Lionel Murphy Memorial Lecture

Vigilance against Injustice in the Justice System[†]

The Hon Robert McClelland MP, Commonwealth Attorney-General[*]

Acknowledgments[1]

Good evening, and thanks Professor Dietze for your very kind introduction.

First, I would like to acknowledge the traditional custodians on whose land we are meeting today — the Ngunnawal people — whose cultures we honour as among the oldest continuing cultures in human history. And I would like to pay my respects to Elders past and present.

I'd also like to recognise:

- our hosts this evening — the ANU College of Law and, in particular, Associate Dean Fiona Wheeler and Head of School, Stephen Bottomley;
- members of Lionel Murphy's family;
- trustees of the Lionel Murphy Foundation;
- Dr Kristine Klugman, President Civil Liberties Australia, and Mr Bill Rowlings, CEO Civil Liberties Australia;
- Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner; and
- Mr Daryl Dellora.

Introduction

It's a great honour to have been asked to speak this evening. I have entitled this year's address as 'Lionel Murphy's Legacy — Vigilance against Injustice in the Justice System'.

And I wish to speak to the national shame that is the over-representation of Indigenous Australians in the criminal justice system.

And to the practical steps the Commonwealth and the States and Territories must take to right this enduring wrong.

[†] 25th annual memorial lecture, delivered at the Australian National University, Canberra, ACT on 7 September 2011.

[*] Editors' note: The Hon Robert McClelland served as Commonwealth Attorney-General from 3 December 2007 to 14 December 2011.

[1] I would like to acknowledge the valuable assistance that I have received from Katherine Post in the preparation of this speech and her work more generally in seeking improved justice outcomes for Indigenous Australians.

This problem has been brought to the public's attention this year particularly because of the 20th anniversary of the Royal Commission into Aboriginal Deaths in Custody (1991) and the release, in June 2011, of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) inquiry report *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*.

Lionel Murphy

But before turning to that I'd first like to pay a brief tribute to Lionel Murphy, whose memory we are here to honour tonight — a great Labor leader, an accomplished Attorney-General and an inspiring High Court Justice.

And in doing so, I would like to speak briefly of a judgment he wrote as a judge of the High Court — *Neal v The Queen*.

The case was that of an Aboriginal man, Mr Neal.

Mr Neal was Council Chairman in Yarrabah, a community in Northern Queensland. This community had a deep sense of grievance about the paternalistic treatment by white authorities, including the management of the store which was reportedly selling rotten meat. Mr Neal had argued with the store manager about the management of the reserve. When the discussion reached an impasse, Mr Neal swore at the store manager and spat at him.

For this, Mr Neal was sentenced to two months' hard labour. On appeal to the Queensland Supreme Court, Mr Neal's sentence was increased to six months.

Mr Neal then appealed to the High Court, where Lionel Murphy presided.

The year was 1982, and Murphy noted in his judgment the appallingly high rates of Indigenous incarceration at that time — that although Indigenous Australians made up only one per cent of the total population they made up nearly 30 per cent of the prison population.

In addressing the question of Mr Neal's relatively harsh sentence for what was a seemingly trivial offence, he said:

> That Mr. Neal was an "agitator" or stirrer in the magistrate's view obviously contributed to the severe penalty. If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. … Mr. Neal is entitled to be an agitator. (at 317)

Needless to say, Mr Neal's appeal was allowed.

So I'd like to draw some inspiration from Lionel Murphy tonight as I speak to the challenges that we currently face in terms of the over-representation of Indigenous Australians in the justice system — an injustice that remains nearly 30 years after *Neal v The Queen*.

Prior to the recent Commonwealth Law Ministers Meeting[2] that brought together Attorneys-General and Justice Ministers from across the Commonwealth, I had cause to reflect on the origins of European settlement in Australia. The British transportation system arose from an attempt by England's privileged classes to remove a so-called 'criminal' class.

