Community Justice Forum

University of Western Australia

Opening Address

by

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Nedlands WA
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[1] Chief Justice of Western Australia. I am indebted to Ms Angela Milne for her assistance in the preparation of this Address. However, responsibility for the opinions expressed, and any errors, is mine alone. Portions of this paper draw upon material included in a paper I presented at the annual Sir Ninian Stephen Lecture in Newcastle on 13 June 2018: *Restorative cities – The role of the justice system* <http://www.supremecourt.wa.gov.au/_files/Speeches/2018/Sir%20Ninian%20Stephen%20Lecture%202018%20Martin%20CJ%20%2013%20June%202018.pdf>.

Acknowledgements

I commence by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan and pay my respects to their Elders past, present and emerging. I acknowledge their continuing stewardship of these lands. I also particularly welcome the many Aboriginal people who have given up their time to join us this morning.

I also wish to acknowledge the project team responsible for both the forum and the final report of the feasibility study into a Community Justice Centre for Western Australia which we will be launching later this morning. That team is Associate Professor Sarah Murray, Professor Harry Blagg, and Ms Suzie May of the Law School of the University of Western Australia.

Distinguished guests

I also wish to welcome our many distinguished guests, including Dr Adam Tomison, Director General of the Department of Justice, and Deputy Commissioner of Police Gary Dreiberg. I also welcome the representatives of the many community groups who have joined us this morning to discuss this important issue.

Regrettably, Minister McGurk and Attorney General Quigley have had to cancel their plans to attend as a result of unexpected events. I know from my discussions with the Attorney General that he has a very keen interest in this project, and have no reason to doubt that Minister McGurk is any less enthusiastic, given the representation from her department here today.

I would like to especially welcome Magistrate David Fanning and his colleagues from the Neighbourhood Justice Centre (NJC) in Collingwood.

The success of the NJC, under the guidance of Magistrate Fanning since its inception, provides fertile soil for the emulation of its achievements in Western Australia. To put it bluntly, the hard data provided by the successes of the NJC[2] enables a responsible business case to be developed for the creation of a similar centre in Western Australia.

Aboriginal Community Justice

I would like to set the context for our discussions with a brief overview of the community focus of the mechanisms that have been utilised for the resolution of disputes and conflict by the Aboriginal peoples who have occupied this continent for 99.95% of the time that it has been subject to human habitation. However, before doing so, I express two notes of caution. First, I am not an Aboriginal person, and there are many Aboriginal people here this morning. They are likely to be much better informed than I in relation to Aboriginal culture and tradition.

Second, generalisation in this area is potentially hazardous. Although estimates vary, and none can be regarded as scrupulously accurate, it is thought that at the time of colonisation, there were more than 500 different tribal groups living in the area we call Australia.[3] Although

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[2] See, for example, S Ross, *Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program, Trends and issues in crime and criminal justice* (Australian Institute of Criminology, No 499, 2015) <https://aic.gov.au/publications/tandi/tandi499>. That study shows a 31% decrease in the total crime rate and a 40% decrease in the property crime rate in the City of Yarra from 2007-2008 to 2012-2013.

[3] Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995) 13.

there were some similarities in the mechanisms for the resolution of disputes and conflict within those tribal groups, there were also differences. The descriptions which follow should not therefore be regarded as universally applicable to all tribal groups at the time of colonisation.

According to Behrendt and Kelly,[4] conflict within Aboriginal society prior to colonisation often arose in circumstances which included:

- failure to observe sacred law or ceremonies, such as failing to get permission to use certain tools or failure to get permission to enter sacred places;
- breach of kin obligations, such as not giving portions of hunted food to relatives, as the law required;
- improper use of sorcery;
- breach of marriage arrangements, such as elopement;
- breach of marital obligations, such as adultery or withholding sex; and
- unlawful acts against a person, such as injuring or neglecting children.

Councils of Elders would not only decide cases brought to them, but would also intervene proactively in disputes if they were not resolved by the participants.[5]

Behrendt and Kelly have referred to the roles played by councils of Elders in the resolution of conflict, together with a variety of

[4] Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes* (Federation Press, 2008) 94.
[5] Ibid.

mechanisms used by different tribal groups. They have described the mechanisms utilised by two clans of the Lower Murray River people when attempting to settle a dispute.[6] The members of the disputing clans sat facing each other while members of other clans were arranged around their negotiators or spokespeople for the disputing clans. The council of Elders began with a general discussion, followed by statements by the accusers, the defendants and their clans, and the statements by those who had witnessed the events giving rise to the dispute.[7] Similar processes were utilised by the Wiradgjeri people of central New South Wales, in Arnhem land, and in the Kimberley.[8]

Those processes of collective participation involving all those with an interest in the dispute - which aimed to identify the way in which the dispute could be resolved and the community could move forward harmoniously - have many similarities to what we now describe as community justice.

