Submission No 22

INQUIRY INTO THE ADEQUACY OF YOUTH DIVERSIONARY PROGRAMS IN NSW

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ABORIGINAL OVER-REPRESENTATION IN THE JUVENILE JUSTICE SYSTEM

Legislative Assembly Committee on Law and Safety Inquiry into Youth Diversionary Programs in New South Wales:
Submission of the New South Wales Bar Association

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I. INTRODUCTION AND OVERVIEW

1. The New South Wales Bar Association (**the Bar Association**) welcomes the opportunity to make a submission to the Inquiry of the Legislative Assembly Committee on Law and Safety (**the Committee**) into Youth Diversionary Programs in New South Wales (**the Inquiry**).

2. By resolution dated 8 June 2017, the Council of the Bar Association (**Bar Council**) established a Joint Working Party on the Over-representation of Indigenous people in the NSW Criminal Justice System (**the Joint Working Party**), consisting of four members of each of the Human Rights Committee, the Criminal Law Committee and the Indigenous Barristers' Strategy Working Party[1], as well as a number of external members with relevant expertise and knowledge.[2]

3. The Joint Working Party's terms of reference require it, inter alia, to consider policy and programs, including legislative and administrative measures, to address the over-representation of Indigenous people in the NSW criminal justice system. The Joint Working Party was also tasked to assume responsibility for developing a submission to the ALRC's Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander peoples. This submission to the Committee was prepared by the Joint Working Party, and adopted by Bar Council.

II. THE COMMITTEE'S TERMS OF REFERENCE

4. The Committee's terms of reference are as follows:

"That the Legislative Assembly Committee on Law and Safety inquire into and report on the adequacy of diversionary programs to deter juvenile offenders from long-term involvement with the criminal justice system.

In examining this matter the Committee should pay particular regard to:

a. the way in which youth diversionary efforts work with:
   - the Police
   - Juvenile Justice
   - Community Corrections
   - the Courts
   - Health, Housing and children's services
   - schools and educational authorities

[1] Now the First Nations Committee chaired by Joint Working Party member Tony McAvoy SC.

[2] The external members include the Hon Judge Peter Johnstone; the Hon Judge Stephen Norrish QC; the Hon Judge Dina Yehia SC; the Hon Bob Debus; Professor Megan Davis; Sarah Hopkins, Chair, Just Reinvest NSW.

- non-government organisations and the local community

b. Aboriginal over-representation in the Juvenile Justice system

c. evaluating outcomes and identifying areas for improvement

d. staff capacity and training requirements

e. case management options

f. bail issues

g. the experience of other jurisdictions

h. any other related matter."

5. The Bar Association's submission to the Committee focuses on the adequacy of diversionary programs in NSW in preventing juvenile offenders from having long-term involvement with the juvenile justice system, with particular regard to the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice system in the State.

6. The Bar Association notes that the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice system in NSW is manifested both in the juvenile crime jurisdiction and in the care and protection jurisdiction. Accordingly, this submission and the Association's recommendations to the Committee, whilst primarily addressed to overrepresentation in the juvenile crime jurisdiction, also recognise and address the relationship between the juvenile crime jurisdiction and the care and protection jurisdiction.

III. BAR ASSOCIATION: GENERAL PRINCIPLES AND COMMITMENTS

7. The Bar Association's submission has been framed consistently with the Association's Reconciliation Plan 2017-2019, and with the principles and commitments enunciated in the Law Council of Australia's *Policy Statement on Indigenous Australians and the Legal Profession* (February 2010)[3] (**the Law Council's Policy Statement**).

8. Further, the Bar Association recognises and seeks to apply the following *Guiding Principles of the Juvenile Justice Aboriginal and Torres Strait Islander Strategic Plan 2011-2013*[4]:

- recognising the diversity of Aboriginal and Torres Strait Islander people and communities in NSW;
- developing policy and proposals that strengthen the capacity and resilience of Aboriginal and Torres Strait Islander young people and their families; and
- acknowledging the impact of past policies on Aboriginal and Torres Strait Islander people and considering the implications of this history in all policy and proposal development.

IV. PREVIOUS INQUIRIES AND REPORTS

[3] Authorised by the Directors, Law Council of Australia, 28 November 2009.

[4] NSW Juvenile Justice, *Juvenile Justice Aboriginal and Torres Strait Islander Strategic Plan 2011-13*, p 2.

9. The over-representation of Aboriginal and Torres Strait Islander people, including children and youth, in custody has long been recognised as a deeply challenging and profoundly important issue for Australia. Almost three decades ago, the Royal Commission into Aboriginal Deaths in Custody (**RCADIC**)[5] highlighted the extensive inequality and myriad structural injustices confronting Aboriginal and Torres Strait Islander Australians in the criminal justice system.

10. In 1997, the Australian Law Reform Commission (**ALRC**) inquired into *inter alia* the adequacy of and desirable guidelines for diversionary schemes for young people suspected of offences, including Aboriginal and Torres Strait Islander young people: *Seen and heard: priority for children in the legal process* (ALRC Report 84), 19 November 1997 (**ALRC *Seen and heard* report**).

11. In 2010, the then NSW Minister for Juvenile Justice commissioned a review of the NSW Juvenile Justice System, *A Strategic Review of the New South Wales Juvenile Justice System* (**the 2010 *Strategic Review***).[6] In the chapter "Indigenous Overrepresentation"[7], the review explored the link between disadvantage in the Aboriginal and Torres Strait Islander population and the over-representation of Aboriginal and Torres Strait Islander children and young people in the juvenile justice system in NSW.

12. In June 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs published the report of its inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system, *Doing time – Time for doing Indigenous youth in the criminal justice system* (**HoR Standing Committee *Doing time* report**). The Committee concluded that "*Indigenous social and economic disadvantage have contributed to the high levels of Indigenous contact with the criminal justice system*", and that "*there is intergenerational dysfunction in some Indigenous communities which presents a significant challenge to break the cycle of offending, recidivism and incarceration*"[8].

13. The Standing Committee examined then current policy arrangements for overcoming Indigenous disadvantage and found it concerning that the Council of Australian Government's (**COAG's**) Closing the Gap Strategy did not include a National Partnership Agreement dedicated to the Safe Communities Building Block, nor did it include specific targets relating to justice. The Standing Committee found this concerning in view of the weight of evidence it received during the inquiry that linked unsafe communities to the development of negative social norms and increasingly high rates of juvenile offending.[9]

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[5] Royal Commission into Aboriginal Deaths in Custody, 1991.
[6] Peter Murphy et al, *A Strategic Review of the New South Wales Juvenile Justice System*, Noetic Solutions Pty Limited, 2010, at [434].
[7] Ibid, at 138–163.
[8] HoR Standing Committee *Doing time* report, at ix-x.
[9] HoR Standing Committee *Doing time* report, at ix-x.

14. The Standing Committee made 40 recommendations to Government, and confirmed that to effect change in the area of Indigenous disadvantage and disproportionate incarceration rates, the following principles must be applied:
    - engage and empower Indigenous communities in the development and implementation of policy and programs
    - address the needs of Indigenous families and communities as a whole
    - integrate and coordinate initiatives by government agencies, nongovernment agencies, and local individuals and groups
    - focus on early intervention and the wellbeing of Indigenous children rather than punitive responses, and
    - engage Indigenous leaders and elders in positions of responsibility and respect.[10]

15. The Standing Committee made discrete recommendations in relation to:
    - Indigenous youth and the criminal justice system: an overview[11]
    - The role of positive social norms [12]
    - The link between health and the criminal justice system [13]
    - Improving education for Indigenous youth[14]
    - Improving the effectiveness of transitioning from education to the workforce[15]
    - The criminal justice system[16]
    - Government policy and coordination[17]

16. More recently, on 17 November 2017, the report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (**the Don Dale Royal Commission**) was

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[10] HoR Standing Committee *Doing time* report, at ix-x.
[11] Recommendation 1 – National Partnership Agreement; Recommendation 2 – Justice Targets.
[12] Recommendation 3 – Positive social norms; Recommendation 4 – Mentors; Recommendation 5 – Sport and recreation; Recommendation 6 – Identification documents; Recommendation 7 – Accommodation.
[13] Recommendation 8 – Alcohol and substance abuse; Recommendation 9 – Foetal Alcohol Spectrum Disorder; Recommendation 10 – Mental health; Recommendation 11 – Hearing tests; Recommendation 12 – Sound amplification systems; Recommendation 13 – Police training to identify hearing loss; Recommendation 14 – Pre-natal and ante-natal support; Recommendation 15 – Health.
[14] Recommendations 16 – 19.
[15] Recommendations 19-23.
[16] Recommendations 23-31: Recommendation 23 – Police training and indigenous employment; Recommendation 24 – Court interpreter service and hearing assistance; Recommendation 25 – National interpreter service; Recommendation 26 - Legal services funding; Recommendation 27 – Post-release accommodation; Recommendation 28 – Study on sentencing options; Recommendation 29 – Alternative sentencing options; Recommendation 30 – Pre-court conferencing; Recommendation 31 – Indigenous offender programs.
[17] Recommendations 32-40: Recommendation 32-Evalutae Indigenous justice programs; Recommendation 33 – Mapping offending; Recommendation 34 – Expanding data collections; Recommendation 35 – Study on the imprisonment of women; Recommendation 36 – Indigenous Law and Justice Advisory Body; Recommendation 37 – Parliamentary Indigenous representation; Recommendation 38 – Funding of the Family Responsibilities Commission; Recommendation 39 – Sustained flexible funding; Recommendation 40 – Justice reinvestment.

tabled in the Northern Territory Parliament.[18] Most of the recommendations of the Don Dale Royal Commission specifically relate to the involvement of Aboriginal and Torres Strait Islander young people in the juvenile justice system in the Northern Territory, and to diversion to be implemented by the Commonwealth and Northern Territory Governments.

17. The Bar Association submits that much of the analysis of the RCADIC, the ALRC *Seen and heard* report, the 2010 *Strategic Review* and the HoR Standing Committee *Doing time* report continues to provide valuable insight into the structural problems confronting Aboriginal and Torres Strait Islander people in overcoming the intolerable economic and social disadvantage, and the unacceptable levels of over-representation in the criminal and juvenile justice systems, which they experience; and that the recommendations of those bodies continue to warrant careful consideration. In particular, the Bar Association submits that many recommendations of the Don Dale Royal Commission, appropriately adapted, should be accepted by the NSW Government, and implemented in the NSW juvenile justice system in engaging with, and providing services to Aboriginal and Torres Strait Islander young people in NSW.

