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Submission No 80

BY: ATSI/A

**Submission to Standing Committee on Aboriginal and Torres
Strait Islander Affairs**

Introduction

"Only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture. The high incidence of imprisonment of aboriginal people, and the often deleterious and sometimes tragic effects it has upon them, are of justifiable concern to the community:.... To recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic."
(**R v Welsh** (unrep, 14/11/97, NSWSC) per Hidden J.

Only in recent weeks have I learnt of the Committee's inquiry into the high levels of involvement of indigenous juveniles and young adults in the criminal justice system. I understand the inquiry has a particular focus on prevention and early intervention. In the terms of reference of the inquiry I noted a number of issues that are identified for special consideration by the Committee. I apologise for the delay in forwarding these submissions. I have been favoured with having read the Honourable Rod Madgwick QC's submission with which I generally agree.

I am a Judge of the District Court of New South Wales, appointed in October 2000, but I make this submission in a private capacity. I am Chair of the NSW Judicial Commission's Ngara Yura Committee, which has the responsibility of providing education to judicial officers in relation to matters relevant to the understanding of Aboriginal, cultural and social circumstances. I am a member of two national committees concerned with educating Judicial Officers on matters relating to Aboriginal society and related matters. I was a solicitor for the Aboriginal Legal Service at Cowra and Redfern from 1975 to 1980, the Principal Solicitor at Redfern from 1978 to 1980 inclusive and practised 20 years at the Bar, primarily in matters related to the criminal law in

all jurisdictions in New South Wales, and the ACT, as well as on a few occasions in the Northern Territory and Queensland. This period included two and a half years as Senior Counsel assisting J H Wootten QC, Royal Commissioner into Aboriginal Deaths in Custody (RCIADC), for New South Wales, Victoria and Tasmania (between 1988 and 1990). I make this submission based upon my experiences in a personal capacity, not as a submission from my Court.

There are no doubt many issues that need to be addressed examining the broader issue of justice for Aboriginal people in the criminal justice system, whether it be concerned with adequate interpreters, adequate legal representation, policing practises, impartial charge selection, impartial judicial attitudes, representative juries, amongst a myriad of other issues. There are many changes and improvements that could be made in these areas to minimise contact with the sentencing aspect of the criminal justice system. However, this submission concentrates largely upon aspects of primarily sentencing practices, largely because this is one area of the administration of justice where the disadvantage for Aboriginal people, unfairness and injustice are most palpable and identifiable. Policing, charge selection, diversionary programs and the like usually lead to the sentencing phase. Further, this area of the criminal justice system has an important role in 'prevention, early intervention and diversion'. I concede from the outset that improvements in other areas will impact upon the sentencing rubric. It would be better to 'divert and prevent than sentence!.

The current context

There is no doubt that it is nothing short of an embarrassment, both nationally and internationally, that throughout the Commonwealth of Australia, to varying degrees from State to State and Territory to Territory, Aboriginal people are grossly over represented in the criminal justice system.

Chief Justice Martin, of the Western Australian Supreme Court, in a speech delivered on 17 September 2009 to Western Australian Correctional staff inter alia observed: "The gross over representation of Aboriginal people within the

criminal justice system of Western Australia was one of the biggest issues confronting that system". He noted that there was "No sign of ... progress (in relation to this issue) at the moment" and that the statistical "indicators" related to the over representation of Aboriginal people in our justice system "continue to get steadily worse". In referring to the concept of "Aboriginal people in our justice system" what his Honour was substantially referring to was the sentencing of such people.

This over representation explained in part the grotesque over representation of Aboriginal deaths in custody during the period covered by the RCIADC (between 1980 and 1990). The proportion of Aboriginal people in the 'prison' or corrective custodial populations has arisen in most States and Territories since the conclusion of the RCIADC. I assume that the Committee is well aware of the evidence reported upon by the Royal Commission and its recommendations following upon its various enquiries across the Commonwealth of Australia. The National Report of the Royal Commission and the recommendations within it sought to address not just the immediate causes and circumstances of deaths in custody but the "underlying issues", the factors contributing to the over representation of Aboriginal people in the criminal justice system.

