

Submission No 66

**House of Representatives Standing Committee on Aboriginal
and Torres Strait Islander Affairs**

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**Inquiry into the high levels of involvement of Indigenous
juveniles and young adults in the criminal justice system**

Joint Submission

Aboriginal Legal Service NSW / ACT

North Australian Aboriginal Justice Agency

Queensland Aboriginal and Torres Strait Islander Legal Service

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Inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system

1. Introduction

A certain sense of hopelessness has attached itself to the spectacle of the chronic and increasing rate of over-representation of Indigenous young people in the criminal justice system. It is paralleled by disappointment at the consistent poor performance in shifting other, more general, indicators of social inequity experienced by Aboriginal and Torres Strait Islander peoples.

In July, 2009, Dr Gary Banks, Chairman of the Productivity Commission and Chair of the Steering Committee for the Review of Government Service Provision, conceded that:

My expectation when presenting the first OID report in 2003 was that many of the disparities evident at that time would have narrowed by now. Six years and three reports later, that has been clearly achieved for only 20% of the indicators. In 10% of them things have actually gotten worse.¹

In relation to Aboriginal and Torres Strait Islander juvenile detentions:

Although the most recent data is for 2007, the rate for that year is 30% higher than at the beginning of the decade – and 28 times greater than for non- Indigenous juveniles²

The lack of improvement – in fact, the degeneration – in this rate of over-representation gives rise to a sense of despair because the situation continues to worsen despite much study and government activity in the field.

However, activity should not be confused with sustained, constructive action.

The causes of the enmeshment of young Aboriginal and Torres Strait Islander people in the criminal justice system are frequently - and correctly - described as complex.

But they are not a mystery.

It is the contention of our submission that:

- the essential characteristics of laws, policies and programs that will reduce the rate of Aboriginal and Torres Strait Islander juvenile detentions are established, but
- they have not been applied in a rigorous, consistent way, supported by adequate human and financial resources, over the time necessary for them to take effect.

It is the firm belief of the Aboriginal and Torres Strait Islander Legal Services presenting this combined submission that substantial reductions in the disproportionate involvement of juveniles and young Aboriginal and Torres Strait Islander people in the criminal justice system can be achieved.

One reason for this belief lies in the nature of the Committee's terms of reference.

1.2 First principles

The Royal Commission of Inquiry into Aboriginal Deaths in Custody was initiated on the assumption that the rate of death of Aboriginal people in police and prison custody was higher than that for non-Aboriginal people.

It was swiftly found this was not so. The rates of death were similar. The number of Aboriginal deaths reflected a broader malaise: the grossly disproportionate numbers of Aboriginal people held in police and prison custody.

The Royal Commission's Letters Patent were revised to expand the scope of inquiry to enable the investigation of the issues underlying this marked degree of over-representation.

The field of investigation widened, from concentration on the immediate circumstances of death, to take into account the underlying issues - the social, cultural and legal factors leading to the disproportionate number of Aboriginal people held in custody.

The chronic cumulative effects of social and cultural disadvantage in education, employment, health and housing, together with substance abuse, were recognised as significant drivers of Aboriginal over-representation.

These factors predisposed Aboriginal people, not only to come into early contact with the criminal justice system, but - in combination with operation of the laws, policies and practices of that system – they predisposed Aboriginal people to be arrested, held in custody and to receive sentences of imprisonment.

Since the Royal Commission's National Report was released in 1991 the need for a concerted, holistic approach to addressing the combined impacts of the underlying social, cultural and legal factors leading to Aboriginal and Torres Strait Islander over-representation has become axiomatic. It is a matter of first principle.

The subsequent increase in the already grossly disproportionate numbers of Aboriginal and Torres Strait Islander people, particularly young people, in detention demonstrates the failure to develop an approach that enables such an integrated response.

In our view, one of the primary reasons for this is an institutional failure on behalf of all Australian governments to maintain a holistic perspective and effectively co-ordinate the design and delivery of programs addressing wider social and economic issues - with explicit linkage and coordination of their impact on the operation of the criminal justice system.

Programs tend to be owned by departments as 'justice' programs or 'education', 'health', 'housing' or 'employment' programs. This results in tension rather than coordinated effort, resulting in duplication or, more frequently, gaps in programs, services and facilities.

The pathway to contact with the criminal justice system is laid down early in the lives of Aboriginal and Torres Strait Islander peoples.

We welcome the Committee's focus on early intervention and prevention.

In particular, your terms of reference clearly associate heightened levels of Aboriginal and Torres Strait Islander juvenile and young adult involvement in the criminal justice system with health and emotional well-being, alcohol and substance abuse, education, training and employment. The need to clearly demarcate and coordinate responsibilities across government jurisdictions and establish common goals is expressly recognised.

We trust that the Committee's findings and recommendations will re-establish an integrated, holistic approach as a fundamental principle for sustained government action.

And that the Committee will conclude that such action must be guided by a further fundamental principle: the direct participation by Aboriginal and Torres Strait Islander communities and organisations in the design, development and implementation of strategies and programs affecting Aboriginal and Torres Strait Islander children and young people.

Experience subsequent to the Royal Commission of Inquiry into Aboriginal Deaths in Custody has only reinforced the relevance of RCIADIC recommendation 236.

That in the process of negotiating with Aboriginal communities and organisations in the devising of Aboriginal youth programs governments should recognise that local community based and devised strategies have the greatest prospect of success and this recognition should be reflected in funding.³

1.3 Our perspective

The Aboriginal and Torres Strait Islander Legal Services presenting this submission clearly have direct and extensive experience of the involvement of Aboriginal and Torres Strait Islander juveniles and young adults in the criminal justice system.

In the jurisdictions of the Northern Territory, Queensland and New South Wales we have daily interaction with the police, courts, corrections, juvenile justice agencies and non-government organisations.

Our relationship with our clients, their families and communities is close: based on trust.

We are in a unique position to present an intimate perspective on the operation of juvenile justice laws, policies and procedures on young Aboriginal and Torres Strait Islander people – with particular reference to diversionary programs.

It is not a narrow legal perspective.

Our practice, in taking instructions, liaising with family and preparing submissions to courts, equips us with direct knowledge of health, housing, education, training and employment issues that affect bail applications and the sentencing of our clients. We actively advocate for greater access to diversionary programs and the need for community participation in program delivery.

The scope of our services is broadening based on the significant and substantial need to provide more intensive through-care to clients and to assist them address the issues underlying their contact with the criminal justice system. At the stage of both pre- and post- release, legal service officers endeavour to match up our client's rehabilitation needs with services and programs - where they are available. A recurrent problem is the significant need for programs of early intervention, prevention and diversion and the absence of programs specifically designed meet the needs of our clients.

Based on our experience, and in consultation with Aboriginal and Torres Strait Islander communities, we deliver community education and participate in the development of policy and law reform. We work with various Commonwealth, State and Territory departments and agencies in the development of policy and programs and their subsequent implementation.

2. Specific submissions on the Terms of Reference

2.1 How the development of social norms and behaviors for Indigenous juveniles and young adults can lead to positive social engagement

The field of adolescent development and building normative values is not within the formal expertise of Aboriginal and Torres Strait Islander Legal Services. However, it may be useful to offer some observations founded on Aboriginal and Torres Strait Islander perspectives, experience and common sense.

It would not appear that social norms and behaviours are artifacts of intentional government policy or formal education. They may be influenced, to some degree, by constructed policies, programs, education and the purposeful introduction of role-models.

It is life experience from early childhood that builds an understanding of what is acceptable behaviour, and what is not.

Normative values are essentially learnt from direct, repeated exposure to a child's immediate social environment. They are influenced by the values and the behaviour of parents, peers, immediate community and the wider society. They are shaped by people who are respected and admired and by those who exercise authority.

Attempts to promote norms and behaviour that contradict the actual experience of Aboriginal and Torres Strait Islander families, young people and children would appear to have little depth or prospect of success.

Any approach to purposefully influence the social norms and values of Aboriginal and Torres Strait Islander youth is clearly a very sensitive area.

