ABORIGINAL OVER-REPRESENTATION PROJECT

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Aboriginal over-representation in the justice system is a major social justice issue in Australia particularly Western Australia (WA). Aboriginal people in Western Australia are significantly over-represented at the custodial and supervisory ends of the justice system at a rate that exceeds the national average. Conversely, Aboriginal people are under-represented in offenders sentenced to alternative penalties, in offenders diverted from the formal criminal justice system and amongst people accessing victim support services.

Following the 1997 Ministerial Summit into Aboriginal Deaths in Custody, the Aboriginal Justice Council and Justice Coordinating Council agreed to jointly develop a strategy to address the continuing over-representation of Aboriginal people in custody. This partnership resulted in the development of the Western Australian Aboriginal Justice Plan 2000 (ABORIGINAL JUSTICE PLAN).

The ABORIGINAL JUSTICE PLAN sets out the agreed vision, principles and framework to guide actions to reduce the number of Aboriginal people currently caught in the criminal justice system.

In as much as the ABORIGINAL JUSTICE PLAN will seek to address many of the underlying socio-economic issues that influence Aboriginal over-representation, the effects or benefits may take some time before they are realised.

In the meantime, the Department of Justice and other Government agencies, which together comprise the criminal justice system, have a responsibility to address policies and practices, which are contributing to Aboriginal over-representation.

To this end, the Department of Justice has initiated the ‘Aboriginal Over-Representation Project’ in order to influence this issue in the shorter term at an intra-agency level.

The Aboriginal Overrepresentation Project objectives include:

- To reduce the level of over-representation of Aboriginal people in the justice system and, in particular, in custodial services, and to improve access to justice, diversionary, victim support and community based services provided by the Department;
- To conduct a Department wide ‘stock take’ in order to identify gaps and overlaps in services to Aboriginal people;
- To identify where Aboriginal over-representation occurs in the WA justice system– whether it is concentrated in particular service areas, or (as is widely believed) occurs as a result of a series of decision making events across a broad range of areas; and
- To develop a ‘whole of Department’ strategy to address over-representation in Department services or funded programs.
- To develop and implement a research agenda to facilitate the collection of key information within the criminal justice system to inform decision-making and the development of evidence-based strategies to address over-representation.

Aboriginal Overrepresentation Project Outcomes

- A reduction in the level of over-representation of Aboriginal people in the justice system, in custodial services,
- Improved access to justice, diversionary, victim support and community based services;
- Identification of gaps in service provision to Aboriginal people;
- Identification of where Aboriginal over-representation in the WA justice system is concentrated, and
- A whole of agency strategy to address over-representation in Department of Justice services and funded programs.
There are many possible contributors to the Aboriginal prison population. International research suggests that over-representation of particular groups in prison is caused by a cumulative effect – at no single decision point is there a huge disparity in treatment, but the accumulation of small biases can result in gross over-representation.

In addition, Aboriginal imprisonment is also likely to derive from the same sources as imprisonment generally, and should therefore be amenable to the same influences that impact on the development of criminality such as health, family, education.

However, because such a high proportion of Western Australia’s Aboriginal population is in contact with the Department of Justice at any one time, effective rehabilitation programs or interventions by the Department of Justice can be expected to have a significant impact on the Aboriginal rate of imprisonment and thereby on the overall rate of imprisonment.

In the 1996 Census, Aboriginal people comprised 3% of the Western Australian population (or 50,700 people). However, in 1998/99 the proportion of Aboriginal people admitted to prison or detention centres to serve sentences was 40%.

Whilst the Department of Justice is progressing a range of specific programs and initiatives designed to target Aboriginal clients, a formal, documented commitment is required to assess the impact on the representation rate of Aboriginal people of any and all new initiatives, whether these are related to policy development, legislation, business improvement or operational processes.

This will ensure better informed decisions are made with regard to the impact on Aboriginal people and to radically amend those proposals that are likely to have a detrimental impact.

