



Emmanuel College

Papers

Indigenous Justice – Five Reasons We Fail

by

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THE AUTHOR

Magistrate Cathy McLennan

Magistrate Cathy McLennan has a Masters of Law from The University of Queensland. She was admitted as a barrister of the Supreme Court of Queensland in 1994 and as a barrister of the High Court of Australia.

Magistrate McLennan practiced at the Bar for over twenty years in all courts to the High Court until appointment to the Bench in 2016. She was awarded the United Nations Association of Australia Queensland Award in 2016 in recognition of her work with Indigenous Australians, and the Chancellors Award for Alumni of the Year, James Cook University. Magistrate McLennan is well known for her dedication to vulnerable Queenslanders, and in particular for her work with Indigenous Australians.

In her early years at the Bar she was employed by the Aboriginal and Torres Strait Islander legal service in Townsville and Palm Island. The cases she worked on during that time, including a murder trial where a 12-year-old boy and his three young cousins stood accused, form the basis of a memoir written by Magistrate McLennan. The book, entitled *Saltwater*, won the prestigious Queensland Literary Award in 2014. *Saltwater* is one of only two non-fiction books ever to have won this prize. Since publication *Saltwater* has been short-listed for several other major literary awards including the Australian Book Industry Award, the Foundation for Australian Literary Studies Award, the People's Choice Queensland Book of the Year, the Non-Fiction Book of the Year and the Book of State Significance, Queensland Literary Awards 2017.

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INDIGENOUS JUSTICE – FIVE REASONS WE FAIL

Introduction

I am honoured to deliver this paper at the Emmanuel College dinner in memory of Sir Harry Gibbs, former Chief Justice of the High Court.

In 1999, female elders from Indigenous communities throughout Queensland participated in the Aboriginal and Torres Strait Islander Women's Task Force on Violence. They made the following plea¹:

"All we want is for the violence to stop."

Their report revealed that²: *"The people who could have made a difference have failed to intervene to stop innocent women and children from being bashed, raped, mutilated and murdered and exposed to forms of violence that have been allowed to escalate to a level that is now a national disgrace."*

Now, nearly twenty years later, statistics show the problem is worse. Since the year 2000 the rate of imprisonment of Aboriginal people has increased by over 77%³. Hospitalisations for self-harm have increased by 56%⁴. Violence, predominantly against women and children, has increased⁵. The 2015 *Not Now*,

¹ Aboriginal and Torres Strait Islander Women's Task Force on Violence, *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999) at Chapter 3, Executive Summary.

² Women's Task Force IBID n1. The report further stated: "Indigenous women's groups, concerned about their disintegrating world, have been calling for assistance for more than a decade. While their circumstances may have been recognised, their pleas have not always been met and in some cases, deliberately ignored. At times, Government representatives appeared to regard violence as a normal aspect of Indigenous life, like the high rate of alcohol consumption. Interventions were dismissed as politically and culturally intrusive in the newly acquired autonomy of Indigenous Communities."

³ Productivity Commission Report 2016, *Overcoming Indigenous Disadvantage: Key Indicators*, issued 17 November 2016. See Key Points at xxviii. Since the year 2000, statistical analysis has shown the rate to be steadily rising to this point. In 2014, the Australian Bureau of Statistics reported that raw numbers of Indigenous prisoners in Australia nearly doubled from 2004–2014, from 5048 to 9264: See ABS, *Prisoners in Australia 2014*. Available here: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>. Indications are that the rate will continue to rise.

⁴ Productivity Commission Report, IBID n3. This report shows that other key indicators have worsened as well, such as the proportion of adults who reported high levels of psychological distress increased from 27% in 2004–5 to 33% in 2014–15. Similarly, the proportion of adults reporting substance misuse in the previous 12 months increased from 23% in 2002 to 31% in 2014–15. In addition, while some indicators have slightly improved, they are still at crisis levels – for example, the juvenile detention rate is still 24 times the rate for non-Indigenous youth. The report shows that any gains have been largely in metropolitan areas and towns.

⁵ See for example, Victorian Government, *Royal Commission into Family Violence (2016)*, Volume 5. Available here: www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-VoL-V.pdf. The report found that while the rate of growth in family violence reports has increased for both Indigenous and non-Indigenous Victorians, and the increase is much higher within Aboriginal and Torres Strait Islander communities. The number of family violence-related assaults involving an Aboriginal or Torres Strait Islander person as the offender increased by 243 per cent in the period between 2008–09 and 2013–14. The number of family violence incidents where children were recorded as present increased approximately 66 per cent between July 2008 and June 2014 (using data from the Victorian Police Service). See also the Productivity Commission Report 2016 IBID 3, Chapter 4, 4.12 'Family and community violence' which states in part: "In 2014–15, hospitalisation rates for Aboriginal and Torres Strait Islander family violence-related assaults were 530 females per 100 000 female population and 191 males per 100 000 male population. After adjusting for differences in population age structures, this was 32 times the rate for non-Indigenous females and 23 times the rate for non-Indigenous males." Although it should be noted that the Report recognises that the true rate is probably far higher as: "The full extent of violence against Aboriginal and Torres Strait Islander Australians is difficult to establish due to underreporting by victims...etc". This was also acknowledged in the Australian Bureau of Statistics, *Recorded Crime- Victims, Australia 2016*, Report 6 July 2017. Reports show that violence and abuse is so common in many Indigenous communities, the people who live there regard it as inevitable (Cripps and Adams 2014; Lloyd 2014).

Not Ever report observed⁶: “*The Taskforce was deeply distressed by what it heard about violence in these vulnerable [Indigenous] communities. Violence and abuse is reported as being so prevalent in some communities as to have become normalised – the people who live there consider violence to be a part of ‘every day’ life.*”

The Law Council of Australia considers that this issue represents one of Australia’s most pressing national social justice concerns⁷. They, and other analysts, point out rising Indigenous imprisonment is a vicious circle, compounding disadvantage and associated propensity to commit crime⁸.

The question is: why? Despite all that Governments and communities have been doing to try to close the gap, what is going wrong? Why does it continue to widen?

It is not lack of resources. Governments and charities spend over \$30 billion each year, of which \$9.3 billion goes to specialised services and programs.⁹

Determining why the rate of Indigenous imprisonment continues to rise is of vital importance, because there are real human beings behind these statistics. This is not a philosophical argument. When I commenced as a Barrister in 1994, I saw the living faces of this problem, women who had been stabbed with such force the knife had broken in their ribs. Men in court the day after, covered in blood, sobered up and remorseful. Now it is their children who appear in court, with increasing frequency. Communities are disintegrating under the weight of crime and disadvantage.

