Submission No 36

CHILDREN'S COURT OF WESTERN AUSTRALIA
PRESIDENT'S CHAMBERS

Ms Anna Dacre
Committee Secretary
Standing Committee on Aboriginal and Torres Strait Islander Affairs

By email: atsia.reps@aph.gov.au

Dear Ms Dacre

I refer to your request for submissions relating to the Committee's inquiry into the high levels of involvement of indigenous juveniles and young adults in the criminal justice system.

In response to your request I offer the following comments.

In Western Australia, relative to the overall population there is a grossly disproportionate number of aboriginal adults in prison and a grossly disproportionate number of aboriginal children in detention. Aboriginal children make up about 80% of the children sentenced to detention. Addressing these appalling statistics is one of the main challenges for our community and also the biggest challenge for our justice system.

Having just mentioned statistics and challenges I wish to make the point that the aboriginal children sentenced to detention, the sentence of last resort, have been so sentenced because of the seriousness of the offending eg. aggravated robbery, grevious bodily harm, multiple burglaries, and multiple stealing of motor vehicles. By the time the Court gets to see these children and have to sentence them, they have been subjected for the whole or the greater part of their lives to high levels of physical and mental abuse, neglect, and dysfunction, and have resorted to the use of alcohol and drugs. So the Court is presented with the task of having to sentence a child for offending which is the end result or symptom of a multiple number of pre-existing causes.

It is clear from the picture that I have just painted that while the justice system has a challenge, which it must accept, it is not a challenge that it alone should be solely responsible for and which it alone can take on and solve. Indeed prevention and diversion programs should be in place regardless of whether or not the Court has had any involvement.

Attached for your information is a copy of part of a presentation that I delivered to Youth Justice Officers of the Department of Corrective Services of Western Australia on 25 November 2009. It includes comments on aboriginal children in the Western Australian justice system. In addition to those comments I also offer the following.

I think it is accurate to state that colonisation and its adverse effects on aboriginal people is at the core of the problems for aboriginal people and particularly aboriginal children. Young aboriginal offenders and particularly those who commit very serious offences have no real sense of their own identity, have little or no self worth, live in conditions characterised by multiple layers of almost constant crises, and are overwhelmed by a sense of hopelessness. In order to prevent offending and reoffending, programs need to be developed to address all of those causative factors. The programs need to be packaged to deal with all three levels, namely, the child, the family, and the community.

For some decades now there has been no improvement in the numbers of aboriginal adults imprisoned and the numbers of aboriginal children detained. Indeed rates of imprisonment and detention have been getting worse and at unacceptable rates. Therefore, different ways of tackling the issue need to be tried. It needs to happen urgently. In my view not enough respect has been given to aboriginal people and aboriginal culture. Also, there has been little or no recognition, both generally and particularly in the area of program development, to the fact that aboriginal children live in two very different domains, namely, an aboriginal domain and a non-aboriginal domain.

Culturally relevant and innovative programs need to be developed, owned and delivered by aboriginal people with the support of government agencies as partners. This would represent a fundamental shift from government agencies controlling programs essentially designed by non-aboriginal people for non-aboriginal people and imposing them on aboriginal people no matter where they live and what their own particular cultural beliefs may be.

I note that one of the terms of reference refers to better coordinated and targeted service provision. There is a real need for a whole of government approach. Generally government agencies do not work collaboratively enough towards common objectives. That needs to urgently change. How that change is implemented is itself a difficult question which needs to be urgently addressed. One idea would be to have a number of highly skilled policy officers in say the Department of Prime Minister at the Commonwealth level or say the Department of Premier and Cabinet at the State level, to set objectives and oversee a collaborative effort by all of the relevant government agencies to ensure that the objectives are met. However this is an area where I have no experience or expertise and so I cannot take it any further.

The point that I wish to make is that child development and also prevention and diversion involve a combination of factors including cultural, mental and physical health, good parenting, safe accommodation, a nurturing environment, education, recreation, and opportunity and the means to access it. Agencies need to work together to share their expertise and efficiently use resources to achieve common objectives. They also need to engage with, listen to, take notice of, and partner aboriginal people and aboriginal organisations when dealing with aboriginal issues.

Many aboriginal adults including aboriginal adults from remote communities are imprisoned for *Road Traffic Act* (RTA) offences including driving under disqualification or suspension. That is not so much the case for aboriginal children.

The RTA provides for high fines including high minimum fines and also imprisonment. Penalty provisions do not take proper account of the circumstances of aboriginal people and particularly those in remote communities. The penalties seem to be essentially designed for financially capable non-aboriginal people living in Perth and major cities and towns in the State.

