



Law Council
OF AUSTRALIA

RECEIVED
28 JAN 2010

BY: ATSA

R.L.

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

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

27 January 2010

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Introduction and background	3
Greater proportion of Indigenous juveniles sent to court	3
Greater likelihood of a custodial sentence	4
Deterrent effect of custodial penalties.....	5
General comments	5
Diversionary conferencing and police cautioning.....	6
Sentencing	6
Recommendations	7
Bail	8
Sentencing courts	9
Aboriginal legal services	10
Cultural awareness	11
Guidelines	11
Attachment A: Profile of the Law Council of Australia	13

Introduction and background

1. The Law Council welcomes the House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into high levels of involvement of Indigenous juveniles and young adults in the criminal justice system.
2. High rates of Indigenous incarceration should be a concern for all Australians, particularly in relation to detention of Indigenous youths. The Productivity Commission reports the average rate of Indigenous incarceration to be 13.3 times that of non-Indigenous Australians.¹ A more recent study has indicated that Indigenous incarceration rates are rapidly worsening, up to 14 times the rate for non-Indigenous Australians as at 30 June 2009.²
3. In 2006, Indigenous juveniles were 21 times more likely to be incarcerated than non-Indigenous juveniles. Overall, the ratio of Indigenous to non-Indigenous juvenile incarceration trend has trended upwards. The average rate of Indigenous to non-Indigenous juveniles detained over the period 1994-1999 was 17.5; while from 2000-2006, the rate was 21.4.³
4. In 2006, 49% of juveniles arrested in WA were Indigenous, with a further 3% whose Indigenous status was unknown. In the NT, the figure is over 75%, in Queensland 33%, in NSW 17%, in SA 20% and in the ACT 19%. The exception was in Victoria, where the percentage of arrests of juveniles of 'Aboriginal appearance' was only 3% (which still amounts to a higher rate of arrest than for non-Indigenous persons).⁴
5. It is also noted that the high and increasing rate of Indigenous juvenile incarceration should be considered in the context of an overall decrease in the rate of juvenile incarceration across Australia – for both Indigenous and non-Indigenous juveniles. Since 2000, the rate of Indigenous and non-Indigenous incarceration has fallen by 24% and 38% respectively.⁵
6. When comparing findings for juveniles against those of the adult population, it is also useful to bear in mind the differences in demographic distribution across different age-groups. Aboriginal and Torres Strait Islanders comprise approximately 2% of the total Australian population, but comprise 5% of the 10-17 age group.
7. Some concerning findings of recent studies into Indigenous juveniles' contact with the criminal justice system include the following:

Greater proportion of Indigenous juveniles sent to court

8. There are a substantially greater proportion of Indigenous juvenile offenders who are dealt with in court, as opposed to diversionary options now available to police in all jurisdictions (such as caution, warning or diversionary conferencing). That is,

¹ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission, Commonwealth of Australia.

² Australian Bureau of Statistics, 2009, *Prisoners in Australia*, Commonwealth of Australia, page 47. See [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A570D4363D75FE30CA257687001D5128/\\$File/45170_2009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A570D4363D75FE30CA257687001D5128/$File/45170_2009.pdf)

³ Data extrapolated from Taylor, N., *Juveniles in Detention in Australia, 1981-2006*, Technical and Background Paper No. 26, Australian Institute of Criminology, Commonwealth of Australia, Table 14.

⁴ Taylor, N., *Juveniles in Detention in Australia, 1981-2006*, Technical and Background Paper No. 26, Australian Institute of Criminology, Commonwealth of Australia.

⁵ *Ibid*, page 16.

following the point of arrest and laying of charges, the rate of diversion into family/diversionary conferencing or cautioning by police is higher for non-Indigenous defendants than for Indigenous defendants.