Government attempts to mold the values, beliefs and behaviour of young Indigenous people have a long and dismal history. From Governor Macquarie onwards, through the many forms and rationales for the removal of Aboriginal children, there has been a common theme of state intervention to influence and align values in accord with standards, beliefs and cultural assumptions determined by non-Indigenous people.

There remains a legacy of profound distrust towards the police, welfare and other government agencies – Australian governments generally – flowing from past practices.

Any recommendations the Committee contemplates in this area must be unequivocally based on the primary right and role of Aboriginal and Torres Strait Islander parents and communities in determining the nature of any programs designed to influence the social and cultural norms and values of their young.

In accord with the recognition in the preamble to the Convention on the Rights of the Child:

...the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Government services and assistance should be primarily directed to strengthening the ability of Aboriginal and Torres Strait Islander families to

build positive values and constructive attitudes in fulfilment of their responsibilities to their children.

It is clear that many Aboriginal and Torres Strait Islander parents and communities have deep concern about the behaviour of children who 'run wild' devoid of respect for the values of their culture and their elders, or indeed, any authority.

The essential point is that any action in this delicate and difficult area must not cut across or weaken the primary position of parents in guiding the development of their children. Programs must be lead by Aboriginal and Torres Strait Islander people and be built on their understanding of the needs of their children and young people. This is of paramount importance.

Respect for authority external to Aboriginal and Torres Strait Islander communities – for the police, courts and other agents of the state – cannot be artificially fostered from the outside. It must start within Aboriginal and Torres Strait Islander families and communities and be based on norms of respect and responsible social behaviour developed in cooperation with Aboriginal and Torres Strait Islander communities.

The complexity of this area is revealed in the paradox of calls for greater police presence in remote Aboriginal and Torres Strait Islander communities, coincident with complaints about police behaviour in targeting Aboriginal and Torres Strait Islander juveniles. In many remote areas the need for a permanent police presence has been a chronic problem. While calling for levels of police services comparable to those commonly enjoyed by other Australians, there is a parallel concern that the police actually provide a service to the community - rather than exacerbating problems by acting as a unilateral force to impose law and order.

Positive social engagement must run in both directions.

Sporting activities, going bush, adventure camps and number of other activities with kids, frequently initiated by individual police who realise that they need to, and want to, work with a community and build trust – to shift the perception and attitudes of young Aboriginal and Torres Strait Islander people towards the police and to promote positive social engagement – are clearly useful, constructive activities. They should be supported and funded.

However, the sporadic and shallow reach of such good efforts, should be recognised. They cannot change the basic terms of engagement between the Australian criminal justice system and young Aboriginal and Torres Strait Islander people.

2.1.1 What does the criminal justice system teach young Aboriginal and Torres Strait Islander people?

The criminal justice system embodies the core norms and values of any society. It serves as a powerful and practical definition and expression of what

is socially acceptable behaviour. Police, magistrates, judges, juvenile justice and correctional officers exercise real authority. They act on behalf of Australian society.

Accordingly, the operation of the criminal justice system in the lives of Aboriginal and Torres Strait Islander juveniles and young adults provides them with a blunt introduction to the norms of our society.

Sitting in a police lock-up, youth detention centre or prison cell, young Aboriginal and Torres Strait Islander people do not have to be familiar with precise statistics or terms such as 'disproportionate rates of arrest and detention', 'gross over-representation' or 'unequal access to bail and diversionary programs'. It is a matter of plain observation. You swiftly get to know how it goes. How you are perceived. It builds profoundly destructive self-images and expectations.

The reality of the Australian juvenile justice system is perhaps the most trenchant lesson available - far too available - to Aboriginal and Torres Strait Islander people regarding what is acceptable and what is regarded as normative. Where a justice system daily works injustice – and this is tolerated over decades – any confected program to build more positive terms of social engagement would seem destined to break against this harsher reality.

The current systemic, indirect, racial discrimination against Aboriginal and Torres Strait Islander youth and young adults sends a powerful, negative message. It consolidates existing alienation. It is based on actual experience.

Real improvements in the operational fairness of the criminal justice system, its ability to embody and model more constructive lessons, must be the primary focus of government action. A system perceived to be just, equipped to treat all who come before it equitably, would send a positive message to young Aboriginal and Torres Strait Islander people and their families.

Three further points may be made regarding norms, values and shifting the current terms of negative social engagement.

2.2.2 Justice policy: Public policy

The heightened access to 'justice' – higher levels of arrest, prosecution and detention – available to Aboriginal and Torres Strait Islander juveniles and young adults, is influenced by ambiguity in the public policy that drives the criminal justice system in all jurisdictions.

While the various forms of legislation governing Australia's juvenile justice systems adopt specific principles promoting rehabilitation and reintegration, and the use of detention as a sanction of last resort, there is another stream of very vocal populist public policy that runs in a contrary direction. It speaks in punitive terms of 'getting tough on juvenile crime' and 'zero tolerance'. Young Aboriginal and Torres Strait Islander people are often, either expressly or indirectly, identified as a particular target population.

The normative standards and values governing juvenile justice in every jurisdiction must be based - unequivocally - on diversion from the formal justice system and support for programs designed to repair harm, rather than inflict punishment. In reality, public support for such programs frequently expands and shrinks in direct proportion to the level of pressure exerted by politicians, interest groups and the media.⁴

Consistent commitment to a diversionary approach should be maintained by all heads of government, responsible ministers and Police Commissioners – and championed to the public. Public safety is clearly a primary goal of public policy. But it is not well served by a ‘tough on crime’ approach. Quite apart from the costs – both financial and human - of incarceration, research shows that locking up children is no more effective than community based orders in reducing the likelihood of re-offending.⁵

The system itself should be founded on the principles and values that it seeks to inculcate in Aboriginal and Torres Strait Islander juveniles and young adults.

2.2.3 Modeling positive behaviour in justice procedures

The criminal justice system has the opportunity to build responsible behaviour and promote positive social engagement through its own procedures. Punishment imposed by an impersonal system teaches little; although it does have the capacity to harden resistance to authority. Restorative justice requires offenders to examine their behaviour, acknowledge its impact on those harmed by it, accept personal responsibility and to make amends. Outcomes include punishment, but in an entirely different human and institutional context.

Restorative justice procedures have the potential to inculcate in Aboriginal and Torres Strait Islander offenders a wider social and personal perspective of their actions, conducive to better future behaviour. Juvenile justice procedures have the potential to actively model norms of responsible social engagement.

Our final observation, relates to the norm the current operation of the criminal justice system establishes for Aboriginal and Torres Strait Islander youth regarding their parents and culture.

2.2.4 Increased standing of parents and elders in the justice system

Aboriginal and Torres Strait Islander parents and elders are frequently sidelined by criminal justice procedures. They are largely external to the system, experiencing a sense of helplessness and powerlessness. This is observed by their children and young people, further eroding respect for their authority.

Justice programs and procedures inclusive of parents and elders, which incorporate Aboriginal and Torres Strait Islander knowledge and cultural

values, have the capacity to reinforce their importance and standing in the eyes of Aboriginal and Torres Strait Islander juveniles.

Community-based programs and procedures that provide a significant, responsible role for Aboriginal and Torres Strait Islander adults – demonstrating respect for their knowledge and skills – have the potential to model respect and exemplify positive social engagement. The Children’s Koori Court, Circle Sentencing procedures, Law and Justice Committees provide such roles for adult community members.

There is an intense need to provide such models within Aboriginal and Torres Strait Islander communities. Many of our young clients have been brought up in communities with appalling living conditions, in the midst of families struggling with gross problems of chronic substance abuse, endemic violence, entrenched unemployment, lack of basic services and a deep sense of cultural alienation and despair.

Unless significant steps are taken at, or even before, the birth of these children to remedy these disadvantages, they will inevitably be at high risk of anti-social and criminal behaviour. The repercussions of the loss of parenting skills and the erosion of traditional parenting roles through the removal of children and assimilation policies continue to exact an inter-generational toll.