Reasons contributing to the increase in the proportion of Aboriginal people in custody particularly in New South Wales (of which State I have direct knowledge) include:

- (i) Greater restrictions on grants of bail over the last 10 years (the changes to "presumption against grant of bail" and other limitations upon grants of bail would require a separate paper);
- (ii) Legislative articulation of matters, or principles, which inhibit sentencing discretion or may direct sentencing practices in a particular direction (eg ss 3A, 21A, 44, 54A-D **Crimes (Sentencing Procedure) Act 1999**). These provisions include 'standard non parole periods' (see **R v Way** (2004) 60 NSWLR 168).

- (iii) Guideline judgments (ie decisions of the New South Wales Court of Criminal Appeal structuring sentencing discretion, eg **R v Henry (& Ors)** (1998) 48 NSWLR, **R v Jurisic** (1998) 45 NSWLR 209).

These matters of public policy are not, of course, directed at Aboriginal people alone. The Australian Institute of Criminology Report: "Juveniles' contact with the Criminal Justice System in Australia", released in late September 2009, reported the "disproportionately" high number of Aboriginal contacts and particularly the disproportionate referral of Aboriginal children to Court, rather than diversionary schemes, such as cautioning. In 2007/8, 48 percent of Aboriginal children were referred to Court, compared to 21 percent of 'non Aboriginal' children. Thirty two percent of non indigenous children received cautions, compared to 18 percent of indigenous children.

Between 1992 and 2006 the age standardised national indigenous imprisonment rate has risen from 1,100 to 1787 per 1,000,000 indigenous adults, whilst for non indigenous adults the rate has remained static at about 134 per 100,000. In 2007 the rates of indigenous to non indigenous rates of imprisonment varied from 3 times in Tasmania, to 21 times in Western Australia, 12 times in New South Wales, 14.5 times in South Australia and 14 times in the Northern Territory, with a national figure of 13 times.

The census of New South Wales prisoners conducted on 30 June 2007, revealed a total of 9,557 full time inmates (out of a total of 10,318) of which 92.4% were male and 7.6% were female. 20.1% were Aboriginal, 74.3% were Australian born and 69.1% had been previously imprisoned. Of the total of inmates in custody, 22.4% were on remand. It is interesting to note in passing that in 1982 in NSW the total of full time custodial inmates both male and female was 3,466 and the percentage of persons who identified themselves as Aboriginal was 5.8%. In 1990, the year after the introduction of the **Sentencing Act 1989(NSW)**, which abolished remissions upon sentences in New South Wales, the full time custodial population was 5,538, of which 9.1% were Aboriginal. In 2001, 7,801 were in full time custody, of which 15.1% were Aboriginal. In 2002, when there was a slight change in the identification

of aboriginality, there were 8,154 persons in full time custody of which 17.2% were identified as Aboriginal.

These statistics might be seen in context of wider census particulars. In the 2006 National Census 138,000 Aboriginal people were identified as resident in New South Wales (2.1% of the state wide population), of which there were slightly more indigenous women (70,027) than men.

The 2007-2008 survey of persons in Juvenile Justice custody in New South Wales showed that the average daily custodial population was 390, including 27 females, of which 200 were identified as Aboriginal people.

To put Australia's position in a true international context, Chief Justice Martin in his paper pointed out that in the United States, within the adult prison population, one in fifteen were African American males. The rate of incarceration of adult Aboriginal men in Western Australia in June 2008 was also one in fifteen (one in fifteen adult Aboriginal men will at any given time be in custody). His Honour pointed out that this was "equivalent to the highest incarceration rate within the country having the highest incarceration rate in the (western) world". The rate of incarceration of African American women was 1 in 2003. In Western Australian 2008 the rate of incarceration of adult Aboriginal females was 1 in 160. He observed that at this rate of imprisonment of Aboriginal women, was worse than the rate of incarceration of African American women and "may well be the highest in the world".

