

WESTERN AUSTRALIAN PENAL CULTURE AND INDIGENOUS OVER REPRESENTATION: EVALUATING 25 YEARS OF LAW, POLICY AND PRACTICE

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I INTRODUCTION

In 2018, the UWA Law Review celebrates its 70th anniversary. The question remains, however, if there is much to celebrate if we review the last 70 years of legislative and policy change, particularly in Western Australia? If we take a broad look at the criminal justice system from a criminological perspective, there is probably not a lot to celebrate, as we will explain in our contribution. For the purposes of this article, we will have to be somewhat more modest than to review the last 70 years and will instead focus on changes over the last 25 years. The reason for this is the lack of reliable data and other recorded sources. Also, for reasons of practicality, expertise and word count, we focus our contribution on the particular situation of Western Australia in the broader Australian context.

Criminology and penal culture in Australia

Australian criminology has, in large part, reconstructed itself from being a humble handmaiden of the criminal justice system, tasked with identifying and measuring the individual psyche or soul of the criminal, to a critical social science with a strong presence in all Australian universities; less concerned with the individual criminal mind than with the cultures, structures and processes that manufacture criminality. Law, policy and practice are no longer viewed as socially neutral and impartial, but reflect power dynamics and interests in society. In Australia, this shift in perspective has led criminologists to explore the underlying causes of crime and interrogate the way changes in criminal law have reflected shifts in social and political attitude. As we discuss, what is called ‘the punitive turn’ in the US, heralded an era of ‘zero tolerance policing’ and ‘tough on crime’ legislation that quickly spread across the globe during the eighties and nineties. Politicians of all stripes fell into line because they feared being seen as ‘soft’ on crime. A powerful common sense was created that assumed that prison ‘worked’, and longer sentences would deter offenders. The aim of the justice system shifted to an emphasis to incapacitate, warehouse and punish offenders, away from the

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rehabilitation paradigm of the sixties and seventies. This shift is reflected in the Australian criminal justice system: it zealously followed the law and order trend and has become more punitive in its legislation, the prison population is continuously growing and the use of community corrections is going down, while most crime and victimisation rates are decreasing. The main aim of this article is to understand why and how this is happening. To do this, we have to look at the broader context of what is constituting the penal culture in Western Australia, more particularly, the interaction between law, policy and practice. At the same time, we suggest that there is no seamless fit between law, policy and practice. Legislation is constantly being interpreted and re-interpreted on the ground as justice agencies mostly have a certain discretionary power in the implementation of the law, and law changes may have different effects in practice, as we will illustrate with examples.

II METHODOLOGY AND STRUCTURE

For the scope of this article, we rely mainly on the analysis of data and interviews gathered in the collective research projects of the authors: including the Australian Research Council Future Fellowship of A/Professor Tubex in which she compared penal cultures within Australian jurisdictions,¹ recent qualitative and socio-legal research for the Australian Institute of Criminology by Professor Blagg and Dr Tulich on Foetal Alcohol Spectrum Disorders and the justice system,² and qualitative research A/Professor Tubex and Professor Blagg conducted for the Australian Institute of Criminology (in collaboration with A/Professor John Rynne from Griffith University) on developing effective throughcare strategies for Indigenous offenders.³

In the first part of this article we introduce the concept of ‘punitiveness’ and ways to measure it; we give a short overview of what is happening internationally, and then focus on the situation in Western Australia - with a particular emphasis on the overrepresentation of Indigenous peoples - and its possible causes. In the second part, we question the rational choice approach within the criminal justice system,

1 Hilde Tubex analysed criminological literature, data published by the Australian Bureau of Statistics and interviews she conducted with criminal justice experts in corrections, academia and NGO’s in six Australian jurisdictions: Queensland, New South Wales, Victoria, South Australia, Western Australia and the Northern Territory (FT100100627).

2 Harry Blagg and Tamara Tulich conducted in-depth interviews with key players in the Kimberley (Broome, Derby and Fitzroy Crossing) into relationships between Indigenous young peoples and the criminal justice system, including the courts and the police, as well as the correctional system; supported by a comparative study of law across Australia - and over the Tasman - on ‘fitness to stand trial’ legislation and the checks and balances employed to ensure that people with cognitive impairments are diverted out of the criminal justice system (CRG35/14-15). The views expressed in this article are the responsibility of the authors and are not necessarily those of the Australian Institute of Criminology.

3 Hilde Tubex, John Rynne and Harry Blagg conducted interviews in Indigenous communities in the Kimberley in WA, and in Darwin, Tiwi Islands and Alice Springs in the Northern Territory (CRG23/15-16). The views expressed in this article are the responsibility of the authors and are not necessarily those of the Australian Institute of Criminology.

particularly when it comes to people with intellectual disabilities, and we close with some suggestions for better practice in the future.

III WHAT IS PUNITIVENESS AND HOW TO MEASURE IT?

Criminological literature has produced numerous debates on the concept of punitiveness and how to measure it. Conceptually, the common denominator in this literature is that punitiveness is a measure of how a society reacts towards what is perceived as unwanted behaviour, whereby some reactions are considered to be more or less punitive. Debate persists as to whether or not punitiveness is growing on a global scale, rather than just in some societies, and whether punitiveness can be quantified as such⁴

This brings us to the methodological issue of how to best measure punitiveness. For reasons of comparability and reliability of data, the imprisonment rate - how many people out of 100,000 inhabitants find themselves in prison - is used as a common yardstick by criminologists. Imprisonment is the most severe sentence in countries that do not implement the death penalty, and so provides a useful proxy for measuring popular sentiment around punishment. This measure is far from perfect, as it fails to capture local deviations of who is included in that rate (Australia only takes into account adult inhabitants, while most other countries do not), and it only provides a snapshot of who is incarcerated on a certain day without taking into account the length of stay. This is highly problematic when trying to accurately pinpoint Indigenous imprisonment because they tend to serve repeated short sentences and are therefore underestimated in the count. It also presents just one end result of the criminal justice process without reflecting on the previous stages such as policing, prosecution and sentencing or other measures of deprivation or limitation of freedom, and it does not report on any qualitative aspects of punishment such as prison conditions and human rights.

However, in the absence of a better instrument, the imprisonment rate functions as a useful, if imperfect, measure of punitiveness, and is still the most frequently used proxy since criminologists started to worry about growing prison populations in the eighties. But since the debate started, the world has kept evolving and so has the penal landscape. While the picture looked pretty bleak from the second half of the eighties and throughout the nineties, with prison populations increasing in most countries where consistent data was available, this started changing in the first decade of the new millennium, and the trend keeps going. Looking at the data of the Institute for Criminal Policy Research⁵, imprisonment rates are currently decreasing in several Anglo-Saxon countries (the US, Canada and the UK), which traditionally have high imprisonment rates, in continental European

4 For a more detailed discussion, see Hilde Tubex, 'Contemporary Penal Policies' (2014) *Oxford Handbooks Online*.

5 World Prison Brief Data, available at <<http://prisonstudies.org/world-prison-brief-data>>.

countries (such as Spain, Italy, Germany and the Netherlands), and in Nordic countries (such as Denmark, Sweden, Finland and Iceland), which have always had low imprisonment rates.