Intensive family support programs - providing early intervention to assist Aboriginal and Torres Strait Islander parents and children in remote and rural areas to reduce and manage the risks of harmful behaviour - is an area of high need. One specific program is the Tyerrtye Arntarnte-Areme, Caring for People, Targeted Family Support Service established by Central Australian Congress. On the basis of need, and adapted to local circumstances, it should be funded to run in every community that expresses a desire to participate.

However, addressing the manifestations of gross forms of social inequity will have only marginal impact until that substantive social inequity is removed.

2.2 The impact that alcohol use and other substance abuse has on the level of Indigenous juvenile and young adult involvement in the criminal justice system and how health and justice authorities can work together to address this.

The correlation between Aboriginal and Torres Strait Islander juvenile and young adult offending and alcohol and other substance abuse is well recognised.

The report of the NSW Bureau of Crime Statistics and Research (BOCSAR) *The economic and social factors underpinning Indigenous contact with the justice system: results from the NATSISS survey 2006* shows that Indigenous Australians are far more likely to have been prosecuted or imprisoned if they abuse drugs or alcohol, fail to complete year 12 or are unemployed. Each factor has a compounding effect. Drug use was found to be the strongest predictor of prosecution and imprisonment. Excessive use of alcohol was the

second most important predictor of prosecution and the third most important predictor of imprisonment. The National Drug and Alcohol Committee report *Bridges and Barriers: Addressing Incarceration and Health 2009*, observes the same strong linkages between substance abuse and Aboriginal and Torres Strait Islander incarceration.

Both reports identify that early intervention and diversionary options specifically addressing drug and alcohol misuse, have the clear potential to reduce the number of Aboriginal and Torres Strait Islander children and young people entering the criminal justice system.

Options that co-ordinate justice, health and other services are essential.

The NSW Drug Court may be taken as a good example of an integrated, inter-agency response. It harnesses the authority of the justice system to provide intensive supervision and treatment. Participants frequently appear in court to ensure compliance with treatment plans and program rules, random urine checks and community supervision. Achievement of identified goals is praised and rewarded. Non-compliance results in immediate sanctions.

Procedures are non-adversarial. They rely on the interaction of probation and parole, police, DPP, legal aid and health personnel to form a team that monitors, supports and sanctions, where necessary.

The NSW Drug Court demonstrates the marked effectiveness of a coordinated response to offending underpinned by drug abuse. It has been thoroughly evaluated over time. It has not only led to the reduction of criminal activity by drug dependent offenders: it is more cost effective than incarceration.⁶ The reach of the court should be widened to include alcohol dependent offenders.

The NSW Youth Drug and Alcohol Court (YDAC) adopts a similar approach to the Drug Court. The YDAC program extends over a six month period providing an intensive program of rehabilitation before the offender is brought before the court for sentencing. The incentive to resolve problems of abuse is strong.

Participants undergo detoxification and rehabilitation, attend educational and vocational course, appearing regularly before the YDAC magistrate. The objective is to assist young offenders entrenched in the criminal justice system with alcohol and/or drug problems to resolve these and other underlying factors. Broader health, welfare, housing, family and educational problems are also addressed.

It demonstrates the effectiveness of a genuine holistic approach. It provides 'wrap-around' support to the young people, who have a clear incentive to participate. It has the potential to transform negative involvement with the criminal justice system into a constructive intervention.

The Law Reform Commission of Western Australian defines interventionist court programs as:

...programs that use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation. The distinguishing feature of court intervention programs is the involvement of the court in supervising offenders...⁷

The integration of alcohol and drug rehabilitation programs with diversionary justice programs has the twin benefits of reducing the incarceration of offenders while utilizing courts to intensively supervise and enhance compliance with health programs of rehabilitation. They are, in effect, symbiotic. The YDAC inclusion of attention to an offender's broader welfare, housing, family and educational problems qualifies its approach as authentically 'holistic'.

The NSW YDAC is a pilot program that has operated in Western Sydney since 2000. It is expanding into central and eastern Sydney. Evaluation of the Youth Drug Court finds that the program has a positive impact on the lives of many young people participating and should be expanded to other areas⁸.

Given the high correlation between Aboriginal and Torres Strait Islander juvenile and young adult offending with alcohol and other substance abuse – and given the established, positive character of courts specializing in constructive intervention – the only question is why they have not been adapted to local circumstances and established throughout Australia.

In the NSW context, courts operating on similar models should be expanded throughout the State: to Tamworth, Broken Hill, Wagga, Moree etc where Department of Juvenile Justice officers already work with those of the Department of Community Services and trained Aboriginal liaison workers, together with the Police, Aboriginal Legal Service and the DPP.

The failure to extend the reach of this program is essentially a matter of resources.

Why does the YDAC remain a pilot program after 10 years?

Its effectiveness is dependent on intensive resourcing. It is subject to the 'pilot syndrome' of so many Indigenous programs. While pilots and trials may prove to be effective, they are considered too expensive to be widely implemented.

In our submission – in this case, and with many other programs and diversionary options – it is not the lack of an established, evidence-based methodology, but resource restraints that prevent them from being rolled out throughout Australia and achieving the reductions in the rates of Aboriginal and Torres Strait Islander youth detention that are available – if the price is willing to be paid.

The price must be considered across government departments. The successful diversion of Aboriginal and Torres Strait Islander young people and young adults from detention and imprisonment is cost-efficient when compared with the cost of incarceration. However, immediate cost savings in corrections do not apply to other departments that must make available, expertise, treatment programs and beds in non-custodial residential rehabilitation facilities. These costs fall outside the criminal justice system. They must be met if diversion from the criminal justice system is to be achieved.

The problems of young Aboriginal and Torres Strait Islander people that underlie offending behaviour, cluster around them and merge: the effect of one compounding the effects of others. They are not divided up into departmental responsibilities. In response, justice interventions should be constructed to achieve a synthetic effect.

The costs of such integrated interventions should be assessed from a similarly synthetic perspective. It is good strategy. Tackling alcohol and drug rehabilitation in the context of diversionary justice interventions enables intensive court supervision and increases individual incentive to comply with treatment regimes - leading to enhanced rates of compliance – and the enhanced cost effectiveness of health programs

In our submission the Committee is well placed to identify and recommend a strategy for the delivery of integrated remedial justice interventions and the commitment of significant Federal, State and Territory funds necessary to extend the benefit of proven drug and alcohol programs - equitably – to Aboriginal and Torres Strait Islander juveniles and young adults across the nation.

In our experience most magistrates will not, by preference, sentence Aboriginal and Torres Strait Islander youth with drug and alcohol problems to detention - if there is a residential rehabilitation program available. There is a critical and chronic shortage of non-custodial drug and alcohol residential rehabilitation centres for juveniles. The absence of facilities adapted to the specific needs of young Aboriginal and Torres Strait Islander people in rural and remote Australia is even more pronounced.

In the Northern Territory there is no residential youth drug or alcohol rehabilitation centre. Court clinicians are not minded to accept juveniles for therapeutic jurisprudence options, such as the NT Alcohol Court, without the availability of a residential care program.

In Alice Springs there is one residential program available for young Aboriginal people: BushMob. It is not a drug and alcohol rehabilitation program. It is not recognised for the purposes of the Court Referral and Evaluation for Drug Intervention Treatment (CREDIT NT) program – a court bail program. In urban areas there are no residential programs enabling young Aboriginal and Torres Strait Islander people to derive the benefit of CREDIT NT.

Two Aboriginal driven programs in central Australia – Ilpurla Outstation and Mt. Theo – seek the healing of young people involved with the justice system through a combination of activities in residential settings.

Mt Theo is a youth service provider specific to Warlpiri people, developed and operated by Yuendumu elders. It has a residential outstation component involving station work and cultural activities, together with 'day program' of education and sports activities based in the community. The involvement of Aboriginal community members in the rehabilitation of their young people, the emphasis on care and the deepening of cultural connection, while promoting formal schooling and the development of practical skills, demonstrates the value of programs built on Aboriginal knowledge and experience, reinforcing an intimate sense of membership of a community, which non-Indigenous programs cannot replicate.

