

A Justice Reinvestment Approach to Criminal Justice in Australia

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Constitutional Affairs

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Endorsed by Liberty Victoria

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Endorsement

This submission is endorsed by Liberty Victoria

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Overview

Vulnerable groups in Australian society are overrepresented in the criminal justice system generally, and (as set out in Part 1) for many of them the trend is worsening. Their rates of incarceration are outstripping the general increase, which is already a matter of concern, not least because of the overcrowding it is causing.¹

These vulnerable groups include young and/or homeless offenders, as well as offenders with a mental illness or cognitive disability. Overrepresentation of Indigenous offenders was acknowledged in 2011 by the Standing Committee on Aboriginal and Torres Strait Islander Affairs as a national crisis.²

Common causes such as presumptions against bail, socio-economic disadvantage and inadequate mental health screening facilities exist in all Australian states and territories, but there are significant regional variations which need to be taken into account in any national response.

Australian Institute of Criminology (AIC) research shows the incidence of mental illness in prisons is up to four times that of the general population. In WA, some offenders who have been declared unfit to stand trial (for reasons of intellectual disability or mental disorder) have been remanded in custody indefinitely due to a lack of alternatives available to the courts. According to the Aboriginal Disability Justice Campaign, this also occurs in other jurisdictions.³

Corrections statistics show that only a small minority of Australian prisoners has completed high school or obtained a trade qualification, and in fact the majority has not completed the ten years of education which are compulsory in most jurisdictions. The AIC has also noted a marked increase in the proportion of juvenile detainees on remand, which is *prima facie* incompatible with the principle of detention being a last resort for children and reduces opportunities for more positive intervention in these young people's lives.

Australia is not alone in facing these problems, and ways of addressing overrepresentation in various comparable jurisdictions – including justice reinvestment models – are discussed in Part 2 of this submission.

¹ See eg 'Prison overcrowding puts community 'at risk,' ABC News, 25 February 2013: <<http://www.abc.net.au/news/2013-02-25/prison-overcrowding-puts-community-27at-risk27/4537598>> and 'Union claims overcrowding in prisons a problem,' ABC News, 23 May, 2012: <<http://www.abc.net.au/news/2012-05-23/union-claims-prison-overcrowding-a-problem-feature/4028962>>.

² See *Doing Time: Time for Doing*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011: <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm>.

³ See Brooks, 'Jail for Life,' *Alice Now* (Alice Springs Local News), 12 December 2011: <<http://alicenow.com.au/news/article/jail-for-life1>>.

It must be acknowledged that the criminal justice system in Australia is mainly within the jurisdiction of state and territory governments. However, the Commonwealth plays an important role in national crime policy development through the Council of Australian Governments (COAG) and the Standing Council on Law and Justice (SCLJ - formerly the Standing Council of Attorneys-General). It also has relevant obligations under multiple international human rights instruments which it is constitutionally empowered to implement. Part 3 discusses these and other human rights standards (both international and domestic).

The submission concludes by recommending ways forward for the Australian Government, including the development of National Guidelines for Best Practice on Diversion and Support for vulnerable offender groups, the establishment of a specific agency to support initiatives to keep vulnerable people out of prison, and the adoption of policies – such as the abolition of mandatory minimum sentences⁴ – which demonstrate leadership at the national level.

Introduction

In July 2012 the Castan Centre for Human Rights Law (the Centre) prepared a major report for the Attorney-General's Department entitled *Alternatives to Imprisonment for Vulnerable Offenders*.⁵ This submission draws on and updates research conducted for that report to address the present inquiry's terms of reference.

This submission is divided into three Parts. The first examines the growth in the imprisonment rate – particularly for vulnerable and Indigenous offenders – in recent decades; the second looks at the availability of alternatives to imprisonment in Australia and overseas, and the third discusses the role the Australian Government should be playing – with particular reference to relevant international obligations.

Part 1 – Imprisonment in Australia

Trends

The evidence of overrepresentation of certain groups in the Australian criminal justice system is overwhelming – indeed the Parliament itself identified the overrepresentation of Indigenous people as a national crisis in 2011.⁶ The relevant UN Special Rapporteur described the overrepresentation of Indigenous juveniles as 'disturbing' after a visit in

⁴ The Government's move to restore discretion in people smuggling cases through prosecutorial guidelines in September 2012 was a positive step in this regard – see: <<http://news.smh.com.au/breaking-news-national/judges-get-their-way-on-people-smugglers-20120910-25o07.html>>. However, legislative change would be preferable.

⁵ At the time of writing, this report has not been made public.

⁶ See *Doing Time: Time for Doing*, above n 2.

2009.⁷ AIC research shows the incidence of mental illness amongst prisoners is also far higher than in the general population, and the proportion of juveniles on remand has seen a marked increase in recent years.

The overall national imprisonment rate, according to the latest figures from the Australian Bureau of Statistics, is 168 per 100,000.⁸ This rate is higher than some comparable jurisdictions such as the UK, Canada and most of Western Europe, but lower than others such as New Zealand and South Africa.⁹

However, the overall imprisonment rate hides a stark divide. For the non-Indigenous population, the rate is 129 per 100,000, whereas for Indigenous Australians it is currently 1,914 per 100,000.¹⁰ In other words, an Indigenous person is almost 15 times more likely to be imprisoned than a non-Indigenous person in Australia. In fact an Indigenous Australian is almost four times as likely to be imprisoned as a resident of the United States, which has one of the highest imprisonment rates in the world.¹¹ This situation is also worsening – between the mid-1980s and 2006 the overrepresentation factor hovered around ten.¹² Evidence shows that the disparity between Indigenous and non-Indigenous juvenile prisoners is even greater.¹³

Academic discussion tends to suggest that some of the key drivers of Indigenous overrepresentation are alcohol abuse, socio-economic disadvantage, childhood exposure to violence and psychological distress.¹⁴ As such, imprisonment is highly unlikely to present more than a temporary solution to the crimes being committed.

⁷ See UN Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous Peoples - *Report on the Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15, 4 March 2010, [50].

⁸ See ABS, *Prisoners in Australia 2012*: <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>, *Prisoner Snapshot*.

⁹ See *Entire world - Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies: <http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=allandcategory=wb_poprate>. Please note that, at the time of writing, there was an error in the Australian rate on this site and it should be ranked higher on the table.

¹⁰ See ABS, *Prisoners in Australia 2012*, above n 8, *Aboriginal and Torres Strait Islander Prisoner Characteristics*.

¹¹ See US Department of Justice, *Prisoners in 2010* (Published December 2011, last updated 2 September 2012): <<http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>>, 1. NB the imprisonment rate of Indigenous Australians is still not as high as that for African American Males in the US.

¹² See *Census of Population and Housing*, 30 June 1986, Australian Bureau of Statistics, 1989 (Figure from Summary Characteristics of Persons and Dwellings - Australia); also eg Mukherjee and Dagger, *Australian Prisoners 1993: Results of the National Prison Census 30 June 1993*, AIC 1995 at 23 and *Census of Population and Housing*, 6 August 1991, ABS 1993. In 2001 the relevant figures were 19% of the prison population compared with 2.2% of the total population (ABS, *Prisoners in Australia 2001* and *Census of Population and Housing: Selected Social and Housing Characteristics, Australia, 2001*). The figures from the 2006 equivalents of these publications were 24% of the prison population and 2.5% of the general population.

¹³ See eg Taylor, *Juveniles in detention in Australia, 1981–2007*, AIC 2009: <<http://www.aic.gov.au/publications/current%20series/mr/1-20/05.aspx>>, 5.

