



Aboriginal Legal Rights Movement Inc.

Justice without Prejudice

Parliament of Australia

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

**Inquiry into the High Level of Involvement of Indigenous Juveniles
and Young Adults in the Criminal Justice System**

Submission

May 2010

Introduction

The Aboriginal Legal Rights Movement (ALRM) welcomes this opportunity to make a submission to the Committee. The excessively high rate of involvement of Aboriginal youth in the justice system and in particular the appalling incarceration rates across the nation is a major concern to ALRM, its Board, Management and the wider Aboriginal community.

It is hoped that this submission will assist the Committee in formulating Government policies to reverse this excessive rate of Aboriginal youth incarceration and participation in the criminal justice system.

ALRM has noted the earlier submissions to the Committee's Inquiry by the various Aboriginal Legal Services (Qld, NSW, Vict, NT and WA). In the main, we support each of these submissions and we will not replicate their contents, rather we will provide additional

information to the Committee relevant to South Australia. We note that many of the issues and concerns presented to the Committee by our sister organizations apply equally throughout the nation.

Background on ALRM

ALRM is an independent incorporated Aboriginal community organisation controlled by a Board of 10 Aboriginal Members from Aboriginal communities throughout the State of South Australia. Members represent both metropolitan and country areas. Appointments are made by the Board Appointment Committee as provided for in ALRM's Constitution.

ALRM fulfils a special social role in the delivery of legal services to the Aboriginal peoples in South Australia, and as such, is a vital part of the legal system in the State. Its major aim is to advance the legal interests of Aboriginal people in South Australia, and to ensure that those rights are protected by the law and not adversely affected under the law. There are approximately 21 major Aboriginal language groups within SA, however it is mostly Aboriginal people from the north and west of the State who use English as a second language and for whom interpreters are required in the courts.

ALRM was incorporated on 25 January 1973 when a number of prominent members of the Aboriginal Community and supporters accessed limited funding to provide basic representation to Aboriginal people in the courts. It was set up to overcome the disadvantage suffered as a result of the racist society that existed in Australia at the time.

The impetus for starting ALRM was the 1967 Referendum when citizenship was finally bestowed on Aboriginal peoples. Unfortunately it is a sad fact that this Constitutional amendment has not delivered improvements in the quality of life, or affected the marginalisation, institutionalised discrimination and acceptance of Aboriginal peoples as our First Nations peoples. We still have no recognition in either the State or Commonwealth Constitutions, or their preambles.

Despite overwhelming evidence of disadvantage, it is also true that both the Australian and State Governments dispute responsibility for funding Aboriginal Legal Aid. One consequence of the resultant underfunding is that historically ALRM has never had sufficient resources to provide adequate representation in the Youth Court jurisdiction. Historically ALRM has only ever had one dedicated Adelaide Youth Court solicitor and sometimes the services of an Aboriginal Field Officer. This is insufficient and always has been so; Adelaide Youth Court has been serviced by only one ALRM Solicitor since the 1980s and still is.

ALRM is a community-governed Aboriginal organisation Chaired by Mr Frank H Lampard OAM, a Ngarrindjeri Elder. ALRM provides a number of Commonwealth and State funded programs to the Aboriginal peoples of South Australia (SA) which I will detail later.

Our Missions says:

“We exist to strengthen, promote and enhance the legal, cultural, political and social rights of Aboriginal peoples of South Australia through the provision of legal services”.

Our Core business comprises the provision of the following services:

- Criminal law advice and representation
- Civil, including family law advice and representation

These services are supplemented by the following services:

- Low Income Support Program (LISP)
- Aboriginal Visitors Scheme (AVS)
- Education and Prevention
- Child Protection
- Law Reform and Advocacy
- Youth Intervention, Prevention & Rehabilitation (until June 2010 when funding runs out)
- Financial Counseling

ALRM is funded for its legal aid program by the Commonwealth Government to which ALRM is certainly most grateful, and in particular the funding received for supporting programs such as Restorative Justice. The State Government on the other hand denies it has any responsibility to fund ALRM. This standoff has resulted in ALRM's funding and indeed all Aboriginal Legal Aid service providers nationally, remaining static since 1996. That is correct, 1996, not 2006, but 1996. It is pleasing that in the recent budget the Commonwealth has provided for an increase to offset some of the loss of funding in real terms since 1996, however it is disappointing to note that from the initial tranche of about \$8m, ALRM receives a paltry \$100k in additional funding for 2010-11 due to the application of a flawed and discredited Funding Allocation Model.

Terms of Reference

Noting that ALRM is primarily a legal aid organization, we consider that terms of reference 5 and 6 are best able to be covered in our submission, which will focus on the policy of the *Young Offenders Act 1993* itself, and better practice means to implement its excellent policy.

We note that Term of Reference number 5 refers to best practice examples of programs that support diversion of Indigenous people from juvenile detention centres and crime and Term of Reference number 6, refers to achieving better coordinated and better targeted service provision for Indigenous juveniles and young adults in the justice system.

As noted, this submission is based around the better implementation of the *Young Offenders Act 1993*, itself, since that Act actively encourages diversion of youth from the justice system into cautioning programs and conferences and away from court and thus the prospect of detention orders being imposed. In that regard we refer to Part 2 Minor Offences, which sets

out in detail the provisions governing diversion from the Youth Court into caution and conference processes.

Crime Statistics

Attached to this submission are excerpts from the SA Office of Crime Statistics and Research (OCSAR) Report 2006 on Juvenile Justice, report number 43(2).

We note in particular dot point 7 (page 4),

.....Aboriginal youths were more likely to be referred to court and less likely to be diverted to a Police caution. Six in ten Aboriginal apprehensions were (61.5%) were directed to court compared to less than half (46%) of the non Aboriginal apprehensions.

Such a gross disparity calls out for attention by this Committee. Despite our attempts to obtain more up to date statistics the office of Crime Statistics and Research (OCSAR) has not been able to provide the 2007 figures to ALRM in time to prepare this submission. ALRM undertakes to provide them as soon as they become available.

Anecdotal evidence of overzealousness by Police

Anecdotal evidence of overzealousness by Police in relation to Aboriginal youths and of unfortunate use of police discretion to arrest Aboriginal youths is illustrated by the following:

1. Police Officers continue to ask our youth to give them their names knowing that these youths are known to the officers. This is seen as being harassment and leads to Aboriginal youth reacting negatively, sometimes resulting in their being arrested.
2. Police vehicles will often pull over when police see Aboriginal youths during the day and early evenings and this can result in arrests.
3. In Berri for example there are signs of strict policing by the laying of charges of fail to cease loiter (*Summary Offences Act section 18*) and then calling for back up when the use of youth workers and other diversionary means might obviate the need for police involvement.
4. A youth arrested in February 2010 for Disorderly Behaviour in Ceduna. Police gave him bail and put him on a curfew which he breached in March and on a second occasion police were willing to give him bail again however the youth refused to sign the bail because the police still wanted him to be on a curfew. Bail was then refused and a phone link-up was done with a magistrate from Adelaide. The youth was refused bail and remanded in custody and then flown to Adelaide and appeared in the youth court the next day. He was subsequently granted bail and transported back to Ceduna. When he appeared in the Ceduna youth court for the charges of Disorderly Behaviour and 2 counts of breaching bail, he was placed on a good behaviour bond for 6 months. The cost alone to the taxpayer is extraordinary and this is not an isolated instance.

5. Our Ceduna office has confirmed this situation has happened in the past on many occasions where youth are refused bail and sent to Adelaide only to be bailed back to Ceduna within a day or two. The staff at our Ceduna office have repeatedly expressed concern to police, but there is no change in procedures. Of great concern to ALRM is the closure of country Magistrates Court Registries, including in Ceduna. This has the effect of increasing the use of primary police bail discretions and lessening the incidence of bail being considered by judicial officers, including country JPs. Telephone Bail reviews are available, but there is a consistent and recurring pattern of youths being remanded in custody from the country on relatively minor matters and then bailed and returned home by the Adelaide Youth Court.
6. In Port Lincoln an Aboriginal youth picked a lemon from a branch over hanging the fence on the road side and a police officer saw this and charged him with stealing. The youth was processed and air transported from Port Lincoln to Adelaide and on to Magill Youth facility and then appeared in the youth court. The matter was heard and the police were told to stop wasting the court's time and dismissed the charge. The youth was then put on a plane back to Port Lincoln at great expense to the taxpayer and again this is not an isolated incident.
7. Again in Port Lincoln an Aboriginal youth returning home from football training at Mallee Park when he noticed police parked outside his house. When he approached his gate the police stopped him and then charged him with breach of bail. His response was he still had half an hour to go but he was told that daylight saving had ceased and he was half an hour over his curfew. He has to appear in court on date of the next hearing in Pt Lincoln

These incidents are not isolated. Similar issues arise with our adult males and females. The United Nations Human Rights Committee has expressed concern about the targeting of Aboriginal people in its correspondence to the Australian Government in April 2009. Please refer to Appendix 2.

The Youth Court sends some prosecutions back to diversion.

Section 17—Young Offenders Act

- (1) Subject to this Act, the Court will deal with a charge laid before the Court in the same way as the Magistrates Court deals with a charge of a summary offence and, in doing so, has the powers of the Magistrates Court.
- (2) The Court may, even though a charge has been laid, refer the subject matter of the charge (after the youth's guilt has been established either by admission or by the Court's findings) to be dealt with by a police officer or by a family conference.

ALRM Solicitors and Aboriginal Field Officers who regularly attend the Adelaide Youth Court have said that a small but significant number of cases are only referred back to police caution or conference by the Youth Court under section 17 (2) *Young Offenders Act*. The estimate of

ALRM's Youth Court solicitor is that between 2 or 3 and sometimes up to 4 cases per week involving Aboriginal youths are referred back from court to caution and family conference.

ALRM suggests that this should become a comparatively rare occurrence if its proposal were adopted and accepted. Obviously it is desirable that Aboriginal youths be diverted from the Court system as much as possible and it is also desirable that the Youth Courts time not be wasted by the consideration of charges which should have been diverted from the beginning.

What ALRM wants to do

Being aware of these statistics attached and the information provided in this submission, ALRM has attempted to create practical solutions and to find the means to increase Aboriginal access to the diversion programs under the existing legislation.

It has been asserted, (not by ALRM) that Aboriginal youth are more likely to exercise their right to silence and decline to make admissions than non Aboriginal youths. This rightly or wrongly is attributed to the role of Aboriginal Field Officers in rendering assistance to Aboriginal persons in police custody and reminding them of their rights under the *Summary Offences Act* to decline to answer police questions. ALRM Aboriginal Field Officers have had this role since the inception of ALRM, and indeed their access to persons in custody for that purpose has been approved by the Police General Order 3015 or its modern equivalent. Field Officers do not provide legal advice; they are neither qualified nor insured sufficiently to do so.

Although Aboriginal Field Officers have access to youths in custody their access is for specific purposes including facilitating contact with parents and family, informing them of their rights under the *Summary offences Act* in relation to right to silence and also regarding forensic procedures. They are not qualified to give advice to make admissions to police so as to get their matters diverted under Part 2 *Young Offenders Act*, nor are they permitted to do so, nor do they have professional indemnity insurance to cover them if they did, nor is it within the ambit of their training.

Thus whether the assertion that Field Officers informing youths of the right to silence, affects the rate of diversion is correct or not, ALRM proposes immediate solutions.

ALRM proposes the provision of legal advice from a dedicated Youth Justice Diversion solicitor's position to Aboriginal youths, whether in police custody, on police bail, or just after being reported for an offence.

If on information available, the dedicated Youth Justice Diversion solicitor recommended that admissions be made by the youth in relation to charges laid or to be laid, that fact would be communicated to the police concerned. There could then be an immediate recommendation for referral and diversion, in appropriate cases (and having regard to relevant guidelines that influence the exercise of discretion), to have the subject matter of the charge, or proposed charge diverted to a police caution or family conference, pursuant to the *Young Offenders Act*. In this way, the rate of diversion of Aboriginal youths would be enhanced and the statistical

imbalance referred to, corrected. An additional benefit would be the reduction of workload for ALRM's Youth Court solicitor as well as for the Youth Court itself.

