



*The Lung Institute of
Western Australia Inc*

Address by

The Hon Wayne Martin
Chief Justice of Western Australia

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Duxton Hotel
Perth, WA

It is a pleasure and a privilege to have been invited to address this dinner of the Lung Institute of Western Australia. I wish to acknowledge the great and proud Noongar people of south-western Australia, their role in the maintenance and preservation of these lands, and to acknowledge their Elders past and present.

I always think it is desirable to try to infuse some humour into addresses associated with a dinner, and I searched my repertoire for jokes about lung disease, but did not come up with too many candidates. There are, of course, in the repertoire a lot more jokes about lawyers but I am sure you have heard most of them. There is one that is a cross-over between medicine and law which I will share with you - although no doubt some of you will have heard it. It involves cross-examination of an expert witness who was giving evidence in a murder trial. The expert witness was the pathologist who carried out the autopsy on the deceased. The line that was being taken by defence counsel was a line of necessity because he had no other line available to him. Essentially the line was to the effect that the deceased was not actually dead at the time of the autopsy, but it was the autopsy that had killed him. You can see he was driven to desperation. Anyway, the line was, "Before you conducted the autopsy, did you take a pulse from the corpse?" "No, I didn't". "Did you listen to see if the heart was beating?" "Well, no, I didn't". "Well, what else did you do to satisfy yourself the patient was dead?" "Well, I didn't do anything else." "So, doctor", the lawyer says rising to a sort of crescendo of this fantastic line of cross-examination he was sure was going to result in the acquittal of his client - "So, doctor, it's quite possible that Mr X was actually still alive at the time you carried out the autopsy." He said, "Well, yes, it is possible - although I have to say that

his brain was in a jar on my desk at the time I carried out the autopsy, but it's quite possible that he was still alive and practising law."

There are two themes that I would like to pursue tonight. The first is the difference between public perception and reality. In that area, I would like to draw a parallel between lung disease and my own particular field, the field of criminal justice, and in particular, the area of crime and punishment. The other area in which I would like to draw the same parallel between lung disease and my own field is in the area of the over-representation of indigenous people and other social indicators relating to indigenous people.

I was pleased to be invited tonight because I have had a particular interest in lung health going back quite a long time.

Being an essentially selfish and introverted person, my interest in that field was aroused when I suffered from a lung health issue myself almost 30 years ago now, in 1980, when as a result of pneumonia I had most of my right lung removed. It seemed a bit of an overreaction at the time. Nevertheless, that was the recommended practice and it was done, and I stand here as living testament to the fact that we have quite a lot of lung capacity we do not actually need. But waiting for that to happen in the thoracic surgery ward at Royal Perth Hospital in a multi bed ward, listening to the patients around me who were literally dying - and far too many of them died during the 3 weeks or so I was in that ward - sparked my interest in the whole field of lung disease. My particular focus in the early years was in preventable lung disease because so many of my fellow patients in that ward were dying as a result of smoking-related disease which seemed to me to be unnecessary and avoidable. I thereafter

had an involvement with the various organisations involved in the anti-smoking movement, particularly the Australian Council on Smoking and Health for which I was an honorary legal adviser for 20 or 30 years. It has been an interesting journey for me and, in particular, to the regrettably few people in our community who have some awareness of the significance of lung health issues in our community.

The first point I wanted to dwell upon is the difference between perception and reality in relation to the prevalence and significance of lung disease within our community. Most people know about the significant killers within our community. They know about heart disease, cancer and strokes. More recently they know about the triple Ds; dementia, depression and diabetes. But very few people know about the significance of lung disease. Chronic lung disease impacts on one in four families in Western Australia, and in particular, diseases like emphysema, asthma, chronic bronchitis, cystic fibrosis, bronchiectasis, lung cancer and asbestos related diseases affect a significant number of people within our communities. Lung infections are a major problem and can affect the whole community as evidenced recently, of course, by the swine flu pandemic. Pulmonary emboli and pulmonary hypertension are under-recognised but often lead to premature death and morbidity. Asthma is, of course, one of the significant lung diseases. About 11% of adults and 18% of children in Australia have asthma. Asthma produces, tragically, about 400 deaths per year around Australia. Australia, New Zealand and the UK lead the world in asthma prevalence.

It is Australia's most widespread chronic health problem. It affects over 2½ million Australians. One in six primary school age children are affected by asthma; one in eight teenagers and one in nine adults are

affected by asthma. Those are extraordinary figures. Of course, asthma cannot yet be cured, but in many cases it can be effectively managed. It is one of the ambitions of the Lung Institute to provide effective management of asthma. 10% of patients with severe asthma account for more than 50% of the cost of managing patients with that disease.

