



Community Legal Centres  
Association (WA)

State Conference

Address by

The Hon Wayne Martin  
Chief Justice of Western Australia

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It is a great pleasure and an honour to have been invited to address this conference of WA community law centres.

Since my appointment I have spoken many times about the problems associated with restricted access to justice in Australia. Because the problems are multifaceted, so must the solutions also be multifaceted. Community Legal Centres (CLCs) play a vital role in addressing the important issue of access to justice. The fact that CLCs are community based and community focused provides a vital dimension that is otherwise not well served by the private providers of legal services or even by the legal aid bodies which tend to be CBD based. Staffed by energetic and dedicated people who, if they are remunerated at all, are often remunerated somewhat inadequately, CLCs provide an indispensable point of reference and advice for the many in our community who would otherwise be totally without access to legal advice or assistance in the resolution of their disputes.

Because of the subject of my address, it is more than usually appropriate that today I acknowledge the traditional owners of the lands on which we meet, the Wadjuk people who are part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present.

The subject I am addressing this morning is the vexed question of justice for indigenous people. The gross over-representation of Aboriginal people within the criminal justice system of Western Australia is fairly well known. It provides a very clear, obvious and tangible manifestation of the various aspects of Aboriginal disadvantage in our society. It is, as I

will endeavour to show, related to many other aspects of disadvantage, including the disadvantage which Aboriginal people experience in the civil justice system. I will come back to that a little later.

Many of you would be generally aware of the extent of the problem, but its precise magnitude is demonstrated by some figures. I apologise for descending into the detail of figures but they are, I think, quite shocking. I will go through them as quickly as I can. I will talk in terms of imprisonment rates which many of you would know are generally expressed in terms of numbers per 100,000 of population. If we start with the Aboriginal population of Western Australia and look at imprisonment rates per 100,000, in December 2009 in Western Australia, the Aboriginal imprisonment rate was 4,400 per 100,000. That compares to the overall imprisonment rate of about 280, and because of the extent of the prison population which is Aboriginal, that means that non-Aboriginal imprisonment rate is about 170 – 170 compared to 4,400. The Aboriginal rate is about 26 times the non-Aboriginal imprisonment rate. That figure of 4,400 is much higher than any other jurisdiction in Australia. In New South Wales, the equivalent rate is 2,500; in the Northern Territory it is 2,200. Because of the proportion of Aboriginal people in the Territory, it is often thought that they lock up Aboriginal people at a great rate. In fact, in Western Australia — per head of Aboriginal population — we are locking up Aboriginal people at twice the rate of the Northern Territory. Other rates include 1,750 in Queensland and Victoria has a rate of 1,350. So, tragically, Western Australia heads that table by a significant margin.

Moving from comparison by jurisdiction to comparison over time, about 20 years ago, the rate of Aboriginal imprisonment in Western Australia

was 1,300 per 100,000. So the rate has gone up by more than a factor of three over the last 20 years. That, of course, is over a period in which we had the Royal Commission into Aboriginal Deaths in Custody which made a number of recommendations, many of which have been implemented, but which also included the critical recommendation to reduce Aboriginal imprisonment. It is a period over which most Australian governments, including the government of Western Australia, have had policies aimed at reducing the extent of Aboriginal imprisonment. Over that time when all of this has been happening, the rate of Aboriginal imprisonment in Western Australia has more than trebled.

To put it into some international context, the country which imprisons more people than any other is the United States of America. Its overall rate of imprisonment is 1,000 per 100,000. As I have mentioned, Western Australia's rate is 280 per 100,000, so the overall rate in the US is about four times that of Western Australia. Predictably enough the most incarcerated group in America is African-American males. The figure I gave you of 4,400 was for males and females in Western Australia. If you take males alone, the rate of incarceration for adult Aboriginal males in Western Australia is 8,000 per 100,000. Those of you who are quick at maths will immediately realise that that means that one in every 12.5 Aboriginal men in this State will spend tonight in prison. Interestingly, that figure correlates to the rate of imprisonment of Africa-American males in the US. But what is different is, of course, that the overall rate of imprisonment in the US is much higher. In terms of disproportion, the disproportion with which Aboriginal people are incarcerated in Western Australia is significantly higher than the disproportion with which African-Americans are incarcerated in America.