¹⁴ See *Indigenous Justice in Focus*, AIC, 2012: <http://www.aic.gov.au/crime_types/in_focus/indigenousjustice.html>; also *Indigenous perpetrators of*

Research commissioned by the Criminology Research Council has shown that the prevalence of mental illness in the criminal justice system is ‘significantly greater than is found in the general population.’¹⁵ Major illnesses, such as schizophrenia and depression, were found to be three to five times more common than in the population at large.¹⁶ The most likely major driver behind this trend was found to be inadequate screening practices.¹⁷ Juvenile offenders with an intellectual disability are particularly vulnerable to inappropriate incarceration – a 2008 NSW study found that 17% of juvenile prisoners had an intellectual disability compared with just 1% of adult prisoners.¹⁸ In a 2012 report, the NSW Law Reform Commission confirmed the continuing nature of this overrepresentation.¹⁹ Overall, the AIC estimates that the rates of mental disorders in prison are up to four times higher than those in the general population.²⁰

Other concerning trends include the increasing number and proportion of female prisoners (up 8.4% between 2011 and 2012, and 48% since 2002 to comprise a total of 7% of the prison population²¹) and the increasing proportion of juveniles on remand (around 60% versus just 23% of adult detainees in 2008²²). Experts claim the former increase largely comprises vulnerable Indigenous women being imprisoned at a greater rate.²³ The latter increase is in part attributable to ‘tough on crime’ policies such as presumptions against bail, which have been adopted into the criminal law of some states and territories.²⁴

In short, various vulnerable groups are overrepresented in Australia’s prison population, and for many of these groups the problem is getting worse. The design of our criminal justice system is clearly not producing equitable outcomes, which raises questions of compliance

violence: Prevalence and risk factors for offending, AIC 2010:

<<http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp105.html>>.

¹⁵ See *The Identification of Mental Disorders in the Criminal Justice System*:

<<http://www.criminologyresearchcouncil.gov.au/reports/2006-ogloff.pdf>>.

¹⁶ *Ibid*, 1.

¹⁷ *Ibid*, 4-5.

¹⁸ See Frize, Kenny and Lennings, ‘The relationship between intellectual disability, Indigenous status and risk of reoffending in juvenile offenders on community orders,’ 52 *Journal of Intellectual Disability Research* 6, 510 at 519.

¹⁹ See *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, NSW Law Reform Commission, June 2012:

<[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/r135.pdf/\\$file/r135.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/r135.pdf/$file/r135.pdf)>.

²⁰ See <http://www.aic.gov.au/crime_community/communitycrime/mental%20health%20and%20crime.aspx>.

²¹ See ABS Media Release *Women Prisoners increasing at a faster rate than men*, 6 December 2012.

²² See Richards, *Trends in juvenile detention in Australia*, AIC, May 2011:

<<http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi416.aspx>>, at 4-5.

²³ See ‘Twenty per cent increase in Indigenous women in prisons,’ *ABC News*, 7 December 2012:

<<http://www.abc.net.au/worldtoday/content/2012/s3649651.htm>>.

²⁴ See eg NSW Law Reform Commission, Report 133 – Bail (2012):

<[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/r133.pdf/\\$file/r133.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/r133.pdf/$file/r133.pdf)> Chapter 8; Victorian Law Reform Commission, Review of the Bail Act (2007):

<http://www.lawreform.vic.gov.au/sites/default/files/Web_version_Bail_Report.pdf> Chapter 3 and

Recommendation 12; also ‘O’Farrell’s ‘thuggish’ rhetoric on bail worries law bodies,’ *Sydney Morning Herald*, 7 May 2012: <<http://www.smh.com.au/nsw/ofarrells-thuggish-rhetoric-on-bail-worries-law-bodies-20120506-1y75a.html>>.

with Australia's international human rights obligations – in particular obligations of non-discrimination under the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disabilities (CRPD), as well as obligations to act in the best interests of the child under the Convention on the Rights of the Child (CRC – see further *International Obligations and Undertakings* below).

Effectiveness and Cost

There is evidence that imprisonment is an imperfect solution to the problem of persistent criminality, and that it is particularly inappropriate as a solution for the offending of vulnerable, socially marginalised people.²⁵ In addition, the harm done by incarceration and the loss of work skills experienced by prisoners have significant economic and social costs.²⁶ A NSW Bureau of Crime Statistics and Research (BOCSAR) study from 2010 actually found evidence that prison increased the risk of (re)offending amongst those convicted of non-aggravated assault.²⁷ Yet the growth of the prison population has far outstripped that of the general population over the past two decades.²⁸

BOCSAR's studies also note that prison is a 'very expensive form of crime control.'²⁹ In 2011, net expenditure on prisons in Australia was over \$2 billion,³⁰ as it has been for several years.³¹ BOCSAR has pointed out that "a ten per cent reduction in the overall re-imprisonment rates would reduce the prison population by more than 800 inmates, saving \$28 million per year," and even a "[ten per cent] reduction in the Indigenous re-imprisonment rate, for example, would reduce the Indigenous sentenced prisoner population by 365 inmates, resulting in savings of more than \$10 million per annum."³² Yet the Bureau also reports that "[e]fforts to reduce the prison population through the creation of alternatives to custody have not been very successful."³³ In a political climate which places a premium on public cost-cutting measures, this is clearly an area to which more attention should be paid.

²⁵ See eg Brown, 'The Limited Benefit of Prison in Controlling Crime,' 22 *Current Issues in Criminal Justice* (1), July 2010, 137-148.

²⁶ Ibid. See also Peck and Theodore, 'Carceral Chicago: Making the Ex-offender Employability Crisis,' 32(2) *International Journal of Urban and Regional Research* (June 2008), 251.

²⁷ See Weatherburn, *The effect of prison on adult reoffending*, BOCSAR, 2010: <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/\\$file/cjb143.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/$file/cjb143.pdf)>, 1.

²⁸ See eg Baldry, 'The Booming Industry: Australian Prisons,' *Debate* No 4 (2009), 31.

²⁹ Ibid.

³⁰ See Wan et al, *The effect of arrest and imprisonment on crime*, BOCSAR 2012: <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB158.pdf/\\$file/CJB158.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB158.pdf/$file/CJB158.pdf)>.

³¹ See Weatherburn et al, *Prison populations and correctional outlays: The effect of reducing re-imprisonment*, BOCSAR 2009: <[http://lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB138.pdf/\\$file/CJB138.pdf](http://lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB138.pdf/$file/CJB138.pdf)>.

³² Ibid.

³³ Ibid.

In response to 'tough on crime' policies adopted by the present Victorian Government, the Salvation Army (which works directly with offenders) summarised the situation succinctly in its 2013-14 Budget submission:

Tough on crime policies result in people becoming unnecessarily embroiled in the justice system for minor crimes. For vulnerable people, this involvement with the justice system usually does not deter them from future offending as intended, but instead makes them more desperate, more marginalised, and begins a downward spiral into increased offending and criminalisation.³⁴

Part 2.1 – Alternatives to Imprisonment: Other Jurisdictions

Generally speaking, restorative justice initiatives and problem-solving courts have been embraced more enthusiastically in 'Anglo-Saxon' countries – including the US, Australia, New Zealand, Canada and the UK – than in Western European countries with an Inquisitorial justice tradition.³⁵ Possible explanations for this include a lower average imprisonment rate in continental Europe (producing less pressure to innovate in criminal justice), or a cultural scepticism of the kinds of public displays of emotion produced in many problem-solving courts.³⁶

United States

There appears to be almost as broad a divide between the US and other Common Law countries as between Common Law and Civil Law countries when it comes to criminal justice innovation. State governments in the US have already established more than 3,200 problem-solving courts – many without any basis in legislation or involvement of the Executive.³⁷ Such judge-led innovation might be seen as unlikely to translate well to the Australian jurisdiction, but in fact Australian judicial officers have already become pioneers in, and advocates of, problem-solving justice. Examples include Magistrate Michael King in WA, Magistrate Chris Vass in SA and Judge Roger Dive in NSW. Magistrate King established the Geraldton Alternative Sentencing Regime, Magistrate Vass established the first

³⁴ See <http://www.salvationarmy.org.au/Global/News%20and%20Media/Reports/2013/TSA-State-Budget-Submission-2013-14_FINAL.pdf>, 20.

³⁵ See Freiberg 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms,' (2010) Monash University Faculty of Law Legal Studies Research Paper No. 2010/17: <<http://ssrn.com/abstract=1609468>>, 10.

³⁶ *Ibid*, 4-5 & 10.

³⁷ See Nolan, 'The International Problem-Solving Court Movement: A Comparative Perspective,' 37 *Monash University Law Review* 1 (2011), 259 at 272-274; also Shdaimah, 'Taking a Stand in a Not-so-perfect World: What's a Critical Supporter of Problem Solving Courts to Do?' 10 *University of Maryland Law Journal: Race, Religion, Gender and Class* (2010) 89.

