
THE CRIMINALISATION OF CONDUCT:

INDIGENOUS YOUTH IN THE CRIMINAL JUSTICE SYSTEM

by Laura Brown

It is an alarming fact that Indigenous juveniles in New South Wales ('NSW') are incarcerated at a rate 28 times higher than non-Indigenous juveniles.¹ Indigenous people make up only 2% of the general population, but make up over 50% of the prison population.² These figures are well documented but explanations and solutions are far less common. Indeed, few of the over 300 recommendations made by the *Royal Commission into Aboriginal Deaths in Custody*³ have been implemented effectively at any level of government, despite the fact these recommendations covered issues such as education, employment, police cultural awareness training and the ways in which prisons should be operated.⁴

While the Federal Government talks about 'Closing the Gap' as part of a joint strategy with state and territory governments,⁵ the NSW Government has been remarkably silent on its own practical measures for resolving the overrepresentation of Indigenous juveniles in NSW prisons. An inquiry by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Issues produced a report on the high involvement of Indigenous juveniles in the criminal justice system. The 2011 report, titled *Doing Time: Time for Doing*, outlines a number of issues that contribute to the high level of Indigenous incarceration and makes over 40 recommendations for change.⁶ However, the majority of these recommendations involve the Federal Government working in collaboration with state and territory governments in relation to health, education, employment and policing services, thereby requiring state government policy changes in areas which the federal government does not control.

The current Federal Government has done much to promote reconciliation with Indigenous people in Australia: the apology in 2008,⁷ the establishment of the National Healing Foundation,⁸ the decision to consult on the best way to recognise Indigenous people in the constitution and the commitment to holding a referendum on that recognition.⁹ These are all key markers of a government attempting to engage productively with Indigenous Australians. However, the Federal Government does not have control over the vast majority of the interactions

between Indigenous Australians and state government agencies. A major problem for Indigenous youth in NSW is that their daily interactions are mainly with state bodies, such as police, state schools and other public authorities. We are yet to see a similar amount of commitment from our state governments in the area of juvenile justice, particularly in NSW. The Noetic Report commissioned under the previous NSW government offered a blueprint for reducing the juvenile imprisonment rate by reinvesting in communities and programs that reduce offending¹⁰ (also discussed in a recent issue of the *Indigenous Law Bulletin*). Unfortunately, the recommendations have not yet been implemented and the problem continues.

Whilst there are multiple reasons for the high rate of involvement of Indigenous young people in the criminal justice system in NSW, two key reasons will be explored in this article: the attitudes of police and the imposition of bail conditions.

POLICING IN NSW

One reason for the high rate of Indigenous interaction with the criminal justice system lies in the different treatment that NSW police extend to Indigenous and non-Indigenous juveniles from the initial point of contact. The Australian Institute of Criminology released a paper in June 2008 that examined the diversion rates of Indigenous and non-Indigenous young people in NSW prior to court. The statistics were concerning: an Indigenous young person was more likely than a non-Indigenous offender to be arrested, charged, taken to court and given bail conditions. Non-Indigenous offenders were more likely to be let go with a warning or a caution (and no arrest) or without bail conditions if they were arrested and charged.¹¹

A vicious cycle is at work here. Indigenous young people are more likely to have a longer criminal history, having previously been arrested and charged, and they are therefore less likely to be able to be diverted from the criminal justice system at certain points of the process.¹² This, in turn, leads to an increased criminal history, and so the cycle of overrepresentation continues.

We have to recognise that racism and bias can influence the ways in which police interact with Indigenous people.¹³ Increased use of public space by young people often means that young Indigenous people can be found congregating in parks and other outdoor areas. Although non-Indigenous young people also congregate in parks and other outdoor areas, anecdotal evidence provided by Public Interest Advocacy Centre ('PIAC') clients indicates that Indigenous young people are more likely to interact with the law, and these interactions are rarely positive. For example, when a police officer tried to stop an 18-year-old client from boarding a train, the officer hit the 18-year-old so hard that his jaw shattered. There were no sanctions against the police officer, but the 18-year-old was charged with resisting arrest. In a separate incident for one of PIAC's clients, six police officers arrested a 15-year-old boy whose only crime was being 10 minutes late home; in the process, those six officers used so much force that the boy vomited and suffered bruising. Elsewhere, PIAC's clients report four 17-year-old girls seen together in the city were searched and questioned without cause, while two Indigenous boys seen near a car were stopped, searched and arrested, again without cause.