It is time to seriously assess why the policy and justice approach is not succeeding. Why, despite the best efforts of government, communities, charities and workers, do Australian prisons continue to fill with Indigenous prisoners? Why does the gap continue to widen?

⁶ Queensland Government Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) at page 006. Available here: <https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/about/not-now-not-ever-report>

⁷ Law Council of Australia, *Addressing Indigenous Imprisonment – National Symposium*, Discussion Paper November 2015 at page 4.

⁸ Law Council of Australia IBID n7 wherein it is clear that the developments that have brought this issue: “... to the forefront of national and international human rights concerns, including the identification of the extreme socio-economic and human cost of imprisonment; evidence that deterrence theory is increasingly ineffective in achieving reductions in crime and improving community safety; the role of imprisonment in compounding disadvantage and associated propensity to commit crime; and the emergence of new criminogenic responses overseas, driven by the increasing cost of criminal justice and corrections.

⁹ Productivity Commission Report 2014, *Indigenous Expenditure*, released December 2014. The next report is due for release in October 2017. Just to put this in perspective, the entire gross annual value of Australia’s agricultural sector averages \$52 Billion (see ABARES, *Agricultural commodities: March Quarter 2017*).

1. LOW EXPECTATIONS OF INDIGENOUS PEOPLE

“...there but for the grace of God goes most of the children in this community.”¹⁰

Low expectations of policy makers, governments and jurists and low expectations within Indigenous communities themselves serve to exacerbate a lack of self-esteem and sense of hopelessness.

Indigenous commentator, Dr Chris Sarra, described the problem as¹¹: *“...some Indigenous people have ... come to accept negative stereotypes as part of their identity... such a negative sense of identity among Aboriginal children and their families fuels low expectations of both self and others, preventing educational engagement and achievement.”*

Welfarism is one obvious result of low expectations. In many Indigenous communities Social Security has become an expected means of living¹². There are other flow-on effects. Alcoholism. Poor school attendance rates¹³ are also indicative that many children are growing up with little to no expectation they will one day achieve and contribute to society. The 2016 Family Responsibilities Commission Report recognises this issue and states¹⁴: *“The indifference to the value of education shown by some families is frustrating the best efforts of many of us.”*

Yet a large number of Aboriginal and Torres Strait Islanders live very successful and productive lives – renowned achievers like Cathy Freeman, Neville Bonner, Larissa Behrendt, Marcia Langton, Jonathon Thurston - and other Indigenous Australians with equally successful, though less well-known careers in professions and trades.

Many commentators have suggested that in the criminal justice system also, expectations should be lower. That Indigenous offenders should be dealt with

¹⁰ Queensland Government Department of Communities, Child Safety and Disability Services representative, Ms Hall, at the sentencing hearing of the rape of a ten year old girl by nine males: *R v KU & Ors; ex parte A-G (Qld) (No 2)* [2008] QCA 154 ; [2011] 1 Qd R 439 at 33.

¹¹ Sarra C, “High-Expectations Relationships A Foundation for Quality Learning Environments in all Australian Schools”, Stronger Smarter Institute Position Paper at page 4.

¹² See Wundersitz J, *Indigenous perpetrators of violence: Prevalence and risk factors for offending*, AIC Reports Research and Public Policy Series 105, 2010. She concludes at page 93: “Indigenous reliance on ‘passive welfarism’ must be redressed.” See also Pearson N, *On the human right to misery, mass incarceration and early death*. The Charles Perkins Memorial oration, University of Sydney. <http://www.koori.usyd.edu.au/news/pearson.pdf>. See also Pearson N, *Outline of a grog and drugs (and therefore violence) strategy*. Cairns: Cape York Partnership. <http://www.capeyorkpartnerships.com/team/noelpearson/papers/np-outline-grog-drugs-1-7-01.pdf>

¹³ In Aurukun, for example, the pre-school attendance rate is 12%, primary school attendance rate is 55% and high-school 16.2% - all far less than the Australian averages. See <http://www.aurukun.qld.gov.au/shire-profile/our-culture/census-data/>. See also Department of Education, Queensland, Statistics 2016 found at <http://education.qld.gov.au/schools/statistics/student-attendance.html>. Other Indigenous Communities such as Doomadgee have similarly low attendance rates, although some towns, such as Coen, have higher rates.

¹⁴ Queensland Government Family Responsibilities Commission, *Annual Report 2015-16*, released 29 September 2016 at page 7. This report also recognises the “chronic levels of passive welfare.”

more leniently to reduce the rate of Indigenous incarceration.¹⁵ But this belies the central issue that often the victims of the crimes, which are predominantly assaults and sexual assaults, are also Indigenous and deserve equal protection of the law¹⁶.

One example is an Aurukun case of in *R v K U & Ors; ex parte A-G (Qld) (no 2)*¹⁷. The prosecutor described the behaviour of nine males who had raped a 10 year old girl as¹⁸:

“... they’re very naughty for doing what they’re doing but it’s really – in this case, it was a form of childish experimentation...”

When the judge drew attention to the fact that some of the rapists were men aged up to 25 years, the prosecutor said¹⁹:

“Yes. Yes. Yes, that’s correct. He may be chronologically 25 but –... I’d submit that there wouldn’t have been much thought given to the age disparity or the legal niceties of consent or that sort of thing.”

Counsel for the Defence submitted, on behalf of the 17 year old defendant who had raped the 10 year old, that²⁰:

“... there’d be a number of sexual relationships that occur at Aurukun between teenagers under the age of 16 ... it just reinforces the lack of education and resources that are given to this community to assist with what clearly is a significant problem.”

Similarly, the representative from the Department of Communities advocated that the males not be sentenced to imprisonment for the rapes because more education was needed in the community and²¹:

¹⁵ Current sentencing statistics show that the median average imprisonment Indigenous prisoners are expected to serve is generally statistically less, or in a few categories of offending similar to, white prisoners. The Productivity Commission Report, IBID n3, ‘COAG Targets and Headline Indicators’, table 4A.13.7 - this is taken from the expected time to serve (median years), which is on most items in the table is less, and on others similar, for Aboriginal and Torres Strait Islander prisoners compared to non-Indigenous prisoners in all offence categories.