Indigenous sentencing court in Port Adelaide and Judge Dive won a Prime Minister's Award for his sustained contribution to the NSW Drug Court in 2011.³⁸

A successful community court model called a Community Justice Centre was pioneered in the troubled community of Red Hook, NY in 2000. The court offers monitored intervention for less serious 'quality of life' offences such as petty theft and drug possession.³⁹ This model aims to involve the local community through eg advisory boards, victim-offender mediation and justice service provision. It has now been replicated in at least 17 other US jurisdictions, as well as Liverpool and Salford in England and in Melbourne here in Australia. Plans are in place to establish similar Centres in Dublin, Glasgow and Vancouver.⁴⁰ The Collingwood Neighbourhood Justice Centre in Melbourne's inner north was launched in 2007 and has already been assessed by the Victorian Auditor-General's office to have reduced recidivism amongst participants and delivered benefits for the local community.⁴¹

Other specialist courts in the US include Teen Courts, Tribal Courts (on reservations) and courts dedicated to crimes associated with prostitution.⁴² Even though the US continues to have one of the highest imprisonment rates in the world, there are lessons for Australia in some of these innovative court programs and practices – many of which are run with little or no extra government funding. Having said that, there is also an excellent initiative known as the Bureau of Justice Assistance within the US Department of Justice which encourages and supports such innovation in the justice system.⁴³

Apart from alternative court options, the other major initiative in the US aimed at reducing the prison population by targeting vulnerable groups is justice reinvestment. In Chapter 2 of the Australian Human Rights Commission's Social Justice Report for 2009,⁴⁴ the Aboriginal and Torres Strait Islander Social Justice Commissioner gives an overview of the origins of justice reinvestment and its implementation in the US and the UK. The theory is that targeting areas from which proportionally large numbers of prisoners originate for significant increases in services funding will produce significant savings in both societal and financial terms. Increased budgets for healthcare, education, housing and other social services can be offset by decreases in corrections spending. Although justice reinvestment is still in the early stages of implementation, the AHRC report shows it has already achieved

³⁸ See Freiberg, 'Problem-oriented courts: an update,' 14 *Journal of Judicial Administration* (2005), 205-206; also *New South Wales Drug Court Judge wins Prime Minister's Award*, Media Release, NSW Attorney-General Greg Smith, 24 June 2011:

<[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Judge_Dive_Wins_PM_Award.pdf/\\$file/Judge_Dive_Wins_PM_Award.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Judge_Dive_Wins_PM_Award.pdf/$file/Judge_Dive_Wins_PM_Award.pdf)>.

³⁹ See Nolan, *Legal Accents, Legal Borrowing*, Princeton University Press 2009, 1.

⁴⁰ *Ibid*, 3-4.

⁴¹ See <http://www.audit.vic.gov.au/reports_and_publications/reports_by_year/2010-11/20110406_justice.aspx>.

⁴² Much more detail can be found in the Centre's July 2012 report.

⁴³ See <<https://www.bja.gov/About/index.html>>.

⁴⁴ See <http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/index.html>.

promising results in Texas and Kansas, and has been endorsed by politicians on both sides of politics all over the US.

The need for a similar policy in Australia is clear – for example, just 2% of Victorian postcodes account for 25% of the state’s prisoners.⁴⁵ The Castan Centre is encouraged by the Committee’s interest in justice reinvestment and recommends Australian governments at all levels consider its potential for their own jurisdictions.

Canada

In 2002, the Director-General of Corrections in Canada’s Department of the Solicitor-General, Richard Zubrycki, reported that the prison population in that country rose sharply during the 1990s (by up to 10% per year in the middle of the decade) but the trend had since been reversed due in large part to “conscious efforts that have been made to utilize community-based alternatives to imprisonment to the extent possible, consistent with public safety.”⁴⁶ Since 2002, Canada’s incarceration rate has continued to decline.⁴⁷

Canadian research combining the results of hundreds of statistical studies have shown that imprisonment has no greater repressive effect on recidivism than community-based sanctions, and that it may in fact increase recidivism later in life.⁴⁸ Based on such research, the Canadian system has increasingly made use of penalties which see the offender remain in the community under some kind of supervision or monitoring. However, Zubrycki observes that this has only been successful due to support and cooperation of civil society (including specialised NGOs such as the Elizabeth Fry society), prosecutors and the judiciary.⁴⁹

Like Australia, Canada faces major Aboriginal overrepresentation in its prison system. In 2009, the Office of the Correctional Investigator published a report⁵⁰ which found that Aboriginal people represented 19.6% of the federal prison population (offenders sentenced to two years’ imprisonment or more are sent to federal penitentiaries in Canada) compared with just 4% of the general population, and that “they serve a greater proportion of their sentences in institutions at higher security classifications and have higher rates of re-incarceration during periods of conditional release.” As in Australia, the report notes that “[t]he offending circumstances of Aboriginal offenders are often related to substance abuse,

⁴⁵ See National Justice Symposium Overview, Jesuit Social Services 2011: <http://www.jss.org.au/files/National_Justice_Symposium_-_Overview.pdf>, 3 (per Professor Tony Vinson).

⁴⁶ See Zubrycki, *Community-Based Alternatives to Incarceration in Canada*, UNAFEI 2002: <http://www.unafei.or.jp/english/pdf/RS_No61/No61_12VE_Zubrycki.pdf>, 98.

⁴⁷ See *Corrections and Conditional Release Statistical Overview*, Public Safety Canada: <<http://www.publicsafety.gc.ca/res/cor/rep/2010-ccrso-eng.aspx#a3>>.

⁴⁸ See Zubrycki, above n 39, 103.

⁴⁹ *Ibid*, 103-4.

⁵⁰ See Mann, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*, OCI 2009: <<http://www.oci-bec.gc.ca/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf>>, 6.

intergenerational abuse and residential schools, low levels of education, employment and income, substandard housing and health care, among other factors.”⁵¹

Parallels may also be drawn with the uneven distribution of Indigenous incarceration rates across Australian jurisdictions. According to the Canadian Correctional Service, Aboriginal youth are overrepresented in prison overall by approximately eight times.⁵²

As such, Canadian initiatives to address these issues – including most notably the introduction of ‘conditional imprisonment’ in 1996⁵³ and the strong support of the Supreme Court for alternatives to imprisonment⁵⁴ – should be studied closely by Australian governments. Of particular note are Canada’s efforts to improve Aboriginal justice through ‘Gladue reports’⁵⁵ and increasing Aboriginal representation on the bench.⁵⁶

United Kingdom and Ireland

An overview of alternatives to custodial sentencing prepared for the UK Parliament in 2008 noted increasing use of community-based sentences compared with custodial sentences between 1996 and 2006 by the UK Courts.⁵⁷ Since reforms in 2003, a wider range of dispositions based on restorative justice principles, Community Orders and electronic monitoring has become available.⁵⁸ Reviews of restorative justice initiatives in several locations around the UK found they provided good value for Government and high levels of satisfaction on the part of participants.⁵⁹ There is also evidence that Community Orders produce result in a lower recidivism rate than imprisonment, and that the unpaid work they involve can produce significant savings for governments.⁶⁰

Growing pressure on its prison system has led the UK Government to reform alternative sentencing orders several times over recent decades, leading to orders known as Suspended

⁵¹ Ibid. See further on the relationship of Aboriginal people to the Canadian criminal justice system – Rudin, *Aboriginal Peoples and the Criminal Justice System*, Research Paper for the Ipperwash Inquiry into the death of Dudley George, an Indigenous protester:

<http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> (Inquiry report available at: <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html>>).

⁵² See Latimer and Foss, *A One-Day Snapshot of Aboriginal Youth in Custody across Canada: Phase II*, Department of Justice Canada, 2004: <<http://www.justice.gc.ca/eng/pi/rs/rep-rap/2004/yj2-ij2/yj2.pdf>>, iii.

⁵³ See <<http://www.gov.mb.ca/ana/apm2000/5/c.html>>.

⁵⁴ See eg *R v Proulx* (2000) 140 CCC (3d) 449 (SCC) or *R v Gladue* [1999] 1 SCR 688 (SCC).

⁵⁵ Named after the Gladue case (above), these reports aim to inform courts better of the circumstances surrounding Aboriginal offending and help them to pass appropriate sentences - See *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program*, Campbell Research Associates 2008: <http://aboriginallegal.ca/docs/Year_3.pdf>, 20.

