



Curtin University
Annual Ethics Lecture

Bridging the Gap - Some Ethical Dilemmas

Address by

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Chief Justice of Western Australia

Curtin University, Bentley
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Introduction

It is a great honour to have been invited to give the annual ethics lecture presented by the Centre for Applied Ethics and Philosophy at this university. Because of the issues which I will be addressing tonight, it is more than usually appropriate for me to commence by acknowledging the traditional owners of the lands on which we meet, the Wadjuk people, who are, of course, part of the great clan of Nyungar peoples of south-western Australia, and to pay my respects to their Elders past and present.

The Centre of Aboriginal Studies

Tonight I want to look at some of the ethical dilemmas which arise when we endeavour to bridge the gap between the living conditions, health and welfare of Aboriginal people and non-Aboriginal people in Australia. It is particularly appropriate to speak of issues associated with the multifaceted disadvantage faced by Aboriginal people in Australia at this university, because the Curtin Centre for Aboriginal Studies makes a very important contribution to the advancement of Aboriginal people by facilitating and encouraging participation in education at the tertiary level.

It's not all bad news

When the disadvantages faced by Aboriginal people in Australia are discussed publicly, there is a tendency to create the impression that nothing but gloom and despair pervades the lives of Aboriginal people, and that nothing positive is happening with respect to the first inhabitants of this country. I do not want this address to add to that false impression. It is therefore important for me to start by emphasising that the vast

majority of Aboriginal Australians are law-abiding citizens who make a great contribution to our nation in many fields of endeavour including public administration, commerce, sport, culture and the arts. Although I will be referring to the over-representation of Aboriginal children in the juvenile justice system of this State, it is important to emphasise that the vast majority of Aboriginal children have no contact whatever with police or the justice system, and grow to mature and responsible adults without ever being arrested or brought before a court.

It is also important to acknowledge and recognise the strong and articulate leaders within the Aboriginal community, who advocate very effectively and forcefully on behalf of their community. Positive things are happening. Governments of all political persuasions, State and Federal, recognise the need for effective action to bridge the gap between Aboriginal and non-Aboriginal Australians and are prepared to commit substantial resources to achieving that objective. So despite the significance of some of the issues that will be addressed tonight, I firmly believe there is room for optimism with respect to the future of Aboriginal Australians.

Over-representation in the criminal justice system

However, as I have said many times since my appointment to the bench, the over-representation of Aboriginal people in the criminal justice system of Western Australia and Australia is almost certainly the biggest single issue facing those systems. Tragically, the phenomenon of over-representation is getting worse, rather than better, despite the objectives of government and the application of substantial public resources in an effort to reduce over-representation.

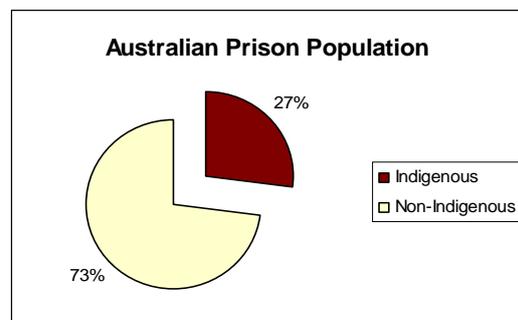
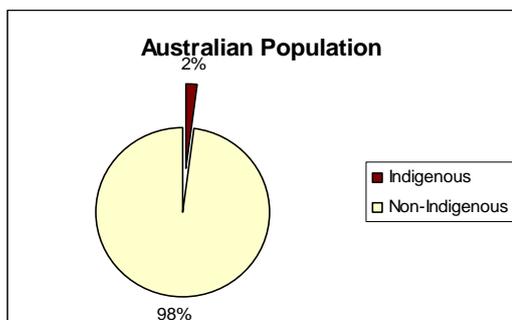
The format of my address this evening will be to first assess the extent of that over-representation, and the trends in the figures, to then proffer some views as to the factors that contribute to over-representation, and then identify some of the ethical dilemmas which arise when we endeavour to address those factors.

It is in the nature of ethical dilemmas that they do not admit readily of a single correct and obvious answer. It is important to concede at the outset that I will not attempt in this paper to provide answers to the ethical questions which I pose. Rather, my purpose is to identify the issues and some of the considerations which are relevant to their resolution.

The Statistics

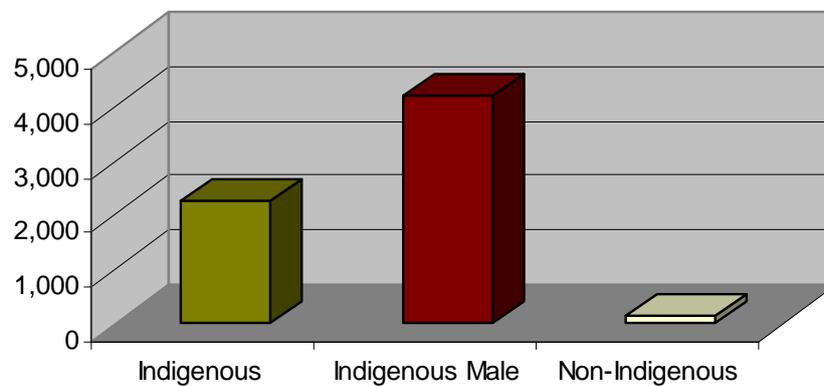
Australian prison numbers

Since 1998, the Australian Bureau of Statistics has regularly published comprehensive data relating to the Australian prison population. The latest published data relates to the quarter ending in March this year. During that quarter, the average daily number of Aboriginal prisoners in Australia was 7,873, which comprised 27% of the total prisoner population. Aboriginal people comprise approximately 2% of the Australian adult population.



