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The intersection between Indigenous cultures and Australian legal custom: Embracing different ways of doing justice

Speech delivered by Dr Jacoba Brasch QC, President, Law Council of Australia at the Sunshine Coast Bar Association's Professional Development Day 2021, Alexandra Headland Surf Lifesaving Club.

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Introduction

Good morning,

I acknowledge that we meet on the traditional lands of the Kabi Kabi people. I pay my respects to their Elders past, present and emerging.

I thank John for yet another thought-provoking conference theme. The last time I joined you, it was about the participation of transgender athletes in world class sporting events and lead to quite the animated discussion. I was only thinking of that to-and-fro during the Tokyo Olympics where New Zealand's Laurel Hubbard was selected for the women's weightlifting team.

We move today to an equally challenging topic, but one of absolute relevance for us as lawyers, and officers of the Courts. Sadly, the intersection between Indigenous culture and legal customs has not always been a happy meeting place.

Today, you have an impressive line-up of experts in their fields of native title, stolen generation legislation, and customary law. And I am pleased to see His Honour, the geekiest Magistrate in Australia, Andrew Sinclair will end the day with his IT session.

For my part, I will reflect on some of the things I have challenged and others I have championed during my year so far as Law Council President. And I must admit – candidly – that my time at the LCA has given me a sharper, Australia-wide focus on how our "justice system" has often done a great disservice to the original inhabitants of this land.

But on a brighter note, I will also touch on alternative sentencing courts for Indigenous Australians – their history and their modern development – and progress on addressing justice reinvestment and justice targets to the present day.

Throughout the course of my talk, I will introduce three figures who have been significant to the way in which Indigenous Australians have come into contact with our criminal justice system over the last 25 years.

Indigenous incarceration rates

It must be acknowledged as a point of continuing urgency that the rates of Indigenous incarceration in our jails are nothing short of horrendous. Although, at the last census, just 3.3 per cent of the Australian population was Indigenous,[1] 29.2 per cent of the Australian prison population of 42,656 is Indigenous.[2] This is an overrepresentation in our prisons by a factor of almost ten.

That is the overall Indigenous incarceration rate.

Amongst women prisoners, 34 per cent of the Australian female prison population is Indigenous – even more dramatically disproportionate. Of all Indigenous women in jail in Australia, in excess of 80 per cent are mothers.[3]

This begs the question: where are the children?

Women in prison often hold the complex, dual roles as both 'offenders' in the eyes of the criminal justice system and victims in their background circumstances.[4]

In 2019, a research team from the University of Technology, Sydney interviewed Aboriginal mothers in custody about their mental state and morale. The mothers were asked about the most significant factors affecting their wellbeing. They nominated the forced removal of their children and intergenerational trauma.[5]

In other words, the chronic incarceration of Indigenous women is perpetuating negative cycles across generations. The physical separation of mother from child serves as a visible, painful, and reminiscent symbol. As a family lawyer, we often refer to attachment theory and what happens when a child's attachments are either never secured, or abruptly terminated – the research paints a frightening picture for those children of a life likely to be

1 https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians
2 https://www.theguardian.com/australia-news/2021/jan/22/indigenous-prison-population-continues-to-increase-while-non-indigenous-incarceration-rate-falls
3 https://theconversation.com/aboriginal-mothers-are-incarcerated-at-alarming-rates-and-their-mental-and-physical-health-suffers-116827#:~:text=The%20majority%20of%20Aboriginal%20women,mental%20health%20and%20well%2Dbeing.
4 Law Council of Australia, National Symposium 2015, 'Addressing Indigenous Imprisonment' p.15
5 https://theconversation.com/aboriginal-mothers-are-incarcerated-at-alarming-rates-and-their-mental-and-physical-health-suffers-116827/

marked by their own mental health problems and problems then forming healthy adult relationships.

