



# **Alternatives to Imprisonment for Vulnerable Offenders**

International Standards and Best Practice

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**Report for Australian Government Attorney-General's Department  
July 2012**

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## Acronyms

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ABS – Australian Bureau of Statistics

ACT – Australian Capital Territory

AHRC – Australian Human Rights Commission (Formerly HREOC)

AIC – Australian Institute of Criminology

ALRC – Australian Law Reform Commission

ANU – Australian National University

BJA – Bureau of Justice Assistance

BOCSAR – NSW Bureau of Crimes Statistics and Research

COAG – Council of Australian Governments

CRC – Committee on the Rights of the Child

CRPD – Convention on the Rights of Persons with Disabilities

HRCtte – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

LRCWA – Western Australia Law Reform Commission

NGO – Non-Governmental Organisation

NJCEOs – National Justice Chief Executive Officers Group

NSW – New South Wales

NT – Northern Territory

OSCE – Organization for Security and Co-operation in Europe

Qld - Queensland

SA – South Australia

SCLJ – Standing Committee on Law and Justice (Formerly SCAG)

Tas - Tasmania

UK – United Kingdom

UNAFEI – United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders

UNODC – United Nations Office on Drugs and Crime

US – United States

Vic – Victoria

WA – Western Australia

## Overview

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This report surveys the current landscape of alternatives to imprisonment for vulnerable groups of offenders in Australia. It identifies strengths and weakness from a human rights perspective, and makes recommendations for policy-makers.

The vulnerable groups which are the focus of this report are young, homeless and Indigenous offenders, as well as offenders with a mental illness or cognitive disability. These groups (which are not mutually exclusive) are overrepresented in imprisonment statistics in Australia. Part 1 sets out the present extent of this overrepresentation and identifies common causes such as presumptions against bail, socio-economic disadvantage and inadequate mental health screening facilities. Part 1 also canvasses the overrepresentation of vulnerable groups in other countries' prison systems, demonstrating that the situation in Australia is far from unique. Even the situation for Indigenous offenders finds close parallels in the Canadian system. Finally, Part 1 interrogates Australia's heavy and increasing reliance on imprisonment as a mode of punishment, given its questionable efficacy in reducing reoffending.

Part 2 and the associated Appendix give an overview of existing alternatives to imprisonment, including other punishments, diversionary programs, therapeutic jurisprudence initiatives and related measures. Naturally, such alternatives will not be appropriate in every case, but for less serious offences committed by vulnerable offenders, their use should be encouraged. Over the last two decades or so, such measures have boomed in Australia and more are emerging every year. This report gives a snapshot of the major ones and, where possible, also gives the outcome of any evaluations which have been undertaken so the reader can assess their relative merits.

Part 3 contains a review of the most pertinent literature on these alternative criminal justice programs, including an academic criminological perspective, along with the perspectives of Government agencies and practitioners. Overall, expert opinion is strongly in favour of measures to reduce the use of imprisonment generally, and particularly for vulnerable offenders. However, the thornier question is which measures are likely to be most effective, and the discussion in Part 3 suggests that participatory processes, tailored to the needs of both offenders and victims, often offer better solutions to offending than the traditional criminal court model.

Part 4 deals with Australia's international obligations and undertakings, as well as relevant international standards which have been developed within the United Nations (UN). It assesses Australia's performance with regard to alternatives to incarceration against the most relevant of these standards. Australia's criminal justice system is, by world standards, robust and effective. However, it is also relatively conservative and could benefit from lessons learnt in comparable jurisdictions on problem-solving specialist courts and alternatives to imprisonment.

## Introduction

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The rates of incarceration in Australia of offenders from vulnerable groups, including young people, Aboriginal and Torres Strait Islanders and people with a cognitive disability or mental illness, are disproportionate to their overall representation in society. In 2011, the Parliamentary Standing Committee on Aboriginal and Torres Strait Islander Affairs identified the overrepresentation of Indigenous people in the justice system as a national crisis<sup>1</sup> – and it is worsening. Indigenous juveniles in particular are said to be 28 times more likely than non-Indigenous juveniles to be incarcerated – a situation the relevant UN Special Rapporteur has described as ‘disturbing’<sup>2</sup> (see *Indigenous Offenders* in **Part 1** below).

Australian Institute of Criminology (AIC) research shows the incidence of mental illness in prisons is up to four times that of the general population (see *Offenders with a Mental Illness or Intellectual Disability* in **Part 1**). In Western Australia (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.<sup>3</sup>

Corrections statistics show that only a small minority of Australian prisoners have 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 (see **Part 4**).

Against this background, initiatives have been put in place in most Australian jurisdictions to divert at-risk offenders from the criminal justice system and to provide courts with alternative sentencing options for those for whom incarceration is inappropriate (see **Part 2** and complementary **Appendix**). The present report assesses current alternative sentencing and diversionary practices from a human rights perspective, and makes recommendations for Government based on this assessment.

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<sup>1</sup> 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](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm). Please note that all URLs in this report were current as of July 2012 but may change due to site updates and restructures.

<sup>2</sup> The disparity was not even as high (21 times) when the Special Rapporteur made his comment – see *Report on the Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15, 4 March 2010, [50].

<sup>3</sup> 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 at the outset 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 obligations under multiple international human rights instruments which it is constitutionally empowered to implement.

International human rights obligations pertaining to liberty, education, child protection and non-discrimination underpin the recommendations for Government contained in this report, which are based on human rights principles and international best practice, and are ultimately aimed at reducing the representation of these vulnerable groups in prison.

## Part 1 - Scope of the Problem

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### Overview of overrepresentation of at-risk groups

According to the Australian Bureau of Statistics (ABS), the overall imprisonment rate in Australia (at 30 June 2011) is 167 per 100,000.<sup>4</sup> This rate means Australia currently imprisons a higher proportion of its population than comparable jurisdictions such as the United Kingdom (UK), Canada and most of Western Europe, although New Zealand and particularly the United States (US) have even higher rates (see further below under *Comparable Jurisdictions*).<sup>5</sup> However, the overall imprisonment rate does not reflect the reality that various groups are more likely to be imprisoned than others – some by a disquieting factor of almost 30 (see *Young Offenders* below).

### *Indigenous Offenders*

Since 1982, the AIC and the ABS have conducted an annual census of the Australian prison population.<sup>6</sup> The first of these, conducted in June 1982, revealed that the proportion of prisoners who were Indigenous ranged from 2.1% in Tasmania to 4.1% in Victoria, 5.8% in New South Wales (NSW), 14.5% in South Australia (SA), 32.7% in WA and 63.5% in the Northern Territory (NT).<sup>7</sup> According to the Census of the whole Australian population conducted one year before, this was against a backdrop of overall Indigenous populations of 0.7% in Tasmania, 0.1% in Victoria, 0.7% in NSW, 0.7% in SA, 2.4% in WA, and 23.6% in NT.<sup>8</sup> In other words, Indigenous people were overrepresented in prison statistics by a factor of 2.7 to 41 in each state and territory for which data was available.<sup>9</sup>

In 1985, the prisoner census revealed that 10.6% of inmates identified as Indigenous.<sup>10</sup> In 1988, this figure had increased to 14.7%.<sup>11</sup> By comparison, the comprehensive census in

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<sup>4</sup> See *Prisoners in Australia*, ABS 2011: <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>, *Prisoner Characteristics, Australia, Prisoner Snapshot*.

<sup>5</sup> 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](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.

<sup>6</sup> ABS – *National Prisoner Census*:

<<http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/8724931436CDF784CA256BD00027E909?OpenDocument>>. The ABS took over this task from the AIC in 1995.

<sup>7</sup> Walker and Biles, *Australian Prisoners 1982: Results of the National Prison Census 30 June 1982*, AIC, 1983.

<sup>8</sup> *Census of Population and Housing*, 30 June 1981, Australian Bureau of Statistics, 1983 (Figures from *Summary Characteristics of Persons and Dwellings* for each State).

<sup>9</sup> No data was available for Queensland at the time and there were no Indigenous prisoners recorded in the ACT.

<sup>10</sup> Walker and Biles, *Australian Prisoners 1985: Results of the National Prison Census 30 June 1985*, AIC 1986, 23.

<sup>11</sup> Walker, *Australian Prisoners 1988: Results of the National Prison Census 30 June 1988*, AIC, 1989 at 24.

1986 put the overall Indigenous population at 1.4%.<sup>12</sup> This overrepresentation by a factor of approximately 10 remained fairly static into the 1990s,<sup>13</sup> and varied only slightly around the time of the 2001 and 2006 censuses.<sup>14</sup> The latest available figure, from 2011, puts the Indigenous proportion of the prison population at 26%.<sup>15</sup> This represents an imprisonment rate of 1,868 per 100,000 Indigenous people, which far exceeds the Australian non-Indigenous rate (130 per 100,000) and even the highest rate of imprisonment of any national population (US; 730 per 100,000).<sup>16</sup>

Overrepresentation of Indigenous people in prison by a factor of 10 or more has thus persisted for the last three decades – and this is just the period for which relatively comprehensive data are available. The ABS estimates that Indigenous Australians are presently around 14 times more likely to be imprisoned than non-Indigenous Australians,<sup>17</sup> and the AIC reports they are on average 17 times more likely to be held in police cells.<sup>18</sup>

The causes of Indigenous overrepresentation have been identified in numerous studies, including the *Overcoming Indigenous Disadvantage Key Indicators Report 2011*, which states that “[p]overty, unemployment, low levels of education, having a parent previously or currently in custody, and lack of access to social services are associated with high crime rates and high levels of imprisonment.”<sup>19</sup> Western Australia, which presently has the highest rate of Indigenous relative to non-Indigenous imprisonment,<sup>20</sup> has an Aboriginal Justice Agreement which recognises “the poor socio-economic conditions of Aboriginal people including limited opportunities for education, training, employment, poor health, poor housing, poverty, domestic violence, and alcohol and drug abuse contribute to the overrepresentation of Aboriginal people in the criminal justice system.”<sup>21</sup>

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<sup>12</sup> *Census of Population and Housing, 30 June 1986*, Australian Bureau of Statistics, 1989 (Figure from *Summary Characteristics of Persons and Dwellings - Australia*).

<sup>13</sup> See 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.

<sup>14</sup> 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*). In 2006, Indigenous people represented 24% of the prison population compared with 2.5% of the general population.

<sup>15</sup> See *Prisoners in Australia*, ABS 2011 above n 4, *Prisoner Characteristics, Australia, Prisoner Snapshot*.

<sup>16</sup> See *Prisoners in Australia*, ABS 2011 above n 4, *Prisoner Characteristics, Imprisonment Rates*; see also *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](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=allandcategory=wb_poprate)>.

<sup>17</sup> See *Prisoners in Australia*, ABS 2011 above n 4, *Prisoner Characteristics, Australia, Prisoner Snapshot*.

<sup>18</sup> See *National Police Custody Survey*, AIC 2002, available at:

<<http://www.aic.gov.au/publications/current%20series/tbp/1-20/tbp013.aspx>>, 12. The rate of overrepresentation found in this report ranges up to 27 times in WA and 25 times in SA.

<sup>19</sup> Steering Committee for the Review of Government Service Provision (report published by Productivity Commission, Canberra, 2011): <<http://www.pc.gov.au/gsp/indigenous/key-indicators-2011>>, 30.

<sup>20</sup> ABS, *Prisoners in Australia 2011*, ATSI Prisoner Characteristics, Imprisonment Rates, available at: <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

<sup>21</sup> Western Australian Aboriginal Justice Agreement, 2004, cited in Hunter, ‘How the criminal justice system can be best utilised to reduce the increasing rate of offending and imprisonment of Western Australia's Indigenous population,’ 15 *Murdoch eLaw* 2 (2008), 134 at 137, available at: <[https://elaw.murdoch.edu.au/archives/issues/2008/2/elaw\\_15\\_2\\_Hunter.pdf](https://elaw.murdoch.edu.au/archives/issues/2008/2/elaw_15_2_Hunter.pdf)>.

Clearly, social welfare policies have the major role to play in addressing these issues, but the criminal justice system itself must strive for international best practice if it is not to contribute to the problems facing Australian Indigenous people.

### *Young Offenders*

Since 1981, the AIC has collected statistics on juvenile detention facilities separately from the prison censuses. Although some juveniles (defined, in accordance with the article 1 of the Convention on the Rights of the Child, as persons under the age of 18) are from time to time detained in adult facilities, most are detained in specialised juvenile facilities. The detention of juveniles alongside adults is a human rights issue which is discussed further in **Part 4**.

According to the AIC:

In all Australian jurisdictions, detention is considered a last resort for juvenile offenders. Juvenile justice legislation in each state and territory provides for the diversion of juveniles from the criminal justice system via measures such as police cautioning, restorative justice conferencing, specialty courts (such as youth drug and alcohol courts) and other diversionary programs.<sup>22</sup>

This is consistent with Australia's obligations under the Convention on the Rights of the Child and associated international standards.<sup>23</sup> These policies, which have been implemented progressively over the last few decades, have resulted in a marked decrease in rates of juvenile detention since figures began to be recorded in 1981. However, there are two areas of particular concern. The first is the increasing number of juvenile offenders being remanded in custody pending trial, and the second is the persistently elevated rate of detention of Indigenous juveniles.

In 1981, just 21% of detained juveniles had not been sentenced. By 2008, this proportion had increased to 59.6% (compared with 23% of adult detainees).<sup>24</sup> The increase is at least 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.<sup>25</sup> Such policies, as several

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<sup>22</sup> See Richards, *Trends in juvenile detention in Australia*, AIC, May 2011: <<http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi416.aspx>>, 1.

<sup>23</sup> See further **Part 4**.

<sup>24</sup> Richards, *Trends in juvenile detention in Australia*, AIC, above n 22 at 4-5.

<sup>25</sup> See eg NSW Law Reform Commission, Report 133 – Bail (2012): <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/vwFiles/r133.pdf/\\$file/r133.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_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](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.

authors have pointed out, are inconsistent with the principle of detention as a last resort.<sup>26</sup> Another relevant consideration is that a high proportion of juveniles are taken into custody for breaches of bail conditions, which suggests that these conditions are overly onerous or unrealistic.<sup>27</sup> There is also no government-funded service to assist young people to meet their bail conditions.<sup>28</sup> The AIC notes that “periods of remand represent missed opportunities to intervene in juveniles’ lives with constructive and appropriate treatment,”<sup>29</sup> which raises the question of whether juveniles’ interests could be best served (as required by the Convention on the Rights of the Child) by reducing reliance on remand.

Indigenous juvenile offenders face an elevated risk of being detained in Australia. According to the AIC, the rate of Indigenous detainees in juvenile facilities has ranged from around 300 to 500 per 100,000 – compared with 32 to 65 per 100,000 for other juveniles. At 30 June 2007, the difference in these rates was around 28 times – double the equivalent adult figure.<sup>30</sup>

The AIC began its *Juveniles in Detention in Australia Monitoring Program* as a result of a recommendation from the Royal Commission into Aboriginal Deaths in Custody in 1991. Since the Program’s inception, the AIC reports that the overrepresentation of Indigenous juveniles in detention has increased steadily.<sup>31</sup> It is of great concern that the rate of detention of non-Indigenous juveniles decreased significantly (by 27.6%) between 1994 and 2008, whereas the rate of detention of Indigenous juveniles actually increased slightly over the same period.<sup>32</sup> This suggests policies which have reduced overall juvenile offending and/or diverted juveniles from detention have been ineffective in their application to Indigenous juveniles.

In a study of a cohort of young people in Queensland born in 1990 who came into contact with the criminal justice system,<sup>33</sup> the AIC determined that police diversionary schemes such as cautions and conferences were significantly more likely to be applied to non-Indigenous than Indigenous youths (even if it was their first offence), and the likelihood of further contact with the justice system for Indigenous offenders was elevated as a result. The AIC

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<sup>26</sup> Richards, *Trends in juvenile detention in Australia*, AIC, above n 22 at 5. See also Boyle, ‘The more things change...: Bail and the incarceration of homeless young people,’ *Current Issues in Criminal Justice* 21(1) 2009 at 59–78 and Wong, Bailey and Kenny, *Bail me out: NSW young people and bail*. Sydney Youth Justice Coalition, 2010: <<http://www.yjconline.net/BailMeOut.pdf>>.

<sup>27</sup> See Wong, Bailey and Kenny, *Bail me out: NSW young people and bail*, above, at v.

<sup>28</sup> Ibid – although NSW has a Bail Assistance Line for police which offers indirect assistance: <[http://www.djj.nsw.gov.au/bail\\_assistance\\_line.htm](http://www.djj.nsw.gov.au/bail_assistance_line.htm)>.

<sup>29</sup> See Richards, *Trends in juvenile detention in Australia*, AIC, above n 22, 5.

<sup>30</sup> See Taylor, *Juveniles in detention in Australia, 1981–2007*, AIC 2009: <<http://www.aic.gov.au/publications/current%20series/mr/1-20/05.aspx>>, 5.

<sup>31</sup> See Richards, *Trends in juvenile detention in Australia*, AIC, above n 22, 6.

<sup>32</sup> Ibid.

<sup>33</sup> See Allard et al, *Police diversion of young offenders and Indigenous overrepresentation*, AIC 2010: <<http://www.aic.gov.au/publications/current%20series/tandi/381-400/tandi390.aspx>>.

also noted that “[t]he high rates of Indigenous contact [found during the study] highlight the need for early intervention programs to prevent Indigenous people having initial contact with the system.”<sup>34</sup> Diversionary processes, while important *per se*, cannot have the beneficial effect intended by their creators if police do not apply them. The AIC study hypothesises that there are at least three potential explanations for the unequal treatment:

- Discrimination;
- a tendency for Indigenous juveniles not to plead guilty; rendering them ineligible for diversion, or
- a lack of specially-trained officers in remote areas.<sup>35</sup>

Given this evidence, recommendations in this report will focus on reducing reliance on remand of young people and addressing the apparent discrimination in the application of policies to reduce juvenile detention.

#### *Offenders with a Mental Illness or Intellectual Disability*

In 2006, the Criminology Research Council released a report entitled *Identification of Mental Disorders in the Criminal Justice System* based on a literature review and interviews with relevant practitioners around Australia.<sup>36</sup> This report confirmed that, even with limited evidence available, the prevalence of mental illness in the criminal justice system is ‘significantly greater than is found in the general population.’<sup>37</sup> Major illnesses, such as schizophrenia and depression, were found to be three to five times more common than in the population at large.<sup>38</sup> The report found that inadequate screening was a major problem, and that when faced with mentally disordered individuals the evidence showed police tended to arrest them by default. In 2001, roughly 15,000 people with major mental illnesses were estimated to be in various institutions around Australia, and around 5,000 of these were in prisons.<sup>39</sup> It recommended that, based on international experience, formal screening tools administered by health professionals be more widely used (particularly at the outset of any form of detention), and relevant police training be increased as a measure of second resort.<sup>40</sup>

The Research Council report’s authors found that “[d]espite the prevalence of mentally disordered people in the criminal justice system, and the potential consequences of failing to adequately address the issues, few services exist either in prisons or in the community to help identify and prevent these people from entering or remaining in the criminal justice

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<sup>34</sup> Ibid, 4. Indigenous juveniles were found to be 4.5 times more likely to come into contact with the system.

<sup>35</sup> Ibid, 5.

<sup>36</sup> See <<http://www.criminologyresearchcouncil.gov.au/reports/2006-ogloff.pdf>>.

<sup>37</sup> Ibid, 7.

<sup>38</sup> Ibid, 1.

<sup>39</sup> Ibid, 2.

<sup>40</sup> Ibid, 4-5.

system.”<sup>41</sup> Finally, they noted that “where appropriate and available, diversion from the criminal justice system to the mental health system is only possible if mentally ill people are properly identified in the criminal justice system.”<sup>42</sup>

Juvenile offenders with an intellectual disability are in a particularly vulnerable category when it comes to the likelihood of being incarcerated – a 2008 study of NSW prisoners found that 17% of juvenile prisoners had an intellectual disability compared with just 1% of adult prisoners.<sup>43</sup> Mental illness is also a very significant problem for those in police custody – the AIC estimates that nearly half are affected.<sup>44</sup> The Australian Human Rights Commission (then HREOC) also reported in 2005 that a survey it conducted in NSW revealed that “88% of young people in custody reported symptoms consistent with a mild moderate or severe psychiatric disorder.”<sup>45</sup> Overall, the AIC estimates that the rates of mental disorders in prison are up to four times higher than those in the general population.<sup>46</sup>

In 2008, the National Justice CEOs (NJCEOs) group commenced the National Justice Mental Health Initiative, of which the first stage was an audit of relevant reports from 2003-08<sup>47</sup> and the second was a set of guidelines for best practice in policy development.<sup>48</sup> The guidelines touch on human rights issues only briefly, so the present report aims to supplement them in this regard.

In 2004, a discussion paper was prepared for the former Aboriginal and Torres Strait Islander Service on Indigenous people with cognitive disability in the criminal justice system.<sup>49</sup> The authors of this paper found “[t]he available evidence suggests that Indigenous people with cognitive disabilities are highly represented as offenders in the criminal and juvenile justice systems.”<sup>50</sup> They also found that “[c]ognitive disability is frequently not recognised by justice system personnel,” and that “[r]ecognition is even less likely if the person with the disability is Indigenous.”<sup>51</sup>

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<sup>41</sup> Ibid, 6.

<sup>42</sup> Ibid, 40.

<sup>43</sup> 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.

<sup>44</sup> See <<http://www.aic.gov.au/publications/current%20series/tandi/421-440/tandi438.aspx>>.

<sup>45</sup> See *Indigenous young people with cognitive disabilities and Australian juvenile justice systems*, Human Rights and Equal Opportunity Commission (HREOC – as it then was) 2005:

<[http://www.hreoc.gov.au/social\\_justice/publications/cognitive\\_disabilities.pdf](http://www.hreoc.gov.au/social_justice/publications/cognitive_disabilities.pdf)>, 11.

<sup>46</sup> See <[http://www.aic.gov.au/crime\\_community/communitycrime/mental%20health%20and%20crime.aspx](http://www.aic.gov.au/crime_community/communitycrime/mental%20health%20and%20crime.aspx)>.

<sup>47</sup> See

<[http://www.aic.gov.au/crime\\_community/communitycrime/~media/aic/njceo/justice\\_mental\\_health\\_audit.pdf](http://www.aic.gov.au/crime_community/communitycrime/~media/aic/njceo/justice_mental_health_audit.pdf)>.

<sup>48</sup> See

<[http://www.aic.gov.au/en/crime\\_community/communitycrime/mental%20health%20and%20crime/~media/aic/njceo/diversion\\_support.pdf](http://www.aic.gov.au/en/crime_community/communitycrime/mental%20health%20and%20crime/~media/aic/njceo/diversion_support.pdf)>.

<sup>49</sup> See <<http://www.beyondbars.org.au/Full%20paper.doc>>. See also *Indigenous young people with cognitive disabilities and Australian juvenile justice systems*, HREOC 2005, above n 45.

<sup>50</sup> Ibid, 8.

<sup>51</sup> Ibid, 9.

WA and the NT have to date failed to provide secure psychiatric facilities for those found unfit to plead or not guilty due to mental illness or cognitive disability, which has led to their incarceration alongside convicted prisoners.<sup>52</sup> The Mental Health Council of Australia's 2005 Inquiry into disability services in Australia *Not for Service* also revealed many stories of mentally ill people being relegated, for want of alternatives, to prisons around Australia.<sup>53</sup> This situation raises serious questions about compliance with Australia's obligations the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of Persons with Disabilities (CRPD).

### *Homeless Offenders*

In 2009, the UN Human Rights Committee (HRCtte) expressed concern at "the situation of homeless persons, in particular indigenous people, who as a result of that condition are not able to fully exercise the rights enshrined in the Covenant."<sup>54</sup> In 2004, the Public Interest Law Clearing House (PILCH) Homeless Persons' Legal Clinic published a discussion paper which noted:

Homeless people are disproportionately represented in the criminal justice system and the rate of recidivism amongst homeless offenders is high. Often, the problems associated with homelessness are further entrenched rather than addressed by the criminal justice system. There are a range of particular issues and difficulties that homeless people face when they are required to attend court. Failure to take into consideration a defendant's homelessness can result in an unfair and unjust outcome for the defendant.<sup>55</sup>

Studies have also shown significant correlations between homelessness and all of the other vulnerabilities identified in this report,<sup>56</sup> which suggests that many of the initiatives aimed at juveniles and offenders with a mental illness are also likely to be of benefit to homeless offenders.

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<sup>52</sup> See eg Innes, 'Imprisonment can do a grave injustice to the intellectually impaired,' *Sydney Morning Herald*, 29 December 2011: <<http://www.smh.com.au/opinion/politics/imprisonment-can-do-a-grave-injustice-to-the-intellectually-impaired-20111228-1pcso.html>>.

<sup>53</sup> See *Not for Service*, Mental Health Council of Australia 2005: <[http://www.hreoc.gov.au/disability\\_rights/notforservice/documents/NFS\\_Finaldoc.pdf](http://www.hreoc.gov.au/disability_rights/notforservice/documents/NFS_Finaldoc.pdf)>. See in particular 122, 129, 145, 178, 189, 209, 211, 242.

<sup>54</sup> See HRCtte, Concluding Observations on Australia, UN Doc CCPR/C/AUS/CO/5, 7 May 2009, [18].

<sup>55</sup> See *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project*, PILCH, August 2004, available at: <[http://www.pilch.org.au/Assets/Files/Report\\_of\\_the\\_Homeless\\_Persons\\_Court\\_Project\\_2004.pdf](http://www.pilch.org.au/Assets/Files/Report_of_the_Homeless_Persons_Court_Project_2004.pdf)>, 4.

<sup>56</sup> See eg *Ex-prisoners, SAAP, Housing and Homelessness in Australia*, AIC 2004, *Overview of homelessness*: <[http://www.fahcsia.gov.au/sa/housing/pubs/homelessness/saap\\_er\\_publications/exprisoners/Documents/ec\\_3.htm](http://www.fahcsia.gov.au/sa/housing/pubs/homelessness/saap_er_publications/exprisoners/Documents/ec_3.htm)>; also *Homelessness and mental illness: mapping the way home*, Mental Health Coordination Council 2002: <<http://mhcc.org.au/documents/Homelessness-and-Mental-Illness-Apr02.pdf>>, 1. This report states that "[t]he prevalence of mental illness in homeless people in Sydney has been estimated at 75% compared to 20% in the general population."

## Comparable jurisdictions

Overrepresentation of vulnerable social groups in prisons is a global problem which has been acknowledged by the UN and other international bodies such as the Organization for Security and Co-operation in Europe (OSCE).<sup>57</sup>

A high proportion of mental illness amongst inmates has been documented in other jurisdictions including the US<sup>58</sup> and the UK.<sup>59</sup> The UK Government, faced with similar pressures to save costs as other governments in the current economic climate, has announced that it intends to reduce its prison population significantly by 2014. In part, this is to be achieved by diverting mentally disordered offenders from the criminal justice system into the health care system. It has been estimated that up to 66% of UK prisoners suffer from personality disorders and 45% have a neurotic disorder. Dual diagnoses with addiction (to both alcohol and illicit substances) are common. Of equal concern is that between 20-30% of prisoners are thought to have a learning disability that adversely affects their ability to cope within the criminal justice system.<sup>60</sup> In 2011 the Government announced it would spend £5m to on 100 "diversion sites" as part of its plan to create a national liaison and diversion service by 2014. The aim is to create consistent availability of services for screening and treatment, which would also be of great benefit in Australia.<sup>61</sup>

*Recommendation 1: The Australian Government should examine the UK Government's diversion plans for mentally disordered offenders with a view to developing a similar model in Australia.*

The Australian experience, including the situation of Indigenous overrepresentation with its social causes such as Foetal Alcohol Syndrome and the lasting effects of historical discrimination in the courts, is closely mirrored in Canada.<sup>62</sup> In 2010, the federal Custodial Inspector portrayed the situation in that country concisely:

<sup>57</sup> See eg *Custodial and Non-custodial Measures: Alternatives to Incarceration*, UNODC/OSCE 2006: <[http://www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/3\\_Alternatives\\_Incarceration.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf)>, 1-3.

<sup>58</sup> See eg Lamb et al, 'Mentally Ill Persons in the Criminal Justice System: Some Perspectives,' 75 *Psychiatric Quarterly* (2), 107 at 108.

<sup>59</sup> See eg Burki, 'Grasping the Nettle of Mental Illness in Prisons,' 376 *The Lancet* (9752), 1529.

<sup>60</sup> *Ibid*, 1530.

<sup>61</sup> See Travis, '£5m scheme to divert mentally ill offenders from prison,' *The Guardian*, 28 March 2011, available at: <<http://www.guardian.co.uk/society/2011/mar/28/divert-mentally-ill-offenders-prison>>.

<sup>62</sup> See eg *Combating aboriginal overrepresentation in the criminal justice system*, Vancouver Sun, 17 April 2012, available at: <<http://www.vancouversun.com/health/Combating+aboriginal+overrepresentation+prison+system/6471314/story.html>>.

As offender population pressures mount, it is important to be mindful of the fact that Canada's incarceration rate is already high when compared internationally. This is particularly an issue when it comes to Aboriginal peoples. In recent years, the most significant offender population growth has taken place among Aboriginal peoples. We incarcerate Aboriginal people at a rate that is nine times more than the national average. One in five males admitted to federal custody today is a person of Aboriginal descent. Among women offenders, the over-representation is even more dramatic—an astounding 33% of the federal women inmate population is Aboriginal.

It is a sobering and cautionary experience to walk through any of Canada's federal penitentiaries or provincial jails today. I reported last year that federal penitentiaries are fast becoming our nation's largest psychiatric facilities and repositories for the mentally ill. As a society, we are criminalizing, incarcerating and warehousing the mentally disordered in large and alarming numbers. The needs of mentally ill people are unfortunately not always being met in the community health and social welfare systems. As a result, the mentally ill are increasingly becoming deeply entangled in the criminal justice system. Substance abuse compounds the problem. Some offenders, like young Ashley Smith, are dying or self-harming behind bars because they cannot access the kind of care, treatment, resources and interventions they so desperately need. These incidents occur in spite of often near-heroic interventions on the part of CSC program and security staff.<sup>63</sup>

Clearly, Australia's experience with overrepresentation of vulnerable groups in prison is not unique. As such, it is appropriate for Australia to look to initiatives which have been adopted in comparable polities to address this pressing social issue. **Part 2** gives a comparative overview which may be of assistance in this regard.

### *Analysis*

It has long been recognised 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.<sup>64</sup> A qualitative study by Alison Thompson of Flinders University published in 2008 concluded:

Considering the lived experience of those who have spent time in prison, particularly in remand, is essential to assessing the viability of remand as a crime control strategy. It may well be that these short-term periods of detention create

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<sup>63</sup> See <<http://www.oci-bec.gc.ca/rpt/pdf/annrpt/annrpt20092010-eng.pdf>>, 5-6.

<sup>64</sup> See eg Brown, 'The Limited Benefit of Prison in Controlling Crime,' 22 *Current Issues in Criminal Justice* (1), July 2010, 137-148.

conditions for further encounters with the criminal justice system over the lifetime of the individual.<sup>65</sup>

Be that as it may, the political trend has been towards increasing use of this mode of punishment. Prison populations have risen more than 50% since the mid-1990s in 50 major countries.<sup>66</sup> In Australia, the growth of the prison population has far outstripped that of the general population over the past two decades.<sup>67</sup> However, the ABS prison census of December 2011 actually recorded a slight fall in prisoner numbers from December 2010 (the first in a decade) due to a notable decrease in NSW<sup>68</sup> and slight decreases in Queensland and WA.<sup>69</sup> Correlation should not be mistaken for causation, but it should be noted that each of those States now has significant alternative sentencing and diversion regimes in place.<sup>70</sup>

On the other hand, the imprisonment rate in WA is still 260 per 100,000 adults, which is around twice the national average and comparable to notoriously punitive countries such as Mongolia, Trinidad and Tobago and Brazil.<sup>71</sup> Still, this is not the highest rate in Australia – the NT currently imprisons 762 per 100,000 adults, which represents an increase of nearly 50% since 2001, and would place it at the very apex of the world imprisonment rate table (if it were a country). In addition, 82% of the NT prison population identify as Indigenous.<sup>72</sup>

The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, has called these overrepresentation statistics in general ‘alarming,’ and the statistics in respect of young people in particular ‘disturbing.’<sup>73</sup> These are apt descriptors. The Government must do what it can to close the gap in this area. The measures suggested throughout the present report may be of assistance in this regard.

*Recommendation 2: In view of the imprisonment rates in WA and the NT, the Australian Government should consider instituting a progressive program of support for diversionary schemes in those jurisdictions.*

<sup>65</sup> See Thompson, ‘The revolving door of penal institutions: a narration of lived experience,’ 10 *Flinders Journal of Law Reform* 3 (2007-2008), 591 at 607.

<sup>66</sup> See eg Stern, *Creating Criminals: Prisons and People in a Market Society*, Zed Books Ltd, 2006, 7.

<sup>67</sup> See eg Baldry, ‘The Booming Industry: Australian Prisons,’ *Debate* No 4, 31.

<sup>68</sup> The decrease was described as ‘unprecedented’ by the NSW Government and has since resulted in the closure of three prisons – see *Prisons to close*, NSW Attorney-General’s media release, 6 September 2011: <[http://www.lawlink.nsw.gov.au/lawlink/corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_lawlink\\_news\\_archive\\_2011#060911\\_CS](http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2011#060911_CS)>.

<sup>69</sup> See ABS, *Prisoners in Australia 2011*, above n 4.

<sup>70</sup> Victoria also has relevant schemes, but the Victorian imprisonment rate was already approximately half that of NSW, lessening the likelihood of a major reduction.

<sup>71</sup> See International Centre for Prison Studies, *Entire world - Prison Population Rates per 100,000 of the national population*, above n 5.

<sup>72</sup> ABS, *Prisoners in Australia 2011*, available at: <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

<sup>73</sup> See the Special Rapporteur’s Report on the Situation of Indigenous Peoples in Australia, above n 2, [50].

In 2011 the Parliament conducted an inquiry into Indigenous youth in the juvenile justice system entitled *Doing Time – Time for Doing*, which called the overrepresentation of Indigenous juveniles ‘a shameful state of affairs.’<sup>74</sup> It noted the Closing the Gap strategy adopted by COAG did not include any specific targets relating to justice, and recommended this situation be rectified through the development of targets by SCLJ.<sup>75</sup> Relevantly, the report also recommended that the Australian Government investigate alternative sentencing and justice reinvestment options, and provide ‘adequate and long term funding’ for Indigenous offender programs.<sup>76</sup> The Castan Centre reaffirms that such funding will be critical to the success of measures to address overrepresentation of vulnerable groups in prison, and of Indigenous people in particular.

Although the present report concentrates on the inappropriateness of imprisonment for vulnerable groups, its appropriateness as a mechanism for reducing offending overall should not be assumed. In 2010, the NSW Bureau of Crime Statistics and Research (BOCSAR) published an assessment of prison’s effectiveness in reducing reoffending among offenders convicted of either (non-aggravated) assault or burglary. Not only did the assessment conclude that “[o]ffenders who received a prison sentence were slightly more likely to reoffend than those who received a non-custodial penalty,” but it went to say that “[t]here is some evidence that prison *increases* the risk of offending amongst offenders convicted of non-aggravated assault.”<sup>77</sup> “These findings,” it noted “are consistent with the results of overseas studies reviewed...most of which either find no specific deterrent effect or a criminogenic effect.”

The BOCSAR assessment pointed out that prison is a “very expensive form of crime control,” but “[d]espite the money spent on it, little Australian research has been conducted into the effectiveness of prison....”<sup>78</sup> Of course, this is not to deny that imprisonment is an appropriate punishment for some offenders – for example those who repeatedly commit acts of violence or those whose prospects for rehabilitation are assessed as poor. However, its ever-increasing use, including in cases involving offenders from vulnerable groups, is a trend which proponents of evidence-based policy making should be seeking to reverse.

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<sup>74</sup> See *Doing Time: Time for Doing*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011, above n 1.

<sup>75</sup> Ibid, Recommendation 2.

