IGNITE JOURNAL

Blackstone's social justice journal

BLACKSTONE SOCIETY

WAJA
WA JUSTICE ASSOCIATION

Foreword

In a world that constantly grapples with issues of equity, diversity, and social justice, the power of knowledge and discourse cannot be underestimated. It is with great pride and enthusiasm that we, the UWA Blackstone Society, present to you the latest edition of Ignite, an equity, diversity, and social justice publication.

This journal is a celebration of diversity and a call to action. It is a reminder that every voice matters, and that the pursuit of social justice is a collective endeavour. It is a platform for voices and perspectives that often go unheard, and where genuine conversations can be used to spark change. We invite you to immerse yourself in these pages, to engage with the ideas presented, and to join us in the ongoing dialogue that is essential for progress.

Within these pages, you will find a diverse array of insights from students, scholars, professionals, and judicial officers all united by a common goal: to shed light on the issues that shape our society and to advocate for a fairer, more just world.

This year we asked for contributions focused on our prompt; ‘let’s sweat the small things – they can have a big impact’. We encouraged submissions on how seemingly small actions, ideas, or initiatives can lead to significant effects in the social justice realm. This journal is all about the big ideas, the small actions, and everything in between that make a difference in the world of social justice.

The journey towards social justice is ongoing and multifaceted and Ignite is a testament to the dedication and passion of our contributors. We specifically thank the WA Justice Association for partnering with us to produce the 7th volume of Ignite, and the articles they have contributed. We also extend our heartfelt gratitude to all those who have contributed to this publication, as well as to our readers for engaging with these important topics.

Together, we can continue to strive for a world where justice is not just an ideal but a reality for all. We hope that the ideas and experiences shared here will inspire thoughtful conversation, spark action, and drive positive change.

May the insights within these pages ignite your own commitment to the cause of social justice.

Sophie Archibald

Editor

2023

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Social Justice?

Judge Charlotte Wallace
District Court of Western Australia

I was approached by the editor of *Ignite* to write a piece about social justice in the context of my judicial role at the District Court of Western Australia. The more I reflected on the meaning of 'social justice', which encapsulates the fair treatment of all people regardless of race, gender, colour, ethnicity, socio-economic background, sexual preference, disability or religious belief, the increasing difficulty it engendered in me. This is because, as a judicial officer presiding over predominantly criminal matters, the vast majority of those who come before me, both as accused/offender and as complainant/victim, are of Indigenous ethnicity, often from a background of severe disadvantage, faced with multi-faceted vulnerabilities. Thus, my starting position is one that does *not* reflect social justice – the statistics disavow that starting premise.

From my years on the Bench, in the face of obvious social injustices, what I have learnt is that the courts must adapt and effectively contort the formal confines of the judicial role in an attempt to provide *meaningful engagement within the justice system.* If the starting premise is social inequality, which it must be, then how do we in the judiciary ensure meaningful engagement and what does that require from us? And are we able to deliver it without encroaching into areas of precarious informality which potentially, whilst assisting an offender in gaining a voice, prejudice them by what they have to say? Is there a risk of breaching procedural fairness in active and meaningful engagement if it occurs spontaneously without notice and/or opportunity to respond? Are there safeguards which can be put in place to ameliorate such risks?

Perhaps a case example can best illustrate these tensions. I recently sentenced a young Indigenous man who had spent most of his life institutionalised. His childhood was one of extreme deprivation, abuse, and poverty. His normalcy was one of severe neglect. His constant was fear of harm; a fear which was well founded. His older

brother injected him with methamphetamine at the age of eight years. His father introduced him to his first home burglary at the age of 10 years. Thereafter followed the life which was already predetermined – one of drug addiction, crime, and institutionalisation.

On this occasion I was sentencing the offender for an armed robbery at a commercial business, namely the stealing of cash whilst armed with a screwdriver. The offender pleaded guilty. The offence took place in the context of homelessness, and an attempt to escape extreme violence perpetrated against the offender on the streets. During the sentencing hearing, as with any sentencing hearing, the offender (and his life) was discussed as if he were not present. Indeed, counsel's role is to make all appropriate submissions in mitigation on behalf of their client. Counsel undertook that role diligently. However, the offender wished for his own voice to be heard and the following (unexpected) exchange then took place:

ACCUSED: *There's no programs in prison. That's not helping me, you know what I mean?*

WALLACE DCJ: *No, I know there has been no programs yet in prison, I accept that.*

ACCUSED: *There's nothing helping me. If I had a real program, I will stick to it and do the right thing. I know what the right thing is. That's why I'm so sorry for what I've done, because I know it was wrong. And I'm sorry for speaking up like this, but - - -*

WALLACE DCJ: *No, that's okay.*

ACCUSED: ***But sometimes I feel like I need to be heard, you know, because no one listens to me at the end of the day.***

WALLACE DCJ: *I'm listening, and I don't mind you speaking up.*

ACCUSED: *He [counsel] can tell you all he wants about my life, and it's true*, ***but none of it is really coming from me.***

WALLACE DCJ: *I understand how difficult this process is for you and I appreciate you having the courage to speak up.*

ACCUSED: *But I'm sorry for speaking up like that.*

WALLACE DCJ: *Don't ever apologise for speaking up. I'm happy to hear your voice, and if you want to speak, don't be afraid to do so.*

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PROSECUTOR: *The State hopes that the offender can get whatever treatment he needs so that he can become a productive member of society. And I don't wish to sound trite in saying this, but the State's position is that at this particular point in time, he has a debt to repay to society because of the crime that he committed.*

WALLACE DCJ: *Society has a debt to repay to him too.*

PROSECUTOR: *Indeed. There is disadvantage, indeed.*

WALLACE DCJ: *Well, he has been the victim of many, many, many offences. So, society needs to repay its debt to him in addition to the reciprocity of him giving back to society.*

PROSECUTOR: *Certainly.*

ACCUSED: *All we want is a chance. Give us the right chance, and we will prove everything to you, you know? We promise the world to you that we won't let you down, but we just need the right chance. No one has given us a chance.*

PROSECUTOR: *The State, respectfully, adopts the observations your Honour has already made.*

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Ultimately the only outcome could be a sentence of immediate imprisonment which was conceded appropriately by defence. As a result of sentencing the offender was then eligible to apply for participation in programs within custody, which was his strong desire.

Following the sentencing hearing I was made aware through my staff that the offender communicated to various court staff his gratitude at having been heard. That is, he had a voice. A voice which acknowledged him as a human being who had value and import. It was, as I understand it, what mattered most to him – far more perhaps than the outcome itself.

The point I wish to ultimately make is this: access to justice, meaningful engagement, and being treated with dignity, compassion and respect are all factors which are inextricably interwoven into what 'social justice' means to me as a judicial officer. How can we achieve this? Do we invite offenders to speak at a sentencing hearing in the way that victims are invited routinely to provide a victim impact statement? If an Indigenous offender has difficulty of expression (verbal and/or written) should there be Indigenous elders who assist to give the voiceless the words which may otherwise elude them? Can an offender's past history be conveyed to the Bench by family members or elders who better understand important cultural sensitivities?

The answers to these questions are there to be found, of that I have no doubt.

In the meantime, what I do know, is that I was taught a lot on the day that a young, disadvantaged Indigenous offender had the courage to bridge the barrier of power, prestige, and privilege to speak to me in his own words. And all I know…. is that it mattered.

IF THERE'S A WILL THERE'S A WAY: THE IMPACT OF ESTATE PLANNING ON FIRST NATIONS COMMUNITIES

April Barton
Gilbert + Tobin

A Introduction

The Pilbara region is an interwoven tapestry of industry and culture. Ancient First Nations petroglyphs which plead for UNESCO world heritage protection[1] hold ground between Mining conglomerates. It is a complex and unique neighbourhood with relations strained by the reality of stark compromise. We arrive as a group of lawyers for a pro bono Wills Clinic, equipped with a suitcase of files and the hope of making a difference. First Nations families gather at the local Lotteries House so we can discuss the meaning of a Will – a concept which in these circumstances seems both deeply profound and trivial. The language of Wills and Estates is unfamiliar though cultural heritage, family, and protection of Country are concepts that the locals know well.