International comparisons are very hard to draw because of the lack of reliable figures, but on the figures available to me, it seems to me to be at least distinctly possible that Aboriginal people in Western Australia are among the most incarcerated ethnic groups in the world.

I have focused on men so far. Women should not be left out of consideration. The number of Aboriginal women imprisoned in Australia increased by 350% between 1993 and 2003. So it seems likely that the rate of incarceration of women has gone up at about the same rate as for men.

If children are the future, juvenile incarceration rates provide a depressing vision of that future. In Western Australia, the rate of detention of Aboriginal juveniles is 811 per 100,000. That is about 43 times the rate of detention for non-Aboriginal juveniles. As I said, the adult ratio of Aboriginal: non-Aboriginal was about 26:1; for children it is about 43:1. The disproportion is higher amongst our youth than it is amongst our adults. The juvenile rate, like the adult rate, is the highest in Australia. It compares to a rate of 610 in New South Wales, 286 in the Northern Territory – so WA has a rate which is about two and a half times the rate of Aboriginal juvenile detention as in the Northern Territory.

Why are we locking up so many Aboriginal people? The simple answer is very obvious, and that is that Aboriginal people commit disproportionate amounts of crime. That, of course, begs the question: why do Aboriginal people commit disproportionately more crime? I do not think one needs to be a social scientist to know that the reason Aboriginal people commit disproportionately more crime is because they are the most disadvantaged group within our society. They have suffered

dispossession from land; they have suffered cultural alienation; they have suffered social dysfunction; they suffer family dysfunction. Some 44% of the children who are subject to care and protection orders in Western Australia are Aboriginal children. That provides some index of family dysfunction. The high imprisonment rates to which I have referred make their own contribution to family dysfunction because so many Aboriginal men are in prison at any given time. The high mortality rates of Aboriginal people also make a significant contribution to family dysfunction and disruption.

Aboriginal health standards are deplorable as we know. That is across the whole spectrum of health issues from infant health to adult health – across a whole range of disorders including heart disease and mental illness where again Aboriginal people are significantly over-represented. Again, in the area of substance abuse, we know that Aboriginal people are particularly over-represented. Aboriginal children have very low participation rates in education. It is estimated that only 35% of Aboriginal children in Western Australia attend school regularly. That means that by the time Aboriginal children get to secondary school, many of them lack the numeracy and literary skills to actively participate in secondary school. On the NAPLAN test Aboriginal children generally rate about 2 years behind non-Aboriginal children, so that the cohort of year 5 Aboriginal children are producing NAPLAN results equivalent to the year 3s; year 7 results are equivalent to year 5s and so on. That leaves them very disadvantaged when they reach secondary school with the result that retention rates in secondary school for Aboriginal students are poor, and participation in tertiary education is significantly lower than for non-Aboriginal people. That in turn feeds into low rates of participation in employment and significantly lower average family incomes for

Aboriginal people. There are, of course, issues with housing that we know about, resulting in chronic overcrowding in many cases, and, of course, we should not overlook racism and discrimination against Aboriginal people.

Those are just some of the things of which we know and of which we have known for decades – probably more than a hundred years, but it seems to me that it is all those factors combining together which are producing the consequences that we are seeing in our justice system and in our prisons. That is not to say that there is not systemic discrimination within our justice system. What I mean by "systemic" is that I do not think most discrimination is overt or deliberate. Of course, I cannot exclude the possibility that there are people in our justice system who have racist attitudes, but I think more problematic is the structural features of our justice system which work adversely against Aboriginal people because of their characteristics.