<sup>76</sup> Ibid, Recommendations 28-31 and 39-40.

<sup>77</sup> 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.

<sup>78</sup> Ibid.

## Part 2 - Existing Alternative Sentencing and Diversionary Regimes

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### Australia

Under the relevant sentencing legislation,<sup>79</sup> criminal courts in Australia generally have the following alternatives to incarceration available to them:<sup>80</sup>

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

In Victoria and NSW, home detention is also available,<sup>81</sup> although the Victorian Government has announced plans to abolish home detention and suspended sentences entirely, and to put in place mandatory minimum sentences for juveniles convicted of certain violent offences, as part of its response to a sentencing survey it conducted in 2011.<sup>82</sup> Experts have cautioned that such changes may disproportionately affect vulnerable offenders.<sup>83</sup>

Diversionary regimes, by which disputes are resolved without judicial intervention, are initiated by police referral in most Australian jurisdictions.<sup>84</sup> The term diversion is sometimes also used to describe court-administered intervention programs aimed at avoiding custodial sentences.<sup>85</sup> Court-administered schemes such as MERIT in NSW and

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<sup>79</sup> Eg *Crimes (Sentencing Procedure) Act 1999* (NSW), *Crimes Act 1914* (Cth), *Crimes (Sentencing) Act 2005* (ACT), *Sentencing Act 1995* (NT), *Penalties and Sentences Act 1992* (Qld), *Criminal Law (Sentencing Act) 1988* (SA), *Sentencing Act 1997* (Tas), *Sentencing Act 1991* (Vic) and *Sentencing Act 1994* (WA). Most jurisdictions have separate sentencing legislation for children and/or young people.

<sup>80</sup> For overview, see eg *Sentencing Question Paper 7: Non-custodial Options*, NSW Law Reform Commission 2012: <[http://lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/vwFiles/cref130qp07.pdf/\\$file/cref130qp07.pdf](http://lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/cref130qp07.pdf/$file/cref130qp07.pdf)>, 27-32. Of course some alternative sentences are not available for certain crimes, such as serious crimes which attract mandatory minimum sentences.

<sup>81</sup> *Sentencing Act 1991* (Vic), ss 18ZT-ZZR; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 6.

<sup>82</sup> See <<http://www.premier.vic.gov.au/our-commitment/law-and-order.html>>; also 'Have your say on justice and sentencing,' *Herald-Sun*, 27 July 2011: <<http://www.heraldsun.com.au/news/more-news/have-your-say-on-justice-and-sentencing/story-fn7x8me2-1226102413896>>.

<sup>83</sup> See eg McCarthy, *The Weight of Sentencing Reform*, Catholic Social Services Victoria 2012: <<http://www.css.org.au/documents/Sentencing18Feb12.pdf>>. The NSW Law Reform Commission is also currently considering reforms to that state's sentencing regime, including non-custodial options – see *Sentencing Question Paper 7: Non-custodial Options*, NSW Law Reform Commission 2012, above n 80.

<sup>84</sup> See eg 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>>. In Victoria, diversion is restricted to the (adult) courts.

<sup>85</sup> 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>>, 7.

CREDIT in Victoria (see **Appendix** for details) also emerged in the mid-2000s in an attempt to keep offenders out of remand.<sup>86</sup>

Another prominent diversionary trend has been the increased use of restorative justice, in the form of victim-offender conferencing. An early pilot program called the Reintegrative Shaming Experiments (RISE) was conducted in the ACT and intensively evaluated by the ANU between 1995 and 2000. RISE demonstrated no or marginal benefit in terms of preventing recidivism for drink drivers or those who committed property offences, but a significant benefit for those who committed violent offences. Overall, the study found high levels of participant satisfaction and perceived fairness of the process.<sup>87</sup> These results were largely replicated by a BOCSAR study of a NSW pilot conferencing program in 2007.<sup>88</sup> Restorative justice initiatives have since been introduced in all states and territories – at first on an ad hoc basis, but now increasingly with supporting legislation.<sup>89</sup> Their main purpose is to divert young offenders from the formal criminal trial process for a range of offences, including some violent offences, but not homicide or sexual assault.<sup>90</sup> So far, evaluations of their effectiveness in reducing reoffending have been mixed.<sup>91</sup>

The majority of 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 serious offences, in line with international human rights obligations (see **Part 4**).

The most common non-custodial sentence is a fine.<sup>92</sup> Although fines are appropriate and preferable to other penalties in many instances, the Australian system of fines for offences and infringements could possibly be improved by reference to the 'day-fine' system used in various European countries.<sup>93</sup> Under this system, the seriousness of the offence (which is already quantified in 'penalty units' in Australia) is indexed to an offender's average daily income, or the surplus remaining after daily expenses. Essentially, fines are expressed

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<sup>86</sup> See Freiberg, 'Problem-oriented courts: an update,' 14 *Journal of Judicial Administration* (2005), 199. There are also 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.

<sup>87</sup> <[http://www.aic.gov.au/en/criminal\\_justice\\_system/rjustice/rise/final.aspx](http://www.aic.gov.au/en/criminal_justice_system/rjustice/rise/final.aspx)>.

<sup>88</sup> See 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)>.

<sup>89</sup> See Richards, *Police-referred restorative justice for juveniles in Australia*, above n 84, 2-6.

<sup>90</sup> *Ibid*, 7.

<sup>91</sup> See eg *Restorative Justice as a Crime Prevention Measure*, AIC 2004:

<<http://www.aic.gov.au/documents/4/6/9/%7B469370DE-46AF-4CE2-96E7-4149836741FA%7Dcrim020.pdf>>.

<sup>92</sup> <[http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/5\\_courts.aspx](http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/5_courts.aspx)>

<sup>93</sup> These countries include 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](http://news.bbc.co.uk/2/hi/uk_news/politics/4173913.stm)>.

according to the number of days it would take the offender to pay them off, resulting in a punishment scale which is potentially both fairer and a more effective deterrent.<sup>94</sup>

*Recommendation 3: The Australian Government should consider the feasibility of a day-fine system to ensure fines deter better-off offenders, and do not disproportionately affect worse-off offenders.*

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.<sup>95</sup>

For young offenders, rehabilitation is the overarching consideration, but for adults it is only one of at least five considerations, and not necessarily the one given the most weight.<sup>96</sup> 5% of offenders who appear before Children's Courts still receive custodial sentences, but due to diversionary efforts, this represents a far lower number of individuals than for adults (approximately 1600 in 2009-10).<sup>97</sup>

Interestingly, the proportions of custodial sentences for offences against the laws of the Commonwealth are very high, ranging from 65% to as high as 89% for property offences. Undoubtedly many such offences are serious in nature, but even for less serious offences and juvenile offenders the rates are well above average.<sup>98</sup> In 2006 the Australian Law Reform Commission (ALRC) recommended the development of a federal sentencing Act (including provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability) and best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.<sup>99</sup> Such initiatives could assist in bringing the federal incarceration rate down.

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<sup>94</sup> 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](http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf)>, 30.

<sup>95</sup> Ibid.

<sup>96</sup> See eg *Sentencing Children and Young People in Victoria*, Sentencing Council, April 2012, available at: <[https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/sentencing\\_children\\_and\\_young\\_people\\_in\\_victoria.pdf](https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/sentencing_children_and_young_people_in_victoria.pdf)>, vii. On the difficulty of ranking purposes of sentencing, see also ALRC Report 103, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006): <<http://www.alrc.gov.au/report-103>>, Chapter 4.

<sup>97</sup> See <[http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/5\\_courts.aspx](http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/5_courts.aspx)>.

<sup>98</sup> Ibid. This is despite many of the existing state and territory non-custodial options being available to judges under s 20AB of the *Crimes Act 1914* (Cth).

<sup>99</sup> ALRC, *Same Crime, Same Time*, above n 96, Recommendations 2-1, 27-3 and 28-3.

*Recommendation 4: The Australian Government should consider the reasons behind the high rates of incarceration for federal offenders, and implement the recommendations of the ARLC's Same Crime, Same Time report as soon as possible.*

Deferral of sentences for treatment is increasingly being recognised as an effective one for dealing with offenders who face underlying issues which drive their offending and for whom traditional custodial sentences may be ineffective or counter-productive.

Since the late 1990s, specialist courts and programs have been established in increasing numbers in most Australian jurisdictions. The ones which are relevant to the present report are not those which specialise in a particular area of the law, such as the Family Court or the Administrative Decisions Tribunal; rather they are 'problem-solving' or (more modestly) 'problem-oriented' courts (or lists/programs in existing criminal courts).<sup>100</sup> However, some retain pilot program status after more than a decade of operation despite documented successes,<sup>101</sup> and others have faced stern criticism for creating what some see as a 'two-tier' justice system.<sup>102</sup>

Drug courts and mental health courts aim to solve problems which have been identified with at-risk offenders, and which the 'mainstream' criminal justice system struggles to adequately address. These kinds of courts 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 and psychological well-being of participants as well as 'justice outcomes',<sup>103</sup> and is based on psychology and social science research as well as law.<sup>104</sup>

Drug courts and programs, which inevitably deal with many people who fall into one or more of the vulnerable categories identified in **Part 1**, now exist in every state and territory. Many have been demonstrably successful in reducing drug dependence and reoffending – the NSW Drug Court in particular has received a Prime Minister's award and represents an example of best practice in the field.<sup>105</sup>

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<sup>100</sup> For an overview of such courts, see eg Freiberg, 'Problem-oriented courts: an update,' above n 86, 196. Please note that other specialist courts which are not diversionary in nature, such as Family Violence Courts, are not covered in the present report.

<sup>101</sup> Eg the NSW Youth Drug and Alcohol Court, which remained a pilot for many years – see **Appendix**.

<sup>102</sup> See below (**Part 3 – Opposing/Cautious Voices**).

<sup>103</sup> See Wexler and Winick, *Law in a Therapeutic Key: developments in therapeutic jurisprudence*, Carolina Academic Press 1996, xvii.

<sup>104</sup> See Diesen, 'Therapeutic Jurisprudence: an Introduction from a Swedish Perspective,' 51 *Scandinavian Studies in Law* (2007), 131 at 134-135.

<sup>105</sup> For full details, see **Appendix**.

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.<sup>106</sup> However, the first specialist mental health court (in Florida) was not established until 1997.<sup>107</sup> 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.”<sup>108</sup> 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.<sup>109</sup>

The first Australian Mental Health court was established in South Australia in 1999.<sup>110</sup> 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 diverting them supporting them through criminal justice processes. A mental health court is also being considered for NSW.<sup>111</sup> The Magistrates Court of WA also has an Intellectual Disability Diversion Program, a joint initiative with that State’s Disability Services Commission.<sup>112</sup>

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, 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 (see **Appendix** for further details).

*Recommendation 5: Given the overrepresentation of homeless people in the criminal justice system throughout Australia, and the success of the Victorian and Queensland Special Circumstances Lists, the Australian Government should encourage other states and territories to implement similar programs.*

<sup>106</sup> Ibid, 633.

<sup>107</sup> Freiberg, ‘Problem-oriented Courts: Innovative Solutions to Intractable Problems?’ 11 *Journal of Judicial Administration* (2001), 16.

<sup>108</sup> See Kuehn, ‘Mental Health Courts Show Promise,’ 297 *Journal of the American Medical Association* 15 (2007), 1641.

<sup>109</sup> Ibid; also Sarteschi et al, ‘Assessing the Effectiveness of Mental Health Courts: A quantitative review,’ 39 *Journal of Criminal Justice* 1 (2011), 12.

<sup>110</sup> Freiberg, ‘Problem-oriented Courts: Innovative Solutions to Intractable Problems?’ above n 107, 16-17.

<sup>111</sup> See <<http://sydney.edu.au/news/law/457.html?eventid=7386>>.

<sup>112</sup> See

<[http://www.magistratescourt.wa.gov.au/l/intellectual\\_disability\\_diversion\\_program\\_iddp.aspx?uid=7942-2328-8603-7948](http://www.magistratescourt.wa.gov.au/l/intellectual_disability_diversion_program_iddp.aspx?uid=7942-2328-8603-7948)>.

Finally, Indigenous sentencing courts, also known as Circle Courts, have been established in each state and territory.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> Circle sentencing in NSW was evaluated in 2003 and again in 2008 with mixed results in terms of its effect on recidivism, but both reviews were positive about the program overall and recommended it be continued and strengthened.<sup>116</sup>

### Overseas (Comparable 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.<sup>117</sup> 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.<sup>118</sup>

#### *United States*

Despite the gulf between the US and Australia – not least in overall imprisonment rates and penal policies such as retention of the death penalty – US experience in criminal justice innovation provides a wealth of data for Australian policy-makers to examine. Apart from drug courts, mental health courts and justice conferences which have already been replicated to some extent in Australia, several other US initiatives hold some promise for vulnerable offenders in Australia.

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

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<sup>113</sup> For details, see **Appendix**.

<sup>114</sup> See Cowdery, 'Alternatives to Conventional Sentencing: Some Recent Developments,' 7 *Judicial Review* 3 (Sep 2005), 365 at 368.

<sup>115</sup> *Ibid*.

<sup>116</sup> For details, see **Appendix**.

<sup>117</sup> See Freiberg 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms,' above n 85, 10.

<sup>118</sup> *Ibid*, 4-5 and 10.

Executive.<sup>119</sup> James L Nolan Jr, a professor of Sociology, conducted an extensive comparison of problem-solving courts in the US, England, Scotland, Ireland, Australia and Canada between 1999 and 2008. In his book *Legal Accents, Legal Borrowing*, he states that such courts in the US are defined by the enthusiasm and boldness of their progenitors (often judges), and that the judiciaries of the other countries he studied demonstrate far more deference and deliberation.<sup>120</sup>

Nolan notes that the willingness of US judges to innovate in terms of both procedure and sentencing may not transfer easily to countries such as Australia. However, 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 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.<sup>121</sup>

Unlike Indigenous-oriented courts in Australia, US Tribal Courts on Indian Reservations actually give Indigenous elders the power to try and punish many offenders, consistent with the right to self-determination. The Law Reform Commission of WA did not recommend such courts for Australia when it conducted an inquiry into the operation of customary laws, although some submissions to its inquiry did.<sup>122</sup> The ALRC also adverted to the possibility of establishing such courts in its 1986 review of customary law.<sup>123</sup> Queensland and WA actually attempted to create courts along these lines, but their establishment proved problematic due to concerns over training, support and sentencing options, and they were eventually closed.<sup>124</sup>

In 2000 the Red Hook Community Justice Center opened in a troubled district of New York City. The court offers monitored intervention for less serious 'quality of life' offences such as petty theft and drug possession.<sup>125</sup> The presiding judge, Alex Calabrese, set out to create a more welcoming and accessible form of justice which engages directly with defendants and focusses on treatment over punishment where possible. It brings together "community organisations, local residents, merchants and other groups concerned with the amenity of

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<sup>119</sup> 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.

<sup>120</sup> See Nolan, *Legal Accents, Legal Borrowing*, Princeton University Press 2009, Chapter 6.

<sup>121</sup> See Freiberg, 'Problem-oriented courts: an update,' above n 86, 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)>.

<sup>122</sup> See *Same Crime, Same Time*, ALRC 2006, above n 96, 143.

<sup>123</sup> See *Customary Laws Discussion Paper*, LRCWA 2005: <<http://www.lrc.justice.wa.gov.au/094-DP.html>>, 142.

<sup>124</sup> *Ibid* 144-5.

<sup>125</sup> See Nolan, *Legal Accents, Legal Borrowing*, above n 120, 1.

their area, both in the organisation of the court (such as the advisory boards, community mediation and victim-offender mediation panels) and the provision of services.”<sup>126</sup> The Center has been successful at reducing low-level crime in its area and has gained considerable public support.

The Red Hook CJC model has been taken up in 17 other US jurisdictions, as well as Liverpool, Salford and Melbourne. Plans are in place to establish similar Centres in Dublin, Glasgow and Vancouver.<sup>127</sup> 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.<sup>128</sup>

In the US, another category of specialist court, the so-called ‘Teen Court,’ has become very successful – growing from a few pilot programs in the 1960s to an estimated 675 by 2000.<sup>129</sup> Also known as Youth Courts, they represent a less formal alternative to traditional juvenile justice processes, and as with the other courts profiled here they receive glowing reports in terms of participant satisfaction. Further, studies have shown their potential to lower recidivism rates, improve youth attitudes towards authority and increase youths’ knowledge of the justice system.<sup>130</sup> These courts are generally used for younger juveniles (aged 10-15) facing their first criminal charges for less serious offences.

What sets Teen Courts apart from other Youth and Juvenile Courts (such as the Youth Court of SA<sup>131</sup>) is that young people are also involved in the process – right through from preliminary hearings to sentencing. Although adults are responsible for much of the court administration, the vital roles of prosecution, defence and judge/jury are played by young people. The model is said to offer benefits in terms of cost/efficiency and community cohesion, as well as being effective due to the considerable power of peer pressure.<sup>132</sup> A major national study published in 2002 found that Teen Courts’ effect on recidivism was difficult to identify, but that there was a correlation between the courts and low recidivism rates.<sup>133</sup> Dr Paul Omaji of the Justice Studies Program at Edith Cowan University suggested in 1999 that teen courts might be a solution to problems facing juvenile justice in Australia,

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<sup>126</sup> See Freiberg, ‘Problem-oriented Courts: Innovative Solutions to Intractable Problems?’ above n 107, 19.

<sup>127</sup> Nolan, *Legal Accents, Legal Borrowing*, above n 120, 3-4.

<sup>128</sup> <[http://www.audit.vic.gov.au/reports\\_and\\_publications/reports\\_by\\_year/2010-11/20110406\\_justice.aspx](http://www.audit.vic.gov.au/reports_and_publications/reports_by_year/2010-11/20110406_justice.aspx)>. Further details may be found in the **Appendix** below.

<sup>129</sup> See Butts and Buck, *Teen Courts: A Focus on Research*, Office of Juvenile Justice and Delinquency Prevention, Washington DC (2000), available at: <<http://youthcourt.net/wp-content/uploads/2010/05/183472.pdf>>, 1.

<sup>130</sup> Ibid.

<sup>131</sup> See <<http://www.courts.sa.gov.au/courts/youth>>.

<sup>132</sup> Ibid, 1-3.

<sup>133</sup> See Butts, Buck and Coggeshall, *The Impact of Teen Courts on Young Offenders*, Urban Institute Justice Policy Center (2002), available at: <<http://www.youthcourt.net/wp-content/uploads/2010/05/410457.pdf>>, 36-37.

including the overrepresentation of Indigenous youth in the system,<sup>134</sup> but the idea seems to have attracted little attention from either Australian academics or authorities since.

*Recommendation 6: Promising results achieved by Teen Courts in the US deserve attention in Australia – if only to confirm whether it would be feasible to implement such a model here. The Australian Government should consider funding research in this area.*

Baltimore has a problem-solving court dedicated to prostitution which commenced operation in 2009.<sup>135</sup> The court has been compared in its conception and objects to the Women's Court of Lower Manhattan which opened in 1910,<sup>136</sup> which demonstrates that efforts to reform the mainstream criminal justice system for vulnerable offenders are not necessarily novel. Dallas also established a diversion program for arrested prostitutes called the PRIDE (Positive Recovery Intensive Divert Experience) Court in 2008, partly funded by a grant from the federal Government.<sup>137</sup>

As with other newly-established problem-solving courts, it is too soon to assess the work of these prostitution courts accurately. However, in line with reports on comparable courts, participants have reported positive experiences and practitioners have warned that the proceedings (which entail a mandatory guilty plea) could lead to due process concerns.<sup>138</sup> A prostitution list has actually been operating in the Melbourne Magistrates Court at St Kilda since 2003, and has given rise to very similar commentary.<sup>139</sup>

The US Department of Justice has a branch called the Bureau of Justice Assistance (BJA) dedicated to providing both "leadership and services in grant administration and criminal justice policy development to support local, state, and tribal justice strategies to achieve safer communities."<sup>140</sup> The BJA emphasises local control and encourages innovation in projects for which it administers grants, and also helps to 'disseminate information on best

<sup>134</sup> *Making Room in the Inn: Teen Courts in Australia's Juvenile Justice System*, presentation <http://www.angelfire.com/biz/nationalteencourts/SpeechOmaji080899.html>

<sup>135</sup> See Shdaimah, above n 119, 90-95.

<sup>136</sup> See Quinn, 'Revisiting Anna Moscowitz Kross's critique of New York City's Women's Court: the continued problem of solving the "problem" of prostitution with specialized criminal courts,' 33 *Fordham Urban Law Journal* 2 (2006), 665 at 666.

<sup>137</sup> See Goldstein, 'Dallas rehab program treats prostitutes as victims rather than criminals,' *The Dallas Morning News*, 20 August 2010: <<http://www.dallasnews.com/news/community-news/dallas/headlines/20100820-Dallas-rehab-program-treats-prostitutes-as-5169.ece>>.

<sup>138</sup> Ibid; see also Kloer, *The Pros and Cons of Prostitution Court*, Change.org, 20 July 2009: <<http://news.change.org/stories/the-pros-and-cons-of-prostitution-court>> and Shdaimah, above n 119, 96-101.

<sup>139</sup> See Popovic, 'Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby out with the Bathwater?' 1 *Murdoch eLaw Special Series* (2006): <[https://elaw.murdoch.edu.au/archives/issues/special/court\\_process.pdf](https://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf)>, 60.

<sup>140</sup> See <<https://www.bja.gov/About/index.html>>.

and promising practices' in criminal justice.<sup>141</sup> It funds programs including drug courts, mental health courts and Indigenous tribal justice initiatives.<sup>142</sup>

*Recommendation 7: The Attorney-General's Department should consider establishing an equivalent to the BJA to assist in the development of progressive criminal justice initiatives in Australia.*

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 the AHRC's Social Justice Report for 2009,<sup>143</sup> 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.<sup>144</sup> Briefly speaking, 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 promising results in Texas and Kansas, and has been endorsed by politicians on both sides of politics all over the US.<sup>145</sup> The need for a similar policy to Australia is clear – for example, just 2% of Victorian postcodes account for 25% of that State's prisoners.<sup>146</sup>

*Recommendation 8: Given their potential for creating safer communities and saving increasingly considerable Corrections costs, Australian Governments should study justice reinvestment strategies in the US (and the UK) with a view to implementing them in Australia. Justice reinvestment may be of particular advantage in addressing Indigenous overrepresentation in the prison population.*

<sup>141</sup> Ibid.

<sup>142</sup> See <<https://www.bja.gov/programs.aspx>>.

<sup>143</sup> See <[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/index.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/index.html)>.

<sup>144</sup> Ibid, Chapter 2.

<sup>145</sup> Ibid.

<sup>146</sup> See *National Justice Symposium Overview*, Jesuit Social Services 2011: <[http://www.jss.org.au/files/National\\_Justice\\_Symposium\\_-\\_Overview.pdf](http://www.jss.org.au/files/National_Justice_Symposium_-_Overview.pdf)>, 3 (per Professor Tony Vinson).

## 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."<sup>147</sup> Since 2002, Canada's incarceration rate has continued to decline.<sup>148</sup>

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.<sup>149</sup> 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<sup>150</sup>), prosecutors and the judiciary.<sup>151</sup>

Like Australia, Canada faces major Aboriginal overrepresentation in its prison system. In 2009, the Office of the Correctional Investigator published a report<sup>152</sup> 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, intergenerational abuse and residential schools, low levels of education, employment and income, substandard housing and health care, among other factors."<sup>153</sup>

Parallels may also be drawn with the uneven distribution of Indigenous incarceration rates across Australian jurisdictions – in Saskatchewan, for example, the incarceration rate of

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<sup>147</sup> Zubrycki, *Community-Based Alternatives to Incarceration in Canada*, UNAFEI 2002: <[http://www.unafei.or.jp/english/pdf/RS\\_No61/No61\\_12VE\\_Zubrycki.pdf](http://www.unafei.or.jp/english/pdf/RS_No61/No61_12VE_Zubrycki.pdf)>, 98.

<sup>148</sup> See *Corrections and Conditional Release Statistical Overview*, Public Safety Canada: <<http://www.publicsafety.gc.ca/res/cor/rep/2010-ccrso-eng.aspx#a3>>.

<sup>149</sup> Zubrycki, above n 147, 103.

<sup>150</sup> See <<http://www.elizabethfry.com>>.

<sup>151</sup> Zubrycki, above n 147, 103-4.

<sup>152</sup> 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.

<sup>153</sup> *Ibid*, 6. 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](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>>).

Aboriginal people was over 1600 per 100,000 in 1999 according to the Canadian Correctional Service.<sup>154</sup> Additionally, Aboriginal youth are overrepresented in prison by approximately eight times.<sup>155</sup>

In an attempt to address these overrepresentation statistics, Canada created a 'conditional sentence of imprisonment' in 1996, to complement existing measures including Community Service Orders, mediation, electronic monitoring, circle sentencing, family group conferencing and community sentencing panels.<sup>156</sup> It has been observed that many of these alternatives apply only to crimes against property and other non-violent crimes, and that, due to Aboriginal offending profiles (which tend towards other crimes), they may have actually increased the proportion of Aboriginal inmates.<sup>157</sup> However, they have combined to bring about the overall decrease in imprisonment rates identified above.<sup>158</sup>

Canada's Supreme Court, in a case on the 'conditional imprisonment' sentence in 2000, found that emphasis on alternatives to imprisonment in the revised Canadian *Criminal Code* is such that failure to consider alternatives will in many cases constitute 'reversible error' for appellate purposes. The Court also cautioned against placing too much faith in the 'uncertain' deterrent effect of imprisonment, and "that whenever both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration."<sup>159</sup> In the 1999 case of *R v Gladue*,<sup>160</sup> the Court also directed Canadian trial courts to give special consideration to sanctions other than imprisonment in cases involving Aboriginal offenders due to "[t]he drastic over-representation of aboriginal peoples within both the Canadian prison population and the criminal justice system."<sup>161</sup>

As in Australia, a Royal Commission in Canada in 1996 reported that the mainstream criminal justice system in that country was failing Aboriginal people,<sup>162</sup> and in 2000 the first Aboriginal court in Canada, the Tsuu T'ina First Nation Court (also called the Tsuu T'ina Peacemaking Court) was established in October 2000 in Alberta.<sup>163</sup> In 2001 a court conducted in Cree, the language of the Indigenous inhabitants of Saskatchewan, was established in Prince Albert to cover regional areas across the north-east of the province.<sup>164</sup>

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<sup>154</sup> See <<http://www.csc-scc.gc.ca/text/media/spchscommis/2002/02-03-07-eng.shtml>>.

<sup>155</sup> 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.

<sup>156</sup> See <<http://www.gov.mb.ca/ana/apm2000/5/c.html>>.

<sup>157</sup> Ibid.

<sup>158</sup> See Bakht, *Problem Solving Courts as Agents of Change*, National Judicial Institute, 2005 – available at: <<http://www.iadtc.law.ecu.edu.au/publications.html>>, 6.

<sup>159</sup> Ibid, 7, citing *R v Proulx* (2000) 140 CCC (3d) 449 (SCC).

<sup>160</sup> *R v Gladue* [1999] 1 SCR 688 (SCC)

<sup>161</sup> Bakht, above n 158, 8.

<sup>162</sup> See summary prepared by Canada's Institute on Governance: <<http://iog.ca/sites/iog/files/rcapsum.pdf>>, 9.

<sup>163</sup> See *Aboriginal Courts in Canada*, Scow Institute 2008:

<[http://www.scowinstitute.ca/library/documents/Aboriginal\\_Courts.pdf](http://www.scowinstitute.ca/library/documents/Aboriginal_Courts.pdf)>, 9.

<sup>164</sup> Ibid; see also: <[http://www.sasklawcourts.ca/default.asp?pg=pc\\_div\\_cree\\_court](http://www.sasklawcourts.ca/default.asp?pg=pc_div_cree_court)>.

Also in 2001, in response to the *Gladue* judgment, the Ontario Court of Justice established the Gladue (Aboriginal Persons) Court in Toronto.<sup>165</sup> Most recently (for the time being), the First Nations Court opened in New Westminster, British Columbia, in November 2006.<sup>166</sup>

Provinces such as Manitoba also have several restorative justice initiatives aimed at Aboriginal offenders, some of which are partially funded by the federal Government,<sup>167</sup> and the Royal Canadian Mounted Police have Community Justice Forums which operate across Canada on restorative justice principles (although these are not exclusively for Aboriginal offenders).<sup>168</sup>

Evaluations of Aboriginal justice initiatives in Canada have revealed strong support from participants and stakeholders. For example, the federal Aboriginal Caseworker program has been successful in:

- Ensuring proper legal representation for Aboriginal defendants;
- Explaining court procedures;
- Enabling defendants to feel more at ease with an intimidating system;
- Connecting defendants to services in the community;
- Educating both defendants and actors in the justice system, and
- Enabling communication and building trust.<sup>169</sup>

A three-year evaluation of the Gladue caseworker program in the Gladue courts of Toronto concluded that the program showed clearly the benefits of having judges, prosecutors and defence lawyers better informed on the circumstances surrounding Aboriginal offending.<sup>170</sup> It found that 'Gladue reports' on these circumstances helped the courts to pass appropriate sentences following recommendations in the reports 80% of the time.<sup>171</sup>

There is an interesting debate in Canada over Aboriginal legal traditions and representation in the judiciary. Although increasing recognition within the constraints of the current legal system is difficult, commentators have argued that "indigenous values, beliefs and legal traditions can be accommodated within the framework of Canadian legal pluralism, and particularly through the appointment of aboriginal judges."<sup>172</sup> Apart from other benefits,

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Bakht above n 158, 8.

<sup>168</sup> See <<http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/cjf-fjc-eng.htm>>

<sup>169</sup> See eg: *Aboriginal Courtwork Program, Summative Evaluation*, Department of Justice 2011: <<http://www.justice.gc.ca/eng/pi/eval/rep-rap/08/acw-papa/p3.html>>.

<sup>170</sup> See *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program*, Campbell Research Associates 2008: <[http://aboriginallegal.ca/docs/Year\\_3.pdf](http://aboriginallegal.ca/docs/Year_3.pdf)>, 20.

<sup>171</sup> Ibid.

<sup>172</sup> 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.

such appointments could assist in understanding and sentencing of Aboriginal offenders – in Canada and in Australia.

*Recommendation 9: The Australian Government should encourage the appointment of more Indigenous jurists to the judiciary.*

The Calgary Diversion Program is a community-based alternative for mentally-ill offenders who commit minor offences. An evaluation of this program from 2002-2003 showed significant benefits in terms of recidivism, acute healthcare needs and a high degree of satisfaction for both offenders and service providers.<sup>173</sup>

The first Canadian Drug Treatment Court began operation in Toronto in 1998. As in Australia,<sup>174</sup> it was established in large part due to the efforts of a pioneering member of the legal community, Justice Paul Bentley, who was inspired by drug court programs in the US. The court was described as a ‘revolution in Canadian criminal justice’ which was ‘expected to fail.’<sup>175</sup> In fact, it was a success and has now been replicated (in some cases with Federal funding) in Vancouver, St John, Calgary, Edmonton, Regina, Winnipeg, Durham and Ottawa.<sup>176</sup> An evaluation of the Drug Treatment Court of Vancouver in 2008 found that “[a]lmost all participants were positive about the program and reported that the experience was helpful, increased self-esteem, well-being, self-control, and vitality.”<sup>177</sup> It found that there was a relatively low completion rate for the drug treatment program, but that graduates showed significantly reduced drug use and future convictions. In addition, treatment was found to be more cost-effective than ‘regular processing.’<sup>178</sup>

Overall, Canada’s experience with specialist courts and alternative sentencing is similar to Australia’s. Although early evaluations have been positive, many diversionary measures have only recently been established and more studies are needed. However, Canada’s incarceration rate has been one of the few in the Western world to decrease since the early 1990s,<sup>179</sup> which suggests that Canadian initiatives bear closer scrutiny.

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<sup>173</sup> <http://www.ncbi.nlm.nih.gov/pubmed/17890831>

<sup>174</sup> Former NSW Attorney-General Jeff Shaw QC was instrumental in the establishment of that State’s Drug Court.

<sup>175</sup> See Barnes, *Remembering the Honourable Justice Paul Bentley*:

<<http://www.cadtc.org/JusticeBentleyAward.aspx>>.

<sup>176</sup> See <<http://www.cadtc.org/DTCProgram.aspx>>.

<sup>177</sup> See <<http://www.publicsafety.gc.ca/res/cp/res/2008-es-18-eng.aspx>>.

<sup>178</sup> Ibid.

<sup>179</sup> See Canada, *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=188](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=188)>.

*Recommendation 10: Given the legal and political similarities between Australia and Canada, the Australian Government should consider whether there are aspects of alternatives to incarceration in Canada which have made them more successful in reducing incarceration rates than their Australian counterparts.*

### *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.<sup>180</sup> Since reforms in 2003, a wider range of dispositions based on restorative justice principles, Community Orders and electronic monitoring has become available.<sup>181</sup> 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.<sup>182</sup> There is also evidence that Community Orders produce result in a better recidivism rate than imprisonment, and that the unpaid work they involve can produce significant savings for governments.<sup>183</sup>

Community Orders and suspended sentences in the UK were revised in 2005 in an attempt to address growing pressure on the prison system. Dissatisfaction with unconditional suspended sentences (similar to that identified by the Victorian Government) led to the development of new conditional Suspended Sentence Orders (SSOs).<sup>184</sup> These orders have been praised by sentencing judges and magistrates, as has the training on them provided by the Government.<sup>185</sup> SSOs are said to provide a good alternative to short-term custody, with harsher sanctions for breach than Community Orders<sup>186</sup> but positive results for offenders' lives.<sup>187</sup> However, a comprehensive three year evaluation found little evidence that these orders were actually acting as an alternative to short-term imprisonment,<sup>188</sup> which may indicate they simply 'widened the net' of punishment.

<sup>180</sup> See <<http://www.parliament.uk/documents/post/postpn308.pdf>>.

<sup>181</sup> Ibid, 2.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid, 3-4.

<sup>184</sup> 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](http://www.crimeandjustice.org.uk/opus677/ccjs_sentencers_views.pdf)>, 7.

<sup>185</sup> Ibid, 39.

<sup>186</sup> Ibid, 40.

<sup>187</sup> See Mair and Mills, *The Community Order and the Suspended Sentence Order: Three Years On*, Centre for Crime and Justice Studies, Kings College London 2009: <[http://www.crimeandjustice.org.uk/opus1292/Three\\_years\\_on.pdf](http://www.crimeandjustice.org.uk/opus1292/Three_years_on.pdf)>, 47.

<sup>188</sup> Ibid, 46.

James L Nolan notes that “[o]utside of the United States, England is among the countries furthest along in the transplanting variations of these American juridical innovations.”<sup>189</sup> Although drug courts and community courts in England and Scotland are based on their US counterparts, they differ both structurally and culturally. Nolan has observed that the UK’s system of lay magistrates and strong probation service have an effect, as does what he calls the ‘top-down’ nature of the British political system. In terms of culture, British problem-solving courts tend to be less theatrical – applause, tears and hugging do not feature as prominently as they do in the US, although UK judges appear to have softened their stance on such exuberance over time.<sup>190</sup>

Drug Treatment and Testing Orders (DTTOs) in the UK were probation-based court orders inspired by US drug court programs. They first appeared in the *Crime and Disorder Act 1998*, and they targeted young offenders who commit crimes to support drug habits. Pilot programs in England were deemed a success, and the UK Government rolled out DTTOs in all 42 probation service areas in 2000.<sup>191</sup> DTTO pilots were also evaluated positively in Scotland in 2002.<sup>192</sup>

The *Criminal Justice Act 2003* effectively phased out DTTOs and replaced them with Drug Rehabilitation Requirements (DRRs) integrated into the broader Community Orders scheme. The revised orders have been praised as more flexible than the DTTOs due to the number of dispositions they provide to judicial officers.<sup>193</sup> In Scotland, “DTTO II” replaced the original DTTOs on a trial basis in 2008, and another pilot evaluation in 2009 once again revealed good performance and cost-effectiveness.<sup>194</sup> Treatment completion rates were also high, which cannot be said of all such programs.<sup>195</sup>

Some difficulties with the DTTO/DRR programs in the UK are associated with the nature of the lay magistracy, which deals with more than 90% of criminal charges. For example, lay magistrates cannot impose interim penalties for breach of treatment orders (they can only cancel them), and the rotating nature of magistrate panels makes continuity in supervision of treatment plans more difficult.<sup>196</sup> These problems are largely overcome by the dedicated drug court model, which has been implemented in West Yorkshire, West London and Leeds.<sup>197</sup>

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<sup>189</sup> See Nolan, *Legal Accents, Legal Borrowing*, above n 120, 43.

