Submission on the ALRC inquiry into the incarceration rate of Indigenous Australians

Your details

Name/organisation *(if you are providing a submission on behalf of an organisation, please provide the name of a contact person)*	SVETLANA ABELLA
Contact details *(one or all of the following: postal address, email address or phone number)*	[Contact details redacted]

Publication of submissions

In meeting the Australian Government's commitment to enhancing the accessibility of published material, the Attorney-General's Department will only publish submissions to this website that have been submitted electronically. The following formats are preferred:

- Microsoft Word
- Rich Text Format (RTF)
- txt format.

Please limit individual file size to less than 5MB. The department may create PDF documents from the above formats.

Hardcopy submissions received by mail or fax will still be considered, however they will not be published on the website.

Confidentiality

Submissions received may be published on the Attorney-General's Department webpage, except where requests have been made to keep them confidential or where they relate to particular cases or personal information.

Would you prefer this submission to remain confidential? NO

Your submission

Thank you very much for this opportunity to contribute to the inquiry into the issue of the overrepresentation of the Indigenous people in the criminal justice system. I am a law student at Charles Darwin University but I submit my research in my personal capacity.

I acknowledge the traditional owners of this land and its waterways, and pay respect to all elders, past, present and emerging.

TABLE OF CONTENTS

INDIGENOUS OVER-REPRESENTATION:

The Dynamics of Colonial Legacy, Justice System and Indigenous Disadvantages

I HYPOTHESIS

Indigenous people are over-represented at almost every stage of the criminal justice system, from police apprehension, court proceedings, and sentencing to punishment.[1] However, Indigenous over-representation does not exist in the vacuum of legal system. It is also influenced by the dynamics of external factors that are complex and interconnected,[2,3] and which victimise Indigenous people through the criminalisation of the various aspects of Indigenous life.[4]

II SCOPE AND LIMITATION

This essay intends to explore the dynamics of internal and external factors on the front-line and the back-end stages of the criminal justice system. The role of the police as agent of Indigenous criminalisation through targeted law and policy is the first stage of Indigenous contact to justice system. Police arrest contributes to the increase of Indigenous over-representation,[5] partly due to unnecessary arrests as illustrated in the case of *Mulrunji* in 2004.[6]

---

[1] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 497-8 [10.30].

[2] Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *UNSW Law Journal* 3, citing 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* 334-40 <http://www.unswlawjournal.unsw.edu.au/sites/default/files/marchetti_and_ransley_371.pdf>.

[3] McRae et al, above n 1, 511 [10.200].

[4] 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* 336 <http://www.austlii.edu.au/au/journals/CICrimJust/2006/1.pdf>.

[5] McRae et al, above n 1, 501-3 [10.110]-[10.120].

[6] Inquest Into the Death of Mulrunji, *Hurley v Clements & Or* (Coroner's Court, COR 2857/04(9), Mr Peter Davis, SC and Mr Mark LeGrand, 14 May 2010) 2; *Doomadgee & Anor v Deputy State Coroner & Ors* [2005] QSC 35 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf>.

On the other end, the sentencing procedure serves as the avenue through which Indigenous future may be maneuvered through precedents or relevant Indigenous considerations pertaining to underlying idiosyncratic disadvantages articulated in the High Court decision in *Bugmy v The Queen*.[7]

III INTRODUCTION

Entrenched in a tangle of historical, institutional and systemic elements characterising the mainstream legal system, the problem of over-representation interlinks with underlying social, economic and cultural disadvantages that plague the Indigenous people.[8] Symptomatic of this dynamism, the custodial over-representation is fuelled by laws and policies targeted at criminalising Indigenous people.[9]

Such criminalisation was a vital strategy to overpower the Indigenous people during the colonisation of Australia,[10] with colonial policies of containment, control and removal.[11] Understanding the dynamism of colonial impacts on Indigenous over-representation, both historically and contemporarily, is significant in understanding the wellspring and ongoing cycle of the prevailing Indigenous disadvantages as indicators and outcomes of over-representation.[12]

IV DYNAMICS OF OVER-REPRESENTATION AT THE CUSTODIAL STAGE

[7] *Bugmy v The Queen* [2013] HCA 37, cited in Alexandra Smith, 'Mainstreaming Restorative Justice in South Australia's Criminal Justice System: A Response to the Over-Representation of Indigenous Offenders' (2014) 5 *The ANU Undergraduate Research Journal* 172 <http://press-files.anu.edu.au/downloads/press/n1673/pdf/Alexandra_Smith.pdf>.