An internationally famous example of a reductionist policy is Finland, which managed to drastically decrease their imprisonment rate from the sixties (from 154 in 1960 to 59 in 2016⁶) through a deliberate decision to rationalise their criminal justice policy to align with the Scandinavian more tolerant penal culture. Further, there is the Netherlands who traditionally had a very progressive criminal justice system, which changed dramatically in the nineties, demonstrated in the increase of their imprisonment rate from 45 in 1990 to 125 in 2006, to then curb again from 2006 onwards to 59 in 2016, resulting in empty prison cells which they rent out to other countries, such as Belgium and Norway.⁷ The reasons behind this remarkable evolution are still a matter of debate between governmental sources who claim that the main reasons are the decline in crime, diversion and more emphasis on rehabilitation, and criminologists who are rather critical about these explanations. More surprisingly is the recent trend in the US, traditionally a world leader in imprisonment rates since the seventies, but witnessing a decrease in their federal prison population (excluding jails) since 2008 (from 755/100,000 to 666 in 2015), which led David Green to carefully express a message of ‘penal optimism’.⁸ Although this optimism has to be tempered by realism: reductions in imprisonment in the US are from an astronomically high peak.

The question ‘what drives prison populations?’ is still a matter of ongoing debate: some refer to global changes in the economic situation and growing political neoliberalism, while others point to more local factors such as a countries’ history and cultural values, ethnic diversity, trust, legitimacy and religion.⁹ The general learning from these readings is that there will probably never be a single, unifying theoretical model that manages to capture what drives penal policy on a global scale.¹⁰ Globalisation has not led to a homogenous stance on imprisonment - much to the relief of those who feared that the American model of mass incarceration would come to dominate the world - and we have to look to the ways policy, law and practice are constructed locally in the light of particular historical, social and cultural contexts. For example, fears and anxieties regarding the ‘Other’ are, some argue, shaping the massive increase in forms of incarceration based not on law breaking as such but on status as an ‘illegal alien’ in Europe, Australia and the US.¹¹ A parallel carceral system has been constructed, often outside the reach of

6 Ibid.

7 Ibid.

8 David Green, ‘Penal Optimism and Second Chances: US Penal-reform Catalysts, Drivers, and Prospects’ (2015) 17(3) *Punishment & Society* 271-98.

9 Tubex, above n 4.

10 For an analysis of this thesis for the Australian situation, see Hilde Tubex, David Brown, Arie Freiberg, Karen Gelb & Rick Sarre, ‘Penal Diversity within Australia’ (2015) 17(3) *Punishment & Society* 345-73.

11 Harry Blagg, ‘From Terra Nullius to Terra Liquidus? Liquid Modernity and the Indigenous Other’ in Anna Erikson (ed), *Punishing the Other: The Social Production of Immorality Revisited* (Routledge, 2002) 230.

domestic law, to warehouse the unwanted ‘Other’, such as on Manus Island. In most western societies, prison remains the preferred domain for warehousing the homeless, mentally ill and impaired, and for punishing the racially different. This brings us neatly to an examination of law, policy and practice in Australia and, more particularly, Western Australia.

IV IMPRISONMENT RATES IN WESTERN AUSTRALIA

The Australian prison population has increased in all our eight jurisdictions (six states and two territories). Nationally, the most concerning trends are the increase of prisoners on remand – due to more restrictive bail legislation - and the increasing time they spend on remand; the growth of female prisoners and Indigenous peoples, and all combinations of the above. We will look at this picture in a more detailed Western Australian perspective. The imprisonment rate in Western Australia is traditionally considerably higher than the Australian average and in second position after the Northern Territory, which has an imprisonment rate that is almost five times the national average. The imprisonment rate in Western Australia on 30th June 2016 was 314 per 100,000 adult population (or 6,329 prisoners), while the national average was 208.¹² Since the snapshot one year earlier,¹³ this is an increase of 14% for Western Australia, the highest percentage increase in prisoners for all states and territories. Twenty-nine percent of the prison population is on remand, which is a bit below the national average of 31%, 60% of the prisoners had been previously imprisoned, compared to the national average of 56%, and 10% of the prison population is female, while the national average is 8%. According to the Office of the Inspector of Custodial Services, Indigenous women are the fastest growing group within the remand population: their number grew with 150% between 2009 and 2014.¹⁴ The most common offence/charge in Western Australian offenders was acts intended to cause injury (20%), followed by unlawful entry with intent (16%) and illicit drug offences (13%).¹⁵ Of particular concern, however, is the fact that imprisonment for fine defaulters is most prevalent in Western Australia. According to the Office of the Inspector of Custodial Services report, Aboriginal men represent 38% of the fine default male prison population and Aboriginal women made up 64% of the female fine defaulter prison population – they constitute the fastest growing fine default population.¹⁶

Of further concern is that the community corrections order rate went down considerably over the last two decades in Western Australia and that Western

12 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2016*, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

13 Ibid.

14 Office of the Inspector of Custodial Services, *Western Australia's Rapidly Increasing Remand Population* (2015) 2.

15 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2016*, above n 12.

16 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016).

Australia, together with the Northern Territory, are the only two jurisdictions where there are more people in prison than under community corrections orders. In Western Australia that cross over took place in 2011, in the last two years the rate of people under community corrections orders increased again, as did the imprisonment rate. This is more a reflection of net-widening than community corrections orders being used as an alternative to imprisonment.¹⁷

V. INDIGENOUS OVERREPRESENTATION

The high overrepresentation of Indigenous peoples in the Western Australian prison population deserves special attention. According to the Australian Bureau of Statistics' (ABS) 2016 census data, 2.8% of the Australian population identified as Aboriginal or Torres Strait Islander people. The percentage of Indigenous peoples in the general population amounts to 25.5% in the Northern Territory, while their proportion is below 4.6% in the other jurisdictions (3.1% in Western Australia or 76,000 Indigenous peoples).¹⁸ In big contrast to that is the percentage of the prison population that identifies as Indigenous. Nationally their proportion is 27%; it is the highest in the Northern Territory at 84%, followed by Western Australia at 38%.¹⁹ Besides the injustice of this overrepresentation, incarcerating Indigenous peoples at the rate we currently do is a very expensive way of dealing with the problem. A recent report calculated that, based on economic modelling, Indigenous incarceration is currently costing the Australian economy \$7.9 billion per year. If nothing is done to address this issue, this cost will rise to \$9.7 billion per year in 2020 and \$19.8 billion per year in 2040.²⁰

The Indigenous imprisonment rate in 2016 is the highest in Western Australia (3,382 per 100,000 Aboriginal and Torres Strait Islander adult population), followed by the Northern Territory (2,503), the overrepresentation rate in Western Australia is 16.5, while the Australian average is 12.5.²¹ The Indigenous female imprisonment rate is over time the highest in Western Australia of all Australian jurisdictions.²²

When interviewing experts in Western Australia about our high imprisonment rates, many pointed to Western Australia having a bigger Indigenous population than the other Australian jurisdictions, and to the overrepresentation of Indigenous peoples in the criminal justice system. This is only partly true. As stated above, the percentage of Indigenous peoples in Western Australia is close to the Australian average and limited in absolute numbers. Further, our current non-Indigenous

17 Australian Bureau of Statistics, *4512.0 Corrective Services, Australia*, June Quarter 2017, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4512.0>>.