Transportation was a means of punishment for lesser offences that were more often than not the effect of extreme social disadvantage. While that's how Europeans originally came to Australia, as a law and order measure this policy was unsuccessful. Crime wasn't addressed until chronic social disadvantage was addressed.

Today, Attorneys-General and Justice Ministers across Australia need to ask ourselves if we making the same mistakes in respect to the issue of the incarceration of Indigenous Australians.

The figures speak for themselves.

Rates of Indigenous incarceration

Today, Indigenous Australians make up only 2.5 per cent of the population, but account for 26 per cent of the adult prison population. The incarceration of Indigenous adults is 14 times higher than for non-Indigenous adults (Steering Committee for the Review of Government Service Provision 2011a:4.132).

Between 2000 and 2010, the rate at which Indigenous women are incarcerated increased by 58.6 per cent. The rate at which Indigenous men are incarcerated increased by 35.2 per cent (Steering Committee for the Review of Government Service Provision 2011a:4.130).

The figures are even higher for Indigenous juveniles. Only five per cent of young Australians are Indigenous, but half the young people in detention are Indigenous. Indigenous young people are 22.7 times more likely to be in detention (Steering Committee for the Review of Government Service Provision 2011a:4.137).

In fact, Indigenous young people are more likely to be incarcerated today than at any time since the release of the National Report of the Royal Commission into Aboriginal Deaths in Custody (1991) — some 20 years ago.

The purpose of incarceration

I do not consider for one moment that the Attorneys-General and Justice Ministers that I have met have the same premeditated intent as our British forebears. But it is clear that the desire to be seen as tough on crime has contributed to a significant increase in the prison population generally.

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[2] Editors' note: The 2011 Commonwealth Law Ministers Meeting was held in Sydney, NSW on 11–14 July 2011.

I am satisfied that there is a genuine desire among all law ministers around Australia to reduce crime — particularly in Indigenous communities. And there is no question that there is an urgent need to do that. The question is — are we doing it effectively?

Victimisation

Every Australian has a fundamental right to live free from fear. It is clear that this is not the case in many Aboriginal and Torres Strait Islander communities.

Statistics show that Indigenous people are almost twice as likely as non-Indigenous people to have been a victim of physical or threatened violence (Steering Committee for the Review of Government Service Provision 2011a:4.122).

Indigenous women are 31 times more likely than non-Indigenous women to be admitted to hospital for injuries caused by assault (Steering Committee for the Review of Government Service Provision 2011a:4.124).

In remote areas, Indigenous people are hospitalised as a result of family violence at 35.6 times the rate of other people (Steering Committee for the Review of Government Service Provision 2011a:4.125).

And the rate of homicide for Indigenous people is 8.5 times higher than for non-Indigenous people, with the victim and offender being intimate partners in 60.9 per cent of cases as compared with 24.2 per cent for non-Indigenous homicides (Steering Committee for the Review of Government Service Provision 2011a:4.125–4.126).

There is no doubt that we need to work to make Indigenous people and communities safer.

And there is no question that incarceration is the appropriate response for serious and violent crimes.

But there is a strong argument that such high levels of incarceration may ultimately undermine our objective of safer communities.

The marginal effect of incarceration in reducing crime

In an excellent article published in July 2010, Emeritus Professor Dave Brown (2010:142) from the University of New South Wales (also the Chairperson of the Lionel Murphy Foundation) argues that incarceration has ‘at best, a modest effect in reducing crime’ — but that effect is short term.

He argues that, in fact, excessive imprisonment rates may actually cause more crime in the long term.

Professor Brown’s point is that prisons can, in effect, become ‘schools of crime’ that result in the fracturing of family and community ties, hardening and brutalisation, and poor mental health outcomes for those who have been incarcerated (Brown 2010:141).

And after an offender is released they are likely to have lost essential life skills, have an increased reliance on criminal networks built up in prison, and experience reduced employment opportunities and access to social programs (Brown 2010:141).

He also points to a study that shows there may be a 'tipping point' for certain communities — where, once incarceration reaches a certain level, crime in that community will only increase (Brown 2010:141).

