Eminent Speakers Series
The University of Notre Dame - Fremantle campus

Youth Justice in Western Australia - Contemporary Issues and its future direction

Thank you for the kind invitation from the University of Notre Dame to speak with you this evening.

Firstly, I wish to pay my respects to traditional owners of this land, the Noongar people and to the elders past and present.

In the course of my address to you this evening I propose to refer to and comment on the riot at Banksia Hill Detention Centre (BHDC) in January last year, the essentials for a good plan for a young offender, the proposed extension to mandatory sentencing, and the paradigm shift in youth justice within government agencies currently led by WA Police. Along the way I will refer to a variety of issues including the gross overrepresentation of aboriginal children in the juvenile justice space. At the end, I will summarise my conclusions on the best direction for youth justice and the community of Western Australia.

At the outset, I wish to set out a quote from the Commissioner Elliott Johnston QC, National Report, Royal Commission into Aboriginal Deaths in Custody, (1992).

> "The issues facing Aboriginal youth should be seen in the context of issues facing the general Aboriginal community and solutions to Aboriginal youth offending should also be located in this wider context…the problems confronting Aboriginal young people which lead to their involvement in the criminal justice system are central to the future reduction of disproportionate detention rates and deaths in custody and so require urgent and immediate attention. In the coming years increasing numbers of young Aboriginal people will move into the age groups which are most vulnerable to incarceration. If these problems cannot be solved, it is inevitable that the over-representation of Aboriginal people in Australia's prisons and police cells will continue and, in all probability, increase."

I will return to comment on this statement at the end of my address.

The BHDC Riot

The riot at BHDC occurred on the night of January 20th last year.

It is a low point in the history of youth justice in this State.

Early in the morning of 21 January, 73 young male detainees were transferred from BHDC to Hakea Prison. On 7 and 8 February more followed taking the total number at Hakea Prison to about 140 or thereabouts. Under 14 year olds and girls stayed at BHDC.

The riot followed Rangeview Remand Centre closing in October 2012 and remand detainees held there, being transferred and held at BHDC.

In the recent Office of Inspector of Custodial Services Report, Professor Neil Morgan has made numerous findings and recommendations in relation to the riot with which I respectfully agree.

Contributing causative factors for the riot include:

1. Failures of management and poor planning in relation to the merger of Banksia and Rangeview.

2. Overcrowding in BHDC.

3. Serious staff shortages at BHDC.
    - Very high workers compensation numbers.
    - Absenteeism on rostered shifts.

    The combination of overcrowding and staff shortages lead to excessive lockdowns, minimal recreational activities and also an absence or lack of program delivery.

4. Repressive regimes for detainees in BHDC. There was no fair and proper reward regime in place for behavioural management. Regimes in place were overly harsh.

5. The time of the riot was in the heat of summer and cells had no air conditioning.

To be frank, it was no surprise to me that there was a riot. I had previously expressed concern about harsh regimes and the need for staff training. That said, the scale of the riot was greater than I thought would be the case.

In short, systemically, the culture at BHDC was characterised by locking up rather than rehabilitation.

There are many good Youth Custodial Officers (YCOs). They were as disappointed as others, including me, by what happened. In the sequel they have shown great resilience.

All of that said, some of the serious issues arising from the riot include:

1. The slow response by the Department in the weeks and months which followed.

2. For about 3 weeks immediately following the riot, the detainees at both Hakea and Banksia were locked down for up to 23 to 24 hours every day. There is, regrettably, good reason to conclude that there was a punitive purpose for that. The Children's Court has reached that conclusion.

3. The need to rethink how you manage behavioural change, particularly bearing in mind that you are dealing with many children with mental health problems who have poor coping skills and lives characterised by neglect and abuse.
   It is true that these children are hardened, but in my view they are no harder than children who committed serious offences used to be.
   The harsh detention regimes contributed to making them harder.

4. A key purpose of detention is to rehabilitate. Children are sent to detention as punishment, not to be punished. To not properly try to achieve that purpose and to release children back into the community more hardened, more angry and more frustrated, is clearly not in the best interests of the community. Indeed it actually increases the risk to the community rather than decreasing it and so the community is thereby rendered more vulnerable.
5. There needs to be therapeutic and life skills programs to enable YCOs to work with children to help them establish positive relationships with the children.
   Relationship building is a key component in the context of rehabilitation.

6. The prison culture has overwhelmed and dominated Youth Justice. That must change.
   With about 5100 or so adults in custody, and only about 160 or so children in detention, it is not surprising that an adult prison culture shadows Youth Justice.
   In my view the adult model is overly heavy on compliance. That approach has filtered down into Youth Justice. It needs to be replaced with a culture of rehabilitation, and prevention and diversion.

This breakdown in the detention area has been accompanied by the community area of the Department of Corrective Services not systematically giving its passionate and committed officers access to an adequate number and kind of programs to deliver to young offenders.

I am pleased to say that the Department is actively addressing all of these issues and will come out the other end much stronger for the benefit of children and the community.

The essentials for a good plan for a young offender

1. Need for punitive requirements.
   Punishment is provided as an objective of sentencing in the Young Offenders Act 1994 (the YO Act). Particularly for serious offending, the community reasonably expects and looks to the Court to impose some level of punishment. Sentencing is very much about striking the right balance between and amongst rehabilitation, punishment and deterrence in the particular case.

2. Need for therapeutic and life skill programs.

   Therapeutic needs include:
   - Family involvement and capacity building;
   - Mentoring;
   - Cultural programs to assist in the young person gaining a sense of identity and positive self-esteem;
   - Education - mainstream/alternative/vocational training;
   - Mental health needs, if any; and
   - Risk factors need to be addressed e.g. stable accommodation, peers, substance abuse.