The Australian Human Rights Commission has previously found that '*Aboriginal and Torres Strait Islander women are the most significantly over-represented population in Australian prisons and their rate of incarceration is increasing more rapidly than any other group'*.[6]

Specifically in respect of patterns of offending amongst Indigenous women, the Law Society's 2015 National Symposium into the disastrous numbers of Aboriginal people in Australian prisons made three clear recommendations:

1. Establish a legislative presumption against arresting victims of domestic violence at time of police intervention for outstanding unrelated charges (in light of evidence victims may be reluctant to report violence or seek help, for fear of arrest);

2. Address the specific needs of Indigenous women, particularly in relation to family violence and child protection, and ensuring the availability of culturally appropriate and community-controlled health services;

3. Substantially increase funding for Family Violence Prevention Legal Services, as the primary providers of joined-up legal assistance and referral to Aboriginal and Torres Strait Islander victims of family violence.

Doing Court Differently

These inexcusable rates should motivate all of us to centre the plight of incarcerated Indigenous Australians, and those at risk of incarceration, in our advocacy and pro bono work as a profession.

One avenue for the reduction in incarceration rates is being open to different ways of '*doing court'* as a Western society.

6 https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_conversation_gender_equality_2017.docx+&cd=2&hl=en&ct=clnk&gl=au&client=safari

Given the majority of Indigenous engagement with the criminal justice system is at courts of first instance and given the majority of this engagement is characterised by a guilty plea,[7] alternative sentencing programs have been a distinct focus for improvements.

However, it must be acknowledged that the entire 'ecosystem' of criminal justice, from community policing to what goes on in the courtroom, stands to benefit from more meaningful and culturally appropriate engagement.

While I was driving home recently, I heard a fascinating story on the radio about the launch of a 'Yarning App'.[8] This app, which is the first of its kind in Australia, assists the Western Australian police force in their engagement with remote Indigenous communities, starting with the Pilbara. It plays aloud messages regarding fundamental legal rights and policing processes in eight Indigenous languages, allowing remote Indigenous Australians for whom English is not their first language to understand. It was developed in consultation with the Aboriginal Legal Service and senior Indigenous elders in Western Australia.

The development of the app comes in the wake of an official apology by WA Police Commissioner Chris Dawson to the family of Ms Dhu, a Yamatji woman who died in custody in 2014. In that apology he pledged to "heal historic wounds". His commitment and invocation of history should be instructive for us as a legal profession: in attempting to reduce overincarceration and improve court processes, what must drive all of our efforts is an awareness of what has gone before us.

Indigenous Courts

Historically, 'Aboriginal Courts' were a vehicle of colonial control and perceptions were mixed. One example is the Courts of Native Affairs, which operated in Western Australia from 1936 until 1954. Although such courtrooms played host to an Indigenous 'head man' who assisted the court, the same legislation under which these native courts were enacted also prevented access by Aboriginal Australians to the common law right of trial by jury.[9]

[7] Cunneen 1992:121; https://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf p.9
[8] https://www.perthnow.com.au/news/crime/wa-police-launch-aboriginal-language-app-c-3643626
[9] http://www.austlii.edu.au/au/journals/CICrimJust/2004/10.html

In Queensland, Aboriginal Councils and Aboriginal-run courts, which had authority over certain lands were provided for in 1984.[10] These Courts had jurisdiction over anyone in the area, whether they were Aboriginal or not, and required such Courts to be constituted by at least two Indigenous Justices of the Peace in the area. What differentiates the Queensland Courts of the 1980s to alternative ways of doing court in the present day, is that they "*related to discrete, separate land where the population was almost all, if not totally, of Indigenous descent*".[11]

Two years later, in 1986, the Australian Law Reform Commission, in a report into the recognition of Customary Law, surveyed the operation and effectiveness of Papua New Guinea Village Courts and North American Tribal Courts as indigenous-centred justice models.[12]

