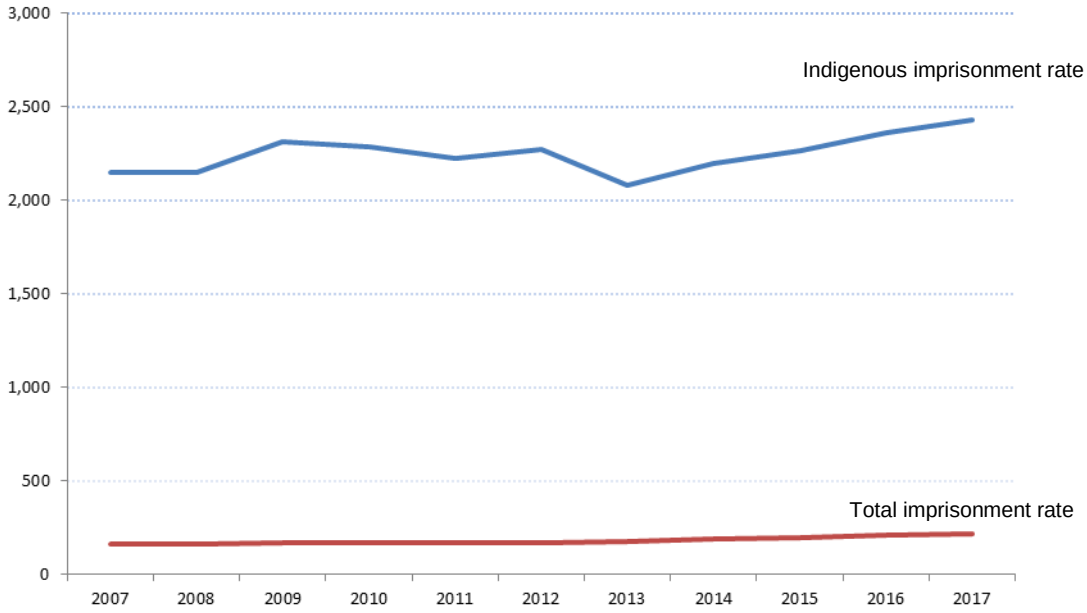


The national rate of Aboriginal imprisonment is now almost double what it was in 1991, when the Royal Commission into Aboriginal Deaths in Custody made more than 300 recommendations largely aimed at reducing the number of Aboriginal people in custody in this country.[11]

[9] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above.
[10] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above.
[11] The rate of Indigenous imprisonment in 1991 was 1,359 per 100,000 Indigenous adult population (David McDonald, *Aboriginal Deaths In Custody & Incarceration: Looking Back & Looking*

Indigenous imprisonment has increased at a significantly greater rate than non-Indigenous imprisonment. Changes in imprisonment rates over the last 10 years are depicted on the graph below:

Graph 6 Indigenous and total imprisonment rate in Australia, 2007 to 2017[12]

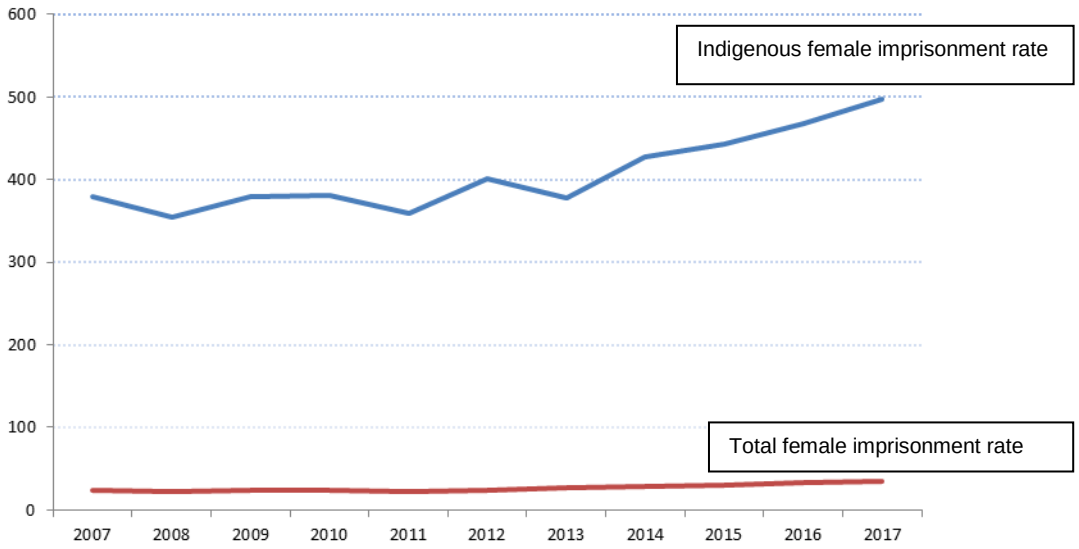


The imprisonment rate for Aboriginal women has increased at an even greater rate over that period. Aboriginal women are the fastest growing cohort in the Australian prison system. Rates of imprisonment for Indigenous women can be compared to rates of imprisonment for women generally in the graph below:

Forward (1996) 11). The national rate reported in the recent ABS data was 2,469 per 100,000 Indigenous adult population (ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above). There have been a number of revisions to methodology over the years and the data is not strictly comparable.

[12] Derived from Sonia Russell & Eileen Baldry, "Three charts on: Australia's booming prison population", *The Conversation - Australia*, note 5 above - figures are based on yearly averages.

Graph 7 Indigenous female and total female imprisonment rate in Australia, 2007 to 2017[13]