¹⁶ Australian Bureau of Statistics, 4517.0 – *Prisoners in Australia*, 2016, report reveals that the most common offences for sentenced male indigenous prisoners was acts intended to cause injury, 33%. Another common offence for sentenced indigenous males is sexual assault, 13%. These figures combined show that a staggering 46% of sentenced indigenous prisoners are in custody for assault offences, most often against indigenous victims. The Australian Bureau of Statistics, 4510.0 – *Recorded Crime – Victims*, Australia, 2016, report found that Aboriginal and Torres Strait Islander victims of assault were more likely than non-Indigenous victims to know the offender, with: “nearly nine out of ten (88%) of Aboriginal and Torres Strait Islander victims [who knew their offender] compared to nearly two-thirds (66%) of non-Indigenous victims” with a correlation in Australian States. While in Queensland Public Order offences dominate, these offences (such as Public Nuisance) commonly involve acts of violence, threats and assault. This was also revealed in the Working Visions Australasia report, *State of the Children 2016*, at page 32, which found that in Yarrabah for example 4451 people have been the victims of crime including murder, assault, sexual abuse, robbery and other offences, in a population of only 2686.

¹⁷ *R v K U & Ors; ex parte A-G (Qld) (no 2)* [2008] QCA 154.

¹⁸ *R v K U* IBID n15 at paragraph 19.

¹⁹ *R v K U* IBID n15 at paragraph 21.

²⁰ *R v K U* IBID n15 at paragraph 24.

²¹ *R v K U* IBID n15 at paragraph 32.

“So, you know, there but for the grace of God goes most of the children in this community.”

This attitude of fatalistic acceptance of the rape of a 10 year old, and low expectation for the safety of Indigenous children, is all the more concerning when considering the fact that across Australia Indigenous victims of sexual assault are predominantly young children. The Australian Bureau of Statistics 2016 report, *Recorded Crime – Victims*²², shows that a staggering 50% of Indigenous victims of sexual assaults are aged 0-14 years²³. While there are some slight discrepancies (the figure being slightly higher than 50% in NSW and QLD, and lower in SA and the NT), the report also shows that the vast majority of victims knew the offender and were victimised at a ‘residential’ location. That is, they were sexually assaulted in the home by someone they knew.

The rape of a 10 year old child is not a culturally accepted practice²⁴. In Indigenous cultures, as in most other cultures worldwide, it is abhorrent. Similarly, domestic violence and other crimes of violence are not culturally accepted. To hold Indigenous defendants to a lesser standard leads to a sense of hopelessness in the victims and the general community.

The position as it should be, in order to give victims of crime equal protection of the law and to maintain consistent expectations, was eloquently stated by Fitzgerald P²⁵:

“It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions and...Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law’s protection...they are entitled to equality of treatment in the law’s responses to offences against them, not to some lesser response because of their race and living conditions.”

²² Australian Bureau of Statistics, 4510.0 – *Recorded Crime – Victims*, Australia, 2016.,

²³ Australian Bureau of Statistics IBID n20. See Table 19 *Victims of Sexual Assault*:

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4510.02016?OpenDocument> – these figures comprise the rate of sexual assault on indigenous children aged 0-9 found at line 33 (for example in NSW this figure is 23.1%, in QLD 18.3% and in SA 14.9%) plus the rate of sexual assaults on indigenous children aged 10-14 found at line 34 (in NSW this figure is 27.3%, in QLD 34.5% and in SA 21.9%). Line 42 of the report lists the location of offence as residential in 79.1% of cases in NSW, 73.2% in QLD and 78.9% in SA. These figures contrast with sexual assaults on non-indigenous victims, where (approximately 37% of non-indigenous victims of sexual assault are aged 0-14 years.

²⁴ R v K U IBID n15 at paragraph 145 where it was noted that: “In the psychological reports prepared by GYFS, the authors observed “that sexual assault and rape are not culturally accepted practices and are of significant concern to the Aurukun community.”

²⁵ R v Daniel [1997] QCA 139; [1998] 1 Qd R 499 at 531. Further R v KU (IBID n15) paragraph 133: “To adopt an approach which proceeds on the basis that the courts may take judicial notice of the supposed effects of a community’s dysfunction upon all or any of its members, is to engage in the kind of stereotyping which was deprecated by this and other Australian courts... This approach diminishes the dignity of individual defendants by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of observing the standards of decent behaviour set by law.”

We need to make sure that in forming policy, and in the justice system, Indigenous Australians are given due respect. They have a proud, enduring culture. People from Indigenous communities can achieve if there is an expectation that children and families have the same rights to safety as the average Australian. If there is an expectation that each child will one day work in a job that genuinely contributes to society (rather than to grow up to Welfareism), and an expectation that each person is important, and valued by the wider community.

In the words of Indigenous commentator, Dr Chris Sarra²⁶:

“Bring us policy approaches that nurture hope and optimism rather than entrench despair.”

2. UNDER-EMPHASIS OF THE SIGNIFICANT ROLE OF ALCOHOL

Alcohol is at the centre of the vortex of disadvantage in Indigenous communities. Alcohol was described by the Commonwealth Race Discrimination Commissioner as posing: *“a major threat to the survival of Aboriginal culture ...”*²⁷

Alcohol is the primary risk factor for violence in Indigenous communities, particularly domestic violence²⁸. The Honourable Justice Bell in the High Court acknowledged this stating²⁹: *“The link between the excessive consumption of alcohol and violence is notorious.”* The Aboriginal and Torres Strait Islander Women's Task Force report found³⁰: *“At every level, alcohol was cited as the trigger for men acting violently.”* In the Cape York Justice study it was said that³¹: *“Life for those who don't drink to excess, including children, is spoiled by those who do. Alcohol abuse and associated violence are so prevalent and damaging that they threaten the communities' existence and obstruct their development.”*

²⁶ Sarra, C, “High Expectations Realities through High Expectations Relationships: Delivering beyond the Indigenous Policy Rhetoric,” Papers on Parliament No. 64. Available here: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop64/c06

²⁷ Commonwealth of Australia, Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol*, (1995) at 4.

²⁸ This has been acknowledged in numerous studies. See for example *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) - which found that the conquering of alcoholism was a priority. Chapter 18 was dedicated to a discussion of alcohol regulation in Aboriginal communities. The report of the inquiry recognised that ‘extreme alcohol abuse has become normal’ and that this abuse contributes significantly to the social devastation of Aboriginal communities. See also the *Aboriginal and Torres Strait Islander Women's Task Force on Violence* IBID n1, which found that alcohol featured prominently in violence. At pages 64-65 it was noted that: “Submissions in the consultations forc[efully] stated that if the issue of alcohol were addressed, violence would decrease.” See also Wundersitz IBID n11 – which further notes that in contrast to alcohol, illicit drug use is less prevalent within the Indigenous population. See also Matthew Willis, *Community safety in Australian Indigenous communities: Service providers' perceptions*, AIC Report No. 110, October 2010. See also Bryant and Willis 2008; Bryant 2009; HREOC 2006; Livingston 2011; Meuleners et al. 2010; Weatherburn, Snowball and Hunter 2008.

