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**Submission to Inquiry into involvement in criminal justice system of
young indigenous people by the House of Representatives Standing
Committee on Aboriginal and Torres Strait Islander Affairs**

by

Rod Madgwick QC

1. This submission represents a range of judicial thinking

Judges Woods QC, Finnane QC and Norrish QC of the NSW District Court and NSW Local Court Magistrate Ms M. Quinn wish to say that they agree with this submission. They have helped in its preparation.

2. Personal background of principal author

- 1970-1986 - 16 years a barrister with an interest (among others) in criminal law, often appearing for aboriginal people and a supporter of Aboriginal Legal Services,
- 1986-1995 - a District Court judge for 9 years principally in criminal work frequently involving indigenous people,
- 1995 -2008 - for 12 years a Federal Court judge with some continuing involvement with criminal law as a relieving ("additional") judge of the ACT Supreme Court, and some involvement with indigenous people in native title cases; retired in 2008,
- June 2009 – appointed part-time Acting Judge of the District Court for criminal work; have sat at Griffith, Dubbo and Grafton as well as city and metropolitan locations; it is estimated that I will sit for about 40% of the available time,
- My family and I have recently been pleased and proud to learn that we have an aboriginal forebear, the redoubtable Diana Mudgee.

3. Disclaimer

The submission speaks only of NSW and the ACT. I have no very relevant experience of other jurisdictions. Indigenous NSW is of course not indigenous Australia.

Many judicial officers and lawyers have much greater current knowledge of relevant practices and problems than I have. In particular, the vast majority of early contacts with the justice system occur in local (magistrates') courts. The Committee might consider directly approaching some of such people for submissions. My involvement before you stems from a social discussion with your Chairman.

4. A return to the scenes of the crimes

Since coming back in a fairly solid way to criminal work in NSW I have been struck by a number of things relevant to the inquiry:

- **The increase in punitiveness of the system** – higher maximum sentences, guideline judgments about sentencing approaches, standard non-parole periods for some more serious crimes and so on. Often the impact of these requirements on sentencing people in outback and regional areas and/or on desperately needy young indigenous offenders has seemed to me, comparatively, unduly harsh.
- **The comparative lack of facilities in country areas to enable appropriate sentencing dispositions falling short of full-time incarceration.** In many non-metropolitan areas of NSW and perhaps other States significant numbers of young indigenous offenders, as well as older indigenous offenders and non-indigenous offenders of all ages there is a lack of suitable facilities for sentencing options other than full-time gaol. There is often no reasonably accessible periodic detention facility, no local community service program, no ability for probation officers to personally supervise home detention.
- **Hardships caused by the broad brush legislative approach to mandatory and mandatory driving licence disqualifications for various offences and as an alternative to fine collection.** Many disqualifications result from conduct that has involved no actual as distinct from entirely theoretical danger to anyone, or from no driving conduct at all. For many poor people in outer metropolitan and regional areas the operation of the law almost guarantees, as a practical matter, further offending or at least a differential and undue degree of real hardship for a good many offenders compared with others living where there is decent public transport and readier access to necessary service-providers such as specialised health professionals.
- **On the up side**, there seems to be a more uniformly high standard of legal representation of aboriginal offenders. There is also much wider awareness on the part of coalface sentencers of institutionalised disadvantage for many aboriginal people. The judiciary is also more widely well-informed about underlying historical and cultural factors.
- **An apparently inadequate level of in-custody support for prisoners in crucial areas** – the frequency and generality of complaints about practical inability to access such aids as psychologists and intensive in-custody drug and alcohol rehabilitation programs suggests that budgetary considerations may not have permitted a rise in the number of professionals corresponding to the increase in prison populations.

- More generally, the State justice system is comparatively much worse-resourced than Commonwealth justice mechanisms, at least as to the post-arrest parts of the criminal justice system and the civil justice system. I am not saying NSW does any worse than any other State; anecdotally I understand the position to be a fairly general one in the States.