Living in Perth with all of its services and its proximity to so many places is very different to living in a remote town or a remote community. Many remote communities are without services and it may be many kilometres, sometimes by dirt road, from one place to the next. Travelling from one place to the next by a motor vehicle is often the only means available. Temperatures can be oppressive. There can be a compulsory need to travel to attend lore business, a funeral or some other event of cultural significance. In addition to all of that some roads may not carry very heavy traffic and there may be no or very few traffic lights or control signs.

Obtaining a driver's licence under the RTA can be difficult and sometimes impossible for aboriginal people with poor literacy and numeracy skills. Those same people may nevertheless know how to safely drive a motor vehicle in and about their own community. There needs to be consideration given to introducing driver's licences limited to local communities and travel between local communities. This should be accompanied by simplifying applications for driver's licences and having programs to assist aboriginal people getting a driver's licence.

In combination with introducing community driver's licences and simplifying applications to get them there needs to be legislative change to give Courts greater discretion (flexibility) when sentencing aboriginal people for RTA offences, including the discretion to impose fines that are within their financial capacity.

Fines which are so obviously beyond the financial capacity of aboriginal people can contribute to a sense of hopelessness and lead aboriginal people to disregard them and eventually lead to imprisonment.

Making all of these changes is clearly preferable to retaining current law, giving no or limited assistance to aboriginal people obtaining driver's licences while at the same time leaving it to the police to vary enforcement practices from place to place to try and account for local conditions and the circumstances of local people.

Legal processes and legal forms can be very difficult and sometimes impossible for many aboriginal people to read and understand. Forms should be simple. Aboriginal people should not be asked to sign documents of legal significance and particularly those which impose obligations on them when they may not clearly understand them eg. bail documents. There is also a need for more interpreters to help aboriginal people understand their legal obligations in particular cases.

There is also a need to take into account the mobile lifestyle of some aboriginal people and that they live in remote locations when making legal requirements of them eg. reporting to the police on bail or pursuant to the sex offender's register. This is very important because breaches of these sorts of obligations can potentially lead to imprisonment.

Finally, can I make what I regard as a very important point. The ownership and responsibility for the behaviour of aboriginal adults and aboriginal children and particularly those in remote aboriginal communities, should be put more into the hands of the communities themselves. One of the adverse effects of colonisation on aboriginal people is disempowerment. While there clearly needs to be police presence at many places, when developing police policies and practices in particular local areas there needs to be careful consideration given to ensuring that the local community is still left with power and responsibility in relation to the behaviour of individuals within the community and has involvement in how misbehaviours are dealt with.

The creation of local justice groups comprised of local people would be consistent with local ownership and responsibility. They could be active in developing and delivering innovative prevention and diversion programs and also innovative programs for offenders. It is essential to appreciate diversity and recognise that in the area of program delivery one size does not fit all. Local problems are best solved by local solutions delivered by local people.

(Attachment) - YJS Presentation 25 November 2009

Can I now talk about what I regard as the greatest challenge for us all. That is the appalling rate of detention, both by reason of sentence and remand, of aboriginal children relative to the proportion of the population as a whole. Indeed, with respect, this is the greatest social challenge not just for the youth justice system as a whole, including the Court, but also of government and the community. We all have a part to play and none of us can afford to be too precious to accept constructive advice and criticism.

Can I start off by giving some statistical information. When talking about detention it is really important to be specific and make the distinction between being sentenced to detention and being remanded in detention pending the resolution of the charge or charges.

When the month of May 2004 is compared with the month of May 2009, and also October 2009 ie last month, the rate of children both aboriginal and non aboriginal combined, actually sentenced to detention has not increased at all. Even so it must be noted that in May 2004, May 2009 and October 2009 the rate of aboriginal children sentenced to detention relative to all children both aboriginal and non aboriginal was 77.22%, 80.77%, and 75% respectively. That is unacceptable by any measure.

Where the situation has turned for the worse, is actually in the remand population. Comparing May 2004 with May 2009 the remand population as a whole both aboriginal and non aboriginal has gone up by 45.82% ie 48.68 children per month on average to 70.99 children per month on average.

Comparing May 2004 with October 2009, last month, the remand population as a whole both aboriginal and non aboriginal has gone up by 56.24%. There are now more children in detention on remand than sentenced to detention.

In May 2004, May 2009 and October 2009 the percentage of aboriginal children remanded in custody compared to all children combined was 77.07%, 81.96% and 70.86% respectively. Again, unacceptable figures.

Numbers of children on supervised bail as a whole both aboriginal and non aboriginal have almost doubled from May 2004 to May 2009 using daily average figures ie from about 21 to about 42. The total number of children both aboriginal and non aboriginal on supervised bail was about 62 in July 2009 and about 55 last month.

The number of aboriginal children on supervised bail in October 2009 compared to May 2004 has increased as a percentage of all of the children on supervised bail from about 35% to about 57%. In a sense that is encouraging.