[8] Balanced Justice Project, *Indigenous Overrepresentation in Prisons* (18 June 2013) Balanced Justice<http://www.balancedjustice.org/uploads/1/3/1/0/13108841/_indigenous_overrepresentation_in_prisons.pdf>; McRae et al, above n 1, 497 [10.30].

[9] Hilde Tubex, 'The Revival of Comparative Criminology in a Globalised World: Local Variances and Indigenous Over-representation' (2013) 2(3) *International Journal for Crime, Justice and Social Democracy* 62 <https://www.crimejusticejournal.com/article/viewFile/110/pdf>.

[10] McRae et al, above n 1, 494 [10.10].

[11] C Cunneen, 'Indigenous Anger and the Criminogenic Effects of the Criminal Justice System' in A Day et al (eds), *Anger and Indigenous Men* (Federation Press, 2008) 37 <http://researchonline.jcu.edu.au/15454/1/IndigenousAnger.pdf>.

[12] Ibid.

Indigenous people undergo the most negative and destructive experiences at the front-line stage of the justice system as they are criminalised even for very minor offences.[13] The historical role of police in the large-scale intervention, regulation and surveillance of Indigenous lives during the colonisation reflects the current over-policing of the Indigenous people and the consequent Indigenous distrust of the system of justice.[14,15]

A Criminalisation During Colonisation

Through the mechanism of the colonial justice system, the Indigenous people were subjected to policing and punishment, which continued on to their containment in government settlements and missions under the protection policy, and on to the policing of every aspect of Indigenous lives legitimised through the Aboriginal Acts.[16] The subsequent assimilation policy triggered the steady increase in Indigenous incarceration as they moved out of settlements and exposed themselves to urban policing, thereby marking the advent of colonial control via the criminal justice system in the 1970s. Thus, the transition of Indigenous people from containment on missions to containment in prisons.[17]

1 Historical Context: The Legacy of Settler Colonialism

The resilience of the colonial policies of protection, segregation and assimilation is the culmination of the settler colonialist theory, which particularly characterises Western Australia. As a frontier state, it is embedded with a frontier mentality that views itself as vulnerable and threatened by 'outsiders'.[18] It was theorised by several authors, namely Cunneen and Rowe,[19] Broadhurst,[20] Blagg,[21] and Anthony,[22] that the

[13] McRae et al, above n 1, 497 [10.30].
[14] Ibid, 519 [10.320], citing Chris Cunneen, *Conflicts, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001) 85-6.
[15] Smart Justice Project, *Ending Over-Representation of Aboriginal and Torres Strait Islander Peoples in the Criminal Justice System* (16 February 2011) Smart Justice <http://www.smartjustice.org.au/resources/SMART_OverRepresentation_Feb11.pdf>.
[16] McRae et al, above n 1, 494 [10.10].
[17] Ibid, 495 [10.10].
[18] R Broadhurst, 'Crime and Indigenous People', in A Graycar and P Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, 2009) 256, cited in Kelly and Tubex, below n 25, 4-5.
[19] Chris Cunneen and Simone Rowe, 'Changing Narratives: Colonised Peoples, Criminology and Social Work' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 49, cited in Kelly and Tubex, below n 25.

colonialist regime of governance, discipline and control is the foundation of Australia's relationship with the Indigenous people.[23]

Settler colonialism is a post-colonial theory, which identifies two forms of colonialism: external and internal colonialism.[24] Veracini contrasted them in terms of the different historic, political and structural relationships that exist when colonisers stay and settle in contrast to those who go out to the colonies and then return home. The aim of the colonisers who do not leave becomes the transformation of the new colony into 'home'. Hence, the ultimate concern within settler colonialism is land.[25]

