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North Australian Aboriginal Justice Agency (NAAJA)

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

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Contact Person:
Jared Sharp
Advocacy Manager, NAAJA

1 Gardiner Street Darwin
GPO Box 1064
Darwin 0801
Phone: 08 8982 5100
Fax: 08 89825195

1. GENERAL SUBMISSIONS

1.1 This issue has been raised numerous times in numerous reports over the last twenty years and the core problems remain unaddressed. With each new Inquiry/Report a raft of fresh approaches follow that are like a fresh coat of paint over a rotten wall. If this Government is serious about dealing with this issue then it must get serious about rebuilding the wall first. Aboriginal people are still suffering significantly from the effects of dispossession, dislocation, disempowerment and disculturation. Aboriginal youth feel this acutely. Many do not have a strong cultural and self esteem base to draw on to deal with their problems. Nothing will change until they do.

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.

1.3 To significantly reduce the involvement of Aboriginal youth in the criminal justice system the criminal justice system has to become an irrelevancy to Aboriginal youth. Aboriginal youth have to be given the opportunity to enjoy a healthy life, a strong culture, a proper education and decent housing from the start of their lives. Those Aboriginal youth who offend despite enjoying these opportunities then have to be given the opportunity of being diverted from the criminal justice system by virtue of well funded and appropriate diversionary programs. Then only the most persistent offenders will front the courts. Basically as it is for non-Aboriginal youth in the country.

1.4 Governments need to make a drastic paradigm shift away from 'negative spending' and towards 'positive spending'. What has been recorded for Thamarrurr (Port Keats/Wadeye region of the NT) is also the case throughout Aboriginal communities in the NT, namely: 'lower than average expenditure on positive aspects of public policy designed to build capacity and increase output, such as education and employment creation, and higher than average spending on negative areas such criminal justice and unemployment benefit'.¹ It is deeply concerning that the main ticket item in the NTER is the building of 18 new police stations in the NT at a cost of \$150 million. Three have already been built. This investment is at the wrong end of the spectrum. It will foster the criminalization of Aboriginal youth. It is an investment that will not ensure community safety. It will

¹ J. Taylor & O. Stanley, The Opportunity Costs of the Status Quo in the Thamarrurr Region (Working Paper No. 28/2005, Centre For Aboriginal Economic Policy Research, 2005) vii.

be the investment that concretes over-policing into the NT environment and provides the basis for the other deeply concerning investment of public funds, that being the proposed \$350 million new prison. In total \$500 million dollars is to be spent on galvanizing the current criminal justice system that so badly fails Territorians. The police force is already the largest per capita in the nation and the prison already houses the highest number of prisoners per capita in the nation. That \$500 million should be spent on the things that will reduce crime in the first place.

1.5 The need for a Youth Diversion Unit, Indigenous Youth Workers in Court and Community Work Orders. The Northern Territory does 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.

1.6 Whilst many of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (1987 – 1991) relating to safety in prisons were implemented, the preventative measures including diversion were largely ignored by governments. Similarly, many of the recommendations in the recent The Little Children are Sacred Report aimed at empowering Aboriginal people and protecting and strengthening Aboriginal children have been largely ignored. The recommendations of the WA Law Reform Commission in relation to Aboriginal Law² are also significant.

As this current Inquiry has a particular focus on prevention and early intervention, NAAJA directs the Committee to revisit the recommendations of the three reports mentioned above that have not yet been implemented.

1.7 The situation is getting worse, not better

Since the landmark Royal Commission into Aboriginal Deaths in Custody (1991), more Aboriginal people are in prison (actual numbers and proportionately), Aboriginal youths are much more likely to be detained than non-Aboriginal youths

² Law Reform Commission of Western Australia, *Aboriginal customary laws: The interaction of WA law with Aboriginal law and culture*, Final Report (September 2006).

and deaths in custody continue at disproportionate levels.³ The emergency began decades ago and will soon be irreversible unless drastic and innovative action is taken.