⁵⁶ See eg Chartrand et al, *Reconciliation and transformation in practice: Aboriginal judicial appointments to the Supreme Court*, 51 *Canadian Public Administration* 1 (2008), 143 at 153.

⁵⁷ See <<http://www.parliament.uk/documents/post/postpn308.pdf>>.

⁵⁸ Ibid, 2.

⁵⁹ Ibid.

⁶⁰ Ibid, 3-4.

Sentence Orders and Drug Treatment and Testing Orders.⁶¹ These have been evaluated and revised over the years to improve participation and completion rates.⁶² The UK Government has also funded a community court in Liverpool based on the one in Red Hook, New York. Since 2005 it has had a dedicated building, which it shares with all of the services involved in its programs (including police, probation, prosecution, victim support, counselling, mentoring, housing and debt services).⁶³ Initial evaluations have been positive,⁶⁴ and a report from Ireland's National Crime Council in 2007 also recommended that a community court be set up in that country.⁶⁵

The UK, which is struggling with an incarceration rate that has increased sharply over the past two decades to 155 per 100,000,⁶⁶ finds itself in a similar situation to Australia and has responded in a similar manner. However, one part of the UK has bucked the trend – the incarceration rate in Northern Ireland has fallen from 112 per 100,000 in 1992 to 99 in 2012 (after dipping as low as 81 in 2010).⁶⁷

According to Dr Graham Ellison of Queen's University in Belfast and Northern Ireland Justice Minister David Ford, the reductions in crime and imprisonment rates in Northern Ireland are partly attributable to a restorative justice program called the Youth Conferencing Service.⁶⁸ This program incorporates not just offender-victim conferencing but also allows for offenders to make restitution, do community service, wear an electronic tag and/or undergo drug and alcohol treatment. It involves the formulation of a plan aimed at both meeting the needs of the victim and preventing recidivism. The plan must be approved by either the prosecution service or a court – if it goes through the prosecutor, it is not classed as a conviction on the young person's criminal record.⁶⁹

Finland

An interesting example of a non-Anglo-Saxon nation which has had significant success with alternatives to imprisonment is Finland. Since 1945, the incarceration rate in Finland has

⁶¹ See Mair et al, *The Community Order and the Suspended Sentence Order: The Views and Attitudes of Sentencers*, Centre for Crime and Justice Studies, Kings College London 2008: <http://www.crimeandjustice.org.uk/opus677/ccjs_sentencers_views.pdf>, 7; also Nolan, *Legal Accents, Legal Borrowing*, above n 39, 43.

⁶² See eg Nolan, *Legal Accents, Legal Borrowing*, above n 39, 44-48.

⁶³ Ibid, 65-66.

⁶⁴ See <http://www.criminalsolicitor.net/forum/uploads/Shrek/files/2007-10-29_160554_liverpool-full-report.pdf> and <<https://www.justice.gov.uk/publications/docs/north-liverpool-full-report.pdf>>.

⁶⁵ See <http://www.crimecouncil.gov.ie/downloads/NCC_Problem_Solving_Justice.pdf>

⁶⁶ See United Kingdom: England and Wales, *Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies: <http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=169>. Scotland has approximately the same rate.

⁶⁷ See United Kingdom: Northern Ireland, *Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies: <http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=170>.

⁶⁸ See <<http://www.pri.org/stories/politics-society/justice-not-jail-in-northern-ireland2088.html>>.

⁶⁹ See *Youth Conference Service, Young People's Guide*, Northern Ireland Department of Justice: <http://www.youthjusticeagencyni.gov.uk/youth_conference_service/young_persons_guide>.

decreased from around 250 per 100,000 to just 59 per 100,100⁷⁰ - a stark contrast to the prevailing trend in most Common Law countries. From the 1950s to the 1970s, Finland had some of the highest imprisonment rates in Western Europe, whereas today it bests even its Scandinavian neighbours and has a rate approximately half of Australia's.⁷¹ Much of the change can be attributed to the increasing use of alternative punishments such as day-fines, community service and suspended prison sentences by the Finnish courts.⁷² Nearly three quarters of cases in Finland are now referred to mediation (a form of restorative justice introduced at the same time as in Sweden), which can be initiated by either the defence or the prosecution, and involves a contract to perform volunteer work in the offender's community.⁷³

In addition, since the 1970s there has been bipartisan support amongst Finnish politicians for reduction of the imprisonment rate, and conscious avoidance of campaigning on a 'crime control' platform with slogans such as 'three strikes' or 'truth in sentencing.' Media reporting of crime also tends to be far more restrained than, for example, in the UK or Australia, and cooperation between Nordic countries in terms of criminological research and justice policy development, along with cooperation between researchers, policy-makers and the judiciary has played a significant role.⁷⁴

Lessons for Australia

From an international human rights perspective, the reduction of incarceration rates and an increased focus on rehabilitation is welcome regardless of whether it is achieved through police/prosecutorial discretion (as is largely the case in Europe) or problem-solving courts (as have been implemented in most Common Law countries). There are potential pitfalls with both approaches – for example Australia may be reluctant to give police/prosecutors too much discretion lest this impinge on the right of each accused to a fair trial at Common Law.

Problem-solving courts have also been criticised as 'paternalistic,'⁷⁵ potentially arbitrary⁷⁶ and possibly even inconsistent with constitutional requirements of independence and

⁷⁰ See Lappi-Seppälä, *Controlling Prisoner Rates: Experiences from Finland*, Visiting Expert Paper, UNAFEI 2008: <http://www.unafei.or.jp/english/pdf/RS_No74/No74_00All.pdf>; also *Finland, Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies:

<http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=137>.

⁷¹ See Lappi-Seppälä, above, 5.

⁷² *Ibid*, 10-11.

⁷³ See Tak, *Methods of Diversion Used by the Prosecution Services in the Netherlands and other Western European Countries*, Visiting Expert Paper, UNAFEI 2008:

<http://www.unafei.or.jp/english/pdf/RS_No74/No74_07VE_Tak.pdf>, 59.

⁷⁴ *Ibid*, 15-16.

⁷⁵ See eg Petrila, 'Paternalism and the Unrealized Promise,' in Wexler and Winick (Eds), *Law in a Therapeutic Key: developments in therapeutic jurisprudence*, Carolina Academic Press 1996, 685; also Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder,' also in *Law in a Therapeutic Key*, 736.

⁷⁶ See eg Diesen, 'Therapeutic Jurisprudence: an Introduction from a Swedish Perspective,' 51 *Scandinavian Studies in Law* (2007), 131 at 157.

impartiality.⁷⁷ Perhaps the most trenchant criticism is that such courts (particularly Indigenous-oriented) courts risk losing focus on the needs of victims by focussing too much on the needs of offenders.⁷⁸

There is also inconsistent data from the various jurisdictions which makes it harder to determine the most appropriate justice reinvestment models.

Given the urgent need to address the overrepresentation of vulnerable groups in detention, these criticisms should not stop Australian governments from pursuing justice system reform; they should merely be taken into account in formulating policy in this area. In the case of data collection, there is some indication that the Attorney-General's Department is working on this.⁷⁹

Part 2.2 – Alternatives to Imprisonment: Australia

Conventional Alternatives

A comprehensive list of existing alternatives to imprisonment in Australia can be found in the Appendix to the Castan Centre's report of July 2012. Generally speaking, courts in Australia have the following sentencing options available:

- Probation;
- Good behaviour bonds (with or without conviction);
- Fines;
- Orders to perform community service;
- Suspended custodial sentences, and
- Deferral of sentencing for rehabilitation.

Home detention is another option in NSW,⁸⁰ and until last year it was also available in Victoria.⁸¹

Most offences are dealt with by the Magistrates'/Local Court in each jurisdiction, and more than 90% result in non-custodial sentences according to the latest available data, which demonstrates that Australian courts generally reserve custodial sentences for the most

⁷⁷ See Duffy, 'Problem-solving courts, therapeutic jurisprudence and the Constitution: If two is company, is three a crowd?' 35 *Melbourne University Law Review* (2011) 394. NB Duffy concludes that existing problem-solving courts are unlikely to be unconstitutional.

⁷⁸ See Cripps, 'Speaking up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence,' 7 *Indigenous Law Bulletin* 26, Sept/Oct 2011, 31.