5. Regional unavailability of diversionary strategies and ancillary facilities

In many non-metropolitan areas of NSW and perhaps other States significant numbers of young indigenous offenders, as well as older indigenous offenders and non-indigenous offenders of all ages there is, for various reasons, a lack of suitable facilities for sentencing options other than full-time gaol. For want of the availability of local facilities, offenders are being dealt with in ways not seen as optimal by sentencing magistrates and judges. A likely effect of this will be the direct or indirect placement and branding of offenders in the class of imprisoned criminals when the sentencer had wanted to avoid that.

Since my return to the District Court in June 2009, I have been unable to sentence as I wished in a number of cases, aboriginal and otherwise in rural areas, because of the practical, local unavailability of facilities or services such as periodic detention (“weekend gaol”) centres and even community service programs. I have been surprised that there appears to have been so little progress in this regard in 15 years. Other magistrates and judges to whom I have spoken have also found this state of affairs a constraint on their sentencing options.

If the sentencing court is in consequence obliged to impose full-time imprisonment, one more person who should have been able to avoid gaol has not. Many aboriginal offenders have heartrending personal histories and sentencers are likely to be looking to try to avoid their becoming confirmed and serious criminals. Some of such offenders suffer in this way.

In these circumstances, one alternative is for the sentencer to impose something less than what otherwise might have been done. There are problems about this: a legislative precondition for periodic detention and community service orders is that, but for their availability, an offender would be sentenced to full-time imprisonment. The logical implication is that if the lesser alternative is not available, the first-blush punishment should stand. Moreover, the offender’s interests are of course not the only ones to be considered. Victims and reasonable onlookers (as distinct from the less responsible media commentators) should not be left with justified grounds for feeling that the sentencing disposition does not adequately reflect the seriousness of the offence.

Further, an experienced sentencer may think that a punishment as serious as community service or periodic detention is necessary as a sharp, last warning to the

offender; indirectly, the absence of this may in time lead to incarceration that was, at the earlier stage, avoidable.

The Committee might consider that the Commonwealth should assist the States to ensure that place of residence is not a limiting factor on the sentencing dispositions of choice, by making tied grants for that purpose.

In that regard, in some country places maintaining the very valuable cooperation of local business to take offenders for community service orders (CSO) is difficult: business will not continue to make itself available when individuals fail to turn up for the CSO. The reasons for non-compliance can be many and varied. Government enterprises could consider expanding what is presently offered. If not offered, consideration could be given to implementing or expanding specific government-enterprise CSO programs for road works or various kinds of other council or National Parks work. Perhaps local aboriginal men's groups or centres could make suggestions as to work availability/suitability in the particular regions.

The matter does not stop with geographical lack of sentencing alternatives. Failure to report to a supervising probation officer often puts aboriginal offenders given bonds in country areas at risk of imprisonment. Often they have inadequate access to a telephone to advise of some difficulty in meeting an appointment. Some offenders frequently move from place to place where they have blood or de facto relatives, often under a sense of moral obligation to visit and help, but with no real settled home in the way middle-class white people think of as normal. The nearest parole officer may be a long way from some of the staging places. **The Committee might consider recommending that the States and Territories require that any such problem be specifically investigated at the stage of initial pre-sentence reporting to the court so that the court might expressly permit multi-location supervision of a bond.**

Indeed, in general, there are not enough probation and parole officers or offices in remote areas. These officers now travel long distances (and times) to visit individuals and report on their progress. It is nothing for officers to travel 200-300km to supervise orders. **The probation and parole service needs to be expanded as a matter of urgency.** It is difficult for the system presently in place to cope.

In some courts a system of duty probation reports has been introduced and works well. It would appear useful in all courts. An officer attends court on a regular day and provides short, duty pre-sentence reports to the court. This saves the officer and offender having to meet at some point within a six weeks period (during which the case must be adjourned) usually required for preparation of a full report. The sentencing options may be limited but the sentencing exercise can be completed there and then. This saves offenders, officers and the court a great amount of time and money, and offenders a deal of anguish.

Mental health diagnostic and treatment capacities are also often especially inadequate in rural areas with obvious implications for the commission of crimes and sentencing without knowledge or adequate knowledge of mental health problems.