   Given that about 70-75% of children, both remand and sentenced, in detention are aboriginal children, aboriginal mentors and cultural programs designed and delivered by aboriginal people must be included in any proposed solution. A knowledge of and positive sense of self identity and connection with culture are fundamental to the rehabilitation of a young aboriginal person.

   Life skill programs include relatively simple things that many of us take for granted, e.g. personal hygiene, shopping, daily planning.

3. Goal setting and time frames need to be in place.

Interventions should commence immediately or at least within a very short timeframe of offending and court orders.

4. Programs need to have longevity - well beyond the term of court orders. The intervention needs to involve working with the community and the family as well as the child. We are all very much products of our environment. Before children are released back into the community, families should be supported to be made resilient and ready.

   Layers of complex problems are not solved within short periods of time and just by contacts with the particular child.

The proposed extension of mandatory sentencing - the criminal law amendment (home burglary and other offences) Bill 2014 (the Bill)

An issue of critical importance in the youth justice space at the moment, critical to government and non-government service providers and the community as a whole is, is the Bill which seeks to extend mandatory sentencing for children as well as adults.

Whatever the outcome of the Bill, in so far as it relates to children, in the parliamentary process, and so be it. That said, I think that as President of the Children's Court of Western Australia, it is both proper and obligatory for me to provide some information and insights that are relevant for the purpose of assisting in comprehensive discussions and debates on the topic, whatever the outcome.

Economically unaffordable and unsustainable

The mandatory sentencing provisions will inevitably lead to a significant increase in the detention population. As I understand it, about an extra 130 beds may be required for young offenders at BHDC within two years. That figure does not surprise me, but I am not privy to how it has been calculated. I would not discount the possibility of the number being even greater.

Adopting that figure, and using $280,000.00 per annum, (over $700 per day) as the approximate cost of detention per detainee, equates to a total of approximately $36.4 million per annum. That could be the minimum for the start of an ever increasing recurrent expenditure.

I have used the words 'minimum for the start' in relation to recurrent expenditure because if a large number of more hardened, angry and

disconnected young offenders are returned to the community, be it about 130 or whatever, then they will have a wide sphere of influence on other disconnected children, including even younger children than them. That will create an ongoing multiplier effect, which over time, will sustain and increase serious offending and its human and financial cost to the community.

The introduction of the proposed mandatory sentencing regime will likely be followed by an ongoing sustained increase in offending. I note that the number of home burglary offences actually increased after the introduction of the three strikes legislation in November 1996.

Macro-economically unsustainable approach

Just over two years ago, the State of Western Australia was spending about $2.4 billion per annum on aboriginal affairs, i.e. about $30,000.00 per annum per aboriginal person. That is only State funding and does not include any Commonwealth funding. What have aboriginal people and the community at large got to show for all of this expenditure? It nearly all goes on damage control and damage repair. Less than about two percent is expended on community development and economic participation. Of course, the cost of crime to the community that can be related to all dysfunctional families and/or offenders will significantly exceed that.

The consequential expenditure needed to support the mandatory sentencing regime will only add to that exceptionally high annual expenditure and is both economically unaffordable and unsustainable. That is particularly so in the current economic environment. In addition to that, is the human physical and emotional cost to the community.

Further again, when talking about macro-economic sustainability and cost, it is also necessary to factor in the financial loss to the community including taxes that a rehabilitated offender would otherwise have contributed to the community had he or she been gainfully employed. Further to all of that, personal benefits of self-esteem and dignity result from economic participation.

The social and economic benefits of rehabilitating a child are exponential from one generation to the next. Conversely, the human and economic loss increases exponentially from one generation to the next when it starts with an abused, neglected and disconnected child.

About 40 percent of the total aboriginal population of Western Australia, of approximately 80,000, are 15 years of age or less, i.e. approximately 32,000. Therefore unless we solve this problem by addressing the underlying causative

factors, then we will create a tsunami of disconnected and anti-social young offenders in the future. It is happening now that is clearly not in the best interests of the community.

BHDC lacks capacity to accommodate increased numbers of detainees resulting from the proposed mandatory regime

Given current capacity at BHDC, put simply, it could not cope with the forecast increase in detention numbers. There will likely be a sustained increase in the numbers which will in turn add pressure to accommodation and service requirements. The cells are not all designed to allow for double bunking. Any overcrowding would be a serious issue.

The necessary increase in capacity could only be met by a large capital works program inevitably perhaps another detention centre. In addition to that there would be never ending calls for increases in funding to meet the necessary maintenance, staff, and other requirements for a detention centre. I should add, that detention centres designed or being required to house large numbers of detainees is undesirable and high risk.

Increased risk of suicide in BHDC and/or in the community

Given the combination of the likely significant increase in the number of detainees at BHDC, the lack of capacity of BHDC to properly accommodate and provide the necessary programs for them, an overwhelming sense of hopelessness that may be felt by some detainees, and particularly those who have a pre-existing mental health problem, and the lengthy sentences bearing in mind a child's sense of time, there will be an increase in the risk of self-harm and suicide by a detainee(s) in BHDC.

While many children in detention are very resilient, resilience can have its limits, and a background of dysfunction, abuse and neglect does not provide a good base for successfully coping with an overwhelming sense of hopelessness.

This increased risk of self-harm and suicide will also extend to children in the community, and particularly to aboriginal children.

Increased risk of another riot at BHDC

Given the combination of everything just mentioned on the increased risk of suicide and given that BHDC is still recovering from the riot in January 2013, the introduction of the proposed mandatory regime will increase the risk of another riot at BHDC.

Given that the riot in January 2013 resulted in a hardening of the detention estate, e.g. grills on windows, extra walls and fencing, and the use of razor wire, there are reasons for concern that if there is another riot then it may result in harm to people, including youth custodial officers, and not only property.