An interpreter sits beside me who speaks 10 of the 120 different First Nations languages spoken around Australia, transforming abstract concepts like "executor" and "residual estates." The outback heat is pervasive, we lean on our red dirt-stained instruction sheets to execute documents on the back of a Ute. My client is a respected Elder. She has six children, only one of whom was born by her, and she plays the role of matriarch to plenty more. She queries whether her "adopted" children can be protected under her Will – a relatively simple question which engages complex considerations around the recognition of First Nations kinship within Australian intestacy law.

In our usual course of instruction-taking, I ask the client whether she has life insurance. She seems irritated by the line of questioning, and I begin to understand her concern stems from the funeral funds which have robbed her people. Only recently, ASIC launched civil penalty proceedings against five directors of the Youpla Group, which

[1] 'World Heritage Listing' *Murujuga Aboriginal Corporation* (Web Page) <https://www.murujuga.org.au/world-heritage/world-heritage- listing/>.

provided funeral insurance predominantly marketed towards First Nations people.[2] It is alleged that the Youpla Group maintained insurance arrangements which were not in the interests of the members, leaving many vulnerable to unaffordable premium increases whilst unaware of the risks to the viability of the funds.[3] It becomes clear to me that the mention of funerals, insurance and future planning are semantically nuanced by trauma. I rely heavily on the Interpreter not only to bridge language gaps but to build confidence where the foundation is of historical mistrust. This is only one question of a 14-page instruction sheet; like a palimpsest the layers begin to reveal themselves. Upon confirming her desire to create an Enduring Power of Attorney, the client queries, *"Does this mean you will be my Attorney*?" I explain and clarify, and I am left shocked that a stranger would be willing to grant me such power.

B The Pro Bono Model

In Western Australia, most First Nations people do not have a Will.[4] Wills are conceptually foreign to understandings of kinship and Country. To some First Nations people it is a stranger – it speaks within the vernacular of ownership and conjugality, rather than custodianship or community. And nonetheless, as we approach the referendum for a constitutionally entrenched First Nations Voice, the significance of people having a say in their affairs feels more cogent than ever. In circumstances where a person dies without a Will in Western Australia, the administration of their estate will be distributed according to the general intestacy laws under the *Administration Act 1903* (WA). This may leave some First Nations people subject to distribution which is pre-determined by specific ideals of familial lineage. In this sense, the Will is a tool of self-determination; it enables outcomes that are culturally and individually appropriate. It is no surprise then that 15% of all civil legal need in regional Western Australia relates to Wills and Estates.[5]

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[2] 'ASIC launches proceedings against five Youpla Group directors' *Australian Securities & Investments Commission* (Web Page, 31 August 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-237mr-asic-launches-proceedings-against-five-youpla-group-directors/>.

[3] Ibid.

[4] There is a lack of available data for Western Australia, however the Aboriginal will-making rate in Australia is estimated to be 2-6%. See Prue Vines 'Giving a Voice to Aboriginal People: Why Aboriginal People in Australia Need Wills More than Anyone Else,' (2019) University of New South Wales Law Society Court of Conscience 80, 82.

[5] ACIL Allen, *Assessment on the Current Legal Needs in Western Australia,* (Final Report to Government of Western Australia, November 2022) 127.

Importantly, and a key reason why Gilbert + Tobin began working with First Nations communities on Wills and Estates, is the prophylactic impact of having a Will in avoiding burial disputes. Almost 70% of all burial disputes that proceed to court involve First Nations people.[6] There is a significant appetite for this legal service offering. The Pro Bono Wills Clinic model is simple. Lawyers offer two days of their time, and the clients receive greater control and autonomy over their future in the form of a suite of documents. At Gilbert + Tobin, the home of my pro bono team, Partners Anne Cregan who pioneered the Model, and Michelle Hannon, have been committed to the Wills Clinic practice for decades and continue to draft estate planning documents for well over a hundred First Nations clients each year.

The Model was a response to an identified gap in legal need, which is reinforced by the immense gratitude of our clients. The exchange brings a renewed existential meaning to the work of lawyers – we are invited into the lives of our clients and entrusted with the details of what they care about most. It is uniquely intimate in a way that is distinct from the day-to-day work of the corporate lawyer. A simple yet salient step law firms can take to pursue more just and equitable outcomes for First Nations people. The Will presents a critical intersection of law and culture as we seek to re-*right* Australia and the pro bono lawyer helps pave the way.

[6] Prue Vines, 'When there's a will' *UNSW Newsroom* (Webpage, 15 July 2013) < https://newsroom.unsw.edu.au/news/law/where-theres-will>.

TSD Plans: The Small Details That Can Transform Mental Health Care

Helen Do

WAJA Advocacy Director

The Treatment, Support, and Discharge Planning ('**TSD Plans**') framework introduced under the *Mental Health Act 2014* (WA) ('**MHA**') was designed to promote a recovery-focused approach in mental health, emphasising inclusive decision-making with individuals and their support networks. However, these goals are not being met in practice due to poor compliance with TSD Planning requirements under the MHA.[1] This article draws on the WA Justice Association's ('**WAJA'**) Recommendations Report, '*Delivering on a commitment: Achieving effective Treatment, Support and Discharge Planning for persons with involuntary status under the Mental Health Act 2014 (WA)*',[2] to discuss how the detailed intricacies in TSD Plans dramatically affect rehabilitation outcomes.

What is a TSD Plan?

A TSD Plan is a plan for the treatment of a person while they are the subject of an involuntary treatment order concerning mental health treatment, and for their support and discharge during and after the order.[3]

Under the MHA, it is a requirement that a TSD Plan is provided to all persons who are:

(1) admitted to hospital involuntarily under an inpatient treatment order;
(2) detained as a mentally impaired accused under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA); or
(3) under a community treatment order.[4]

[1] Mental Health Advocacy Service, *Treatment Support and Discharge Plans Inquiry* (Final Report, March 2018) 3 (*'MHAS Inquiry*').
[2] WA Justice Association, *Delivering on a commitment: Achieving effective Treatment, Support and Discharge Planning for persons with involuntary status under the Mental Health Act 2014 (WA)* (Recommendation Report, 19 June 2023) ('*Recommendation Report*')
[3] Chief Psychiatrist Guidelines (December 2015) 26.
[4] *Mental Health Act 2014* (WA) s 185 ('*MHA*').

Value of TSD Plans

TSD Plans have the power to transform and reintegrate people back into society, but their effectiveness hinges on precise personalisation. Prioritising a person-led approach, these plans empower individuals by tailoring treatment to their unique needs and goals, fostering a sense of control and contribution to their own recovery.[5] Moreover, they nurture therapeutic relationships between individuals and their treatment teams, often surpassing the impact of medication alone.[6] TSD Plans also address the concerns of carers, family, and personal support people, ensuring their valuable insights are recognized and integrated into the care process.[7] These plans facilitate information sharing and ensure continuity of care, and reduce confusing and disrupting treatment transitions.[8] Lastly, when developed in genuine partnership, TSD Plans can mitigate the trauma associated with involuntary admissions and significantly improve the discharge planning process, enhancing the safety and effectiveness of transitions from hospital to community-based care.[9]

Repercussions of Non-Compliance

A TSD Plan must comply with both the MHA requirements and the Guidelines of Chief Psychiatrists.[10] However, the 2018 Treatment Support and Discharge Plans Inquiry, conducted by the Mental Health Advocacy Service ('**MHAS**'), confirmed the general acceptance prior to the MHAS Inquiry that 'most mental health services were not complying fully' with the TSD Plan requirements under the MHA.[11] Further, the MHAS Annual Report 2021-22 confirms that there is 'no effective system-wide implementation' of TSD Plans and that individuals' access to their rights under their TSD Plan is 'still patchy'. Further, numerous recommendations have been made from 2019 to present encouraging psychiatrists to review TSD Plans for effective use.[12]

[5] Recommendation Report (n 2).
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Mental Health Tribunal, *Annual Report 2021-22* (Report, 15 August 2022) 13.
[11] MHAS Inquiry (n 1).
[12] Mental Health Tribunal, *Annual Report 2021-22* (Report, 15 August 2022) 13; Mental Health Tribunal, *Annual Report 2020-21* (Report, 22 September 2021) 13; Mental Health Tribunal, *Annual Report 2019-20* (Report, 27 August 2020) 16.