<sup>190</sup> *Ibid*, 43-44.

<sup>191</sup> *Ibid*, 45-46.

<sup>192</sup> See <<http://www.scotland.gov.uk/Publications/2002/10/15525/11591>>.

<sup>193</sup> See Nolan, *Legal Accents, Legal Borrowing*, above n 120, 46.

<sup>194</sup> See <<http://www.scotland.gov.uk/Publications/2010/04/26095317/1>>.

<sup>195</sup> *Ibid*.

<sup>196</sup> See Nolan, *Legal Accents, Legal Borrowing*, above n 120, 47-48.

<sup>197</sup> *Ibid*, 44-46.

In 2001 and 2002 pilot drug courts were also set up in Glasgow and Fife, and broadly positive evaluations allowed them to continue operation.<sup>198</sup> A comprehensive evaluation published in 2006 found the courts to be particularly effective in reducing drug use and associated offending behaviour,<sup>199</sup> and another published in 2009 confirmed these findings, although it warned that the Scottish sample size was relatively small.<sup>200</sup>

In 2003, former Home Secretary Blunkett and former Lord Chief Justice Woolf visited the Red Hook Community Justice Center in New York. Shortly afterwards, they announced £3 million in funding for community court pilot schemes in England.<sup>201</sup> Drawing on the experience of Red Hook and the Midtown Community Court, the first UK Community Court began operation in the local Magistrates Court in Liverpool in 2004. In late 2005, the Community Court received its own building, which it shared with all of the services involved in its programs (including police, probation, prosecution, victim support, counselling, mentoring, housing and debt services).<sup>202</sup>

The Liverpool Court is a flagship, resource-intensive program, much like Red Hook. It is led by Judge David Fletcher, who models his role on that of Alex Calabrese, and has the capacity to act either as a magistrate or Crown Court judge (if a more severe sentence is indicated).<sup>203</sup> He has considerable flexibility in adjusting sentencing to suit the offence and/or provide the greatest benefit to the community, although he remains bound by the Community Order legislative scheme, and cannot impose 'intermediate sentences' for minor infractions committed in the court of the Court's programs, unlike some US courts.<sup>204</sup>

A Ministry of Justice review of the Liverpool Court's impact on reoffending in 2009 (along with that of a second Community Court in Salford) found no statistical advantage over a traditional Magistrates Court in Manchester, but pointed out that Community Courts are a new initiative which will take time to change the culture in a community (the study only covered offenders who went through the Community Courts in their first year of operation).<sup>205</sup> Qualitative studies in 2007 showed high levels of participant and general community satisfaction with the Liverpool Court.<sup>206</sup> In 2011, Minister of State McNally stated in the House of Lords that the Ministry of Justice was studying the Liverpool Court with a view to expanding community justice initiatives in the UK:

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<sup>198</sup> See *Review of the Glasgow and Fife Drug Courts: Report*, Scottish Government Community Justice Services 2010: <<http://www.scotland.gov.uk/Resource/Doc/299438/0093354.pdf>>, 1.

<sup>199</sup> See McIvor et al, *The Operation and Effectiveness of the Scottish Drug Court Pilots* (Scottish Executive Social Research 2006): <<http://www.scotland.gov.uk/Resource/Doc/100021/0024203.pdf>>.

<sup>200</sup> See *Review of the Glasgow and Fife Drug Courts: Report*, above n 198, 17.

<sup>201</sup> See Nolan, *Legal Accents, Legal Borrowing*, above n 120, 64.

<sup>202</sup> Ibid, 65-66.

<sup>203</sup> Ibid, 67-68. A second Community Court, in Salford, remains based in the local Magistrates Court and uses external service providers.

<sup>204</sup> Ibid, 68-69.

<sup>205</sup> See <[http://www.crim.cam.ac.uk/people/academic\\_research/david\\_farrington/commjmoj.pdf](http://www.crim.cam.ac.uk/people/academic_research/david_farrington/commjmoj.pdf)>.

<sup>206</sup> See <[http://www.criminalsolicitor.net/forum/uploads/Shrek/files/2007-10-29\\_160554\\_liverpool-full-report.pdf](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>>.

We are trying to learn all the lessons from the justice centre, which is a unique and innovative court model employing problem solving, partnership working, community involvement and a single-judge approach to tackling reoffending and improving community confidence in the justice system. We will seek in the study to learn lessons across the board which we can take into the wider criminal justice system.<sup>207</sup>

A report from Ireland's National Crime Council in 2007 also recommended that a community court be set up in that country.<sup>208</sup>

The UK, which is struggling with an incarceration rate that has increased sharply over the past two decades to 155 per 100,000,<sup>209</sup> 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).<sup>210</sup>

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.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup>

*Recommendation 11: The Australian Government should consider why the Northern Irish Youth Conferencing Service appears to have been unusually successful in reducing offending, even though it is superficially similar in many respects to restorative justice initiatives in Australia which have achieved mixed results.*

<sup>207</sup> See *Lords Hansard* for 21 June 2011 from 2.30pm:

<<http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110621-0001.htm>>.

<sup>208</sup> See <[http://www.crimecouncil.gov.ie/downloads/NCC\\_Problem\\_Solving\\_Justice.pdf](http://www.crimecouncil.gov.ie/downloads/NCC_Problem_Solving_Justice.pdf)>

<sup>209</sup> 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](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=169)>. Scotland has approximately the same rate.

<sup>210</sup> 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](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=170)>.

<sup>211</sup> See <<http://www.pri.org/stories/politics-society/justice-not-jail-in-northern-ireland2088.html>>.

<sup>212</sup> *Ibid.*

<sup>213</sup> See *Youth Conference Service, Young People's Guide*, Northern Ireland Department of Justice: <[http://www.youthjusticeagency.gov.uk/youth\\_conference\\_service/young\\_persons\\_guide](http://www.youthjusticeagency.gov.uk/youth_conference_service/young_persons_guide)>.

## France

Under the French Criminal Procedure Code (Code de procédure pénale), prosecutors have the option to implement alternatives to prosecution (or decline to prosecute).<sup>214</sup> It is estimated that 50-80% of all cases are dropped entirely, and that the proportion of cases dealt with by alternative prosecutorial dispositions increased from around 10% of cases to nearly 40% between 1994 and 2006.<sup>215</sup>

The Procedure Code provides for 16 conditions of diversion, some of which are therapeutic in nature. If an offender fulfils the agreed condition, the prosecution is discontinued.<sup>216</sup> France's current incarceration rate is 101 per 100,000 (around one quarter lower than Australia's).<sup>217</sup>

French criminal procedure also allows for the examination of the background and personality of offenders at all stages of the criminal justice process (rather than just during sentencing as is usually the case in Australia).<sup>218</sup> This focus on the individual emphasises his or her status as a human being with a story to be told, rather than merely an offender to be processed. This accords with the principle that human rights derive from the 'inherent dignity of the human person.'<sup>219</sup>

*Recommendation 12: The Australian Government should consider whether it may be appropriate for Australian prosecutors to have more or broader powers to divert offenders from the courts, as is the case in France.*

## The Netherlands

Dr Peter Tak of the Radboud University Nijmegen in the Netherlands has observed that only a very small proportion of recorded crimes in that country end up in court.<sup>220</sup> In part, Dr Tak states that this is due to an increasing number of cases being settled out of court by the

<sup>214</sup> Code available at <<http://www.legifrance.gouv.fr>>, see in particular article 40-1.

<sup>215</sup> See Freiberg, 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms,' above n 85, 7-8.

<sup>216</sup> Ibid.

<sup>217</sup> *Entire world - Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies, above n 5.

<sup>218</sup> See Freiberg, 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms,' above n 85, 10.

<sup>219</sup> See ICCPR, *Preamble*.

<sup>220</sup> 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](http://www.unafei.or.jp/english/pdf/RS_No74/No74_07VE_Tak.pdf)>, 53.

both the police and prosecution services.<sup>221</sup> Although this is partly due to a need to reduce pressure on the courts, it is also driven by “efforts to socialize, humanize and rationalize the administration of criminal justice.”<sup>222</sup>

Prosecutors in the Netherlands have the power to refer cases to justice conferences or mediation, to issue oral or written admonitions or fines (‘transactions’) and otherwise divert offenders from a formal trial process. The Dutch Code of Criminal Procedure specifically provides that prosecutions should proceed only when they ‘seem to be necessary’ and can be ‘dropped on the grounds of public interest.’<sup>223</sup> In 2000, approximately 14% of recorded crimes were unconditionally waived in accordance with this section, but this proportion has since substantially reduced due to public opposition (transactions or conditional waivers are now more common).<sup>224</sup>

Although criticised on the basis of conflict with separation of powers doctrine and equality concerns, the transaction (available for all crimes punishable by less than six years’ imprisonment) is now used to settle around a third of all criminal cases in the Netherlands. Guidelines have been adopted to minimise the risks of arbitrariness and lack of uniformity.<sup>225</sup> On the latest available figures, the overall incarceration rate in the Netherlands is 87 per 100,000.<sup>226</sup>

### *Finland*

According to Dr Tapio Lappi-Seppälä of Finland’s National Research Institute of Legal Policy, the sentencing provisions of Finland’s *Criminal Code* are based on the theory that the criminal law should have an educative function – to make people “refrain from illegal behavior not because it is followed by unpleasant punishment but because the behavior itself is regarded as morally blameworthy.” In Finnish sentencing “proportionality, predictability and equality are the central values.”<sup>227</sup> Dr Lappi-Seppälä reports that “[c]ourts have a general right to go below the prescribed minimum [sentence] whenever exceptional circumstances call for such a deviation” and that lists of aggravating circumstances are always exhaustive, whereas lists of mitigating circumstances are always open-ended.<sup>228</sup> As in Australia, the principle that imprisonment is a last resort is reflected in Finnish customary law as well as legislation.<sup>229</sup>

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<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid, 54.

<sup>224</sup> Ibid, 55.

<sup>225</sup> Ibid, 56.

<sup>226</sup> *Entire world - Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies, above n 5.

<sup>227</sup> See Tonry (Ed), *Why Punish? How Much? A Reader on Punishment*, OUP USA, 2011, 240.

<sup>228</sup> Ibid, 241.

<sup>229</sup> Ibid, 251.

Since 1945, the incarceration rate in Finland has decreased from around 250 per 100,000 to just 59 per 100,000<sup>230</sup> - 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.<sup>231</sup> Much of the change can be attributed to the increasing use of alternative punishments such as day-fines (see above), community service and suspended prison sentences by the Finnish courts.<sup>232</sup> 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.<sup>233</sup>

In addition, Dr Lappi-Seppälä also notes that 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.<sup>234</sup>

*Recommendation 13: Given Finland's rare success in reducing its incarceration rate over recent decades, the Australian Government should consider whether measures such as day-fines and mediation could assist in achieving similar reductions in Australia.*

### *European Overview*

A 2006 comparative study of community service orders (CSOs) in Belgium, the Netherlands, Scotland and Spain found that such orders are one of the most successful modern forms of punishment from a quantitative point of view.<sup>235</sup> However, CSOs are subject to some of the same limitations as imprisonment and other forms of punishment – that is, without proper funding and support from Government, they will not necessarily achieve their objectives. As in England, the statistics show that the increasing use of CSOs has not reduced the prison

<sup>230</sup> 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](http://www.unafei.or.jp/english/pdf/RS_No74/No74_00All.pdf)>; also *Entire world - Prison Population Rates per 100,000 of the national population*, International Centre for Prison Studies, above n 5.

<sup>231</sup> Lappi-Seppälä, above, 5.

<sup>232</sup> *Ibid*, 10-11.

<sup>233</sup> See Tak, above n 220, 59.

<sup>234</sup> *Ibid*, 15-16.

<sup>235</sup> See McIvor et al, *Community service in Belgium, the Netherlands, Scotland and Spain: a comparative perspective*, 2 *European Journal of Probation* 1 (2006), 82 at 95.

population in the countries studied. Rather, punishment has increased overall in most jurisdictions. Demand for more ‘credible’ punishments has also driven the focus of community service orders away from rehabilitation towards punishment.<sup>236</sup> Perhaps most interestingly for the purposes of the present report, the 2006 study found significant underrepresentation of certain groups, including “non-nationals and...socially and physical disabled offenders” in the statistics on the use of CSOs.<sup>237</sup>

European countries have not rushed to establish problem-solving courts as the US (and to a lesser extent other Common Law nations) has. One pilot drug court has been created in Belgium, and two in Norway.<sup>238</sup> Although there are exceptions,<sup>239</sup> it may simply be that there is less pressure on, and dissatisfaction with, the existing criminal justice processes in Europe and therefore less impetus for reform. Commentators have pointed out that unique features of the US justice system in particular can produce ‘anti-therapeutic’ effects.<sup>240</sup> Existing diversionary programs and alternatives to incarceration have evidently assisted in achieving lower average incarceration rates in most European jurisdictions, although many other factors (including public attitudes to crime and punishment as well as lower maximum penalties) also undoubtedly play a role.<sup>241</sup>

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 or problem-solving courts. It may be that concerns, including countervailing human rights concerns (such as for the right to a fair trial – see further **Part 3**), preclude the adoption of some European-style measures in Australia. However, given that the incarceration rate in the US was already very high in the early 1990s when problem-solving courts first appeared, and has since increased by more than 50%,<sup>242</sup> it may be appropriate for Australia to consider emulating diversionary practices in European countries where rates have remained relatively low in addition to US-style therapeutic justice initiatives.

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<sup>236</sup> Ibid, 95-96.

<sup>237</sup> Ibid, 96.

<sup>238</sup> See Freiberg, ‘Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms,’ above n 85, 11-12.

<sup>239</sup> One example of an exception is Italy, where a prison amnesty had to be declared in 2010 due to severe overcrowding – see Freiberg, above, 5.

<sup>240</sup> See eg Diesen, ‘Therapeutic Jurisprudence: an Introduction from a Swedish Perspective,’ above n 104, 156.

<sup>241</sup> See eg Nelken, ‘Comparative Criminal Justice: Beyond Ethnocentrism and Relativism,’ 6 *European Journal of Criminology* 4 (2009), 291 at 295-300.

<sup>242</sup> See *United States of America - 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=190](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190)>. Australia’s rate has almost doubled over the same period (albeit from a lower base): see <[http://www.prisonstudies.org/info/worldbrief/wpb\\_country.php?country=192](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=192)> and *Prisoners in Australia*, ABS 2011, above n 4, *Prisoner Characteristics, Australia, Prisoner Snapshot*.

## Part 3 – Overview of Relevant Literature and Commentary

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The literature and commentary on non-custodial sentencing, problems-solving courts and therapeutic jurisprudence is vast and varied – especially in the United States (US). This Part can only hope to give a brief overview of representative views, focussing on the efficacy of various initiatives in an attempt to assess whether they are likely to be helpful in meeting Australia’s international human rights obligations.

### Research Agency Perspectives

Don Weatherburn, Director of the NSW Bureau of Crime and Statistics Research (BOCSAR), delivered a conference paper on non-custodial sanctions in Australia in 1990.<sup>243</sup>

Dr Weatherburn noted at the time that there was a trend towards harsher law enforcement and penal policies in Australia, and observed that scholars have drawn links between difficult economic times and punitive attitudes – which is a salient warning in the current economic climate. Weatherburn pointed out that this is paradoxically inconvenient for Governments, because while they are trying to cut costs, “among the criminal sanctions available to the courts, far and away the most expensive is that of imprisonment.”<sup>244</sup>

Dr Weatherburn’s work shows that the development of appropriate non-custodial options, particularly for those who would otherwise serve only a relatively brief term of imprisonment, can have a significant effect on imprisonment rates.

The statistics may convince Government of the desirability of non-custodial options, but convincing sceptical members of the public may be more difficult.<sup>245</sup> A range of arguments and evidence in favour of such options is set out below.

In 2004 the AIC conducted a major audit of specialty (problem-solving) courts in Australia<sup>246</sup> which identified some common strengths and weaknesses:

- Potential equity and access concerns were raised, created by strict access criteria (on grounds of age, Indigenous status, type of offence etc). For example, offenders with diagnosed mental illnesses are often excluded from specialty courts (other than mental health courts) due to

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<sup>243</sup> See Weatherburn, *Non-Custodial Sanctions, Prison Costs and Prison Overcrowding*, paper delivered to a conference on Keeping People out of Prisons in March 1990, available at: <http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/11.aspx>.

<sup>244</sup> Ibid, 61.

<sup>245</sup> Cf Gelb, *Alternatives to Imprisonment: Community Views in Victoria*, Sentencing Advisory Council 2011: [https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/alternatives\\_to\\_imprisonment\\_community\\_views\\_in\\_victoria\\_0.doc](https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/alternatives_to_imprisonment_community_views_in_victoria_0.doc).

<sup>246</sup> See Payne, *Specialty Courts in Australia: Report to the Criminology Research Council*, AIC 2005, available at: <http://www.criminologyresearchcouncil.gov.au/reports/2005-07-payne/2005-07-payne.pdf>.

decision-making capacity concerns (all participation must be voluntary) and possible risks to the community (if they are not detained).<sup>247</sup>

- The audit found solid evidence which suggested that drug courts and mental impairment courts were successful at reducing reoffending, but only anecdotal evidence of the same for Indigenous courts.<sup>248</sup>

The author of the audit, Jason Payne, called for reassessment of eligibility criteria and better risk assessment to determine who could benefit most from problem-solving programs. He also recommended “embedded evaluations to improve outcomes as part of a process of continuous improvement.” He noted that “[i]n some jurisdictions, the implementation of specialty court programs has been heralded as a successful working model for cross-government collaboration and cooperation. This is a positive outcome from the development of specialty courts which has wider implications for policy and practice development across government,” and advised “greater collaboration across the states and territories in the development of good practice principles in the delivery of therapeutic and targeted interventions.”<sup>249</sup>

*Recommendation 14: Systematic evaluation is a common thread through many reviews of problem-solving courts and alternative sentencing regimes. Governments establishing, or supporting the establishment of, such courts and programs should allocate specific and adequate funding to regular assessments.*

*Recommendation 15: The Australian Government should encourage greater collaboration between the states and territories in the development of alternative sentencing schemes and problem-solving courts.*

More recently, the AIC published studies on the effects of custodial versus non-custodial sentences on recidivism. One study, which surveyed a cohort of offenders sentenced in the NSW Local Court from 2000-2007, concluded that those given suspended sentences (an increasingly utilised option) reoffended at the same rate as those imprisoned for a first offence, and for subsequent offences suspended sentences were actually more effective.<sup>250</sup> This is corroborated by studies in the UK which have shown short prison sentences (less

<sup>247</sup> See Payne, *Specialty courts: current issues and future prospects*, AIC 2006:

<<http://www.aic.gov.au/publications/current%20series/tandi/301-320/tandi317.aspx>>, 4.

<sup>248</sup> Ibid, 2-5.

<sup>249</sup> Ibid, 6.

<sup>250</sup> <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/cjb136.pdf/\\$file/cjb136.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb136.pdf/$file/cjb136.pdf)>.

than 12 months) to result in increased reoffending compared with community-based sanctions or suspended sentences.<sup>251</sup>

Another AIC study of the deterrent effect of custodial sentences in 2009 found “no significant difference between juveniles given a custodial penalty and those given a non-custodial penalty in the likelihood of reconviction.” This, the study pointed out, raises the question of whether spending nearly half of the NSW Department of Juvenile Justice’s annual budget on keeping juvenile offenders in custody is justified.<sup>252</sup>

There is also evidence that the Australian public may not be as sceptical about alternative sentencing regimes as is commonly believed. Dr Karen Gelb of the Victorian Sentencing Advisory Council, published a report in March 2011 which found that:

...contrary to common myths and misconceptions about a punitive public, people are open to a policy of increasing the use of alternatives to prison such as supervision, treatment and community work. Victorians are especially accepting of appropriate alternatives for mentally ill, young or drug-addicted offenders, preferring a policy of treatment, rehabilitation, counselling and education programs to prison.<sup>253</sup>

## Academic Perspectives

### *On Problem-Solving Courts Generally*

There have been many academic studies and evaluations of problem-solving courts. In 2001, Professor Arie Freiberg of Melbourne University (now Monash), who specialises in the study of sentencing and problem-oriented courts, wrote the first comprehensive overview of the influence in Australia of US-style problem-solving courts.<sup>254</sup>

According to Freiberg, therapeutic justice requires a major thinking shift from judges and practitioners accustomed to the adversarial nature of Common Law systems. The traditional criminal trial system has “failed to sufficiently consider the importance of participation in justice.”<sup>255</sup> Freiberg acknowledges that the early Australian initiatives, which were still firmly in the pilot stage in 2001, were open to criticism. Nevertheless, he points out:

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<sup>251</sup> UK Ministry of Justice, *2011 Compendium of reoffending statistics and analysis*, Statistics bulletin, May 2011, available at: <<http://www.justice.gov.uk/downloads/statistics/mojstats/2011-compendium-reoffending-stats-analysis.pdf>>, 4.

<sup>252</sup> <<http://www.aic.gov.au/documents/A/3/D/%7BA3DB5DEB-2A53-4272-87CF-CE510D13481B%7Dtbp33.pdf>>.

<sup>253</sup> See Gelb, *Alternatives to Imprisonment: Community Views in Victoria*, above n 245, 2.

<sup>254</sup> Freiberg, ‘Problem-oriented Courts: Innovative Solutions to Intractable Problems?’ above n 107, 9.

<sup>255</sup> *Ibid*, 23-24.

The astonishing expansion of restorative justice programs around the world, even in the absence of solid evidence about their effects on recidivism, indicates that their true appeal is not necessarily utilitarian but symbolic: process is paramount. When this insight is joined with a problem-oriented approach which devotes court and service resources to deal with underlying criminogenic causes, it can provide a powerful alternative to the sterile, costly and ultimately counter-productive punitive approaches which have resulted in dispirited court and correctional officers and bursting gaols.<sup>256</sup>

Subsequent studies of participants' satisfaction with alternative court processes (examples of which are detailed throughout the present report) bear out Professor Freiberg's views. Paul Holland of Seattle University confirms that experience in the US shows "many of the traditional values embedded in the role of lawyer for the accused have a central place within these new-model courts, provided lawyers are prepared to adapt the forms of practice through which they pursue those values."<sup>257</sup>

The adversarial nature of Common Law justice systems is not the only cultural factor driving people to seek alternatives to traditional courts and punishments. As in Europe, 'penal populism,' or political campaigning based on fear of crime, has been identified as a potential cause of high imprisonment rates in the US, United Kingdom (UK), New Zealand and Australia.<sup>258</sup> However, unlike in many European countries, this has not caused politicians to desist from such campaigning despite the evident costs to society.<sup>259</sup>

### *On Drug Courts*

The first problem-solving court in Australia was the NSW Drug Court (which has since set an example of best practice in the field – see **Appendix** for details). Analysis of the effects of drug courts' diversionary schemes in the US found them to produce significant cost savings compared with sending people to prison, and had significant medical benefits as well.<sup>260</sup> In 2005, Freiberg published an updated overview.<sup>261</sup> By that time, drug courts (along with domestic violence courts, circle sentencing courts and mental health courts) had spread around Australia. Therapeutic jurisprudence initiatives had also begun making inroads in Canada, New Zealand and the UK.<sup>262</sup>

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<sup>256</sup> Ibid, 24.

<sup>257</sup> See Holland, 'Lawyering and Learning in Problem-Solving Courts,' *Seattle University School of Law Research Paper No. 11-08* (2011): <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1798064](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1798064)>.

<sup>258</sup> See Freiberg, 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms,' above n 85, 4.

<sup>259</sup> See eg <<http://www.smartjustice.org.au/media.php>>.

<sup>260</sup> Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' above n 107, 9.

<sup>261</sup> See Freiberg, 'Problem-oriented courts: an update,' above n 86.

<sup>262</sup> Ibid, 196. Domestic violence courts are less focussed on diversion than the other courts mentioned, which is why the present report does not consider them in detail.

As their nature and mission came into focus, it became obvious that these courts “provide a focus for the provision of social, welfare and health services and can coordinate their delivery in particular cases,”<sup>263</sup> but they are emphatically not service providers, and their modest budgets reflect this. Most of the new courts being established had common features, including judicial supervision of treatment programs and informal processes involving direct contact with defendants. However, the details of their practice and procedure varied significantly across the country.<sup>264</sup>

By 2005, evaluations of the drug courts in NSW (Adult and Youth) and Queensland had already demonstrated that people who manage to make it through the treatment programs had lower rates of recidivism and took longer to reoffend than those who failed and/or were sent to prison.<sup>265</sup> In WA, a similar audit had revealed no significant difference in recidivism rates, but considered the extra cost of the drug court to be offset by the savings in prison/detention costs. It concluded that the drug court was useful and should be supported.<sup>266</sup> Thorough evaluations of the health benefits and cost-effectiveness of the Victorian Drug Court were published in 2004-05, and they concluded that the Court (which started as a pilot in 2002) was already delivering a significant net benefit to the Victorian justice system – the court’s programs cost less and achieved better recidivism rates than alternative of incarceration.<sup>267</sup> In SA, a review published in May 2012 showed that the Drug Court program in that State was having a ‘relatively sustained impact’ on offenders.<sup>268</sup>

#### *On Mental Health Courts and Programs*

SA’s mental health diversion program was instituted in the Magistrates’ Court in 1999 to deal with mentally disordered and intellectually disabled offenders (see **Appendix**). A five-year review of this program in 2004 was not able to demonstrate any concrete reduction in recidivism, but did claim an overall positive effect.<sup>269</sup>

In 2003-04, recommendations were made to establish mental health courts in WA and Victoria.<sup>270</sup> The relevant WA Government report noted that there were some 600 mentally impaired prisoners in the State at the time.<sup>271</sup> These recommendations were eventually implemented. The Victorian Assessment and Referral Court (ARC) List started operation in

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<sup>263</sup> Ibid.

<sup>264</sup> Ibid, 198.

<sup>265</sup> Ibid, 200-201.

<sup>266</sup> Ibid, 202.

<sup>267</sup> Summary of reports available at:

<[http://www.justice.vic.gov.au/resources/f/1/f1079280404a62a1bdd1fff5f2791d4a/drug\\_court\\_evaluation\\_booklet.pdf](http://www.justice.vic.gov.au/resources/f/1/f1079280404a62a1bdd1fff5f2791d4a/drug_court_evaluation_booklet.pdf)>.

<sup>268</sup> See *The South Australian Drug Court: A Recidivism Study*, SA Office of Crimes Statistics and Research 2012:

<[http://www.ocsar.sa.gov.au/docs/evaluation\\_reports/SADrugCourtRecidivismStudy.pdf](http://www.ocsar.sa.gov.au/docs/evaluation_reports/SADrugCourtRecidivismStudy.pdf)>, 5.

<sup>269</sup> See Payne, Specialty Courts: Current Issues and Future Prospects, above n 247, 5.

<sup>270</sup> Freiberg, ‘Problem-oriented courts: an update,’ above n 86, 203-204.

<sup>271</sup> See <<http://www.health.wa.gov.au/mhareview/>>.

2010, and the WA Government announced in May 2012 that it would spend \$5 million to establish a Mental Health Court Diversion Program as a two-year trial.<sup>272</sup>

Dr Effie Zafirakis of the Royal Melbourne Institute of Technology published an overview of mental health courts in 2010.<sup>273</sup> She found that they constitute “a timely initiative in responding to the overwhelming number of mentally impaired offenders entering the criminal justice system,” and that they “can facilitate successful treatment outcomes by minimising the use of coercion and ensuring that mentally impaired offenders are accorded a ‘voice’ and treated with dignity and respect.”<sup>274</sup>

However, Zafirakis warns that consent – to both treatment and legal procedures – is an ever-present concern, and that an absence of coercion is more likely to produce a therapeutic outcome.<sup>275</sup> In common with other commentators, Zafirakis also advocates more evaluation and evidence-based practice, as well as funding to ensure sufficient access to treatment for offenders.<sup>276</sup> She cites the Victorian ARC List as “a promising and timely initiative in addressing the need to provide a more comprehensive, flexible and responsive service delivery for mentally impaired offenders and improving equitable access and participation in the legal process.”<sup>277</sup>

### *On Community Courts*

In 2005, Freiberg noted plans to establish a community court in Victoria modelled on successful the Red Hook Community Court in Brooklyn.<sup>278</sup> In 2007, this plan came to fruition in the form of the Neighbourhood Justice Centre in Collingwood. The foundational legislation for the Centre provides that it was established “with the objectives of simplifying access to the justice system and applying therapeutic and restorative approaches in the administration of justice.”<sup>279</sup> An evaluation of the Centre in 2010 showed improvement in recidivism rates, higher completion of Community-based Orders (similar to community service orders), increased community work and stronger support for people attending court.<sup>280</sup>

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<sup>272</sup> See *State Budget 2012-13: Supporting our Community - Mental health court diversion program first for WA*, WA Government Media Release, 19 May 2012:

<<http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=150116>>. Further information about both initiatives can be found in the **Appendix**.

<sup>273</sup> See Zafirakis, ‘Curbing the “revolving door” phenomenon with mentally impaired offenders: Applying a therapeutic jurisprudence lens,’ 20 *Journal of Judicial Administration* (2010), 81.

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*, 88-89.

<sup>276</sup> *Ibid.*, 89-90.

<sup>277</sup> *Ibid.*, 91.

<sup>278</sup> See Freiberg, ‘Problem-oriented courts: an update,’ above n 86, 204-206.

<sup>279</sup> *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic), s 1. Further details on the Community Justice Centre’s operation and jurisdiction can be found in the **Appendix**.

<sup>280</sup> See <<http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=238>>.

The Open Society Foundation in South Africa published a report on various community court models around the world in 2008, which discovered 52 functioning community courts and 27 more in the planning stages.<sup>281</sup> Although they varied, attributes they had in common included goals of addressing underlying causes of offending and combining punishment with help and/or treatment.<sup>282</sup> Of the 35 courts in several countries surveyed, most had not set up data collection studies to determine whether their goals of reducing reoffending were being met, but those which had reported lower reoffending rates for participants compared with non-participants.<sup>283</sup>

### *On Indigenous Sentencing Courts*

Nigel Stobbs of Queensland University of Technology and Professor Geraldine McKenzie of Bond University, in assessing the performance of Indigenous sentencing courts to date, write: “The inability of the traditional sentencing process to have any meaningful and measurable effect on reoffending is of course one of the key realities that has led to the rise of the problem-solving courts, with their potential to address and treat the causes of offending.”<sup>284</sup> The authors acknowledge the difficulty of evaluating long-term social outcomes, citing one example of an evaluation of the Murri Court in 2005-06 which struggled to gather evidence other than anecdotes on reoffending. The indications are positive, but there is a clear need for better data. In any case, the authors note, “given the relatively short time that Indigenous courts have been operating (especially beyond the piloting stages) it is somewhat unreasonable, we suggest, to expect that significant effects on recidivism rates at a community level would be measurable at this time, especially given the extent to which more than 200 years of acute, systemic disadvantage and dispossession have contributed to current levels of overrepresentation. But such reductions will inevitably be expected.”<sup>285</sup>

In 2007, Elena Marchetti and Professor Kathleen Daly of Griffith University published an article giving an overview of Indigenous sentencing courts around Australia, which they had been observing since 2001. They state that it is difficult to make meaningful comparisons across jurisdictions, in part because some Indigenous courts sentence many offenders (and provide adequate data for analysis – for example Port Adelaide Nunga Court), whereas others have very low volumes of work (for example Nowra Circle Court).<sup>286</sup>

Marchetti and Daly contend that the aims and philosophical bases of Indigenous sentencing courts are distinct from other restorative/therapeutic justice programs, although they share

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<sup>281</sup> See <[http://www.osf.org.za/File\\_Uploads/docs/community\\_court\\_world\\_text\\_web.pdf](http://www.osf.org.za/File_Uploads/docs/community_court_world_text_web.pdf)>.

<sup>282</sup> Ibid, v-vi.

<sup>283</sup> Ibid, 22.

<sup>284</sup> See Stobbs and Mackenzie, ‘Evaluating the Performance of Indigenous Sentencing Courts,’ 13 *Australian Indigenous Law Reports* 2 (2009), 90 at 97.

<sup>285</sup> Ibid, 98.

<sup>286</sup> See Marchetti and Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model,’ 29 *Sydney Law Review* (2007), 415 at 418.

elements of practice and procedure.<sup>287</sup> They are squarely aimed at reducing the overrepresentation of Indigenous people in custody, thereby offering Governments an opportunity to fulfil some of the recommendations of the Royal Commission into Aboriginal Deaths in Custody and of the Justice Agreements which exist in most states and territories.<sup>288</sup> Indigenous courts set out not only to improve the lives of individuals, but to institute “group-based change in social relations (a form of political transformation).”<sup>289</sup>

Indigenous sentencing courts tend not to deal with cases involving violence, sexual offences or cases in which the victim is a child. The court structure is believed to be inappropriate to deal with the complexity and potentially emotive nature of such cases, and public perception of circle courts as a more lenient option may also discourage Parliaments from conferring jurisdiction over more serious crimes.<sup>290</sup>

Marchetti and Daly have observed real benefits to Indigenous sentencing courts – for example, more open and honest communication between offenders and magistrates, greater use of Indigenous knowledge and ‘informal modes of social control’ and (arguably) more appropriate penalties. They are also said to strengthen communities significantly by reinforcing the traditionally powerful role of Elders.<sup>291</sup> Whether they should be established by legislation is a moot point. On the one hand it lends them permanence and a basis for different operation from mainstream courts. On the other hand, having the parameters of the court determined by the Parliament could lead to a more government-controlled process, and potentially hamper productive experimentation.<sup>292</sup>

Marchetti and Daly claim that “[i]t is too early to tell whether the courts have had an impact on the rates of recidivism. We have already noted problems of assuming that courts can quickly deliver on reducing rates of offending or incarceration.” They acknowledge that “evidence on reoffending is either anecdotal or relies on statistical analyses that are incomplete or questionable.”<sup>293</sup> However, they remind us that the “[a]necdotal evidence suggests that for some courts, appearance rates are higher and reoffending has decreased.”<sup>294</sup> Observation also suggests that, despite the fact that most jurisdictions state support for victims as an aim of their Indigenous courts, only NSW circle courts have victims participating regularly.<sup>295</sup>

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<sup>287</sup> Ibid, 419.

<sup>288</sup> Ibid, 422.

<sup>289</sup> Ibid, 429-430.

<sup>290</sup> Ibid, 421-422.

<sup>291</sup> Ibid, 422-423.

<sup>292</sup> Ibid, 429-431.

<sup>293</sup> Ibid, 437.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

*Recommendation 16: There continues to be a need for better data collection and ongoing monitoring of Indigenous sentencing regimes to determine their effectiveness and justify (or justify increases in) their budgets. The Australian Government should consider funding appropriate bodies (such as the AIC) to conduct longer-term studies in this area.*

Finally, Marchetti and Daly state that Indigenous courts are “ultimately concerned with transforming racialised relationships and communities.”<sup>296</sup> They warn that expectations of a dramatic effect on recidivism and Aboriginal incarceration rates are unrealistic, at least in the short term, and whether these courts ‘work’ should not be judged solely on these kinds of statistics.<sup>297</sup>

Professor Allan Borowski of La Trobe University has evaluated the Children’s Koori Court in Victoria, tracking offenders from the time of their appearance to between 6 and 30 months afterwards.<sup>298</sup> Borowski notes that this court was the first of its kind to be formally established by legislation in Australia, although ad hoc courts with similar goals operating in Queensland and SA.<sup>299</sup> He found that the failure-to-appear rate and the rate of breaches of court orders were much improved over regular court processes, but that the recidivism rate (of just under 60%) was only slightly improved.<sup>300</sup> Borowski agrees with Marchetti and Daly that Indigenous courts like the Children’s Koori Court are unlikely to achieve significantly reduced recidivism rates in the short term, because they only process a small proportion of offenders, and structural problems with associated services such as education health care remain.<sup>301</sup>

### Law Reform Commission Perspectives

#### *On Sentencing Indigenous Offenders*

One priority identified for action at the Federal Criminal Justice Forum in September 2008 was ‘providing more diversionary options for sentencing judges and magistrates.’ This was in response to the ALRC’s *Same Crime, Same Time* report on the sentencing of federal offenders.<sup>302</sup>

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<sup>296</sup> Ibid, 443.