The same can be said of the practice described by Behrendt and Kelly of airing a dispute with an open display of anger in which the aggrieved person yelled about the offender and the wrong done to him or her.[9] The purpose of airing the dispute openly was to bring public pressure, through the community, upon the wrongdoer to make redress to the person aggrieved.

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[6] They drew on the descriptions of the process by non-Aboriginal observers, the anthropologists Ronald and Catherine Berndt.
[7] Ibid 94-95.
[8] Ibid 95.
[9] Ibid.

Behrendt and Kelly point out that uncontrolled retaliation was discouraged and disputants were encouraged to spend time getting their emotions under control before they faced the person with whom they were in dispute. Women were especially important in this process, using their influence to ensure that unauthorised violence did not occur.[10] They also point out that the dynamics of a small, interdependent community made social pressure an extremely effective sanction to settle a dispute or enforce a punishment; and that disputes were often settled by restitution - such as by offering gifts to the offended person or by performing ceremonies to show respect, or to bring about an increase in natural resources to the country of the offended person.[11]

Sanctions which could be imposed through these processes included exile and spearing.[12] Although superficially punitive in nature, these sanctions had restorative elements and a community component, as they were imposed by the offended person or community. In the case of spearing, the offender would be placed in opposition to the aggrieved person and, in some cases, the clan of the aggrieved person who would then throw spears or boomerangs at the offender.[13] Exile would be enforced by the offended community. My point is that community engagement was the central focus of all levels of the different mechanisms used by Aboriginal peoples to resolve disputes and conflict.

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[10] Ibid.
[11] Ibid.
[12] Ibid 95-96.
[13] Ibid 96.

As Behrendt and Kelly observed:

> Dispute resolution in pre-invasion Aboriginal culture reflected the values of the people. These were vastly different to the values of the British legal system, which was to evolve into the Australian legal system.[14]

In its report on Aboriginal customary laws,[15] the Law Reform Commission of Western Australia summarised the differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system in the following terms.[16]

- Aboriginal dispute resolution methods involve the family and communities, whilst in the Australian legal system strangers determine disputes and impose punishments.
- The disputants are directly involved in customary law processes, which can be contrasted to the use of advocates under the Australian legal system.
- Aboriginal customary law decision-making is collective and by consensus, rather than the hierarchical nature of decision-making found under Australian law.

The community focus of traditional Aboriginal dispute mechanisms is evident in these comparisons. It is similarly evident in the observations of Ruby Langford Ginibi that:[17]

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[14] Ibid 96.
[15] Law Reform Commission, *Aboriginal Customary Laws - Final Report* (Project 94, September 2006).
[16] Ibid 81.
[17] Ruby Langford Ginibi, *Aboriginal Traditional and Customary Law, Law Text Culture* (1994) 1, 8-11.

> The process of the law was one of political negotiation that involved everyone in the community … Settling disputes under Aboriginal law was part of the purpose of the great gatherings of Aboriginal people …

Anglo-Australian justice

I turn now to the justice system which has largely replaced the mechanisms which were in place for more than 60,000 years, and which have been derived from the systems which the colonists brought with them from England and Wales about 200 years ago.

The development of punitivism

The earliest structures or mechanisms for the resolution of disputes in what became England and Wales involved very significant degrees of community participation, including participation by all those with an interest in the events which gave rise to the dispute or grievance. Following the Norman Conquest in 1066, these mechanisms and structures were increasingly adapted to serve as means for the imposition of the authority of the monarch, through the agency of the travelling justice appointed by the King. The focus shifted away from the provision of redress to the aggrieved and the resolution of community disquiet and toward the imposition of punishment. The punishment imposed was determined by the court acting with the authority of the Crown, or, after the establishment of parliamentary sovereignty, the State. Greater emphasis came to be placed upon the interests of the State in the maintenance of law and order, with decreasing interest and attention being paid to the interests of victims

or, in the case of homicides, the secondary victims of the offence. The State was represented by the judge. Although the community was and remains involved in the determination of guilt or innocence through the jury system, there is no community involvement or engagement in the imposition of punishment, other than the regular expressions of anger about the perceived laxity of sentences imposed, which are expressed, of course, after the event.