Failure to adhere to TSD Plans within the framework of the MHA can result in severe repercussions for individuals grappling with mental health challenges, their support networks, and the broader community. Cases where mental health services do not comply with the collaborative development of effective TSD Plans can sustain a perilous cycle that may ultimately contribute to the worsening of an individual's mental health and well-being.

Although the MHA demands complex TSD Plans, neglecting the intricacies that render these Plans effective can cause large-scale harm to the community. Low-quality TSD Plans will result in rising healthcare costs due to a lack of early intervention and increased reliance on crisis services.[13] Discharged individuals may face homelessness without an appropriate TSD Plan to arrange affordable accommodation/shelter.[14] Young people and individuals with mental illnesses may find themselves continuous victims of the criminal justice system as their challenges are exacerbated due to a lack of support and corrective processes that should be integrated in their TSD Plan.[15] This is especially concerning for Aboriginal and Torres Strait Islander people who have elevated rates of mental health challenges, stemming from historical trauma, land dispossession, and forced family separations due to colonization.[16] The unique challenges faced by Aboriginal and Torres Strait Island people in the mental health system, demand meaningful efforts to be made to meet their needs and provide a level of care that meets cultural health and wellbeing standards.

WAJA's Recommendations

In collaboration with industry consultants, WAJA puts forth several recommendations to improve TSD Plans. These seemingly pedantic amendments would significantly impact the effectiveness of current TSD Plans.

[13] Jason Payne, Sarah Macgregor & Hayley McDonald, 'Homelessness and housing stress among police detainees: Results from the DUMA program' Trends & issues in crime and criminal justice (2015) 492.
[14] Ibid.
[15] Productivity Commission Inquiry Report into Mental Health 2020 (Final Report, June 2020) vol 3, 1015.
[16] Leilani Darwin, Stacey Vervoort, Emma Vollert and Shol Blustein, 'Intergenerational trauma and mental health' Australian Institute of Health and Welfare, Australian Government (2023), 2.

Increased training, informative resources and Standardized TSD Planning Forms would prioritise person-centred care and standardise high-quality TSD Plans. Inclusion and advocation of family members/Personal Support Persons (**PSPs**) with lived experience, Elders and Traditional Healers, local cultural leaders and agencies, would better guide the health care system towards effective TSD Plans that address every individual's unique needs. Empowering the Mental Health Tribunal to order the creation or review of TSD plans by psychiatrists, issue compliance notices to adhere to the MHA, and enforce timing requirements for TSD Plans, would provide a great legal obligation on organisations to create TSD Plans operating in the interests of the individual.

These recommendations aim to enhance TSD Plans, ensuring they are person-centred, culturally sensitive, and compliant with mental health regulations. Collaborative efforts involving various stakeholders and continuous advocacy are essential for their successful implementation. The recommendations and required action moving forward may seem minutiae, but it is the small stuff that makes the biggest difference in transforming society.

CONFIRMATION BIAS AND FALSE CONFESSIONS BY INDIGENOUS SUSPECTS

Lexi Schneider

UWA Law Student

I INTRODUCTION

Confirmation bias, or 'tunnel vision', is the process of selecting and interpreting information in a way that is consistent with pre-existing assumptions and beliefs.[1] The literature has affirmed the ways in which confirmation bias during the investigative stage can skew the fact finder's judgment in a criminal trial.[2] This paper will focus on the effects of false confessions by innocent Indigenous suspects. It will be concluded that evidence law in Western Australia is unable to mitigate the harmful effects of confirmation bias in this context.

II OBTAINING CONFESSIONS

A *Bias*

Scholarship has indicated that investigators may form a presumption of guilt in the pre-interrogation process.[3] This may lead to the utilisation of 'heavy-handed interrogation tactics' to induce a false confession by a suspect.[4] Moreover, one study found that the suspect's innocence had no effect on mitigating this exertion of pressure.[5] Rather, it

[1] Vanessa Meterko and Glinda Cooper, 'Cognitive Biases in Criminal Case Evaluation: A Review of the Research' (2021) 37(1) *Journal of Police and Criminal Psychology* 101, 106 citing Raymond S. Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2(2) *Review of General Psychology* 175.
[2] See Karl Ask and Pär Anders Garnhag, 'Motivational Bias in Criminal Investigators' Judgments of Witness Reliability' (2007) 37(3) *Journal of Applied Social Psychology* 561.
[3] See eg, Saul M. Kassin, Christine C. Goldstein and Kenneth Savitsky, 'Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt' (2003) 27(2) *Law and Human Behaviour* 187, 198-201; See also Saul M. Kassin, Christian A. Meissner and Rebecca J. Norwick, '"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators' (2005) 29(2) *Law and Human Behaviour* 211, 221-224.
[4] Fadia M. Narchet, Christian A. Meissner and Melissa B. Russano, 'Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions' (2011) 35(6) *Law and Human Behaviour* 452, 452-453.
[5] Kassin, Goldstein and Savitsky (n 3) 199.

led investigators to apply more pressure to achieve an outcome consistent with their hypothesis.[6] This is known as the 'bias snowball effect'.[7]

III INDIGENOUS SUSPECTS

Indigenous Australians are particularly vulnerable to this phenomenon on account of their inherent disadvantage within the criminal justice system.[8] Roach describes this increased risk as a condition of the prejudicial association of Indigenous Australians to crime.[9] Certainly, it may be suggested that the grossly disproportionate incarceration rates of Indigenous persons is evidence that investigators attach a presumption of guilt to an Indigenous suspect early in an investigation.[10] This assertion is consistent with a large body of work indicating the presence of systemic bias and institutional racism within the criminal justice system.[11]

B *Practical Implications*

Confirmation bias in this context is a hinderance to criminal trials as confessional evidence is an extremely incriminating tool against an accused.[12] Several mock-jury experiments indicate that confessions influence verdicts, even if the confessions are coerced.[13] A recanted confession,[14] inconsistencies that undermine the credibility of confessional evidence,[15] nor exculpatory evidence can deter a finding of guilt.[16] Once

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[6] Ibid.
[7] See Steve D. Charman, Melissa Kavetski and Dana H. Mueller, 'Cognitive Bias in the Legal System: Police Officers Evaluate Ambiguous Evidence in a Belief-Consistent Manner' (2017) 6(2) *Journal of Applied Research in Memory and Cognition* 193, 194-199.
[8] Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' (2015) 17(2) 203, 206, 243.
[9] Ibid 206, 222, 224, 229, 243.
[10] See eg, Australian Law Reform Commission, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1998) vol 5, [4.1] (*'RCIADIC'*); See generally ibid 222, 243.
[11] See eg, Grace O'Brien, 'Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia' (2021) 10(2) *Social Sciences* 1, 4-5; See also Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2005) 17(3) *Current Issues in Criminal Justice* 329, 330-333; Cf Don Weatherburn, Jackie Fitzgerald and Jiuzhao Hua, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62(3) 65.
[12] See Saul M. Kassin, Daniel Bogart and Jacqueline Kerner, 'Confessions That Corrupt: Evidence From the DNA Exoneration Case Files' (2012) 23(1) *Psychological Science* 41, 41.
[13] Ibid.
[14] Linda A. Henkel, 'Jurors' Reactions to Recanted Confessions: Do the Defendant's Personal and Dispositional Characteristics Play a Role?' (2008) 14(6) *Psychology, Crime & Law* 565, 572-575.
[15] Lindsay C. Malloy and Michael E. Lamb, 'Biases in Judging Victims and Suspects Whose Statements Are Inconsistent', (2010) 34(1) *Law and Human Behaviour* 46, 46-47; Cf Matthew Palmer et al, 'Inconsistencies undermine the credibility of confession evidence' (2016) 21(1) *Legal and Criminal Psychology* 161, 162.
[16] Lisa E. Hasel and Saul M. Kassin, 'On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?' (2009) 21(1) *Psychological Science* 122, 125.

a fact finder believes a suspect is guilty, it is difficult for them to consider alternative scenarios challenging this belief.[17]