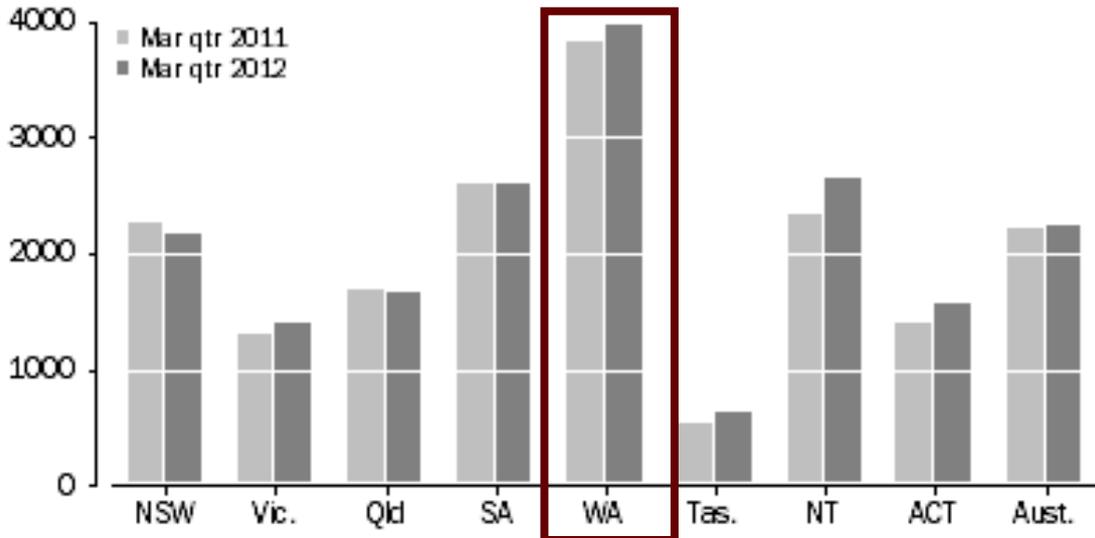
Prisoner statistics are usually expressed in terms of numbers per 100,000 of adult population. The rate for Aboriginal people during the March quarter of this year was 2,247 per 100,000, and for Aboriginal males, the rate was almost double, at 4,194 per 100,000. Those rates are to be compared to the rate for non-Indigenous persons which was approximately 130 per 100,000.

Rate of Imprisonment (per 100,000 people)



Western Australian prison numbers

Western Australia has the highest rate of imprisonment of Aboriginal people in the country, by a significant margin. During the March quarter of this year, the rate in Western Australia was 3,991 per 100,000, which is a little under double the national rate. The next highest rate was in the Northern Territory, which had a rate of 2,645 per 100,000. Those who are quick at maths will notice that in Western Australia, the rate at which we lock up Aboriginal people is 50% higher than in the Northern Territory.

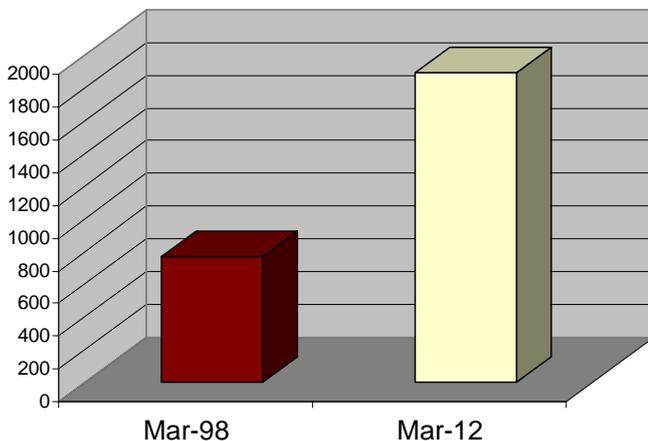


Source: Australian Bureau of Statistics

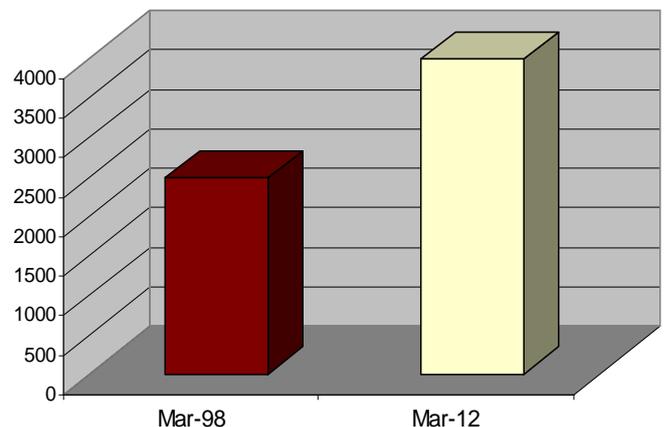
Comparison with 1998

It is interesting (but depressing) to compare these figures to the first figures published in this series of statistics in March 1998. At that time in Western Australia there were 766 adult Aboriginal prisoners in Western Australia (on the first day of the month), compared to 1,893 14 years later. So in absolute terms, the number of Aboriginal prisoners has more than doubled in this State in 14 years. In terms of rates per head of population, the rate of indigenous imprisonment in Western Australia in the March quarter of 1998 was 2,489, compared to 3,991 for the March quarter of this year - an increase of approximately 50%.

**Number of adult Aboriginal prisoners -
March 1998 and March 2012**



**Rate of Indigenous imprisonment (per
100,000 people) - March 1998 and March
2012**



The last decade

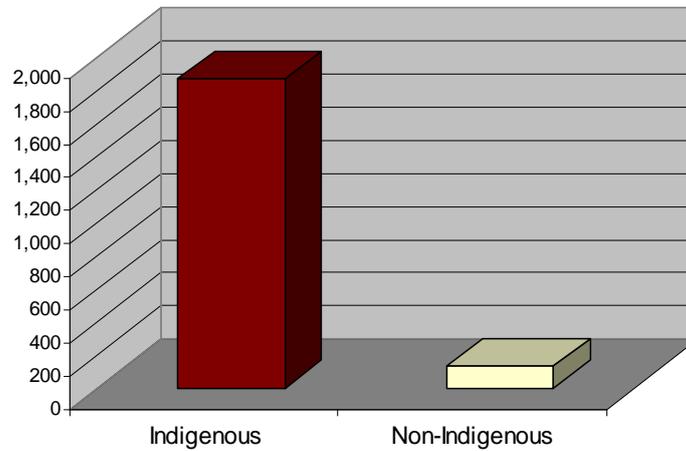
More detailed data relating to the Australian prison population is published by the ABS on an annual basis. The latest published data relates to a census conducted on 30 June 2011, and includes comparative data for the preceding 10 years. On a national level, in the 10 years between 2001 and 2011, the Indigenous prison population increased from 4,447 to 7,656 - an increase of 72%. Over the same period, the non-Indigenous prison population increased from 18,011 to 21,426, an increase of 19%. So while it is clear that the prison population in Australia is growing generally, the Aboriginal prison population is growing at a much faster rate than the non-Aboriginal population. Over the same 10 years, Aboriginal people have gone from comprising about 20% of the prison population to a little under 27%. In Western Australia, Aboriginal adults comprised 38% of the prison population in 2011, compared to 3.8% of the general population.