He went on to point out the disparity between rates of imprisonment of Aboriginal people and non Aboriginal people was much higher in Western Australia than between different ethnicities in the United States. Adult Aboriginals are imprisoned at "twenty five times the rate of non Aboriginals". African American adults are imprisoned at seven times the rate of White American adults. More compelling would be to see the matter from the perspective of the percentage of Aboriginal people as a proportion of the total population, as opposed to the percentage of African American people as the percentage of the total population.

Of course, I am not in any way suggesting that Western Australia should be held up for special opprobrium. The figures from Western Australia reflect upon the whole of the country, because the position is by and large much the same across the Commonwealth of Australia, particularly in those states with the largest Aboriginal populations (New South Wales, Queensland, Northern Territory). The truth of the matter is that the disproportionate representation of Aboriginal people in gaol/custody is a national shame and the time for excusing it by simply stating that the law equally applied has produced these results, that the disproportionate gaol representation of Aboriginal people represents their disproportionate level of offending, that the social circumstances of the various and varying Aboriginal communities across Australia contribute to this situation and that nothing will change or improve until these fundamental social issues are addressed etc has surely passed.

It is conceded from an anecdotal perspective that whilst the current circumstances of social and economic disadvantage strongly contribute to the rates of offending by Aboriginal people, there are crimes that are committed where the victims involved are Aboriginal people themselves, that Aboriginal people deserve the protection of the law as much as all other people in the community, that society must be protected from persons who are violent or damage or steal the property of others and other truisms of sentencing law generally set out in case law, such as **Veen (No 2) v The Queen** (1988) 164 CLR 465, a decision of the High Court of Australia.

But, as the ultimate determination of matters from the perspective of punishment and deterrence involve the deprivation of liberty, it must be also true that the deprivation of liberty is the most expensive alternative for the community in “treating” or “punishing” offenders. That deprivation of liberty, in the case of Aboriginal people, ultimately leads to the return of people to their communities which remain unchanged. The ‘revolving door’ of which Chief Justice Martin speaks.

The current situation is also summarised in a Report published in June 2009 by the National Indigenous Drug and Alcohol Committee (NIDAC) – “Bridges and Barriers” which I believe will be provided to the Committee. This report

“addressing indigenous incarceration and health” addresses a range of topics including,

- (i) the incidence of particular health issues for Aboriginal people in custody, particularly HIV and hepatitis C,
- (ii) “co morbidity” of conditions such as mental health problems, alcoholism and the like,
- (iii) an up-to-date profile of indigenous prisoners and detainees,
- (iv) substance abuse issues for Aboriginal people, within the community, within the correction system and on release,
- (v) reasons for indigenous over representation in the correction system, such as socioeconomic factors, alcohol and other drug misuse,
- (vi) barriers to access to diversionary programs, morbid conditions such as acquired brain injury and fetal alcohol spectrum disorders and a summary of intervention opportunities within the criminal justice system.

The evidence in that Report, summarised though it is from many source materials, paints a disturbing picture of disadvantage and denial of opportunity at all levels of Aboriginal society and at all levels of the criminal justice system, including most intensely at the time central to the Committee’s enquiries, at points of prevention and early intervention. The recommendations in that Report (which no doubt would be known by the Committee) I generally support. To health issues requiring attention may I respectfully add hearing loss, discussed by the Hon. Michael Kirby, in **R v Russell**, a decision he gave as Acting Chief Justice (NSW) in 1984 (84 **Australian Criminal Reports** at 388-394). I also acknowledge that many recommendations require implementation by State and Territory legislation or administrative action and are beyond the power of the Commonwealth.

