Where the Justice System Is Not Working and What to Do About It

[Paper presented by John McKenzie (Aboriginal Legal Service (NSW/ACT) Limited) to the National Pro Bono and Access to Justice Conference, Sydney, 14 November 2008.]

Is Australia deserving of "pariah state" status? Should we be included in any future listing of the "Axis of Evil"? Such proposals will undoubtedly disturb the great majority of Australians who are rightly proud of the representative democracy that is at the core of our system of government. But when one examines the scandalous deterioration in the imprisonment rates of our Aboriginal and Torres Strait Islander citizens, perhaps there is a place for inclusion in such shameful lists.

As one of those who worked on the staff of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) from 1987 to 1991, I can safely assume that none of my colleagues from that time ever envisioned that the situation would deteriorate to the sorry predicament disclosed by the latest Australian Bureau of Statistics (ABS) figures. At the time of RCIADIC the statistics were that Aboriginal adult prisoners comprised 17% of the total prisoner population whilst making up just 2% of the Australian population. As at June 2006, they represent 24% of the prisoner population. What is particularly frightening is that there has been an increasing rate of deterioration so that between 2002 and 2006 the imprisonment rate for Aboriginal and Torres Strait Islander women increased by 34% and the imprisonment rate for men increased by 21.6%. The figures for young people and children are even more disturbing, averaging nationally 36% of all young Australians under juvenile justice supervision and far higher in particular states, whilst comprising only 5% of the total population aged 10-17.(AGD, September '08)

Enough of the figures. It is not my intention to enter into a dissection of the numbers. Rather I want to put flesh and blood to those numbers and examine the relationship between location and imprisonment. I have had the disillusioning experience of representing not only the children of clients of mine from the early 1980's, but also their

grandchildren. Heaven forbid that I ever appear for one of their great-grandchildren as three generations of a family caught in the criminal justice system vice is surely enough to demonstrate to anyone who looks, or cares, that the system is broken. Let us get down to basics. Anyone who has had the pleasure of working with Aboriginal people will tell you that, on the whole, they are polite, good-natured people. Why is it that they are sent to prison as if they were assistants to Osama Bin Laden? Terrorists, they are not!

I come from a state, NSW, that has the second worst Aboriginal imprisonment rates in Australia after Western Australia (ABS,2006). In the Local (Magistrate) Courts here, Aboriginal defendants are sent to gaol at a far higher rate than non-Aboriginal defendants fronting the court. Almost a fifth of Aboriginal offenders (19%) were sent to gaol by NSW Local courts compared to just 7% of non-Aboriginal offenders.(BOCSAR, 2008). And this has happened within an overall context of falling crime rates for several years in the state.

Let us start our examination of this conundrum by looking at what aspects of the criminal justice system differ on the basis of location within the state.

The distribution of the Aboriginal population throughout NSW is quite different from that of the non-Aboriginal population. Whilst the non-Aboriginal population is concentrated in metropolitan parts of the State, the Aboriginal population is higher in rural NSW.

Figures produced by the Australian Bureau of Statistics after the 2001 Census indicate that only 0.98% of the population of Sydney identifies as Aboriginal. These figures also demonstrate that 11.15% of the population of North Western NSW identifies as Aboriginal, along with 7.79% of the population of the Far West of NSW.

If we look at the availability of community based sentencing options across the state we see a serious lack of such options outside the major population centres. By a community based sentencing option, I refer to a penalty which is not primarily based in a prison setting but rather is carried out wholly, or to a large extent, in the community. The

category includes periodic detention, home detention, community service orders, good behaviour bonds (supervised and unsupervised), conditional dismissal of charges and fines. It can also include suspended gaol sentences, but care must be taken here because all instances of a breach of the conditions for suspension, other than those in the most extenuating circumstances, result in automatic enforcement of the gaol term.

Data provided by the NSW Bureau of Crime Statistics and Research (BOCSAR) show that in the following categories there is a statistically significant lower usage by courts in regional and remote areas as compared to courts in metropolitan areas:

- Periodic detention
- Home detention
- Community service orders
- Good behaviour bonds with Supervision
- Fines

At the same time, there was a reversal of this trend in the case of Suspended sentences, such that offenders in regional/remote areas received the penalty at twice the rate experienced by offenders in metropolitan areas. Whilst there are no official figures on this, the experience of the ALS is that approximately half of all suspended sentences result in breach and imprisonment.