<sup>297</sup> Ibid.

<sup>298</sup> See Borowski, ‘Indigenous Participation in Sentencing Young Offenders: Findings from an Evaluation of the Children’s Koori Court of Victoria,’ 43 *Australian and New Zealand Journal of Criminology* 3 (2010) 465.

<sup>299</sup> Ibid, 467.

<sup>300</sup> Ibid, 480-481.

<sup>301</sup> Ibid, 481-482.

<sup>302</sup> See *Same Crime, Same Time*, ALRC 2006, above n 96.

The Western Australia Law Reform Commission (LRCWA) has also produced relevant reports on Aboriginal Customary Laws (2006)<sup>303</sup> and Court Intervention Programs generally (2009).<sup>304</sup> In the former report, the LRCWA agrees with Marchetti and Daly that Indigenous courts are in a different category from other problem-solving courts, stating that “[i]f there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system.”<sup>305</sup>

The LRCWA acknowledged that Indigenous sentencing courts are relatively costly and intensive in terms of labour and time. However, it supports their continued establishment in WA (subject to ongoing review) due to their sensitivity to cultural issues, their potential to improve Indigenous offenders’ participation rates through the building of trust and involvement of community Elders, and their potential to reduce recidivism rates. The LRCWA also clarified in the report “that its support [for Indigenous courts]...should not be taken to imply that there is no need for courts generally to adapt their procedures so that they are more culturally appropriate and sensitive to the needs of Aboriginal people.”<sup>306</sup>

The ALRC noted that “Indigenous peoples are among the most disadvantaged and socially marginalised groups in the world. In Australia, ATSI offenders are overrepresented in all jurisdictions at all stages of the criminal justice process,” and that “existing rehabilitation programs are not appropriately tailored to meet the needs of ATSI offenders.”<sup>307</sup> It recommended that more appropriate options – developed in consultation with Indigenous people – be provided.<sup>308</sup>

#### *On Sentencing Offenders with a Mental Illness or Cognitive Disability*

The ALRC also commented on the overrepresentation of offenders with a mental illness or intellectual disability in *Same Crime, Same Time*.<sup>309</sup> It recommended (not for the first time) that a comprehensive inquiry into “issues concerning people with a mental illness or intellectual disability in the federal criminal justice system.”<sup>310</sup> The Castan Centre understands that an NJCEOs Working Group is currently doing relevant work. The ALRC noted that the principal barriers to success for diversionary schemes are the provision of “adequate mechanisms in place to screen offenders at an early stage of the criminal justice process to identify those with a mental illness or intellectual disability”<sup>311</sup> and the resource-intensive nature of service provision sufficient to achieve the schemes’

<sup>303</sup> See *Project 94 – Aboriginal Customary Laws*, LRCWA 2006: <<http://www.lrc.justice.wa.gov.au/094p.html>>.

<sup>304</sup> LRCWA, *Court Intervention Programs*, Final Report (June 2009), available at: <<http://www.lrc.justice.wa.gov.au/2publications/reports/P96-FR.pdf>>.

<sup>305</sup> See *Project 94 – Aboriginal Customary Laws*, LRCWA, above n 303, 146.

<sup>306</sup> *Ibid*, 146-156.

<sup>307</sup> See *Same Crime, Same Time*, ALRC 2006, above n 96, 29.40 and 29.53

<sup>308</sup> *Ibid*, Recommendations 29-1 and 29-2.

<sup>309</sup> *Ibid*, 28.1.

<sup>310</sup> *Ibid*, Recommendation 28-1. See also ALRC Discussion Paper 70, available at: <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/DP70.pdf>>, 536.

<sup>311</sup> *Ibid*, 28.23-28.28.

rehabilitative goals. It noted that “[a] number of successful diversionary schemes have been developed in the United States. These schemes may provide an appropriate model for diversionary schemes in Australia.”<sup>312</sup>

In its 2009 report on Court Intervention Programs, the LRCWA considered the operation to date of drug and alcohol courts, mental impairment intervention programs and other alternative sentencing programs, which it characterises as “programs that use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation.”<sup>313</sup> In the LRCWA’s view, by 2009 there was “sufficient evidence to demonstrate that court intervention programs can be effective” (referring to many of the evaluations cited above).<sup>314</sup> The LRCWA acknowledged:

There may be some reluctance to invest in court intervention programs bearing in mind the current global economic crisis and moves by the government of Western Australia to reduce spending by government departments. However, the Commission emphasises that court intervention programs can result in considerable cost savings in the longer-term. Further, the current economic crisis and rising unemployment may increase the need for better-resourced court intervention programs. Loss of employment and financial pressures may lead to increased drug and alcohol use, family dysfunction, family violence, gambling and homelessness, and for some, the commission of crimes.<sup>315</sup>

The Castan Centre submits that such an analysis is applicable to most, if not all, other Australian jurisdictions as well. Several of the LRCWA’s general recommendations for the WA Government could be adapted for application by other jurisdictions, including:

- The establishment of an Intervention Programs Unit in the Attorney General’s Department (or equivalent);
- Review of the general legislative framework for intervention programs;
- Ensuring that failure to complete intervention programs does not automatically result in sanctions or susceptibility to an increased traditional sentence;
- The expansion into as many areas as possible of Intellectual Disability diversion programs with commensurate funding, and
- The establishment of general court intervention programs to service vulnerable offenders regardless of the court before which they appear.

In a 2010 Discussion Paper, the NSW Law Reform Commission (NSWLRC) dealt with that State’s laws relating to people with mental illness or cognitive disability in the criminal

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<sup>312</sup> Ibid, referring to initiatives undertaken by the New York State Division of Criminal Justice Services - See <[http://www.criminaljustice.ny.gov/opca/shared\\_mentally\\_ill.htm](http://www.criminaljustice.ny.gov/opca/shared_mentally_ill.htm)>.

<sup>313</sup> LRCWA, *Court Intervention Programs*, above n 304, 1.

<sup>314</sup> Ibid, 8.

<sup>315</sup> Ibid, 16.

justice system.<sup>316</sup> The NSWLRC noted that diversion for people in this group has become increasingly popular in Australia in response to “the limitations of traditional forms of punishment in reducing crime and rehabilitating offenders.”<sup>317</sup> It also noted that “the culpability of these groups of offenders should be measured against the wider social problems that they typically face and which may offer at least a partial explanation for their criminal behaviour.”<sup>318</sup>

Diversionary schemes, in the NSWLRC’s view, “should aim to identify the underlying causes of the criminal conduct, provide a means of overcoming these underlying causes, stop people from becoming entrenched in the criminal justice system, and ultimately redress their over-representation in that system.”<sup>319</sup> Such schemes not only offer potential benefits to both offenders and their communities, but also to Australian “...society as a whole, if its collective conscience weighs more lightly in treating some of its most vulnerable members with compassion and humanity, rather than condemnation.”<sup>320</sup>

In NSW, police and prosecutors have general powers to discontinue cases or grant bail, as well as specific powers under the *Mental Health Act 2007* (NSW) to refer people directly to mental health facilities. However, the legislation’s coverage of people with cognitive impairment may be susceptible to improvement.<sup>321</sup> Under the *Mental Health (Forensic Provisions) Act 1990* (NSW), the NSW Local Court and Children’s Court have diversionary powers for less serious offences. Although these powers are broadly-defined and flexible, the NSWLRC reports that “figures suggest that the number of defendants in fact diverted from the court system under s 32 is very small.”<sup>322</sup> As with similar legislation, definition of terms such as ‘developmentally disabled’ and ‘mentally ill’ present the courts with significant difficulties. The NSWLRC notes that other jurisdictions use the broad term ‘mental impairment’ to make similar legislation more inclusive.<sup>323</sup>

The NSWLRC also raises the question of whether diversion schemes should be available for more serious offences, including in the higher courts, as a matter of principle.<sup>324</sup> From a human rights perspective, it would be desirable to extend them to serious offences, in part because limiting them to summary and minor offences reinforces the perception that they are a ‘soft option,’ rather than a potentially more effective option for curbing crime than imprisonment.

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<sup>316</sup> See *People with cognitive and mental health impairments in the criminal justice system: diversion*, NSW Law Reform Commission 2010:

<[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/CP07.pdf/\\$file/CP07.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/CP07.pdf/$file/CP07.pdf)>.

<sup>317</sup> Ibid, 3.

<sup>318</sup> Ibid, 4.

<sup>319</sup> Ibid, 6

<sup>320</sup> Ibid.

<sup>321</sup> Ibid, 8-11.

<sup>322</sup> Ibid, 18-19.

<sup>323</sup> Ibid, 20-28.

<sup>324</sup> Ibid, 32 and Ch 5.

## Practitioners' Perspectives

### *On Indigenous Justice Initiatives*

Derek Hunter, a Legal Aid solicitor from Western Australia who has practised extensively in Indigenous communities, agrees with the LRCWA's call for "not only...adequate numbers of pre-release and post-release prison programs, but...also...quality community-based pre-sentence and diversion programs, which are readily available in both city and regional areas."<sup>325</sup> Health and human services are critical to the provision of therapeutic justice, and relevant agencies should be engaged as a matter of course rather than on an ad hoc basis.<sup>326</sup>

Hunter observes that the (mainstream) courts can help through care and protection applications, granting bail and appropriate sentencing. Magistrates can have a powerful effect by ordering counselling and otherwise engaging Government agencies and service providers to come to the aid of people early in their interactions with the criminal justice system and thereby stopping 'the onset of an offending cycle.' Local magistrates are best-placed to do this because they are likely to have the most information about the people appearing before them, including their family circumstances.<sup>327</sup> Due to the priority that Indigenous culture places on family and community ties, the involvement of family members and Elders is crucial. In his opinion, Community Justice Groups, similar to those which already exist in Queensland and NT (see **Appendix**), which would get involved in court processes and supervision of offenders participating in diversion programs, could be very helpful.<sup>328</sup>

Hunter concurs with academic observers that the benefits of rehabilitation programs for Indigenous offenders have a flow-on effect, because the offenders who complete them are no longer contributing to the dysfunction of their family and/or community; indeed they may even be in a position to combat it.<sup>329</sup> He cites marked improvements in recidivism rates for offenders who complete the Indigenous Diversion Program or Supervised Treatment Intervention Program under the supervision of a Magistrate.<sup>330</sup>

However, Hunter warns that programs must not be paternalistic and must be structured so as not to disadvantage people who try and fail at diversion programs unduly (it should be a requirement that their sentence be no harsher than if they hadn't opted for diversion at all). Hunter also warns that programs which are funded only for short periods as pilots, as was the case in the community of Aurukun, eventually result in poor supervision and follow-up

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<sup>325</sup> See Hunter, 'How the criminal justice system can be best utilised to reduce the increasing rate of offending and imprisonment of Western Australia's Indigenous population,' above n 21, 138.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid, 141-142.

<sup>329</sup> Ibid, 139.

<sup>330</sup> Ibid, 139-140.

and high recidivism rates are the inevitable result. Success should be measured in terms of chances for children to grow up in less chaotic environments and savings in welfare expenditure, as well as reductions in recidivism and imprisonment.<sup>331</sup>

One of Hunter's most compelling recommendations, and one which the Castan Centre supports, is his call for wider community education about alternative justice programs – especially to counter the 'soft option' image with which they have been burdened by certain sections of the media. Such an education campaign might also help to relieve pressure on the judiciary to opt for prison sentences, even where they may constitute disproportionate punishment in view of the offender's circumstances.<sup>332</sup>

*Recommendation 17: As part of the education component of the National Human Rights Framework, the Australian Government should fund campaigns about alternative justice programs to educate the public about their potential to create safer communities, and to counter perceptions of them as an ineffective 'soft option.'*

### *On The Value of Therapeutic Jurisprudence Generally*

Pauline Spencer is a magistrate in the Victorian Magistrates' Court at Dandenong. She hears mainly criminal cases and passes many sentences per day in busy periods.<sup>333</sup> Spencer is of the view that "[i]n light of their effectiveness...therapeutic approaches should not just be applied in specialist courts but also in mainstream courts where the vast majority of cases are heard."<sup>334</sup> She suggests that, even without systemic changes or additional resources, some such approaches could be applied within current court processes.<sup>335</sup> However, challenges which would need to be overcome include the limited time, large caseloads and generalist training of court personnel (as opposed to, for example, the Collingwood Neighbourhood Justice Centre, where magistrates and staff are specially trained in therapeutic jurisprudence and restorative justice).

Spencer suggests that the traditional plea and sentencing process can be modified in small but important ways to improve efficacy. For example, a represented defendant often remains completely passive throughout the plea and sentencing processes – Spencer sees

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<sup>331</sup> Ibid.

<sup>332</sup> Ibid, 143.

<sup>333</sup> See Spencer, *To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts*, Paper delivered at the 2012 Conference on Law and Society, available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2083370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083370)>.

<sup>334</sup> Ibid, 2.

<sup>335</sup> Ibid.

this as a lost opportunity to engage him/her and to encourage behavioural change.<sup>336</sup> An understanding of therapeutic jurisprudence, including reference to behavioural science, could assist sentencing magistrates to motivate offenders to change – for example, by emphasising the impact of their actions on the victim.<sup>337</sup>

Spencer and her colleague Greg Connellan, informed by the work of Michael King in his Geraldton Alternative Sentencing Regime in WA (see **Appendix**), now routinely ask defence lawyers for permission to engage their clients directly, and use this opportunity to pose pointed questions and help the defendants devise plans to improve their behaviour.<sup>338</sup> These plans may be implemented while a sentence is deferred, or as part of a community corrections order under judicial supervision.<sup>339</sup>

Spencer points out that there are already programs (including the Court Integrated Services Program and the CREDIT Bail Support Program<sup>340</sup>) available to assist offenders with their plans in some mainstream courts, but most regional and rural courts do not have access to these programs.<sup>341</sup> She emphasises that targeting the offenders at highest risk of reoffending and building partnerships with the local community, as well as professional treatment and rehabilitation services, are the keys to successfully incorporating therapeutic jurisprudence techniques into mainstream court work with minimal extra resources (or even within existing resources).<sup>342</sup> On the role of Government, Spencer notes that former Attorney-General Hulls' Justice Statement (see Government Perspectives and Policies below) significantly supported therapeutic efforts within the Magistrates' Court, and says Government support generally (both in terms of policy and legislation) is "key to driving systemic and cultural change at all court levels."<sup>343</sup>

Despite her optimism and enthusiasm for a therapeutic approach, Spencer sounds some notes of caution. First, she notes that "[at] the present point in time...there has not been a structured evaluation of this offender-driven, solution-focused approach in Victoria and this is required."<sup>344</sup> In addition, she warns that performance measures and targets set for courts "may be at odds with trying to build a solution-focused culture" if they concentrate too much on throughput and short-term 'deliverables.'<sup>345</sup>

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<sup>336</sup> Ibid, 5-6.

<sup>337</sup> Ibid, 6-8.

<sup>338</sup> Ibid, 8-9.

<sup>339</sup> Ibid, 9-10.

<sup>340</sup> For details see **Appendix**.

<sup>341</sup> See Spencer, *To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts*, above n 333, 4-5.

<sup>342</sup> Ibid, 11-15 and 20.

<sup>343</sup> Ibid, 17.

<sup>344</sup> Ibid, 10.

<sup>345</sup> Ibid, 19-20.

*Recommendation 18: The Australian Government should be aware that progressive court initiatives may require, for example, extra time to deal with each offender on an individual basis, and this may reflect poorly in existing performance indicators. As such, governments at all levels should be encouraged to develop indicators which take into account longer-term prospects for rehabilitation and reductions in recidivism for alternative sentencing regimes.*

Many other prominent practitioners with significant relevant experience, including former heads of research agencies and parole boards or sentencing councils, as well as lawyers and sentencing judges, have called for more and/or strengthened alternative sentencing and diversionary programs.<sup>346</sup>

### Government Perspectives and Policies

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.<sup>347</sup>

In 2004, former Victorian Attorney-General Robert Hulls delivered the Victorian Justice Statement 2004-2014. Two of the action points in this Statement were:

- ‘Develop and implement a framework for problem solving approaches in the Magistrates’ Court to consistently address the underlying causes of offending behaviour by people from groups who are overrepresented in the criminal justice system’
- ‘Adopt a multidisciplinary approach to addressing the behaviour of people who may be mentally ill, have an intellectual disability, are dependent on drugs or who are homeless, and are caught up in a cycle of offending and punishment.’<sup>348</sup>

<sup>346</sup> See *National Justice Symposium Overview*, Jesuit Social Services 2011, above n 146, 3-5.

<sup>347</sup> *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.”

<sup>348</sup> Victorian Department of Justice, Attorney General’s Justice Statement: New Directions for the Victorian Justice System: 2004–2014 (May 2004) 52.

Victoria has since 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 successor Coalition Government in Victoria agreed in 2011 to continue funding these initiatives after consideration of the relevant reviews.<sup>349</sup> In addition, it has boosted funding for treatment programs and advice for homeless defendants,<sup>350</sup> 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.<sup>351</sup> However, it has also reduced sentencing options by abolishing home detention and some suspended sentences, as noted in **Part 2**.

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.<sup>352</sup> NSW has also pledged to expand the Forum Sentencing (restorative justice) scheme to all locations in which the Local Court sits,<sup>353</sup> 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.<sup>354</sup>

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,<sup>355</sup> and the abrogation of the principle for certain cases involving violence in Queensland<sup>356</sup> and Tasmania.<sup>357</sup>

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<sup>349</sup> See Rood, *Libs to keep 'apartheid' courts*, *The Age*, 8 April 2011: <<http://www.theage.com.au/victoria/lib-to-keep-apartheid-courts-20110407-1d66e.html>>.

<sup>350</sup> 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>>. Further details on the programs in question can be found in the **Appendix**.

<sup>351</sup> See <<http://sentencingcouncil.vic.gov.au/page/about-sentencing/sentencing-information/sentencing-options/sentencing-adults/community-correcti>>.

<sup>352</sup> 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>>.

<sup>353</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/forum\\_index](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/forum_index)>.

<sup>354</sup> See 'Youth drug court closure sparks debate,' *ABC 7.30 Program*, 3 July 2012, above n 135.

<sup>355</sup> For repeat property, trafficking and people smuggling offences. The Queensland Government in particular has apparently responded to political pressure on mandatory sentences: <<http://www.brisbanetimes.com.au/queensland/lmp-mandatory-sentencing-policy-goes-fullcircle-20120430-1xul7.html>>.

<sup>356</sup> See *Penalties and Sentences Act 1992* (Qld), 9(3).

<sup>357</sup> See *Sentencing Act 1997* (Tas), s 19.

The (in)compatibility of mandatory sentencing with human rights has been discussed many times.<sup>358</sup> The Victorian Government recently abolished the mandatory sentence for certain driving offences, as recommended by the Sentencing Advisory Council, due to statistics that showed the sentence (which was mainly converted to a suspended sentence) has in practice been replaced by fines and Community Correction Orders.<sup>359</sup> However, such winding back of mandatory sentences is unusual. 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.<sup>360</sup>

*Recommendation 19: The Australian Government should abolish mandatory minimum sentences of imprisonment in its own legislation, and encourage state and territory Governments to do the same. It should also discourage legislative dilution of the principle that imprisonment is a punishment of last resort, in accordance with both Common Law and human rights principles.*

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.<sup>361</sup> 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.<sup>362</sup>

The changes identified clearly had a disproportionate effect on Indigenous offenders, and seriously undermined efforts to reduce Indigenous overrepresentation. The subsequent decrease in overall prisoner numbers between 2010 and 2011 (see **Part 1**) had relatively little effect on the level of Indigenous overrepresentation.

<sup>358</sup> 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](http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf)>.

<sup>359</sup> See <<https://sentencingcouncil.vic.gov.au/content/publications/driving-while-disqualified-or-suspended-report>>.

<sup>360</sup> See Brown, 'The Limited Benefit of Prison in Controlling Crime,' above n 63. See also Weatherburn, *The effect of prison on adult reoffending*, above n 77.

<sup>361</sup> 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.

<sup>362</sup> *Ibid*, 5-6.

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 not guilty as a result of mental illness or intellectual disability.<sup>363</sup> 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.<sup>364</sup> 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.<sup>365</sup> Although the Guidelines are said to be a 'resource for different jurisdictions to devise policy positions and programs' rather than a 'consensus policy statement',<sup>366</sup> this was an excellent initiative which could be emulated in respect of other groups of vulnerable offenders.

*Recommendation 20: The Australian Government, through the National Justice CEOs Group, should develop (or encourage the development of) National Guidelines for Best Practice on Diversion and Support for other vulnerable offender groups identified in the present report – with the highest priority accorded to Indigenous offenders.*

## Opposing/Cautious Voices

### *On Therapeutic Justice and Problem-Solving Courts Generally*

Since the 1990s, both academic and practitioner commentators have been largely supportive of therapeutic justice and problem-solving court initiatives. However, some have warned of pitfalls, including:

- a paternalistic approach in 'getting people's lives on the right track' chosen by the State;<sup>367</sup>

<sup>363</sup> 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>>.

<sup>364</sup> See <[http://www.hreoc.gov.au/about/media/media\\_releases/2012/1\\_12.html](http://www.hreoc.gov.au/about/media/media_releases/2012/1_12.html)>.

<sup>365</sup> See <[http://www.aic.gov.au/en/crime\\_community/communitycrime/mental\\_health\\_and\\_crime/~media/aic/njceo/diversion\\_support.pdf](http://www.aic.gov.au/en/crime_community/communitycrime/mental_health_and_crime/~media/aic/njceo/diversion_support.pdf)>, 4.2.2.

<sup>366</sup> See <[http://www.aic.gov.au/en/crime\\_community/communitycrime/mental\\_health\\_and\\_crime/njceos.aspx](http://www.aic.gov.au/en/crime_community/communitycrime/mental_health_and_crime/njceos.aspx)>.

<sup>367</sup> See Petrla, 'Paternalism and the Unrealized Promise,' in *Law in a Therapeutic Key*, above n 102, 685; also Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder,' also in *Law in a Therapeutic Key*, 736.

- an unclear definition of ‘therapeutic’ and blurring of the line between health services, social sciences and the law;<sup>368</sup>
- risking victim dissatisfaction due to perceptions that alternative sentences are ‘soft options’;<sup>369</sup>
- the risk of undermining fundamental criminal justice notions such as predictability and equality in sentencing,<sup>370</sup> and even
- possible inconsistency of the role of a problem-solving judge with constitutional requirements of independence and impartiality.<sup>371</sup>

In 2008, the think tank Policy Exchange prepared a report for the UK Government entitled *Lasting Change or Passing Fad? Problem-Solving Justice in England and Wales*.<sup>372</sup> The report considered results from problem-solving courts in several countries. Overall, the report was supportive of the idea of problem-solving justice, but it cautioned:

[D]espite some early encouraging results, it is not clear whether these new experiments are simply a fad that will fade away over time, or the beginning of a fundamental shift in how the criminal justice system works and the way that the public interacts with judges, prosecutors, police officers, and other criminal justice officials.

One key challenge for problem-solving reformers in England and Wales is finding ways to encourage some of the entrepreneurial and more localised, energy that has powered the problem-solving reform movement in the United States. As impressive as the commitment of central government to problem-solving justice has been, there are some inherent limitations to the pursuit of a ‘top down’ strategy of policy reform – most notably, it tends to undermine buy-in from front-line police officers, magistrates, lawyers, and probation officers. This is particularly important for problem-solving justice, which seeks to engage local actors in solving local crime problems.

This reasoning seems equally applicable to Australian problem-solving court initiatives, and is similar to the admonitions of the risks of a ‘top-down’ approach presented by Hunter, Nolan, Marchetti and Daly (see **Part 2**). Although it is a natural tendency of policy-makers to develop policy for implementation by government agencies, in this area it is worth considering whether it is better for judges, magistrates and others working directly with offenders and victims to take the lead, with the Executive confined to a supporting role.

<sup>368</sup> See Slobogin, above, 766; also Bozza, ‘Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-solving Courts,’ 17 *Widener Law Journal* 97 (2007).

<sup>369</sup> 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.

<sup>370</sup> See eg Diesen, ‘Therapeutic Jurisprudence: an Introduction from a Swedish Perspective,’ above n 104, 157. See also *On Indigenous Sentencing Courts* section below.

<sup>371</sup> 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.

<sup>372</sup> See <[http://www.policyexchange.org.uk/images/publications/lasting\\_change\\_or\\_passing\\_fad\\_-\\_aug\\_09.pdf](http://www.policyexchange.org.uk/images/publications/lasting_change_or_passing_fad_-_aug_09.pdf)>.

The scientific basis for various aspects of problem-solving courts, including selection of the most appropriate offender participants<sup>373</sup> and suitability of judges to administer behavioural science techniques,<sup>374</sup> is at times unclear. No doubt over time selection processes will be refined and judicial training improved, but the latter in particular will require adequate funding and cooperation from experts in the relevant scientific fields.

Finally, the potential for problem-solving courts to blur the distinction between functions of the Executive and the Judiciary has been raised by commentators including Freiberg<sup>375</sup> and James Duffy of the Queensland University of Technology.<sup>376</sup> Duffy has conducted a detailed analysis, and he concludes that existing problem-solving courts are not likely to pose constitutional problems.<sup>377</sup> However, the appointment of judges who can maintain their independence and impartiality while engaging more closely with offenders is crucial.<sup>378</sup>

### *On Indigenous Sentencing Courts*

Dr Kylie Cripps, a Senior Lecturer at UNSW has criticised the Victorian case of *R v Morgan*,<sup>379</sup> which involved family violence even though family violence cases were not supposed to be dealt with by the Koori Court. She notes that the Koori Courts sit outside other integrated family violence frameworks and argues they should not hear family violence cases, even though the law only technically prevents them from hearing cases involving Intervention Orders. In Dr Cripps' view, the courts risk losing focus on the needs of victims by focussing too much on the needs of offenders.<sup>380</sup>

Morgan appealed in 2010, and the Court of Appeal held that participation in a 'sentencing conversation' (a restorative justice process involving the victim and Indigenous Elders) could be a mitigating factor in Koori Court sentencing, which further incensed critics. Writing in *The Weekend Australian Magazine*, Richard Guilliat pointed out that the Government had announced that Koori Courts would not hear family violence matters.<sup>381</sup> Mr Guilliat comments on the studies of NSW Circle Courts, the Victorian Children's' Koori Court and WA Community Court at Kalgoorlie (see **Part 2**) which showed no reduction in recidivism rates

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<sup>373</sup> See eg Sarteschi et al, 'Assessing the Effectiveness of Mental Health Courts: A quantitative review,' above n 109.

<sup>374</sup> See eg Bozza, 'Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-solving Courts,' above n 368.

<sup>375</sup> See 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' above n 107, 23.

<sup>376</sup> See Duffy, 'Problem-Solving Courts and the *Constitution*,' 25 *Melbourne University Law Review* (2011), 394.

<sup>377</sup> *Ibid*, 411.

<sup>378</sup> *Ibid*, 424-425.

<sup>379</sup> *R v Morgan* (Unreported, County Court of Victoria, Judge Lawson, 3 July 2009).

<sup>380</sup> See Cripps, 'Speaking up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence,' above n 369.

<sup>381</sup> See Guilliat, 'Justice in black and white,' *The Australian*, 22 October 2010:

<<http://www.theaustralian.com.au/news/features/justice-in-black-and-white/story-e6frg8h6-1225942356421>>.

compared with the traditional court system. In Guillatt's view, Indigenous sentencing courts are "costly, time-consuming and deal with only a small number of cases." He supports calls for money to be spent on youth services and rehabilitation rather than in the "duplication of the court process." At least one other commentator in the *Australian* has also strongly criticised the Koori Courts.<sup>382</sup>

### The Way Forward

Professor Freiberg has suggested a number of ways forward for policy-makers in Australia. One is to fund more problem-solving courts, building on the successes of existing programs. An alternative approach would be to encourage the mainstream courts to incorporate more of what has been learnt into their practices and procedures.<sup>383</sup> The Victorian Government is perhaps the most advanced Australian jurisdiction in policy development in this area.<sup>384</sup>

In the US the Center for Court Innovation, which specialises in problem-solving approaches to justice, is currently researching the possibility of incorporating such approaches into the practice of mainstream courts. Freiberg and others have endorsed the development of a centre to do comparable work here – preferably a cooperative enterprise involving the courts, Governments, the private and community sectors and universities.<sup>385</sup> There is already an Australian Centre for Court and Justice System Innovation, which is a joint initiative between Monash University and the Australasian Institute for Judicial Administration, and which has government representatives on its Advisory Board.<sup>386</sup>

*Recommendation 21: The Castan Centre endorses the recommendation to support work similar to that done by the US Center for Court Innovation in Australia, with a view to developing problem-solving courts and programs from a strong evidence base.*

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<sup>382</sup> See Faris, 'Kooris' court a waste of money,' *The Australian*, 9 May 2008:

<<http://www.theaustralian.com.au/business/legal-affairs/kooris-court-a-waste-of-money/story-e6frg986-111116285918>>.

<sup>383</sup> See Freiberg, 'Problem-oriented courts: an update,' above n 86, 214.

<sup>384</sup> See <<http://www.egov.vic.gov.au/victorian-government-resources/government-initiatives-victoria/law-and-justice-victoria/problem-solving-approaches-to-justice.html>>.

<sup>385</sup> See Freiberg, 'Problem-oriented courts: an update,' above n 86, 216-217. See also eg Spencer, *To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts*, above n 333, 21-22.

<sup>386</sup> See <<http://www.law.monash.edu.au/centres/accjsi/about-accjsi>>.

## Part 4 - Human Rights Assessment

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### 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.<sup>387</sup> 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).

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'<sup>388</sup>). 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. With few exceptions, a strong focus on rehabilitation is likely to lead to greater benefits for society than an overly punitive approach.<sup>389</sup>

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.<sup>390</sup>

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<sup>387</sup> 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).

<sup>388</sup> An example of 'message' sentencing: <<http://news.smh.com.au/breaking-news-world/riot-inciter-to-appeal-as-sentences-panned-20110818-1iylm.html>>.

<sup>389</sup> 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*, above n 77.

<sup>390</sup> 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](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](http://www.ombudsman.vic.gov.au/resources/documents/MonashConference_-_Mental_health_and_prisons_21_Feb_2012.pdf)>.

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.

### *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.

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.”<sup>391</sup> 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%,<sup>392</sup> and recent reports on prisons in WA,<sup>393</sup> Victoria<sup>394</sup> and SA<sup>395</sup> suggest that overcrowding is a growing problem. At their worst, overcrowded and generally substandard prison conditions may even lead to breaches of the

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<sup>391</sup> Report of the Working Group of the UPR, UN Doc A/HRC/17/10 (2011), Recommendations 86.93-94 (Austria).

<sup>392</sup> 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/wpb\\_country.php?country=192](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=192)>, 3.

<sup>393</sup> See Banks, ‘Bunbury Prison Overcrowded,’ *The West Australian*, 20 January 2012:

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

<sup>394</sup> 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>>.

<sup>395</sup> See

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

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....”<sup>396</sup> 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*.<sup>397</sup> 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 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.”<sup>398</sup>

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.<sup>399</sup> This view supports that of Derek Hunter (see **Part 3**), who emphasises the need to educate the public about alternative sentencing and diversion.

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*<sup>400</sup> (Tokyo Rules), the *UN Standard Minimum Rules for the Administration of Juvenile Justice*<sup>401</sup> (Beijing Rules) and the *UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*.<sup>402</sup> Specific relevant standards from these instruments and their application to Australia are set out in **Tables 1 to 10** below.

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<sup>396</sup> See <<http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html>>.

<sup>397</sup> See *Custodial and Non-custodial Measures: Alternatives to Incarceration*, UNODC/OSCE 2006, above n 57.

<sup>398</sup> *Ibid*, 1.

<sup>399</sup> *Ibid*, 2.

<sup>400</sup> Adopted by General Assembly resolution 45/110 (1990), text available at: <<http://www2.ohchr.org/english/law/tokyorules.htm>>.

<sup>401</sup> Adopted by General Assembly Resolution 40/33 (1985), text available at: <<http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>>.

<sup>402</sup> 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>>.

In 2006 and 2007 respectively, the UNODC also published a *Handbook on Restorative Justice Programs*<sup>403</sup> and a *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*.<sup>404</sup> 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.”<sup>405</sup> 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.<sup>406</sup>

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 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.<sup>407</sup>

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. In the tables below, the most relevant specific international obligations and standards are set out, with comments on Australia’s compliance and recommendations for improvement (where necessary or desirable).

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<sup>403</sup> See <[http://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf)>.

<sup>404</sup> See above, n 94.

<sup>405</sup> Ibid, 2.

<sup>406</sup> Ibid, 3.

<sup>407</sup> See *Alternatives to Incarceration*, UNODC, above n 57, 6.

Table 1: The International Covenant on Civil and Political Rights

Article	Comments
<i>Article 1(1): All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.</i>	Indigenous sentencing courts have been praised for allowing Indigenous communities to retain some measure of control over social problems in their communities, <sup>408</sup> which is essential for social development.
<i>Article 9(1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.</i>	<p>The HRCtte states that “[t]he drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law,” but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means inter alia that remand in custody pursuant to arrest must not only be lawful but reasonable in all the circumstances.”<sup>409</sup> Presumptions against bail, which are continually being legislated for a wider range of offences in Australia,<sup>410</sup> may undermine judicial assessment of reasonableness in this context.</p> <p>Disproportionate sentences, which might include prison sentences where less drastic alternatives are warranted, may also breach Article 9(1).<sup>411</sup></p>
<i>Article 9(3): Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained</i>	HRCtte jurisprudence urges States to prioritise the presumption of innocence and detain only as a last resort and for the shortest appropriate period. <sup>412</sup> However, median periods of remand in Australia range from 2.8 months to as high as 9.9 for certain offences, <sup>413</sup> and delays between arrest and

<sup>408</sup> See Wallace, ‘Nowra Circle Sentencing: Seven Years Down the Track,’ 7 *Indigenous Law Bulletin* 16 (Jan/Feb 2010), 13-16.

<sup>409</sup> See *Marinich v Belarus*, Communication 1502/2006, Views of 19 August 2010, [10.4].

<sup>410</sup> See eg ss 8A-8F of the *Bail Act 1978* (NSW), which provide that bail may only be granted in ‘exceptional circumstances’ for the relevant offences; also s 10A of the *Bail Act 1985* (SA), s 7A(2) of the *Bail Act* (NT) etc.

<sup>411</sup> See *Fernando v Sri Lanka*, Communication 1189/2003, Views of 10 May 2005, [9.2].

<sup>412</sup> See eg *Hill v Spain*, Communication 526/1993, Views of 2 April 1997, [12.3] and *Kulov v Kyrgyzstan*, Communication 1369/2005, Views of 19 August 2010, [8.3]. On delay, see eg *Smantser v Belarus*, Communication 1178/2003, Views of 17 November 2008, [10.3].

<sup>413</sup> See *Prisoners in Australia 2011: Prisoner Characteristics, Australia: Unsentenced Prisoners*, ABS, 2011: <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/6627A96DA080E829CA25795F000DB33E?opendocument>> A review of the *Bail Act 1978* (NSW) revealed that the mean time spent on remand in NSW was almost 6 months as at 30 June 2009 – See

*in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

trial in the lower courts continue to leave room for improvement.<sup>414</sup>

It is the view of the HRCtte that “pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party”<sup>415</sup> Yet tougher tests for, and even presumptions against, bail, based on the offence committed rather than future risk, are on the increase in Australia.<sup>416</sup>

In 2005 the Criminology Research Council published research which showed that differences in bail legislation had a very significant effect on the rates and proportions of detainees on remand in each State/Territory.<sup>417</sup>

In 2006, the AIC found that the proportion of remanded prisoners had increased from 12 to 20% between 1984 and 2004, and that drug and mental health issues had played a significant role.<sup>418</sup>

In 2007 a Victorian Law Reform Commission review of that State’s bail laws recommended that all presumptions against bail and ‘reverse onuses’ be removed from the legislation. It also recommended special consideration for Indigenous offenders and other marginalised groups.<sup>419</sup> This review should be studied by other jurisdictions with similar provisions.