Aboriginal people are more likely to be pulled over or questioned by police because, of course, they are proportionately more likely to be involved in committing crime. So if a policeman is looking for someone to interview about a crime, they go to a person who has characteristics associated with criminal behaviour, which focuses attention upon Aboriginal people. Having been pulled over or questioned and suspected of committing a crime, Aboriginal people are more likely to be arrested and put through the court system than diverted away from the court system. Again that is because of police perception of their characteristics – perhaps their prior record, their behavioural attitude towards police and so on. At that point, where a decision has to be made about whether a diversionary programme is pursued, or alternatively arrest and charge,

Aboriginal people are more likely to be arrested. When arrested, they are more likely to be remanded in custody than bailed. If you go to the criteria under the Bail Act which includes things like stable accommodation, stable employment, financial position and those sorts of things, they are all areas upon which Aboriginal people are likely to score poorly and therefore the application of the traditional criteria to Aboriginal people results in many more of them being remanded in custody than given bail. Those who are given bail, for example, children, are often given bail on conditions that they find hard to meet and as a consequence they breach those conditions and are rearrested. Often with Aboriginal children, curfew conditions will be imposed which mean they have to stay off the streets after a certain hour. Because of the conditions at home, there is sometimes a good reason for Aboriginal children to not be at home at night. The children go out on the streets, get arrested for breaching their bail conditions and back into custody they go.

At the point of sentencing, after conviction on plea of guilty or after trial, Aboriginal people are more likely to be imprisoned than given a non-custodial sentence – again, because of the application of all the normal criteria, criminal record, employment history, family stability, residential stability. All of those things work against Aboriginal people, so when a decision has to be made about whether a custodial or a non-custodial sentence is imposed, that decision is less likely to be a favourable one for them.

In some parts of Western Australia that problem is exacerbated because of the limited availability, almost complete lack in some areas, of non-custodial supervision or non-custodial programmes, so that a sentencing Judge or a Magistrate is confronted with a scenario in which

they know that there is virtually no-one available to provide supervision or programme support for an Aboriginal person who is not given a custodial sentence. That sometimes tips the scale more in favour of a custodial sentence than a non-custodial sentence.

Aboriginal people are also more likely to be imprisoned for fine default or for motor vehicle offences than non-Aboriginal people. I will come back to motor vehicle offences and fine default in a moment. But at virtually every structural point in the criminal justice system where decisions have to be made, there is what I would describe as structural discrimination which tends to work against Aboriginal people and results in exacerbation of those appallingly high incarceration rates to which I have already referred.

I have been focusing so far on Western Australian figures, but let us go Australia wide. Between 2001 and 2008 the Aboriginal prison population rose from about 4,500 to 6,700. That is an increase of about 50% over 8 years. That was over a time when, as I have said, all Australian governments had policies that were directed at reducing Aboriginal imprisonment. Nevertheless, Aboriginal imprisonment went up by 50%.

There was an interesting analysis undertaken in New South Wales over approximately the same period to work out why this was happening. It showed that there had been a significant increase in the number of Indigenous adults remanded in custody. That had gone up by 72% over the same period – so a significant chunk of the increase in numbers in NSW was the result of bail decisions. Interestingly, the same study showed that in terms of Indigenous people brought to court, over the same period, the numbers brought to court had fallen from about 21,000

to 19,500. The number of Indigenous people convicted had fallen from 15,000 to 14,700. Over the eight years the Indigenous imprisonment rate went up 50%, but the number of Indigenous people being brought to court and convicted fell. How do you explain that? There are a number of obvious explanations as a matter of logic. The first is that more Indigenous people have been refused bail and the study suggested that that was certainly happening. The next explanation is that when Indigenous people are convicted, over that period it became more likely for them to go to prison and for a longer period. The study that was conducted in New South Wales suggested that all of those things were happening. Over that period it was more likely that Indigenous people would be refused bail and, when convicted, it was more likely that they would go to prison and would go to prison for longer.

I mentioned earlier motor vehicle offences, and there are particular problems in that area in Western Australia. A Committee headed by State parliamentarian Ben Wyatt reported on this subject in 2007. That report makes very graphic reading and it came up with a number of recommendations that I thought were excellent, almost none of which seem to have been acted upon so far. That report noted that 148 Aboriginal people had been imprisoned over a 12-month period for driving while disqualified or without a motor vehicle driver's licence. It also noted that 30% of Aboriginal prisoners were incarcerated for driving under the influence or other driving offences, and that in the two years, 2004-2005, 853 Aboriginal people had been imprisoned either for driving under the influence or for motor vehicle/ driver's licence offences.

