



INDIGENOUS INCARCERATION RATES

Strategies for much needed reform

by

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Acknowledgement

Given the topic which I am addressing, it is more than usually appropriate to acknowledge the traditional owners of the land on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia and I pay my respects to their Elders past and present.

Magna Carta

Given the theme of this conference, it is also interesting to note that Noongar law is much, much older than the principles laid out in Magna Carta a mere 800 years ago. It is also worth noting that Aboriginal people have been gathering near where we gather on the banks of the body of water which they know as Derbarl Yerrigan and which we know as the Swan River for thousands of years before the English earls and barons bailed up King John on the banks of the Thames near Runnymede and used coercion to force him to sign the Great Charter. It is an interesting paradox that a document which has been taken to signify the rule of law was procured by coercion. Nevertheless, it was seen by those earls and barons as a Charter of redress for despotism and tyranny, and of course because democracy had not made its way from ancient Greece and Rome to Western Europe by then, all the nobles had to fall back on was the rule of law. The document is replete with concepts and propositions that we would now embody under the heading "the Rule of Law", although those terms are not used in the Great Charter.

Some of the provisions of the Charter are relevant to the topic we are addressing. One of those provisions was that "no free man" - and that

is a term that is used in the Charter to describe a citizen - "shall be seized or imprisoned or stripped of his rights or possessions or outlawed or exiled or deprived of his standing in any way, nor will we proceed with force against him or send others to do so except by the lawful judgment of his equals or by the law of the land". There is another clause that I think would resonate with Aboriginal people under which the King undertook "to any man whom we have deprived or dispossessed of lands, castles, liberties or rights without the lawful judgment of his equals we will at once restore these".

Now the Great Charter, as you are probably aware, is celebrated at least as much in America as anywhere. Indeed, later this year 600 American lawyers are descending upon Runnymede as part of the anniversary celebrations. That is because the Charter is an integral part of the legal culture which the English took to their various colonies. Had the first inhabitants of this English colony known about the Great Charter, they might have expected its terms to provide them with some protection from oppression. But, of course, history tells us that they would have been sadly disappointed. They were not recognised as citizens or in the words of the Charter, free men until 1967, almost 200 years after colonisation. In practical terms, Aboriginal people still have not achieved the protection of an entitlement to trial by their peers, because around this State they are very often tried by all-white juries or by white judges and magistrates. Regrettably, those magistrates, judges and jurors often have a quite inadequate appreciation of Aboriginal culture, values, traditions and ways of life.

I think it is no overstatement to say that the justice system of this country has not served Aboriginal people well. Certainly it has led to their incarceration at quite extraordinary rates.

Incarceration rates

What is the magnitude of the problem? Let us look briefly at the statistics. Criminologists talk of imprisonment rates in terms of people per 100,000. In Western Australia, the adult Aboriginal imprisonment rate is 3,663 per 100,000.¹ That compares to the national rate of 2,174, so if you're quick at maths, the rate in this State is about 70% higher than the national rate. The next highest rate is in the Northern Territory at 2,808/100,000, so our rate is about 30% higher than the rate in the Territory.

That compares to the non-Aboriginal imprisonment rate in Western Australia of 164/100,000, so the non-Aboriginal:Aboriginal ratio is 164:3,663. That is a multiple of 22.3 times. That has the result that tonight one out of every 15 adult Aboriginal men will spend the night in prison.² Aboriginal people tonight will comprise about 40% of the adult prison population of Western Australia even though they only comprise about 3.5% of the general population. The rate of imprisonment of Aboriginal women is rising faster than the rate pertaining to Aboriginal men, and Aboriginal women now comprise more than 50% of the female prison population in this State.³

¹ Australian Bureau of Statistics (ABS), 4517.0 - Prisoners in Australia, 2014 (11 December 2014) (Table 19).

² ABS, 4512.0 - Corrective Services, Australia, September Quarter 2014 (4 December 2014) (Table 14).

³ Ibid, (Tables 4, 13).

The statistics relating to Aboriginal children are even more depressing. The disproportion of Aboriginal children in detention is 58 times greater than non-Aboriginal children per head of population.⁴ Aboriginal children comprise about 75% to 80% of the population at Banksia Hill.