V. BACKGROUND: OVER-REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN AND YOUTH IN THE YOUTH JUSTICE SYSTEM

Understanding the level of overrepresentation

18. According to the March 2017 report of the Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-16* (**2015-16 *Youth Justice Report***):

> In 2015–16 there were around 5,500 young people aged 10 and older who were under youth justice supervision in Australia, on an average day. Among those aged 10–17 this equates to a rate of 21 per 10,000, or about 1 in every 476-young people. Indigenous young people made up nearly half (48%) of young people aged 10–17 under supervision on an average day and over half (59%) of young people in detention.[19]

19. As the 2010 *Strategic Review* commented, "[i]*t is important to understand that any measures to reduce Indigenous overrepresentation in the juvenile justice system in isolation of broader disadvantage is highly unlikely to realise long-term benefits.*"[20]

Population demographics

20. In relation to population demographics, in its 2015 report *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples 2015* (**the 2015 *Health and Welfare Report***), the Australian Institute of Health and Welfare recorded that:

[181818] Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, 2017 (**Don Dale Royal Commission**), Findings and Recommendations.

[19] Australian Institute of Health and Welfare, 'Youth Justice in Australia 2015-16' [2017] (139) *Bulletin of the Australian Institute of Health and Welfare* 1.

[20] Peter Murphy et al, *A Strategic Review of the New South Wales Juvenile Justice System*, Noetic Solutions Pty Limited, 2010, at [434].

- in 2014, there were about 713,600 Aboriginal and Torres Strait Islander people in Australia, accounting for 3.0% of the total population;
- in 2011, 10% of the Indigenous population identified as being of Torres Strait Islander origin (63,700 people). Almost two-thirds (63%) of the Torres Strait Islander population lived in Queensland; and
- the Indigenous population has a relatively young age structure - in 2011, the median age was 21.8 years, compared with 37.6 years for the non-Indigenous population, while over one-third (36%) were aged under 15, compared with 18% of non-Indigenous people.

21. The 2015 *Health and Welfare Report* referred to projections by the Australian Bureau of Statistics (**ABS**) which suggest that by 2026, the Aboriginal and Torres Strait Islander population will be around 925,000, and will account for 3.2% of the Australian population. This suggests an average growth rate of 2.2% per year between 2011 and 2026 (ABS 2014h); the comparable growth rate for the non-Indigenous population is 1.6% (AIHW analysis of ABS 2013m, 2014h). The Indigenous population is projected to increase across all age groups between 2011 and 2026, although at different rates. The number of Indigenous children aged 0 to 14 is projected to increase by 25%, the number aged 15 to 54 by 35%, and the number aged 55 and over is projected to more than double (114%) (AIHW analysis of ABS 2014h).[21]

22. Specifically, in relation to NSW, by June 2014 "*New South Wales was home to the largest proportion of Indigenous people (31%)*"[22] and Indigenous Australians represented 2.9% of the total State population, with 220,902 individuals.[23]

23. In relation to the age distribution of Aboriginal and Torres Strait Islander Australians, the 2015 *Health and Welfare Report* highlighted the much younger age structure of the Indigenous population. In June 2011:
    - the median age of the Indigenous population (the age at which half the population is older and half is younger) was 21.8 years, compared with 37.6 years for the non-Indigenous population;
    - over one-third (36%) of Indigenous people were aged under 15, compared with 18% of non-Indigenous people;
    - people aged 65 and over comprised 3.4% of the Indigenous population, compared with 14% of the non-Indigenous population. [24]

Aboriginal and Torres Strait Islander disadvantage

24. Like many other reviews and reports, the 2010 *Strategic Review* recognised the interrelationship between disadvantage and the over-representation of Aboriginal and Torres Strait Islander children and youth in the juvenile justice system:

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[21] Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples 2015*, 2015, pp 8-9.
[22] Ibid, p 15.
[23] Ibid.
[24] Ibid, p 10, Figure 2.2.

In order to fully analyse Indigenous overrepresentation in the juvenile justice system, it is necessary to understand Indigenous disadvantage. This is because overrepresentation is not a juvenile justice issue, it is the effect of socioeconomic disadvantage that has existed since colonisation of the country.[25]

25. Likewise, the Law Council's Policy Statement recognises that Indigenous Australians have been subject to significant dispossession, marginalisation and discrimination, and continue to experience widespread disadvantage, including in the areas of housing, health, education, employment, access to justice and participation in the political, economic, social and cultural life of the nation. The disadvantage of Aboriginal and Torres Strait Islander people on virtually every key socio-economic indicator is notorious, and continues to be documented in reports such as *Closing the Gap*[26]; *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples*[27]; and *Overcoming Indigenous Disadvantage: Key Indicators*[28].

Data gaps in relation to juvenile justice

26. The Bar Association notes that in relation to juvenile justice, there are major data gaps. Even in relation to young people in adult custody, there are data gaps with rates of 'flow' through correctional centres estimated to be well in excess of the daily numbers.[29]

27. The lack of available and comparable data is in stark contrast to other areas of major public expenditure, such as education and health, yet despite "*a recurring public investment of more the $3 billion a year, equivalent data are not yet available for Australia's correctional systems*".[30] There is also a lack of cohesive criminological data from police, youth services, legal assistance bodies, prosecuting agencies, courts, corrections, justice health authorities, parole supervisors and associated service providers.

28. The Bar Association recognises the urgent need for funding and co-ordination in the area of data collection in relation to juvenile justice.

Over-representation of Aboriginal and Torres Strait Islander children and youth in the juvenile justice system nationally

29. In 2015-16, Aboriginal and Torres Strait Islander young people were 17 times more likely to be under supervision than non-Indigenous young people, reflecting an increase in the rate.[31] The increase was the result of the decreases in numbers of non-Indigenous young people under

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[25] Peter Murphy et al, *A Strategic Review of the New South Wales Juvenile Justice System*, Noetic Solutions Pty Limited, 2010, at [437].
[26] See https://closingthegap.pmc.gov.au/
[27] See https://www.aihw.gov.au/reports-statistics/population-groups/indigenous-australians/reports
[28] See https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage
[29] S Kinner and A Avery, A robust estimate of the number and charcateristics of persons released from prison in Australia (2015) ANZJPH 39: 4, 315-318.
[30] Ibid.
[31] Australian Institute of Health and Welfare, 'Youth Justice in Australia 2015-16' [2017] (139) *Bulletin of the Australian Institute of Health and Welfare*, pp 1-2.

supervision over the 5-year period from 2011-12 to 2015-16 being proportionally greater than the decreases for Indigenous young people.[32] Supervision, as referenced in the 2015-16 *Youth Justice Report*, includes four categories of legal orders: unsentenced community-based supervision, unsentenced detention supervision, sentenced community-based supervision, and sentenced detention supervision[33]:

- supervision, sentenced and unsentenced - may be community-based or in detention based on the legal orders[34];
- unsentenced supervision - when a person has been charged with an offence and is awaiting the outcome of their court matter, or when they have been found or have pleaded guilty and are awaiting sentence[35];
- sentenced supervision - when a young person has been proven guilty in court and sentenced[36];
- unsentenced community-based supervision - results from legal orders, including supervised or conditional bail (which may include conditions such as curfew or a monetary bond) and home detention bail[37];
- unsentenced detention supervision - might take the form of a young person being remanded in custody by police or court referral[38];
- sentenced community-based supervision - includes probation and similar (where regular reporting to the youth justice agency and participation in treatment programs may be required), suspended detention (where the young person must meet certain conditions or not re-offend within a specified time period), and parole or supervised release (supervision that follows a period of detention)[39]; and
- sentenced detention supervision - when a young person is sentenced to a period of detention.[40]

30. In relation to the over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system, the 2015-16 *Youth Justice Report* noted that:
    - over the 5-year period to 2015–16, rates of both Indigenous and non-Indigenous young people under supervision fell. This decrease was proportionally greater for non-Indigenous young people, resulting in an increase in the level of Indigenous over-representation;
    - in 2011–12, Indigenous young people were 13 times as likely to be under supervision as non-Indigenous young people, increasing to 17 times as likely in 2015–16; and
    - in 2015–16, Indigenous over-representation was higher for those in detention (25 times) than for those under community-based supervision (15 times).[41]

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[32] Ibid, pp 17 – 18.
[33] Ibid, pp 3-4 and Table 1: Types of youth justice supervision.
[34] Ibid.
[35] Ibid, p 4.
[36] Ibid.
[37] Ibid
[38] Ibid Table 1: Types of youth justice supervision.
[39] Ibid, p 4.
[40] Ibid. However, given that young people should only be placed in detention as a last resort, 'most young people under youth justice supervision are supervised in the community rather than in detention: ibid p 3.

31. Across Australia the over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system is extreme. The 2015-16 *Youth Justice Report* highlighted that :
    - although less than 6% of young people aged 10–17 in Australia are Indigenous, nearly half (2,322 or 48%) of the young people aged 10–17 under supervision on an average day in 2015–16 were Indigenous. This proportion was higher in detention, where over half (59%) of the young people aged 10–17 in detention were Indigenous;
    - in 2015–16, the rate of Indigenous young people aged 10–17 under supervision on an average day was 184 per 10,000, compared with 11 per 10,000 for non-Indigenous young people. Indigenous young people aged 10–17 were therefore 17 times as likely as non-Indigenous young people to be under supervision on an average day;
    - the level of Indigenous over-representation (as measured by the rate ratio) was higher for detention (25 times as likely) than for community-based supervision (15 times as likely);
    - on average, Indigenous young people under supervision were younger than non-Indigenous young people. This was the case for both males and females;
    - in 2015–16, half (50%) of all Indigenous young people under supervision on an average day were aged 10–15, compared with one-third (33%) of non-Indigenous young people. More than 1 in 8 Indigenous young people under supervision were aged 13 or less, compared with 1 in 20 non-Indigenous young people; and
    - similar proportions of Indigenous and non-Indigenous young people under supervision were male (81% and 84%, respectively).[42]

32. In relation to the over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system in different jurisdictions, the 2015-16 *Youth Justice Report* recorded that Indigenous young people are over-represented in youth justice supervision in every State and Territory. The rate of Indigenous young people aged 10–17 under supervision on an average day was lowest in Tasmania (52 per 10,000), and highest in Western Australia (279 per 10,000). Similarly, the level of Indigenous over-representation (rate ratio) was lowest in Tasmania (3 times as likely), and highest in Western Australia (27 times as likely).[43] In NSW, the rate of Indigenous young people aged 10-17 under supervision on an average day was 167 per 10,000[44]; and the level of Indigenous over-representation (rate ratio) the same as the national rate ratio at 17 times as likely.[45]

33. Whilst noting the decreases in the rates of young people under supervision, the 2015-16 *Youth Justice Report* also drew attention to the overall increase in the level of over-representation of Aboriginal and Torres Strait Islander young people in supervision:

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[41] Ibid.
[42] Ibid, pp 8 and 10.
[43] Ibid, p 8.
[44] Ibid p 9, Table 3: Young people aged 10-17 under supervision on an average day by Indigenous status, States and Territories, 2015-16(rate).
[45] Ibid.

