To: The Standing Committee on Aboriginal and Torres Strait Islander Affairs

Re: Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system

Extra submissions for the ATSIA Roundtable

28 January 2011, Sydney

Firstly, please accept my apologies for not being in attendance today. At the time of the invitation to attend I had an existing commitment to honour in Indonesia.

Some of the material I have included here is extracted from my previous submissions and some of it is new to the ATSIA Committee. Most of the new submissions I have incorporated here are from Aboriginal customary law leaders in Arnhem Land.

All of the submissions point to a single major aspect relevant to the Committees' inquiry, that is that in the remote Aboriginal communities of the Northern Territory, **the answers to the problems reside in the senior and respected Aboriginal people of those communities.** This approach is reflected in the first recommendation of the 'Little Children are Sacred' Report:

> *It is critical that both governments* (NT and Commonwealth) *commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities*[1]

For some communities (for example most communities in Arnhem Land) there is a great deal of traditional law institutions and methods that are effective in dealing with juvenile crime. In many other communities the institutions and methods may be less traditional than modern, however it is still the senior and respected Aboriginal people of these communities who possess the answers to the problems. This is due to these senior and respected local Aboriginal people enjoying recognition of authority in their communities by the community residents.

With this in mind, it is submitted that the greatest positive contribution the Government can make is to resource and facilitate these senior and respected people to design and implement locally appropriate solutions to lowering juvenile crime. These solutions will look different to equivalent solutions in other parts of Australia

[1] Report of the NT Board of Enquiry into the Protection of Aboriginal Children from Sexual Abuse 2007

and will even look different across the Northern Territory. However the essential aspect of these solutions that will make them effective is that the properly resourced and facilitated local senior and respected Aboriginal people who are authoritative in their particular community. This type of authority is respected and followed by the locals of each community far more than any other type of authority.

The resourcing and facilitating of senior and respected local Aboriginal people to design and implement locally appropriate solutions to lowering juvenile crime is the critical, but not the only, relevant consideration in devising solutions to juvenile crimes (and crime generally) in Aboriginal communities. The problem is a multi-faceted one and submissions were made by NAAJA on all of the terms of reference of the Inquiry in December 2009. All of the other relevant areas (such as housing, health and education) are also important, however it is submitted here that the involvement of the senior and respected people local people is critical to achieving lasting improvements as these people occupy the positions of authority within the communities.

The current ways that Government involve senior and respected local Aboriginal people in the Northern Territory are negligible

The current ways that Government involve senior and respected local Aboriginal people inn justice matters are negligible in remote Northern Territory communities. Occasionally, and usually by sheer coincidence, a local Aboriginal interpreter is engaged to provide interpreting services in court for an accused who happens to be in a 'right relationship' with the accused to speak about matters of discipline. More often, people who under Aboriginal customary law must avoid each other (for example, 'poison cousins') are required by the visiting Magistrate's court to be in the same court room at the same time.

On, 6 May 2010 in Darwin I made the following oral submissions to the ATSIA Committee[2]:

> At a very practical level, whoever the young person who is in trouble is, the correct person to conduct the youth diversionary activities for that offender is not just a government agency or even an Aboriginal person who an agency has determined is the employee, but it is dependent upon a blood relation to that offender. In most cases, that would be what is called an uncle. For these purposes, it is enough to just describe that person as the uncle. Essentially it will be a senior man and that person will be related to the offender. Relationships in traditional Aboriginal communities are what keep places alive. They are the currency.

[2] Danial Kelly, Thursday, 6 May 2010 REPS ATSIA 55-6.

> They are what is important, not government programs, not even Centrelink money. It is family relationships. That is the No. 1 norm that controls people, that drives people, that keeps people functioning. If I can make a correlation back to mainstream Australian society, if I were in trouble and I appeared before Her Honour, I would accept the punishment that Her Honour gave me because she is socially sanctioned by our society to do so. However, if I were to turn up to the desk of my friend here Mr Brock, I would not accept such a punishment, because he is simply not socially sanctioned to do so. That parallel can be drawn with the Aboriginal communities that we are talking about, because not everyone—and certainly not the people who have been employed, necessarily, by the government agencies to do so—are the correct people to run the diversionary programs. When I say 'diversionary', we could extend that to similar types of home detention or other types of community service arrangements.