How is this 'tipping point' reached? Professor Brown argues that

> high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce further income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of managing social order through family or social groups, and crime rates go up. (Rose and Clear in Brown 2010:141)

We know that this is currently what is happening in our Indigenous communities. And we must turn this around.

If we are to address crime and victimisation we need to commit to a longer term approach and address the causes of offending and — very importantly — reoffending.

So how do we do this?

Addressing social disadvantage

Of the factors that contribute to high incarceration rates, social disadvantage comes at the top. And so addressing social disadvantage must be a key part of the solution.

To this end, in 2008 the Council of Australian Governments has agreed to specific timeframes for achieving six 'Closing the Gap' targets:

- to close the life-expectancy gap within a generation;
- to halve the gap in mortality rates for Indigenous children under five within a decade;
- to ensure access to early childhood education for all Indigenous four years olds in remote communities within five years;
- to halve the gap in reading, writing and numeracy achievements for children within a decade;
- to halve the gap for Indigenous students in Year 12 (or equivalent) attainment rates by 2020; and
- to halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

And all jurisdictions have committed to work together — with Indigenous Australians — to achieve these targets.

Progress towards overcoming the extreme social disadvantage experienced by many Indigenous people and communities will go a long way towards reducing the high rates of Indigenous incarceration.

The important role of families

And key to this will be ensuring that we address the dysfunctional family life experienced by many Indigenous young people. David Malcolm (2007:44–5), the former Chief Justice of Western Australia, said in 2007:

> The family is the most important factor in a young person's development. We as a community rely primarily on the family to educate children as to matters such as a shared morality, ethics, and a sense of "right and wrong". There is also a link between the dysfunctional family and a deterioration in the self-esteem and self-worth of a young person which may lead into substance abuse, violence and, eventually, criminal behaviour. There is a need to target resources to assist and support families and children as a strategy in addressing juvenile crime.

We must clearly address family dysfunction in the community if we are going to make a real impact in terms of young Indigenous Australians' contact with the justice system.

A 2008 study has found up to one-in-five Aboriginal children have a parent or carer in prison (Levy 2008).

It is not difficult to see, and the evidence confirms this, that having a parent in prison is considered to be a significant predictor of future criminal behaviour.

The *Overcoming Indigenous Disadvantage Report* released last month emphasises the impact of this, and I quote:

> High rates of imprisonment remove adults from their important roles in caring for the next generation ... and can lead to the 'normalisation' of incarceration. Prison can become more of an expectation than a deterrent; for some it might even become a rite of passage. (Steering Committee for the Review of Government Service Provision 2011a:4.131)

The New South Wales (NSW) Department of Corrective Services Women's Advisory Council gave evidence to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into Indigenous youth in the criminal justice system which demonstrates that this is the tragic reality for many Indigenous families. The Council said:

> So many of the people in custody or on community based orders are following the footsteps of their parents or grandparents. When I was going to Muluwa prison a woman came up to me and introduced me to her mother and her grandmother. They had all been in custody and they are all in Muluwa together in the women's jail. It was not remarkable to them. It was just what happens. (McFarlane 2010:6–7)

Community constables

It is this kind of evidence that motivated the Federal Government to trial what are known as 'community constables' in the Northern Territory. We have established eight sworn community engagement officers to work in remote locations such as Maningrida and Wadeye in the Top End and Ali Curung and Papunya in the south.

Their role is to work in communities to assess the source of crime, and, when it arises from a particular individual or family, to link with other services to address the broader issues that are at the heart of that family's dysfunction.

These officers will develop links between police and other services in communities such as schools and health providers to ensure the services work together with the community to improve community safety.

The eight officers commenced working in communities in early July 2011 — so it's very early days. But the initial feedback that I am receiving about the officers' work is very encouraging.