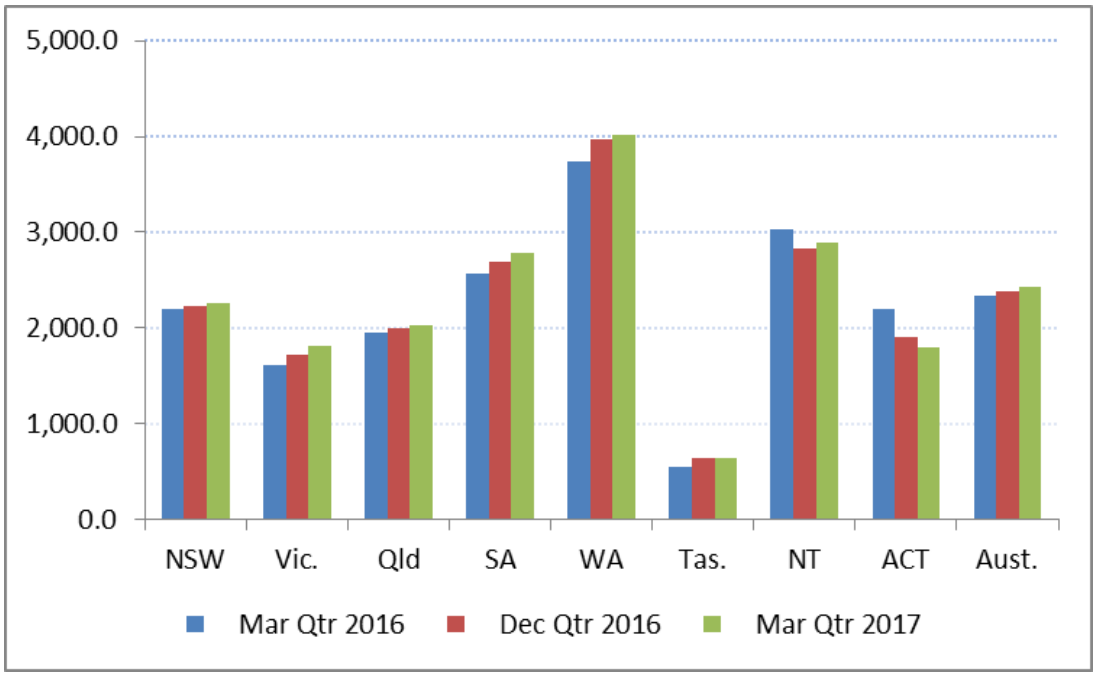


Aboriginal imprisonment by jurisdiction

The rate of Aboriginal imprisonment[14] also varies widely amongst Australian jurisdictions. I am ashamed to admit that the rate of Aboriginal imprisonment in Western Australia is significantly higher than any other jurisdiction, at 4,011 people per 100,000. As you might expect, the Territory ranks second, with a rate of 2,893.[15] The jurisdictional rates are shown in the bar chart below:

[13] Derived from Sonia Russell & Eileen Baldry, "Three charts on: Australia's booming prison population", *The Conversation - Australia* , note 5 above - figures are based on yearly averages.
[14] Expressed as numbers of people per 100,000 adult Aboriginal people.
[15] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above, Table 13 - Aboriginal and Torres Strait Islander Imprisonment rates, by sex - March 2017 rates.

Graph 8 Aboriginal and Torres Strait Islander imprisonment rate by states and territories[16]



When the jurisdictional imprisonment rates are broken down by gender, the rate for adult Aboriginal men during the March 2017 was 7,187 in Western Australia, and 5,437 in the Northern Territory. So, in Western Australia, during the first quarter of this year about one in every 14 adult Aboriginal men spent the night in prison, and in the Territory it was about one in 18.[17]

There is, however, an interesting feature of the trends in Aboriginal imprisonment viewed by jurisdiction. In all Australian jurisdictions except two, that rate has continually increased over the last four years. In the Northern Territory, the rate in the last quarter (2,892.7) was lower than the rate in 2014 (2,903.6), and the rates during the intervening

[16] Derived from ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above, Table 13 - Aboriginal and Torres Strait Islander imprisonment rates, by sex.
[17] ABS, *Corrective Services, Australia, March quarter 2017*, note 1 above, Table 13 - Aboriginal and Torres Strait Islander Imprisonment rates, by sex.

period have not shown the same consistent trend of increase evident in all other Australian jurisdictions other than the ACT.[18] I would be interested to hear your views on why this might be so.

Indigenous imprisonment - a summary

PricewaterhouseCoopers (PwC) summarised this data in a recent report[19] which contains the following chart:

Figure 1 - Australian imprisonment rates[20]

As can be seen, Indigenous men are imprisoned at 11 times the rate of the general population, Indigenous women at 15 times the rate of the general population, and Indigenous youth at 25 times the rate of non-Indigenous youth. As these are national rates, it will be obvious that the differential rates in Western Australia and the Northern Territory are likely to be significantly higher than these rates.

[18] In the ACT the annual rate increased between 2014 and 2016, but decreased between the March quarter 2016 and the March quarter 2017 (although the rate for the March quarter in 2017 is still higher than the annual rates in 2014 and 2015).
[19] PwC, *Indigenous incarceration: Unlock the facts* (May 2017) (available at www.pwc.com.au).
[20] PwC, *Indigenous incarceration: Unlock the facts*, above note 19, 5.

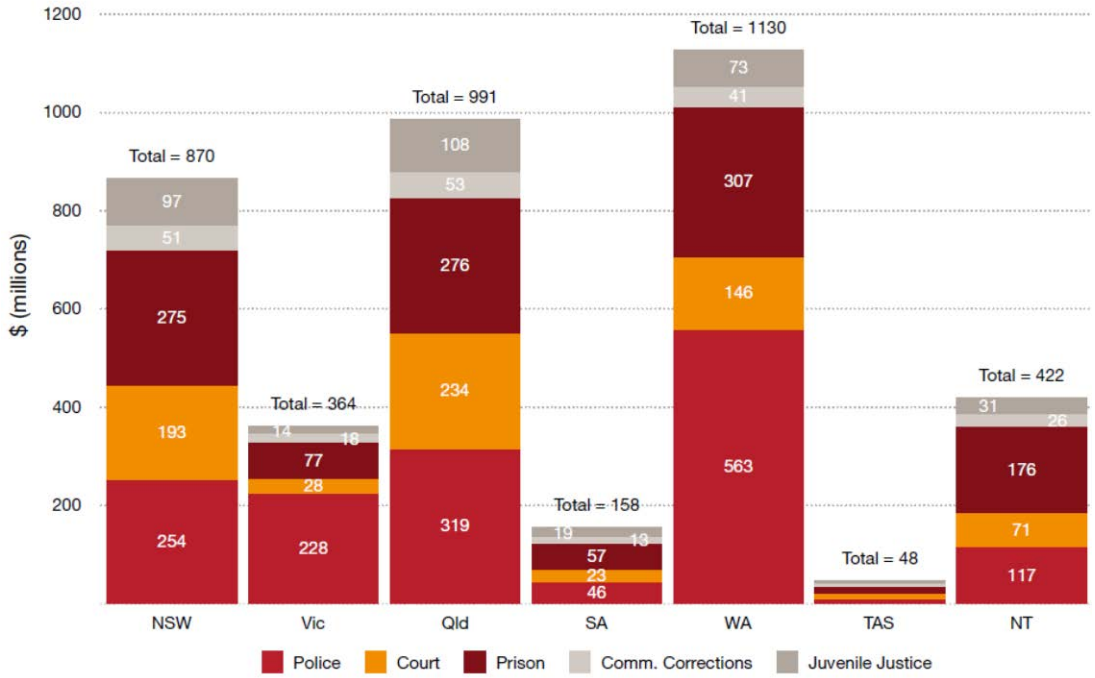
Cost

This audience will be well aware of the scale of the human tragedy which is depicted, somewhat clinically, in these shocking figures. In the report to which I have referred, PwC have modelled the cost of Indigenous incarceration to the Australian economy, and assesses that cost at $7.9 billion per year, rising to $9.7 billion per year by 2020, and to $19.8 billion by 2040.[21]

PwC also analysed justice system costs (police, courts, prisons, community corrections and juvenile justice) arising from Indigenous offending in each of the Australian jurisdictions during 2016. The greatest cost of Indigenous crime in any jurisdiction was in Western Australia where, last year, a staggering $1.13 billion was spent - a little under $900 million being spent on police and prisons. PwC estimate that $422 million was spent on Indigenous crime in the Northern Territory justice system last year. Justice system expenditure on Indigenous crime in the different Australian jurisdictions is shown in the chart below:

[21] PwC, *Indigenous incarceration: Unlock the facts*, above note 19, 7.

