



Why Do We Fail to Deliver Justice to Indigenous Populations?

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ARTICLE



ABSTRACT

First Nations people are often disadvantaged as they negotiate justice systems that fail to deliver equal treatment before the law. Examining this issue from the perspective of the criminal justice system of my own country, Australia, this article reviews the causes of that disadvantage and what has been, and remains to be, done to remedy this persistent inequality. I distil the lessons from our experience to offer suggestions to courts and justice administrations in other countries that are grappling with similar challenges. I hope this exploration might provoke a wider conversation about our responsibilities as judicial administration scholars and professionals.

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The principle of 'equal treatment' is a central tenant of the rule of law and western liberal democracy. Yet, governments, in particular their justice systems and courts, in many self-proclaimed democracies fail to achieve equality as they seek to deliver justice to all sectors of their populations. First Nations people are exceptionally disadvantaged in this respect.

In this article I examine this disadvantage in my country, Australia, focussing on the criminal justice system and the way in which our First Nations people (Aboriginal and Torres Strait Islanders)¹ have experienced, and continue to experience, injustice at its hands. I review what has been done to identify the causes of this situation and the success or otherwise of efforts to address them. Drawing on that experience, I offer suggestions for charting a more successful course going forward. I hope that this exploration resonates with readers from other justice systems that grapple with similar challenges and provokes a wider conversation about our responsibilities as judicial administration scholars and professionals.

I offer this reflection as a non-indigenous Australian who, during her career, has been privileged to work with a number indigenous and non-indigenous Australians who have made strenuous efforts to improve the experience and the outcome of justice for our First Nations people. This multi-year experience has informed my perspective as an academic scholar of judicial administration, that is relatively unique.²

THE FAILURES

What do we mean by 'real justice'? As a former Chief Justice of Australia has observed, justice does not necessarily result from laws are promulgated in terms that are neutral and applied in the same way to all citizens:

Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life"[citation omitted]³

¹ I use the term First Nations in this paper to refer collectively to the two large and distinctive groups that constitute Australia's indigenous population: **Australian Institute for Aboriginal and Torres Strait Islander Studies ('AIATSIS')** *What Term is Best to Use?* at <<https://aiatsis.gov.au/explore/australias-first-peoples#toc-what-term-is-best-to-use->> [accessed 26 January 2024], noting, however, their advice that 'These terms of grouping are umbrella terms, within which sits a large array of different nations, each with their own culture, language, beliefs and practices' and there are a variety of ways in which individuals may choose to identify: *Ibid*.

² The author served as the Deputy Executive Director for the Australasian Institute of Judicial Administration (AIJA) (1993–2006). In this role she managed a national program for Indigenous Cultural Awareness training for the judiciary. After leaving that role she was engaged to design a curriculum framework on Indigenous Issues for the National Judicial College of Australia (NJCA) and served as a member of the NJCA's Indigenous Issues Committee (2007–2020). More recently, she has served as a member of a Committee for the Judicial Council on Diversity and Inclusion that has prepared two editions of Australia's *Recommended National Standards for Working with Interpreters in Courts and Tribunals*.

³ *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 Per Brennan CJ [26].

As is recognised under international law, achieving true equality, or equality in fact, requires equality in terms of opportunities and outcomes.⁴

No more telling illustration of the inequality in outcomes for First Nations people can be found in the criminal justice system of Australia. First Nations Australians make up just 3.8% of the Australian population;⁵ yet in 2023 they constituted 33% of the average daily prison population.⁶ This over-representation⁷ is long-standing.⁸ The picture for young First Australians is particularly bleak; not only are they twenty-two times as likely to be imprisoned or placed in youth detention than their non-indigenous peers,⁹ they are disproportionately impacted by a minimum age of criminal responsibility that is alarmingly out of step with international norms.¹⁰

IDENTIFYING CAUSES

A series of inquiries in Australia have investigated why First Nations Australians are so much more likely to be incarcerated. The first, a Royal Commission charged with investigating the disproportionate rate of Aboriginal deaths in police and prison custody ('RCIADIC'), handed down a five-volume report in 1991.¹¹ Finding that this

⁴ [26]–[28].

⁵ Australian Bureau of Statistics (30 June 2021), *Estimates of Aboriginal and Torres Strait Islander Australians*, <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/30-june-2021#cite-window1>> [accessed 26 January 2024].