Claiming the Indigenous lands as the colonial settlers' new home and source of capital, and, consequentially, disrupting the Indigenous relationships to land equates to a deep-rooted 'epistemic' and 'ontological' turmoil.[26] The settlers had to establish such violent systematic disavowal of Indigenous presence,[27] without which would eternally remind them of their status as foreigners, invaders and exploiters.[28] In effect, the emerging settler colonial state denies viewing the original Indigenous inhabitants as labour to utilise for resource extraction but, instead, intends to eradicate the 'Aboriginal Other' through assimilation and elimination.[29]

2 Asymmetric Power Relations: The Oppression of Settler Colonialism

---

[20] Broadhurst, above n 20, 2.
[21] Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008), cited in Kelly and Tubex, below n 25.
[22] Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013), cited in Kelly and Tubex, below n 25.
[23] Miriam Kelly and Hilde Tubex, 'Stemming the Tide of Aboriginal Incarceration' (2015) 17(2) *The University of Notre Dame Australia Law Review* 2 <http://researchonline.nd.edu.au/cgi/viewcontent.cgi?article=1000&context=undalr>.
[24] Ibid.
[25] Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Palgrave Macmillan, 2010) 4, cited in Kelly and Tubex, above 25, 5.
[26] Tuck and Young, above n 27, cited in Kelly and Tubex, above n 25, 5.
[27] Lorenzo Veracini, 'Settler Collective, Founding Violence and Disavowal: The Settler Colonial Situation (2008) 29(4) *Journal of Intercultural Studies* 363, 366, cited in Kelly and Tubex, above n 25, 5.
[28] Adam Barker, 'Already Occupied: Indigenous Peoples, Settler Colonialism, and the Occupy Movements in North America' (2012) 11(3) *Social Movement Studies*, 327, 330, cited in Kelly and Tubex, above n 25, 5.
[29] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, cited in Kelly and Tubex, above n 25, 5.

To accomplish the objective of the settler colonial regime demands the active and forceful domination of the original inhabitants of the invaded territory, which involved the repression of their culture, identity, and history.[30] To address the persistent nature of domination, the settler colonials resorted to prisons and policing, which ascertained the ascendancy of the white elite, hence, the criminalisation of the Indigenous people.[31] As an ongoing struggle rather than a single historic phenomenon, settler colonialism is reasserted each day of the occupation, thereby normalising the incessant asymmetric power relations.[32]

Understanding the Indigenous past through this lens assist in making sense of the current dynamics of justice system, the Indigenous over-representation and the underlying Indigenous disadvantages. Arguably, the Indigenous people are victimised by the colonising impact of the justice system while being criminalised by socioeconomic marginalisation that is the very product of the legal system itself.[33] It is firmly established that, in addition to the discriminating impacts of the justice system,[34] these dynamics have a criminogenic effect on the Indigenous population.[35]

B Criminalisation Via Laws and Policies

Systematic biases embedded in laws are best exemplified in public order offences, such as public drunkenness, offensive language and behaviour, to which Indigenous people are more susceptible due to

[30] N Rouhana, 'Reconciling History and Equal Citizenship in Israel: Democracy and the Politics of Historical Denial' in W Kymlicka and B Bashir (eds), *The Politics of Reconciliation Multicultural Societies* (Oxford University Press, 2008) 73, cited in Kelly and Tubex, above 25, 6.

[31] Tuck and Young, above n 27, cited in Kelly and Tubex, above n 25, 6.

[32] Veracini, above n 29, 25, as cited in Kelly and Tubex, above n 25, 6.

[33] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 1, cited in 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* 336 <http://www.austlii.edu.au/au/journals/CICrimJust/2006/1.pdf>.

[34] Alexandra Smith, 'Mainstreaming Restorative Justice in South Australia's Criminal Justice System: A Response to the Over-Representation of Indigenous Offenders' (2014) 5 *The ANU Undergraduate Research Journal* 172, citing Chris Cunneen, *Conflicts, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001) <http://press-files.anu.edu.au/downloads/press/n1673/pdf/Alexandra_Smith.pdf>.

