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PERSPECTIVES

"The Things Which Must Be Done…"

Aboriginal Incarceration: the urgent need for Aboriginal community solutions.

The Honourable Bob Debus AM

August 2016

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The Honourable Bob Debus AM

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This paper was first given as the NSW Society of Labor Lawyers' Annual Lecture in memory of the late Frank Walker, who was a Minister in the Wran and Keating Governments and, from a young age, a fighter for the rights of Aboriginal people.

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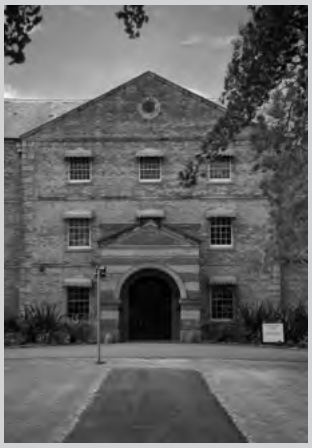

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Foreword

I sat down to write these few words having just heard the announcement that the NSW Government will be spending $3.8 billion dollars over four years to "fund around 7,000 new beds as part of a record investment in the correctional system - delivering long-term capacity for the state's facilities".

I realised that this paper, *The Things that Must Be Done*, could not be more timely.

Bob Debus tells how he first met Frank Walker in 1971 "at a meeting concerning what was to become the Redfern Aboriginal Legal Service". As will be apparent as you read the paper, both shared a passion for genuine reform in the conduct of criminal justice. Both shared a conviction that the system's failures fell most heavily on Aboriginal people.

Both went on to become Attorney General introducing significant reforms but I suspect neither kidded himself that the job was done.

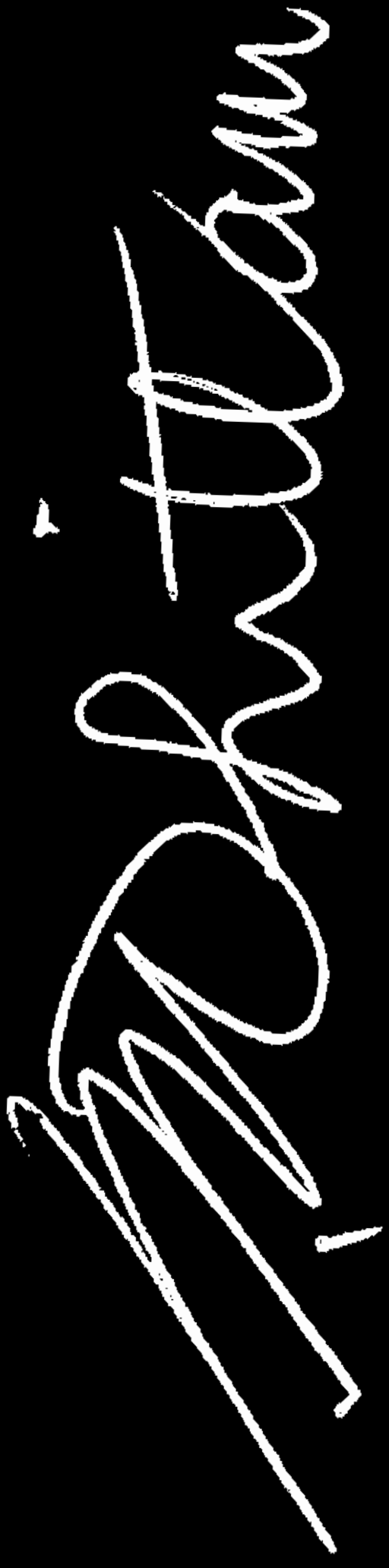
In this revised version of his 2016 Frank Walker Lecture, Debus returns to the question of criminal justice and Aboriginal incarceration. It is simply not possible to shy away from the truth of this matter: the facts indict us not only for accepting what should be intolerable levels of incarceration but for our failure to act upon the advice and evidence as to how this situation might be addressed. The "practical things" upon which reform is built and meaningful change realised.

Debus's focus on these practical things lifts our eyes beyond the temptation to despair to an appreciation that it really doesn't have to be this way.

In this regard it important that we don't equate "practical things" with minimal reforms. Indeed, Debus notes that some two decades ago the Aboriginal and Torres Strait Islander Commission (ATSIC) proposed that a broad set of principles for Indigenous social justice and the development of relations between government and Indigenous people be negotiated and legislated. There is some precedent in the NSW Land Rights Act (1983) introduced by Walker and more recently in the landmark South West Native Title Settlement between the Western Australian Government and the Noongar (2015).

In the light of such considerations, you cannot help but think that Debus's suggestion that it would be beneficial to legislate the principles of negotiation between Government and Indigenous people (consistent with the Declaration of the Rights of Indigenous People) is a practical matter of national significance and that opening the door to a negotiated Treaty may not be beyond us.

Eric Sidoti
Director, Whitlam Institute



"The Things Which Must Be Done…"

Aboriginal Incarceration: the urgent need for Aboriginal community solutions.

Introduction

This paper was first given as the second Society of Labor Lawyers Annual Lecture in memory of the late Frank Walker, a Minister in the Wran and Keating Governments and a fighter for the civil rights of Aboriginal people from a young age. It also reflects some of my own experience, first of all from the protest years of the sixties and seventies, which to some degree Frank Walker and I shared, and much later when I followed him into the portfolio of the Attorney General in New South Wales.

In the last recorded interview of his dramatically eventful life, in 2012, Frank Walker discusses the Land Rights legislation that he had introduced thirty years beforehand. It appears in the series "Legends of Land Rights" on the website of the Aboriginal Land Council of New South Wales and that is fitting. His attitudes to Aboriginal people and his acceptance of the obligations of Government toward them long anticipated the 2007 UN Declaration on the Rights of Indigenous People.

