



*Presentation to Joint Development Day -
Department of Corrective Services*

*'Corrective Services for
Indigenous Offenders - Stopping the
Revolving Door'*

The Hon Wayne Martin
Chief Justice of Western Australia

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Introduction

It is an honour and a privilege to have been invited to address this gathering of leaders within the Department of Corrective Services. Given the topic of my address, it is more than usually appropriate for me to commence by acknowledging the traditional owners of the lands on which we meet, the Noongar People, and by paying my respects to their elders past and present.

The over-representation of indigenous offenders

I have often described the gross over-representation of Aboriginal people within the criminal justice system of Western Australia as one of the biggest issues confronting that system. I will continue to do so until there is some indication that we are making progress in reducing the extent of that over-representation. Tragically there is no sign of that progress at the moment. All the statistical indicators relating to the over-representation of Aboriginal people in our justice system continue to get steadily worse.

The magnitude of the imbalance between Aboriginal people and other ethnicities within the group of offenders convicted and sentenced by our criminal courts will be well known to everybody at this meeting. However, because my paper will be published to a wider audience, and at the risk of depressing us all, I will recap on some of those statistics.

The United States has the highest rate of adult imprisonment in the world. The Pew Center reported in 2008 that approximately one in 100 adults in the US was in prison. Within that group, the highest adult incarceration rate was for African-American males, where the rate was one in 15. The rate of incarceration of adult Aboriginal men in WA in June 2008 was also one in 15. Put another way, tonight about one in 15 adult Aboriginal

men will spend the night in prison. That is equivalent to the highest incarceration rate within the country having the highest incarceration rate in the world.

The Pew Center reported that the highest rate of female incarceration in the United States in 2008 was for African-American women. That rate was one in 203. In Western Australia in 2008, the rate of incarceration of adult Aboriginal females was about one in 160. So the rate of imprisonment of Aboriginal women in Western Australia is worse than the rate of incarceration of African-American women in the United States, and may well be the highest in the world.

If both genders are combined in the US in 2008 the overall rate of incarceration of adult African-Americans was one in 29. In Western Australia in the same year the rate of incarceration of adult Aboriginals was one in 28. The disparity between the rates of imprisonment of Aboriginals and non-Aboriginals is much higher in Western Australia than between different ethnicities in the United States. In Western Australia adult Aboriginals are imprisoned at 25 times the rate of non-Aboriginals. In the United States African-American adults are imprisoned at seven times the rate of white American adults. So, notwithstanding that the United States is a significantly more punitive society, in Western Australia Aboriginal people are being imprisoned at about the same or higher rates (in the case of women) as the most imprisoned ethnic group in that country.

If these figures are not depressing enough, let us move to the rates of juvenile detention. A recent report published by the Australian Institute of Criminology confirmed that Western Australia has by far the highest

rate of detention of indigenous juveniles in Australia - about 700 per 100,000 in June 2007. The next highest rate of incarceration of Aboriginal juveniles was South Australia, where the rate was 528. Conversely, in Western Australia the rate of detention for non-indigenous juveniles is one of the lowest in the country.

The proportion of Aboriginal juveniles in detention in Western Australia has, in recent years, generally varied between 75% and 80% of all those detained. This is obviously a portent of the future. Absent dramatic change in current trends, it is highly likely that these young Aboriginal offenders will form part of the group of adult Aboriginal offenders who are so over-represented in our prisons.

Rates of reoffending

Punishment serves many purposes. One of those purposes is the public denunciation of those who transgress the laws of our society. Another is the recognition and vindication of the rights of the victim of the offence. Another of those purposes is the discouragement of offending, and reoffending. The imprisonment of Aboriginal offenders is singularly unsuccessful in reducing the likelihood of them reoffending. This proposition is amply demonstrated by comparing the rate at which non-Aboriginal prisoners return to prison, compared with the comparable rate for Aboriginal prisoners.

About 40% of male adult non-Aboriginal prisoners leaving prison between 1 July 1998 and 30 June 2008 had returned to prison before early May 2009. However, in the case of Aboriginal prisoners, the equivalent figure was just under 70%. In the case of female prisoners the rate of

return to prison for non-Aboriginal prisoners over the same period was about 30%, compared to about 55% for Aboriginal prisoners.