IV EVIDENCE LAW

A *Voluntariness*

Despite a statutory regime regulating the process of properly obtaining confessional evidence,[18] the rules of admissibility are substantially governed by the common law.[19] There are two limbs which may trigger the rule of exclusion.[20] Confessions will be involuntary, so excluded, if they are: 1) derived as a consequence of a suspect's overborne will;[21] or 2) induced by a person in a position of authority.[22] Although the prosecution bears the onus of proof, the defence generally must raise an aspect of the confessional evidence to suggest it was not obtained voluntarily for the matter to be traversed.[23] This is a high threshold. Furthermore, a trial judge may still allow inadmissible confessional evidence to be adduced pursuant to s 155 of the *Criminal Investigation Act 2006* (WA) (*'CIA')*, insofar as the probative value outweighs its undesirability.[24]

I *Narkle*

There are several examples where confessional evidence has been admitted notwithstanding indications of coercion by law-enforcement. In *Narkle v The State of Western Australia ('Narkle'*),[25] the Indigenous suspect admitted to striking the victim and shaking him.[26] The Court rejected the applicant's submission that this

[17] See generally Eric Rassin, 'Blindness to Alternative Scenarios in Evidence Evaluation' (2010) 7(2) *Journal of investigative psychology and offender profiling* 153.
[18] See eg, *Criminal Investigation Act 2006* (WA) s 154.
[19] *Wright v The State of Western Australia* [2010] WASCA 199, [47] (McLure P) (*'Wright')*; See also Jennifer Porter, 'Admissibility of confession evidence: Principles of hearsay and the rule of voluntariness' (2021) 25(2) *The International Journal of Evidence & Proof* 93, 94-95.
[20] *Cleland v The Queen* (1982) 151 CLR 1, 27 (Dawson J).
[21] *McDermott* (n 58) 511-512 (Dixon J); See also *Cornelius v The King* [1936] 55 CLR 235.
[22] Ibid; See also *Collins v The Queen* (1980) 31 ALR 257, 307-309 (Brennan J) (*'Collins')*.
[23] Porter (n 57) 96-97 citing *R v Bosman* (1988) 50 SASR 365; See also *Wright* (n 54) [115]-[116] (Blaxell J).
[24] *Wright* (n 57) [207]-[211] (Blaxell J).
[25] [2014] WASC 328 (Simmonds J) (*'Narkle').*
[26] Ibid [5].

confessional evidence was obtained involuntarily.[27] Simmonds J accepted that there was a 'significant risk that the will of the accused was overborne' during the course of the interview,[28] however this was more indicative of the accused's 'emotional distress' in recalling the events.[29] Furthermore, the confessional evidence was not considered unfair for the purposes of invoking a discretionary exclusion.[30] Although Mr Narkle was acquitted for other reasons,[31] Simmonds J's position on confessional evidence remains concerning.

Consistent with the above discussion, the questioning of police suggests tunnel vision in suspecting Mr Narkle was guilty. In her work on this subject matter, Dr Eades recognises that Indigenous persons communicate in a way distinct to that of 'General Australian English'.[32] In *Narkle,* the Court's understanding of the accused's repetitive avoidance in answering questions demonstrates the way in which Anglo conventions interpret silence.[33] Dr Eades notes that it is not unusual for Indigenous persons to engage in lengthy silences, yet this delay may be construed as mere 'evasion, ignorance, confusion, insolence or even guilt'.[34] Therefore, it is possible that the investigators adopted the belief that Mr Narkle's hesitations were indicative of his culpability. Simmonds J was potentially relying on the investigators' interpretation of the evidence to justify its admission in trial.[35]

II *Stuart*

This issue was more decisive in *Stuart v The King*,[36] whereby an Indigenous man was unfairly convicted of the sexual assault and murder of a young girl.[37] Stuart initially admitted to the charge, signing a typed confession.[38] On appeal, Stuart said: 'I cannot

[27] Ibid [2]; see also at [38].
[28] Ibid [44].
[29] Ibid [56].
[30] Ibid [86].
[31] *Narkle v The State of Western Australia* [2006] WASCA 113, [13]; See also Roach (n 8) 237.
[32] Diane Eades, 'Communication with Aboriginal Speakers of English in the Legal Process' (2012) 32(4) *Australian Journal of Linguistics* 473, 474.
[33] Ibid 478.
[34] Ibid.
[35] Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia: First Steps toward Estimating Prevalence and Causal Contributing Factors' (2015) 17(2) *Flinders Law Journal* 163, 163; See also *Narkle* (n 25) [33], [45], [56], [58].
[36] [1959] 101 CLR 1.
[37] Roach (n 8) 207.
[38] Maicee Harrison and Justin Trounson, 'An Investigation of the Key Factors Leading to the Wrongful Conviction of Aboriginal and Torres Strait Islander Peoples' (2021) 24(4) *Journal of Australian Indigenous Issues* 20, 22.

read or write. Never been to school. I did not see the little girl. I did not kill her. Police hit me. Choked me. Make me say these words...'[39] Stuart's account was dismissed by the High Court, as this lack of comprehension was not raised at an appropriate time by his counsel.[40] The lack of cultural competence in the criminal justice system ensures evidence law fails at protecting vulnerable Indigenous suspects from the harmful implications of confirmation bias.[41]

III *Gibson*

Notwithstanding the above, the rules of admissibility are not always deficient. In *State of Western Australia v Gibson,*[42] Hall J held the confessional evidence of a young Indigenous man was not obtained properly and was hence inadmissible.[43] Specifically, his Honour found the confession was in breach of the *CIA,*[44] involuntary on account of Mr Gibson's overborne will,[45] and unfair to the accused.[46] Importantly, Hall J acknowledges the answers provided by Mr Gibson were 'unreliable because he did not understand what he was being asked, could not communicate his own thoughts adequately in English or gave false answers in order to appear agreeable'.[47] This judgment demonstrates that there is capacity for evidence law to circumvent the effects of confirmation bias.

Mr Gibson subsequently pleaded guilty to a downgraded charge of manslaughter.[48] On appeal, counsel submitted he was coerced into falsely confessing, and he did not understand the consequences of his plea.[49] Although the appeal was successful, this case in its entirety affirms the prevailing vulnerability of Indigenous suspects once they have confessed.[50]

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[39] *Stuart* (n 36) 7.
[40] Ibid 4-5.
[41] Roach (n 8) 205.
[42] [2014] WASC 240 ('Gibbs').
[43] Ibid [183].
[44] Ibid [176]; *Criminal Investigations Act 2006* (WA) s 118, s 137(3)(d), s 138(2)(d).
[45] *Gibbs* (n 42) [175].
[46] Ibid [180].
[47] Ibid [182].
[48] Harrison and Trounson (n 38) 26.
[49] Ibid 26-27.
[50] Tamara Tulich, Harry Blagg and Ava Hill-De Monchaux, 'Miscarriage of Justice in Western Australia: The Case of Gene Gibson'(2017) 5(2) *Griffith Journal of Law & Human Dignity* 119.

V CONCLUSION

Confirmation bias is an issue that continues to plague the criminal litigation process. Attention should be paid to this phenomenon to protect vulnerable Indigenous suspects from further miscarriages of justice.

The Lost Art of Listening

Aline Benkendorf

Law Access

Abstract: At this time in our history, when we are talking about the importance of an Indigenous Voice, it is apt for us all to contemplate the general need to be heard. The relationship of trust and confidence between lawyer and client does not spring into existence upon the signing of a retainer. For that relationship to exist in practice, not just according to legal principle, a lawyer must listen, and a client must believe that they have been truly heard.

In today's fast-paced professional world we are asking more and more of ourselves. Billable hours, corporate targets, external and personal pressures create expectations and motivates a high level of output. But a high level of measurable and tangible output comes at a cost, a cost at odds with our own innate human nature, the need to be HEARD, and the ability to LISTEN. In the legal world of real person clients, re-learning the lost art of listening can make a big difference to those we seek to help.

From our first breath upon entrance to the world, the first cry that is emitted serves a purpose. Babies soon learn that vocalising will bring their carer to their side. As we grow into adulthood, we learn to turn our feelings of discontent into words, seeking advice and comfort from our parents or other trusted individuals. But what if no-one listens? Does that provide comfort? Does it solve whatever the source of the discontent is? Even if the source of the discontent passes, how does that make a person feel? As legal professionals, what if we value the journey as much as we value the outcome?

