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MISCARRIAGE OF JUSTICE IN WESTERN AUSTRALIA: THE CASE OF GENE GIBSON

TAMARA TULICH, HARRY BLAGG & AVA HILL-DE MONCHAUX*

On 12 April 2017, the Western Australian Court of Appeal overturned the conviction of Gene Gibson, a young Aboriginal man who had spent nearly five years in prison after pleading guilty to the manslaughter of Joshua Warneke. The Court of Appeal unanimously quashed Mr Gibson's conviction on the basis that he suffered a miscarriage of justice as, amongst other things, he did not adequately understand the legal process, the case against him, or the nature and implications of his plea of guilty because of his cognitive impairments and English language difficulties. This article outlines the systemic failings of the Western Australian justice system in responding to Aboriginal peoples highlighted by this case and, in particular, Aboriginal persons suspected of having some form of cognitive impairment. We argue that the reforms instigated by the Western Australian Police in response to this case, while welcome changes, will not, of themselves, resolve many of the underlying problems that led to this miscarriage of justice. We argue that these reforms need to be accompanied by changes to Western Australia's mentally impaired accused regime, and must be developed within a broader paradigm shift that nurtures and strengthens community justice mechanisms and ensures greater partnership with Aboriginal people.

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I INTRODUCTION

On April 12 2017, the Western Australian Court of Appeal overturned Gene Gibson’s conviction for the manslaughter of Joshua Warneke, a 21-year-old man killed in the early hours of 26 February 2010.¹ Mr Warneke’s body was discovered on the side of the Old Broome Road by a taxi driver, and a post-mortem examination concluded the cause of death to be ‘head injury in a man with acute alcohol intoxication’, including extensive fracturing of the skull.² Expert opinion excluded injury from a car as the cause of death.³ Two years after the incident, Mr Gibson, an Aboriginal man from the remote community of Kiwirrkurra in the Gibson Desert in Western Australia, was identified as a person of interest in the investigation. Mr Gibson was 18 years old at the time of Mr Warneke’s death.

In 2012, following admissions made in interviews with the WA Police, Mr Gibson was charged with the murder of Joshua Warneke. He pleaded not guilty and a trial date was set for August 2014. In early July 2014, the police interviews were ruled inadmissible by the

¹ Victoria Laurie, ‘Manslaughter Conviction Overturned, Gene Gibson Free’, *The Australian* (online), 13 April 2017 <<http://www.theaustralian.com.au/news/nation/manslaughter-conviction-overturned-gene-gibson-free/news-story/c5306a062d9f7e969ad745be8f95f619>>; ‘Gene Gibson Freed as Conviction for Broome Manslaughter of Josh Warneke Quashed’, *ABC News* (online), 12 April 2017 <<http://www.abc.net.au/news/2017-04-12/gene-gibson-josh-warneke-manslaughter-conviction-quashed-appeal/8436550>>. The Court of Appeal made its decision known on 12 April 2017, however the reasons for the decision were published on 28 July 2017: *Gibson v Western Australia* [2017] WASCA 141 (Buss P, Mazza and Beech JJA).

² *State of Western Australia v Gibson* [2014] WASC 240, [5] (Hall J); Corruption and Crime Commission, *Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Warneke* (Report, Corruption and Crime Commission, 5 November 2015) [7].

³ Corruption and Crime Commission, above n 2, [8].

WA Supreme Court on the basis that the interviews were involuntarily obtained in breach of the *Criminal Investigation Act 2006* (WA) — the primary source of police powers in Western Australia — and that their admission would be unfair to Mr Gibson.⁴ Despite this, in July 2014, Mr Gibson pleaded guilty to manslaughter and, on 22 October 2014, was sentenced to seven years and six months imprisonment.⁵ In November 2016, Mr Gibson was granted leave to appeal against his conviction,⁶ and his appeal was heard in early April 2017. The Court of Appeal unanimously quashed Mr Gibson's manslaughter conviction on the basis that he suffered a miscarriage of justice, because his plea of guilty 'was entered in circumstances in which the integrity of the plea was impugned' by, amongst other things, the likelihood that Mr Gibson 'did not understand adequately' the legal process, the case against him, legal advice about his plea or the consequences of pleading guilty, and the real risk 'that the plea was not attributable to a genuine consciousness of guilt'.⁷ The Court of Appeal found that Mr Gibson had 'significant and pervasive' cognitive impairments, English language difficulties, and a 'tendency for gratuitous concurrence' at all material times.⁸ Mr Gibson was released after spending nearly five years in prison.⁹

As we will outline, this case highlights a number of systemic failings of the Western Australian justice system in responding to Aboriginal peoples and, in particular, Aboriginal persons suspected of having some form of cognitive impairment. The 2015 Report of the Corruption and Crime Commission, for example, identified systemic weaknesses in WA Police's interviewing of Aboriginal witnesses and suspects, as well as in the administration of cautions to persons with English as a second language.¹⁰ The Commission also identified broader issues with breaches of the *Criminal Investigation Act 2006* (WA) and involuntary confessions.¹¹

⁴ *State of Western Australia v Gibson* [2014] WASC 240, 59, [183] (Hall J).

⁵ *State of Western Australia v Gibson* [2014] WASC 203 (Jenkins J).

⁶ 'Josh Warneke Death: Gene Gibson Granted Leave to Appeal Against Conviction over Broome Killing' *ABC News* (online), 15 November 2016 <<http://www.abc.net.au/news/2016-11-15/josh-warneke-death-case-gene-gibson-granted-leave-to-appeal/8026114>>.

⁷ *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁸ *Ibid* 80 [161], 89 [200] (Buss P, Mazza and Beech JJA).

⁹ On 28 July, it was reported that Mr Gibson will seek compensation for his wrongful conviction: Irena Ceranic, 'Gene Gibson Seeks Compensation over Wrongful Conviction for Josh Warneke Manslaughter' *ABC News* (online), 28 July 2017 <<http://www.abc.net.au/news/2017-07-28/gene-gibson-to-sue-over-josh-warneke-conviction/8753032>>.

¹⁰ Above n 2, 33–41.

¹¹ *Ibid*.