Age standardised data - Australia

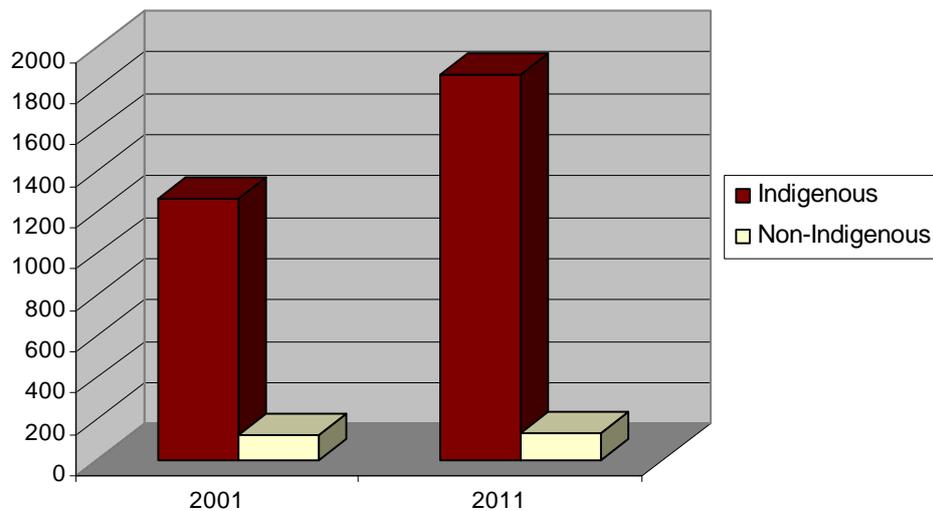
When comparing imprisonment rates, it is generally preferable to use age standardised data. This is because criminal behaviour tends to be associated with age so that if one sector of the population has a different age profile to another sector of the population, comparing data that is not adjusted for age is not comparing apples with apples. The age standardised imprisonment rate for Aboriginal people across Australia on 30 June 2011 was 1,868 per 100,000, compared to 130 per 100,000 for non-Aboriginal people, so the Aboriginal rate is about 14 times higher than the non-Aboriginal rate. Between 2001 and 2011 the age standardised rate for Aboriginal prisoners increased from 1,267 to 1,868 per 100,000 - an increase of about 47%, compared to an increase in the

non-Indigenous rate from 125 to 130 per 100,000 - an increase of about 4%.

Age standardised imprisonment rate for Aboriginal people (per 100,000 people)



Age standardised imprisonment rate per 100,000 people- Comparison between 2001 and 2011

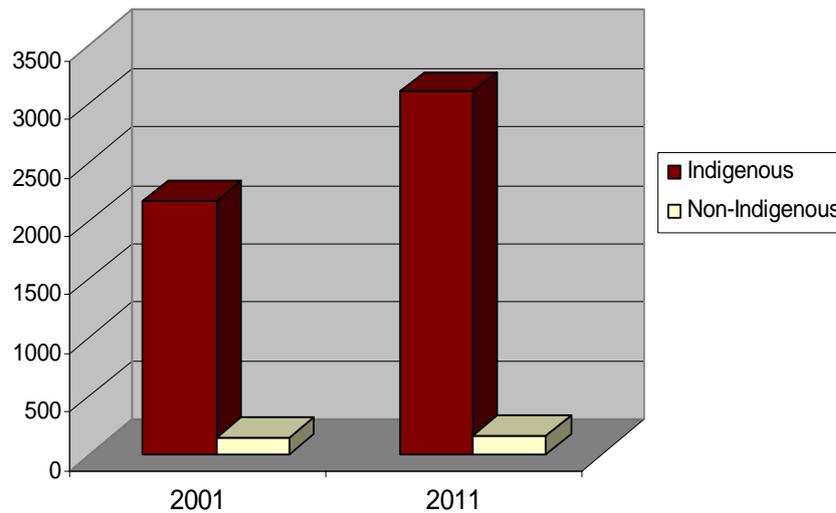


Age standardised data - Western Australia

The same general rate of increase was experienced in Western Australia, although as I have noted, the rates start from a much higher base. The age standardised rate of Aboriginal imprisonment in this State increased from 2,172 to 3,106 per 100,000 between 2001 and 2011 - an increase of about 43%, whereas the non-Indigenous rate rose from 150 to 170 per 100,000 over the same period - an increase of about 13%. The ratio of

Indigenous to non-Indigenous imprisonment rates in Western Australia is about 18 to one, the highest in the country, compared to a national ratio of about 14 to one.

**Age standardised imprisonment rate per
100,000 people in Western Australia-
Comparison between 2001 and 2011**



Recidivism

Aboriginal prisoners have significantly higher recidivism rates as well. On 30 June 2011, nearly three-quarters of all Aboriginal prisoners had been to prison before, compared with just under half of the non-Aboriginal prison population.

A depressing trend

The trend of these figures is tragically clear. Over-representation of Aboriginal people in the criminal justice system of this country became a national issue as long ago as the Royal Commission into Aboriginal Deaths in Custody, which reported more than 20 years ago. Since that time, pretty well all governments at State and Federal level have made a commitment to address the problem, and have directed resources to that end. Despite these efforts, the situation is getting much, much worse - not steadily but rapidly.

The figures by themselves are not a very effective means of conveying the magnitude of the problem. Let me try to bring that out a little more by returning to the Aboriginal imprisonment rate in Western Australia in the first quarter of this year, of 3,991 per 100,000. That rate includes both males and females. Generally speaking, when allowance is made for the significantly lower offending rates of females, the rate for males alone is around double the combined rate for males and females - in Western Australia around 7,235 per 100,000. This means that tonight about one in every 14 adult Aboriginal men in this State will spend the night in prison.

Juveniles

As if this is not depressing enough, the data relating to juveniles paints an even gloomier picture of the future. Although data on Western Australia has not been available for the national reports on juvenile justice published in the last two years we know from the weekly data published by the Department of Corrective Services that in Western Australia, Aboriginal children generally comprise about 75% of juveniles in custody at any given time. The most recent national comparisons available, for 2007-8, showed that WA had the highest incarceration rate for Aboriginal juveniles in the nation. The chance of an Aboriginal child being in custody in this State at that time was more than 40 times higher than the chance of a non-Aboriginal child being in custody. This is over double the disproportion between Aboriginal and non-Aboriginal adults.