The logical outcome of the fact that the Aboriginal population is greater in rural parts of NSW than in metropolitan areas is that inequitable sentencing practices affect Aboriginal people disproportionately.

The BOCSAR statistics indicate that people found guilty or pleading guilty in the Local Court in regional/remote NSW are:

- more likely to be sentenced to full-time imprisonment;

- far less likely to be able to serve a sentence of imprisonment by way of periodic detention;
- far less likely (virtually unable) to serve a sentence of imprisonment by way of home detention;
- far more likely to receive a suspended sentence;
- less likely to receive a community service order or bond with supervision;
- considerably less likely to be fined

than their counterparts who are found guilty in metropolitan NSW.

Clearly, the fact that offenders in the Local Court in regional/remote NSW are more likely to be sentenced to full-time imprisonment is not wholly unrelated to the fact that other sentencing options are less frequently imposed in these areas. For this reason, and leaving out of the equation the issue of the harshness or otherwise of rural magistrates, higher rates of full-time imprisonment in the country must be examined in the context of the under-use of community based sentencing options.

Now let us turn to the issue of recidivism. Aboriginal Australians are more likely to re-offend than non-Aboriginal Australians. As at 30 June 2007, 74.3% of Aboriginal prisoners had prior adult imprisonment, compared to 52% of non-Aboriginal prisoners. (ABS,2007)

The fact of the unavailability of community based sentencing options in regional/remote NSW suggests that residents of these areas are sentenced to imprisonment sooner and more frequently than their metropolitan counterparts. As a result, it could be argued that a number of people sentenced to full-time imprisonment in rural NSW are not of the most recalcitrant variety of offenders. Yet, they are presumably included in the recidivism figures. Remember here that we are talking about Aboriginal people who are amongst the most personable, caring and respectful groups within our society.

I argue that inherent recalcitrance in the offender is less to blame for high recidivism rates amongst Aboriginal people than the impact of full-time imprisonment on offenders. Much anecdotal evidence at the ALS suggests that prison only very rarely achieves the sentencing aim of rehabilitation and that more often than not, prison simply renders an offender more disconnected from life in the outside world and provides them with a "school for crime".

If figures concerning recidivism among Aboriginal offenders are considered in conjunction with figures concerning Aboriginal population distribution, it would not be unreasonable to suggest that Aboriginal people may acquire more prior custodial episodes as a result of the absence of community based sentencing options in rural parts of NSW, where large proportions of the Aboriginal population are located. This absence of community based sentencing options results in Aboriginal offenders being sentenced to full-time imprisonment more frequently than their non-Aboriginal counterparts, which in turn results in Aboriginal offenders becoming more likely to recidivate.

The only logical reason for the comparatively lower use of community based sentencing options in regional/remote courts is that magistrates there do not have at their disposal the same resources and programs provided by the Department of Corrective Services in the cities. Indeed, it is a common utterance by country magistrates that were there an appropriate non-custodial option they would not send a particular offender to prison. In NSW, as I think it likely to be the case in many other states and territories, the Corrective Services department has re-distributed many resources away from 'community corrections' and into prison administration over recent years. Often this has been done at the express direction of government ministers who have the many 'law and order' promises they made in the last election campaign ringing in their ears.

I think that it is really a so-called 'no-brainer' that the return to society for each dollar spent on community based corrections is far superior to the return from a dollar spent on gaols. The estimated cost to keep one prisoner in gaol for a year continues to rise but has recently been suggested to be in excess of $80,000. Granted, the provision of community

based correction services in regional/remote areas involves greater expense than their provision in the metropolitan areas due to distance and associated costs. But when we consider the injustice and the demonstrated inequitable outcomes for Aboriginal people, is not that additional expense the very least we, as a proudly representative democratic society, should insist that our governments undertake as an urgent priority?