Information to identify what the mechanisms are to decrease over-representation is either inadequate or speculative. This applies to:

The identification of Aboriginal people in the Courts: An example of this is information on sentencing trends such as the imposition of fines;

The impact of certain laws on Aboriginal over-representation such as the Criminal Code Amendment Act 1996 (specifically the “three strikes” legislation);

“What works” and “what doesn’t” in Western Australia and other jurisdictions to reduce over-representation of Aboriginal people;

The management values and practices related to adult and juvenile community orders;

Data on possible prosecution biases;

Population data, in particular demographic information at a local area level and between censuses;

Policing practices (by the Police Service and other agencies with a policing role) in terms of the use of discretion when deciding to caution, summons or arrest. A significant skew is evident in the comparative police contact with Aboriginal youth of 5:1 and the comparative ratio for imprisonment of 22:1.

The impact on children’s welfare and future contact with the criminal justice system.

The availability, appropriateness and use of diversionary schemes at all levels of the justice system;

Qualitative information on the comparative Aboriginal experience across the criminal justice system.
Strategies determined suitable for implementation, on the basis of better information, will impact on both Aboriginal and non-Aboriginal imprisonment rates. Recommended responses must be linked to policy development that gives full consideration to potential consequences.

Possible Strategies, some of which have been commenced include:

**Diversion**
- Review eligibility criteria for diversion
- Introduce conditional cautioning – pre-court.
- Enhancements to Juvenile Justice Teams strategies to engage young Aboriginal offenders through greater consultation with families on access and process issues
- The feasibility of a family, team or panel determining the suitability of diversion, cautioning or court in the circumstances

**Arrest/Bail**
- A work in progress is the investigation of bail placements in regional areas for juveniles with two community supervised bail alternatives now in place in the North West.
- Provide Police with alternative options to arrest. For example conditional cautions.
- Notification of a defendant by summons issued by the Department where there has been a non-appearance in court is the practiced alternative to issuing a warrant.
- A full review of the Bail Act is currently underway.
- Training for Justices of the Peace and Police on options for bail and conditions.
- Introduction of greater flexibility to restrictions placed on offender address in relation to obtaining surety.
- Referral to programs to address alcohol and substance abuse whilst on bail.
- Introduction of a bail coordinator at the court site to reduce the use of the remand in custody option.
- Increased opportunities for Home Detention Bail.

**Sentencing and Post- Sentencing**
- Consultation with Aboriginal communities on sentencing options.
- Provide information on sentencing options and consequences to offenders and families.
- Review court /Fines Enforcement Registry costs where there is no capacity to pay.
- Supported accommodation programs.
- Review of staff selection and recruitment process.
- Ensure the Parole Board and judiciary are equipped with culturally significant information on offenders appearing before them.
- Provide statistics to the judiciary to increase their understanding and awareness of the issues.
- Record “ethnicity” of offender in court statistics.
- Investigate and address low referrals to the Aboriginal Family Supervision Program.
- Review tracking methods of offenders under supervision.
• Investigate feasibility of Aboriginal court day with specific judicial officers.
• Review breaches for non-compliance of community orders.
• Increase opportunities for early release from prison.
• Expand video conferencing and visits for prisoners/detainees, families and legal representatives.

Human Resources
• Increase number of Aboriginal staff in the field.
• Training investment in Department of Justice staff to enrich cross cultural understanding.

Corporate Partners
• Institute high level outcome statements and measures to actively promote whole of system thinking, and continue to pursue shared outcomes through cross government and intersectoral partnerships.

General
• Monitoring and maintaining statistics and distribution of these to agencies in addition to informing the public through the Department of Justice website
• Improved communication line between operational and policy areas.
• Ongoing and improved consultation with Aboriginal people on impacting criminal justice processes.

The following is a comparative analysis of prisoners serving sentences of less than six months, & serving sentences for driving offences which has led to legislative reform and changes in sentencing:

On April 30 2001 164 prisoners were serving sentences of less than 6 months.