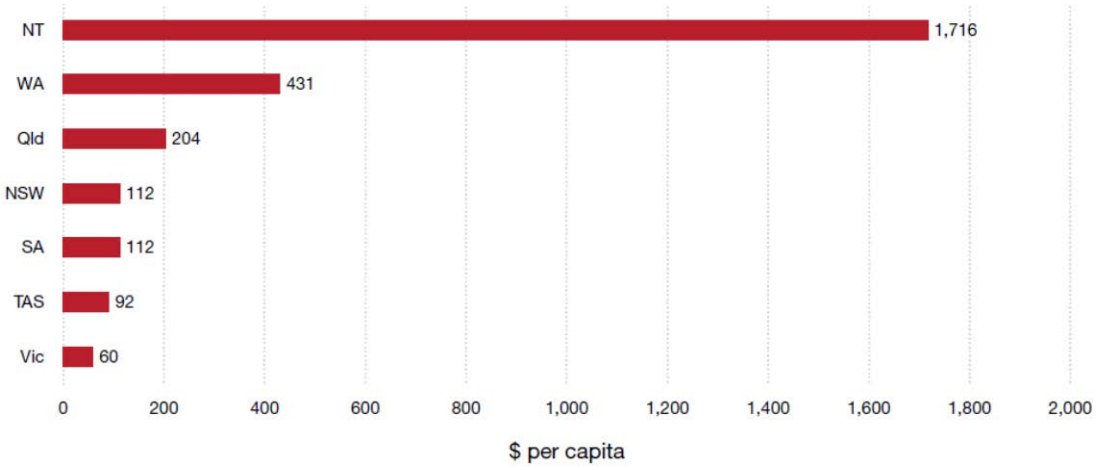
Figure 2 - Fiscal costs by state and territory, 2016 (justice costs only)[22]



Because the Northern Territory has a much smaller population than other Australian jurisdictions, per capita expenditure on Indigenous crime in the Territory is much greater than in any other Australian jurisdiction. Per capita expenditure on Indigenous crime in the justice systems of the various Australian jurisdictions is depicted in the bar chart below[23] which shows that per capita expenditure in the Territory is four times higher than the next highest jurisdiction which is, predictably enough, Western Australia.

[22] PwC, *Indigenous incarceration: Unlock the facts*, above note 19, 30
[23] PwC, *Indigenous incarceration: Unlock the facts*, above note 19, 30.

Figure 3 - Fiscal costs per capita (all Australians), 2016 (justice costs only)[24]



The nature of equality

As this paper is directed to the question of whether at least some of this staggering disproportion can be attributed to the unequal treatment of Aboriginal people in the justice system, it is desirable to address what we mean by equality. Both the courts and community regard equality before the law as a principle of paramount importance. As French CJ, Crennan and Kiefel JJ observed:

> "Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, or lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties".[25]

However, equality can be an elusive notion. It can lie, like beauty, in the eye of the beholder. It can and often does mean different things to different people and it seems likely that lawyers and judges apply a

[24] PwC, *Indigenous incarceration: Unlock the facts*, above note 19, 30.
[25] ***Green v The Queen; Quinn v The Queen*** [2011] HCA 49; 244 CLR 462 [28].

meaning to the term which is rather different to that applied by sociologists.

Formal equality

When lawyers and judges refer to equality, they apply the notion of formal equality attributed to Aristotle - that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness".[26] In legal terms, this:

> requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in ***Wong v The Queen***:
>
> > Equal justice requires identity of outcome in cases that are ***relevantly*** identical. It requires ***different*** outcomes in cases that are different in some relevant respect. [emphasis in original][27]

So, application of the legal principle of equality depends critically and fundamentally upon the identification of all the characteristics that are relevant to the legal outcome. In ***Bugmy v The Queen***[28] the High Court confirmed that Aboriginality was irrelevant to the sentencing process, although circumstances of social deprivation often associated with remote Aboriginal communities were relevant to that process. So, applying Aristotle's notion of formal equality does not require Aboriginal offenders to be sentenced differently to non-Aboriginal

[26] Aristotle, *Ethica Nichomachea* (Trans WD Ross) (1925) Book 3 at 1131a-1131b, as summarised by Prof Peter Weston, "The Empty Idea of Equality" (1982) 95(3) *Harvard Law Review* 537, 543.
[27] Per French CJ, Crennan and Kiefel JJ in ***Green v The Queen,***[2011] HCA 49; 244 CLR 462 [28].
[28] [2013] HCA 37; 249 CLR 571.

offenders, but it does require offenders who have suffered extreme social deprivation to be sentenced differently to those who have not experienced such circumstances, and it requires all those who have suffered such experiences to be treated alike, irrespective of whether or not they are Aboriginal.

Substantive equality

On the other hand, sociologists are more inclined to assess the outcomes of any process for the purpose of ascertaining whether the process provides substantive equality to all who are subjected to it. As Professor Catharine MacKinnon has pointed out in the field of gender equality, even though most western democracies have had laws prohibiting discrimination on the ground of gender (in the legal sense) for many decades now, women in those societies remain significantly under-represented in most areas of leadership. This suggests that the structures and processes which allocate leadership roles within those societies disadvantage women and to that extent do not provide substantive equality to women. A sociologist might take the same view of a justice system in which 28% of the prison population come from 2% of the general population. A lawyer and a sociologist might well arrive at different conclusions as to whether the justice system is treating that group equally.

In order to assess whether Aboriginal people are treated equally, in either of the senses of the term I have described, it is appropriate to start by asking why Aboriginal people are so over-represented in our courts and prisons.

A regrettable truth

The regrettable truth is that the main, but not the only reason why Aboriginal people are overrepresented in our courts and prisons, is because they are overrepresented amongst those who commit crime. But there are two things that need to be immediately said about that proposition.

Aboriginal victims

The first is that Aboriginal people are just as overrepresented amongst victims as they are amongst offenders. Most Aboriginal crime is directed against other Aboriginal people. Even lethal harm is often directed by Aboriginal people towards themselves. The national Indigenous suicide rate is two times the non-Indigenous rate.[29]

Most Aboriginal people are law abiding

It is vital to remember that the majority of Aboriginal people are not offenders. The figures I have set out might make one think that all Aboriginal people are offenders. The vast majority of Aboriginal people are law-abiding citizens. A relatively small number of Aboriginal people are answerable for an astoundingly large amount of crime. You would think this should make it easier to solve the problem, but it does not seem to have been the case.