In relation to motor driver's licences, there are, of course, very significant structural issues that result in Aboriginal people being significantly

under-represented amongst those who have licences. If you live in a remote locality there is no licensing office nearby. If you do make your way to a licensing office and you are a young Aboriginal person living in a remote locality, you will be confronted with a test in a language which may not be your first language and which will ask you about how you deal with freeway on ramps and off ramps, how you deal with traffic light control intersections – none of which you have ever seen.

Of course, what often happens is that because these young people are used to driving in remote areas, sometimes at the request of an intoxicated family member, they will often be arrested driving before they are of an age where they are eligible for a licence. The consequence under the *Road Traffic Act* is that such offenders receive an automatic disqualification for a period after they become of age. If you live in a remote locality, you cannot get around by taxi or by bus, or other means of public transport. If you want to get anywhere, driving becomes essential. So it is very likely that a person who is disqualified such as the hypothetical young person I have spoken of will drive while under disqualification, get picked up again and suffer yet another period of disqualification. The same cycle repeats itself, and so you have a number of people living in remote areas who have never been eligible to hold a driver's licence, and yet have never driven either drunk or dangerously. By the time they get to their 13<sup>th</sup> or 15<sup>th</sup> or 18<sup>th</sup> conviction of driving whilst under disqualification, out of exasperation the courts move to a custodial sentence.

In relation to driving under the influence, the Wyatt Committee reported that Aboriginal people are three times more likely to be arrested and 25 times more likely to be imprisoned than non-Aboriginal people for

driving under the influence of alcohol. The Committee also reported that Aboriginal people are significantly over-represented as victims of road trauma. In both mortality and hospital admissions, Aboriginal people are significantly over-represented among those who suffer those consequences as a result of road accidents. Lack of a motor driver's licence impacts significantly on employment opportunities, and in most remote areas of the State a driver's licence is a pre-condition to employment within a mine. If you do not have a licence, you are not eligible for employment, and so the cycle of poverty and disadvantage continues.

What are the solutions to these issues? In relation to the driver's licence issues, a number of solutions have been suggested in the Wyatt Committee Report. They include teams being sent to address the lack of licences in regional areas and some structural change in the licence requirements. As many of you would know, for young people it is a requirement that you have so many hours of supervised driving by a driver who meets certain criteria. In a lot of remote communities, there just are not enough people to meet those criteria to provide the supervised driving hours. We need a more flexible approach to the requirements for the grant of drivers' licences in those areas.

More controversial are suggestions made by others for the grant of regional licences – that is, licences that are only valid in regional areas of Western Australia, and not valid in big cities or metropolitan Perth. Again more controversial is the suggestion that extraordinary licences should be easier to get, particularly for Aboriginal people so that those who are disqualified for life can demonstrate to the satisfaction of the court that they have changed their behaviour, should find it easier to get

an extraordinary licence so that they can enter the workforce than is currently the case. As I say, some of those recommendations are controversial, but it seems to me that the time is well and truly nigh for serious consideration to be given to solutions that might overcome these structural problems in the licensing area.

In relation to driving under the influence of alcohol, of course, this is part and parcel of this whole problem of substance abuse that pervades a lot of Aboriginal lives and which also needs vigorous attention.

Returning to depressing figures, about 40% of the prison population of Western Australia is Aboriginal compared to 3.8% of the general population. About 75% of the juveniles at Rangeview and Banksia Hill are Aboriginal children. Many of you will know the history of Aboriginal imprisonment including that dark chapter in our history involving Rottnest where Aboriginal people were taken, imprisoned and died in significant numbers. Imprisonment in predominantly Aboriginal prisons is still a feature of Western Australian penal practice. The prisons of Broome, Roebourne, Greenough and the Goldfields are comprised almost entirely of Aboriginal inmates and, of course, Aboriginal inmates are significantly represented in many of our other prisons — with the largest number in fact held at Acacia Prison.