In the case of juveniles the rate of return to custody over the same period for female Aboriginal detainees was about 64%, and for male Aboriginal detainees about 80%. Unfortunately the equivalent comparison for non-Aboriginal juvenile offenders was not available from the answers given by the Attorney General and Minister for Corrective Services to a series of Parliamentary questions which I have used for the other data I have specified, but there is no reason to think the comparison would be any less invidious than the comparison relating to adults returning to custody.

The cost of dealing with young Aboriginal offenders

The Auditor General's report in 2008 analysing the cost of dealing with young offenders provides valuable data on the over-representation of young Aboriginal offenders, and some of the economic cost to the community of their offending.

The Auditor General's report identified groups of young people who had varying degrees of formal contact with police over a five year period. Of the group of about 1,000 young offenders who had more than 10 formal contacts with police over that period, 80% were male, 75% were indigenous, and 55% lived in regional Western Australia.

A group of about 120 young people who had 25 or more formal police contacts over the last five years was identified. They were predominantly male, indigenous, and lived in regional Western Australia. The majority of these young people entered the justice system as soon as they could be

held criminally responsible for their actions at the age of 10. The Auditor General calculated the cost to the justice system of dealing with the 250 young people who had most contact with that justice system over their juvenile years - that is, between the ages of 10 and 17. He estimated that cost to be \$100 million - that is, approximately \$400,000 for each and every child in that group. The rates of return to custody to which I have already referred show that even expenditure at these extraordinary levels is spectacularly unsuccessful in discouraging young Aboriginal offenders from reoffending.

Hence the title to this paper. An alarmingly high proportion of the Aboriginal population of Western Australia are caught in a metaphorical revolving door at the entrance to the criminal justice system. They will often enter that system at a very young age - perhaps at or about the age of criminal responsibility, which is the age of 10. The seriousness of their offending will progressively elevate, to the point where they find themselves in detention. In due course they 'graduate' from the juvenile justice system into the adult justice system and receive prison terms. Although they may emerge from the system, from time to time, through the revolving door, they quickly re-enter through that same door.

Despite the expenditure of large amounts of public funds, there is no indication that we are any closer to breaking this tragic cycle. On the contrary, all the indications are to the effect that the problem is getting worse.

The conclusion which I draw from this depressing picture is that detention and imprisonment are not in themselves particularly effective at reducing the rate of offending among Aboriginal people. Put another

way, locking up Aboriginal people does not seem to have a significant effect on behaviour, either by discouraging offending in the first place, or discouraging reoffending. It may be that imprisonment does not have the same punitive force for Aboriginal people as it does for non-Aboriginals. Tragically, it may be that Aboriginal people have come to see incarceration as a rite of passage, the trauma of which is reduced by the fact that often they are reunited with incarcerated family members. I do not expect that these observations would come as a surprise to anybody working in the Department of Corrective Services of Western Australia.

Behavioural modification

A term like 'behavioural modification' tends to conjure up Orwellian notions of gulags and doctrinal 're-education'. I use that term in a much less sinister sense. A significant purpose of the criminal justice system is to discourage conduct which is contrary to the laws of the state. In the case of those who are tempted to transgress those laws, our purpose is to modify behaviour so as to encourage them to resist that temptation. In the case of those who have offended, our purpose, at least in part, is to modify behaviour so as to reduce the risk of reoffending. The fundamental objective in each case is to protect the community, by discouraging transgression of our laws.

As I have endeavoured to illustrate, a purely punitive model is not very effective at modifying behaviour. In Western Australia it seems to be singularly ineffective in modifying the behaviour of Aboriginal people. How then do we stop the revolving door from returning those people back into the criminal justice system again and again and again?