²⁹ *Maloney v The Queen* (2013) 252 CLR 168 per Bell J at 194.

³⁰ *Aboriginal and Torres Strait Islander Women's Task Force on Violence* IBID n1 at 16.

³¹ Fitzgerald T, *Cape York Justice Study, 2001*. Available: <http://www.communities.qld.gov.au/community/publications/capeyork.html>.

The use of alcohol in communities also corrupts the culture and basic traditional customs of Indigenous people.³² Noel Pearson described alcohol as cultural death³³, stating that “*substance abuse endemics are embedded in our Aboriginal social web and has become our new dysfunctional culture; to drink is to be Aboriginal.*”

Alcohol is linked to sexual abuse and neglect of children³⁴. The Little Children are Sacred Report found that conquering alcohol is a priority³⁵. The Aboriginal and Torres Strait Islander Women's Task Force explained that with alcohol use³⁶: “*Neglect is the real problem ... and this lack of supervision leaves opportunities for children to be sexually abused...*” Parental alcohol abuse is one of the main reasons many children do not go to school³⁷. Parents spend money on alcohol rather than healthy food for children.³⁸

Alcohol in communities results in foetal alcohol syndrome, the incidence of which is said to be “*alarmingly high*” in communities³⁹. It means that some babies are being born with brain damage, leaving little hope for a healthy, productive future.⁴⁰

Harmful alcohol consumption is also responsible for a significant proportion of death, disease and injury from accidents, violence, suicide and homicide as well as chronic diseases⁴¹.

³² Little Children are Sacred Report et al IBID n25. Several Indigenous social commentators have also made this point. Mick Dodson, *Violence Dysfunction Aboriginality*, presentation to the National Press Club, Canberra, 2003, 2, <http://law.anu.edu.au/anuiia/dodson.pdf> at 25 January 2005 suggests that ‘alcohol-related violence and dysfunction dominate the rhythms of life for everyone’ in Aboriginal communities. Noel Pearson, *Our Right to Take Responsibility*, (2000) at 17 emphasises the entrenched nature of alcohol in Aboriginal communities. He suggests that the use of alcohol has itself become symbolic of what it means to be an Aboriginal person in some communities. He has referred to alcohol as “*the last nail in the cultural coffin...unless we get on top of addiction and get organised, we won't be able to save ourselves.*”

³³ Noel Pearson, ‘The Light on the Hill’, Ben Chifley Memorial Lecture, Panthers Leagues Club, Bathurst, 2000, <http://www.balkanu.com.au/people/noelpearson/lightonhill-12-8-00.htm> at 25 January 2005, 14; See also Noel Pearson, ‘An Abyss Beyond the Bottle’ *The Australian*, 14 July 2007, 8.

³⁴ See Fitzgerald T, *Cape York Justice Study, 2001*. Available: <http://www.communities.qld.gov.au/community/publications/capeyork.html>. See also the summary at Australian Indigenous Law Reporter, 6(4) 2001 at 50-51. See also Australian Government Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2016*, released 17 November 2016.

³⁵ *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007). The report was commissioned by the NT Government after Public Prosecutor, Nanette Rogers appeared on ABC’s *Lateline* in 2006 and described shocking cases of child sexual abuse in Indigenous communities, explaining that the reason for the abuse was “grog”.

³⁶ *Aboriginal and Torres Strait Islander Women's Task Force on Violence* IBID n1 at 72.

³⁷ IBID n33. See also Matthew Willis, *Community safety in Australian Indigenous communities: Service providers' perceptions*, AIC Report No. 110, October 2010 at page 19.

³⁸ ATSI Women’s Task Force Report IBID n33.

³⁹ Carmody T, *Queensland Child Protection Commission of Inquiry* (2013) at page 380. However, the exact incidence of FASD is largely unexplored and often cases go undiagnosed until after individuals have a history of involvement with the criminal justice system.

⁴⁰ The Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – inquiry into the prevention, diagnosis and management of foetal alcohol spectrum disorders* (2012) defined FASD as: “... the overarching term for a range of conditions with symptoms that can include: brain damage, developmental delay, poor growth, problems with vision and hearing, memory problems, and social and behavioural problems.”

⁴¹ Productivity Commission Report IBID n 3. See also Cussen T and Bryant W, *Domestic/family homicide in Australia*, Wundersitz J, *Indigenous perpetrators of violence: Prevalence and risk factors for offending*, AIC Reports Research in Practice Series 38 (2015), which further indicates that the use of alcohol by both victims and offenders appears to be a risk factor for homicide.

Often the problems are manifold, where there is alcohol in the home, children are exposed to domestic violence, neglect and abuse. This normalises the behaviour and children are more likely to grow up to perpetuate the cycle. For example, one of the true stories in my memoir, *Saltwater*⁴², is of little Olivia. Her parents, while sober, were lovely. But they were binge drinkers. Olivia was born with foetal alcohol syndrome, symptoms of which included mild brain damage and only one lung. Both parents were violent when drunk. Her father was sent to prison for stabbing her mother. There were countless times before Olivia turned ten that her mother became so drunk she either hurt Olivia, or was incapable of caring for her, and while unprotected Olivia was sexually abused numerous times. Most of their welfare payments were spent on alcohol instead of food, so Olivia suffered from malnutrition.

Since the release of *Saltwater*, many people have asked what happened to Olivia. The answer is that she is now 33 and she is an alcoholic. Over the past 20 years she has been in and out of prison and domestically violent relationships. She had three children, who suffer just as she did, from foetal alcohol syndrome and alcohol fuelled violence and neglect (although I'm not aware if they've been sexually abused). Most recently, in January 2017, Olivia was incarcerated. While in prison she received treatment for an infected jaw, broken by her partner.

Olivia is one of the numbers that make up the 'imprisonment phenomenon'⁴³. It's a tragic story but not, in my experience, uncommon. Lives like hers have an enormous moral and social cost. But there's also the economic cost of the many crimes she has committed – paid for by her victims, the community and the criminal justice system. And her children are following in her footsteps. This is the cost of alcohol in communities. This is what Mal Brough referred to in Federal Parliament when introducing alcohol prohibitions he said⁴⁴: “[w]hen it comes to a choice between a person's right to drink and a child's right to be safe, there is no question in my mind which path we must take.”