18 Australian Bureau of Statistics, *2016 Census data*, <<http://www.abs.gov.au/census>>.

19 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2016*, above n 12.

20 Pricewaterhouse Cooper's Indigenous Consulting, *Indigenous Incarceration: Unlock the facts* (2017).

21 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2016*, above n 12.

22 Australian Bureau of Statistics, *Customised Report* (2016).

imprisonment rate is 206, which puts us on top of the pack (the non-Indigenous imprisonment rate in the Northern Territory is only 193) and it is considerably higher than the national average of 163 out of 100,000 non-Indigenous adult Australians. So, while the assumption of high imprisonment rates as being ‘an Indigenous problem’ might be correct for the Northern Territory, it is not for Western Australia and it has never been the case. In 1981, the ‘Dixon report’ concluded for the period 1971-1980 that it was not the length of prison sentences in Western Australia which caused the high imprisonment rate, but the frequency with which people were imprisoned in the state, which impacts more particularly on Indigenous offenders. The report calculated that, if all people of Aboriginal descent were removed, the prison population would decrease by 30%, but the imprisonment rate would still be 20% above the national average,²³ and that situation is still exactly the same today.

A longstanding dispute in Australian criminology rages over whether the overrepresentation of Indigenous peoples in the criminal justice system has to do with a greater involvement in crime or with a racial bias throughout the criminal justice system.²⁴ The ABS only provides data on Indigenous and non-Indigenous offender rates for four jurisdictions, due to the lack of reliable data for the other ones, including Western Australia. For the states for which we have data available, the Indigenous offending rate is considerably higher than the non-Indigenous offender rate, but over time this rate has remained stable or has reduced, while their imprisonment rate is going up. Further, sentencing research in this area has to date been unable to find consistent evidence that Indigenous peoples are sentenced more harshly than non-Indigenous people, as the results differ according to the state and if higher or lower courts are investigated. However, Jeffries and Bond find that Indigenous peoples get longer sentences in the lower courts in Western Australia, all other variables being the same, while no effect was found for the higher courts.²⁵ Thalia Anthony argues that sentencing practices in Australia have failed to take account of the degree of disadvantage experienced by Indigenous people: ‘the true litmus test for taking Indigenous disadvantage seriously would be courts reducing sentences for Indigenous people, rather than sentencing equality’.²⁶ Anthony argues that failure to take into account ‘Indigenous specific’ factors such as structural discrimination, stolen generations, inter-generational trauma, family violence, intellectual disabilities, and mental health leads to

23 Western Australia, *Report of the Committee of Inquiry into the Rate of Imprisonment* (1981).

24 See, eg, the debate between Don Weatherburn and Chris Cunneen in the journal, *Current Issues in Criminal Justice* see: Don Weatherburn, ‘“Rack ‘em, Pack ‘em and Stack ‘em”: Decarceration in an Age of Zero Tolerance’ (2016) 18(2) *Current Issues in Criminal Justice* 137; Chris Cunneen, *Barry Goldson and Sophie Russell*, ‘Juvenile Justice, Young People and Human Rights in Australia’ (2016) 18(2) *Current Issues in Criminal Justice* 173.

25 Samantha Jeffries and Christine Bond, ‘The Sentencing of Indigenous Offenders in the Lower Courts: A Study of Three Australian Jurisdictions’ (Report to the Criminology Research Advisory Council, 2011).

26 Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 62.

substantive inequality.²⁷ Simply treating Indigenous peoples ‘equally’ before the law is not enough; it does nothing to correct the massive structural disadvantages experienced by Indigenous peoples since colonisation.

The discussion above only scratches the surface of the problem of Indigenous overrepresentation in the criminal justice system. The data does not adequately capture interactions between Indigenous peoples and the ‘front end’ of the system – the police. Historically, the police and the lower courts formed part of a colonial system designed to manage the process of Indigenous dispossession and implement the myriad ‘apartheid’ laws and ordinances employed to move Indigenous peoples off traditional lands and contain them in various places of forced confinement (goals, police lock-ups, pastoral stations, the pearling industry, missions, orphanages, ration stations). Extreme levels of violence, including massacres, were employed to cleanse the country and further the goal of replacing Indigenous peoples with white Europeans. This era has left its mark on the present, with Indigenous peoples still calling out the police for racist disrespect and for using the law as an instrument to ethnical cleanse Indigenous peoples from white occupied space. The majority of deaths in custody in Western Australia have taken place in police lock-ups, including the recent death of Ms Dhu, who died from septicaemia while detained in the Hedland lock-up for non-payment of fines.²⁸

The history of Western Australia’s colonisation is quite recent in comparison to other jurisdictions. Particularly in the north and north-west of Western Australia, the savagery of colonial incursion is still vivid and raw in Indigenous memory. Some of the social dislocation and chaos in the Kimberley and Pilbara regions can be traced back to the 1960s when pastoralists abruptly ejected Indigenous stockmen and their families from cattle stations because they did not want to pay equal wages. As a result, Indigenous peoples were herded into townships like Fitzroy Crossing and Roebourne, without work and far from country. This set the scene for years spent ‘crying for country’, with the ‘right to drink’ the only tangible right accorded them.²⁹

Further, employing a postcolonial lens to view Indigenous peoples and their relationship with the criminal justice system, we see the subtle and insidious ways in which Indigenous peoples are still disadvantaged.³⁰ The term postcolonial does not mean *after* colonisations, but rather the more subtle forms of control

27 Ibid 63.

28 See: http://www.coronerscourt.wa.gov.au/1/inquest_into_the_death_of_ms_dhu.aspx?uid=1644-2151-2753-9965; Ethan Blue, ‘Seeing Ms. Dhu: Inquest, Conquest, and (In)visibility in Black Women’s Deaths in Custody’ (2017) 7(3) *Settler Colonial Studies* 299-320.