A lot of State agencies do not specifically record expenditure on Aboriginal, as opposed to non-Aboriginal, people. Major General Sanderson estimates, on the very rough figures available to him when he was Special Adviser on Indigenous Affairs, that about half of the money that is spent by the State of Western Australia on Aboriginal people is

spent in the criminal justice system. Of course, much of that would be spent on imprisonment.

Let us now look at recidivism rates to see if incarcerating Aboriginal people actually helps to change their behaviour. For Aboriginal adults released from custody in Western Australia between 1998 and 2008, the rates of reoffending and return to prison before May 2009, in rough terms, were 70% of the males and 55% of the females. That compares to non-Aboriginal recidivism rates of 40% and 30% respectively. So recidivism rates for Aboriginal adults are a little under double the recidivism rates for non-Aboriginal prisoners.

In the juvenile area, the recidivism rate for male juveniles over same period was 80% and for females 65%. Those rates are almost exactly double the recidivism rates for non-Aboriginal juveniles. As a measure of efficacy, if you like, in changing behaviour, those recidivism rates tell us that imprisonment is particularly ineffective in relation to Aboriginal people. It is not particularly effective for anyone, but it is particularly ineffective with Aboriginal people. This is not to deny that imprisonment serves other purposes, including the punishment of those who transgress society's rules.

Let us go back to the question of cost. It costs the community of Australia about \$650 million a year to incarcerate the 6,700 Aboriginal adults that we lock up around the country. In Western Australia it costs \$275 a day or \$100,000 a year to incarcerate an adult. It costs about \$610 a day to detain a juvenile, or about \$220,000 a year.

Some of you would be aware of the Auditor-General's report conducted approximately 2 years ago. He estimated that, leaving aside indirect costs, direct costs for the 250 children who had the most contact with the juvenile justice system would be \$100 million. If you are quick at maths, that means it is about \$400,000 per child as each child passes between the ages of 10 and 17. It is estimated that some 75% of those children would be Aboriginal children. About the only thing we can say with relative certainty is that a very significant percentage of those will graduate into the adult criminal justice system despite that effort, and despite that expenditure. So we are spending a lot of money for little benefit.

There are, however, some glimmers of hope. New programmes have been available in each of Geraldton and Kalgoorlie since 2007/08. There is now a process whereby children in trouble in those towns can be found safe places – they are not always being transferred to Perth and put into detention as they used to be. I was very pleased to see in the recent State budget that it was announced that those programmes are going to be extended to the Pilbara and Kimberley. I think the government and the Attorney General are to be congratulated on that step which is a very important step. I am sure that money will be money very well spent and will pay very substantial dividends.

I mentioned earlier that while the focus tends to be upon intersection of Aboriginal people with the criminal justice system, it is I think unwise to view those issues entirely in isolation. There was an interesting study carried out by Professor Chris Cunneen and Melanie Schwartz at the Faculty of Law of the UNSW. They carried out focus group studies with Aboriginal people and looked at the difficulties they had in the non-criminal legal area.

Predictably enough, many of the people who they interviewed reported experiencing discrimination on the ground of race which caused them distress and antagonism towards the society in which they live. They were also significantly overrepresented in housing disputes; that is, disputes with their landlords, which would likely feed into the overcrowding problems that we all know about. Aboriginal people also were significantly overrepresented in disputes with education providers in relation to their children — which again probably feeds into some of the low levels of participation in the education that we see. Aboriginal people are also overrepresented in credit and debt disputes resulting in Aboriginal people often having low credit ratings and exacerbating the cycle of poverty in which many Aboriginal people live; this in turn feeds into non-payment of fines, leading to fine enforcement processes such as licence suspension, which can lead to driving whilst under disqualification and ultimately to prison. Also, as I have already mentioned, Aboriginal children are overrepresented amongst children who are subject to care and protection orders and participants in the focus groups identified their interactions with child protection agencies as another area of dissatisfaction.