This was the practical and observational aspect to the Indigenous-centred justice project. But there was also a case law aspect: *R v Neal* (1982) found that relevant factors arising from an offender's membership of an ethnic or racial group ought to be taken into account in sentencing. *Munugurr v R* (1994) had similar findings.[13] *Neal* made the point that practices within the Aboriginal community affect offenders in a palpable way. Taking these practices into account and centring them in the justice process is important. *Robertson v Flood* (1992) found that the views of the offender's community may be taken into account in sentencing, so long as they do not prevail over what would be an appropriate sentence.[14]

In this state, the work of 'Justice Groups', localised community partnerships initiated in the early 1990s,[15] led to a formalisation of their powers in the *Penalties and Sentences Act 1992*, requiring judicial officers to 'have regard' to the views of Indigenous community members in the sentencing of offenders.[16] Today, these bodies are known as Community Justice Groups, of which there are more than 40 across Queensland.[17]

10 Councils: s47, Community Services (Aborigines) Act (1984); Courts: s80; s82, Community Services (Aborigines) Act (1984)
11 http://www.austlii.edu.au/au/journals/CICrimJust/2004/10.html p.28
12 Ibid
13 Both cases http://www.austlii.edu.au/au/journals/CICrimJust/2004/10.html p.28
14 Ibid p.29
15 https://archive.sclqld.org.au/judgepub/2006/forde060406.pdf
16 https://www.aic.gov.au/publications/tandi/tandi277
17 https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program

In the northern hemisphere around this time, the circle sentencing process was originating with the Yukon in Canada in 1992, when a judge adapted the idea from the healing circles of Plains Indians. This was one example of restorative justice in action, where offenders are brought face-to-face with their victims in order to repair harm, restore relationships (where appropriate) and strengthen social bonds within a community.[18]

Modern alternative justice models here in Australia had their advent in 1999, when South Australia introduced the Nunga Court in Port Adelaide after years of consultation.[19] The journey to that point brings me to the first figure of history for consideration today.
The father of modern circle sentencing in Australia was a fascinating figure.

Chris Vass spent 15 years working in Papua New Guinea, including as a Patrol Officer and Assistant District Commissioner, in the 1960s and 70s.[20] He returned to Australia in 1975 and was appointed a Magistrate of South Australia in 1980. As a Magistrate, he took on a circuit to the Pitjantjatjara lands, travelling there six times a year for 17 years – with just one two-year hiatus.[21] Pitjantjatjara is a large, sparsely-populated local government area for Aboriginal people, located in the remote northwest of South Australia.[22]

A major element motivating Vass was redressing what he saw as the deep distrust of Indigenous people toward the criminal justice system. A fellow South Australian Magistrate, Kym Boxall, observed the following about the circuit sittings in Pitjantjara in 2000:

> *"The Aboriginal Community tended to resolve problems, including crime, by engaging in group discussions, often over a long period of time, until a solution was agreed upon. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand and, in particular, they did not respond well to the demands of the formal questioning process required by examination and cross-examination."*

In 1996, Vass began a three-year effort to bring together local Indigenous groups, the Aboriginal Legal Rights Movement and the then Department of Aboriginal Affairs, the

18 https://www.bocsar.nsw.gov.au/Publications/CJB/2020-Report-Circle-Sentencing-incarceration-and-recidivism-CJB226.pdf)
19 https://www.aic.gov.au/publications/tandi/tandi277
20 https://www.pngattitude.com/2019/02/tales-from-old-oro-new-roads-uncharted-seas-wild-rivers.html; http://dicklang.com.au/papua-new-guinea-tour/
21 https://www.aic.gov.au/publications/tandi/tandi277
22 https://guides.slsa.sa.gov.au/Aboriginal_peopleSA/Pitjantjatjara

result of which was that an Aboriginal Court Day was established. This was soon renamed the Nunga Court - which was the regional Aboriginal name given to it by the local Aboriginal community, with 'Nunga' being a self-referential term.[23]