When attempting to answer that rhetorical question, I think we must be realistic about the extent to which any intervention by the criminal justice system is likely to modify illegal behaviour by Aboriginal offenders. It should not be overlooked that Aboriginal people are grossly over-represented in the criminal justice system in this State mainly because they engage in criminal conduct more often than the other inhabitants of this State. The causes of Aboriginal crime are as many and varied as the many and varied circumstances of Aboriginal offenders. But there are some common themes which will be obvious to this audience. They include all those aspects of the 'gap' between the living conditions of Aboriginal people and those of non-Aboriginal people in our community. They include the lower standards of health enjoyed by Aboriginal people, lower and often inadequate standards of accommodation, poor participation rates in education and employment, social and family dysfunction, cultural dislocation, dispossession, substance abuse, despair and high levels of mental illness. Unless and until these massive and multifaceted issues are addressed and resolved, the over-representation of Aboriginal people within the criminal justice system of Western Australia is likely to continue. And obviously there is a limit to which agencies like courts and corrective services can address these deep-seated issues, which have defied resolution for many years now. But that is no excuse for not trying.

This is also not to deny that the criminal justice system has components which structurally discriminate against Aboriginal people, at virtually every step within the system. In the juvenile area, Aboriginal children are less likely to be diverted from court than non-Aboriginal children, and more likely to be remanded in custody or given a sentence of detention. This is not because of racial discrimination by police or the courts, but

because the family circumstances and prior record of young Aboriginal offenders commonly count against the exercise of discretion in their favour. Similarly in the adult justice system, Aboriginal offenders are more likely to have adverse prior records, unstable residential and employment histories, and substance abuse issues, with the consequence that they are more likely to be refused bail, and more likely to be given a custodial sentence when convicted.

Culturally appropriate programmes - custodial and non-custodial

I am pleased to acknowledge that the material published by your department readily acknowledges the importance of providing effective and culturally appropriate programmes to Aboriginal offenders in both custodial and non-custodial environments. The conclusions I have drawn from the data reinforce the importance of utilising the intersection of an Aboriginal person with the criminal justice system as an opportunity for a beneficial intervention designed to reduce the likelihood of reoffending. I doubt that anyone would contest that fairly obvious proposition.

However, as with many areas of life, there has unfortunately been a gap between aspiration and achievement in this area. As the then Acting Inspector of Custodial Services stated in his report following an inspection of Broome Regional Prison in October 2008:

There is an almost complete absence of culturally appropriate programmes that address offending behaviour for Aboriginal prisoners. One consequence of this is the higher rate of recidivism (rate of return to custody or community corrections) among Aboriginal prisoners, which incidentally, is highest at Broome prison.

These observations were consistent with an earlier report by the Inspector, who observed that:

Funding for rehabilitation in Western Australia is low compared to other jurisdictions - the lowest of all the mainland states. Funding for programmatic intervention and community reintegration programmes are particularly limited. Other jurisdictions have a heavy focus on both these forms of intervention. This based on the 'what works' literature, which points to these as important in reducing in-prison violence and recidivism as well as contributing to survival in the community.

The Inspector has also reported upon the shortfall between the demand for rehabilitative programmes within the prison system, and the supply of those programmes. As I am sure you would be aware, in almost every area of programme delivery, demands substantially outstrips supply.

In the case of Aboriginal offenders, there are at least two areas of behaviour in which programmes aimed at behaviour or modification are of profound significance. They are substance abuse and family violence. Despite the obvious and acknowledged significance of programmes in these areas, there have been considerable difficulties involved in delivering programmes in these important areas to Aboriginal people in the regions where they are most needed. In regional Western Australia, substance abuse and family violence amongst Aboriginal people is at epidemic levels in some communities. I readily acknowledge and accept the practical difficulties involved in recruiting appropriately qualified personnel to live and work in these remote areas, in which there are chronic shortages of even the most basic infrastructure, such as housing. Those practical problems are heavily compounded by the fact that offenders are often living in relatively small communities separated by vast distances, which makes service delivery difficult and expensive. However, where those offenders are concentrated in large numbers by

reason of being incarcerated, programme delivery should be more feasible.

It would be hypocritical of me to criticise your department for the imbalance between the services available in the regions, compared to the services available in the metropolitan area, when precisely the same criticism can be justifiably levelled at the courts. The Drug Court operates only in the metropolitan area, and all metropolitan Magistrates Courts have a Family Violence Court programme. However, there is no specific Drug Court which sits outside the metropolitan area, and the only specific Family Violence Court is in Geraldton (although it is specifically targeted at the needs of Aboriginal offenders in that region).