³ Chris Cunneen & Melanie Schwartz, 'Funding Aboriginal and Torres Straight Islander Legal Services: Issues of equity and access' (2008) 32 Criminal Law Journal 38.

2. SPECIFIC SUBMISSIONS TO THE TERMS OF REFERENCE

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

2.1.1 The social and physical infrastructure in Aboriginal communities in the Northern Territory is monumentally deficient⁴. This deficiency seriously hampers opportunities for positive social engagement.

2.1.2 Culture

Many Aboriginal youth are turning their backs on their traditional legal structures and laws. At the same time they are strongly resisting mainstream legal structures and laws. The result is a state of anarchy and a resistance to authority of any type. This is a serious and rapidly growing problem in many NT communities. The way with greatest potential to deal with this is to re-empower the traditional legal structures and to work in conjunction with them to restore a respect for the law and authority. Through these structures education of and respect for the mainstream system can also be achieved.

2.1.3 Housing

One overwhelmingly deficient physical element that impinges greatly upon the social infrastructure is housing. Housing inadequacies result in over-crowding – it seems houses in Northern Territory Aboriginal communities regularly house 15 or more people – and consequently the facilities of the house such as washing and toilet facilities are over-used and suffer from advanced wear and tear. Stable, adequate and safe housing is not enjoyed by many Aboriginal people in Northern Territory communities. This condition impacts adversely upon Indigenous juveniles and young adults. For example, when a youth has received a court order to attend school but their housing situation requires them to move from one house to another or to reside in an inadequate or over crowded facility, the youth is often struggling to attend school regularly and may subsequently be breached for not keeping a relevant bail or probation condition. Stable, adequate and safe housing would assist in recidivism among youth offenders in the Northern Territory.

2.1.4 Recreation

The lack of recreation facilities and opportunities in Aboriginal communities in the Northern Territory also adversely affects positive social engagement for Indigenous youth and young adults. Few communities are equipped with operational sporting

⁴ See for example: John Taylor, '*Social Indicators for Aboriginal Governance: Insights from the Thamarrurr Region, Northern Territory*' (2004) Research Monograph No. 24, Centre for Aboriginal Economic Policy Research, The Australian National University, ANU E Press
<http://epress.anu.edu.au/caepr_series/no_24/frames.php>

and other recreational facilities, staff and programs such as those that exist in the Northern Territory towns. Recreation programs provide youth with opportunities to develop physically and socially. Without these programs youth easily become bored and some stumble into criminal activity or substance abuse in order to alleviate boredom.

2.1.4 Employment

Increased employment opportunities in Aboriginal communities could assist in developing social norms and behaviours that lead to positive social engagement. The lack of genuine employment opportunities for Aboriginal people generally, and young people in particular, is manifest. There are no clear pathways to post-school employment in Northern Territory Aboriginal communities. A Centrelink/store existence is profoundly evident in most communities whereby income is derived only from Centrelink and spent predominantly at the community store on essential goods, especially food. Positive social engagement in the absence of employment is extremely difficult. The horse needs to come before the cart.

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

2.2.1 It is common knowledge that there is an extremely high correlation between alcohol abuse and Indigenous involvement in the criminal justice system in the Northern Territory.⁵ Fetal-alcohol syndrome is a particularly cruel inter-generational condition that often leads to sufferers entering the criminal justice system. There are ways that health and justice authorities can work together to address this issue. In the short term a serious review of the availability of alcohol in the NT needs to be undertaken.

2.2.2 Lack of a residential facility for youth

In the Northern Territory there is no residential facility for youth with alcohol or drug abuse issues and Court Clinicians are not minded to accept juveniles for therapeutic jurisprudence options such as the Alcohol Court and the Credit Court without the availability of a residential care program. As such, youth whose offending is compounded by alcohol abuse do not have access to rehabilitative options pre or post sentencing. As the underlying problems of alcohol abuse go unmet, the offending is not functionally addressed. A residential facility for young offenders with drug and alcohol problems would assist in meeting the underlying issues of offending.