Why do some Aboriginal people commit more crime than non-Aboriginal people? I think the answer to this question is quite

[29] ABS, *Causes of Death, Australia, 2015* (Cat No 3303.0) (2016) Table 12.1 (Age standardised rates).

obvious and lies in the fact that Aboriginal people are significantly over-represented amongst the most marginalised and disadvantaged people within our society, and it is the most marginalised and disadvantaged people within our society who are much more likely to commit crime. Why are Aboriginal people over-represented amongst that group? I think the answer to this question is also obvious and lies in the historical treatment of Aboriginal people since colonisation which involves dispossession, disenfranchisement, brutalisation, cultural alienation, fracturing of families by misguided policies and so on and so on. The consequences of these various things have been disastrous and continue to reverberate, particularly as a result of unaddressed intergenerational trauma. They explain why Aboriginal children are significantly over-represented amongst the children who are the subject of care and protection orders. Around the nation 28% of care and protection orders relating to children involve Indigenous children whereas Indigenous children comprise only 5.4% of the juvenile population; the rate is almost 10 times that for non-Indigenous children.[30] Tragically the number of care and protection orders relating to Indigenous children has grown by over 280% since 2006.[31]

[30] Australian Institute of Health & Welfare (AIHW), *Child protection Australia 2015-16* (2017) 43; ABS, *Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026* (Cat No 3238.0) Estimated and projected population, Aboriginal and Torres Strait Islander Australians, Series B, Single year of age, Australia, states and territories; ABS, *Population Projections, Australia, 2012 (base) to 2101* (Cat No 3222.0) Table B9 - Population projections, By age and sex, Australia (Series B).

[31] AIHW, *Child protection Australia 2005-06* (2007) 39; AIHW, *Child protection Australia 2015-16*, above note 30, 43.

Systemic discrimination

Over-representation amongst those who commit crime is, however, not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. 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.[32] If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.

Returning to the notion of equality espoused by Aristotle, and which the High Court has adopted, requires us to ask whether the outcomes of Indigenous interaction with the criminal justice system can be attributed to unequal treatment. In the way in which lawyers approach these things, the Western Australian legislation which provides for police to issue move-on orders against people thought to be committing a public nuisance does not discriminate against Aboriginal people because it

[32] By a non-Aboriginal magistrate, or in WA at least, by a predominantly non-Aboriginal jury. The difficulties of increasing Aboriginal participation in jury service is a topic for another day.

applies equally to anybody thought to be committing a public nuisance. By the same process of analysis, bail legislation does not discriminate against Aboriginal people because people who do not have a home or who are not in stable employment or who have a long prior criminal record are treated the same whether they are Aboriginal or not. On the same analysis, mandatory sentencing does not discriminate against Aboriginal people because it applies to all offenders who come within the scope of that legislation irrespective of race or culture. So, on a lawyer's analysis, these laws cannot be said to discriminate against Aboriginal people, or to result in unequal treatment, because they do not discriminate by reference to Aboriginality, but rather by reference to characteristics with which Aboriginal people are much more significantly associated.

This is where I think, with respect, the sociological approach espoused by Professor MacKinnon makes rather more sense than the lawyer's approach. Put bluntly, if one looks at the outcomes of a system and sees that they are skewed, it is a fair inference that the system is not working fairly. We know that the outcomes of the criminal justice system are significantly skewed in relation to Aboriginal people. Some of the sources of that skew can be seen in the examples that I have given. Move-on orders are more likely to be issued against Aboriginal people, Aboriginal people are more likely to be denied bail because they are homeless, or because of their prior criminal records, and the mandatory sentencing legislation in Western Australia has a much greater impact upon Aboriginal people than upon non-Aboriginal people, as does the dangerous sexual offender legislation.

There cannot be any doubt that Aboriginal people are significantly disadvantaged within our criminal justice system in almost every aspect of that system's operation. Even if a lawyer might describe the system's treatment of Aboriginal and non-Aboriginal people as equal, the outcomes of the system's operations are grossly unequal. Whether you attribute those outcomes to disadvantage or to discrimination, it does not alter the tragic effects of those outcomes on the descendants of the longest unbroken cultural grouping on the planet.

Some recent cases from Western Australia

The general proposition I am advancing can be conveniently illustrated using the circumstances of three cases decided by the Court of Appeal in Western Australia over the last couple of years. Each of them involved offenders with characteristics we all see far too often - namely, young Indigenous offenders who have been subjected to such exceptional disadvantage and trauma that their capacity to operate effectively in contemporary Australian society is seriously diminished.

The cases all involve young offenders who were either diagnosed with, or suspected of suffering from foetal alcohol spectrum disorder (FASD).

AH

AH v The State of Western Australia[33] involved a 21-year-old Aboriginal woman from the Pilbara whose childhood was characterised by dysfunction, dislocation, physical abuse, sexual abuse and exposure to substance abuse. She suffers from significant intellectual impairment

[33] [2014] WASCA 228.

and cognitive disability and is almost completely illiterate and innumerate. She has never gained employment and lacks the skills to obtain any form of employment. Despite the history which she repeatedly gave of alcohol abuse involving her mother, and despite repeated appearances before the courts of Western Australia, she was never assessed in order to determine whether she suffered from FASD.

The tragic history of AH's involvement with the criminal justice system, and the circumstances which brought her before the Court of Appeal[34] are conveniently summarised in the following portion of the Court's reasons:[35]

> After a relatively brief history of offending as a child, AH came to the attention of the adult criminal justice system as a result of a series of offences she committed shortly after turning 18. Her various disabilities and needs were identified in a report provided to the District Court and she was placed on a community-based order in the expectation that the plans and proposals identified in that report would be implemented, thereby reducing the risk of her reoffending. However, none of those plans or proposals were in fact implemented. Instead, AH was subjected to requirements to report at particular times which were entirely unrealistic, having regard to her disabilities and her itinerant and unstable lifestyle. She reoffended.
>
> After AH reoffended, further reports were prepared, reinforcing the observations made in the earlier report and further refining the plans and proposals which would reduce AH's risk of reoffending. In reliance upon those reports, and the reasonable expectation that the plans and proposals embodied within them would be implemented, AH was placed upon another community-based order. However, in the six weeks which followed that sentence, AH was spoken to only once, immediately after the sentence was

[34] In a case over which I presided.
[35] [2014] WASCA 228 [3] - [8].

imposed. While the various agencies involved communicated with each other during that period, none of them actually did anything to provide any form of support or assistance to AH, who then reoffended.