So if you move away from the criminal justice area and look at the civil justice area, you can see that Aboriginal people are overrepresented in the groups that are disadvantaged in that area. A critical finding of the study was that the lack of access to legal services to address these other areas of disadvantage almost certainly feeds into the overrepresentation of Aboriginal people in criminal justice areas.

If that study had been conducted in Western Australia, I suspect that it would have found that Aboriginal people are also overrepresented in the area of violence restraining orders. Many of you would be familiar with the phenomenon of an Aboriginal woman taking out a violence restraining order, perhaps at the suggestion of the police after an incidence of domestic violence which has been caused by alcohol or other forms of substance abuse. Then after the order has been granted, the offender will mend his ways, stay off the grog and be invited back into the family home by the Aboriginal woman. Then the offender goes back on the grog again, there is another incident involving an assault, but this time the offender is not just charged with assault, he is charged with breaching the violence restraining order as well because the Aboriginal woman has not been sufficiently adept at legal systems and does not have the sort of access to the court to get that order revoked when the couple resume cohabitation. These are those areas of structural disadvantage that I think are almost certainly feeding into the high rates of incarceration that we see.

What is the answer to this problem? If you accept my hypothesis that the cause of the problem lies in all the areas of disadvantage that Aboriginal people experience, then that is where the answers lie as well. That means that the answers are not easily found. We will have to grapple with and find solutions to the problems that arise in health, education, unemployment, overcrowding of housing, family dysfunction, substance abuse, social alienation, cultural alienation – all of those things will have to be addressed effectively before we can expect to see significant changes in the tangible manifestation of the interaction of all of those problems that we are seeing in our criminal justice system.

Of course, what we need – and this has been said many times – is holistic community-based solutions for all those problems. We cannot have government agencies addressing those issues from their own particular perspective as if they are in their own silos. We cannot have one agency addressing the health issues of a community without also addressing the way in which that relates to housing, which in turn relates to the extent to which children are likely to go to school and so on. There needs to be community-based solutions which address all of these issues for that community, and they will almost certainly need to be tailor-made for the particular problems in that community. There is no one size fits all in this area. I think absolutely critical to the success of the sort of things I am talking about is the empowerment of Aboriginal people to take ownership and responsibility for devising the solutions for their community. Noel Pearson is a very strong advocate for the empowerment of Aboriginal people and for encouraging Aboriginal people to themselves take responsibility in these areas and to themselves devise the solutions that they need in order to enable them to address these problems, because, it is, of course, Aboriginal people who suffer most. I have mentioned that Aboriginal people are overrepresented in the offender statistics. Of course, they are almost exactly equally overrepresented in the victim statistics, because most Aboriginal crimes are committed against other Aboriginal people, so there are just as many victims as there are offenders, and sometimes the line between the two is very hard to draw.

There are some promising signs in this area. Roebourne is a case study in point. Roebourne has been a very troubled community for very many years as many of you would know. Happily, there is now a programme under way whereby all the agencies in the State who are engaged in trying to deliver services to this town are behind a project which involves

extensive collaboration with the Aboriginal people of that community to try to devise an holistic community-based solution. There is a long way to go because when I was in Roebourne a little while ago, it was a very problematic community. I was told again and again that children were on the streets late at night because their homes were not safe. The children were not being fed and so they broke into houses to steal food and after they broke into a house to steal food, they would elevate the scale of their offending by doing damage to make sure that they were arrested and sent to Rangeview or Banksia Hill. That was because first of all, an aeroplane ride is a bit of excitement for a child who lives in Roebourne, but perhaps more significantly, at Rangeview or Banksia Hill, they are fed and they have a safe place to sleep at night. I do not know if that is the case now. I hope it is not, but if that was the case, it tells you that really what is happening is that the criminal justice system is being used to solve problems that do not have their origins in the criminal justice system. If these children were being fed, if they had safe places to live, then they would not be in Rangeview or Banksia Hill.