The details of the ALRM proposal are found in letters to Dr John Boersig, former Assistant Secretary Indigenous Policy and Service Branch Commonwealth Attorney General's Department, dated 19th December 2008 and 15th February 2009. In addition submissions to the Department in, 2009 and 2010 have raised the same proposal. Each of these documents is also attached.

ALRM regrets to say that although acknowledgement of correspondence has been given, no indication has yet been received from Commonwealth officials of their attitude to it, or whether it deserves further consideration or development. ALRM has consistently submitted for the proposal as part of the Youth Prevention and Diversion Sub program of the Commonwealth Attorney General's Department Indigenous Justice Program. ALRM maintains the view that the proposal is clearly within the Program, the scope of which is defined as:-

Youth Prevention and Diversion

Scope: to fund projects that help reduce the number of at risk Indigenous youth and adults having adverse contact with the criminal justice system, and to seek to increase their motivation to identify and take opportunities to support a productive, crime-free life.

Nevertheless absent any formal recognition of the merits of the ALRM proposal or of discussions with ALRM being undertaken by Commonwealth officials, ALRM has been loath to trouble senior officers of SAPOL or other State officials at this stage.

ALRM recognizes that for the proposal to be effective, close cooperation with SAPOL would be required. For the proposal to succeed, the ALRM Youth Justice Diversion solicitor would need to have continued consensual access to youths in custody, or on report or on bail. That would require close cooperation from SAPOL and the Youth Detention Centre. The Youth Justice Diversion solicitor would also need rapid access to the subject matter of the charge laid, or to be laid, and again that would require close cooperation from SAPOL and from the arresting or charging officer. In addition it would be desirable that there be access to SAPOL Guidelines on diversion and related topics, so that appropriate submissions could be made to police as to diversion in individual cases.

What ALRM has done so far

In addition to making the submissions as attached, ALRM has discussed this proposal in some detail, but informally with the Senior Judge of the Adelaide Youth Court His Honour Judge McEwin.

Judge McEwin has specifically authorized ALRM to say that he endorses the proposal and will support it.

For the reasons given above, ALRM has not yet taken the matter up directly with representatives of SAPOL.

What ALRM hopes that this Submission can Achieve

ALRM notes that Terms of Reference includes achieving better coordinated and better targeted service provision for Aboriginal young adults in the justice system. It is submitted that this Committee may provide a forum for frank exchanges between ALRM and other key stake holders regarding its proposal, so that the proposal may receive necessary and sufficient endorsement by the Committee itself and its implementation be overseen. ALRM would envisage that for a Commonwealth Youth Prevention and Diversion scheme, such as we propose to be implemented, close cooperation would be required between State and Commonwealth officials and ALRM. The setting up of an effective Steering committee would also be required.

ALRM asks the Committee to consider and endorse these proposals and in particular the suggestion that Commonwealth funded activities in the State, through ATSILS, need close Commonwealth supervision and effective oversight and facilitation functions being performed.

ALRM has also taken the opportunity to bring to the Committee's attention other significant issues which are of concern to the Board and management. It is hoped that the Committee would take the opportunity to consider these concerns as part of its wider role as a Standing Committee and seek explanations from relevant Ministers on the continuing denial of access to justice for our most disadvantaged and vulnerable citizens.

Neil E. Gillespie
Chief Executive officer

20 May 2010

APPENDIX 1

Young Offenders Act 1993

Part 2—Minor offences

Division 1—General powers

6—Informal cautions

- (1) If a youth admits the commission of a minor offence, and a police officer is of the opinion that the matter does not warrant any formal action under this Act, the officer may informally caution the youth against further offending and proceed no further against the youth.
- (2) If a youth is informally cautioned under this section, no further proceedings may be taken against the youth for the offence in relation to which the youth was cautioned.
- (3) No official record is to be kept of an informal caution.

7—More formal proceedings

- (1) If a youth admits the commission of a minor offence, a police officer may deal with the matter as follows:
 - (a) the officer may deal with the matter under Division 2; or
 - (b) the officer may notify a Youth Justice Co-coordinator of the admission so that a family conference may be convened to deal with the matter; or
 - (c) the officer may lay a charge for the offence before the Court.
- (2) Before the police officer proceeds to deal with an offence under Division 2, or notifies a Youth Justice Co-coordinator of the admission so that a family conference may be convened—
 - (a) the officer should explain to the youth—
 - (i) the nature of the offence and of the circumstances out of which it is alleged to arise; and
 - (ii) that the youth is entitled to obtain legal advice; and
 - (iii) that the youth is entitled (irrespective of whether he or she exercises the right to obtain legal advice) to require that the matter be dealt with by the Court; and
 - (b) if the youth does not require the matter to be dealt with by the Court, the officer should put the admission into written form and, if possible, get the youth to sign the admission.
- (3) An explanation given to a youth or the signing of an admission by a youth under subsection (2) should take place, if practicable, in the presence of—
 - (a) a guardian of the youth; or

- (b) if a guardian is not available—an adult person nominated by the youth who has had a close association with the youth or has been counseling, advising or aiding the youth.
- (4) A charge may only be laid—
 - (a) if the youth requires the matter to be dealt with by the Court; or
 - (b) if, in the opinion of the police officer, the matter cannot be adequately dealt with by the officer or a family conference because of the youth's repeated offending or some other circumstance of aggravation.

Division 2—Sanctions that may be imposed by police officer

8—Powers of police officer

- (1) If a police officer decides to deal with a minor offence under this Division, the officer may administer a formal caution against further offending and exercise any one or more of the following powers:
 - (a) the officer may require the youth to enter into an undertaking to pay compensation to the victim of the offence;
 - (b) the officer may require the youth to enter into an undertaking to carry out a specified period (not exceeding 75 hours) of community service;
 - (c) the officer may require the youth to enter into an undertaking to apologise to the victim of the offence or to do anything else that may be appropriate in the circumstances of the case.
- (2) If a formal caution is to be administered—
 - (a) the police officer must explain to the youth the nature of the caution and the fact that evidence of the caution may, if the youth is subsequently dealt with for an offence, be treated as evidence of commission of the offence in respect of which the caution is administered; and
 - (b) the caution must, if practicable, be administered in the presence of—
 - (i) a guardian of the youth; or
 - (ii) if a guardian is not available—an adult person nominated by the youth who has had a close association with the youth or has been counseling, advising or aiding the youth; and
 - (c) the caution must be put in writing and acknowledged in writing by the youth.
- (3) Before requiring a youth to enter an undertaking under this section, the police officer must take all reasonable steps to give the guardians of the youth an opportunity to make representations with respect to the matter.
- (4) In exercising powers under this section, the police officer must—
 - (a) have regard to sentences imposed for comparable offences by the Court; and
 - (b) have regard to any guidelines on the subject issued by the Commissioner of Police.

- (5) If a youth enters into an undertaking under this section to apologise to the victim of the offence, the apology must be made in the presence of an adult person approved by a police officer.
- (6) If a youth enters into an undertaking under this section—
 - (a) the undertaking must be signed by the youth, a representative of the Commissioner of Police, and, if practicable, by the youth's parents or guardians; and
 - (b) the undertaking will have a maximum duration of three months.
- (7) If a youth does not comply with a requirement of a police officer under this section, or an undertaking under this section, the officer or some other police officer may—
 - (a) refer the matter to a Youth Justice Co-coordinator so that a family conference may be convened to deal with the offence; or
 - (b) if the youth requires the matter to be dealt with by the Court—lay a charge for the offence before the Court.
- (8) If—
 - (a) a youth is cautioned, and no further requirements are made of the youth, under this section; or
 - (b) all requirements made of the youth under this section (including obligations arising under an undertaking) are complied with,
 the youth is not liable to be prosecuted for the offence.
- (9) If a police officer deals with an offence under this Division, the officer must—
 - (a) ask the victim of the offence whether he or she wishes to be informed of the identity of the offender and how the offence has been dealt with; and
 - (b) if the victim indicates that he or she does wish to have that information—give the victim that information.

Division 3—Family conference

9—Youth Justice Co-ordinators

- (1) The following are to be Youth Justice Co-ordinators:
 - (a) the Magistrates who are members of the Youth Court's principal or ancillary judiciary; and
 - (b) the persons who are appointed as Youth Justice Co-ordinators.
- (1a) Youth Justice Co-ordinators (who are not Magistrates) will be appointed under the *Courts Administration Act 1993*.
- (2) A person appointed as a Youth Justice Co-coordinator will be appointed for a term not exceeding three years specified in the instrument of appointment and is, on the expiration of a term of appointment, eligible for re-appointment.

- (3) A person cannot be appointed as a Youth Justice Co-coordinator unless the Senior Judge of the Youth Court has been consulted in relation to the proposed appointment.
- (4) A person appointed as a Youth Justice Co-coordinator is responsible to the Senior Judge of the Youth Court (through any properly constituted administrative superior) for the proper and efficient discharge of his or her duties.

10—Convening of family conference

- (1) When a police officer notifies a Youth Justice Co-coordinator of an offence so that a family conference may be convened to deal with the matter, the officer must supply the Youth Justice Co-coordinator with the names and addresses of—
 - (a) the guardians of the youth; and
 - (b) any relatives of the youth who may, in the opinion of the officer, be able to participate usefully in the family conference; and
 - (c) any other person who has had a close association with the youth and may, in the opinion of the authorised officer, be able to participate usefully in the family conference; and
 - (d) the victim of the offence and, if the victim is a youth, the guardians of the victim.
- (2) The Youth Justice Co-coordinator—
 - (a) will fix a time and place for the family conference; and
 - (b) will issue a notice requiring the youth to attend at that time and place; and
 - (c) will invite the persons referred to in subsection (1) and, in the case of the victim of the offence, will invite the victim to bring along some person of the victim's choice to provide assistance and support; and
 - (d) will invite other persons, whom the Youth Justice Co-coordinator, after consultation with the youth and members of the youth's family, thinks appropriate to attend the conference at that time and place.

11—Family conference, how constituted

- (1) A family conference consists of—
 - (a) a Youth Justice Co-coordinator (who will chair the conference); and
 - (b) the youth; and
 - (c) such of the persons invited to attend the conference as attend in response to that invitation; and
 - (d) a representative of the Commissioner of Police.
- (2) A family conference should act if possible by consensus of the youth and such of the persons invited to attend the conference as attend in response to that invitation.
- (3) A decision by a family conference is not however to be regarded as validly made unless the youth and the representative of the Commissioner of Police concur in the decision.

- (4) A youth is entitled to be advised by a legal practitioner at a family conference.
- (5) If a family conference fails to reach a decision, the Youth Justice Co-coordinator must refer the matter to the Court and the Court may decide any question, and exercise any power, that could have been decided or exercised by the family conference.

12—Powers of family conference

- (1) A family conference has the following powers:
 - (a) the conference may administer a formal caution against further offending;
 - (b) the conference may require the youth to enter into an undertaking to pay compensation to the victim of the offence;
 - (c) the conference may require the youth to enter into an undertaking to carry out a specified period (not exceeding 300 hours) of community service;
 - (d) the conference may require the youth to enter into an undertaking to apologise to the victim of the offence or to do anything else that may be appropriate in the circumstances of the case.
- (2) In exercising powers under this section, the family conference must have regard to sentences imposed for comparable offences by the Court.
- (3) If a formal caution is administered, the caution must be put in writing and acknowledged in writing by the youth.
- (4) An undertaking will have a maximum duration of 12 months.
- (5) If a youth enters into an undertaking to pay compensation, a copy of the undertaking must be filed with the Registrar and payments of compensation must be made to the Registrar who will disburse the compensation to the victims named in the undertaking.
- (6) If a youth enters into an undertaking to carry out community service, a copy of the undertaking must be filed with the Registrar.
- (7) If a youth enters into an undertaking under this section to apologise to the victim of the offence, the apology must be made in the presence of an adult person approved by the family conference or a Youth Justice Co-coordinator.
- (8) If a youth—
 - (a) fails to attend at the time appointed for a family conference; or
 - (b) does not comply with a requirement of the family conference; or
 - (c) does not comply with an undertaking under this section,a police officer may lay a charge before the Court for the offence in relation to which the conference was convened.
- (9) A charge may be laid under subsection (8) even though a period of limitation relating to the commencement of proceeding for the relevant offence has expired, but the charge must be laid not more than 12 months after the expiration of that period of limitation.