Similarly, Judy Spence introduced alcohol prohibitions into Queensland State Parliament and said⁴⁵: “*In communities... no one escapes the ravages of alcohol abuse. Children are sexually abused. Babies are born with foetal alcohol syndrome. Women are bashed and raped. Families go without food when meagre funds are spent in the hotel or siphoned off by unscrupulous sly grog merchants.*”

⁴² McLennan C, *Saltwater*, Published by UQ Press August 2016.

⁴³ “Imprisonment phenomenon” is the description of the Law Council of Australia at the National Indigenous Imprisonment Symposium. IBID n7 at page 8.

⁴⁴ Mal Brough, Second Reading Speech, *Northern Territory National Emergency Response Bill* 2007, Hansard, 7 August, 2007, 9.

⁴⁵ Spence J, “Liquor Restrictions in Queensland Indigenous Communities” [2003] IndigLawB 35; (2003) 5(25) Indigenous Law Bulletin 5

Laws prohibiting the possession of alcohol in communities are now in place⁴⁶, but sly grog continues to be a major issue. The Cape York Justice Study explains the problem⁴⁷: *“A right to drink is effectively treated as paramount to the right of other people to safety, the right of families to food and shelter, the right of children to nutrition, sleep, education and innocence and the right of a community to peace and order.”*

While alcohol remains prevalent in communities, no programs, no health initiatives, child protection, or family violence initiatives have any real possibility of improving the lives of children and their families.

The emphasis of policy-makers needs to be on the central problem - alcohol. If alcohol could be removed from the disadvantage equation, then the \$30 billion spent annually could have a better chance of bridging the gap. Programs would have a better chance of being effective. While criticised by some commentators, the Northern Territory Intervention is seen by many as an additional effective measure to alcohol prohibitions. As was stated recently by Indigenous commentator, Jacinta Price⁴⁸: *“...no amount of money or lack of money should stop us from wanting to stop women being killed and children from going through what they’re going through. It is our responsibility. People’s lives are better because of the intervention. The basics card is good. It helped people get off alcohol. The women can fill their fridges up with food for the children. It’s like the most popular thing to say is ... the basics card is terrible. It’s not working. But people who don’t like the basics card are those who would prefer to be drinking, gambling.”*

Similarly, Noel Pearson has been involved in moving the focus towards ever-greater regulation of drinking in Aboriginal communities. He has called for a model of regulation focused on abstinence and/or strict regulation and control. Pearson suggests that Aboriginal alcoholics must ‘rehabilitate and abstain’⁴⁹.

Either way, this is where the spotlight needs to be. On keeping the alcohol out of the communities. To ensure a future for the children.

3. ISOLATION OF COMMUNITIES

Statistics show that there is a wide gulf between isolated Indigenous communities and Indigenous people living in towns and cities. The most recent

⁴⁶ See for example, Liquor Act QLD (1992) at Part 8—*Provisions affecting Communities of Aborigines or Islanders*.

⁴⁷ Cape York Justice Study Report, IBID n31 at 53. There is also a thorough analysis in Douglas H, *The curse of ‘white man’s water’: Aboriginal people and the control of alcohol*, 4 UNELJ (2007).

⁴⁸ Jacinta Price, ‘Incentives, Intervention and Fireworks’, ABC Q & A, 3 July 2017.

⁴⁹ Cape York Justice Study Report, IBID n31.

Productivity Commission report, *Overcoming Indigenous Disadvantage – Key Indicators 2016*, found that remoteness was a key variable for outcomes⁵⁰: “For most indicators that can be disaggregated by remoteness, outcomes for Aboriginal and Torres Strait Islander Australians worsen as remoteness increases.”

For example, Indigenous communities such as Doomadgee and Aurukun only have a school attendance rate of about 50%, but in nearby towns the school attendance rate of aboriginal children approximates the State average. Other indicators show a similar disparity.

Communities such as Palm Island and Aurukun are made up of disparate family groups, from various tribal lands, living in close proximity. The populations of the communities are not traditional cultural groupings, some people originate from the area, some were moved in. Aurukun, for example, was initially set up as a Christian mission. Palm Island was a penal settlement.

Many living in the communities still struggle with family rivalry and this is one of the reasons, in my experience, the community does not work together cohesively. Often the rivalry will go back many years.

There is limited employment in some communities (except in essential services) and no real prospect of employment. This contributes to a sense of worthlessness⁵¹. While there are mines near places such as Aurukun, high levels of illiteracy, lack of job readiness and low expectations of the community members themselves mean that very few are able or willing to take advantage of the work.

Studies have also shown that the transition from community to town has proved difficult. There is a Government program in Queensland for children to attend high school outside the communities. But there is a very high dropout rate due to the difficulties with transition. Young people leaving communities to look for work have also found it very difficult to navigate between the two worlds.

Since I commenced in law, I have seen the children of the children I represented in the communities in the 1990s appearing before the court with the same, if not worse, problems than their parents had. They found the transition from community to town impossible and without hope of

⁵⁰ Productivity Commission Report IBID n3 at page 8. With family violence, across remoteness areas ATSI adults reported experiencing physical or threatened violence in the previous 12 months at a rate of 1.6 times the rate of non-Indigenous adults in outer regional areas and 2.8 times in major cities. The hospitalisation rate for acute intoxication for Aboriginal and Torres Strait Islander Australians in remote and very remote areas (865.4 per 100 000) was more than three times the rate in major cities.

⁵¹ Matthew Willis, *Community safety in Australian Indigenous communities: Service providers' perceptions*, AIC Report No. 110, October 2010.

employment in the community they turned to alcohol. It is a tragic situation. Their children and their grandchildren deserve a better life. Children like Olivia, highlighted in my memoir *Saltwater*, who was sexually abused and neglected and born with foetal alcohol syndrome deserve a chance at a better life.

In Western Australia, the move has started to close down some of the more isolated communities where the disadvantage is most pronounced and there are very high crime rates, suicide levels and alcoholism, and where communities are not traditional Indigenous groupings.

Maintaining these communities in such isolated places is certainly one factor that has prevented policy makers from closing the gap. The disadvantage is entrenched and generational. They are not self-sufficient, nor likely to become so, and it is very concerning to consider what will happen to the communities in the event Australia suffers a significant recession and funding decreases.