In 2008, research into bail use in SA found it

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<[http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/review\\_of\\_bail\\_in\\_nsw\\_oct\\_2010.pdf](http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/review_of_bail_in_nsw_oct_2010.pdf)>, 17.

<sup>414</sup> See eg *Long-term trends in trial court delay in NSW*, BOCSAR 2004:

<[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_cjb82](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb82)>.

<sup>415</sup> See *Hill v Spain*, above n 412, [12.3].

<sup>416</sup> See eg Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, BOCSAR 2010: <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/bb49.pdf/\\$file/bb49.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/bb49.pdf/$file/bb49.pdf)>.

<sup>417</sup> See <<http://www.criminologyresearchcouncil.gov.au/reports/2005-11-remand.pdf>>.

<sup>418</sup> See *Remand in Custody: critical factors and key issues*, AIC 2006:

<<http://www.aic.gov.au/documents/8/D/E/%7B8DE2E6F6-9D25-45E8-AED0-39FA7CC9EA79%7Dtandi310.pdf>>.

<sup>419</sup> See <<http://www.lawreform.vic.gov.au/projects/bail/review-bail-act-final-report>>.

could have significant therapeutic benefits when supervision was focussed on the individual (although overly close supervision could be counter-productive).<sup>420</sup>

*Article 10(2)(a): Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons*

Commentators in several Australian jurisdictions have noted failures to separate those on remand (including young offenders) from convicted persons.<sup>421</sup>

Australia's reservation to this article is acknowledged, but it should be withdrawn as recommended by the HRCttee.<sup>422</sup> In the meantime, it should not prevent the Government from striving to uphold this important guarantee.

*Article 10(3): The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation....*

Arguably, the focus in Australian criminal justice discourse is more on prevention of crime through keeping those perceived to be dangerous locked up and sending a 'tough on crime message,' rather than reformation and rehabilitation of offenders.

Although the present report is about alternatives to imprisonment rather than conditions of imprisonment, greater focus on rehabilitation in the criminal justice system as a whole would be of benefit to the community in the long term, because the vast majority of prisoners will eventually return to society and bring their prison experiences with them.<sup>423</sup> In addition, a well-resourced, rehabilitative prison system

<sup>420</sup> See Mather, 'Bail supervision and young people: pathway or freeway?' 10 *Flinders Journal of Law Reform* 3 (2007-2008), 675.

<sup>421</sup> See eg *Remodelling Corrections for Juveniles and Young Men*, WA Office of the Inspector of Custodial Services 2009 (direct link not available); also *Young people on remand in Victoria: Balancing individual and community interests*, Jesuit Social Services 2010: <[http://www.jss.org.au/files/Docs/policy-and-advocacy/publications/Young\\_people\\_in\\_remand\\_in\\_Victoria\\_-\\_Balancing\\_individual\\_and\\_community\\_interests.pdf](http://www.jss.org.au/files/Docs/policy-and-advocacy/publications/Young_people_in_remand_in_Victoria_-_Balancing_individual_and_community_interests.pdf)>, 67; *Northern Territory: Key Moments in Penal Culture 1970-Present*, UNSW Australian Prisons Project 2008: <<http://www.app.unsw.edu.au/key-moments-penal-culture-northern-territory-1970-present>>, 28; Human Rights for prisoners: the ACT experience, ACT Human Rights Commissioner (Speech delivered at NSW State Library, 5 September 2009): <<http://www.hrc.act.gov.au/content.php/content.view/id/309>>.

<sup>422</sup> See Concluding Observations on Australia, above n 54, [9].

<sup>423</sup> The Tasmanian Government acknowledges this in its publication *Breaking the Cycle: Tasmania Corrections Plan 2010-2020 Discussion Paper*, Tasmanian Department of Justice: <[http://www.justice.tas.gov.au/correctiveservices/breaking\\_the\\_cycle/documents/Breaking\\_the\\_Cycle\\_Discussion\\_Paper.pdf](http://www.justice.tas.gov.au/correctiveservices/breaking_the_cycle/documents/Breaking_the_Cycle_Discussion_Paper.pdf)>, 4.

gives sentencing judges a viable option when rehabilitation in the community is not possible.

In light of its international obligations in this regard, the Australian Government should encourage the states and territories to take a more positive approach.

*Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....*

As discussed, the right to equality and fair treatment before the courts does not necessarily dictate exactly the same trial process for all. If, for reasons such as cultural difference or disability, offenders require modified trial processes, such processes promote equality rather than undermine it.

The HRCtte has expressed concern that Australia does not provide sufficient access to justice for marginalised groups as this article requires.<sup>424</sup>

*Article 23(1): The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Sentences which remove regionally-based offenders, and particularly Indigenous offenders, from their family and community potentially infringe upon this right. The provision of programs and services in regional areas has been identified as a significant problem.<sup>425</sup>

*Article 24(1): Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

Custodial sentences for parents and providers are a significant issue. According to the Australian Institute of Family Studies, 38,000 Australian children have a parent in prison on any given day. The Institute notes that “[d]espite...concerns and the growing nature of the problem, these children remain largely invisible, and do not feature as a priority for government policy and statutory welfare bodies.”<sup>426</sup>

A project on Bail and Remand Experiences for Indigenous Queenslanders also found that financial stress is placed on family members when the primary income earner is

<sup>424</sup> See Concluding Observations on Australia, above n 54, [25].

<sup>425</sup> This is particularly a problem in larger States with more remote communities such as WA. The WA Parole Board has identified that “often the only way for an Aboriginal prisoner to access programs is to transfer to another prison sometimes long distances from the offender’s community. This adds to cultural and community dislocation” – see Parole Board of WA, Annual Report (June 2005), 8, 12.

<sup>426</sup> See <<http://www.aifs.gov.au/afrc/pubs/newsletter/frq019/frq019-3.html>>.

assigned to long-term residential programs.<sup>427</sup>

*Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

On Indigenous equality, see **Table 3** below.

The achievement of substantive equality requires governments to take special measures to address the disproportionate effect that imprisonment has on other vulnerable groups, including some female offenders, young offenders and offenders with a disability. See further **Tables 4, 6 and 7** below.

*Recommendation 22: In accordance with the requirements of article 9(3) of the ICCPR, The Australian Government should encourage jurisdictions with legislative presumptions against bail and ‘reverse onus’ provisions to remove them, as recommended by the Victorian Law Reform Commission.*

*Recommendation 23: Given that article 10(2)(a) of the ICCPR already provides an ‘exceptional circumstances’ exception, Australia should withdraw its reservation to this article and strive to uphold the important guarantee it contains.*

*Recommendation 24: In light of its international obligations in respect of a criminal justice system focussed on rehabilitation, the Australian Government should discourage ‘tough on crime’ initiatives which give undue priority to punishment.*

*Recommendation 25: In remote areas, the Government should increase funding for custody and/or remand facilities to obviate the practice of transportation away from an offender’s family and community, which may be inconsistent with article 23(1) of the ICCPR.*

<sup>427</sup> See <<http://www.premiers.qld.gov.au/publications/categories/reports/assets/exploring-bail-and-remand-experiences.pdf>>.

Table 2: The International Covenant on Economic, Social and Cultural Rights

Article	Comments
<i>Article 1(1): All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.</i>	See article 1(1) ICCPR ( <b>Table 1</b> ) above.
<i>Article 6(1): The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.</i>	The right to work will obviously be seriously affected by any sentence of imprisonment, and this should be a consideration in sentencing. Alternative sentences such as home detention or conditional release may also produce a negative outcome overall if they unduly infringe upon this right, but have the potential to be more consistent with it.
<i>Article 10(1): The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children....</i>	See article 23(1) ICCPR ( <b>Table 1</b> ) above.
<i>Article 12(1): The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</i>	Serious deficiencies in the provision of health care to imprisoned offenders in Australia have been identified by, amongst others, the Australian Institute of Health and Welfare, <sup>428</sup> the Victorian Ombudsman <sup>429</sup> and the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Anand Grover. <sup>430</sup>  For the time being, it seems clear that non-custodial sentences have the potential to produce better health outcomes than imprisonment.

<sup>428</sup> *The Health of Australian Prisoners*, AIHW 2010: <<http://www.aihw.gov.au/publication-detail/?id=10737420111andtab=2>>, Chapter 5.

<sup>429</sup> See *Investigation into prisoner access to health care*, Ombudsman Victoria, 2011: <[http://www.ombudsman.vic.gov.au/resources/documents/Investigation\\_into\\_prisoner\\_access\\_to\\_health\\_care.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_prisoner_access_to_health_care.pdf)>.

<sup>430</sup> See *Report of the Special Rapporteur...on Mission to Australia*, A/HRC/14/20/Add.4, available at: <<http://www2.ohchr.org/english/issues/health/right/visits.htm>>, Section IV.

*Article 13(1): The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

Just as the right to work may be impermissibly infringed by detention; so might the right to education of juvenile offenders. See further **Table 6** below.

Table 3: The Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article	Comments
<p><i>Article 5(a): The right to equal treatment before the tribunals and all other organs administering justice</i></p>	<p>The Indigenous incarceration rate discussed in <b>Part 1</b> strongly suggests that the Australian criminal justice system as a whole is not living up to the standard of equal treatment required of it by the CERD. Formal equality, as propounded by critics of alternative solutions such as circle sentencing,<sup>431</sup> should not be confused with substantive equality, which may only be achieved through measures to address the ongoing problem of extremely high incarceration rates for Indigenous people. In the ACT, the NT and Queensland, there is legislation which requires sentencing courts to consider the offender’s cultural background.<sup>432</sup> Such provisions can be of assistance in ensuring respect for article 5(a).</p>

*Recommendation 26: The Government should increase its support for measures such as Circle Courts and Indigenous-specific diversion programs. In addition, other jurisdictions should be encouraged to duplicate provisions in ACT, NT and Queensland legislation requiring sentencing courts to consider an offender’s cultural background.*

<sup>431</sup> See Faris, ‘Kooris’ court a waste of money,’ above n 382.

<sup>432</sup> *Crimes (Sentencing) Act 2005* (ACT), s 33(m); *Sentencing Act 1995* (NT), s 104A and *Penalties and Sentences Act 1992* (Qld) s 9(2)(p). Cf *Crimes Act 1914* (Cth), s 16A(2A).

Table 4: The Convention on the Elimination of All Forms of Discrimination against Women

Article	Comments
<p><i>Article 15(1): States Parties shall accord to women equality with men before the law.</i></p>	<p>Far fewer women than men are incarcerated in Australia. In addition, there are specialised women’s institutions in most jurisdictions. Compared with other groups identified in the present report, women are not overrepresented in incarceration statistics in Australia.</p> <p>However, there is evidence to suggest that females are treated as ‘second class prisoners’ in some facilities,<sup>433</sup> and the ABS’ <i>Prisoners in Australia</i> surveys have revealed that female incarceration is increasing at a faster rate than that of males, with females increasing 35% and males 29%, since 2001.<sup>434</sup> Before an unusual decrease in 2011, the growth rate for females between 2001 and 2010 was nearly double that for males.<sup>435</sup> This trend has already resulted in severe overcrowding in some women’s prisons,<sup>436</sup> and warrants close monitoring.</p>

<sup>433</sup> See eg *Women do it tougher, even in jail*, Civil Liberties Australia 2011: <<http://www.cla.asn.au/0805/index.php/articles/articles/women-do-it-even-tougher-1>>.

<sup>434</sup> See <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/1F2BD14CF87EE4AFCA25751B001AC5FA?OpenDocument>>.

<sup>435</sup> See <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyReleaseDate/F0D73066C1F8B94ECA25795F000DBCE9?OpenDocument>>.

<sup>436</sup> See eg ‘Women prisoners sleep on the floor,’ *The West Australian*, 2 July 2012: <<http://au.news.yahoo.com/thewest/a/-/breaking/14100065/women-prisoners-sleep-on-the-floor>>.

Table 5: The Convention against Torture

Article	Comments
<p><i>Article 16: Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity....</i></p>	<p>Cruel, inhuman or degrading treatment or punishment as defined in the Convention are most likely to occur in places of detention, where individuals' personal circumstances are beyond their own control and where they are out of public sight.</p> <p>Examples of such treatment have been seen in police and private security custody in recent years.<sup>437</sup></p> <p>Restriction of reliance on remand and administrative detention in particular, as well as detention generally, should help to minimise the possibility of such incidents in the future.</p>

The UN Committee on the Rights of the Child (CRC) has urged States to develop comprehensive juvenile justice policies, drawing on the expertise of the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund, the UNODC and non-governmental organisations,<sup>438</sup> as well as children and their parents at the domestic level.<sup>439</sup> The key elements of such a policy are non-discrimination, respect for the best interests of the child, respect for the right to life, survival and development, respect for the child's right to be heard and respect for his/her dignity.<sup>440</sup>

The CRC urges States parties to emphasise prevention of juvenile delinquency over punishment. It calls for policy to integrate the UN *Guidelines for the Prevention of Juvenile Delinquency* of 1990 (Riyadh Guidelines).<sup>441</sup> These Guidelines provide helpful guidance on social policy measures to complement juvenile justice measures. Generally speaking, Australian policy in this area is well developed and meets most of the guidelines already, but

<sup>437</sup> See eg 'Government pleads guilty in Mr Ward death,' *WA Today*, 5 May 2011: <<http://www.watoday.com.au/wa-news/government-pleads-guilty-in-mr-ward-death-20110505-1e9s3.html>>; see also eg *The Use of Taser Weapons by WA Police*, WA Corruption and Crime Commission, October 2010: <<http://www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202010/Full%20Report%20-%20Use%20of%20Taser%20Weapons%20by%20WAPOL.pdf>>; 'Finding of Inquest into the Death of Mulrunji,' Queensland Coroner's Court 2006: <<http://www.courts.qld.gov.au/mulrunji270906.pdf>>; also eg Michael Reed 'Man Who Died Inside Melbourne Assessment Prison was Unconscious for Almost 1 Hour, Left Untreated', *The Courier Pigeon*, (1 December 2010): <<http://thecourierpigeon.com.au/man-who-died-inside-melbourne-assessment-prison-was-unconscious-for-almost-1-hour-left-untreated/85315>>.

<sup>438</sup> Committee on the Rights of the Child, General Comment 10 (25 April 2007), UN Doc CRC/C/GC/10, [4].

<sup>439</sup> *Ibid*, [20].

<sup>440</sup> *Ibid*, [5-14].

<sup>441</sup> *Ibid*, [17]. Text of the Riyadh Guidelines available at: <<http://www1.umn.edu/humanrts/instree/i2ungpid.htm>>.

there are exceptions, such as the recommended prohibition of harsh or degrading punishments for children at home and in schools.<sup>442</sup> The CRC advises that prevention programs should ‘focus on support for particularly vulnerable families,’ and extend ‘special care and attention to young persons at risk.’<sup>443</sup> It notes the preventive benefits of good quality early childhood education<sup>444</sup> – which is fortunately already a high priority for the Australian Government.<sup>445</sup>

Table 6: The Convention on the Rights of the Child

Article	Comments
<p><i>Article 12:</i></p> <p><i>(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.</i></p> <p><i>(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.</i></p>	<p>The Committee considers respect for this right to be ‘fundamental for a fair trial.’<sup>446</sup> However, the AHRC’s joint study with the ALRC <i>Seen and Heard: Priority for Children in the Legal Process</i> revealed that “[m]uch of the language used by Australian judges and magistrates in relation to sentencing is confusing and alienating for children.”<sup>447</sup> The study recommended better resourcing for duty solicitors to ensure children’s particular need for extra explanation is met.<sup>448</sup></p>
<p><i>Article 28: States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity....</i></p>	<p>Studies have shown clear links between a lack of education and crime.<sup>449</sup> In addition, the AIC has noted that ‘[m]any offenders have education and skill levels well below the Australian average and are more likely to</p>

<sup>442</sup> Riyadh Guidelines, above, Guideline 54. The Committee on the Rights of the Child has consistently criticised Australia for allowing corporal punishment of children ‘under the label of so-called “reasonable chastisement”’ – see Concluding Observations on Australia, June 2012 (UN Doc CRC/C/AUS/CO/4), [43-44].

<sup>443</sup> CRC General Comment 10, above n 438, [18].

<sup>444</sup> Ibid, [19].

<sup>445</sup> See <<http://www.mychild.gov.au>>.

<sup>446</sup> See CRC General Comment 10, above n 438, [44].

<sup>447</sup> See <[http://www.hreoc.gov.au/human\\_rights/briefs/brief\\_2.html](http://www.hreoc.gov.au/human_rights/briefs/brief_2.html)>. The full report is available at: <<http://www.austlii.edu.au/au/other/alrc/publications/reports/84>> and pertinent section is entitled *Children’s voice in the sentencing process* [19.81-19.87].

<sup>448</sup> Ibid, Recommendation 245.

<sup>449</sup> See eg Lochner and Moretti, ‘The Effect of Education on Crime: Evidence from Prison Inmates, Arrests and Self-Reports,’ 94 *American Economic Review* 1 (2004), 155.

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be unemployed, which has an impact on their health and ability to find housing.<sup>450</sup> As such, detention of juveniles which interrupts their education is likely to be counter-productive in terms of reducing offending. Short sentences are a particular problem, because the waiting lists for prison education programs can be long.<sup>451</sup> Alternatives which allow the juvenile offender to continue education in the community are therefore to be preferred.

*Article 37(b): No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

There has been a substantial increase nationally in the use of remand for juvenile offenders.<sup>452</sup> The widespread use of remand is not only expensive and ineffective in reducing crime;<sup>453</sup> it is also incompatible with article 37(b).<sup>454</sup>

*Article 37(c): Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*

As with Article 10(2)(a) of the ICCPR, Australia has a reservation to this article in respect of separation of adult and child offenders.

In the *Seen and Heard* report, the ALRC reported that evidence presented to its inquiry showed “[i]t is not uncommon for children to be detained side by side with hardened adult criminals.”<sup>455</sup> The ALRC recommended Australia withdraw this reservation and ensure there are separate facilities for children and young adults in all jurisdictions.<sup>456</sup>

In its periodic review of Australia in June 2012, the Committee on the Rights of the Child recommended Australia “strengthen its

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<sup>450</sup> See *Reducing recidivism through vocational education and training programs*, AIC 2008: <<http://www.aic.gov.au/documents/F/6/8/%7BF6809B19-BF61-4531-9A2F-BE9808CC383B%7Dcrn065.pdf>>.

<sup>451</sup> Ibid.

<sup>452</sup> See Richards, *Trends in Juvenile Detention in Australia*, AIC 2011, above n 22; also Bargaen, ‘Embedding Diversion and Limiting the Use of Bail in NSW: A Consideration of the Issues Related to Achieving and Embedding Diversion into Juvenile Justice Practices,’ 21 *Current Issues in Criminal Justice* 3 (2010) 467.

<sup>453</sup> See Bargaen, above, at 468-469.

<sup>454</sup> See CRC General Comment 10, above n 438, [80-81].

<sup>455</sup> See *Seen and Heard*, above n 447, [20.108].

<sup>456</sup> Ibid, Recommendations 271-272.

efforts towards a full withdrawal of this reservation.<sup>457</sup> The Castan Centre strongly supports this recommendation.

*Article 40(1): States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

This obligation is also reflected in Article 14(4) of the ICCPR. The Committee states that it applies equally to recidivist children and should not be limited to the most minor offences.<sup>458</sup>

It is a broadly-drawn critically important right which can only be fulfilled through multiple complementary measures. Some such measures, including restorative justice processes, are discussed below in **Table 9**.

*Article 40(3): States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:*

*(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;*

*(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.*

The minimum age of criminal responsibility has been standardised at 10 years in all states and territories since the 1990s.<sup>459</sup> Although the Convention does not specify a recommended minimum, countries which set it at less than 12 years have been criticised by the Committee on the Rights of the Child.<sup>460</sup>

Diversionary options such as verbal and written warnings, formal cautions, restorative justice conferencing and referral to various programs exist in each state and territory (see **Appendix** for details), but according to the AHRC, 'the extent of their use varies considerably among jurisdictions.'<sup>461</sup> See further **Table 9** below.

*Article 40(4): A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to*

Such dispositions are generally available in each state and territory, as outlined in **Part 2**. However, there is constant funding pressure on counselling, education and training services which may undermine

<sup>457</sup> See Concluding Observations on Australia, above n 442, [10].

<sup>458</sup> See CRC General Comment 10, above n 438, [23-25].

<sup>459</sup> See Urbas, *The Age of Criminal Responsibility*, AIC 2000:

<<http://www.aic.gov.au/documents/0/0/A/%7B00A92691-0908-47BF-9311-01AD743F01E1%7Dt181.pdf>>.

<sup>460</sup> See eg Concluding Observations on the 3<sup>rd</sup> and 4<sup>th</sup> Periodic Reports of Great Britain and Northern Ireland, CRC/C/GBR/CO/4, 20 October 2008:

<<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>>, [77].

<sup>461</sup> See AHRC, *Human Rights Brief No. 5*: <[http://www.hreoc.gov.au/human\\_rights/briefs/hrbrief5.pdf](http://www.hreoc.gov.au/human_rights/briefs/hrbrief5.pdf)>.

*institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.* efforts by the criminal justice system to reduce offending.<sup>462</sup>

*Recommendation 27: Australian policy on juvenile justice should incorporate the Guidelines for the Prevention of Juvenile Delinquency of 1990 (Riyadh Guidelines), as recommended by the Committee on the Rights of the Child.*

*Recommendation 28: Funding for children's legal representation should be increased, because it is critical to ensuring their right to be heard and to express themselves in the criminal justice process.*

*Recommendation 29: The Australian Government should make it clear to states and territories that remand for juveniles – in particular for long periods – may be contrary to article 37(b) of the Convention on the Rights of the Child.*

*Recommendation 30: The Committee on the Rights of the Child has recommended that Australia increase its efforts to withdraw its reservation to article 37(c) of the Convention on the Rights of the Child – the Castan Centre strongly supports this recommendation.*

*Recommendation 31: Constant funding pressure on counselling, education and training services for young people makes diversion from the criminal justice system more difficult – the Australian Government should increase funding to relevant institutions with a view to assisting in crime prevention, as well as for their own sake.*

<sup>462</sup> See eg <<http://justicereinvestmentnow.net.au/faq>>.

The overrepresentation of offenders with disabilities, in particular cognitive disabilities, identified in **Part 1** suggests that article 5(1) of the CRPD, which requires non-discrimination and equal treatment before the law, is not being adequately respected in Australia.

Table 7: Convention on the Rights of Persons with Disabilities

Article	Comments
<p><i>Article 12(2): States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.</i></p>	<p>A Monash University study into the potential impact of the Convention on detention of persons with mental health issues noted that this article has “already influenced a number of Australian government law reform enquiries into mental health and guardianship laws”<sup>463</sup> despite Australia’s declaration that substituted decision-making would be retained as a last resort and subject to safeguards.</p> <p>Such enquiries are timely, because it seems that the legal capacity of disabled persons has been undermined in several disturbing cases such as that of Marlon Noble, discussed in <b>Part 3</b> above, as well as others in similar situations identified in investigations by journalists.<sup>464</sup></p>
<p><i>Article 14(1): States Parties shall ensure that persons with disabilities, on an equal basis with others:</i></p> <p><i>(a) Enjoy the right to liberty and security of person;</i></p> <p><i>(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.</i></p>	<p>Academics and the UN Office of the High Commissioner for Human Rights have argued that “Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished.... This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.”<sup>465</sup></p>

<sup>463</sup> See McSherry and Wilson, ‘Detention and Treatment Down under: Human Rights and Mental Health Laws in Australia and New Zealand,’ 19 *Medical Law Review* 4 (2011), 548 at 573.

<sup>464</sup> See eg *Mentally ill in jail ‘tantamount to torture,’* ABC Lateline, 25 June 2012: <<http://www.abc.net.au/lateline/content/2012/s3532797.htm>>.

<sup>465</sup> See *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights*

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As in the context of article 9 of the ICCPR, Australia may face allegations of arbitrary detention under article 14 of the CRPD. In order to avoid a finding of arbitrariness, the Australian Government should take measures to ensure that those with disabilities are not detained when less invasive alternatives are available.<sup>466</sup>

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### *Other International Standards*

The Tokyo Rules were adopted by the UN General Assembly in 1990. They are expressed to “provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.”<sup>467</sup> This emphasises that alternative punishments, while likely to be better from a human rights perspective than imprisonment, must still be subject to safeguards to ensure they conform to human rights principles. The Rules are also “intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.”<sup>468</sup>

In passing the Tokyo Rules, the General Assembly referred to previous UN Congresses on the Prevention of Crime and the Treatment of Offenders, which had been working since 1980 on alternatives to imprisonment.<sup>469</sup> The preamble to the relevant Resolution states that the General Assembly is “convinced that alternatives to imprisonment can be an effective means of treating offenders within the community to the best advantage of both the offenders and society.” The resolution calls upon member States to apply the Tokyo Rules in their policies and practice.<sup>470</sup> It also requests States to report every five years on the implementation of the Rules<sup>471</sup> – an exercise which would have the benefit of formalising Australian Government monitoring of the use of non-custodial measures across Australia.

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*of Persons with Disabilities*, UN Doc A/HRC/10/48, (2009):

<<http://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf>> [49]. See also eg Minkowitz, ‘Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities,’ in *Rethinking Rights-Based Mental Health Laws*, Hart, Oxford 2010, 167.

<sup>466</sup> See eg *Shams et al*, Communications 1255-1288/2004, Views of 11 September 2007, [7.2].

<sup>467</sup> UN Doc A/45/49 [1990], available at: <<http://www2.ohchr.org/english/law/tokyorules.htm>>, [1.1].

<sup>468</sup> *Ibid*, [1.2].

<sup>469</sup> See Resolution 45/110 of 14 December 1990, UN Doc A/RES/45/110:

<<http://www.un.org/Depts/dhl/resguide/r45.htm>> .

<sup>470</sup> *Ibid*, [3].

<sup>471</sup> *Ibid* [5].

*Recommendation 32: The Australian Government should consider preparing regular reports for the General Assembly on the implementation of the Tokyo Rules.*

**Table 8: The Tokyo Rules**

Rule	Comments
<i>2.3 - In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.</i>	The (mainstream) Australian courts have long had a selection of non-custodial penalties available to them, and the alternative and specialist courts surveyed in <b>Part 2</b> of this report are beginning to increase and tailor this selection to provide the flexibility and range required by Rule 2.3. The Australian Government should encourage and support this expansion.
<i>2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.</i>	To date, many alternative courts and sentencing/diversion programs remain in the pilot stage due to a reluctance to commit to long-term funding. In addition, evaluations have not been undertaken on a regular, ongoing basis (see <b>Part 3</b> ). The Australian Government should take steps to assist responsible state and territory Governments in these endeavours.
<i>3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.</i>	In most Australian jurisdictions, non-custodial measures are based on magistrates' discretion. With the potential drawbacks of overregulation in mind, the Australian Government should consider developing model national legislation on non-custodial measures.
<i>3.4 Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.</i>	Most of the alternative sentencing regimes and diversionary programs covered in the <b>Appendix</b> require an offender's consent. However, many also require the offender to

3.5 Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

3.6 The offender shall be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights in the implementation of non-custodial measures.

3.7 Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.

3.8 Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.

3.9 The dignity of the offender subject to non-custodial measures shall be protected at all times.

plead guilty – a prerequisite which has been criticised on procedural fairness grounds.<sup>472</sup>

This does not appear to be an issue for any of the courts listed in the **Appendix**. However, for vulnerable offenders the ability to appeal may not coincide with the capacity to do so.

Offenders can take their complaints directly to the courts in the ACT and indirectly in Victoria under those jurisdictions' human rights legislation. In other jurisdictions, complaints can be made to the relevant oversight bodies, including Ombudsmen and Human Rights Commissions.

The ACT and Victoria have specific legislative protection for those involved in the criminal justice system, but only the ACT provides a free-standing right of action for breaches of human rights.

The widespread use of involuntary seclusion and restraint in psychiatric wards has been criticised as dangerous by patient advocacy groups,<sup>473</sup> and should be treated as a last resort like imprisonment (see further **Table 10** below).

Court-ordered public shaming is a feature of alternative punishments in, for example, the United States,<sup>474</sup> but does not appear to have occurred in Australia. However, the potential of shaming to contribute to sentencing goals of retribution and deterrence has been considered in the NSW Court of Criminal Appeal<sup>475</sup> and commentators have noted the problematic nature of the Australian news media's power

<sup>472</sup> See eg Diesen, 'Therapeutic Jurisprudence: an Introduction from a Swedish Perspective,' above n 104, 159.

<sup>473</sup> See eg *Ending Seclusion and Restraint in Australian Mental Health Services*, NMHCCF 2010: <<http://www.nmhccf.org.au/documents/Seclusion%20and%20Restraint.pdf>>.

<sup>474</sup> See eg Flanders, 'Shame and the Meanings of Punishment,' 54 *Cleveland State Law Review* (2006), available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=967521](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967521)>. Flanders cites examples in which offenders have been forced to parade in public wearing signs proclaiming their culpability, or for those convicted of drink driving to put special bumper stickers on their car averting to their convictions (see 2-3).

<sup>475</sup> See Chappell and Lincoln, 'Abandoning identity protection for juvenile offenders,' 18 *Current Issues in Criminal Justice* 3 (2007), 481.

	<p>to compound punishments through shaming.<sup>476</sup> The use of public shaming is <i>prima facie</i> contrary to this Rule, and should especially be discouraged for vulnerable offenders.</p>
<p>3.10 <i>In the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.</i></p>	<p>This is a particular concern in the mental health arena, where offenders referred for treatment may face inappropriate medication or seclusion and restraint.<sup>477</sup> Researchers have also identified ethical concerns with compulsory drug treatment programs, which can have unintended consequences,<sup>478</sup> especially over the long term.<sup>479</sup></p>
<p>3.11 <i>In the application of non-custodial measures, the offender's right to privacy shall be respected, as shall be the right to privacy of the offender's family.</i></p>	<p>The Castan Centre has previously recommended that the Australian Government consider implementing a statutory right of privacy.<sup>480</sup> Existing legislative privacy protections relate mainly to personal data and do not extend to protection of the private lives of offenders undertaking alternative punishments. The right to privacy is, however, protected under the Victorian Charter and ACT Human Rights Act.<sup>481</sup></p>
<p>3.12 <i>The offender's personal records shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the offender's case or to other duly authorized persons.</i></p>	<p>Existing Australian privacy protections are applicable in these circumstances.</p>
<p>5.1 <i>Where appropriate and compatible with the legal system, the police, the prosecution</i></p>	<p>Police and prosecutors generally have the appropriate discretion in Australia, and</p>

<sup>476</sup> See eg Hess and Waller, *Naming and Shaming: Media justice for summary offenders in a regional community?* Deakin University School of Communication and Creative Arts, 2010: <<http://www.deakin.edu.au/buslaw/law/rrjc/papers/hesskwallerl.pdf>>.

<sup>477</sup> See eg *Not for Service*, Mental Health Council of Australia 2005, above n 53.

<sup>478</sup> See *Compulsory Treatment in Australia*, Australian National Council on Drugs Research Paper 2007: <[http://www.ncd.org.au/images/PDF/Researchpapers/rp14\\_compulsory\\_treatment.pdf](http://www.ncd.org.au/images/PDF/Researchpapers/rp14_compulsory_treatment.pdf)>, 23.

<sup>479</sup> See eg Hall and Lucke, *Legally coerced treatment for drug using offenders: ethical and policy issues*, BOCSAR 2010: <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB144.pdf/\\$file/CJB144.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB144.pdf/$file/CJB144.pdf)>, 2.

<sup>480</sup> See *Submission on Commonwealth Government's Issues Paper: A Statutory Cause of Action for Serious Invasion of Privacy*, Castan Centre 2011: <<http://www.law.monash.edu.au/castancentre/publications/privacy-cause-of-action-sub.pdf>>.

<sup>481</sup> See *Relevant Domestic Human Rights Standards* below.

*service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.*

*6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.*

*7.1 If the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency. The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified.*

*8.2 Sentencing authorities may dispose of cases in the following ways:*

- (a) Verbal sanctions, such as admonition, reprimand and warning;*
- (b) Conditional discharge;*
- (c) Status penalties;*

prosecutorial authorities in each state and territory have guidelines establishing the criteria for discontinuance of cases.<sup>482</sup>

The increasing proportion of detainees on remand identified in **Part 1** – in particular of Indigenous offenders – is of concern in this regard. The use of remand as anything but a last resort should be discouraged for vulnerable offender groups.

The use of such reports in Australia appears to be *ad hoc* and highly dependent on the relevant judicial officer.<sup>483</sup> Systematisation, as recommended by sentencing experts,<sup>484</sup> would be desirable.

With the exception of day-fines (see **Part 2**), all of these dispositions exist in Australia, and are available to most sentencing authorities. However, home detention has recently been abolished in Victoria<sup>485</sup> and combination sentences are relatively rare.<sup>486</sup>

<sup>482</sup> See eg NSW Prosecution Guidelines: <<http://www.odpp.nsw.gov.au/guidelines/guidelines.html>>, 13.

<sup>483</sup> There is some variance between jurisdictions – eg reports are required for more serious punishments in Victoria under s 8A(2) of the *Sentencing Act 1991* (Vic).

<sup>484</sup> See eg *Seen and Heard*, ALRC, above n 447, Recommendation 244.

<sup>485</sup> See *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic).

<sup>486</sup> See eg: *Crimes (Sentencing) Act 2005* (ACT), Part 3.6. Combinations of terms of imprisonment (including suspended terms) and treatment orders are also available under the *Sentencing Act 1991* (Vic) ss 18Q-W. See

- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment;
- (m) Some combination of the measures listed above.

9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.

Parole, work release and remission are all available in Australia but their use should be further encouraged to combat institutionalisation.

10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

Such assistance is often provided by charities or on a *pro bono* basis<sup>487</sup> – extra funding in this area would be a good investment in community safety.

14.3 The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.

Breach of conditions placed on bail or probation arrangements (eg failure to complete treatment plans) does not automatically lead to imprisonment in Australia.<sup>488</sup> However, it does greatly increase the risk of imprisonment and there

further *Suspended Sentences and Intermediate Sentencing Orders – Suspended Sentences Final Report Part 2*, Victorian Sentencing Council 2008:

<[https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/suspended\\_sentences\\_final\\_report\\_part\\_2.pdf](https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/suspended_sentences_final_report_part_2.pdf)>, 167-168.

<sup>487</sup> See eg Kinner, *The post-release experience of prisoners in Queensland*, Criminology Research Council 2006: <<http://www.criminologyresearchcouncil.gov.au/reports/200304-27.pdf>>. The experience of ex-prisoners in this regard is comparable (if not identical) to the experience of those who have completed non-custodial sentences.

<sup>488</sup> See eg *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, BOCSAR 2009: <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_cjb128](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb128)>. The American Law Institute is also developing proposals to combat a similar trend in the US: <[http://www.nytimes.com/2012/05/20/opinion/sunday/punishment-outside-prison.html?\\_r=2](http://www.nytimes.com/2012/05/20/opinion/sunday/punishment-outside-prison.html?_r=2)>.