Some other reasons for high levels of involvement of young Aboriginal people in the Criminal Justice System

Any examination of "the high levels of involvement of indigenous juveniles and young adults in the criminal justice system" obviously requires consideration of both cause and effect of that over representation. The matter cannot be addressed simply by paternalistic correctional policies, diversionary programs, improved government services standing alone. If the international and national shame of the current statistical picture is not to be reduced and removed the "solutions" must be seen in a holistic approach that interrelates all the salient factors, whether they be socioeconomic factors such as housing, education, medical and related services to the population in general, economic opportunity, control of resources, recognition of country ,through to diversionary programs before arrest, after arrest, after sentencing, post release or within correctional programs, the primary purpose of which should be primarily to rehabilitate and divert, rather than punish and deter. A study of 'prevention' and 'early intervention' cannot look at one point in the 'continuum' frozen in time.

For example, the evidence in the NIDAC Report refers to a lack of equal (or any) access to educational opportunities, economic opportunity, appropriate medical treatment and mental health services, drug and alcohol counselling and the like. One factor which is relevant to this lack or absence of opportunity is a general suspicion and distrust for Aboriginal people widely in the capacity or interest in government services to provide services which are sympathetic (culturally or otherwise), relevant or effective. There should be appropriately formulated survey of Aboriginal views on the reliability, relevance and cultural sensitivity of State and Commonwealth government.

The multigenerational experience of Aboriginal people whether it be contact with Child Welfare agencies, Police or Correctional Services has been negative, notwithstanding enormous strides taken by these various agencies, to varying degrees across the States and Territory, to improve and make more relevant their services, to recognise Aboriginal cultural diversity and to acknowledge the relevance of historical factors in contributing to social

conditions and Aboriginal perceptions. These matters are recognised in reports of the **Human Rights Commission** (eg the so called “Stolen Generations” Report) and the RCIADC, as well Judicial “Benchbooks” such as “Equality before the Law” in New South Wales and similar publications in Western Australia and elsewhere.

The Role of Sentencing

As the sentencing exercise by judicial officers (along with policing policies) is the ‘crucible’, or focal point, of the over representation of Aboriginal people in the justice system, there is a need to reappraise the fundamental approach to sentencing the vast majority of Aboriginal offenders. I acknowledge that particular Aboriginal people will commit crimes that will require greater weight to be given to punishment, deterrence, denunciation and those more “punitive” purposes of sentencing that may be seen for example in s 3A **Crimes (Sentencing Procedure) Act** (NSW), s 21A of the same Act or s 16A **Crimes Act** 1914 (Cth), State and Commonwealth legislation with which I am most familiar at the present time. No doubt other States and Territories have similar, if not identical provisions, setting out both the “purposes of sentencing” and relevant “factors” for sentencing.

Making the assumption for the purposes of this submission that all Aboriginal people actually committed the crimes for which they were sentenced, I submit that special statutory provisions must be established in respect of Aboriginal people (subject to appropriate definition of relevant persons, the character of the offending and relevant subjective matters) which displace the existing requirements to approach sentencing from the perspective of “punitive” purposes as statutorily defined, unless there are special or “appropriate” circumstances for so doing. If this be seen as an act of “positive discrimination” in favour of Aboriginal people, then so be it. The reality is that unless acts of “positive discrimination” at stages of the interaction of the criminal justice system with individuals are formally recognised, not only will the disproportionate number of Aboriginal people in the criminal justice system continue, but it will increase to this nation’s greater shame. The historical narrative relating to Aboriginal people which was addressed in the various

Regional Reports and the National Report of the Royal Commission into Aboriginal Deaths in Custody (the most extensive such inquiry ever conducted on a State by State and National scale) show that the current situation, (extrapolating from 1991, the year of the release of the National Report of the Royal Commission) is not something that arose overnight. It is the consequence of over two hundred years of bad and/or discriminatory policies, neglect and general discrimination, towards Aboriginal people by government agencies and the dominant European population. To sever the 'Gordian knot' of 'cause and effect' will take too long to arrest the current trends given the slow progress of improvement of social conditions for Aboriginal people.