Punitivism and the colonisation of Australia

We should not overlook the fact that the development of this authoritarian and fundamentally punitive model of justice played a major part in the colonisation of Australia. After the American Revolution, the English authorities had nowhere to send the many prisoners who were temporarily detained in rotting hulks on the Thames estuary. In order to avoid the capital cost of building new prisons, and the recurring costs of feeding and clothing the prisoners within them, it was decided to transport the convicts to a new colony to be founded using their indentured labour. That colony was, of course, the colony of New South Wales, which initially embraced the entire east coast of the continent, Tasmania and New Zealand. Although the Swan River colony, which became Western Australia, was not established using convict labour, the advantages to be derived from utilising essentially free labour to clear land and establish infrastructure were soon realised, and the imperial government was requested to despatch convicts to the fledgling colony, which it did. The prison in Fremantle which those convicts built in the 1850s was still in use when I commenced my legal career, although happily it now serves as a somewhat gruesome tourist

facility providing a tangible reminder of the punitive objectives of colonisation.

Contemporary Community Views

The colonists from England and Wales brought with them a fundamentally punitive approach to criminal justice which has a long and rich cultural tradition in the place from which they came. Indeed, without that tradition they may not have come at all. Those cultural traditions seem to have given rise to contemporary community views about the utility of punishment which are based more upon intuition than upon reasoned analysis or evidence.

I entertain great doubt as to whether contemporary community values relating to criminal justice can be accurately gauged from statements made by callers to talk-back radio, or bloggers, or correspondents to newspapers, or even by editorial pieces in printed media. The unreliability of sources such as these as a guide to contemporary community values is a topic for another day. It is sufficient for my purposes to observe that, reliable or not, these sources have motivated legislators all around Australia to enact increasingly punitive laws in response to what they perceive to be community expectations.

In most, if not all, Australian jurisdictions, including Western Australia, general elections are preceded by a law and order auction in which political contestants endeavour to out-bid each other in their punitive approach to crime. Participants in political debates with respect to these issues rely upon the assumption that a majority of electors firmly believe that increasing levels of punishment generally, and reducing the

discretion of the courts by imposing mandatory minimum sentences, will make the community safer. I assume that assumption is based on feedback from the electorate. It is never publicly questioned. Tragically missing from any open political debate with respect to such issues is any reference to any evidence, or any form of analysis aimed at assessing whether the community might be made safer by other or more nuanced and varied responses to criminal behaviour. I hasten to add that I accept, of course, that politicians must operate in a fiercely competitive electoral environment, and I also accept that the cause of public policy is not advanced by political contestants committing electoral suicide at the foot of an ideological icon. But after the election is over, it is time for reasoned and evidence-based analysis.

Any reasoned analysis of the policies which are likely to reduce crime and make our community safer would probably start with the identification of what criminologists call "criminogenic factors" - that is, the factors which contribute to or are associated with, either singly or in combination, criminal behaviour. That process of reasoning embodies the fairly simple proposition that if you want to effectively stop or reduce some phenomenon from occurring, it is useful to know what is causing it to occur in the first place. Policies which reduce the incidence of those causes can be expected to reduce the incidence of the crime which those causes produce.

It is unnecessary to draw upon detailed social research to identify the factors which are associated with the commission of crime in Australia. These factors are well known. They will be obvious to anybody who

has, like me, spent a reasonable amount of time in criminal courts. They include:

- mental health issues - including mental illness and cognitive disability;[18]
- substance abuse - both legal (alcohol) and illegal;
- unstable housing or homelessness;
- exposure to physical or emotional abuse, domestic violence or sexual abuse as a child;
- placement in out-of-home care as a child;
- foetal alcohol spectrum disorder; and
- Aboriginality.

These factors either singly, or more commonly in combination, contribute to or are associated with the vast majority of crime committed in Australia.[19] Far too often these factors operate across generations - tragically enabling us to predict with confidence the likely criminal trajectory of a child born into circumstances involving a number of these factors at the time of its birth.

A purely punitive response does nothing whatever to address or mitigate any of these factors. Although Australia's prisons are, by far, the biggest providers of institutional mental health care in the country, they could not be described as therapeutic environments conducive to the

[18] It is conservatively estimated that about 50% of the prison population suffers from mental illness or cognitive disability, and that the proportion is higher in juveniles in detention. For further information see Mental Health Commission, *Report from the Health and Emotional Wellbeing Survey of Western Australian Reception Prisoners 2013* (April 2015) <http://www.health.wa.gov.au/crc/outcomes/docs/mh%20substance%20use%20wa%20prisons.pdf > (accessed 1 June 2018).

[19] When I refer to "crime" in this context, I do not refer to regulatory offences, such as minor traffic offences.

restoration of mental health. Nor are they places conducive to training those who suffer from cognitive disability to identify and avoid the risks of criminal behaviour associated with their condition. Nor has imprisonment, of itself, been shown to be particularly effective in reducing substance abuse or dependence - especially given the relatively free availability of illicit substances in Australia's prisons.