Ilpurla Outstation has a specific focus on addressing volatile substance abuse, as well as drug and alcohol abuse. It is an intensive residential rehabilitation facility predominantly catering to young Aboriginal people, but open to all. The program is run by an Aboriginal family, based at an outstation. Its participants learn about the pastoral industry and are taught specific station skills, including horse and cattle care and management. At the end of the program, the aim is to link young people into further education and employment opportunities.

Both programs serve to illustrate the value of rehabilitation programs initiated and run by Aboriginal people. Both are run by traditional owners and elders of the land on which they are based. They have a depth recognized by the report of the Community Affairs Reference Committee, Senate of Australia: *Beyond Petrol Sniffing: Reviewing hope for Indigenous Australians* 2006. Recommendations 14 and 15 emphasise the importance of community ownership, family and youth involvement in the development of such programs – and the importance of supporting such programs with appropriate expertise. The incorporation of further expertise should not compromise their strength which lies in the genuine quality of their Aboriginal ownership.

The terms of the provision of expertise and resources to support Aboriginal and Torres Strait Islander designed and driven rehabilitation programs should never distort their Indigenous character.

The principles on which Mt Theo and Ilpurla Outstation are based can be applied generally, but they cannot simply be replicated. They must be built by the communities they are intended to serve, responding to their needs and incorporating their knowledge.

2.3 Any initiatives which would improve the effectiveness of the education system in contributing to reducing the levels of involvement of Aboriginal and Torres Strait Islander juveniles and young adults with the criminal justice system.

While being acutely aware of the significance of education and the close relationship between poor school performance and involvement with the criminal justice system – and that measures to improve school performance and retention reduce the risk of juvenile involvement in crime⁹ – our legal services have no real expertise in this area.

The Committee's attention is drawn to the following findings which touch on the twin paradoxical problems associated with Aboriginal and Torres Strait Islander education: high levels of failure to attend school and heightened levels of suspension and exclusion.

Programs teaching social competence training have had positive outcomes in all settings. Rewarding pro-social behaviour in school has been effective in reducing truancy and discipline problems.¹⁰

Reinforcing positive social behaviour and involvement rather than punishing anti-social behaviour has the greatest impact in improving the effectiveness of the education system.¹¹

It is self-evident that diversionary options have the benefit of keeping young Aboriginal and Torres Strait Islander people within the community, without disruption to their schooling.

2.4 The effectiveness of arrangements for transitioning from education to work and how the effectiveness of the 'learn or earn' concept can be maximised;

Similarly, the connection between unemployment and the heightened risk of offending is well established¹² - but it is not an area in which we have specialist knowledge.

Perhaps it may be useful to provide two illustrations of how formal schooling may be made to hold more immediate relevance and have a realistic connection with employment attractive to young Aboriginal and Torres Strait Islander people.

Project Murra is funded by the Commonwealth government and is being conducted in the Illawarra region of NSW. It encourages Aboriginal and Torres Strait Islander youth who are entering the last two years of secondary school to enter a traineeship which, when successfully completed, offers them the chance of employment in either the NSW Police Service or the NSW Ambulance Service.

The program is expressly about "school retention, keeping Aboriginal students at school to complete their HSC, it's about careers, it's about helping

Aboriginal students move from school into a career and it's also about building linkages between the police and the Aboriginal community.”¹³

At the completion of the traineeship students will have gained a Higher School Certificate, a University Academic Index needed to gain entry to university, a Certificate three in vocational and study pathways from TAFE NSW. They will also have obtained one hundred days paid employment with the NSW Police Service over the two year period.¹⁴

Young people in Aboriginal communities in Queensland express significant interest in joining the Australian Defence Force (ADF). However, recruitment in rural and remote communities is not occurring. The provision of school-based ADF apprenticeships would create real incentive to remain in the education system and provide continuity with attractive employment.

Given that the separation rate of members of the ADF is increasing, there is a match between its needs and those of Aboriginal and Torres Strait Islander youth to find employment. Significant advantages could be gained from the recruitment of Aboriginal and Torres Strait Islander juveniles and young adults into the Australian Defence Force.

2.5 Best practice examples of programs that support diversion of Aboriginal and Torres Strait Islander people from juvenile detention centres and crime, and provide support for those returning from such centres;

2.5.1 Addressing the underlying causes

While acknowledging that the causes of the high rate of over-representation of Aboriginal and Torres Strait Islander people in juvenile detention are complex, it is contended that the essential elements of laws, policies and practices capable of reducing that rate are well established.

They rest on the clear identification that heightened involvement in the criminal justice system flows from underlying social causes. That the inequity of over-representation reflects deeper social inequities experienced in the formative environment of Aboriginal and Torres Strait Islander children and young adults.

The criminal justice system cannot directly address the wider systemic problems of health, housing, education, employment, alcohol and substance abuse, community governance, together with the damage that has already occurred and had substantial impact on Aboriginal and Torres Strait Islander culture.

But the justice system can respond purposefully to these causative factors, as they manifest in the individual lives of young Aboriginal and Torres Strait Islander offenders. They must be taken into account in understanding the wider context of individual offending and be address directly in the terms of any intervention – linking sanctions to constructive programs and services that ameliorate the personal and environmental factors precipitating contact with the criminal justice system.

Past offending should be primarily a means of identifying and tackling the reasons for offending - looking forward, not back - to prevent future offending through positive interventions.

Diversion entails choosing the least intrusive option to divert children from the criminal justice system. It requires parsimony in the use of custody. Successful diversionary practice does not rest on simply avoiding custody; it takes the occasion of contact with the police or courts for active, constructive engagement.

Diversion is espoused by all Australian youth justice systems. The current level of Aboriginal and Torres Strait Islander enmeshment with the criminal justice system demonstrates its poor implementation. While detention centres are increasingly over-crowded, costly and productive of future offending – support for their expansion seems to be the one systemic imperative. Ancillary personnel, services and infrastructure necessary to support diversionary programs are always in critically short supply.

2.5.1 Diversionary Essentials

Structurally, every jurisdiction should have a specialist department with responsibility for youth justice and a division dedicated to diversion. Most jurisdictions do, in various forms. The Northern Territory is exceptional in that it has no separate department or specific juvenile diversionary unit.

Best practice in the selection of an appropriate department with responsibility for youth justice – guided by an ethos most likely to promote rehabilitation rather than incapacitation - is found in Victoria. Responsibility for youth justice rests with the Department of Human Services which runs two detention centres. Similarly in Queensland it is the Department of Community Services and in South Australia, the Department of Families and Community Services hold responsibility. There is a confluence between the departments' provision of core human services and the effective provision of such services to young people and their families at the point where they are at risk of entry to the criminal justice system.

In New South Wales, while the Department of Juvenile Justice controls most of the youth justice system, there is also the Kariiong Juvenile Correctional Centre which is operated by the adult Department of Corrective Services, holding between 30 and 40 young people. A creeping form of correctionalism is entering the NSW system, marked by an approach that no longer treats juveniles as needing special attention and assistance, but rather as young adults requiring stringent control.

In many areas of operation New South Wales's rates of youth detention are on par with the peak rates of Western Australia, where juvenile justice has been run by the correctional system since the early 1990's. The NSW rates of youth detention have increased sharply due to new restrictions on the use of bail - In 2007/08, 85% of Aboriginal young people being detained were on remand.¹⁵

The current broad problems in relation to heightened levels of Aboriginal and Torres Strait Islander young people with criminal justice system flow directly from an approach which increasingly tends to place incapacitation ahead of diversion and rehabilitation: making youth justice more like the adult justice system. This reflects the previously noted ambiguity in public policy concerning juvenile justice. It has particular impact on young Aboriginal and Torres Strait Islander people.

Effective youth diversion requires specialist court structures.

In NSW there is no specialist children's court magistrate outside Sydney, Wollongong, Nowra and Newcastle; in the Central Australian region of the NT there is no specifically trained magistrate or dedicated Youth Justice Court. The situation is replicated throughout the rural and remote regions of Australia where there are high proportions of Aboriginal and Torres Strait Islander peoples. An Aboriginal young person appearing for example in Grafton children's court is four times as likely to be sentenced to detention than one appearing in Bourke.¹⁶

The same marked local variation in rates of detention are scattered across the continent. From a national perspective there is a kind of arbitrariness in rates of Indigenous detention. They vary from jurisdiction to jurisdiction and within the same jurisdictions.¹⁷ The expert administration of juvenile justice should not be dependent on geography.