⁷⁹ See Report of Australian National University forum on Justice Reinvestment, 2 August 2012: <http://ncis.anu.edu.au/lib/doc/jrf_proceedings.pdf>, 40.

⁸⁰ See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 6.

⁸¹ See *Home Detention No Longer Parole Option*, Sentencing Advisory Council, 20 January 2012: <<http://sentencingcouncil.vic.gov.au/news/2012-01-20/home-detention-no-longer-parole-option>>.

serious offences, in line with international human rights obligations (see *International Obligations and Undertakings* below). For serious offences dealt with by higher courts, convictions lead to custodial sentences 85% of the time. Overall, around 7% of adult males and 3% of adult females receive custodial sentences. Although these may seem like small proportions, they represented more than 32,500 individuals in 2009-10.⁸²

The most common non-custodial sentence in Australia is the fine.⁸³ Although fines are preferable to a custodial sentence for many offences, there is an issue with some defendants' ability to pay.⁸⁴ A 2007 survey of NSW magistrates revealed that 44% 'sometimes or often impose a fine knowing that the defendant cannot or will not pay.'⁸⁵ Non-payment can lead to imprisonment for fine default and secondary offending (eg driving unlicensed or unregistered).⁸⁶ In other countries, 'day-fine' systems exist which take ability to pay into account – this seems to be a fairer model which could be adopted in Australia.⁸⁷ The need for a fairer approach was acknowledged in a 2012 NSW Police Force submission to the NSW Law Reform Commission, which stated:

Given that a fine is advantageous only if an offender has the capacity to pay, consideration should be given to allowing an impecunious offender to apply to the court, at the time of the imposition of a fine or thereafter, for an order that he or she be approved to work off the fine by way of community service.

It is imperative that the courts do not impose sentences that cannot be enforced. If magistrates are obliged to impose fines because no other options are available, even in cases where they know the fine is unlikely to be paid, this is likely to challenge the court system.⁸⁸

Restorative Justice and Diversionary Schemes

On 2 August 2012, the National Centre for Indigenous Studies at the Australian National University held a forum which discussed whether justice reinvestment was needed in Australia.⁸⁹ The overwhelming answer was yes. We need to address the root causes of

⁸² See *Australian Crime: Facts & Figures 2011*, AIC 2012:

<http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/5_courts.html>.

⁸³ Ibid.

⁸⁴ See eg Williams and Gilbert, *Reducing the unintended impacts of fines*, Indigenous Justice Clearinghouse, January 2011: <<http://www.indigenousjustice.gov.au/initiatives/initiative002.pdf>>.

⁸⁵ Ibid, 1-2.

⁸⁶ Ibid.

⁸⁷ Day-fine systems operate in countries including the Czech Republic, Sweden and Finland. A simpler version of an income-dependent fine model also applies in Switzerland, Norway and Germany. Day-fines have also been trialled with some success in various US States – see eg Day Fines in Four US Jurisdictions, RAND, 1996: <<https://www.ncjrs.gov/pdffiles1/pr/163409.pdf>>. However, similar 'unit fines' in the UK were unpopular and eventually abandoned – arguably due to a flawed implementation – see eg 'Fine plans echo 1991 Tory policy,' BBC News Online, 14 January 2005: <http://news.bbc.co.uk/2/hi/uk_news/politics/4173913.stm>.

⁸⁸ See

<[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/cref130_SE032.pdf/\\$file/cref130_SE032.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/cref130_SE032.pdf/$file/cref130_SE032.pdf)>, 13.

⁸⁹ See above n 79.

criminality, particularly for vulnerable and disadvantaged offender groups in problem areas – and not just for their own sake, but also because alternatives to imprisonment represent a better investment in public safety.

Several diversionary schemes and specialist courts/programs, inspired by justice reinvestment approaches, already exist around Australia.

Diversionary schemes include bail support programs to keep offenders out of remand in NSW, SA, Tas and Victoria,⁹⁰ as well as victim-offender conferencing programs in various jurisdictions. Evaluations of such schemes have shown high levels of participant satisfaction and perceived fairness, but their effectiveness in reducing reoffending has proven more difficult to demonstrate.⁹¹ Nevertheless, support for them remains strong from participants on all side of the justice system.⁹²

Specialist Courts and Court Programs

Since the 1990s, ‘problem-solving’ or ‘problem-oriented’ courts have been established in increasing numbers in most Australian jurisdictions. However, some have retained pilot program status or even been discontinued after more than a decade of operation despite documented successes,⁹³ and others have faced stern criticism for creating what some see as a ‘two-tier’ justice system.⁹⁴

Perhaps the most successful of these specialist courts are drug courts and mental health courts. These aim to address societal problems which lead otherwise law-abiding citizens to commit crimes. They are based on a philosophy known as therapeutic jurisprudence – using the law as a therapeutic agent in the lives of vulnerable people who require treatment more than (or in addition to) punishment. Therapeutic jurisprudence is concerned with emotional

⁹⁰ See Freiberg, ‘Problem-oriented courts: an update,’ 14 *Journal of Judicial Administration* (2005), 199. On equivalent schemes in SA and Tas see Denning-Cotter, *Bail Support in Australia*, Indigenous Justice Clearinghouse 2008: <<http://www.indigenousjustice.gov.au/briefs/brief002.pdf>>, 3-4.

⁹¹ See eg People and Trimboli, *An Evaluation of the NSW Community Conferencing For Young Adults Pilot Program*, BOCSAR 2007: <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/L16.pdf/\\$file/L16.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/L16.pdf/$file/L16.pdf)>; Richards, *Police-referred restorative justice for juveniles in Australia*, AIC 2010: <<http://www.aic.gov.au/documents/D/3/F/%7BD3F3C924-7049-49E9-8545-B5D75553BBD%7Dtandi398.pdf>>and Strang et al, *Experiments in Restorative policing: Final report*, AIC 2011: <http://aic.gov.au/criminal_justice_system/rjustice/rise/final.html>.

⁹² See eg submissions to NSW Law Reform Commission on its Question Papers on Reference 130 (Sentencing), which almost universally support that state’s CREDIT and MERIT programs: <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref130sub>.

⁹³ Eg the NSW Youth Drug and Alcohol Court, which remained a pilot for many years before it was closed in June 2012, despite documented successes – see Hannam, ‘The Youth Drug and Alcohol Court: An Alternative to Custody,’ 7 *Indigenous Law Bulletin* 13 (Jul/Aug 2009), 12; also ‘Youth drug court closure sparks debate,’ ABC 7.30 Program, 3 July 2012: <<http://www.abc.net.au/7.30/content/2012/s3538261.htm>>.

⁹⁴ See eg Cripps, ‘Speaking up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence,’ 7 *Indigenous Law Bulletin* 26, Sept/Oct 2011, 31 at 33.

and psychological well-being of participants as well as ‘justice outcomes,’⁹⁵ and is based on psychology and social science research as well as law.⁹⁶

There are now drug courts or programs in every state and territory, and many have been demonstrably successful in reducing drug dependence and reoffending – for example the NSW Drug Court has received a Prime Minister’s award and represents an example of best practice in the field.

Although mental health courts in their modern form are also based on therapeutic jurisprudence, their origins can be traced back to a constitutionally-based movement for legal rights of mentally-disordered people in the US in the 1960s and 1970s. However, the first specialist mental health court (in Florida) was not established until 1997.⁹⁷ There are now more than 120 such courts in the US – growth which “has been driven by concern about the large number of inmates with mental illness in jails or prisons nationwide and the hope that connecting them with appropriate treatment will improve their quality of life while reducing communities’ crime rates and incarceration costs.”⁹⁸ Studies suggest these courts, along with programs to divert mentally disordered offenders away from the criminal justice system entirely, are benefiting both offenders and communities.⁹⁹

The first Australian Mental Health court was established in South Australia in 1999.¹⁰⁰ There are now mental health lists in the Perth, Hobart and Melbourne Magistrates’ Courts, and liaison programs in most states and territories, aimed at identifying at-risk offenders and supporting them through criminal justice processes.¹⁰¹ The Magistrates Court of WA also has an Intellectual Disability Diversion Program, a joint initiative with that State’s Disability Services Commission.¹⁰²

Closely related to drug and mental health courts are Special Circumstances courts and lists, which cater variously to persons experiencing precarious situations, including the homeless,

⁹⁵ See Wexler and Winick, *Law in a Therapeutic Key: developments in therapeutic jurisprudence*, Carolina Academic Press 1996, xvii.