(10) If—

- (a) a youth is cautioned, and no further requirements are made of the youth, under this section; or
- (b) all requirements made of the youth under this section (including obligations arising from an undertaking given by the youth) are complied with,

the youth is not liable to be prosecuted for the offence.

(11) If a family conference deals with an offence under this Division, the Youth Justice Co-coordinator must—

- (a) ask the victim of the offence whether he or she wishes to be informed of the identity of the offender and how the offence has been dealt with; and
- (b) if the victim indicates that he or she does wish to have that information—
give the victim that information.

APPENDIX2

United Nations Human Rights Committee

The United Nations Human Rights Committee (UNHRC) expressed concern on a number of issues in April 2009 to the Australian Government in regard to the denial of access to justice for Aboriginal people in Australia. These concerns are consistent with ALRM's position on these concerns.

ALRM's position on the issues raised by the UNHRC are as follows.

The Aboriginal people of the State of South Australia for many years have been the subject of institutionalism discrimination, marginalisation and social disadvantage due to the racist policies of both the Commonwealth and State Governments. This is particularly evidenced as a result of successive Governments implementing policies that are designed to effectively deny access to justice for Aboriginal people.

These policies are too numerous to be detailed in this submission on the denial of access to justice concerns. We do however provide a brief outline of each access to justice issues.

Stolen Generations

Members of the Stolen Generations continue to be denied access to reparation and compensation as victims of the racist policies of the State Government of South Australia. Whilst the now famous Trevorrow Stolen Generations case has been decided, and the State appeal dismissed, the same Government recently paid a member of Victims in State Care an out of court settlement of over \$500k and is planning to introduce a compensation scheme for other claimants following the State Care inquiry. This same Government will not engage with ALRM in regard to compensation for victims of the Stolen Generations.

Both the Commonwealth and State Governments have denied funding for other members of the Stolen Generations even though the presiding Judge in the Trevorrow case made provision for funding to be available for other claimants. As a result of the lack of action by both Governments, the Aboriginal Legal Rights Movement has lodged 6 claims on behalf of other members of the Stolen Generations with the courts and a class action is currently being considered by other victims and their pro bono legal representatives.

One disturbing aspect of the Commonwealth Government's position is that in our request for funding, it suggested ALRM seek pro bono representation for victims of the Stolen Generations. This would NEVER happen to the Legal Service Commission yet is the position for Aboriginal people. This is a basic denial of human rights.

Family Violence

Family violence within the Aboriginal community is increasing dramatically due to the increasing social disadvantage and marginalisation of Aboriginal people.

Owing to a demarcation between the Commonwealth and State Governments, only minimal funding is provided to a limited number of regional and remote communities for the family violence prevention legal services. It is unfortunate that this demarcation is resulting in denying access to services in Adelaide and other major centres such as Murray Bridge and the Riverland in South Australia where most Aboriginal people reside (and elsewhere throughout the nation).

In addition to a lack of family violence prevention legal services, there is also an absence of other early intervention prevention programs aimed at reducing crime within the Aboriginal community.

The denying of access to both these services is having a dramatic affect on the Aboriginal peoples of this State which is resulting in our over representation in the justice system and in particular the incarceration rates of Aboriginal men and women which are currently at unprecedented rates of 30% for males and even higher for females.

Targeting of Aboriginal People by Police

The attention paid by Police towards Aboriginal people contributes significantly to the high participation in the justice system. The racially motivated and unnecessary targeting of Aboriginal people and the excessive use of force by Police is a breach of Aboriginal people's basic human rights. This targeting results in the overpolicing of Aboriginal people and the fostering of greater engagement our people in the justice system and in particular our youth.

We have unprecedented Aboriginal youth incarceration of which prompted the UN's Permanent Forum on Indigenous Issues to incorporate this matter of concern on the April 2010 agenda of the Permanent Forum. ALRM presented the attached Intervention to the Forum on behalf of the Australian delegation. The attached report was also tabled at the Permanent Forum.

Another significant concern is the inappropriateness of the Police Complaints mechanism in existence in South Australia. Complaints against Police are investigated by Police themselves so there is no confidence in the system because of the perceived and actual conflicts of interest. The lack of an independent complaints mechanism means that Aboriginal people are denied access to a fair and independent system.

Access to Justice

Due to the static funding of Aboriginal legal aid from 1996 to 2009, Aboriginal people continue to be denied access to justice. Mainstream legal aid on the other hand has received over 120% increase in funding for the same period. This disparity in funding has resulted in a higher than satisfactory incarceration rate of Aboriginal people and an exodus of experienced lawyers from Aboriginal legal aid due to static remuneration.

The Aboriginal Legal Rights Movement is effectively being juniorised by this static funding which is the result of a demarcation between the Commonwealth and States Governments on the responsibility of funding Aboriginal legal aid.

By juniorising I mean we replace senior experienced lawyers with less experienced ones thereby denying Aboriginal people legal services enjoyed by non-Aboriginal people.

Various Government Reports and Inquiries have found significant underfunding within Aboriginal legal aid services however successive Governments have failed to rectify the disparity between mainstream and Aboriginal legal aid funding due to this continuing demarcation on responsibilities.

This denial of access to justice is reinforced by the lack of funding of Aboriginal interpreter services whilst non-Aboriginal interpreter services are suitably funded.

Whilst Aboriginal people make up only 2% of the State's population, we make up 30% of males incarcerated and the percentage is even higher for Aboriginal women.

It is unfortunate that a large number of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody have not been implemented by both tiers of Government. The NGO monitoring bodies of RCIADIC were defunded in 2003 due to their highlighting the lack of action in implementing the recommendations by Government.

It is also disturbing to ALRM that promises made by both the Rudd and Rann Governments to increase Aboriginal legal aid funding have not been honoured.

The above issues are a summary of our concerns which are also consistent with the concerns expressed by the UNHRC in April 2009 to the Australian Government. What is significant is the targeting of Aboriginal people and in particular youth which escalates the participation of our youth in the criminal justice system.



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19th December 2008

Dr John Boersig
Assistant Secretary
Indigenous Policy and Service Branch
Attorney General's Department
Robert Garran Offices
BARTON ACT 2600

Dear Dr Boersig,

Aboriginal Youth Restorative Justice Project in the Aboriginal Legal Rights Movement

As you are aware, statistical data suggests that Aboriginal youth are still grossly over represented in the criminal justice system of South Australia. With the introduction of the *Young Offenders Act* in the early 1990's, provision was made for diversion of youth from the Youth Court to process of formal and informal cautioning by police and family conferencing. Information in the possession of ALRM suggests that not enough Aboriginal youth, proportionately are being diverted and we seek funding to improve that statistic.¹

The judicial criteria for diversion from the criminal justice system to youth conferences has varied over the years but now a broad approach has been taken by the Supreme Court as to the question of what kind of criminal charges can be diverted. The most recent decision of the Full Court Supreme Court of South Australia on the point is the case of *Police v G, PA* [2007]SASC78 which decided that major indictable offences may be diverted, both initially by police and later, as it were on review, by the Youth Court.

A noteworthy feature of the *Young Offenders Act* is that the gatekeepers for diversion are essentially the South Australian Police. It is police who make the preliminary decision whether a youth should be diverted or not and also whether what the terms and conditions of diversion should be. This is subject to general judicial oversight, but the point remains and was explicitly acknowledged by the Full Court in *Police v G, PA* where Duggan J said @ para33:

If the opinion is formed and the offence admitted, it is open to the police officer to make the further assessments pursuant to s 6 or s 7 to determine whether the matter should be diverted for cautioning or referred to a family conference. The question whether a matter should be diverted at this early

¹ Recent information from the manager of the Family Conference Unit of the Youth Court suggests that about 14% of diversions to Family Conferences under the *Young Offenders Act* involve Aboriginal youth.

state is dependent upon the subjective views and assessment of the police officer after having regard to the criteria prescribed in the Act.

Matters such as previous involvement with police, seriousness of offence, known associates, family background and other matters often work to the disadvantage of Aboriginal youth, as compared to other youths and prevent their effective involvement in the diversion system. Incarceration of Aboriginal youths in South Australia occurs at an unacceptably high level.

To give some perspective on the size and shape of juvenile incarceration in Australia, it is useful to give a brief summary derived from the quarterly based data of the Australian Institute of Criminology's (AIC) Juveniles in Detention Monitoring Program (Taylor 2007). This program has collected data on the status of juveniles in detention since 1981 and the data obtained on 30 June each year compliments the larger annual snapshot of the adult prison population entitled *Prisoners in Australia*. The most recent census figures available at the time of writing are those contained in the 2007 report of the AIC for the financial period 2005/06 (see Taylor 2007). As at 30 June 2006, there were 651 juveniles aged 10 to 17 detained across 23 facilities throughout Australia. This amounted to a detention rate of 29.1 persons per 100,000 relevant population.ⁱ The overwhelming majority (92%) were male and just over eight in ten (83%) of the total detained population were aged 15 to 17 years (see Taylor 2007, pp.9-14). The 651 persons detained in juvenile facilities as of 30 June 2006 can be contrasted with the 1352 such persons incarcerated on the same date in 1981. Over the last quarter century, the rate at which juveniles are detained in secure care has dropped from 64.9 to 29.1 per 100,000 relevant population – with the female rate reducing from 22.9 to 4.6, and the male rate from 105.2 to 52.4 (Taylor 2007, pp.9-10).

In looking to further disaggregate this broad statistical overview, it is useful to employ data from the Australian Institute of Health and Welfare (AIHW) concerning juvenile justice supervision in Australia.ⁱⁱ The most recent AIHW report offers a mixture of national snapshot (daily averages) and yearly flow data on detention. A quite different picture of juvenile detention emerges according to whether the primary reference point is taken to be a census date (n=651 for 30 June 2006) or yearly flow data (n=4576 for the period 2005/06) (AIHW 2008, p.28).ⁱⁱⁱ On this count, the number of persons subject to at least one episode of detention (sentenced or remanded) during an annual cycle in Australia is roughly 10 times greater than the detention population on discrete days in that cycle. It goes without saying that many of these persons are in fact one and the same individual released from and returned to juvenile detention in the same year. Indeed, a recent major review of recidivism research in Australia (Payne 2007, p.xii), noted that:

1. 'approximately half of all juveniles in detention across Australia have spent time in [detention] on at least one prior occasion;
2. more than half of those released from detention will be reconvicted within at least six months;
3. nearly eight in every 10 juveniles released from detention will be subject to supervision (community or custodial) by a corrective

services agency within seven years and almost half will be imprisoned as an adult

This analysis suggests that it is worthwhile spending resources on improving youth justice and the National Report of RCIADIC and the Cappel Report confirm this view.

Provision of legal advice

An important criterion for diversion, from the perspective of ALRM, has always been the question of appropriate legal advice before diversion takes place. Again this is acknowledged by Duggan J in the passage quoted above, wherein the youth's admission of the offence, as well as the police officer's opinion are conditions precedent to the exercise of the discretion to divert the youth. See also Section 7(1), (2)(a) and (b) *Young Offenders Act*.