Extending mandatory sentencing when the detention estate is not functioning properly and is in a stage of recovery and reform is untimely and unwise. Put simply, putting something which is broken under more stress will inevitably lead to failure.

Home burglaries - varying degrees of seriousness - not all the same

With respect, in my view, a serious problem with the proposed mandatory regime is that is fails to recognise that all home burglaries are not the same.

Home burglaries are committed in a large range of scenarios/factual circumstances, e.g.:

1. entry without causing any damage, no one home, and with intent to commit an offence but no offence actually committed,

2. a lot of damage and/or property taken, but no confrontation with an occupant and so no violence or threats,

3. little or no damage or property taken, but violence or threats of violence against the occupant(s), or

4. entry through an open door knowing that no one is home and only taking food out of a fridge or alcohol. (Burglaries for food and/or drink are sometimes committed by young neglected children)

5. entry into a garage under the main roof and stealing a push bike.

Two points arise from that. First, if the Court is obliged to impose a term of detention or imprisonment of at least a year, it will have little or no scope to properly reflect the level of seriousness of the particular offence in the sentencing option and the length of the term imposed.

Secondly, and further to the first point, the level of seriousness of home burglary offences may increase if the proposed mandatory sentencing regime is introduced because in some instances children will think that there is no

incentive to hold back because they will get a lengthy term of detention or imprisonment anyway.

It should be noted that 'aggravated' home burglaries by reason of the offender being in the company of another person, is not of itself necessarily significant for a child offender because children usually commit home burglaries in company.

Why do home burglaries remain a problem and what is the best solution

Everyone agrees that home burglaries remain a problem which needs "a solution". That said, and in no way departing from it, it is interesting to note that the number of burglaries reported to Police in each of the last two financial years is actually less than the number reported each year in the late 1990s. The question is, what is the best "solution". The extension of mandatory sentencing assumes that mandatory sentencing is "the solution". The evidence and research shows us that it is not.

Reasons why mandatory sentencing will expose the community to greater risk

The proposed extension of mandatory sentencing and particularly in those cases where a multiple number of sentences are imposed on subsequent occasions producing a compounding of sentences which will significantly extend beyond a year, will result in already hardened young offenders becoming even more hardened. The release of more hardened, aggressive and disconnected children back into the community will increase the risk of them reoffending and thereby expose the community to greater risk. That risk extends beyond more burglaries and includes aggravated robberies and other offences involving personal violence.

As previously mentioned, such a cohort of hardened, aggressive and disconnected young offenders will influence other children to engage in anti-social behaviour and thereby produce a multiplier effect and further increase the risk to the community.

Being overly punitive on all home burglaries no matter what the level of seriousness, will inevitably result in a shift in the kind of offending rather than any commensurate reduction in offending. To avoid being a 'third striker' there may be an increase in other offences such as burglaries of business premises and robberies (including aggravated robberies and aggravated armed robberies).

For example, many home burglaries are committed to get keys for a car. That trend commenced with the introduction of immobilisers in cars which has made it impossible/difficult to start a car without the key.

Rather than commit a home burglary for the purpose of obtaining keys to steal a car, young offenders may choose to commit a robbery (including an aggravated robbery or an aggravated armed robbery) to obtain keys and a car. A potential example of doing this would be an aggravated robbery in circumstances where a woman was returning to her car at a shopping centre car park or in circumstances where after pulling into the driveway of her home she is confronted by young offenders who threaten her and demand her keys, wallet and car and then drive off in her car. Another possibility is a young offender stepping on to the roadway in front of a car in the day or night, getting the car to stop, and then a co-offender mugging the driver and then he and the others stealing the car.

Young children on bail or on a supervised release order for a home burglary may if they reoffend, choose to do a business burglary or a robbery to avoid being a third striker.

One of the points to note about robberies committed by children is that they rarely result in much property/money being obtained. Therefore, if there is a shift to robberies there will be multiple numbers of them.

The prospect of a lengthy term of detention or imprisonment and/or the prospect of multiple numbers of them, may well result in:

(a) Some young offenders (and adults) being desperate to avoid detection. An example of young offenders doing extreme and desperate things to avoid detection is the burning of a car to get rid of any fingerprints or other evidence that could result in their detection.

    In the context of a home burglary desperation to avoid detection could translate to personal violence against an occupant or destroying property, and

(b) some young offenders may well commit a more serious burglary than otherwise with the thought process being along the lines of 'in for a penny in for a pound'. That may be particularly so if the young person is already on bail or a supervised release order for a home burglary.

(c) Some young offenders may commit as many burglaries as possible, again with the same thought process as just mentioned.

Children are not small versions of adults

The objectives and principles in the YO Act are consistent with the provisions in the Convention on the Rights of the Child of the United Nations and to which Australia is a signatory. All of that in combination with the creation of a separate Court, the Children's Court of Western Australia, to deal with children in this State, shows that there is a clear recognition both internationally and in Western Australia, that children should be treated differently to adults. Children are not small versions of adults. Special objectives and principles should be applied when dealing with children.

The proposed mandatory regime can actually result in juvenile offenders being treated worse than adults. Indeed, pursuant to the Bill, juvenile offenders could be treated worse than adults by reason of their behaviour when they were less than 16 years of age.

In 1985, the late Nelson Mandela made the following statement;
"There can be no keener revelation of a society's soul than in the way it treats its children and young people."