The difficulty of providing services in regional Western Australia should not be under-estimated. However, the townships of Roebourne and Wickham, which AH moves between, are not remote communities. They are located a relatively short distance from Karratha which is a major regional centre.

Another psychiatric report was prepared before AH came back before the court. It reinforced the observations made in the earlier reports, and again identified the various steps which should be taken in order to reduce the risk of AH reoffending.

When AH came before the District Court on the third occasion for sentence, the sentencing judge reasonably but erroneously assumed that steps had been taken to provide support and assistance to AH in line with the proposals contained in the earlier reports to the court, and that such support and assistance had failed to change her pattern of offending behaviour. He sentenced AH to an effective term of 2 years imprisonment. She received no beneficial training or treatment while in prison. To the contrary, because of her vulnerability to stress and anxiety, her mental condition deteriorated during her imprisonment, as it had on the previous occasions she had been incarcerated. Ultimately her condition deteriorated to acute psychosis, and by the time her appeal came on for hearing, she was an involuntary patient at the Frankland Centre, although this was not known to counsel or the court.

In this case it is difficult to escape the conclusion that there was an undue focus upon the preparation of reports and assessments for the court, and far too little focus upon the need to actually provide support and assistance to AH. The conspicuous failure of the justice system to provide AH with any of the support and assistance which she so clearly needed and which was identified in the various reports and assessments presented to the court not only failed AH, but also failed to protect the communities of Roebourne and Karratha. Had he been aware of the true facts, the

> judge sentencing AH should have concluded that, in the particular circumstances of her case, the best means of protecting the community and increasing the prospect of AH living a useful life would be to provide an opportunity for the plans and proposals which had been so clearly identified to be implemented while AH was living in a supportive environment within the community with orders to that effect. The sentences of imprisonment which he imposed should be set aside. Having regard to the period of time which AH has served, the significant deterioration in her mental condition probably caused or exacerbated by her imprisonment, and the positive steps to provide her with the support and assistance she needs which have been taken with the encouragement of this court, AH should be resentenced in a way that does not expose her to the prospect of further punishment.

Put bluntly, each time AH was arrested and brought before the court, a great deal of effort was put into the preparation of reports which identified her disadvantages, disabilities and needs, and which outlined interventions which could reduce her risk of reoffending, whereas minimal effort was applied to the application of those interventions. Although wads of paper were produced, often covering much the same ground, very little was actually done to attempt to alter AH's living arrangements. As a consequence, the inevitable cycle of reoffending continued, to the point where she was ultimately incarcerated, the stress of which caused a very significant deterioration in her mental condition. Regrettably, by the time her case got to the Court of Appeal, she was detained as an involuntary mental patient, but steps initiated by the court did identify living arrangements which could be put in place once her condition improved to the point at which she could be released, and again, as a result of intervention by the court, the Disability Services Commission accepted responsibility to provide support and supervision for her. Although AH's life opportunities should undoubtedly be seen as

a work in progress, regrettably, the story so far has not been a happy one.

LCM

LCM came before the Court of Appeal shortly before his 18th birthday.[36] He was the youngest child in what was described as a 'large, fragmented family system which has been characterised by domestic abuse, neglect abandonment, disrupted attachment relationships, parental substance misuse and involvement in the criminal justice system'.[37] While it was not of relevance in the court proceedings, the findings of a parliamentary committee investigating the circumstances of LCM's actions is relevant for the purposes of this address. It noted:

> A statement made by the mother of the youth (provided originally to the Royal Commission into Institutional Responses to Child Sexual Abuse) indicates that the youth was taken into care because of his mother's abuse of alcohol and drugs.
>
> The youth's mother had suffered a series of tragic events. She was sent to a mission at the age of eight due to her parents' alcohol abuse, where she was sexually abused. She also turned to alcohol to try to forget the abuse. Her use of alcohol and drugs apparently increased after the death of her partner of 20 years and the loss of her house. She and her four adult children were still homeless at the time of the statement.[38]

When he was six, he and his siblings were placed into the care of the State, although four years later he was returned to the care of his family. However, two years later, as a result of neglect, including being exposed

[36] ***LCM v The State of Western Australia*** [2016] WASCA 164.
[37] [2016] WASCA 164 [49].
[38] Community Development and Justice Standing Committee, *Red flags, white flag response? The Department for Child Protection and Family Support's management of a troubled boy with a baby* (2016) 3.

to illicit drug use, transience, being left alone for long periods without adult care or supervision and without food, LCM was again taken into the care of the State.[39] Even then he was not provided with stable accommodation. He commenced using illicit substances and became a regular user of cannabis, alcohol and, on occasions, amphetamines. After completing year 7, he only attended school in year 8 for a short period before dropping out altogether. His literacy skills are limited, as are his vocational skills. His criminal history involved some serious offending, including aggravated robbery, aggravated burglary and causing bodily harm - the latter conviction arising from an occasion upon which he threw a knife at his girlfriend, missing her and injuring an innocent bystander.

LCM met his girlfriend when they were both 12 years old. They formed an intimate relationship and she became pregnant, giving birth to their son when she was 16 and LCM was approaching his 16th birthday. Because the baby was premature, he was kept at the hospital for almost a month. One evening at the hospital, the boy's mother went to the kitchen to warm up some food, leaving LCM and the boy alone. During that time, LCM struck the boy's head against a hard surface somewhere within the room with considerable force, fracturing the baby's skull, and causing severe brain injuries which led to the baby's death.

LCM was originally charged with murder, but the State accepted a plea of guilty to manslaughter, and LCM was sentenced to a term of 10 years detention.

[39] [2016] WASCA 164 [51].

While in detention after sentence, but before his appeal had been heard, LCM was assessed in the course of a project undertaken by the Telethon Kids Institute (TKI) aimed at identifying the proportion of children in juvenile detention suffering from FASD. He was diagnosed with that condition and evidence of that diagnosis was presented to the Court of Appeal. Consistently with established authority, the Court of Appeal considered that evidence to reduce LCM's culpability, and the appeal was allowed, and the sentence reduced to a term of 7 years detention, with eligibility for supervised release after serving one half of that term.

I expressed my view of this sequence of events in the following terms:[40]

> In ***AH v The State of Western Australia*** this court drew attention to the surprising lack of any FASD assessment of the appellant in that case, given its potential significance to the management of that offender. Senior counsel for the appellant in this case advised the court that despite those observations having been made 18 months ago, AH had still not been assessed for FASD. The circumstances of this case, viewed in the context of that advice, suggest that the arrangements for the assessment and management of offenders suffering from FASD in this State remain quite inadequate.
>
> In this case, the evidence established that one of the reasons LCM was taken into the care and protection of the State in early childhood was because of a recorded history of alcohol and substance abuse by his mother, and continuing prolific substance abuse by other members of the family. In that context, when LCM's neurological deficits became apparent and manifest in his behaviour, including the various behavioural and intellectual difficulties he manifested as a young child, it is remarkable that those responsible for his care and protection did not initiate an assessment of whether or not he was affected by FASD. As Dr Mutch observed, if the extent of LCM's neurological deficits had

[40] [2016] WASCA 164 [3] - [7].

been understood and addressed by appropriate management intervention early in his life, the trauma which he subsequently experienced and caused to others may have been averted.

