



National Youth Health Conference 2013

Youth Justice - 30 years after the death of John Pat

Address by

The Honourable Wayne Martin AC
Chief Justice of Western Australia

Esplanade Hotel, Fremantle
15 November 2013

The Traditional Owners

Given the topic which I will be addressing, it is more than usually appropriate for me to acknowledge the traditional owners of the land on which we meet, the Whadjuk people who form part of the great Noongar clan, the traditional owners of the south-west of Western Australia, and to pay my respects to their Elders past and present. The particular area in which we meet is known to the Whadjuk as Walyalup, being the place of the Walyo, or Kangaroo Rat, which forms part of the broader Beeliar cultural region. The land around Walyalup has always been a significant place for the Whadjuk, having been regularly used as a place of ceremonies, significant cultural practices and trading.

The Death of John Pat

A little over 30 years ago, on 28 September 1983, a 16-year-old Aboriginal boy, John Pat, died locked inside a juvenile cell at the Roebourne Police Station Lock-up in the Pilbara district of Western Australia. He was Yindjibarndi. The circumstances of his death were the subject of an inquest, a trial, and a Royal Commission. Although there are differing versions of the circumstances of his death, it is clear that he was involved in a fracas outside the Victoria Hotel in Roebourne. The participants in the fracas included a number of Aboriginal people, and a number of off-duty policemen. During the altercation John Pat suffered significant head injuries. He was placed in a police van, taken to the police lock-up, and later, when police checked upon him, he was found dead. A subsequent autopsy revealed a fractured skull, haemorrhage and swelling, as well as bruising and tearing, to the brain. He had clearly sustained a number of massive blows to the head. The death of this Yindjibarndi youth provides a graphic example of the perils which attend the intersection between young people and the criminal justice system, and

particularly of the perils associated with the incarceration of young people.¹ What no doubt will be pleasing to some members of this audience in particular is that the death of juveniles in juvenile custodial facilities continues to be very rare.²

The WA Parliament remembers John Pat

People are often critical of politicians, in the same way as they are often critical of judges. However, there were proceedings in the Parliament of Western Australia very close to the 30th anniversary of the death of John Pat which brought great credit upon our elected representatives in this State, and made me proud to be Western Australian. Mr Ben Wyatt MLC, a member of Parliament of Aboriginal descent, moved a motion that the Parliament acknowledge the death of John Pat and that:

on behalf of all Western Australians, in the spirit of reconciliation and healing, apologises to Mrs Mavis Pat and her family for the untimely death of her son.

The motion received strong bipartisan support. Speakers spoke eloquently and movingly of the need to ensure that risks of incidents of this kind were minimised. The passage of the motion was followed by a minute's silence.

¹ I would like to be able to add that the number of young people dying in custody has declined, however as these statistics are no longer reported I am unable to give that assurance. The Australian Institute of Criminology (AIC) last reported data on juvenile deaths in custody in 1993 (C Howlett, *Australian Deaths in Custody No 5: Death of Young People in Police and Prison Custody and Juvenile Detention, 1980-1992* (AIC) 1993 p 5). It is no longer possible to determine how often juveniles die in custody from the AIC data as it uses no separate category for such deaths occurring in police or prison custody (Mathew Lyneham and Andy Chan, *Deaths in custody in Australia to 30 June 2011: Twenty years of monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody* (AIC) 2013). If the current categorisation of "less than 25 years" was in use at the time of John Pat's death in police custody, his death would not be reported as a juvenile death in custody. The most recent data I identified was reported by Social Justice Commissioner in 1996 when 10 of the 15 Indigenous juvenile deaths in custody between 1989 and 1996 occurred during police pursuits, four died in adult prisons and one after escaping a juvenile detention centre (Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1996* Chapter 9).

² Mathew Lyneham and Andy Chan, *Deaths in custody in Australia to 30 June 2011...* (AIC) 2013 p iii.

During debate on the motion, one member read into Hansard a poem by the famous Western Australian Noongar poet Jack Davis published in 1988. The poem is simply titled John Pat. The first verse is in these terms:

*Write of life
the pious said
forget the past
the past is dead
But all I see
in front of me
is a concrete floor
a cell door
and John Pat.*

The Royal Commission into Aboriginal Deaths in Custody

John Pat's death was a catalyst for many significant developments in Australia – importantly including the establishment of the Royal Commission into Aboriginal Deaths in Custody in 1987. When it reported in 1991, the Commission made 339 recommendations. Key – and perhaps the most spectacularly unsuccessful – recommendations were intended to reduce the level of Aboriginal imprisonment in Australia. The Commission reported that the rate of Indigenous imprisonment in 1989 was 1,464.9 per 100,000 Indigenous adult population; some twenty years later, and thirty years after John Pat's death in custody, it had *increased* by 55%, to 2,273.4 per 100,000.³ WA continues to imprison Indigenous adults at the highest rate in the country – 4,113.7 per 100,000 in 2012.⁴

The disproportionate rate of Indigenous imprisonment in Australia has increased from 15 to more than 18 times higher than the non-Indigenous rate.⁵

³ Royal Commission into Aboriginal Deaths in Custody (RCIDIC), *National Report* 1991 Table 9.3; Australian Bureau of Statistics (ABS), *Prisoners in Australia 2012* (4517.0) p 34.