⁵ For an Australia-wide description see: *Bridges and Barriers: Addressing Indigenous incarceration and health*, 2009, National Indigenous Drug and Alcohol Committee:
http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf

- **2.3 Any initiatives which would improve the effectiveness of the education system in contributing to reducing the levels of involvement of Indigenous juveniles and young adults with the criminal justice system;**

2.3.1 Holistic approach for effective schooling

Effective schooling needs to be understood and conducted in the context of a holistic approach to personal and community development. A feasibility and/or pilot project along similar lines to the Family Responsibilities Commission should be conducted in one or more Aboriginal communities in the Northern Territory. The Family Responsibilities Commission (FRC) began operation on 1 July 2008 as a key component of the Cape York Welfare Reform objective of restoring social norms in Indigenous communities.⁶ The FRC is an integrated approach to socio-community development which takes a holistic view of the individual, including school attendance for youths and aims to empower rather than control parents.⁷ The benefits of the FRC approach include looking at and addressing the bigger picture of why people are experiencing various social difficulties such as involvement in the criminal justice system and the central and authoritative role of the Local (Aboriginal) Commissioners (respected community Elders) which provides a measure of local sanction to the FRC.

Education needs to be equally divided along cultural and mainstream lines. The government needs to support the transmission of culture and language with the same vigour that it needs to put behind mainstream education. If done properly one will support the other and Aboriginal children will be able to operate from both a strong cultural base and move successfully within the mainstream world.

We refer once again to The Little Children are Sacred Report and the recommendations contained therein regarding education.

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

2.4.1 NAAJA is not aware of arrangements for the transition from education to work in Aboriginal communities in the Northern Territory. Before a 'learn or earn' concept can be maximized it needs to be initiated. The concept cannot take root in the absence of effective incentives, programs and resources. Effective programs will include those which work from an autochthonous schema, where authentic Indigenous methods and resources are drawn upon. A 'cut-and-paste' approach taken from another culture will almost certainly fail as the core means and motivators will not be recognized by the target group.

⁶ <http://www.atsip.qld.gov.au/government/families-responsibilities-commission/>

⁷ http://blogs.usyd.edu.au/thaliaanthony/2009/10/strong_community_the_answer_to.html

2.4.2 The welfare dependency that pervades Aboriginal communities has resulted in a lack of genuine employment opportunities for Aboriginal people generally, and young people in particular. Clear pathways to post-school employment in Northern Territory Aboriginal communities do not exist. In most Aboriginal communities in the Northern Territory a subsistence existence is eked out by collecting Centrelink payments and spending them at the local store.

- **2.5 Best practice examples of programs that support diversion of Indigenous people from juvenile detention centres and crime, and provide support for those returning from such centres;**

2.5.1 Law and Justice Committees

The most promising and successful all encompassing program for dealing with criminal justice issues in Aboriginal communities in the NT was the Law and Justice Committees that operated in Ali Curung, Lajamanu and Yuendumu earlier this decade. The key objectives of these programs were to increase community accountability, maximise community participation in the criminal justice system and to develop a structure that could interface with government and co-ordinate services. The program was aiming for 10 year outcomes which would have been assessed in 2012. For reasons unknown the program was dismantled and defunded in 2005 shortly after the election. It was the experience of members of our service, as well as the government employees involved and the communities themselves that the program was an enormous success and would have gone from strength to strength if continued. The elders in these communities are still upset that the committees were 'taken from them'.

These committees were very successful in reducing and preventing youth crime. They were also very successful in dealing effectively with any youth crime that did occur.

We urge the Inquiry to read the parts of the Little Children are Sacred Report and The WA LRC Report into Aboriginal Law⁸ that relate to Law and Justice Committees, Community Justice Groups and Aboriginal Courts. The common element in all of these programs is that they empower Aboriginal people to deal with the issues themselves and from a strong cultural base.

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 Foundation⁹ have developed cultural camps for

⁸ Law Reform Commission of Western Australia, *Aboriginal customary laws: The interaction of WA law with Aboriginal law and culture*, Final Report (September 2006).