⁶ Australian Bureau of Statistics (2023), *Prisoners in Australia* <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2023#aboriginal-and-torres-strait-islander-prisoners>> [accessed 26 January 2024]. They also constituted 28 % of deaths in prison or police custody: Merran McAlister, Hannah Miles and Samantha Bricknell, 'Deaths in Custody 2022–23' AIC Reports Statistical Report No. 44, AIC 2023, p. 10. First nations people in Canada are also imprisoned at a disproportionately higher rate: United Nations, Report of the Special Rapporteur on the rights of Indigenous Peoples, *Visit to Canada* (24 July 2023) p. 9, as are native Americans: Zhen Zeng and Todd J Minton, *Jail Inmates in 2019*, (March 2021) Bulletin, US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, pp. 4–6.

⁷ Post-colonial theorists in criminology now challenge the use of the term 'over-representation', preferring to characterise the rate at which First Australians are imprisoned not as an aberration but, rather, the logical extension of colonial laws, practices and policies: H. Blagg & T. Anthony, Introduction: Turning Criminology Upside Down, in H. Blagg & T. Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World*, Palgrave MacMillan 2019, pp. 1–29, p. 15.

⁸ A Royal Commission into Aboriginal Deaths in Custody, which handed down its findings in 1991, appears to have made the first detailed attempt to calculate the extent of the disproportion, focussing on the period 1988–89: Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), *National Report*, Vol. 1, Australian Government Publishing Service, 1991, pp. 221–26. The Australian Productivity Commission, *Overcoming Indigenous disadvantage: Key Indicators 2020* at <<https://www.pc.gov.au/ongoing/overcoming-indigenous-disadvantage/2020>> [accessed 26 January 2024] p. 4.139 provides an overview of the statistics for the period 2000–2019.

⁹ Australian Productivity Commission, *Ibid.*, p. 4.136.

¹⁰ *Ibid.*, pp. 1.142–1.143. The minimum age of criminal responsibility in all Australian States is currently set at 10 years despite repeated calls at international level that Australia implement the 2019 recommendation of the United Nations Committee of the Rights of the Child that it should be set at 14 years. See, e.g. United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, (1 November 2019) p. 14. The two Territories – the Northern Territory and the Australian Capital Territory – have raised the age to 12 and 14 years, respectively.

¹¹ *Supra* n.8.

disproportionate rate of incarceration was the primary cause of the rate of deaths in custody, RCIADIC addressed a series of recommendations directly to leaders of the criminal justice system, including law reform, changes to policing strategies, measures designed to improve relationships between indigenous people and the police,¹² programs for at-risk youth (including alternatives to detention),¹³ measures to improve the treatment of Aboriginal people in the court system, exploring alternatives to imprisonment, reducing the risks of deaths in custody (greater attention to the vulnerabilities of Aboriginal detainees, improved custodial standards) and improving the prison experience and outcomes.¹⁴

However, RCIADIC's investigation did not stop at this level; it went deeper. It noted that acting on its recommendations directed solely at the justice system would not, alone, suffice to resolve the problem, pointing to causes which, in its words, underlay 'the alienation of Aboriginal people and their continuing conflict with the law.'¹⁵ The inquiry detailed the legacy of colonialism (dispossession from land, violence and introduction of disease), of protection, integration and assimilation policies (including child removals), the historic and contemporary role of the police as agents of violence and state control, exploitative labour arrangements, substance abuse, and welfare dependency and poverty.¹⁶ It investigated the position of First Nations Australians on socio-economic and well-being indicators — education, income, health, housing, employment — finding that 'on almost every statistical indicator of the status, or well-being, of the Aboriginal population, we find its members to be in a highly disadvantaged position.'¹⁷ Underlying all of this, the Commission found evidence of 'relentless discrimination'¹⁸ and racism, both personal and institutional, in Australian society. All these factors, it found, created the conditions under which First Nations Australians experienced more frequent, serious, and intense contact with the criminal justice system than the population as a whole.¹⁹

To address these issues, RCIADIC proposed a lengthy series of detailed recommendations directed at improving the social and economic circumstances of First Nations Australians. They targeted physiological as well as psychological health,²⁰ including addressing the adverse impact of alcohol and other addictive drugs,²¹ education,²² increasing economic opportunity,²³ and improving the lived environment (housing and infrastructure).²⁴ The recommendations stressed a greater role in self-determination, in essence, government working in partnership with First Nations

¹² *Ibid.*, Vol 4, Ch 29.