Effective diversionary programs rely on intensive coordination and support to identify and meet risk factors.

Once again, in the Northern Territory there are no targeted positions within the criminal justice system, such as youth justice officers, Aboriginal youth liaison officers, policy officers or youth workers. Such specialist positions – in every jurisdiction – are critical to provide the intensive 'wrap-around' support that will deliver results. In those jurisdictions where equivalent positions exist they are inadequate to meet the level of demand, consistent with the maintenance of a high professional standard of service.

While each jurisdiction has legislation articulating principles celebrating a preference for diversionary approaches, one of the major reasons for the consistent failure to reduce the heightened detention rates of Aboriginal and Torres Strait Islander juveniles is the sheer lack of adequately trained, dedicated officers to provide ancillary services and establish linkages with non-custodial rehabilitation services, where such services exist.

Aboriginal and Torres Strait Islander Legal Services, to the limits of our resources, attend cells, provide advice and support to our clients and their families, liaise with police, prosecutors, and courts to negotiate diversionary options. Critical to this endeavour is the availability of secure accommodation that may result in the grant of bail or space in a rehabilitation program resulting in the diversion rather than the detention of our clients.

There is a severe shortfall – a massive gap – between the need for, and the availability of, facilities and rehabilitation services necessary for the successful diversion of Aboriginal and Torres Strait Islander youth in numbers that would significantly cut into current rates of detention.

Aboriginal and Torres Strait Islander children sit in cells, refused bail, because they have no where safe to stay the night. If the home environment is not safe, and there are no relatives considered appropriate, both police and magistrates may consider that a cell is the best accommodation available. It is a choice made under compulsion

Bail is often made conditional on the availability of appropriate accommodation. In NSW 'reside as directed by the Director of Juvenile Justice' is frequently a condition imposed on homeless young people. Equivalent orders are made in other jurisdictions. It often means that they are held in detention until suitable accommodation is found. This contravenes the UN Convention on the Rights of the Child to which Australia is a signatory. Detention is a criminal sanction: not a 'placement' for children in need of care.

Responsibility for such detention - its inherent unfairness, stress and negative engagement with criminal justice system - lies squarely with the Australian governments. It is clear and predictable that young people at risk of entry to the criminal justice system will come from homes where it is unsafe for them to be. The need to provide accommodation, other than police cells or detention centres, is chronic. Detention in these circumstances is detention by government neglect.

Throughout Australia – in urban, rural and remote areas - bail hostels, safe houses or other forms of secure, culturally appropriate, accommodation are urgently required as part of the essential infrastructure enabling the diversion of young Aboriginal and Torres Strait Islander peoples being held in custody for the simple lack of an alternative. An intense influx of resources is urgently required to make diversion a practical option where Aboriginal and Torres Strait Islander young people actually live.

In New South Wales a recent parliamentary report also found that many sentencing options were not available in rural areas. In particular supervised bonds, community service orders, periodic detention and home detention were not available in many parts of the state. Interviews with judicial officers found that more than 70 per cent of judges and 53 per cent of magistrates stated that they were prevented from using periodic detention when sentencing Indigenous offenders because of the lack of facilities.¹⁸

The entire issue of front-end entry to the criminal justice system as the result of decisions made by police at the point of first contact with Indigenous youth is a deep systemic problem

The decision to arrest and refusal of bail is a discretionary decision made by police officers. They stand as gate-keepers to the criminal justice system.

They are the principle decision-makers, opening or closing access to diversion. The exceptionally high proportion of Indigenous young people remanded in custody, as opposed to those sentenced to detention, reflects the impact of choices made by arresting officers.

Despite principles in juvenile justice legislation favouring the administration of warnings, cautions, proceedings by way of court notice rather than arrest, young Indigenous people are routinely arrested for minor – sometimes, trivial – offences, denied bail and placed in detention.

In Queensland in 2003-04, 85% of all admissions to detention involving Indigenous juveniles were as a result of being remanded in custody; but few later received a custodial sentence. For the period 2000-01 to 2003-04, some 16% remanded in custody received a custodial sentence: 62% received a community based order.¹⁹ In New South Wales in 2007-08, some 2363 Indigenous young people came into detention: 85% were on remand. Only 16% went on to receive a custodial sentence.²⁰

A major driver of the increased incarceration and over-representation of Indigenous young people remanded in custody has been the growing Indigenous remand population. A further worrying aspect of this is that many of those refused bail and remanded in custody are under 15 years of age.²¹

And many of those on remand are held in custody for very short periods – 3 to 4 days – which begs the question of why they were detained in the first place. There is more punishment here than justice.

This situation is aggravated by unrealistic bail conditions, coupled with ‘zero tolerance policing’ that sees Indigenous young people routinely breached for minor deviations from strict bail conditions, especially curfew, residence and non-association conditions that are highly unrealistic in the circumstances of the lives of the young people they apply to.

In our experience, arrests for breach of bail conditions, triggered by minor infractions - being 15 minutes out of curfew, or leaving the family home where there was heavy drinking and violence, to go to a safer residence - are not rare exceptions: they accurately reflect systemic policing policy. A conviction for breach of bail reduces the likelihood of being granted bail in the future and heightens the prospect of a custodial sentence for any future substantive offence.

There is a compounding effect caused by the initial closure of the gate to diversionary options.

While, in jurisdictions like NSW, courts may subsequently order the referral of matters to Youth Justice Conferencing, exposure to the damaging and potentially spiralling effects of the system has already occurred. Given that around nine out of ten children plead guilty when they arrive in court, they forego their procedural due-process rights, including the opportunity to

challenge initial police actions and decisions.²² As a matter of procedural fairness there is a need for secondary screening mechanisms, such as those operating in New Zealand and Victoria, provided by specialist police youth sections which are able to discontinue prosecutions.

Victoria Police's approach to working with young people is coordinated and managed through a very active and well resourced Youth Affairs Office which has the responsibility for leading policies designed to reduce repeat offending, youth victimisation and increased diversion from the criminal justice system. Genuine systemic reform across Australian police services would have a marked impact on the success of the diversionary approach to juvenile justice.

Youth justice principles under the *Children, Young Persons and their Families Act 1989* (NZ) provide an excellent reference point for Australian practice. The principles apply to any person exercising powers under the Act, including police. The principles state that:

- (a)... unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:
- (b) the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau¹, or family group:
- (c) the principle that any measures for dealing with offending by children or young persons should be designed—
 - (i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
 - (ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:
- (d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:
- (e) the principle that a child's or young person's age is a mitigating factor in determining—
 - (i) whether or not to impose sanctions in respect of offending by a child or young person; and
 - (ii) the nature of any such sanctions:
- (f) the principle that any sanctions imposed on a child or young person who commits an offence should—

- (i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group; and
- (ii) take the least restrictive form that is appropriate in the circumstances:

(g) the principle that any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending:

(h) the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

1. Whanau is a Maori term meaning family.

The presumption is strongly against criminal proceedings. Any sanction should be the least restrictive possible and designed to promote the development of the child or young person, within his family and community. Similar objectives are claimed by comparable Australian legislation.

Two factors are striking about the NZ legislation.

First, it expressly states that criminal proceedings should not be used solely to provide assistance or services needed to advance the welfare of the child or young person.

In Australian jurisdictions the gross paucity of services and assistance within the community results in detention becoming the only realistic option to remove Aboriginal and Torres Strait Islander young people from the immediate risk factors they are surrounded by and to receive some form of help. Aboriginal and Torres Strait Islander juveniles are absorbed into the criminal justice system as a surrogate source of assistance and services unavailable outside the system.

Second, the NZ legislation is highly inclusive of Indigenous families, and the wider Indigenous community. They are regarded as integral to measures designed to deal with offending. Measures should be designed to strengthen the child or young person's extended family and foster their independent ability to care and guide their young people. Promoting the development of Indigenous young people within the family group is the express aim.