Cystic fibrosis is the most common life-threatening recessive genetic condition affecting children in Australia. 165 adult Western Australians are living with this disease. The Lung Institute intends to raise funds to establish the first Australian academic position for cystic fibrosis and infectious respiratory disease to enable further research to be conducted in this important area.

Emphysema is a terrible disease which leads to progressive breathlessness, inactivity, social isolation and obviously also associated with that are other psychological conditions like depression. Within the next decade, it will become the fourth most common disease in the world. Research in Western Australia shows that risk of dying within 12 months of hospitalisation with emphysema is about 30%. There are effective treatments in the area of pulmonary rehabilitation, but that is under-resourced and under-utilised and this is another of the areas the Institute would like to pursue. That very brief description of the types of chronic lung disease that exist in our community will obviously indicate that the implications of contracting diseases of that kind upon people are profound - there is an obvious tendency to withdraw, to become psychologically, physiologically and socially debilitated.

Bizarrely, those conditions generally do not feature in government lists of disabilities. They are not conditions that entitle one to an ACROD pass.

That is evidence of the gap between perception and reality in this important area of disease.

I would like to move from lung disease to my own area - in particular, the criminal justice system. There is a public perception that crime is like a tidal wave sweeping over our community which is not being adequately addressed by our courts, who respond insipidly, giving offenders a hug and a kiss, and a pat on the head and sending them on their way. Neither of those things are true. In relation to crime rates within our community, fortunately I am able to report that in most significant areas, crime rates are going down. In the area of homicide, the rate in Western Australia is significantly less than it was about 10 years ago, and consistently for the last 20 years or so, the homicide rate in Western Australia is less than the national average.

In relation to armed robbery, the rates are marginally lower than they have been for some years. In relation to burglary, the current rates are less than two-thirds of what they were 10 years ago. In relation to car theft, the current rate is about half what it was 10 years ago. The area of assault is an area in which we are losing ground. There have been increases in the area of assaults, but one has to take account of report rates, and the uncertainty that is created by the question of whether or not the increase in reported crime is reflecting actual crime or an increase in the report rates. Assault is one of those areas in which we have reason to believe the report rate is quite low, unlike burglary and car theft, where people are encouraged to report because of a need to claim on insurance.

So generally speaking, on a per capita basis, crime has gone down over the last 10 years or so, and particularly in the area of what we call

household crime. That, I think, is not the community perception. In relation to sentencing, there is a community perception that Judges are increasingly weak when it comes to imposing sentences. The fact is that over the last 20 years in Western Australia, the imprisonment rate has more than doubled. The current rate is 260 per 100,000 of adult population. That is the highest rate in Australia with the exception of the Northern Territory which has a much higher percentage of Aboriginal people in its population. Our rate of 260 per 100,000 compares to the Victorian rate of 100 per 100,000, so we are locking up two and a half times as many people per head of population as are locked up in the State of Victoria.

Although we are high on an Australian scale, we are still not as high as the United States which locks up about 1000 per 100,000 people, so our rate is about a quarter of that in the US. But it is still a very high rate in Australian terms. Those people did not get there themselves. They did not present themselves to a prison and say "lock me up"; they were sent there by our Judges and Magistrates. When you look at what is happening in relation to crime and punishment, the perception that there is an increasing level of crime and decreasing level of imprisonment is false. Why is there this perception then? I think it has to do with the nature of news. I do not mean to criticise the media in making these remarks, but news only becomes newsworthy because it is of interest to the people who read, hear or see it. There has to be some characteristic to the story that will attract attention before the media will report it. That is understandable and I do not criticise the media for that. Things that are uneventful, things that are good, things that are normal are not newsworthy. It is unlikely that you will wake up tomorrow and read on the front page of *The West Australian*, "The Narrows Bridge stayed up

again last night". But if the Narrows Bridge falls down, you are likely to read about it. Similarly, you are unlikely to get up and read a story on page 3 or 5 to the effect that Chief Justice Martin dealt with a case, took into account all the relevant circumstances and handed down a sentence that was eminently fair and reasonable. But if I was seen to be aberrant and to have imposed a sentence that was far too lenient, or a victim of crime or the family of a victim of crime comes out of court and expresses outrage about the sentence I have handed down because it did not adequately reflect the severity of the crime, then that is newsworthy. So then you will hear and see about it.