9. For example, Indigenous juveniles coming into contact with Queensland Police were more than twice as likely to be arrested, half as likely to be issued a caution and half as likely to be diverted to a community conference. Similarly in NSW, Indigenous juveniles were two-and-a-half times as likely to be dealt with in court. In SA, Indigenous juveniles were 35% more likely to be dealt with in youth court. In the NT Indigenous juveniles were around 20% more likely to be dealt with in court.⁶
10. The cause of this trend is unclear. However it is considered that the greater proportion of Indigenous juveniles sent to court, rather than diverted away from the court system into alternative, therapeutic and holistic justice mechanisms, contributes directly to the higher rates of Indigenous juveniles in prison detention and on remand.
11. The lower rate of diversion of Indigenous offenders may be explained by the greater likelihood of Indigenous offenders having multiple charges, previous criminal convictions, substance misuse problems (which fall outside the scope of existing diversionary justice programs) and the requirement to admit guilt.⁷ It is not known to what extent cultural and language barriers contribute to the lower rate of diversions for Indigenous offenders.
12. It is noted that there is a relative paucity of information or data collected and published by children's/juvenile courts across Australia and that differences in legislation and policies make it difficult to extrapolate findings in one jurisdiction to another.⁸ It is recommended that all courts develop common systems for recording and collating data about defendants, including (where consented to) in relation to Indigenous status.

Greater likelihood of a custodial sentence

13. Among those who are sentenced by the courts, Indigenous juveniles are significantly more likely to be given a custodial sentence than non-Indigenous juveniles.
14. For example in WA, in 2005, Indigenous juvenile defendants were around 3 times as likely to receive a custodial sentence, compared with non-Indigenous juvenile defendants.⁹ This is despite that the total number of Indigenous juveniles sentenced was approximately the same as non-Indigenous.
15. Courts in other jurisdictions do not publish data on sentencing outcomes by Indigenous status and it is therefore not possible to draw inferences about other jurisdictions from this data alone. However, national overrepresentation of Indigenous juveniles in custody (at 21 times the rate for non-Indigenous juveniles) suggests that there may be a similar trend in sentencing practices in other jurisdictions as well.

⁶ *Ibid*, *op cit* 2, pages 58-59.

⁷ National Indigenous Drug and Alcohol Committee, 2009, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Australian National Council on Drugs, Commonwealth of Australia, page 9. See also Joudo, J, *Responding to substance abuse and offending in Indigenous communities: review of diversion programs*, Research and Public Policy Series, No. 88, Australian Institute of Criminology.

⁸ *Ibid*, *op cit* 3, page 86.

⁹ *Ibid*, page 91, table 39.

Deterrent effect of custodial penalties

16. Recent studies suggest that custodial sentences generally do not deter offending behaviour. More than two-thirds of offenders given a custodial sentence in the NSW Children's Court are convicted of a further offence within 2 years of their custodial order. All other factors being equal, juvenile offenders given a custodial sentence are 74% more likely to be convicted of a further offence than those who receive a non-custodial sentence.
17. Overall, the findings of various studies into custodial penalties and recidivism are that (1) the incidence and duration of custodial penalties for Indigenous juvenile and adult offenders is increasing and (2) the rate of recidivism is substantially higher among those who have served a custodial sentence.
18. It has also been found that:
 - (1) Indigenous offenders are more likely to re-offend than non-Indigenous offenders after serving a custodial sentence;¹⁰
 - (2) The younger the age of incarceration, the more likely it is that an offender will reoffend and enter a cycle of recidivism;¹¹
 - (3) Indigenous offenders are more likely to begin offending regularly at younger ages than non-Indigenous offenders;¹²
 - (4) Drug and alcohol misuse is more likely to begin at a younger age for Indigenous juveniles than for non-Indigenous juveniles; and¹³
 - (5) Indigenous offenders are more likely to receive custodial sentences for violence and property offences.

General comments

19. It is clear that the reasons for presumed higher rates of Indigenous juvenile offending are complex. Various studies have suggested causal factors including (but not limited to) higher rates of poverty and disadvantage among Indigenous Australians, lower rates of attainment in primary and secondary education, and alcohol and drug misuse. Incarceration, in the absence of effective rehabilitation, arguably contributes to a perpetual cycle of recidivist behaviour due to stigmatisation associated with imprisonment (effecting employment prospects), greater exposure to the wrong influences, lack of facilities to treat underlying health issues, among other things.
20. Whilst the urgent need to address the underlying disadvantage faced by Indigenous Australians has been clearly identified by successive government (and most recently by the Prime Minister, Kevin Rudd), it is also of critical importance that any systemic discrimination within the criminal justice system be identified and removed and that a greater number and range of options be developed as an alternative to incarceration or detention.

¹⁰ Joudo, J., *Responding to substance abuse and offending in Indigenous communities: review of diversion programs*, Research and Public Policy Series, No. 88, Australian Institute of Criminology.

¹¹ *Ibid*, page 6-7.

¹² *Ibid*, page 7.

¹³ *Ibid*, page 9.