29 Patrick Dodson, *Underlying Issues in Western Australia* (Australian Government Publishing Service, 1991).

30 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Federation Press, 2nd ed, 2016).

that survive formal decolonisation. So, while Indigenous peoples may enjoy formal equality, their status as a *colonised* people, their *difference*, is not given recognition: they are subsumed within the narrative of the Australian nation state and their unique status as first people is denied them. A postcolonial stance rescues the stories, voices and narratives of the marginalised and dispossessed and actively seeks to decolonise relationships between the ‘hegemonic mainstream’ and the dispossessed Indigenous minority.³¹

For all the above, the relationship of Indigenous peoples with the ‘white’ criminal justice system is still problematic. There is the fundamental issue of Indigenous peoples not recognising the legitimacy of the western criminal justice system. Aboriginal law is a fact of life in Indigenous communities, and it governs social relations in most spheres of the Indigenous domain. Even urban Indigenous peoples practice law through their obligations to kin and country. Therefore, many Indigenous peoples do not engage with the western criminal justice system but they do not feel empowered to challenge it. Indeed, they tend to plead guilty to ‘have it over and done with’. Further, because of offending patterns and sentencing practices, many Indigenous peoples serve short sentences, which causes a lot of disruption to their lives, but gives them hardly any access to programmes and little support. Of serious concern is the lack of data on the availability of treatment programmes for Indigenous offenders, as well as evaluations on the effectiveness of these programmes, but also the lack of support from the Corrective Services Administrators’ Council to provide for these data.³² Moreover, in remote communities, few services are available as an alternative to imprisonment and for supervision, and the police presence is high. So, while there is a sizable contingent of police, pushing Indigenous peoples into the justice system, there is a negligible supply of services pulling them out, and keeping them out. Many Indigenous peoples serve out their sentence instead of attempting early release or parole because of a lack of information about the system, the inaccessibility of the bureaucratic process and lack of legal information. Furthermore, they may wish to have as little to do with the corrections bureaucracy as possible and prefer to walk free at the end of their sentence.

The unwillingness of the justice system itself to offer appropriate services to Indigenous peoples, while remaining ever watchful for any minor breach of court orders, bail, parole, curfews, non-payment of fines, etc., is testament to the nature of the problem. Indigenous imprisonment rates are linked to a high Indigenous recidivism rate. In 2016, 76% of all sentenced Indigenous prisoners had a known prior imprisonment, against 49% of the non-Indigenous sentenced prisoners;

31 Frances Morphy and Howard Morphy, ‘Anthropological Theory and Government Policy in Australia’s Northern Territory: The Hegemony of the “Mainstream”’ (2013) 115(2) *American Anthropologist* 174.

32 Clarke Jones and Jill Guthrie, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (Australian Institute of Judicial Administration, 2016).

in Western Australia the figure is 80% against 47%.³³ Research into the release of violent male offenders has demonstrated that Indigenous offenders are more likely (55%) to be readmitted to prison within two years than non-Indigenous offenders (31%) and more than twice as likely to return to prison for assault (44% against 20%).³⁴ Recidivism on this scale reflects the lack of adequate preparation for release from prison, the abysmal absence of social supports for newly released prisoners, and a paucity of rehabilitation facilities and holistic treatment services. Instead there is lack of support for families; people finding themselves homeless or coming home to find the same crises they left on entering prison, and some re-offend because the pains of confinement are more tolerable than the traumas of family life. There are no culturally secure and appropriate services available that can handle the inter-generational trauma that creates family violence, suicide, and self-medicating alcohol consumption. In the absence of these support services a return to prison is inevitable – sometimes it's the lesser of evils.

After this investigation of the high imprisonment rate in Western Australia and the overrepresentation of Indigenous peoples, we turn to the possible causes of this situation.

VI WHAT ABOUT CRIME AND HOW TO MEASURE IT?

A simple explanation for increasing prison numbers would be that crime is increasing in our contemporary society, a commonly shared belief requiring a factual check. Crime victimisation data is published by the ABS,³⁵ and is based on annual surveys that collect information through personal interviews about people's experiences of crime victimisation for a selected range of personal and household crimes. The first survey dates from 2008/9, currently eight surveys have been conducted, and the last one dates from 2015/16. These data show that victimisation rates, as in most other developed countries, have been going down over the series. This is also the case for Western Australia, except for the last survey, where we see an upwards spark. However, in our research,³⁶ we investigated if the personal crime victimisation rate in six Australian jurisdictions correlated statistically with the imprisonment rate. The outcome of that was that for none of these jurisdictions is there a significant positive correlation between the victimisation rate and the imprisonment rate over the time period victimisation surveys are available.

A second source from which to measure crime is the ABS recorded crime-

33 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2016*, above n 12.

34 Matthew Willis and John-Patrick Moore, *Reintegration of Indigenous Prisoners* (Research and Public Policy Series No 90, Australian Institute of Criminology, 2008).

35 Australian Bureau of Statistics, 4530.0, *Crime Victimisation, Australia, 2015-16*, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4530.0>>.

36 Hilde Tubex, 'Political Economy of Punishment in Australia' in Dario Melossi, Maximo Sozzo and JA Brandariz-Garcia (eds), *The Political Economy of Punishment Today: Visions, Debates and Challenges* (Routledge, 2017) 137.

offenders data series.³⁷ This collection provides statistics related to the number and characteristics of alleged offenders aged 10 years and over who have been proceeded against by police during the 12-month reference period. Data are available since 2007/8 and the last data refer to 2015/16. The overall offender rates are rather stable in the selected jurisdictions over the series (except for South Australia where they increase), but they went down considerably in Western Australia (-22%). Looking at the four most frequent offences (theft, acts intended to cause injury, public order offences, illicit drugs) and homicide over time, all offender rates are going down consistently in Western Australia, except for a recent spike in illicit drug offences and a slight increase in homicide in the last census. Again, looking at the six states we investigated, there is no statistically significant correlation between the offender rates and the imprisonment rates.

From this data we learn that crime, measured according to the victimisation and the offender rates, does not hold pace with the increasing imprisonment rates in the selected jurisdictions, and there is no statistical correlation between them. This is particularly the case for Western Australia where the general crime rate for the period studied is going down. We thus conclude that rising crime is not the issue, which brings us to looking at the system

VII LEGISLATIVE CHANGES

In our interviews with Western Australian experts, many of them pointed to punitive politics, being strongly driven by law and order and frontline policing, with a tendency to overregulate behaviour, including behaviour that should be met by social or health policy, such as mental health issues. It was said that imprisonment is used in Western Australia as a first rather than the last resort (eg. imprisonment for fine defaulters). Other comments had to do with changed correctional policies, such as the introduction of an enforcement policy, curtailing the discretionary power of the community corrections officers when it comes to breaching, and moving to a compliance model in which every breach of conditions needs to be reported. The lack of prison programmes – particularly for Indigenous peoples – was also mentioned. Finally, it was observed that, over time, a more risk averse culture developed and that corrections are now more driven by politics instead of corrections informing politics. Not all these claims are reflected in legislative changes, they are more observations of a punitive political culture, but some did result in legislation that was intended to be ‘tough on crime’ or had that result in practice. We provide an overview below.