I now wish to move to an associated issue that arises from our recent experience in the ALS in our regional/remote offices. NSW has the largest total Aboriginal and Torres Strait Islander population in Australia of 138, 500 with Queensland a close second. There is a discernable trend across much of regional/remote NSW of rapidly increasing population rates of Aboriginal people in many country towns. Just under 1% of the population of Sydney identifies as Aboriginal, whilst 11% of the population of North Western NSW identifies as Aboriginal, along with 8% of the population of Far Western NSW. (ABS, 2001)

The rate of increase in the Aboriginal population across rural NSW is noteworthy. To put it into human terms, in the sweep of land that runs from Broken Hill to Moree, the Aboriginal population is doubling in numbers every generation. We are seeing an increasing so-called 'Indigenisation' of country towns as the non-Aboriginal population decreases at the same time. It is happening in other states as well with towns such as Port Augusta and Kalgoorlie experiencing similar demographic trends. The issues facing regional towns such as these are already self-evident. Public infrastructure and services such as housing and retention of hospital and teaching staff are under pressure. If the current trend continues these towns will become predominantly Aboriginal.

We are experiencing acute difficulty in recruiting and retaining experienced criminal lawyers to live and work in regional/remote NSW. We have no problem in recruiting raw, recent graduates to work in those regions and we then invest considerable time and effort in training them. Unfortunately, the country life is not very attractive to many of the young lawyers and we lose them to city firms or Legal Aid NSW after 9-12 months on average. As I have outlined earlier today, the situation in the regional/remote areas is

critical regarding the incarceration of our clients. I am realistic enough to accept that even if we all started a concerted campaign tomorrow for greatly increased provision of services for community based sentencing options in the bush, little will change on the ground for at least a couple of years. Add to that the latest mantra that pre-occupies government decision-makers, that is the "GFC", or Global Financial Crisis to which I was introduced in Canberra earlier this week by a bureaucrat with a furrowed brow, and I must accept that financial assistance from any level of government is even more unlikely.

If the current lack of adequate community corrections resources continues, it is even more critical for us to have highly experienced and knowledgeable advocates to take up the issue with magistrates and judges in regional/remote areas. The task is beyond most young recruits. We do receive interest from suitably qualified practitioners for advertised vacancies in the country, but once they are informed of the very modest salary that we can afford, almost none proceed to apply.

My proposal for your consideration is that legal firms who are committed to meaningful pro bono assistance regarding access to justice should enter into discussions with Aboriginal and Torres Strait Islander Legal Services to sponsor particular senior criminal lawyer positions in the regional/remote areas. There might be agreed conditions for the lawyer in such a position to report on an occasional but regular basis to the sponsoring firm so as to inform about the range and type of cases handled. Practitioners in the sponsoring firms would be educated as to the situation on the ground in the bush, hopefully leading to an increased commitment to assist Aboriginal people where they are most in need. The ALS senior advocate would, besides receiving a salary that enables them to take on such demanding work without sacrificing their family finances, have potentially helpful contacts with lawyers in larger private firms.

I am conscious of the fact that most large firms who are committed to pro bono assistance do not conduct criminal practices. I am also well aware that the lack of expert legal services to Aboriginal people in the bush in the areas of civil and family law contributes to problems that are often at the root of some criminal offending. ALS's are simply not

properly funded to provide those services as well as their core responsibility of criminal casework. My proposal may have the additional benefit of providing a targeted locality and a familiarity of the local problems through the regular contact between the sponsored criminal advocate and the civil and family law expert lawyers in the sponsoring firm. If targeted sponsorship is good for destitute children living in foreign countries, why not bring it home to those in our own country who are living in third world conditions.

As some of you may gather, I could talk for many hours on these topics as they vibrate within my core on a daily basis. All of you will be glad to hear that I will not do so, not today anyway. I will leave you with one final suggestion that came to me whilst listening to the Honourable Justice Michael Kirby address the National Indigenous Legal Conference in Melbourne recently. As His Honour so astutely pointed out, other countries, such as Canada, have recognized that the State owes a Fiduciary duty to Indigenous people by virtue of the fact that, as a group, they are particularly vulnerable to deprivation and abuse at the hands of government. We only need to consider the actions of the previous federal government in its use of constitutional powers to make laws to the detriment, as well as the benefit, of Aboriginal people to recognize the accuracy of His Honour's point. To any equitable law experts in the audience, here is a challenge to research the case for a change in the Equity laws so that a Fiduciary duty is recognized by case law. All judge-made laws are developed over time and the development should continue rather than accept the status quo that says that equitable principles are sacrosanct and unchangeable. When you have the developed case plan, let me know. Who knows, such a legal development may be enough to keep Australia off the next listing of the Axis of Evil.