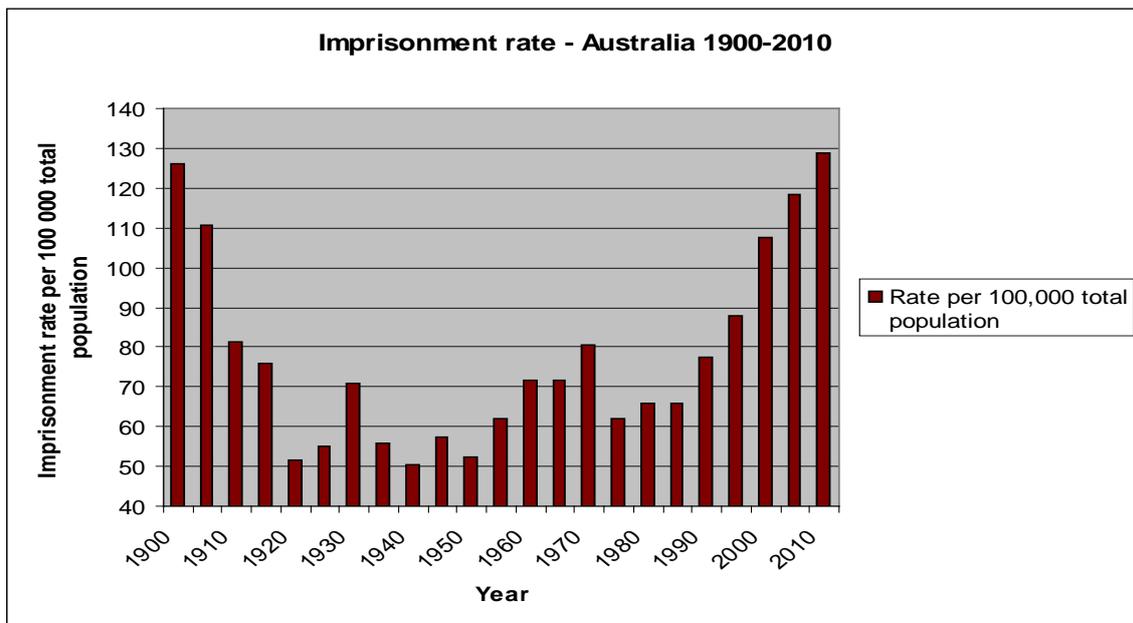
⁴ ABS, *Prisoners in Australia, 2012* (4517.0) p 34.

⁵ RCIADIC, *National Report* 1991 [9.3.1]; ABS, *Prisoners in Australia 2012* (4517.0) p 34.

And most dramatic has been the increase in the imprisonment of Indigenous women – they are now overrepresented by almost 25 times the rate of non-Indigenous women⁶ and are imprisoned at almost twice the rate of non-Indigenous *men*.⁷

Imprisonment trends generally

While Indigenous imprisonment rates increased by 55% between 1989 and 2012, non-Indigenous imprisonment rates also increased – by 27%.⁸ The overall rate of imprisonment in Australia now exceeds the imprisonment rate of 1900 (see Graph 1).



Graph 1: Rate of imprisonment per 100,000 total population in Australia 1900-2010⁹

Source: ABS, 'Crime in the Twentieth Century' *Year Book Australia, 2001* (1301.0) Table C8.11; ABS, *Corrective Services* (4512.0) (average daily number of prisoners for 2000, 2005 & 2010); ABS, *Australian Demographic Statistics* (3101.10) (as at December 2000, 2005 & 2010)

⁶ ABS, *Prisoners in Australia, 2012* (4517.0) p 58 [rate for Indigenous women – 405.4; rate for non-Indigenous women 16.5].

⁷ ABS, *Prisoners in Australia, 2012* (4517.0) p.58 [rate for Indigenous women – 405.4; rate for non-Indigenous men 234.3].

⁸ RCIADIC, *National Report 1991* Table 9.3 [97.2 per 100,000 non-Indigenous adult population]; ABS, *Prisoners in Australia, 2012* (4517.0) p 34 [123.7 per 100,000 non-Indigenous adult population].

⁹ The Chart uses a rate per 100,000 *total* population and not 100,000 of the relevant population group as used for calculating other rates cited in this paper.

It should be remembered that in 1900 almost all of Australia's non-Indigenous history was as a penal colony. The last shipment of convicts to Australia disembarked in Western Australia just 32 years earlier, in 1868.¹⁰

The more recent and dramatic increases in imprisonment rates have occurred against a backdrop of considerable changes to the criminal justice system. In the years from 1995 to 2006, researchers identified over 700 major changes to law and order legislation in Australian states and territories.¹¹ By 2011-12 government spending in Australia on recurrent costs was more than \$3 billion a year on corrections; \$9.5 billion on policing and \$1.4 billion on courts.¹²

The limited research available indicates that this increased use of imprisonment is not necessarily associated with increased crime. A study of Indigenous adult imprisonment in New South Wales between 2001 and 2008 found that increased rates of imprisonment were associated with:

- increases in the number of remandees in custody because of more bail refusals and longer times spent on remand;
- a higher proportion of Indigenous prisoners receiving custodial terms;
- and

¹⁰ One of the reasons WA was denied responsible government in 1874 was because of the "*the presence of a considerable number of convicted criminals still remaining in the Colony*". (Lord Carnarvon to Governor Robinson, 5 August 1875, *Western Australian Parliament Votes and Proceedings of the Legislative Council*, report no 15, pp 5-6, quoted in Dr P R Millett, ' "... under the tutelage of Downing Street" ...' published by the Constitutional Centre of Western Australia). Indeed the inner gates of Fremantle Prison, which was an operational prison until 1991, are made from iron scavenged from convict ships. (Fremantle Prison, Cultural Heritage (20 May 2009) at: www.fremantleprison.com.au/Cultural_Heritage/conservation/projects/interpretationsignagegatehouseandterrace/Documents/A3%20Proofs%2019%20May%202009%20Final%20proofs.pdf accessed 23 October 2013)

¹¹ NSW Parliamentary Library Research Service, *Law and order legislation in the Australian States and Territories Briefing Papers* Nos 7/99, 6/03, 12/06 [176 major changes during 1995-8; 324 major changes during 1999-2000; over 230 major changes during 2001-2006].