Happily, the total number of children in custody is declining per head of population both nationally and in this State,⁵ but the proportion of Aboriginal children among those in detention remains unacceptably high. The juvenile detention rate for Aboriginal children in Western Australia is also about 30% higher than the rate in the Northern Territory.⁶

Cost

How much is this costing us? In Western Australia it costs about \$120,000 a year to keep an adult in prison,⁷ so we are currently spending about \$260 million a year incarcerating Aboriginal adults.⁸ Last year it cost \$300,000 a year to keep a child in detention in Western Australia,⁹ although that figure was unusually high because of the costs of the riot at Banksia Hill. But on any view, bearing in mind that 75% to 80% of the children in Banksia Hill are Aboriginal children, the cost of detaining them must be measured in many tens of millions of dollars each year.

⁴ AIHW, *Youth detention population in Australia 2014* (2014) 11.

⁵ *Ibid*, vii.

⁶ *Ibid*, Table S10.

⁷ \$334 per day in 2013-14 (*Department of Corrective Services Annual Report 2013-14* (2014)13);

⁸ Using an Aboriginal adult prison population calculated as 40% of the estimated prison population for 2014-15 (5,293) (Government of Western Australia, *2014-15 Government Mid-year Financial Projections Statement* (2014) 140) and based on the daily rate for 2013-14. Note that this is likely to underestimate the cost as a large number of Aboriginal adults are imprisoned in the regional and more costly prisons (Economic Regulation Authority, *Inquiry into the Efficiency and Performance of Western Australian Prisons Issues Paper* (2014) 13).

⁹ \$814 per day in 2013-14 (*Department of Corrective Services Annual Report 2013-14* (2014)13).

In 2008, the Auditor-General's review of juvenile justice concluded that the 250 children who have the greatest number of intersections with the criminal justice system in Western Australia will cost the State of Western Australia \$100 million (in 2008 dollars) when they pass between the ages of 10 and 17.¹⁰ If you are quick at maths, that is \$400,000 per child. Inflate that to today's costs and it is probably about half a million dollars per child. We could send those children to Geelong Grammar and to a Swiss finishing school and still have change.

Indirect costs

These are just the direct costs. I could talk for a long time about the indirect costs of incarceration. Incarceration has become a rite of passage for a lot of Aboriginal people. It is often a form of family reunion, although it leaves the family on the outside completely fractured.

Is incarceration reducing crime?

Is incarceration at these rates helping to reduce crime and make our community safer? Is all this expenditure reducing Aboriginal offending? It seems not. 80% of the Aboriginal people in prison have been there before.¹¹ Tragically most of the children who are in detention graduate into the adult criminal justice system, including the Aboriginal children.

¹⁰ Auditor General of Western Australia, *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994* (June 2008) 7.

¹¹ Australian Bureau of Statistics (ABS), 4517.0 - Prisoners in Australia, 2014 (11 December 2014) (Table 28).

A regrettable truth

Why are Aboriginal people so over-represented in our courts and prisons? The regrettable truth is that the main, but not the only reason why Aboriginal are overrepresented in our courts and prisons, is because they are overrepresented amongst those who commit crime. But there are two things that need to be immediately said about that proposition.

Aboriginal victims

The first is that Aboriginal people are just as overrepresented amongst victims as they are amongst offenders. Most Aboriginal crime is directed against other Aboriginal people. Even lethal harm is often directed by Aboriginal people towards themselves. The Aboriginal suicide rate is three times higher than the non-Aboriginal rate.¹²

Most Aboriginal people are law abiding

It is vital to remember that not all or even a majority of Aboriginal people are offenders. The figures might make one think that all Aboriginal people are offenders. The vast majority of Aboriginal people are law-abiding citizens. A relatively small number of Aboriginal people are responsible for an astoundingly large amount of crime. You would think this should make it easier to solve the problem, but it does not seem to have been the case.

Why do some Aboriginal people commit more crime than non-Aboriginal people? I think the answer to this question is quite obvious and lies in the fact that Aboriginal people are significantly

¹² Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2014* (2014) Table 8A.8.1 (Age standardised rates).

over-represented amongst the most marginalised and disadvantaged people within our society, and it is the most marginalised and disadvantaged people within our society who are much more likely to commit crime. Why are Aboriginal over-represented amongst that group? Well we all know the history since colonisation which involves dispossession, disenfranchisement, brutalisation, cultural alienation, fracturing of families by misguided policies and so on and so on. The consequences of these various things have been disastrous. They explain why Aboriginal children are significantly over-represented amongst the children who are the subject of care and protection orders. Around the nation 35% of care and protection orders relating to children involve Aboriginal children whereas Aboriginal children comprise only 4.6% of the juvenile population.¹³ Tragically the number of care and protection orders relating to Aboriginal children has grown by over 250% since 2005.¹⁴ So the number of Aboriginal children under care and protection is rising at an alarming rate.