Previously I made the following submissions as a solicitor employed by the North Australian Aboriginal Justice Agency (NAAJA)[3]:

> **1.2 Aboriginal people need to be the owners and leaders of the solutions. Their ideas and methods need to be supported.** At present there is a manifest lack of genuine involvement of Aboriginal people in government programs. Most government programs concerning Aboriginal people are entered into by governments suffering from a lack of knowledge and skills to effectively collaborate with and improve outcomes for Aboriginal people. The major mistake made repeatedly is to impose solutions from the outside as opposed to supporting Aboriginal initiatives or initiatives that operate from and strengthen the cultural base. Another common mistake is the failure to understand that criminal justice issues are but one spoke in a wheel of inter-dependant issues faced by Aboriginal Australians in the Northern Territory. Culture, health, housing, education and employment are some of the other spokes that need to be addressed in a holistic approach together with criminal justice issues in order for improvements to be made.
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> **1.5 The need for a Youth Diversion Unit, Indigenous Youth Workers in Court and Community Work Orders.** The Northern Territory does

[3] Submissions in response to the Terms of Reference of the Parliamentary Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system by North Australian Aboriginal Justice Agency (NAAJA), December 2009.

not have an independent Youth Diversion Unit as is commonly found in other Australian jurisdictions. The lack of an independent Youth Diversion Unit in the Northern Territory means that youth at risk of exposure to the criminal justice system are not given the therapeutic and rehabilitative options available to other Australian youths. Instead, Northern Territory youths are dealt with solely by Police and as a result are prematurely drawn into a system which is not open for review or question.

There is a manifest lack of Community Work Order options in the Northern Territory. Magistrates are only ordering bonds, fines and detention. Alternative types of sentences that address the underlying issues are not being ordered.
In addition to the Youth Diversion Unit, an independent Indigenous Youth Worker is required to be present in Court to liaise with potential service providers and legal aid lawyers.

Local senior and respected Aboriginal people need to be resourced and facilitated to design, establish and maintain juvenile crime solutions, including diversion programs and other community work order programs.

Further previously made submissions by NAAJA[4]:

2.5.2 Government needs to recognize effective Aboriginal approaches to diversion and sanction and resource those approaches.

2.5.3 Rather than trying to invent programs the government should take notice of programs that have already been developed by Aboriginal people and that need funding to survive. The Balunu Foundation[5] have developed cultural camps for troubled Aboriginal youth that have had significant success in turning kids around. We urge the Inquiry to look at the work of this foundation.

2.5.4 Diversion programs for Indigenous youth in Aboriginal communities of the Northern Territory are scant. Police in Arnhem Land recently admitted to a NAAJA solicitor that they did not know how to initiate diversion. NAAJA is not aware of support mechanisms

[4] Ibid.
[5] http://www.balunu.org.au

for those returning from juvenile detention centers or from court with non-custodial sentences.

2.5.5 The Mt Theo Outstation[6] (160 kms from Yuendemu) has operated since 1994 to assist youth with petrol sniffing problems. Mt Theo is widely acknowledged for successfully diverting Indigenous youth from petrol sniffing and other harmful practices that commonly lead to contact with the criminal justice system. The essential model of Mt Theo is that of a relatively isolated outstation run by the senior traditional owners of the area who provide the youth with culturally appropriate rehabilitative activities, teachings and responsibilities – in a nut shell, a healthy and rehabilitative effective lifestyle. In the Northern Territory this is commonly the Aboriginal method of dealing with people in need of direction in their lives. For cultural and disciplinary purposes these outstations or camps are still run and should be tapped into by the courts and adequately resourced by the government in order to conduct effective diversion for Indigenous youths and young adults. This may not be an option in other parts of Australia but it certainly is a viable option in the Northern Territory and may very well be the most effective option. Certainly Mt Theo attests to the outstation model of diversion.