⁹⁶ See eg Diesen, ‘Therapeutic Jurisprudence: an Introduction from a Swedish Perspective,’ above n 76, 134-135.

⁹⁷ See Freiberg, ‘Problem-oriented Courts: Innovative Solutions to Intractable Problems?’ 11 *Journal of Judicial Administration* (2001), 16.

⁹⁸ See Kuehn, ‘Mental Health Courts Show Promise,’ 297 *Journal of the American Medical Association* 15 (2007), 1641.

⁹⁹ Ibid; also Sarteschi et al, ‘Assessing the Effectiveness of Mental Health Courts: A quantitative review,’ 39 *Journal of Criminal Justice* 1 (2011), 12.

¹⁰⁰ See Freiberg, above n 97, 16-17.

¹⁰¹ Some diversion programs have been more successful than others – eg in NSW the Law Reform Commission reports that mental health programs are underutilised - see *Fact Sheet – People with cognitive and mental health impairments in the criminal justice system: Diversion* (August 2012): <[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/Diversion_fact_sheet.pdf/\\$file/Diversion_fact_sheet.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/Diversion_fact_sheet.pdf/$file/Diversion_fact_sheet.pdf)>.

¹⁰² See <http://www.magistratescourt.wa.gov.au/l/intellectual_disability_diversion_program_iddp.aspx?uid=7942-2328-8603-7948>.

sex workers and special categories of mental impairment. Such lists or courts exist in Queensland, SA, Tasmania, Victoria and WA, and have had significant positive impacts for these vulnerable groups (further details of specific courts are available in the Centre's July 2012 report or on the relevant state government websites).

Finally, Indigenous sentencing courts, also known as Circle Courts, have been established in each state and territory. The NSW Justice Advisory Council adapted the Canadian model for the sentencing of Indigenous offenders to suit the needs of the Aboriginal people in NSW, establishing the first circle sentencing court on a trial basis at Nowra in 2002.¹⁰³ Circle sentencing is intended to engage the Aboriginal community in the sentencing process, reduce the number of people coming into contact with the criminal justice system and involve victims of crime. It is a flexible process which allows communities to adapt it to suit their own local culture and experience.¹⁰⁴ Circle sentencing in NSW was evaluated in 2003 and again in 2008. The earlier review said it 'helped to break the cycle of recidivism,' but the later one found no measurable improvement in this regard. Still, both reviews were positive about the program overall and recommended it be continued and strengthened.¹⁰⁵

Compared with the thousands of specialist courts and programs in the US, Australia's efforts at implementing a therapeutic jurisprudence approach remain in the initial stages. Despite some outstanding efforts in certain jurisdictions, there is a lack of coordination and direction in this area which can only be remedied by the Australian Government. The Secretary of the Attorney-General's Department has indicated he is aware of this, which is a positive sign.¹⁰⁶

Part 3 – Government's Obligations

Relevant International Human Rights Standards

Personal liberty is one of the most fundamental human rights, recognised not only in international human rights law, but also in national constitutions and legal traditions around the world.¹⁰⁷ The prohibition on arbitrary detention in article 9 of the ICCPR aims to ensure that no one is deprived of liberty without rigorous justification, and only where detention is the least restrictive option to achieve the objective sought (for example, protection of the public or deterrence of crime).

¹⁰³ See Cowdery, 'Alternatives to Conventional Sentencing: Some Recent Developments,' 7 *Judicial Review* 3 (Sep 2005), 365 at 368.

¹⁰⁴ *Ibid.*

¹⁰⁵ See *Circle Sentencing in NSW: A Review and Evaluation*, NSW Judicial Commission 2003: <<http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph22/circle.pdf>>, and <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb115>.

¹⁰⁶ See Report of NCIS forum on Justice Reinvestment, 2 August 2012, above n 79, 40-2.

¹⁰⁷ See articles 3 and 9 of the Universal Declaration of Human Rights. See also eg *Bushell's Case* (1670) per Vaughan CJ on the development of *habeas corpus*, or *Foucha v Louisiana*, (1992) 504 US 71, in which the US Supreme Court observed that '[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action' (at 80).

Broadly speaking, sentencing practice in Australia can be deemed successful from an international human rights perspective if it is participatory, respects the dignity of all involved and treats people strictly on an individual basis (rather than, for example, sentencing according to a mandatory minimum or to ‘send a message’¹⁰⁸). In each case, it should result in sentences which are proportionate to the gravity of the relevant offence, and which take into account the overarching goals of rehabilitation and reintegration into society. Evidence suggests that a strong focus on reinvestment and rehabilitation is likely to lead to greater benefits for society than an overly punitive approach.¹⁰⁹

If imprisonment is the least restrictive option available to a sentencing court, but would be inappropriate or ineffective in the circumstances of the particular case, the Government has a responsibility to make less restrictive alternatives available. Courts and legislators must also consider whether a sentence of incarceration may have a disproportionate effect on a particular offender or group of offenders, in which case it may be a discriminatory punishment.¹¹⁰

Human rights standards, both binding and aspirational, have been developed by the international community with a view to improving the delivery of criminal justice around the world – including in the area of alternatives to imprisonment. They represent the combined experience of many experts from relevant fields, and Australian policy makers, whose task it is to assess and improve the Australian criminal justice system, should adhere to them.

International Obligations and Undertakings

The following treaties to which Australia is a party contain obligations relevant to the treatment of vulnerable groups, including vulnerable offenders:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination against Women;
- the Convention against Torture;
- the Convention on the Rights of the Child, and
- the Convention on the Rights of Persons with Disabilities.

¹⁰⁸ An example of ‘message’ sentencing: <<http://news.smh.com.au/breaking-news-world/riot-inciter-to-appeal-as-sentences-panned-20110818-1iylm.html>>.

¹⁰⁹ Studies suggest prison represents poor value for money and may, in certain circumstances, actually increase reoffending – see eg Weatherburn, *The effect of prison on adult reoffending*, BOCSAR, 2010, above n 27.

¹¹⁰ See eg *Women in Prison*, a 2006 report from the Anti-Discrimination Commission Queensland which found that prison policies and practices in that State may discriminate against some women prisoners (available at: <http://www.adcq.qld.gov.au/pubs/WIP_report.pdf>). The effects of imprisonment on mentally ill offenders are also often disproportionate – see eg Victorian Ombudsman, *Mental Health and Prisons – Monitoring and Oversight*, Paper presented at Implementing Human Rights in Closed Environments Conference February 2012: <http://www.ombudsman.vic.gov.au/resources/documents/MonashConference_-_Mental_health_and_prisons_21_Feb_2012.pdf>.

In addition, as part of the Human Rights Council's Universal Periodic Review process, Australia accepted recommendations to "[i]mplement measures in order to address the factors leading to an overrepresentation of Aboriginal and Torres Strait Islander communities in the prison population," and to "examine possibilities to increase the use of non-custodial measures."¹¹¹ The Government can expect to be asked about progress on this undertaking in the second cycle of the Universal Periodic Review in 2015.

Another reason to ensure that imprisonment is a punishment of last resort is that overcrowded prisons frequently impinge upon other rights in addition to the right to liberty (for example the right to dignified treatment in detention in article 10(1) of the ICCPR). This may be less of a problem in Australia than some other nations, but the overall occupancy level in Australian prisons was last estimated at 105.9%,¹¹² and recent reports on prisons in WA,¹¹³ Victoria¹¹⁴ and SA¹¹⁵ suggest that overcrowding is a growing problem. At their worst, overcrowded and generally substandard prison conditions may even lead to breaches of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under article 7 of the ICCPR.

In 2006, the UN Office on Drugs and Crime (UNODC) produced a Criminal Justice Assessment Toolkit which it describes as a "standardized and cross-referenced set of tools designed to enable United Nations agencies, government officials engaged in criminal justice reform, as well as other organizations and individuals to conduct comprehensive assessments of criminal justice systems..." and "to assist agencies in the design of interventions that integrate United Nations standards and norms on crime prevention and criminal justice...."¹¹⁶ The Toolkit was evidently designed primarily for the assessment of criminal justice systems which are underdeveloped or in need of significant reform, but much of the advice it contains is still relevant to Australia.