For example, one officer in Papunya has been involved in what is referred to as the 'Walking School Bus'. The local school attendance officer walks the streets beating a drum and stops at houses to collect students. At those houses where the students don't show, the community constable gives them some encouragement. I'm told that this has seen an increase in daily school attendance from about 15–20 to approximately 70 children.

A recent program by drug and alcohol councillors in Ali Curung asked a number of youths to list people who they felt comfortable about talking to if the youths were put in a situation they did not feel comfortable with. I'm told that every youth nominated the local community constable.

While these are very initial signs, I am optimistic that the community constables could have a real impact in these communities. I have met the constables, they are fine police officers and incredibly decent people — they have a real prospect of turning these communities around.

Standing Committee of Attorneys-General: Justice target

But the reality is that Justice Ministers cannot address these broader social issues through their portfolios alone. At the last meeting of the Standing Committee of Attorneys-General (SCAG),[3] my state and territory colleagues and I discussed the unacceptable rates of Indigenous incarceration, and I can report that there is a lot of good will to turn these figures around.

At that meeting, Attorneys-General and Justice Ministers resolved to 'significantly reduce the gap in Indigenous offending and victimisation' (Standing Committee of Attorneys-General 2011:3). In recognition of the need for governments to address these broader social issues as part of the solution, Attorneys-General agreed to refer the possible adoption of justice-specific targets to COAG (Standing Committee of Attorneys-General 2011:3).

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[3] Editors' note: The final SCAG meeting was held in Adelaide, South Australia on 21–22 July 2011. On 17 September 2011, the SCAG transitioned to the Standing Council on Law and Justice (SCLJ). The inaugural meeting of SCLJ was held on 18 November 2011 in Launceston, Tasmania.

But while Attorneys-General and Justice Ministers can have only a limited impact on these broader issues of social disadvantage, what we can do is address specific matters relating to the justice system.

The *Doing Time* report made a great number of valuable recommendations and it noted that we would get some big impacts in terms of reducing Indigenous incarceration rates if we focused on a few key areas, which I'll briefly mention — the remand population; addressing reoffending; and addressing the rate of incarceration for trivial offences, such as fine defaults and traffic offences.

Remand population

The *Doing Time* report notes that about half of those Indigenous young people in detention on an average day were on remand (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011:219[7.101]).

> One of the biggest growth rates in relation to detention for Indigenous juveniles is in remand. These are not children who have actually been convicted of anything but, because they are unable to meet bail conditions, often because they do not have functional homes to go to, they either breach their bail, or do not get bail in the first place. (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:222[7.109])

Evidence to the Committee also noted that 70 per cent of juveniles in detention are remanded for bail breaches — usually of a minor or technical nature (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:223[7.114]).

The *Doing Time* report identified the lack of appropriate accommodation available to young offenders whilst they are awaiting sentencing as the single biggest factor for them being unable to comply with bail conditions (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:222[7.110]). Magistrates are actually locking Indigenous young people up because those young people don't have any other suitable accommodation. Jail is seen as the only safe option.

So there is a clear need for appropriate accommodation options for Indigenous youth who are granted bail — accommodation that is safe and includes access to services that address their needs.

The Commonwealth has started this process by talking to the Aboriginal Hostels about how their services might meet the needs of Indigenous youth. But this is undoubtedly a big task and one which Commonwealth, State and Territory governments will need to work together to meet.

Addressing reoffending

Another area where the *Doing Time* report noted that significant gains could be made is by addressing the very high rates of reoffending amongst Indigenous prisoners.

A Queensland study showed that almost 90 per cent of Indigenous youth who complete their first sentence are subsequently arrested. Data from Western Australia shows that recidivism rates for Indigenous juveniles was 8 in 10 for males, and 6.5 in 10 for females (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:249[7.223]).