2.5.6 Few other diversionary programs are functional in the Northern Territory. Two programs that are operating usefully are the Tiwi Islands Diversionary Unit (operated by Kevin Doolan) and the Groote Eylandt & Milyakburra Youth Unit (GEMYDU) on Groote Eylandt. The Balunu Foundation helps Indigenous youths in the Darwin region in preventative health and well-being programs and could be approached for future diversionary programs.[7]

2.5.7 Every Aboriginal community in the Northern Territory needs diversionary programs operated by local people who understand the local socio-cultural fabric such that effective diversion occurs. These diversionary programs need to be properly resourced and supported by government if there is to be a serious attempt to divert Indigenous youths from the criminal justice system.

There is a particularly strong need for diversionary programs to be established by local senior and respected Aboriginal people in remote Northern Territory communities. Per NAAJA's earlier submissions:

[6] See http://www.mttheo.org/about_mttheo.htm
[7] www.balunu.org.au

2.6.4 Diversion

There are two major issues with diversion for Indigenous youth in the Northern Territory :

a) the shortage of diversionary programs, and

b) the unwillingness of police to direct indigenous youths to diversion

2.6.4.a Shortage of diversionary programs

NAAJA is aware of only a handful of diversionary programs currently functioning in the Top End of the Northern Territory. Corrections has not supplied NAAJA with a list of currently functioning Community Work Order approved supervisors despite our requests that they do so.

2.6.4.b Unwillingness of police to direct indigenous youths to diversion

According to s39 of the Youth Justice Act, a police officer **must**, instead of charging the youth with the offence, do one or more of the following as the officer considers appropriate:

(a) give the youth a verbal warning;

(b) give the youth a written warning;

(c) cause a Youth Justice Conference involving the youth to be convened;

(d) refer the youth to a diversion program.[8]

Notwithstanding this legislative requirement, a recent report from the Australian Institute of Criminology[9] shows the Northern Territory has the lowest percentage of youth being offered diversionary programs in Australia. The report also describes how Indigenous young people are much more likely to be detained in custody than their non-Indigenous counterparts. These two findings point to a problem originating in Police practice which result in higher than necessary levels of involvement of Indigenous juveniles and young adults in the criminal justice system in the Northern Territory.

[8] s39(2) *Youth Justice Act (NT)*
[9] http://www.aic.gov.au/publications/current%20series/tandi/341-360/tandi355/view%20paper.aspx

It is critical for Government to identify the appropriate local senior and respected people and to take the time necessary to establish effective communication channels with those people in order to draft local solutions:

> The solutions are not going to work so long as they are top-down approach from government to people in the communities; it misses the target every time. That has happened for as long as we have been Australia and is probably going to continue. There is no indication that it will change. The solutions are there, though, and the people are there and they have those solutions. It is a matter of whether those people are effectively consulted. I am not talking about a fly-in fly-out quick visit or writing a quick report and sending it in. I am talking about the effective ways of communicating with those people. In the first place, identify who those people are. That takes time. Then sort out the relevant groups that need to be consulted. These types of answers, for the overwhelming majority of communities, cannot occur at a community level. There are clans within communities that need to be incorporated into this. For nine out of 10 communities it will not be effective just to have someone from the community. There need to be the clans and the families within the communities who have been identified contributing and taking on board themselves the responsibility of working with government on this. The examples I could point out are numerous, but the one thing I do want to emphasise is that the solutions are there. They do require government to have effective listening skills and then to facilitate the people who have always lived there to implement those solutions.[10]

> How do we identify who those people are? The work is case by case. The people who would be conducting those types of diversionary programs or alternative types of sentence arrangements do not, in my opinion, need to be paid employees of any department, but they do need to be facilitated. So how might this be done? It might be the use of a vehicle; it might be the use of funds for food; it might be, if not the use of a vehicle, some sort of other travel provision. The typical arrangement for a punishment of this type is to remove the person from the main community, take them to an outstation for an amount of time and then for them to come back later. That might be one month, six

[10] Danial Kelly, Thursday, 6 May 2010 REPS ATSIA 55.