One element of the Criminal Justice Assessment Toolkit is entitled *Alternatives to Incarceration*.¹¹⁷ In it, the UNODC notes that "[p]rison populations around the world are increasing, placing enormous financial burdens on governments. In the meantime, there is

¹¹¹ Report of the Working Group of the UPR, UN Doc A/HRC/17/10 (2011), Recommendations 86.93-94 (Austria).

¹¹² The report found that prisoners had significantly higher rates than the general population of hepatitis, depression, STDs, self-harm and injury, suicide attempt and hospitalisation - See <<http://www.prisonstudies.org/info/worldbrief/wpbcountry.php?country=192>>, 3.

¹¹³ See Banks, 'Bunbury Prison Overcrowded,' *The West Australian*, 20 January 2012:

<<http://au.news.yahoo.com/thewest/a/-/newshome/12670444/bunbury-prison-overcrowded>>

¹¹⁴ See Farouque, 'Overcrowded prisons open to damages claims,' *The Age*, 21 May 2012:

<<http://www.theage.com.au/victoria/overcrowded-prisons-open-to-damages-claims-20120520-1yz1v.html>>.

¹¹⁵ See

<<http://www.stephenwade.com.au/Portfolio/Crime/tabid/82/articleType/ArticleView/articleId/5/Prison-Overcrowding.aspx>>.

¹¹⁶ See <<http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html>>.

¹¹⁷ See *Custodial and Non-custodial Measures: Alternatives to Incarceration*, UNODC/OSCE 2006, UNODC/OSCE 2006: <http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf>.

growing recognition that imprisonment does not achieve some of its most important stated objectives, as well as being harmful – to offenders, to their families and in the long term, to the community.” It argues that “the implementation of penal sanctions within the community, rather than through a process of isolation from it, offers in the long term better protection for society.”¹¹⁸ The UNODC is of the view that the support of the judiciary and the public are crucial to the ongoing implementation and success of alternative punishments.¹¹⁹

The Toolkit refers not only to treaties such as the ICCPR, but also to relevant standards contained in the *UN Standard Minimum Rules for Non-Custodial Measures*¹²⁰ (Tokyo Rules), the *UN Standard Minimum Rules for the Administration of Juvenile Justice*¹²¹ (Beijing Rules) and the *UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*.¹²²

In 2006 and 2007 respectively, the UNODC also published a *Handbook on Restorative Justice Programs*¹²³ and a *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*.¹²⁴ Drawing on the experience of academics and criminal justice experts convened by the UNODC, the *Alternatives to Imprisonment* handbook “seeks to provide guidance on the implementation of various sentencing alternatives that integrate United Nations standards and norms.”¹²⁵ It notes that prisons are the default option for criminal punishment in many countries around the world, yet this has not always been the case, and has not proven to be an appropriate solution for minor crimes or vulnerable offenders.¹²⁶

The UNODC poses the following rhetorical question which succinctly characterises the relationship between imprisonment and human rights:

Given that imprisonment inevitably infringes upon at least some human rights and that it is expensive, is it nevertheless such an effective way of achieving [its stated] objectives that its use can be justified? The reality is that most of the objectives of imprisonment can be met more effectively in other ways. Alternatives may both infringe less on the human rights of persons who would

¹¹⁸ Ibid, 1.

¹¹⁹ Ibid, 2.

¹²⁰ Adopted by General Assembly resolution 45/110 (1990), text available at: <<http://www2.ohchr.org/english/law/tokyorules.htm>>.

¹²¹ Adopted by General Assembly Resolution 40/33 (1985), text available at: <<http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>>.

¹²² Adopted by General Assembly Resolution 46/119 (1991), available at: <<http://www.un.org/documents/ga/res/46/a46r119.htm>>. These principles have already been employed in relevant law reform projects in Australia – eg in the review of the *Mental Health Act 1996* and *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) – See <<http://www.health.wa.gov.au/mhareview/reports>>.

¹²³ See <http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf>.

¹²⁴ See *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, UNODC 2007: <http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf>.

¹²⁵ Ibid, 2.

¹²⁶ Ibid, 3.

otherwise be detained and may be less expensive. Measured against the standards of human rights protection and expense, the argument against imprisonment, except as a last resort, is very powerful.¹²⁷

Domestic Obligations

The *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) both contain several guarantees which are relevant to non-custodial measures and diversion, including protections against:

- inequality before the law;
- arbitrary and unlawful deprivation of liberty;
- undue interference with privacy and family life, and
- unfair criminal proceedings – including for children.

The Victorian Act also contains a guarantee of dignified treatment in detention in s 22(1), which has been raised in particular in cases relating to mentally ill detainees.¹²⁸

There are many other human rights guarantees which are potentially breached in the context of incarceration; or which might be better protected by appropriate alternatives. There is insufficient space in this submission to set out the relevant obligations and standards in detail, but they are set out in Part 4 of the Castan Centre's July 2012 report.

Compatibility of Current Policies and Practices

The principle that imprisonment is to be regarded as a last resort – or at least a less preferable option – is generally supported by Australian Governments, as reflected in the relevant provisions of their sentencing legislation.¹²⁹

Victoria has been a leader in developing alternative court, diversion and sentencing programs, including pioneering initiatives such as the Neighbourhood Justice Centre at Collingwood and the Court Integrated Services Program in the mainstream Magistrates' Court. Despite expressing scepticism while in opposition, the present Coalition Government in Victoria agreed in 2011 to continue funding these initiatives after consideration of the

¹²⁷ See *Alternatives to Incarceration*, UNODC, UNODC/OSCE 2006: <http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf>, 6.

¹²⁸ See eg *R v Kent* [2009] VSC 375.

¹²⁹ *Sentencing Act 1995* (WA) ss 6(4), 39(3); *Young Offenders Act 1994* (WA) ss 7(h), 120; *Severe Substance Dependence Treatment Act 2010* (Vic) s3(2); *Children, Youth and Families Act 2005* (Vic) ss 345, 361, 410(c) and 412(1)(c); *Penalties and Sentences Act 1992* (Qld), 9(2)(a); *Criminal Law (Sentencing) Act 1988* (SA), s 11; *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1). Cf *Sentencing Act 1997* (Tas) s 3(b), which provides that "[the purpose of this Act is to] promote the protection of the community as a primary consideration in sentencing offenders."

relevant reviews.¹³⁰ In addition, it has boosted funding for treatment programs and advice for homeless defendants,¹³¹ and a created a new Community Correction Order (comparable to the UK's Community Orders) which provides courts with a wide range of options and is being enthusiastically embraced.¹³² However, it has also recently reduced sentencing options by abolishing home detention and some suspended sentences – policies which have had a disproportionate effect on the state's Indigenous population.¹³³

In NSW, the Government has been very supportive of the work of the Drug Court. In November 2011, it announced that a second Drug Court would be established in recognition of the success of the original at Parramatta.¹³⁴ NSW has also pledged to expand the Forum Sentencing (restorative justice) scheme to all locations in which the Local Court sits,¹³⁵ and it has expanded the ambit of the Circle Sentencing program from one to 15 locations over the past ten years. However, it did close the Youth Drug and Alcohol Court (allegedly without warning) on 1 July 2012, citing cost-effectiveness concerns.¹³⁶

On the other hand, diversionary schemes and attempts to maintain the principle of prison as a punishment of last resort continually come under pressure from 'law and order' politics. Results of this pressure have included mandatory minimum prison sentences for certain offences in the NT, Queensland, WA and Commonwealth jurisdictions,¹³⁷ and the abrogation of the principle for certain cases involving violence in Queensland¹³⁸ and Tasmania.¹³⁹

The (in)compatibility of mandatory sentencing with human rights has been discussed many times.¹⁴⁰ The Victorian Government recently abolished the mandatory sentence for certain driving offences, as recommended by the Sentencing Advisory Council, due to statistics that

¹³⁰ See Rood, *Libs to keep 'apartheid' courts*, *The Age*, 8 April 2011: <<http://www.theage.com.au/victoria/libsto-keep-apartheid-courts-20110407-1d66e.html>>.