In the assemblies of New South Wales Young Labor in the 1960s Frank Walker and Paul Keating were prominent in opposing factions. Nevertheless, they both came to understand that Aboriginal people and organisations need to be given respect, to be allowed participation and given responsibility, to be treated openly and consistently, if policies for the improvement of their circumstances are to be generally successful. They were much better at that kind of openness than so many that have followed and more successful in consequence. "Perhaps when we recognise what we have in common," said Paul Keating at Redfern Park in December 1992,"we will see the things which must be done – the practical things".[1]

In recent times nevertheless, many organisations have been demonstrating especial concern about the levels of Aboriginal imprisonment in Australia – the Law Council of Australia and the Australian Bar Association, The Red Cross and Amnesty International, The National Congress of Australia's First Peoples, ANTaR and The Aboriginal and Torres Strait Islander Social Justice Commissioner. Perhaps we can again begin to actively consider the practical things which must be done.

Last year Judge Greg Woods presented the inaugural Frank Walker Memorial Lecture. He gave an account of the exceptional range and lasting significance of the reform of the justice system and the expansion of civil liberty achieved during Frank Walker's term as Attorney General and Minister for Aboriginal Affairs in the late seventies and early eighties.[2]

Judge Woods was head of the Criminal Law Review Division of the Attorney General's Department during a good deal of that time. I observe that the abolition of the Division last year took place within the new 'Justice Superministry' in which the Minister for Police is senior to the Attorney General. That is a constraint on the role of the Attorney General for which I can find no precedent in the history of New South Wales.

A Generation Ago

I first met Frank Walker in 1971 at a meeting concerning what was to become the Redfern Aboriginal Legal Service. He was 29, recently elected to the previously safe Liberal seat of Georges River and yet to tune his political and parliamentary skills to their later concert pitch but his driving conviction and courage were evident: also his proclivity for conspiracy. We were not to tell Patrick Darcy Hills, the leader of the Labor Party about the meeting, for he would not approve.

I did not at the time know of Frank Walker's life-defining childhood spent living with tribal people in New Guinea; nor of his youth in the Coffs Harbour District, where he was bashed by police for sitting with Aboriginal people in the roped-off section of the Bowraville Picture Show. I was not then aware that while an articled clerk he had joined the 1965 Student Freedom Ride in northwest New South Wales and had his ribs broken by local police for swimming in the segregated section of the Moree Municipal Baths.

But you will understand why – as a new Attorney General forty years ago – his first concern was justice in the system of criminal law, the human rights of oppressed people. His changes to the rape laws and the introduction of apprehended violence orders were designed to end the near impunity of the perpetrators of domestic violence. The repeal of the Summary Offences Act, which extinguished the offence of vagrancy and removed the so called 'trifecta' offences, the reform of the bail law and the decriminalisation of drunkenness were all designed in the first instance to protect the poor and indigent from harassment and unfair treatment. A disproportionate number of the poor and indigent were Aboriginal.

Hard to recall, but when Frank Walker was in office in the early 1980s there was no heroin epidemic, no talkback radio law and order campaigns and there were less than 4000 people in prison in New South Wales. I observe wistfully that the Premier of the day was a patron of the Council for Civil Liberties. In June last year there were nearly 12,000 inmates in New South Wales and more than 2,800 or 24 per cent of them were Aboriginal.[3] Nationally, there were nearly 34,000 inmates, 27 per cent of them Aboriginal. This is an age-standardised imprisonment rate 13 times higher than the non-indigenous population. For every 100,000 non-Indigenous Australians there were 146 in prison last year. For every 100,000 Indigenous Australians 2,253 were in prison.

1 Prime Minister Paul Keating at Redfern Park, 10 December, 1992.

2 Attorney General 1976-83, Minister for Justice 1978-83, Minister for Aboriginal Affairs 1981-84.

3 Australian Bureau of Statistics, 4517.0 Prisoners in Australia, Canberra, 11 December 2015.

Several disclaimers. When one talks about a difficult subject like this it is too easy to overlook some of the dramatic changes that have taken place in recent decades. The recent report on the Closing the Gap Strategy reminded us of the persistence of Aboriginal disadvantage but Aboriginal people live in many settings. Aboriginal professionals, artists and sportspeople have these days become embedded in national life and the popular imagination. In 1971 Charlie Perkins was known as the only Aboriginal graduate, today thousands are at university and in consequence an Aboriginal middle class begins to emerge.[4]

There is some encouragement in the news that there has been a decline in the rate of imprisonment for younger males over the last ten years[5], but here's the rub. In the last decade or so *overall* rates of Aboriginal incarceration have increased by more than fifty per cent In New South Wales. Alcohol-induced death for Indigenous people occurs at six times the rate for non-Indigenous people.[6] In 2009 a careful study reported that one in four indigenous women living with dependent children younger than 15 years had been victims of violence in the previous year.[7] It seems that still there are somewhat more young Indigenous men in prison than there are at university.[8] The saga of Adam Goodes reminds us that any rupture of our society's veneer of tolerance reveals plenty of outright racism bubbling beneath the surface.

You will surely not need to be persuaded that the imprisonment of Aboriginal people cannot be addressed by changes to the system of criminal justice alone, although I'll address that first. The imperative is to change the circumstances that encourage the drift into the ambit of the criminal justice system from early adolescence – and I shall explore that later.