Over-representation as victims

We should not overlook the fact that Aboriginal people are also grossly over-represented as victims of crime. Although the figures vary from time to time and from jurisdiction to jurisdiction, the Social Justice

Report published in 2011 by the Australian Human Rights Commission suggests that, generally speaking, Aboriginal people are more than four times more likely to be murdered than non-Aboriginal people, four to five more times likely to be assaulted, and four times more likely to be sexually assaulted. In Western Australia, far too many of the homicide cases dealt with by our Supreme Court involve Aboriginal people killing each other.

Why is it so?

There are, of course, many different factors which contribute to the over-representation of Aboriginal people in the criminal justice system. I will endeavour to address what I consider to be the major factors grouped under two headings - disadvantage and discrimination.

Disadvantage

Many reports have addressed the multifaceted and interrelated disadvantages faced by Aboriginal people and which contribute to their offending behaviour. Prominent amongst those reports is the report of the Royal Commission into Deaths in Custody to which I have already referred. A more recent picture of the various disadvantages faced by Aboriginal people in Australia was provided in an appendix to the Social Justice Report published by the Human Rights Commission in 2008 drawing on data obtained from the 2006 census.

Health and Mortality - the 2008 report

Aboriginal people are about twice as likely as non-Aboriginal people to report their health as fair or poor, compared to good. The gap in life expectancy of Aboriginal and non-Aboriginal people is variously calculated at between 10 and 17 years. At the other end of the life cycle,

Aboriginal women give birth to low weight infants at about twice the rate of non-Aboriginal women, and the infant mortality rate is two to three times higher for Aboriginal infants. Rates of cardio vascular disease are significantly higher among Aboriginal people, as are rates of contagious diseases such as hepatitis, meningococcal infection and chlamydia. Aboriginal people are significantly more likely than non-Aboriginal people to suffer illnesses associated with their ears and eyes. Aboriginal people are significantly over-represented in mental health admissions, with the rate of hospitalisation for mental and behavioural disorder due to psycho substance abuse being almost five times higher for Aboriginal males, and about three times higher for Aboriginal females. Further, Indigenous Australians are three times more likely to be hospitalised for intentional self-harm than other Australians. Aboriginal people smoke tobacco at approximately twice the rate of non-Aboriginal people.

Income Levels

In the 2006 census, the average gross household income for Indigenous persons was about 62% of that for non-Indigenous Australians. The gap between incomes was higher in regional and remote Australia.

Employment

Aboriginal people are less likely to be participating in paid employment than non-Aboriginal people (about 57% compared to 76% of people aged 15 - 64).

Education

Happily, educational attainment among Aboriginal people continues to improve, as do school retention rates. However, Indigenous students are still much less likely than non-Indigenous students to progress to the final

year of schooling. Between 2000 and 2010, the retention rate at year 12 increased from 36% to 47% for Aboriginal students (although those rates decrease in regional and remote areas). Although the rate is improving, it is still about half the rate applicable to non-Indigenous students. At the tertiary level, although Aboriginal participation in tertiary education is increasing, non-Aboriginal people are four times as likely to have a university degree compared to Aboriginal people, and twice as likely to have an advanced diploma or diploma.

Housing and homelessness

Aboriginal people are much less likely to own their own home than non-Aboriginal people. About one-third of Aboriginal households are in dwellings which have significant structural problems of one kind or another. Again, the situation deteriorates significantly in regional and remote Australia. The rate of homelessness for Indigenous Australians people is four times that of non-Indigenous Australians. Homeless Indigenous Australians were almost twice as likely to sleep rough, or in improvised dwellings and shelters, than non-Indigenous Australians. Indigenous households were ten times more likely to be living in overcrowded conditions compared to non-Indigenous households.

Child protection

Aboriginal children are much more likely to be the subject of a child protection notification or order than non-Aboriginal children - in Western Australia, about eight times more likely. In 2006, around 32 Aboriginal children per thousand were the subject of a care and protection order, compared to around four non-Aboriginal children per thousand.

A dilemma - do we discriminate in addressing disadvantage?

This brings me to my first ethical dilemma. Is it morally justifiable to discriminate in favour of or against Aboriginal people when addressing the multifaceted disadvantages to which I have just referred? As a society, we are still reeling from the consequences of discriminatory policies in the past, particularly in relation to child protection. The consequences of those policies were brought to national attention by the report published by the Human Rights Commission on the Stolen Generation (Bringing Them Home). Whatever was the motivation for those responsible for separating large numbers of Aboriginal children from their families, the results in many cases were disastrous and enduring. The question I would like to pose, however, is whether our current policies may be an over-reaction to the Stolen Generation, and may provide lesser standards of care and protection to Aboriginal children than those applied to non-Aboriginal children, and thereby discriminate against those children.

There is no doubt that some Aboriginal children are living in appalling conditions in different parts of Australia with the knowledge and acquiescence of the child protection authorities. This proposition can be illustrated by some photographs tendered in evidence in proceedings in the Children's Court earlier this year, depicting the living conditions in a small community not far from Port Hedland (attached at the end of this paper). I digress to observe that Port Hedland is a town which generates massive revenue and affluence for many non-Aboriginal Australians. The child protection authorities had approved of children who had come to the attention of the department (described as "open cases" - that is, monitored by the Department without being taken into legal care) living at this place with their family.

The dilemma faced by the authorities is obvious. Do they separate the children from their family, with all the adverse consequences likely to flow from that course, or do they approve of children living in worse than third world conditions? And if they do decide to separate the children from their family, will there be places for them in a safe environment where they can be brought up in accordance with the cultural traditions which are their heritage? These are not easy questions, nor are they uncommon. I am assured that there are many cases like this.

I repeat that it is not my purpose to propose answers to dilemmas of this kind, if indeed there is a correct answer. However, if one were to seek an answer, perhaps one way of approaching the question would be to ask whether it is likely that the State would approve of a child who was not Aboriginal living in the conditions depicted in these photographs. If the answer to that question is 'no', does it mean that we as a society are condoning Aboriginal children living in conditions that are below the minimum standards that we set for non-Aboriginal children? If that is the case, it raises not only a serious moral issue, but also the legal question of whether unlawful discrimination on the grounds of race is occurring. But if the only alternative is to remove a child from the care of his or her parents, the awful spectre of the Stolen Generation rises again.

Plainly, removal of a child from his or her parents is a last resort, whatever the race of the family. There are significant problems associated with an alternative placement for the child, whatever the race of that child. These issues can be more acute with Aboriginal children. It is obviously preferable for such children to be placed in a culturally

familiar, safe and nourishing environment in which they can be brought up in accordance with their cultural heritage. But there are a limited number of places of this kind available. We now know of the many risks and dangers associated with placement of children in institutional care generally, and we know from the stolen generation that placement of Aboriginal children in non-Aboriginal families can cause profound disorientation and cultural confusion. Recent tragic events have reminded us just how difficult these problems of placement can be, and of the risks.