¹² Productivity Commission, *Report on Government Services 2013*, Table 6A.10, Table 7.1 (courts excluding the High Court and specialist jurisdiction courts — except for family courts, children's courts and coroners' courts), Table 8A.12.

- the increased length of prison terms imposed.¹³

The study concluded that the substantial increase in the number of Indigenous people in NSW prisons *"is due mainly to changes in the criminal justice system's response to offending rather than changes to offending itself"*.¹⁴

Professor Chris Cunneen identifies factors possibly contributing to the increased use of imprisonment as including:

- changes in sentencing law and practice;
- restrictions on judicial discretion;
- changes to bail eligibility;
- changes in administrative procedures and practices;
- changes in parole and post-release surveillance;
- the limited availability of non-custodial sentencing options;
- the limited availability of rehabilitative programs; and
- a judicial and political perception of the need for *"tougher"* penalties.¹⁵

The trend in rapidly increasing imprisonment rates is an international one – at least for Anglo-American styled liberal democracies.¹⁶ In 2009, the United States had the highest imprisonment rate in the world, at 743 per 100,000. Although its national population was only one-twentieth of world population, the US incarcerated one-fifth of the world's prisoners.¹⁷

¹³ Jacqueline Fitzgerald, 'Why are Indigenous imprisonment rates rising?' (NSW Bureau of Crime Statistics and Research) *Crime and Justice Statistics* August 2009 p 1. The one possible exception identified by the study was that while there had been no overall increase in the number of Indigenous adults imprisoned, more had been convicted specifically for offences against justice procedures.

¹⁴ Jacqueline Fitzgerald, 'Why are Indigenous imprisonment rates rising?' (NSW Bureau of Crime Statistics and Research) *Crime and Justice Statistics* August 2009 pp 5, 6.

¹⁵ Chris Cunneen, 'Punishment: Two Decades of Penal expansionism and its effects on Indigenous Imprisonment' *Australian Indigenous Law Review* 2011 15(1) 8, p 11.

¹⁶ Chris Cunneen, 'Punishment: Two Decades of Penal expansionism and its effects on Indigenous Imprisonment' *Australian Indigenous Law Review* 2011 15(1) 8, p 11.

¹⁷ Roy Walmsley, 'World Prison Population List' (9th ed) (International Centre for Prison Studies) 2011.

This growing reliance upon imprisonment has been described as "*governing through crime*". Criminal law and imprisonment are said to be increasingly used as tools of social policy, with the civil and political order increasingly being structured to address "*the problem of crime*".¹⁸ Whether that analysis is accepted or not, the cost of the growth in imprisonment in the United States is astonishing. Even if the social and emotional costs are ignored, in 2007 governments at all levels in the United States spent \$228 billion on police, corrections, judicial and legal services; \$75 billion on corrections alone.¹⁹

Unlike Australia, however the number of people imprisoned in the US has been declining since 2009,²⁰ at least in part because Americans have decided they have better and more effective ways to spend their money.