Rising Incarceration Rates

It was normal until the 1980s for the executive government in the Common Law world to remain somewhat aloof from the operation of police and courts. But Margaret Thatcher's 1979 election campaign rhetoric changed that posture decisively. She insisted that rising crime was one of a piece with increasing industrial disputes and a permissive youth culture, that it was undermining the rule of law and driving the decline of the British nation. This was caused by the policies of the Labour Party and the flabbiness of the welfare state. It was a quite devastatingly effective electoral strategy – indeed a significant proportion of Labour voters agreed with her argument.[9]

It was only in 1993 that the young shadow Home Secretary, Tony Blair, took back the electoral momentum for the Labour Party in the United Kingdom. He didn't do it by returning to rational, civil libertarian arguments for minimising incarceration. He outflanked the Tories with the rhetorically brilliant slogan "Tough on Crime, Tough on the Causes of Crime" – "tough" twice in a few words essentially – and created a suite of policies to match.[10] He made major speeches pointing out accurately that the working class suffered most from the effects of general crime, and claiming that crime was therefore a "socialist issue". As a result of the Blair law and order push, at least on some measures, incarceration rates are higher in Great Britain than Australia.[11]

Modern 'law and order' politics arrived in New South Wales in the lead up to the 1988 general election when Frank Walker and I both lost our seats. Heroin-related rates of street crime – violence and robbery – had begun what was to be a steady twenty-year period of increase and there was straightforward, reasonable concern about it in the community. However, this was also the first election to be conducted in the climate of resentment, revenge and hysteria generated across the tabloid media by the new talkback style of radio.[12] Frank Walker was Minister for Youth and Community Services by then and I recall that his completely sensible juvenile cautioning scheme was attacked for being "soft on crime". The Liberal's promise of "Truth in Sentencing" legislation and the restoration of summary offences legislation was a defining, successful election strategy.

Once the cork is removed from this particular bottle it's very hard in real life to get it back in. Politicians may be indifferent to an increase in levels of incarceration or they may strenuously try to limit it but either way they cannot operate in isolation from aroused media and public opinion. The machinery of justice often responds incrementally to public and media demands for punishment by exercising its discretion to increase arrests and sentences and to refuse bail. Police methods have become much more managerial and targeted, the performance of local commanders measured by enforcement criteria.

Terrible individual crimes against innocent victims can massively intensify the pressures. Governments have even more difficulty mediating popular opinion – I cannot emphasise this enough – if their political opponents seek to encourage and exploit feelings of fear in the community through the techniques of wedge politics. The ugly history of Australia's refugee policy since the 'Tampa' incident – which was of course followed by the mother of all law and order political wedge strategies – well enough illustrates the point.

In any event a long wave of more punitive laws concerning sentencing, bail and parole saw a substantial increase in the prison population across Australia and the Common Law world.[13] And these changes had predictable and *disproportionate* effects upon Aboriginal offenders, in several ways.

4 J. Lahn,"Aboriginal Professionals: Work, Class and Culture', Centre For Aboriginal Policy Research, Australian National University, 2006.

5 Neil Donnelly, Imogen Halstead, Simon Corben and Don Weatherburn, "*The 2015 NSW prison population forecast*," NSW Bureau of Crime Statistics and Research, Issues Paper No 105, April 2015.

6 Don Weatherburn, *Arresting Incarceration, Pathways out of Indigenous Imprisonment,* Aboriginal Studies Press 2014, p85.

7 Kylie Cripps, Catherine M. Bennett, Lyle C. Gurrin and David. M.Studdert, "Victims of violence among Indigenous mothers living with dependent children," *Medical Journal of Australia*, Vol.191 No 9, 2 December 2009.

8 *ABC News* Fact Check, 4 December 2015.

9 See David Downes and Rod Morgan, 'No Turning Back: The Politics of Law and Order into the Millennium,' in M. Maguire, R. Morgan and R. Reiner (eds.) *The Oxford Handbook of Criminology*, 4th edition, Oxford University Press, p 201.

10 See Tim Newburn and Robert Reiner, Chapter 10, *Blair's Britain 1997-2007*, Anthony Seldon (ed.) Cambridge University Press, 2007.

11 See for instance, Georgina Brignell and Hugh Donnelly, *Sentencing in NSW: A cross-jurisdictional comparison of fulltime imprisonment*, Judicial Commission of NSW, 2015.

12 Alan Jones made his first radio broadcast in 1985. He had stood against Labor's Ken Gabb in a critical by-election for the State electorate of Earlwood in 1978 and lost. Ken Gabb's campaign was given particular support by an MP from a nearby electorate, Frank Walker. In 1986 Ken Gabb became New South Wales Minister for Aboriginal Affairs.

13 See for instance Chris Cuneen, Eileen Baldry, David Brown, Mark Brown, Melanie Schwartz and Alex Steel, *Penal Culture and Hyperincarceration: The Revival of the Prison,* Ashgate, 2013.

Aboriginal Legal Services, underfunded as they have been, have still made sure that fewer people are verballed or plead to crimes they don't commit. However problems still reside in the consequences of intensive policing and the high visibility of the kind of street level offences habitually committed in impoverished communities, not least traffic offences.

More than that, you are more likely to receive a prison sentence if you commit a violent act after a previous violent offence or after breaching a previous court order. Aboriginal offenders are greatly over-represented in these categories.[14] On 30 June last year there were more than 9,000 Indigenous prisoners in Australia and 7,100 of them had been in prison before.[15] Don Weatherburn shows why it is quite critical to understand that – as a statistical matter – the higher rate at which Aboriginal people *first arrive* in prison is much less significant than rate at which they *come back to it*.[16]

And bear in mind that while law and order policies arose in an environment of rising crime, they changed public attitudes to crime and punishment permanently. The so-called "heroin drought" has been a principal cause in an actual decline in most categories of crime for more than a decade now, but there has been no corresponding reduction in police numbers or levels of imprisonment.

It is nevertheless my rebuttable perception that declining crime rates generally reduce the ability of talkback radio to agitate public opinion. I believe it is easier at the present time than it has been for decades for a Government to divert funds into diversionary and rehabilitative measures within the correctional system should it *actually desire* to do so. It is a better time to seek bipartisan commitment to a more rational and humane approach to crime prevention – and to explain it to the public. As for instance, the present Prime Minister has been able quickly to gain acceptance for a somewhat more rational rhetoric around the issue of terrorism.

A fall in the overall rate of imprisonment would of course be likely to bring a disproportionate reduction in Aboriginal imprisonment.