> months—it depends on the offence that has happened. All that costs money—to move people from one place to another and to keep them there without access to a shop and so on. Those are the sorts of things that are effective and already do occur, even though the formal criminal justice system does not regularly engage with that. These things are occurring. I know the people who are conducting this type of taking young people out to outstations for a type of diversionary program. It is all informal and there is no support in any way from any organisation, government or NGO. But they are the programs that are effective, because those young people, mostly men, come back and have a changed approach to how they ought to conduct themselves in the community. They are the solutions that are already functioning. If they are going to support the formal criminal justice system then they ought to be facilitated or supported to do so.[11]

This leads to the practical concerns of how such diversionary and other programs aimed at reducing juvenile crime in NT Aboriginal communities be accomplished. Again, from my oral submissions made to the ATISA Committee in May 2010:

> In the first place, if police are exercising their discretion then there would be the opportunity to take (juvenile criminal matters) before the criminal justice system or to deal with it in another way. If the police had this knowledge then this type of diversionary program could occur—that is, to discover the child's moiety and discover the appropriate Dalkarmirri man if this were, say, in the context of Arnhem Land. That is a type of judicial officer in the Yolngu context. We could ask that person who are the appropriate elders for this boy—it is most likely to be a boy—to advise on punishment and correction and so on, and to convene that meeting. But that is all knowledge that comes about after one has properly listened in the first place.
>
> How might this happen? The knowledge does exist, as I said in the beginning, and there are non-Aboriginal people who have some understanding of how this can happen as well. Some of that knowledge exists at NAAJA among us up there. Some of it is here at CDU and in other places as well. It is a genuine listening that comes before a successful program.
>
> I have the benefit of a couple of years working on a couple of AusAID programs in Indonesia, so I can speak from that side of the fence, since you mention it as well. In those cases, Australian

[11] Ibid, 56.

> people are properly funded to be in the local context on an extensive timescale—two years or more—to (1) learn the language and culture and (2) know how to operate in culturally appropriate ways in those communities. Then programs can occur successfully.
>
> Sorry for sounding like a broken record on this, but it is about government being able to listen. That listening does not occur by convening a meeting in the sort of format, for example, that we have here today. That works fine for us, because we are culturally used to that, but in the remote Aboriginal contexts that is not the method of having successful communication. Again, if we wanted to have this inquiry out in an Arnhem Land community, it would be about finding the appropriate Dalkarmirri men in that community and asking them to extend the invitation—not from us—to the appropriate people. You will get all the appropriate people at that meeting, they will turn up without fuss and that will work for that clan. In that community you may need to do that a couple of times, depending on the community and the number of major clans there. Again, it comes back to effective listening

Continuing on the theme of how diversionary and the like can practically be accomplished, I recount the oral submissions made to ATSIA in Darwin[12]:

> **CHAIR**—The question still remains. Everyone has a desire to do it, but the question is: what is the actual process that ought to take place? What are the skills that should be brought to bear to answer the question. It is a matter of goodwill that people are trying so hard to find out what the problems are and what the solutions are, but it is all pointless if somebody just comes in and tells everybody else what the problem is and we begin another cycle of only barely relevant expenditure.
>
> **Mr Kelly**—In a generic way, the answer does lie in having people involved who have cross-cultural and intercultural skills—they might be Aboriginal people or non-Aboriginal people but, either way, they will be competent in both cultures—and then for the government department to take their advice, rather than put it aside or not have the preparedness to attempt it, because many of the solutions will not look like things we currently see as solutions, but they will be effective.
>
> **CHAIR**—They might not cost much either.

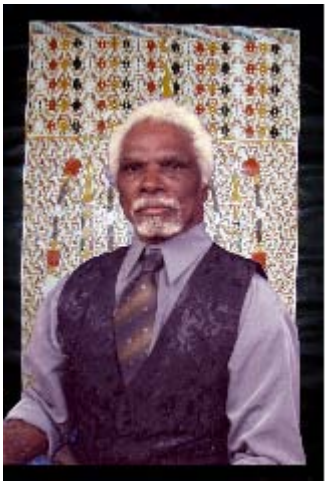
[12] Ibid, 64.

Mr Kelly—I think we mentioned before that it is not necessarily about throwing more money into the mix. It is about listening effectively and then being prepared to try methods that would seem unconventional to someone from, say, Melbourne or Sydney.