Youth Justice – Rates of detention

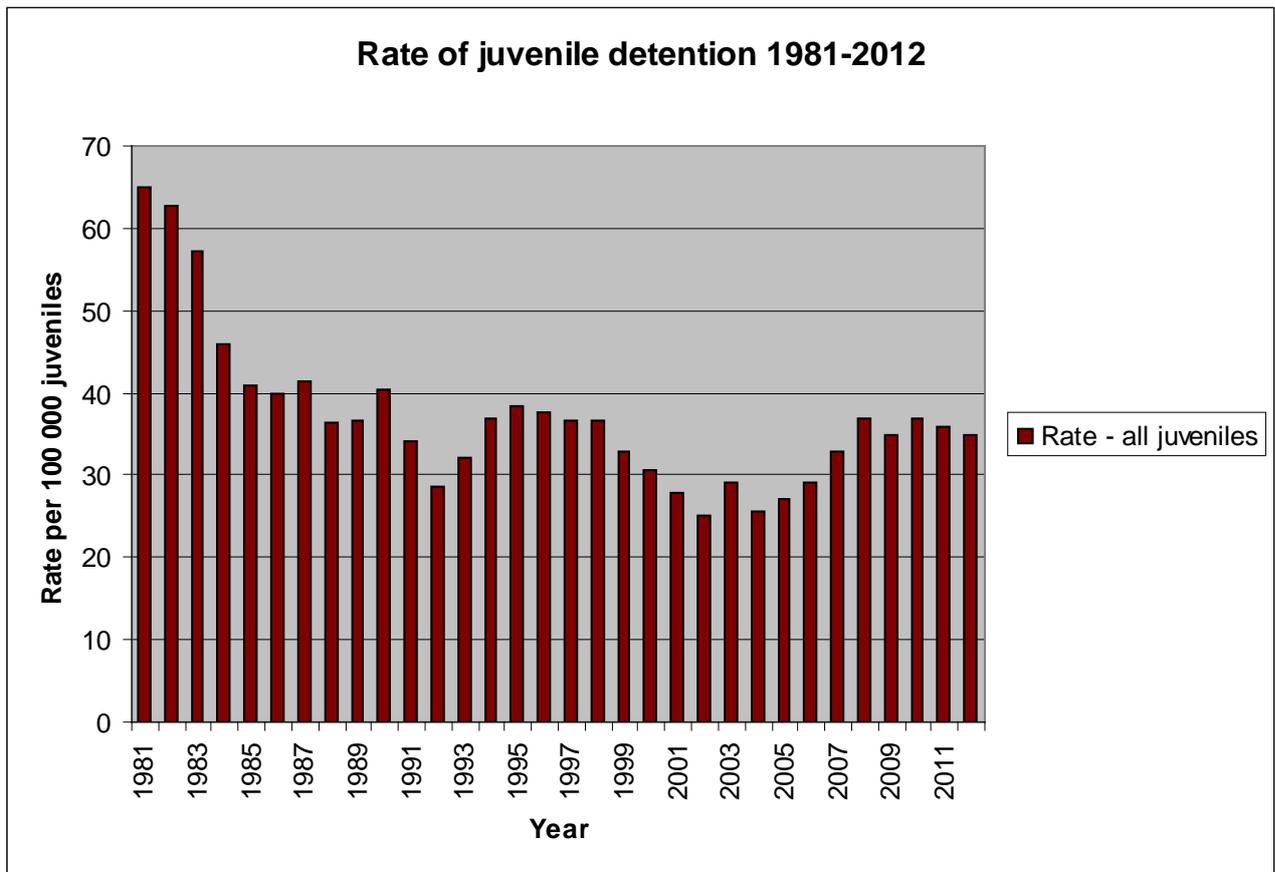
Although adult incarceration rates continue to rise in Australia, more optimism is warranted in relation to Youth Justice over the years since John Pat's death (see Graph 2).²¹

¹⁸ Chris Cunneen, 'Punishment: Two Decades of Penal expansionism and its effects on Indigenous Imprisonment' *Australian Indigenous Law Review* 2011 15(1) 8, p11; the term "*governing through crime*" was coined by Jonathan Simon, Professor of Law at the University of California, Berkeley.

¹⁹ Tracey Kyckelhahn, *Justice Expenditures and Employment, FY 1982-2007 - Statistical Tables* (US Department of Justice, Bureau of Justice Statistics) December 2011 p 5.

²⁰ E Ann Carson and Daniela Golinelli, *Prisoners in 2012 - Advance Counts* (US Department of Justice, Bureau of Justice Bulletin) July 2013 p 2.

²¹ Kelly Richards, 'Trends in juvenile detention in Australia' *Trends & issues in crime and criminal justice* (AIC) May 2011.