It is clear that police interaction with young people in NSW, and particularly with Indigenous young people, is often problematic and antagonistic. Although there are police in all commands at all levels who dedicate themselves to breaking down barriers between police and Indigenous communities, PIAC clients report repeated negative interactions with police when they are doing innocuous things such as walking in a public space, staying at a friend's house, spending time with their family or catching public transport.

Law reform can only do so much to change attitudes and policies. Cultural awareness training and specialist Aboriginal Liaison Officers, while also important, will only be effective if the State Government takes the lead in mandating better interaction with Indigenous juveniles. Decades of conflict between Indigenous people in NSW and the police, and the constant recurrence of consultations, recommendations and inaction have led to mistrust between police and Indigenous communities. This needs to be addressed as an urgent priority by the NSW Government.

BAIL CONDITIONS

The imposition of bail conditions highlights cultural inconsistencies between the way the criminal justice system presumes a family operates and the ways in which Indigenous families and communities operate in practice.

For far too long, the criminal justice system in NSW has acted as a de facto welfare system for young people, imposing multiple and onerous bail conditions that seek to resolve housing and parenting issues through the use of curfews and requirements to live at particular places.¹⁴ An overwhelming lack of cultural awareness means that Indigenous young people are frequently subject to bail conditions that are impossible for them to meet.

An example is a 13 year old male PIAC client who was charged with a public disturbance with a group of other young people, some of whom were his cousins. The police decided to impose numerous conditions, including that he reside with his mother, obey a curfew, and not associate with his cousins. These conditions were set for a number of months, while the young person waited for his court date. This means that if the young person is found to be staying with someone other than his mother, such as his grandmother, his aunt or other extended family member, and despite having committed no further offence by staying with them, the police can revoke his liberty and take him before the courts. This also means that if the child goes to school with his cousin, as is common, he could be breaching his non-association order.

The police regularly take young people into custody for breaching their bail in these types of circumstances. It is easy to check on young people who are already known to them, and the previous State Plan contained a focus on monitoring breaches of bail.¹⁵ However, it is difficult to see the utility in such arrests and detentions, as it is clear that any time spent in custody increases the chances of recidivism.¹⁶ The frequent practice of multiple curfew checks, often up to five times a night, also disturbs family, sleep and reduces the positive engagement in schooling and social activities. The way in which police monitor young people on bail, particularly young Indigenous people, needs to change.

BAIL REFORM

The *Bail Act 1978* (NSW), although frequently amended in ways which make it harder for offenders to access bail, has not been seriously overhauled since its inception. The former NSW government made an attempt in late 2010 when it released a 100-page 'background paper'¹⁷ and a re-drafted bill with two weeks for public comment, without consulting anyone outside of government. The paper did not address the multiple submissions and reports over the previous five years relating to the negative effects of bail laws on young people, and the rewritten legislation made no special provision for young people. Fortunately, the public outcry was such that this bill did not appear

in parliament prior to the election and the incoming government committed to a detailed review of the *Bail Act*.

The current NSW Government's involvement in reforms to juvenile justice is increasing, with the results of the public inquiries and reviews of the *Bail Act*, the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987* all forthcoming in 2012. However, a holistic approach to these issues is required to ensure that the rate of Indigenous involvement with the criminal justice system is reduced. Reforms to the treatment of juveniles who are already in the court system will only take the process so far. To reduce the numbers, the government needs to take a step back and look at how communities are policed and handled. However, comments from the NSW Attorney-General in relation to graffiti as a serious crime, particular in regional areas,¹⁸ highlights that diversion and changes to police practices may not be the government's principal focus.

REFORMS AND RECOMMENDATIONS

In order to address the abovementioned issues the NSW Government needs to actively engage with the recommendations arising from the Noetic report and the recent House of Representatives inquiry. All recommendations should be responded to in full, with plans for implementation within this current government term. It is concerning that the State Plan 2021 does not mention the Noetic report, or the *Doing Time* report, or even highlights Indigenous juveniles for particular attention.

A good start is the public consultations on employment, education and community building that the Minister for Aboriginal Affairs in NSW is conducting in early 2012.¹⁹ However, it is concerning that these consultations do not address juvenile involvement with the criminal justice system as a separate and distinct issue.