The supervised bail section of Youth Justice is doing an excellent job. Resources allocated to it are clearly well justified and need to be increased. Without supervised bail the numbers of children actually remanded in custody would be much greater resulting in much greater cost in monetary terms. There are also obvious advantages to children and their families if children are remanded on supervised bail with conditions rather than being remanded in custody. As mentioned, the number of aboriginal children on supervised bail has increased and managing this is very resource intensive.

This significant increase in the number of children on remand in detention is not unique to Western Australia. It is also the current position in New South Wales. Provisions in bail legislation requiring children to establish exceptional circumstances if they have been charged with committing a serious offence when on bail for a serious offence is a contributing factor. Other factors include lack of accommodation options for children, parents not taking on the role of responsible adults, increased monitoring by the police of compliance

with bail conditions by children on remand for serious offences and/or with a bad history of offending, work practices in the legal profession resulting in delays in obtaining full instructions and the entry of pleas leading to unnecessary adjournments, and bail being wrongly refused simply because no responsible adult or accommodation can be identified. In these cases the Department for Child Protection should be filling the breach while there is a search for a responsible adult.

In my view, and speaking generally, there needs to be a greater focus and allocation of resources at an earlier point in time in addressing factors which contribute to criminal behaviour. In other words, generally the response by Youth Justice and other agencies needs to be earlier when charges are made rather than waiting for a plea of guilty to be entered or a finding of guilty and the sentencing.

I must point out that the reason that such a high and grossly disproportionate number of aboriginal children are sentenced to detention is simply and sadly that as a matter of fact they commit a high and grossly disproportionate number of the serious offences committed by children which requires the Court when applying the law to the facts of the case to impose the sentence of last resort, namely detention. I am talking mostly about serious grevious bodily harms (with and without intent as a separate element), woundings, assaults occasioning bodily harm, aggravated robberies including aggravated armed robberies, multiple burglaries and stealing motor vehicles and driving recklessly. I should add that all children including aboriginal children are legally represented in the Children's Court, and particularly so when charged with serious offences.

Having made that point clear, can I move on and say that there needs to be focus on providing programs for prevention and diversion and programs as conditions of non-custodial Court orders eg Conditional Release Orders, Intensive Youth Supervision Orders and Youth Community Based Orders for aboriginal children that are culturally

appropriate and delivered by aboriginal people. The fact of the matter is that aboriginal children live in a different domain compared to non aboriginal children within our broader community and while well intentioned non aboriginal people may try their very best to communicate with aboriginal children mostly they will not be able to do it as well and effectively as aboriginal people.

In my view aboriginal children can rightly have the effects of colonisation added to the list of causative factors for their criminal behaviour. I say that to assist in understanding or explaining such behaviour and not to excuse it.

Aboriginal children who commit serious offences which result in sentences of immediate detention are themselves victims in many ways:

- parents are usually separated
- parenting skills are relatively poor or non existent
- they have been exposed to various neglects and abuses
- they have been subjected to and/or been witness to domestic violence
- abuse of substances and violence are the norm
- they have been subjected to death and grief within the family
- they have attended an inadequate amount of schooling - they are too tired to go to school or too traumatised to learn if they do go to school
- they have no sense of their own identity
- they have no sense of any positive self esteem
- they have an overwhelming sense of hopelessness
- they have no respect for themselves and so none for anyone else or the property of anyone else
- they often have to fend for themselves for accommodation, food and other necessities of life

- they often have to worry about one or both of their own parents and/or take on the caring role of another family member and as a result miss out on their own childhood.

As an aboriginal liaison officer in this State has put it, it is not a matter of needing to be 'rehabilitated', but rather a matter of needing to be 'habilitated'.

Aboriginal children need to gain a sense of identity and be connected or reconnected with community. Families and some communities need support for capacity building. Youth justice and other agencies must engage with aboriginal people. There are three dimensions to it, namely, children, family and community. There are separate agencies for each of those three dimensions and also a separate department for indigenous affairs. Other agencies can also make a very useful contribution eg sport and recreation. That is why I talk about the need for a whole of government approach.

All of the agencies including Youth Justice of Corrections must provide support to aboriginal people. They must not only listen to aboriginal people but they must also take notice of what aboriginal people tell them and give aboriginal communities and aboriginal people ownership of solutions and the capacity to deliver them in a way that recognises and respects aboriginal culture including in particular local culture and practices.

Aboriginal children need to discover their own identity and develop respect for themselves, a sense of self worth and hope. This needs to be the first step along the way because nothing much else will likely succeed without that base.

At present it seems to me that the agencies are so risk averse and process focused so as to be paralysed. The agencies including Youth Justice need to be 'less risk averse' and be innovative and engage with

and outsource to aboriginal organisations and aboriginal people. There are obviously some things that need to be kept inhouse, but in my view partnerships and outsourcing is the way for the future.