This process of reasoning might suggest that the answer lies in the provision of other alternatives focused on the family, rather than just the child and aimed at ensuring that the entire family lives in conditions that meet acceptable minimum standards. This places a heavy onus on those responsible for emergency accommodation in the short-term and public housing in the longer term, at a time when the rapid growth of the State's population has put the entire accommodation sector under pressure. Locating suitable family accommodation inevitably takes time, and what do we do about the children in the meantime?

Income management

One of the policies that has been adopted with a view to improving the living conditions of Aboriginal people is income management. Although these policies come in various forms, their basic feature is to constrain the power of Aboriginal people to spend payments made to them for their welfare in order to ensure that at least some of those funds are spent acquiring the basic necessities of life such as food, shelter and clothing. On one view these are practical and effective policies which improve the prospect of Aboriginal children living in adequate accommodation and

being properly fed, and which thereby reduce the prospect of those children being removed from their family under a care and protection order. On another view, the policies are patronising and discriminatory if applied without an assessment of an individual's circumstances or compulsorily, and will have the effect of reducing the self-reliance of the people subjected to the policies. Is the moral force of this latter view diminished if the policies have improved living conditions in the areas in which they have been applied? Should income management only be undertaken with consent? On these issues I will let you be the judge.

School attendance

I referred earlier to the progress that is being made in improving school retention rates for Aboriginal students, although noting that there is significant room for further improvement. Retention rates reflect school enrolments. Attendance rates measure the extent to which enrolled students actually attend school. In some parts of regional and remote Australia, school attendance rates for Aboriginal children are abysmal.

A couple of years ago I visited a remote community in the Western Desert region of our State. I asked the teachers what the attendance rates were like at the local school. After some coyness, I was eventually told that attendance rates were around 25% at that time. Put another way, on any given day, three out of four children in that community were not attending school. By way of explanation I was told that the kids didn't like attending school in the winter months when it is very cold. I do not for a minute suggest that this is the fault of the teachers, who were obviously dedicated professionals foregoing comfort and convenience to try to make a difference in the community in which they were working.

I asked myself then, and I repeat rhetorically now, whether we as a society would think it is acceptable if there was a suburb in Perth in which three out of four children did not attend school during the winter months because it was cold? I suspect that the answer to that question would be a resounding 'no'. I would like to think that if there was a suburb of Perth in which three out of four children were not attending school, truancy officers would be despatched to every street until school attendance rates rose to acceptable levels. Why then don't we take the same approach in remote Aboriginal communities? Is our apparent acquiescence in lower attendance rates for Aboriginal children a form of structural discrimination which will doom those children to lower rates of participation in employment, and more menial roles in society for the rest of their lives?

Empowerment

As my last observations show, when confronted with school attendance statistics of the kind to which I have referred, it is easy to quickly move to pejorative and inflammatory rhetoric. Much more constructive however, is a consideration of possible alternative ways of addressing the problem in the manner I have already suggested in relation to accommodation issues. When looking at these alternatives, we might usefully start by asking ourselves why these problems have proven to be so intractable despite decades of effort by people of good will. It seems to me that one of the reasons for the apparent intractability of these issues is the way in which they have been approached by non-Aboriginal Australians. The general approach has usually been for non-Aboriginal policy makers and administrators to approach these issues as if they are their problem, to be resolved by the non-Aboriginal policy makers. The reality is that these are problems for the Aboriginal community concerned, and which can

only be effectively solved by that community. Once that proposition is accepted, the proper role of non-Aboriginal policy makers and administrators is to empower and resource Aboriginal communities to derive their own solutions to these problems. And we should not assume that one size will fit all. If local and regional empowerment is the general strategy adopted, it is to be expected that quite different approaches will be taken in different communities.

This is, of course, not to say that governments can wash their hands of these issues and ignore their responsibilities. There are simple things that can and should be done by government which can encourage school attendance rates without impinging upon the capacity of Aboriginal communities to determine their own destiny. One obvious example in the area of school attendance rates is by the provision of school meals. As parents we all know that the carrot is more effective than the stick, and that a hungry child is unlikely to learn anything. The provision of school meals, in the form of breakfast and lunch, not only provides an incentive for the children to come to school, and for their parents to send them to school, but also assists in ensuring that minimum nutritional levels are attained. It is pleasing to note that many schools in remote Western Australia do provide this form of incentive for attendance.

I am not an educator, and the best policies to be adopted to improve school attendance rates in regional and remote Australia is a matter for government, not for a judge like me. However, what I can say as a judge is that unless and until school attendance rates improve, the cycles of disadvantage that we see evident in the Aboriginal people appearing in our courts is likely to continue, as will the over-representation of Aboriginal people in our courts.

Discrimination

Dispossession

It is generally thought that the Aboriginal peoples of Australia have created the longest continuous cultural grouping on the planet, one which, prior to colonisation, was largely undisturbed by external influences. Of course, colonisation saw people dispossessed of the land which they and their ancestors had considered, and continue to consider to be at the very centre of their spiritual beliefs and cultural practices. Although this dispossession has now been recognised by the courts, and later the legislatures of Australia, it is not clear to me that non-Aboriginal Australians generally appreciate the profoundly devastating and continuing effect which dispossession has had upon the original inhabitants of this continent.

Discriminatory maltreatment

Dispossession was followed by centuries of discrimination and maltreatment, including murder, assault, including sexual assault, exploitation, including sexual exploitation, the spreading of contagious diseases and the disintegration of Aboriginal families.

The Aborigines Act 1905 (WA)

In Western Australia, the discriminatory practices and policies are perhaps most evident in the *Aborigines Act 1905*, an extraordinary piece of legislation, many aspects of which were similar to the legislation later used to implement the deplorable apartheid regime in South Africa. The 1905 Act had its origins in a Royal Commission conducted in 1904 by Dr Walter Roth, who was an Oxford-educated surgeon and ethnologist who had been Protector of Aborigines in Queensland. The 1905 Act

followed closely the recommendations which Roth made in his report, and also bore a close resemblance to the legislation in force in Queensland.

The long title of the Act describes it as:

"An Act to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia"

More than a century later it is difficult to know whether this assertion was amongst the most disingenuous claims ever made by a legislature, or a genuine attempt to depict the legislators' motives. If it was the latter, hindsight enables us to say with some confidence that any attempt to achieve that worthy objective through the 1905 Act was utterly and hopelessly misguided.