Driving offences

In 2007 a report by a committee chaired by Ben Wyatt MLC, which was created to investigate the effect which motor drivers licence and driving laws had on remote communities revealed the extent to which unlicensed driving, and driving offences generally, significantly contribute to the over-representation of Aboriginal people in our prisons. The rate of imprisonment of Aboriginal people is 12.5% for driving and vehicle offences, compared with 2.9% for non-Aboriginal people. Two-thirds of the offences giving rise to imprisonment are related to driving without a valid licence.

There are significant structural issues at work which contribute to these statistics. The remoteness of many of the communities makes it extremely difficult for drivers licences to be obtained. Not uncommonly, because of the lack of alternative means of transport in the areas in which people live, young persons might be apprehended for driving without a

licence before they are legally eligible to obtain a licence. Sometimes that might be because they had been directed to drive a vehicle by an older person who is intoxicated. The consequence of their conviction is of course that they are automatically disqualified from holding a licence for a period. Practical necessity might prompt them to drive unlawfully again during that period, with the result that another automatic disqualification follows. The result of this tragic cycle is often that Aboriginal people living in remote communities have no realistic prospect of obtaining a motor drivers licence in the foreseeable future, under the current legal regime. By the time they get to their 13th, or 23rd, or even 33rd conviction for driving without a licence, imprisonment seems the only appropriate penalty. By comparison to non-Aboriginal offenders who are in prison for driving offences, there are more Aboriginal offenders in prison for such offences who have never driven drunk or dangerously.

The use of driving licence suspension as a means of fine enforcement also contributes significantly to this problem. Let me give another example. Suppose an Aboriginal person fails to vote for some reason - perhaps due to engagement in 'sorry' business on election day. The notification of the fine for failing to vote may never reach that person, as the collection of mail in remote communities can be somewhat haphazard. The notification of licence suspension following failure to pay the fine may not be received for the same reason. That person is then apprehended and convicted for driving while under suspension, which gives rise to an automatic disqualification, which sets in train the process of continuing disqualification leading ultimately to imprisonment to which I have referred.

One of the poor social indicators I have already mentioned as contributing to the over-representation of Aboriginal people in the criminal justice system is low rates of participation in employment. The difficulties to which I have referred in relation to driving licences significantly compound these problems, as the mining companies who are the likely source of employment in remote areas will generally not employ anybody without a driving licence.

There is a significant structural problem here that needs to be addressed urgently. Part of the answer lies in providing dedicated teams charged with the responsibility of improving the extent to which Aboriginal people in remote communities hold valid drivers licences. Another part of the solution lies in the modification of legal regimes which work well in the metropolitan area, but unjustly in the remote parts of our State. The Wyatt Committee has provided a report containing detailed recommendations relating to this problem. I would respectfully commend those recommendations to Government.

Alternatives to custodial intervention

In many jurisdictions with a rapidly escalating prison population, such as the United States and Western Australia, the cost of imprisoning increasingly large numbers of people has been noticed by those responsible for public policy. By 'cost' in this context, I mean economic cost, leaving out of consideration the many social costs which attend incarceration. Measured purely in economic terms, there is a real question as to whether the high cost of imprisonment represents the most effective deployment of public resources aimed at protecting the community. That question has been rhetorically posed because, of course, I am not the only person to have expressed the view that

imprisonment, of itself, is not particularly effective in modifying behaviour. General John Sanderson has observed that in Western Australia, about half of the money spent by the State on Aboriginal people is spent in the justice and corrective services systems. A significant proportion of that expenditure is incurred incarcerating people. On the evidence which I have set out above, it seems least possible that there would be better ways of spending that money in order to provide better protection to the community. In particular, if those resources were deployed to improve the availability of programmes aimed at beneficial behavioural modification, both in number and in geographical region, it seems to me to be very likely that the community of Western Australia would be better protected than by continuing to spend that money on incarceration.

The judges and magistrates sentencing Aboriginal offenders in regional Western Australia commonly have no practical alternative to a custodial sentence because of the unavailability of non-custodial programmes, and limited availability of non-custodial supervision. Imprisoning offenders because of a lack of non-custodial options is expensive and counter-productive. It discriminates between regional and metropolitan residents, and has the consequence that the former are more likely to go to prison.