As lawyers, we often describe ourselves as problem solvers, with emphasis on the overall outcome of the matter and not the wholistic process. In most cases a client comes to a lawyer in some of the most difficult circumstances of their life; a relationship

breakdown, a criminal matter, the death of a loved one, starting up a business. There is understandably human emotion tied up in each and every client seeking a lawyer's assistance. As professionals we are taught to take the emotion out of our vocation and focus on the written letter of the law, tangible facts, and evidence. But these are real people with real emotion who not only need a solution to their legal situation; they need to be heard, and we need to listen.

To really listen is no easy feat. It's difficult to be open-minded, particularly in areas of law where you find yourself desensitized to client circumstances. In order to listen, we must be open to receiving communication without preconceived ideas as to the conveyor's background, education, intelligence level, preferred resolution or outcome, or purpose of their communication. We must be careful to be conscious of our biases, our own lived experiences, and our privilege. We must also resist the urge to formulate our response before the task of listening is finished. Listen to the words, listen to the emotion, listen to the subtext.

Working in Community Legal Centres for most of my legal career, I have significant experience in highly emotional matters where no outcome could ever recompense the client for what has occurred. Where the best possible legal outcome is not even remotely a good outcome in the clients' eyes. It is against this backdrop I learnt that even when there is no favourable legal outcome possible, the client's experience or satisfaction with the service is directly related to time spent with them, giving them the opportunity to express their story including emotions, frustrations, confusion and queries. To understand, you must truly listen, and when you understand, someone has truly been heard.

Whether the organisation is a private practice or community legal centre there are always financial considerations, and when you place listening against the reality of time constraints, billables, and the overall financial cost to the client or service, we need to examine what we can do to balance these competing priorities. Perhaps it's a matter of adjusting our priorities to include the establishment of a relationship of trust

and confidence as part of the service that we provide as lawyers. That means valuing listening to our clients and establishing that relationship as much as we would a carefully drafted minute of proposed orders, sale of business contract, complex legal submission, or plea in mitigation.

Maybe it's time the legal profession recognised its duty to accommodate the humanity in provision of its services They are not provided in a vacuum. Sweating the lost art of listening makes a big difference to those clients whose humanity makes it an innate need to be heard.

Thank you for listening.

The One-Digit Difference:
Raising the Minimum Age of Criminal Responsibility in Western Australia

Claudia Reedy

WAJA Advocacy Officer

A one-digit alteration in the minimum age of criminal responsibility ('**MACR**') from 10 to 14 is not merely a statutory adjustment. It signifies a significant shift towards aligning the juvenile justice system in Western Australia ('**WA**') with established empirical evidence and international human rights standards. This article provides a critical examination of the current legislative stance in WA, adopting a particular focus on the implications of our existing MACR on recidivism. Further, it draws upon the work of the Western Australia Justice Association ('**WAJA**') to provide a guide for future reform.[1]

I Understanding the Current Legislative Position

In WA, children as young as 10 can be arrested, held in police custody, and incarcerated, often far removed from their communities.[2] This policy contrasts sharply with global standards, where the median MACR is 14 years, a one-digit difference to WA's MACR.[3] A study encompassing 90 countries revealed that 68% surveyed have a MACR of 12 or higher, aligning with nations like China, Russia, and Sierra Leone, which have set their MACR at 14 years.[4] The United Nations has urged Australia to elevate its MACR to an internationally acceptable level, emphasising the rehabilitation and best interests of the child as paramount considerations.[5]

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[1] Western Australia Justice Association, *Raise the Age: Opportunities for Diversion and Support in Western Australia* (Report, 2020) <https://static1.squarespace.com/static/5feaa16452f617203ba291a2/t/608b767c7dadbb5e55354081/1619752628136/WAJA+Raise+the+Age+Report+2020+%282%29.pdf> ('*WAJA*').

[2] University of Melbourne, *Raise the Age: Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review* (Report, 2021) 2 https://mspgh.unimelb.edu.au/__data/assets/pdf_file/0010/3311497/JHU-UoM-Raise-The-Age-submission.pdf ('*University of Melbourne*'). See also, The Australia Institute, *Raising the Age of Criminal Responsibility* (Report, December 2020) 2 <https://australiainstitute.org.au/wp-content/uploads/2020/12/P952-Raising-the-age-of-criminal-responsibility-Web.pdf> ('*Australia Institute*').

[3] *WAJA* (n 1) 7.

[4] *Australia Institute* (n 2) 8.

[5] *WAJA* (n 1) 13.

Further to this international criticism,[6] WA possesses one of the lowest MACR's in the country.[7] This has contributed to our state harbouring the second-highest average rate of youth detention in Australia, trailing only the Northern Territory.[8] Indigenous youth in WA are detained at nearly double the national average rate, and are 49 times more likely to be detained than non-Indigenous youth.[9] In addition to compounding systemic inequalities, mounting empirical evidence further suggests this low MACR contributes substantially to high recidivism rates observed across our state.[10]

II. Recidivism as a Critical Indicator

A comprehensive Australian study by O'Brien found as many as 70% of previously detained youths are rearrested within two years.[11] Notably, children who encounter the criminal justice system between the ages of 10 and 14 are significantly more likely to be institutionalised in their later teens, compared to those encountering these systems later in life. Is it estimated those incarcerated between 10-14 are three times more likely to reoffend as adults compared to those who first encounter the system at ages greater than 14.[12] Not only does early criminalisation of children fail to engage with the underlying factors that contribute to youth offending, but it also exacerbates these issues.[13]

This cycle of recidivism has been linked to several factors. Firstly, early exposure encourages children to develop an internalised identity as a 'criminal'.[14] This identity crystallisation is further underpinned by the nascent cognitive development of children within this age bracket.[15] Scientific consensus indicates that children under the age of

[6] Australian Human Rights Commission, *Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review* (Submission, 26 February 2020) 2 <https://humanrights.gov.au/sites/default/files/ahrc_20200226_submission_cag_working_group_macr.pdf> ('*AHRC*').

[7] *WAJA* (n 1) 7.
[8] Ibid.
[9] *WAJA* (n 1) 8.
[10] Youth Affairs Council of Western Australia, *Submission on Raising the Age of Criminal Responsibility* 12,18 ('*YACWA*). See also *University of Melbourne* (n 2) 4-5.
[11] Wendy O'Brien and Kate Fitz-Gibbon, 'Old Enough to Offend, but Not to Buy a Hamster: The Argument for Raising the Minimum Age of Criminal Responsibility' (2022) 29(1) *Psychiatry, Psychology and Law* 51, 58.

[12] *Australia Institute* (n 2) 10.
[13] Ibid. See also, *University of Melbourne* (n 2) 10-12.
[14] O'Brien and Fitz-Gibbon (n 11) 8.
[15] Ibid.

14 are undergoing significant brain development, affecting areas such as impulsivity, reasoning, and consequential thinking.[16] This developmental stage renders them less capable of fully grasping the repercussions of their actions, thereby making the assignment of criminal responsibility both unjust and ineffective.[17]

III Learning from International Leaders in Juvenile Justice

In the global arena, several nations have pioneered reforms in juvenile justice, shifting the focus from punitive measures to rehabilitative and educational approaches. For instance, the German justice system is deeply rooted in educational principles with a focus on conflict resolution. A cornerstone of this approach is the "Jugendgerichtsgesetz" (Juvenile Court Act), which prioritizes educational and rehabilitative measures over punitive sanctions.[18] This Act fosters a sense of responsibility and social integration among young offenders through educational assistance programs and community service initiatives, thereby aiming to prevent their re-entry into the criminal justice system. [19]

Comparatively, the Netherlands has adopted a multidisciplinary approach to juvenile justice, characterised by collaboration amongst psychology, education, and social work professionals. This united effort facilitates the development of individualised intervention plans addressing the underlying issues contributing to criminal behaviour. The Dutch juvenile justice system has successfully implemented the "HALT" program ("Het ALTernatief"), offering an alternative to criminal prosecution for minor offences.[20] This program encompasses a series of interventions including restitution to victims, educational workshops, and community service assignments, emphasising restorative justice practices and encouraging dialogue between the offender and the victim.[21]

[16] Royal Australian and New Zealand College of Psychiatrists, *National Raise the Age Open Letter to Standing Council of Attorney General* (Open Letter, 21 April 2023) https://www.ranzcp.org/getmedia/03413c38-4e3c-4371-9410-8903f1fda428/national-raise-the-age-open-letter-to-standing-council-of-attorney-general-21-april-2023.pdf (‘*RANZCP*’).