New submissions to the Committee from Customary Law Leaders in Arnhem Land

In the material above I have largely recounted the relevant submissions I have previously made to the Committee. In the following excerpts, I cite new material from current leading Aboriginal customary law men from Arnhem Land regarding how criminal matters (juvenile or adult) can be dealt with under the customary law system.

Mr James Gurrwanngu Gaykamangu



"I am a *dalkarramiri* from Milingimbi. I have worked in the *White* legal system as a NAATI-accredited Senior Interpreter and mentor to younger interpreters. I have worked as an Indigenous Court Liaison Officer in Katherine. I have worked very hard with Danial Kelly on this *Yolngu Ngarra* law from Arnhem Land[13]; we worked together in partnership. This is the future – *Yolngu* and *Balanda* working together in partnership."

> Aboriginal customary law in Arnhem Land *(Ngarra)* includes disciplining people doing the wrong thing. This legal process in known as *raypirri*. It is like the *Balanda* (White) term 'corrections'.
>
> The problem we have is one of mutual understanding and mutual respect. The *Balanda* legislation and case law does not work together with *Ngarra* law. They are clashing because they do not understand each other. The mainstream legal system comes from England, but *Ngarra* law has always been in Australia. We need to work together to understand each other, and when there is an issue we need to sit down together and work it out together. It will not be resolved by continuing to ignore one another.
>
> Whenever a *Balanda* court is set up for *Yolngu* people, the court should be a Community Court, not the same regular court that happens in Darwin. *Yolngu* Elders should be involved in the court process whenever *Yolngu* people are the offenders or the victims.

[13] Forthcoming publication: *Ngarra Law: Aboriginal Customary Law from Arnhem Land*, written by James Gurrwanngu Gaykamangu and edited by Danial Kelly on behalf of the *Yolngu* people.

When *Balanda* think of the term 'payback' the first thing that comes to mind is something like spearing someone in a leg and traditionally this has been a punishment for serious crimes. Another option that is available under *Ngarra* law is the *makarrata* which is a type of settled agreement, similar to a treaty, and typically involves compensation and undertakings to do or not to do certain things.

In discipline (*raypirri*) *Yolngu* children and adults are all taught good manners and behaviours. *Raypirri* can happen after an offence as a form of correction or before any trouble happens as a form of prevention against offences occurring.

For correcting offenders, the *Balanda* courts and government could easily work together with *Yolngu* elders for offenders to serve sentences under *Ngarra* law methods. Offenders could work off their sentences as community work orders in remote locations away from their family. As well as community work, the offenders would learn from and be disciplined by responsible elders. Offenders could also produce artwork which is sold and the proceeds be sent to the victim of the crime. This type of correctional program is known as *gunapipi*. Offenders can attend *gunapipi* for short durations for minor offences and long durations – up to three years or more – for more serious offences.

There are many ways the white legal system can work together with the *Ngarra* legal system. The white system just needs to learn to sit down and listen to the *dalkarramiri* and *djunggaya* instead of ignoring us. Two laws working side by side will work well – it will be strong law, not weak like now.

Mr Gaymarani George Pacsoe

"I decided to do write down this law[14] after working in many fields of education for a long time. I have studied the customary law for almost thirty five years, learning what are the consequences in Indigenous law, what are heavy penalties, what are light penalties and what type of punishment is appropriate. I have studied Indigenous welfare law, customary marriage law and many other areas of law. Many senior law men that I have met and studied with have entrusted me with their law, because they saw me and made sure that some day this law is taught to someone who will one day write to Australian readers across the Northern Territory and further."

Stealing and breaking into people's homes is an offence under *Ngarra* law. Children caught stealing are sent to their grand parents for more discipline and encouragement.

Once a person is convicted of a serious crime under *Ngarra* law, he or she is sentenced to serve a *Gunapipi* 'prison' term. *Gunapipi* prisons are set up in the bush far from where people normally live. *Gunapipi* camps are supervised and conducted by senior law people (*jungays* or *dalkarramiris)*. The duration of the *Gunapipi* sentence depends upon the seriousness of the crime committed. A first offence may attract a sentence of between three and twelve months in a *Gunapipi* prison. (*Gunapipi* is commonly called 'ceremony'.) Once in the *Gunapipi* ceremony the offender will be taught discipline.