The *Doing Time* report references Dr Don Weatherburn from the NSW Bureau of Crime Statistics and Research who said:

> One of the reasons the Aboriginal imprisonment rates is so high is not so much the differential in the rate of arrival for the first time as the huge differential in the rate they come back. ... tiny changes in the rate of return to prison make big differences in the number of people in prison. So, if you are looking for a short to medium term strategy for reducing Aboriginal imprisonment, there could be no better place to start than rehabilitation strategies for reducing the proportion of Aboriginal people who, after release from prison, come back to prison. (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:247–8[7.215])

And reducing reoffending will necessarily reduce high rates of victimisation. We see too many cases of individuals being imprisoned for violence, only to repeat the violence once their sentence is completed and they return to the community. We absolutely must look at time spent in prison as an opportunity to break this cycle of reoffending and victimisation.

To do this, we will need to increase our focus on providing rehabilitation through in-custody programs — for example, to treat drug and alcohol addiction and provide education and training. There must also be a focus on providing post-release support, such as greater access to accommodation, ongoing drug and alcohol services, and transitions to employment.

To make this change, significant political will and courage is required. The challenge is to link investments in rehabilitation with improvements in public safety. It needs to be clearly articulated that rehabilitation is not a soft-on-crime approach, but a significant step in breaking the cycle of violence and victimisation experienced by too many Indigenous people in this country. To make the argument that the correctional system is supposed to correct and not just punish.

Incarceration for minor offences

We must also make sure that incarceration is being used appropriately and not for minor offences — for example, unlicensed driving and fine defaults. *The Australian* has reported that in a remote prison in WA, where more than 90 per cent of the inmates are Indigenous, 60 per cent of those inmates are remanded for unlicensed driving (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:231[7.148]).

In regional and remote communities, where there is very limited public transport available, Indigenous people are more likely to drive without licences. The Committee heard evidence that it is almost normal for Indigenous people to accept that driving illegally is a part of life — something they have to do.

And what is a relatively minor offence of driving unlicensed can snowball into a much bigger problem — it can lead to the imposition of fines that go unpaid, which in turn could lead to custodial sentence for fine default.

The excessive use of fines was also reported to impact on the high rates of incarceration — even minor fines may be defaulted due to the lack of a fixed address, low levels of literacy resulting in being unable to read the penalty notice, or a simple inability to pay because of financial circumstances.

High cost of incarceration

But the reality is that the mindless incarceration of people is an incredibly expensive way to deal with minor offences.

The real net operating cost per prisoner per day was A$207 in 2009–10 (Steering Committee for the Review of Government Service Provision, Parliament of Australia 2011b:8.24). That equates to nearly A$80,000 per prisoner per year. Expenditure on prisons and periodic detention centres totalled $2.9 billion nationally in 2009–10 (Steering Committee for the Review of Government Service Provision, Parliament of Australia 2011b:8.3).

If you accept that in many instances we are taking some communities over the tipping point through extreme rates of incarceration, the question must be asked — from the position of fiscal responsibility, let alone social responsibility — whether this huge expenditure could be better directed to address the causes of crime and make our communities safer.

This realisation has caused a meeting of the minds between the Left and the Right in relation to the criminal justice system. We are beginning to understand that the traditional political dichotomy that you are either ‘tough on crime’ or ‘soft on crime’ serves us poorly.

And there is an increased willingness to look at new approaches that show promise of achieving our broader objectives of reducing both crime and victimisation, and creating safer communities.

Justice reinvestment

One such approach is justice reinvestment. It involves funding programs and services that address the underlying causes of crime in these communities, ultimately reducing the expenditure on incarceration.

The rationale for such an approach is that a large proportion of offenders come from a small number of disadvantaged communities and, even, households. The theory is that diverting more energy and funding to these communities and vulnerable people to address the underlying causes of crime will produce better results for the money invested.

There are very promising results coming out of the United States and the United Kingdom that show the potential of such an approach to have a real impact on criminal

behaviour in communities, by getting to the source of the problem. For example, in Texas, the Government invested US$241 into local drug and alcohol treatment programs and improved probation and parole services. There was US$210.5 million saved in the 2008–09 financial year from the prison budget, and the Texas prison population has stopped growing for the first time in decades (Aboriginal and Torres Strait Islander Social Justice Commissioner 2009: 19[Case Study 2.1]).