Systemic discrimination

Over-representation amongst those who commit crime is, however, plainly not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in

¹³ Secretariat of National Aboriginal and Islander Child Care, 'Community meeting on the crisis of Aboriginal and Torres Strait Islander child removals' (Media release, 4 February 2015).

¹⁴ Australian Institute of Health & Welfare, *Child protection Australia 2004-05* (2006) 39; Australian Institute of Health & Welfare, *Child protection Australia 2012-13* (2014) 41.

custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.

Recently I had the benefit of attending a very interesting lecture given by Professor Catharine MacKinnon who is an expert in the field of gender discrimination.¹⁵ Prof MacKinnon drew a very interesting distinction between formal equality and substantive equality. Formal equality relies upon the analysis of equality attributed to Aristotle - that is, like things must be treated alike and unlike things must be treated differently. That is the approach that the High Court has consistently taken. Using that approach, the legislation providing for move on orders, for example, does not discriminate against Aboriginal people because anybody who is committing a public nuisance can be subject to a move on order. The *Bail Act 1982* (WA) does not discriminate against Aboriginal people because people who do not have a home, and who are not in stable employment and who have a long prior criminal record are treated the same whether they are Aboriginal or not. Mandatory sentencing does not discriminate against Aboriginal people in this lexicon because it applies to

¹⁵ Professor Catharine MacKinnon, 'Sex Equality in Global Perspective' (Faculty of Law, University of Western Australia, 16 February 2015).

everybody who has committed the offences that result in the mandatory minimum sentence. So using a criterion of formal equality, none of those things discriminate against Aboriginal people, but we know that the effect of them both individually and collectively is that we have very, very large numbers of Aboriginal people in prison.

This is where Professor MacKinnon's notion of substantive equality can be applied. Simply put, under this notion if one looks at the outcomes of a system and sees that they are skewed we can safely conclude that the system is not working fairly. We know that the outcomes of the criminal justice system are significantly skewed in the ways in which that system relates to Aboriginal people. That seems to me to lead inexorably to the conclusion that Aboriginal people are significantly disadvantaged within our criminal justice system. Whether one wants to go the next step and call the adverse outcomes for Aboriginal people the consequence of discrimination or disadvantage is really a matter of nomenclature which does not alter these outcomes.

What can we do?

So how do we address the chronic over-incarceration of Aboriginal people? There are a variety of possible responses worthy of consideration that I would group into three categories: short-term, medium term and long-term.

Short-term responses

Driving offences

Aboriginal people are grossly over-represented amongst those who do not have driving licences. There are lots of reasons for this which are well known. I will not go through them all now. They result in a lot of Aboriginal people being imprisoned for driving offences that do not involve drunk driving or dangerous driving, but repeated driving without a licence. Very often such offenders have had no real opportunity to get a licence for a variety of reasons. Very often there is no practical alternative to driving without a licence. If you are in a remote community, there are no taxis or buses. There are far too many Aboriginal people in prison whose only crime has been to drive without a driver's licence. Traffic laws fashioned for the metropolitan area can operate unjustly in remote communities.

Fine default

Imprisonment for fine default has been a topical subject recently following the tragic death of Ms Dhu.¹⁶ In 2013 1,358 people who were taken into prison were imprisoned only for fine default and for no other reason.¹⁷ 16% of Aboriginal people who entered prison that year were there only for fine default.¹⁸ 27% of women entering prison that year were there only for fine default.¹⁹ It is a complex problem. We have to have some kind of penalty for offending behaviour and if

¹⁶ See, for example, Caitlyn Gribbin and Dale Owens, 'Ms Dhu death: Family distressed by details of WA lockup death amid calls for urgent inquiry' (ABC News online, 30 October 2014) at www.abc.net.au/news/2014-10-23/family-distressed-by-details-of-wa-death-in-custody-ms-dhu/5835084.

¹⁷ Legislative Assembly, Details of Incarceration Figures, for Fine Defaulters for the Years 2008 to 2013 (Tabled Paper LA2027, 16 September 2014).

¹⁸ Ibid.

¹⁹ Ibid.

people cannot pay a fine, it is difficult to work out what that penalty should be. Those figures show that we have not found a solution to this complex problem yet, and the current arrangements are contributing significantly to the over-representation of Aboriginal people in prison.

Bail

Aboriginal people often do not fare well by reference to the factors which a court is required to assess when considering bail because they are less likely to have stable accommodation. As it is costing \$120,000 a year to keep a person in prison (or about \$330 per day), one would have thought we could provide cheaper accommodation and facilitate the grant of bail. Some very good things have been done in this area in relation to children, particularly in the Kimberley and the Pilbara, and in the Goldfields. Accommodation is now available for children who intersect with the law so they are not now being flown to Perth and put in detention simply because there is nowhere safe for them to live.