[17] Ibid 2.
[18] O’Brien and Fitz-Gibbon (n 11) 17.
[19] Ibid.
[20] *RANZCP* (n 16) 1.
[21] Ibid 1.

Closer to home, New Zealand has utilised multi-systemic therapy as a best practice approach to prevent and address problematic behaviour by young adolescents.[22] This approach focuses on family and community-based interventions addressing the root causes of criminal behaviour.[23] Additionally, the Youth Court in New Zealand employs a Family Group Conference (FGC) model. The model uses a restorative justice approach facilitating a collaborative process involving the young person, their family, the victim, and other community members to develop a plan that addresses the harm caused and prevents future offending.[24]

VI Advocating for Change

Drawing from international best-practise initiatives, WAJA has crafted a roadmap to cultivate a more equitable and effective juvenile justice system. Central to this blueprint is the initiation of community co-design strategies, which pinpoint high-risk areas identified through poverty and crime indicators as the nucleus for community-led interventions and reforms.[25] A pivotal part of this strategy is a transformative shift in policing policies and culture. The aim is to terminate over-policing of Indigenous communities and foster a collaborative relationship between the police and these communities, thereby preventing the under-cautioning of Indigenous children, a highly represented group. [26]

Moreover, WAJA recommends the exploration of the Aboriginal Family Led Decision Making (AFLDM) model.[27] This collaborative approach involves making decisions regarding child protection placements for Indigenous children in conjunction with the child's extended family and an independent Indigenous facilitator, fostering a more inclusive and culturally sensitive approach to juvenile justice.[28] Finally, WAJA asserts the necessity of adopting well-established and successful strategies that emphasise early intervention and post-offence programs as key components in reforming the youth justice system in WA. These strategies not only aim to diminish the potential for

[22] *University of Melbourne* (n 2) 9-10.
[23] Ibid.
[24] *WAJA* (n 1) 13-14.
[25] Ibid 20-21.
[26] Ibid 19-20.
[27] Ibid.
[28] Ibid.

future offending but also focus on the rehabilitation of child offenders, steering towards a system that prioritises care over detention.[29]

V Conclusion

The roadmap delineated by WAJA offers a viable pathway for reform, advocating for community co-design strategies and policing policies. By embracing this one-digit difference, WA can pave the way for a system that prioritises the well-being and rehabilitation of young individuals, steering them away from a life of recidivism and towards a future of promise and potential.

[29] Ibid 18-19, 25.

JUSTICE, COLONIALISM & 2023: A VOICE FOR ALL

Brittany Sharpe

UWA law student and District Court Usher

Overview

The purpose of my submission is to share my experience of a McCusker Centre internship as a JD Student, and how the opportunity expanded my understanding of criminal law. Following a written application, I was placed with a host organisation: the Piddington Legal Assistance Clinic (PLAC). My placement commenced in Semester 1 as a legal clerk, and I reported to a Francis Burt Chambers (FBC) barrister, Nicholas van Hattem.

At the commencement of the internship, the McCusker Centre asked interns to set personal learning objectives, I listed mine as:

1. to gain experience of legal aid cases and understand the scope in which practitioners operate,
2. improve my legal research skills and gain real-time advice on how to be specific in my research and subsequent writing skills, and
3. be of service in the 13 weeks of internship and learn how I might be able to continue serving the community through internship networks.

Context

During the internship I supported PLAC's purpose, which is to bridge the gap and promote equitable opportunities for legal representation. The beneficiaries of this internship were private and Legal Aid clients. Clients were predominantly funded by Legal Aid which holds a greater representation of Indigenous people.

Clients may be on bail or incarcerated, presenting challenges in accessing levels of legal representation. This barrier is being pushed by organisations like Legal Aid

linking clients to barristers, in this case PLAC. The barrister's focus was to represent the best interests of the accused. Considering the background of most Legal Aid clients, and more broadly most citizens, legal nuances can be difficult to navigate, let alone be afforded.

Experience

On week three, my first visit to the Perth Magistrate's Court (PMC), whilst walking the corridors I found it challenging to remain detached. It was clear there is a separation of society. The front tables, with barristers and Court officials, were all white, not one person of colour. Whereas in the waiting areas, and the back of the court room - majority on bail or dialled in from prisons - were overwhelmingly Indigenous. It wasn't a coincidence; it was a stark comparison of two worlds meeting in one building, however the charges predominantly laid against one demographic. That is not to say that in other court rooms the demographic was more balanced, but in my experience, it was awkwardly colonial.

But it was encouraging to witness the beautiful level of respect, attention to detail, and sincerity that each barrister and Court official held for each accused. The accused were respectfully addressed; instructions were not passed condescendingly, and I felt passion behind each argument put before the Magistrate. It was inspiring to see the quality of legal representation and confirmation of how society is slowly facilitating access to justice for all people.

Reflection

During the first six weeks of my placement, I learnt to digest criminal court documents, engage with confronting factual circumstances, and reflect during morally challenging discussions. During this time, I felt a shift in my understanding of criminal law. Previously, I wrestled with the work of criminal defence lawyers, questioning how a practitioner can possibly represent those with serious and morally distasteful charges. I have questioned at times; surely there is a line of justice where a criminal charge can

be so heinous that by even representing an accused, further harm is created for the victim?

However, in witnessing the work of a criminal law barrister, I have seen nobility in their work, that seems focussed on justice for both parties so that even in complex fact scenarios the accused receives access to justice and support services. It reminded me of the true meaning of jurisprudence, that an accused is innocent until proven guilty. Even at times when the facts and public opinion screams ‘to the stocks’, it is the criminal defence lawyer that says, ‘but first let’s consider mercy’.

My previous struggle was simply a result of little faith in the criminal justice system to adequately deliver justice for victims both in consistent delays in court proceedings and the often-reported light sentencing. However, during this internship, I have seen a balanced approach in ensuring justice for both parties and recognition that the accused may have complex circumstances in which a one size fits all justice system is not fair. In some cases, a person’s history can be so tragic that they become both the accused and a victim to the justice system.

Conclusion

On completion of my internship hours I have reflected that my personal objectives have changed over the course of the Semester. Originally, they were focussed on seeking to learn about legal tools and skills from a barrister, but now have prompted a more philosophical debate on my pathway following graduation.

Previously, I had not considered family or criminal law to be areas of advocacy as I thought I would struggle with not being able to remain at ‘arm’s length’. As a mother, whilst I am passionate about women and children's welfare and protection, I thought it would be very difficult to put the work down at the end of the day and return to my normal life.

Yet throughout this internship, with appropriate warnings and offers to not be exposed to certain content without my consent, I pushed myself to read, review, and consider very challenging case facts that I would not have previously wanted to be involved in.

As a result of watching a highly skilled barrister compassionately contextualise challenging content, my resilience grew and my ability to review distressing content built over the few weeks, as I grappled with their motto of a ‘fair legal go for all’.

Since completing this internship, I have sparked a passion and humble respect for the advocacy of all accused that I hadn’t previously understood or believed I had the courage to pursue.

Justice Reinvestment: Small Changes in Community to Momentous Changes for All

Jake Norris

Senior Resource Officer, Social Reinvestment WA

I PROBLEM

Many communities in WA have considerable levels of youth offending and crime stemming from deeply embedded socio-economic disadvantage, intergenerational trauma, systemic discrimination, and ineffective rehabilitation.[1] Offenders from communities across the state often suffer from trauma, mental illness, and disadvantage, which are not addressed when imprisoned.[2] The lack of effective rehabilitation and reintegration in WA's prisons is evident, with 47% of all offenders being sent back to prison and 80% of Aboriginal and Torres Strait Islander offenders returning to prison.[3] When people return to communities after spending time in prison without rehabilitation, this leads to a chronic cycle of reoffending, which has serious impacts on individuals and communities as the cycle gradually reduces community safety. Banksia Hill Detention Centre and Unit 18 implementing 20+ hour a day lockdowns are examples of youth incarceration practices that do not deliver or focus on rehabilitation. When young people return to their communities without rehabilitation, no one wins.[4]

II HOW DO WE CHANGE THE OUTCOMES?