¹³ *Ibid.*, Ch 30.

¹⁴ *Ibid.*, Vol 3, Ch 30.

¹⁵ *Ibid.*, Vol 1, p. xix.

¹⁶ *Ibid.*, Vol 2, Ch 10, Ch 11, Pt 11.6, 11.7, 11.8.

¹⁷ *Ibid.*, p. 62.

¹⁸ *Ibid.*, p. 154.

¹⁹ *Ibid.*, Vol. 1, p. 15.

²⁰ *Ibid.*, Ch 31.

²¹ *Ibid.*, Ch 32.

²² *Ibid.*, Ch 33.

²³ *Ibid.*, Ch 34.

²⁴ *Ibid.*, Ch 35.

organisations and communities, granting First Nations ownership and control of policy making, and combatting racism and discrimination.²⁵

The shocking findings and detailed recommendations of RCIADIC were reinforced in 1997 by the release of the findings of a national inquiry into practices of forcible²⁶ removal and separation of First Nations children from their families, which the enquiry determined was the direct outcome of systematic racial discrimination amounting to a gross violation of human rights.²⁷ As the inquiry recorded, from the late 19th century onwards under various State and Territory policies, children perceived as of 'mixed descent' were forcibly separated from their First Nations families, placed into the custody of state institutions, and then involuntarily fostered or adopted.²⁸ The vast majority of these children were snatched under duress from their families, culture settings, and language milieu. Institutional conditions were very harsh and inhumane; the children's well-being was compromised, even severely neglected, with harsh punishments imposed for even minor rule breaches. The inquiry revealed a high incidence of physical and sexual abuse among survivors of both institutional and foster care who testified in formal hearings.²⁹

In recording and documenting the experience of many survivors of these practices ('the Stolen Generation'), the report drew attention to the devastating effects of forced removal that were strongly associated with many of the issues facing First Nations communities, such as substance abuse, mental illness, and family violence;³⁰ issues that, in turn, correlate with their disproportionately high representation in the criminal justice system. The report also drew attention to the fact that First Nations young people continued to be removed from family and community at a disproportionate rate due to their over-representation in the juvenile justice system, observing that:

The juvenile justice system provides the linchpin for the criminalisation and removal of a new generation of indigenous children and young people. The reasons for this intervention can be linked to a number of specific factors relating to policing and the administration of justice, as well as the interaction of the many underlying social and economic issues which are likely to spark intervention.³¹

A formal apology was offered by the federal government in 2007 and a system of reparation established.³² The report's findings also spawned a renewed effort to

²⁵ *Ibid.*, Chs 26–28, 31.

²⁶ In the sense of 'laws, practices and policies which resulted in the separation of Indigenous children from their families by compulsion, duress or undue influence': Human Rights and Equal Opportunity Commission ('HEROC'), *Bringing them Home, Report of the National inquiry into the separation of Aboriginal and Torres Strait Island children from their families* (1997), Commonwealth of Australia, Terms of Reference and Introduction.

²⁷ *Ibid.*, Pt 4, Ch. 13.

²⁸ *Ibid.*, Pt 2.

²⁹ *Ibid.*, Pt. 3.

³⁰ *Ibid.*, Pt 4, Ch. 13.

³¹ *Ibid.*, Ch. 24.

³² AIATSIS, *The National Apology* at <<https://aiatsis.gov.au/explore/stolen-generations#toc-the-national-apology>> [accessed 27 January 2024].

address the underlying issues identified by RCIADIC. In 2008, the Council of Australian Governments established a program entitled ‘Closing the Gap’ which set measurable targets for reducing First Nations’ disadvantage, including in health, education and employment outcomes.³³

However, a decade later in 2017, continuing concern about First Nations rates of imprisonment prompted further inquiry by the Australian Law Reform Commission. Although constrained by its terms of reference to focus ‘principally on criminal laws and legal frameworks’, the Commission’s final report noted that ‘it is difficult to disentangle historical, social and economic disadvantage from legal issues that contribute to the incarceration of Aboriginal and Torres Strait Islander peoples’.³⁴ It made a series of recommendations in relation to bail and sentencing, but also strongly endorsed the use of ‘justice reinvestment strategies’ including ‘the redirection of resources from the criminal justice system into local communities that have a high concentration of incarceration and contact with the criminal justice system’³⁵ in order to address key drivers of disadvantage.³⁶ It also strongly recommended that this work be done in partnership with Aboriginal people and communities.³⁷