The regular law and order auctions which I have described and the increasingly punitive policies which have emerged have caused Australia's prison population to grow at a much faster rate than reported crime. Most Australian prisons are now chronically overcrowded. The attention and resources of prison authorities are understandably focused upon the constant struggle to satisfy the ever-increasing demand for accommodation, food and clothing. The capacity of those authorities to provide treatment for mental illness, behavioural therapy to those with cognitive disability, treatment to those dependent on substances, programmes relating to substance misuse, anger management or violence aversion, even basic numeracy or literacy training or the most mundane forms of occupational training are all severely compromised by the overcrowded environment in our prisons, and the consequent focus upon containment, despite the best efforts of those authorities.

To put it bluntly, for many Australian prisoners, all that happens while they are in prison is that they get a little older, spend time with other offenders and perhaps improve their criminal skills before being released back into the community.

This admittedly superficial analysis leaves me pondering aloud as to why Australia's legislators and, inferentially at least, the communities

that they represent, persist with increasingly punitive policies and laws which have no impact whatever upon reducing or mitigating the factors which we know are associated with criminal behaviour.

While we do have systems to address the causes of crime in some areas through our Drug Court,[20] Mental Health Court[21] and domestic violence lists,[22] generally speaking our system is focused primarily upon responding to the consequences of crime, not its causes.

Clearly we need a new approach. It has been said many times that those who do not learn from history are doomed to repeat it.

When we are contemplating any new approach, we must give full weight to community values and expectations. Any effective justice system depends critically upon community support and respect. Systems which are vulnerable to criticism as being 'new age', 'feely touchy', 'flaky' or ideologically driven are unlikely to receive the levels of community support required to be effective.

As I have tried to demonstrate, community engagement in the administration of justice is not vulnerable to any of these criticisms. It is not new age - it is as old as the development of human communities,

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[20] The Perth Drug Court operates in the Perth Magistrates Court and accepts referrals from the District and Supreme Courts, as well as other Magistrates Courts around the State. The Children's Court Drug Court operates in the Perth Children's Court.

[21] The Mental Health Court Diversion and Support Program consists of an adult program (the Start Court, based within the Central Law Courts in Perth) and a children's program (Links, based within the Perth Children's Court). The program is a partnership between the Mental Health Commission and the Department of Justice.

[22] The Metropolitan Family Violence Court and the Bardimalgu Court (in Geraldton) which previously operated in Western Australia, were closed in 2015 by the State Government of that time. Some magistrates now conduct informal domestic violence lists in the Magistrates Court.

both on this continent and in the British islands, and indeed most other parts of the planet.

What has happened, in relatively recent times, is that community engagement has been displaced by an increasingly authoritarian state imposing increasingly punitive sanctions.

Nor is community justice novel or untried. There are many examples in other comparable jurisdictions from which valuable lessons can be learned, including the NJC in Collingwood. Those community justice centres provide an evidence base for the making of reasoned and responsible decisions with respect to public expenditure.

I will leave it to later speakers with much greater experience in this field to flesh out what a community justice centre in Western Australia might look like. Before doing so, however, I would sound a note of gentle caution in relation to the adaptions which will be necessary if the model is to be successful in Western Australia.

That note of caution takes me back to where I started - with the Aboriginal peoples of Western Australia. Everybody at this conference will be aware of the gross over-representation of Aboriginal people in the criminal justice systems of this State. That over-representation is significantly worse than in any other jurisdiction of Australia, viewed by reference to the proportion of Aboriginal people in our community.[23] The over-representation is comparable to the highest rates of disadvantage by race in any justice system in the world.

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[23] Australian Bureau of Statistics, *Prisoners in Australia, 2017* (Cat No 4517.0) (released 8 December 2017).

Of course, I do not suggest that there are no Aboriginal people in Collingwood - far from it, but the scale of their involvement will likely be at a different level to that of Western Australia. In Western Australia, the level of involvement of Aboriginal people is also much greater in our regional courts than in our metropolitan courts, although nevertheless significant in all courts.

So, any system designed for Western Australia must be culturally flexible, culturally appropriate and culturally secure. Those essential requirements will only be achieved if Aboriginal people are prominently involved, at the most senior levels, in the design and delivery of any community justice project, and in the delivery of services to Aboriginal people interacting with the community justice centre. The significant involvement of Aboriginal people in the development of this project will be a very positive aspect of the project, given the long cultural connection which Aboriginal people have with community justice. This is one of the many areas in which we can, and should, learn a lot from Aboriginal people, their traditional culture and practices.

I very much look forward to hearing the distinguished speakers who have been assembled for this forum, and thank you for your attention.