Within a few years, Courts based on the Nunga model emerged in Victoria and here in Queensland - the Koori Court and the Murri Court. As part of this model, family members and support persons are encouraged to attend and speak directly to the Court:[24]

> *'[The magistrate] sits at eye level to the offender, usually at the bar table rather than the bench, with a respected Indigenous person (or elder), whose role varies by jurisdiction. Some courts sit with one elder, and others with up to four. An elder's participation ranges from briefly addressing the offender about his or her behaviour to having a significant role in determining the sentence and monitoring the offender's progress. Some courts try to ensure that the sex of this person matches the sex of the offender."*[25]

Alternative ways of doing Court were innovated even further in New South Wales with the turn of the new century, which brings me to my second inspirational figure, who was integral to the development of circle sentencing in that State: Aunty Gail Wallace.

Aunty Gail grew up on an Aboriginal mission in the South Coast in the 1950s and 60s, believing herself destined to a life of labour in domestic situations or in the fields, like her parents. She witnessed horrific, ingrained racism on a daily basis.

Not allowed to attend mainstream schools until she was old enough to attend high school, her primary education was confined to a single teacher in the Aboriginal-only mission school. When the Whitlam government came to power in 1972, university fees were abolished, and Aboriginal people were encouraged to gain an education and receive formal training. Gail began her tertiary education by enrolling in a Certificate of Secretarial Studies in the Illawarra and worked for a number of federal government departments throughout the 1980s.

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23 http://webcache.googleusercontent.com/search?q=cache:L2bwv5Y3yIwJ:www.courts.sa.gov.au/Information/Pages/General-Media-Releases.aspx?IsDlg%3D1%26Filter%3D108&hl=en&gl=au&strip=1&vwsrc=0

24 http://webcache.googleusercontent.com/search?q=cache:L2bwv5Y3yIwJ:www.courts.sa.gov.au/Information/Pages/General-Media-Releases.aspx?IsDlg%3D1%26Filter%3D108&hl=en&gl=au&strip=1&vwsrc=0

25 https://www.aic.gov.au/publications/tandi/tandi277

In 1991, Gail became the first Aboriginal woman to study a Bachelor of Laws at the University of Wollongong. On graduation, she began using her law degree to break down communication and cultural barriers between Aboriginal people and the justice system. She worked with the Attorney-General's Department and the ODPP in New South Wales. She was informed by the belief that communication barriers are not always language-deep: they relate to culture, and historical experiences.

In 2001, Gail's work culminated in the pilot Circle Sentencing project in New South Wales. She described it as "*the most revolutionary program for Aboriginal people I have ever heard of or come across … our Aboriginal elders were given the authority within the criminal justice system … to deal justly with their people [whether] offenders or victims*." She chose elders for the circle court panel who knew the offender, and to whom the offender looked up and respected.[26]

One such elder was Aunty Ethel Little, who was one of the local elders present when circle sentencing was born in Nowra. In her obituary in 2014[27] she was described as a 'pillar of the community', someone who bore no grudges and taught her thirteen children '*the importance of being the best possible person they can be'*.[28] In 2003, an article in the *Sydney Morning Herald* focused on Ethel and other Nowra community members' experience of circle sentencing sessions at South Coast Aboriginal Cultural Centre.[29]

The article records Ethel addressing a participant by saying: "*In our old cultural path, you would be responsible to your elders and that's what we're doing right now*."