Changing the Justice System

Substantial possibilities do exist, apart from more adequate funding, for improving the way that the justice system itself deals with Indigenous people. I will mention only a few of the most obvious.

1) In these days of frequent ideological attack upon the civil service it's worth reminding readers that dedicated, competent public servants can fix some things just by paying attention, by doing the administration of government well. During 2009/2010 the average daily number of juveniles in custody in New South Wales reached 485, in part at least because of strict bail condition requirements. Rooms were doubled up and healthy young people were being placed in clinical beds.

14 Jacqueline Fitzgerald, "Why are Indigenous Imprisonment Rates Rising?" NSW Bureau of Crime Statistics and Research, Issues Paper 41, August 2009.

15 Australia Bureau of Statistics, 4571.0 Prisoners in Australia, Canberra, 11 December 2015.

16 Reported in *Doing Time—Time for Doing, Indigenous youth in the criminal justice system*, Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Canberra, June 2011, p247.

Officials understood that these circumstances could lead to a riot, incidents of self-harm and the like. Fifty per cent of inmates were on remand. A quarter of that remand population were detained for a breach of bail without committing a new offence, typically for breach of curfew. There had also been a number of juveniles who had been granted conditional bail but could not meet all the required conditions.

So special officers were placed in all Childrens' Courts and were also available to provide information to Magistrates at any court hearing children's cases. Their function was not to supplant the lawyer's role of advocating for bail but rather to provide the court with options and to mobilise resources to support young people having difficulty meeting bail requirements.[17]

In 2014/15 the average daily population of Juvenile Justice Centres was stable at an average of 286, a fall of around 40 per cent. The proportion of Indigenous inmates remained unchanged at 50 per cent, so there are now 20 per cent *fewer* Indigenous children in full time detention in New South Wales than there were 5 years ago.

2) My next example concerns the reduction of recidivism.

- We know that released Indigenous inmates are more likely to be arrested and charged with new offences.
- We know also that the reduction of re-offending is by some distance the fastest way to reduce the Indigenous prison population.
- We know from internationally validated data that tailored through-care and back of prison sentence programs assisting inmates to reintegrate into the community are effective in reducing recidivism.

We know these three things but here in New South Wales nevertheless, the Government is taking no notice. Remand numbers in adult prisons are at present extending for a variety of reasons, not least because of a clear-cut and easily remedied shortage of District Court judges.[18]

Prisons are running seriously over capacity. In such circumstances rehabilitation work is always degraded but the situation appears to be worse than that. The Budget Papers show that targeted offender programs and education programs have actually been reduced.[19] When prison numbers rise at the same time as savings are demanded, the funding of custodial programs will always come at the expense of rehabilitation programs. And that is to the detriment of the inmates and the budget in the long term.

3) My final example concerns diversion from the prison system. There are plenty of established diversion and rehabilitation programs that are more effective and cheaper than prison. Drug Courts reduce offending, cognitive behavioural therapy works.[20] Increased expenditure on all these measures would reduce imprisonment.

17 Valda Rusis, former Chief Executive, Juvenile Justice New South Wales, (personal communication, December 2015).

18 "Court delays 'unsatisfactory' says Bar Association," *Australian Lawyer*, 28 August 2015.

19 New South Wales Budget Estimates 2015-2016, Budget Paper No 3, pp7-15.

20 See for instance Don Weatherburn, *Arresting Incarceration*, p102.

Circle Sentencing Courts have engaged Aboriginal communities in the sentencing process and improved local relationships with the justice system, but don't appear to be reducing offending as effectively as many of us expected a decade ago.[21] However evaluations suggest that greater investment in support services, including drug and alcohol services and post sentencing programs linked to circles, would have a measurable effect on re-offending.

In any event the benefit of diversion and post-release programs is conclusively proven. At Fitzroy Crossing I have seen proud men running a program of work and culture training to straighten up delinquent children who would otherwise have been sent to an institution 3000 kilometres away in Perth. I have seen the success of the Tribal Warrior mentoring program in New South Wales.

Yet national provision for diversion is intermittent and uneven. After interviewing many hundreds of witnesses around the nation, a Parliamentary Inquiry which I chaired for a time recommended in 2011 that the Commonwealth should establish a new pool of adequate and long term funding which allowed local organisations and community groups to apply for programs to assist young Indigenous offenders with post release, diversion and continuing education programs.[22]

The same Committee recommended the inclusion of measurable justice targets in the Closing the Gap Strategy, as Human Rights Commissioner Mick Gooda has continued to do since. Neither recommendation has been acted upon though the arguments for each only continue to strengthen – and justice targets are Labor policy now.

The most obviously urgent issue of all at present concerns the substantial number of Aboriginal people, especially women, who enter the correctional system suffering high levels of untreated mental and cognitive disability, often combined with substance addiction. The *Indigenous Australians with Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project* is now publishing the results of extensive research that powerfully confirms the dimension of the problem.

The researchers demonstrate that at present it is police "who are often the first and only service to show up to a crisis involving Aboriginal people with mental and cognitive disabilities" in remote areas of New South Wales. Even if police are well motivated they aren't social workers and the frequent result of their intervention is that a person is imprisoned for incidental criminal action instead of being treated for a health problem.

The Project researchers argue that offending and re-offending could be prevented by early intervention and the provision of community-based support tailored to complex needs.[23] More effective diversion and treatment in the community could reduce the Aboriginal imprisonment rate over time by more than 20 per cent.

And so it is also easily understood that the best thing to do for the long run is to keep more people away from the justice system altogether and to fix up the environment in which Aboriginal offending is taking place. Easily understood but not easily achieved.

Land Rights

At exactly the time I met Frank Walker I had given up law practice to work in a publishing house and I had crossed the path of an Aboriginal man named Kevin Gilbert. He was recovering from 14 years in the New South Wales prison system, served for murder – a matter for another discussion. I became aware of *his* life-defining childhood as an orphaned boy enduring deep racial discrimination as he grew up with his siblings in the 1940s, surviving on the margins, for much of the time on the riverbank at Condobolin in Wiradjuri country.