Nor do the arrangements for the assessment and management of FASD in the criminal justice system appear any better than in the child protection system, despite the publication last year to justice system professionals of a series of informative videos on the subject produced by the Telethon Kids Institute. When LCM was charged with the most serious offence known to the criminal law, namely murder, in a context in which the death was caused by unusual and unexplained circumstances, it is equally remarkable that neither the experienced defence counsel who represented LCM at first instance, or the author of the pre-sentence report, or the author of the psychiatric report, or the author of the psychological report, or the court identified the fairly obvious prospect that LCM might be affected by FASD, or initiated an assessment to ascertain whether or not he was, in fact, suffering from that condition. It should also be noted that the Community Development and Justice Standing Committee of the Legislative Assembly of Western Australia enquired into and reported upon the circumstances of this case without making any reference to the prospect that LCM might suffer from FASD, or should at least be assessed for that condition. The fact of LCM's FASD only came to light coincidentally because LCM had been sentenced to a term of detention when the programme for screening for FASD undertaken by the Telethon Kids Institute was underway in that detention centre.

So, this is another case in which neither the agencies responsible for the care and protection of children nor those responsible for the assessment and management of offenders responded appropriately, or indeed at all, to the obvious prospect that LCM might suffer from FASD. As a consequence, the opportunity for early intervention and appropriate management to which Dr Mutch referred was lost, and the sentencing process at first instance miscarried.

The inadequacy of the arrangements for the assessment of FASD in this State make it impossible to make any meaningful assessment of the extent to which that condition is suffered by

> offenders in this State. The screening programme currently underway in the Banksia Hill Detention Centre may shed some light on that question. What is clear, however, is that the current arrangements for the assessment and management of offenders with that condition are quite inadequate. Unless those arrangements are improved, not only will injustice be suffered by those who commit crime at least in part because of a condition which they suffer through no fault of their own, but also the opportunity to reduce the risk to the community by appropriately managing such offenders will be lost. I can only hope that the observations made by the court in this case will have greater effect than the observations we made in ***AH***.

For those with an interest in this issue, I also reviewed a number of Canadian cases on the subject of FASD. It is clear that FASD has received considerably greater forensic attention in Canada than it has in Australia.[41] Following that review I summarised my conclusion in these terms:[42]

> This case illustrates the significance which a diagnosis of FASD may have upon the application of established principles of sentencing. It also illustrates that levels of awareness with respect to the possibility that an offender might be suffering FASD, and the arrangements which pertain to an assessment of that prospect and for the management of an offender found to be suffering that condition are inadequate, especially when compared to the awareness of and attention given to this issue in another comparable jurisdiction - namely Canada.

Churnside

Mr Churnside appealed against a sentence of 22 months imprisonment imposed following his conviction after pleading guilty to two counts of

[41] [2016] WASCA 164 [17] - [24].
[42] [2016] WASCA 164 [25].

aggravated burglary.[43] He was 20 years old at the time the offences were committed.

Mr Churnside had a long history of prior offending, including 34 prior convictions for burglary. His offending commenced at the age of 12 and by the age of 14 he was a significant user of alcohol and marijuana. He had been diagnosed with intellectual disability and adaptive functioning disability and had been registered with the Disability Services Commission. His verbal abilities had been assessed within the extremely low range, his listening comprehension was extremely low, his fine motor skills were borderline and his initial attention span was in the extremely low range, as was his working memory. His cognitive flexibility and multi-tasking abilities were also assessed as poor, as was his verbal memory.

Prior to being sentenced, Mr Churnside was assessed by Dr James Fitzpatrick a paediatrician with special expertise in the field of FASD. Perhaps unsurprisingly given the characteristics I have described, Dr Fitzpatrick assessed Mr Churnside as suffering from FASD, the effects of which were compounded by the combined and cumulative effects of emotional and social trauma in early life. Dr Fitzpatrick expressed the view that Mr Churnside's offending behaviour was likely to continue if he was not engaged in a therapeutic sentencing process that explored the trauma and stress of his early life, recognised his limited intellectual and social/adaptive capacity and provided realistic goals for his future. Dr Fitpatrick also expressed the unsurprising view that imprisonment was unlikely to have any effect in deterring

[43] ***Churnside v The State of Western Australia*** [2016] WASCA 146.

Mr Churnside from reoffending. He recommended a structured and supportive environment with practical activities appropriate to his level of cognitive function - such as an 'on country' or basic workplace programme.

The sentencing judge noted and accepted those views. However, without causing any inquiries to be undertaken with respect to the availability of appropriate levels of support for Mr Churnside, he concluded that those supports were not available in the Pilbara, where Mr Churnside lived, and imposed the sentence of imprisonment to which I have referred.

When the matter came before the Court of Appeal, we directed that inquiries be made with respect to the possibility of placing Mr Churnside in the sort of environment and arrangements described by Dr Fitzpatrick. We received evidence that his mother was willing to move to a dry community with which she had a connection, and in which, through those connections, Mr Churnside would be able to join the rangers' programme providing services to a nearby national park. The court was also advised that both the Disability Services Commission and the Department of Corrective Services would be able to provide some measure of support, albeit on the basis of occasional visits and telephone calls with the appellant. The court allowed the appeal and re-sentenced the appellant to a community-based order with a condition that he reside in the community to which I have referred.

The court[44] summarised its view of the lessons which might be derived from Mr Churnside's case in the following terms:[45]

> The gross over-representation of Aboriginal people in the criminal justice system of Australia has attracted the attention of courts, governments, the legal profession and the international and domestic community, the latter including, of course, the Aboriginal community, for many years. The objective of reducing the number of Aboriginal people in Australia's prisons was the focus of many of the recommendations made in the final report of the Royal Commission into Aboriginal Deaths in Custody. Regrettably, despite the efforts of governments at national, State and Territory level since those recommendations were made in 1991, the disproportionate over-representation of Aboriginal people in Australia's prisons has increased, rather than decreased.
>
> The government of Western Australia has committed to attempting to reduce the number of Aboriginal people in prison in this State. However, measured in terms of numbers per head of Aboriginal population, the rate of Aboriginal imprisonment in Western Australia continues to be higher than in any other Australian jurisdiction.
>
> The Aboriginality of an offender is not, of itself, a characteristic which is relevant to the sentencing process. However, the fact that an offender has experienced a traumatic childhood, deprivation and social disadvantage is relevant to the sentencing process, and it is the long experience of the courts of this State that Aboriginal offenders are over-represented amongst those who have suffered such life experiences. Similarly, although foetal alcohol spectrum disorder, which this appellant suffers, is not a condition which is in any way peculiar to Aboriginal people, such limited evidence as there is suggests that Aboriginal people are over-represented amongst those who suffer from this condition.
>
> The appellant's foetal alcohol spectrum disorder and neglect during early childhood have deprived him of the capacity to live independently in the community. Yet, apart from his interactions

[44] Over which I presided.
[45] [2016] WASCA 146 [1] - [7].

with the criminal justice system, he has been living without significant support in an environment which promotes a purposeless anti-social lifestyle. His is not an isolated case. The community will either bear the cost involved in providing the appellant and those like him with support or bear the costs involved in a cycle of offending and incarceration. While the latter costs will be greater, there is little evidence in the present case of government agencies being proactive in providing the required support to the appellant.