A. MANDATORY SENTENCING

While most Australian jurisdictions introduced mandatory imprisonment for violent offences and/or organised crime, only two jurisdictions introduced them

37 Australian Bureau of Statistics, 4519.0, *Recorded Crime – Offenders*, 2015-16, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4519.0>>.

for non-violent offences: Western Australian and the Northern Territory. In the Northern Territory they were repealed after four years under international criticism from the United Nations.³⁸ Mandatory sentences for non-violent offences were first introduced in Western Australia in 1992 for car theft, as a political response to the death of a young pregnant women and her child on Christmas Eve 1991 in a collision with a stolen car driven by an Aboriginal youngster³⁹. The *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (WA) generated a lot of academic criticism and was repealed in 1994.⁴⁰ In 1996, the Liberal Party amended the Criminal Code (WA) to introduce ‘three strikes’ legislation for repeat home burglary offenders.⁴¹ Research from the UWA Crime Research Centre found that there had been no reduction in the number of home burglaries as a result of this legislation and that 81% of the juvenile offenders sentenced under the law were Aboriginal.⁴² However, the legislation was later repeatedly expanded to include grievous bodily harm and the assault of a public officer. In 2014 the definition of a ‘strike’ was revised, which may particularly affect Indigenous children, to ‘meet public expectations’, against reservations of some of the judiciary.⁴³ Over time, both the Law Council of Australia and the Law Society of Western Australia have taken a strong negative policy position against these sentences, stating that they are undermining the fundamental rule of law and human rights principles, are ineffective, unjust, and mainly affect young Indigenous peoples.⁴⁴ In a recent discussion paper on ‘Incarceration Rates of Aboriginal and Torres Strait Islander Peoples’, the Australian Law Reform Commission reports that it is difficult to make a direct correlation between high incarceration rates and mandatory sentences, due to lack of data. However, they state that ‘the two most common categories of offence recorded for Aboriginal and Torres Strait Islander offenders in WA are ‘acts intended to cause injury’ and ‘unlawful entry with intend’, categories in which the above offences that attract mandatory penalties would fall’.⁴⁵

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- 38 Committee on the Rights of the Child, Concluding observations on Australia’s first report under the Convention on the Rights of the Child, adopted on 10 October 1997.
- 39 Roderic Broadhurst and Nini Loh, ‘The Phantom of Deterrence: The Crime (Serious and Repeat offenders) Sentencing Act’ (1993) 26 *Australian and New Zealand Journal of Criminology* 251-71.
- 40 Meredith Wilkie, ‘Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective’ (1992) 22 *Western Australian Law Review* 187-96; Ibid.
- 41 Neil Morgan, ‘Business as Usual or a ‘New Utopia’? Non-Custodial Sentences under Western Australia’s New Sentencing Laws’ (1996) 26(2) *University of Western Australia Law Review* 364–88.
- 42 Neil Morgan, Harry Blagg and Victoria Williams, *Mandatory Sentencing in Western Australia & the Impact on Aboriginal Youth* (2001, Aboriginal Justice Council).
- 43 ‘New Burglary Laws will Jail More Aboriginal People in WA, Experts Fear’, *Guardian Australia* [online], 24 February 2015, <<https://www.theguardian.com/australia-news/2015/feb/24/new-burglary-laws-will-jail-more-aboriginal-people-in-wa-experts-fear>>.
- 44 Law Council of Australia, ‘Policy Discussion Paper on Mandatory Sentencing’ (2014); The Law Society of Western Australia, *Briefing Paper Mandatory Sentencing* (2016).
- 45 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84 (2017) 76.

B. TRUTH IN SENTENCING

Following similar legislation in other states, ‘truth in sentencing’ was introduced in 1999, under a Liberal government, which abolished automatic one-third remission. The subsequent Labor government legislatively confirmed this in 2003 but courts were instructed to reduce the fixed term of their sentences by one third to neutralise the abolition of remission.⁴⁶ Labor also aimed for improved ‘prisoner re-entry’ by abolishing sentences of up to six months; in some cases imprisonment was no longer an option, in others the maximum sentence length was increased. However, the outcome of the 2003 legislation was an increase in the mean minimum sentences imposed and a greater proportion of the sentence to be served.⁴⁷ Further, Labor repealed the discounting provision in the run up to the 2008 elections, to allow for tougher sentences in serious cases. Regardless, they were beaten by the Liberal Party who stood on a strong law and order campaign, and they fulfilled their electoral promise with the introduction of the *Prohibited Behaviour Orders Act 2010* (WA).

C. CHANGES TO THE PAROLE PRACTICE

Impactful changes do not always require a legislative initiative, but can come out of changes in the implementation of the law. An important example in this respect was the appointment of a new chair of the Prisoners Review Board in 2009. At the request of the then Attorney-General, Judge Johnson instituted a very strict interpretation of the parole legislation, and while Western Australia used to have a very liberal parole policy, with around a 90% rate of release, this dropped to 21% in the period 2009–2011. This, in combination with an increase of cancellations of parole orders, caused nearly a 24% increase in sentenced prisoners over a period of only eight months.⁴⁸ This change of parole practices has, again, a particular effect on Indigenous prisoners. Even if eligible for parole, Indigenous peoples assess their chances of success as unlikely, and it was reported that in Western Australia, 80% of the Indigenous peoples who were released in 2014–15 left the prison without parole.⁴⁹

D. LEGISLATION AND POLITICS

From the examples above, we can conclude that politics in Western Australia, from both left and right, have been heavily influenced by a law and order approach. Interestingly, the rare reductionist initiatives, such as the abolition of six month sentences to stop people being recycled in and out the system with

46 Neil Morgan, ‘The 2002 Sentencing Legislation Part II: Truth in Sentencing’ (2013) 30(11) *Brief* 18–24.

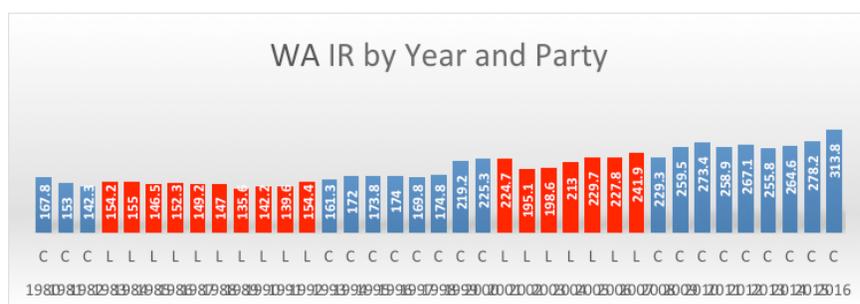
47 Department of the Attorney-General, ‘Sentence Length v. Time Served in Prison: Western Australian Higher Courts Offenders, 1996–2006’ (2006) *Contemporary Issues Bulletin*.

48 Western Australian Auditor General, Submission No 11 to Parliament of Western Australia, *The Management of Offenders on Parole*, November 2011.