Punishment

Under *Ngarra* law an individual is considered innocent until proven guilty. The sentence applied to offenders of *Ngarra* law depends on the nature of the breach committed. The *Ngarra* law allows for the

[14] From forthcoming publication: Gaymarani George Pacsoe in consultation with Northeast and West Arnhem Land Elders (Danial Kelly, ed), *An introduction to the Ngarra law of Arnhem Land.*

imposition of sentences upon individuals for up to five or six years. The sentence may include the forced relocation of the offender to another community far away from their home or a period of community work and good behaviour within their own community. The *Ngarra* law recognises the basic right to reasonable freedom, especially for offenders of less serious offences. (This right to reasonable freedom does not apply for serious offences and for the time spent in *Gunapipi.)* Reasonable freedom means the offender has a right to live and work in the community. The *Ngarra* law punishes the person, but also gives the person a chance to live a normal life of marriage and work and to do good deeds for the community. Below is a table containing a sample of offences together with examples of appropriate types of punishment.

Offence	**Appropriate punishment**
Small to medium crimes	Community work or *Gunapipi*
Disrespect	*Gunapipi*
Stealing with violence	Parole on remote island (separate islands for male and female)
Juveniles committing crimes	Guidance by parents or other responsible and appropriate kin, or order to attend school if less than sixteen years old, or parole on remote island (separate islands for male and female)

This *Ngarra* law has been used for the safety and wellbeing of *Yolngu* communities long before European contact, and these days it is still vital for community wellbeing. *Yolngu* people are waiting for Australian law to work side by side with *Ngarra* law. The *dalkarramiri*, the *jungaya* and the other *Yolngu* elders are waiting for recognition by the Australian lawyers to work collaboratively.

Ngarra law does not have to regulate everything that happens in Arnhem Land or in the lives of Aboriginal people. There are certain areas of life that the Australian law should continue to be the sole source of law on, such as:

- driver licensing

- motor vehicle registry
-fire arms
-entry to Aboriginal land permits
-illegal drugs
-alcohol
-birth and death registry
-Coroner's Court
-corruption
-illegal vessels
-immigration

There are other areas of life that are ideally suited to a combined Australian and *Ngarra* law approach in the Community Court format, such as:

-personal property damage
-burglary
-breaking and entering premises
-harassment
-assault
-riot
-murder and manslaughter

The Australian law will only be effective if a *Ngarra* law justice committee made up of appropriate *dalkarramiri* and *jungay* agree to the extradition of a *Yolngu* offender to an Australian law court. The *Ngarra* law justice committee will listen to the offender's victim to see if they have a preference for the matter to be determined by *Ngarra* law or Australian law.

It is possible for the *Ngarra* law to adapt to the changing modern life style and to regulate *Yolngu* community life to the fullest. *Ngarra* law will take up positive opportunities to work with the Australian law in order to support the wellbeing of *Yolngu* communities.

Conclusions

Whilst juvenile crime (and crime generally) in Aboriginal communities in the Northern Territory is a multifaceted issue, there is a single common aspect to the solutions to these issues, namely the senior and respected local Aboriginal people in each community. These Elders hold the keys necessary to the solutions.

In order to effectively deal with juvenile crime in a lasting manner Government need to resource and facilitate the senior and respected local Aboriginal people in the communities to design and implement locally appropriate solutions to lowering juvenile crime. These solutions will look different to equivalent solutions in other parts of Australia and will even look different across the Northern Territory. However the essential aspect of these solutions that will make them effective is that the properly resourced and facilitated local senior and respected Aboriginal people who are authoritative in their particular community.

It must be at the forefront of Government action on these matters to accomplish locally appropriate and meaningful dialogue with the senior and respected local Aboriginal people in each community. Of critical importance is for Government to listen to these people. The phrase 'Government consultation' now has a bad reputation in NT Aboriginal communities. Government must refrain from imposing 'solutions' (which to date have not worked anyway) upon Aboriginal people. Genuine listening and a willingness by Government to try the solutions suggested by local Aboriginal Elders are required.

Danial Kelly

Darwin, 13 December 2010

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