The courts are not in a position to address the social disadvantage in remote Aboriginal communities which cultivates the offending behaviour that produces unacceptably high rates of Aboriginal imprisonment. Nor do the courts control the allocation of government funding which may seek to address that social disadvantage. The challenges facing even well-resourced programs are not to be under-estimated. There will be cases where the seriousness of the offences or the pattern of offending committed by persons in the appellant's position is such as to demand the imposition of a term of imprisonment to be immediately served. Ultimately, community protection may require the removal of an offender from the community.

However, the present case is not one which, having regard to the nature of the offence and the circumstances of the offender, required the imposition of an immediate term of imprisonment. The appellant's cognitive deficits, which are no fault of his, limit the deterrent effect of imprisonment, both at a general and personal level. The community protection which his imprisonment offers is entirely short-term, as time spent in custody will do nothing to address the prospect of the appellant resuming a cycle of offending and imprisonment on release. Further, the appellant is still a very young man for whom the specialist reports indicate hope for rehabilitation if support can be provided in the community. The material placed before the sentencing judge indicated that there was some prospect that steps to promote change in the appellant's behaviour might be available in the community. Further inquiries made by this court have indicated that arrangements can in fact be made in the community which offer better prospect than imprisonment for breaking the

> tragic cycle of offending and imprisonment which threatens to characterise the appellant's life. We have concluded that the sentencing judge erred in finding that there was no viable community-based disposition without directing the making of inquiries which would establish whether that was in fact the case.
>
> The circumstances of this case demonstrate that the courts of this State must make every possible effort and take every step consistent with the interests of justice to engage the services of governmental and non-governmental agencies to assist offenders to change their living circumstances and behaviour in a way which will reduce the risk of reoffending, particularly in relation to offenders who suffer from cognitive deficits of the kind associated with foetal alcohol spectrum disorder. Without those efforts being made, the repetitive cycle of offending followed by ineffective punishment is likely to continue indefinitely to the detriment of both the relevant offender and to the safety of the community. The circumstances of this case also demonstrate the practical difficulties of providing appropriate support and assistance to offenders who reside in regional and remote parts of our State. As Aboriginal people are over-represented amongst those who have suffered childhood trauma, deprivation and social disadvantage, and amongst those who suffer foetal alcohol spectrum disorder, and amongst those who reside in regional and remote Western Australia, assiduous effort by the courts of this State to engage and facilitate whatever support and services may be available to offenders with these characteristics is an essential component of any effective strategy to reduce disproportionate Aboriginal imprisonment.

The TKI survey

The TKI survey which fortuitously improved the quality of justice provided to LCM has now been completed. Although the results have not yet been published, I have had the benefit of a briefing from the lead researchers with respect to its outcomes. It is desirable to preface a brief review of those outcomes with an observation with respect to the difficulty of accurately diagnosing FASD, largely because of the

difficulty often encountered obtaining reliable evidence of maternal alcohol use.

In that context, the majority of the children assessed had some form of neurocognitive impairment. Because of the difficulty of diagnosis to which I have referred, it was difficult to ascertain the precise extent of the role of maternal alcohol use in those children, although in the result, the researchers assessed 36% of all the children assessed during the project as suffering FASD. This is the highest recorded incident of FASD in the world.

The children assessed also had very poor levels of general health, very often showing signs of physical trauma - scars and poorly healed injuries from risky behaviours or self-harm, hearing loss and difficulty sleeping. A high proportion of the children had a history of trauma including incarcerated family members, a single or no parents, substance abuse and chronic illness within the family. 25% to 30% of participants in the survey had a motor skill impairment, which is obviously problematic because for a lot of these children, their only potential employment is in the area of manual labour. 50% of those surveyed had a severe language disorder.

About 75% of the participants in the survey were Aboriginal, which is consistent with the proportion of Aboriginal children in detention in Western Australia.

Results like this ought to shock. However, the fact that many of us who work in the system are not likely to be surprised by these results shows how hardened we have become to the extraordinary levels of

disadvantage and dysfunction experienced by a disproportionately large number of Aboriginal children. Any system of justice worthy of that description, and any society with credible claims of providing justice to all must respond sensitively, compassionately, and most importantly of all, effectively, to the desperate needs of these seriously harmed children. By 'effectively' I mean to refer to a response which identifies the many and various needs of each child and endeavours to respond to those needs in a way which will not only reduce the risk of the child embarking upon the trajectory of escalating offending which we see all too often, but which will improve the prospect of that child living a happy and fulfilling life as a responsible member of the Australian community.

Gibson

My reference to the three cases above should not be thought to encourage the view that issues connected with Aboriginal disadvantage only arise at the point of sentence. To the contrary, as I have endeavoured to indicate already, those issues permeate the criminal justice system at every point from the investigation of an offence to the consideration of parole. The case of Mr Gene Gibson provides a topical example of the way in which those issues can affect the determination of guilt.

The case arose from the murder of a young non-Aboriginal man who was walking home after a night out at a hotel and night-club in Broome in February 2010. For some time police had considerable difficulty identifying any significant suspects. Eventually, in August 2012,

Mr Gibson, who was then 21 years of age, was interviewed in the Kiwirrkurra community in the western desert. Although Mr Gibson was as long-term resident of that community, and had very limited facility with the English language, no interpreter was used, either to interpret the caution or the interview. Police allege that Mr Gibson made admissions of guilt towards the end of the interview, and he was charged with murder.

After a voir dire conducted prior to trial, Hall J ruled that the evidence of the police interview was inadmissible[46] on a number of grounds including, most significantly, the absence of an interpreter. Following that ruling, the State accepted a plea of guilty to manslaughter, and Mr Gibson was sentenced to a term of imprisonment, but only after difficulties were encountered securing the services of an interpreter during the sentencing process.