Diversory conferencing and police cautioning

21. As noted above, it has emerged from recent studies that Indigenous offenders are much less likely to be diverted into family or youth conferencing, or be issued a caution in preference to a formal charge, than non-Indigenous offenders.
22. An Australian Institute of Criminology study¹⁴ examined diversion practices in WA, SA and NSW, comparing treatment of juvenile offenders according to Indigenous status. The study found that in all three jurisdictions, Indigenous juvenile offenders were significantly less likely to be diverted into conferencing or issued a caution by police, when compared with non-Indigenous juvenile offenders of similar background, sex, age and criminal history. This has been supported by other studies,¹⁵ which have also concluded that a substantial proportion of arrests resulting in detention of Indigenous youths (as high as 80%) include those being held on remand due to inability to meet increasingly restrictive bail conditions.
23. It has been argued that bias in the exercise of police discretion against Indigenous youths (e.g. in the decision to arrest rather than caution offenders) results in Indigenous people acquiring a longer criminal record at a young age, increasing their risk of detention or imprisonment when they reappear in the justice system.¹⁶ However, further studies¹⁷ have found that the effect of Indigenous status on the likelihood of incarceration “reduces considerably when other factors are controlled for”¹⁸ (e.g. number of prior convictions, number of concurrent convictions, seriousness of/type of offending, etc). Indigenous offenders were twice as likely as non-Indigenous offenders to have been subject to a prior conviction, suspended sentence or periodic detention; twice as likely to be subject to 3 or more concurrent convictions; almost 4 times as likely to have 8 or more prior convictions; and 25% more likely to be charged with a serious violent offence.
24. The later studies referred to above do not exclude the possibility of bias in the exercise of police discretion. Indigenous youths generally have a longer criminal record than non-Indigenous youths, increasing their risk of recidivism and incarceration in adulthood. It is particularly concerning that first-time Aboriginal and Torres Strait Islander offenders are more than twice as likely to be referred to a court for sentencing. Whilst this may be explained by other factors, including the greater likelihood of Indigenous offenders being charged with more than one offence or a serious violent offence and the application of guidelines in the exercise of police discretion, it presents a sufficient case for appropriate cultural awareness training for police and other measures to improve police interactions with young Indigenous offenders.

Sentencing

25. Among juvenile offenders sentenced in court, custodial sentences are given to Indigenous juvenile offenders at a higher rate than for non-Indigenous juvenile offenders. Studies have shown Indigenous people are more likely to commit

¹⁴ Snowball, L., *Diversion of Indigenous Juvenile Offenders*, Trends and Issues in Crime and Criminal Justice, No. 355, June 2008, Australian Institute of Criminology, Commonwealth of Australia, page 4.

¹⁵ See Cunneen, C. and Schwartz, M. (2008) 32 Crim LJ 38 at 46.

¹⁶ Cunneen, C., (2006) *Racism, discrimination and over-representation of Indigenous people in the criminal justice system: some conceptual and explanatory issues*, Current Issues In Criminal Justice 17(3), 329-346.

¹⁷ Snowball, L. and Weatherburn, D., *Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?*, Australian and New Zealand Journal of Criminology, Vol. 40, No. 3, 2007, p 272-290.

¹⁸ *Ibid*, p 284.

property and violent offences and are more likely to be sentenced to imprisonment when convicted of those offences.¹⁹

26. It has also been observed that Indigenous people are more likely to be remanded in police custody after arrest, rather than receive a court attendance notice.²⁰ This is because, after the option to arrest is exercised, Indigenous offenders may more often fail to meet bail conditions or be refused bail. Cunneen and Schwartz²¹ note that “In Queensland, in 2003-2004, 84% of all admissions of Indigenous young people to detention were as a result of being remanded in custody.” It is further noted that increasingly punitive amendments to bail laws has shifted the presumption further and further against bail, particularly for repeat offenders. This is particularly concerning, given the large proportion of remandees who are ultimately given a non-custodial sentence (45% in NSW).²²
27. It is further noted that there may be limited sentencing options available to the courts, particularly in regional and remote areas, due to the lack of infrastructure or local public administration to carry out or monitor alternative sentences.²³ This may contribute to the number of young Aboriginal people sentenced in a court rather than diverted to other remedial or therapeutic options.
28. Notwithstanding this, there is evidence that courts are aware of the limited options available and the high rate of indigenous incarceration, and attempt to exercise the sentencing discretion to take account of a defendant’s Aboriginal status (see, for example, *R v Fernando* (1992) 76 A Crim R 58). This is supported by data suggesting that Indigenous offenders with a given number of prior convictions are less likely to receive a custodial sentence than non-Indigenous offenders with the same number of prior convictions.²⁴
29. Further, overall reductions in the numbers of juveniles incarcerated (as noted above), in the absence of information suggesting that more juveniles are being diverted into conferencing or non-court justice mechanisms, may indicate that courts are becoming increasingly reluctant to sentence juvenile offenders to periods of incarceration.