This highlights the connection between Indigenous culture stretching back 60,000 years and the principles of circle sentencing. The Western Australian Aboriginal Bench Book, which was published in 2008 to improve the judiciary's understanding of Indigenous issues, includes reference to traditional dispute resolution prior to colonisation which is echoed in circle sentencing today:

26 https://www.uow.edu.au/media/2019/aunty-gail-wallace-shares-her-journey-from-aboriginal-mission-to-law-graduate.php
27 https://www.southcoastregister.com.au/story/2673428/aunty-ethel-a-pillar-of-the-community/
28 [ibid]
29 https://www.smh.com.au/national/the-healing-hand-of-justice-20030901-gdhb9x.html

> *Elders may attempt to negotiate a satisfactory outcome [to disputes]; immediate family members usually play an important role. Sometimes disputes may be resolved by open informal discussions, in which everyone participates.*

The Reverend Aunty Alexandra Gator, a prominent Indigenous community advocate, says of circle sentencing, "*The word has spread; and a lot of Aboriginal men and women want to have their matters heard in a more culturally relevant way, even though it is not customary law*."[30]

The article featuring Ethel Little also records the reflection of a participant in circle sentencing after the process has concluded:

> *"I didn't think nothing would help me," he says. "This made me realise the stress I'm putting on my family and my kids and made me realise I've got more to live for. I didn't care about the community before. I just cared about myself. They're helping me more than just getting rid of me and getting rid of the problem. But I'm nervous about letting them down. Just the fact you're looking into their eyes and they care and you know they care and you don't want to hurt them or let them down. I would have preferred a [circle] court any day. If I would have gone to a normal court, I would have wanted to go to jail. To escape my problems and then get out scot-free. It's not as much pressure. But this is what I need: help and pressure at the same time. I feel like I've gone from nothing to something. Now I just want to get on with me life."*

What a profound shift in that young man. There have also been reports of one victim, the proprietor of a motor vehicle shop in Nowra, who sponsored the local Aboriginal football team after his involvement in the circle sentencing program. He recognised the potential of such a model to reduce the likelihood of reoffending and change lives.[31]

But are these anecdotal improvements borne out in the evidence? Early statistical analysis is encouraging. In 2020, a Bureau of Crime Statistics and Research (BOCSAR) study into Circle Sentencing found that it has lowered rates of imprisonment and reoffending. Offenders participating in Circle Sentencing are 9.3 per cent less likely to

30 Circle sentencing - Creative Spirits, retrieved from https://www.creativespirits.info/aboriginalculture/law/circle-sentencing - 'Positive report for Murri Courts', Koori Mail 488 p.11
31 https://www.creativespirits.info/aboriginalculture/law/circle-sentencing

receive a prison sentence; 3.9 per cent less likely to reoffend within 12 months; and take 55 days longer to reoffend if and when they do. BOCSAR's report into these statistics concludes:

> *"Even a one-percentage point decrease [in Indigenous incarceration in NSW] would equate to 31 fewer incarcerations per day. This implies a saving of $7,843 per day, or $2.8 million per year. On these grounds alone, further research, ideally in the form of a long-running randomised controlled trial, to determine the true causal effect of circle sentencing on reoffending is certainly justified."*[32]

The differences between conventional Courts and Indigenous sentencing courts are both visual and formational. In many of the latter, there is no bar table at all and those present sit in a literal circle. In others, Indigenous paintings and flags occupy a prominent role in the optics. In Nowra, the sentencing takes place in a cultural centre, complete with a table for tea and biscuits, and not a Court building. In Indigenous Courts in other places, although the courtroom may be the site of the proceeding,

> "*the offender … sits at the bar table beside his or her solicitor. In some courts, magistrates insist that any handcuffs be removed. The offender typically has a support person, a family member or partner, beside him or her … the offender and the support person are invited to speak directly to the magistrate about the offender's behaviour. People in the public gallery may also be asked to speak. The degree of informality adopted varies … but … considerably more time is taken for each matter than would be the case in a regular court*."[33]

These cultural and structural differences are an essential ingredient to these Courts' success.

The third and final figure I would like to present today is Senator Patrick Dodson.