[35] Brian Steels and Dot Goulding 'When It's a Question of Social Health and Well-Being, the Answer is not Prison' (2009) 7(12) *Indigenous Law Bulletin* 15 <http://www.austlii.edu.au/au/journals/IndigLawB/2009/21.html>.

the public nature of their life.[36] Convicted for minor offences, Indigenous people are most possibly affected by mandatory sentencing laws, which operate in Western Australia and in the Northern Territory.[37]

1 Western Australia: The Frontier State

Due to the 'tough on crime' policy, the Indigenous people in Western Australia are marginalised, socially excluded, and targeted by the criminal justice system.[38] Although mandatory sentencing is in force in most States and in Northern Territory, it is only in Western Australia that the legislation consists of a relatively longer list of mandatory sentencing regimes.[39] Furthermore, on 12 March 2014, the Western Australian government introduced the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014, which will change the law by making burglary strikes counted by occurrence and not conviction appearance, and eliminate the option of conditional release order sentence for juvenile offenders to make them face mandatory detention. In other words, a child who steals from three neighboring residences in the same night **in order to obtain food** will face a mandatory sentence of 12 months imprisonment or detention.[40]

The recent introduction of Prohibited Behaviour Orders in Western Australia in 2010 further aggravated the risk of Indigenous people to becoming subjected to the criminal justice system though a civil order.[41] Successive governments of Western Australia have continually extended the scope of mandatory imprisonment.[42]

---

[36] Tubex, above n 13, citing R Broadhurst, 'The Imprisonment of the Aborigine in Western Australia: 1957-1987' in K Hazelhurst (ed), *Ivory Scales: Black Australians and the Law* (University of New South Wales Press, 1987) 153-189; Chris Cunneen, *Conflicts, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

[37] Ibid, citing R Broadhurst, 'Aborigines and Crime in Australia' in M Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 1997) 407-468; R Hogg, 'Penality and Modes of Regulating Indigenous Peoples in Australia' (2001) 3(3) *Punishment and Society* 355-379.

[38] Brian Steels and Dot Goulding, 'When It's a Question of Social Health and Well-Being, The Answer is Not Prison' (2009) 7(12) *Indigenous Law Bulletin* 15 <http://www.austlii.edu.au/au/journals/IndigLawB/2009/21.html>.

[39] Law Council of Australia, *Mandatory Sentencing* (Policy Discussion Paper, May 2014) 50-1 <www.aph.gov.au/DocumentStore.ashx?id=c05f81ff-d005-4738-8e1b-28469555b76a&subId=298819 Indigenous criminal laws and legislations in Western Australia>.

[40] Ibid, 51-2.

[41] Ibid, citing T Crofts and T Mitchell, 'Prohibited Behaviour Orders and Indigenous Over-Representation in the Criminal Justice System' (2011) 23(2) *Current Issues in Criminal Justice* 277-285.

[42] Law Council of Australia, 51.

2 Northern Territory: Retreat to Paternalism

Despite a shift in crime policy that adopted some aspects of the self-determination in the 1970s and 1980s, there is a recoil to paternalistic policies manifested in over-policing and incarceration, and the Northern Territory Intervention.[43] Engendering increased criminalisation and control of the Indigenous people, the re-emergence of paternalism via the *Northern Territory Emergency Response Act 2007* (Cth) is a national emergency approach that utilises a historical problem to warrant the imperative to act swiftly and unilaterally on communities with no mutual deliberation.[44]

In June 1999, the *Sentencing Act 1995* (NT) was amended to extend the ambit of mandatory sentencing to second offences of assault committed by adults. Mandatory sentencing only applied for juvenile offenders if they have at least one prior conviction: *Juvenile Justice Act 1983* s 53AE. While a second offence carries mandatory imprisonment of 28 days, a court could order a juvenile to participate in a diversionary program, under s 53AE(2)(c). However, once a juvenile has been referred to a diversionary program, the option has been exhausted, thereby reactivating the mandatory detention provisions for future convictions.[45] Notably, in the Northern Territory, the offence of murder carries a mandatory sentence of *reclusion perpetua*.[46]