This point identifies one of the most critical elements in the successful diversion of young Aboriginal and Torres Strait Islander people: the central role of Aboriginal and Torres Strait Islander communities in the design and delivery of programs.

The use of off-the-shelf programs administered by non-Aboriginal and Torres Strait Islander experts, slightly modified for Aboriginal and Torres Strait Islander people, do not have the same capacity to engage as those which are

community driven or rely on community involvement like mentoring, post release support, Aboriginal courts, Circle Sentencing and community justice groups. Diversionary programs that are organic to Aboriginal and Torres Strait Islander young people and their communities are closer to their culture, needs and experiences.²³

...Aboriginal and Torres Strait Islander people are less likely to participate in mainstream programs and more likely to drop out than non-Aboriginal and Torres Strait Islander participants²⁴ [and] the lack of Aboriginal and Torres Strait Islander specific programs has been identified as a major barrier to Aboriginal and Torres Strait Islander participation and successful reintegration from prison.²⁵

Aboriginal and Torres Strait Islander developed programs - like Red Dust Healing, Ending Offending, Ending Family Violence, and Journey to Respect – move from a different starting point and have a more embracing perspective than conventional individualised programs.

Individual harms and wrongs are placed within a collective context. On the one hand, offenders are dealt with as individuals responsible for their own actions; their pain and the forces propelling them to harmful behaviour towards themselves and others are confronted. However, they are *understood* within a collective context of the experience of Indigenous peoples in a non-Indigenous society. The explanatory context, the explanation for behaviour, is within collective experiences of Indigenous people.

In this sense Indigenous programs are unique because they seek individual change within a collective context. Mainstream programs can not and do not do that – they do not understand individual change as part of a collective experience.

This is why Indigenous programs and Indigenous people prioritise the concept of healing: healing is quintessentially and simultaneously an individual and collective experience. It is far more expansive a notion of rehabilitation. It is about healing yourself, healing your relationship with others, understanding yourself within a cultural framework and healing your community.²⁶

Aboriginal and Torres Strait Islander diversionary programs not only have the potential to address the immediate problems of young offenders, the community members who participate in them model positive engagement in the process.

Government support for such Aboriginal and Torres Strait Islander leadership demonstrates recognition of the standing and abilities of elders to take charge within their own communities. This establishes norms of responsible and respected behaviour. The benefits flow into the wider community as well as to the young people directly involved.

2.5.2 Examples of good practice

Indigenous community justice mechanisms have the potential to tackle both the immediate manifestations of crime together with underlying causes.

The Law and Justice Committees that operated in the central Australian Warlpiri communities of Ali Curung, Lajamanu and Yuendumu demonstrated the potential to blend community leadership and traditional dispute resolution procedures with the work of justice and other agencies in a concerted approach to law and order issues, with particular focus on the interests of women, children and young people.

The program was initiated in Ali Curung and, once established, was introduced through peer modelling by Ali Curung elders to the elders of Lajamanu and Yuendumu. It relied on participation and ownership of the program by the community, acting in alignment with the local police, magistrate and officers of other government agencies. Components included a community-run night patrol and safe-house, pre-court meetings and traditional dispute resolution procedures. Aboriginal decision-making processes were recognised and taken into account within court proceedings.

Criminal justice issues were placed in a deeper perspective of alcohol abuse, community violence and the needs of young people. A Community Law and Order Plan was developed to reduce substance abuse, improve safety, health, school attendance and to create sports and recreation activities. The plan was developed over a sustained period of time by the community, in consultation with government agencies and culminated in the signing of an agreement by all agencies as a means of coordinating their services in support of the plan. The agreement was expressed in these terms:

The Ali Curung Law and Order Plan is a holistic response by Government to assist the community address a range of law and order concerns.

The Plan has these main objectives

- to reduce the levels of community and family violence and associated law and order concerns,
- to enable greater participation by Aboriginal people in law and justice processes, and
- encourage greater responsibility in local law and order matters by Aboriginal people.

The following agencies signed the agreement: Territory Health Services; Office of Women's Policy; Office of Aboriginal Development; Department of Sport and Recreation; Ali Curung Community Council; NT Correctional Services; Housing and Local Government; Department of Education; Family Youth and Children's Service. The NT Police Service gave in principle support.

Not only the substance, but the methodology of the Law and Justice Committee in Ali Curung set a bench-mark in best practice of a genuine community-led holistic approach that achieved its objectives over a sustained period. Its demise is described in the context of the next term of reference.

The NSW Youth Drug and Alcohol Court, stands as an example of good practice – together with a pilot program called the Intensive Court Supervision (ICS) program. It was run as a pilot program in Brewarrina and the Bourke Courts in 2005-06 by the Attorney-General's Department. Major stakeholders involved in the program were the Department of Juvenile Justice (DJJ), Aboriginal Legal Service, the Courts, Department of Health and Education, TAFE and of course the Aboriginal elders in each of the communities.

Based on the Youth Drug Court model in Sydney, its distinctive difference was that the young person did not need a drug problem as such, but broadly problematic criminal behaviour that had lead the young person to be in danger of incurring a gaol sentence.

It was a diversionary program that was aimed at young offenders above the age of 16 years old. The key players at court were the young person, the Magistrate, parents and/or guardians, the Police Prosecutor, the Aboriginal Legal Service solicitor and a Juvenile Justice officer.

Characteristically, the ICS program at Brewarrina and Bourke Courts was terminated due to a lack of funding²⁷ This was intensely disappointing. The program had a lot to offer the young person and the community. The program's integrity was sound. Certainly, the DJJ, Health, Education and TAFE were all in place to provide their specialised services for the young person. However, many of the young people, who were predominantly male, wanted to work. There was a huge lack of employment and training options available in the towns.

Many of the elders were involved not only in this program, but in Circle Sentencing for adults and other community programs. A select few did most of the work, and were in danger of being burnt out by the tough workload, for no financial remuneration. The elders were the only group in the program that did not get paid for their contribution to the program.

Circle Sentencing – developed initially as a pilot program in Nowra – provides another example of the successful participation of community elders in the sentencing of offenders who are facing the real prospect of a sentence to detention. It is based on restorative justice principles and raises the awareness of an offender of the damage they have done, the impact on the victim, the impact on the offender's family and community.

The procedure places the offender's behaviour in a human context, stimulating remorse, shame - and understanding. While the sentence is ultimately imposed by the magistrate, the victim, family members, elders, Aboriginal Legal Service solicitor and police all have the opportunity to express a view on appropriate punishment and reparation. It is usual that a

consensus is reached. Sanctions are not lenient. The Victorian Children's Court provides another model of the inclusion of Aboriginal elders in the justice process and sentencing.

The payment of Aboriginal and Torres Strait Islander elders and community representatives for the considerable demands of their work in these programs is an open question. Equity would clearly demand it. However, some elders are adamant that they do not wish to be paid. It is work for their communities and young people. The introduction of financial reward, in their view, may distort the underlying value of the process which is founded on care and healing. It has been thought that payment may attract participants for the wrong reasons and compromise the quality of the process.

While bearing these issues in mind, it would seem that provision for payment on terms comparable to other non-Indigenous participants should be the default position, negated only by the express decision by an elder to decline payment.

2.6 The scope for the clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the justice system.

This is a critical issue. To effectively and efficiently deliver services, coupled with facilities, to support the programs addressing the multivalent issues underlying Aboriginal and Torres Strait Islander juvenile and young adult involvement in the criminal justice system – coordination between government service providers must be achieved.

The targeted convergence of justice and health services in the context of the NSW Youth Drug and Alcohol Court demonstrates both the need and value of such coordination. Individual offenders gain the benefit of aligned supervision and treatment through interagency teams pursuing a clearly identified common objective.

The common objective centres on the marshalling of all relevant resources in support of the individual's rehabilitation.

In our experience it is usually our legal representatives that must expend a great deal of time and energy on behalf of our clients trying to gain access and qualify for a diversionary option, obtaining clinical assessments, other reports, finding accommodation or a residential rehabilitation centre that is able to accept our clients. On a case by case basis, the individual elements of an integrated response must be stitched together.