IMPLEMENTING CHANGE

Given the plethora of inquiries, recommendations and commitments, one might expect to see some improved outcomes for First Australians vis-à-vis the criminal justice system at this point in time. However, statistics referred to at the outset of this paper confirm that rates of imprisonment for First Australians remain disproportionately high. In fact, a 2020 review of key indicators of First Nations disadvantage by the Australian Productivity Commission (‘APC’) found that from 2000 to 2019 the imprisonment rate for First Nations’ adults increased by 72% and, despite a decrease in the rate at which First Nations’ youth were detained, their detention rate was still 22 times the rate for non-Indigenous youth.³⁸

Turning to underlying causes, the APC found that, despite some progress in educational achievement and child mortality rates, rates of First Nations children in ‘out of home care’ that is, removed from their own family, had almost tripled in the 15 years prior to 2018–2019. The proportion of adults experiencing psychological distress had also increased over that period, and, in the decade prior to 2018–19 the rate of First Nations deaths from suicide and self-harm had increased by 40%, reinforcing concerns that dramatic attention was required to address a looming mental health catastrophe.³⁹ Other research found that recently, nearly 50% of First Nations Australians reported

³³ Commonwealth of Australia, *Closing the Gap Report 2020*, at <<https://ctgreport.niaa.gov.au/overview>> [accessed 27 January 2024].

³⁴ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) p. 23.

³⁵ *Ibid.*, p. 26.

³⁶ *Ibid.*, p. 27.

³⁷ *Ibid.*

³⁸ APC, *supra* n.8. The full report, at p. 4.139 provides an overview of the statistics for the period 2000–2019.

³⁹ *Ibid.*

experiencing ‘major discrimination (such as being unfairly fired) in the past two years and everyday discrimination (such as being treated poorly by others) at least weekly.’⁴⁰ Another study in 2019 found that three of four Australians hold a negative implicit or unconscious bias against First Australians.⁴¹

What explains this dismal lack of progress? Reviewing the literature, a number of factors contribute and combine to make it far more difficult to effect the changes in this area than to identify those that are needed.

FAILURE TO ACT

A 2018 review of the implementation of the RCIADIC recommendations found that in the 27 years since the report was released, only 64% of its recommendations had been fully implemented. Most of those were directed to the (i) justice system, (ii) prison safety administration, and (iii) those classified as relating to ‘reconciliation, land needs and international obligations.’⁴² Of the remainder, 14% had been mostly implemented, 16% partially implemented, and 6% not implemented.⁴³ The report found that the ‘lowest proportion of fully implemented recommendations relate to self-determination, non-custodial approaches, and cycle of offending.’⁴⁴

A 2020 report noted that most of the recommendations of the *Bringing them Home Report* had either been rejected or inadequately implemented.⁴⁵ The authors commented that ‘While we note that both federal and state governments over the past 20 years have made responses to the *Bringing Them Home report*, it has been neither adequate in resources nor the commitment required to create real change.’⁴⁶

Ten years on from the *Closing the Gap* initiative, a 2018 report found that only three of the seven overall targets were on track to be met in the agreed time frames and, in some cases, outcomes had worsened.⁴⁷ A subsequent re-commitment by the Council of Australian Governments in 2020 was encouraging; however a detailed evaluation of progress by the Australian Productivity Commission recently determined that:

Despite some pockets of good practice, progress in implementing the Agreement’s Priority Reforms has, for the most part, been weak

⁴⁰ Nicholas Faulkner, Kun Zhao, Kim Borg, and Liam Smith, *The Inclusive Australia Social Inclusion Index: 2022 Report* (Inclusive Australia, April 2022) p. 10.

⁴¹ S. Shirodkar, Bias against Indigenous Australians: Implicit Association Test results for Australia. *Journal of Australian Indigenous Issues* (December, 2019) 22 (2–3) pp. 3–34, p. 11.

⁴² Deloitte Access Economics, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Department of Prime Minister and Cabinet, (August 2018) pp. x–xi.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Pat Anderson and Edward Tilton, *Bringing Them Home 20 years on: an action plan for healing* (Healing Foundation, 2020) at <<https://healingfoundation.org.au/app/uploads/2017/05/Bringing-Them-Home-20-years-on-FINAL-SCREEN-1.pdf>> [accessed 27 January 2024], p. 14.