7—More formal proceedings

- (1) If a youth admits the commission of a minor offence, a police officer may deal with the matter as follows:
 - (a) the officer may deal with the matter under Division 2; or
 - (b) the officer may notify a Youth Justice Co-ordinator of the admission so that a family conference may be convened to deal with the matter; or
 - (c) the officer may lay a charge for the offence before the Court.
- (2) Before the police officer proceeds to deal with an offence under Division 2, or notifies a Youth Justice Co-ordinator of the admission so that a family conference may be convened—
 - (a) the officer should explain to the youth—
 - (i) the nature of the offence and of the circumstances out of which it is alleged to arise; and
 - (ii) that the youth is entitled to obtain legal advice; and
 - (iii) that the youth is entitled (irrespective of whether he or she exercises the right to obtain legal advice) to require that the matter be dealt with by the Court; and
 - (b) if the youth does not require the matter to be dealt with by the Court, the officer should put the admission into written form and, if possible, get the youth to sign the admission.
- (3) An explanation given to a youth or the signing of an admission by a youth under subsection (2) should take place, if practicable, in the presence of—
 - (a) a guardian of the youth; or
 - (b) if a guardian is not available—an adult person nominated by the youth who has had a close association with the youth or has been counselling, advising or aiding the youth.

It has always concerned ALRM that the admission referred to in section 7(1) is prior to the provision of legal advice under section 7(2). From the perspective of ALRM a youth should know the case against them and

should receive competent legal advice that their matter would likely result in a guilty plea *before* they are diverted. A youth should not be persuaded to enter into a diversionary program on a matter where they are not guilty or where the police do not have a case to answer against the youth.

Proper legal advice is needed for this and at all events is available under the Act and it has been recommended that the Attorney-General's Department (Commonwealth) provide proper resources to ALRM to enable that to take place. Provision of proper resources for this has been a feature of ALRM funding submissions for many years.

Some years ago ALRM had made arrangements with SAPOL for adjourning diversion under family conference and formal cautioning, under the *Young Offenders Act* until such time as the young offender had received advice on the Apprehension (AP) report, at least. This arrangement with SAPOL has been in place for some years, but because of chronic under resourcing of our criminal section, it is more honoured in the breach than the observance. So it is not known whether less youths are diverted than should be, or whether they are being diverted without a proper legal screening process.

The Restorative Justice Project Manager

ALRM envisions that the proposed Restorative Justice Project Manager for both the APY and the Adelaide youth restorative justice projects be a legal practitioner whose duties will include the provision of such advice to prospective RJ Project clients, both on the APY lands, and for youth in suburban Adelaide.

If this were to occur ALRM would have accurate knowledge of which youths and which youth criminal matters were being sent by police to diversion, and the Project Manager would be in a stronger position to advocate before existing stakeholders, particularly police and the Family Conference team and judiciary about the operation of *Young Offenders Act* diversion.

Correspondingly the Project Manager would do a similar legal job on the APY RJ project and in conjunction with the Restorative justice officer on the APY Lands, and would be able to keep abreast of developments on that project also.

Discretion and maintenance of privilege would be a requirement for the provision of legal advice to prospective RJ clients, but in appropriate cases the Project Manager would obtain waiver of privilege in order to advocate for the client about diversion issues, particularly if police discretions were not operating properly.

ALRM would thus then be in a position to maintain clear statistical analysis of the numbers of youths going through the diversion system and the numbers of youths being referred to court. ALRM has never been able to do this hitherto, because we have never had the resources to have a solicitor available to give this advice to *Young Offenders Act* diversion clients.

Restorative Justice Youth Worker

It is requested that existing funding for 2008-9 in the amount of \$80,000 be made available to continue this position, but in a radically different program.

This employee would work under the Project Manager and would be an Aboriginal person. Unlike the APY project, there is an already existing program, through the official police and family conference diversions under the *Young Offenders Act*. Thus the Restorative Justice Youth Worker, acting under the direction of the Project Manager might for example attend on clients intent on making formal admissions, after legal advice pursuant to section 7(3) *Young Offenders Act*.

Thus the actual work of the Restorative Justice Youth Worker would be realigned to working with the youths diverted, in conjunction with the Family Conference Team and the police formal and informal caution teams to improve outcomes and enhance aboriginal community participation in the programs under the *Young Offenders Act*, as well as enhancing the prospects of direct restorative justice outcomes with victims – but in accordance with the legislation.

It is envisaged that the Restorative Justice Youth Worker would work with young offenders and their families to meeting their expectations for successful completion of diversion projects. In addition the Restorative Justice Youth Worker, in conjunction with the Project Manager would be expected to raise the profile of Aboriginal young offenders and their families with the Family Conference teams and introduce ideas and concepts to enable the teams to have better understanding of the social and cultural position of the young Aboriginal offenders and thus better assist them.

In addition the 2007 Cappelletti Report made numerous recommendations about improving Aboriginal youths access to restorative justice impulses and it is expected that the Project Manager would introduce the Restorative Justice Youth Worker to workplaces suitable for restorative justice under the State Government's Cappelletti initiatives.

Accordingly the objectives of the program would be:

1. To maintain clear statistics on the numbers of Aboriginal youths going through the youth justice system and be eligible for and obtaining diversion.
2. To consider the criteria applied by police in assessing suitability for diversion and their application to Aboriginal youth and the circumstances of Aboriginal youth.
3. To find the parameters of effectiveness of youth diversion particularly through the formal and informal cautioning system and through the youth conferencing system and to in-still into that system a greater sense of cultural awareness of the distressed circumstances of Aboriginal youths and their often poor support networks. Refer to "Criminal Law And

Sentencing Issues Amongst Indigenous Communities “Questions from Aurukun”²

4. The project would also be aimed at getting more and better resources to Aboriginal families, through the Government’s Cappo and social inclusion initiatives. Already distressed Aboriginal families need considerable support for their children to be diverted in the long term, from the criminal justice system. Realism is a vital in assessing the needs of these Aboriginal families.

Stakeholders

The primary stakeholders in this process are the South Australian Police in their metropolitan Adelaide processes for assessment for diversion and the provision of formal and informal cautions and sending children to Youth Family Conferences. Other stakeholders are the Family Conference Team attached to the Adelaide Youth Court where again greater support is needed to be provided and greater cultural awareness of the situation of Aboriginal youths in Adelaide.

Other keys stakeholders are of course the Judiciary and the legal profession and the ALRM criminal section.

Conclusion

ALRM has an interest in the workload of the Adelaide Youth Court solicitor being lightened by greater effectiveness and greater operation of the Family Conference and formal and informal caution system.

ALRM is the body best placed to provide this service to the Aboriginal community of South Australia because it is the primary provider of youth court representation to Aboriginal youths in South Australia. In addition it is the best placed to do it, because the way the *Young Offenders Act* operates guarantees there can be no conflict of interest within the office. That is to say we can have a Youth Justice Field Manager working, in conjunction with the Youth Court and APY Lands diversion solicitor/Project Manager who will in turn work in parallel with , but not in conflict with the Adelaide Youth Court solicitor.

ALRM commends to the Attorney-General’s Department the prospect of continuing to fund this project through the auspices of the Aboriginal Legal Rights Movement.

Yours faithfully

² Speech To National Indigenous Legal Conference 12 September 2008: The Hon. Geoffrey M.Eames, QC.

Neil E. Gillespie
Chief Executive Officer

Footnote to statistical analysis [i] As at 30 June 2006, 58.4% of the 651 juveniles in detention were on remand – a figure that has remained relatively stable for some years (Taylor 2007, p.36).

ii[ii] The 2008 AIHW report is the fourth in the series. It is based on the Juvenile Justice National Minimum Data Set which was first established to record juvenile community based supervision and detention data in the 2000-01 reporting period.

iii[iii] A degree of interpretive caution is called for here as the AIHW report invokes a slightly higher number of 10 to 17 year olds in detention than the data set mentioned at note 7 (see AIHW 2008, p.14).



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15th February 2009

Dr John Boersig
Assistant Secretary
Attorney-General's Department
Robert Garran Offices
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Dear Dr Boersig

Youth Justice Restorative Justice Project & Incarcerated Youths in Custody Program ALRM 2009/10

I refer to my letter to you of December 2008 in which certain proposals were put to you regarding the future conduct of the Youth Restorative Justice Program. In particular, it was suggested that much more emphasis would be put on making use of the existing *Young Offenders Act* provisions and to use ALRM resources to encourage greater use of the Diversionary Programs under the *Young Offenders Act* to get more Aboriginal Youths out of the Youth Court and into diversionary Projects and Programs. Police formal and informal cautions and Family conferences have built into them provisions for restorative justice and appropriate dealings between young offenders and victims of offences. (See Sections 8(1)(a)&(c), 10(1)(d), 12(1)(a)(b)&(d) and 12(11). *Young Offenders Act* 1993.

In my December letter, the proposal had been put that the Manager of the Restorative Justice Program should be a solicitor's position to give legal advice to youths and on the APY Lands, in order to facilitate this.

Since that letter, there has been further discussion within ALRM, directed towards the appropriate use of resources to achieve these ends and to achieve appropriate management of the APY Lands Project.

A new proposal has come forward. The proposal is that the Manager of the Restorative Justice Program not be a designated solicitor's position but that the Youth Restorative Justice Project Worker position be a designated solicitor's position. It is anticipated that an experienced Youth Court Advocate should be employed to provide legal advice to youths intended for diversion out of the court system.

The role of this advocate would be as follows:

1. With the Manager Restorative Justice Programs to advocate with SAPOL to increase opportunities for Aboriginal Young Offenders to obtain legal advice under section 7 *Young Offenders Act*. Anecdotal and written evidence suggests that SAPOL do not consider that Aboriginal Young Offenders take up diversion because they do not admit offences. The Solicitor's task would be to actively seek out Aboriginal Young Offenders and give them advice and take their

instructions about participating in diversion , by making admissions inappropriate cases.(see section 7(2)(a)(ii) *Young Offenders Act* .and the case of *Police v G,PA [2007]SASC78*)

2. To advocate with the South Australian Police Department for creating a scheme throughout metropolitan Adelaide where by police are encouraged to actively participate in the proper implementation of the Young Offenders Act Section 7. That will be done by encouraging Police Local Service Areas to allow for say a 2 week grace period between apprehension and the laying of charges to the Youth Court, to allow for youths to obtain legal advice from the Young Offenders Diversion solicitor and to get themselves into the Diversion Schemes, pursuant to section 7 *Young Offenders Act*, where appropriate.
3. SAPOL would be encouraged to seek out the services of the Young Offenders Diversion solicitor so that he or she can speak with their clients and to give them accurate and realistic advice about their position and the prospect upon diversion or the prospects in Court. There will be an active policy of giving advice and taking instructions so as to encourage youths to get them diverted out of the court system.

These proposals have been discussed with and have received the support in principle of the Senior Judge of the Youth Court, however before matters are progressed further, detailed discussion will need to take place with Senior Officers of SAPOL, responsible for Youth Court Prosecutions and Youth Court Diversion Schemes.

It is anticipated that if these proposals are successfully implemented, they will have a significant impact upon the Young Offenders Diversion Schemes and the potential for Restorative Justice Principles to be properly applied through the existing *Young Offenders Act* process.

It is also anticipated that the incarcerated Youth in Custody Officer's position, maybe at least partly diverted to being a Field Officer to assist the Young Offenders Diversion Solicitor's position. If that were required, a request would be made to the Attorney General's Department to alter the Program Funding agreement in that regard.

I will keep you informed, but it will be necessary that detailed consultations and discussions take place with Senior Officers of SAPOL before matters are progressed.