The conditions for access to diversionary options or other court dispositions, together with establishing our client's eligibility for entry to treatment services are determined by each separate department or agency involved. Sometimes eligibility requirements are in conflict. The time taken to build *ad hoc* each case prevents swift intervention. In the meantime our client sits in a lock-up, may have breached the terms of their bail or committed another offence. Time is of the essence if an intervention is to have the greatest prospect of success

with young offenders. Responses in the juvenile justice system must be fluent and swift.

Individual programs and services tend to be 'owned' by separate departments, resulting in lack of coordination, duplication, or – more frequently – gaps in services. If an authentic holistic approach to tackling offending behaviour is to be achieved the alignment of government responsibilities must be radically improved. They must be effective, in practice, at a local level. They should be guided by the common objective of meeting the best interests of the children and young people at risk of entry to the criminal justice system.

While the generic objective of the best interests of the child is commonly acknowledged by various departments and agencies, it is not translated into combined, disciplined practice. The perspective of the department tends to over-ride the perspective of the child.

Our observation is that 'well intentioned approaches' often result in different departments competing for resources, and the creation of mini empires giving rise to conflict. Who will receive the funds and who will hold governance of the program or service?

This results in horizontal competition, the professional siloing of interventions and the undermining of – or indifference towards – the activities of other departments. Within government departments and agencies there is also vertical tension between various levels of the bureaucracy. Central control competes with local management. Pursuit of the core service objective is dampened, initial common intents are frustrated and the inevitable rapid run-out of resources, both financial and human, results in co-ordinated provision failing.

Every program be it health, alcohol minimisation, juvenile justice, parenting, education, policing, economic employment capacity building in communities must always have a client focus at its core and remain the focus through the planning, resourcing, activating and evaluating stages of any project.

One way to counter these tendencies and retain a common, practical focus is to build up. Start with the location of the problems to be addressed. In the community most affected by young Aboriginal and Torres Strait Islander people at risk of entering the criminal justice system.

Concerns, needs, resources and the common objectives should be identified through discussion with all those immediately affected – the Aboriginal and Torres Strait Islander community, the wider community, representatives of police, justice agencies, Aboriginal and Torres Strait Islander Legal Service, health, housing, education, sport, employment etc. The design of concerted, coordinated services and programs to address identified problems is best located in the place and with the people living and working where impact is sought.

The Committee's attention is particularly drawn to the planning process and formal agreements concerning the commitment of government and community resources that preceded the establishment of the Law and Justice Committees that operated in Ali Curung, Lajamanu and Yuendumu in the Northern Territory. Clear roles and accountabilities were agreed to identify

community responsibilities and maximise community participation in the diversion of their children and young adults from the criminal justice system. A defined structure was developed to inter-face with government departments and coordinate services. These arrangements were formally recorded in the Community Law and Order Agreements enabling a clear identification of objectives, roles and responsibilities at the ground level, where services were to be provided.

Its demise in 2002 was associated with the transfer of 'ownership' from the department that initiated the program to another government department. It was cut despite its success in the view of government service providers directly involved, the elders of the Warlpiri communities in which it operated, several agencies that evaluated the program, including Desert Knowledge CRC. It is an object lesson in a good program broken on the failure of government coordination and differing departmental perspectives. While the planning and negotiations leading to the establishment of the Ali Curung Law and Justice Committee were long and detailed: the reasons for closure of the program in their community, remains a mystery.

The *Law and Justice (Cross Border and other Amendments) Act 2009* (Cth) (the Act)²⁸ is a welcome example of a legislative initiative to ensure the coordination and definition of clearer responsibilities within and between government jurisdictions. It arose from the Cross Border Justice Project which was established to address and improve the safety and security issues of Aboriginal peoples living in the Central Desert – Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) regions of Australia. The traditional areas involved flow across the cross-border regions of the Northern Territory, Western Australia and South Australia.

The concept was initially modelled on the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPYWC), a non-Government organisation providing support and advocacy services for Aboriginal women in the NPY region.

The Council operated as one organisation under a tri-State model. This model has now been adopted under the Act, and substantially supports our position that when Aboriginal community controlled organisations are engaged, those organisations are in the best position to discuss and implement particular programs. New programs initiated by Aboriginal and Torres Strait Islander communities may, if given Government recognition and support, result in new legislation being enacted for the benefit of Aboriginal and Torres Strait Islander communities.

It is intended that the legislation will create a legal and administrative framework allowing the justice systems to operate much more freely and effectively, importantly with community support. In this case across the borders of the Northern Territory, South Australia and Western Australia.

We submit that there is a need for cross border legislation applicable to the cross border regions of Queensland and the Northern Territory. The lack of legislation for Queensland and the Northern Territory perpetuates the difficulty of the justice system operating effectively when people are attempting to

evade police and the justice system, as justice services operate exclusively in each State.

The lack of cross border legislation for Queensland and the Northern Territory undermines the safety of the Aboriginal community living on the Queensland/Northern Territory border. It adds further complexities to COAG's goal of achieving a collaborative approach and positive action initiatives across Australia including the 'closing the gap' strategies.

2.7 The extent to which current preventative programs across government jurisdictions are aligned against common goals to improve the health and emotional well-being of Indigenous adolescents, any gaps or duplication in effort, and recommendations for their modification or enhancement.

A number of problems presently exist in aligning current preventative programs with common goals of improvement across Federal and State jurisdictions. The initiative to attain broad improvements in the health and well-being of Aboriginal and Torres Strait Islander adolescents is welcome. Concerted Federal and State governments' drive to achieve holistic improvement is well overdue, however what is missing is a long term practical improvement plan for all Aboriginal and Torres Strait Islander peoples regardless of urban, rural or remote residential status.

While COAG and Department of Families, Housing, Community Services and Aboriginal and Torres Strait Islander Affairs (FaHCSIA) strategies – such as, the rural and remote service delivery strategy - have established the goals for improvement, what is fundamental to success is their implementation at ground level. This requires dismantling the existing dichotomy of “us and them” between Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander service providers.

The existence of this dichotomy directly contributes to the duplication in effort and the gaps in the service delivery system. Without concurrent policies of achievement, change in attitude and key performance indicators for non-Aboriginal and Torres Strait Islander service providers, future initiatives will simply result in further failed attempts to improve the health and well-being of Aboriginal and Torres Strait Islander adolescents, with its corresponding impact on the high level of involvement of Aboriginal and Torres Strait Islander juveniles and young adults in the criminal justice system.

In our experience, a critical flaw in the current system is the inability of government to actually identify where allocated funds are being distributed in communities. This is particularly apparent in relation to non-governmental agencies receiving funds Federal and State Departments or both. It is imperative for all Federal, State and non-governmental agencies in urban, rural and remote locations to know who provides what service, whether or not there is any collaboration between agencies and Departments and what strategies and outcomes are to be achieved and more importantly measurements of these achievements. It is a critical issue of accountability, leading to enhanced, coordinated service delivery.

Non-Aboriginal and Torres Strait Islander service providers are not, in many instances, consistently engaging with Aboriginal and Torres Strait Islander peoples in communities and, accordingly they are unaware of what is currently being done and of the initiatives within communities that are working.

In order for preventative and early intervention programs to be successful Federal and State Governments must engage providers who have proven cultural competence, and are capable of successfully negotiating change. Aboriginal and Torres Strait Islander community controlled organisations are always in a better position to be able to discuss and implement particular programs and introduce holistic change in their particular community.

A proactive and realistic approach to preventative programs with a particular focus on early intervention programs for education, health, justice, child protection and housing in urban, rural and remote areas is essential to achieve a critical mass of demonstrable improvements in the health and emotional well being of communities.

Re-engineering of the social fabric that currently exists across Aboriginal and Torres Strait Islander communities is crucial if any of the COAG and FACHSIA strategies are to be achieved.

Alcohol and substance abuse, combined with or precipitating, mental health problems are frequently associated with offending. They are most often left undiagnosed and/or untreated throughout periods of contact with the criminal justice system - leading to repeated offending and sentences of detention. The Children's Clinic associated with the Children's Court of Victoria provides the bench-mark of a specialist service which has the capacity to screen young people, enabling their full circumstances to be put before the court prior to sentencing.