A question arising in a consideration of mandatory sentencing for children, is do we as a community wish to unduly crush the most disadvantaged and vulnerable children in our community or do we wish to reasonably support and protect them to try and rehabilitate them and help them reach their potential? I say 'unduly, because it should be understood that the Children's Court when sentencing a young offender always considers the nature, circumstances and seriousness of the offence and the circumstances of the young offender when deciding the relative weightings to be given to rehabilitation, deterrence and punishment in the particular case. When approaching some cases in that way, detention may be the only appropriate sentence.

Profile of the kind of children impacted most by the mandatory sentencing regime

Regrettably most aboriginal children who appear before the Court have profiles characterised by extreme disadvantage and vulnerability. They with other children with similar with similar profiles, impacted most by the proposed extended mandatory regime. It is essential to know the profiles of these children in order to properly consider what the next response or mixture of responses, should be to the problem of youth offending, and in particular home burglaries.

With respect, it seems to me that the many complexities and layers of crises which render children and youth vulnerable to offend are simply not known or properly appreciated by many policy advisers and decision makers. Further to that, they apply adult thinking to children with serious behavioural problems from dysfunctional backgrounds when it comes to decide responses to child and youth offending.

It is often a superficial as, lock them up, that will teach them and their mates a lesson, and they will not do it again.

With respect, that line of thinking will not solve the problem and so it will not result in the community being a safer place. It is never as simple as that. The solution requires addressing the underlying causes of anti-social and criminal behaviour. Those causes are to be found in the individual, family and community. Support needs to be given to build resilience and capacity at all three levels. For example, returning the child from detention to a dysfunctional family and/or to a dysfunctional community, is likely to result in the child reoffending.

To help get a good sense of the point that I am making, I have set out below the profiles of two young offenders who have appeared before the court. It is children like them that the extended mandatory sentencing regime will apply to.

Case Profile 'K'

K was born to the union of D (preferred to be known as D) and M. Five children were born to this union, including K. D also has a further three children, with her latest partner, MR.

D reports that the family were united, with the support of her mother, until K was five years old. D stated that they shared a good family environment, up until a few years prior to the separation. Unfortunately M's infidelity was the ultimate cause of the separation. Unfortunately M's contact details were not available in order for this information to be discussed with him.

K claimed his parents have had substance misuse issues, specifically speed and marijuana. D stated she did turn to drug use after the suicide of her subsequent partner and it is only in recent times that she has realised the impact it has had on her family. D states she has ceased using speed, largely in part due to seeing what it was doing to her sons and uses marijuana on a decreasing level as a form of self medication when she is extremely depressed. It is in the authors opinion, due to observations since assuming case management, that D has significantly

reduced her drug use and is making a serious attempt to resume a pro-social lifestyle. D is focussed on re-uniting her family and moving forward together in a new direction.

Following his parents separation, K was primarily raised by his maternal grandmother. He reports he had a good upbringing with his grandmother and she provided him with a stable and loving environment.

Unfortunately, approximately three years ago, his grandmother committed suicide. Since this time K has had no ongoing stable accommodation or caregiver. He explained that it has been a difficult time for him and his circumstances have declined significantly since this time.

D reports that following the death of her mother, the entire family including her, have been in turmoil. Then the suicide of her partner caused the family to disintegrate completely with D's children now located in various locations throughout the State, some of whom are now in the care of the Department of Child Protection (DCP). The situation was further compounded by their lack of accommodation and therefore D's inability to reunite the family.

D also reported an incident which occurred when K was approximately 8 years old in which a teenage relative sexually abused K. D stated she feels this event has also severely affected K and she feels that it makes him quiet and withdrawn at times.

Due to K's ongoing lack of parental supervision, care and accommodation options, DCP became involved with K last year however he was closed as a case by DCP in late June 2011 even though he was homeless at the time and had no prospect of securing accommodation. The most recent Case Conference held between Youth Justice Services (YJS) and DCP occurred on the 2nd August 2011 however DCP declined at the time to re-open K's case.

Personal Profile for young offender 'A'

A is the third born to MR and MS who separated when A was approximately four years old. A cited the main reason his parents separated was due to the alleged domestic violence perpetrated against MS. A also has five older siblings from both MR's and MS's previous relationships, one of whom is the sister (maternal) he was recently residing with.

Shortly after the conclusion of his parent's relationship, the Department for Child Protection and Family Support (CPFS) became involved with the family. Departmental records indicate this was primarily related to substance use,

welfare concerns and domestic violence issues. A along with his siblings was placed into CPFS's care with a family in the Rockingham area. However, A has previously reported due to alleged incidences of physical abuse by his carers, he often absconded from the home. A remained with this particular family for approximately two years before CPFS relocated him to Armadale with another family. This placement lasted less than a year. When A was approximately six years old, MS located her three children and they returned to her care. Youth Justice has attempted to gain CPFS records to give a more detailed history of A in care, however was unable to obtain such documents.

In 2006, A's father, MR, was a victim of a violent assault where he was hit with a crow bar during an altercation with another man. As a result, MR received permanent brain damage which inhibits him from being able to walk or speak. MR currently resides with his mother, who is also his carer, in Belmont. A previously advised he has a close relationship with his father.

Upon reconnecting with his mother, A and his siblings relocated to Collie. However, CPFS became involved with the family again after alleged domestic violence issues arose between MS and her new partner. As a consequence, MS relationship ended with her partner and the family moved into CPFS supported accommodation.

After the cessation of MS's relationship, the family moved around the metropolitan area before settling in Belmont. In June 2011, MS assaulted a taxi driver with a screw driver who was dropping the family back to their home. A was in the vehicle at the time and witnessed the behaviour. A has reported this as a traumatic experience for him. Further to this offence, his mother assaulted another associate with boiling water leading to another charge in January 2012 and as a consequence, was sentenced to imprisonment and is currently in Bandyup Women's Prison. Upon MS's incarceration, A went to reside with his grandmother and father in Belmont. However, this placement was brief and A moved to his sister in February of this year.