Following the Court of Appeal decision, Premier Mark McGowan said that ‘a modern justice system should not fall down because people didn’t understand the language or suffered mental impairment’.¹² We agree and argue that a paradigm shift is required to improve the responsiveness of the Western Australian justice system to Aboriginal peoples and, in particular, to Aboriginal people with mental impairment. A shift of this kind would minimise the risk of miscarriages of justice. The proposed paradigm shift entails diversion into Aboriginal-owned therapeutic alternatives, particularly in the emerging sphere of “on-country” initiatives, drawing on the authority of Elders and respected persons in the Aboriginal community, and optimising opportunities for timely screening and intervention. We argue that this, combined with the changes instigated by WA Police in response to this case, can contribute to ensuring the Western Australian justice system does not continue to “fall down” when responding to Aboriginal peoples, and in particular young Aboriginal persons suspected of having cognitive impairment.

II BACKGROUND

Between 2010 and 2012, several people, including Mr Gibson, were identified as persons of interest in the homicide investigation into the unlawful killing of Mr Warneke undertaken by the Major Crime Squad in Perth, called ‘Operation Aviemore’.¹³ Mr Gibson became known to the police through ‘vague and contradictory’ information about a stolen vehicle being involved in the murder.¹⁴ Some witnesses suggested that Mr Gibson was seen in the car, while others indicated that he might have been involved in the death.¹⁵ Detective Senior Sergeant Baddock, then Officer in Charge of Broome Detectives, recommended that other witnesses be interviewed before Gibson; however this advice was not heeded.¹⁶ At the end of July 2012, it was decided that Mr Gibson was to be interviewed as a *witness*.¹⁷

On 16 August 2012, Detectives Gazzzone and Shannon flew to Kiwirrkurra to interview Mr Gibson.¹⁸ The interview lasted for almost three hours and no interpreter was present,

¹² Tim Clarke, ‘How Justice Failed Gene Gibson,’ *The West Australian* (online), 13 April 2017 <<https://thewest.com.au/news/wa/how-justice-failed-gene-gibson-ng-b88442950z>>.

¹³ Corruption and Crime Commission, above n 2, 3.

¹⁴ *Ibid* 4.

¹⁵ *Ibid* 3.

¹⁶ *Ibid*.

¹⁷ *Ibid* 5.

¹⁸ *Ibid* 6.

despite the fact that Mr Gibson's spoken language was Pintupi, a local Aboriginal language.¹⁹ As Detective Shannon prepared the written statement, Mr Gibson made a comment, 'significantly inconsistent with earlier comments', to the effect that he had struck the deceased with a vehicle.²⁰ Following this admission, Detective Gazzzone contacted his supervisor, who instructed him to treat Mr Gibson as a suspect and continue the interview.²¹ It was not until after Mr Gibson made a further admission that he had assaulted the deceased that a camera was used to record the interview.²² A senior member of the Kiwirrkurra Community was then arranged to be an 'interview friend' and translator.²³ Not long after the commencement of the recorded interview, Mr Gibson exercised his right to obtain legal advice.²⁴ Mr Gibson spoke, by phone, to Ms Kilby, a lawyer from the Kalgoorlie office of the Aboriginal Legal Service ('ALS'), and was advised not to answer any more questions.²⁵ Despite this, the interview continued, with neither Detective clarifying whether Mr Gibson was willing to do so.²⁶

When the Detectives returned to Broome the next day, Detective Senior Sergeant Baddock listened to their account of the interview and advised Detective Sergeant Western, the Senior Investigating Officer, to redo the interview, offering to arrange for an interpreter.²⁷ This offer was declined, with Detective Sergeant Western relying on the interviewing detectives' accounts of Mr Gibson's English competency.²⁸ Mr Gibson then accompanied the detectives on a re-enactment and participated in a further interview. During the Broome interview, Mr Gibson was not assisted by an interpreter or an interview friend, nor was he given the opportunity to seek further legal advice.²⁹ Mr Gibson was charged with murder, to which he pleaded not guilty, and a trial date was set for August 2014.

In March 2014, Mr Gibson applied to the WA Supreme Court for a ruling that the Kiwirrkurra and Broome interviews were 'inadmissible because his participation was not voluntary and because the police failed to comply with the *Criminal Investigation Act 2006*

¹⁹ Ibid.

²⁰ *State of Western Australia v Gibson* [2014] WASC 240, 4 [8].

²¹ Corruption and Crime Commission, above n 2, 6.

²² Ibid.

²³ Ibid; *State of Western Australia v Gibson* [2014] WASC 240, 4 [9].

²⁴ Corruption and Crime Commission, above n 2, 7.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid 8.

(WA)', including the right to be assisted by an interpreter or other qualified person during an interview.³⁰ The *Criminal Investigation Act 2006* (WA) codifies police powers and responsibilities, and is the primary source of police powers in the State. Justice Hall held that the interviews between Mr Gibson and the Detectives on 16 and 17 August 2012 were inadmissible, as 'they were not voluntary, were obtained in breach of the CIA and to admit them would, in any event, be unfair to the accused'.³¹ Despite this, in July 2014, Mr Gibson pleaded guilty to manslaughter and, on 22 October 2014, was sentenced to seven years and six months imprisonment.³²

Following the Supreme Court's decision, the CCC commenced an investigation into 'Operation Aviemore' to determine if members of the WA Police had 'engaged in misconduct and/or reviewable police action during the investigation of the death of Joshua Warneke and the subsequent arrest and prosecution of Gene Gibson'.³³ The CCC found that the case demonstrated a number of 'systemic weaknesses', including a failure on the part of the WA Police to comply with the *Criminal Investigation Act 2006* (WA) and the WA Police Manual, which indicates accepted police practice.³⁴ Alongside the CCC, the WA Police Internal Affairs Unit also investigated the events of 16 and 17 August 2012 and instigated disciplinary proceedings in relation to a number of officers involved in the matter, resulting in three officers facing disciplinary charges under s 23 of the *Police Act 1982* (WA).³⁵

These reviews were key to the appeal against conviction leading to Mr Gibson's release. Lawyer Michael Lundberg noted the importance of the detailed reviews undertaken by the Internal Affairs Unit of the WA Police and the CCC, claiming that they 'helped focus the spotlight on Gene's case and his incarceration, and they both provided the catalyst for the bringing of this appeal'.³⁶

³⁰ *State of Western Australia v Gibson* [2014] WASC 240, 4–7 [12].

³¹ *Ibid* 58, [183] (Hall J).

³² *State of Western Australia v Gibson* [2014] WASC 203 (Jenkins J).

³³ Corruption and Crime Commission, above n 2, [47].

³⁴ *Ibid* 1. See also Chapters 6–10.