Yours faithfully

Neil E Gillespie
Chief Executive Officer



Government of South Australia
Department of Justice

office of crime statistics and research

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Juvenile Justice

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Summary of juvenile justice statistics for the year 2006

Police statistics

Police apprehensions

- During 2006 young people aged 10 – 17 years at the time of the offence¹ accounted for 6,372 apprehension reports lodged by police. This is 4.0% higher than the 6,127 apprehensions filed in 2005 and 37.0% lower than the peak of 10,118 recorded in 1995. The 2006 figure is the second lowest of the twelve years depicted, but reverses the decreasing trend of the previous five years.
- The majority of juvenile apprehensions in 2006 involved males (81.2%) and youths aged 16 and over (52.3%).
- Aboriginal youths accounted for 20.9% of those apprehension reports where this information was recorded. A higher proportion of Aboriginal than non-Aboriginal apprehensions involved relatively young individuals (with 57.9% of Aboriginal youth aged 15 years and under compared with 44.3% of non-Aboriginal youths).
- *Larceny and receiving* constituted the major allegation in 26.3% of all apprehensions, with the most prominent being *larceny from shops* (11.4%) and *larceny - miscellaneous* (5.0%). *Offences against good order* accounted for 24.7% of all apprehensions while *offences against the person (excluding sexual offences)* accounted for a further 12.8%. This offending profile was generally similar to that recorded in previous years.
- Of the 6,372 juvenile apprehensions in 2006, 48.0% were brought about by way of an arrest rather than a report. The figure was higher for those apprehensions involving Aboriginal youths, with 63.6% being arrest-based.
- For those 5,662 apprehension reports where the type of action taken was recorded, 32.9% resulted in a referral to a formal police caution, while 46.9% were directed to the Youth Court. A further 19.1% were referred to a family conference while 1.1% were withdrawn. These referral patterns were comparable with those recorded in previous years.
- The level of referrals to the Youth Court varied depending on the nature of the charge involved, as well as the age and racial appearance of the young person. Older youths and Aboriginal youths were more likely to be referred to court and less likely to be diverted to a police caution. Six in ten Aboriginal apprehensions (61.5%) were directed to court compared with less than half (46.0%) of the non-Aboriginal apprehensions.
- The 6,372 apprehension reports submitted in 2006 involved 4,061 discrete individuals. This gives an average of 1.6 apprehensions per youth which was slightly higher as that recorded in 2005. On average, males recorded 1.6 apprehensions in 2006 while females recorded 1.4.

Formal cautions

- *Offences against good order* were listed as the major allegation in over one third (41.5%) of the apprehensions referred to a formal caution in 2006, followed by *larceny and*

¹ However, they may have been aged over 17 years at the time they were apprehended and/or processed through the juvenile justice system.

receiving (28.7%) and damage property and environmental offences (11.6%).

- In total, the 1,861 referrals to a caution in 2006 resulted in 1,840 formal cautions being administered.
- In just under one quarter of these formal cautions (23.1%), the young person was required to apologise to the victim while 10.8% involved the payment of compensation, 3.3% required the young person to perform community work, and 31.9% involved some 'other' condition.
- Over half (56.1%) of the compensation payments were for \$50 or less, while only 1.5% were for amounts in excess of \$500. The maximum amount which a young person agreed to pay as part of a cautionary undertaking was \$579.
- Over six in ten (63.3%) of the community work agreements involved 10 hours or less, while the highest was 25 hours.

Family Conferences

Case referrals finalised by the Family Conference Team

- In 2006, 1,413 case referrals were finalised by the Family Conference Team. This is 0.8% higher than the 1,402 cases finalised in 2005.
- For the majority of these referrals (90.9%), a conference was successfully convened and an agreement was reached. (Note that this figure does not take account of whether any undertakings entered into at a conference were subsequently completed.)
- In a small number of cases (2.3%), a conference was held but no resolution was achieved.
- In a further 6.7% of cases, no conference was held, primarily because the youth failed to attend the scheduled meeting or could not be located.
- As in previous years, referrals involving Aboriginal youths were proportionately less likely to result in a 'successful' conference than those involving non-Aboriginal youths. Eight in ten (82.3%) of Aboriginal referrals were resolved at a conference compared with 93.2% of non-Aboriginal referrals. The main contributor to this difference was the higher level of non-attendance recorded for Aboriginal youths (14.3% compared with 4.4% for non-Aboriginal youths.)

Cases dealt with at a family conference

- There were 1,319 cases for which a conference was actually held in 2006. The majority of these involved males (80.1%) and young people aged 15 years and under (61.6%). Aboriginal youths accounted for 20.4% of those cases for which racial identity was recorded.
- *Larceny and receiving* dominated the offence profile. It was listed as the major allegation in 28.5% of cases dealt with at a conference, followed by *offences against good order* (24.0%), *criminal trespass* (17.0%) and *offences against the person, excluding sexual offences* (12.0%).
- Over half of the cases (50.9%) involved one offence only while very few (4.6%) involved five or more allegations.

- Of the 1,098 cases dealt with in 2006 which resulted in the young person agreeing to enter into an undertaking, half (51.5%) involved a letter or regret, 23.4% required the payment of compensation, 20.7% agreed to undertake community work and 13.7% involved an apology. In addition, one in seven (70.3%) entailed 'other' conditions (such as agreement not to associate with certain peers, participate in counselling sessions, etc).
- Undertakings agreed to by Aboriginal youths were less likely than non-Aboriginal undertakings to involve compensation, community work, apologies or letters of regret but were more likely to involve 'other' conditions.
- Of the 257 cases that resulted in a compensation agreement, just under one half (44.7%) were for amounts of \$100 or less. The average amount agreed to was \$236 while the maximum was \$2,400.
- The average number of hours of community work agreed to was 26 (down from 28 in the previous year), while the maximum was 300 (compared with 275 in 2005).
- Of the 1,098 conference cases finalised in 2006 by way of an undertaking, information on undertaking compliance was available for 926 (84.3%). In 86.5% of these cases all undertakings were listed as having been complied with by mid April 2007, while 13.4% were referred back to police for non-compliance.
- While the level of compliance for Aboriginal youths was relatively high, a slightly greater proportion of Aboriginal than non-Aboriginal cases were referred back to police for non-compliance (18.4% compared with 12.2% respectively).
- When information on undertaking compliance is combined with information on conference outcomes for all referrals, a more accurate measure of the level of positive resolution achieved by the conference process is obtained. Of the 1,413 conference referrals recorded in 2006, by the end of the survey period 70.7% had been positively finalised, with all undertakings having been complied with. In a further 12.2% of cases, compliance data for undertakings were not available at the time the data-base was closed off, and so these matters still had the potential to be positively resolved at this level. In contrast, 17.1% of referrals were not resolved, either because the conference had not gone ahead (6.1%) or, if held, had not reached agreement (2.3%) or the resultant undertaking had not been subsequently complied with (8.8%).
- The level of positive finalisation was lower for Aboriginal than non-Aboriginal referrals (63.2% compared with 73.1% respectively) largely because of the higher proportion of cases where no conference was convened because the youth failed to attend or could not be located.

Number of actual conferences held

- In 2006, 1,212 discrete conferences were held, which was 3.7% higher than in the previous year.
- The vast majority of these conferences (93.6%) involved one young offender only, while at the other end of the scale, only seven conferences dealt with four or more young offenders.
- Almost one third (30.0%) had at least one victim present which continues the declining trend of the previous years.
- However, if attendance by a victim supporter/representative is included, the number of

conferences which had at least some form of victim involvement increases to 41.8%.

Youth Court

- The Youth Court finalised 2,295 cases in 2006, which 4.6% lower than the 2,405 cases finalised in 2005.
- Males accounted for 85.2% of the finalised court cases for which sex was recorded, while 60.5% of juveniles for whom age was listed were 16 years and over at the time of the offence. Aboriginal youths comprised 21.3% of those defendants for whom racial appearance was recorded.
- As at the cautioning and conferencing level, *larceny and receiving* offences dominated, being listed as the major charge in 20.0% of all cases.
- In the majority of cases (78.5%) the major charge was proved. In a further 107 appearances (4.7%), the major charge was not proved but there was a finding of guilt to a lesser or other charge. In total then, of the 2,295 cases finalised in 2006, 83.1% resulted in at least one charge being proved.
- Obligations were listed as the major penalty in 24.0% of the cases where at least one charge was proved. Fines accounted for 17.2% of cases, licence disqualifications for 14.9% and community service orders for 12.8%. 12.9% of cases were dismissed without penalty.
- The number of proved cases resulting in a detention order was relatively low (4.8%) while a further 8.8% received a suspended sentence.
- The likelihood of receiving a detention order varied according to the seriousness of the charge involved. At one end of the scale, 26.5% of proven *robbery and extortion* cases resulted in detention, while at the other end, only 0.3% of cases involving a proven *offence against good order* had this outcome.
- Of the 327 fines imposed as the major penalty, the average amount payable was \$158 while the maximum was \$1,000. Of the 244 community service orders listed as the major penalty, the average duration was 52 hours while the maximum was 320.
- Of the 89 cases where detention constituted the most serious penalty imposed, the majority (92.1%) involved detention in a secure care facility while 7 (7.9%) were home detentions. Three of the 89 cases involved a combined secure care/home detention order.
- Of the 82 secure detention orders, the average duration was 18 weeks (shorter than the 23 weeks recorded in 2004), while the maximum was 79 weeks. For home detention orders the average was 13 weeks and the maximum 21 weeks.
- Just over one in four (27.1%) of all secure detention orders were of less than eight weeks duration. The most frequently imposed duration was that of two to less than six months, with this category accounting for 45.9% of all secure care orders.

Juveniles in custody

Admissions

- In 2006, there were 926 admissions to the State's two youth training centres. This figure was 4.2% lower than the 967 admissions recorded in 2005, 17.4% lower than the 1,121 admissions recorded in 2004 and 21.8% lower than the 1,184 recorded in 2003.
- The majority of admissions involved males (80.3%) and just under half of all juveniles were aged 16 years or over (45.9%). There were 65 admissions involving young persons aged 12 years or under.
- Aboriginal youths comprised just over one third of admissions (34.9%) where racial identity was known. Of all females admitted into secure care in 2006, 31.3% were Aboriginal. Aboriginals accounted for 35.7% of all male admissions.

Census figures

- There were 51 young people who spent at least some time in secure care on the 30 June 2006. This figure is 23.9% lower than the 67 recorded as being present one year earlier, on 30 June 2005.
- Twenty five (49.0%) of those youths in custody on 30 June 2006 were serving a detention order while 19 (37.3%) were on remand.
- Only two young people in custody at 30 June 2006 were female (3.9%), while 16 (or 31.43%) were Aboriginal.

Average daily occupancy

- On average, 54.40 youths were held in custody per day during 2006 compared with 62.23 in 2005.
- In 2006, on average there were 25.85 youths serving a detention order. This figure was 19.6% lower than the average of 32.15 recorded in 2005 and 57.7% lower than the peak of 61.05 recorded in 1996. The remand daily average of 21.49 was lower than that in 2005 (26.08).
- Aboriginal daily occupancy numbers in 2006 decreased to 17.96 compared with 26.32 in 2005. In contrast, the non Aboriginal daily average increased from 35.90 in 2005 to 36.44.

Using crime and justice reports

As with all quantitative data, the tables in this publication can give rise to misunderstanding and confusion unless interpreted carefully. The notes that follow are designed to assist understanding of the data in this *Crime and Justice in South Australia: Juvenile Justice* report. Readers are also urged to read the footnotes appended to the individual tables and the detailed explanatory notes in the Appendix.

Comprehensiveness

In using this report it is important to understand that, although it encompasses all major areas of the juvenile justice system, it does not purport to provide a comprehensive picture of the nature or level of youth offending in the community. The statistics presented here relate only to those young people who have actually been apprehended by police and have therefore come within the purview of the formal criminal justice system. The statistics do not include offences which were never reported to police or, if reported, were never cleared by way of an apprehension. Nor does this publication include those young people dealt with by way of an informal police caution (see Appendix for further discussion). Moreover, because of resource constraints, it does not include prosecutions for minor traffic offences, breaches of local government by-laws, etc.

Another factor which should be borne in mind in assessing these *Crime and Justice* figures is that, because they derive from operational records, they are affected by changes to the criminal law or justice administration. For example, the number of youths apprehended for drug offences in a given year may rise significantly if the South Australia Police dedicates more resources to enforcing the laws applying to this type of criminal behaviour. Changes in police recording practices also impact on the statistics. In 1999, for example, a modification to SAPOL work practices altered the way in certain driving related offences (notably *licencing*, *motor registration* and *dangerous or reckless driving*) were entered onto the data base, with the result that more of these offences were counted than previously (see Appendix for a more detailed explanation). Any observed increase in these categories between 1998 and subsequent years may therefore be due, not to an increase in the actual number of persons caught for these offences, but to a change in data recording practices.