⁴⁶ *Ibid.*, p. 26.

⁴⁷ Commonwealth of Australia, Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister’s Report 2018* <https://www.niaa.gov.au/sites/default/files/reports/closing-the-gap-2018/sites/default/files/ctg-report-20183872.pdf> [accessed 27 January 2024].

and reflects tweaks to, or actions overlayed onto, business-as-usual approaches. The disparate actions and ad hoc changes have not led to improvements that are noticeable and meaningful for Aboriginal and Torres Strait Islander people.⁴⁸

In many cases, a failure to act is indicative of a lack of political will. Australian Governments of conservative political stripe, in particular, have been reluctant to accede to the recommendations of reports such as RCIADIC and *Bringing them home*, particularly those that call for financial compensation and self-determination, preferring to place stronger emphasis on 'law and order' policies. For example, in the 1990s, despite the findings of the *Bringing them Home Report*, the two Australian jurisdictions with the highest proportion of First Nations Australians introduced mandatory sentencing policies. These required juveniles convicted of any third offence for offences such as home burglary or other property crimes to be sentenced to Imprisonment, further adversely impacting the disproportional treatment of First Nations youth and increasing their imprisonment rate.⁴⁹

A lack of political will gives rise to other recurring themes in the various reports and inquiries; a lack of consistency in policy development and application, and a failure to see through to the end programs that were initially developed with high hopes. The bifurcated responsibilities that exist in a constitutional federation create an additional complexity in this respect.

FAILURE OF ACCOUNTABILITY

Associated with a lack of political will is a reluctance to establish mechanisms to monitor and evaluate progress in implementing the recommendations of the various reports and inquiries. For example, to date the federal government has not evaluated the extent, if at all, to which recommendations of the most recent inquiry into First Nations imprisonment, the 2017 ALRC inquiry, have been implemented.

Where monitoring and evaluation mechanisms have been established, as was the case with RCIADIC, there has often been considerable criticism of the way that they have operated. For example, the Aboriginal Social Justice Commissioner wrote in 1997:

[B]ookshelves of implementation reports have been published
Unfortunately, the reports tend to take a 'public relations approach' to monitoring.
The responses often miss the point of a recommendation. The approaches taken to the concept of what constitutes implementation are arbitrary.
General assertions of compliance are made without any evidence to back them up.

⁴⁸ Australian Productivity Commission, *Review of the National Agreement on Closing the Gap*, Study Report, Vol. 1, (Commonwealth of Australia, 2024) p. 3.

⁴⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission of Australia, Submission to the United Nations Committee on the Rights of the Child for their Day of General Discussion on the Rights of Indigenous Children: Issue 3: Law and public order, including juvenile justice, at <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/issue-3-law-and-public-order>> [accessed 27 January 2024].

The reports give a very misleading impression of the daily experience of Aboriginal people.⁵⁰

The annual *Closing the Gap* reports from Commonwealth State and Territory governments appear to have suffered the same fate, with greater emphasis on glossy pictures and extended stories illustrating instances of improvement, than on detailed examination of those targets where progress is no closer or falling even further behind.⁵¹

A closer examination of the 2018 review of the implementation of the RCIADIC recommendations also reveals that its assessment was often quite superficial. To take one example, the review's discussion of the implementation status of Recommendation 96 of the RCIAD on judicial and court officer cross-cultural training⁵² reveals several inconsistencies, inadequacies and discrepancies. The Commonwealth is classified as having fully implemented the recommendation merely on the basis of reportedly developing cultural awareness training programs,⁵³ although no statistical data are provided on the number of programs offered, the frequency with which they are offered, the number and type of attendees, or any evaluative data that purports to measure their impact. Critically, one key component of the recommendation, 'the opportunity for informal discussions with members of the Aboriginal community', is not addressed at all in the assessment of the Commonwealth response.⁵⁴ The State of New South Wales is classified as having fully implemented the recommendation merely on the basis that it provides mandatory cultural awareness training to its community corrections staff and that its policy unit engages in ongoing consultation with Aboriginal organisations. There is no reference to training with judicial officers or to opportunity for informal discussion.⁵⁵ The latter omission is particularly surprising, given that the Judicial Commission of New South Wales established a program to implement the RCIADIC recommendation as early as 1992, and that it publishes details of that program on its publicly accessible website.⁵⁶

⁵⁰ *Indigenous Deaths in Custody 1989 – 1996, A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner for the Aboriginal and Torres Strait Islander Commission*, October 1997 at <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/indigenous-deaths> [accessed 27 January 2024].