<p>14.5 <i>The power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law.</i></p>	<p>have been reports of onerous conditions being imposed in some jurisdictions.<sup>489</sup> Bail Acts in most jurisdictions provide for arrest upon failure to meet bail conditions. The Courts generally have powers under each jurisdiction’s sentencing legislation to issue arrest warrants for those who breach probation conditions or Community Service Orders.<sup>490</sup> Breach of such conditions constitutes a separate offence in Queensland.<sup>491</sup></p>
<p>15.3 <i>To secure and retain qualified professional staff, appropriate service status, adequate salary and benefits commensurate with the nature of the work should be ensured and ample opportunities should be provided for professional growth and career development.</i></p>	<p>Staff remuneration and retention have been identified as issues in various Australian corrections contexts.<sup>492</sup></p>
<p>18.1 <i>Government agencies, the private sector and the general public should be encouraged to support voluntary organizations that promote non-custodial measures.</i></p>	<p>Organisations specifically focussed on non-custodial measures are not common in Australia, but include the Justice Reinvestment Campaign for Aboriginal Young People in NSW<sup>493</sup> and the Smart Justice campaign in Victoria.<sup>494</sup> Many charities and Community Legal Centres also promote non-custodial measures.<sup>495</sup></p>
<p>18.4 <i>Every effort should be made to inform the public of the importance of its role in the implementation of non-custodial measures.</i></p>	<p>Perceptions of non-custodial measures as ‘soft options’ may undermine their effectiveness and should be countered through Government education programs.</p>
<p>20.3 <i>Research and information mechanisms</i></p>	<p>As canvassed in <b>Part 3</b>, this would greatly</p>

<sup>489</sup> See *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, BOCSAR 2009, above.

<sup>490</sup> See eg *Criminal Law (Sentencing) Act 1988 (SA)*, s 71.

<sup>491</sup> See *Penalties and Sentences Act 1992 (Qld)*, s 123.

<sup>492</sup> See eg *Breaking the Cycle: Tasmania Corrections Plan 2010-2020 Discussion Paper*, Tasmanian Department of Justice 2010, above n 423, Chapter 7; and *Evaluation of the Redevelopment of Community Correctional Services - Final Report*, RMIT for Victorian Department of Justice 2005:

<<http://www.justice.vic.gov.au/home/sentencing/community+corrections/evaluation+of+the+redevelopment+of+community+correctional+services+--+final+report>>, 77.

<sup>493</sup> See <<http://justicereinvestmentnow.net.au>>.

<sup>494</sup> See <<http://www.smartjustice.org.au>>.

<sup>495</sup> See eg *Young People on Remand in Victoria: Balancing Individual and Community Interests*, Jesuit Social Services 2010, above n 421; or *Response to Department of Justice discussion paper Breaking the cycle: Tasmania Corrections Plan 2010-2020*, Anglicare Tasmania 2010: <[http://www.anglicare-tas.org.au/docs/research/Submission\\_on\\_Tasmanian\\_Corrections\\_Plan\\_2010\\_-\\_2020.pdf](http://www.anglicare-tas.org.au/docs/research/Submission_on_Tasmanian_Corrections_Plan_2010_-_2020.pdf)>.

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*should be built into the criminal justice system for the collection and analysis of data and statistics on the implementation of non-custodial treatment for offenders.*

*21.1 Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process.*

*21.3 Periodic reviews should be concluded to assess the objectives, functioning and effectiveness of non-custodial measures.*

*22.1 Suitable mechanisms should be evolved at various levels to facilitate the establishment of linkages between services responsible for non-custodial measures, other branches of the criminal justice system, social development and welfare agencies, both governmental and non-governmental, in such fields as health, housing, education and labour, and the mass media.*

*23.1 Efforts shall be made to promote scientific cooperation between countries in the field of non-institutional treatment. Research, training, technical assistance and the exchange of information among Member States on non-custodial measures should be*

facilitate the assessment of non-custodial measures by bodies such as the AIC. The Australian Government should consider funding such data collection, which could be done according to UNODC guidelines.<sup>496</sup>

The development of these measures has so far been *ad hoc* and reactive – non-custodial measures should be promoted as mainstream elements of a progressive criminal justice system.<sup>497</sup>

Onerous reporting requirements could have the effect of stifling the development of alternative sentencing practices, but regular reviews at appropriate intervals (informed by the ongoing collection of relevant statistics) would assist in justifying the further growth and/or strengthening of these measures.

Linkages between courts and service providers are critical to the success of non-custodial measures. Cooperation between relevant agencies and bodies – for example through conferences<sup>498</sup> and training in best practice<sup>499</sup> – should be supported wherever possible.

The Australian Government should support exchanges with countries which are more advanced in their development of alternative sentencing practices. Data from these countries is invaluable for policy development purposes.

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<sup>496</sup> See *Alternatives to Incarceration*, UNODC Toolkit (2006), above n 57, 4-6.

<sup>497</sup> Such incorporation work has already begun in eg the Victorian Magistrates' Court – see Spencer, *To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts*, above n 333.

<sup>498</sup> Such conferences have already been organised privately – see eg <[http://www.jss.org.au/files/National\\_Justice\\_Symposium\\_-\\_Overview.pdf](http://www.jss.org.au/files/National_Justice_Symposium_-_Overview.pdf)>.

<sup>499</sup> In 2009, Michael King produced the *Solution-Focused Judging Bench Book* for the Australian Institute of Judicial Administration. It is a comprehensive guide for judges, drawing on Dr King's experience as a pioneering problem-solving magistrate in Geraldton – see <<http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>>.

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*strengthened, through the United Nations institutes for the prevention of crime and the treatment of offenders, in close collaboration with the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs of the United Nations Secretariat.*

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Cooperation through specialised agencies such as UNAFEI<sup>500</sup> is also recommended – particularly for sharing regional experiences which may not be available in other fora.

*Recommendation 33: The Australian Government should provide financial and other appropriate support for the development of problem-solving court and diversionary initiatives across the country.*

*Recommendation 34: The Australian Government should consider developing, in cooperation with the states and territories, model legislation on non-custodial measures.*

*Recommendation 35: Given that existing Australian privacy protections generally address only personal data, a more complete right to privacy should be legislated to comply with Australia's international obligations.*

*Recommendation 36: The Government should support voluntary and charitable organisations which advocate non-custodial measures as an investment in reducing overrepresentation of vulnerable groups in prison.*

*Recommendation 37: The Australian Government should consider increasing funding for research agencies such as the AIC to assess problem-solving courts and associated measures more systematically.*

*Recommendation 38: The Government should support collaboration between court actors and service providers, which is critical to the success of problem-solving courts and diversion schemes.*

*Recommendation 39: The Australian Government should support international exchanges with countries which have more experience with the measures described in the present report, bilaterally and through the UN.*

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<sup>500</sup> See <<http://www.unafei.or.jp/english>>.

Related to the Tokyo Rules are the UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*,<sup>501</sup> which recommend that restorative justice programs be made available at all stages of the criminal justice process, for any offender who wishes to participate.<sup>502</sup> AIC research suggests that, while Australia is not yet able to meet this recommendation, restorative justice programs are now offered in every state and territory, at least for juveniles.<sup>503</sup>

The Beijing Rules, which expand upon the requirements of the Convention on the Rights of the Child, contain several standards which are applicable to the sentencing of juvenile offenders in Australia.

In its landmark report *Seen and Heard: Priority for Children in the Legal Process*, the ALRC notes that juvenile criminal justice has traditionally been based on either a welfare model or a justice model. However, over the last two decades a new restorative model, which involves victims and focusses on the responsibility of the offender for harm caused, has gained traction. The ALRC is of the view that “[t]he restorative model is often integral to diverting young offenders from the formal court system,” and recommends that “[t]he national standards for juvenile justice should stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and the community.”<sup>504</sup> Such an approach is firmly supported by the international standards represented in the Beijing Rules, which are premised on the avoidance of detention and the institutionalisation which can result from it.

Table 9: The Beijing Rules

Rule	Comments
<p><i>1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.</i></p>	<p>Essentially, this Rule requires that Governments at all levels ensure that funding priority is appropriately apportioned between schools and social support institutions on the one hand, and the criminal justice system (including policing, the courts and corrections) on the other.</p>

<sup>501</sup> Adopted by ECOSOC Resolution 2000/14: <[http://www.unicef.org/lac/spbarbados/Legal/global/CP/Basic\\_principles\\_restorative\\_justice\\_criminal\\_matters.doc](http://www.unicef.org/lac/spbarbados/Legal/global/CP/Basic_principles_restorative_justice_criminal_matters.doc)>.

<sup>502</sup> Ibid, Principles 6-7.

<sup>503</sup> See Richards, *Police-referred restorative justice for juveniles in Australia*, above n 84.

<sup>504</sup> See <<http://www.alrc.gov.au/publications/18-childrens-involvement-criminal-justice-processes/juvenile-justice-models>>.

8.1 *The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.*

In the NT (unlike other Australian jurisdictions) juvenile offenders can be named unless an application is made to suppress identifying information.<sup>505</sup>

The practice of not recording convictions for juveniles who commit less serious offences and/or complete diversionary programs can help to avoid stigmatisation. It is relatively common in the ACT and should be encouraged in other jurisdictions.<sup>506</sup>

11.1 *Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.*

As noted in **Table 6** above, pre-trial diversionary options exist in all Australian jurisdictions, but their use is inconsistent. For example, in Queensland, the AIC has found that young Indigenous offenders are 2.9 times less likely to be cautioned than to appear in court, and are almost twice as likely to appear in court as non-Indigenous youths.<sup>507</sup> Similar trends have been observed in NSW, SA and WA.<sup>508</sup>

AIC research has also shown that the proportion of young offenders referred by police to restorative justice conferencing (see *Pre-trial programs* in **Appendix** below) varies from 2-3% in NSW and the ACT to 17% in SA and 25% in the NT.<sup>509</sup> Obviously the appropriate figure for each jurisdiction will vary, but States which tend to rely heavily on the formal court system to deal with juveniles should be encouraged to refer more offenders to conferencing or comparable diversionary options.

The *Seen and Heard* report recommended that best practice guidelines for conferencing be developed, to encourage conferencing to be more independent of law

<sup>505</sup> See Snowball, *Diversion of Indigenous juvenile offenders*, AIC 2008: <<http://www.aic.gov.au/publications/current%20series/tandi/341-360/tandi355.aspx>>.

<sup>506</sup> *Ibid*, 5-6.

<sup>507</sup> See Allard et al, *Police diversion of young offenders in Indigenous over-representation*, AIC 2010: <<http://www.aic.gov.au/documents/0/9/2/%7B092C048E-7721-4CD8-99A6-1BC89C47D329%7Dtandi390.pdf>>, 3-4.

<sup>508</sup> See Snowball *Diversion of Indigenous juvenile offenders*, AIC 2008, above n 505, 5.

<sup>509</sup> See Richards, *Police-referred restorative justice for juveniles in Australia*, AIC 2010, above n 84, 5.

enforcement, increased monitoring and the continued importance of legal advice.<sup>510</sup>

*11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.*

Police in all Australian jurisdictions are empowered to dispose of cases without recourse to formal hearings – it is the use of these powers which varies. Studies have shown that certain trends – such as underrepresentation of Indigenous youth in cautioning statistics – have been sustained over time.<sup>511</sup>

*11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.*

In all jurisdictions offenders may only be referred to conferencing with consent.<sup>512</sup> However, the AHRC has identified concerns about advice available to young people in certain jurisdictions to ensure the consent is given on an informed basis.<sup>513</sup> This is also a concern for the Committee on the Rights of the Child.<sup>514</sup>

Referral to community services is generally done outside the criminal justice framework altogether, but general health care and social work principles require a person's informed consent for all such referrals.<sup>515</sup>

*12.1 In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose.*

AHRC research suggests that police training in diversion “while highly significant, does not equip the police to deal with the full range of issues and circumstances facing young people – particularly in coordinating their service needs such as crisis accommodation, welfare and health support. Training of police does not obviate the need for specialist youth case workers,”

<sup>510</sup> See AHRC, *Human Rights Brief No. 5*, above n 461, 5.

<sup>511</sup> See eg Polk et al, *Early Intervention: Diversion and Youth Conferencing* - A national profile and review of current approaches to diverting juveniles from the criminal justice system, Attorney-General's Dept 2003: <[http://www.crimeprevention.gov.au/Publications/EarlyIntervention/Documents/Diversion\\_Report.htm](http://www.crimeprevention.gov.au/Publications/EarlyIntervention/Documents/Diversion_Report.htm)>.

<sup>512</sup> Ibid, 2-7. For Victoria, see *Review of the Youth Justice Group Conferencing Program*, KPMG 2010: <[http://www.dhs.vic.gov.au/\\_data/assets/pdf\\_file/0006/675564/review-youth-group-conferencing-report-2011.pdf](http://www.dhs.vic.gov.au/_data/assets/pdf_file/0006/675564/review-youth-group-conferencing-report-2011.pdf)>, 18. On conferencing generally, see *Pre-trial programs* in **Appendix** below.

<sup>513</sup> See the AHRC's *Social Justice Report 2001*, Chapter 5: <[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport01/chapter5.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport01/chapter5.html)>.

<sup>514</sup> See CRC General Comment 10, above n 438, [27].

<sup>515</sup> See eg *Code of Ethics*, Australian Association of Social Workers 2010: <<http://www.aasw.asn.au/document/item/740>>, 27.

	and that the availability of such workers varies among jurisdictions. <sup>516</sup>
13.1 <i>Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.</i>	See article 9(3) ICCPR in <b>Table 1</b> above.
13.2 <i>Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.</i>	Evidence from the UK suggests that remandees are more likely than sentenced prisoners to be homeless, unemployed or have some form of mental disorder. <sup>517</sup> AIC research also suggests they tend to be relatively young, have drug or alcohol dependency issues, and they are more likely to die in custody. <sup>518</sup> As such, alternatives to remand such as therapeutic justice processes and generous use of bail (in association with eg electronic surveillance or Bail Hostels) are extremely important. Adequate funding for bail support programs is also a key factor. <sup>519</sup>
14.2 <i>The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.</i>	See <b>Table 6</b> above.
16.1 <i>In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.</i>	This is not systematically done in Australia – see Tokyo Rule 7.1 in <b>Table 8</b> above.
17.1 <i>The disposition of the competent</i>	In relation to the options for sentencing

<sup>516</sup> See the AHRC's *Social Justice Report 2001*, Chapter 5, above n 513, *Training of law enforcement officials involved in the administration of diversion to meet the needs of young people*.

<sup>517</sup> See Sarre et al, *Remand in custody: critical factors and key issues*, AIC 2006: <<http://www.aic.gov.au/documents/8/D/E/%7B8DE2E6F6-9D25-45E8-AED0-39FA7CC9EA79%7Dtandi310.pdf>>, 2.

<sup>518</sup> *Ibid*, 1-3.

<sup>519</sup> *Ibid*, 5. See also Kiely, *The Question of Bail and Remand: Does the lack of Stable Accommodation, Family Support, Income Support and other factors describe the remand population of 17-24 year old males in Melbourne?* Jesuit Social Services: <[http://www.jss.org.au/files/Docs/policy-and-advocacy/publications/bail\\_and\\_remand.pdf](http://www.jss.org.au/files/Docs/policy-and-advocacy/publications/bail_and_remand.pdf)>.

authority shall be guided by the following principles:

(a) *The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;*

(b) *Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;*

(c) *Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;*

(d) *The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.*

juveniles in Australia, the AIC reports that “[s]entencing hierarchies have been established in most legislation, setting out the available penalties in order of severity with the aim of promoting the use of non-custodial options and to reinforce the use of detention as a sentence of last resort.”<sup>520</sup>

Difficulties arise when juveniles are sentenced as adults – a practice specifically discouraged by the Committee on the Rights of the Child.<sup>521</sup> Studies in the US have shown that youth receiving adult sanctions are significantly more likely to reoffend.<sup>522</sup>

Furthermore, juveniles tried in adult courts tend to receive more severe penalties than those tried in children’s courts, despite guidelines promoting leniency.<sup>523</sup>

In Australia, there is inconsistent jurisprudence on sentencing children displaying ‘adult offending behaviour’,<sup>524</sup> with the result that rehabilitation is not always prioritised to the extent that international human rights law requires.

18.1 *A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible.*

See Tokyo Rule 8.2 in **Table 8** above.

30.3 *Efforts shall be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for*

See Tokyo Rule 2.4 in **Table 8** above.

<sup>520</sup> See <[http://www.aic.gov.au/crime\\_community/demographicgroup/youngpeople/sentencing.aspx](http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/sentencing.aspx)>.

<sup>521</sup> See CRC General Comment 10, above n 438, [38]. See also HR Committee, Concluding Observations on Australia, above n 54, [24].

<sup>522</sup> See Mason et al, ‘Impacting Re-Arrest Rates Among Youth Sentenced in Adult Court: An Epidemiological Examination of the Juvenile Sentencing Advocacy Project,’ *32 Journal of Clinical Child and Adolescent Psychology* 2 (2003), 205.

<sup>523</sup> See Kurlychek and Johnson, ‘The juvenile penalty: a comparison of juvenile and young adult sentencing outcomes in criminal court,’ *42 Criminology* 2 (2004), 485.

<sup>524</sup> See eg Yehia, *Youth as a Mitigating Factor: To What Extent Does the Principle Survive?* Presentation to Children’s Legal Service Conference, 2007: <[http://www.lawlink.nsw.gov.au/lawlink/pdo/ll\\_pdo.nsf/pages/PDO\\_sentencingchildrenmitigatingfactor](http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_sentencingchildrenmitigatingfactor)>

*appropriate assessment and future improvement and reform of the administration.*

*Recommendation 40: With a view to decreasing juvenile imprisonment rates, Australia should strengthen and monitor compliance with the Beijing Rules.*

*Recommendation 41: The Australian Government should consider funding essential services such as bail support programs in the context of its implementation of international obligations in respect of juveniles.*

UN Conferences can also provide a source of valuable information on international experience and best practice. For example, at a 2010 UNAFEI conference on prison overcrowding, Sir David Carruthers, Chair of the New Zealand Parole Board, reported that New Zealand introduced a restorative justice process for juveniles in 1989 and the number of custodial institutions for juveniles had since dropped from 18 to four. New Zealand also uses restorative justice techniques in schools, which Carruthers believes contributes to crime prevention down the track.<sup>525</sup>

The UN *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*<sup>526</sup> arose out of a study by the former Commission on Human Rights into the detention on the grounds of mental ill-health. The fundamental purpose of these principles is to ensure that all persons have the right to the best available mental health care, as required under Article 12 of the ICESCR. They also aim to eliminate discrimination on the basis of mental illness and protection for those who lack decision-making capacity. Principle 11 deals with the use of seclusion and restraint, which may be seen as alternatives to imprisonment.

<sup>525</sup> See *Executive Summary of the Workshop on “Strategies and Best Practices against Overcrowding in Correctional Facilities*, UNAFEI 2010:

<[http://www.unafei.or.jp/english/pdf/Congress\\_2010/07Executive\\_Summary.pdf](http://www.unafei.or.jp/english/pdf/Congress_2010/07Executive_Summary.pdf)>, 28.

<sup>526</sup> Adopted by General Assembly Resolution 46/119 (1991), available at:

<<http://www.un.org/documents/ga/res/46/a46r119.htm>>.

Table 10: UN Principles for the Protection of Persons with Mental Illness:

Principle	Comments
<i>Principle 11: Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others....</i>	A 2009 report on the use of seclusion and restraint in Australian mental health facilities by the National Mental Health and Consumer Carer Forum <sup>527</sup> found that these techniques are overused in Australia – especially considering the paucity of evidence to support their effectiveness. <sup>528</sup> The Report made six strong recommendations aimed at curbing the practice and replacing it with better care planning. It noted that this is already a priority for the Australian Government under the Department of Health and Ageing’s <i>National Safety Priorities in Mental Health – a national plan for reducing harm.</i> <sup>529</sup>

### Relevant Domestic Human Rights Standards

#### ACT

The *Human Rights Act 2004* (ACT) contains several guarantees which are relevant to non-custodial measures and diversion from the criminal justice system, including:

- Section 8(3) – equality before the law
- Section 8(4) – positive measures are not discriminatory
- Section 11 – protection of the family and children
- Section 18 – right to liberty and security of person
- Section 20 – children in the criminal process
- Section 22 – rights in criminal proceedings

These rights are based on their equivalents in international law including the ICCPR and Convention on the Rights of the Child, which means the observations in **Tables 2 and 6** above are also applicable in respect of the Human Rights Act.

The Human Rights Act has been applied in the context of the Ngambra Circle Court (see **Appendix** for description). Sentencing Magistrate Madden has reported that in at least one

<sup>527</sup> See *Ending Seclusion and Restraint in Australian Mental Health Services*, NMHCCF 2009 (Revised 2010), above n 473.

<sup>528</sup> *Ibid*, 8.

<sup>529</sup> *Ibid*, 10.

case he wished to refer an offender to the Circle Court but was prevented by the Commonwealth Director of Public Prosecutions, who contended that only offences against the law of the ACT were subject to circle sentencing procedures. Magistrate Madden was of the view that this contravened section 8 of the HRA, but he could not refer the individual to the Circle Court without the CDPP's cooperation. Noting the preamble to the HRA, which refers to the 'special significance' and 'continuing importance' of human rights protection for Indigenous people, he said "[i]t seems to me the introduction of the circle court goes some of the way to assist in advancing the human rights and dignity of indigenous people."<sup>530</sup>

*Recommendation 42: Commonwealth agencies should be encouraged to review their policies relating to alternative sentencing and diversion programs, with a view to supporting them for offences against the law of the Commonwealth as well as state and territory offences.*

In *Aldridge v R*,<sup>531</sup> the ACT Court of Appeal held that s 11 of the Human Rights Act requires arrangements for the care of children to be taken into account in consideration of bail and sentencing. This is a positive move in the context of observations made by the Institute of Family Studies (see article 24(1) ICCPR in **Table 1** above).

### *Victoria*

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) also contains guarantees, derived from Australia's international obligations, in respect of criminal justice processes, including:

- Section 8(3) – equality before the law
- Section 8(4) – positive measures are not discriminatory
- Section 21 – right to liberty and security of person
- Section 23 – children in the criminal process
- Section 22(1) – rights in detention
- Section 25 – rights in criminal proceedings

The Victorian Charter's preamble asserts that 'human rights have a special importance for the Aboriginal people of Victoria.' Victoria does better than some jurisdictions in terms of

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<sup>530</sup> See Madden, *The Circle Court in the ACT – An Overview and its Future*, address to the Australian Institute of Judicial Administration, 2007, available at:

<<http://www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Madden.pdf>>, 18-19.

<sup>531</sup> [2011] ACTCA 20.

overrepresentation of Indigenous Australians in its prison system (see **Part 1**), but it is nonetheless a pressing issue for the State.

In its review of the *Bail Act 1977* (Vic), the Victorian Law Reform Commission recommended that a new Bail Act be developed which “should comply with not only the provisions but the intention of the Charter of *Human Rights and Responsibilities Act 2006* and the *Victims’ Charter Act 2006*.”<sup>532</sup> In particular, as noted in **Table 1** above, it recommended that all presumptions against bail and ‘reverse onuses’ be removed from the legislation. It also recommended special consideration for marginalised and disadvantaged groups.<sup>533</sup>

The Charter has already been applied by the Victorian courts in several decisions relevant to alternatives to imprisonment. A selection is set out below.

In the 2009 case of *Dale v DPP*,<sup>534</sup> the Victorian Court of Appeal was asked to reconsider bail for a former police officer charged with murder on the grounds that his confinement on remand was contributing to his mental illness. The relevant bail legislation contained a presumption against bail for murder, and the lower courts found that Mr Dale was not able to rebut this presumption. One consideration which arose for the Court of Appeal was whether Mr Dale’s conditions of detention (solitary confinement) were compatible with s 22 of the Charter. In all of the circumstances, the Court found the applicant did not pose an unacceptable risk and ordered that he be released.

In *R v Kent*,<sup>535</sup> the Victorian Supreme Court considered a sentence of imprisonment imposed on an individual with major depression which was being exacerbated by his detention in a maximum security facility. The court found that s 22(1) of the Charter required special consideration in sentencing people whose conditions were likely to be significantly worsened by their conditions of detention. However, since the defendant was convicted of serious terrorism-related offences, the court did not order any changes to his conditions of detention.

*Kent* serves to emphasise that human rights guarantees are not unlimited and do not require all offenders to be released or diverted from detention. Even vulnerable offenders, such as those with mental illness, may not warrant release or diversion if their offences are sufficiently serious.

In *Re Dickson*,<sup>536</sup> the Victorian Supreme Court considered whether a breach (or potential breach) of the guarantee against ‘unreasonable delay’ of trials in s 21 of the Charter outweighed the presumption that bail be refused for offences involving a firearm. Despite

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<sup>532</sup> See <[http://www.lawreform.vic.gov.au/sites/default/files/Web\\_version\\_Bail\\_Report.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Web_version_Bail_Report.pdf)>, Recommendation 10.

<sup>533</sup> *Ibid*, Recommendations 12-13 and Executive Summary.

<sup>534</sup> [2009] VSCA 212.

<sup>535</sup> [2009] VSC 375.

<sup>536</sup> [2008] VSC 516.

the defendant being held on remand for more than two years, the court found that, in the circumstances, his release would present an unacceptable flight risk, as well as a risk to community safety.

In *DPP v TY (No 3)*,<sup>537</sup> the Victorian Supreme Court considered the application of the Charter, as well as the *Convention on the Rights of the Child*, in sentencing a young offender for murder. The court took article 40(1) of the Convention into account, finding that it required an emphasis on youth and prospects for rehabilitation when sentencing children. Ultimately, the offender was sentenced to 12 years with an eight-year non-parole period, to be served in a youth justice centre (rather than an adult prison).

### *Other Jurisdictions*

The lack of comprehensive legislative protection for human rights in other Australian jurisdictions renders the development of appropriate guidelines particularly important.<sup>538</sup> States and territories should be encouraged to review their criminal law and procedure in line with the relevant international obligations identified in the present report, with the goal of addressing the alarming statistics presented in **Part 1** firmly in mind.

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<sup>537</sup> [2007] VSC 489.

<sup>538</sup> The HRCtte has also observed that Australian courts pay relatively little attention to international human rights law – see eg Concluding Observations on Australia, above n 54, [8].

## Recommendations

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1. The Australian Government should examine the UK Government's diversion plans for mentally disordered offenders with a view to developing a similar model in Australia.
2. In view of the imprisonment rates in WA and the NT, the Australian Government should consider instituting a progressive program of support for diversionary schemes in those jurisdictions.
3. The Australian Government should consider the feasibility of a day-fine system to ensure fines deter better-off offenders, and do not disproportionately affect worse-off offenders.
4. The Australian Government should consider the reasons behind the high rates of incarceration for federal offenders, and implement the recommendations of the ARLC's *Same Crime, Same Time* report as soon as possible.
5. Given the overrepresentation of homeless people in the criminal justice system throughout Australia, and the success of the Victorian and Queensland Special Circumstances Lists, the Australian Government should encourage other states and territories to implement similar programs.
6. Promising results achieved by Teen Courts in the US deserve attention in Australia – if only to confirm whether it would be feasible to implement such a model here. The Australian Government should consider funding research in this area.
7. The Attorney-General's Department should consider establishing an equivalent to the US Bureau of Justice Assistance (BJA) to assist in the development of progressive criminal justice initiatives in Australia.
8. Given their potential for creating safer communities and saving increasingly considerable Corrections costs, Australian Governments should study justice reinvestment strategies in the US (and the UK) with a view to implementing them in Australia. Justice reinvestment may be of particular advantage in addressing Indigenous overrepresentation in the prison population.
9. The Australian Government should encourage the appointment of more Indigenous jurists to the judiciary.
10. Given the legal and political similarities between Australia and Canada, the Australian Government should consider whether there are aspects of alternatives to incarceration in Canada which have made them more successful in reducing incarceration rates than their Australian counterparts.
11. The Australian Government should consider why the Northern Irish Youth Conferencing Service appears to have been unusually successful in reducing offending, even though it is superficially similar in many respects to restorative justice initiatives in Australia which have achieved mixed results.
12. The Australian Government should consider whether it may be appropriate for Australian prosecutors to have more or broader powers to divert offenders from the courts, as is the case in France.

13. Given Finland's rare success in reducing its incarceration rate over recent decades, the Australian Government should consider whether measures such as day-fines and mediation could assist in achieving similar reductions in Australia.
14. Systematic evaluation is a common thread through many reviews of problem-solving courts and alternative sentencing regimes. Governments establishing, or supporting the establishment of, such courts and programs should allocate specific and adequate funding to regular assessments.
15. The Australian Government should encourage greater collaboration between the states and territories in the development of alternative sentencing schemes and problem-solving courts.
16. There continues to be a need for better data collection and ongoing monitoring of Indigenous sentencing regimes to determine their effectiveness and justify (or justify increases in) their budgets. The Australian Government should consider funding appropriate bodies (such as the AIC) to conduct longer-term studies in this area.
17. As part of the education component of the National Human Rights Framework, the Australian Government should fund campaigns about alternative justice programs to educate the public about their potential to create safer communities, and to counter perceptions of them as an ineffective 'soft option.'
18. The Australian Government should be aware that progressive court initiatives may require, for example, extra time to deal with each offender on an individual basis, and this may reflect poorly in existing performance indicators. As such, governments at all levels should be encouraged to develop indicators which take into account longer-term prospects for rehabilitation and reductions in recidivism for alternative sentencing regimes.
19. The Australian Government should abolish mandatory sentences of imprisonment in its own legislation, and encourage state and territory Governments to do the same. It should also discourage legislative dilution of the principle that imprisonment is a punishment of last resort, in accordance with both Common Law and human rights principles.
20. The Australian Government, through the National Justice CEOs Group, should develop (or encourage the development of) National Guidelines for Best Practice on Diversion and Support for other vulnerable offender groups identified in the present report – with the highest priority accorded to Indigenous offenders.
21. The Castan Centre endorses the recommendation to support work similar to that done by the US Center for Court Innovation in Australia, with a view to developing problem-solving courts and programs from a strong evidence base.
22. In accordance with the requirements of article 9(3) of the ICCPR, the Australian Government should encourage jurisdictions with legislative presumptions against bail and 'reverse onus' provisions to remove them, as recommended by the Victorian Law Reform Commission.

23. Given that article 10(2)(a) of the ICCPR already provides an ‘exceptional circumstances’ exception, Australia should withdraw its reservation to this article and strive to uphold the important guarantee it contains.
24. In light of its international obligations in respect of a criminal justice system focussed on rehabilitation, the Australian Government should discourage ‘tough on crime’ initiatives which give undue priority to punishment.
25. In remote areas, the Government should increase funding for custody and/or remand facilities to obviate the practice of transportation away from an offender’s family and community, which may be inconsistent with article 23(1) of the ICCPR.
26. The Government should increase its support for measures such as Circle Courts and Indigenous-specific diversion programs. In addition, other jurisdictions should be encouraged to duplicate provisions in ACT, NT and Queensland legislation requiring sentencing courts to consider an offender’s cultural background.
27. Australian policy on juvenile justice should incorporate the Guidelines for the Prevention of Juvenile Delinquency of 1990 (Riyadh Guidelines), as recommended by the Committee on the Rights of the Child.
28. Funding for children’s legal representation should be increased, because it is critical to ensuring their right to be heard and to express themselves in the criminal justice process.
29. The Australian Government should make it clear to states and territories that remand for juveniles – in particular for long periods – may be contrary to article 37(b) of the Convention on the Rights of the Child.
30. The Committee on the Rights of the Child has recommended that Australia increase its efforts to withdraw its reservation to article 37(c) of the Convention on the Rights of the Child – the Castan Centre strongly supports this recommendation.
31. Constant funding pressure on counselling, education and training services for young people makes diversion from the criminal justice system more difficult – the Australian Government should increase funding to relevant institutions with a view to assisting in crime prevention, as well as for their own sake.
32. The Australian Government should consider preparing regular reports for the General Assembly on the implementation of the Tokyo Rules.
33. The Australian Government should provide financial and other appropriate support for the development of problem-solving court and diversionary initiatives across the country.
34. The Australian Government should consider developing, in cooperation with the states and territories, model legislation on non-custodial measures.
35. Given that existing Australian privacy protections generally address only personal data, a more complete right to privacy should be legislated to comply with Australia’s international obligations.
36. The Government should support voluntary and charitable organisations which advocate non-custodial measures as an investment in reducing overrepresentation of vulnerable groups in prison.

37. The Australian Government should consider increasing funding for research agencies such as the AIC to assess problem-solving courts and associated measures more systematically.
38. The Government should support collaboration between court actors and service providers, which is critical to the success of problem-solving courts and diversion schemes.
39. The Australian Government should support international exchanges with countries which have more experience with the measures described in the present report, bilaterally and through the United Nations.
40. With a view to decreasing juvenile imprisonment rates, Australia should strengthen and monitor compliance with the Beijing Rules.
41. The Australian Government should consider funding essential services such as bail support programs in the context of its implementation of international obligations in respect of juveniles.
42. Commonwealth agencies should be encouraged to review their policies relating to alternative sentencing and diversion programs, with a view to supporting them for offences against the law of the Commonwealth as well as state and territory offences.

## Appendix

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### **Indigenous Sentencing Courts**

#### *General*

All of the states and territories except for Tasmania have established some type of Indigenous justice practice.<sup>1</sup> Indigenous justice practices in Australia can be split into two types: more formal practices, known as Indigenous sentencing courts, and less formal practices where judicial officers travel on circuit to regional and remote areas (eg in Western Australia, courts in Wiluna, Yandeyarra, Geraldton, and in the Ngaanyatjarra Lands; and in Queensland, the Justice Groups' oral or written submissions to magistrates and judges at sentencing in the circuits to Cape York, the Gulf area, Thursday Island, Palm Island and other circuits in remote areas).<sup>2</sup>

Indigenous sentencing courts can be further broken down into three types: the South Australian Nunga Court model; the circle sentencing model used in NSW and the ACT, and the Community Courts in WA and the NT, which are a combination of the two former models.

#### *Common Features of Indigenous Sentencing Courts*

There are Indigenous sentencing courts in the ACT, NSW, the NT, Queensland, SA, Victoria, and WA.<sup>3</sup> Key features of all the Indigenous sentencing courts include: physical layout, informal procedure and communication, jurisdiction and Aboriginal Elders.<sup>4</sup> A common aim of Indigenous sentencing courts across all seven jurisdictions is to make the judicial process more culturally appropriate – and more inclusive of both the Indigenous community and the offender – than other sentencing options.<sup>5</sup>

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<sup>1</sup> See Marchetti and Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415, 416

<sup>2</sup> Ibid, 416.

<sup>3</sup> Ibid, 417-418. Please note that although the NT Community Courts are not restricted to Indigenous defendants, this was because the Courts were not established under a specific Act (Ibid, 431). The Darwin Community Court guidelines also state that "indigenous offenders will make up the vast majority of defendants appearing in court":

<[http://www.nt.gov.au/justice/ntmc/docs/community\\_court\\_guidelines\\_27.05.pdf](http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf)>.

<sup>4</sup> Law Reform Commission of Western Australia (LRCWA), *Customary Laws Discussion Paper*, Project 94 (December 2005), 152-155.

<sup>5</sup> Marchetti and Daly, above n 1, 435.

### *Physical layout*

Generally, Aboriginal courts employ a different physical layout from mainstream courts. In the ACT and NSW, hearings are held in a facility that has cultural meaning for the local Indigenous community. In other jurisdictions, Indigenous insignia, artwork and symbolism are displayed in a mainstream courtroom. The Magistrate typically sits at eye-level with the offender, usually at a bar table or in a circle rather than on an elevated bench.<sup>6</sup>

### *Informal Procedure and Communication*

Proceedings in Indigenous sentencing courts are informal and use of legal jargon is discouraged. In some cases Elders speak to the offender in their own language. Victims are often given the opportunity to speak.

### *Jurisdiction*

Currently, all Aboriginal courts operate at the magistrates court level – the charge heard must be one that is normally heard in a Magistrates' or Local Court (except for the County Koori Court in Morwell, Victoria).<sup>7</sup> The offender must be Indigenous (except in the Northern Territory); must have entered a guilty plea or have been found guilty in a summary hearing;<sup>8</sup> must agree to the matter being heard in an Indigenous sentencing court, and must have committed the offence in the geographical area covered by the court. A magistrate retains the ultimate power in sentencing the offender.