- over the 5-year period, there were decreases in the rates of Indigenous and non-Indigenous young people under supervision in all States and Territories except the Northern Territory and Queensland, where rates of Indigenous young people fluctuated from year to year, but increased overall. In NSW, this had fallen from approximately 240 per 10,000 Indigenous young people aged 10–17 under supervision on an average day in 2011-12 to 167 per 10,000 in 2015-16[46];
- the level of Indigenous over-representation in supervision on an average day (rate ratio) increased overall between 2011–12 and 2015–16 in all States and Territories except for the Australian Capital Territory, where it decreased. The Northern Territory had the largest increase, with the rate ratio increasing from 16 to 26. In NSW, the rate of over-representation of Indigenous young people aged 10-17 under supervision fell from 18 times as likely in 2011-12,[47] which was then the second highest rate in Australia, to 17 times as likely in 2015-16.[48]

Over-representation of Aboriginal and Torres Strait Islander children and youth in the New South Wales juvenile justice system

34. The 2009 the Australian Institute of Criminology report, *Juveniles' contact with the criminal justice system in Australia* (**2009 AIC Report**)[49], provided data and analysis in relation to the interaction of Aboriginal and Torres Strait Islander young people with the criminal justice system. The 2009 AIC Report was relied upon in the 2010 *Strategic Review* prepared for the NSW Government. Whilst no longer current, the 2009 AIC Report nonetheless provides important information in relation to the interaction of Aboriginal and Torres Strait Islander young people with the criminal justice system, including in New South Wales.

In relation to police contact with alleged juvenile offenders by Indigenous status:

35. Police data suggest that Indigenous juveniles come into contact with the police disproportionately in comparison with their non-Indigenous counterparts. In ***New South Wales,*** 11,049 Indigenous juvenile persons of interest (17%) were recorded by police during the 2007–08 financial year, compared with 55,309 non-Indigenous juvenile persons of interest (83%).[50]

In relation to gender and the Indigenous status of juveniles:

36. Police data suggest that in some jurisdictions, Indigenous female juveniles are disproportionately apprehended by police in comparison with Indigenous male juveniles. Although in these jurisdictions, far higher numbers of male juveniles than female juveniles come into contact with the police, Indigenous females come into contact with police at a

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[46] Ibid, p 10, Figure 4: Young people aged 10-17 under supervision on an average day by Indigenous status, States and Territories, 2011-12(rate).
[47] Ibid, p 10.
[48] Ibid, p 17; p 9, Table 3: Young people aged 10-17 under supervision on an average day by Indigenous status, states and territories, 2015-16(rate).
[49] Kelly Richards, *Juveniles' contact with the criminal justice system in Australia*, Australian Institute of Criminology, 2009.
[50] Ibid, p 38.

disproportionate rate compared with their male counterparts. Figures from ***New South Wales***, the Australian Capital Territory, Victoria and the Northern Territory showed similar levels of police contact with Indigenous male and female juveniles. NSW police recorded 51,197 juvenile male persons of interest during the 2007–08 financial year. Of these, 8,670 (17%) were Indigenous. Similarly, NSW police recorded 15,161 juvenile female persons of interest during the period. Of these, 2,394 (16%) were Indigenous.[51]

In relation to Indigenous status and the age of juveniles:

37. The relationship between age and contact with the police was less clear in relation to Indigenous juveniles, however in ***New South Wales*** an inverse relationship existed between juveniles' ages and the amount of contact with the police; that is, a higher proportion of 10 year old than 11 year old persons of interest was Indigenous during the 2007–08 collecting period. This pattern could be observed for all age groups, with Indigenous juveniles comprising a greater proportion of 11 year old than 12 year old persons of interest and so on.[52]

In relation to police contact with alleged juvenile offenders by offence type and Indigenous status:

38. Police data from jurisdictions that recorded the Indigenous status or "Aboriginal appearance" of alleged juvenile offenders indicated that Indigenous juveniles (or those of "Aboriginal appearance") were overrepresented among juveniles coming into contact with the police. In ***New South Wales***, Indigenous juveniles were overrepresented for almost all offence types for which persons of interest were recorded by NSW police in the 2007–08 financial year:
    - although Indigenous 10 to 17 year olds comprised only four percent of all 10 to 17 year olds in New South Wales (according to the most recent census data (ABS 2006)), they typically comprised far higher proportions of juveniles recorded by NSW police as persons of interest;
    - there were a small number of offences for which Indigenous juveniles were not overrepresented among recorded juvenile persons of interest for the period. Only three percent of the 71 juveniles recorded as persons of interest in relation to possession and/or use of ecstasy were Indigenous, and less than one percent of the 274 juveniles recorded in relation to exceeding the legal speed limit were Indigenous. Just three percent of the 742 juvenile persons of interest recorded in relation to driving licence offences not elsewhere classified were Indigenous. Indigenous juveniles were not overrepresented for a range of other offences, including murder accessory/conspiracy, manslaughter, driving causing death, blackmail and extortion, stock theft, deal or traffick cocaine, deal or traffick narcotics, deal or traffick amphetamines, deal or traffick ecstasy, deal or traffick other drugs, manufacture drugs, import drugs, betting and gaming offences, pornography offences, fail to appear, culpable driving, PCA, drive while disqualified, drive in a manner or with speed dangerous and roadworthiness offences.[53]

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[51] Ibid, p 40.

[52] Ibid, p 41.

[53] Only very small numbers of juveniles were recorded as persons of interest by NSW police for these offences, however, and these data must be interpreted with caution: Ibid, pp 47–48.

In relation to the outcomes of alleged juvenile offenders' contact with the police by Indigenous status:

39. Police processing of Indigenous and non-Indigenous juvenile persons of interest in ***New South Wales*** for the 2007–08 financial year showed similar proportions of Indigenous and non-Indigenous juveniles processed via cautions and youth justice conferences, however a far higher proportion of non-Indigenous juveniles processed via warnings than their Indigenous counterparts. Conversely, a far higher proportion of Indigenous juveniles were transferred to court than their non-Indigenous counterparts. Some 48 percent of Indigenous juveniles were transferred to court, compared with 21 percent of non-Indigenous juveniles; and 32 percent of non-Indigenous juveniles received warnings, compared with 18 percent of Indigenous juveniles.[54] There should be a review undertaken in relation to police processing of Indigenous and non-Indigenous persons of interest in New South Wales for the 2017-2018 financial year to ascertain to what extent if any there has been any change in the last decade.

Contact of Aboriginal and Torres Strait Islander young people as alleged offenders with children's courts:

40. There appears to be little data in relation to the contact and experiences of Aboriginal and Torres Strait Islander young people with children's courts in Australia. ABS data on children's courts do not provide detail in relation to the Indigenous status of juveniles. It is not known, for example, what proportion of juveniles before the children's courts are Aboriginal or Torres Strait Islander, in relation to what types of offences, how Aboriginal and Torres Strait Islander juveniles plead, and what types of sentences are imposed on them. Although many jurisdictions report policing data on the Indigenous status of juveniles, Indigenous status is not reported in most sources of children's court data.[55]

VI. DIVERSION OF ABORIGINAL AND TORRES STRAIT ISLANDER YOUNG PEOPLE FROM THE CRIMINAL JUSTICE SYSTEM

Diversion generally

41. The Bar Association strongly supports the diversion of juvenile offenders away from the criminal justice system to community support services as the optimal response to the problem of juvenile crime.[56] Diversion is an important aspect of many juvenile justice systems throughout the world, consistent with the 1985 United Nations Standard Minimum Rules for

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[54] Ibid, pp 5–58.

[55] Two States - South Australia and Western Australia - publish data on the contact of Aboriginal and Torres Strait Islander juveniles with the children's courts in those jurisdictions. See also the Australian Institute of Criminology report for data on Indigenous juveniles' contact with the children's courts in South Australia and Western Australia, 2009, at pp 86-93.

[56] M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* Oxford University Press Melbourne 1994, 267; also Australian Law Reform Commission (**ALRC**), *Seen and heard: priority for children in the legal process* (ALRC Report 84), 19 November 1997 (**ALRC *Seen and heard* report**) at [18.36]-[18.37].

the Administration of Juvenile Justice (**the Beijing Rules**) which provide that consideration should be given to dealing with juvenile offenders without resorting to formal trial: r 11.1.[57]

42. The 1997 ALRC *Seen and heard* report noted that young people suspected of offences were increasingly being diverted from formal court adjudication through mechanisms such as cautioning and family group conferences, and that diversionary mechanisms seek to temper the punitive nature of criminal justice processes in recognition of the particular vulnerabilities of juvenile offenders.[58] For example, cautioning a young person for a minor offence indicates clearly that his or her behaviour is unacceptable. However, it avoids the stigma associated with prosecution and conviction and it avoids contaminating a first minor offender through contact with serious or recidivist offenders. The ALRC also recognised that diverting young people from the formal legal system may create better opportunities to identify any family, behavioural and health problems contributing to the offending behaviour. It helps to address the causes of unacceptable conduct, not merely the consequences of it.[59]

43. The Bar Association strongly agrees with the conclusion of the ALRC that the main feature of an effective juvenile justice system is that it adopts a minimal interventionist approach at every stage of dealing with young people who come to the attention of justice authorities.[60]

44. Diversion can take various forms, including warnings, cautioning minor or first offenders, and conferencing. In relation to *cautioning minor or first offenders*, see in NSW the *Young Offenders Act 1997* (NSW) Pt 4 of which enables police to caution formally any child who admits an offence and consents to being cautioned (s 19). In determining whether it is appropriate to deal with a matter by caution an investigating officer must consider a number of factors, including the degree of violence involved in the offence and the harm caused to the victim (s 20(3)).

45. As the ALRC recognised (at [18.43]), while discretion is a vital part of police work, it must be properly exercised. The ALRC's Inquiry had received evidence that some children do not receive the benefit of cautioning at the same rate as the general youth population. For example, in 1994–95 only 11.3% of Aboriginal alleged juvenile offenders in Victoria received formal cautions compared with 35.65% of non-Aboriginal juveniles.[61] This was despite the fact that the RCADIC recommended that police administrators encourage officers to make greater use of cautioning for Indigenous suspects.[62]

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[57] For an overview of pre-court diversion see J Wundersitz 'Pre-court diversion: The Australian experience' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* Longman Sydney 1997.
[58] At [18.36].
[59] At [18.37].
[60] At [18.37], citing K Buttrum 'Juvenile justice: What works and what doesn't!', Juvenile Crime and Juvenile Justice: Towards 2000 and Beyond AIC Conference Adelaide 26–27 June 1997, 5.
[61] M Mackay, *Victorian Criminal Justice System Fails ATSI Youth: Discussion Paper*, Monash University Koorie Research Centre Melbourne 1996, 9. See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families, *Bringing Them Home*, HREOC Sydney 1997, 513–16.
[62] *National Report*, vol 4, AGPS Canberra 1991, rec 240a.

46. Accordingly, in relation to cautioning, the ALRC recommended national standards for juvenile justice which "*should provide best practice guidelines for cautioning that will ensure equal treatment of young people wherever they live and whatever their background*", with the Office for Children to monitor compliance with such guidelines (recommendation 199). The Bar Association supports this approach, and makes a number of recommendations to the Committee derived from it in Part IX below.