Part of the solution lies in early intervention and resolution of issues related to education and community development. However, we also need to closely examine the attitudes of police and courts towards Indigenous youth, and in doing so, change the current power dynamic which results in an overly high proportion of Indigenous youth being criminalised.

In addition, the imposition of bail conditions on young people needs to be examined. Hopefully, the Law Reform Commission's inquiry into the *Bail Act* will recommend specific guidelines for applying bail conditions to young people, and particularly Indigenous young people.

However, reducing the number and nature of bail conditions imposed on Indigenous young people will only solve half of the problem: the NSW Government needs to work with NSW police to actively reduce the focus on policing bail conditions for young people, particularly curfew checks and monitoring of residence conditions.

If the NSW Government fully commits to cultural and policy change for police and courts in relation to bail conditions, Indigenous juveniles will be considerably less likely to be over-represented in the criminal justice system.

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- 1 Productivity Commission, *Overcoming Indigenous Disadvantage Key Indicators 2009*, (2009) 4-5 <http://www.pc.gov.au/_data/assets/pdf_file/0003/90129/key-indicators-2009.pdf>.
- 2 Australian Institute of Criminology, *Australian Crime Facts and Figures 2008* (2009) 103.
- 3 Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody*, 1991, <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.
- 4 Aboriginal Legal Service NSW/ACT, "NATSILS call for a fair go: Royal Commission into Aboriginal Deaths in Custody" (Press Release, 14 April 2011).
- 5 Commonwealth of Australia, *Closing the Gap: the Indigenous Reform Agenda*, (2011) <<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx>>.
- 6 Commonwealth of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (2011) <<http://www.aph.gov.au/house/committee/atsia/sentencing/report/fullreport.pdf>> .
- 7 Kevin Rudd, "Speech by Prime Minister Kevin Rudd to the Parliament", 13 February 2008, <http://www.dfat.gov.au/indigenous/apology-to-stolen-generations/rudd_speech.html>.
- 8 See Aboriginal and Torres Strait Islander Healing Foundation <<http://healingfoundation.org.au/>>.
- 9 See Constitutional Recognition Of Indigenous Australians - You Me Unity <<http://www.youmeunity.org.au>>.
- 10 Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System Report for the Minister for Juvenile Justice* (2010). <http://www.djj.nsw.gov.au/strategic_review.htm>.
- 11 Lucy Snowball, 'Diversion of Indigenous juvenile offenders' (2008) 355 *Trends & Issues in Crime and Criminal Justice* 3.
- 12 Ibid 2.
- 13 See Garth Luke & Chris Cunneen, *Aboriginal overrepresentation and discretionary decisions in the NSW juvenile justice system* (1995). Sydney: Juvenile Justice Council of NSW; Chris Cunneen, "Racism, discrimination and the over-representation of Indigenous people in the criminal justice system: some conceptual and explanatory issues" (2006) 17(3) *Current issues in criminal justice* 329–346.
- 14 Katrina Wong, Brenda Bailey and Diana Kenny, *Bail me Out: NSW Young Offenders and Bail* (2010) 16.
- 15 Ibid 17.

- 16 Talina Drabsch, "Reducing the Risk of Recidivism", (2006) *NSW Parliament Library Research Service*, Briefing Paper No 15/06 3.
- 17 See <http://www.lpcldr.lawlink.nsw.gov.au/agdbasev7wr/lpcldr/documents/pdf/review_of_bail_in_nsw_oct_2010.pdf>.
- 18 Geesche Jacobson, "Spray and pay: repeated graffiti offenders face jail, says A-G", *Sydney Morning Herald* (6 April 2011) <[http://www.smh.com.au/nsw/spray-and-pay-repeat-graffiti-](http://www.smh.com.au/nsw/spray-and-pay-repeat-graffiti-offenders-face-jail-says-ag-20110405-1d2zo.html)

- [offenders-face-jail-says-ag-20110405-1d2zo.html](http://www.smh.com.au/nsw/spray-and-pay-repeat-graffiti-offenders-face-jail-says-ag-20110405-1d2zo.html) .
- 19 See Department of Aboriginal Affairs New South Wales <<http://www.daa.nsw.gov.au/taskforce/yoursay.html>>.

Young Wiradjuri Warriors

Nyree Reynolds

*Acrylic on canvas
700mm x 700mm*

The young Wiradjuri warriors dance at the ending of the day in their own Country, Cowra Country. They dance for all warriors, past, present and future.