C Criminalisation and Custodial Death

Exceeding the proportion of their general population, the Indigenous people are over-represented in police or prison custody, which has a strong correlation with Indigenous deaths in custody.[47] Even though the Royal Commission into Aboriginal Deaths in Custody has brought the issue to light in 1991, the incidence

's 401(4) of the *Criminal Code*: Home Burglary (3rd strike); *Criminal Code* s 297: Grievous Bodily Harm (Public Officer); *Criminal Code* s 318: Assault Public Office (Bodily Harm); ss 6 and 7 of the *Misuse of Drugs Act*: Manufacture or cultivate causing bodily harm to child; ss 59 and 60 of the *Road Traffic Act*: Dangerous Driving; and *Criminal Organisations Control Act* (Enacted 2013, Part 10, Schedule 1A): Offences committed in association with declared criminal organisations.'

43 McRae et al, above n 1, 498 [10.30].

44 G Coventry and D Palmer, 'Toward Constituting a Critical Criminology for Rural Australia' in T Anthony and C Cunneen (eds), *The Critical Criminology* Companion (Hawkins Press, 2008) 309, cited in McRae et al, above n 1, 588 [10.1130].

45 Law Council of Australia, above n 45, 52.

46 Ibid, 54.

47 McRae et al, above n 1, 500 [10.80].

of Indigenous deaths in custody continues to escalate at an unprecedented level.[48] Tackling Indigenous custodial over-representation is germane to mitigating Indigenous custodial deaths.[49]

The types of offences that bring about Indigenous contact with the criminal justice system were mostly minor public order crimes, which can evoke altercation with police triggering further serious charges like resisting arrest and assaulting police.[50] The case of *Mulrunji* in 2004 highlights the triviality of the offence that lead to unnecessary arrest and ensuing death in custody.[51]

1 Doomadgee & Anor v Deputy State Coroner & Ors

Known by his tribal name Mulrunji, Cameron Francis Doomadgee was a Palm Island resident of good character who was arrested for offensive language but not convicted of this minor offence.[52] While in police custody, he died from internal bleeding after having sustained a cut above his right eye, four broken ribs, pierced liver, and ruptured portal vein.[53] The responsible police officer, Sergeant Hurley was merely charged with assault and manslaughter, but not murder, of Mulrunji. The Townsville jury acquitted him despite strong evidence, and was immediately reinstated.[54] Ironically, despite a lengthy and well-documented history of Indigenous deaths in police custody, the 2004 *Mulrunji* case was the first prosecution of Indigenous custodial death.[55]

The most common reasons for Indigenous deaths in custody in 2002 were alleged public order offences, but only less than 25% of those have actually committed these offences.[56] It has implications not only on the difference in the nature of offending between Indigenous and non-Indigenous individuals but also on

---

48 Ibid.
49 Ibid, 500 [10.60].
50 Ibid, 502 [10.120].
51 Ibid.
52 Ibid.
53 Inquest Into the Death of Mulrunji, *Hurley v Clements & Or* (Coroner's Court, COR 2857/04(9), Mr Peter Davis, SC and Mr Mark LeGrand, 14 May 2010) 2; *Doomadgee & Anor v Deputy State Coroner & Ors* [2005] QSC 357 <http://www.courts.qld.gov.au/data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf>.
54 McRae et al, above n 1, 519 [10.300].
55 Ibid, 5119 [10.300].
56 N Taylor and M Bareja, '2002 National Police Custody Survey' (Technical and Background Paper, Australian Institute of Criminology, 2005) 30, cited in McRae et al, above n 1, 502-3 [10.120].

the unfair treatment by the criminal justice system given that these minor crimes are excessively subject to policing and discretion.[57]