49 Council of Australian Governments, *Prison to Work Report* (2016) 97.

hardly any constructive effect, backfired in the sense that sentences became longer, possibly as a reaction of the judiciary towards this political interference. In the figure below, we see how this led to an almost uninterrupted increase of the prison population, regardless the party in place (L=Labor, C=Liberal). There is a considerable increase in 1999, when the Liberals abolished automatic remission. After Labor taking office in 2001, there is a slight decrease, but by the end of their legislature the prison population is higher than when they started. The changes to parole had an immediate effect, and the prison population remained high since.

Figure 1: Imprisonment rate in Western Australia by year and political party in office



This picture is not unlike other jurisdictions, where we also see an increasing punitiveness throughout the eighties after the rather progressive and tolerant seventies, demonstrated in similar initiatives such as mandatory sentences, ‘truth in sentencing’, and changes to the parole system. However, the fact is that Western Australia’s prison population was always at a higher level than it was in the Eastern states. Reliable datasets only go back to the early seventies, but Western Australia has been in that second pole position ever since, and the overall growing punitiveness has only lifted that number up.

VIII A PUNITIVE PUBLIC?

According to the American criminologist Michael Tonry, ‘[c]ountries and states have the policies and prison populations they choose to have’,⁵⁰ meaning that it is the public that elects the politicians based on the political promises they make. According to the experts we talked to, Western Australia suffers from a ‘frontier’ mentality, being less tolerant towards those who deviate, a conservative reaction due to our isolated position in the country, which plays particularly towards Indigenous peoples.

Again, looking for evidence to substantiate this claim, we turn to public opinion research in Australia. Not all of this research goes down to the state level, but of

50 Michael Tonry, ‘Sentencing in America, 1975–2025’ in Michael Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2013) 185.

particular interest here is the research of Roberts et al. in which they investigate differences in the levels of confidence in sentencing and the levels of punitiveness across the various jurisdictions.⁵¹ They conclude that people in Western Australia are more punitive in comparison to other states, but the statistical difference is so small that it can by no means explain our much higher prison population. Unfortunately, we are unaware of any research that investigates the public view of people towards Indigenous peoples engaging in criminal activity in Western Australia.

IX RATIONAL CHOICE THEORY AND REALITY

The punitive turn we discussed in the first part of this article was informed by a view of human behaviour that assumed individuals to be rational actors in charge of the choices they make and capable of calculating risks.⁵² The likelihood of punishment ensures both individual and general deterrence. This over-simplified thesis ignores other factors, not least that offenders usually calculate the likelihood of being caught, rather than the severity of punishment, and that much crime does not occur following deep reflection on the likely outcomes, but is spontaneous, opportunistic, driven by desperation, rage or anger, fuelled by alcohol or drugs, or is committed by people incapable of making rational judgments. Many Indigenous offenders are in the system not because they do not want to obey the law, but because they cannot. ‘Rational choice’ theories of offending do not help us to understand the overrepresentation of people with intellectual disabilities in the justice system, or what to do about it.⁵³

In the next section, we report on research that challenges contemporary mythology around offending behaviour that underpinned mandatory sentencing and truth in sentencing. It takes the focus away from the futile strategy of ‘punitive excess’ to addressing the underlying causes of offending behaviour.⁵⁴ The increasing awareness of Foetal Alcohol Spectrum Disorders (FASD) amongst Indigenous peoples who have contact with the justice system is creating fresh debate focused less on punishment and more on problem solving.

X FOETAL ALCOHOL SPECTRUM DISORDERS

The problematic consumption of alcohol that has resulted in children being born suffering from the permanent effects of FASD often finds its roots in the systemic discrimination of First Nations peoples, and resultant alienation they experience

51 Lynne Roberts, Caroline Spiranovic and David Indermaur, ‘A Country Not Divided: A Comparison of Public Punitiveness and Confidence in Sentencing Across Australia’ (2011) 44(3) *Australian and New Zealand Journal of Criminology* 370–86.

52 Derek Cornish and Ronald Clarke, *The Reasoning Criminal: Rational Choice Perspectives on Offending* (Springer-Verlag, 1986).

53 Ibid.

54 Chris Cunneen, ‘Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues’ (2006) 17(3) *Current Issues in Criminal Justice* 329–47.

from their ancestry, culture and their families.⁵⁵

In recent years Australia has, belatedly and begrudgingly, joined other settler societies such as Canada, New Zealand and the US, in acknowledging the damaging, inter-generational impact of excessive alcohol consumption in Indigenous communities. Foetal Alcohol Spectrum Disorders (FASD), an umbrella term encompassing a collection of disorders resulting from exposure to alcohol in utero, is one of the catastrophes of colonisation.

It was first identified in the 1960s in France, and is an issue across all social classes and societies where alcohol is consumed; it is not solely an Indigenous issue. However, colonial dispossession has bequeathed to Indigenous peoples a litany of injuries, including: inter-generational trauma; chronic illness; high levels of incarceration; mental illness and disability; social dislocation; and, chaotic and unpredictable family lives. This ensures that the effects of FASD are more insidious, compounded and protracted than among the 'hegemonic mainstream'. Recently completed research on FASD examined justice interventions for Indigenous young peoples suspected of having FASD and related disorders. It came about after listening to the concerns raised by Aboriginal workers and justice professionals in the West Kimberley that increasing numbers of Indigenous youth were displaying symptoms of FASD and becoming enmeshed in the criminal justice system.⁵⁶ The study explored and mapped out 'community owned' alternatives and law reform options that would equip courts and multi-agency teams, partnered with community-owned and managed services, to construct alternative pathways into treatment and support.

This research aimed to take stock of the inadequacies of the criminal justice system to respond to young people displaying symptoms of FASD in the West Kimberley and then develop diversionary alternatives, particularly with a strong 'cultural base' and greater use of 'problem solving' meetings and family conferencing models. The research found a need for diversionary and assessment options to be available at the first point of contact with the criminal justice system and a greater role for community-owned organisations and mainstream agencies to act as an 'early warning' system and be engaged in developing tailored programs. We were critical of the lack of screening tools to assess young people suspected of having

55 *R v Quash* [2009] YKTC 54, [62] (Cozens J).

56 Harry Blagg and Tamara Tulich, *Developing Diversionary Pathways for Indigenous Youth with Foetal Alcohol Spectrum Disorders (FASD): A Three Community Study in Western Australia* (Australian Institute of Criminology, 2017); see also Harry Blagg, Tamara Tulich and Zoe Bush, 'Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)' (2015) 19(2) *Australian Indigenous Law Review* 4; Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' (2016) 40(4) *Alternative Law Journal* 257; Harry Blagg, Tamara Tulich and Zoe Bush, 'Indefinite Detention Meets Colonial Dispossession: Indigenous Youths with Foetal Alcohol Spectrum Disorders in a White Settler Justice System' (2017) 26(3) *Social and Legal Studies* 333.

cognitive impairment that come into contact with the justice system. We also talked to Elders and Indigenous organisations about the potential for more ‘on-country’ programs as an alternative to mainstream initiatives. Law reform emerged as an urgent issue, given that the existing *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* (CLMIA Act) is punitive and outdated, leading to situations where Indigenous peoples can be placed in indefinite detention if found unfit to stand trial for an offence punishable by a term of imprisonment.