The views of Justice Hidden, a Supreme Court judge in New South Wales since 1996 with an unrivalled experience of dealing with Aboriginal communities as a legal practitioner, quoted at the commencement of this submission, should encapsulate the views of the informed sentencer. But the informed sentencer may still be bound to pursue punitive options that may lead nowhere. Certainly not to rehabilitation and redemption. Just 'more of the same'

I appreciate that the criminal justice system is not solely concerned with 'sentencing'. But the vast bulk of the work of the criminal courts, at all jurisdictions, is concerned with 'sentencing'. The vast majority of 'prosecutions' ultimately end up with a sentencing exercise at the end whether there is a plea of 'guilty' or not. Of course, a disproportionate amount of court time will be taken up in hearings (trials) to determine whether accused persons are guilty or not. But the proportion of time taken up with determining these issues relates to a very small percentage of defendants (or cases) heard by the courts.

Other Matters to bear in Mind

In putting the various proposals that I outline below I am mindful of a number of matters which will limit the relevance, or appropriateness, of some of the general propositions. Not all Aboriginal people in Australia have the same background or contemporary experience of disadvantage, discrimination,

dislocation. Not all separate Aboriginal communities or groups have the same social circumstances, problems, disadvantages and the like. Not all Aboriginal offending is of the same type, and, where the same type, has the same causes or explanations. Not all Aboriginal offending is a reflection of the social, economic, community or historical circumstances of the individual and/or his community. Aboriginal offenders may commit crimes not in an 'Aboriginal context', but as participants of the wider criminal milieu. There are some Aboriginal offenders who are simply 'professional criminals' who commit crimes for the same reasons as non-Aboriginal people who themselves are professional criminals (although some of these people may have been 'steered' into crime by socio-economic reasons). There are Aboriginal offenders who have psychiatric, psychological or other disabilities which contribute to offending that may not have necessarily any relationship to, or origin in, the 'Aboriginal' context.

However, even allowing for these matters and others that may be relevant to 'Aboriginal offending' across the Commonwealth of Australia, they do not explain the disproportionate number of Aboriginal people in custody, or before the courts for sentence or explain away the relationship of Aboriginal offending to unique conditions or circumstances which contribute to that offending.

I am also mindful of the fact that there are particular Aboriginal offenders, either because of their threat to their own, or the wider, community or because of the particular crimes they commit, that society cannot reasonably deal with other than by deprivation of liberty, sometimes for lengthy periods of time. Further, there are crimes committed by Aboriginal people of such seriousness that no significant discrimination or distinction can be drawn from non-Aboriginal co-offenders, or other non-Aboriginal offenders, without engendering in the view of 'non-Aboriginal' offenders a 'justifiable sense of grievance', or an objectively measurable unfairness on any view.

But there are a great many statistical indicia that strongly suggest that such offenders are a relatively small minority of Aboriginal offenders who are deprived of their liberty from time to time. In any event, what I propose would,

within proper exercise of discretion, enable courts to 'discriminate; between offenders to ensure that no 'wider' injustice arose.

The following points may be made in conclusion to summarize some of the issues that I have addressed:

- (i) The more serious the offending where greater weight must be given to deterrence and denunciation/retribution usually, the less likely that the 'needs' of the offender will be addressed or met in the sentencing process.
- (ii) The public interest policy in punishment over rehabilitation in a particular sentencing exercise will rarely address the causes of offending. In some more serious matters, this may be academic. Many causes of offending will never be met by conventional sentencing procedures, either because of limitations of options and sentencing law or simply because sentencing is not the appropriate mechanism for reform.
- (iii) The capacity of judicial officers to meet the needs of offenders is constrained considerably by circumstances beyond their control. The role of the judicial officer is not necessarily central or pivotal to sentencing outcomes that meet the needs of offenders and their community.
- (iv) Some offenders may have "special needs" either contributing to offending or subjective only (ie mental health alcohol, drug addiction, homelessness, victim of sexual or physical abuse) only able to be met outside sentencing processes. Some such "needs" can never be met by the sentencing process, even where those needs ordinarily do not take a back seat to considerations of punishment, general deterrence and the like.
- (v) The better informed the sentencer, the more able he or she will be to satisfy those purposes of sentencing that address the "needs" of offenders, relevant to sentencing. The capacity or resources of

the prosecution and/or the defence to obtain relevant information will be on many occasions limited, if not "non-existent".