Commonwealth aid seems necessary to enable the various necessary facilities and services to be provided. In relation to indigenous Australians there is undoubted constitutional power for the Commonwealth to act.

NSW probably does no worse than any other State as to these matters.

6. Some "aboriginal problems" are largely instances of more general problems

Because indigenous Australians are likely to be poor and many live outside city centres, some of their problems leading to an environment in which crimes may be committed and result in imprisonment largely stem simply from poverty and comparative isolation. For example, if an offender, indigenous or non-indigenous, does not have a home in which he/she or the carer(s) cannot afford a landline telephone, the non-custodial sentencing option of home detention is not available.

Commonwealth help for people who are poor and/or living in isolation will assist everyone, including Aborigines, who need it. Indeed, so far as involvement in the criminal justice system is concerned, because indigenous people are so disproportionately involved in it, any such assistance or any preventative program targeted at all young people is likely, to a degree, to benefit them disproportionately.

On the other hand, some problems are specific to Aboriginal people: surviving racism, family and cultural dislocation stemming from historical causes and generations of disadvantage, ultimately tracing to dispossession of lands and racist, cultural suppression.

The Committee might therefore consider, or cause others to consider, what Commonwealth steps might be taken to minimise crime-inducing poverty and isolation for all Australians.

For example, too many young offenders emerge from school functionally illiterate or close to it, and in any case unfitted for paid work, notwithstanding recent efforts. A close look at our **educational systems** appears warranted. I have in mind such matters as truancy, overcoming the ill effects of things like lack of a stable family, families that are dysfunctional or a family simply educationally unable to provide adequate home support. Likewise, the Committee might examine whether we have world's best practice in outreach to adult non-readers to offer them remedial literacy education and support them in it.

In addition close scrutiny of the actual efficacy of programs specifically aimed at indigenous children may be warranted. Too often well-meant programs for aboriginal support founder on insufficiently rigorous implementation.

Another crucial area for scrutiny would be the extent and efficacy of exposure of children and young people generally, particularly in more remote areas, to **diagnosis and treatment of mental health problems**, including serious substance abuse. It is well accepted that many offenders have such problems in greater or lesser degree, and too often it is only the criminal process that uncovers the problem or lack of effective treatment. Earlier intervention in a more benign context would often enough have avoided the crime.

A third would be the adequacy of funding for and potential improvements in **custodial medical and quasi-medical and other services**, particularly touching mental health and addiction problems among young people.

These suggestions, indeed all the proposals made in this submission, tie in well with the “Justice Reinvestment” concept advocated in Chapter 2 of the Social Justice Report 2009 by the Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights Commission. Impressed by US and UK initiatives, the Commissioner essentially advocates diverting some expenditure that would otherwise go on gaols to community support and development in areas from which disproportionately large numbers of their residents are imprisoned. The Report points out that such an approach is supported by both social justice (or “left”) considerations, and value and comparative value for the public dollar (or “right”) analysis. I would strongly commend that chapter to the Committee and, in general, support what the Commissioner says.

Whether or not the States are willing or able to take up the Commissioner’s suggestion, the Commonwealth can and should directly act, on a non-discriminatory basis, to try to reduce the underlying causes of aboriginal imprisonment. This would very likely also have benefits for aboriginal mortality, to the reduction of which the present government has committed itself.

The Commonwealth could and should fund special help to communities disproportionately represented in prison populations in such fields as mental and physical health, literacy, job training, housing and anti-drug abuse on a non-discriminatory basis that would, because of the over-representation of indigenous people in prisons, nevertheless greatly benefit indigenous offenders, their families and communities.