⁹ <http://www.balunu.org.au>

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

2.5.5 The Mt Theo Outstation¹⁰ (160 kms from Yuendumu) 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.¹¹

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.

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

2.6.1 Youth Diversion Unit

¹⁰ See http://www.mttheo.org/about_mttheo.htm

¹¹ www.balunu.org.au

There is a dire need for a united approach to youth diversion within and between governments. A Youth Diversion Unit (YDU) that is independent from Police and Corrections needs to be established.¹² Police must refer alleged youth offenders to the YDU except for instances of serious offences.¹³ Referrals to the YDU may also be made by other service providers to at-risk youths, such as schools. The YDU will have the authority to decide upon diversion options for clients with ultimate authority for review to be held by the court.

The Northern Territory does not have an independent Youth Diversion Unit as is commonly found in other Australian jurisdictions. In the Northern Territory police are the gatekeepers who determine if a youthful offender is to be considered for diversion, and if granted diversion, the success or otherwise of their participation. Police officers make the referrals and police officers make the determination. The determination for diversion is not open for review or question.

There have been many instances where our service has come across a relatively minor matter which we had sought a referral to diversion. Counsel has written to the 'police' diversion unit seeking their client be diverted only to receive a word at court or on some small occasions a brief notification of refusal without explanation or reason. Whether it could have been an attitude problem, missed appointment, illness etc our service and the client would not be given an explanation. Once refused the decision cannot be the subject of review or appeal to any court.¹⁴ This is not the case in some jurisdictions such as in WA where the court itself can order a diversion even after police have refused earlier.¹⁵

Often times it is perceived that police are taking the easy option of going through the courts rather than trying to assist a youth avoid engagement in the criminal justice system. There is a real perception that some 'problem' children are being taken through the formal court process to either punish them or deflect the obligation to assist those 'problem' children onto a path of rehabilitation. Some children's family and personal circumstances may not be conducive to the current police model for diversion, such as when the family do not support or attend appointments, or a parent with a drug or alcohol misuse issue, etc.

It is submitted that the current police diversion model does not provide the machinery or is ill-equipped to deal with children who lack the sort of family and community support that could otherwise assist in appropriate development. A preferable approach exists in other jurisdictions where youth justice teams are built from a multi-agency and inter-disciplinary approach. In WA the youth justice team consists of a youth justice coordinator, a police officer, a Ministry of Education officer and an Aboriginal community worker.

2.6.2 Indigenous Youth Workers

¹² The YDU may come under Departments of Youth & Families or Justice.

¹³ Section 39(7) of the *Youth Justice Act* (NT) provides for serious offences to be prescribed by regulation which can be found in Section 3 of the *Youth Justice Regulations* (NT).

¹⁴ Section 44, *Youth Justice Act* (NT)

¹⁵ Section 28, *Young Offenders Act* (WA)

In addition to the YDU, Indigenous Youth Workers (IYW) need to be appointed in order to facilitate the various rehabilitative services for Indigenous youth. The IYWs will be required to be physically present in court in order to promptly liaise between solicitors and the appropriate service providers. The IYWs will liaise with the YDU, police, Community Corrections, counseling services, etc and organize victim/offender conferencing when required. Currently, NAAJA criminal defence lawyers are called upon to perform these tasks that should be performed by government officials. The IYWs must also be independent of all relevant parties (the YDU, prosecutions, corrections and NAAJA) so as to not give rise to compromise. The most appropriate supervision of the IYWs would be the Department of Justice. NAAJA solicitors are required to liaise with a plethora of potential service providers relevant to their clients, and all too commonly even create diversionary and community work order arrangements. This is especially the case in remote Aboriginal communities. Even in Darwin Courts the Department of Justice does not organize the attendance at court of the Aboriginal Language Interpreters from the NT Government Aboriginal Interpreter Service. Government sorely needs to shoulder these responsibilities instead of piling them upon NAAJA solicitors. These types of services are coordinated by the government in Western Australia and other Australian States. An IYW is one way that government could discharge this responsibility.