2 Police Racism, Over-Policing and Custodial Discretion

Claims of racial discrimination are most pronounced at the police level, according to Tubex' research on Indigenous over-representation in 2013.[58] In the administration of the wide-ranging discretionary powers in police work, such as stop and question, move on, search and arrest, police racism has a direct influence on the over-policing of Indigenous people.[59] Moreover, police discretionary powers can have a significant impact on the preceding stages of the criminal justice system, especially that police officers are the vital gatekeepers to the system.[60]

With respect to Indigenous offending, there is evidence that the more punitive options are selected.[61] Snowball, in 2008, proved that Indigenous juvenile offenders were less likely to be diverted from the court compared to their non-Indigenous counterparts who were more likely to be referred to diversionary alternatives in the juvenile justice system, such as family conferencing and police cautioning.[62] It has been put forward that increased use of diversionary processes has a considerable impact on reducing Indigenous over-representation.[63]

---

[57] J Baker, 'The Scope for Reducing Indigenous Imprisonment Rates' (2001) 55 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 5, cited in McRae et al, above n 1, 502-3 [10.120].

[58] Tubex, above n 13, 63.

[59] Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody* (1991); J Chan, 'Police Culture: A Brief History of a Concept' in T Anthony and C Cunneen (eds), *The Critical Criminology* Companion (Hawkins Press, 2008 221, cited in McRae et al, above n 1, 517 [10.290] [10.120].

[60] Tubex, above n 13, 63.

[61] Ibid.

[62] Lucy Snowball, 'Diversion of Indigenous Juvenile Offenders' (Research Paper No 355, Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology, June 2008) 1, 5 <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi355.pdf>.

[63] Troy Allard et al, 'Police Diversion of Young Offenders and Indigenous Over-Representation' (Research Paper No 390, Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology, March 2010) <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi390.pdf>.

Furthermore, there is empirical evidence that Indigeneity affects police discretion to arrest and refuse bail. In 2012, Indigenous people were more likely to be refused bail.[64] Even if bail is granted, defendants usually fail to comply since bail conditions are predominantly unrealistic, arbitrary or onerous. In addition, if released on bail, Indigenous people are able to comply but often subjected to stringent, over-policed bail conditions.[65]

3 Judicial Racism, Judicial Discretion and Sentencing Practices

Even though the sentencing stage within the criminal justice system is not a predominant factor in the over-representation of Indigenous incarceration rates, the sentencing process is a crucial avenue for intervention and diversion alternatives, which can be integrated with the mainstream criminal sentencing.[66] In most cases, the sentences handed down by judicial officers are the direct outcome of Indigenous over-representation in police arrest and in conviction. Nonetheless, seemingly unbiased sentencing rules and practices can operate discriminatorily, such as the impact of mandatory sentencing laws on Indigenous offenders.[67]

Directed at repeat offenders, the operation of mandatory sentencing legislation has, arguably, a discriminatory impact on Indigenous people as they are over-policed for recurrent minor offences such as public drunkenness, offensive language and offensive behavior.[68] According to Walsh, and as noted by the Royal Commission into Aboriginal Deaths in Custody, these trivial crimes can act as 'gateway' offences leading to imposition of subsequent charges, such as 'obstruct, resist or assault police officer', thereby aggravating the risk of incarceration upon conviction.[69]

V DYNAMICS OF INDIGENEITY AT THE JUDICIAL STAGE

[64] D Weatherburn and L Snowball, 'The Effect of Indigenous Status on the Risk of Bail Refusal' (2012) 36(1) *Criminal Law Journal* 50-57, cited in Tubex, above n 13, 63.

[65] Lisa Stone, *A Better Approach to NSW Bail Laws for Aboriginal and Torres Strait Islander People* (August 2016) Criminalcle, citing D Weatherburn and L Snowball, 'The Effect of Indigenous Status on the Risk of Bail Refusal' (2012) 36(1) *Criminal Law Journal* 50; Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW* (2002) <http://www.criminalcle.net.au/attachments/A_Better_Approach_to_NSW_Bail_Laws_Aboriginal_And_Torres_Strait_Islander_Peoples__Lisa_Stone__Aug16.pdf>.

[66] Marchetti and Ransley, above n 2, 2.