47. In relation to ***conferencing***, the ALRC noted that family group conferences were being used increasingly in the States and Territories either to divert young offenders from the courts or as a sentencing option. Conferences are a type of restorative justice - a means for the offender to accept responsibility and make amends to the victim.[63] New Zealand was the first common law country to introduce family group conferences for young offenders in the *Children, Young Persons and Their Families Act 1989* (NZ). Following the first Australian pilot of a form of family conferencing in Wagga Wagga in 1991, and similar pilots, in 1997 the NSW Parliament enacted a Statewide legislative scheme of youth justice conferences based on the New Zealand model in Pt 5 of the *Young Offenders Act 1997* (NSW).

48. In relation to the value of conferencing, the ALRC noted that diversionary schemes have many benefits, including that the child usually avoids a formal conviction and is given a 'second chance'; that the formality of the court system may be particularly alienating to children, whereas diversionary programs tend to be informal and therefore less intimidating; that the schemes advance the rehabilitative aspect of juvenile justice, encouraging children to take responsibility for their actions and learn from their mistakes; and the capacity for the child to participate meaningfully in the proceedings in keeping with article 12 of the UN *Convention on the Rights of the Child* (**CROC**). Despite these apparently positive elements, the ALRC noted that all the models of family group conferencing used throughout Australia had been the subject of criticism. Particular concerns included the extent of police involvement; the child's lack of access to legal advice; the severity of penalties imposed; a perceived net-widening effect; and the problematic nature of conferences for offenders who have poor verbal skills or no family support. Whilst the ALRC considered that conferencing schemes can be a just, effective and cost-efficient means of diverting young offenders from the formal juvenile justice system, it considered that conferencing should not usurp the role of other diversions such as warnings and cautions and must not lead to a criminal record for the young person.[64]

49. Accordingly, in relation to conferencing, the ALRC recommended that the national standards for juvenile justice should incorporate best practice guidelines for conferencing models to ensure that children in all States and Territories have access to fair and effective diversionary schemes. Matters to be taken into consideration should include the desirability of diversionary schemes being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer; the need to monitor penalties agreed to in

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[63] See at [18.45], citing J Wundersitz 'Juvenile justice' in K Hazlehurst (ed), *Crime and Justice: An Australian Textbook in Criminology* LBC Information Services Sydney 1996, 137–141.
[64] At [18.53].

conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence; the need to ensure that young people do not get a criminal record as a result of participating in conferencing; the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person; the child's access to legal advice prior to agreeing to participate in a conference; whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less *ad hoc*; and the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system. Again, the ALRC recommended that "the national standards for juvenile justice should provide best practice guidelines for family group conferencing", and that the Office for Children should monitor compliance with these guidelines (recommendation 200).

50. The Bar Association strongly supports this approach, and makes a number of recommendations to the Committee derived from it in Part IX below.[65]

Aboriginal and Torres Strait Islander young people and diversion

51. The ALRC *Seen and heard* report further noted that despite increased focus on the chronic over-representation of Indigenous children at all stages of the juvenile justice system, they were still not being diverted at the same rate as non-Indigenous offenders; and that this may be due to factors such as the effect of prior records in some cases or to the manner of exercise of discretionary powers in others.[66]

52. Whilst New Zealand experience indicated that diversionary schemes can work well for Indigenous young offenders because of the scope for the extended family and community to be involved[67], current Australian models "*fail*[ed] *to understand the complex reality of Indigenous communities and ignore fundamentally the principle of self-determination*"[68] The level of police involvement in most conferencing models was particularly problematic for Indigenous communities.[69]

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[65] The Bar Association also notes and commends to the Committee for its consideration the principles identified by Associate Professor Chris Cunneen and David McDonald in relation to values, principles and process when establishing diversion programs targeted towards Indigenous Australians: Chris Cunneen and David McDonald, "Diversion and Best Practice for Indigenous People: A Non-Indigenous View", paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology in conjunction with Department for Correctional Services SA, Adelaide, 13-15 October 1999, 4.

[66] At [18.60]-[18.61].

[67] Referring for a fuller discussion of pre-trial diversion and Indigenous young offenders to ALRC Report 31, *The Recognition of Aboriginal Customary Laws*, vol 1, AGPS Canberra 1986, 344–350.

[68] Citing the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families, *Bringing Them Home*, HREOC Sydney 1997, 521.

[69] Ibid, 525.

53. Accordingly, the ALRC concluded that Governments should ensure that Indigenous communities are able to develop and run their own family group conferencing models, and existing conferencing schemes should be modified to be culturally appropriate:

> Ultimately the only credible way of breaking out of the destructive relationship between juvenile justice agencies and indigenous young people is to facilitate the move to Aboriginal and Torres Strait Islander community control over juvenile justice administration.[70]

54. The ALRC recommended that the national standards for juvenile justice "*should require governments to ensure Indigenous communities are able to develop their own family group conferencing models*", and that "[e]*xisting conferencing schemes should be modified to be culturally appropriate*" (recommendation 202).

55. The Bar Association strongly supports this approach, and makes a number of recommendations to the Committee derived from it in Part IX below.

The Don Dale Royal Commission and diversion programs

56. More recently, the Don Dale Royal Commission emphasised the importance of diversion programs for young people, referring to Northern Territory Police data for 2015–16 which indicates that 85% of children and young people who participated in a diversion program did not reoffend. The Don Dale Royal Commission also highlighted the disparity in offerings of diversion to Indigenous and non-Indigenous young people in the Northern Territory:[71]

> In 2015–16 there were 2,082 children and young people apprehended by police, and 729 individual youth diversions. These included youth justice conferences, verbal and written warnings, and other diversions including referrals to drug treatment programs, such as those run by the Council for Aboriginal Alcohol Program Services (CAAPS), the CatholicCare NT Drug and Alcohol Intensive Support Program for Youth (DAISY) and BushMob.
> These figures show that only 35% of the young people apprehended during this period were diverted. ...
> Research suggests that nation-wide, Aboriginal children and young people are less likely to be diverted than non-Aboriginal children and young people. This is also the case in the Northern Territory specifically, where in 2015 32.6% of Aboriginal children and young people accused of offences were diverted, compared with 47.9% of non-Aboriginal children and young people.

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[70] At [18.62], citing C Cunneen 'Indigenous young people and juvenile crime' in A Borowski & I O'Connor (eds), *Juvenile Crime, Justice and Corrections*, Longman Sydney, 1997.

[71] Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory – Final Report, 2017 (**Don Dale Royal Commission final report**), 258–259 (footnotes omitted).

In the same year, 62.2% of Aboriginal children and young people were denied diversion because of the seriousness of the offence or because they had re-offended, compared with 46.1% of non-Aboriginal children and young people. ...

57. The Don Dale Royal Commission concluded that Aboriginal children and young people were consistently less likely to be granted diversion than their non-Aboriginal peers. And this notwithstanding that diversion of Aboriginal children and young people had generally been found to be effective in reducing recidivism among those who complete the program.[72]

58. The Royal Commission identified the opportunities that diversion presents to children and young people as follows:

> Diversion programs attempt to re-direct children and young people who have come into contact with the police away from the youth justice system. The police and the courts can refer young offenders to diversion; the hope is that the more nuanced intervention that diversion programs can offer will lead the young person to understand the effect and impact of their crime, and change their behaviour.
> Offering diversion for young offenders recognises that not all young offenders are or will ever become dangerous criminals, and that for some young people an early intervention at the right time can change patterns of behaviour. Diversion gives children and young people an opportunity to learn from their mistakes and correct their behaviours without resorting to the formal justice system. The objective of diversion is to encourage young offenders to take responsibility for their actions and minimise their interactions with the youth justice system.[73]

59. The preference for diversion of children and young peoples was grounded in Australia's international obligations:

> Diversion obligations
> The terms '*diversion*' and '*alternative action*' capture a range of measures including verbal or written warnings, formal cautions, referrals to youth justice conferences and community-based programs. Consistent with the '*last resort*' principle for detention, opportunities for diversion should be strongly pursued.
> This view is consistent with Australia's international obligations in relation to youth justice. The preference for diversion as an alternative to formal judicial proceedings is to be found in the [United Nations *Convention on the Rights of the Child*] (CRC). Article 40.3(b) mandates:
>
> > States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged, as, accused of, or recognized as having infringed the penal law, and, in particular whenever appropriate and desirable, measures for dealing with children without resorting to

[72] Ibid.
[73] Don Dale Royal Commission final report, 249 (footnotes omitted).

judicial proceedings, providing that human rights and legal safeguards are fully respected.[74]

The Beijing Rules provide:

> Rule 11(1): Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority...
>
> Rule 11(2): The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.
>
> Rule 11(3): Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
>
> Rule 11(4): In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.[75]

60. The Royal Commission identified the following features of successful diversion programs as a fundamental aspect of a good youth justice system:[76]

- Timely referral, assessment and participation: To be most effective, particularly given a child's sense of time, any diversion and responsive action should closely follow apprehension by police. Delay will diminish any positive impact.
- Availability without admission of guilt: To require an admission of the offence before allowing the young person into diversion; may discourage some young offenders from participating.
- Availability for repeated referrals: Some children and young people may re-offend after diversion, and placing automatic restrictions on their capacity to re-engage in further diversion programs would limit the value of the program.
- Inclusion of a conference with the victim or family: Conferences can encourage young people to take responsibility and be held accountable for their actions. Participation of the victim in a youth justice conference is important for the child or young person to be able to understand the effect of their offending.

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[74] Don Dale Royal Commission final report, 249-250, citing article 40.3(b) of the UN Convention on the Rights of the Child.

[75] Don Dale Royal Commission final report, 250, citing the Beijing Rules; and also citing article 1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (**the Havana Rules**), 14 December 1990.

[76] Don Dale Royal Commission final report, 250-251, citing *inter alia*, Judge C J Harding and Judge A J Becroft, "10 Characteristics of A Good Youth Justice System", speech delivered at The Pacific Judicial Development Programme – Family Violence and Youth Justice Workshop, Port Vila, Vanuatu, 12 – 15 February 2013, 8.

- A diversion plan and a specialist case manager: An effective diversion system will include individual plans, tailored for the person, and a case manager who will work with the young person to complete the plan.
- 'Wraparound' services for the young person: This would assist the young person to comply with the plan, and address their health, housing and education needs.
- Engagement with the young person's family: Having the family of the young person involved in developing the diversion plan connects the process to the young person's home and community and gives them support to achieve the plan.
- Built-in education, rehabilitative programs, cultural activities, employment pathways, mentoring and community service: Diversion programs should incorporate multiple components, address multiple needs and strengths, and work in multiple environments, such as family, peer group and education. Services such as mental health services and substance abuse services should also be available through the diversion program.
- Culturally appropriate plans and programs: A good diversion process must be culturally appropriate, working towards a stronger connection to and understanding of culture and cultural values.
- Community input and control of diversion programs: The Commission received numerous submissions from a range of organisations and individuals emphasising the need for diversion programs for children and young people to be designed and implemented by the communities in which they operate.
- Measureable and evaluated outcomes: Diversion programs should be evaluated against established criteria to determine whether the programs are leading to positive change. Measures might include engagement with education, training or employment; reconnecting with family; maintaining or securing stable accommodation; and the rates and/or types of re-offending participants compared with non-participants.