Once again, we see Western Australia stranded at the punitive end of the spectrum in comparison with like jurisdictions. In Western Australia, a diagnosis of FASD can trigger indefinite detention under the CLMIA Act if a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment. A young person can therefore spend a longer time in detention than if he or she plead guilty and was sentenced to imprisonment for the offence. Unlike the *Young Offenders’ Act 1994 (WA)*, the Act does not contain special procedures for persons who are 17 years of age or younger. Parliamentary Committees, members of Western Australia’s judiciary, and academics have noted the inadequacies of Western Australia’s regime with regards to unfit accused with FASD.⁵⁷ Particular concern has been expressed about the absence of a special hearing process to determine the accused’s guilt or innocence, the fact that the courts have only two options at their disposal (unconditional release or a custody order), and the unlimited duration of a custody order. Significantly, in 2016, the United Nations Committee on the Rights of Persons with Disabilities found that Australia breached its obligations under the UN Convention on the Rights of Persons with Disabilities,⁵⁸ by the indefinite detention of Marlon Noble, an Aboriginal man with an intellectual impairment found unfit to stand trial under Western Australia’s mentally impaired accused legislation.⁵⁹ The Committee found that Mr Noble’s indefinite detention ‘amounted to inhuman and degrading treatment under article

57 Ibid; Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016); *State of Western Australia v BB (a child)* [2015] WADC 2, 16 [55] (Reynolds J); *State of Western Australia v Tax* [2010] WASC 208, [18]-[19] (Martin CJ); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws, Report No 124* (2014); Catherine Crawford, ‘Families Impacted by the Criminal Justice System on the Frontier: A New Model Required’ (2010) 17(3) *Psychiatry, Psychology and Law* 464; Office of the Inspector of Custodial Services of Western Australia, *Mentally Impaired Accused on ‘Custody Orders’: Not Guilty, but Incarcerated Indefinitely* (2014); Piers Gooding, Anna Arstein-Kerslake, Louis Andrews and Bernadette McSherry, ‘Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: Human rights challenges and proposals for change’ (2017) 40(3) *Melbourne University Law Review* 816.

58 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, (2008) 2515 UNTS 3 (entered into force 3 May 2008).

59 Committee on the Rights of Persons with Disabilities Decision: *Communication No 7/2012*, 16th session, UN Doc CRPD/C/16/D/7/2012 (15 August-2 September 2016), (‘Noble v Australia’); Fiona McGaughey, Tamara Tulich and Harry Blagg, ‘UN Decision on Marlon Noble case - imprisonment of an Aboriginal man with intellectual disability found unfit to stand trial in Western Australia’ (2017) 42(1) *Alternative Law Journal* 67; Gooding et al, above n 57.

15 of the Convention'.⁶⁰

A 'lock them up' culture in policing, draconian and Dickensian legislation, and an inflexibly adversarial justice system, have conspired to create an environment where miscarriages of justice involving Indigenous peoples with FASD, and other intellectual impairments, are bound to occur. This is illustrated in the example below.

A recent miscarriage of justice in Western Australia involved the imprisonment of a young Aboriginal man from the Western Desert community of Kiwirrkurra with an intellectual disability, and for whom English was not a first language. Gene Gibson pleaded guilty to the manslaughter of Joshua Warneke, and spent nearly five years in prison prior to his release by the Western Australian Court of Appeal in April of this year.⁶¹ The Court of Appeal unanimously quashed Mr Gibson's conviction on the basis that, because of his cognitive impairments and limited English language proficiency, Mr Gibson did not adequately understand the legal process, the case against him or the nature and implications of his plea of guilty, and there was a real risk 'that the plea was not attributable to a genuine consciousness of guilt'.⁶² The indefinite incarceration of mentally impaired accused persons with FASD was also highlighted by the case of Rosie Anne Fulton, a young Aboriginal woman born with FASD. Rosie was imprisoned for 21 months in Eastern Goldfields Regional Prison without support or treatment, after being found unfit to stand trial on charges of reckless driving and motor vehicle theft.

The dire shortage of interpreter services in remote areas (and the reticence of the police to use them, often on the mistaken belief that they 'understand' Indigenous peoples), widespread hearing problems such as otitis media, cognitive impairments (including FASD), a lack of screening, assessment and treatment programs, coupled by a tendency towards 'gratuitous concurrence' when faced with white authority, place Indigenous peoples at a significant disadvantage when up against a culturally alien and powerful system that makes few allowances for their vulnerabilities.

Reform of the CLMIA Act is urgently required to ensure that it cures, rather than compounds, unfairness to an accused person who cannot adequately understand a legal process, and promotes of the rights of young people. During the last term of the Barnett Liberal Government, the Western Australian Attorney General's Department reviewed the CLMIA Act. On 7 April 2016, the Final Report of the Review was tabled in Parliament.⁶³ The recommendations of the 2016 Review

60 McGaughey, Tulich and Blagg, above n 59, 68.

61 *Gibson v The State of Western Australia* [2017] WASCA 141 (Buss P, Mazza and Beech JJA).

62 *Gibson v The State of Western Australia* [2017] WASCA 141, 79 (Buss P, Mazza and Beech JJA).

63 Department of the Attorney General (WA), *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final Report (2016) [27].

would, if implemented, overcome some of the deficiencies of the regime (namely the limited options available to a judicial officer on a finding of unfitness). However, the recommendations fail to address many of the problems that have been identified with the regime. There is, however, hope of further reform under the current McGowen Labor Government: prior to the 2017 election, the Labor party pledged to reform the Act if elected.

Our comparative research identified a number of legislative schemes that could be drawn upon, and adapted to local context, to improve the Western Australian regime to better meet the needs of Indigenous young people with FASD and other cognitive impairments. In Australia, the Victorian model offers a more child-focused approach, being the only Australian jurisdiction with separate provisions for young persons found unfit to stand trial and prohibiting the placing of children in custody unless there are no practicable alternatives.⁶⁴

The Victorian regime also has a strong focus on treatment and support. New South Wales provides an example of a diversionary option, before fitness is raised, for persons with mental impairment in s32 of the *Criminal Law (Forensic Provisions) Act 2007* (NSW). Internationally, New Zealand provides a best practice model for young people with FASD. The *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ), in keeping with its approach to managing young people enshrined in the *Children, Young Persons and their Families Act 1989* (NZ), mandates that, wherever possible, a young person's family must be fully engaged in decision-making. This facilitates greater respect for the responsibilities, rights and duties of a young person's family or community pursuant to article 5 of the *Convention on the Rights of the Child*.⁶⁵ The New Zealand regime also provides for a needs assessment process that, significantly, includes a cultural assessment if the person is Māori.

We do not present these better practice examples as panaceas: each regime involves its own challenges and dilemmas,⁶⁶ and caution is necessary in recommending a jurisdiction model a feature or features of legislation from another jurisdiction. Rather, we argue that further research is indicated into how these features might be adapted to the Western Australian context.