³⁵ *Ibid* [44], [232]; Kathryn Diss, 'Two WA Police Officers Face Possible Demotion over Bungled Josh Warneke Investigation' *ABC News* (online), 7 January 2016 <<http://www.abc.net.au/news/2016-01-07/wa-police-officers-face-disciplinary-action-josh-warneke-case/7074072>>.

³⁶ 'Gene Gibson: Indigenous Man Jailed over Josh Warneke's Death Has Conviction Overturned' *The Guardian* (online), 12 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/12/gene-gibson-indigenous-man-jailed-over-josh-warnekes-death-has-conviction-overturned>>.

Mr Gibson's appeal against his conviction was heard on 3–6 April 2017 by the WA Court of Appeal. In a joint judgment, the Court of Appeal accepted the unchallenged evidence led on appeal of Ms Marley, a clinical psychologist, and Dr Vuletich, a clinical neuropsychologist. This evidence established that 'at all material times' Mr Gibson 'suffered from cognitive impairments that were significant and pervasive'.³⁷ These impairments 'seriously affected his capacity':

- (a) to function in day-to-day life;
- (b) to respond effectively in novel situations, especially those requiring abstract or flexible thinking;
- (c) to make decisions of importance;
- (d) to understand the implications of decisions of importance;
- (e) to understand complex oral instructions involving several steps;
- (f) to evaluate, weigh and synthesise several pieces of information;
- (g) to remember reliably detailed information;
- (h) to pursue and complete complex or challenging tasks;
- (i) to formulate and reflect on alternative strategies;
- (j) to ask questions to clarify his understanding or lack of understanding; and
- (k) to seek support from others.³⁸

On the basis of this evidence, the Court of Appeal was also satisfied that Mr Gibson is:

- (a) shy and reserved;
- (b) compliant and agreeable;
- (c) vulnerable to suggestions by others;
- (d) at risk of responding to others in a manner which he thinks will please them or secure their approval;

³⁷ *Gibson v Western Australia* [2017] WASCA 141, 80 [160] (Buss P, Mazza and Beech JJA).

³⁸ *Gibson v Western Australia* [2017] WASCA 141, 80 [160] (Buss P, Mazza and Beech JJA).

- (e) at risk of behaving in accordance with what he thinks others expect of him;
- (f) at risk of acquiescing or agreeing when questioned, rather than seek clarification about concepts, proposals or alternatives that he does not understand;
- (g) not necessarily reliable in expressing a clear and consistent choice with respect to alternative courses of action presented to him for decision; and
- (h) prone to some inflexibility in his thinking and a tendency to revert to over-learned, automatic responses,
- (i) and that these characteristics are attributable, to a significant extent, to his cognitive impairments.³⁹

The Court also found that Mr Gibson had limited English language proficiency: he could not read written English, and his oral English skills were inadequate to understand and communicate in the context of the issues raised in the police interviews and legal proceedings, including giving instructions and receiving legal advice.⁴⁰

The Court found that a miscarriage of justice had occurred as, due to his cognitive impairment and English language difficulties, Mr Gibson did not adequately understand the nature and implications of his plea of guilty, legal advice regarding the plea, the legal process, or the case against him.⁴¹ Further, there was a real risk 'that the plea was not attributable to a genuine consciousness of guilt'.⁴² The Court set aside the conviction for manslaughter and entered a judgment of acquittal.

III SYSTEMIC FAILINGS OF THE WESTERN AUSTRALIAN JUSTICE SYSTEM

There were a number of problems with the treatment of Mr Gibson, identified by Hall J in *State of Western Australia v Gibson*,⁴³ the Court of Appeal in *Gibson v Western Australia*,⁴⁴ and by the CCC in its 2015 Report,⁴⁵ which highlight systemic failings in the Western

³⁹ Ibid 80-1 [162] (Buss P, Mazza and Beech JJA).

⁴⁰ Ibid.

⁴¹ *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁴² Ibid.

⁴³ [2014] WASC 240.

⁴⁴ [2017] WASCA 141.

⁴⁵ Corruption and Crime Commission, above n 2.

Australian justice system in relation to Aboriginal persons and, in particular, those suspected of having a cognitive impairment. These failings were conducive to the miscarriage of justice that occurred.

First, Mr Gibson was initially interviewed *as a witness*, not a suspect. As a result, he was not cautioned or arrested, and the interview was not recorded. An interpreter was not used. During this unrecorded interview, it was alleged that Mr Gibson made an admission of guilt. He was then arrested on suspicion of murder, and the detectives commenced recording the interview. The decision to interview Mr Gibson as a witness meant that he had limited rights. When a person is accompanying police, s 28 of the *Criminal Investigation Act 2006* (WA) only requires that police officers inform the person they are not under arrest, not required to accompany police, and are free to leave at any time. By contrast, where a person is suspected of having committed an offence, a number of rights come into play.

Justice Hall found that there was sufficient information available for the police to reasonably suspect Mr Gibson was responsible for the death of Mr Warneke.⁴⁶ As such, Mr Gibson should have been arrested and afforded the rights set out under ss 137(3) and 138(2) of the *Criminal Investigation Act 2006* (WA), including the right to be assisted by an interpreter or other qualified person, to be cautioned before being interviewed as a suspect, and to communicate with a lawyer. The interview should also have been recorded.⁴⁷ It is important to note that Hall J found that the decision to interview Mr Gibson as a witness was an honest but mistaken one — a mistaken but defensible decision that the CCC reported ‘had grave consequences’.⁴⁸

Second, there was a failure to ensure that Mr Gibson, once arrested, was assisted by a qualified interpreter as required by ss 137(3)(d) and 138(2)(d) of the *Criminal Investigation Act 2006* (WA). Once arrested, a senior member of Mr Gibson’s community attended as an interview friend. Mr Gibson and his interview friend conversed in the local Aboriginal language, Pintupi. Mr Gibson was not provided with an independent, qualified interpreter. His Honour found:

⁴⁶ *State of Western Australia v Gibson* [2014] WASC 240, 17 [43].

⁴⁷ *Criminal Investigation Act 2006* (WA) s 118.

⁴⁸ *State of Western Australia v Gibson* [2014] WASC 240, 17 [44]; Corruption and Crime Commission, above n 2, 6 [28].