But there is an ongoing place for communities in Australia. If they could find a way back to traditional values – away from alcohol. A nurturing safe environment for children to grow and learn and become confident, able adults. The ultimate aim should be to have the communities as good safe places for families, for the children to grow up and be nurtured. For adults who have struggled with addictions in the wider community to return to traditional values.

4. OVER-RELIANCE ON THE CRIMINAL JUSTICE SYSTEM FOR SOLUTIONS

We live in the multi-media age where information is available at the touch of a fingertip. Now, not only newspapers report on crime, but victims, defendants, friends, bystanders and anyone with an opinion.

Judges and lawyers are under more scrutiny than ever. There are constant calls for “*Tougher penalties for crime*”⁵². Yet, as Sir Harry Gibbs has said, the role of the judiciary is to give justice according to the rule of law⁵³. The justice system operates under a strict set of rules and precedents and strict adherence to its processes is what enables courts to adopt a consistent approach to justice. It is

⁵² For example, McMahon C, *Young Offenders to Feel the Full Force of the Law*, Townsville Bulletin 18/8/17; Anderson C, ‘*Police Assaults Spark Call for Tougher Penalties*’, Townsville Bulletin 30/3/15; Elder J and Emery L, ‘*Push for tougher penalties for teenage thugs...*’, Gold Coast Bulletin 5/1/2017; Editorial, ‘*We need to get tougher on young criminals*’, Courier Mail 4/1/14; Schefman L, ‘*Frankston police want tougher penalties for young offenders*’, Herald Sun 7/8/16; Banks K, ‘*Putting the boot into youth offenders*’, NT News 12/1/17; Brown G, ‘*Jeff Kennett slams ‘weak’ juvenile bail laws*’, The Australian 18/11/16.

⁵³ Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, (1997) at v. He states: “In a democracy, every educated citizen should have an understanding of the role of the judiciary, the manner in which the courts function and the history of the relationship between the courts and other organs of government. This is particularly important because ... the independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves and the support and confidence of the public.”

not a function of the justice system to change the underlying social structure – nor should it be.⁵⁴

But there remains a weighty expectation that the justice system will fix the problems in Indigenous communities. While there is a time and a place for a get tough approach on crime, particularly if the law mandates it, grassroots change can only be brought about by effective Government policies.

Courts in Queensland must impose sentences in accordance with the principles in the Penalties and Sentences Act⁵⁵, and are limited to imposing sentences of punishment, rehabilitation, deterrence and/or to denounce the offending. Because of these principles, Courts can work alongside intervention programs designed to rehabilitate offenders. Courts can make community based orders like probation or community service, requiring defendants to attend alcohol or domestic violence counselling, literacy programs, mental health assessments and treatment.

But while these programs are sometimes successful, many Indigenous prisoners have previously had the opportunity of community based orders. Yet they end up in prison because they continue to offend⁵⁶, most commonly for offences of violence, particularly domestic violence, and sexual assaults⁵⁷.

The problem is that of its nature, the criminal justice system is reactive to problems. It only becomes involved once someone is charged with criminal offences. Often, by this stage the problems the defendant faces are entrenched and long-standing such as alcoholism, child abuse and domestic violence⁵⁸. So for many Indigenous defendants, court interventions are too late.

This is true even of the children. One case referred to in my book, *Saltwater*, is of a young boy, Alfie, who was arrested on his tenth birthday. He used to break into houses and steal food and money. He'd eat the food and take the money

⁵⁴ The Australian Red Cross put forward 23 recommendations to the Senate Legal and Constitutional Affairs Inquiry into a Justice Reinvestment Approach to Criminal Justice in Australia, including: "...that political parties focus on the evidence in relation to the most effective responses and strategic use of limited resources in addressing crime and community safety, rather than the seemingly unproductive and expensive "tough on crime" stance which is prevalent in public policy." Australian Red Cross Submission, 23 March 2013. Available here: <http://www.aph.gov.au%2FDocumentStore.ashx%3Fid%3D43ec3b59-c286-4dec-8d6a-9a91eae2679e&usg=AFQjCNG90tXfS6CBFu3TKgWEsrfuLzzRVg>

⁵⁵ *Penalties and Sentences Act* (1992) Qld. See Section 9(1). See also the *Youth Justice Act* (1992) Qld in relation to children.

⁵⁶ The Productivity Commission Report, IBID n3 at paragraph 11.3 found that recidivist offending is a major issue stating: "Repeat offending and re-incarceration are significant contributors to the overrepresentation of Aboriginal and Torres Strait Islander Australians in the youth justice and criminal justice systems."

⁵⁷ Australian Bureau of Statistics IBID n 14.

⁵⁸ The Productivity Commission Report, IBID n3, 'COAG Targets and Headline Indicators', Part 4.13 "Imprisonment and Juvenile Detention" analyses this issue and states: "A high proportion of Aboriginal and Torres Strait Islander offenders have experienced trauma and abuse as a child." See also Wundersitz 2010 IBID n11. See also Weatherburn D, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*, Aboriginal Studies Press, Canberra, 2014; Weatherburn D, Snowball L and Hunter B, "The Economic and Social Factors Underpinning Indigenous Contact With the Justice System: Results From the 2002 NatSiss Survey", 2008.

and leave a little pile of discarded wrappers and empty wallets in a park or alley nearby. Police knew about him for years before he reached the age of criminal responsibility. By the time he was finally before the court, the behaviour was ingrained. While to me, growing up as a child, going to church every Sunday was something normal that everyone did, to Alfie breaking into houses and stealing was normal. He'd been taught by the older kids in the community, and with alcoholic parents that was often his only way to get food. Within a year, he ended up in Youth Detention.

One of the other issues Courts face in Indigenous communities is the high incidence of mental health conditions suffered by adult and child defendants⁵⁹. Courts can take a mental health condition into account in mitigating penalty⁶⁰, but have limited ability to impose effective sentences to address the mental health issues that led to the offending. Neither prison, nor the probation and parole system are set up to accommodate mental health conditions.⁶¹ But despite this, there are times when the level of offending warrants an imprisonment sentence.⁶²

Similarly, Courts regularly are required to sentence children who are, or have been, abused or neglected⁶³. In my experience, the more abused they are, the more serious the recidivist offending. The sentencing options for those children are limited, often they are not going to school and do not have parental support, so their compliance with community based orders is problematic. Criminal courts cannot make a child protection order. And, as in the case of Alfie, while courts use every measure of rehabilitation available, often the only

⁵⁹ Many researchers have reported on the link between disproportionate contact with the criminal justice system and mental health and cognitive impairments of offenders, which are often undetected. For example, Baldry, E, "A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system," October 2015 UNSW. This report noted at page 9: "Aboriginal and Torres Strait Islander peoples with mental and cognitive disabilities are significantly over-represented in Australian criminal justice systems." See also the discussion (above) regarding foetal alcohol syndrome IBID n36.