⁵¹ *Closing the Gap, Reports* at <<https://www.closingthegap.gov.au/resources/reports>> [accessed 29 January 2024].

⁵² 'That judicial officers and persons who work in the court services and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal and non-Aboriginal communities today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should, wherever possible, participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding': RCIADIC, *supra* n.8, p. 79.

⁵³ Deloitte Access Economics, *supra* n.42, pp. 191–193.

⁵⁴ *Ibid*, p. 191.

⁵⁵ *Ibid*.

⁵⁶ Judicial Commission of New South Wales, 'Ngara Yura Program' at <<https://www.judcom.nsw.gov.au/education/ngara-yura-program/>> [accessed 27 January 2024].

Another salient cause of the repeated failure was identified in the *Bringing them Home* report which observed that many of the new regimes introduced in Australian States and Territories in the wake of the RCIADIC recommendations had largely failed to address the disproportionately high representation of indigenous youth minorities in the custody of the juvenile justice system. In addition to identifying a tendency to tokenism (i.e. lack of genuine commitment) and the fact that the underlying issues had still not been addressed,⁵⁷ the report observed:

Many of the more progressive changes have been restricted in form, content and applicability. They have been designed and implemented as non-Indigenous systems with the expectation of finding solutions to the problems facing Indigenous people.⁵⁸

RCIADIC had strongly cautioned against adoption of a ‘top down’ approach, implemented from a centralised non-indigenous perspective. Rather, it called for a ‘fundamental change in race relations ... in the position of Aboriginal people from being dependents on (and, in some instances, victims of) government controls to becoming negotiators with the government — and with other interest groups in the broader community’⁵⁹ as necessary to eliminate disadvantage and achieve equality.

Yet a constant feature of criticisms of attempts to address First Nations disadvantage over the past 30 years since RCIADIC’s findings has been that governments, justice agencies, bureaucrats and individuals too often fail to engage with, listen to, collaborate, and jointly develop solutions with First Nations Australians. This was again recently pointed out by the APC when it identified as a key factor in the lack of progress toward *Closing the Gap* targets: ‘the lack of power sharing needed for joint decision-making, and the failure of governments to acknowledge and act on the reality that Aboriginal and Torres Strait Islander people know what is best for their communities.’⁶⁰

THE LESSONS

Amid this depressing picture, the APC’s 2020 review was able identify some features of approaches to improving outcomes for First Nations Australians that have been successful:

- Enabling Aboriginal and Torres Strait Islander people to share in decisionmaking on things that affect them.
- Addressing laws, policies, and practices that operate to the detriment of Aboriginal and Torres Strait Islander people.
- Ensuring ongoing government investment, collaboration and coordination.
- Providing access to effective culturally safe services at the right time, suited to the local context, and validated as having a direct and lasting impact.

⁵⁷ HEROC, n. 26, Pt 24 *Juvenile Justice*.

⁵⁸ *Ibid*.

⁵⁹ RCIADIC, *supra* n. 8, Volume 2, p. 166.

⁶⁰ APC, *supra*, n. 48.

- Addressing racism and discrimination in the Australian community, through structural changes and building knowledge and education.⁶¹

A full examination of the extent to which all these characteristics apply to the various efforts made to address indigenous disadvantage overall is a task beyond the scope of this paper. In what follows I focus on three approaches I believe to be of major significance for the justice system.

ADDRESSING LAWS, POLICIES AND PRACTICES

Identifying laws verified as having a discriminatory impact on First Australians is an ongoing effort, and many of the inquiries discussed above have produced excellent work in this respect. Redressing those laws is not, however, simply a matter of legislative change but requires close examination of the policies and practices that determine how the laws operate in practice and whether they produce any adverse unanticipated consequences. The case of interpreters provides a relevant illustration.