There are some other promising signs. The alcohol restrictions in Fitzroy have shown real benefits in terms of reduction in the severity of domestic violence, in terms of reduction of hospital admissions and the general level of safety within that community, and similarly in Hall's Creek where the restrictions are more recent. Fitzroy provides a tangible demonstration of the point I was trying to make about the importance of Aboriginal ownership of the solutions. The Fitzroy restrictions came about as a result of some very strong and motivated women within that community who pressed hard for change. Where the community itself embraces the solution, it is much more likely to be effective. Of course, the sorts of solutions which work well in predominantly Aboriginal

communities like Fitzroy and Hall's Creek are much more problematic in a more urban environment, like in Kununurra or Broome, where the Aboriginal people are only a small proportion of the community.

Because of the problem of displacement which we have seen in both Fitzroy and Hall's Creek, by which I mean the fact that some problem drinkers left those towns when restrictions were introduced and moved to either Broome or Kununurra or even further afield, it seems to me that we need more regionally focused solutions.

Foetal alcohol spectrum disorder is another very dark cloud over this whole area. FASD is a problem that we are now seeing in much greater numbers. As Aboriginal women started using alcohol to a greater extent about 20 or 30 years ago, we are now seeing the consequences of that alcohol misuse coming through the criminal justice system. The size of the problem is very difficult to estimate because there are significant diagnostic issues with FASD. Most of the studies I have seen in this area suggest that it is a condition that is regularly under-diagnosed because of uncertain diagnostic criteria. One of the known symptoms of the condition is an inability to reason beyond the immediate consequences of the action and to see the longer term consequences. People who suffer this condition tend to be more prone to behaviour that provides a short-term benefit without considering the long-term consequences. That, of course, is a behavioural characteristic that is inherently likely to lead people into the criminal justice system. The problem is that because this is a neurological condition, there is not a great deal we can do about it through the criminal justice system's traditional approaches. Probably the only thing we can do in the criminal justice system is to try to identify outcomes that will put people in protective environments so that they will

be less vulnerable to offending behaviour. This is a problem which is becoming bigger. The estimates vary and, as I say, there are significant problems with diagnosis, but some of the medical practitioners in remote parts of the State to whom I have spoken suggest that the rate could be as high as one-third of children being born in some of those areas suffering FADS.

I have suggested that the solutions to these problems generally lie outside the court system. That is not to say that the court system can ignore its responsibilities. There are elements of systemic discrimination which I have described earlier that we can do better to address. More critically, the justice system provides an opportunity for beneficial intervention for bringing to bear changes in offenders' behaviour.

I have suggested earlier that punishment of itself is not particularly effective in changing behaviour, especially not for Aboriginal people. Punishment is sometimes inevitable. There are some offences that are so serious that they can only be dealt with by a term of significant imprisonment and, sadly, that is often the situation in which Judges and Magistrates find themselves. But there are other offences where there might be opportunities for more beneficial intervention.

Many of you here who have been to remote courts in Western Australia will have drawn the same conclusion that I have, although — to a lesser degree perhaps — the same can also be seen in metropolitan courts as well. The court process seems largely irrelevant to the Aboriginal offender. He or she is disengaged – looking at the floor, out the window, shuffling; it might be because the court process is being conducted in

language the offender does not understand. In a lot of remote areas, English might be the third or fourth language spoken by the offender.

Western Australia, unlike the Northern Territory, does not have a proper interpreter service to provide services to Aboriginal offenders. Part of the problem that we have in remote courts is that people simply do not understand what is going on and have no prospect of understanding because they do not speak adequate English.

Another reason for disengagement might be the irrelevance of outcome. It is either going to be the imposition of a fine which they cannot afford to pay, or the imposition of another custodial sentence. Aboriginal offenders disengage with a process that is largely irrelevant to them. That might be why the court process seems to be ineffective at changing behaviour.