Because the accused had only a very limited understanding of English the absence of an interpreter means that I cannot be confident that he understood what the police said to him about his rights. Nor can I be confident he sufficiently understood police questions or that his answers can be accepted at face value.⁴⁹

These findings were endorsed by the Court of Appeal.⁵⁰ The *Criminal Investigation Act 2006* (WA) obliges the police to use an interpreter or other qualified person when they are required to inform a person about matters such as their rights when the person cannot sufficiently understand or communicate in English. The WA Police Manual also provides that a professional independent interpreter must be used, stating that WA Police should not assume Aboriginal Australians who speak some English (as their second, third, or fourth language) are able to fully understand their legal rights and responsibilities in English, and that they may require an interpreter.⁵¹ The manual's recommended English language test was not administered. Justice Hall found that an interpreter was required — a finding endorsed by the Court of Appeal.⁵²

Third, problems were identified with the administering of the caution to Mr Gibson. In Western Australia, an arrested person must be given a caution before being interviewed as a suspect pursuant to s 138(2)(b) of the *Criminal Investigation Act 2006* (WA). A caution usually includes words to the effect that 'you have the right not to answer questions, and any answers can be used in evidence against you'.⁵³ The purpose of a caution is to ensure that any confession made is voluntary. Justice Hall stated, '[a]dmissions made out of court are not admissible in evidence unless they are made voluntarily ... in the exercise of free choice to speak or be silent'.⁵⁴ The caution must be given in clear and unequivocal terms and understood by an arrested person.⁵⁵ Where a person has an insufficient understanding of English, an interpreter should be used.⁵⁶ One way to ensure that a suspect understands

⁴⁹ *State of Western Australia v Gibson* [2014] WASC 240, [84] (Hall J).

⁵⁰ *Gibson v Western Australia* [2017] WASC 141, 83 [174] (Buss P, Mazza and Beech JJA).

⁵¹ *State of Western Australia v Gibson* [2014] WASC 240, [80]–[82] (Hall J).

⁵² *State of Western Australia v Gibson* [2014] WASC 240, [83] (Hall J); *Gibson v Western Australia* [2017] WASC 141, 83–4 (Buss P, Mazza and Beech JJA).

⁵³ *Criminal Investigation Act 2006* (WA) s 138(2)(b).

⁵⁴ *State of Western Australia v Gibson* [2014] WASC 240, [160] (Hall J).

⁵⁵ *Ibid* [147] (Hall J).

⁵⁶ *Criminal Investigation Act 2006* (WA) s 10.

their rights is to have them explain the caution in their own words. This is recommended by the WA Police Manual.

Justice Hall found it was unlikely Mr Gibson understood the caution as he was given conflicting messages about it. Mr Gibson was never asked to explain in his own words what the caution meant.⁵⁷ The Court found the detectives could not have been satisfied that Mr Gibson understood the caution, and in particular his right to silence. This was compounded by directives given by the interview friend, who was a person in authority in Mr Gibson's community, which were regarded by the Court as imperative commands to Mr Gibson to speak to police.⁵⁸

Fourth, there was a failure to cease the interview after Mr Gibson's lawyer advised police that Mr Gibson did not wish to answer questions. During the interview, Mr Gibson was made aware of his right to contact a lawyer, and he contacted a lawyer in the Kalgoorlie office of the ALS.⁵⁹ The lawyer advised the police officers that Mr Gibson did not wish to answer questions. However, the interview was not stopped, and continued for some six hours including breaks. Mr Gibson made further admissions during this time. Justice Hall found that it was 'inappropriate for the police to continue with the interview in these circumstances'.⁶⁰

Fifth, problems were identified with the role of the 'interview friend'. An interview friend acts as a support for a suspect. The interview friend should be someone the suspect has confidence in, who can speak the same language, and who is independent of the police.⁶¹ Mr Gibson's interview friend was a person of authority in his community with whom he was in a kinship relationship. The Court found that because of this Mr Gibson would have felt pressured to answer the police questions.⁶²

Further issues were raised in Mr Gibson's appeal against his conviction before the WA Court of Appeal, including: the integrity of the plea of guilty entered; the difficulties obtaining qualified interpreters; the adequacy of interpreting services provided; the unsatisfactory provision of legal advice and instructions, and the absence of interpreters during

⁵⁷ *State of Western Australia v Gibson* [2014] WASC 240, [116] (Hall J).

⁵⁸ *Ibid* [150] (Hall J).

⁵⁹ *State of Western Australia v Gibson* [2014] WASC 240, 42-43.

⁶⁰ *Ibid* 57 [180].

⁶¹ *Ibid* 47 [148]; *R v Butler (No 1)* (1991) 102 FLR 341; *Njana* (1998) 99 A Crim R 273.

⁶² *State of Western Australia v Gibson* [2014] WASC 240, 57 [175] (Hall J).

instructions and advice; and the lack of resources for ‘medical and psychological experts to assess and report on the appellant’s neuropsychological condition’.⁶³ Further, one of the grounds for the appeal was that Mr Gibson’s plea was ‘induced by and/or entered in circumstances in which’:

(i) witness statements were obtained by investigating police officers which inculpated the appellant in the offence to which he pleaded guilty;

(ii) the circumstances in which those witness statements were obtained by police officers significantly affected the reliability of the inculpatory allegations that were made by the witnesses; and

(iii) after the appellant pleaded guilty, and as a result of further investigations that were conducted by the Western Australian Police, it has become apparent that the inculpatory allegations that were made by the witnesses were materially false.⁶⁴

The incriminating statements were made by two men who had been with Mr Gibson on the night of Mr Warneke’s death.⁶⁵ The men had originally claimed that they drove past the body without stopping but, after hearing Mr Gibson’s confession, changed their testimonies and claimed that the car stopped and ‘Gibson got out and hit Warneke’.⁶⁶ It was not until much later that the defence team learned that one of these men had retracted his statement within minutes, saying he had made it up because the interviewing officers were pushing him for answers.⁶⁷

An exchange from the Court of Appeal hearing, highlighting systemic concerns with the Western Australian justice system, was reported by the media:

Prompted by questions from Gibson’s barrister Sam Van Dongen SC, Brunello [Mr Gibson’s lawyer in Broome] painted a picture of a justice system that made it hugely difficult to represent a man such as Gibson; the ALS was “notoriously underfunded”; only two Pintubi

⁶³ *Gibson v Western Australia* [2017] WASCA 141, 85 [181], 80–90 (Buss P, Mazza and Beech JJA).

⁶⁴ *Gibson v Western Australia* [2017] WASCA 141, 12 [35] (Buss P, Mazza and Beech JJA).