What that means is that the stories about which you will read will necessarily be selected by that criterion of newsworthiness. You might read or hear about 40 or 50 such cases if you are very avid consumer of news over the entire year. You may well assume that those cases are representative of the cases coming before the justice system, but they are not. They are the cases that are self selected by having that criterion or characteristic of newsworthiness. Those 40 or 50 cases have to be viewed in the context of about 90,000 penalties that are imposed by the courts of Western Australia each year. You do not hear about the other 89,900 which are unnewsworthy because they do not have that characteristic of newsworthiness.

In relation to sentencing, there are a number of reasons why we sentence criminals to punishment. They include denunciation - an important objective is for the community to denounce criminal activity and to deplore its commission. There is an aspect of retribution on behalf of victims and families of victims. They need to feel that the guilt of the offender has been assuaged by the imposition of a penalty. There is a

notion of proportionality; that is, the punishment has to fit the crime. All of these are important considerations when sentences come to be imposed. It is often said by Judges and others that deterrence is a very significant factor when sentences come to be imposed.

There is a tendency to overstate the significance of deterrence when it comes to sentencing and an overly optimistic belief that increasing the levels of punishment will somehow better protect the community. Let me try to explain why I think deterrence is significantly overrated. General deterrence is the proposition that by increasing penalties we will discourage people from committing crime. This assumes that criminals rationally assess the likely consequences of their behaviour before committing it. Most of the people who come before our courts are behaving irrationally; that is why they are there. They are inebriated or stupefied, or they have lost control because of passion or emotion or sexual enthusiasm. Crime is not a rational activity.

Let me give you an example. Let's take an offence and double the penalty from 3 years to 6 years. Let's hypothesise an offender is contemplating committing that offence and aware of the penalty being doubled from 3 years to 6 years. There are two or perhaps three, categories of potential offenders. There are those who think they will not get caught. There are those who think they will get caught, and there are those who think they might get caught. For those who think they will get caught, the difference between 3 years and 6 years is not going to make any difference because 3 years is going to be enough to discourage them. For those who think they will not get caught, the difference between 3 years and 6 years is not going to influence their behaviour because they are not going to get caught so the penalty does not matter. So it is only

those who think that they might get caught and are able to evaluate the risk of being caught, and to balance that against the likely level of punishment they are going to receive and then undertake a sophisticated risk/benefit analysis for whom this difference between 3 years and 6 years will make a difference. If any of you think that that is how prospective criminals evaluate the consequences of their conduct, you are dealing with a different group in society than the ones I see in my court.

Specific deterrence is the proposition that a person once convicted of an offence will be deterred from reoffending by being punished. However, all the empirical evidence tends to suggest that the longer the term of imprisonment imposed upon someone, the more likely they are to offend again. I do not suggest for a minute that we should not punish criminals. There are lots of good reasons for punishing criminals, but I do suggest that the significance of deterrence is somewhat overrated in popular perception.

I would like now to turn to my second theme which concerns the over-representation of indigenous people in both the lung area and in my area of crime and punishment. In the area of lung disease, the most common reason for hospital admission for indigenous people in Western Australia, Queensland, South Australia and the Northern Territory is lung disease. It represents 12% of all admissions, and that is three or four times the rate for non-indigenous people. In the area of crime and punishment, I told you earlier that the general imprisonment rate in Western Australia had doubled over the last 20 years. For Aboriginal people it has trebled. It has gone from 1300 to about 3800 per 100,000. I said earlier the overall imprisonment rate in WA was 260 per 100,000 for Aboriginal people; it is 3800 per 100,000. What that means is that

tonight about 40% of our prison population will be comprised of Aboriginal people, compared to about 3½% of the general population. What that means for an adult Aboriginal male is that one out of 15 adult Aboriginal men in Western Australia will spend tonight in prison. For those of you who are good with figures - and I can see there are a few scientists around the room - 3800 per 100,000 compared to 260 per 100,000 means that the non-Aboriginal rate has to be lot lower than 260. It is about 120. The rate of adult Aboriginal imprisonment is about 25 times higher than the non-Aboriginal rate.

Interestingly, I mentioned earlier that the US has the highest rate of imprisonment. The rate of 3800 per 100,000 is almost exactly identical to the rate at which the United States locks up African Americans. So we lock up Aboriginal people in Western Australia at about the same rate they lock up African Americans in the USA. Of course, given that the overall rate in the USA is four times higher than ours, that obviously means that the non-African American imprisonment rate in the US is much higher. So the disparity between Aboriginal and non-Aboriginal rates in Australia is much higher than the difference between African Americans and non-African Americans in the US. The rate at which we lock up Aboriginal people is probably equivalent to the highest rate of imprisonment for any ethnic group in the world.