Children

The 1905 Act applied to Aboriginals and to those who were referred to at that time as "half castes" who lived or associated with Aboriginals, and to half caste children. It created an Aborigines Department and allocated funds to that department which it was to use to distribute blankets, clothes and other relief to the Aborigines "at the discretion of the department" and to provide for the custody, maintenance and education of the children of Aborigines. The Act also created the office of Chief Protector of Aborigines who was made the legal guardian of every Aboriginal and half caste child under the age of 16. By this stroke of the legislative pen, Aboriginal people were deprived of the legal right to care for and control their children.

Reserves

The 1905 Act also made provision for the declaration of Aboriginal reserves and empowered the Minister to cause any Aboriginal to be removed and kept within the boundaries of a reserve, and any Aboriginal who refused to be removed or to remain within the reserve committed an offence against the Act. This provision denied Aboriginal people freedom of movement through the land which they and their ancestors had occupied for tens of thousands of years before the white settlers arrived, and which is at the core of their spiritual beliefs and cultural practices. Another provision of the Act made it an offence for any Aboriginal to absent himself from his work, or to refuse or neglect to work in the capacity in which he has been engaged - a liability to which non-Aboriginal employees were not exposed.

Property

Another provision of the Act empowered the Chief Protector to take possession of, retain or dispose of any property of any Aboriginal or half caste either with the consent of the person whose property it is, or "so far as may be necessary to provide for the due preservation of such property".

Removal

Other provisions of the Act empowered a protector to cause Aborigines camped within or near the limits of any town to remove their camp to such distance from the town as he may direct. Any Justice of the Peace or police officer was empowered to order any Aboriginal found loitering in any town to leave the town forthwith. The Governor was empowered to declare any town, municipal, district or other place to be an area in

which it was unlawful for Aboriginals not in lawful employment to be or remain.

Marriage

Other provisions of the Act made it an offence to celebrate the marriage of a female Aboriginal to a non-Aboriginal without prior written permission of the Chief Protector. It was an offence for any non-Aboriginal to habitually live with Aboriginals, or for a male person other than an Aboriginal to cohabit with a female Aboriginal not being his wife, cohabiting being presumed in the absence of proof to the contrary if a non-Aboriginal male travelled accompanied by a female Aboriginal.

Alcohol

The supply of alcohol to any Aboriginal or half caste was also prohibited by the Act, although a later amendment (in 1911) shifted the focus of liability to the Aboriginal recipient of alcohol.

From the vantage point of 2012, it seems extraordinary that a Western Australian Parliament could ever have passed such draconian, offensive and discriminatory legislation. However, it was promoted by Dr Roth and the government as legislation which would improve the living conditions of Aboriginal people. The long-serving Chief Protector in Western Australia, the famous Mr A O Neville, justified his actions in creating reserves, moving people to those reserves, and breaking up families on the same basis. Although we now know what the consequences of his policies were, it is I think difficult to say from this distant point in time that his expressed motivations were not genuine.

I digress to observe that shortly after the passage of the 1905 Act, Dr Roth was hounded from office in Queensland following a series of scandals including reference to photographs which he took of Aboriginal people having sexual intercourse (which he justified as ethnological research), allegations of mismanagement of the savings accounts of Aboriginal working girls, and another allegation that Roth had sold a large collection of Aboriginal artefacts and photographs which belonged to the Queensland Government to the Sydney Museum for personal profit. In the result, Roth was forced to resign and moved to British Guyana, where he became a magistrate.

The 1944 Act

The 1905 Act (later renamed the *Native Administration Act*), governed the lives of Aboriginal people in this State for the first half of the last century. The *Natives (Citizenship Rights) Act 1944* provided a mechanism whereby Aboriginal people could escape from the privations of the 1905 Act by applying to a magistrate for a "Certificate of Citizenship". The applicant was required to declare that he wished to become a citizen of the State, and that for the two years prior to the application he "has dissolved tribal or native association except with respect to lineal descendants or native relations of the first degree". Before granting the application, the magistrate had to be satisfied that for two years immediately prior to the application, the applicant had "adopted the manner and habits of civilised life", that he or she was able to speak and understand English, and was not suffering from leprosy, syphilis, granuloma or yaws, and was reasonably capable of managing his own affairs. In that event, the application could be granted and the applicant was then:

"Deemed to be no longer a native or Aborigine and shall have all the rights, privileges and immunities and shall be subject to the duties and liabilities of a natural born or naturalised subject of His Majesty."

It seems remarkable, to say the least, that in 1944 at a time when Aboriginal Australians were fighting and dying for their country, the Western Australian Parliament passed an Act which presumed that they were not to be taken to be "natural born or naturalised subjects of His Majesty" unless and until they had undertaken the offensive processes associated with applying for and obtaining a grant of so-called State citizenship. One of the practical incentives for undertaking such a process was that a grant of citizenship would carry with it a right to acquire alcohol - a right otherwise denied Aboriginal people at that time.

The Path to Emancipation

The path to emancipation for Aboriginal people was long and tortuous. It was not until 1959 that Aboriginal people gained the same entitlement to social welfare benefits as other Australians. In Western Australia, restrictions on the provision of alcohol to Aboriginal people were not repealed until 1964. The referendum amending the Australian Constitution conferred citizenship and the right to vote upon Aboriginal people in 1967, and in 1968 Aboriginal people acquired the right to be paid the same wages as non-Aboriginal people.

It is difficult to see any ethical or moral basis whatever upon which Aboriginal people could be denied the rights taken for granted by other Australians and which were progressively conferred upon them during those decades, during which the offensive laws to which I have referred

were progressively repealed. However, there is a cogent argument to the effect that at least in some parts of Australia, particularly regional and remote Australia, the combined effect of the conferral of these rights upon Aboriginal people was disastrous.

Unintended consequences

In the Kimberley, Aboriginal people had worked and lived on cattle stations for many years after the creation of the cattle industry in that region. Aboriginal stockmen and their families were thus enabled to live on or near their traditional country and to live lives closer to their traditional lives than would be possible in an urban or semi-urban environment. The advent of the right to equal wages resulted in many of those stockmen being dismissed, and they and their families were evicted from the land which they had always regarded as theirs. Artificial semi-urban settlements grew up, where these displaced families clustered, such as at Fitzroy Crossing and Hall's Creek. There were little or no employment opportunities in these townships and displacement from country limited or precluded pursuit of traditional cultural practices, and the semi-urban environment interfered with traditional ways of life. Welfare payments arrived regularly, and alcohol was freely available. This is obviously a hazardous combination of circumstances - not just for Aboriginal people, but for any group. Geographical and cultural displacement accompanied by unemployment and no prospect of employment, welfare payments and available alcohol have combined to probably cause or at least exacerbate many of the multifaceted aspects of disadvantage suffered by Aboriginal people in regional and remote Australia to which I referred earlier in this paper.