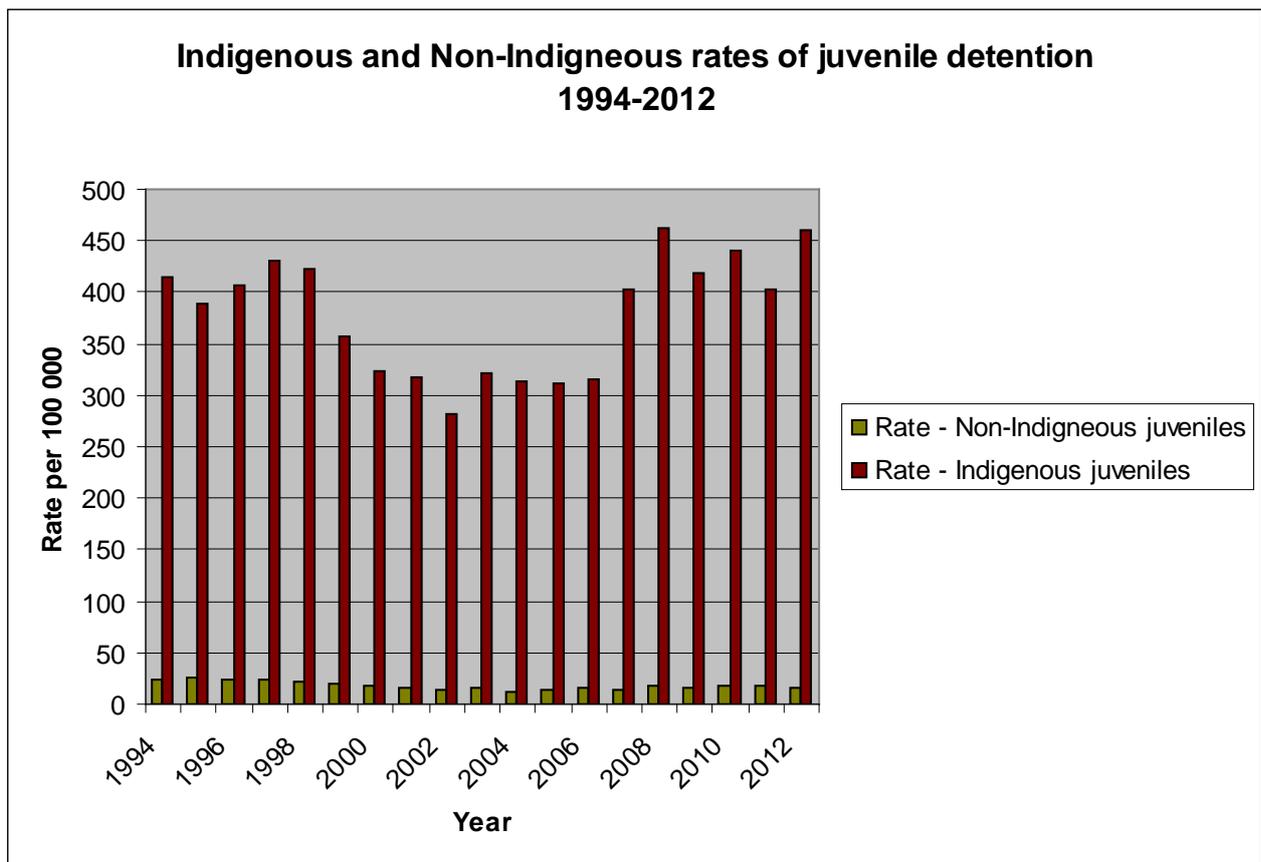


Graph 2: Juveniles in detention in Australia 1981-2008

Source: Australian Institute of Health and Welfare (AIHW), *Juveniles in detention in Australia, 1981-2008*, 2010 pp 15-16, 24-26, 28-29; AIHW, *Juvenile detention population in Australia 2012*, 2012 Supplementary Table S10.

Unfortunately, and sadly all too predictably, there is less reason for optimism in relation to the detention of Indigenous young people, at least since reliable national data started to be available from 1994 (see Graph 3).²²

²² Chris Cunneen and David McDonald note that the lack of national retrospective data makes it difficult to determine to what extent policies instituted in the 1980s and into the 1990s to decarcerate 'welfare' juveniles have impacted on the proportions of Indigenous youth detained (*Keeping Aboriginal and Torres Strait Islander People out of Custody...* 1997 p 30). However there is evidence that Indigenous juveniles were a high proportion of the large numbers of juveniles detained prior to 1994 (Lynn Atkinson, 'Detaining Aboriginal Juveniles as a last resort...' *Trends & issues in crime and criminal justice* (AIC) 1996 pp 1-2; Chris Cunneen, 'The New Stolen Generations' Paper AIC Conference Juvenile Crime and Juvenile Justice: Toward 2000 and Beyond 26 & 27 June 1997; RCIADIC, *National Report* 1991 [14.3.3, 14.3.10-14.3.25].)



Graph 3: Rate of Indigenous and Non-Indigenous juvenile detention 1994-2012

Source: AIHW, *Juveniles in detention in Australia, 1981-2008*, 2010 pp 15-16, 24-26, 28-29; AIHW, *Juvenile detention population in Australia 2012*, 2012 Supplementary Table S10.

The reductions achieved in the detention rates for young Indigenous people since 1994 appear to have been reversed since 2007. Of grave concern, the disproportionate rate of Indigenous juvenile imprisonment increased from 17 in 1994 to 31 times the rate of Non-Indigenous juvenile detention in 2012.²³ In 2012, Indigenous young people made up 53% of the juvenile detention population almost twice the proportion of Indigenous adults in the prison population (27%).²⁴

²³ Kelly Richards, 'Trends in juvenile detention in Australia' *Trends & issues in crime and criminal justice* (AIC) May 2011 p 3; AIHW *Juvenile detention population in Australia 2012*, 2012 p vii.

²⁴ AIHW *Juvenile detention population in Australia 2012*, 2012 p 4; ABS *Prisoners in Australia, 2012* (4517.0) p 8.

Not all jurisdictions are equally responsible for this. As can be seen from the "snapshot" of juvenile detention rates in the 1994 and 2012 June quarters (Table 1), in contrast to every other jurisdiction, the detention rate for Indigenous juveniles in NSW has fallen considerably. Also although the rate has increased in Victoria, it continues to detain Indigenous young people at far lower rates than other jurisdictions.²⁵

	NON-INDIGENOUS JUVENILE DETENTION RATES		INDIGENOUS JUVENILE DETENTION RATES	
	June 1994	June 2012	June 1994	June 2012
NSW	38.8	16	628.3	492
Victoria	12.0	9	140.2	223
Queensland	12.4	10	278.9	345
WA	28.3	20	798.3	890
SA	27.0	20	443.0	621
Tasmania	16.7	30	35.1	n.a.
NT	37.0	n.a.	87.8	329
ACT	24.6	45	0.0	797
AUSTRALIA	24.3	15	413.9	460

Table 1: Snapshot of juvenile detention rates per 100,000 1994 and 2012²⁶

Source: AIC, *Juveniles in detention in Australia*, 1981-2008, 2010 pp 15-16, 24-26, 28-29; AIHW, *Juvenile detention population in Australia 2012*, 2012 Supplementary Table S10.

Sadly, and despite the significant increase in the Northern Territory rate, WA continued to have by far the highest rate of Indigenous juvenile detention (890

²⁵ Although juvenile detention rates can be volatile, particularly in jurisdictions with smaller populations, the two "snapshots" of the juvenile detention data in Table 1 are indicative of the longer term trends in each jurisdiction's quarterly data. See *Juveniles in detention in Australia, 1981-2008*, 2010 pp 15-16, 24-26, 28-29; AIHW, *Juvenile detention population in Australia 2012*, 2012 Supplementary Table S10.

²⁶ Wide fluctuations are to be expected in jurisdictions with a relatively small population of juvenile detainees – see, for example, the ACT.

per 100,000 population compared to the national average of 460).²⁷ It is likely this will decline markedly, however, with the transfer of young males to Hakea men's prison following a riot at the only juvenile detention facility in WA Banksia Hill Detention Centre in early 2013. The detention at Hakea has resulted in a reduction in the length of some of the custodial terms being imposed because of the hardship to detainees. Many of these young people were held at Hakea, in a (largely) segregated juvenile facility, for up to nine months where they were subject to extended lockdown and reduced access to education, recreation and counselling support.²⁸

The riot also prompted a review by the President of the Children's Court of those held on remand or arrest at the time to identify if there were any who could appropriately be released from custody because of the turmoil and lack of custodial options. As I subsequently observed in a decision dealing with the legality of the detention of juveniles at Hakea:

*the charges which have been brought against the detainees are, generally speaking, charges for very serious offences. Robbery, both armed and aggravated, and aggravated burglary are the most prolific offence type in the schedules. Almost all of the offences charged could be described as serious, and most as very serious.*²⁹

However the President had identified one 10 year old boy, from a town in the north-west, who was remanded in detention on charges of trespass and stealing some glue and deodorant cans. The President stated that it was clear the boy was being detained in Perth for offences which would not warrant detention. The reason the child was there was because he had a serious sniffing problem.

²⁷ AIHW, *Juvenile detention population in Australia 2012* 2012, Table S10.

²⁸ See, for example, Office of the Inspector of Custodial Services, *Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013* 2013 [7.39]; *WW (a child) -v- Williams* [2013] WASC 363

²⁹ *Wilson v Francis, Minister for Corrective Services WA* [2013] WASC 157 at [72].

When he presented to the court in the regional town he was under the influence and not in a position to plead; he was also in need of some urgent assistance so far as his health was concerned.³⁰

The President understood that this child had been remanded in custody because there were no other arrangements for him in his community, either with his family or any welfare agency, and there were concerns that there could "*be serious consequences so far as his wellbeing is concerned*".³¹ In fact the remanding magistrate had been fearful that this young boy would die in the absence of any local arrangements for his accommodation and care.³² The relevant police officer had also expressed alarm to the magistrate in the following terms: "*With [this child] being only 10 years old and his substance abuse being out of control, I hold grave fears for [this child] and his future*". The officer also noted that she was trying to contact mental health authorities to find out the level of contact that they had with the child, "*if any*".³³

With the intervention of the Court, arrangements were made for the child to be returned to his community with appropriate supports. The child appears to have ceased substance misuse after the counselling he subsequently received from a regional service provider and the more recent relocation of the child and his family to Perth, which changed his peer associations and the environmental factors which had contributed to his substance misuse.

The outcome may have been positive. But when the only apparent means to keep an obviously unwell child as young as 10 safe from harm is to place that child in criminal detention we should ask how much we have come to accept the

³⁰ Unpublished transcript, 5 February 2013.

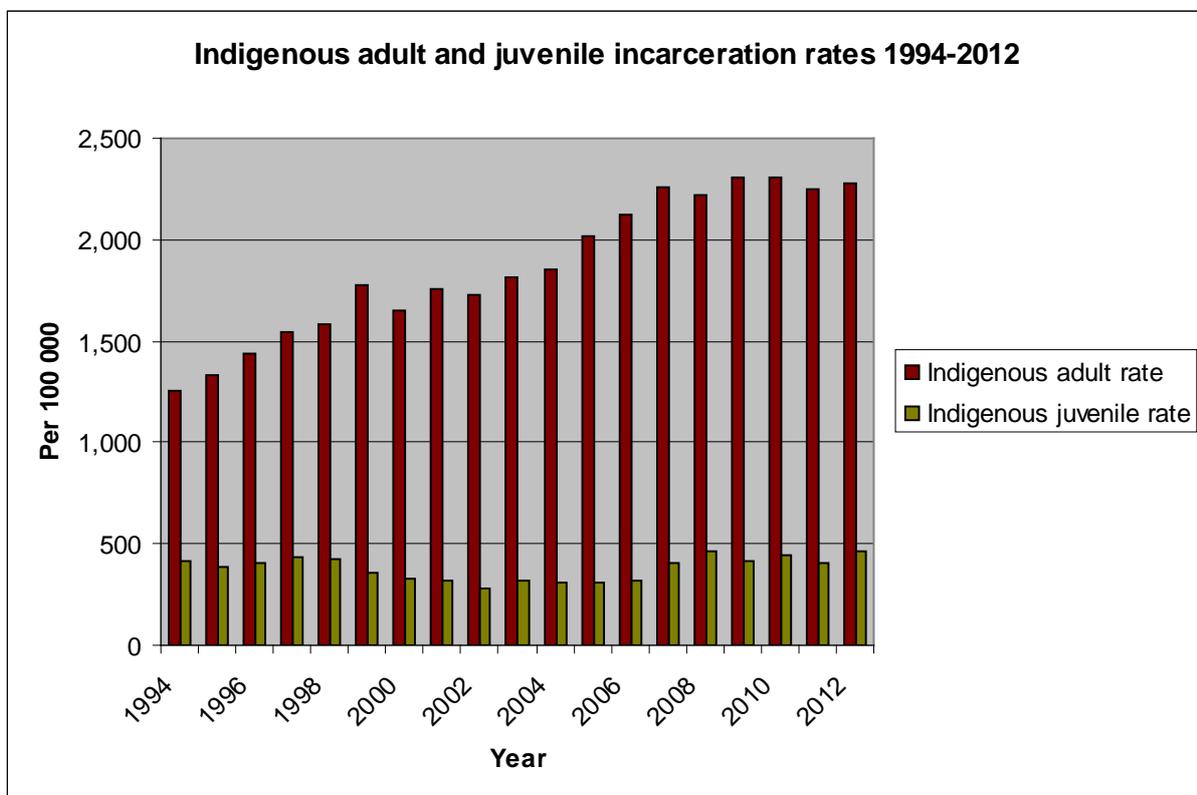
³¹ Unpublished transcript, 5 February 2013.

³² Also Paige Taylor, 'Don't give up on them', *The Australian*, 1 May 2013.

³³ Memo from Senior Constable to Magistrate.

"governing through crime" paradigm, with criminalisation and imprisonment becoming increasingly our only means of responding to social problems.

Despite my note of caution, it is also important not to lose sight of how much better the trends in juvenile detention have been in comparison to adult imprisonment (see Graphs 1 & 2). Even in relation to Indigenous people, the 82% increase in adult custodial rates between 1994 and 2012³⁴ dwarves an 11% increase in the rate of detention of young Indigenous people (see Graph 4).³⁵



Graph 4: Rate of Indigenous adult and juvenile incarceration 1994-2012

Source: ABS, *Prisoners in Australia*, for the years 2004, 2005, 2008-12 (4517.0); AIHW, *Juveniles in detention in Australia, 1981-2008*, 2010 pp 15-16, 24-26, 28-29; AIHW, *Juvenile detention population in Australia 2012*, 2012 Supplementary Table S10.

³⁴ ABS, *Prisoners in Australia* (2004 & 2012) (4517.0)

³⁵ Kelly Richards, 'Trends in juvenile detention in Australia' *Trends & issues in crime and criminal justice* (Australian Institute of Criminology) May 2011 p 2.

The difference between juvenile and adult offenders

The comparison between trends in juvenile and adult detention over the past 30 years brings to the forefront the importance of the clear differentiation between juvenile and adult offenders. This is not simply because the outcomes for Aboriginal young people are far more in keeping with the recommendations of the Royal Commission. Nor is it because this better accommodates the United Nations minimum rules for the administration of juvenile justice,³⁶ although that too is important.

Research shows that child and adolescent crime is generally different from adult offending:³⁷

- While young people have high rates of offending, it tends to peak in late adolescence when they are aged 18 and 19 years old. Most will grow out of "offending".
- Most youth offences are property related and conversely serious offences, such as homicide or sexual offences, are rarely perpetrated by young people. There are also a range of offences that only apply to young people such as underage drinking.
- Young people are more likely to come to the attention of police for a range of reasons including offending that is attention-seeking and opportunistic, their lack of experience and tendency to commit offences in groups and in public areas.
- Young people under criminal justice supervision have been found to have higher levels of intellectual disability and mental illness than adults under supervision.

³⁶ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' *Trends & issues in crime and criminal justice* (AIC) February 2011 p 1.

³⁷ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' *Trends & issues in crime and criminal justice* (AIC) February 2011.

- The high rate of victimisation of young people is a pathway to offending behaviour.
- Young people are also more susceptible to stigmatisation by the criminal justice system and peer contagion.

Kelly Richards, Research Analyst at the Australian Institute of Criminology, writes that in this context:

*Preventing juveniles from having repeated contacts with the criminal justice system and intervening to support juveniles desist from crime are therefore critical policy issues.*³⁸

Richards also notes however, that while juvenile crimes are typically less costly in economic terms, juvenile offenders often require more intensive and costly interventions.

What works

A recent study by the Australian Institute of Health and Welfare reports that a range of juvenile justice studies have been done to identify "*what works*" and what doesn't.³⁹ For example, the Australian Institute of Criminology found that effective intervention in juvenile offending relied upon targeting individual needs, working across multiple settings (family, school, peers), dealing with multiple risk factors and being culturally specific.

Ineffective programs have also been identified and the literature is said to suggest that interventions such as boot camps and incarceration without therapeutic components are ineffective due to:

³⁸ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' *Trends & issues in crime and criminal justice* (Australian Institute of Criminology) February 2011 p 4.

³⁹ AIHW, *Young people aged 10-14 in the youth justice system 2011-12* 2013.

*a combination of stigmatising effects, reinforcement of criminal behaviour through the concentration of offenders together and failure to tackle the underlying factors contributing to offending behaviour and provide positive role models.*⁴⁰

Interestingly the study also found that young people who are first supervised under the criminal justice system when aged between 10-14 are more likely to be under supervision when 15-17 and significantly more likely to be in detention (33% compared to 8% of those who are first supervised at an older age).⁴¹ It is difficult to know whether this demonstrates that the criminal justice system is good at identifying "*problem*" children or actually contributes to this through the peer contagion and stigmatisation referred to above.

It might be thought that none of these insights are particularly new. The first juvenile penal institution in Australia, Carters Barracks in Sydney, was terminated after about 15 years in 1835, because, according to the then Chief Justice "*the association of a body of young criminal together, and the incorrigible effects of their example and communications upon each other*".⁴² Another institution at Port Arthur in Tasmania, Point Peur, was intended to be a place of rehabilitation and training for young offenders. It too lasted just 15 years, from 1834, before it failed due to the gap between its stated intention and philosophy and its accomplishments and practice. The regime was harsh and disciplinarian, with corporal punishment as its central feature.⁴³

⁴⁰ AIHW, *Young people aged 10-14 in the youth justice system 2011-12* 2013, p 23.

⁴¹ AIHW, *Young people aged 10-14 in the youth justice system 2011-12* 2013, p vi.

⁴² Quoted in Lyne Atkinson 'An Overview of Juvenile detention in Australia' Address to the National Conference on Juvenile Detention 10-12 August 1993, p 2 (Attachment 12).

⁴³ Quoted in Lyne Atkinson 'An Overview of Juvenile detention in Australia' Address to the National Conference on Juvenile Detention 10-12 August 1993, pp 2, 3.

Similarly it has long been suggested that any program designed for Indigenous communities must be culturally appropriate.⁴⁴ For example, in 2001 Chris Cunneen found that:

the key characteristics shared by Indigenous programs that seek to effectively address crime prevention issues can be reduced to the following propositions:

- *holistic approach incorporating different strategies*
- *involvement of significant others such as family and community elders*
- *self-determination*
- *culturally appropriate programs and staff.*⁴⁵

The results of adopting such an approach to addressing Indigenous health issues are now being proven. Professors Fiona Stanley and Sandra Eades have reported the dramatic success of health services which have been developed with the involvement of Indigenous people, including for Inuit communities in Canada and the strategy for addressing foetal alcohol spectrum disorders developed by Aboriginal women June Oscar and Emily Carter in the Fitzroy Valley in WA.⁴⁶

It is very encouraging to see this approach being adopted and promoted by the Royal Australian College of Physicians in its report on *The health and well-being of incarcerated adolescents*. The care of juveniles in detention remains critical, as it is undoubtedly the case that there are some juveniles whose offending is so extreme that detention is required. The mistakes of the past can be avoided if we learn from our experiences of what works and what doesn't work.

⁴⁴ AIC, 'Working with Indigenous communities to reduce crime' *AICrime Reduction Matters* 1 July 2004.

⁴⁵ Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities*, September 2001, p 10.

⁴⁶ See also Fiona Stanley, 'On the ground: Key to successful policy outcomes' [online] *Griffith Review*, No. 41, 2013: [200]-[210]; Aboriginal and Torres Strait Islander Healing Foundation, *Growing our children up strong and deadly: healing for children and young people* (2013).

Critical to the lessons learned is that juvenile offenders and offending are not the same as adult offenders and offences and should not be treated the same. In this context recent developments in Western Australia give reason for pause. As indicated, a riot at what had become the only juvenile detention facility in WA resulted in over 100 young male offenders being incarcerated in a male adult prison. The lack of any viable alternatives in Western Australia at the time was a significant factor in my determination that the detention was not unlawful.

However, that is not to say there is no cause for concern about the absence of alternative accommodation for young offenders other than adult custodial facilities. Alarming the proposal to detain juveniles in adult custodial facilities in WA had been noted with concern by Professor Bryant Stokes AM in his report on mental health which was published more than six months before the riot.⁴⁷ More recently, the Inspector of Custodial Services has called for consideration of the transfer of some male juveniles to the young adult male facility Wandoo, and the co-location of all females (juveniles and adults) in the one facility, citing the need for "*a stocktake of existing custodial assets and an intelligent reflection on future options, especially at times of financial constraint*".⁴⁸

If complying with the Royal Commission recommendations that were precipitated by death of John Pat is taken as a standard, 30 years later we have done far better with youth justice than adult corrections. We need to make sure we build on the lessons learned and the strengths that are in place and not lose grasp of the important differences between adults and young people.

⁴⁷ Professor Bryant Stokes AM, *Review of the admission or referral to and the discharge and transfer practices of public mental health facilities/services in Western Australia* July 2011 p 115.

⁴⁸ Office of the Inspector of Custodial Services, *Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013* 2013 [8.78], [8.81].

Diversion and community supervision

There is no doubt that placement of a child in detention provides opportunities for intensive therapeutic intervention. However, later speakers in this session will identify the doubts which currently exist as to whether those opportunities are being fully utilised, at least in Western Australia. While there are some occasions upon which detention provides a practical solution in circumstances where there are no viable alternatives (such as the case of the 10-year-old to whom I earlier referred), the detention of young offenders must be regarded as an absolute last resort, to be utilised only when there is no other viable alternative disposition of the case. The death of John Pat graphically illustrates the tragic consequences which can follow from the detention of young offenders. There are, of course, adverse consequences of detention of less severity, including disruption of family contact, removal from country with which young Indigenous offenders may have a close association, the formation of undesirable associations with other young offenders and so on.

It is obviously important that we, as a community, provide the best possible care to young offenders placed in detention. In my view, however, it is at least as important that we devote very significant efforts to identifying young persons at risk, with a view to diverting those persons away from the criminal justice system and placing them in a community-based therapeutic environment which will reduce the risks of offending behaviour. Those efforts will be more effective if a young person at risk is viewed in the family context, because that, of course, is the context which has created the risk. In other words, the approach should be to identify families at risk and address the needs of all members of the family on an holistic basis. That will in turn require cross-agency cooperation, so that all relevant issues including health, housing, schooling, employment,

substance abuse, etc can be identified and addressed, with a view to encouraging a more supportive environment for the young person at risk, and through that means, reducing the risk of offending behaviour. I am aware that some progress has been made towards this approach in both Western Australia and other jurisdictions, but it seems to me that there is much more that could be done in this regard.