Senator Dodson has lived a remarkable life, growing up in Broome and Katherine, being orphaned by the age of 12, joining the priesthood in Melbourne and taking up leadership

32 https://www.bocsar.nsw.gov.au/Publications/CJB/2020-Report-Circle-Sentencing-incarceration-and-recidivism-CJB226.pdf p.15
33 https://www.griffith.edu.au/__data/assets/pdf_file/0025/227716/2004-Marchetti-and-Daly-Indigenous-courts-and-justice-practices-PUBversion.pdf p.2

positions in a range of influential Indigenous-controlled commissions and organisations. Senator Dodson joined the Australian Senate representing Western Australia in 2016.

Culture is a central consideration for Senator Dodson. In his inaugural speech, he invoked three cultural concepts from the Yawuru people of Broome, from which he hails:

> *In the Yawuru language from around Broome there are three key concepts from the Bugarrigarra which shape our ways of knowing and understanding. These concepts will inform my work here, as they have formed my being. They are: Mabu ngarrung, a strong community where people matter and are valued; Mabu buru, a strong place, a good country where use of resources is balanced and sacredness is embedded in the landscape; Mabu liyan, a healthy spirit, a good state of being for individuals, families and community. Its essence arises from our encounter with the land and people.*[34]

Our concepts of justice would be well informed by these three Indigenous concepts, which derive, so Dodson explains, from a *'time before time began'*; basing justice on community, connecting justice outcomes to land and country; and privileging a 'good state of being' not just for individuals but for whole families and communities, always informed by our encounter with the land and people, in ancient times inseparable, and now disjointed by generations of trauma and displacement.

Senator Dodson has also instructively spoken about justice. He says:

> *"We need a smarter form of justice that takes us beyond a narrow-eyed focus on punishment and penalties, to look more broadly at a vision of justice as a coherent and integrated whole. Not as a closed system, but as an integrated life process that allows some sense of healing and rehabilitation."*[35]

Dodson, in speaking these words, was giving a 2016 National Press Club address reviewing the 339 recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody, 25 years on. The recommendations of that Report focused on reducing Indigenous incarceration and increasing participation of Indigenous people in the

34 https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansards/1a29ded1-e7dc-4605-87aa-2fcf6a321e27/0169%22
35 http://classic.austlii.edu.au/au/journals/IndigLawB/2016/12.pdf

justice system as court staff or advisors. The Report has been described as '*the moral touchstone for any policy or practice relating to Indigenous people and crime*'.

At the time of the Royal Commission's report, some 14 per cent of those in custody were Indigenous.[36] By the time Dodson gave his address in 2016, it was around 27 per cent. Today the figure is a staggering 29 per cent.[37]

In that speech, Dodson identifies criminal justice policy, including mandatory sentencing, 'paperless arrest' laws, tough bail and punitive sentencing regimes as possibly to blame for the worsening situation. At the systemic level he nominated funding cuts to frontline legal aid and inadequate resourcing of diversionary programmes.

Dodson believes that a strong-arm, 'tough-on-crime' mentality filters from community attitudes and political policy right down to policing practices on-the-street. This means that the criminalisation of what could be perceived as 'victimless' acts, often involving drunk and disorderly conduct or offensive language, sees Indigenous people needlessly caught up in the criminal justice system. As Dodson said in his address: society can't arrest its way out of Indigenous disadvantage.

He explains that a compounding cycle of increased likelihood is perpetuating itself across society:

> *Indigenous people are more likely to come to the attention of police, including for minor offences; Those who come to the attention of police are more likely to be charged; who are then more likely to go to court if they are Indigenous; who are then more likely to receive a prison sentence; who are then more likely to die in custody.*

Where do we stand today, and what is the Law Council asking for in this space?