7. *Increased punitiveness in the system*

There is little doubt that the criminal justice system is now considerably more punitive than 15 years ago: increased maximum sentences, guideline judgments about sentencing approaches, standard non-parole periods for some more serious crimes, higher hurdles for bail and so on. This is so despite the introduction of some promising initiatives such as the MERIT program, Circle Sentencing and Youth Justice Conferencing, for use by Magistrates. (These initiatives are not generally available). The numbers of the gaoled, adult and juvenile, indigenous and others, have risen accordingly. A deliberately more punitive sentencing regime seems in practice to lead to loss of sight of the 'principle of parsimony' emphasized in the common law tradition— the idea that the state should only interfere with the offender's liberty to the least extent necessary to achieve the purposes of punishment.

No doubt this has been legislatively engineered or condoned. While it may perhaps prove futile to say so, the efficacy of these measures in relation to prevention of re-offence by many young offenders, indigenous included, is open to doubt. Statistical or other studies may clarify (or have clarified) this.

Further, it has recently been suggested that people who go to gaol have a markedly shorter life expectancy than those who do not. Scientific personnel (epidemiologists?) associated with the Centre for Health Research in Criminal Justice, Justice Health

examined factors associated with increased mortality in a cohort of 85,203 adults with a history of imprisonment in New South Wales ... between 1988 and 2002 ... Our results reinforce **how disadvantaged prisoners are, measured by mortality as the most fundamental scale of human wellbeing**. Certain demographic and imprisonment characteristics are indicators of high mortality among this population. **The underlying causes of some of these characteristics such as mental illness or multiple imprisonments are potentially treatable and preventable**. Prison health services need to develop interventions targeting high-risk groups to avoid this situation [emphasis supplied].

(see "Factors associated with mortality in a cohort of Australian prisoners", Kariminia A, Law MG, Butler TG, Corben SP, Levy MH, Kaldor JM, Grant L.: Eur J Epidemiol. 2007;22(7):417-28. Epub 2007 Aug 1) The quotation here is from the authors' abstract. A contact was given in the abstract:

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Better by far, we could all agree, to detect and treat the mental illness *before* any imprisonment. Indigenous Australians are of course grossly over-represented in the prison population.

Better also, I submit, to strain against 'multiple imprisonments' further adding to the risk of premature death, rather than bow before populist demands for vengeance and unfounded cries of a weak judiciary.

In any case, I repeat that often the impact of the more punitive norms on sentencing people in isolated and regional areas and/or on desperately needy young indigenous offenders has seemed to me, comparatively, unduly harsh.

More generally, if cultural factors, whether or not exacerbated by isolation, have strongly tended against keeping a young person out of criminality, it seems unjust to sentence as if this were not so. In some cases the seriousness of the offending may be such as to require that other sentencing objectives trump this, but such cases are relatively uncommon. Guideline judgments and statutory codifications of sentencing principles and practice do not always make this clear or contemplate that such a factor may be relevant.

The Committee might recommend that there be specific mechanisms for bringing to the attention of busy State legislatures and appellate courts, the necessity to have regard to potentially unjust relative hardship because of geographical or cultural factors in formulating general prescriptions as to sentencing and regulatory regimes with sentencing implications. The Commonwealth might indeed have legislative power, from a variety of constitutional sources, to correct this.

8. Mandatory driving disqualifications

The outstanding NSW example of this sort of lack of due and fair attention to differential disadvantage is mandatory driving disqualifications. They are notorious among judges and magistrates.

It seems that state authorities have exhibited an insufficiently nuanced reaction to public condemnation of driving offences. While they may be serious offences, where judicial discretion is removed by mandatory sentencing/disqualification periods, the penalty imposed takes no account of individual circumstances once a conviction is recorded.

The effect on the livelihoods and lives generally of people in more isolated areas tends to be much greater than it usually is in the metropolises, where there is more often some semblance of decent public transport and accessible services and entertainment. The pressure in isolated towns to breach the restriction, sometimes for serious reasons, can be overwhelming. Breaches often enough lead sooner or later to imprisonment.

In country areas where individuals may travel between 50 to 150 km to work or for essential services, and only be able to do so by private vehicle, the imposition of a disqualification is devastating and disproportionate when compared with the effect on offenders in city areas. This is particularly so in areas where work is intermittent e.g. the wheat harvest and cotton picking. Walgett, it has been suggested, is a prime example. The local aborigines and other young people travel long distances to take

up work which may only last 6 or 8 weeks, and is often the only source of wage income for families for the whole year.