I'm not sure how Kevin Gilbert then survived the prison system of the 1960s. Once, he told me, when he was being taken back to the barely imaginable brutality of Grafton Gaol he was so terrified that he asked to go to the lavatory and then dived, handcuffed, through the glass window of a moving train in an unsuccessful escape attempt. His play *The Cherry Pickers*, the first in English by an Aboriginal person, was written on toilet paper and smuggled out of prison for its first production.

During that same year he wrote a political book, called *Because a White Man'll Never Do It* [24] and I was its editor – a never forgotten experience.[25] It boiled with ideas that were not familiar at the time and it burned with anger. It interwove Kevin's own poetry; memories of brutal oppression, massacre and dispossession; irresistibly convincing accounts of the experience of everyday spirit-crushing racism and prejudice; commentary on national and international political events; and searing yet admirably clear-minded description of conditions in broken Aboriginal communities.[26]

Kevin Gilbert and "Mum" Shirley Smith in Redfern taught a young left wing lawyer not to have romantic illusions about chronic problems of drinking, violence and dependence in communities. But they were also among those who showed me that Aboriginal culture was powerful, even when the traditional law had been mostly lost, even when many individuals were lost in the present: that it would, one way and another, resist assimilation. Mum Shirl showed me also that certain Aboriginal grandmothers are indestructible!

At one point, after describing the experience of a day of unremitting human horror visiting a Reserve in New South Wales, Gilbert says this: "A long-standing answer to the problem posed by the ruined human beings that I have described is to ignore them and let the canker grow. Another view says 'throw out

21 See for example '*Circle sentencing in New South Wales: A Review and Evaluation*", Aboriginal Justice Advisory Council and the Judicial Commission of New South Wales, Monograph 22 JCNSW, October 2003.

22 *Doing Time –Time for Doing*, p262.

23 The work of this Project was made accessible in five articles by Project researchers Eileen Baldry, Elizabeth McEntyre and Ruth McCausland of the University of New South Wales in *The Conversation* between 2 November and 6 November 2015.

24 First published by Angus and Robertson in 1973, it has been republished as an *A and R Australian Classic*, Harper Collins, 2013.

25 The Aboriginal community worker Alice Briggs had said to Gilbert in an interview, "The only answer is to give them back their land rights and let the Aborigine try and rectify what the white man has done, because a white man'll never do it."

26 Charles Rowley had published his seminal trilogy *Aboriginal Policy and Practice* (ANU Press) between 1970 and 1971. I suspect that Kevin had dipped into the first volume, *The Destruction of Aboriginal Society*. However his account is based for the most part on oral history.

the Aboriginal Welfare Department and send in the Red Cross.' Almost all white Australians who care at all about the problem take a 'help them, guide them, show them the way' view. Almost nobody can get his mind around what blacks really want – land, compensation, discreet non-dictatorial help and *to be left alone* by white Australia."[27]

Gilbert knew intuitively what the New South Wales Bureau of Crime Statistics and Research demonstrates by intricate statistical analysis. A vicious circle of intergenerational causal factors continues to play a "significant role in the onset, seriousness, duration and frequency of [Aboriginal] involvement in crime". That circle can only be broken by the amelioration of Aboriginal disadvantage through "an improvement in the family and social environment into which Indigenous children are born and in which they subsequently develop".[28]

Kevin Gilbert went right out of his way to say that good parenting was not a matter of "black" or "white" values. In his words, "it is *human* values not to neglect and starve your kids. It is *human* values to work and contribute to your own community".[29] His survival strategy for black Australia at that time depended on an idea of self-reliance supported by compensation and land rights. He wouldn't do it now but he spoke then of "Black Israels," where the people would achieve some form of autonomy and recover the discipline, pride and cultural identity substantially lost on the existing Reserves as they were. Substance abuse would be curtailed and violence would be stopped.

Gilbert also helped invent the symbolically potent Tent Embassy set up outside Parliament House, Canberra, on Australia Day 1972 after the McMahon Government had rejected proposals to legislate for land rights and soon afterward lost an election. The Whitlam Government passed the decisive *Racial Discrimination* Act. It introduced, and the Fraser Government then passed, the *Aboriginal Councils and Associations* Act and the *Aboriginal (Northern Territory) Land Rights* Act. Land rights were seen, then and I think now, in both ethical and economic terms – to restore ancestral land, to help rebuild self-esteem and to create economic opportunity for Aboriginal people.

It was against that background that in 1983 Frank Walker introduced his *Aboriginal Land Rights* Act into New South Wales. In this State dispossession was virtually complete, not a little of it quite recent. Mabo native title rights were more than a decade away. Short of forced acquisition, the only practical strategy to follow was the creation of a fund to purchase already alienated land. It was supported by a levy on land tax for 15 years.

Reactionary people in politics and elsewhere were especially hostile to Frank Walker because they sensed, correctly, that he really was out to beat them. It wasn't only that they hated the idea of land rights; they hated his absolute refusal to accept the paternalistic, authoritarian attitudes of conservative whites toward Aboriginal people. He said that he had learnt lessons about New Guinean culture in his own boyhood village – he learned enough to know that he could never understand everything. He thought somebody in his position should in his own words be the "servant" of the community. Walker clearly saw the Local Aboriginal Land Councils created across New South Wales as organisations with a political purpose: he wanted them to have some independent power. The Councils were to have the financial independence to support the staff and resources necessary for local groups, in his words, "to organise their own campaigns" for their own reasons and to acquire new land.[30]

The New South Wales Aboriginal Land Council has had some problems with financial administration but it is now a well-managed institution with an independent, elected board administering a Statutory Fund worth $600 million. Working also in cooperation with the Indigenous Land Corporation created by the Keating Government, it is able to acquire land and property for Aboriginal organisations and to support Aboriginal employment. Constituent Local Land Councils are engaged in some areas in the ownership and joint management of national parks and in the creation of Indigenous Protected Areas (IPAs).