3.0 Aboriginal and Torres Strait Islander Legal Services: their expanding role in reducing contact by Indigenous juveniles and young adults with the criminal justice system.

In developing more effective pathways into diversionary programs - away from formal, adversarial criminal proceedings - it must be recognised that one of core responsibilities of Aboriginal and Torres Strait Islander Legal Services is to protect the rights of our young clients.

It is not entirely unknown for Aboriginal and Torres Strait Islander juveniles to be falsely charged, overcharged or inappropriately charged. They are entitled to the full protection of the law – to challenge the allegations made against them, test the strength of the evidence and to put forward a full defence of their innocence.

The provision of formal advice, attending police interviews and court appearances are, and will remain, a central role performed by all Aboriginal and Torres Strait Legal Services.

In addition, we dedicate considerable effort to ensuring that our clients obtain equitable access to diversionary programs. To the degree we are able, we

also act to reduce risk factors in our communities - assisting young people and their families to address underlying issues and environmental factors that predispose them to contact with the criminal justice system. Our practice is to provide a comprehensive service, to the full extent of our resources.

The legal and non-legal officers of Aboriginal and Torres Strait Islander Legal Services have a clear understanding of the manifold needs of our clients and their families. We are governed by Aboriginal and Torres Strait Islander boards of management. We are part of the communities that we serve. We not only have deep local knowledge of needs, we act as a trusted broker to link up our people with the services and facilities of government and non-government agencies. We endeavour to provide a holistic service to pre-empt and reduce the drivers of contact with the criminal justice system.

While the police act as the gatekeepers of many diversionary options such as warnings, cautions and referrals to Youth Justice Conferencing – our legal officers are critical to the successful operation of these programs. We maintain a 24 hour hot-line for young Aboriginal and Torres Strait Islander people who come into contact with the police day or night. Our clients' immediate access to legal advice and negotiation with police officers can directly affect the exercise of discretionary decisions at this critical point.

At the street level, in practice, it is to Aboriginal and Torres Strait Islander legal services that our young people go for advice – whether it is in relation to formal police cautions or the NSW Tag and Release scheme, where police specifically direct young Aboriginal and Torres Strait Islander people to our service. Access to bail and the conditions set by either police or a magistrate may be affected by our ability to locate the parents, arrange for care by a responsible adult, find alternative safe accommodation or a place in a rehabilitation program.

In court settings such as the NSW Youth Drug and Alcohol Court and ICS program our legal officers work with the magistrate, police, DJJ, DPP, and Corrections Health as part of a non-adversarial inter-agency team to supervise the rehabilitation of our clients.

Access to many diversionary options throughout Australia requires the offender to acknowledge guilt, as a threshold condition. There is a relationship of trust that must stand behind any legal advice to accept and acknowledge guilt and to take responsibility for your actions. Direct participation by Aboriginal and Torres Strait Islander legal and field officers is integral to the operation of Youth Justice Conferencing, Circle Sentencing and Murri Court.

Front-end entry to the criminal justice system is critically affected by the work of Aboriginal and Torres Strait Islander Legal Services. Given the exceptionally high rates of Aboriginal and Torres Strait Islander young people who are arrested, denied bail and held on remand, awaiting trial or sentencing - this is an area where enhanced capacity in our services could bring significant results.

In Queensland in 2003-04 – 83% of all admissions to detention that involved young Aboriginal and Torres Strait Islander people were as a result of being

remanded in custody.²⁹ In NSW in 2007-08 and in Western Australia in 2008-09 – 85% of those detained were on remand.³⁰ According to the WA Department of Corrective Services data, in 2007-08 it cost over \$190,000 per year to incarcerate a juvenile. Remanding children in custody costs around \$15,000 per stay.³¹

We offer pro-active support designed to resolve problems that may lead to re-offending. The provision of through-care to offenders – both pre- and post-release - is assuming greater significance in our work. Re-entry to the community from detention is a precarious time. One area of post-release support that is very often over-looked is the importance of legal needs.

Young people leaving institutions are not 'free' except in the most superficial sense. They have a range of legal webs that retain them within criminal justice networks (warrants, on-going supervision, outstanding charges, further police surveillance, outstanding fines, non-finalised court appearances) and these conditions tend to propel them back into the juvenile justice system and detention. This affects both Indigenous and non-Indigenous young people, but it has greater impact for Indigenous youth because of their particular circumstances, their usually longer prior records and levels of surveillance.³²

Through-care has become 'probably the most significant gap in service' by correctional agencies.³³

Building on our established relationship with clients, a thorough knowledge of their criminal history and outstanding legal matters, their personal and family circumstances – Aboriginal and Torres Strait Islander Legal Services are in a unique and trusted position to manage successful re-entry to the community.

We are developing a range of specialist non-legal services to address systemic sources of risk to young Aboriginal and Torres Strait Islander people:

The Aboriginal Legal Service NSW/ACT has Family Violence Contact Officers – women trained and experienced in assisting victims of family violence who act as a first point of contact for victims seeking assistance to break the cycle of violence.

The Prisoner and Family Support Service officers visit adult prisons, juvenile detention centres, police stations and corrective services holding cells. The maintenance of family ties and the management of the difficult process of re-entry to the community are an essential part of the through-care of offenders.

Our Family Law and Children's Care and Protection Services address problems that are not limited to legal issues – they grapple with the social and family dynamics to help resolve problems affecting the safety and security of women and children.

We have an active policy of building the representation of women within our services – as lawyers, field officers and other staff, such as those in

Queensland who prepare pre-sentence reports addressing the underlying causes of offending.

Our capacity to maintain these services - to recruit, train and retain Aboriginal and Torres Strait Islander Legal Service officers - is increasingly constrained by funds as the demand rises. We cannot match the salaries and conditions of government agencies. Our ability to respond adequately to the high level of demand is constantly stretched. Our potential contribution is diminished.

The underfunding of Aboriginal and Torres Strait Islander Legal Services and the workloads which we carry directly impacts on our ability to represent the interests of Aboriginal and Torres Strait Islander young people. It is reflected in outcomes.

A comparison may demonstrate that the disparities in the Australian criminal justice system do not merely apply to our clients.

In 2008 the North Australian Aboriginal Legal Aid Service (NAALAS, now NAAJA) had half the budget of the Northern Territory Legal Aid Commission (NTLAC) although it dealt with 3 times as many criminal matters, and a greater combined number of criminal, civil and family law matters.

Typically our lawyers have markedly greater case loads, are paid less and have fewer resources to prepare each case. To take another figure from the Northern Territory comparison, a further indicator of this disparity in resources is the money spent on client costs in criminal matters – medical examinations, pathology and other tests, expert evidence, psychological assessments, travel expenses and witness costs, etc. NTLAC expended \$871,357 compared to \$60,000 by NAALAS – and this amount was spent on one third of the number of criminal cases run by NALAAS. As an average, court costs for criminal matters by NTLAC were \$762 per matter; compared to \$17 per matter by NAALAS.³⁴

The degree of such differentials in the funding of Aboriginal and Torres Strait Islander Legal Services is a straight forward issue of equity and justice for our clients. Given the complexity of the problems that attend most of our client's cases and - particularly in rural and remote settings - the increased costs of communication and travel, a positive differential would be justified. Plain parity would be welcome.

The negative differential in access by young Aboriginal and Torres Strait Islander people to diversionary programs mirrors the negative differential in the funding of their legal services. It is not the major factor accounting for lower rates of admission to diversionary programs, but it clearly affects our ability to obtain reports and assessments, locate accommodation or a place in a rehabilitation centre – to build a persuasive case that may open the door to a diversionary option.

It is submitted that the current level of funding to all Aboriginal and Torres Strait Islander Legal Services is a salient matter for the Committee's attention.

From one perspective, Aboriginal and Torres Strait Islander Legal Services are a form of diversionary program. Our entire expertise and focus is on preventing the entry of our young clients to the criminal justice system: finding effective ways to resolve risk factors in a non-custodial setting. The leverage that our services could provide in reducing contact with the criminal justice system is not sufficiently supported to achieve the greatest impact.

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