A's sister already accommodated an unrelated young person known to Youth Justice and supervised by the Author. This young person is older than A and to date a prolific and ongoing offender. Further to this and as discussed, A's older brother was released on a Supervised Release Order to the same address, which impacted A's behaviour. A's offending started when he came into contact with these two young people and many associates they connected with. A followed his brother into a number of offences, likely the time A's offending behaviour developed and normalised. A possibly started to gain an offender's identity via connection with his older brother and finding social belonging in the many other young people frequenting his sister's home.

It became apparent to Youth Justice that although A's sister wants the best for her family, she had little ability to control A and appeared unable to help him maintain his appointments and attend programmes. Further to this, she is currently in a relationship with A's adult co-offender, bringing Youth Justice to view that at this time in her life, she does not have the ability to support and care for A's complex needs.

Youth Justice upon A's advice made contact with A's cousin who resides in Albany. A's cousin was quick to offer his assistance when contacted and indicated he wants to assist A and get him away from his current environment. A's cousin informed that he has been in trouble in the past however has walked away from that lifestyle and hopes he can help A walk away while he is still young. A's cousin advised he wants to assist A back into school and positive recreation. The author has made contact with youth services that will assist A's cousin and are discussed in greater detail below.

The author views A's cousin support as a possible circuit breaker in A's offending behaviour, removing him from the negative associates with his recent home environment. Potentially intervening on the identity A may currently be developing while in regular contact which he currently has with his brother.

Miscellaneous concerns arising from the Bill

- Retrospective operation.

- To catch a young offender as a third striker for the first charge for a home burglary committed after the commencement date of the new regime, the legislation seeks to make some convictions no matter whether or not they were recorded before or after the commencement date, for home burglaries committed before the commencement date, as relevant convictions. This is obviously designed to fast-track young offenders to becoming third strikers after the commencement date.

- The requirement to impose mandatory detention/imprisonment sentences for home burglaries which are not relevant offences will inevitably lead to injustices. This comment particularly applies to some back captured home burglaries committed before the offender became a third striker.

- The inability of the Court to do justice by reason of its discretion being removed or limited by it not being able to properly take totality into

account and also by it not being able to order sentences to be served wholly or partly cumulative or concurrent.

- The real potential for young offenders (and adults) to be caught up in being sentenced on multiple occasions because of time gaps between charges being made and/or because of when the Court resolves charges, such that he or she could remain in custody almost indefinitely or at least for many years. With that comes the risk of becoming institutionalised, which in turn reduces the prospect of a successful rehabilitation back into the community. As mentioned, it also increases the risk of developing a sense of hopelessness and suicide.

- The real potential for a young offender (or adult) to spend a lengthy time in custody pursuant to a mandatory sentence(s) and then later after rehabilitation, be charged with an historical offence and have to be sentenced again to immediate imprisonment for at least another year. That could happen no matter what the circumstances of the historical offence and even if it was at the lowest level of seriousness and of itself would not warrant a custodial sentence. The Bill seeks to decrease the chance of this but it does not completely remove it.

- As mentioned, a serious problem with the proposed extended mandatory regime is that there is no recognition at all that while home burglary is a particular category of offence, a particular home burglary can be committed within a very large range of factual circumstances, some circumstances being very serious and some not.

Increase in aboriginal children from country WA in BHDC

The mandatory sentencing legislation will likely result in an increase in the number of aboriginal children from country WA being sentenced to lengthy terms of detention. That detention will need to be served in BHDC, in Perth. That is a very long way from their country and family.

I am also very mindful that Noongar children who live in Perth will most likely have family connections outside of Perth.

Aboriginal children across that State do not share the same language and culture. Aboriginal children from the Kimberley and Pilbara have different language and culture to other aboriginal children, including Noongar children. Mixing different aboriginal groups is difficult for both the children themselves and the detention management.

Increase in the mean age and level of anger of detainees in BHDC

The Bill will likely not only significantly increase the number of children in detention but will also likely increase the number of older children in detention. A juvenile offender being defined as an offender who was 16 years of age but less than 18 years of age at the time of the offence will likely result in an increase in the weighting of 17, 18 and 19 year olds in the general detention population in BHDC. A significant proportion of them will likely be or become angry, frustrated, more hardened and overwhelmed with a sense of hopelessness because of the length of their sentence(s). That will create serious management issues. This problem will also put pressure on the adult prison system

Older detainees negatively impacting younger detainees

Younger child detainees less than 16 years of age mixing with such a cohort as just mentioned will create management problems. In addition to negatively influencing the younger children in the detention centre, such mixing may manifest itself in the younger children's behaviour and who they associate with when they return to the community. It may increase their risk to the community.

Relations between government agencies/non-aboriginal and aboriginal people

In April 2014, about 74 percent of children in custody on remand were aboriginal children. About 81 percent of children in custody and sentenced to detention were aboriginal children. These statistics are consistent with historical statistics which show a gross overrepresentation of aboriginal children in custody in Western Australia.

It is clear from those statistics that aboriginal children are seriously struggling in our community. The difficulties for aboriginal children should be considered in the wider historical context of aboriginal people as a whole. There is much research on why this is so and I do not propose to refer to it in this document. Suffice to say that the adverse impacts of the *Aborigines Act 1905*, including about three stolen generations, are still very recent and ongoing.

There has been an almost complete absence of rehabilitation programs for aboriginal children for many years despite the ongoing urgent need for them. The need is now more urgent than ever. There are many Elder, senior and young aboriginal people wanting to enter the youth justice space to assist aboriginal

children and the community generally. It is essential and in the best interests of our community as a whole that the aboriginal people presenting themselves to work in the youth justice space are given the necessary capacity building supports and encouragement by Government to enable them to actually bring culturally appropriate programs into operation.