- (vi) Greater resources for custodial and supervision agencies and flexibility of sentencing options will enhance the capacity for Courts to meet the need for rehabilitation of offenders where that is relevant. Punishment is well resourced, programs for rehabilitation reform are usually not both within the custodial setting and outside.
- (vii) Alternative sentencing models, intensive treatment regimes, and the like, provide opportunities that conventional sentencing regimes cannot match or provide.
- (viii) There are however characteristics of offenders, or the offending, that will require attention to solutions that put as a priority protection of the victim or the community in the short to long term.
- (ix) Under New South Wales law (applied also to the execution of Commonwealth sentences) options (both custodial and non custodial) are limited by reason of availability of resources, geography or characteristics (including age of the offender).

Of course, the Commonwealth's capacity to pass legislation which may have an impact upon the way State laws are administered is limited or may be seen as giving rise to complex constitutional issues and/or consideration of the width of the Commonwealth **Racial Discrimination Act** (1975).

I make the following specific proposals.

- (1) The Committee should consider recommending that now, almost 20 years after the release of the National Report of the Royal Commission into Aboriginal Deaths in Custody, there should be a National Enquiry, jointly run by the States and the Commonwealth, not to undertake an examination of the width of an enquiry into Aboriginal Deaths in Custody, but to re-examine

the “underlying issues” contributing to the disproportionate numbers of Aboriginal people in custody in **all** States and Territories (albeit that the figures in Victoria are much “better” than elsewhere). These issues require addressing over a longer period than this Committee can spare and requires direct “expert” evidence and/or opinion beyond the scope of individual submissions or contributors.

(2) I propose changing the current legislative framework in which sentencing proceeds both at a Commonwealth and a State level. This would require, for example amendments to s 16A **Crimes Act (Cth)** 1914, and other legislation operating in State and Territory law concerned with both the ‘purposes of sentencing’ (example s 3A **Crimes (Sentencing Procedure) Act** 1999 (NSW)) and “factors” to be taken into account in sentence (example s 21A **Crimes (Sentencing Procedure) Act** 1999 (NSW)).

(a) In relation to the ‘purposes of sentencing’ (such as contemplated in s 3A (NSW)) I would suggest adding concepts such as ‘ensuring social justice’, ‘reducing Aboriginal disadvantage’, ‘recognising Aboriginal social and economic disadvantage’, as general matters that could be added to concepts of ‘punishment’, ‘denunciation’, ‘accountability’ etc.

(b) I suggest other purposes of sentencing be recognised by legislation to include ‘restoration of offenders to their community’, ‘restoration of stability and harmony to the offenders community’, ‘restoration of the offender to his or her family’ as relevant ‘purposes of sentencing’.

(c) Further, I suggest express recognition of ‘cultural or social circumstances to offending’ as mitigating factors to be taken into account in the appropriate case. For example, where it could be established that a person’s cultural or social environment or

circumstances had contributed to the offending behaviour that could be expressly taken into account as a 'mitigating factor'.

- (3) In relation to provisions such as s 5 **Crimes (Sentencing Procedure) Act**, and similar provisions elsewhere in the Commonwealth, which purports to identify 'imprisonment' as an option of 'last resort' there should be express reference to the sentencing of Aboriginal people in this context and express promotion of alternatives to imprisonment which will address both restoration of the offender and restoration of the offenders community, where that can be addressed in the sentencing context.

In other words, changing the legislative foundation of sentencing to require Courts to properly recognize contemporary Aboriginal disadvantage.