More likely to be relevant are the community court processes that we see in Kalgoorlie and Norseman, at Yandeyarra in the Pilbara and in the Barndimalgu Domestic Violence Court in Geraldton. Many of you will be familiar with these processes. These processes involve, I think, importantly, a component of Aboriginal ownership of the process, so that Elders sit with the Magistrate and engage in the sentencing process. It is not possible for an offender in that environment to disengage because there are three respected Aboriginal people who can speak language if needed to that offender, and the offender simply has to engage. They cannot stare out the window; they have to respond to questions. The approach is much more collegiate than punitive, so that everyone around the oval table is addressing the problem. The common problem that everyone there has is: What is the cause of the offender's aberrant

behaviour? What can we do to address the cause of that behaviour? Let's leave aside the symptom and let us focus on the cause. What do we need to do to get behavioural change? That, I think, has great promise for the future and I would like to see that approach rolled out around Western Australia.

Many of you would be aware there was an evaluation of the Kalgoorlie court which included an assessment of recidivism rates, that is, rates of reoffending. The evaluation came up with the surprising conclusion that those who went through the community court were more likely to reoffend than those who did not. Now, of course, those of you familiar with statistics – and many of you would be – know that statistics are only as good as what you are measuring and the comparisons are only valid if you are comparing like with like.

The problem that is endemic in studies of recidivism rates is that very often you are not comparing like with like. In Kalgoorlie if the offender is almost certain to get a modest fine, their legal advisor would likely recommend that the offender opt for a conventional court rather than the trauma of going through the community court because it is a lot more problematic for the offender and the court appearance takes a lot longer. Alternatively, where the advisors to the offender see a prospect that what might otherwise be a custodial sentence might be converted into a non-custodial sentence through the community court process they are likely to recommend the community court process.

This process of natural selection will mean that the cases going through the community court are the harder cases - the cases that are more intractable, the tougher cases to handle. They are the cases that are

inherently more likely to lead to reoffending than the more simple cases that go through conventional courts. So when you are comparing recidivism rates for these sorts of courts with conventional courts it is unlikely that you are comparing apples with apples. This is reflected in the different profile of the offender cohorts compared for the evaluation of the community court — with the “mainstream” cohort consisting of offenders who were considerably older, who were charged with significantly less serious offences and who had fewer prior convictions.

There is another aspect to these community courts that I think can be undervalued when you look at recidivism studies. Happily the Kalgoorlie report did not undervalue this aspect – it did acknowledge the importance of the phenomena that I referred to earlier; that is, the phenomenon of Aboriginal ownership and empowerment in the court process. Instead of Aboriginal people regarding the court as a place where they are oppressed, where they go to be sent to prison, they can regard it more and more as their court – a place in which they are represented and a place in which their representatives have a real voice. The 15 or so panel members in Kalgoorlie become, if you like, ambassadors for the court system within their own communities. So that when someone in the community has a problem, they will go and speak to Uncle Bill because he knows the person in the court and Uncle Bill will be able to say, "Well, you go and speak to Mary down at the courthouse and she will sort that problem out". There is a real advantage from that level of connection between communities that have traditionally been distrustful of courts for good and obvious reasons, but which now have a real stake in the court process through their representatives.

Despite the adverse evaluation of recidivism rates in the Kalgoorlie court, I congratulate the government on deciding to extend that court process for another two years, and to commit the resources that are required to continue that court in operation. The government has also, I think, very wisely recognised that these types of courts will only be as effective as the support and programmes that they have available to them. One of the problems with the Kalgoorlie court was that unless it is supported by justice teams that can provide culturally appropriate community supervision and programme interventions, there is a real limit to what they might achieve.

Another area I think has great promise has come out of the United States, and it is known as "justice reinvestment strategy". The United States is, as I say, the highest imprisoning country in the world. A lot of State administrations have realised the enormous cost of imprisonment. They have said - why don't we look at proactive investment in reducing crime? An analysis of the prison population is undertaken, assessing where the inmates are coming from, identifying communities that are overrepresented in prison, and spending money in those communities – providing community-based supervision, providing greater supervision for the children in those communities, providing the sort of support and social infrastructure that is needed to change the behavioural patterns in those communities. Studies show that proactive investment in crime reduction not only saves a lot of money but is effective in protecting the community from crime.