The importance of country

I claim no expertise in Aboriginal culture. However, like most Australians, I am aware of the profound significance of the connection between many Aboriginal persons and their country. It is a connection which transcends adequate description in the English language. It is I think a concept which those of us who are not steeped in Aboriginal

culture have difficulty comprehending. Nevertheless, despite these difficulties of the expression and comprehension, there does not seem to be any doubt that corrective services delivered on or near the country of an Aboriginal offender are much more likely to be effective.

Again, I am pleased to note and acknowledge that your department has recognised this expressly in many of its publications. However, practical problems often preclude achievement of that objective. There are simply insufficient custodial and non-custodial services available in regional Western Australia to enable all Aboriginal offenders to maintain appropriate links with country and community while under either form of sentence.

The geographical limits upon the availability of corrective services to Aboriginal offenders impose costs at a number of levels. It impedes the efficacy of the delivery of those services, and it has a significant economic cost in the form of prisoner transport. Despite genuine and concentrated efforts to reduce the transport of prisoners in custody, the time and money spent in such transports throughout Western Australia continues to accelerate. The most recent estimate of annual cost which I saw put the figure on the contracted services - and therefore excluding the Department's costs for the fleet and its maintenance - at just under \$30 million. If that expenditure could be reduced because of the greater availability of services in the regions, those resources could be more productively deployed.

Work camps

One way of facilitating Aboriginal offenders staying on or near to country, and at the same time encouraging the development of vocational

skills, is through the provision of work camps. When I was presented with the research for this paper I was surprised to read that they are of relatively recent origin, although pleased to read that the number and range of those camps has expanded significantly over the last 10 years or so.

Work camps seem to me to have a number of significant advantages over more traditional forms of incarceration. First, they might enable Aboriginal offenders to work on or near country. Second, they encourage the development of vocational skills, by facilitating engagement in productive work. Third, they provide an opportunity for Aboriginal offenders to make a positive contribution to their local community, by providing labour, which is often in very short supply in these areas.

Previous custodial plans have foreshadowed the provision of mobile work camps, travelling throughout a particular region, such as the East Kimberley. This seems to me to be highly desirable. Again, such a programme would enable Aboriginal offenders to live on or near country, in ways that are more consistent with a traditional manner of life, acquiring vocational skills and providing much needed labour to the community.

The number of places available in work camps in Western Australia is still very small, compared to the number of minimum security prisoners who might be eligible for placement in such a camp. For my part, I would strongly encourage the movement towards the development of these camps.

The Boronia Pre-release Centre

The Boronia Pre-release Centre provides an important capacity to assist female offenders re-entering the community, as they approach the end of their sentence. However, the figures presented to me suggest that the percentage of Aboriginal women amongst those at Boronia is significantly less than the percentage of Aboriginal women within the prison population generally. While this may be a consequence of the characteristics of Aboriginal women offenders, including their offence types and criminal histories, the rates of return to custody which I have mentioned earlier suggest that those offenders are in greater need of assistance when re-entering the community, if they are to avoid returning to prison.

Some good news

Given the depressing character of some of the ground I have covered in this paper, let me finish with some optimistic observations. They flow from a meeting which I attended recently in which I had the benefit of an exposition of the plans relating to the new West Kimberley Regional Prison. I was particularly impressed not only with the plans for the physical construction of that prison, but also with the obvious thought, care and attention to cultural issues which had gone into the planning and preparation for that facility. The various proposals for greater Aboriginal participation in the management and operation of that prison are very much to be welcomed. The physical configuration of the prison is much more consistent with Aboriginal culture and tradition than more conventional prison designs. It is to be hoped that similar considerations can be brought to bear in other prisons predominantly accommodating Aboriginal people.

I have no doubt that your department is genuine in its commitment to addressing the devastating consequences which flow from the over-representation of Aboriginal people in the criminal justice system of this State. The difficulty - for all of us - is translating that commitment to practical outcomes. My hope is that the various agencies involved in addressing those problems, which include police and courts, not to mention the agencies responsible for addressing the manifold aspects of Aboriginal disadvantage which lie at the heart of the problem, can work together so that we can reverse the trends of recent years, and remove Aboriginal people from the revolving door of the criminal justice system.