In the metropolitan area there is another programme for children which involves looking very hard to locate a responsible adult who then provides appropriate care and supervision. So we have done well in relation to bail issues for children recently but we could do better in relation to adults.

Legal Aid

Judges like me must show appropriate restraint when talking about government policies, particularly those relating to spending because, of course, it is for the executive government to determine how public

resources are allocated, and it has to make decisions between competing priorities. That is the job of the executive and not mine. Nevertheless, it is appropriate for me to make some observations about the consequences of decisions that have had the effect of reducing the resources available to legal aid agencies. In the recent Productivity Commission report on access to justice arrangements, the Commission recommended the immediate injection of \$200 million per year into the legal aid systems of this country.²⁰ If you have economists telling you that you need to spend money to save money, there might be something in it.

We also know, and the Productivity Commission reported, that it is not just legal aid in the criminal area that we need to consider because unmet legal aid need in the civil area manifests itself in the criminal justice system, so that civil disputes can turn into criminal disputes very quickly.

Of course, it is up to government as to how much money they want to inject into the legal aid system, but there is an obvious and direct connection between the provision of adequate legal assistance and the rate of over-incarceration of Aboriginal people.

Interpreters

The same is true of interpreters. The State government has announced that it will discontinue funding for the Kimberley Interpreter Service,²¹ as it is perfectly entitled to do. However, if we do not have properly

²⁰ Productivity Commission, *Access to Justice Arrangements* (2014) Recommendation 21.4.

²¹ See, for example, NITV News, 'Fear for the future of the Kimberley Interpreter Service' (1 December 2014) available at: www.youtube.com/watch?v=WpajKHj9pfM.

resourced and effective interpreter services for Aboriginal people, then they will continue to fare badly in the criminal justice system.

Mandatory sentencing

The same is true for mandatory sentencing. Very shortly there will be a debate in the Parliament about some mandatory sentencing legislation that will almost certainly impact more significantly upon Aboriginal people than upon non-Aboriginal people.²² Of course, it is up to the members of Parliament to pass those laws if they wish, but they ought to be aware that the consequences of those laws will almost certainly magnify the problem of incarceration of Aboriginal people at a time when there has been government commitment, at the highest level, to reducing that rate.²³

Sentencing

The last matter I mention in the category of short-term solutions is what I would call culturally relevant sentencing approaches and solution-focused courts - the community court in Kalgoorlie, the domestic violence courts, the mental health court, the drug court. They focus on the reasons for underlying behavioural problems rather than simply addressing the symptom which is the offending behaviour. There is a great deal to be said for these courts, but there are problems relating to them. The number of offenders going through the community court in Kalgoorlie is going down significantly. I do not know why, but there are fewer people going through that court than there used to be.

²² See also Calla Wahlquist, 'New burglary laws will jail more Aboriginal people in WA, experts fear', *The Guardian Australia* (24 February 2015) available at: www.theguardian.com/australia-news/2015/feb/24/new-burglary-laws-will-jail-more-aboriginal-people-in-wa-experts-fear.

²³ Paige Taylor, 'Barnet to examine jail deaths' *The Australian*, (4 December 2014).

The government has announced that domestic violence courts will be discontinued as specialty courts with effect from 1 July 2015. We do not know what is going to fill that space yet. The mental health court is doing great work, but it does not have nearly enough places for all the people who need attention of that kind. During one sample week it was found that about 240 of the 1,100 people who presented themselves to the Central Law Courts during that week were on the records of the Mental Health Commission. About 50% of people in our prison have either significant cognitive disability or mental illness. So the mental health court is important, but we could use more of them. The drug court works very well but there is no alcohol court, and, of course, alcohol is a significant problem for Aboriginal (and non-Aboriginal) people.

Medium term responses

Diversion

Bad things happen to people when they get into the justice system and into the courts - we know that. We have to try to keep Aboriginal people out of the courts preferably through programmes that are designed, run and presented entirely by Aboriginal people. There are programmes of this kind. There is a very good programme run by the Yiriman Project which is based out of the Fitzroy Valley. The presenters of this programme struggled desperately to obtain funding for years despite the fact that we know that it works. It is very, very difficult for programmes of this kind to get off the ground and there are other programmes of that kind. Those are the things we ought to be spending money on. We should be addressing the causes rather than the symptoms of offending behaviour, so that programmes should

focus on the underlying cause of that behaviour, and in a family and community context, because often these things have a family and community connection.