It is my respectful view, that if against a background of long term failure to deliver rehabilitation programs to aboriginal children with the inclusion of aboriginal people, the next response to offending by aboriginal children is a more punitive legislative regime, then relationships and trust between government, non-aboriginal people and aboriginal people, will be seriously damaged and remain so for at least a very long time. That is not in the best interests of the community as a whole.

Offending by aboriginal children will not be solved without resourcing culturally appropriate programs and the inclusion of aboriginal people.

No legislative 'loophole' - Court's discretion affirmed by Parliament - Discretion exercised by the Court for about 17 years

With respect, it is an error to suggest, as I have frequently heard and read, that the current legislative provisions in the *Criminal Code* and the *Young Offenders Act 1994* (the YO Act) on three strikes for home burglary offences contain a 'loophole' which the Children's court has wrongly exploited and which needs plugging.

The legislation containing the current three strikes provisions came into force in November 1996. In February 1997 the Children's Court interpreted the legislation to leave it with the discretion to impose a conditional release order for a third striker. A conditional release order is a combination of an order for detention and an intensive youth supervision order. It is akin to conditional suspended detention served in the community. If breached it can result in immediate detention being imposed. The State did not appeal and seek to overturn that interpretation of the legislation by the Children's Court. There was a requirement in the legislation that it be reviewed after four years of operation.

On 14 March 2000, the Hon Attorney General Peter Foss, publicly defended the legislation from complaints that it constituted mandatory sentencing of children, by again expressly stating that the Children's Court was responsibly exercising discretion under the legislation when sentencing young children for home burglaries.

Further, and significantly, the Hon Attorney General, and also the Government of the day, fully knowing that the Children's Court was exercising discretion and the legal reasons for so, did not amend the legislation and change the law after the review in 2000.

On 4 December 2003, the Hon Peter Foss, when he was then the Shadow Attorney General, introduced a Bill before the Parliament to require the Children's Court to treat all home burglaries as strikes for the purpose of the relevant three strikes provisions in the *Criminal Code* and remove the Court's discretion. On 18 November 2004, the Second reading of the Bill was not agreed to.

Accordingly, history shows that the three strikes legislation in its current form and the approach of the Children's Court pursuant to it, has actually been supported by the then Government in 1997 and 2000, and affirmed by Parliament in 2004. This is in addition to the Court's interpretation of the legislation having been accepted for about the last 17 years.

The Court already imposes detention against third strikers

The Court already sentences many third strikers to immediate detention. Further, if a third strike home burglary involves an offence of personal violence against an occupant then immediate detention is usually imposed.

In those cases where immediate detention is not imposed, a Conditional Release Order is always imposed, which if breached, would in turn usually result in a sentence of at least 12 months immediate detention.

In 2010, of a total of 505 cases that resulted in a sentence or sentences of immediate detention, 195 were cases in which the most serious offence was burglary. In 2011, of a total of 453 cases that resulted in a sentence or sentences of immediate detention, 164 were cases in which the most serious offence was burglary. On 15 May 2012, the total number of sentenced detainees in Banksia Hill Detention Centre and Rangeview Remand Centre was 93, of which 37 were third strikers for home burglaries. This equates to 39.7% of the total number of sentenced detainees.

General acceptance of sentencing by the Children's Court

Further to everything mentioned above, at least in my time as President, the State has not appealed any decisions of mine or sought a review by me of any decisions of magistrates of the Children's Court on the basis that detention

should have been imposed at first instance on a third striker when it was not, or on the basis that the term of detention imposed was manifestly inadequate.

It is fair to conclude from all of this that the sentences of the Children's Court are meeting the expectations of reasonable and fair minded people in the community and that the current weakness in the system as a whole which needs to be addressed first is the failure to adequately resource and deliver culturally appropriate prevention and diversion programs for young offenders and to support their families.

An increase in trials and the need for home occupiers to be witnesses

A serious workload issue is likely to arise from the introduction of the proposed mandatory sentencing regime. I think that it is inevitable that there will be an increase in not guilty pleas to charges of home burglary. In addition to the State being put to proof of the charge, it will also most likely be necessary to have hearings on the facts for the State to establish the day and time of the home burglary. That would be necessary because the Bill effectively provides that home burglaries committed on the same day constitute one strike and home burglaries committed on different days constitute different strikes. I am in no way suggesting that every home burglary should be a strike. That would result in many other problems.

More hearings will mean that Police and home owners and occupiers will be required to spend time at Court and be examined and cross-examined. That is undesirable.

Likely increase in remands in custody and length of remands

As mentioned, there will likely be an increase in pleas of not guilty and hearings on the facts. The length of remands will likely increase because lawyers may see no reason to hurry and may also want to give the best chance for as many home burglary offences to be dealt with at the same time.

In relation to lengthy remands, it is important to add that they are undesirable per se and also that lengthy backdating of sentences is highly undesirable because remand detainees do not have access to as many programs as sentenced detainees.

Breach of objectives and principles in the YO Act

The proposed extended mandatory sentencing regime breaches every relevant principle in the YO Act

Shift of discretion from the Court to the DPP and Police - fundamentally wrong

To avoid an injustice resulting from a mandatory minimum sentence of one year detention or imprisonment having to be imposed under the proposed mandatory sentencing regime, there may well be cases where the DPP or the Police choose not to prefer a charge or choose to charge for a trespass instead of a home burglary. This would constitute a shift in the exercise of discretion from the Court to the DPP and the Police. The DPP and the Police should not be put in the position of being able to effectively decide whether or not a child is sentenced to immediate detention. That is objectionable in our democratic system. Such discretion should reside in the independent judiciary. Further, the DPP and the Police should not be put in this position because it will expose them to criticism and allegations of abuse.