61. The Don Dale Royal Commission concluded that one of the most effective components of diversion is the youth justice conference ss 39 and 64 of the *Youth Justice Act* (NT) which refer to a youth justice conference that takes the form of either a victim-offender conference or a family conference. Under s 84, another type of youth justice conference can also be convened which is a pre-sentence conference with victims, community representatives, family members or other appropriate persons. The Don Dale Royal Commission concluded:

    At the end of a youth justice conference the child or young person and their responsible adult must sign an agreement. The diversion plan that was designed for them may be altered at the conference, and is signed by everyone who attends the conference. The conditions imposed on each child or young person are tailored to the individual, but the outcomes might include having to perform community service, provide an apology, or engage in further case management or counselling.

    Youth justice conferences are demonstrated to be effective at reducing offending. Northern Territory Police data for 2015-16 found that 'after participating in youth justice conferencing only 15% of children and young people reoffended and only 6.6% offended more than twice'. Youth justice conferences are not only beneficial to young offenders. Research suggests that there are also benefits for victims who participate in youth justice

conferences, including greater satisfaction about how their case is handled, and reduced symptoms of post-traumatic stress disorder.[77]

62. Currently, in the Northern Territory, *Police General Order – Youth Pre-Court Diversion* requires that a child or young person ***must admit*** his/her responsibility in the commission of the offence when an officer is considering them for diversion. There is no legislative requirement to do so. Legislation requires the child or young person to consent to the diversion but not to admit responsibility for the offence. The Don Dale Royal Commission noted that in New Zealand, the young person is required to '*not deny*' the offence to have access to a family group conference; and that in New Zealand, '*not denied*' may indicate that the child or young person accepts that they are guilty of some conduct, but not necessarily the charge as laid by the police.

63. Accordingly, the Royal Commission recommended the Northern Territory Commissioner of Police amend the general order, and require instead that the child or young person '*does not deny*' the offence.[78] The Bar Association supports this approach, and makes a recommendation to the Committee derived from it in relation to equivalent NSW provisions derived from it in Part IX below.

64. The Royal Commission also recognised the following drivers behind those jurisdictions which have succeeded in diverting the majority of their young people demonstrating poor and anti-social behaviour away from engagement with the courts:

- that many children and young people who engage in anti-social behaviour and even criminal conduct will mature eventually and become responsible adults;
- those children and young people who are at risk of continuing on a trajectory of criminal behaviour are able to be deflected from such an outcome; and
- if a child can be kept out of the formal criminal justice system the prospects of staying out are considerably enhanced.[79]

65. Against this background, the Commission considered whether the age of criminal responsibility from which a child can be charged with a criminal offence should be increased from 10 to 12 years, noting that this would not only "*more accurately reflect modern understanding of brain development, it would ensure that the number of children brought before the courts is reduced*".[80] The Commission recommended that the minimum age for criminal responsibility should be increased to 12 years; and that there should be a rebuttable presumption retained for children aged between 12–14:

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[77] Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory – Final Report, 2017 (**Don Dale Royal Commission final report**), 262 – 263.
[78] Don Dale Royal Commission final report, Recommendation 25.12.
[79] Ibid, 410-411.
[80] Ibid, 417-418.

> Some children under 12 years will display risks and needs which require a level of support and intervention. Where police become aware of those situations, they should have power to deal with them by way of diversion to appropriately resourced programs, subject to the condition that if they had been over 12 years old they would have been reasonably suspected to have committed a criminal offence.

66. Against this background, the Commission also recommended that for children under 14 years, detention should not be a sentencing option, nor should children under 14 years be remanded in detention:

> Imposing a minimum age eligibility for detention reflects practices in other international jurisdictions ... where children over the age of criminal responsibility are protected from certain sentencing options until they reach higher age thresholds, and there is heavy investment in pre-court diversion alternatives.[81]

67. The Bar Association strongly supports the approach and the recommendations of the Don Dale Royal Commission in relation to diversion, and makes a number of recommendations to the Committee derived from that approach and those recommendations in Part IX below.

Aboriginal and Torres Strait Islander girls and young women, and diversion

68. Further, the Bar Association strongly supports an approach to diversion which specifically considers the pathways available for Aboriginal and Torres Strait Islander girls and young women. These should be consulted in relation to the content and delivery of programs designed having regard to both their gender and culture, rather than "special provisions for women being 'added on'" to male focussed programs.[82] In her 2010 paper, *Diversion programs for Indigenous women*, Dr Lorana Bartels observed:

> Due to the relatively small, albeit growing, size of the Indigenous women's population in corrections and the criminal justice system generally, it is vital to ensure that programs do not merely replicate male-oriented or non-Indigenous-oriented initiatives but are both gender-sensitive and culturally appropriate.

69. Initiatives tailored to the distinct needs and perspectives of Aboriginal and Torres Strait Islander girls and young women are essential to ensure that their experiences do not remain invisible and their vulnerability perpetuated.[83] The Bar Association makes a recommendation to the Committee in this regard in Part IX below.

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[81] Ibid, 418-420.
[82] Lorana Bartels, 'Diversion programs for Indigenous women' [2010] (13) *Australian Institute of Criminology: Research in Practice*, 10 quoting Andrew Coyle, Foreword in Diane C Hatton and Anastasia A Fisher (eds), *Women Prisoners and Health Justice: Perspectives for an International Hidden Population* (Oxford, 2009).
[83] Lorana Bartels, 'Diversion programs for Indigenous women' [2010] (13) *Australian Institute of Criminology: Research in Practice*, 10.

Justice Reinvestment and diversion

70. The Bar Association also supports Justice Reinvestment as a fiscal framework to better support youth diversionary outcomes and recognises that addressing the complex issue of Aboriginal over-imprisonment requires a data-driven, place-based approach. The economic and social costs of juvenile incarceration are unacceptably high. Under a justice reinvestment framework, savings resulting from a reduction in the number of juveniles in detention should be tracked and reinvested into the expansion of programs that are demonstrated to be effective in diverting Aboriginal and Torres Strait Islander children and young people away from the criminal justice system, together with early intervention programs and strategies that strengthen communities. It is critical that programs are community-led and culturally responsive with an enhanced focus on data collection, service system collaboration, and performance monitoring.

VII. THE APPROACHES OF THE CHILDREN'S COURT OF NEW SOUTH WALES, AND THE YOUTH KOORI COURT, TO DIVERSION

71. In a July 2016 submission to the Legislative Council Inquiry into Child Protection,[84] the President of the Children's Court of New South Wales, Judge Peter Johnstone, wrote:

> Aboriginals and Torres Strait Islanders are over represented in the justice system. In the Children's Court, this over-representation is manifested in both the juvenile crime jurisdiction and in the care and protection jurisdiction. Aboriginal children are similarly over-represented in detention centres. The Children's Court is proactively taking what steps it can to excite discussion and thought surrounding ways and means by which it can assist in the amelioration of this tragic reality.
>
> In its crime jurisdiction a Youth Koori Court has been established.
>
> In its care jurisdiction, the Court has increased its focus on cultural awareness and planning. Research has established that culture is a central factor in the socialisation of children and young people. If a child is removed from its parents, culture remains important – whether the child is at an age in which they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.
>
> In my decision in The Director-General of DFaCS (NSW) and Gail and Grace [2013] NSWChC 4 I said at [95]:
>
> > "I wish to place on record that this Court is increasingly frustrated by the lack of cultural knowledge and awareness displayed by some caseworkers and practitioners in their presentation of matters before it. The time has come for a more enlightened approach and a heightened attention to the necessary detail

[84] *Submission of the Children's Court of New South Wales to the Legislative Council Inquiry into Child Protection* (July 2016), Submission #80.

required, which may require specific training and education by the agencies and organisations involved."

A new care plan template will shortly be rolled out within FACs that will focus attention on the development of appropriate cultural plans for Aboriginal and Torres Strait Islander children but it will be necessary for NGOs and carers to commit to implementing the plans if children are to benefit from this process.

The Court considers that it is critical to raise this issue until comprehensive cultural planning is embedded at all levels of the care and protection process. The Children's Court submits that caseworkers and legal practitioners will benefit from increased training and professional development in this area.[85]

72. In relation to youth justice conferences (**YJCs**) which may be utilised by police under the *Young Offenders Act 1997* (NSW), Judge Johnstone has written:

> A YJC brings young offenders, their families and supporters face-to-face with victims, their supporters and police to discuss the crime and how people have been affected. Together, they agree on a suitable outcome that can include an apology, reasonable reparation to victims, and steps to reconnect the young person with their community to help them desist from further offending.
>
> YJC's are beneficial for the young person's experience of the criminal justice system, as all involved in the conference are not placed in an adversarial situation.
>
> Further, YJC's facilitate co-operation between the young person and police and foster collaboration and input from the individual offender, victims, families and communities.
>
> I am particularly supportive of the use of YJC's. In my view, they produce fruitful results for both the individual offender and the community.[86]

73. In 2015, the Children's Court began trialling the Youth Koori Court (**YKC**) in response to the over-representation of Aboriginal young people in the justice system.[87] The YKC involves a deferred sentencing model (see s 33(1)(c2) of the *Children (Criminal Proceedings) Act 1987*), as well as an understanding of and respect for Aboriginal culture.[88] According to the President of the Court, mediation principles and practices are employed in a conference process to identify issues of concern for the young person, identify ways in which those concerns can be addressed, and develop an Action and Support Plan for the young person to focus on for three to six months prior to sentence. Referrals to the YKC can only be made on the application of the young person. It is a voluntary process and relies upon commitment and ownership by the young person. The YKC sits in a court room with artworks prepared by young people in custody at each of the juvenile justice centres in NSW. The full suite of sentencing options is available to the Judicial Officer.

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[85] Ibid, pp 5-6.

[86] Judge Peter Johnstone, 'Early Intervention, Diversion and Rehabilitation from the perspective of the Children's Court of NSW' (Speech delivered at the 6th Annual Juvenile Justice Summit, Swissotel, Sydney, 5 May 2017), 9.

[87] Ibid.

[88] Ibid.

74. Between February 2015 and December 2016, the YKC had 52 referrals, and 48 of those young people were sentenced. As at May 2017, 11 young people were continuing or referred, 2 had been sentenced so far that year, and 9 young people working within the YKC program.