¹³¹ See *\$22 million to help courts get offenders back on track*, Media Release, 3 May 2011: <<http://www.premier.vic.gov.au/media-centre/media-releases/736-22-million-to-help-courts-get-offenders-back-on-track.html>>.

¹³² See <<http://sentencingcouncil.vic.gov.au/page/about-sentencing/sentencing-information/sentencing-options/sentencing-adults/community-correcti>>.

¹³³ See Lynch, 'Prison population balloons under Baillieu,' *The Age*, 1 March 2013: <<http://www.theage.com.au/victoria/prison-population-balloons-under-baillieu-20130228-2f98p.html>>.

¹³⁴ See 'Sydney to get second drug court: NSW govt,' *Sydney Morning Herald*, 9 November 2011: <<http://news.smh.com.au/breaking-news-national/sydney-to-get-second-drug-court-nsw-govt-20111109-1n6ka.html>>.

¹³⁵ See <http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/forum_index>.

¹³⁶ See 'Youth drug court closure sparks debate,' *ABC 7.30 Program*, 3 July 2012, *ABC 7.30 Program*, 3 July 2012: <<http://www.abc.net.au/7.30/content/2012/s3538261.htm>>.

¹³⁷ Mandatory minima apply in repeat property, trafficking and violent offences, as well as people smuggling offences. The Queensland Government in particular has apparently responded to political pressure on mandatory sentences: <<http://www.brisbanetimes.com.au/queensland/lnp-mandatory-sentencing-policy-goes-fullcircle-20120430-1xul7.html>>. These policies are routinely decried by judges, including recently in the NT Supreme Court - see: <<http://www.abc.net.au/news/2013-01-10/mandatory-sentencing-injustice-judge-mildren/4459464>>.

¹³⁸ See *Penalties and Sentences Act 1992* (Qld), 9(3).

¹³⁹ See *Sentencing Act 1997* (Tas), s 19.

¹⁴⁰ See eg *Mandatory Sentencing Laws in the NT and WA*, AHRC:

<http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf>.

showed the sentence (which was mainly converted to a suspended sentence) has in practice been replaced by fines and Community Correction Orders.¹⁴¹ However, such winding back of mandatory sentences is unusual. In fact, the WA Government recently announced its intention to extend mandatory sentencing laws – a move opposed by the state’s judiciary, Aboriginal Legal Service and even the Governor.¹⁴² Such a move is particularly perplexing in light of the WA Government’s parallel introduction of a trial Mental Health Court Diversion and Support Program in Perth.¹⁴³

Clearly, governments have to strike a balance between the various aims of criminal sentencing, including deterrence and protection of the public as well as rehabilitation of the offender. However, policies which truly protect the public over the long term must be based on evidence of the best ways to reduce recidivism, and the evidence suggests that imprisonment is relatively ineffective in this regard.¹⁴⁴

Successive New South Wales Governments, despite their support for problem-solving courts and diversion programs, have adopted other policies which resulted in a 56.4% increase in the State’s Indigenous prison population between 2001 and 2008.¹⁴⁵ A 2009 BOCSAR report notes:

There has been no overall increase in the number of Indigenous adults convicted but there was an increase in the number convicted specifically of offences against justice procedures. These results suggest that the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system’s response to offending rather than changes in offending itself.¹⁴⁶

The changes identified clearly had a disproportionate effect on Indigenous offenders, and seriously undermined efforts to reduce Indigenous overrepresentation. A subsequent decrease in overall prisoner numbers between 2010 and 2011 had relatively little effect on the level of Indigenous overrepresentation. Obligations to guarantee substantive equality before the law require governments at all levels to take more effective action.

WA and the NT, in addition to having the highest incarceration rates in Australia, have failed to establish adequate secure treatment facilities for those who are found unfit to plead or

¹⁴¹ See <<https://sentencingcouncil.vic.gov.au/content/publications/driving-while-disqualified-or-suspended-report>>. NB The Victorian Government mooted mandatory sentences for young people involved in violence in 2011, but did not proceed with the policy – see:

<http://www.smartjustice.org.au/cb_pages/minimum_mandatory_sentences_for_young_people.php>.

¹⁴² See Robinson, ‘Most needy kids at risk in sentencing push,’ *The Australian*, 26 February 2013:

<<http://www.theaustralian.com.au/national-affairs/indigenous/most-needy-kids-at-risk-in-sentencing-push/story-fn9hm1pm-1226585445246>> NB access to article may require subscription.

¹⁴³ See <http://www.mentalhealth.wa.gov.au/mentalhealth_changes/Mental_Health_Court_Diversion.aspx>.

¹⁴⁴ See Brown, ‘The Limited Benefit of Prison in Controlling Crime,’ 22 *Current Issues in Criminal Justice* (1), July 2010, 137. See also Weatherburn, *The effect of prison on adult reoffending*, BOCSAR, 2010, above n 27.

¹⁴⁵ See Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* BOCSAR, 2009:

<[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB41.pdf/\\$file/BB41.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB41.pdf/$file/BB41.pdf)>, 4.

¹⁴⁶ *Ibid*, 5-6.

not guilty as a result of mental illness or intellectual disability.¹⁴⁷ This has led to some regrettable outcomes, including the case of Marlon Noble, who was imprisoned for more than ten years without ever pleading or being convicted of a crime, and with serious doubts about his 'dangerousness' to the community.¹⁴⁸ In 2010 the Victorian Department of Justice prepared National Guidelines for Best Practice on Diversion and Support of People with Mental Illness for the National Justice CEOs Group which discourage imprisonment for people with mental health issues.¹⁴⁹ Although the Guidelines are said to be a 'resource for different jurisdictions to devise policy positions and programs' rather than a 'consensus policy statement',¹⁵⁰ this was an excellent initiative which could be emulated in respect of other groups of vulnerable offenders.

Conclusion/Recommendations

It is the Australian Government's responsibility to ensure the obligations outlined above are respected throughout Australia, as reflected in provisions such as article 50 of the ICCPR. Admittedly, this is made more difficult by the fact that the states have primary responsibility for most of the criminal law and justice policy, but this must not be an excuse for inaction.

As a first step, the Australian Government should, through the National Justice CEOs Group, develop (or encourage the development of) National Guidelines for Best Practice on Diversion and Support for vulnerable offender groups – with the highest priority accorded to Indigenous offenders. It should also increase support for Legal Aid as recommended by the Law Council of Australia, so that representatives can help offenders access diversion programs and advocate alternatives to incarceration.¹⁵¹

In order to provide incentives for the development of alternatives to imprisonment, the Australian Government should set up an agency with a mandate similar to that of the US Government's Bureau of Justice Assistance and fund it adequately. The inordinate cost of allowing the trends identified in Part 1 to continue should more than justify the expense.

The agency would not have to start from scratch. It could draw on the work of the Australian Centre for Justice Innovation – a joint venture between Monash University and the Australasian Institute for Judicial Administration which already has government

¹⁴⁷ See eg 'Mentally impaired held in NT jails without conviction,' *ABC Lateline*, 26 June 2012: <<http://www.abc.net.au/news/2012-06-25/mentally-impaired-being-held-in-nt-prisons-without-conviction/4091940>>.

¹⁴⁸ See <http://www.hreoc.gov.au/about/media/media_releases/2012/1_12.html>.

¹⁴⁹ See <http://www.aic.gov.au/en/crime_community/communitycrime/mental_health_and_crime/~media/aic/njceo/diversion_support.pdf>, 4.2.2.

¹⁵⁰ See <http://www.aic.gov.au/en/crime_community/communitycrime/mental_health_and_crime/njceos.aspx>.

¹⁵¹ See <<http://www.lawcouncil.asn.au/programs/national-policy/legal-aid/campaign.cfm>>.

representatives on its Advisory Board.¹⁵² It could also draw on the experience of comparable overseas jurisdictions such as those mentioned in part 2.1.

The Australian Government should abolish mandatory minimum sentences of imprisonment and mandatory non-parole periods in its own legislation,¹⁵³ and encourage state and territory Governments to do the same. Additionally, it should discourage legislative dilution of the principle that imprisonment is a punishment of last resort, in accordance with both Common Law and human rights principles.

¹⁵² See <<http://www.law.monash.edu.au/centres/acji>>.

¹⁵³ See *Migration Act 1958* (Cth) s 233C and *Crimes Act 1914* (Cth), s 19AG.