Victoria, NSW, WA and the two territories place limitations on the types of offences that can be heard. None of the five allows sexual offences to be heard. Victoria also disallows family violence offences; the ACT disallows offenders who are addicted to drugs other than cannabis; and NSW rules out offences of malicious wounding, grievous bodily harm, stalking, firearm offences, certain drug offences and child pornography/prostitution offences. The NT is cautious about cases involving violent offences, domestic violence offences or where the victim is a child.<sup>9</sup>

### *Participation of Elders*

The involvement of Elders or Respected Persons is one of the most important features of Indigenous sentencing courts. The aim is for there to be a positive impact when an Elder or Respected Person “has an existing relationship with the offender and when the offender comes to understand that he or she has ‘committed an offence not only against the white

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<sup>6</sup> See Marchetti and Daly, above n 1, 421 and 436

<sup>7</sup> See <<http://www.justice.vic.gov.au/home/courts/victorian+courts/justice+-+koori+court>>

<sup>8</sup> In Victoria, the Koori Court also has jurisdiction to deal with an offence where the defendant “intends to consent to the adjournment of the proceeding to enable him or her to participate in a diversion program”: *Magistrates' Court Act 1989* (Vic) s 4F(1)(c)(iii).

<sup>9</sup> See Marchetti and Daly, above n 1, 421-422.

law but also against the values of the [Indigenous] community.”<sup>10</sup> Whilst in some jurisdictions Elders or Respected Persons are chosen by the Aboriginal community, in Victoria they are appointed by the Secretary of the Department of Justice, following a selection process and interviews. In NSW they are appointed by the Minister after a recommendation by the Aboriginal project worker.<sup>11</sup>

### The Nunga Court Model (SA, Qld and Vic)<sup>12</sup>

*South Australia:* The South Australian Nunga Court was first established in Port Adelaide in 1999, and was the first modern Indigenous court in Australia.<sup>13</sup> It has since been extended to Port Augusta, Murray Bridge and Ceduna (on circuit).<sup>14</sup> The Port Augusta court has had a youth division since May 2003.<sup>15</sup>

The Nunga Court was the initiative of magistrate Mr Chris Vass after several years of discussions with Aboriginal community groups, State Government agencies, the Aboriginal Legal Rights Movement, police prosecutors, solicitors and Aboriginal people.<sup>16</sup>

The overwhelming feedback from those discussions was that Aboriginal people mistrusted the justice system, did not respond well to the demands of the formal questioning process required by examination and cross-examination, and felt that they had little input into the judicial process generally and sentencing deliberations specifically.<sup>17</sup>

Elders are paid for their contribution, and the Courts Administration Authority funds Aboriginal justice Officers who facilitate and foster links between Aboriginal people and the courts, educate Aboriginal communities about the operation of the criminal justice system, and educate court staff and the judiciary to raise awareness of local Aboriginal issues.<sup>18</sup>

The Nunga Courts achieve better attendance rates for Aboriginal offenders than regular courts, and the direct participation of government agencies and NGOs such as the Aboriginal Sobriety Group means that “opportunities for rehabilitation is more readily identified in Aboriginal courts [than in mainstream courts].”<sup>19</sup> Between 2003 and 2004, only 10% of the sentences imposed were prison sentences.<sup>20</sup>

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<sup>10</sup> Ibid, 436.

<sup>11</sup> LRCWA, above n 4, 155.

<sup>12</sup> See Tomaino, *Aboriginal Nunga Courts*, Information Bulletin #39, Government of South Australia and Office of Crime Statistics and Research : <[http://www.ocsar.sa.gov.au/docs/information\\_bulletins/IB39.pdf](http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf)>.

<sup>13</sup> See Freiberg, ‘Problem-orientated courts: An update,’ (2005) 14 *Journal of Judicial Administration* 196, 206.

<sup>14</sup> See also Marchetti and Daly, above n 1, 418.

<sup>15</sup> Ibid.

<sup>16</sup> Tomaino, above n 12, 2

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, 3.

<sup>19</sup> Ibid, 5.

<sup>20</sup> Ibid 10.

## Queensland

The Queensland Murri Court was first established in 2002. Individual Magistrates, service providers and local Indigenous communities have worked together to establish Murri Courts in Magistrates' and Children's Courts in Brisbane, Ipswich, Caboolture, Cleveland, Caloundra, Maryborough, Rockhampton, Mount Isa, Townsville and Cherbourg.<sup>21</sup> Their legislative basis is to be found in s 9(2) of the *Sentencing and Penalties Act 1992* (Qld), which requires judicial officers to listen to submissions from Elders or respected members of the Indigenous community when sentencing Indigenous offenders.<sup>22</sup> The Youth Murri Court in Brisbane was the first of its kind in Australia.<sup>23</sup>

In September 2005, the Attorney-General and Minister for Justice commissioned an internal review of the Murri Court. The review found that the Murri Court is a culturally appropriate sentencing court, and the involvement of Elders and respected persons assists the offender in developing trust in the court. It also found that the court's problem solving focus assists offenders to undertake rehabilitation and stop their offending conduct.<sup>24</sup> The Murri Court is seen as effective because it acknowledges offenders in the process, encourages them to change and reintegrate into the community, and the presence of members of their community helps them to understand the impact of the offending behaviour on their victim and the community.<sup>25</sup> The review also found that stakeholders did not find the Murri Court a 'soft option,' as the penalties (including intensive treatment and supervision) were considered relatively onerous on the offender.<sup>26</sup>

The review found that the offences most often dealt with by the Murri Court were non-violent offences such as stealing, receiving stolen property, unlawful use of a vehicle, illegal entry of premises, driving offences, drug offences and breach of bail conditions.<sup>27</sup> However, due to limitations in data collection processes, the review was unable to determine conclusively whether the Murri Court met its objectives of reducing imprisonment and decreasing the rate of reoffending.<sup>28</sup> Anecdotal evidence suggests that there is some success in diverting offenders from prison, with many offenders receiving rehabilitative probation orders rather than sentences of imprisonment.<sup>29</sup>

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<sup>21</sup> See

<[http://www.legalaid.qld.gov.au/legalinformation/Pages/Organisations.aspx?index=9004andredirect=organisations\\_details.asp](http://www.legalaid.qld.gov.au/legalinformation/Pages/Organisations.aspx?index=9004andredirect=organisations_details.asp)>

<sup>22</sup> See Marchetti and Daly, above n 1, 416.

<sup>23</sup> See LRCWA, above n 4, 149.

<sup>24</sup> Summary of the Review of the Murri Court, 2

<sup>25</sup> Ibid, 2-3.

<sup>26</sup> Ibid, 2.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, 3.

<sup>29</sup> Ibid.

## Victoria

The Victorian Koori Court first sat at Shepparton in 2002 following the passage of the *Magistrates' Court (Koori Court) Act 2002*.<sup>30</sup> It is the first, and so far only, Indigenous court that has been established under a separate legislative framework.<sup>31</sup> The Koori Court has since expanded to include a County Koori Court in Morwell dealing with indictable matters, and Koori Courts in Bairnsdale, Broadmeadows, Melbourne (Children's Court only), Mildura (both Adult and Children's), Moe/LaTrobe, Swan Hill, and Warnambool (on circuit to Portland and Hamilton).<sup>32</sup>

The Koori Courts in Shepparton and Broadmeadows were reviewed in 2005. This review found that the Koori Courts reduced levels of recidivism amongst Koori defendants, thereby decreasing the levels of Koori over-representation in the prison system.<sup>33</sup> During the review period between October 2002 and October 2004, the recidivism rate of the Shepparton Koori Court was approximately 12.5% and the rate for the Broadmeadows Koori Court was 15.5%, considerably less than the general rate of 29.4%.<sup>34</sup> The review also found that the Koori Courts had achieved reductions in breach rates of community corrections orders, and in rates of Koori defendants failing to appear at court.<sup>35</sup> Reinforced status and authority for Elders and Respected Persons helped to strengthen the Koori community. The consideration of cultural issues, along with a less alienating sentencing forum, also allowed defendants to give their own accounts of their reasons for offending.<sup>36</sup>

A further evaluation of the Children's Koori Court published in 2010 found that it had significant benefits in terms of the rates of failures to appear or breaches of court orders compared with regular court processes, but that the recidivism rate (of just under 60%) was only a slight improvement. However, the author (Professor Allan Borowski of La Trobe University) pointed out that this could be explained by the low proportion of offenders dealt with by the court, as well as underlying issues associated with offenders' disadvantaged social status.<sup>37</sup>

There is a formal Victorian Aboriginal Justice Agreement, the first version of which was launched in 2000 and reviewed four years later. The second version was launched in 2006.<sup>38</sup>

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<sup>30</sup> See *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004*: <[http://www.justice.vic.gov.au/resources/3/0/30b2b88045b5b35c8eceaee6d4b02f11/evaluation\\_of\\_the\\_koori\\_courts\\_pilot\\_program.pdf](http://www.justice.vic.gov.au/resources/3/0/30b2b88045b5b35c8eceaee6d4b02f11/evaluation_of_the_koori_courts_pilot_program.pdf)>. Since incorporated into the *Magistrates' Court Act 1989*. The Children's Koori Court was established under the *Children, Youth and Families Act 2005*.

<sup>31</sup> See Marchetti and Daly, above n 1, 430.

<sup>32</sup> See <<http://www.justice.vic.gov.au/home/courts/victorian+courts/justice+-+koori+court>>.

<sup>33</sup> See *A Sentencing Conversation*, above n 30, 8.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, 9.

<sup>37</sup> See Borowski, 'Indigenous Participation in Sentencing Young Offenders: Findings from an Evaluation of the Children's Koori Court of Victoria,' 43 *Australian and New Zealand Journal of Criminology* 3 (2010), 465-482.

<sup>38</sup> See <<http://indigenousjustice.gov.au/db/publications/272603.html>>.

## Circle Sentencing Courts (NSW and ACT)

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.<sup>39</sup>

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.<sup>40</sup> The first circle sentencing court was established on a trial basis at Nowra in 2002. The Ngambra Circle Court<sup>41</sup> was established in May 2004 within the ACT Magistrates Court. It was modelled on the Nowra court. After a six month trial period, it was made a permanent fixture.<sup>42</sup> An offence may be dealt with by circle sentencing if it can be finalised in the local court (that is, it is not a serious indictable offence which must be dealt with in a higher court), and it carries a term of imprisonment which is likely to be imposed in the circumstances. This ensure the process targets those offenders who are most at risk of imprisonment, although it may still result in a sentence of imprisonment if that is considered appropriate.<sup>43</sup>

The main differences between circle sentencing and the Nunga Court model are as follows: circle court hearings are often held in a culturally significant venue rather than mainstream Magistrates' or Local courts, the participants sit in a circle rather sitting at a Bar table or in normal courtroom seats, victims have a greater degree of participation in circle sentencing and the Elders in a circle court have a greater degree of participation in the framing of the penalty imposed on an offender.<sup>44</sup> Circle courts also tend to be more resource intensive than the Nunga Court model, as sentencing can take anywhere between two hours and an entire day for one matter.<sup>45</sup>

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<sup>39</sup> Ibid. See Madden, *The Circle Court in the ACT – An Overview and its Future*, address to the Australian Institute of Judicial Administration, 2007, available at:

<<http://www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Madden.pdf>>.

<sup>40</sup> See Nicholas Cowdery, 'Alternatives to Conventional Sentencing: Some Recent Developments,' 7 *Judicial Review* 3 (Sep 2005), 365 at 368.

<sup>41</sup> See <[http://www.justice.act.gov.au/criminal\\_and\\_civil\\_justice/circle\\_sentencing](http://www.justice.act.gov.au/criminal_and_civil_justice/circle_sentencing)>.

<sup>42</sup> See Madden, above n 39.

<sup>43</sup> 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>>, 5.

<sup>44</sup> See Marchetti and Daly, above n 1, 430.

<sup>45</sup> See LRCWA, above n 4, 153.

Circle sentencing in NSW has been evaluated twice – by the Judicial Commission in 2003<sup>46</sup> and by the BOCSAR in 2008.<sup>47</sup> The 2003 review, which evaluated the first 12 months of operation in Nowra, found that circle sentencing:

- reduces the barrier between the courts and Aboriginal people
- improves the level of support for Aboriginal offenders
- incorporates support for victims and promotes healing and reconciliation
- increases the confidence and generally promotes the empowerment of Aboriginal persons in the community
- introduces more relevant and meaningful sentencing options for Aboriginal offenders, with the help of respected community members,
- engenders a high level of satisfaction on the part of offenders, victims, lawyers, community representatives and support persons compared with normal court proceedings, and
- helps to break the cycle of recidivism.<sup>48</sup>

The BOCSAR review five years later, in contrast, found that the statistics on reoffending showed no significant improvement from circle sentencing compared with normal court proceedings. However, the author of the review noted that:

*It should not be concluded that circle sentencing has no value simply because it does not appear to have any short-term impact on reoffending. Reducing recidivism is just one of several objectives of the process. There is nothing in this analysis to suggest that circle sentencing is not meeting the other objectives. If it strengthens the informal social controls that exist in Aboriginal communities, circle sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of reoffending for individuals.<sup>49</sup>*

The report suggested that circle sentencing might be more effective in reducing recidivism if it were combined with other programs such as cognitive behavioural therapy, drug and alcohol treatment and remedial education.<sup>50</sup> The NSW Government moved to enable such cooperation between 2008 and 2010.<sup>51</sup>

According to Gail Wallace, an Indigenous woman and Project Officer with the Nowra court, the circle sentencing experience has been positive. A culturally appropriate court is an

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<sup>46</sup> See *Circle Sentencing in NSW: A Review and Evaluation*, above n 43.

<sup>47</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_cjb115](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb115)>.

<sup>48</sup> See Judicial Commission Review, *Circle Sentencing in New South Wales: A Review and Evaluation*, Executive Summary: <[http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph22/executive\\_summary.html](http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph22/executive_summary.html)>.

<sup>49</sup> See Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB115.pdf/\\$file/CJB115.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB115.pdf/$file/CJB115.pdf)>, 7.

<sup>50</sup> Ibid.

<sup>51</sup> Sydney Morning Herald, "Circle Sentencing Expanded in NSW" (2010). See <<http://news.smh.com.au/breaking-news-national/circle-sentencing-expanded-in-nsw-20100930-15xon.html>>

important part of the restoration of missing culture to Aboriginal communities, which has a strong healing impact. Trust between Indigenous people and the traditional criminal justice system is lacking, and circle sentencing is helping to build bridges in this regard by involving the community directly and giving them a fuller picture of crime. Crucially, circle sentencing allows communities to regain some control over their social problems, and its educational value is just as important as its effect on reoffending.<sup>52</sup>

Since 2002, circle sentencing in NSW has been rolled out to Dubbo, Brewarrina (on circuit), Bourke, Kempsey, Armidale, Lismore, Walgett, Mt Druitt (in Sydney), Kempsey, Nambucca Heads, Moree, Ulladulla, Wellington, Blacktown (also in Sydney) and Coonamble.<sup>53</sup> It now has a specific mandate under the under Part 6 of the Criminal Procedure Regulation 2010 (NSW).

The Ngambra Circle Court in the ACT is based on an Interim Practice Direction from the Chief Magistrate and the general sentencing discretion afforded by the *Crimes (Sentencing) Act 2005* (ACT). The ACT Government signed an Aboriginal and Torres Strait Islander Justice Agreement on 2 August 2010, one aspect of which involved strengthening the Ngambra Circle Court. So far this is still under consideration, although a public Options Paper has been released.<sup>54</sup>

## Community Courts

### *Western Australia*

The Kalgoorlie Aboriginal Sentencing Court or “Community Court” was established in 2006 within the Magistrates’ Court’s existing legislation.<sup>55</sup> The court was established after initial evaluations of Aboriginal Courts operating in Victoria, South Australia and New South Wales and extensive consultation with Kalgoorlie’s Aboriginal community.<sup>56</sup> The purpose of the court is to provide a courtroom and sentencing experience that is more relevant and less intimidating for Aboriginal people, with informal processes and a rehabilitative focus.<sup>57</sup> Aboriginal Elders and respected persons serve as panellists who advise the magistrate on cultural issues and help the accused understand court processes.<sup>58</sup> The intended outcomes

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<sup>52</sup> See Wallace, ‘Nowra Circle Sentencing: Seven Years Down the Track,’ 7 *Indigenous Law Bulletin* 16 (Jan/Feb 2010), 13-16.

<sup>53</sup> See Marchetti and Daly, above n 1, 417; also <<http://www.creativespirits.info/aboriginalculture/law/circle-sentencing.html>>.

<sup>54</sup> See <<http://www.justice.act.gov.au/publication/view/1286>>.

<sup>55</sup> See *The Origin of the Kalgoorlie Aboriginal Sentencing Court Factsheet*, WA Dept of the Attorney-General: <[http://www.courts.dotag.wa.gov.au/files/kalcourt\\_factsheet1.pdf](http://www.courts.dotag.wa.gov.au/files/kalcourt_factsheet1.pdf)>.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

of the court are a decrease in the overrepresentation of Aboriginal people in the criminal justice system, and a decrease in the rate of recidivism.<sup>59</sup>

In the second half of 2009, strategic business experts from *Shelby Consulting* were engaged to conduct an evaluation of the Kalgoorlie Community Court. They found that most stakeholders believed that the Community Court process resulted in a more meaningful and culturally appropriate experience, and had a positive effect on the relationship between the law and Aboriginal people.<sup>60</sup> However, despite these positive perceptions, evidence indicated that offenders dealt with by the Community Court were more likely to reoffend than those dealt with by the Kalgoorlie Magistrates' Court.<sup>61</sup> The evaluation found that 51 per cent of juvenile offenders in the Community Court reoffended after six months compared to 41 per cent in the Children's Court, 46 per cent of adult offenders in the Community Court re-offended after six months compared to 30 per cent in the Magistrates' Court and overall 48 per cent of all participants in Community Court re-offended after six months compared to 31 per cent in the mainstream courts.<sup>62</sup>

On a more positive note, 49 per cent of Community Court participants who reoffended committed a less serious offence, compared with 36 per cent in the Magistrates' Court.<sup>63</sup> The evaluation concluded that the lack of mainstream and Aboriginal-specific treatment, intervention and rehabilitation programs, as well as inadequate support for offenders, were key factors in the failure of the Community Courts to achieve a reduction in the rate of recidivism.<sup>64</sup> The consultants concluded that the Community Court needs proper care and attention to be able to meet its aims and purposes.

There are also Community Courts in Yandeyarra, South Hedland and Norseman,<sup>65</sup> as well as less formal practices where judicial officers travel to regional and remote areas in Wiluna, Geraldton and the Ngaanyatjarra Lands.<sup>66</sup>

### *Northern Territory*

The Darwin Community Court grew out of discussions between the Magistrates' Court and the Yilli Rreung Council in 2004. The Community Court is not restricted to Indigenous defendants.<sup>67</sup> The Court aims to provide more effective, meaningful and culturally relevant

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<sup>59</sup> Ibid.

<sup>60</sup> See *Summary of Evaluation of the Kalgoorlie Community Court*, WA Dept of the Attorney-General: <[http://www.courts.dotag.wa.gov.au/files/kalcourt\\_factsheet2.pdf](http://www.courts.dotag.wa.gov.au/files/kalcourt_factsheet2.pdf)>.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid. The evaluation also found that 40 per cent of participants in the Community Court were children, compared with 10 per cent in the mainstream court.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> See Hunter, 'How the Criminal Justice System can be Best Utilised to Reduce the Increasing Rate of Offending and Imprisonment of Western Australia's Indigenous Population,' 15 *Murdoch eLaw Journal* 2 (2008) 134 at 142.

<sup>66</sup> Marchetti and Daly, above n 1, 416.

<sup>67</sup> See *Community Court Darwin Guidelines*:

<[http://www.nt.gov.au/justice/ntmc/docs/community\\_court\\_guidelines\\_27.05.pdf](http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf)>, 1.

sentencing options; increase community safety; decrease rates of offending, and to reduce repeat offending and breaches of court orders.<sup>68</sup> The Court also aims to increase community participation in the administration of the law and the sentencing process; increase community knowledge and confidence in the sentencing process; increase the accountability of the community, families and offenders; provide support to victims and enhance the rights and place of victims in the sentencing process, and to enhance the offender's prospects of rehabilitation and capacity to make reparation to the community.<sup>69</sup> The Community Court model is also used in Nhulunbuy and Nguuu on the Tiwi Islands when the Magistrate is on circuit.<sup>70</sup>

## **Diversiory Programs**

### **Pre-charge Programs**

Under the ACT's Police Early Diversion program, the police in the ACT may refer an offender charged with possession of a small quantity of illicit drugs to an approved health agency for treatment rather than laying formal charges.<sup>71</sup> Police retain the option to charge if the offender does not comply with (or agree to) a treatment plan.

In NSW there are a range of pre-charge options available to police. Under the Adult Cannabis Cautioning Scheme police are given discretion to caution an eligible adult in possession of up to 15 grams of cannabis leaf and/or equipment for the administration of cannabis.<sup>72</sup> The program is not applicable to offenders with histories of violent, sexual or drug offences. Alternatively, section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) "allows a person with a developmental disability, mental illness or other mental condition to be diverted from the criminal justice system to be treated in an appropriate rehabilitative context enforced by the court."<sup>73</sup> Magistrates were surveyed on the use of s 32 by the Judicial Commission of NSW in 2008. The Commission found that this mechanism has "the potential to produce positive outcomes"<sup>74</sup> but that magistrates were concerned about the "utility of s 32 being undermined by a lack of mental health care resources."<sup>75</sup>

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<sup>68</sup> Ibid, 2.

<sup>69</sup> Ibid.

<sup>70</sup> See Marchetti and Daly, above n 1, 417.

<sup>71</sup> See <<http://www.health.act.gov.au/health-services/community-health/community-health-services/alcohol-other-drugs/diversion-services>>.

<sup>72</sup> See Cowdery, 'Alternatives to Conventional Sentencing: Some Recent Developments,' 7 *Judicial Review* 3 (Sep 2005), 365 at 376.

<sup>73</sup> See Weeks, 'To Section 32 or Not?,' 2010 *Law Society Journal* 49.

<sup>74</sup> See Gotsis and Donnelly, Diverting mentally disordered offenders in the NSW Local Court, Judicial Commission 2008: <<http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph31/monograph31.pdf>>, 29.

<sup>75</sup> Ibid, 31.

Under section 10 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, a court that finds a person guilty of an offence can, without proceeding to a conviction, dismiss the charges or discharge the offender on a conditional good behaviour bond or intervention program.<sup>76</sup>

### Pre-trial Programs

Pre-trial conferencing – an alternative to a formal court hearing involving a meeting between the offender and the victim(s) of the crime - is used in all states and territories. The programs are primarily aimed at juveniles, and focus on helping the offender take responsibility for their actions, as well as allowing victims a greater role in proceedings.

#### ACT

Pre-trial justice conferencing has been used in the ACT since 1994 on an ad hoc basis,<sup>77</sup> but in 2004 the *Crimes (Restorative Justice) Act 2004 (ACT)* was passed as part of the ACT Government's Criminal Justice Strategic Plan 2002-05. It allows the use of conferencing at all stages of proceedings – from pre-trial diversion by police to parole hearings. Participants are required to accept responsibility for their offence and consent to a conference with the victim(s). The scheme is open to any offender over the age of 10, but is most frequently used for juvenile offenders. The AFP's ACT policing unit has set up a Restorative Justice Unit to implement the pre-trial aspect of the scheme.<sup>78</sup>

#### NSW

The *Young Offenders Act 1997 (NSW)* allows for Youth Justice Conferences in some circumstances.<sup>79</sup> The Act provides procedures for warnings, cautions, youth justice conferences and court proceedings in ascending order of severity. The conferences are intended to enable young people to take steps towards repairing the harm they have caused and taking responsibility for their actions. Offenders, family, supporters and victims are brought together and must agree on a suitable outcome that can include an apology, reasonable reparation to victims and steps to link the young person back into the community. Participation is voluntary, and a caution may be considered as inappropriate due to the seriousness of the offence, degree of violence, harm caused to the victim or the offender's criminal history. In February 2012 a BOCSAR study on juvenile reoffending found that Youth Justice Conferencing was achieving substantially the same results as the Children's Court.<sup>80</sup>

The *Criminal Procedure Amendment (Community Conferencing Intervention Program) Regulation 2005 (NSW)* provides the regulatory framework for a community conferencing

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<sup>76</sup> See <[http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1999278/s10.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s10.html)>.

<sup>77</sup> See <<http://www.aic.gov.au/publications/current%20series/tandi/381-400/tandi398.aspx>>.

<sup>78</sup> See <[http://www.afp.gov.au/about-the-afp/~/\\_media/afp/pdf/ips-foi-documents/ips/publication-list/PRA10075\\_PG\\_on\\_Diversionary\\_conferencing\\_Restorative\\_Justice\\_Unit\\_ACT\\_Policing.ashx](http://www.afp.gov.au/about-the-afp/~/_media/afp/pdf/ips-foi-documents/ips/publication-list/PRA10075_PG_on_Diversionary_conferencing_Restorative_Justice_Unit_ACT_Policing.ashx)>.

<sup>79</sup> See Cowdery, above n 72, 371.

<sup>80</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/cjb160.pdf/\\$file/cjb160.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb160.pdf/$file/cjb160.pdf)>.

pilot program for young adult offenders.<sup>81</sup> The pilot program is modelled on the *Young Offenders Act*, however conferencing will be used by magistrates as an additional sentence option rather than a diversionary option - magistrates can sentence an offender after the completion of an intervention plan. The objectives of the program include:

- providing greater participation in the justice process for offenders, victims and their families;
- increasing offender's awareness of the consequences of offending;
- increasing the satisfaction of victims with the justice process;
- increasing the confidence of the community in the justice process, and
- providing an additional sentencing option to participating courts.

To be eligible to participate in the program, the offender must be aged 18-24 at the time the offence was committed and have pleaded guilty or been convicted. Eligible offences must be a summary offence or an indictable offence that may be dealt with summarily. Section 348 of the *Criminal Procedure Act 1986* excludes a number of offences such as offences involving the use of a firearm, sexual assault and malicious wounding or infliction of grievous bodily offences. Victims play a large role in the program.<sup>82</sup> They are entitled to attend and bring support persons, and can also veto the intervention plan.

In relation to sexual offences, the *Pre-Trial Diversion of Offenders Act 1985* (NSW) provides that a person who pleads guilty to an offence of child sexual assault committed against a child who is his child, a partner's child or their de facto partner's child, may be diverted from the criminal justice system to the pre-trial diversion program co-ordinated by the NSW Health Department.<sup>83</sup> After being charged with the defined sexual assault offence, the offender must be given information regarding the program by the police. If he intends to take part in the program, the offender must indicate this to the magistrate before plea or any indication of a plea. Offenders can obtain treatment and counselling for their behaviour, however they may only participate in the program if the Director of Public Prosecutions considers that they should be referred for assessment and have satisfied the eligibility test set out in the regulations. If offenders are excluded from the program, they are sentenced for the offences for which they have been convicted.

### *Victoria*

In Victoria, unlike all other jurisdictions, restorative conferencing is a diversion program used by the courts; police are unable to refer juveniles to restorative conferences.<sup>84</sup> Under Victoria's *Children, Youth and Families Act 2005*, conferences aim to prevent juvenile

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<sup>81</sup> See Cowdery, above n 72, 372.

<sup>82</sup> Ibid, 373.

<sup>83</sup> Ibid, 375-6.

<sup>84</sup> See 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>>.

recidivism by enhancing juveniles' understanding of the effects of their offending behaviour on victims and the community. Under the program, juveniles can be diverted from receiving a community-based youth justice order, or from receiving a more severe disposition than they may have received had they not participated in a conference. The court must take a juvenile's participation in a group conference into consideration during sentencing. To avoid net-widening (that is, punishing offenders who might not otherwise face any punishment), the program does not target offences that may be dealt with by police diversion strategies, such as cautioning.

In 2006, the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* established the Neighbourhood Justice Court in Victoria. The Children's Court (criminal division) sits at the Neighbourhood Justice Centre and the juvenile conferencing program operates from the court.

Victoria also runs the Juvenile Justice Adult Court and Advice Support Service (JJACASS) which targets offenders between 17 and 21 in the critical phase of transition to the adult justice system.<sup>85</sup>

### *Tasmania*

Youth justice conferences were conducted by police in Tasmania in an unlegislated capacity until the introduction of the *Youth Justice Act 1997*.<sup>86</sup> Although this legislation does not describe the purpose of community conferences for juveniles, the Department of Health and Human Services Tasmania states that conferences aim to assist juveniles to accept responsibility for, and repair harm caused by, their offending behaviour; assist victims by facilitating their participation in decision-making; improve community confidence in the criminal justice system; and provide the young person with support to develop pro-social behaviours and to avoid recidivism.

Under the Act, a juvenile must agree to the convening of a community conference and must sign an undertaking to attend the conference. The juvenile, the relevant police officer and the victim (if present at the conference) must agree on the outcome of a community conference.

### *South Australia*

Conferencing for juveniles in South Australia was introduced across the state under the *Young Offenders Act 1993*.<sup>87</sup> This Act deals with 'minor offences' committed by juveniles and determines whether an offence is minor according to: the limited extent of the harm

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<sup>85</sup> See Freiberg, above n 13, 199.

<sup>86</sup> See Richards, above n 84, 4.

<sup>87</sup> Ibid.

caused; the character and antecedents of the alleged offender; the improbability of the youth reoffending; and where relevant, the attitude of the youth's parents or guardians. Although the Act does not describe the purpose of conferencing, its general principles are that interventions with juveniles should emphasise restitution to victims, strengthen family relationships and avoid impairing juveniles' sense of cultural, racial or ethnic identity and/or their education or employment.

Both the youth for whom the conference has been convened, and the Commissioner of Police, have the right to veto decisions made at family conferences.

#### *Western Australia*

Following a pilot scheme in Fremantle and Perth, juvenile justice teams were formally established across Western Australia in 1995 under the *Young Offenders Act 1994*.<sup>88</sup> According to the Act, juvenile justice teams aim to prevent recidivism by avoiding juveniles' exposure to negative influences, provide a forum in which families can positively influence young offenders, provide a response that is proportionate to the seriousness of juveniles' offending and can be delivered within a timeframe appropriate for young people and enhance juveniles' understanding of their offending behaviour and its consequences. All potential participants must consent to having the offence dealt with via a juvenile justice team. If the juvenile, the juvenile's parent/guardian, or the victim does not consent to having the matter dealt with by a team, or does not agree with the outcomes stipulated by a team, the matter is to be sent back to the referral source.

#### *Queensland*

Conferencing for juveniles in Queensland was introduced in 1996 following amendments to the *Juvenile Justice Act 1992* and was initially implemented in a small number of localities by community organisations.<sup>89</sup> The program now operates across the state. According to the Act, conferencing aims to assist juveniles, their parents, victims and the community by facilitating their participation in a process that encourages juveniles to accept responsibility for their behaviour, allows victims to receive restitution, encourages family and community decision-making, reduces costs and prevents recidivism.

#### *Northern Territory*

A police-run conferencing program for juveniles was trialled in Alice Springs and Yuendumu during 1995–96.<sup>90</sup> A pre-court diversion scheme was established across the Northern Territory in 2000, which introduced police-led conferences for selected offences. In 2008, the Youth Justice Act came into force in the Northern Territory. Although the Act does not explicitly state the purpose of conferencing for juveniles, conferences appear to have been

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, 4-5.

introduced within the context of diversion and exist as part of the Northern Territory's range of diversionary options for juveniles.

Under this Act, police must divert juveniles via warnings, conferences or other diversionary measures, unless: the offence for which the juvenile has been apprehended is 'serious'; the youth has been diverted twice before; or the youth has a history of previous diversions or convictions that make him/her unsuitable for diversion. In addition, both the youth and a responsible adult, such as the youth's guardians, must consent to the diversion.

### Non-drug-related Sentence Deferral Programs

New South Wales runs two Sentence Deferral Programs similar to those available to drug addicted offenders.

The Traffic Offender Intervention Program is a road safety education program, undertaken as a condition of bail or sentence deferral, which "provides offenders with the information and skills necessary to develop positive attitudes towards driving and become safer drivers."<sup>91</sup> Offenders must attend intensive lessons with follow-up written assignments, and their level of commitment can be taken into account on final sentencing.<sup>92</sup>

The Court Referral of Eligible Defendants into Treatment (CREDIT) program is for offenders who wish to address underlying causes of their offending other than drugs and alcohol. Participation may either be voluntary or court-ordered. The program began in 2009 in Burwood and Tamworth with the primary goal of reducing reoffending through facilitation of access to social welfare support.<sup>93</sup>

An evaluation of CREDIT published in February 2012 by BOCSAR commented that the high quality information provided to the court about the context of crimes and the defendant's psychosocial situation contributes to very effective decision-making and sentencing. It also found that collaboration between different service sectors in an effort to address underlying problems causing offending was particularly good and efficient in the CREDIT program.<sup>94</sup> The evaluation concluded that CREDIT has already resulted in significant mental and physical health benefits for participants, and engendered a high level of satisfaction with its procedures.<sup>95</sup> BOCSAR intends to release a complementary evaluation focussing on recidivism later in 2012.<sup>96</sup>

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<sup>91</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/CPD\\_projects](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/CPD_projects)>.

<sup>92</sup> See Cowdery, above n 72, 374.

<sup>93</sup> See <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB159.pdf/\\$file/CJB159.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB159.pdf/$file/CJB159.pdf)>, 1.

<sup>94</sup> Ibid, 21.

<sup>95</sup> Ibid.

<sup>96</sup> See <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_cjb159](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb159)>.

## Special Circumstances Lists

Some states have court lists or diversion programs for people in special circumstances, including being homeless, mentally impaired and, in Victoria, being a sex worker.

### *Queensland*

The Brisbane Special Circumstances Court Diversion Program (also known as the Homeless Persons' Court) commenced operation in May 2006. It is available to adults who are homeless or at immediate risk of becoming homeless and suffer from a decision-making impairment. It is not available to violent and/or sex offenders.

The court was assessed in 2006 and it was found to be meeting its aims of more appropriate sentences for homeless offenders and intensive ongoing supervision for offenders receiving coordinated services. The reviewer (Tamara Walsh of the University of Queensland) concluded "[i]t certainly seems that the special circumstances list has been effective in changing sentencing practice in a way that is appropriate to defendants' needs, and more likely to address the underlying causes of their offending behaviour."<sup>97</sup> Walsh conducted a further assessment in 2010 and 2011 which involved interviews with offenders:

*Many said that they believed they would be in jail, homeless or even have died, had they not come across the Special Circumstances Court. Others spoke of the impact the court had had on their sense of self – their self-esteem, their confidence, and their capacity to cope. One said, 'I've begun to dream again'. Many defendants said their respect for the justice system had been renewed.*

Many of the defendants expressed the hope that the services they had received at the Special Circumstances Court would be available to other defendants like them in future. Some of the professionals added that they felt the kind of help that was available to defendants at the Special Circumstances Court should be available to "all homeless people; all mentally ill people". Clearly this would require a significant injection of funds into the community sector, but further to this, the comments of these participants indicated that serious thought needs to be put into how the service system is organised, and how accessible it is to the people it aims to assist.<sup>98</sup>

Walsh concluded by noting that "[t]he participants interviewed in this study believed the Special Circumstances Court should be considered a 'success,' even if its achievements are not easily quantified".<sup>99</sup>

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<sup>97</sup> Tamara Walsh, 'The Queensland Special Circumstances Court,' 16 *Journal of Judicial Administration* (2007) 223, 234.

<sup>98</sup> Tamara Walsh, 'Defendants' and criminal justice professionals' views on the Brisbane Special Circumstances Court,' 21 *Journal of Judicial Administration* (2011) 93, 107.

<sup>99</sup> *Ibid*, 108.