[67] McRae et al, above n 1, 557 [10.790].

[68] Ibid, 557 [10.800].

[69] Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24(1) *University of Queensland Law Journal* 123 <http://www.austlii.edu.au/au/journals/UQLawJl/2005/5.html>.

Recently, the High Court case of *Bugmy v The Queen* illustrates the need for the courts to take into account the idiosyncratic disadvantage suffered by the Indigenous people of Australia while growing up in a community riddled with drugs, alcohol abuse and violence. The Court recognised that this cultural context may be a relevant consideration in Indigenous sentencing, and may reduce an offender's moral culpability for criminal behaviour.[70]

Bugmy pleaded guilty, in 2011, to assaulting two prison officers and intentionally causing grievous bodily harm to another while imprisoned on remand. The initial six-year-and-three-month sentence of Bugmy was increase on appeal by the New South Wales' Court of Criminal Appeal on the grounds that too much weight was allocated to his personal circumstances considering the objective seriousness of his offences.[71]

Corollary to the *Bugmy* case, the initial sentencing is reminiscent of the controversies and varying judicial opinions surrounding the New South Wales Supreme Court decision of *R v Fernando*.[72] Justice Wood articulated the eight principles of the implications of deprived socioeconomic circumstances and alcohol abuse in sentencing Indigenous offenders.[73] The principles in the Fernando case were applied by the

---

[70] *Bugmy v The Queen* [2013] HCA 37, cited in Alexandra Smith, 'Mainstreaming Restorative Justice in South Australia's Criminal Justice System: A Response to the Over-Representation of Indigenous Offenders' (2014) 5 *The ANU Undergraduate Research Journal* 172 <http://press-files.anu.edu.au/downloads/press/n1673/pdf/Alexandra_Smith.pdf>.

[71] *R v Bugmy* [2012] NSWCCA 223 (18 October 2012), cited in Kelly and Tubex, above 25, 13.

[72] *R v Fernando* (1992) 76 A Crim R 58, cited in Marchetti and Ransley, above n 2, 16.

[73] McRae et al, above n 1, 561 [10.840]:

1. Equality before the law but without ignoring an offender's membership of a minority group.
2. Aboriginality will not necessarily mitigate punishment but will throw light on the circumstances of the offence and / or offender.
3. Recognition of relationship between alcohol abuse and violence in Aboriginal communities, which requires "more subtle remedies" than imprisonment.
4. Sentencing of Aboriginal offenders should be taken seriously and account for the protection of Aboriginal communities from violent, intoxicated offenders.
5. In recognition of the endemic presence of alcohol in Aboriginal communities due to grave social difficulties, where alcohol abuse reflects the offender's socioeconomic circumstances in which the offender has grown up, that should be taken into account as a mitigating factor.
6. Courts must avoid "racism, paternalism or collective guilt" when sentencing, but nonetheless consider the subjective circumstances of the offender.
7. For Aboriginal offenders who have come from a deprived background, are disadvantaged by social or economic factors, ort "who have] little experience of European ways", a lengthy imprisonment term may be particularly harsh when served in a foreign environment dominated by European inmates and officers.
8. Consideration should be given to the "competing public interest" in rehabilitation of the offender and the avoidance of recidivism.

Supreme Courts across Australia, such as in *Stone*,[74] *Russel*,[75] *Daniel*,[76] *Amagula v White*,[77] *Police v Abdulla*,[78] *and Tjami*.[79,80]

Moreover, different sentencing frameworks, by legislation and common law, are imposed by various Australian jurisdictions, of which Australian Capital Territory, Queensland, and the Northern Territory make specific legislative provisions pertaining to judicial notice of offenders' Indigenous backgrounds.[81] While cultural background or considerations are declared to be relevant in ACT and in Queensland,[82] submissions may be made with respect to Indigenous customary law or the view of an Indigenous community in the Northern Territory.[83] It must be borne in mind, though, that the Commonwealth government's Northern Territory Intervention may override some parts of the Northern Territory scheme.[84]