Recommendations

30. The given the matters outlined above, particularly with respect to the findings of numerous studies into interactions between Indigenous people and the criminal justice system, the Law Council recommends that:
 - (a) Bail provisions be revised to remove systemic bias against Aboriginal offenders;
 - (b) Alternative court mechanisms, such as Aboriginal sentencing courts, be given greater resources to operate more extensively in regional and remote areas;
 - (c) Funding to Aboriginal and Torres Strait Islander Legal Services (ATSILS) be substantially increased to meet the obvious demand;

¹⁹ Joudo, J., *Ibid*, *op cit* 10.

²⁰ Cunneen, C. and Schwartz, M. *Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access* (2008) 32 Crim L J 38, at 45-46.

²¹ *Ibid*.

²² *Ibid*. See also Aboriginal Justice Advisory Council, *Aboriginal People & Bail Courts* (2002)

²³ *Ibid*, at 47.

²⁴ Snowball and Weatherburn, *Ibid*, *op cit* 17, page 286.

-
- (d) All people involved in the criminal justice system, including judicial officers, lawyers and police, be required to undertake cultural awareness training; and
 - (e) Guidelines be developed for police to encourage the greater use of diversionary conferencing, cautions and out-of-court resolution.

Bail

- 31. The tendency of successive Parliaments over time has been to respond to law and order concerns by imposing increasingly restrictive bail guidelines under legislation, which has increased the number of people held on remand significantly. For example:
 - (a) In 2006 and 2007, the Federal Government legislated to prevent consideration of customary law or cultural background evidence in bail or sentencing of an offender, under both the Commonwealth *Crimes Act 1914* and under Northern Territory bail statutes.
 - (b) Amendments to NSW bail laws in 2002 removed the presumption in favour of bail for repeat offenders, anyone who has previously been convicted of an indictable offence and anyone who has previously failed to appear. Further changes came into effect in 2005, removing the presumption in favour of bail for certain public order offences.
- 32. In NSW between 2000 and 2005, the proportion of Indigenous youths held on remand increased by 30%. This is reflective of a broader national trend toward “tough” bail laws across the country.²⁵
- 33. Increasingly punitive bail laws have a deleterious and disproportionate impact on Indigenous people. The Indigenous youths are more likely than non-Indigenous youths to be arrested and therefore required to apply for bail. They are also more likely to be refused bail, because they are unable to meet certain conditions or are repeat offenders (despite that the nature of the offending may, in many instances, have been minor). They are also more likely to be subject to bail conditions they are unable to meet, resulting in further arrest for breaching bail conditions.²⁶ They are more likely to miss a court appearance (for a variety of reasons) and more likely to have been previously convicted of an offence and previously incarcerated.
- 34. Finally, any provision which restricts the matters a court may consider when determining a bail application is fraught with danger. This is particularly the case with respect to cultural background evidence and customary laws, which may form an integral part of the offender’s identity and therefore the background against which an alleged offence was committed.
- 35. The Law Council recommends:
 - (1) The Crimes (Bail and Sentencing) Act 2006 (Cth) be repealed immediately;
 - (2) Part 6 of the *Northern Territory National Emergency Intervention Act 2007* (Cth) be repealed immediately;

²⁵ Cunneen & Schwartz, *Ibid*, *op cit* 20, at 46

²⁶ *Ibid*.

-
- (3) State and Territory bail laws be reviewed and amended to ensure that, in all cases, there is a presumption in favour of bail for youths for less serious offences.