The possibilities for generating livelihood from the *National* Indigenous Estate seem indeed to be receiving renewed attention although the success of Indigenous Protected Areas is little understood. Created under formal conservation categories which permit economic activity and job creation for traditional owners and supported to some degree by funded Aboriginal Ranger programs, they have been declared over 64 million hectares across Australia in the last decade: amounting now to 40 per cent of the National Reserve System.

Earlier, the New South Wales land rights regime survived the failed attempt of the Hawke Government to introduce national land rights legislation: overcome as that was by the resistance of mining companies, the pastoral industry and the Burke Labor Government of Western Australia. So it is especially notable that last year's landmark Noongar Settlement – achieved after long negotiation between the Aboriginal people living within the most densely settled part of southwest Western Australia and their state Government – contains many elements that were first present in Frank Walker's Act of thirty years ago.

And today only a few Indigenous organisations have anything resembling the financial stability and independence available to the New South Wales Land Council. It is something of a beacon for self-determination.

Self-determination

Forty-five years ago Kevin Gilbert had asked for land rights and some non-dictatorial help – exactly what Frank Walker felt he should provide. At the same time Gilbert demanded respect from white Australia in his usual robust manner. He understood that Aboriginal people did not want to be "done to."

"…No grassroots black," he said, "is ever going to regard *any* hideously expensive, white-anted, white-controlled showpiece, no matter how much it costs, as anything but the travesty of truth it is. *When* will white men ever realise that it is no use giving the substance unless they also give the spirit …[Otherwise] it becomes mere palliation. Real compensation will only be paid in so far as the money sets up a situation which allows for real human growth for blacks".[31]

27 *Because a White Man'll Never Do It*, p183
28 Don Weatherburn, *Arresting Incarceration,* p149.
29 *Because A White Man'll Never Do It,* p205.
30 "Legends of Land Rights", a video interview posted on the website of the New South Wales Aboriginal Land Council, 3 April 2012.
31 *Because a White Man'll Never Do It*, p184.

I can also imagine him saying that an absolutely decent initiative like the Closing the Gap program cannot be enough *on its own*. A goal of statistical equality may concern important substance: but you find the spirit in concern for rights and responsibility, the formal acceptance of difference and the acknowledgement of heritage: those are the things that provide what Noel Pearson has elegantly called "a rightful place" for Aboriginal people in a more complete Commonwealth.[32]

Gilbert was asking for a strong form of self-determination in the terms of Articles 3 and 4 of the 2007 UN Declaration on the Rights of Indigenous People, which speak of their right to freely pursue their own development and the right to autonomy or self-government in matters relating to their internal and local affairs. Present day negotiations concerning Constitutional Recognition are difficult enough – it is gratifying to see that we are likely finally to get that matter settled in 2017 – but Gilbert was even then talking of going further: a Treaty, dedicated Aboriginal seats in the national parliament as there are Maori seats in the New Zealand Parliament.

Gilbert was also, I think, anticipating those elements of self-determination and engagement expressed now in Articles 18 and 19 of the UN Declaration which refer on the one hand, to the right of Indigenous peoples to participate in decision-making in matters affecting their interests through representatives chosen by themselves and on the other hand, to the obligation of States to negotiate and cooperate in good faith.

In fact the Whitlam Government did formally abandon the colonial era policy of assimilation and replace it with a general policy of self-determination. Whitlam, being himself, saw this as a matter of international legal obligation. Even so, the practice was testing. Conditions in a good many Aboriginal communities, especially in remote northern Australia, became more and not less difficult in the years that followed.[33]

In 1990 the Parliamentary Standing Committee on Aboriginal and Torres Strait Islander Affairs was comprehensively critical of the way that so called self-determination policies had operated in practice. It said that programs and policies had been implemented without the consultation that defined genuine self-determination, that [Aboriginal] Council management structures had been imposed with no regard for traditional decision-making processes and that Aboriginal people had not been assisted to develop the capacity to manage their own communities according to the Government's requirements.[34]

The 1991 Royal Commission on Aboriginal Deaths in Custody changed the national debate about Aboriginal affairs forever. After years of deliberation it came adamantly to support the idea of self-determination and empowerment. Former Commissioner Hal Wootton says that the commonest message the Commission received from Indigenous people "was that they were not taken seriously as individuals or as a people, not listened to, not recognised … there was an ingrained pattern of white domination in policy making, service delivery and community relations that had survived the years of so-called self- determination." And that's why the Report of National Commissioner Elliott Johnston "targeted disempowerment, advocating an end to domination and the return of control of their lives and communities to Aboriginal hands".[35]

Changing the community

It might fairly be said that the Hawke and Keating Governments supported the Royal Commission's recommendations and saw the elected Aboriginal and Torres Strait Islander Commission (ATSIC) as a serious instrument of engagement.

However, the Howard Government waged a culture war against the whole Keating social legacy: the wonderful Redfern Speech, native title legislation, support for a republic. It abandoned even the rhetoric of self-determination, preferring an approach that it called "mainstreaming", which was nearly impossible to distinguish from assimilation. It seemed to cling to the fearful belief that self-determination might involve formal secession and a challenge to the territorial integrity of Australia. Howard's agenda was almost diametrically opposed to the UN Declaration on the Rights of Indigenous People. No wonder his government refused to sign it in 2007: the Labor Government did that in 2009.

At his first press conference John Howard announced an intention to appoint an administrator to take over ATSIC, launching what Laura Tingle has called "a war on Indigenous organisations".[36] He later abolished ATSIC – and more importantly its regional administrative structures – on the grounds of financial mismanagement that could have been fairly easily corrected. He cut legal aid drastically. He diluted the provisions for native title after the High Court had extended them over leasehold land in the Wik Case. He refused to walk across the Harbour Bridge for Reconciliation in 2000 and he refused to make an Apology to the Stolen Generation, ever.