⁶⁵ Victoria Laurie, ‘Indigenous Australian Gene Gibson Was Lost in Translation,’ *The Australian* (online), April 8 2017 <<http://www.theaustralian.com.au/news/inquirer/indigenous-australian-gene-gibson-was-lost-in-translation/news-story/6ea8c503fadce99928092b73120a95b5>>.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

interpreters in the entire state were available at certain times; and even when they were, funds to pay them to come to Perth were not.

...

Van Dongen told the court “a perfect storm” had led an illiterate Aboriginal man with “significant cognitive deficits” to plead guilty to a crime he repeatedly claimed not to have committed.⁶⁸

On 12 April 2017, the WA Court of Appeal quashed Mr Gibson’s conviction, finding that he suffered a miscarriage of justice as he did not adequately understand the nature and implications of his plea of guilty, the legal process, or the case against him because of his cognitive impairment and limited English proficiency, and there was a real risk ‘that the plea was not attributable to a genuine consciousness of guilt’.⁶⁹

IV A NEW PARADIGM: DECOLONISING CRIMINAL JUSTICE IN WESTERN AUSTRALIA

There has been a promising response from the WA Police to the CCC report and the WA Police Internal Affairs Unit investigation. Following the Internal Affairs Unit investigation, WA Police Commissioner Karl O’Callahan, accepted that mistakes were made in the handling of the investigation and reported that a number of changes would be made to improve the handling of future investigations, including:

- the creation of a specialist unit for dealing with Aboriginal witnesses and suspects from remote communities;
- the introduction of pre-recorded cautions in every Aboriginal language;
- improvements to victims’ liaison services;
- live review teams; and
- a new homicide investigation course for select officers.⁷⁰

Commissioner O’Callahan stated that, from now on:

in all cases when you go into an Aboriginal community to interview either a witness or a

⁶⁸ Victoria Laurie, above n 66.

⁶⁹ *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁷⁰ Kathryn Diss, above n 35.

suspect, you will need an interpreter who is specialised in that language to provide the right sort of support ... this is a very significant change. And will have a very significant resource implication on the WA Police and Government in general.⁷¹

WA Police accepted most of the CCC's recommendations.⁷² In its 2015 Report, the CCC called on WA Police to ensure that:

- all officers know and apply their obligations under the Criminal Investigation Act and the Police Manual contained in the Corporate Knowledge Database;
- persons who are not proficient in English have the assistance of an interpreter;
- officers interacting with Aboriginal citizens are properly trained in culture and language; and
- decisions not to charge a person are properly authorised and accountable.⁷³

A year after the CCC report, in December 2016, the CCC sought further information on the implementation of the recommendations by the WA Police.⁷⁴ The WA Police's response outlined work which was currently underway to implement the recommendations, including the creation of the new Crime Investigation Standards and Family Violence Division tasked with 'identifying the best solution for the administration of a police caution to culturally and linguistically diverse community members'.⁷⁵

A The Paradigm Shift

A new approach is required to improve the responsiveness of the Western Australian justice system to Aboriginal peoples and, in particular, to Aboriginal people with cognitive impairment. This approach can, combined with the changes instigated by the WA Police, contribute to ensuring the justice system does not continue to "fall down" when responding to Aboriginal peoples, and in particular young Aboriginal persons suspected of having cognitive impairment. We argue, however, that the Gibson case offers an opportunity to

⁷¹ Ibid.

⁷² Corruption and Crime Commission, above n 2, [4].

⁷³ Corruption and Crime Commission, above n 2, [3]. See also Chapters 6–10.

⁷⁴ Corruption and Crime Commission, *Operation Aviemore: Commissioner of Police Response to Commission Recommendations* (Report, Corruption and Crime Commission, 2 December 2016).

⁷⁵ Ibid 2.

redress the imbalance of power between the mainstream justice system and Aboriginal Australians. While it is encouraging that steps are being taken to implement recommendations of the CCC, this does not go far enough to remedy the failing of the justice system that gave rise to the miscarriage of justice experienced by Mr Gibson. We argue that the Gibson case is both a manifestation of the systemic problems between the settler justice system and Aboriginal Australians, and evidence that these issues require a significant paradigm shift rather than piecemeal remedies. This shift would require both legislative reform and significant empowerment of Aboriginal communities.

B Legislative Reform

Legislative reform to Western Australia's regime for mentally impaired accused, contained in the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act'), is urgently required. Each Australian jurisdiction has separate legislation governing fitness to stand trial — fitness to stand trial relates to an accused's ability to comprehend the proceedings and communicate *at the time of a criminal trial*, which is central to the fairness of the trial process. Where a person who *may not* be fit to stand trial is tried, there is a miscarriage of justice: the miscarriage of justice 'is that there has been a trial where there should not have been'.⁷⁶ While designed to ensure fairness to an accused, members of the High Court have repeatedly emphasised that,

it should not be overlooked ... that the usual consequence of a finding that a person is unfit to plead is indefinite incarceration without trial. It is ordinarily in the interests of an accused person to be brought to trial, rather than suffer such incarceration.⁷⁷

C Indefinite Detention Without Trial

The Western Australian regime is controversial because it provides for *indefinite* detention in a *custodial* setting *without* trial of a person found unfit to stand trial for an offence carrying a term of imprisonment. A person found unfit, and thus unconvicted, can spend longer in detention than if they had pleaded guilty and were sentenced to imprisonment for the offence. There have been concerns raised in many quarters that Aboriginal people with

⁷⁶ *Eastman v The Queen* (2000) 203 CLR 1, [317] (Hayne J). See also *Kesavarajah* (1994) 181 CLR 230; *Ngatayi v the Queen* (1980) 147 CLR 1.