The ethical dilemma

The detection skills of Sherlock Holmes are not required to identify the moral and ethical dilemmas which pervade this scenario. The discriminatory policies and practices which characterised the treatment of Aboriginal people until the latter part of the 20th century are morally and ethically unjustifiable and indefensible. It is difficult, if not impossible, to see any plausible moral or ethical justification for denying Aboriginal people the right to equal pay, to equal welfare benefits, and equal access to alcohol purely because of their aboriginality. But the redress of the discriminatory practices and policies of the past, and the conferral of equal rights has, at least in some parts of Australia, had a significant adverse effect upon the recipients of those rights.

How do we address these competing considerations from a moral and ethical perspective? I doubt that any reasonable person would propose that we should return to policies that discriminate against Aboriginal people simply because they are Aboriginal, although at the time of the Northern Territory intervention it was necessary to exempt those measures from the operation of the *Racial Discrimination Act 1975*.

Unemployment

An ethical opposition to discrimination on the basis of race is, of course, not to say that we cannot or should not adopt policies and practices aimed at addressing the disadvantages experienced by Aboriginal people not because they are Aboriginal, but because they are disadvantaged Australians. Take employment as an example. It is obviously in the national interest for able Australians of working age to be in employment, and all governments, State and Federal, have policies directed at achieving that objective. Various programmes exist to provide people with the skills they need to enter the workforce. Those programmes will

be more effective if they target the special needs of the persons to whom they are delivered. It is entirely proper and appropriate to develop specific programmes, and apply specific public resources to preparing unemployed Aboriginal people for work, not because they are Aboriginal, but because they are unemployed. Professor Marcia Langton has recently called for assistance programmes to be refocused, so that they are not focused on race, but on disadvantage¹.

Alcohol

Alcohol raises slightly more contentious issues. The moderate and sensible use of alcohol is an integral part of Australian life and provides enjoyment to many, including me. However, over-indulgence or abuse of alcohol is also the cause of many social problems. Most experienced Western Australian Judges and Magistrates would readily agree that alcohol abuse is almost certainly the single biggest cause of the criminal behaviour dealt with by our courts. There is no doubt that it contributes very substantially to the over-representation of Aboriginal people in our courts and prisons, and to many of the health and social disadvantages to which I referred earlier in this paper. This is, of course, not to suggest that Aboriginal people are the only people in our community who are adversely affected by alcohol abuse - far from it, but it is to acknowledge that alcohol abuse is commonly associated with disadvantage and dysfunction in Aboriginal communities.

This has been recognised by many Aboriginal communities, which have acted to address the problem by making by-laws under the *Aboriginal Communities Act* prohibiting the possession or use of alcohol within the

¹ Prof M Langton, "Indigenous exceptionalism and the constitutional race power", Melbourne Writers Festival, 26 August 2012.

boundaries of the community. Some years ago a powerful and articulate group of Aboriginal Elders encouraged the introduction of alcohol restrictions in Fitzroy Crossing which have undoubtedly been of significant benefit to that community. Similar moves were taken a little later in Hall's Creek.

However, there is a limit to the efficacy of restrictions which are geographically limited. Aboriginal communities which go dry frequently see some of the drinking members of that community move either permanently or temporarily to other places where alcohol is freely available. The introduction of restrictions in Fitzroy and Hall's Creek has led to some displacement of people from those communities to other communities like Broome and Kununurra where alcohol is more readily available. Because displaced persons often have nowhere to stay and limited family support, they can cause greater problems in the places to which they are displaced than if they had remained in their home environment. And alcohol restrictions are much more likely to be accepted in a predominantly Aboriginal community or township, such as Fitzroy Crossing or Hall's Creek, than in predominantly non-Aboriginal communities such as Broome, Kununurra, Karratha or Port Hedland.

Point of sale controls

I would suggest that one way of addressing these issues is by putting to one side the aboriginality of the problem drinkers in these regions and addressing the fact that they are a problem drinker in the same way as we provide assistance to someone in gaining employment not because he or she is Aboriginal, but because he or she is unemployed. This approach has been taken in the Northern Territory with the introduction of a regime whereby persons who have been identified as problem drinkers because

of their conduct or behaviour can be made the subject of an order restricting or even removing their capacity to acquire take-away alcohol. Such orders are enforced at the point of sale by requiring photo ID before any transaction is undertaken, using a computer programme which will identify whether or not the person is the subject of an adverse order before the transaction is completed. The government of the Northern Territory regularly publishes reports on the progress of this initiative. It is beyond the scope of this paper to undertake a detailed analysis of those reports. The efficacy of these measures became politically contentious during the recent elections in the Territory. The potential beneficial impact of measures of this kind justifies detailed objective and scientific analysis, ideally in an apolitical environment.

Whether such a policy should be adopted in part or all of Western Australia is a matter for government, not for a judge like me. But as a judge, I can say that misuse of alcohol is a major factor contributing to the over-representation of Aboriginal people in the justice system, and unless and until it is addressed, that over-representation is likely to continue.

Regional discrimination?

The different circumstances and living conditions in different parts of our State raise the question of whether there should be different policies applied in some of those regions. If we were to take this approach, a question would arise as to whether we were discriminating against the residents of one region or another. Using the possibility of point of sale controls on alcohol as an example, the residents of, say, Broome might reasonably ask why they have to produce photo ID in order to purchase alcohol when residents of Perth do not, just as the residents of, say,

Balgo, might now ask why they are not entitled to use alcohol in their houses like the residents of Broome. However, I see no moral dilemma here. The fact is that different regions of the State require different policies and approaches because the circumstances in those regions are quite different. The boundaries of our State derive from historical accident, not from an alignment or homogenous grouping of people and communities with common interests and requirements. This is recognised in policies like the Royalties for Regions programme, which respond to many years of chronic under-investment in infrastructure in our regions.