In many ways then, official crime statistics do not provide a reliable insight into what crimes are being committed and by whom. However, they do provide a valuable source of information about how the criminal justice system itself operates.

Before attempting to derive conclusions from the tables contained in Sections 2 to 5 of this report, readers should review the relevant explanatory text provided in the Appendix and take careful note of the scope of each collection.

'Snapshot' rather than 'flow' statistics

Readers should not see this report as a source of information about the 'flow' of business through the juvenile justice system. It would be tempting, for example, to try to link police apprehension figures (Section 2) with figures relating to finalised Youth Court cases (Section 4) in an attempt to estimate the extent to which young persons apprehended for a particular offence are subsequently sentenced to detention. However, this would not be a valid exercise. Many young offenders who came to the attention of police in 2005 may not have had their cases finalised by the end of the year, and so would not appear in the caution, conference or court statistics for 2005. Conversely, the conference and court data will contain cases which commenced in the previous year. Similarly, statistics relating to the number of youths held in a detention centre will contain persons apprehended and/or sentenced in the preceding year. In other words, this publication provides a 'snapshot' of the relevant operations at each level of the system, rather than a 'tracking' system which follows the same group of offenders from the point of apprehension to final disposition.

Youth Restorative Justice 2009

What the project is about

In letters of 19th December 2008 and 14th Feb 2009, addressed to Dr Boersig of AGD, ALRM set out in detail, proposals to revamp the Youth Restorative Justice Program by directing more attention to the actual process of diversion under the *Young Offenders Act 1993*.

This will be done by employing a solicitor to take charge of the giving of advice to Aboriginal Youth in the metropolitan area of Adelaide and ensuring that as many as possible Aboriginal youth are diverted by police to formal and informal cautioning and to Family conferences under the legislation. Advice received is that the SAPOL explanation for the comparatively low number of Aboriginal youths diverted is that they never make admissions and are always diverted to court.

ALRM wants to provide a dedicated youth solicitors position to give advice and facilitate diversion under the *Young Offenders Act 1993 section 7*, and to facilitate this by creating procedural protocols with SAPOL for youths to enable youths to

- Receive legal advice before referral to court
- Where appropriate make written admissions
- Get their cases diverted out of the Youth Court process into conferences and cautioning

A dedicated youth solicitor, working with SAPOL and with a n Aboriginal field officer would arrange for this to be done for all the metropolitan area of Adelaide.

Locations

The Youth restorative justice program will be carried on initially in metropolitan Adelaide, with youth in that region being contacted by the youth solicitor, either in custody in Cavan or Magill training centre through the incarcerated youth field officer, or whilst on bail at their home addresses, or at hostels or at MAYFS foster homes etc etc. This will be done before their first court appearance and will enable to the police diversion under the *Young Offenders Act 1993* to take place. The project will be limited initially to metro Adelaide, and evaluated in that location to see what effect it has on reducing the workload of the youth court Law & Justice solicitors. The benefits will be as described above.

Addressing priorities and objectives in the funding guidelines

The project addresses priorities and objectives in the funding guidelines by emphasising the implementation of the intentions of the *Young Offenders Act 1993* in diverting aboriginal youth from the court system into a range of programs such as family conferences and cautioning. It is in those programs that provision is made for restorative justice mechanisms to take place (see letter of Feb 14th 2009)

It will also be designed to meet key restorative justice outcomes mentioned in the Capps report.

Why the project is needed

The project is needed because the numbers of Aboriginal youths diverted from youth Court is too low. See OCSAR Juvenile Justice report no 42 of 2006. Summary report for 2005. This is the latest available on the OCSAR website,

Of 6127 police apprehensions for that year Aboriginal youths accounted for 21.9% of apprehension reports, with 60% of youths under 15 years apprehended being aboriginal compared to 40% non aboriginal.

Of 1402 referrals to family conference Aboriginal cases were nearly 10% less likely to be successfully concluded in conference. Of the 1261 [total number of family conferences held in 2005], 22.4% of cases for which racial identity was recorded in family conferences were Aboriginal.

The disproportionate number of Aboriginal apprehension reports generated by police is in marked contrast to the relatively much lower numbers of Aboriginal youths diverted to family conference or cautioning.

In addition ALRM has received advice from the Senior Judge of the Youth Court that he needs no statistical advice on this but is concerned that far too many aboriginal youths are referred to court and more should be diverted to conferences and cautions

Key Risks

ALRM has seen an evaluation of an earlier project to get more aboriginal youth in suburban Adelaide diverted. This was quite inconclusive but it was done in Dec 2004, when ALRM had absolutely no extra resources beyond already overstretched lawyers and field officers to carry out a scheme to assist in the diversion of Aboriginal youth, by providing legal advice and encouraging participation in *Young Offenders Act 1993* diversions.

ALRM anticipated that the key risk to the program proposed is the existence of this report, and the need to persuade SAPOL to actively cooperate in the proposals, but they are proposals that are already sanctioned and provided for in the terms of section 7 *Young Offenders Act 1993*, so it is expected that SAPOL will cooperate with the proper implementation of the scheme of section 7 of the *Young Offenders Act 1993*. In addition it is intended that before staff are employed, detailed consultations and planning will take place with senior officials in SAPOL youth justice and prosecutions to arrange for the proper implementation of a scheme for giving aboriginal youth legal advice and facilitating diversion under *Young Offenders Act* It is to be hoped that a protocol of procedures for local service areas will thus be developed, in terms of facilitating aboriginal youth diversions.

How will we undertake the project ?

ALRM will undertake the project by

1. undertaking consultations with senior SAPOL youth justice and prosecutions services officers
2. developing protocols for contact between LSA police and the youth solicitor to obtain AP Reports in advance
3. Gaining early access to youths in custody or on bail , or subject to report and summons to or in contact with MAYFS to
 - give them advice on their charges ,
 - arrange where appropriate for their diversion
 - facilitate their diversion form court to cautioning or conference diversion procedures .
4. TO evaluate the project against OCSAR statistical models for diversion and processing through the Youth Court

It is anticipated that 1 dedicated youth solicitors position operating 9 to 5 pm Monday to Friday will be more than sufficient to staff the project ,with the assistance of the Incarcerated youth in custody field officer .Depending on operational considerations , requests may be made to AGD to vary the PFA for the Incarcerated youth in custody field officer position to make it fit better with the work of the legal officer . Because of the nature of the work an experienced youth court lawyer would be needed ; a person who is already familiar with Youth Court practice , police AP Reports and with ALRM Youth clientele.

ALRM has years of practice and experience in dealings with Youth Court, police prosecutions , MAYFS Dept of Families and Communities and related government officials . ALRM has also gained in recent years experience in project management of diversionary programs of this type

Tasks and Milestones .

The tasks and milestones for the project are as described above . The tasks will be done in this order below . Appointment of the solicitor's position would not take place until the protocols with SAPOL had been developed and requests to AGD to vary the PFA for the Incarcerated youth in custody field officer position, until that proved necessary .The whole project should however be up and running within 6to12 months

The order of tasks is :--

- 1.. undertaking consultations with senior SAPOL youth justice and prosecutions services officers
- 2.developing protocols for contact between LSA police and the youth solicitor to obtain AP Reports in advance
- 3.Gaining early access to youths in custody or on bail , or subject to report and summons to or in contact with MAYFS to
 - give them advice on their charges ,
 - arrange where appropriate for their diversion
 - facilitate their diversion form court to cautioning or conference diversion procedures .
- 4.TO evaluate the project against OCSAR statistical models for diversion and processing through the Youth Court .

**United Nations Permanent Forum on Indigenous Issues
Ninth Session - New York
19-30 April 2010**

Indigenous Peoples Organisations of Australia

**Agenda Item 7: Intervention on the report of the expert group meeting
on Indigenous youth and children in detention**

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JOINT INTERVENTION DELIVERED BY Neil Gillespie ON BEHALF OF:

Indigenous Peoples Organisation Network Youth Delegation
National Native Title Council (NNTC)
Foundation for Aboriginal and Islander Research Action (FAIRA)
New South Wales Aboriginal Land Council (NSWALC)
National Indigenous Higher Education Network (NIHEN)
Aboriginal Legal Service Western Australia (ALSWA)
Aboriginal Legal Rights Movement (ALRM)
Bullana, The Poche Centre for Indigenous Health
National Aboriginal Community Controlled Health Organisation (NACCHO)
Amnesty International Australia
Oxfam Australia
Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner

.....

Mister Chairperson, this Intervention is presented on behalf of the Indigenous Peoples Organisations of Australia present at this forum.

The human rights and fundamental freedoms of Aboriginal and Torres Strait Islander children and youth in Australia and Indigenous children and youth around the world are severely threatened by alarmingly high rates of incarceration that are continuing to rise.

The International Expert Group Meeting on this issue has acknowledged the 'multifaceted, inter-related and mutually-reinforcing' human rights considerations relating to Indigenous children in state custody.

We note the Declaration on the Rights of Indigenous Peoples (Declaration) and Convention on the Rights of the Child (CROC) and together reaffirm that Indigenous children and youth enjoy all the human rights and freedoms recognised in international law, and especially recognise the social and cultural needs of children in Indigenous communities.

The International Expert Group Meeting noted the legacy of historical abuse and impact of past government policies and removal programs are a major contributing factor to this situation. The increasing rates of incarceration indicate that measures currently adopted by States are failing to address the unique situation of Indigenous children and youth in contemporary society.

The special place of Indigenous children and youth as leaders of tomorrow and bearers of Indigenous cultures require the international communities' urgent attention to identify and formulate methods to overturn this situation.

Indigenous children and youth often face disadvantage and marginalisation from birth until adulthood characterised by:

- intergenerational poverty;
- overcrowding in poor housing conditions;
- low levels of literacy and numeracy;
- low quality of health, well-being and life expectancy;
- welfare dependency;
- social marginalisation;
- poor and unsuitable service delivery by governments;
- inadequate resources, funding and support for culturally appropriate Indigenous owned and controlled services; and
- over-policing, targeting and discrimination by police and law enforcement authorities.

Programs need to address these multi-faceted and inter-related considerations to overcome disadvantage, marginalisation and the structural impediments and barriers in justice systems that all impact on the high involvement of Indigenous children and youth in detention and custody.

The Declaration, CROC and other international instruments can be better utilised and incorporated into measures identified to address this situation, with a particular focus on working with local communities to address local needs and increasing the participation of Indigenous children and youth in decision-making processes.

A particular framework proving successful in mainstream communities in the United States of America and the United Kingdom is 'justice reinvestment,' which is a localised criminal justice policy approach diverting a portion of funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services in communities where these issues are most acute in order to address the underlying causes and prevent crime in those communities. Justice reinvestment still retains incarceration as a measure for dangerous and serious offenders, but actively shifts the culture away from imprisonment and starts providing community wide services that prevent offending.

Justice reinvestment was recently recommended by the departing Aboriginal and Torres Strait Islander Social Justice Commissioner of Australia, and is supported by the Indigenous Peoples Organisations of Australia present at this forum.

Recommendations

1. That the Permanent Forum urge States to divert Indigenous children and youth away from detention and custody as a matter of priority, using detention only as a matter of last resort.
2. That the Permanent Forum urge States to engage and consult with Indigenous peoples and organisations to identify causal factors and strategies to overcome the disproportionately high level of involvement and overrepresentation by Indigenous children and youth in the justice system.
3. That the Permanent Forum urge States to provide resources to empower Indigenous organisations where possible, to implement culturally appropriate programs that prevent, intervene, divert and rehabilitate Indigenous youth in the justice system through counselling, mediation, employment, education, and cultural and family reconnections.
4. That the Permanent Forum encourage discussion and input from States and Indigenous peoples and organisations about best practice models, such as justice reinvestment, and consider how to encourage a framework for broader application beyond local settings.
5. That the Permanent Forum work to identify mechanisms for increasing accessibility and participation for Indigenous children and youth in the UN system to highlight their issues and concerns directly with the international community, including consideration of international complaint mechanisms.