⁷⁷ *Eastman v The Queen* (2000) 203 CLR 1 [24] (Gleeson CJ); *Kesavarajah* (1994) 181 CLR 230, 249 (Deane and Dawson JJ).

cognitive impairments may be indefinitely detained under the CLMIA Act, pressuring lawyers to encourage early pleas of guilty, as any sanctions would be time-limited.⁷⁸

The CLMIA Act places lawyers representing unfit persons in a precarious position. This is not unique to Western Australia: similar concerns have been raised in Queensland and Local Court proceedings in New South Wales (where special hearings are not provided for).⁷⁹ Lawyers are faced with the dilemma of raising unfitness, which could result in their client being indefinitely detained without trial, or advising their client to plead guilty to the charged offences, as any custodial sentence imposed would be limited and shorter.⁸⁰ This is only further complicated by mandatory sentencing provisions in Western Australia. Justice Reynolds articulated the problem in *BB (a child)*:

The legislation in its current form puts undue pressure on legal advisers to go down the path of arguing that an accused is fit to stand trial in order to avoid exposing the accused to the possibility of an indefinite custody order. It is highly desirable for that undue pressure to be removed ... The obvious downside to accused persons pleading guilty or being found guilty when they are in fact unfit to stand trial is that they can become immersed in the criminal justice system at the expense of the focus being on the provision of appropriate mental health services within the community. That immersion can become particularly problematic if accused persons who are in fact unfit to stand trial plead guilty to offences which can then or later be taken into account for the purpose of mandatory penalties. Further, research shows that early intervention is a key in relation to the improvement of mental health.⁸¹

⁷⁸ See Catherine Crawford, 'Families Impacted by the Criminal Justice System on the Frontier: A New Model Required' (2010) 17(3) *Psychiatry, Psychology and Law* 464; Catherine Crawford, 'FASD Clinicians Forum' (Speech delivered at the Telethons Kids Institute, 18 November 2014); Chief Justice Martin, 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Speech delivered at the Law Summer School, Perth, 20 February 2015); Parliament of Western Australia, Legislative Assembly, Education and Health Standing Committee, 'Foetal Alcohol Spectrum Disorder: The Invisible Disability' (Report No 15, Parliament of Western Australia, Perth, 2012); *The State of Western Australia v BB (a child)* [2015] WACC 2; *State of Western Australia v Tax* [2010] WASC 208.

⁷⁹ Betheli O'Carroll, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37(1) *Criminal Law Journal* 51; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 345-6

⁸⁰ See Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies' (Report, February 2014).

⁸¹ *The State of Western Australia v BB (a child)* [2015] WACC 2, [55], [59].

This is not to suggest that Mr Gibson was pressured to plead guilty or that the CLMIA Act formed part of the reasoning process behind advice to Mr Gibson to so plead. Rather, the Court of Appeal decision quashing Mr Gibson's conviction makes it clear that Mr Gibson's cognitive impairments and limited English language proficiency meant that he did not adequately understand the legal process or the nature and implications of his plea of guilty.⁸² We argue that the CLMIA Act must be reformed so that it can prevent, rather than compound, unfairness to an accused person who cannot adequately understand a legal process.

The paradigm shift we propose is underpinned by what is increasingly being called a decolonising approach — a form of engagement that acknowledges the colonial roots of modern Indigenous disadvantage and seeks to reform structures, law, and policies in ways that give back power to Indigenous communities. Mainstream disciplines, such as law, social work, psychiatry, and education are imbued with a colonial mentality that perpetuates mainstream control over Indigenous people. For example, Dudgeon and Walker argue that mainstream psychology 'colonises' by individualising human behaviour and negating Aboriginal knowledge.⁸³ Decolonising projects focus on 'social and emotional wellbeing'.⁸⁴ Holistic social and emotional wellbeing encourages 'a positive state of mental health and happiness associated with a strong and sustaining cultural identity, community, and family life that provides a source of strength against adversity, poverty, neglect, and other challenges of life'.⁸⁵ There are a number of projects across Australia that offer "on-country" cultural experience based on social and emotional wellbeing principles.

D A Country-Centric Approach

The paradigm shift involves nurturing Aboriginal owned therapeutic alternatives, particularly in the emerging sphere of "on-country" initiatives, drawing on the authority of Elders and respected persons in the Aboriginal community, and optimising opportunities for timely screening and intervention. Our decolonising model tasks agencies with new demands: *the requirement, not simply to divert individuals, but to help strengthen Aboriginal*

⁸² *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁸³ Pat Dudgeon and Roz Walker, 'Decolonising Australian Psychology: Discourses, Strategies, and Practice' (2015) 3(1) *Journal of Social and Political Psychology* 276.

⁸⁴ *Ibid.*

⁸⁵ National Mental Health Commission, extracted in Dudgeon and Walker, above n 84, 278.

owned initiatives through resource sharing and the establishment of local protocols that would facilitate diversionary programs run and owned by Aboriginal people. This may be enabled and maintained by establishing a local community justice group, as recommended by the Law Reform Commission of Western Australia ('LRCWA') and as practised in Queensland and New South Wales, to 'increase the participation of Aboriginal people in the operation of the criminal justice system and to provide support for the development of community-owned justice processes'.⁸⁶ The Commission recommended amendments to the *Communities Act 1979* (WA) that would allow discrete communities gazetted under the Act to establish community justice groups on the grounds that:

The recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts and other justice agencies to access the expertise, community and customary law knowledge, and authority of community justice groups.⁸⁷

However, the LRCWA's recommendations refer only to discrete remote communities as defined for the purposes of the *Communities Act 1979* (WA), whereas we consider it essential to create community justice groups in urban, rural and remote communities, not covered by this legislation. The LRCWA's recommendations on this issue appear outdated in that they do not take into account native title legislation and the role this has given to Prescribed Bodies Corporate, Traditional Owner groups, and similar entities, who now have a crucial role in social and economic development.

The model developed in Queensland under the Community Justice Group ('CJG') Program is more flexible, and provides support to Aboriginal and Torres Strait Islander people within the criminal justice system. The program allocates 'funding to Aboriginal and Torres Strait Islander organisations to develop strategies within their communities for dealing with justice-related issues and to decrease Aboriginal and Torres Strait Islander peoples' contact with the justice system'.⁸⁸ The CJG, amongst other functions, ensures that there are

⁸⁶ Law Reform Commission of Western Australia, *Aboriginal Customary Law Final Report*, Final Report No 94 (2006) 97.

⁸⁷ *Ibid.*

⁸⁸ Queensland Department of Justice and Attorney-General, 'Community Justice Group Program' (Report, Queensland Courts, 21 February 2016) 1.

suitable Aboriginal Elders, or significant people, to sit in Murri courts and be involved in diversionary conferencing; these are paid positions.