2.6.3 Separate Court

If refused diversion a youthful offender is then to be brought before the courts to be dealt with formally. Currently the Youth Justice Court is held in one of the regular court rooms at the Darwin Magistrates' Court. Youthful offenders regardless of age mill about in the general foyer accessed by adult offenders awaiting their matters in other courts. It is a wholly unsavory and inappropriate situation with the very real prospect of exposing the youth to advanced criminal elements. The Youth Justice Court needs to be physically located in a court room separated from the regular courts. There is a good current opportunity to achieve this with the pending opening of some new court rooms in the Darwin Magistrates' Court complex that are distinctly separated from the rest of the courts.

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.¹⁶

Notwithstanding this legislative requirement, a recent report from the Australian Institute of Criminology¹⁷ 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.

2.6.5 Family Responsibilities Commission

In a general sense the Families Responsibilities Commission ('FRC'; in operation in the Cape York, Qld) is a valuable model that brings coherence of government agencies to Aboriginal people. It would be worth seeking interest from Northern Territory communities to trial a similar effort.

The FRC, which has operated in four Aboriginal communities Cape York since 1 July 2008, involves cross-departmental and cross-governmental aspects of social reform

¹⁶ s39(2) *Youth Justice Act (NT)*

¹⁷ <http://www.aic.gov.au/publications/current%20series/tandi/341-360/tandi355/view%20paper.aspx>

including income management, alcohol restrictions and school attendance yet it is a very different approach to that of the Northern Territory Emergency Response (NTER).

The FRC was brought into existence by an Act of the Queensland parliament¹⁸ which describes the main objects of the Act as:

1. to support the restoration of socially responsible standards of behaviour and local authority in welfare reform community areas, and
2. to help people in welfare reform community areas to resume primary responsibility for the wellbeing of their community and the individuals and families of the community.¹⁹

The principles which underpin the FRC approach include supporting the restoration of local (Indigenous) authority and that Aboriginal tradition and Island custom must be taken into account in matters involving Aboriginal people or Torres Strait Islanders.²⁰

NAAJA recommends the investigation into an approach similar to the Family Responsibilities Commission to be conducted for Aboriginal communities in the Northern Territory. Such an approach would empower and draw upon local leadership in Aboriginal communities to make socio-culturally appropriate recommendations for social reform rather than a distant and socio-culturally ignorant government department determining Aboriginal peoples' lives.

2.6.6 Other government agencies

- The Government Business Managers (GBMs) that were put in Northern Territory communities as part of the NTER are another strategy that brings coherence to government agencies. NAAJA has noticed that the value and effectiveness of the GBMs seems in large part to depend upon the individual – GBMs that genuinely work consultatively in partnership with the local Aboriginal leadership are a valuable addition to the community. The success of the GMB is also highly dependant upon their Indigenous Liaison Officer.
- Families and Children's Services (FACS) exercise a large influence over many Indigenous youth that come into contact with the criminal justice system. Under s 51(3) of the Youth Justice Act, FACS may provide a report to the court whether or not the youth is a child in need of protection and any action that has been taken in relation to the youth regarding those circumstances. These reports are often vague and unhelpful. Legislative provisions need to be enacted that require the author of the FACS court report to be cross-examined in court in order to ascertain the true extent of influence in the youth's life.

¹⁸ *Family Responsibilities Commission Act (Qld) 2008*

¹⁹ s4(1)(a) & (b) *Family Responsibilities Commission Act (Qld) 2008*

²⁰ s5 *Family Responsibilities Commission Act (Qld) 2008*

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

2.7.1 NAAJA is the Aboriginal Legal Aid provider for the Top End of the Northern Territory. We are at the coal face of Indigenous youths and young adults who come into contact with the criminal justice system. NAAJA is not aware of any preventative programs run by government with the goals of improving the health and emotional well-being of Indigenous adolescents.