But the worst was saved for last. On the eve of the 2007 general election the Howard Government launched a sudden, manifestly ill-planned and grotesquely wasteful "emergency Intervention" on the Indigenous people of the Northern Territory. It was led by the military and regarded with utter dismay by the authors of the *Little Children Are Sacred Report* to which it was allegedly responding.[37] This was not a matter of failing to consult in good faith: it was a defiant failure to consult at all. The deliberate attack upon Indigenous autonomy was nothing to do with any mainstream I know about. It was a radical neoconservative political strategy with a strong element of law and order wedge thrown in for the purpose of imminent federal election as well.

I went to one community six months later and met the Federal Government's appointed business manager for the Intervention. He had no relevant training and my impression was that he was not precisely certain which part of the country he was in. At another community the business

32 Noel Pearson, "A Rightful Place. Race, recognition and a more complete Commonwealth", *Quarterly Essay* No 55, 2014.

33 Writers like Peter Sutton (*The Politics of Suffering*, *Indigenous Australia and the end of the liberal consensus,* Melbourne University Press, 2009) speak of the failure of self-determination policies. However others, like Sarah Maddison ("Indigenous autonomy matters: what's wrong with the Australian Government's 'intervention' in Aboriginal communities," *Australian Journal of Human Rights*, Volume 14(1) 2008), argue to the contrary that the failure of Government administration to implement genuine self-determination policies actually deepened dependency.

34 House of Representatives Standing Committee on Aboriginal and Islander Affairs, *Our Future, ourselves: Aboriginal and Torres Strait Islander community control, management and resources*, Canberra, 1990.

35 From a paper delivered to the Queensland University of Technology School of Justice on the twentieth anniversary of the RCIADIC, 18 November 2011 (personal communication).

36 Laura Tingle, "Political Amnesia. How we forgot how to govern", *Quarterly Essay* No 60, 2015, p32.

37 Lindsay Murdoch, 'Aboriginal action 'a betrayal,'" *Sydney Morning Herald*, 6 August 2007.

manager had many years of experience with poverty alleviation in the Third World. He broke down and wept as he explained to me what he felt to be the futility of the process underway.

You will understand that I'm not at all arguing that there are not profoundly serious problems to be confronted in some communities and I'm not blaming the Army, which behaved professionally. I'm saying that a hyped-up military-backed takeover is a downright stupid way to deal with acute and complex social problems that have in fact been present for many years. Nevertheless the subsequent Labor Governments only ameliorated its most oppressive elements: the suspension of the Human Rights Act, blanket compulsory income management, the ideological proposal to destroy the successful Community Development Employment Program (CDEP).

The whole Intervention exercise has been extended with bipartisan agreement until 2022. To cap it all off, the Abbott government – of which a good deal had been hoped in this area – cut overall funding for Aboriginal organisations severely and introduced entirely altered administrative arrangements without any consultation to speak of at all. It launched its own war on the Human Rights Commission for good measure.

Recently the Castan Centre for Human Rights of Monash University published an analysis showing that the Intervention had just about entirely failed to produce an improvement in circumstances. I understand that there is deep discouragement among Aboriginal leaders especially in the Northern Territory.

Twenty years ago ATSIC asked for a broad set of principles for Indigenous social justice and the development of relations between government and Indigenous people to be negotiated and legislated. It's still a good idea. The concept of self-determination is not radical in principle: in the world it's mainstream and it's common sense. Insofar as it supports attempts to maintain elements of ancient cultures it embraces conservatism.

There is an economic literature of Himalayan proportions, from the World Bank down, demonstrating that community based decision-making and local leadership remain essential to the effective conduct of local governance and affairs in Indigenous development. There is a substantial public health literature to show that those with the least control over their lives have the poorest health.

The well-respected Harvard University Project on American Indian Economic Development has consistently found that, "When Native Nations make their own decisions about what development approach to take, they consistently out-perform external decision-makers on matters as diverse as governmental form, natural resource management, economic development, health care and social service provision."

The authoritative Indigenous Community Governance Project at The Australian National University[38] provides a great deal of practical information about how to run Indigenous organisations. Its overall findings are summarised by the anthropologist Mary Edmunds in this way:

"…there will be no human rights for Aboriginal people until they have some genuine decision-making power and the responsibilities to go with that; and to have that happen with the facilitation and mentoring of governments … not just 'hit and run' like the self-determination policy proved to be [in northern Australia] but sustained, informed and bureaucratically *enabling* rather than obstructing".[39]

The Australian Productivity Commission[40] is not known for its revolutionary tendencies. But here is the list of the high level principles that, after much consideration, it identifies as underpinning successful Indigenous programs: flexibility of design and delivery so that *local* needs and contexts can be taken into account; community involvement and engagement in both the development and delivery of programs; the importance of building trust and relationships*;* a well trained and well resourced workforce, with an emphasis on retention of staff; continuity and coordination of services.

There are of course organisations and local programs that live up to these ideals, not least in the health sector. Nevertheless one grows weary of reading reports that complain of Indigenous communities and organisations living in a world beset by pilot programs with indecisive results, short term funding arrangements, pointlessly onerous accountability requirements, lack of program coordination, erratically changing policy positions and disruptive bureaucratic restructures. The Human Rights Commissioner Mick Gooda reminds us that the federal structures for Indigenous administration have been completely changed six times in twenty years. He suggests precisely that many of these changes "are symptomatic of government failure to adequately include Aboriginal and Torres Strait Islander people in decision making".[41]

Whatever the implementation problems of the past, the best way to introduce new policies to Indigenous communities is not to impose solutions as if one size fits all or the solution is already known. Rather it is to engage seriously and openly through some kind of collaboration between the communities, experts, Indigenous organisations and the various levels of Government.