Evaluation of Indigenous programs

While I acknowledge that law enforcement is a matter for the States and Territories, at the Federal Government level we can have a role in influencing policy direction.

So, in an endeavour to shift policy towards a justice reinvestment approach, the Attorney-General's Department has committed A$2 million to conduct an evaluation of successful programs that already exist — be they programs to divert minor offenders away from prison, or programs to successfully rehabilitate those already in the system to prevent reoffending.

I expect to see the first interim report of these evaluations by the end of 2011 and the final report by the end of 2012. The results of this evaluation will be important to ensure that, in future, governments commit funding to programs that are going to succeed in reducing offending and recidivism.

However, we do already know about some programs that are achieving results, and I'd like to touch on just a few to emphasise that it's not all doom and gloom — that there is some really good work being done.

Programs that are already achieving results

The Aboriginal Youth Justice Throughcare Service operating in Perth provides one-on-one support to mentor Aboriginal offenders aged 12 to 18 years who are exiting detention. Individual case plans are developed for each young person that encompass education and training, work experience, employment, financial support and accommodation. Since it commenced in July 2010, the program has assisted 17 young people at high risk of recidivism, with 11 not reoffending.

The Marist Youth Care Darumu Program for Indigenous Youth supports young people detained or in contact with police in Western Sydney. The program employs Indigenous caseworkers and has worked closely with Indigenous consultants to achieve cultural competence. Between July and December 2010, 18 Indigenous young people were provided with support with 16 not reoffending.

Senator Mark Arbib also recently announced funding from the Indigenous Employment Program for a project in the Junee Correctional Centre. The Project will provide transitional services for Indigenous inmates transferring back to community, including job training, mentoring, work experience and links to appropriate support services. This is recognising that one of the best ways to stop reoffending is to ensure inmates who are released have access to employment.

And we are seeing good initial results from a trial of multi-systemic therapy in NSW — an intensive family and community-based treatment program for chronic and violent juvenile offenders, which focuses on their homes and families, schools and teachers, neighbourhoods and friends. Therapists are available 24 hours a day, seven days a week and meetings take place in the young person's home. As of May 2010, 87 families had entered the program, with 90 per cent successfully completing it. Preliminary findings show substantial decreases in rates of offending by juveniles (West 2010).

I think the crucial thing to ensure the success of these programs is that they are developed in partnership with the local communities themselves. Commenting, for example, on the value of Circle Sentencing an Aboriginal lawyer Gail Wallace has reflected:

> Circle sentencing allows communities to reclaim some control over their own social problems and establish the mechanisms necessary to solving those problems. It is assisting beyond simply reducing the rate of reoffending; it is educating the whole community about crime. Circle sentencing is teaching us that crime is destroying our families and communities, mainly because it is taking mothers, fathers and our kids away. (Wallace 2010:16)

Conclusion

In *Neal v The Queen*, Justice Murphy noted that 'Aboriginal sense of grievance has developed over the two hundred years of white settlement in Australia' (at [16]).

Our challenge in considering Indigenous over-representation in the justice system is to likewise set it in its context. To understand the part that disadvantage plays in Indigenous people ending up in prison, but equally the way the number of Indigenous people in our jails contributes to that disadvantage.

In understanding the complex web of problems that have come from the history of Australia since colonial settlement, we can understand there is no one solution. Instead, we need to work on many fronts to address the injustices that still exist.

To date, not enough focus or action has been taken in addressing Indigenous incarceration. This needs to change. We need to address the injustices still in the justice system.

All Australian governments must recognise that Indigenous incarceration is both a symptom and a cause of disadvantage, and commit to making changes that respond accordingly.

There is undoubtedly a strong desire and a lot of good will to address this injustice — but we need to work together, closely with the Indigenous community, and redouble our efforts to get on with constructive programs that make a real difference.

Case

Neal v The Queen (1982) 149 CLR 305

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