64 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38J(1), 38ZH(7)).

65 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Harry Blagg, Tamara Tulich and Zoe Bush, 'Placing Country at the Centre', above n 56.

66 For an extended discussion of the different regimes and their challenges, see Harry Blagg and Tamara Tulich, *Developing Diversionary Pathways for Indigenous Youth with Foetal Alcohol Spectrum Disorders (FASD): A Three Community Study in Western Australia* (Australian Institute of Criminology, 2017).

XI CONCLUSION: MOVING FORWARD

Finally, and to end with a positive note as a commemorative issue deserves, we discuss avenues for future improvement.

A first positive note is that growing punitiveness is not as global as was initially thought, and not inevitable or irreversible, as demonstrated in European countries who managed to keep their imprisonment rate low, or curb it back in more recent years. Australia, and more particularly, Western Australia, has not yet followed that trend. We have seen that increasing imprisonment rates are a matter of choice and policy, and not a result of changes in crime. Indigenous overrepresentation lies at the heart of the growing prison population in Western Australia, and while addressing this would not yet bring us to the national average, it would considerably reduce our prison population and deal with a matter of grotesque injustice.

We could start by creating treaties with Indigenous groups which give them formal control over their communities and their resources, and allow them to build their own justice systems based on Indigenous legal principles. However, we do not need to wait for formal ‘treaty’ to begin the work of decolonising relationships between Indigenous peoples and the mainstream justice system. We could begin by working up a range of localised structures that would give Indigenous peoples a greater say in the upbringing of their children, and allow them to work in partnership with the police and judiciary. This may be enabled by establishing a local community justice group, as recommended by the Law Reform Commission of Western Australia in 2006, and is practice in Queensland and New South Wales, to ‘increase the participation of Aboriginal people in the operation of the criminal justice system and to provide support for the development of community-owned justice processes.’⁶⁷ Government could fund initiatives such as ‘strong women’s groups’ and ‘strong men’s groups’ to work on the causes of family violence in localities, and we could make more resources available to allow Indigenous peoples to be ‘on-country’ for community healing. Justice Reinvestment is gathering support in Australia. The idea is to redirect money spent on prisons into community-based initiatives aimed at tackling the underlying causes of crime, promising both to cut crime and save money. Justice Reinvestment recognises that prison building is unsustainable and resources are better expended on building healthy communities.⁶⁸

Secondly, some legislative reforms are required. There is strong consensus among legal and criminological experts that mandatory sentencing provisions need to be repealed, and that the discretionary sentencing power needs to lie with the judiciary.

67 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Report No 94 (2006) 76.

68 David Brown et al, *Justice Reinvestment: Winding Back Imprisonment* (Polity Press, 2016).

Further, and as recommended by the Australian Law Reform Commission, fine defaulters should not be sent to prison and preference should be given to workable alternatives, such as the Work and Development Orders in New South Wales, which allow people to clear their fines with approved activities instead of money. This can include attending educational or counselling services.⁶⁹

Thirdly, more diversionary options should be available to prevent short terms of imprisonment, which are particularly prevalent with Indigenous offenders and even more with Indigenous women. These sentences have significant detrimental effects on the individual, but also on the communities from which they come. Moreover, they hardly allow for the prisoners involved to have access to prison programmes, and mainly result in unsupervised and unsupported release. However, to prevent ‘sentence creep’, alternatives need to be available. Instead of locking large numbers of Indigenous peoples up far away from country, we should be investing in a range of local facilities that do not operate like prisons but build cultural strengths. Resources should be made available for Indigenous communities in partnership with mainstream organisations (but not controlled by them) to construct healing centres that work from a trauma-informed and place-based philosophy. There are a number of projects across Australia that offer ‘on-country’ cultural experience based on Social and Emotional Wellbeing principles, such as the Yirriman Project in the Kimberley that takes at risk young people on to country to ‘builds stories in them’.⁷⁰ The surest way to reduce imprisonment is to ensure that we prevent young people from becoming enmeshed in the first place by building robust diversionary pathways at the first point of contact, or ‘front end’ of the justice system. In the context of Indigenous youth these pathways must have a cultural component. Making diversion ‘work’ for Indigenous offenders may require a shift in thinking and practice towards greater multi-disciplinary assessment and engagement, with a strong emphasis on Aboriginal ownership, including the use of cultural assessments, ‘on-country’ programs, and leadership by Aboriginal community organisations.

At the court stage, we need to be looking at the ‘Aboriginal Court’ model (such as Koori courts in Victoria) with its focus on the involvement of Elders in the court process, and also take elements of the Neighbourhood Justice Centre model,⁷¹ which has a single magistrate, a comprehensive screening process for clients when they enter the court, and rapid entry into, preferably ‘on-country’, support. Unlike other ‘specialist’ courts, Neighbourhood Justice Centres cover the spectrum of issues many defendants and their families face, including health, mental health, and disabilities such as FASD.

When it comes to people that do end up in the prison system, it is essential

69 Australian Law Reform Commission, above n 45, 107.

70 Harry Blagg, Tamara Tulich and Zoe Bush, ‘Diversionary Pathways’, above n 56.

71 An idea from the US. There is one Neighbourhood Justice Centre in Australia, the Collingwood NJC in the City of Yarra, Melbourne, Victoria.

that a supported return to their community be provided. Effective throughcare for Indigenous offenders needs to start from a community-based approach, investing in local initiatives, drawing on the authority of Elders and respected persons in the Aboriginal community. It moves away from the western approach of crime and punishment as an individual problem, involves extended families and community members to address underlying issues of offending behaviour (such as poverty, substance abuse and domestic violence), and acknowledges the importance of healing in a traditional sense. This approach becomes crucial after release, to prevent recidivism, but needs to start from the moment of arrest and be continued throughout the time in prison. If they are to be effective for Indigenous offenders, prison programmes need to operate from an Indigenous perspective, being developed and ran with Indigenous involvement. A greater involvement of Indigenous peoples in prison programmes might also enhance their chances for, and belief in early release under parole supervision. More broadly, prison management needs to acknowledge the importance of the Indigenous community lifestyle and cultural obligations, and provide every possible effort to incorporate these in the prison culture.

To make these suggestions possible, a paradigm shift is required. This paradigm shift is strongly underscored by what is increasingly being called a decolonizing practice: a form of engagement that acknowledges the colonial roots of modern Indigenous disadvantage and seeks to reform structures, law and policies in ways that give back power to Indigenous communities. Mainstream disciplines, such as law, social work, psychiatry and education are imbued with a colonial mentality that, inadvertently, perpetuate mainstream control over Indigenous peoples. A decolonising model tasks agencies with new demands: the requirement, not simply to support individuals, but to help strengthen initiatives that are run and owned by Indigenous communities. This is never going to be an easy task, and it requires a 'whole of government approach' with a long-term view, which is particularly challenging in the current political climate as described above, but according to our research and experiences, it is the only way to go.