⁶⁰ In certain circumstances and if the condition has been diagnosed and there is some evidence, such as a doctors report. Presuming the offender is fit to plead.

⁶¹ The lack of suitable programs and facilities for treating and managing offenders with cognitive impairment has attracted regular commentary. Baldry, E, "A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system," October 2015 UNSW a page 12: "...pathways into and around the criminal justice system for many Aboriginal people with mental and cognitive disabilities is ... embedded and entrenched by the absence of coherent frameworks for holistic disability, education and human services support. Aboriginal people with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways." See also, The Australian Human Rights Commission report, *Equal Before the Law: Towards Disability Justice Strategies*, 2014; And Department of Justice, *Intellectual Disability in the Victorian Prison System Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Corrections Research Paper Series, Paper No.2, September 2007, Victorian Government; Sotiri M, *No End in Sight – the imprisonment and indefinite detention of Indigenous Australians with a Cognitive Impairment*, Sept. 2012, UNSW, Sydney.

⁶² The difficulty is that often these prisoners pose a substantial risk to the community if released from custody, such as serial child sexual offenders. The Mental Health system often does not the capacity to deal with them, particularly if the mental health condition is not severe enough to render the offender unfit to plead. See also the discussion in Australian Medical Association, *Undue Punishment? Aboriginal People And Torres Strait Islanders in Prison: An Unacceptable Reality?* Indigenous Health Report Card 2006, Canberra.

⁶³ It is well established that childhood abuse and neglect is associated with an increased criminal behaviour. Twenty seven percent (27%) of all Queensland children who had bene victims of substantiated harm and had contact with the child protection system subsequently offended and became involved in the youth justice system. Approximately one in six (17%) had been in the care of the department prior to detention: See for example: Commission of Children and Young People and Child Guardian, *Snapshot*, 2009.

way to stop the offending for the sake of the child, the community and the victims is to sentence the child to Detention⁶⁴.

It is important to recognise that the criminal justice system is set up to punish *criminals*. It is unfortunate but inevitable that those most marginalised, least educated and with significant social problems are more likely to end up as defendants. But there must be one law for all, as Sir Harry Gibbs has said. The criminal justice system does work effectively as it is intended to in most cases. It can and does punish, deter, rehabilitate and denounce the vast majority of Australians, given that it is applied consistently, impartially and without fear or favour to all. But it cannot make societal change. It cannot make sure that children grow up safe and cared for with the basic necessities of life. It cannot treat the mentally ill. It has at best limited effect on reducing the recidivism of defendants in the community with serious substance abuse problems.

The real answer is Government services, such as secure facilities for those with mental illness, working alongside the criminal justice system. And particularly, early intervention in the form of permanent child safety orders for children at risk – before they suffer harm.

Alfie never received any intervention that I am aware of, other than through the criminal justice system. Courts kept telling him not to steal, and imposed the range of sentences available. But most nights he went home to an empty fridge, and abuse. So he continued burglarising nearby homes and leaving little piles of rubbish. Then, when he was 18 he forced the flyscreen on an open window of a house in Townsville and took a handbag and food. This time he also took a four year old child. She was left with the discarded wrappers and empty handbag in the park. Alive but sodomised. When I saw Alfie in prison he could not understand the seriousness of what he'd done. After all, it had happened to him.⁶⁵

I often wonder what would have transpired if, when he was a little boy, someone had intervened earlier to give him a childhood where he was safe and nurtured.

⁶⁴ But even then, the special considerations in section 150(2) of the Youth Justice Act apply and in particular subsection (d): “a detention order should be imposed only as a last resort and for the shortest appropriate period.” The reality is that for children who offend in a context of abuse/neglect, as with those with a mental or cognitive impairment, often there are no other options.

⁶⁵ There are many reported cases reflecting this type of escalation of offending. See for example: *R v SBU* [2011] QCA 203.

5. TAINTING POLICY DECISIONS WITH GUILT FROM THE PAST

*It's too late to change the past, but it's never too late to change the future.*⁶⁶

Many argue that violence in Indigenous communities has its origins in colonisation and subsequent dispossession, and that the dysfunction is further intensified by historical policy decisions such as the 'stolen generation' and 'stolen wages' policies. While that may be true, it is impossible to change history. The First Fleet did arrive in Australia. Many Indigenous tribes were dispossessed of their land. There were unpardonable massacres.

But focussing on past wrongs in current and future decision-making has a negative impact on addressing the immediate problems. Indigenous communities are living through tragedy right now as the disadvantage gap widens. The focus needs to be forward thinking, on fixing the problems of the future generation.

In particular, there needs to be more focus on the current problems of alcoholism, child safety and welfarism, without tainting these decisions with past guilt. Huge amounts of money have been poured into communities for programs, for land grants, for welfare and infrastructure, and yet the gap continues to widen. Noel Pearson, while acknowledging the problems of the past, argues that the focus needs to be on current problems. He states that alcohol abuse is responsible for *"a great proportion of Indigenous violence"* and that⁶⁷: *"Such individuals cannot be convinced to quit by offering a materially and socially better life including land rights, infrastructure, work, education, loving care, voluntary rehabilitation and so on. The addict will use all of these material and human resources to facilitate an abusive lifestyle."*

There have been several empirical studies that have come to the same conclusion. Weatherburn, Snowball and Hunter found that⁶⁸: *"... drug and alcohol abuse are problems in their own right and play an independent role in explaining Indigenous contact with the criminal justice system and in perpetuating Indigenous socioeconomic inequality."*

So, while the high and rising crime rates may have their genesis in historical factors including dispossession and oppression – we can't fix history. But the immediate causes of dysfunction, particularly binge drinking and child neglect,

⁶⁶ Many social commentators have made this point - recently the 14th Dalai Lama said on 17 December 2013: "We cannot change the past, but we can reshape the future."

⁶⁷ Pearson N, *On the human right to misery, mass incarceration and early death*, The University of Sydney, Dr Charles Perkins Memorial Oration, 25 October 2001.

⁶⁸ Weatherburn D, Snowball L and Hunter B, "The Economic and Social Factors Underpinning Indigenous Contact With the Justice System: Results From the 2002 Natsiss Survey", 2008.

are something we can address. Policies such as the current federal Government's Northern Territory Intervention represent one potential way forward. A strong policy aimed at fixing the problems of the now, not the problems of the past.