I have deliberately chosen the words 'less risk averse' rather than 'be more bold' because there are very intelligent, responsible, capable and passionate aboriginal people wanting the opportunity to get involved in this space. To use the words 'be more bold' implies taking on some unacceptable level of risk and so those words would frankly be offensive and insulting to aboriginal people. Changing the way that business is done in this area is no different to any other area. After careful consideration and embarking on a particular course, some things will work, some things will not work, some things may need adjustment or even overhaul, but one thing for certain is that there needs to be change and we are beyond the point of it being urgent to make a start.

On 23 September this year the Children's Court, at Albany, sat at Nowanup Farm located out of Albany and about 30km's north west of Boxwood Hills. The Court was convened to sentence four young Noongar boys. Three of the four boys had committed serious offences and taking everything into account, detention, the sentence of last resort, was a real possibility. In the lead up to the sentencing all four young boys were remanded on bail with conditions including that they resided at Nowanup Farm and participated in the program delivered by a well respected and local Noongar man. The program was conducted over a period of about eight weeks. To assist in the provision of food and other life necessities for the boys for the duration of the program, their mothers signed over their child benefit payments from Centrelink to the co-ordinator of the program. Having regard to the content of the program the Department for Education and Training gave it home schooling status for each of the boys.

During the early stages of the program the boys or at least some of them wanted to go back home and live with their mothers. This is not surprising as separation from family can be a very difficult thing. With encouragement from the mothers, the local aboriginal liaison officer and others, all of the boys stayed put on the farm and engaged in the program.

During the program the boys walked trails with the respected local Noongar man, learnt Noongar culture, learnt some Noongar language, made ceremonial sticks, made didgeridoos, learnt cultural dances and importantly learnt to respect themselves and others.

A special open air facility had been erected on the farm, circular in shape, and ideal for meetings and convening a Court. All of the participants directly involved in the Court proceedings including her Honour, the Magistrate based in Albany who presided over the proceedings, myself, the police prosecutor, legal counsel, the children and their mothers, sat on the ground within this facility. There was also over 100 other people present, mostly local aboriginal people. All of these participants were invited to speak by her Honour and in particular each of the children was asked what he had done and learnt during the eight weeks of the program. Non custodial sentences were imposed for each of the four boys. I have been away for the last couple of weeks or so but before then I understand that none of the boys had reoffended. After the boys were sentenced they all joined in with a senior Noongar man and performed a ceremonial dance for all to witness.

From observing and talking with the boys it was obvious from what they said, their facial expressions, their whole body language and the way they communicated that their participation in the program had been a profoundly positive and rewarding experience. It was obvious that a very strong bond had developed between the boys and the respected local Noongar man who conducted the program. The mother's also rightly showed a sense of pride in themselves and their children.

Members of the local aboriginal community present not only showed a sense of pride but also a sense of hope that this type of engagement with aboriginal people would be carried forward into the future.

It is important to note that the program and the Court proceedings not only benefited the four boys but it also importantly helped engage and generate trust and goodwill and a sense of ownership in the local Noongar community. The power of it all had to be seen and felt to be believed.

There is a lot in common between this Albany example and the approach in Fitzroy Crossing with the Yiriman Project. They provide a very good template for the future. With respect, a program designed and delivered by non-aboriginal people could not have and would not have achieved the results that the Albany example achieved. These sorts of programs need to be supported.

Western Australia is a very large and diverse State. There are remote communities in the Kimberleys, the Pilbara, the Gascoyne, the far eastern desert regions and elsewhere. There are many different aboriginal groups across the State. Solutions need to be very localised. There may be common features to solutions implemented in various locations across the State but what you do in one area you may not do in another and so it is not a case of one size fits all.

Youth Justice managers and caseworkers need to engage with aboriginal people in their local area and:

- develop relationships with local aboriginal people and groups
- provide necessary supports for capacity building
- learn local aboriginal culture
- assist in setting up community justice groups within local aboriginal communities

- let local aboriginal people develop solutions for their local community
- the engagement with aboriginal communities and aboriginal people should be by way of partnerships and support rather than control.

To enable all of this to happen local managers and caseworkers of regional offices in particular will need to be trained and trusted with a greater degree of autonomy to engage with local people and local organisations and develop and manage local solutions. I am sure that this change and approach with result in greater reward for effort and generate greater work satisfaction.

Can I close by again saying that I am very pleased with the realignment of Youth Justice within the Department of Corrective Services. I am delighted with the strong commitment to effect change and engage with aboriginal people. With all of the passion and ability that all of you good people have I look forward to working with all of you in the future for the benefit of children, families and the community.