The tables below show the top 6 most frequent offences (not ranked) for which persons were in prison on that day serving sentences of less than 6 months (major offence = longest sentence)

Aboriginals

<table>
<thead>
<tr>
<th>Major offence</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault (minor)</td>
<td>24</td>
<td>31</td>
</tr>
<tr>
<td>Breaches</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>Driving Licence Offences (suspensions)</td>
<td>17</td>
<td>22</td>
</tr>
<tr>
<td>Driving under the Influence</td>
<td>10</td>
<td>13</td>
</tr>
<tr>
<td>B &amp; E (Burglary)</td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>Other Justice Processes</td>
<td>11</td>
<td>15</td>
</tr>
</tbody>
</table>
### Non-Aboriginals

<table>
<thead>
<tr>
<th>Major offence</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Driving Licence Offences</td>
<td>29</td>
<td>41</td>
</tr>
<tr>
<td>(Suspensions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breaches</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>Assault (minor)</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Theft (other)</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Driving Under the Influence</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>B &amp; E (Burglary)</td>
<td>16</td>
<td>23</td>
</tr>
</tbody>
</table>

On the night of April 30 2001 a total of 264 persons were in jail for **driving related offences** including Driving under the Influence (Alcohol or Drugs), Dangerous Driving, Driving Licence Offences (Suspensions) and other traffic offences.

Because of restrictions in the Road Traffic Act, the full range of sentencing options are not available for all offences under the RTA. With a minor amendment to the RTA in February 2001, a small number of Community Based Orders are now being imposed for driving licence offences. While also available for first and second drink driving offences, fines, suspended and immediate imprisonment dominate sentencing. Removal of restrictions would open up this process so that Conditional Release Orders, Community Based Orders and Intensive Supervision Orders are more readily available.

Other analysis will include:

**Bail Reform**

The review of the Bail Act is a work in progress.

**Fines Enforcement Reforms**

Proposals considered briefly in the context of reducing imprisonment include:

- removing imprisonment for fine default where original offence was not imprisonable;
- capacity for Work and Development Orders to be undertaken within prison in conjunction with s.94 activity programmes, concurrent with other orders;
- proscribing imprisonment for driving under licence suspension order if original suspension was a result of infringement notice or non-imprisonable offence;
- various issues to address earlier payment of fines, including:
  - examination of apportionment of monies paid in relation to fine/costs;
  - garnishing bank accounts/CDEP, on a voluntary basis if involuntary not feasible
- greater consideration of ability to pay and time to pay
- deduction from prison gratuities to pay fines.
Abolition of Sentences Six Months and Less

This proposal extends current provisions of the Sentencing Act so as to proscribe the immediate imprisonment on sentences six months and less. Such sentences would be retained only as the “head” of a suspended imprisonment.

Expansion on current provisions which allow for deferral of sentencing for up to six months. This new provision would only be permitted when the court is considering imposing imprisonment. The Court would consider use of deferral of such sentence and give reason if it chooses not to defer. The court could order programme attendance, community work etc. Participation in such would be taken into account when sentencing offender. This may result in the use of lesser sentencing sanctions at the end of the day e.g. court may impose Intensive Supervision Orders in lieu of imprisonment.

Breach Strategy

The ratio of suspensions rose from 1:9 in 1997/8 to 1:4 in 1999/2000. In returning to reduced levels of parole suspension, (1:7) Community and Juvenile Services would reduce by 300 per annum the number of offenders returning to prison.

Facilitate Release at Earliest Eligibility

The Release Planning Unit has been strengthened to raise prisoners’ awareness of their eligibility for early release schemes.

Communications Strategy

The Department of Justice will consult with key agencies and community members prior to proposed legislative and administrative changes being finalised:

- Aboriginal communities
- Judiciary
- Parole Board
- Aboriginal Justice Council
- Police
- Relevant Unions
- Law Society and the Aboriginal Legal Service