Take the problem of alcohol abuse, so closely identified with problems of violence embedded in offending behaviour. Specialists from the National Drug Research Institute at Curtin University have prepared The Resource Sheet of the Closing the Gap Clearing House concerning the reduction of alcohol-related harm.[42] It summarises the existing scientific research into effective methods to control the supply and demand of alcohol and to reduce harm. In the section explaining "what works" the authors say, "factors which facilitate effective provision of AOD services to Indigenous communities include Indigenous community control; adequate resourcing and support; and planned, comprehensive intervention." What they say "doesn't work" – apart from factors that generally cause alcohol control programs to fail – are "interventions

38 See the various publications of the *Indigenous Community Governance Project* from 2006 onward for the Centre for Aboriginal Economic Policy Research, Australian National University. See also M. Dodson and D.E. Smith, 'Governance for Sustainable Development: Strategic issues and principles for Indigenous Australian communities,' Centre For Aboriginal Economic Policy Research, Australian National University, Discussion Paper 250/2013.

39 Mary Edmunds, "The Northern Territory Intervention and Human Rights, An Anthropological Perspective", *Perspectives 3,* The Whitlam Institute within the University of Western Sydney, November 2010.

40 Australian Government Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators Report 2014*, Canberra 2014.

41 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015*, Australian Human Rights Commission, Sydney 2015, p38.

42 Dennis Gray and Edward Wilkes, National Drug Research Institute, Curtin University.

designed for the non-Indigenous population that are imposed without local Indigenous community control and culturally appropriate adaptation."

Take family violence and child sexual assault, so closely identified with high incarceration levels. The *real* recommendations of *The Little Children are Sacred* Report[43] bear quite strong resemblance to the earlier New South Wales Report called *Breaking The Silence*[44], which was mostly written by Aboriginal women. Both Reports speak of the background problem of social breakdown, loss of identity and control; both make various specific recommendations about improvement in the practices of government agencies. But more than that they support joined up Family Violence Prevention Services and Aboriginal Legal Services and discuss ways in which the community can take more control of the issue. The New South Wales report discusses the famous Healing Circle developed in Hollow Water, Manitoba at length.

The Little Children are Sacred Report dwells on the importance of school and in my own view State institutions like schools and hospitals are somewhat unsung heroes in the long struggle to end Aboriginal disadvantage. I acknowledge that the New South Wales Government has continued to develop policies for effective engagement of schools in the community. They do have a powerful role in the provision of remedial education and the encouragement of cultural respect among all children through the wider curriculum. A strong level of commitment is normal among teaching staff, itself an ingredient of success. In areas of significant Aboriginal population I have seen that schools with high levels of community engagement can be centres of inspirational community development.[45]

If you have strong education, together with useful programs to approach problems of family violence and the alcohol in place, you are likely to be on track to reduce offending behaviour in a community over time.

I've previously mentioned the Parliamentary Committee recommendation for community controlled diversion programs. If we have a successful network of Indigenous Protected Areas in place now, supported with some Federal funds at least, why can we not have a systematic network of accredited Indigenous Diversion Programs to which magistrates sitting in remote areas can refer young and minor offenders?

And these examples lead me to place very considerable significance upon an initiative being undertaken by the NGO Just Reinvest New South Wales and its philanthropic funders in Bourke at the present time. It strives to meet the high level principles that are set out by the Productivity Commission: strives to respect the human rights of the Bourke community and also to find practical, permanent ways to reduce rates of offending and imprisonment.

The idea of 'justice reinvestment' has been gathering strength in Australia over some years. It is associated in the United States with the introduction of measures that take money out of absurdly bloated State Corrections budgets and invest it in measures to reduce offending in communities with high crime rates. Bourke has a very high crime rate.

In the United States 'justice reinvestment' policy is generally a 'top down' exercise: rational but directed essentially to revenue considerations. The Bourke process is quite different. Just Reinvest is working with local Aboriginal organisations to gather precise information, and in cooperation with them to devise a policy for public safety and youth diversion to fit the needs of the town. It seeks to reframe government expenditure but it requires full engagement by local people to do so. New South Wales Police and the Human Rights Commissioner support the initiative.

The Plan will need to be approved by the key representatives of the Aboriginal community. It will also require agreement by a very wide range of existing government agencies and NGOs to abandon their individual organisational plans for Bourke and instead to accept "a common agenda," a shared form of measurement and alignment of effort to a plan that everybody has agreed to. This would produce an extraordinary thing: not a conventional partnership but a new kind of centralised organisation with a small secretariat and a single plan of collective action – government, non-government and self-determining community all accepting one plan for Bourke.[46] The planning process becomes itself a process of social change.

Already specific initiatives have been started to deal with issues that often bring young offenders into their first contact with the justice system: driver licensing matters, fine default and police bail arrangements. And now Walgett elders and the School of Social Sciences at the University of New South Wales are devising a similar initiative.

The "Change the Record" Campaign of the National Justice Coalition – which includes the Law Council of Australia and the National Aboriginal and Torres Strait Islander Legal Services – and others that I have mentioned, offer the possibility of a much larger political movement.

It is past time for all people of goodwill to get behind Indigenous leaders in a political campaign for reform, to do the things which must be done, in spirit and in substance, that will allow us together to make the principles of the United Nations Declaration on the Rights of Indigenous People a reality of which the next generation may be proud.

43 R. Wild and P. Anderson, *Ampe Akelyernemane Meke Mekarle: Little Children are Sacred*, Report of The Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, Darwin 2007.

44 Aboriginal Sexual Assault Taskforce, *Breaking The Silence*: *addressing child sexual assault in Aboriginal communities in New South Wales*, Attorney General's Department, Sydney 2006.

45 The Menindee Central School, for instance, is a partner in an established accommodation venture and proposals also for a youth centre, a language and culture centre and an engineering fabrication enterprise, all managed by a Board with majority Indigenous membership.

46 See John Kania and Mark Kramer, Collective Impact, *Stanford Social Innovation Review*, Winter 2011.

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