Treating Unequal Things Equally

According to Aristotle, 'the worst form of inequality is to try to make unequal things equal' (Nicomachean Ethics, V 3). In the justice system, this concept is often expressed by observing that treating unlike cases alike is as great an injustice as treating like cases differently. Because the dispossession and discriminatory treatment of Aboriginal people has resulted in the multifaceted disadvantages which I have identified (and some others), it could be argued that non-Aboriginal Australians have a moral and ethical obligation to treat Aboriginal people preferentially as a means of redressing the wrongs of the past. However, it seems to me to be unnecessary to go that far. The Aristotelian ethic requires us to treat disadvantaged Aboriginal people differently not because they are Aboriginal, but because they are disadvantaged, and further requires us to treat all equally disadvantaged people alike, irrespective of race.

Discrimination within the justice system

The last topic I will address is the issue of discrimination within the justice system. It is important to commence by clarifying what I mean by

discrimination in this context. Of course, our laws do not discriminate against Aboriginal people because of their aboriginality - such laws would very likely be invalid. Nor do I believe that judges or magistrates in Western Australia adopt an approach which discriminates against Aboriginal people in our courts by, for example, imposing harsher penalties because a person is Aboriginal. Such studies as have been conducted in this area do not support the proposition that aboriginality per se has any significant impact upon the sentencing process.

But laws and practices which are not intended to discriminate against people or groups can have that effect in practice. This is what I would call systemic discrimination. Let me give some examples.

Arrest

Aboriginal people are more likely to be pulled over or questioned by police because unfortunately, Aboriginal people are proportionately more likely to be involved in committing crime and more likely to have a criminal record. Once suspected of crime, Aboriginal people are more likely to be arrested and put through the court system, rather than diverted away from the court system because they are more likely to have a criminal record, and less likely to have the personal characteristics which would encourage police to use diversionary techniques - for example, they are less likely to be in stable employment and accommodation and so on.

Bail

Once arrested, Aboriginal people are more likely to be remanded in custody than granted bail. This is not because they are Aboriginal, but because the criteria which a court is required to take into account under

the *Bail Act* include things like stable accommodation, employment history, financial position, prior criminal record, etc. Aboriginal people are more likely to score poorly by reference to these criteria, and therefore less likely to get bail.

Breach of bail

If granted bail, Aboriginal people are more likely to breach the conditions of bail and be rearrested. It is quite common for bail to be granted to Aboriginal juveniles subject to a curfew condition - that is, that they be at home after a certain time. But sometimes the conditions at home late at night will be so bad that it is simply unsafe for the child to remain. But if the child takes to the streets, he or she is in breach of bail. In regional Western Australia, distance, the lack of public transport, and cultural obligations such as sorry business can make compliance with reporting conditions difficult or impossible.

Sentencing

If convicted, Aboriginal people are more likely to be imprisoned than given a non-custodial sentence - not because they are Aboriginal, but because the normal criteria applied by a court at the time of sentence require account to be taken of prior good behaviour and the likelihood of reoffending assessed by reference to factors such as employment prospects, stability of accommodation, history of substance abuse, etc. In some parts of Western Australia this problem is exacerbated because of the limited availability, almost complete unavailability in some areas, of non-custodial supervision or non-custodial programmes. If there are little or no effective non-custodial options available to a sentencing Judge or Magistrate in the relevant region, a custodial sentence becomes a more likely outcome.

Another ethical dilemma

This brings me to my last ethical dilemma. Should police, magistrates and judges be encouraged, or even required to ameliorate the disadvantages suffered by Aboriginal people in our justice system? Can a system which operates to the disadvantage of a group within our society be fairly described as a just system?

I must confess that I do not find the answer to this dilemma either easy or obvious. At one level it is possible to respond to the problem by asserting that the justice system does not discriminate against Aboriginal people per se, but applies equally to all who have prior criminal records, a history of substance abuse, poor prospects of rehabilitation and so on. But that response seems to me to be facile. Conversely, a policy which involved sentencing Aboriginal offenders more leniently than non-Aboriginal offenders merely because of their aboriginality would, in my view, be unjustifiable, and would bring the law into disrepute, not least because it could be interpreted as giving a lesser value to the suffering of the predominantly Aboriginal victims of Aboriginal offenders

As with the other ethical dilemmas I have endeavoured to expose in this paper, I suspect that the answer may lie in treating aboriginality as a distraction and addressing the substantive issue, which is the issue of offending behaviour. The best way of protecting the community from crime is by addressing the underlying causes of offending behaviour. That proposition holds good irrespective of whether or not the offender is Aboriginal. So, if the over-representation of Aboriginal people in the criminal justice system is related to the multifaceted disadvantages which

some Aboriginal people experience, as I have suggested, the focus of our attention should not be upon the aboriginality of those offenders, but upon addressing the disadvantages to which they are subject - improving health and living conditions, educational levels and participation in employment, which would also have the effect of reducing the systemic disadvantage which Aboriginal people face within the criminal justice system.

A positive note

I endeavoured to commence this paper on a positive note, and will try to conclude the same way. While there are undoubtedly some depressing aspects of the intersection of Aboriginal people and the justice system, there are some positive things happening. School retention rates and employment participation rates are increasing. More Aboriginal people are getting driver's licences. Funding from the Royalties for Regions Programme has resulted in a very significant strengthening of juvenile justice programmes and facilities in the Kimberley and the Pilbara, including through the provision of supervised bail facilities, and similar facilities in Geraldton and Kalgoorlie have dramatically reduced the number of children from regional WA in detention in Perth. The new prison which will be opened in Derby in the next few months sets a new benchmark for the humane incarceration of Aboriginal prisoners in a culturally appropriate environment which will be conducive to achieving behavioural change and reducing the prospects of recidivism, under the supervision of its Aboriginal superintendent, Mr Mike McFarlane. Strong and articulate Aboriginal leaders are trying to help us understand Aboriginal perspectives, and Aboriginal people have been elected to State and Federal Parliaments.

Lessons can be learnt from the relatively short non-Aboriginal history of this place. However, we should not become frozen into inaction by our previous interventions, such as the Stolen Generations. It is not enough for us to simply behave with good intentions as we see them. As I noted earlier, viewed with lengthy hindsight, the purported good intentions underpinning the 1905 Act appear either disingenuous or utterly and hopelessly misguided. A good start would be genuine collaboration with Aboriginal people. They might not tell us what we want to hear and they will not speak with one voice. But they can help us identify what needs to be done to empower Aboriginal people to take the steps necessary to reverse the increasing trend of over-representation within the criminal justice system.

Progress is being made, and will continue to be made if people of good will take a sensible and constructive approach to the empowerment of Aboriginal people and the resolution of the ethical dilemmas I have endeavoured to expose in this paper.

Photographs tendered in evidence in proceedings in the Children's Court depicting a community near Port Hedland