If you really want to get depressed, let's move to our children. About 75% to 80% of the kids sentenced to detention in Western Australia are Aboriginal children. The figures are a bit less if you take into account children who are on remand rather than under sentence. I mentioned earlier that the adult rates of imprisonment were 25 times higher for Aboriginal adults; for Aboriginal children in detention, the rate is 50

times higher. What is really worrying about that is that 50% of the Aboriginal community is under the age of 20. If that is a portent of the future, it is a very, very depressing one. What it shows is that despite all the best efforts made by a lot of people in this field, we are making no progress whatsoever in relation to reducing the rate of Aboriginal incarceration.

There are, of course, many and varied causes of Aboriginal crime, and it would be simplistic to suggest there is one single factor. But I do not think you need scientific qualifications or social surveys to conclude that there is a causal relationship between the general levels of disadvantage that are suffered by Aboriginal people in Australia in areas such as employment, housing, education, health and their over-representation in the criminal justice system. The Royal Commission into Deaths in Custody said about 15 years ago that indigenous criminality was the consequence of all of those areas of disadvantage and I do not see any reason to doubt that proposition. It follows that unless and until we address those other areas of disadvantage, it is unlikely that we can do much to address the gross over-representation of Aboriginal people in the criminal justice system.

When we go into those other areas of disadvantage, the figures are equally depressing. The average gross household income for Aboriginal and Torres Strait Islanders is significantly less than that for non-indigenous people. Unemployment is about three times higher than the rate of non-indigenous Australians, and at the time of the census in 2001, only 52% of Aboriginal and Torres Strait Islanders over the age of 15 years recorded participation in the workforce.

Retention in upper school levels has been improving, but is still a lot less than for non-indigenous people. Aboriginal and Torres Strait Islander people are less than half as likely as non-indigenous people to have completed year 12.

In the area of health, as I have already mentioned, there is a significant over-representation in lung disease. Most of us would know the average life expectancy of Aboriginal people is about 17 years less than non-Aboriginal people for men and women, and, of course, they enjoy less access to primary health care than non-indigenous Australians. If you take out the south-eastern corner of the country, 75% of male and 65% of female Aboriginal people die before 65 years of age, compared to 26% of males and 16% of females in the non-indigenous population.

Aboriginal babies are twice as likely as non-indigenous babies to be low birth weight babies - that is, less than 2½ kilos at birth. They have an infant mortality rate which is three times higher than non-indigenous babies. In WA, 18% of Aboriginal children have a recurring ear infection; 12% a recurring chest infection; 9% a recurring skin infection and 6%, a recurring gastro-intestinal infection. Aboriginal men are hospitalised for ischemic heart disease at twice the rate of the general population; for women, it is four times the rate. For psychological and behavioural disorders, the hospitalisation rate for indigenous people is double that of the general population. For assaults and self-harm, for males the hospitalisation rate is seven times higher; for women, a staggering 31 times higher. Aboriginal women are between five and seven times more likely to be the victim of an assault or sexual abuse than non-Aboriginal women. The over-representation of Aboriginal people in the area of lung health is just one aspect of the enormous disadvantage

which that group suffers within our community and which manifests itself in the appalling figures that we see in our justice system.

Those are all very depressing matters but I would like to end on a positive note. I would like to infuse that positive note by talking a little about the Lung Institute, because the Lung Institute shows what can be done by dedicated people who set out to make a difference. In a relatively short period of 10 years or so, the Lung Institute has come from almost nowhere to have established itself as a very significant organisation advancing the cause of lung health within our community. It is a very interesting organisation because it enjoys a community base. It is a research institute and one of only two such research institutes in the field of lung health in Australia. It attracts support from a number of groups including, in particular, from student groups. There are between 60 and 70 people working with the Lung Institute.

It has risen from very modest beginnings 10 years or so ago to now running an annual budget of about \$3,000,000. Tonight is an example of the role that it is assuming in relation to public advocacy of issues relating to the important issue of lung health within our community. It is the largest clinical drug trial centre for lung medicine in Australia, and half of the work done within that important area is generated from overseas pharmaceutical companies. It is also engaged in community trials in relation to issues concerning lung health as a consequence of environmental issues in particular communities. It is a very important organisation. It shows the enormous power that people within our community have if they are dedicated, if they are prepared to work together, co-operatively and collaboratively, towards an important goal. Improvement of lung health is a very, very important goal.

In the area of lung health, I am confident that the Lung Institute of Western Australia will very much help to bridge the gap between perception and reality and to bring to our community's attention the very important issues that arise in relation to lung health. In the criminal justice area, I am not so confident. I wish we had something which is equivalent to the Lung Institute to try to bridge that gap between perception and reality, but I will keep on trying to bring the true facts to people's attention.