Finally, please note that a more comprehensive report on these issues has been provided to the Permanent Forum for its consideration.

Thank you Mr Chairman.

Report to the
United Nations Permanent Forum on Indigenous Issues
Ninth Session - New York
19-30 April 2009

Agenda Item 7: Future Work of the Permanent Forum: Indigenous children and youth in detention and custody

Joint report submitted on behalf of the following Aboriginal and Torres Strait Islander organisations from Australia:

Aboriginal Legal Service of Western Australia (Inc.) (ALSWA)
Aboriginal Legal Rights Movement (ALRM)
Amnesty (International) Australia
Australian Human Rights Commission (AHRC)
Bullana, The Poche Centre for indigenous Health
Indigenous Peoples Organisation Network Youth Delegation
Foundation for Aboriginal and Islander Research Action (FAIRA)
National Aboriginal Community Controlled Health Organisation (NACCHO)
National Indigenous Higher Education Network (NIHEN)
National Native Title Council (NNTC)
New South Wales Aboriginal Land Council (NSWALC)
Oxfam Australia

Introduction

Aboriginal and Torres Strait Islander Organisations of Australia¹ are concerned at the alarmingly high rate of Aboriginal and Torres Strait Islander children and youth in detention and custody.

The Data

The Australian Institute of Criminology (AIC)² have recorded data that demonstrates that Aboriginal and Torres Strait Islander juveniles comprise 58 percent of all detained juveniles in Australia and that Aboriginal and Torres Strait Islander juveniles are 28 times more likely to be detained than non-Aboriginal juveniles. The breakdown by gender shows that Aboriginal and Torres Strait Islander boys are 28 more times more likely to be detained and girls are 24 times more likely. It is concerning that the data also demonstrates that the over-representation has been steadily increasing over the last decade.

The data further shows that the rates of Aboriginal and Torres Strait Islander over-representation among juveniles in detention vary among jurisdictions and that although high everywhere, it is especially high in the Northern Territory (NT) and Western Australia (WA).

Finally, the data shows that Aboriginal and Torres Strait Islander juveniles in detention are younger on average than their non-Aboriginal counterparts. Twenty-two percent of Aboriginal and Torres Strait Islander juveniles in detention were aged 14 years or less, compared with 14 percent of non-Aboriginal juveniles.

The Reasons for High Incarceration Rates

The failure of police to divert Aboriginal and Torres Strait Islander children and youth from the criminal justice system and other forms of over-policing practices are main contributing factors to this situation. This stems from a legacy of historical abuse and impact of past government policies combined with disturbing contemporary practices that directly and indirectly discriminate against Aboriginal and Torres Strait Islander children and youth.

Other reasons for high incarceration rates include:

- punitive police practices with respect to bail;
- absence of crisis care accommodation, bail hostels and rehabilitation programs;
- absence of an interpreter service in Aboriginal languages;
- limited access to legal advice; and
- mandatory sentencing and other punitive laws.

There is a critical need for a holistic approach to address the combined impacts of the underlying social, cultural and legal factors leading to over-representation.

¹ See the organisations listed on the front of this report.

² A. Tomison & K. Richards, 'Submission to the Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system,' AIC, 2009, <http://www.aph.gov.au/house/committee/atsia/sentencing/subs/Sub067.pdf> at 25/03/10.

Current Inquiry

The Australian Government is currently holding an inquiry into the high level of involvement of Aboriginal and Torres Strait Islander juveniles and young adults in the criminal justice system, but is yet to produce a final report.³ The issues explored in the current inquiry are directly relevant to this international issue of concern and in this regard we **attach** the submissions prepared by the Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia to this report as follows:

- Annexure 1: Submission by the Aboriginal Legal Service of Western Australia (Inc)
- Annexure 2: Joint submission by the Aboriginal Legal Service of NSW / ACT, North Australian Aboriginal Justice Agency, Queensland Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd.
- Annexure 3: Submission by Queensland Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd.
- Annexure 4: Submission by the North Australian Aboriginal Justice Agency.
- Annexure 5: Submission by Victorian Aboriginal Legal Service Co-operative Ltd.
- Annexure 6: Submission by the Central Australian Aboriginal Legal Aid Service Inc.

These submissions refer to the historical context of Aboriginal and Torres Strait Islander peoples and provide an overview of the main causes and concerns about Aboriginal and Torres Strait Islander children and youth in detention and custody in Australia.

The submissions refer to the terms of reference of the Australian Government inquiry, which focus on early intervention, prevention and behaviour, as follows:

- How the development of social norms and behaviours for Indigenous juveniles and young adults can lead to positive social engagement;
- 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;
- 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;
- The effectiveness of arrangements for transitioning from education to work and how the effectiveness of the 'learn or earn' concept can be maximised; and
- 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;

These submissions highlight the need for culturally appropriate strategies being formulated by local organisations with relevant expertise and knowledge to address the underlying causes of the high levels of Aboriginal and Torres Strait Islander children and youth in detention and custody. These strategies require support and commitment from governments to ensure their effective implementation.

³ Further information about the Inquiry and submissions received is at <http://www.aph.gov.au/house/committee/atsia/sentencing/index.htm>.

International Engagement

Although Australia has indicated its support for the Declaration on the Rights of Indigenous Peoples in 2008 and ratified important instruments such as the International Covenant on Civil and Political Rights in 1980 and Convention on the Rights of the Child in 1990, there is a lack of reference to these frameworks and standards in Australia.

Greater protection and promotion of human rights is needed in Australia to improve the contact of Aboriginal and Torres Strait Islander children and young people with the criminal justice system. A greater utilisation of international instruments and mechanisms is also needed as an additional form of addressing this situation.

The United Nations Permanent Forum on Indigenous Issues (UNPFII) provides a useful opportunity for Indigenous peoples to come together and discuss ideas and solutions to address the high incarceration rates of Indigenous children and youth around the world. For example, the UNPFII and UN system could consider the development of an accessible complaint mechanism for children and youth to communicate and have their concerns evaluated, encourage States to refer to their obligations under international law, provide opportunities for discussion and promotion of best practice models, and consider how Indigenous children can better access and utilise international mechanisms to ensure their voices are heard and concerns are addressed.

Recommendations

1. That the Permanent Forum urge States to divert Indigenous children and youth away from detention and custody as a matter of priority, using detention only as a matter of last resort.
2. That the Permanent Forum urge States to engage and consult with Indigenous Peoples and organisations to identify causal factors and strategies to overcome the disproportionately high level of involvement and overrepresentation by Indigenous children and youth in the justice system.
3. That the Permanent Forum urge States to provide resources to empower Indigenous organisations where possible, to implement or advise governments on culturally appropriate programs that prevent, intervene, divert and rehabilitate Indigenous youth in the justice system through counselling, mediation, employment, education, and cultural and family reconnections.
4. That the Permanent Forum encourage discussion and input from States and Indigenous Peoples and organisations about best practice models, and consider how to encourage a framework for broader application beyond local settings.
5. That the Permanent Forum work to identify mechanisms for increasing accessibility and participation for Indigenous children and youth in the UN system to highlight their issues and concerns directly with the international community, including consideration of international complaint mechanisms.



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Reply To: Adelaide

Your Reference:
Our Reference:

8th June 2009

Hon Michael Atkinson LLB, MHA
Attorney General
DX336 Adelaide 5000

Dear Mr Attorney,

re Proposed amendments to the *Bail Act* and *Young Offenders Act*

I refer to your letter of 30th April in relation to proposed amendments to the *Bail Act* and *Young Offenders Act*. ALRM has considered the proposals and thanks you for this opportunity to respond.

ALRM has several concerns.

Changed circumstances after initial refusal of bail

Inevitably, even if rarely, there will be occasions where the parent /guardian, who was previously un contactable, can be located and is prepared to have the child bailed to them, after an initial police refusal of bail, and even late at night. That is precisely the circumstance where a Magistrates bail review jurisdiction is both warranted on the facts and entirely justified in law. If a bail review justifies release of the child late at night, it should be undertaken and the child released to a parent or guardian. These are the cases where, because of changed circumstances, a Magistrate would be in an entirely different position to the police bail authority and that is precisely the reason the jurisdiction should be retained.

Police bail authorities do not regularly review their own decisions if there were changes of circumstances, justifying later release on bail. A fresh application could conceivably be made, yet the Bail Act makes no specific allowance for it. That is why the review jurisdiction exists. We ask you also to note existing section 15(2)(a) *Bail Act*, which allows a Magistrate to "weed out" frivolous bail reviews.

15(2)(a) Where a magistrate is contacted under subsection (1), the following provisions apply:

- (a) the magistrate must make such inquiries as the magistrate thinks necessary to satisfy himself or herself of the genuineness of the application for review; and.

Finally on this topic, if it is proposed to remove the review jurisdiction of Magistrates, then it is submitted that it should be made clear that police bail authorities can entertain a fresh application for bail when there are advantageously changed circumstances. Nevertheless ALRM submits that the presently restricted bail review jurisdiction is a better way to deal with the issue. There will always be cases where a Police Bail Authority takes a more restricted view of bail than a judicial officer and again those cases should be immediately reviewed. ALRM far prefers

that the Magistrate's jurisdiction remains, because reconsidering bail applications in light of changed circumstances, or on the merits, is inherently a judicial function, not a police function.. Police Officers are bound by their oath of office; they are not judicial officers.

Bail and remote centres of Aboriginal Population

ALRM is also concerned with what could happen in remote and country locations. ALRM has recently received correspondence from the Courts Administration Authority regarding further proposals to close, or restrict the operations of Country Court Registries in major centres of Aboriginal population, including Ceduna, Coober Pedy and Kadina.

ALRM is concerned that the partial closure of these country registries may reduce access to courts for fresh bail applications under section 13(2) *Bail Act*. In that circumstance ALRM is concerned at the prospect of losing the right of Magistrate's review of police bail decisions.

At the present time a charge needs to have been laid and a court file generated for an application to be made under section 13(2) *Bail Act*, or for the process of having the child before a Youth Court before 4pm on the following day, pursuant to section 13(3)&(4) *Bail Act*. Absent a remote country registry, this would presumably need to be done at a registry where there is a resident Youth Court Magistrate, or in the Adelaide Youth Court.

The logistical problems in achieving that would need to be dealt with by police prosecutors and court staff. In the absence of compliance, it is arguable that the Magistrates Bail review jurisdiction would not have been ousted anyway, since the conditions precedent found in section 15(3) *Bail Act* would not have been complied with.

ALRM is also concerned that, in the generality of cases, regardless of remote locations, removing the jurisdiction to allow a bail review may lessen SAPOL's diligence in looking for a placement in the first place, pursuant to section 13 (1) *Bail Act*. It is possible that Police will be more likely to leave this to Families SA, whom they know will be in court during a listed hearing, which could be some days away. That situation could only be exacerbated if remote and regional court registries were to be closed and the section 13(2) bail application were required to take place by telephone or by video link or by removal of the youth to a Youth Court location, remote from the place of arrest or their usual residence.

It is in that context that we consider the further proposal that youths not ordinarily be transported to Adelaide Youth Court, after an initial refusal of bail.

Young Offenders Act section 15

ALRM notes the concern that youths from remote and regional areas should not be transported into Adelaide Youth Court, only to be pleaded up or bailed the next day. It is something the Youth Court Judiciary are concerned about, and with good reason. It is costly to the state, in terms of time and resources. Most parents cannot transport themselves to Adelaide to attend

and support their child and the Court often has to send them back on the next flight home, or remand them in custody.