Further to these comments, it should be noted that mandatory sentencing legislation does not so much remove discretion, but rather shifts it.

Further to all of that, prosecutors and defence lawyers may negotiate on pleas where a young defendant has a multiple number of charges for multiple kinds of offences. A defendant may feel pressure to plead guilty to a non-mandatory offence to get a home burglary charge dropped.

All of that would send mixed and confused messages to children on the seriousness of home burglaries.

The last window of opportunity for rehabilitation is lost

The proposed extended mandatory sentencing regime for juvenile offenders will result in the last window of opportunity to rehabilitate young offenders before they turn 18 years of age being lost. There are cases where children of about 16 years of age or so commit serious offences including serious home burglary offences where detention, and a lengthy term of detention, is the only appropriate sentence, and it results in them being properly in custody until and beyond their eighteenth birthday. However, in less serious cases and/or when there are powerful mitigating circumstances, including mental health problems, the last opportunity to rehabilitate a young offender before he or she becomes an adult should not be lost.

Inability to properly weigh mental health problems and FASD

There will no doubt be cases where home burglaries are committed by children with a mental health problem, psychiatric and/or psychological. There is an increasing awareness that many children who enter the youth justice system may have FASD which is incurable an requires specific and intensive therapeutic interventions. Mandatory sentencing prevents due weight being given to such significant factors in the overall consideration of the appropriate sentence.

Injustices will inevitably occur in these cases.

Distortion of sentences

Imposing a term of at least one year detention or imprisonment for home burglaries no matter what the circumstances will produce distortions and disparities in sentences imposed for them in comparison to sentences imposed for other offences, including other more serious kinds of offences committed in more serious circumstances, e.g. compared to some aggravated robberies.

Inevitability of a disparity of sentences for co-offenders

There will inevitably be a disparity of sentences for co-offenders in a large number of cases involving home burglaries. The proposed mandatory regime leaves it open for a juvenile offender aged 16 years at the time of the home burglary and who reluctantly acted as a lookout on the aggressive insistence of an adult, and who received no proceeds from the burglary, to be sentenced to detention when the adult who forcibly entered the home and carried out the burglary and kept all of the proceeds could be sentenced to a non-custodial sentence. I do not think that a reasonably minded member of the community would think that that was fair and just.

There will also inevitably be a disparity of sentences for young co-offenders. There may well be cases where the youngest or a younger co-offender who played a less serious role than others is required to be sentenced to detention for a year and the other older and more culpable co-offender or co-offenders are properly sentenced to a non-custodial sentence.

Likely reduction in young offenders admitting to home burglaries

Children frequently admit to home burglaries and even when the police have no evidence to link them to the burglaries. This will likely change, at least to some

degree, if every home burglary on a different day is counted as a strike and three strikes will result in immediate detention.

Possible involvement of children less than 10 years of age in home burglaries

Young children including young children less than 10 years of age, the age of criminal responsibility, are sometimes used by older children to commit offences. If a young person is above or below 16 years of age then the proposed mandatory regime may cause him or her to put pressure on a child less than 10 years of age to commit a home burglary and deliver proceeds from the home burglary to him or her.

Clearly this sort of behaviour is undesirable, but it happens, and it sets young siblings and cousins of old offenders on the path of criminal offending.

In 2010 in WA, there were 767 instances of children nine years of age and younger being processed for offending, including burglaries. In 2011, there were 755 such instances. In both years, the vast majority of the young children were aboriginal children.

The Children's Court Drug Court program excluded as an option

I have already referred to young offenders who are third strikers having a serious substance abuse problem which is an underlying cause for the commission of home burglary offences. Solve the underlying substance abuse problem and you are well on the way towards rehabilitating the young offender.

Mandatory minimum sentences of one year or two years detention will preclude third strikers, and whether any subsequent home burglary is a relevant offence or not, of ever being able to or wanting to participate in the Children's Court Drug Court program.

The need for care to not overstate the significance of deterrence for young offenders - young offenders susceptible to multiple offending

While deterrence is a relevant factor when sentencing, it is important not to overstate its significance in cases involving some young children. When sentencing, what weight is attached to a particular factor will depend very much on the nature and significance of all of the other factors involved in the overall consideration.

Most young children, including aboriginal children who have committed home burglary offences come from very dysfunctional family circumstances and have been subjected to long term neglect and abuse. Their lives are characterised by layers of crises and often grief from deaths in the family and exposure to serious domestic violence. I refer to the offender profiles that I have previously set out here in. As a consequence, many of them resort to alcohol and drug abuse as an escape. They fall into a lifestyle which involves not attending school, associating with negative peers, engaging in substance abuse, and engaging in anti-social behaviour. The substance abuse often overlays a post-traumatic stress disorder. It is often after young offenders have abused substances that they commit home burglaries for the purpose of obtaining money and property to support their substance abuse. That of course is not an excuse. It is an explanation. When in that condition they are unlikely to think of deterrence and becoming a third striker and the consequences of that.

Further to all of that, an alcohol or drug binge is usually not a momentary thing. It can continue over days or weeks or months. It is against this background that young offenders can commit a multiple number of home burglaries over days or weeks or months. To treat each and every home burglary committed over that time as a single strike when the young offender was continuously under the influence of a substance abuse problem, and/or a mental health problem, rather than regard them as all being part and parcel of one episode or course of behaviour, can lead to error and injustice. The injustice would be further compounded if no account at all could be taken of the objective seriousness of each of the home burglary offences. In such cases, the Court should have the discretion to decide what the proper sentence and the total of the sentences should be.