Recidivism

A recidivism rate of 80% is plainly unacceptable. What are we doing when Aboriginal people do go to prison? Are we using it as an opportunity to improve their skills and effect behavioural change so there is less chance they will go back? I think the answer is that we are not using this opportunity nearly as effectively as we could. Why are we not making sure that Aboriginal prisoners can read when they leave prison - that they are numerate; that they have a driver's licence; that they have skills that will render them employable; that they have had substance abuse programmes; that they have had anger management programmes. Why are we not doing all of these things? We are doing some of those things but not nearly as comprehensively as we could.

Parole

I mentioned earlier that Aboriginal people fare poorly when parole decisions are made, and parole generally has diminished very significantly over the last five years or so. One problem with a reduction in parole is that it reduces the incentive for people in prison to do programmes. If you are not going to get parole why would you do a programme? We might also ask, is it better to just take somebody to the door at the prison and say, 'Well, you have done your time now, off you go - we'll see you later', knowing we almost certainly will, or is it better to say, 'Here is your parole officer - he or

she is going to keep an eye on you. You're going to be urine tested every 2 weeks and we're going to make sure you don't fall in with that bad mob you were moving with before'. The answer to this rhetorical question is obvious, but we have reduced the number of people who are given parole because it is seen as a kind of soft option.

A Specific Committee

The option that I put in the group of medium term responses is a committee along the lines of that recently created in New South Wales - a committee charged with the responsibility of reducing Aboriginal incarceration comprised with representatives of all the agencies, chaired by the Aboriginal Legal Service of New South Wales, and with the significant involvement of Aboriginal people.²⁴

Longer term responses

If I am right, and the reason for this over-representation is disadvantage and marginalisation, the only real solution, which is necessarily long term, is to address disadvantage and marginalisation in the longer term. We know all the areas of disadvantage. We just do not seem to be addressing it very well. The disadvantage can start before children are born, when too many contract Foetal Alcohol Spectrum Disorder (FASD).²⁵ We know that in the north of this State FASD is now a significant problem in our criminal justice system.

We know the first three years of a child's life are absolutely critical for their future, so we have to improve health and nutrition in those

²⁴ Corrective Services NSW, 'New focus to reduce Aboriginal re-offending' *CSNSW Bulletin Magazine* (November/December 2014) 5.

²⁵ See Emma Wynne, 'Foetal alcohol syndrome: Fitzroy Valley leader June Oscar hopes study brings long-term change', ABC News online (20 January 2015) available at: www.abc.net.au/news/2015-01-20/june-oscar-fitzroy-valley-highest-fetal-alcohol-figures/6028330.

important years in Aboriginal children's lives. We have to improve hygiene; we have to improve housing and stop over-crowding. We have to improve education participation and retention. We have to improve employment. We have to reduce substance abuse. We have to try to address the mental health problems in Aboriginal communities and we have to address substance abuse as well.

That all sounds like a big wish list, but it is not rocket science. We can do these things. We have the capacity to do it with a bit of good will and a bit of effort, and if we do, then we should make some progress in relation to reducing incarceration.

If we are going to do those things, it costs money. At the moment there seems to be a reduction of resources available in these areas. Again this is a matter for government and not for me, but if resources are reduced in what I might call the prevention side, then we will be spending additional resources in our prisons. Why not spend the money on prevention rather than punishment?

In Western Australia we have a looming problem in relation to our remote communities as a result of withdrawal of Commonwealth funding.²⁶ If this results in a lot of communities closing down and people clustering at places like Fitzroy Crossing and Hall's Creek, then that will manifest itself in a problem in our criminal justice system as well.

²⁶ AAP, 'Premier Colin Barnett says remote WA communities face closure due to Commonwealth funding cuts', Perth Now (13 November 2013) available at: www.perthnow.com.au/news/western-australia/premier-colin-barnett-says-remote-wa-communities-face-closure-due-to-commonwealth-funding-cuts/story-fnhocxo3-1227121002455.

Summary

I have endeavoured to identify some of the possible responses. With a view to finishing on a positive note, retention rates in school are improving. Participation rates are also improving, although not nearly as fast as we would like. We also have got some very powerful spokespeople for Aboriginal communities; people in whom we can repose great confidence. It is through listening to Aboriginal men and women that the courts will be better able to deliver on the promise of the Magna Carta - and ensure that justice is informed by a person's peers. There are some promising signs but we need to do better and we need to do it a faster, if we are going to make any impact on the chronic over-representation of Aboriginal people in the criminal justice system.