Our Indigenous Incarceration symposium called for courts to favour diversion to custodial sentences where the offence would attract a sentence of under six months - except where the offender poses a material risk to the community; diversionary treatment of traffic

36 http://classic.austlii.edu.au/au/journals/IndigLawB/2016/12.pdf
37 ('4512.0 - Corrective Services, Australia, December Quarter 2019', Australian Bureau of Statistics 12/3/2020 - Source: Aboriginal prison rates - Creative Spirits, retrieved from https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates)

infringements and driver's license disqualifications; and an examination of bail laws, parole policies and mandatory sentencing to reduce disproportionate Indigenous outcomes.[38]

The Law Council's landmark Justice Project, released in 2018, found that underlying drivers of imprisonment such as family violence, disability, homelessness and poverty are currently poorly addressed due to limited investment by government in social support services and early intervention strategies, or in the Aboriginal controlled organisations that are best placed to deliver them.

A new funding package worth over $1 billion and announced by the government this year as part of the Closing the Gap Implementation Plan is a good start – especially the $7.6 million over three years for the Justice Policy Partnership, which will bring together Commonwealth, state and territory governments and Aboriginal and Torres Strait Islander representatives aimed at identifying ways to achieve justice targets. However, this still does not adequately address the level of need within the community.

Justice reinvestment was an unfortunate omission from the Implementation Plan. Government could leverage the newly-announced $38.6 million Outcomes and Evidence Fund[39] to support community-controlled justice reinvestment programmes. The Law Council has called on the Commonwealth to establish a national, independent justice reinvestment body, as recommended by the Australian Law Reform Commission and our own Justice Project.

As for the progress of alternative courts, in around 2018, there were over 50 adult and children's Aboriginal and Torres Strait Islander sentencing courts operating, although these were lacking in certain states and territories, such as Western Australia and, despite its relatively high Aboriginal and Torres Strait Islander population, the Northern Territory.

Court innovations continue to be made, but they are threatened by a lack of funding and the effects of the Covid-19 pandemic. Just two years ago, in 2019, the Federal Circuit Court of Australia launched the Indigenous List Pilot, a measure implemented to enhance access to justice measures for Aboriginal and Torres Strait Islander peoples, which was

38 https://www.lawcouncil.asn.au/media/media-releases/indigenous-imprisonment-symposium-communique
39 https://ministers.dss.gov.au/media-releases/7406

anecdotally well-received and supported in the Northern Territory, particularly in Alice Springs.

The pilot as applied in the Northern Territory entailed adopting a less formal approach to proceedings, where both parties agreed that the pilot was appropriate. Instead of the formal structures of the traditional court room, under the pilot program, the Judge sat at eye level with the parties and utilised culturally appropriate language and explored avenues to reduce conflict. Other pilot sites included Adelaide, Darwin and Sydney.

A similar pilot, with less formal courts, was implemented and trialled in the Kimberley by the late, former Chief Judge of the Family Court of Western Australia, His Honour Stephen Thackray, with great success, before his retirement – but has not continued due to lack of funding.

Due to COVID-19, the option for face-to-face court events has recently been greatly limited. The Law Council hopes that the Indigenous List Pilot will become available to Aboriginal and Torres Strait Islander parties again.

On the advice of its Family Law Section, the Law Council recommends that this list be trialled in other regions, including in the Far North of this state and in Western Australia, once face to face court events can more readily occur. It should also be independently evaluated towards the end of the pilot, with a view to rolling it out more generally, if it is found to be successful.

From my perspective, in all of our policymaking, funding and administration of justice, we must ensure that culture remains at the heart of all that we do. Until we understand kinship networks, spirituality, taboo, elder structures and customary law, our efforts to reduce incarceration rates and develop culturally competent models of justice will be in vain.

I will finish with the words of Commissioner Elliott Johnston in the final 1991 Royal Commission into Aboriginal Deaths in Custody Report:

> *"The whole thrust of this report is directed towards empowerment of Aboriginal societies on the basis of their deeply held desire, their demonstrated capacity, their democratic right to exercise, according to circumstances, maximum control over their lives and that of their communities … Such empowerment requires that the*

broader society, on the one hand, makes material assistance available to make good past deprivations, and on the other hand approach the relationship with the Aboriginal society on the basis of the principles of self-determination."

This must remain our guiding light.

Thank you.

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