The importance of the Children's Court to be seen as a place of justice

In all modern and healthy democracies, Courts are seen as places of justice. If Courts cannot and do not deliver justice, for whatever reason, then the community will lose confidence in them and in their democracy.

The proposed extended mandatory sentencing regime will inevitably produce injustices in the Children's Court for children, and also adults who committed offences when they were children.

The credibility and good standing of the Children's Court of Western Australia in the eyes of all reasonable minded members of the community is an absolute necessity.

I'm fully aware that usually courts are criticised for sentences not being harsh enough. However, if reasonable minded people fully informed of all of the circumstances of the offence and the young offender could properly conclude that the court was imposing sentences in some cases which were unjust and too harsh, then that would also undermine the credibility of the court. In making this point I am mindful that our community is full of reasonable minded people and that it is from them that we select juries to collectively apply their reasonable minds to evidence to reach decisions in trials on serious criminal matters.

The future - a long awaited and necessary paradigm shift

Can I conclude with some positive notes and comments. There is good reason to be optimistic for the future.

First, over the last five years the number of cases (individual offenders) and the number of charges dealt with in the Children's Court of Western Australia has been declining.

Secondly, the Department of Corrective Services with strong political and administrative leadership is bolstering its efforts in prevention and diversion and is actively working to make BHDC a facility for rehabilitation.

Thirdly, there are some excellent not for profit organisations in the youth justice space.

Fourthly, WA Police has for some years now, and particularly more recently, increased its presence in youth justice diversion by working with families as well as children and vigorously monitoring conditions of bail.

WA Police currently has 20 Youth Crime Intervention Officers (YCIO's) across the metropolitan and regional areas of the state. PCYC's have been restructured but still have a very close working relationship with Police. In some places YCIO's are co-located with PCYC's. PCYC now has greater flexibility to connect children and families to programs which are not run by WA Police.

In the 30 years that I have been a Judicial Officer, I have observed that WA Police has been and is the only 24/7 agency. As a result they are usually first at the scene and engage in enforcement, investigation and social work. That is particularly so in relatively small regional areas of country Western Australia.

It is not surprising, therefore, that the Police Commissioner, Mr O'Callaghan, has taken the lead amongst government agencies to involve WA Police in

intervention, by working with the dysfunctional families of child offenders. The YCIO's are working with families and young offenders by connecting them to service providers to address the underlining causes of offending.

The logic in this approach is simple but very sound and cost effective. WA Police could not go on putting more and more resources into tactical responses. The underlining causes needed to be addressed to reduce and hopefully eliminate the need for so many call outs. As a result, necessary and adequate resources could be given to matters which warranted priority.

This approach is consistent with what is currently happening in New Zealand and the United Kingdom. It is a kind of justice reinvestment. Anyway, call it what you want, the approach is achieving outstanding results. It is, with respect, the paradigm shift that we needed to have. It is an approach which needs to be coordinated across all agencies of government and the not for profit and corporate sectors. It results in significant expenditure savings, a safer community, and improved lives for families and children once associated with high frequency offending and now connected to and a valuable part of the community.

The following statistics bear out what I have just said.

	NUMBER OF YOUTH	TOTAL OFFENCES	DETECTED OFFENCES PRIOR TO ENGAGING	DETECTED OFFENCES SINCE ENGAGING	% Reduction
REGIONAL WA					
Great Southern	31	619	210	43	**80%**
Kimberley - Broome	17	620	133	100	**25%**
Kimberley - Kununurra	19	525	189	54	**72%**
Pilbara	16	378	122	101	**18%**
Collie - Combined with SW					
South West - Bunbury	28	741	80	28	**65%**
Goldfields - Esperence	*	*	*	*	
Wheatbelt	9	144	16	12	**25%**
Mid West Gas - Carnarvon	12	294	108	26	**76%**
Mid West Gas - Geraldton	33	881	172	65	**63%**
	165	**4202**	**1030**	**429**	**59%**
METRO WA					
South Metro	15	373	37	51	**plus 37%**
East Metro	7	104	53	11	**80%**
West & Central Metro	22	422	157	50	**69%**
South East Metro - Armd	18	325	117	30	**75%**
South East Metro - Kens	31	849	211	117	**45%**
North West Metro	11	265	63	33	**53%**
Peel	24	733	605	128	**79%**
	128	**3071**	**1243**	**420**	
	Totals 293	**7273**	**2273**	**849**	**63%**

The reduction of offending of 63 percent for the particular cohort of children involved for the January to March 2014 quarter, follows a reduction of 64 percent for the children and families involved in the program in the previous quarter.

The cohorts of children involved are the more serious offenders who fall within the prolific and priority offenders (PPO's) program, operated by WA Police. Globally in the youth justice space, there is a rule of thumb that about 20 percent of the offenders commit about 80 percent of the crime. PPO's would fall within the top 20 percent category. It follows therefore that the best results can be achieved by working with this cohort and their families. That has been reflected in the results.

Conclusion

On a consideration of everything that I have mentioned and commented upon, it seems to me, with respect, that the blue print for the short to long term future in the youth justice space involves;

1. Giving time to the Department of Corrective Services to restore the community based and detention areas of youth justice with the input of the newly created Youth Justice Board, and
2. Build on the paradigm shift by WA Police, and
3. Work on the coordination of government agencies, including WA Police, and the not for profit and corporate sectors, and
4. Leave the mandatory sentencing provisions for children as they currently are.

I hope that if the President of the Children's Court of Western Australia is fortunate enough to come and speak at the University of Notre Dame in another 22 years, that he or she will not be saying the same things and referring to the statement of Commissioner Elliott Johnston QC made in 1992.

Judge D J Reynolds
President of the Children's Court of Western Australia

13 May 2014