Justice Reinvestment is an evidence-driven approach to reducing crime, which shifts attention away from incarceration to initiatives that involve early intervention, prevention, and rehabilitation.[5] Instead of responding to crime after it has occurred, Justice Reinvestment targets the underlying causes of crime and addresses them at

[1] Jesuit Social Services, *Dropping Off the Edge 2021: Persistent and multilayered disadvantage in Australia* (Report, 2021) 139.
[2] Ibid 140.
[3] Australian Law Reform Commission (Cth), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, 2017) 120.
[4] Harry Blagg, Tamara Tulish, and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' (2018) 40(4) *Alternative Law Journal* 258.
[5] Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14(1) *Australian Indigenous Law Review* 2,3.

their root, usually socio-economic causes.[6] The intention is then that savings generated from reducing crime and incarceration can be continually reinvested into evidence-based socio-economic initiatives that continuously create safer communities. Social Reinvestment WA is the peak body for Justice Reinvestment in WA and has outlined several essential principles that must be the foundation of Justice Reinvestment to be effective.[7] Self-determination, community leadership and co-creation, coordinated collaboration, prevention-focused, strength-based, evidence-informed thinking, and prioritising cultural, social, and emotional wellbeing underpin a successful Justice Reinvestment site or initiative.[8]

In WA Justice Reinvestment is place-based and empowers communities to lead change themselves rather than being government-led.[9] SRWA has set out frameworks for communities to follow to ensure that Justice Reinvestment truly is place-based and community-led.[10] These frameworks, which are asset- place-based approaches, involving co-design, and prioritising collective impact, all ensure that community collaboration, shared goals, and local opportunities are at the core of Justice Reinvestment in any community.

III CASE STUDY: YOUTH PARTNERSHIP PROJECT

The Youth Partnership Project (YPP) was a place-based initiative in Perth's south that focused on supporting young people who at higher risk of encountering the justice system.[11] The project identified and supported at-risk youth and used evidence-based interventions through a collective impact approach, involving collaboration between government agencies, community services, and community leaders. The relatively small act of intervening and supporting at-risk young people and their families had significant benefits for the individual, the family, and the community. During the program's lifespan, all the young people engaged had increased school engagement,

[6] Sophie Stewart, 'The Case for Smart Justice Alternatives: Responding to justice issues in WA through a Justice Reinvestment approach' (Discussion Paper, Social Reinvestment WA, March 2020) 13.
[7] Mason Rothwell, et al, *Blueprint for a Better Future: Paving the Way for Youth Justice Reform in Western Australia* (Report, 2022) 13.
[8] SVA Consulting, *Think Martu. Think Differently. Act Differently.* (Report, 2021) 4.
[9] Australian Institute of Criminology (Cth), *Justice reinvestment in Australia: A review of the literature* (Report No 9, 2018) 5.
[10] 'JR Community Toolkit', *Social Reinvestment WA* (Toolkit) 5 <https://www.socialreinvestmentwa.org.au/s/Getting-Started-with-JR-Community-Toolkit_DigitalSmall.pdf>.
[11] 'Programs That Work', *Social Reinvestment WA* (Fact Sheet) 2 <https://www.socialreinvestmentwa.org.au/s/RTA-Case-Studies-Programs-that-Work.pdf>.

less anti-social behaviour, and zero instances of offending.[12] Consequently, this led to reduced crime in the community, fewer victims in the community, and fewer children in Banksia Hill or Unit 18. If initiatives similar to the YPP, which follow the principles and frameworks of Justice Reinvestment, were widely adopted, it would significantly benefit the community.

IV JUSTICE REINVESTMENT'S SIGNIFICANT BENEFIT

By addressing offending at its root causes and shifting attention away from incarceration to early intervention, prevention, and rehabilitation, the community can reduce crime more effectively.[13] A key principle of Justice Reinvestment is ensuring the savings generated from reducing crime are reinvested into evidence-based socio-economic initiatives that create safer communities and support healthy families.[14] Instead of reactionary measures, governments can allocate resources to evidence-based alternatives that address and prevent the root social and economic causes of crime for long-term benefit in communities in WA, particularly for First Nation communities disproportionately affected by colonisation, discriminatory policies, and intergenerational trauma. A 2017 report by PwC Consulting discovered that if state and territory governments addressed their ineffective justice systems and closed the gap on incarceration for Aboriginal and Torres Strait Islander peoples, $19 billion would be saved by 2040.[15] Relatively small initiatives at a community-level in many communities have the potential to lead to billions in savings, which can be spent in other areas, such as health and education. This reallocation of funding can help communities thrive and address areas of significant disadvantage.

The benefit is two-fold; Justice Reinvestment not only aims to reduce crime to prevent the number of people that fall victim to crime, but also aims to change the lives of potential offenders.

[12] Ibid.
[13] Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14(1) *Australian Indigenous Law Review* 2,3.
[14] Mason Rothwell, et al, *Blueprint for a Better Future: Paving the Way for Youth Justice Reform in Western Australia* (Report, 2022) 19.
[15] PwC, *Indigenous incarceration: Unlock the facts* (Report, 2017) 7.

V CONCLUSION

Justice Reinvestment is a proactive and evidence-based approach to reducing crime by addressing the root causes of offending. By addressing challenging behaviour via early intervention, prevention, and diversion rather than incarceration, WA can build safer communities, reduce crime, and break the cycle of reoffending. The Youth Partnership Project serves as a compelling example of Justice Reinvestment principles and frameworks in action to benefit individuals and the community.

WA is presented with the opportunity to reallocate resources away from ineffective punitive measures toward evidence-based alternatives. This reallocation can further reduce crime by reinvesting resources to address the socio-economic causes of crime and redirect funds support communities in other areas.

Small changes at the start of young people's journeys can have extraordinary effects for themselves, their families, and the wider community.

That which we call a rose: The importance of diversity and inclusion in the courtroom

Bridget Rumball – 2022 Graduate Lawyer
David Anthony – Diversity & Inclusion Partner

Corrs Chambers Westgarth

One of Shakespeare's most famous verses is taken from Act II of Romeo and Juliet, in which a lovestruck Juliet proclaims:

What's in a name? that which we call a rose
By any other name would smell as sweet;
So Romeo would, were he not Romeo call'd,
Retain that dear perfection which he owes
Without that title.

Any literature student would know that the point being made is that one's name is unimportant when compared to the attributes of the person it belongs to. But in a country as diverse and multicultural as Australia, a person's name (and the gender pronouns which accompany it) is often an incredibly vital part of their cultural and gender identity. One Australian court has recently made steps towards acknowledging this by updating their procedural guidelines – a small change which could have a huge impact on not only those within the courtroom, but outside of it, too.

What are the guidelines?

It is standard practice for each Australian jurisdiction to release documents called 'practice directions'. These are not legally binding but advisory in nature, acting as how-to guides to assist lawyers, judicial officers, and litigants to conduct proceedings in the most efficient and respectful way possible. Where there are procedural gaps at common law or in legislation, practice directions fill in the blanks on how to behave.

On 4 August 2023, the Federal Circuit and Family Court of Australia (**FCFCA**) released a direction titled 'Pronunciation of Names and Forms of Address." It states that the Court recognises that the correct pronunciation of names and use of gender pronouns is a matter of respect, which is important in maintaining public confidence in the

administration of justice. As such, legal practitioners and unrepresented litigants should, where reasonably practicable, carefully consider any names and gender pronouns that are associated with the matter – whether that be other counsel, parties, witnesses, or interpreters.

If any name is "difficult to pronounce", or if a person uses a preferred set of pronouns, then it is the legal practitioner or litigant's responsibility to provide pronunciation or pronoun details to the Court. This should be done prior to a hearing or court event and can be as simple as including a phonetic spelling or pronouns in square brackets as part of written submissions, appearances, or chambers correspondence. Further, any practitioner or litigant who appears in the FCFCA must know the correct pronunciation of all names and the appropriate pronouns for those involved in the case, should they be called on by the Court to clarify.

Why does it matter?