## *South Australia*

The Magistrates' Court Diversion Program in South Australia is effectively a mental health court. It has moved beyond trial status and now operates in seven courts which may sit on a weekly, fortnightly or monthly basis.<sup>100</sup>

## *Tasmania*

The Mental Health Diversion List (MHDL) Program operates with dedicated magistrates in the Hobart and Launceston registries of the Tasmanian Magistrates' Court.<sup>101</sup> The Magistrates' Court commenced a pilot MHDL in Hobart on 24 May 2007. The success of the MHDL pilot in Hobart has convinced the Court to make the MHDL a permanent feature of its operations and extend the list to Launceston. The MHDL program commenced in Launceston in March 2010.<sup>102</sup>

The MHDL is intended to deliver a more therapeutic response to offending behaviour by defendants with mental health issues. These defendants offend usually in ways which are considered 'nuisances' - eg shoplifting and disorderly conduct, and they have traditionally been dealt with in the general lists where there is little time to consider the reasons for their offending. They are often repeat offenders. They present some problems in sentencing as they often have no money with which to pay a fine, and their offences are not serious enough for imprisonment or community service orders.<sup>103</sup>

Eligibility for participation in the MHDL is limited to adult defendants with impaired intellectual or mental functioning as a result of a mental illness (as defined in the *Mental Health Act 1996*). Participation in the MHDL is at all times voluntary. Referrals to the MHDL can come from the defendants themselves, family members, other magistrates, and lawyers acting for the defendant. The MHDL is only available where the defendant is charged with a summary offence, or an indictable offence triable summarily, and excludes sexual offences and offences involving the infliction of actual and serious bodily harm.

In October 2010 the MHDL received a Certificate of Merit as part of the Australian Crime and Violence Prevention Awards. The Awards reward good practice in the prevention or reduction of violence and other types of crimes in Australia, to encourage public initiatives and to assist governments in identifying and developing practical projects that will reduce violence and other types of crime in the community. An evaluation of the MHDL in 2000 found that it met one of its main objectives which was to address the mental health issues

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<sup>100</sup> Freiberg, above n 13, 203.

<sup>101</sup> See <[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_and\\_general/mental\\_health\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion)>

<sup>102</sup> See

<[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_and\\_general/mental\\_health\\_diversion/Mental\\_Health\\_Diversion\\_List](http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion/Mental_Health_Diversion_List)>

<sup>103</sup> Ibid.

and needs of defendants and, in turn, reduce their offending behaviour.<sup>104</sup> The evaluation also found that the MHDL was able to offer a more therapeutic approach to the criminal justice system for mentally ill defendants and save valuable court resources and time.<sup>105</sup>

### Victoria

Given the representation of the vulnerable groups which are the principal subjects of the present report is high amongst Australia's homeless population,<sup>106</sup> recommendations made by PILCH in 2004 in its report on homeless persons and the law are highly relevant. PILCH recommended a specialist Homeless Persons' List be set up which would coordinate relevant agencies and "apply the principles of therapeutic jurisprudence and administer a range of diversionary strategies and alternative sentencing options."<sup>107</sup> In 2006 the Victorian Government expanded the remit of an existing list (the Special Circumstances List, which deals with defendants with mental, cognitive or psychiatric impairment) to include homelessness, and adopted another PILCH recommendation to appoint a Homeless Persons' Liaison Officer to the Magistrates' Court in 2010.<sup>108</sup>

The Assessment and Referral Court (ARC) List is managed by the Magistrates' Court of Victoria. The ARC List helps people with a mental illness or cognitive impairment receive appropriate support. The Mental Health Court Liaison Service (MHCLS) is an initiative of the Magistrates' Court of Victoria. The aim of the MHCLS is to provide court assessment and advice services to Magistrates in relation to people who may have a mental illness appearing before the Magistrates' Courts.<sup>109</sup>

The Criminal Justice Diversion Program is governed by section 59 of the *Criminal Procedure Act 2009*. The Program provides mainly first time offenders with the opportunity to avoid a criminal record by undertaking conditions that benefit the offender, victim and the community as a whole. In January 1997, the Magistrates' Court of Victoria, in cooperation with Victoria Police, piloted the scheme at Broadmeadows Magistrates' Court. Senior police, courts and the legal profession reviewed the pilot and a revised scheme commenced at Broadmeadows and Heidelberg Courts in November 2000. It is now available to all Magistrates' Courts throughout Victoria.<sup>110</sup>

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<sup>104</sup> See Newitt and Stojcevski, *Mental Health Diversion List: Evaluation Report* (2009), 6.

<sup>105</sup> Ibid.

<sup>106</sup> See eg *Queensland Homeless Persons Court Diversion Program Pilot Evaluation – Literature Review* (2007), available at: <[http://www.courts.qld.gov.au/data/assets/pdf\\_file/0016/95110/HPCDP-RPT-EvaluationLiteratureReviewJan08.pdf](http://www.courts.qld.gov.au/data/assets/pdf_file/0016/95110/HPCDP-RPT-EvaluationLiteratureReviewJan08.pdf)>, 5-6.

<sup>107</sup> Ibid, 6.

<sup>108</sup> See <<http://www.pilch.org.au/hplo/>>

<sup>109</sup> See <<http://www.courts.vic.gov.au/courts-tribunals/specialist-courts-and-initiatives/assessment-and-referral-court>>

<sup>110</sup> See *Guide to Court Support and Diversion Services*:

<<http://www.magistratescourt.vic.gov.au/sites/default/files/Default/guide%2Bto%2Bcourt%2Bsupport%2B%26%2Bdiversion%2Bservices%2B-%2Bmar%2B2011.pdf>>.

The Diversion Program is aimed at improving the efficient use of court resources by facilitating the development of an alternative and/or complementary procedure to normal case processes. The Magistrates' Court intends the Program to provide the following benefits: when appropriate, making restitution to the victim of the offence and providing an apology; reducing the likelihood of reoffending; avoiding a criminal record for the offender; providing the offender with assistance with rehabilitation and appropriate counselling and/or treatment and finally assisting in local community projects with voluntary work and donations.<sup>111</sup>

### *Western Australia*

The Magistrates' Court of Western Australia has an Intellectual Disability Diversion Program, a joint initiative with that State's Disability Services Commission.<sup>112</sup> It aims to reduce recidivism, the rate of imprisonment and to improve the ways in which the justice system deals with people with intellectual disability. The program is operated out of the Central Law Courts and specifically addresses the problem or problems that underpin offending behaviour.<sup>113</sup>

A separate court listing has been created at the Central Law Courts for those the Court has identified as having mental health issues. This Mental Health List aims to ensure that those with mental health issues are dealt with in a more appropriate manner than the general sentencing courts by assisting in the provision of treatment, care and support.<sup>114</sup>

## **Drug Courts**

### *General*

The drug court was the first problem-oriented court to be established in Australia.<sup>115</sup> All of the drug court programs were introduced on a pilot basis with their continuation being subject to satisfactory evaluation.

A drug court is generally understood as a court which is "specifically designated to administer cases referred for judicially supervised drug treatment and rehabilitation within a jurisdiction."<sup>116</sup> In relation to the criminal justice system, they aim to reduce the level of

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<sup>111</sup> Ibid.

<sup>112</sup> See

<[http://www.magistratescourt.wa.gov.au/I/intellectual\\_disability\\_diversion\\_program\\_iddp.aspx?uid=7942-2328-8603-7948](http://www.magistratescourt.wa.gov.au/I/intellectual_disability_diversion_program_iddp.aspx?uid=7942-2328-8603-7948)>.

<sup>113</sup> See

<[http://www.magistratescourt.wa.gov.au/I/intellectual\\_disability\\_diversion\\_program\\_iddp.aspx?uid=7942-2328-8603-7948](http://www.magistratescourt.wa.gov.au/I/intellectual_disability_diversion_program_iddp.aspx?uid=7942-2328-8603-7948)>.

<sup>114</sup> See <[http://www.magistratescourt.wa.gov.au/M/mental\\_health\\_list.aspx?uid=1798-2813-8239-9839](http://www.magistratescourt.wa.gov.au/M/mental_health_list.aspx?uid=1798-2813-8239-9839)>.

<sup>115</sup> Freiberg, above n 13, 200.

<sup>116</sup> See Freiberg "Problem-Oriented Courts: Innovative Solutions to Intractable Problems?" (2001) *Journal of Judicial Administration* 9, 12.

drug-related criminal activity, reduce the level of breaches of conditional orders and to reduce imprisonment rates and the consequent cost to the criminal justice system.<sup>117</sup> These aims are achieved by “judicial and therapeutic interventions which aim to eliminate, decrease or manage drug usage, to decrease the number and rate of relapses and the provision of a range of life skills.”<sup>118</sup>

The United States National Association of Drug Court Professionals, Drug Court Standards Committee has identified ten key components of drug courts:<sup>119</sup>

- drug courts integrate alcohol and other drug treatment services with justice system case processing;
- using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants’ due process rights;
- eligible participants are identified early and promptly placed in the drug court program;
- drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services;
- abstinence is monitored by frequent alcohol and other drug testing;
- a coordinated strategy governs drug court responses to participants’ compliance;
- ongoing judicial interaction with each drug court participant is essential;
- monitoring and evaluation measure the achievement of program goals and gauge effectiveness;
- continuing interdisciplinary education promotes effective drug court planning, implementation, and operations;
- forging partnerships among drug courts, public agencies, and community-based organisations generates local support and enhances drug court effectiveness.

## NSW

The NSW (Adult) Drug Court in Parramatta, the first of its kind in Australia, was established in 1999 under the *Drug Court Act 1998* (NSW).<sup>120</sup> It accepts referrals of addicted offenders who are willing to plead guilty and are highly likely to be imprisoned. It limits access geographically to a ‘catchment area’ which covers part of Western Sydney. Violent and sexual offences are excluded.<sup>121</sup>

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid, 13.

<sup>120</sup> See <[http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_index.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_index.html)>.

<sup>121</sup> See <[http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_program/dc\\_eligible.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_program/dc_eligible.html)>.

In 2008, the NSW BOCSAR found the Drug Court was more cost-effective than prison in reducing the recidivism rate amongst drug offenders. The study also found offenders who completed the program were 37% less likely to be convicted of an offence than offenders who did not enter the Drug Court.<sup>122</sup>

In 2011, a judge who was instrumental in the development of the Drug Court (Roger Dive) received the Prime Minister's Award at the National Drug and Alcohol Awards in recognition of the many lives he had helped turn around through his work on the court.<sup>123</sup> A second Drug Court was established in Toronto (in the Hunter district) in March 2011. The NSW Government announced in November 2011 that it would add a third part-time drug court to the Downing Centre Local Court in 2012.<sup>124</sup>

The Drug Court collaborates with the NSW Department of Corrective Services, including the Community Compliance Monitoring Group, and the Department of Health, through Justice Health and the Area Health Services. A variety of residential rehabilitation services provide treatment. Prosecutors, including Police Prosecutors, and the Legal Aid Commission also form part of the Drug Court team.<sup>125</sup> Uniquely, NSW also has a Compulsory Drug Treatment Correctional Centre and the Drug Court has a partnership with Housing NSW.<sup>126</sup> According to Justice Dive, not a single participant has died of an overdose since 2004, and many have begun to function better in society through, for example, paying bills and studying. Not all graduate from the program, but the success rate is improving year on year.<sup>127</sup> These NSW initiatives represent best practice in the area of cooperative problem-solving justice, and should be recognised as such.

The MERIT (Magistrates Early Referral into Treatment) program commenced as a pilot in Lismore in 2000, and is applicable to those with addictions to illicit drugs or alcohol. It applies at the bail stage of proceedings under the *Bail Act 1978* (NSW). MERIT is for adults who commit non-violent, non-sexual offences and are deemed suitable for bail and treatment. MERIT assessment teams can comprise NSW Health or NGO officers who can tailor a treatment program to an individual offender. If the offender consents to treatment, it is usually made a condition of bail, and progress through the program is regularly reported to the presiding magistrate, who will take it into consideration on final sentencing.<sup>128</sup> MERIT is currently available in 65 Local Court locations around NSW.<sup>129</sup>

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<sup>122</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_cjb121](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb121)>.

<sup>123</sup> See

<[http://www.lawlink.nsw.gov.au/lawlink/corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_lawlink\\_news\\_archive\\_2011#PM\\_Award](http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2011#PM_Award)>.

<sup>124</sup> See 'Sydney to Get Second drug Court,' *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>>.

<sup>125</sup> See <[http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_role.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_role.html)>.

<sup>126</sup> See <<http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/news.html>>.

<sup>127</sup> See <[http://www.criminalcle.net.au/attachments/Drug\\_Court\\_of\\_NSW\\_Young\\_Lawyers\\_Feb\\_20121.pdf](http://www.criminalcle.net.au/attachments/Drug_Court_of_NSW_Young_Lawyers_Feb_20121.pdf)>.

<sup>128</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit\\_index](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_index)>.

<sup>129</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit\\_coverage](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_coverage)>.

Evaluations of MERIT have shown significant likely savings in terms of reduced incarceration, police, hospital and criminal activity costs,<sup>130</sup> and BOCSAR has identified statistical evidence for its efficacy in reducing offending.<sup>131</sup>

The Youth Drug and Alcohol Court (YDAC) was a program in the NSW Children's Court, aimed at reducing drug and alcohol-fuelled offending amongst young people in the NSW criminal justice system.<sup>132</sup> It provided an intensive scheme for each offender, involving treatment, rehabilitation, support and supervision. At first, the court was only for illicit drugs, but was later made available to those dependent on alcohol as well. Another change made early on was to the voluntary nature of referral to the program – low participation rates (possibly due to lack of education about the program's benefits) led to magistrates being empowered to refer offenders regardless of consent.<sup>133</sup> Despite the YDAC's apparent success,<sup>134</sup> it remained a pilot until the end of June 2012, when it was closed by the NSW Government.<sup>135</sup>

Magistrate Hilary Hannam<sup>136</sup> reported that the YDAC, '[u]nlike other drug-related diversionary programs, which appear to be less successful with Indigenous people than non-Indigenous people...has been widely utilised by Indigenous offenders and seems to be a successful strategy in reducing offending amongst this cohort'.<sup>137</sup> The program was also unusual in that it did not exclude violent offenders and admitted participants from all over Sydney. The YDAC team comprised specially trained magistrates, working with police prosecutors, Legal Aid solicitors and a representative from the Joint Assessment Review Team (JART) who assessed offenders' suitability. Those who were selected often had complex physical and emotional needs and came from highly disturbed family backgrounds. Those who refused to take part, or who could not due to severe mental health or intellectual disability issues, were returned to the mainstream Children's Court.<sup>138</sup> Apart from the Court's relationships with Government welfare agencies (including a special housing unit for those who cannot complete the program while living at home), it frequently

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<sup>130</sup> See Bolitho et al, 'The Magistrates Early Referral into Treatment (Merit) Program: Evaluation and Real World Challenges,' Paper Presented at the "Delivering Crime Prevention: making the evidence work", Australian Institute of Criminology, Sydney, 21-22 November 2005.

<sup>131</sup> See <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB131.pdf/\\$file/CJB131.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB131.pdf/$file/CJB131.pdf)>.

<sup>132</sup> See <[http://www.djj.nsw.gov.au/comser\\_ydac.htm](http://www.djj.nsw.gov.au/comser_ydac.htm)>.

<sup>133</sup> Ibid.

<sup>134</sup> See Hannam, 'The Youth Drug and Alcohol Court: An Alternative to Custody,' 7 *Indigenous Law Bulletin* 13 (Jul/Aug 2009), 12

<sup>135</sup> See 'Youth drug court closure sparks debate,' *ABC 7.30 Program*, 3 July 2012:

<<http://www.abc.net.au/7.30/content/2012/s3538261.htm>>.

<sup>136</sup> Formerly of the YDAC; now NT Chief Magistrate:

<<http://newsroom.nt.gov.au/adminmedia/mailouts/7188/attachments/Lawrie%20280710%20ChiefMagistrate.pdf>>.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid, 13.

engaged NGOs to support young people undertaking treatment – another remarkable feature of the YDAC.<sup>139</sup>

The first two years of the YDAC's operation were evaluated by the University of NSW's Social Policy Research Centre.<sup>140</sup> The Centre reported that "the program is having an important, positive impact on the lives of many of those participating." However, the study was unable to confirm any decrease in recidivism compared with regular sentencing. Magistrate Hannam pointed out that the evaluation was "undertaken at a very early stage in the history of the program" and her own experience suggests the YDAC "is one of the very few programs that offer an alternative to [the] harsh reality [of the 'revolving door' model of criminal justice]. In my personal experience, the hundred or so young people I have encountered on the program have all made improvements in their lives, whether or not they complete the program. This is especially so with Indigenous participants."<sup>141</sup>

### *Queensland*

The *Drug Rehabilitation (Court Diversion) Act 2000* gave all Queensland courts the option of diversion, and is described as "less a drug court system than a sentencing option which may eventually be available to all courts."<sup>142</sup> A core element is the Intensive Drug Rehabilitation Order – under which the court records a conviction and sentences the offender to a term in imprisonment which is suspended subject to a range of treatment and other options.

The Queensland Drug Court program is available at the Beenleigh, Ipswich, Southport, Cairns and Townsville Magistrates Courts.<sup>143</sup> To be eligible, offenders must be aged 17 or over, be charged with drug-related offences, have no outstanding sexual or other types of physical violence charges outstanding, be drug-dependent, be likely to be imprisoned for the offences, intend to plead guilty and be suitable for intensive drug rehabilitation.<sup>144</sup> Eligible offenders are supervised by various government agencies including Queensland Police Service, Queensland Health, Queensland Corrective Services and Legal Aid Queensland. Rehabilitation occurs intensively for 12-18 months. The court is designed to promote the "rehabilitation of eligible offenders and their re-integration into the community" and reduce drug-dependency and related crimes in the community; health risks related to drug-dependency; and the pressure on the court, health and prison systems.<sup>145</sup>

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<sup>139</sup> Ibid, 14.

<sup>140</sup> <[http://www.lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/ydrgcrt\\_evaluation](http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_evaluation)>.

<sup>141</sup> See Hannam, above n 134, 14.

<sup>142</sup> See Freiberg, above n 116, 13-14.

<sup>143</sup> Queensland Courts – Drug Courts Common Questions. See <[www.courts.qld.gov.au/courts/drug-court/common-questions](http://www.courts.qld.gov.au/courts/drug-court/common-questions)>

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

## South Australia

The Drug Court in South Australia is a part of the Magistrates' Court and is implemented by the Courts Administration Authority in collaboration with the Department for Correctional Services, the Legal Services Commission, the Office of the Director of Public Prosecutions, and Drug and Alcohol Services SA.<sup>146</sup> The Drug Court operates under discretionary provisions of the *Bail Act 1985* (SA) rather than on separate legislative foundation.<sup>147</sup>

Police, magistrates from the metropolitan area, legal representatives, prosecution counsel or defendants themselves can make/request referrals to the program. Mandatory participation in treatment, regular drug testing through urinalysis and strict home detention restrictions are typical bail conditions while on the program. Breaches of bail conditions, further use of drugs or reoffending may lead to sanctions and ultimately termination from the program and sentencing.<sup>148</sup>

Completion of the program, which typically lasts for up to 12 months, is taken into consideration at the time the offender is sentenced. It is not uncommon for a defendant who has successfully refrained from drug use and offending to receive a suspended prison sentence.<sup>149</sup>

South Australia also operates a drug program known as CARDS (Court Assessment and Referral Drug Scheme).<sup>150</sup> The scheme operates in both the Magistrates' Courts in Port Adelaide, Adelaide, Elizabeth, Christies Beach, Holden Hill, Mount Gambier, Murray Bridge, Mount Barker and Whyalla.<sup>151</sup> Youth CARDS is available in the Youth Court, and through the Family Conference Team.<sup>152</sup> Treatment involves at least four counselling sessions with a specialist clinician, and the scheme is aimed at less serious crimes than the Drug Court, with eligible offenders more likely to be first offenders.<sup>153</sup>

## Victoria

Victoria's Drug Court is located at the Dandenong Magistrates' Court. Pursuant to section 18 of the *Sentencing Act 1991* (VIC), the Drug Court Magistrate can sentence an offender to a two year Drug Treatment Order (DTO) consisting of two parts: The Magistrate will sentence the offender to a custodial period that is served in the community whilst they undergo the

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<sup>146</sup> See *Magistrates' Court Drug Court*: <[http://www.courts.sa.gov.au/courts/drug\\_court/index.html](http://www.courts.sa.gov.au/courts/drug_court/index.html)>.

<sup>147</sup> See Freiberg, above n 13, 200.

<sup>148</sup> See *Magistrates' Court Drug Court*, above n 146.

<sup>149</sup> Ibid.

<sup>150</sup> Jason Payne, "Specialty Courts: current issues and future prospects", (2006) Trends and Issues in Crime and Justice No. 317 (Australian Institute of Criminology, 2

<sup>151</sup> Court Assessment and Referral Drug Scheme (CARDS). See <<http://www.courts.sa.gov.au/courts/magistrates/cards.html>>

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

DTO; and the offender will have conditions imposed to address their drug and alcohol dependency.<sup>154</sup>

Other Victorian courts can place defendants within the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program. The 12 week program provides assessment, treatment and support for defendants on bail.<sup>155</sup>

### *Western Australia*

Western Australia takes a multi-faceted approach which “involves a number of sentencing options combined with a number of treatment interventions.”<sup>156</sup> To be accepted into the Drug Court program, offenders must admit they have an illicit substance use problem, enter a guilty plea to all charges, be willing to undergo appropriate and agreed treatment and be willing to be helped and supervised by the Drug Court and Court Assessment and Treatment Service (CATS).<sup>157</sup> There are three types of intervention: a *Pre-sentence Order* (PSO), which usually runs for 12 months; a *Supervised Treatment Intervention Regime* (STIR), which is aimed at offenders with substance abuse problems charged with minor offences and involves community based treatment and generally runs for six months; and a *Drug Court Regime* (DCR) which is aimed at offenders who are likely to face imprisonment and involves an intensive level of intervention and supervision.<sup>158</sup>

The Perth Drug Court program reduced reoffending and the program was more cost-effective than prison and community corrections supervision. The cost of the Drug Court program per offender was estimated at \$16,210 per year, higher than community corrections (\$7,310) but substantially less than prison (\$93,075).<sup>159</sup>

The Drug Court program also exists in the Perth Children’s Court.<sup>160</sup>

### *Tasmania*

Whilst Tasmania does not have a Drug Court, its Magistrates’ Court does have a Drug Diversion program.<sup>161</sup> The Court Mandated Diversion (CMD) program provides magistrates with an option to divert eligible offenders into treatment for their drug use through either

<sup>154</sup> See *Drug Court Information Sheet*:

<<http://www.magistratescourt.vic.gov.au/sites/default/files/Default/drug%2Bcourt%2Binformation%2Bsheet2011.pdf>>.

<sup>155</sup> See *Australian Responses to Illicit Drugs: Drug Courts*:

<[http://www.aic.gov.au/criminal\\_justice\\_system/courts/specialist/drugcourts.aspx](http://www.aic.gov.au/criminal_justice_system/courts/specialist/drugcourts.aspx)>

<sup>156</sup> See Freiberg, above n 116, 14.

<sup>157</sup> See *What is the Drug Court?* <[http://www.courts.dotag.wa.gov.au/\\_files/DrugCourt\\_Adult.pdf](http://www.courts.dotag.wa.gov.au/_files/DrugCourt_Adult.pdf)>

<sup>158</sup> Ibid.

<sup>159</sup> See *Court Intervention Programs: Final Report*, LRCWA Project No. 96 (2009):

<<http://www.lrc.justice.wa.gov.au/2publications/reports/P96-FR.pdf>>, 8.

<sup>160</sup> See Freiberg, above n 116, 14.

<sup>161</sup> See

<[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_and\\_general/court\\_mandated\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/court_mandated_diversion)>.

the bail or sentencing process. There are three basic ways diversion into drug treatment can occur after a plea of guilty or a finding of guilt:

- through conditions attached to a bail order; or
- through conditions attached to a community-based order, eg suspended sentence or probation; or
- through a Drug Treatment Order where a magistrate will continually review offender progress on the order.

In 2007, *Success Works* (a consultancy with “knowledge of national and international trends in therapeutic jurisprudence as well as the needs of offenders with substance abuse issues”<sup>162</sup>) was commissioned to undertake a 12 month evaluation of the pilot Court Mandated Diversion for Drug Offenders (CMD) program in Tasmania.<sup>163</sup> The evaluation found that the CMD is unique amongst court diversion programs in Australia in that it is focussed on addressing ‘criminogenic needs’ and targeted towards offenders who are at a high risk of reoffending. It is also available to family violence related offenders as well as non-violent offenders.<sup>164</sup> Contracted service providers in the first year of the CMD program included Anglicare Tasmania, Salvation Army, Community Corrections and Youth Justice.<sup>165</sup> The evaluation found that the CMD had been largely successful in achieving the following short term outcomes: preventing or delaying relapses; addressing offenders’ drug treatment needs; coordinating services effectively and helping them to achieve best practice, and giving the courts more options to respond appropriately to drug-using offenders.<sup>166</sup>

### *Australian Capital Territory*

The ACT has a Treatment Referral Program.<sup>167</sup> This program is for those who have been sentenced for serious drug offences – the court may order treatment as part of, or instead of, prison time which would normally be served (from 6 months to 2 years). Those who fail to complete their treatment plan may revert to the traditional custodial sentence. The ACT also has a pre-sentencing program called the *Court Alcohol and Drug Assessment Service (CADAS)*<sup>168</sup> aimed at reducing recidivism and engaging offenders in treatment programs for dependence on alcohol and other drugs. A CADAS clinician is placed in the Magistrates’ Court in order to make assessments and devise treatment plans. If the magistrate agrees (and releases the offender on bail), the treatment can proceed. Successful completion of the treatment plan is usually a condition of bail, and progress is reported back

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<sup>162</sup> See

<[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_and\\_general/court\\_mandated\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/court_mandated_diversion)>.

<sup>163</sup> Tasmania’s Court Mandated Drug Diversion Program: Evaluation Report. See

<[http://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0020/115463/CMD\\_Eval\\_Final\\_Report\\_Jan\\_09.pdf](http://www.justice.tas.gov.au/_data/assets/pdf_file/0020/115463/CMD_Eval_Final_Report_Jan_09.pdf)>.

<sup>164</sup> Ibid, 1.

<sup>165</sup> Ibid, 1-2.

<sup>166</sup> Ibid, 3.

<sup>167</sup> See <<http://www.health.act.gov.au/health-services/community-health/community-health-services/alcohol-other-drugs/diversion-services>>.

<sup>168</sup> Ibid.

to the court. Non-compliance does not automatically result in penalties, but can be taken into account during final sentencing.

In September 2011 the ACT began a trial of a Youth Drug and Alcohol Court in the Magistrates' Court.<sup>169</sup> Offenders who are eligible for the court will have their sentencing deferred to allow them to undertake a rehabilitation program supervised by a magistrate.

### *Northern Territory*

In 2003 the Northern Territory commenced a drug court program based on the Victorian Court Referral and Evaluation for Drug Intervention Treatment program.<sup>170</sup> Known as the CREDIT NT program, it received a chief Minister's Award for Excellence in Public Sector Management (Cross Government Collaboration category) in 2006.<sup>171</sup> 78.5% of Territory clients accepted into CREDIT NT completed the program, including 83% in Darwin and 56% in Alice Springs.<sup>172</sup> Then Minister for Justice Syd Stirling said that the "success of CREDIT NT in reducing illicit substance use harm has surpassed expectations", with that success being due to the program's impressive network of experts, which included: counsellors, psychologists, social workers, nurses and medical officers, legal practitioners and alcohol and other drug specialists; community organisations like Amity Community Services, Banyan House and the Salvation Army; legal services like Legal Aid and Aboriginal Legal Aid services; and government agencies like Police, Fire and Emergency Services, and the Health and Community Services Department.<sup>173</sup>

After 30 June 2011, the Substance Misuse Assessment and Referral for Treatment Court (SMART Court) replaced the CREDIT NT program.<sup>174</sup> The SMART Court is able to issue bans on the consumption of alcohol or drugs and will make SMART orders as a condition of sentence or deferred sentence (bail) after a person is found guilty of an offence. The SMART orders will include treatment and other relevant conditions which will form the basis of case management and supervision by a Court Clinician for a period of no less than 6 months. A criminal matter which is being heard in the Magistrates Court or the Youth Justice Court may be referred to the SMART Court by the Court, a prosecutor, a police officer or the eligible offender. An eligible offender may be referred to the SMART Court for a mandatory assessment, however once the assessment is completed, the offender has a choice whether to participate in the SMART Court program. If the offender progresses well under the SMART order the Court may offer rewards, including a reduction in the frequency of treatment or intervention. On the other hand, if the offender is not progressing well, the Court may order that interventions be increased. At the completion of the SMART Order,

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<sup>169</sup> See <<http://www.abc.net.au/news/2011-08-01/act-children-drug-court/2818776>>

<sup>170</sup> See Freiberg, above n 13, 200.

<sup>171</sup> See *Drug Court Program Wins Major Award*, <<http://www.newsroom.nt.gov.au/index.cfm?fuseaction=printReleaseandID=198>>

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> See <[http://www.nt.gov.au/justice/ntmc/specialist\\_courts.shtml](http://www.nt.gov.au/justice/ntmc/specialist_courts.shtml)>.

offenders appear before the SMART Court to be sentenced, or for reconsideration of their suspended sentence.

### **Other alternative sentencing regimes**

#### *NSW*

The Forum Sentencing program is an intervention program. It may be implemented after arrest but before trial, or after a finding of guilt or conviction. —<sup>175</sup> Forum sentencing, like circle sentencing but not restricted to Indigenous defendants, is based on a restorative justice model which aims to achieve a better balance in how people experience justice. Victims, offenders and their families are given an opportunity to give voice to and appreciate fully the effects of crime.

Victims have an opportunity to speak about the effects of crime, to be listened to and be supported by significant people in their lives, which can help to regain their confidence, optimism and sense of safety. For offenders, restorative justice distinguishes between the worthiness of a person and the unacceptability of their behaviour by focusing on the harm caused by a criminal act and helping the offenders to accept responsibility for their actions.<sup>176</sup>

Forum sentencing has been strongly endorsed by successive NSW Governments. As of September 2011, it was already operating at 33 locations around NSW, and the Government announced an extra \$9m to expand it to seven further locations as part of a \$46m package to reduce reoffending.<sup>177</sup>

#### *Victoria*

The Collingwood Neighbourhood Justice Centre (NJC) in Melbourne was launched in 2007. The NJC is a multi-jurisdictional model, able to sit as a Children's Court, Civil and Administrative Tribunal and Victims Assistance Tribunal as well as a Magistrates' Court.<sup>178</sup> One of its key attributes is a focus on the needs of participants, to ensure the court's processes are comprehensible and inclusive so that no one feels unfairly treated. To this end, the Department of Justice also consults the local community regularly to determine

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<sup>175</sup> See

<[http://www.lawlink.nsw.gov.au/lawlink/local\\_courts/ll\\_localcourts.nsf/vwFiles/forum\\_sentencing\\_factsheet.pdf/\\$file/forum\\_sentencing\\_factsheet.pdf](http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/vwFiles/forum_sentencing_factsheet.pdf/$file/forum_sentencing_factsheet.pdf)>.

<sup>176</sup> See Cowdery, above n 72, 376-377.

<sup>177</sup> See

<[http://www.lawlink.nsw.gov.au/lawlink/corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_lawlink\\_news\\_archive\\_2011#060911](http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2011#060911)>.

<sup>178</sup> See Douglas, 'Therapeutic Jurisprudence, restorative justice and the law,' 32 *Alternative Law Journal* 2 (2007), 107.

court practices – for example the kind of court-ordered community work which might be required of offenders.<sup>179</sup>

In addition to those who live in the locality, the NJC is open to homeless people who are staying or who are accused of an offence in the area.<sup>180</sup> It also has a Neighbourhood Justice Officer who helps in coordinating services offered by the court, and is able to defer sentences to allow adults over 25 to participate in various programs (this is otherwise generally only an option for those aged under 25 in Victoria).<sup>181</sup>

The Court Integrated Service Program (CISP) is not, strictly speaking, either a diversionary or an alternative sentencing scheme. Although it involves treatment plans which can be taken into account by judges and magistrates in sentencing, there is no formal requirement for this to happen.<sup>182</sup>

An economic evaluation of the CISP found that defendants who had completed the program spent, on average, 32.6 days less in prison compared to a control group; took longer to reoffend; and, when they did reoffend, committed less serious offences. Based on the finding of a statistically significant 10 per cent reduction in reoffending by CISP participants nearly two years after program completion compared to a control group, the benefit cost analysis of CISP concluded that if the reduced recidivism rate amongst CISP participants is maintained for a period of two years, the benefits of CISP will have exceeded the costs. After three years, if the CISP program continues to have a lasting impact on its participants, resulting in a reduced recidivism rate, annual benefits to society will continue to accrue. The longer the impact of CISP lasts, the greater the benefits to society.<sup>183</sup>

In 2011 both the NJC and the CISP were also evaluated by the Victorian Auditor-General's Office. The Office found that:

Both NJC and CISP have shown positive indications of achieving their client and community outcomes. Each program supported its intended client groups and provided high-quality reports to the judiciary to assist their decision making.

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid, 108.

<sup>181</sup> Ibid.

<sup>182</sup> See <<http://www.courts.vic.gov.au/courts-tribunals/specialist-courts-and-initiatives/courts-integrated-services-program-cisp>>.

<sup>183</sup> See <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB159.pdf/\\$file/CJB159.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB159.pdf/$file/CJB159.pdf)>, 21.

Both NJC and CISP showed positive indications of reducing reoffending. While CISP demonstrably reduced reoffending for offenders examined in the evaluation, definitive conclusions cannot yet be made for NJC. This is due to limitations in available data, primarily due to the small number of offenders who had completed the program, but also because of difficulties in accessing data without expending considerable manual effort.<sup>184</sup>

The Auditor-General's Office recommended that "the Department of Justice evaluate NJC's outcomes in reducing reoffending when sufficient data becomes available."<sup>185</sup>

### *Western Australia*

In April 2001 the Geraldton magistrate, Michael King, called a meeting of representatives from the police, legal profession, Community and Juvenile Justice Services (who supervise offenders in the community) and local treatment agencies to sound out their views on establishing a therapeutic alternative sentencing regime at the Geraldton court. Four months later a practice direction based on the work of the committee was implemented. Since then the steering committee has met quarterly to oversee the operation of what came to be known as the Geraldton Alternative Sentencing Regime (GASR).<sup>186</sup>

Under the GASR, magistrates still impose punishments, but they also use alternative techniques including meditation and culturally-appropriate language to promote wellbeing, with a view to reducing reoffending rates. The GASR promotes the rehabilitation of those with abuse, domestic violence and other related problems. It also involves appropriate professionals in related fields as needed, depending on the availability of the professional. Although it has some features in common with Indigenous sentencing courts, the GASR does not include Elders.<sup>187</sup> According to King, the GASR's therapeutic approach has paid dividends:

Results suggest that this approach promotes different aspects of participants' wellbeing – physical, psychological and social – and that positive interaction between the magistrate and participant is useful in promoting wellbeing. Moreover, results also suggest that the program positively impacts the wellbeing of others associated with it. For example, preliminary research suggests that it promotes job satisfaction of court staff. The Geraldton Alternative Sentencing Regime has also promoted a better working relationship between agencies.<sup>188</sup>

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<sup>184</sup> See <<http://download.audit.vic.gov.au/files/20110406-Justice.rtf>>, 2. Full report available at: <[http://www.audit.vic.gov.au/reports\\_and\\_publications/reports\\_by\\_year/2010-11/20110406\\_justice.aspx](http://www.audit.vic.gov.au/reports_and_publications/reports_by_year/2010-11/20110406_justice.aspx)>.

<sup>185</sup> Ibid, 5.

<sup>186</sup> See King, 'Applying Therapeutic Jurisprudence in Regional Areas - The Western Australian Experience,' 10 *Murdoch eLaw Journal* 2 (2003): <<http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>>.

<sup>187</sup> See LRCWA, above n 4, 147-8.

<sup>188</sup> See King and Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime,' *Murdoch eLaw Special Issue* (2006): <<https://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf>>.

In 2009, Michael King produced the Solution-Focused Judging Bench Book for the Australian Institute of Judicial Administration. It is a comprehensive guide for judges, drawing on Dr King's experience as a pioneering problem-solving magistrate in Geraldton.<sup>189</sup> This book describes in great detail how best to deal with vulnerable offenders, and is an invaluable resource, even for judges in what Dr King describes as 'mainstream courts.'<sup>190</sup>

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<sup>189</sup> See <<http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>>.

<sup>190</sup> Ibid, Chapter 8.