75. The Bar Association understands that a formal process evaluation of YKC has being conducted by Western Sydney University, but that the results are not yet publicly available. According to the Court's President, anecdotally many young people have become genuinely engaged in the process, and have developed a strong sense of accountability for their actions. With the assistance of the Children's Court Assistance Scheme, five YKC participants have been able to obtain permanent housing. According to the Court's President, the lack of funding is the main impediment to expansion of the YKC. Noting that the NSW Bureau of Crime Statistics and Research (**BOCSAR**) reported on 30 January 2017 that the number of juveniles in custody in NSW had fallen by 38 per cent[89] , and 3 detention centres closed over the past 5 years, Justice Johnstone was *"advocating strongly for the reinvestment of the savings of this remarkable reduction of 38% of children in detention into the youth justice system, to enable the expansion of programs such as the YKC to service more communities, and to support and divert as many youths as possible."*[90]

76. The Bar Association understands that communities such as those in Redfern, Glebe, La Perouse and Dubbo have been consulted on the possibility of expanding the YKC, and are eager to see its expansion to their communities.[91]

77. Since 2014, the Children's Court has also been implementing diversionary options to reduce contact of children with the criminal justice system through its Youth Diversion Process. Under this process, legal practitioners engaged by Legal Aid NSW identify young people who are likely to become regular uses of Legal Aid services against specific criteria developed and informed by research conducted on High Service Users. The legal practitioner also assesses the young person against the criteria used by the Integrated Case Management Panel (a panel coordinated by the Department of Family and Community Services in the Western Sydney District), and in appropriate cases makes a referral to that panel in conjunction with Juvenile Justice. Unless a young person has entered a plea of not guilty, the Children's Court agrees that an adjournment of 3 or 6 weeks, where the Court has ordered a Juvenile Justice Background Report is appropriate to allow for referral to and assessment by the Integrated Case Management Panel. The Children's Court thereafter manages and deals with these matters having regard to any additional information or action taken by the Integrated Case Management Panel or related agency. According to the Court's President, "[t]h*e principles of diversion, rehabilitation and a*

[89] From a peak of 405 detainees in June 2011 to 250 in December 2016: Bureau of Crime Statistics and Research, "New South Wales Custody Statistics, Quarterly Update", December 2016, http://www.bocsar.nsw.gov.au/Documents/custody/NSW_Custody_Statistics_Dec2016.pdf, accessed 21 February 2017.
[90] Ibid, pp 24–27.
[91] Ibid, pp 24–27.

multi-agency approach underlie the Youth Diversion Process, which is very much in line with the principles underlying Justice Reinvestment".

78. The Court's President, Judge Johnstone has applied a NSW lens to the features of successful diversion programs, first discussed by Judges Becroft and Harding of the New Zealand Youth Court. The Bar Association commends the President's consideration of the characteristics of such programs to the Committee, and notes in particular his Honour's discussion of the following characteristics:

- the *fifth* characteristic is the delegation of decision making to families, victims and communities. Judge Johnstone cites Youth Justice Conferencing as an example of this process "*which has proven to be effective in diverting young offenders and improving the outcomes for young people, whilst acknowledging the harm caused and the reasons why this occurred*", as well as the YKC as "*another process reflective of the desirability and effectiveness of community-based therapeutic justice*";
- the *sixth* characteristic is the duty to encourage participation by young people in the criminal justice process, embodied in NSW by the YJC and YKC;
- the *seventh* characteristic is evidence-based, therapeutic approaches to offending. Judge Johnstone "*strongly advocate*[es] *for a residential drug and alcohol service in Western Sydney, as well as a model similar to the Family Drug Treatment Court in Victoria*".
- the *eighth*, and one of the most important characteristics of an effective youth justice system is an ability to refer children and young people to care and protection where there is an overwhelming need to do so. Judge Johnstone notes that in NSW, the two jurisdictions of care and crime are separated, and there is no ability of the Court to divert a young offender to care and protective measures of its own accord. In New Zealand, by contrast, the legislation allows for referral out of the Court and to welfare services if a young offender or a child is considered to be in sufficient need of care and protection. The reality demonstrates a significant link between the two jurisdictions, and New Zealand is leading the way in incorporating this into their legislation and practice;
- *the tenth and final* characteristic is keeping the young person with their family and community which requires alternative programs which involve the family and community groups in an addressing a young offender's behaviour, in NSW such as the YJC and YKC. Again, according to Judge Johnstone, it is necessary to expand these services, particularly the YKC, to all areas of the state, so as to ensure that young people are given the opportunity for diversion into a holistic, family-oriented community program; and, again, this may require additional services such as drug and alcohol programs, family counselling.[92]

79. In its submission to this Committee, the Children's Court makes numerous submissions touching upon reform, including the following:

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[92] Judge Peter Johnstone, 'Early Intervention, Diversion and Rehabilitation from the perspective of the Children's Court of NSW' (Speech delivered at the 6th Annual Juvenile Justice Summit, Swissotel, Sydney, 5 May 2017), 32-37.

- suggesting lowering the threshold of the requirement under the *Young Offenders Act 1997* for a young person to admit the offence in order for police to be able to issue a caution or warning, along the lines of a "*concession of wrongdoing*" or to "*not deny*" the offence, noting that such requirement may discourage some young offenders from participating and being diverted from the criminal justice system[93];

- considering it critical that police who are interacting with children and young people understand the diversionary options available under the *Young Offenders Act 1997* and the circumstances in which diversion is appropriate[94];

- recommending that consideration be given to the use of Suspect Targeting Management Plans (**STMPs**), the impact of the scheme on young people, and whether or not it undermines the key objectives of the YOA, including diversion[95]. Of particular concern is the impact of STMPs of young people participating in the YKC and undertaking holistic diversionary programs;

- continuing to advocate for the expansion of the YKC, particularly to areas such as Dubbo and Central Sydney[96];

- supporting consideration of changing the age of criminal responsibility, as recommended by the Don Dale Royal Commission[97], from 10 years to 12 years[98], recognising that such a change requires processes, supports and services in place to identify and respond to the needs of children who are engaging in offending behaviour at a younger and that without access to appropriate diversionary processes, there is a risk that contact with the Court system will simply be delayed until the child reaches the age of 12;

- suggesting that some insight could be drawn from jurisdictions which operate a combined care and crime jurisdiction[99], such as the Children's Hearing System in Scotland[100], which recognises that children and young people in need of care and protection are often the same children and young people who commit offences[101], and present a model to address the "cross-over" of children from care to crime in New South Wales[102]; and

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[93] Submission of the Children's Court of NSW to the Legislative Assembly Law and Safety Inquiry into Youth Diversionary Programs in NSW, 2018 (**Children's Court submission**), pp 3-4.
[94] Ibid, p 4.
[95] Children's Court submission, p 7, citing Vicki Sentas and Camilla Pandolfini, Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW, 2017.
[96] Ibid p 10.
[97] Don Dale Royal Commission, Recommendation 27.1.
[98] Children's Court submission, p 12.
[99] Ibid p 14.
[100] See http://www.chscotland.gov.uk/the-childrens-hearings-system/
[101] Children's Court submission, p 14.
[102] Ibid.

- continuing to advocate strongly for a power similar to the "secure welfare" power or a power to refer a child in the criminal justice system to the care and protection system.

80. The Bar Association strongly supports the approaches of the Children's Court of NSW, in particular the YKC, in relation to diversion, and calls on the Government to provide dedicated funding to the YKC in order to achieve excellence in the program and to allow its expansion to service more communities, and to support and divert as many youths as possible. The Bar Association makes a number of recommendations to the Committee derived from the approach of the Children's Court of NSW and the recommendations of its President in relation to diversion in Part IX below.

VIII. SPECIALIST GLADUE STYLE SENTENCING REPORTS

81. As noted in the Bar Association's 5 September 2017 submission to the Australian Law Reform Commission Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, the overwhelming experience of the Bar Association is that in sentencing Aboriginal and Torres Strait Islander offenders, courts have insufficient information about the offender's background, including social, cultural and historical factors that relate to the offender and their community. Community Corrections reports in NSW provide a brief outline of the offender's subjective circumstances. The reports rarely provide information about the unique systemic, social, cultural and historical circumstances that are often relevant and necessary to place the individual offender's case into its proper context and to assist the sentencing judge in determining the appropriate penalty and the structure of any term of full-time imprisonment. Without such information, a sentencing judge is constrained in his/her ability to take into account material relevant to the person being sentenced.

82. Accordingly, the Bar Association has called for legislation to require Gladue style specialist reports[103] to provide information to judicial officers in relation to systemic and background factors (social, cultural and historical) that relate to an Indigenous offender and their community. This is for the following reasons:

    (a) First, in order that there is a fuller understanding of the impact of those factors on the offender's life.

    (b) Second, consideration of those factors should operate as a check before any sentence of imprisonment is imposed.

    (c) Third, the factors may assist in informing the type, length and structure of the sentence, thereby promoting both proportionality and individualised sentencing.

    (d) Fourth, individual relevant factors will no longer be assessed in a vacuum, they will be assessed within their relevant historical context.

[103] Named after the Canadian case of *R v Gladue* [1999] 1 SCR 688.

(e) Fifth, the systemic factors can shed light on the reasons for the offending behaviour and may assist in an assessment of moral culpability.

(f) Sixth, an understanding of the systemic factors may be relevant to considerations of deterrence and other purposes of punishment.

83. In the case of children and young people in NSW, it is true that a mandatory background report with respect to the circumstances surrounding the commission of the offence is a prerequisite to a sentence of imprisonment: see s 25(1) of the *Children (Criminal Proceedings) Act 1987*. It is also true, in the experience of the Bar Association, that such background reports are generally of a high standard. However, in the case of Aboriginal and Torres Strait Islander young people, they rarely if ever provide any information in relation to systemic and background factors (social, cultural and historical) that relate to the young person and the young person's Indigenous community.[104]

84. The Bar Association calls on the NSW Parliament to legislate, as a matter of urgency, to amend the *Children (Criminal Proceedings) Act 1987* to make it mandatory, in the case of Aboriginal and Torres Strait Islander young people, for a sentencing judge be provided with a Gladue style specialist report dealing with systemic and background factors (social, cultural and historical) that relate to the young person and the young person's Indigenous community before a sentence of imprisonment is imposed.

IX. ADDRESSING THE UNACCEPTABLE OVER-REPRESENTATION OF ABORIGINAL AND TORRES SRAIT ISLANDER YOUNG PEOPLE IN THE JUVENILE JUSTICE SYSTEM IN NEW SOUTH WALES BAR ASSOCIATION: RECOMMENDATIONS TO THE COMMITTEE

85. The Bar Association acknowledges the many Aboriginal and Torres Strait Islander community-led efforts to address the unacceptable over-representation of their children and young people in the juvenile justice system, in both the juvenile crime jurisdiction and the care and protection jurisdiction, and to divert as many of their children and young people as possible from the juvenile justice system. The Bar Association strongly supports the role of Aboriginal and Torres Strait Islander controlled organisations in the design and provision of juvenile justice related programs and diversion programs and pathways for Aboriginal and Torres Strait Islander children and youth. It is essential that such organisations be adequately resourced, structurally integrated and available in urban, regional and rural areas.