Sentencing courts

36. Aboriginal sentencing courts, youth courts, drug and alcohol courts and other “therapeutic” or restorative justice mechanisms have been demonstrated to have a greater impact on recidivism, particularly among young people.
37. In particular, Aboriginal sentencing courts have been described as “an approach to justice that advocates the active involvement of communities and individuals in the criminal justice process; it provides the opportunity for empowerment and increased relevance of outcomes through direct involvement in the system and influence over punishment and sanction options. This approach has found support among Indigenous communities.”²⁷
38. The Koori Children’s Court has operated in Victoria since 2005, based around a similar holistic model to the Koori Magistrates Court and the Koori County Court. The court is a sentencing court and offenders are only eligible to be diverted there if they enter a guilty plea and consent to its jurisdiction. Certain offence categories are ineligible for sentencing in the Koori Court, including serious violent offences and sexual offences. The court is characterised by its informal setting and the involvement of Indigenous elders and other community members in the sentencing process. Community elders advise the judge or magistrate with respect to cultural issues, the offender’s background and are permitted to speak directly to the offender, in many cases to “shame” them.
39. There are similar models operating in other jurisdictions, although not all jurisdictions have Aboriginal youth courts. Aboriginal courts are generally operating in their ‘pilot’ stages, although the number of Aboriginal courts operating in some jurisdictions has increased gradually since the first courts were developed (e.g. there are 10 Koori courts now operating in regional Victoria (including 7 Koori Magistrates Courts, 1 Koori County Court and 2 Koori Children’s Court), 9 Circle Sentencing courts in NSW, etc).
40. Early indications suggest that Aboriginal courts have resulted in significantly lower recidivism rates among those tried, compared with ordinary criminal courts. For example, reoffending among those tried in the Koori Courts in Victoria is estimated at almost half the rate among Indigenous people tried through the Magistrates Court.²⁸ Similar results have been reported in Queensland²⁹ and South Australia.³⁰ Early indications suggest Community Courts may also be having a positive effect on recidivism in the Northern Territory.³¹ While a recent report indicated that ‘Circle Sentencing’ in NSW had negligible effect on recidivism rates, it was concluded that

²⁷ Joudo, J., *Ibid*, *op cit* 10, page 14.

²⁸ On the basis of these results, the Koori Court program in Victoria has steadily increased. The Victorian Government recently announced the establishment of its seventh Koori Court - see Victorian Dept. of Justice Media Release, *Victoria’s Seventh Koori Court Opened*, 23 March 2007.

²⁹ Summary of the Review of the Murri Court Report, Queensland Government – see <http://www.courts.qld.gov.au/Factsheets/M-MC-ReviewSummary.pdf>.

³⁰ Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Productivity Commission, Canberra, pages 122-123.

³¹ Jenny Brockland, Chief Magistrate of the Northern Territory, *Remote Justice*, paper presented at the Criminal Lawyers Association of the Northern Territory Bali Conference July 2007.

the findings demonstrated a need to strengthen, rather than abolish, alternative sentencing procedures in that jurisdiction.³²

41. A consistently reported benefit of the Aboriginal courts has been the re-empowerment of Aboriginal elders who participate in the programs.³³ The increased authority of Aboriginal elders is considered to increase social cohesion and order within communities which participate in Aboriginal sentencing courts. Aboriginal sentencing courts have also been said break down cultural barriers between Indigenous offenders and the court system, by allowing community members to communicate with the offender throughout the proceedings. This is attributed with improving understanding between judicial officers and offenders about the offence and the circumstances in which it was committed, which can assist in developing an appropriate response.³⁴
42. A key inhibiting factor for Aboriginal courts has been a lack of resources provided by Federal, State and Territory governments. It is recommended that greater resources be allocated toward the expansion of Aboriginal courts programs, in particular to enable the courts to sit more often in regional and remote areas.

Aboriginal legal services

43. Aboriginal and Torres Strait Islander Legal Services (ATSILS) are desperately underfunded, even compared with unacceptably low (and diminishing) funding given to the Legal Aid Commissions. As noted by Cunneen & Schwartz:

*The most striking evidence of the underfunding of ATSILS appears when comparing the resources available to them with those allocated to LACs. ATSILS provide legal services at a significantly lower cost than LACs while maintaining comparable levels of client satisfaction. Yet the workload of ATSILS lawyers is significantly higher: 52 hours per week compared with LAC practitioners' 42 hours. It continues to be an issue that current funding levels to ATSILS provides a cheap form of legal representation for Indigenous people.*³⁵

44. There needs to be an improvement in the understanding of the importance and value of ATSILS to Indigenous Australians. Over-representation of Indigenous people in the criminal justice system is commonly cited in government and non-government reviews into Indigenous disadvantage, and yet there continues to be enormous underinvestment in ATSILS. Consequently, ATSILS lawyers are paid significantly less than their LAC counterparts, whilst carrying an enormous caseload and working under extremely challenging conditions. Consequently, recruitment and retention of experienced lawyers is described as a "chronic and increasingly acute" problem.³⁶ Cunneen & Schwartz note that:

A further indication of this disparity in resources is the money spent on client costs (ie medical certificates and associated costs, psychological assessments, court fees, etc) in criminal matters. NTLAC [Northern Territory Legal Aid Commission] expended \$871,357 compared to NAAJA's [North Australian Aboriginal Justice Agency's] \$60,000 – and this amount was spent on one third the number of

³² Jacqueline Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending*, Crime and Justice Bulletin No. 115, May 2008, NSW Bureau of Crime Statistics and Research, NSW Government.

³³ *Ibid*, *op cit* 11.

³⁴ Marchetti, E and Daly, K, 'Indigenous Courts and Justice Practices in Australia', *Trends and Issues in Criminal Justice in Australia No 244*, Australian Institute of Criminology, page 5.

³⁵ Cunneen & Schwartz, *Ibid*, *op cit* 20, page 50.

³⁶ *Ibid*, page 48.

*criminal cases run by the NTLAC. As an average, court costs for criminal matters by the NTLAC were \$762 per matter, compared to \$17 per matter by NAAJA.*³⁷

45. This is not to suggest that LACs are inefficient or overfunded – the opposite is true. A recent report by the Senate Legal and Constitutional Affairs Committee found that increased funding for the entire legal assistance sector is required, including legal aid commissions, community legal centres, in addition to ATSILS.³⁸ Cunneen is swift to point out that NAAJA simply deals with a greater number of criminal matters than NTLAC (as would be expected, given over 80% of those appearing in Northern Territory criminal courts are Indigenous).
46. The primary source of ATSILS funding is from the Federal Government and very little is recovered, in terms of client contributions or court costs.
47. The Law Council recommends that funding of ATSILS be increased as a matter of urgency and that parity with LAC funding be reached as soon as possible.

Cultural awareness

48. The rate at which young Indigenous people are arrested and held in detention, as discussed earlier in this submission, is a major cause for concern and may be indicative of a more systemic problem. It is not suggested that police discriminate against Aboriginal youths when exercising discretion to arrest, issue a caution, utilise diversionary programs rather than courts, etc. However, it is likely that lack of cultural awareness and understanding of the issues affecting the lives of Aboriginal children plays a part in the disproportionate rate of arrest and detention of Aboriginal youths.
49. The Law Council also considers that periodic cultural awareness training should be mandatory for the judiciary and other persons involved in the criminal justice system who deal regularly with Indigenous offenders.
50. Programs directed at treating the causes of offending behaviour and rehabilitation should be reviewed and, where necessary, redesigned to ensure they are culturally appropriate. This is considered to be particularly important in efforts to capture early offending by young Indigenous people, before cycle of recidivist behaviour develops. Indigenous offenders are reported, on average, to have their first contact with the criminal justice system at age 14, compared to age 19 for non-Indigenous offenders.³⁹ It is also known that the younger the first age of contact with the criminal justice system, the more likely it is that reoffending will occur. Indigenous youths were also more likely to reoffend than non-Indigenous juveniles, and to begin reoffending regularly.⁴⁰ Incarceration appears only to compound this behaviour, perhaps through further stigmatisation of the offender and reduced opportunities for employment and social inclusion once released. It is therefore suggested that early intervention programs must be designed to ensure relevance, cultural understanding and flexibility.

Guidelines

51. It is not known what guidelines police and court officers/justice workers presently use to assist in determining whether to issue a caution, court appearance notice,

³⁷ Ibid, page 51.

³⁸ Senate Legal and Constitutional Affairs Inquiry into Access to Justice, 8 December 2009, Rec 9, 23 and 27.

³⁹ Joudo, J., *ibid*, *op cit* 10, page 7.

⁴⁰ Ibid, page 8.

proceed with arrest or set bail conditions. Guidelines, whilst suggestive only of a process to regularise the exercise of official discretion, may also support systemic discrimination if they result in a higher rate of Indigenous persons being arrested and held on remand.

52. Given the significantly higher rate at which Indigenous people are arrested, required to apply for bail and are held on remand, the Law Council recommends that any guidelines used by police and bail authorities should be reviewed as soon as possible, to identify and remove any systemic discrimination where it exists.