However, Mr Gibson later appealed against his conviction, notwithstanding that it was based upon his own plea of guilty. That appeal, presented with the generous pro bono support of a major law firm and a number of barristers was heard earlier this year. Shortly after the conclusion of the hearing the Court of Appeal announced that the appeal would be upheld and the conviction quashed for reasons to be published in due course.[47] I will not speculate with respect to the content of those reasons, although from reports of the evidence led at the hearing, it seems a fair inference that the various disadvantages suffered by Mr Gibson, including his limited capacity in English caused the court

[46] ***The State of Western Australia v Gibson*** [2014] WASC 240.
[47] And which are still in preparation.

to conclude that his plea of guilty to manslaughter was not a free and fully informed decision.

Linguistic disadvantage

The regular experience of dealing with Aboriginal people who have limited or no capacity in English is another characteristic shared by the justice systems of Western Australia and the Northern Territory. The issues arising from that experience were, of course, famously analysed by Forster J in ***R v Anunga***,[48] and I note that the current ramifications of that decision are to be addressed later in this conference. The issues associated with the use of interpreters for Aboriginal witnesses and accused are too many and varied to be considered within the scope of this paper. However, in many parts of my State and the Territory, language is another source of significant disadvantage for Aboriginal people caught up in the justice system. I am envious of the services available to deal with these issues in the Territory, through the Northern Territory Interpreter Service. I have spoken publicly many times of the need for an equivalent service in Western Australia. Without diminishing in any way the valuable work performed by the Kimberley Interpreter Service, that service was defunded by the State a year or so ago, and is not nearly as well resourced as the NTIS, and only covers part of the State in which interpreters are needed.

Mental impairment

AH, LCM and Churnside were all cases involving Aboriginal people with some form of mental impairment. It will be clear from my

[48] [1976] 11 ALR 412.

description of the medical reports that at least some of those offenders were suffering quite significant mental impairment at the time their offences were committed, and at the time their cases were considered by the court.

In those circumstances one might well ask why no issue with respect to mental capacity was raised in any of those cases. The answer to that question lies in the draconian state of the law of Western Australia relating to mentally impaired accused[49] which is another one of those laws which, although applicable to all, appears to operate to the particular disadvantage of Aboriginal people.

The most significant problems with the Western Australian law include:

- if a court concludes that an offender was mentally impaired at the time of the offence or is unable to meaningfully participate in the criminal process as a result of mental impairment, the only options available to the court are either unconditional release or indefinite detention;
- if an order of indefinite detention is made, in practical terms, despite the construction of a new facility which has had only limited use since it was opened some years ago, the place of detention will be a prison;
- the court imposing a detention order has no power to place any limit upon the period a person will be detained (imprisoned);

[49] *The Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

- decisions with respect to the release of persons subject to a detention order are made by an executive body, and not by an independent court.

The result of these various deficiencies is that lawyers are understandably reluctant to recommend invocation of the legislation for a client facing anything but a most serious charge. There have been a number of cases in which people subject to detention orders have served significantly longer periods in prison than they would have served if they had been convicted of the offence with which they were charged. Two of the most publicised of those cases involve Aboriginal people,[50] one of whom is a young woman normally resident in Alice Springs.

The Community Affairs References Committee of the Senate recently conducted an inquiry into the indefinite detention of people with cognitive and psychiatric impairment. In its report published earlier this year,[51] the Committee recommended that State and Territory legislation be amended in line with the principle that indefinite detention is unacceptable. It also recommended that the Council of Australasian Governments (COAG) work to ensure that recently developed tools such as the FASD diagnosis tool are provided as a support and resource to police, courts, Legal Aid, and other related groups. It also recommended that COAG take responsibility for ensuring a consistent legislative approach with respect to limiting terms for forensic patients in all Australian jurisdictions.

[50] Mr Marlon Noble and Ms Rosie Fulton.
[51] Senate Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016).

The Committee made two recommendations specifically related to the Northern Territory. It recommended that the Australian government work closely with the Northern Territory government to:[52]

- plan, fund, and construct non-prison forensic secure care facilities and acquire supportive accommodation options in communities, and ensure that all forensic facilities are appropriately staffed; and
- ensure that its operating procedures for forensic patients have clear objectives of transitioning a forensic patient from prison to secure care, and where appropriate, from secure care to the community.

The Committee made another recommendation specifically aimed at Western Australia and the Northern Territory, recommending that the governments of those jurisdictions transition forensic patients currently held in prison to the relevant secure care forensic facility in each jurisdiction as a matter of urgency.[53]

I am unaware of any response to these recommendations from the governments or inter-government bodies to which they were directed.

In a desperate attempt to finish this depressing address on a positive note, I am optimistic that the recently elected government of Western Australia will address the deficiencies in the WA legislation sooner rather than later.

[52] Senate Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, above note 51, Recommendations 20 & 22.
[53] Senate Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, above note 51, Recommendation 26.

Summary and conclusion

The colonisation of Australia, in common with the colonisation of many other parts of the planet, has had a disastrous effect upon the original inhabitants and their descendants. In this paper I have endeavoured to address the question of whether, more than 200 years after colonisation, our justice systems are living up to the promise of providing equal justice for all, including the descendants of the people colonised. Although I have no doubt that the vast majority of the people working in our justice systems, including me, are genuinely trying to ameliorate the effects of the multi-faceted disadvantages faced by too many Aboriginal people, my review suggests that there is very considerable room for improvement in performance and in outcomes. I do not under-estimate the cost and difficulty of providing culturally relevant and appropriate support and services to Aboriginal people in remote parts of our vast continent, but unless we improve the provision of those services, the rate of Aboriginal imprisonment will continue to spiral ever upwards, and far too much of our resources will be spent imprisoning Aboriginal men, women and children rather than improving upon the dreadful conditions and circumstances in which too many Indigenous Australians live. But it seems to me that there is something which is neither costly nor difficult that we all can, and need, to do: that is, to work in a genuinely collaborative way with Indigenous people who continue to tell us that nothing will change otherwise.

It must be accepted that there are limits upon the extent to which courts can effectively address the consequences of Aboriginal disadvantage. As the cases of AH, LCM and Mr Churnside show, too often by the time

Aboriginal people come before the court they suffer disabilities caused by no fault of theirs - perhaps caused by maternal alcohol use even before they are born, exacerbated by a dysfunctional and traumatic childhood, or they may have developed anti-social behavioural patterns associated with chronic substance abuse which are strongly resistant to change, and which, of course, is all too often associated with the inter-generational trauma visited upon Aboriginal people as a result of our shared history.

Nor do I suggest that the law, or courts, should discriminate purely on the basis of race. Happily there is a growing number of Aboriginal people who have not suffered the same extent of disadvantage or have against the odds, largely overcome it to take their rightful places in professions, business and in our parliaments. But I do suggest, consistently with the approach taken by the High Court in ***Bugmy***, that laws should provide courts with discretionary powers that can and should be exercised by courts in order to ameliorate the disadvantages experienced by those who have suffered the social deprivations experienced by too many Aboriginal people when they encounter the justice system, thereby improving the quality of justice for all Australians.