People who are illiterate have more difficulty obtaining a licence even if there are mechanisms available to provide for them. The length of the disqualification to be applied, together with the inability to modify it, imposes a disproportionate penalty on those who are disadvantaged in that or other ways. For example, for a first offence with no licence, there is no mandatory disqualification. For a second offence, there is a mandatory 3 year disqualification. This penalty can be extremely harsh in country areas and is sometimes overcome by the sentencer exercising the discretion to dismiss the matter without any conviction and with no significant penalty, often the choice of the least unattractive of the available alternatives.

Ms Quinn, reflecting many magistrates' views, strongly recommends that **at least permitting an offender, in suitable cases, a form of licence for travel to and from work might be considered for areas where there is no or virtually no public transport.**

I would urge the Committee to consider also injustices that are not only work-related. Many young indigenous people (and people generally) in the country cannot find work but may have compassionate needs to drive.

9. Prevention and early cure

In a sense, once a young indigenous (or non-indigenous) offender has any involvement with the criminal justice system, it is too late. Anything then done for the young person is done with a degree of compulsion. Even the compulsory receipt of assistance may trigger or confirm anti-system resentment and undue disrespect for authority generally. The long history of less than wholly sensitive paternalism in relation to indigenous people provides a difficult cultural backdrop. The aim is and must be to obviate such involvement.

Hence the importance of the efficacy of preventative educational, anti-addiction and mental health efforts, among others, for young people generally.

The Committee might care to

- i) highlight the social costs, including estimated monetary costs, of a failure of preventing young indigenous and other people becoming involved in the criminal justice system,**
- ii) stress the importance of effective deployment of resources to obviate such involvement,**
- iii) endorse, in principle, the "Justice Reinvestment" concept espoused by the Australian Human Rights Commission, and**

- iv) **develop proposals for the Commonwealth to substantially contribute to such investment.**

10. A suggested mechanism for early intervention

I offer the following more specific suggestion, conscious of its lack of refinement and of possible concerns and suspicions that indigenous people and civil libertarians might reasonably have about it. No doubt it would need considerable tuning, to say nothing of fine-tuning.

The moment of first potential involvement with the justice system, that is when a responsible person first reports an offence by a child or young person (indigenous or not), could be the trigger for

- i) **the examination by a specialised assessor (with social work and other relevant training) of whether anything serious has gone wrong in the young person's life and, if so,**
- ii) **the offer to the offender, family or community of multi-disciplinary expert and lay support .**

What I am suggesting is a sort of **minimally compulsive, non-punitive, supportive, "zero tolerance" approach**, in addition to any actually punitive measures later deemed appropriate by a court.

It would be applicable to all young alleged offenders, not just indigenous. Indigenous resentment at being singled out, even for help, and the racial discrimination legislation need not and should not be tested

Such a scheme would be activated *before* conviction. Many a young person who has done something really worrying, with grave implications for the risk of future serious offending, escapes conviction or even prosecution for it by reason of such matters as uncooperative witnesses or some unavoidable legal technicality.

The scheme would also be quite independent of conviction, since there would be no compulsion on anyone to do anything, beyond the necessity for the young person and his/her carer(s) (if any) initially to speak to the assessor.

Where the young person's family situation should appear to warrant involvement of compulsory state protective activity, it would be necessary for that to be duly reported to the protective authorities by the assessor.

Of course many young people do something stupid and criminal in a minor way without this implying any real family or other problem presaging later criminality. There would need to be close consideration of the levels and types of reported offending that would bring the scheme into play. Families and young people should not be troubled needlessly. A trained and sensible case worker would soon identify

such cases and not waste inevitably scarce resources on them. It would also be plain that, usually, the more serious the alleged offence, the closer the attention that should be given.

However, I do suggest that thought be given to a near-blanket initial check. Generally, in the case of experienced offenders, the seriousness of their offending has escalated from something initially quite minor.