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[104] In accordance with clause 6 of the *Children (Criminal Proceedings) Regulation 2016*, a background report must with such of the following matters as are relevant to the circumstances surrounding the commission of the offence concerned: (a) the child's family background, (b) the child's employment, (c) the child's education, (d) the child's friends and associates, (e) the nature and extent of the child's participation in the life of the community, (f) the child's disabilities (if any), (g) the child's antecedents, (h) any other matters that the Children's Court may require, (i) any other matters that the prosecutor considers appropriate to include in the report.

86. As noted above, the Bar Association submits that much of the analysis of the RCADIC, the ALRC *Seen and heard* report, and the 2010 *Strategic Review* continues to provide valuable insight into the structural problems confronting Aboriginal and Torres Strait Islander people in their unacceptable levels of over-representation in the criminal and juvenile justice systems, and their recommendations continue to warrant careful consideration. In particular, the Bar Association submits that many recommendations of the Don Dale Royal Commission, appropriately adapted, should be accepted by the NSW Government, and implemented in the NSW juvenile justice system in engaging with, and providing services to Aboriginal and Torres Strait Islander young people in New South Wales.

87. The Bar Association strongly supports the work of the Children's Court of NSW in continuing to seek new and innovative ways to address the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice system through initiatives such as the YKC and its increased focus on cultural awareness and planning.

88. The NSW Bar Association makes the following recommendations to the Committee for adoption in its final report:

Recommendations adapted from those of the 1997 ALRC *Seen and heard* report

1. The NSW Government should commit to, and take up with the Council of Attorneys-General, the development of national standards for juvenile justice to reflect Australia's international commitments and ensure a proper balance between rehabilitation, deterrence and due process. The standards should be developed by the National Children's Commissioner, in consultation with the relevant State and Territory authorities, the legal profession, Aboriginal and Torres Strait Islander communities and organisations, community groups, peak bodies such as juvenile justice advisory councils and young people.[105] The National Children's Commissioner should be funded to undertake this task.

2. Compliance by the Commonwealth, States and Territories with the national standards for juvenile justice should be monitored by the National Children's Commissioner. As part of this process, the Commonwealth and each State and Territory should be required to provide a detailed profile of juvenile justice laws, programs and policies annually, including information on performance measures and outcomes. The community sector should be given regular opportunities to contribute to the monitoring process. [106] The National Children's Commissioner should be funded to undertake this task.

3. Juvenile justice data provided to the National Children's Commissioner by the States and Territories in accordance with the above recommendation should provide a breakdown as

[105] ALRC Recommendation 192.
[106] ALRC Recommendation 193.

to whether a decision was made by a specialist children's magistrate or by a generalist magistrate and be matched with the type of order made in each case.[107]

4. The national standards for juvenile justice should stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and the community.[108]

5. The national standards for juvenile justice should provide best practice guidelines for cautioning that will ensure equal treatment of young people wherever they live and whatever their background. The National Children's Commissioner should be funded to monitor compliance with these guidelines.[109]

6. The national standards for juvenile justice should provide best practice guidelines for family group conferencing. The National Children's Commissioner should be funded to monitor compliance with these guidelines.[110]

7. The national standards for juvenile justice should require governments to ensure Indigenous communities are able to develop their own family group conferencing models. Existing conferencing schemes should be modified to be culturally appropriate.[111]

8. In addition to training already provided, all magistrates and judges who hear juvenile justice matters should receive specialised training. The training should include components on matters such as communications skills, child development, Indigenous culture, juvenile justice procedure and the structural causes of offending.[112] The Judicial Commission of NSW should be funded to provide such training, in consultation with Indigenous community organisations.

9. The judicial training proposed in the above recommendation should include material on ensuring Indigenous witnesses understand juvenile proceedings and can participate in them effectively.[113]

10. Courts of appellate jurisdiction should designate judges to hear appeals in juvenile justice matters. These judges should undertake the training proposed in the above recommendations.[114]

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[107] ALRC Recommendation 235.
[108] ALRC Recommendation 198.
[109] ALRC Recommendation 199.
[110] ALRC Recommendation 200.
[111] ALRC Recommendation 202.
[112] ALRC Recommendation 236.
[113] ALRC Recommendation 233.
[114] ALRC Recommendation 237.

Recommendations adapted from those of the HoR Standing Committee *Doing time* report

Justice targets

11. The NSW Government support justice targets to be developed by the Council of Attorneys-General for inclusion in the Council of Australian Governments' Closing the Gap strategy. These targets should then be monitored and reported against. [115]

Mentors

12. The NSW Government support a national program to develop and provide local Indigenous mentors for Indigenous youth at risk before, during and after custody. [116]

The link between health and the criminal justice system

13. The NSW Government urgently addresses the high incidence of Foetal Alcohol Spectrum Disorder (**FASD**) in Indigenous communities by (a) supporting the development and implementation of FASD diagnostic tools and therapies, with a focus on working in partnership with Indigenous health organisations in remote and regional NSW; (b) recognising FASD as a registered disability and as a condition eligible for support services in the health and education systems. Further, that the NSW Government establish a comprehensive inquiry into FASD prevalence, diagnosis, intervention and prevention.[117]

14. The NSW Government recognise mental health as a significant issue affecting Indigenous youth, and direct funding to successful Indigenous community developed and led programs with a focus on healing, culture, emotional wellbeing and reconnection with family.[118]

Police training and Indigenous employment

15. The NSW Government work with the Law, Crime and Community Safety Council to address the following priorities at its next meeting:
    - The development of a national framework for the provision of comprehensive Indigenous cultural awareness training for all police employees that:
        - Promotes better understanding and relations between police and Indigenous communities
        - Addresses the specific circumstances of Indigenous youth overrepresentation in police contact, and
        - Outlines the diversionary options that are available, and the positive impact that diversion can have.
    - An expanded national network of Indigenous Liaison Officers, with facilities to share information and knowledge across jurisdictions, and

[115] Ibid, Recommendation 2.
[116] Ibid, Recommendation 4.
[117] Ibid, Recommendation 9.
[118] Ibid, Recommendation 10.

- Incentives to increase the employment of Indigenous police men and women and opportunities for mentoring and police work experience for Indigenous students.[119]

Court interpreter service and hearing assistance

16. The NSW Attorney-General present to the Council of Attorneys-General a revision of criminal justice guidelines to include formal recognition of the requirement to ascertain the need for an interpreter service or hearing assistance when dealing with Indigenous Australians.[120]

National interpreter service

17. The NSW Attorney-General work, in partnership with Commonwealth, State and Territory governments, to establish and fund a national Indigenous interpreter service that includes a dedicated criminal justice resource and is suitably resourced to service remote areas.[121]

Legal services funding

18. The NSW Government work with the Commonwealth Government to increase funding for Aboriginal and Torres Strait Islander Legal Services to achieve parity per case load with Legal Aid Commission funding in the next Federal Budget, with appropriate loadings to cover additional costs in service delivery to regional and remote areas.[122]

Post-release bail accommodation

19. The NSW Government provide, and the NSW Attorney-General take to the Council of Attorneys-General the proposal for, increased funding for appropriate accommodation options for youth who are granted bail, in order to prevent the unnecessary detention of Indigenous youth.[123]

Study on sentencing options

20. The NSW Bureau of Crime Statistics and Research be asked to undertake an analysis of sentencing options and outcomes for Indigenous youth and young adults and the use of available diversionary options to determine whether alternative sentencing options are fully utilised before resorting to incarceration.[124]

Alternative sentencing options

21. The NSW Attorney-General evaluate outcomes for current sentencing options, such as reduced recidivism and improved positive and independent living, and from this research develop a proposal for a range of Indigenous alternative sentencing options and present it

[119] Ibid, Recommendation 23.
[120] Ibid, Recommendation 24.
[121] Ibid, Recommendation 25.
[122] Ibid, Recommendation 26.
[123] Ibid, Recommendation 27.
[124] Ibid, Recommendation 28.

to the Council of Attorneys-General for inclusion in the National Indigenous Law and Justice Framework.[125]

Pre-court conferencing

22. The NSW Government implement a program, and the NSW Attorney-General take to the Council of Attorneys-General the proposal for a nationwide program, that begins the rehabilitation process of young Indigenous offenders from the point at which they are charged with an offence. Such a program should include:
    - Assigning a community services case worker to an individual immediately after they have been charged to organise a family conference
    - A victim contact meeting where the offender hears the consequences and impacts of their unlawful actions on the victim
    - Ascertaining, through family conferencing, any underlying problems that are influencing offending behaviour and setting out a plan for behavioural change with clear targets to be achieved prior to attending court.

    Sentencing of individuals who have engaged with this program should take into account any genuine progress towards meeting these targets for behavioural modification.[126]

Indigenous offender programs

23. The NSW Government itself provide, and work with the Commonwealth Government to establish, a new pool of adequate and long term funding for young Indigenous offender programs. Organisations and community groups should be able to apply for funding for programs that assist young Indigenous offenders with:
    - Post-release or diversionary program accommodation
    - reintegrating into the community and positive social engagement through volunteering and team involvement
    - reconnecting with culture where possible
    - drug, alcohol and other substance abuse rehabilitation
    - continued education and training or employment, and
    - life and work readiness skills, including literacy and numeracy

    This fund be geared towards small-scale community-based groups, operating in local areas, and include a specific stream for programs that address the needs of young Indigenous female offenders. Local employers would be encouraged to mentor and train with a view to employment.[127]

Evaluate Indigenous justice programs

24. The NSW Government commit further resources to evaluate the effectiveness of Indigenous youth justice and diversion programs and that the findings be published on relevant

[125] Ibid, Recommendation 29.
[126] Ibid, Recommendation 30.
[127] Ibid, Recommendation 31.

websites, such as the Indigenous Justice Clearinghouse and the Closing the Gap Clearinghouse websites.[128]

Mapping offending

25. The NSW Government invest in mapping research to identify areas of concentrated youth offending, types of offending and gaps in services, with a focus on Indigenous disadvantage and need.[129]

Expanding data collections

26. The Australian Bureau of Statistics expand its collection of data to include:
    - offender data disaggregated by all jurisdictions and all categories of offence, including traffic and vehicle related offences
    - court appearance data, disaggregated by all jurisdictions by Indigenous status, sex, offence and sentence
    - prisoner reception data disaggregated by all jurisdictions, according to Indigenous status, sex, offence, age, sentence length and episodes of prior offending by category of offence, and
    - data on the rates of which Indigenous people are victims of crime, disaggregated by all jurisdictions and all categories of offence.

    The Australian Institute of Health and Welfare expands its collection of data to include:
    - detainee receptions and census data disaggregated by jurisdiction
    - Indigenous status, sex, offence, age, sentence duration and periods of prior offending by category of offence.