Despite the existence of the right to an interpreter when interrogated by police or testifying in court,⁶² many suspects and witnesses are routinely deprived of interpreter services because of resource constraints. There is a long-standing, chronic shortage of interpreters trained and qualified in multiple Aboriginal and Torres Strait Islander languages. The effect of these shortages is compounded by inadequate training and support for existing interpreters, limited training for judges and court staff on how to identify the need for and work effectively with interpreters, as well as perceptions by police and lawyers that their tactical interests are better served by not requesting an interpreter.⁶³ These factors contribute to conditions that spawn a significant risk of miscommunication⁶⁴ that results in the maladministration of justice and puts at risk the right to a fair trial.⁶⁵

As one very experienced researcher in this field has identified, courts are in the unique position to ensure that trials do not begin before miscommunication issues are duly

⁶¹ APC, *supra* n.8.

⁶² There is no legislated right to an interpreter for a First Nations Australian being interviewed by police. However, guidelines based on those set out in the case of *R v Anunga* (1976) 11 ALR 412 exist in most Australian jurisdictions: D. Eades, *Communicating the Right to Silence to Aboriginal Suspects: Lessons from Western Australia v Gibson*, *Journal of Judicial Administration* (2018) 28(1) pp. 4–21s(?), pp. 5–6. Section 30 of the Evidence Act 1995 (Cth) provides that: ‘A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.’ Most States and Territories have legislation in a similar form, see for an overview: *Judicial Council on Diversity & Inclusion*, ‘Legal Appendix: Engagement of interpreters to ensure procedural fairness – legal requirements for interpreting’ at <https://jcdi.org.au/publications/national_standards_interpreters/legal-appendix-engagement-of-interpreters-to-ensure-procedural-fairness-legal-requirements-for-interpreting/> [accessed 29 January 2024].

⁶³ Recently the subject of detailed examination in Kristina Kukolja, ‘Justice: but not in my language,’ ABC Radio Law Report, 25 July, 2023, <https://www.abc.net.au/listen/programs/lawreport/interpreters-northern-territory/102564212>.

⁶⁴ Michael Cooke, *Anglo-Aboriginal communication in the criminal justice process: A collective responsibility*. *Journal of Judicial Administration* (2009) 19(1) pp. 26–35.

⁶⁵ See for an illustration of a particular egregious injustice visited on a young Western Australian man who was questioned by police without the provision of an interpreter: Eades, *supra*, n.62.

addressed.⁶⁶ Australia has already established, through the efforts of its Judicial Council on Diversity and Inclusion, comprehensive standards for court interpreting accompanied by Model Rules and a Model Practice Note to assist courts and tribunals to give effect to them.⁶⁷ It is important that judges and court personnel follow through and are adequately resourced to do so.

ADDRESSING RACISM AND DISCRIMINATION

As noted above, First Australians regularly report instances of discrimination at an alarming rate. Although this is often the product of overt racism, it also appears from the findings of the 2021 research that unconscious bias is a key factor. It cannot be expected that police, courts and other justice agencies are immune in this respect which is why RCIADIC emphasized the need for training in its recommendations. However, experience suggests that, as it recommended, to change attitudes and combat bias, such programs need go beyond the mere provision of information to provide opportunities for actual engagement by justice personnel with First Australians.

A recent review of contemporary judicial education in Australia recently adopted a revised typology of judicial education programs that specifically included both cultural sensitivity and bias education, describing these terms as follows:

Cultural sensitivity education addresses expanding judicial officers' understanding of different cultural frames. In Australia it incorporates education on the culture and practice of Aboriginal and Torres Strait Islander peoples that can inform judicial officers' understanding of First Nations issues in cases that come before them. It also includes education relating to the culture and practice of the many and varied ethnicities of the Australian population, including but not limited to language and translation. It extends to education around particular issues that manifest for people based on their age, gender, religion or sexual orientation. Bias training is closely related to this and includes education on unconscious bias that might manifest in relation to race, ethnicity, age, gender, religion, or sexual orientation.⁶⁸

Furthermore, a demonstrated commitment to inclusivity now forms one of the recommended criteria for judicial appointment in Australia,⁶⁹ on the basis that 'Good judging requires a high degree of cultural awareness, involving insight into the needs and perspectives of court participants from many backgrounds, and some direct engagement with or experience of those varied perspectives.'⁷⁰

⁶⁶ Cooke, *supra* n.64, pp. 34–35.

⁶⁷ Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals*, end edition, March 2022 at <<https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf>> [accessed 28 January 2024].