The assessor might seek and offer whatever kind of help seems necessary, including as to fully functional literacy, anti-drug programs, and physical and mental health, negotiating help with housing, employment training and placement, social security benefits and so on.

In relation to aboriginal people, the initial co-involvement of a suitable and properly trained aboriginal person, unless the assessor should be such, would appear desirable. Any follow up action should involve trained lay aboriginal input. One reason for this, and there are obviously others, is that as much as a whole community's cooperation may be necessary to deal with some problems impacting on one or more young people.

It may be objected that the costs might outweigh the benefits: a lot of assessing would be done; there is no way of knowing in advance how much need there is for the intervention of others, how often it would be voluntarily accepted, or how much practical good any such intervention might do.

However there seem to be alarming levels of depression, self harm (in varying degrees) and anti-social behaviour among young men, and young indigenous men in particular, such as regular binge intoxication and gross irresponsibility towards women, and of seriously dysfunctional family life, to say nothing of frankly criminal activity. This suggests that the scope for remediation is large. Many people would likely welcome help for their children or themselves, though some would no doubt decline it. Various "carrots" might attend the scheme – cooperation and progress (but not the lack of them) could be reported by the assessor to the court following any conviction.

A pilot scheme in different types of location could test all aspects of the notion and expose and enable the ironing out of various problems that might emerge, including any issues of civil liberties and of not interfering with the police doing their job.

The Commonwealth could promote and pay for this.

It might be expensive. However if it worked, the costs would be insignificant against the economic and social costs of young people's continuing involvement in the criminal justice system (or other adverse consequences of unattended problems, such as unemployment and alcoholism or other addiction) which might be obviated.

This suggestion clearly could be an aspect of a Justice Reinvestment approach, but its adoption would not be dependent on acceptance of that more general concept.

11. The 'National Indigenous Law and Justice Framework 2009-2015' prepared by the Standing Committee of Attorneys General Working Group on Indigenous Justice

The above suggestions appear to be entirely consistent with the concepts the Attorneys General have recently, to their credit, accepted.

12. The magnitude of the task

Another judicial officer having strong connections with, and deep knowledge of, NSW aboriginal communities offered the following comment on this submission:

I have absolutely no confidence in governments to do anything positive. Their track record over the past 35 years is abysmal and the last Fed. Govt. attempt to crash through with the intervention is an outrage. There was no need to take back land or suspend the Anti-Discrimination Act. I see the NT govt is now refusing to teach in indigenous languages so they will be lost up there, as has occurred elsewhere over the last 2 centuries.

The imprisonment rates remain the same if not worse after the Deaths in Custody Royal Commission [a generation ago]. The only statistic to improve in the last 30 years is some moderate improvement in infant mortality. Life expectancy remains the same.

Aborigines are still being discriminated against, especially in terms of jobs, accommodation and by the police (the imprisonment rates would be quite different if police did not refuse bail as often as they do).

All this sounds pessimistic. Well, ... I am pessimistic because with all the dollars and good will by some governments (e.g. land rights) and by the majority of individuals, little if anything has changed and I see no light at the end of the tunnel being switched on by governments.

Last year I spent some time in the Kimberly. The Argyle Mine has seen the value of employing indigenous people from Halls Creek rather than fly people in from Perth or the East. It works well I am told, from the company's viewpoint, the individual's, as well as community viewpoint.

People whose views I respect see private enterprise not the government holding the key for the future and I cannot disagree with such views...

I tried to weave into [a response to the Committee's] terms of reference the prejudice to all, especially in remote parts of NSW, in terms of access to justice caused by the regionalisation of [the] NSW District Court [eg no DC sittings at places like: Hay Cowra Deniliquin Cootamundra]. I could not see how I could do it. Maybe you can!

The challenge for the Committee is to propose or endorse an inspiring, credible and practicable set of approaches to overcome that sort of exhaustion of hope and prove it wrong. The private sector can play valuable roles in the development of young indigenous Australia, and is increasingly doing so. There are, however, plain limits to that. **Increased Commonwealth involvement, funding and monitoring are essential.**

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