    These expanded data sets and any trends they show be annually evaluated and reported on and used to inform future policy or program changes.[130]

Study on the imprisonment of women

27. The NSW Bureau of Crime Statistics and Research be asked to undertake a study of the reasons for the increasing imprisonment of Indigenous women, with a view to informing policymakers on how best to address the key drivers of offending and imprisonment and the consequences of that imprisonment for women, their children (if any) and their community.[131]

Sustained flexible funding

28. The NSW Government itself provide, and work with Commonwealth, State and Territory governments to coordinate, sustained and flexible funding support for a range of youth justice diversion and rehabilitation services which are developed with and supported by local Indigenous communities.[132]

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[128] Ibid, Recommendation 32.
[129] Ibid, Recommendation 33.
[130] Ibid, Recommendation 34.
[131] Ibid, Recommendation 35.
[132] Ibid, Recommendation 39.

Justice reinvestment

29. The NSW Government support the principles of justice reinvestment and focus its efforts on early intervention and diversionary programs and support further research to investigate the justice reinvestment approach in Australia.[133]

Recommendations adapted from those of the Don Dale Royal Commission

The work of the Committee

30. The NSW Government establish a program of community engagement to visit communities and communicate the outcomes and recommendations of the Committee's final report.[134]

Personal stories

31. The NSW Government provide legislation for a representative body of Aboriginal and Torres Strait Islander children and young people who are or have been in and out of home care or who have been in the youth justice system to express their views on the development and implementation of laws and policies which affect children and young people in those systems and that those views be given due weight.[135]

Community engagement

32. The NSW Government commit to a "place-based" approach for the implementation of the relevant recommendations of the Committee's final report in partnership with local communities. The partnership should be built on the principles of mutual respect, shared commitment, shared responsibility and good faith. The location of the "place' could be a single community, a group of communities or a region.

33. The purpose of the partnership should be to reach agreement on the strategies, policies and programs needed to provide sustained positive outcomes for children and young people at each "place".

34. The NSW Government immediately engage with Aboriginal community representatives to negotiate the broad terms for the partnership and its implementation across NSW built on the following principles:
    - the best interest of the child
    - local solutions for local problems
    - local decision-making
    - the centrality of family and community to the wellbeing of children and young people
    - the NSW Government has the ultimate responsibility to ensure the safety and security of all children and young people in NSW, and

[133] Ibid, Recommendation 40.
[134] Don Dale Royal Commission, Recommendation 1.1.
[135] Ibid, Recommendation 2.1.

- shared responsibility and accountability.[136]

Diversion

35. The units of the NSW Police responsible for youth diversion be resourced to provide a comprehensive diversion service, with adequate specialist staff members and facilities, to give effect to the principles of the *Young Offenders Act 1997* (NSW).[137]

36. Sections 19(b) and 36(b) of the *Young Offenders Act 1997* (NSW) be amended to replace the requirement for an admission of an offence in accordance with s 10 of the Act in order for police to issue a formal police caution or utilise a YJC, with a requirement that a child '*does not deny*' the offence.[138]

37. NSW Family and Community Services, in consultation with Aboriginal health and legal assistance organisations, undertake an immediate assessment of the diversion program requirements available to the NSW Children's Court and make available the necessary resourcing to support their implementation and delivery.[139]

38. Youth diversion programs in remote communities be developed and operated in partnership with, or by, Aboriginal communities and/or Aboriginal controlled organisations.[140]

Courts

39. All judicial officers in NSW be provided with access to seminars conducted by experts with particular emphasis on cognitive development, adolescent behaviour, communication with young people appearing in court and Aboriginal cultural competence.[141] The Judicial Commission of NSW be provided with additional funding in order to facilitate such seminars.

40. Resources be provided to develop and support Aboriginal controlled Law and Justice groups, in consultation with local Aboriginal communities, both remote and urban.[142]

41. Adequate resourcing be available to ensure the accessibility of conferencing, including in remote areas for all children and young people.[143]

42. Communities be resourced to establish a process to provide:
    - information for pre-sentencing reports for Aboriginal children and young people, and

[136] Ibid, Recommendations 7.1 – 7.3.
[137] Ibid, Recommendation 25.8.
[138] Ibid, Recommendation 25.12.
[139] Ibid, Recommendation 25.39.
[140] Ibid, Recommendation 25.14.
[141] Ibid, Recommendation 25.26.
[142] Ibid, Recommendation 25.34.
[143] Ibid, Recommendation 24.40.

- information about local non-custodial sentencing options for Aboriginal children and young people.[144]

43. The NSW Department of Justice ensure access to Aboriginal interpreters as required.[145]

Reshaping youth justice

44. Section 5 of the *Children (Criminal Proceedings) Act 1987* (NSW) be amended to provide that the age of criminal responsibility be 12 years.

45. There be legislation enacted to provide that children under the age of 14 years may not be ordered to serve a time of detention, other than where the child:
    - has been convicted of a serious and violent crime against the person;
    - presents a serious risk to the community; and
    - the sentence is approved by the President of the Children's Court.[146]

Entry into the child protection system

46. NSW Family and Community Services develop cultural awareness and competence training in consultation with Aboriginal controlled organisations.[147]

47. NSW Family and Community Services ensure that any family where a child is to be removed is given all appropriate information about the reason for the removal, the steps the family must take to have the child returned, and legal advisors the family may contact in a form and language suitable for the family.[148]

Children in out of home care

48. NSW Family and Community Services work with Aboriginal organisations to implement a joint program dedicated to increasing the number of Aboriginal foster and kinship carers, using community awareness and individualised community engagement.[149]

49. Care plans must be kept up to date and provided to parents in clear and understandable language, with an interpreter if necessary, about what is required for reunification with their children.[150]

50. NSW Family and Community Services:
    - report on the number of children and young people successfully and unsuccessfully reunified with families and the duration of their period in out of home care and the systemic impediments to reunification, and

[144] Ibid, Recommendation 25.42 (1).
[145] Ibid, Recommendation 34.11
[146] Ibid, Recommendation 27.1.
[147] Ibid, Recommendation 32.10.
[148] Ibid, Recommendation 32.12.
[149] Ibid, Recommendation 33.5.
[150] Ibid, Recommendation 33.2.

- create a senior position with overall responsibility for reunification policy and processes.[151]

51. NSW Family and Community Services consult with Aboriginal organisations to:
    - improve content and the delivery of specific training to NSW Family and Community Services staff members undertaking kinship care assessments, and
    - amend and streamline kinship care assessment forms and processes to ensure that the best interests of the child are considered, consistent with a fully informed assessment of acceptable and unacceptable risks to the child.[152]

52. NSW Family and Community Services create senior positions, to be filled by Aboriginal or Torres Strait Islander peoples, in the area of kinship care, with responsibility for:
    - increasing the number of Indigenous foster and kinship carers
    - overseeing training on kinship and kinship care decision-making
    - reviewing decisions relating to kinship care, including carer assessments and failure to place children with identified kin, and
    - reporting annually on aspects of kinship care, including the number of Indigenous children placed in or outside kinship care.

53. NSW Family and Community Services ensure access to Aboriginal interpreters as required.[153]

Avoidance of involvement in the criminal justice system

54. The NSW Government investigate the development of a tool appropriate for usage in NSW, the purpose of which is to identify young people for whom intensive support and intervention would be successful in avoiding involvement in the criminal justice system.

The crossover of care and detention

55. A joint protocol be developed between NSW Family and Community Services, the out of home care service sector and the police to address the management and response to criminal behaviour in the out of home care environment, with an evaluation of the protocol carried out within two years.[154]

Recommendations derived from the experience of the Children's Court of NSW and the YKC

56. The NSW Government recognise the desirability and effectiveness of community-based therapeutic justice and therapeutic approaches to offending in addressing the

[151] Ibid, Recommendation 33.3
[152] Ibid, Recommendation 33.8
[153] Ibid, Recommendation 34.11
[154] Ibid, Recommendation 35.2.

overrepresentation of Aboriginal and Torres Strait Islander young people in detention in NSW.

57. The NSW Government provide adequate funding to the Koori Youth Court, and facilitate its expansion to all areas of the State, and in particular to those communities such as Dubbo and Central Sydney which are currently seeking its expansion.

58. The NSW Government provide adequate funding to Juvenile Justice to enable the provision of Youth Justice Conferencing in all areas of the State.

59. The NSW Government provide adequate funding to ensure the availability of drug and alcohol programs and family counselling services for children and young people in all areas of the State.

60. The NSW Government establish and fund a residential drug and alcohol service in Western Sydney.

61. The NSW Government consider the creation in NSW of a court similar to the Victorian Family Drug Treatment Court.

62. The Children's Court be provided with a power similar to the "secure welfare" power or a power to refer a child in the criminal justice system to the care and protection system.

63. The NSW Government support the creation of a combined care and crime jurisdiction in NSW, such as that of the Children's Hearing System in Scotland, which recognises that children and young people in need of care and protection are often the same children and young people who commit offences, and addresses the "cross-over" of children from care to crime.

64. NSW police who are interacting with children and young people receive training in relation to the diversionary options available under the *Young Offenders Act 1997* (NSW) and the circumstances in which diversion is appropriate.

65. The use of Suspect Targeting Management Plans be discontinued in relation to children and young people, in particular those young people participating in the YKC and undertaking diversionary programs.

Recommendation in relation to Aboriginal and Torres Strait Islander girls and young women, and diversion

66. In all initiatives in relation to the diversion of Aboriginal and Torres Strait Islander children and young people, Aboriginal and Torres Strait Islander girls and young women should be

consulted in relation to the content and delivery of policies and programs to ensure that their distinct needs and perspectives are adequately addressed.

The principle of equal accessibility to diversionary programs and services in all areas of the State

67. The NSW Government commit to and ensure implementation of the principle of equal accessibility for children and young people throughout the State, including in regional and remote areas, to the full range of diversionary programs and services.

Broadening the scope of the *Young Offenders Act 1997*

68. The scope of the *Young Offenders Act 1997* (NSW) as a legislative framework for the diversion of young offenders in NSW be broadened, through measures including:

    a. removing the exclusion from the Act of certain offences that operate to prevent the diversion of children in appropriate cases, such as offences under the *Crimes (Domestic and Personal Violence) Act 2007* (s 8(2)(a)) and less serious sexual offences under ss 61L, 61N and 66C *Crimes Act 1900* (s 8(2)(d));

    b. removing the restriction in s 20(7) on the number of cautions that a child can be given;

    c. replacing the requirement in ss 19(b) and 36(b) that a child admit to committing an offence with a requirement that the child '*does not deny the offence*' (in accordance with the recommendations of the Don Dale Royal Commission – see recommendation 35 above). There should be no requirement that the young person participate in an ERISP for this purpose, but rather that they sign a standardised form.

Specialist Gladue style sentencing reports

69. The NSW Parliament legislate, as a matter of urgency, to amend the *Children (Criminal Proceedings) Act 1987* (NSW) to make it mandatory in the case of Aboriginal and Torres Strait Islander young people for the court to be provided with a Gladue style specialist report dealing with systemic and background factors (social, cultural and historical) that relate to the young person and the young person's Indigenous community before sentencing to a term of imprisonment.