E Making Diversion “Work”

Blagg, Tulich, and Bush argue for renewal at two key strategic points of contact with the criminal justice system to create the prerequisites for a new paradigm: the point of first contact with the police; and the courts.⁸⁹ Aboriginal youths remain under-represented in front-end diversion and over-represented at the more punitive stages.⁹⁰ In Western Australia, Aboriginal young people are more likely to be proceeded against by way of arrest and bail, to be held in police custody, and less likely to be issued with a court attendance notice than non-Aboriginal young people.⁹¹ A Price Consulting Group report noted that in 2007 approximately 80% of non-Aboriginal young people were being diverted from court, in contrast to only 55% of young Aboriginal people.⁹² An inquiry into youth justice in Western Australia by Amnesty International Australia also expressed concerns about the low rate of diversion for Aboriginal youth in the Kimberley.⁹³

Making diversion “work” for Aboriginal youths and young adults, particularly those with a cognitive impairment, may require a shift in thinking and practice towards greater multi-disciplinary assessment and engagement. We argue that this should include a strong emphasis on Aboriginal ownership, the use of cultural assessments, “on-country” programs, and leadership by Aboriginal community organisations. At the court stage, there could be “solution-focused” courts that take elements from the Koori Court model, with its focus on the involvement of Elders in the court process, and the Neighbourhood Justice Centre (NJC) model, which has a single magistrate, a comprehensive screening process for

⁸⁹ See Harry Blagg, Tamara Tulich and Zoe Bush, ‘Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives’ (2015) 40(4) *Alternative Law Journal* 257.

⁹⁰ See Chris Cunneen and Robert Douglas White, *Juvenile Justice: Youth and Crime in Australia* (South Melbourne: Oxford University Press, 3rd ed, 2007).

⁹¹ N S N Loh, M G Maller, J A Fernandez, A M Ferrante and R J Walsh, ‘Crime and Justice Statistics for WA: 2005’ (Report, Crime Research Centre, University of Western Australia, 2005) 46.

⁹² See Fiona Macleod, B Macnish and Darlene Gould, ‘A Review of Structure and Service Delivery for the Community and Juvenile Justice Division, Department of Corrective Services’ (Report, Price Consulting Group, 2009).

⁹³ See Amnesty International Australia, ‘A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia’ (Report, May 2015).

clients when they enter the court, and rapid entry into, preferably “on-country”, support.⁹⁴ Unlike other ‘specialist’ courts, NJCs cover the spectrum of issues many defendants and their families face, including health, mental health, disability, drug and alcohol dependency, housing etc, and do not require a plea of guilty to access services.⁹⁵

F *Solution-Focused Courts*

While adopting the terminology of “solution-focused” courts, we stress that, in the Aboriginal context, solution-focused courts must be *strengths* and *needs* based.⁹⁶ Such an approach acknowledges that the “solution” resides not with the court or the mainstream justice process, but with the Aboriginal community. Improving diversionary pathways and interventions requires an understanding of the needs of Aboriginal peoples, particularly those with cognitive impairments, and a close synthesis of medical knowledge and the law. It recasts contact with the system as an opportunity for diversion into community-owned networks of care and support, with a focus on cultural health and wellbeing. We argue that this diversionary approach should be available for adults as well as juveniles, especially young adults in the 18–25-year-old population range.

The Commonwealth Senate Standing Committees on Community Affairs, in its report on the Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia, found that:

There is a need for... [specialist] courts to be adapted for remote Aboriginal and Torres Strait Islander communities ... Such mobile courts could deal with alleged criminal activity in a culturally appropriate way that acknowledges the inappropriateness of any proven negative behaviours and then provides a suitable therapeutic on-country pathway.⁹⁷

⁹⁴ Harry Blagg, Tamara Tulich and Zoe Bush, ‘Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)’ (2016) 19(2) *Australian Indigenous Law Review* 4; Harry Blagg, Tamara Tulich and Zoe Bush, ‘Diversionary Pathways for Indigenous Youth with FASD’, above n 90; Harry Blagg, Tamara Tulich and Zoe Bush, ‘Indefinite Detention Meets Colonial Dispossession: Indigenous Youths with Foetal Alcohol Spectrum Disorders in a White Settler Justice System’ (2017) 26(3) *Social and Legal Studies* 333.

⁹⁵ Harry Blagg, Tamara Tulich and Zoe Bush, ‘Indefinite Detention Meets Colonial Dispossession’, above n 94.

⁹⁶ See Sarah Murray, Tamara Tulich and Harry Blagg, ‘The Innovative Magistrate and Legitimacy —Lessons for a ‘Solution-Based’ Model’ (2017) 40(2) *UNSW Law Journal* 897, 913.

⁹⁷ Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [3.104].

The potential game changer that could provide the basis for a new Aboriginal justice paradigm emerges not from western epistemology alone, but at the point of intersection between Aboriginal and non-Aboriginal knowledge.⁹⁸ It is at this point of intersection that hybrid forms of justice innovation are developing. *Indigenous place can become a fulcrum upon which a new decolonised justice system can be leveraged into being.*

V CONCLUSION

The Gibson case adds to a long list of miscarriages of justice in Western Australia, highlighting how systemic failures in the justice system continue to place Aboriginal peoples and people with impairments at great risk of miscarriages of justice. It also demonstrates that miscarriages of justice are not always the result of deliberate attempts to withhold or corrupt vital evidence, rather they are the outcome of poor decision making, lax regimes of accountability, and weakly enforced rules and guidelines. In this respect, the decision by the WA Police to strengthen its practices in relation to interaction with Aboriginal communities is a very welcome move. Clearly, this move needs to be accompanied by reform of the draconian, and Dickensian, CLMIA Act. However, these changes alone, will not resolve many of the underlying problems unless they are also developed within a broader paradigm shift that strengthens community justice mechanisms and ensures greater partnership with Aboriginal people.

Miscarriages of justice, often involving Aboriginal people with limited English skills and carrying some form of cognitive impairment, continue to haunt the criminal justice system of Western Australia, to its considerable detriment. As Justice Cory, in his report of the Manitoba Justice Commission of Enquiry, intones: 'A wrongful conviction is as much a wrong to the administration of justice and to our society, as it is to the individual prisoner. Wrongful imprisonment is the nightmare of all free people. It cannot be accepted or tolerated.'⁹⁹

⁹⁸ Harry Blagg, Tamara Tulich and Zoe Bush, 'Indefinite Detention Meets Colonial Dispossession', above n 94.

⁹⁹ Peter de C Cory, Thomas Sophonow, *The Inquiry Regarding Thomas Sophonow: Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg, Manitoba Justice, 2001), extracted in Malcolm McCusker AC CVO QC, 'Miscarriages of Justice' (2015) 42(9) *Brief* 14, 14.