⁶⁸ G. Appelby et. al, *Judicial education in Australia: A contemporary overview* (AIJA 2021) p. 27.

⁶⁹ Australasian Institute for Judicial Administration, *Suggested Criteria for Judicial Appointment* (AIJA, 2024) p. 8.

⁷⁰ *Ibid.*, p. 7.

In its 1991 report, RCIADIC expressed the view that ‘...the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands’,⁷¹ a concept defined, in broad terms, as ‘self-determination.’⁷² Self-determination, in various forms, has been a key demand of indigenous activists in Australia since the early 1970s;⁷³ however, as RCIADIC noted, efforts by successive Australian governments to implement policies and frameworks that provide for it floundered over successive decades.⁷⁴ Post-RCIADIC too, Australia has struggled to find a consistent forum for enabling participation at national level by First Nations people in decisions that affect them.⁷⁵ Most recently, a seemingly innocuous change to the Australian Constitution to enshrine an advisory Voice to Parliament was resoundingly defeated in a national referendum.⁷⁶

Yet, paradoxically, the results of experiments in the justice system in the 30 post-RCIADIC years appear clear. As the ALRC noted in 2018, ‘...some of the most effective solutions to local problems (such as diversion programs and post release assistance) have been developed locally by, or in conjunction with, local Aboriginal and Torres Strait Islander people.’⁷⁷ What are generally termed ‘indigenous sentencing courts’ are usually cited as the most common example of these types of localised, collaborative initiatives.⁷⁸ These are a hybrid model in which First Nations Elders work with a presiding judicial officer to apply their cultural knowledge to achieve the best sentencing outcome — for a defendant, the victim and the community.⁷⁹ Community forms of policing, such as night patrols, have also been found to have positive outcomes⁸⁰ as have community-based programs that work to reintegrate offenders and improve community safety.⁸¹

⁷¹ RCIADIC, *supra* n.8, Vol. 1, p. 15.

⁷² *Ibid.*, Vol 2 p. 503.

⁷³ *Ibid.*, p. 519.

⁷⁴ *Ibid.*, pp. 519–563.

⁷⁵ See *Australians for Negotiated Treaties and Resolution (‘ANTAR’), Voice: A History of Representation* at <<https://antar.org.au/wp-content/uploads/2023/06/Voice-A-History-of-Representation-Factsheet.pdf>> [accessed 28 January 2024] for a succinct outline of the various attempts and the reasons for their failure.

⁷⁶ See *Australian Electoral Commission, ‘2023 federal referendum’* at <<https://www.aec.gov.au/Elections/referendums/2023.htm>> [accessed 28 January 2024] for the detail results and explanation of the process.

⁷⁷ ALRC, *supra* n.34, pp. 24–25.

⁷⁸ *Ibid.*

⁷⁹ ‘Hybrid Justice (i): Indigenous Sentencing and Justice Planning’ in Blagg & Anthony, *supra* n.7, pp. 245–278, at pp. 258–259 provides a very general overview. See sources quoted there for greater detail and for variations in the models between different jurisdictions.

⁸⁰ ‘Hybrid Justice (ii): Night Patrols and Place-Based Sovereignty’ in Blagg & Anthony, *supra* n.7, pp. 279–318, at p. 282.

⁸¹ *Ibid.*, p. 283.

CONCLUSIONS

This brief survey summarizes complex issues that bedevil the relationship between First Nations Australians and the operation and administration of the criminal law. The historical failures are manifold, but lessons can be drawn from them. Courts and justice agencies in search of solutions to provide real justice to their indigenous citizens would be well-advised to:

- Set aside any pre-conceived ideas about what the problems and the solution are, and rather focus on engaging with and developing meaningful partnerships with First Nations communities;
- Aim to develop collaborative solutions at a local level that support and empower those communities, rather than imposing ‘top down’ solutions, or models adopted from other jurisdictions without consultation;
- Be prepared to examine attitudes, at both an individual and institutional level; actively work to combat and address overt racism and ‘unconscious bias’; and
- Be accountable; measures of success should be meaningful, jointly crafted, and periodically assessed and refined in meaningful and constructive sessions.

Above all, our experience suggests that a continuation of past failures is likely to continue to exacerbate the disadvantage suffered by indigenous populations in accessing justice.

COMPETING INTERESTS

The author has no competing interests to declare.

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