With child neglect, the legacy of the 'stolen generation' means that it is now rare that a child of any colour is removed from their home. This is despite the conditions and abuse and/or neglect the child must endure.

One former client of mine whose story is detailed in my book, *Saltwater*, suffered extreme abuse and neglect during her childhood. Olivia is now an alcoholic, has mental health issues and is in and out of jail. But she was never taken from her parents. Likewise, her three children have not been permanently taken from Olivia. They have a similar childhood to hers. No stable permanent home for Olivia's children, only the endless reshuffling in and out of foster homes as she goes in and out of jail and the Department continues to 'work with' Olivia. The children are at an age now that if they are given a safe, permanent home, it may be too late.⁶⁹

Olivia and her children are not part of the stolen generation, but there will be no happy ending for them. They are part of the abandoned generation.⁷⁰

I have encountered children like Olivia many times during my career. A baby lying in dirt and broken glass, left there in the care of a woman drunk on methylated spirits. That baby is not one of the stolen generation, but what sort of life will she have? In my experience, she will be in and out of prison, domestically violent relationships, an alcoholic. White children are in a similar position of vulnerability – for example, Mason Lee⁷¹. The starting position in the legislation should be that every single child, white or black, deserves the basic necessities of life, a safe place to sleep, food to eat and a stable home and caregiver, permanently. Everything else, including cultural awareness, is a desirable extra. Because otherwise, we will be perpetuating the atrocity of the current generation – the abandoned generation.

These are real children. Not statistics. This is not a philosophical debate. These are Australian children who deserve the very best in life.

⁶⁹ Child development experts now say that intervention must be in the very early years (before 3) for a child who is severely neglected or subject to trauma. For example, Dr Stephen Stathis, child psychiatrist, in his evidence before The State of Queensland (Queensland Child Protection Commission of Inquiry) on 7 November 2012 advised that of the children living in residential care or foster care who had been previously abused as infants, studies in some cases indicated brain damage. Dr Stathis stated: "These kids have small brains, they have small temporal lobes...the temporal lobe has not developed properly." See also the statement of Dr Elizabeth Hoehn.

⁷⁰ The term 'abandoned' was first used in discussion during the Queensland Child Protection Inquiry: The State of Queensland (Queensland Child Protection Commission of Inquiry) 2012 on 7 November 2012.

⁷¹ See for example: "Mason Lee suffered months sickening abuse revealed in his tragic final moments."

<https://au.news.yahoo.com/a/32273008/mason-lee-suffered-months-sickening-abuse-revealed-in-his-tragic-final-moments/#page1> – Mason Lee was a child of a family with whom the Department of Child Safety had previous involvement.

6. CONCLUSION

In 1987 Prime-Minister Bob Hawke made a very famous pledge:

*By 1990, no child will be living in poverty.*⁷²

The children from the 1990s who grew up in poverty and were neglected or abused are now filling Australian jails. They take up the beds in mental health facilities and receive disability support pensions. The children who were not severely damaged, but were still in dysfunctional homes, often have a limited education and have difficulty understanding the minutiae of daily life. They are an enormous social and economic cost.

Far too many Australian children still live in homes where they are abused and neglected. These children will grow up to steal our children's cars – there will be assaults, rapes and violent murders in future by the babies of today who are only now beginning their traumatic childhoods. They will fill our future jails.

Many of these children will be Indigenous. The number of Indigenous people in our jails is rising. The gap between communities and the rest of Australia is widening. Early intervention is the key. We need to intervene before a child ends up in the criminal justice system.

There have been many and varied efforts made, billions and billions of dollars have been spent, and there have been a multitude of Commissions and Inquiries, reports and studies. In my view, there are five reasons we've failed to close the gap to date. Addressing these things will give our children, and the most vulnerable children in our society, a chance at a better future.

First: It's time to raise our expectations of what Indigenous people are capable of. To reconsider current policies of 'sit down money', and whether welfare dependence is contributing to the high level of hopelessness. This is a matter for more thought, rather than more money. Certainly it is time for drastic new steps to break this cycle of hopelessness and low expectations.

Second: Policy makers need to give better recognition to the pivotal role alcohol plays in the dysfunction of Indigenous communities. Alcohol is the centre of the vortex, a black hole which sucks away Indigenous children's futures leaving them vulnerable to violence, sexual abuse, neglect, and despair. No program is going to be effective while alcohol is still readily available in the community. Unless alcohol is no longer a factor, the gap will continue to widen.

⁷² Labor Campaign Launch, Speech by Bob Hawke, 23 June 1987.

Again, this requires more thought, not more money. For risks to be taken with progressive policy, such as the Northern Territory Intervention, and reconsidering penalties for breaching liquor prohibition laws. There is a solution to removing alcohol from the communities and with careful thought and focus, it will be found.

Third: Addressing the issue of isolation. What is the future of communities with no hope of employment or industry, with generational levels of extreme dysfunction, high crime rates, low school attendance, low life expectancies, that are not traditional communities but were set up by white people as missions or penal settlements?

Fourth: We cannot any longer let our policy decisions be tainted by guilt from the past. It is our social, moral and economic responsibility to intervene and save neglected and abused children from their suffering, whatever their colour, race or religion. This will mean taking children from severely dysfunctional homes, preferably at a very early age, and giving them permanent, safe, nurturing homes. With safeguards to ensure that children are never again 'stolen' from good homes. This means that the Child Protection systems we currently have throughout Australia should be entirely over-hauled. And for this I suggest studies of effective child safety systems overseas, with a view to entirely re-writing the child protection laws, so they are no longer a misnomer and do, in fact, *protect*.

Fifth: While the criminal justice system has a very important role to play, it is not a cure. It focuses on punishing criminals, and while there is a rehabilitation aspect, it cannot provide complete solutions in the absence of effective government strategy. The law is a strict system of rules in Australia regulating the actions of inhabitants which are enforced by the imposition of penalties⁷³. It is not a system of general social transformation, and lawyers are not social workers. Judges are required to follow the law and work strictly within the system of case law.

As Gibbs CJ said⁷⁴:

“A Justice, unlike a legislator, cannot introduce a programme of reform...”

⁷³ Definition from the Oxford English Dictionary

⁷⁴ *Gibbs CJ, Second Territorial Senators Case (1977) 139 CLR 585 at 599*. The sentence reads in full: “A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established.”



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