REFERENCE LIST

A Articles/Books/Reports

Amnesty International Australia, 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia' (Report, Broadway, May 2015)

Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies' (Report, Australian Human Rights Commission, February 2014)

Blagg, Harry, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' (2015) 40(4) *Alternative Law Journal* 257

Blagg, Harry, Tamara Tulich and Zoe Bush 'Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)' (2016) 19(2) *Australian Indigenous Law Review* 4

Blagg, Harry, Tamara Tulich and Zoe Bush, 'Indefinite Detention Meets Colonial Dispossession: Indigenous Youths with Foetal Alcohol Spectrum Disorders in a White Settler Justice System' (2017) 26(3) *Social and Legal Studies* 333

Corruption and Crime Commission, *Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Warneke* (Report, Corruption and Crime Commission, 5 November 2015)

Corruption and Crime Commission, *Operation Aviemore: Commissioner of Police Response to Commission Recommendations* (Report, Corruption and Crime Commission, 2 December 2016)

Cory, Peter de C, Thomas Sophonow, *The Inquiry Regarding Thomas Sophonow: Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg, Manitoba Justice, 2001)

Crawford, Catherine, 'Families Impacted by the Criminal Justice System on the Frontier: A New Model Required' (2010) 17(3) *Psychiatry, Psychology and Law* 464

Cunneen, Chris and Robert Douglas White, *Juvenile Justice: Youth and Crime in Australia* (South Melbourne: Oxford University Press, 3rd ed, 2007)

Dudgeon, Pat and Roz Walker, 'Decolonising Australian Psychology: Discourses, Strategies, and Practice' (2015) 3(1) *Journal of Social and Political Psychology* 276

Law Reform Commission of Western Australia, *Aboriginal Customary Law Final Report*, Final Report No 94 (2006)

Loh, N S N, M G Maller, J A Fernandez, A M Ferrante and M R J Walsh, 'Crime and Justice Statistics for WA: 2005' (Report, Crime Research Centre, University of Western Australia, 2005)

Macleod, Fiona, B Macnish and Darlene Gould, 'A Review of Structure and Service Delivery for the Community and Juvenile Justice Division, Department of Corrective Services' (Report, Price Consulting Group, 2009)

McCusker, Malcolm, 'Miscarriages of Justice' (2015) 42(9) *Brief* 14

Murray, Sarah, Tamara Tulich and Harry Blagg, 'The Innovative Magistrate and Legitimacy — Lessons for a 'Solution-Based' Model' (2017) 40(2) *UNSW Law Journal* 897

NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013)

O'Carroll, Bethali, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37(1) *Criminal Law Journal* 51

Parliament of Western Australia, Legislative Assembly, Education and Health Standing Committee, 'Foetal Alcohol Spectrum Disorder: The Invisible Disability' (Report No 15, Parliament of Western Australia, Perth, 2012)

Queensland Department of Justice and Attorney-General, 'Community Justice Group Program' (Report, Queensland Courts, 21 February 2016)

Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016)

B Cases

Eastman v The Queen (2000) 203 CLR 1

Gibson v Western Australia [2017] WASCA 141

Kesavarajah (1994) 181 CLR 230

Ngatayi v The Queen (1980) 147 CLR 1

Njana (1998) 99 A Crim R 273

R v Butler (No 1) (1991) 102 FLR 341

State of Western Australia v BB (a child) [2015] WACC 2

State of Western Australia v Gibson [2014] WASCSR 203

State of Western Australia v Gibson [2014] WASC 240

State of Western Australia v Tax [2010] WASC 208

C Legislation

Communities Act 1979 (WA)

Criminal Law (Mentally Impaired Accused) Act 1996 (WA)

Criminal Investigation Act 2006 (WA)

Police Act 1982 (WA)

D Other

Ceranic, Irena, 'Gene Gibson Seeks Compensation over Wrongful Conviction for Josh Warneke Manslaughter' *ABC News* (online), 28 July 2017 <<http://www.abc.net.au/news/2017-07-28/gene-gibson-to-sue-over-josh-warneke-conviction/8753032>>

Clarke, Tim, 'How Justice Failed Gene Gibson,' *The West Australian* (online), 13 April 2017 <<https://thewest.com.au/news/wa/how-justice-failed-gene-gibson-ng-b88442950z>>

Crawford, Catherine, 'FASD Clinicians Forum' (Speech delivered at the Telethon Kids Institute, 18 November 2014) <http://alcoholpregnancy.telethonkids.org.au/media/1020099/fasd_clinicians_forum_magistrate_crawford_presentation.pdf>

Diss, Kathryn, 'Two WA Police Officers Face Possible Demotion over Bungled Josh Warneke Investigation' *ABC News* (online), 7 January 2016 <<http://www.abc.net.au/news/2016-01-07/wa-police-officers-face-disciplinary-action-josh-warneke-case/7074072>>

'Gene Gibson: Indigenous Man Jailed over Josh Warneke's Death Has Conviction Overturned' *The Guardian* (online), 12 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/12/gene-gibson-indigenous-man-jailed-over-josh-warnekes-death-has-conviction-overturned>>

'Gene Gibson Freed as Conviction for Broome Manslaughter of Josh Warneke Quashed,' *ABC News* (online), 12 April 2017 <<http://www.abc.net.au/news/2017-04-12/gene-gibson-josh-warneke-manslaughter-conviction-quashed-appeal/8436550>>

'Josh Warneke Death: Gene Gibson Granted Leave to Appeal Against Conviction over Broome Killing' *ABC News* (online), 15 November 2016 <<http://www.abc.net.au/news/2016-11-15/josh-warneke-death-case-gene-gibson-granted-leave-to-appeal/8026114>>

Laurie, Victoria, 'Indigenous Australian Gene Gibson Was Lost in Translation,' *The Australian* (online), 8 April 2017 <<http://www.theaustralian.com.au/news/inquirer/indigenous-australian-gene-gibson-was-lost-in-translation/news-story/6ea8c503fadce99928092b73120a95b5>>

Laurie, Victoria, 'Manslaughter Conviction Overturned, Gene Gibson Free,' *The Australian* (online) 13 April 2017 <<http://www.theaustralian.com.au/news/nation/manslaughter-conviction-overturned-gene-gibson-free/news-story/c5306a062d9f7e969ad745be8f95f619>>

Martin, Chief Justice, 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Speech delivered at the Law Summer School, Perth, 20 February 2015) <http://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf>