



*Rotary District 9450
2007 Conference*

*Protecting the Future
Youth and the Justice System*

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Introduction

I would like to first acknowledge the traditional custodians of these lands, the Nyoongar people, and pay my respects to their elders, past and present. I would also like to thank the organisers for providing me with an opportunity to address you today, and in particular, to share the podium with my sister Cherry on the first occasion our careers in law and medicine have intersected. It seems particularly appropriate that this should occur at a conference devoted to youth, given that we spent our childhoods and adolescence together.

The primary obligation of the criminal justice system is to protect the community from the consequences of crime. It used to be said that crime was predominantly perpetrated by young men. Unfortunately, the emancipation which has seen women involved in a much greater range of activities over the last 30 years has also seen them more involved in crime. So today it is more accurate to say that crime is predominantly perpetrated by young men and, to a lesser extent, by young women.

In this address I will endeavour to identify the main ways in which the criminal justice system responds differently to young offenders as compared to older offenders, and the reasons for that differential approach. However, in order to put those differences in their context, it is appropriate to commence with an overview of some of the major issues that confront the criminal justice system generally, irrespective of the age of the offender.

As I have already observed, the fundamental objective of the criminal justice system is to protect the community by discouraging the

commission of crime. The objective of discouraging crime, or reducing recidivism, gives rise to two principles of sentencing - deterrence and rehabilitation. Deterrence itself has two components - general deterrence, which is the objective of deterring all prospective offenders from committing crime, and specific deterrence, which is the objective of discouraging the particular offender from committing further crime. Rehabilitation is, of course, the objective of using the sentence as the occasion for the introduction of processes and programmes which will provide the offender with insight into the reasons for his or her offending and thereby reduce the likelihood of repetition.

More recently, a number of specific aspects of the rehabilitative approach have received particular focus. The first is what is often described as "restorative justice". The focus of this approach is upon redressing the harm caused by the crime, and includes a focus upon the interests of the victim and reparation. A second aspect is that which is sometimes labelled "therapeutic jurisprudence", but which I prefer to call "problem solving". This approach accepts that criminal conduct is often a symptom of a more fundamental underlying cause or group of causes of anti-social conduct. It embraces the fairly obvious proposition that unless and until those underlying causes are addressed and those problems solved, imposing punishment as a result of the symptomatic expression of those causes is unlikely to have any enduring beneficial effect.

This approach is given practical expression in a number of recent developments, such as the creation of specialist courts addressing particular types of criminal conduct, in which an underlying social problem is prevalent - such as drug courts, domestic violence courts and Aboriginal community courts. Each of these courts has been established

in Western Australia over the last few years, although they have been going for much longer in other jurisdictions. For example, in the United States there are more than 1000 drug courts. These courts have now been going for long enough for their performance to have been the subject of rigorous and repeated assessment. Those assessments have consistently shown that these courts work very well in reducing re-offending. This should not come as a surprise. Locking up a drug addict does nothing of itself to alleviate or address the causes of his or her addiction. It does not even preclude access to illicit drugs, as they are available within the prison system, despite the best efforts of the prison authorities. And while incarcerating a man who bashes his wife or children will prevent him from doing that while in prison, if he is to return to the family environment after release, further violence can be expected unless something is done to address the causes of that violence during the penal process.

Allied to the objective of discouraging crime is the important function of publicly and formally enunciating the community's abhorrence of criminal behaviour by imposing a sentence which is proportional to the culpability of the criminal conduct. That function, sometimes described as retribution or punishment, serves a number of objectives. The first is the moral objective of making the punishment fit the crime - the principle graphically enunciated in the biblical exhortation - "An eye for an eye, a tooth for a tooth" - an exhortation we should remember before we too readily condemn Islamic justice as barbaric. But all human societies have proceeded upon the assumption that misconduct should be matched by punishment, and ours is no different. There is also the social objective of reducing the risk that people will take the law into their own hands - the mentality of the lynch mob or vigilante. And a third objective, more

prominent recently, is recognition of the interests of the victim in the imposition of an appropriate penalty.

It is a grave mistake to underestimate the importance of retribution or punishment in the workings of the criminal justice system. In order to be effective, that system critically depends upon public confidence and acceptance. Too great a departure from what the public regard as an appropriately punitive model leads to what criminologists have described as "popular punitiveness" - that is, a phenomenon in which politicians, and sometimes Judges, use apparent expressions of public opinion to justify either changing the law, in the case of politicians, or applying the law, in the case of Judges, to produce more severe sentences. When this approach is taken, there is always the grave danger that the views of a vocal minority will be mistaken for public opinion. It is dangerous to assume that the small number of people who take the trouble to call talk-back radio, or write to the newspaper, represent widely held public opinion.

But the popular expression of these views inevitably leads to "law and order auctions" prior to State elections, in which politicians competing for votes endeavour to outbid each other on the scale of sentencing severity. These auctions sometimes involve public attacks on the judiciary, who are said to be so out of touch with community standards and expectations that the discretion which we exercise when passing sentence needs to be curtailed by legislation resulting in mandatory minimum sentences. These predictable electoral processes would pose a greater threat to the achievement of rehabilitation and restorative justice through the processes to which I have referred if our politicians felt obliged to fulfil their promises when elected, but fortunately they don't.

So that general context sets the scene for a consideration of the particular issues that arise when young people commit crime.

Young people are, of course, in transition to adulthood. In the course of that journey they confront many opportunities and experiences for the first time. They have to make choices often without any prior experience to inform that choice. When they come into contact with the criminal justice system, it must respond in a way that encourages the correct choice when that possibility next arises. We need to ensure that young people do not become entrenched in the criminal justice environment. That doesn't help them or the community – no one wins from that result.

International recognition

The proposition that youths should be treated differently to adults in the criminal justice system is recognised internationally. There is a raft of international standards for juvenile justice. The most well known is probably CROC – the Convention on the Rights of the Child.¹ Equally important though in this context are The Beijing Rules (United Nations Standard Minimum Rules for the Administration of Juvenile Justice),² and in particular Rule 1.2 which provides for Member States to "endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible". Other international standards include The Riyadh Guidelines (United Nations Guidelines for the Prevention of

¹ Available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>, as at 12 March 2007.

² Available at http://www.unhchr.ch/html/menu3/b/h_comp48.htm, as at 12 March 2007.

Juvenile Delinquency)³ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.⁴

Legislation

In Australia, juvenile justice is addressed under State law. While the international standards to which I have referred do not bind this State or its Courts, they help inform our attitudes and our legislative and judicial approaches to our treatment of young offenders.

The special position of young people in Western Australia is legislatively recognised in a number of ways. For example:

Special rules about criminal responsibility

Section 29 of the *Criminal Code* provides:

"A person under the age of 10 years is not criminally responsible for any act or omission.

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission".

Specialist Court

Young offenders are dealt with in the Children's Court of Western Australia which has exclusive jurisdiction to hear and determine a charge of an offence alleged to have been committed by a child, which under the *Children's Court of Western Australia Act 1988* is essentially any boy or girl under the age of 18 (see ss 3 and 19(1)). That Act embodies a range of protections for children coming before the Court, including limitations

³ Available at http://www.unhchr.ch/html/menu3/b/h_comp47.htm, as at 12 March 2007.

⁴ Available at http://www.unhchr.ch/html/menu3/b/h_comp37.htm, as at 12 March 2007.

protecting disclosure of the identity of children involved in proceedings (see s 35).

Section 46 of the *Young Offenders Act 1994* (WA) also provides for a specialised sentencing regime for young offenders, as well as a range of diversionary options to which I will return shortly.

Models

Before considering the use of diversionary options, it is useful to appreciate the theoretical underpinnings to these specialised approaches to dealing with young offenders.

"Historically, the two most influential theoretical models of juvenile justice have been the welfare model and the justice model".⁵ The welfare model (with an emphasis on rehabilitation and treatment rather than punishment) which was in the ascendancy for much of the 20th century is said to have given way to the justice model (with its emphasis on accountability and responsibility) in the 1980s and 1990s.⁶ In Western Australia, the justice model was typified by the introduction of mandatory minimum sentences for some juvenile offenders during the 1990s, in response to a perceived increase in some types of juvenile crime, such as car theft. Those provisions have made very little difference in practice, having only applied to a few score offenders who would very likely have got the mandatory minimum sentence anyway. As it happens, the car

⁵ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) at 18.33 (relevantly available at <http://138.25.65.50/au/other/alrc/publications/reports/84/18.html#Heading153>, as at 13 March 2007).

⁶ Discussion of these models appears, eg, in Priday, "Thinking About New Directions in Juvenile Justice: Risk and Cognitive Behaviourism" (March 2006) 17(3) *Current Issues in Criminal Justice* 413 (esp at 414 – 415); Alder and Wundersitz, "New directions in juvenile justice reform in Australia", published in Alder and Wundersitz (eds), *Family conferencing and juvenile justice : the way forward or misplaced optimism?* (Canberra: Australian Institute of Criminology, 1994) (available at <http://www.aic.gov.au/publications/lcj/family/ch1.html>, as at 13 March 2007).

theft rate is now one-third of the rate in 1995⁷ - but that is probably due much more to immobilisers than anything the justice system has done. Of course, these models are just "conceptual tools, and no juvenile justice system has ever fitted exclusively into ... these categories".⁸ More recently, the restorative justice and problem-solving models have emerged encouraging offenders to accept responsibility for their criminal behaviour, and involving victims in the process⁹ as evidenced in the diversionary mediation processes of juvenile justice teams in Western Australia to which I will turn now.

Diversionary options

Perhaps the most significant difference between the treatment of juvenile and adult offenders is the prevalence of diversionary options intended to divert young offenders from entrenched involvement in the criminal justice system.

The *Young Offenders Act 1994* (WA) gives police officers various options to avoid a matter coming before the Courts in the first place and to try to limit the involvement and contact of young offenders with the juvenile justice system. This might involve merely cautioning the youth (rather than laying charges) (see esp ss 22, 23) - indeed, the Act provides that a police officer, before starting a proceeding against a young person for an offence, *must* first consider whether in all the circumstances it would be more appropriate (a) to take no action; or (b) administer a caution to the young person (s 22B).

⁷ Crime Research Centre, *Crime and Justice Statistics for Western Australia: 2004 - Statistical Report 2004* (available at http://www.crc.law.uwa.edu.au/facts__and__figures/statistical_report_2004, as at 13 March 2007).

⁸ See Alder and Wundersitz, *supra* n.6, at 4.

⁹ Australian Law Reform Commission, *supra*, n.5.

There is also the option available in certain circumstances under the Act for the police (or the Court) to refer a youth to a juvenile justice team (see esp ss 27, 28) – indeed, the discretion given by section 27 or 28 is to be exercised in favour of referring the matter to a juvenile justice team if the young person has not previously offended against the law (s 29). The work of these teams is described by the Department of Corrective Services in the following terms:¹⁰.

"Juvenile Justice Teams are a ... way of dealing with young people who have committed minor offences or are in the early stages of offending."

"The teams offer young people a choice. They can choose to go through a mediation process and face the victim of their crime or they may choose to have the matter dealt with in court. If the juvenile chooses the mediation process, they must accept responsibility for their actions. If they are not willing to do this, the matter must be referred back to the courts."

"Central to the mediation process is a meeting with the offender and their family or guardian, the victim and their family, police and a juvenile justice officer. Other people such as a representative from the young person's school or an Aboriginal community may also be present."

"At the meeting, all participants work out and agree on a contract known as an action plan for the young offender. ..."

Diversionsary processes (of police cautions and mediation) offer a means of avoiding court involvement; described in at least one text as "the

¹⁰ <http://www.correctiveservices.wa.gov.au/J/juvjussystems.aspx?uid=4750-2726-1391-6826>, as at 12 March 2007.

optimal response to the problem of juvenile crime".¹¹ Indeed, a focus on diversion is emphasised in Rule 11 of The Beijing Rules (United Nations Standard Minimum Rules for the Administration of Juvenile Justice) to which I referred earlier. In commentary upon the Rule, it is stated:

"Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner."¹²

Western Australia now has more than 10 years experience with the use of juvenile justice teams – "juvenile justice teams were formally established in March 1995, following the introduction of the *Young Offenders Act 1994*".¹³ The Department of Corrective Services has commented that:

"Since the teams were established, there has been a dramatic reduction in the number of young offenders involved in the justice system. There has also been a significant reduction in the number of cases needing to be processed by the courts. The teams are a very

¹¹ Findlay et al, *Australia Criminal Justice* (Oxford University Press, South Melbourne, 2005, 3rd ed) at 321.

¹² http://www.unhcr.ch/html/menu3/b/h_comp48.htm, as at 14 March 2007.

¹³ Noted by the Crime Research Centre at http://www.crc.law.uwa.edu.au/facts_and_figures/statistical_report_1997/childrens_court_appearances, as at 12 March 2007.

real solution to a problem encountered by the justice system for many years - too many minor offenders entering the court system at a very young age".¹⁴

A study undertaken in Western Australia in 2004 found:

" ... a 55:19:26 split, that is, 55% of juvenile contacts are cautions, 19% are referrals and 26% are dealings with the Children's Court".¹⁵

The juvenile conferencing model has become the most popular example of the restorative justice approach in Australia,¹⁶ and the victim's participation in the process has become a common theme in juvenile legislation around the country.¹⁷ Indeed, conferencing and diversion appear to "have found a solid and ongoing place in Australia's juvenile justice systems".¹⁸ The obvious strength of family conferencing with juvenile offenders is that it addresses the offender in the family context, and hopefully strengthens family support and encouragement, and increases the opportunity and incentive to take a lawful option next time. At the same time, particular problems such as drug or alcohol abuse, truancy, poor literacy, child abuse and so on can be identified and addressed.

¹⁴ <http://www.correctiveservices.wa.gov.au/J/juvjustsystems.aspx?uid=4750-2726-1391-6826>, as at 12 March 2007.

¹⁵ Ferrante et al, *Pathways through Justice: A Statistical Analysis of Offender Contact with the WA Juvenile Justice System* (Final Report, Crime Research Centre for the Department of Justice, 31 July 2004) at 12.1 (available at <http://www.crc.law.uwa.edu.au/publications?f=115066>, as at 12 March 2007).

¹⁶ White, "Community Corrections and Restorative Justice" (July 2004) 16(1) *Current Issues in Criminal Justice* 42 at 43.

¹⁷ Wundersitz and Skrzypiec, "Juvenile Justice in Australia: Old Challenges in a New Millennium" in Chappell and Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, Australia, 2005) at 53 - 54. See also Australian Institute of Health and Welfare 2007, *Juvenile Justice in Australia 2004-05* (AIHW cat. no. JUV #2. Canberra: AIHW) at 4 (available at <http://www.aihw.gov.au/publications/juv/jjia04-05/jjia04-05.pdf>, as at 28 March 2007).

¹⁸ Suggested in Wundersitz and Skrzypiec, *id.*, at 55.

Net Widening

One of the dangers of the availability of diversionary options is the process described as "net widening"¹⁹ - that is, the risk of diverting people into a less formal, bureaucratic facet of the justice system, rather than away from the system entirely. So, the argument goes, that before these diversionary systems become available, a sensible policeman would send a troublesome child on his way with a clip over the ear and a damn good talking to. Now the same child might be referred to a conference or mediation, softening his or her introduction to the justice system, and reducing fear of further involvement. This danger should not be overlooked.

Recidivism

An important finding of the 2004 WA study was "that the majority of juvenile offenders do not re-offend" – 62% of offenders (whether merely initially cautioned or indeed initially dealt with by the Courts) did not re-offend during a two year follow up period and overall 61% of juveniles entering the system had no further contact with it after two years.²⁰ While this offers some encouragement to our processes in Western Australia, it is perhaps contradicted by a more extensive (albeit NSW) study published in 2005, with a follow-up period of 8 years. It found that 68% of young offenders who appeared in the Children's Court for the first time in 1995 had re-appeared in a NSW criminal court at least once in the next 8 years.²¹

¹⁹ See, eg, brief discussion of the concept in Findlay et al, *supra* n.11, at 322; Ferrante et al, *supra* n.15, at 12.3.

²⁰ Ferrante et al, *Id.*, at 12.4. See also Findlay et al, *Id.*, at 319.

²¹ Chen et al, "The transition from juvenile justice to adult criminal careers" (NSW Bureau of Crime Statistics and Research) (May 2005) 86 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1at 9.

Studies such as these are vital to informing policy on our approaches to the way in which we as a community should deal with young offenders. For example, as noted in the NSW study:

"If most juvenile offenders do not reoffend after their first court appearance, it would seem sensible to focus prevention and rehabilitation resources on juveniles who have an established history of involvement in crime. If, on the other hand, one appearance in court indicates that further offending is highly likely, we should begin trying to reduce the risk of re-offending at the first point of contact between a juvenile and the court system".²²

Need for research

There are few Australian studies on juvenile re-offending²³ and whether these "new" arrangements and processes are generally achieving their objectives.²⁴ There are no national data even on the extent of juvenile diversions; data on juvenile diversions are not comparable as between the various States and Territories.²⁵ There is a clear need for research in these areas, and in particular on the effectiveness and impact of our existing diversionary processes, to better inform the development of public policy on these important issues. One matter – sadly – on which all studies and commentators agree is the gross over-representation of Indigenous youth in our criminal justice system. Tragically, the gains that appear to have been made in the juvenile justice system generally have had little or no impact on indigenous youth.

²² *Id.*, at 1.

²³ *Ibid.*

²⁴ Noted in Wundersitz and Skrzypiec, *supra* n.17, at 55.

²⁵ As noted in Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (Productivity Commission, Canberra) at xxxix (available at <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2005/keyindicators2005.pdf>, as at 13 March 2007).

Indigenous youth

The NSW study reported in 2005 concluded:

"It is safe to assume that virtually all Indigenous males and a large majority of Indigenous females will reoffend and reappear in court unless something is done to assist them".²⁶

It is "widely recognised that Indigenous young people are significantly over-represented in the juvenile justice system in Australia, in police custody and in juvenile detention centres".²⁷ A study undertaken in Queensland on youth criminal trajectories suggested that Indigenous young people are more likely than non-Indigenous youth to progress from the juvenile system to the adult criminal justice system.²⁸ And in New South Wales a study showed that rate to be about nine times higher than for non-indigenous juvenile offenders.²⁹

Across Australia, "Indigenous young people are 20 times more likely to be incarcerated than non-Indigenous young people".³⁰ Indigenous youth have "not [had] the same level of access to ... diversionary processes (especially police cautioning) as non-Indigenous youth".³¹ The 2004 Western Australian study found that "on the whole non-Indigenous juveniles are more likely to be cautioned and less likely to go to court than Indigenous juveniles".³² The study's conclusions emphasise the "[e]arlier contact with the juvenile justice system by Indigenous

²⁶ Chen et al, *supra* n. 21, at 11.

²⁷ "Juvenile Justice (2004) 49 *Hot topics* 1 at 18.

²⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Indigenous young people with cognitive disabilities and Australian juvenile justice systems* (Human Rights and Equal Opportunity Commission, Sydney, December 2005) at 9 (available at http://www.hreoc.gov.au/social_justice/cognitive_disabilities.doc, as at 12 March 2007), referring to Institute of Criminology, *Youth Justice: Criminal Trajectories*, Trend and Issues, No.265, September 2003.

²⁹ *Id.*, at 10.

³⁰ *Id.*, at 9.

³¹ Wundersitz and Skrzypiec, *supra* n.17, at 63.

³² Ferrante et al, *supra* n.15, at 12.1.

offenders" and their higher recidivism rates with greater levels of progression to detention amongst Indigenous offenders.³³ "It has long been recognised ... that Indigenous youth tend to enter the system at much younger ages and with greater frequency."³⁴ This was again confirmed in a report released earlier this week by the Australian Institute of Health and Welfare, finding that nationally in 2004-05 Indigenous young people under juvenile justice supervision were younger on average than their non-Indigenous counterparts.³⁵

That report also found that during 2004-05 while nationally over one third of young people under juvenile justice supervision identified/were identified as being of Aboriginal and Torres Strait Islander origin (a sobering statistic in itself), in Western Australia this was 60% and in the case of young indigenous females in this State, almost 75%.³⁶ The Crime Research Centre has also noted the particular need for concern in Western Australia. It has found that in 2004, as compared to other States and Territories, the WA juvenile detention rate (51.9 per 100,000 juvenile persons) remained the highest in the country, and notably the WA Indigenous juvenile detention rate was 654.6 per 100,000 Indigenous juveniles – also the highest in the country – indeed, 52 times greater than that for non-Indigenous juveniles and double the national rate.³⁷ These reports show a disaster of epidemic proportions, nationally and in particular in Western Australia.

³³ *Id.*, at 13.1.

³⁴ Lincoln and Wilson, "The Aboriginal Crime and Justice Landscape: Time for a Rethink" in Chappell and Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, Australia, 2005) at 224.

³⁵ Australian Institute of Health and Welfare, *supra* n.17, at 33.

³⁶ *Id.*, at x, 30, 35 (see also at 31).

³⁷ Crime Research Centre, *supra* n.7.

All of this paints a bleak picture made even bleaker by the fact that some 50% of the Indigenous community are aged 20 years or below.³⁸ It is that generation that we are failing and which is likely to continue its interaction within the criminal justice system as they move into adulthood. This is a tragedy not just for the Indigenous community, but for the wider Australian community and the Australian nation as a whole.

The Indigenous community

I firmly believe that the success of any programme for our Indigenous community must start with the social and economic inequalities experienced by our Indigenous community. While there have been improvements in a range of areas,³⁹ Indigenous Australians continue to suffer significant disadvantage in employment, housing, education, health and justice. I have no doubt that indigenous criminality is the symptom of these underlying causes. Unless and until those underlying causes are addressed, it will be difficult for the justice system to make any meaningful progress in reducing indigenous crime.

Employment

Average gross household income for Aboriginal and Torres Strait Islander peoples is significantly less than that of non-Indigenous, and unemployment amongst Aboriginal and Torres Strait Islander peoples is in the order of three times higher than the rate for non-Indigenous Australians.⁴⁰ At the 2001 Census, only 52% of Aboriginal and Torres

³⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *supra* n.28, at 8, referring to AIHW, (2003) *Australia's Young People: Their Health and Wellbeing 2003*, AIHW, Canberra, Chap.2, p.16.

³⁹ As noted in Steering Committee for the Review of Government Service Provision 2005, *supra* n.25, at xx and subsequently.

⁴⁰ As appears from "Social Justice Report 2005 - Health Fact Sheet 2" in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (available at http://www.hreoc.gov.au/social_justice/sjreport05/sjr_2005_health2.html, as at 13 March 2007). See also Steering Committee for the Review of Government Service Provision 2005, *supra* n.25 at xxvii.

Strait Islanders over the age of 15 reported participation in the workforce.⁴¹

Education

While there have been improvements in post-secondary education participation and attainment, and in apparent retention rates to year 12,⁴² Aboriginal and Torres Strait Islander peoples are less than half as likely as non-Indigenous Australians to have completed post-secondary qualifications of at least certificate level 3, and about half as likely to have continued to year 12.⁴³

Health

Aboriginal and Torres Strait Islander peoples enjoy markedly less per capita access than the non-Indigenous population to primary health care provided by general practitioners.⁴⁴ They also suffer a significantly lower life expectancy - an estimated difference of about 17 years for both men and women.⁴⁵

In the areas of the country apart from the south-eastern corner, 75% of male and 65% of Aboriginal and Torres Strait islanders die before 65 years of age compared to 26% of males and 16% of females in the non-indigenous population.⁴⁶ Aboriginal and Torres Strait Islander babies are twice as likely as non-indigenous babies to be low birthweight

⁴¹ As appears from Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ibid.*

⁴² As noted in Steering Committee for the Review of Government Service Provision 2005, *supra* n.25, at xx.

⁴³ As appears from Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, *supra* n.40. See also Steering Committee for the Review of Government Service Provision 2005, *supra* n.25, at xxv - xxvi.

⁴⁴ As appears from "Social Justice Report 2005 - Health Fact Sheet 3" in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (available at http://www.hreoc.gov.au/social_justice/sjreport05/sjr_2005_health3.html as at 13 March 2007).

⁴⁵ As appears from "Social Justice Report 2005 - Health Fact Sheet 1" in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (available at http://www.hreoc.gov.au/social_justice/sjreport05/sjr_2005_health1.html, as at 13 March 2007); Steering Committee for the Review of Government Service Provision 2005, *supra* n.25 at xxiv.

⁴⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ibid.*

babies (<2.5kg) and have an infant mortality rate which is three times higher⁴⁷. 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.⁴⁸ Aboriginal and Torres Strait Islander men are hospitalised for ischaemic heart disease at twice the rate of the general population, and for women it is four times the rate.⁴⁹

For psychological and behavioural disorders, the hospitalisation rate is double that of the general population, and for assaults or self-harm, for males the hospitalisation rate is seven times higher than the general population, and for women a staggering 31 times higher.⁵⁰

Justice

Justice is one area where outcomes are not only confronting but appear to have steadily worsened, including (over the period 2000 to 2004) for both Indigenous men and women.⁵¹ I have already noted that across Australia, "Indigenous young people are 20 times more likely to be incarcerated than non-Indigenous young people".⁵² While Aboriginal people represent only 3% of this State's population they make up almost 42% of prisoners and 73% of juvenile detainees across the board, but about 85% of the inmates of our two juvenile detention facilities, Rangeview and Banksia Hill.⁵³ The "staggering figure" is that Aboriginal Australians are 20 times

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ As noted in Steering Committee for the Review of Government Service Provision 2005, *supra* n.25, at xx.

⁵² Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *supra* n.28.

⁵³ See generally figures provided on the WA Department of the Attorney General website in the context of the Western Australian Aboriginal Justice Agreement (available at http://www.justice.wa.gov.au/W/wa_aboriginal_justice_agreement.aspx?uid=4342-1114-3498-1551, as at 14 March 2007).

more at risk of coming into contact with the criminal justice system than non-Aboriginal Australians.⁵⁴ "Cycles of intergenerational offending, where children of prisoners commit offences that result in their own imprisonment, is common for Indigenous families".⁵⁵

It has been suggested that "[a]ll sides agree that policies which reduce Indigenous economic disadvantage are likely to reduce Indigenous contact with the criminal justice system".⁵⁶ The adage "prevention is better than cure" should be at the forefront of our thinking. Many young Indigenous Australians live without secure housing in households with incomes below the poverty line, marginalised from mainstream health and education services.⁵⁷ Until we come to grips with the inequalities that challenge the Indigenous members of our community, even the most successful approaches to juvenile justice are likely to have limited impact upon young Indigenous Australians.

Of course, the fact that the most successful approach to the over-representation of indigenous people in the criminal justice system is an holistic one, taking account of all the areas of disadvantage I have mentioned, provides no excuse for failing to do whatever we can within the criminal justice system. And there are many opportunities for improved delivery of justice to Aboriginal people within our justice system.

⁵⁴ Findlay et al, *supra* n.11, at 326.

⁵⁵ Steering Committee for the Review of Government Service Provision 2005, *supra* n.25, at xliii.

⁵⁶ Weatherburn et al, "The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey" (NSW Bureau of Crime Statistics and Research) (October 2006) 104 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1 at 12.

⁵⁷ As noted in "Crisis in Indigenous Housing, Health, Education and Juvenile Justice" (Sept 2006) 41 *Australian Children's Rights News* 1,4 at 1, referring to the non-Government Alternative Report to the UN Committee on the Rights of the Child prepared by DCI-Australia and the National Children's and Youth Law Centre.

In the area of juvenile justice, one of the great problems is the lack of diversionary options, or non-custodial sentences in remote communities. The chronic shortage of corrective services personnel in regional and remote areas of the State means that the diversionary and non-custodial options that are available for non-indigenous juveniles in the metropolitan area are simply unavailable to juveniles in more remote parts of the State, who are predominantly Aboriginal. Regrettably, there is a long-established history of under-resourcing the delivery of justice services in remote and regional Western Australia. The only juvenile detention facility in the corrective services system is in the metropolitan area. That means that juvenile offenders in, say, the Kimberley are either detained for unacceptably long periods in police custody, in company with adult offenders, or are flown to Perth, away from family and country and introduced to much more sophisticated offenders who can teach them criminal skills of which they had no prior appreciation.

The situation for adult offenders is no better. Broome prison is so chronically over-crowded that there is no opportunity for any counselling or educational programmes. All that happens to the inmates in Broome prison is that they grow older. And women and men are detained in the same facility, with obvious problems, given the prevalence of offences of domestic violence in causing those people to be incarcerated there in the first place.

There is a desperate need to think more laterally in the provision of corrective services in the remote and regional parts of the State. Building new and bigger prisons is not the answer, as history has shown. Mobile work camps provide an opportunity to reinforce the links between Aboriginal inmates and their country, and at the same time teach

occupational skills, such as station work and tourism, which might go some way towards breaking the cycle of social disadvantage to which I have referred. In the case of juvenile offenders, the model of a low security rural facility within reasonable proximity of a remote population centre has a number of significant advantages. Juveniles can be removed from a situation in which they are at risk, but not so far removed as to be dislocated from family and country, and at the same time introduced to the possibility of occupational skills that will provide motivation for self-improvement.

And there is a need to extend Aboriginal community courts around the State. Experience in both Victoria and South Australia has shown how advantageous these courts can be in dealing with juvenile Aboriginal offenders. But they require resources. And at the moment, court resources in some parts of the State are already stretched to breaking point. The Kimberley is a vast area about the same size as the State of Victoria. It is 1100 kilometres from Broome to Kununurra. Only one Magistrate is provided to service that entire area. Transport difficulties, including the impassability of roads and the unusability of air strips in the wet mean that courts are convened in some communities so infrequently that you almost wonder why we bother convening them at all. If the Magistrate arrives many months after an offence has been committed, the offender, the victim and the community will have all moved on and forgotten all about the circumstances giving rise to the offence. A court process operated entirely by white people long after that event seems understandably irrelevant to them. A community-based court convened more frequently would have much greater prospect of dealing with an offender in a way that would reduce the risk of re-offending.

Western Australia is experiencing a sustained economic boom, largely driven by the harvesting of resources from remote and regional parts of the State. It is well and truly time that we, as a community, acknowledged the need to devote an appropriate level of resources to those parts of the State which are producing the wealth which we in the city enjoy, but which are chronically under-resourced in terms of education, health, housing, justice and corrective services. We can and must provide the resources that are needed to break the cycle of disadvantage that afflicts the first inhabitants of this country.