Some may say that the release of the FCFCA's practice direction is nothing more than performative. Australia's colonial legal system is still rather traditionalist, having changed little in the way of cultural or gender diversity over its 120-year life span. However, that is the very reason why a document like this matters. It is an acknowledgement on behalf of the FCFCA that the law has not always properly respected the diverse range of applicants and respondents which appear daily in court proceedings, and that the FCFCA is committed to fostering a more inclusive environment in future. This, as the direction states, helps to maintain confidence in the legal system as an open, accessible vehicle for justice. Focusing on 'something as small as' pronunciation or pronouns has a big impact on the real people involved in a court proceeding, making them feel seen and heard in the process.

This is particularly important, given the context which informs most matters heard in the FCFCA. Across 2021 – 2022, there were 4,503 migration matters and 45,481 family law applications filed across both divisions of the Court.[1] The overwhelming majority of applicants in migration matters were unrepresented, with 73% of those applicants requiring interpreters speaking more than 70 different languages.[2] Further,

[1] *Federal Circuit and Family Court of Australia: Annual Reports 2021 – 2022,* pages 72, 104.
[2] *Federal Circuit and Family Court of Australia: Annual Reports 2021 – 2022,* page 104.

the jurisdiction of the FCFCA includes applications relating to the Gillick competency of children seeking major medical procedures to diagnose and treat their gender dysphoria – a common enough occurrence to warrant its own practice direction.[3] To an applicant in either case – whether that be a transgender teen or a refugee seeking safety in Australia – a correctly pronounced set of pronouns or surname goes a long way towards making the courtroom feel more inclusive and less alien.

This also has flow on effects to the parts of the legal profession existing outside of the courtroom. In abiding by these procedural guidelines during appearances in the FCFCA, legal practitioners become comfortable with the usage of gender-neutral pronouns or phonetic pronunciation. For these practitioners – who are generally older[4] and identify with a white Australian cultural background[5] - the significance of these 'small things' may otherwise be foreign. This respect is then transplanted back into law firms and chambers throughout Australia, changing how practitioners behave in the office and impacting on the diversity of culture created there, too.

What about Western Australia?

Of course, this practice direction only applies to the FCFCA. While this is not the first time a practice direction concerning preferred pronouns and/or pronunciation has been released,[6] the subject matter remains novel to some Australian jurisdictions. This includes Western Australia, where no official guidance has been released on either (at the time of publication). Judicial officers have touched on the importance of both within recent judgments – for example, Quinlan CJ's decision to use masculine pronouns to refer to a transgender child as 'that is [the child's] preference',[7] or Solomon J's careful consideration of Australian Kriol pronunciation and syntax used by an interpreter in a lower court.[8] However, no Western Australian court has yet taken the same step as the FCFCA in formally acknowledging this importance.

[3] *Family Law Practice Direction – Medical Procedure Proceedings,* Federal Circuit and Family Court of Australia (1 September 2021, updated 28 November 2022).
[4] *2022 National Profile of Solicitors,* Law Society of NSW (26 April 2023), pages 8, 22.
[5] *2021 Annual Profile of Solicitors NSW,* Law Society of NSW (2 June 2022); see e.g. the 60% of NSW solicitors who identify as being Australian (non-Indigenous) (page 20), and the 71% who were born in Australia (page 18).
[6] See e.g. *Practice Direction Number 10 of 2023* from the Supreme Court of Queensland (3 April 2023).
[7] *WM v CEO for Department of Communities* [2021] WASC 325, [17].
[8] *Murray v Feast* [2023] WASC 273.

There is still much more work to be done until every Australian court is an inclusive space for people of all cultural and gender backgrounds. Justice remains inaccessible to many, by the very nature of the institution on which its systems have been built. However, it is through small steps – such as the acknowledgement of a rose's name, as well as its characteristics, as part of its complete identity – that the most profound change can be realised.

https://www.fcfcoa.gov.au/pd/in-pfa

On the Importance of Small Things

The Hon. Justice Stephen Hall

Supreme Court of Western Australia

"*Great things are not done by impulse, but by a series of small things brought together." George Eliot*

Most law students aspire to become lawyers. A law degree is a necessary qualification, but it doesn't make you a lawyer. This transformation takes place at an admission ceremony. The critical feature of the ceremony is the taking of an oath or an affirmation to truly and honestly conduct yourself as a lawyer and as an officer of the court. Easily said – but not to be taken lightly.

A profession is not merely an occupation. Being a lawyer is not just about the work that you do. Much more importantly it is about promising to adhere to a set of values, values that require you to uphold the rule of law, to maintain the highest standards of honesty and to treat all who you deal with in the course of your work with the utmost fairness and respect. Lawyers must also bear in mind that their paramount duty is to the court – they are not mere agents or instruments for their clients. As you will appreciate from this, a lawyer is defined by his or her obligations; any benefits that adhere to the role are only incidental.

The values that you promise to abide by when you become a lawyer apply to every aspect of your work, and indeed your life. Things you do in your private life can reflect on the profession and on your fitness to continue to be a member of it. Even the smallest infringements matter because they can not only undermine your own integrity but that of the system that you are duty bound to uphold. Don't make the mistake of thinking that small lies or evasions won't matter. The smallest compromises will aggregate and have a corrosive effect on your character and reputation. The

reputation of a lawyer is built up over time by the accumulation of small ethical decisions. Every professional or personal act, however small, matters.

We are accustomed to speaking of the justice system but we rarely give much thought to what it means. At a purely mechanical level it means that there are a number of component parts that operate together in an efficient and consistent way. The justice system comprises not just the police and the courts, but the legal profession. Of course, a system can be efficient and consistent, but not be just. That is where the legal profession has a particularly acute responsibility.

When we hear about the justice system failing it is usually in the context of miscarriages of justice – prominent cases where it is found that an innocent person has been wrongly convicted in a criminal case, or where a victim of injustice has not had their rights vindicated in a civil case. These sorts of cases attract publicity and public concern. It is easy to forget that justice operates at the level of a suburban solicitor giving advice to a client about a dividing fence just as much as it does when a senior counsel is representing a person on a murder charge. The system is not *just* unless it is *just* in its smallest acts.

Lawyers are called upon to ensure that their clients receive competent and candid advice, are treated with respect and dignity, and achieve fair and just outcomes, regardless of wealth or social position. These duties are the same whether the client is a multi-national company engaged in a large commercial arbitration or a homeless person who is charged with failing to comply with a move-on order. The law should not deliver different standards of justice. A miscarriage of justice is not acceptable because the case is small or the affected person is weak and powerless. Indeed, due to difficulties in accessing justice through the courts, it is in the small cases that lawyers often have a crucial responsibility for ensuring that the system remains just for all. The legal aid duty lawyer performs just as important a task as the Solicitor-General. Every case, however small the stakes may seem, matters. Every client, however disadvantaged, matters.

When you are admitted you may be lucky enough to be involved in a large matter, either litigation or a complex commercial transaction. You will likely find yourself working in a team. In every large matter there will be the mundane but necessary tasks – checking through huge numbers of documents for discovery, arranging exhibits or interviewing large numbers of seemingly peripheral witnesses. It may seem that such tasks are below your dignity. You may feel that you did not study long hours at Law School to be doing this sort of work. But remember this, almost every case will be determined on the facts and the work that is done in marshalling those facts will enable your client to get a proper measure of the strength of the case and whether it is worth pursuing. And if it is worth pursuing, the party who has put this work in will have a much better chance of presenting their case effectively.

Sometimes the critical evidence is based on work done by a junior team member. For every silk who shines in a trial or on an appeal there are usually many junior solicitors who are responsible for that lustre. No large case can be presented well without the accumulation of many small preparatory acts. And that good work will rarely pass unnoticed. Treat every job you are given as a lawyer as an opportunity. Every task, however small, matters.

From time to time I preside at admissions ceremonies. In my speech I often include the following: Being admitted as a lawyer affords you the opportunity to earn a good living. But monetary success is only incidental to what makes a good lawyer. A good lawyer adheres to the law and the ethical rules of the profession. A good lawyer always bears in mind that their paramount duty is to the court. A good lawyer can also provide invaluable assistance for clients who are at their most vulnerable or in their greatest peril. Our society does not need more financially successful lawyers, it needs more good lawyers. So, while I trust you will *do well*, I hope you will also endeavour to *do good*.