While the sentencing principles of South Australia prefer a broad application of the *Fernando* principles, those of New South Wales narrowed its application, which is subsequent to the appeal against the decision of the New South Wales Court of Criminal Appeal in *R v Bugmy*. In October 2013, majority of the High Court decided that, in the absence of a legislative provision that directs courts to pay particular attention to the circumstances of Aboriginal offenders, there is

> 'no warrant in sentencing an Aboriginal offender in New South Wales to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal defender.'[85]

---

[74] *Stone* (1995) A Crim R 218.
[75] *Russel* (1995) 84 A Crim R 386.
[76] *Daniel* [1997] QCA 139.
[77] *Amagula v White* [1998] NTSC 61.
[78] *Police v Abdulla* [1999] SASC 239.
[79] *Tjami* [2000] SASC 311.
[80] McRae et al, above n 1, 561 [10.840].
[81] Thalia Anthony, 'Sentencing Indigenous Offenders' (Brief No 7, Indigenous Justice Clearinghouse, March 2010) 1, cited in Marchetti and Ransley, above n 2, 16.
[82] See, eg, *Crimes Sentencing Act 2005* (ACT) s 22m; *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).
[83] *Sentencing Act 1995* (NT) s 104A.
[84] See *Crimes Act 1914* (Cth) s 16A(2A) and *Northern Territory National Emergency Response Act 2007* (Cth) s 91, which limit the use of customary law.
[85] Marchetti and Ransley, above n 2, 17.

Therefore, the *Bugmy* case firmly establishes that the *Fernando* principles are not about Indigeneity but rather about social and economic disadvantage.[86]

VI CONCLUDING STATEMENTS: BEST PRACTICE

The study of Marchetti and Ransley,[87] in 2014, focuses on the relationship between the Indigenous people and court processes. It stresses the significance of innovative sentencing courts, practices and principles implemented across the Australian jurisdictions that are tailored to Indigenous offenders.[88]

Providing a more culturally appropriate and inclusive courtroom experience for offenders, these best practices include circuit courts in regional and remote centres where judicial officers seek the advice of community members when making sentencing determinations; Indigenous sentencing courts in urban cities and regional towns where Elders or community representatives are included in the sentencing court process; and the cross-border justice scheme where judicial officers and legal practitioners from the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands in the Northern Territory, South Australia and Western Australia are involved in 'processing' offenders from cross-border jurisdictions.[89]

On the other hand, in the study conducted by Smith,[90] restorative justice is given emphasis. It argues that restorative justice has been confirmed, over the last three decades, as a legitimate response to criminal behaviour.[91] With the United Nations encouraging states to formulate guidelines and standards to govern the utilisation of restorative justice programs, their benefits are increasingly being acknowledged internationally.[92]

---

[86] Ibid.
[87] Ibid, 1.
[88] Ibid, 6.
[89] Ibid, 1.
[90] Smith, above n 34, 169.
[91] Kelly Richards, 'Police-Referred Restorative Justice for Juveniles in Australia' (2010) 398 *Trends and Issues in Crime and Criminal Justice*, cited in Smith, above n 34, 169.
[92] ECOSOC Resolutions 2002/12, *Basic Principles on the Use of Restorative Justice Programs in Criminal Matters* (United Nations Publications), cited in Smith, above n 34, 170.

Moreover, Smith's study discusses how mainstream criminal sentencing can be reimagined to integrate restorative justice. In addition, it includes not only the historic disadvantages confronting the Indigenous people and the inadequacy of the current criminal justice system in addressing the underlying causes of Indigenous offending, but also the proposed solution to these issues in the form of legal framework that promotes a centralised restorative justice scheme to buttress existing legislation.[93]

> ***There can be no justice in a world without connectedness and empathy; at the same time, social capital cannot flourish in a world without an infrastructure of security around human relationships that can only be guaranteed by institutions of justice.***[94]

[93] Smith, above n 34, 170.
[94] John Braithwaite, 'Doing Justice Intelligently in Civil Society' (2006) 62 *Journal of Social Issues* 402, cited in Smith Above n 34, 169.