- (4) There is a need for a national 'cost/benefit' analysis of incarceration to the cost of residential/non residential rehabilitation programs. Resources that are currently being spent on the incarceration of Aboriginal people could be diverted to resources for programs that will permit supervision and direction for Aboriginal offenders outside of custody for many offences currently leading to jail sentences.
- (5) Where incarceration or deprivation of liberty is the only option, for the appropriate offender (subject to security risk and the like), diversion of Aboriginal people from the mainstream gaol system to programs of the type such as Balund-A or Yetta Dhinnakkal, run by New South Wales Corrections' which accommodate Aboriginal people in a culturally appropriate or relevant setting with options available of training and/or employment during the period of time that the offender is in custody.
- (6) I propose expanding the availability of Circle sentencing/Koori Court models for dealing with appropriate Aboriginal offenders at

Local Court/District (County) Court jurisdictions across the Commonwealth. Further, there should be encouragement of the involvement of **Elders** in the “traditional” sentencing exercises. Therapeutic justice models should take priority over punitive models.

- (7) There should be greater legislative freedom to recognise the **rights** and interests of third parties dependent upon, or related to, the offender. To sentence particular individuals may have an effect upon the human rights of “innocent third” parties, a concept recognised recently by the South African Constitutional Court in 2007 in the judgment of Justice Sachs and others in the decision of **M**.
- (8) Legislative changes should be made to provide greater ‘mix and match options’ on sentencing:
 - (a) ‘community service work’ or in house rehabilitation programs as conditions of bonds, home detention, in addition to periodic detention,
 - (b) power for courts to choose the type of community service work that might be performed, or programs that are available as part of community service work or of imprisonment,
 - (c) greater power for courts to choose the place of detention, in the appropriate case, rather than make recommendations for such matters.
- (9) Greater attention in legislation to the rights of children to protect them from incarceration in adult prisons and to prevent juvenile offenders finishing their sentences in adult prisons.
- (10) Legislative recognition of wider options in sentencing and greater flexibility in the execution of penalties, particular imprisonment, such as pre-release to halfway houses (or rehabilitation centres)

before non parole periods expire, or short sentences expire where there is no non parole period. There are many creative models available from overseas (eg. in Canada, particularly Alberta, dealing with 'First Nation' offenders) to provide fresh inspiration.

- (11) Sentences of 6-12 months imprisonment or less should be served by community service work, or in rehabilitation programs, with the risk of full time detention on failure to perform the work or complete the program.
- (12) Where imprisonment or detention is the last and only option more "special prisons", or places within them, for the drug addicted, the mentally ill and disabled, aboriginal men and women, domestic violence and repeat serious driving offenders. to protect the individual, to concentrate rehabilitation services and to avoid contact with experienced criminals.
- (13) Judicial education bodies must provide specialist sentencing checklists and programs to alert the Court to available options and programs or matters to look out for, as well as focussed programs and publications advising judicial officers of services and programs available to meet specific needs.
- (14) There should be wider and more creative use of restorative justice models, or alternative court models for the drug and alcohol addicted in summary and indictable matters. The **Drug Court** 'in New South Wales, and elsewhere is such a 'model'.
- (15) Specialist sentencing lists, particularly in the Local Court with adequate counselling and advisory resources readily available, for the mentally ill or disabled, aboriginal people, abused women and young people, sex workers and other identifiable disadvantaged groups.
- (16) A nationally co-ordinated survey of Aboriginal communities to assess the reliability, availability and relevance of government

services, welfare, economic enforcement, correctional and the like.

- (17) Remove restrictions upon the availability of particular non-custodial options and diversion programs at all levels both geographically and/or having regard to the characteristics of the offender. All programs, sentencing options and services should be available to all despite geographical tyranny.

Conclusion

Most importantly there should be equal opportunity to **all** to have access to any government service regardless of race or geographical location. Courts cannot provide justice in the individual case when there is not equal and open opportunity for all in the wider context.

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