Nevertheless ALRM has grave concerns about children being kept in rural regional and remote police station, police prisons. An alternative, which the Government appears to be considering, would be for youths - except those posing an immediate threat to themselves or others - to be taken into custody at secure accommodation in the country, rather than SAYTC. There are guardianship homes maintained by Families SA in regional areas, staffed by teams of social workers who work around the clock. I am advised that there is one in Pt Lincoln (which is one of the most frequent areas sending youths to Adelaide, only for the Court to send them back). This would be a much more appropriate holding centre that takes into account the special needs of children. ALRM asks whether it is contemplated that such centres be approved in regional areas, under section 15(1) *Young Offenders Act*, though the approval would need to be that of the Minister of Families and Communities. Conceivably they could also be used as bail hostels in appropriate cases, and we note that bail hostels were a key recommendation of RCIADIC. ALRM specifically recommends the reintroduction of suitably staffed bail hostels.

In that regard ALRM also asks you to note recommendation number 10 made by the State Coroner in the 2002 and 2005 petrol sniffing inquests¹:-

10 Planning for the establishment of secure care facilities on the Anangu Pitjantjatjara Lands should commence immediately. These facilities must be reasonably accessible from all communities on the Anangu Pitjantjatjara Lands, and have a multi-functional role to provide facilities for detention, detoxification, treatment and rehabilitation as outlined in these findings;

The prospect of Aboriginal youths being held in custody in remote country police stations is a cause for considerable concern. Having regard to public holidays such as Easter this could happen for up to four days, before a Youth Court could be convened under section 13(2) *Bail Act*, and it is submitted that this is too long to hold a youth in a police prison. ALRM is most concerned about considerations of adequate standards for youth custody arising from the Convention on the Rights of the Child. ALRM is most concerned at the prospect of Aboriginal youth deaths in custody, as a result of an inadequate standard of care being maintained in police prisons.

Assuming that the minimum standard of separating youths from adult prisoners can be maintained ALRM is still concerned at the state of understaffed regional, rural and remote police stations. We are concerned that there are inadequate facilities to care for youths in custody for extended periods and insufficient and inadequately trained cell guards, let alone those trained to meet the special needs of youths. In that regard we also refer you to the findings of the State Coroner in the Sansbury death in custody inquest.

¹ www.courts.sa.gov.au/coroner/findings/2002/kunmanaraKen, Hunt and Thompson

Of more concern is the fact that the criticisms made by the State Coroner in Sansbury, applied to Elizabeth in the city, not a remote country police station.

That said ALRM was encouraged by a report to it, from Assistant Commissioner Kilmier on implementation of those Coronial recommendations from Sansbury. That report is well over twelve months old now, however, and we do not have up to date information. Our concerns remain.

An alternative proposal

ALRM submits that the police bail authority should be maintained as a first resort and that in the case of youths to be remanded in custody over a weekend or longer, in remote areas and not to be brought to Adelaide, the matter should go to the intensive and immediate supervision of a Magistrate.

In the case of remands after refusal of police bail over a weekend or extended public holiday period, the bail review jurisdiction is not ousted in any event and ALRM suggests below that it should be extended.

In the case of youths to be remanded in custody in remote locations, on refusal of police bail, on-call Magistrates should be empowered to order placement reports for children without confirmed residences. Police might also be requested by the Magistrate to immediately liaise with Families SA to begin consideration of a placement through whatever fulltime service is available.

Magistrates' jurisdiction should be maintained and strengthened to enable this to happen. This might require an amendment to section 15(2)(e) *Bail Act*, which necessarily restricts the nature of the existing review jurisdiction, to- review of police bail decisions only.

Section 15(2)(e) *Bail Act* currently reads:-

- (e) the magistrate must then advise the member of the police force or justices who made the original decision of the decision on review, and bail must then be granted or refused in accordance with that decision.

ALRM suggests that effectively Review Magistrates should be allowed, if necessary to adjourn telephone review applications to the next possible and available Youth Court date, with Bail Assessment reports having been ordered by the reviewing Magistrate. Such a proposal has the advantage of giving immediacy to the process of finding a suitable bail placement for the youth in custody. Similarly the supervising Magistrate should be empowered to remand the youth to a specific safe location, if there are fears that the police station, police prison is not appropriate or safe. It is conceded that Court files of some sort would probably need to be generated to enable this to occur.

ALRM lawyers regularly see Adelaide Youth Court files with a bail refusal, upon Bail Review by the on-call Magistrate but with no reports

ordered. ALRM lawyers conclude that this happens because Magistrates take a view of their review jurisdiction, which prevents the ordering of such reports for a later appearance. This leaves the sitting Magistrate on the next court appearance to do something that could and should have been commenced some days earlier (particularly in the case of youths arrested on or before a weekend or long weekend, or Easter break . and before the Youth Court listing).

It is submitted that a speedier ordering of a bail assessment or placement report would make a significant difference to the youths fate and disposition.

In summary, ALRM calls for the maintenance of the existing and limited police bail powers and expansion of the Magistrates bail review jurisdiction to a process of overall judicial supervision of youths to be held in custody in remote areas.

That should include a Magistrates jurisdiction to expedite Bail Enquiry and report processes, to enable immediate remand to enhanced alternative care for youths in custody to guardianship homes as places of bail placement or remand. Your proposal that youths not be automatically transported to Adelaide Youth Court, bespeaks the need for this broadened Magistrates jurisdiction by way of telephone review and judicial supervision of youths in remote locations.

ALRM gives cautious support for the proposal that overnight transfers to Adelaide Youth Court should be discontinued, or at least modified to other Youth Courts where there are resident Magistrates, in cases where fresh bail applications cannot be made pursuant to section 13(2) *Bail Act* , because of the closure of country registries, or because there is not a resident Magistrate in the remote area. It may be anticipated that Pt Augusta would be used for that purpose and it is conceivable that enhanced youth detention and guardianship and bail hostel facilities will be needed there.

ALRM recognises that the expansion of section 15(1) *Young Offenders Act* to institutions in a remote location is a suitable response to the problem of continual remand to Adelaide Youth Court. Extended custody in Police stations as police prisons causes ALRM concerns , having regard to recent findings of the State Coroner on inquests into deaths in custody in police stations, or police prisons.

Yours faithfully

Neil E. Gillespie
Chief Executive Officer



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POLICE v G, PA [2007] SASC 78 (7 March 2007)

Last Updated: 7 March 2007

SUPREME COURT OF SOUTH AUSTRALIA
(Full Court)

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POLICE v G, PA

[\[2007\] SASC 78](#)

Judgment of The Honourable Chief Justice Doyle, The Honourable Justice Duggan and The Honourable Justice David

7 March 2007

APPEAL AND NEW TRIAL - APPEAL GENERAL PRINCIPLES - RIGHT OF APPEAL - WHEN APPEAL LIES - FROM INTERLOCUTORY DECISIONS

Prosecution appeal against decision of Youth Court judge to refer matter to a family conference - respondent charged with aggravated robbery whilst in possession of an offensive weapon - matter referred to a family conference pursuant to Young Offenders Act 1993 (YOA) s 17(2) - appeal directed to Full Court - consideration of appeal provisions in Youth Court Act 1993 (YCA) s 22 - Held: referral of matter to family conference is an interlocutory order and appeal lies to single judge of the Supreme Court - by consent, issue on original appeal dealt with by way of reservation of question of law for the consideration of the Full Court pursuant to [Supreme Court Act 1935 s 49\(1\)](#).

MAGISTRATES - JURISDICTION AND PROCEDURE GENERALLY - PROCEDURE - ORDERS AND CONVICTIONS - SENTENCING - RELEVANT FACTORS - FIRST OFFENDERS AND JUVENILE OFFENDERS

Question of law referred to Full Court - whether Youth Court judge had power under

YOA s 17(2) to refer subject matter of charge of aggravated robbery to be dealt with by family conference - whether court's power to refer matter to family conference restricted to a "minor offence" as defined in YOA s 4 - whether power to refer major indictable offence to family conference - Held: Youth Court's power under YOA s 17(2) not restricted to minor offences or offences which are not major indictable offences.

[Young Offenders Act 1993 s 4, 6, 7\(1\), 8, 11, 12, 17\(2\), 21](#); [Youth Court Act 1993 s 22, 22\(2\)\(b\)](#); [Criminal Law \(Sentencing\) Act 1988 s 3](#); [Supreme Court Act 1935 s 49\(1\)](#), referred to.

R v Police (2002) 224 LSJS 210, applied.

H v Police (1998) 198 LSJS 331; *Police v CB & Others* [1999] SASC 371, distinguished.

SA Police v W (1995) 64 SASR 408, discussed.

POLICE v G, PA
[\[2007\] SASC 78](#)

Full Court: Doyle CJ, Duggan and David JJ

1 **DOYLE CJ.** I agree that the question of law reserved by Duggan J for the consideration of the Full Court should be answered "Yes". I agree with the reasons of Duggan J for that answer.

2 **DUGGAN J.** The respondent appeared before the Youth Court charged on an information which alleged that, on 9 July 2006 at Tea Tree Gully, he and another youth committed aggravated robbery whilst in possession of an offensive weapon and robbed Drew Clark of three pizzas, a bag and money.

3 Aggravated robbery is a major indictable offence.

4 The respondent was aged 16 years and 9 months at the time of the alleged offence.

5 The respondent pleaded guilty to the offence on 19 July 2006. The presiding Youth Court magistrate then ordered a social background report.

6 Subsequently, the matter was listed before the Senior Judge of the Youth Court on 23 August 2006. The social background report and a victim impact statement were provided to the court on this occasion.

7 In the course of submissions before the Senior Judge, defence counsel applied for the matter to be dealt with by way of a referral to a family conference pursuant to [s 17\(2\)](#) of the [Young Offenders Act 1993](#). The prosecution opposed the referral, but the defence application was granted.

8 The prosecution appealed to this court against the decision to refer the matter to a family conference. The grounds of appeal are as follows:

1 The learned appeal Judge imposed a sentence that was manifestly inadequate.

2 The learned appeal Judge erred in law by dealing with the respondent pursuant to [section 17\(2\)](#) of the [Young Offenders Act 1993](#) when the respondent had pleaded guilty to a major indictable offence involving violence.

3 The learned appeal Judge erred in law by dealing with the respondent pursuant to [section 17\(2\)](#) of the [Young Offenders Act 1993](#) when the offence to which the respondent pleaded guilty was not a minor offence as defined in [section 4](#) of the [Young Offenders Act 1993](#).

9 It is necessary to deal first with the competency of the appeal.

10 [Section 22](#) of the [Youth Court Act 1993](#) provides for appeals against judgments

given in proceedings before the Youth Court. "Judgment" is defined in s 3 to include a declaration or order. Section 22(2)(b) states that, in the case of an interlocutory judgment given by a judge, the appeal is to the Supreme Court constituted of a single judge.

- 11 A decision to refer a matter to a family conference is in the nature of an interlocutory order in that it does not finally dispose of the matter. It follows that the appeal in this matter should have been to a single judge of the Supreme Court.
- 12 There is a further difficulty with the notice of appeal. Ground 1 complains that the sentence is manifestly inadequate. It may be that no sentence has been imposed. The referral to a family conference may not be a "sentence" as defined in s 3 of the Criminal Law (Sentencing) Act 1988. However, this issue was not argued on the hearing of the appeal and it is unnecessary to express a decided view in relation to it.
- 13 Section 49(1) of the Supreme Court Act 1935 enables a court constituted of a single judge of the Supreme Court or a master to reserve a question of law for the consideration of the Full Court. The questions of law raised in grounds 2 and 3 of the notice of appeal give rise to important issues which have been the subject of conflicting decisions by single judges of this court. In the circumstances, it seems appropriate to treat this appeal as an appeal to a single judge so as to conform with s 22(2)(b) of the Youth Court Act and for a single judge from the court as presently constituted to reserve for the Full Court, as a question of law, the issue whether the judge had power to refer the subject matter of the charge in the present case to be dealt with by a family conference.
- 14 Following discussion between the members of the court and counsel, it has been agreed that I should reserve for the consideration of the Full Court the following question:

Did the learned senior judge have the power under s 17(2) of the Young Offenders Act 1993 to refer the subject matter of the charge of aggravated robbery with which the respondent has been charged, to be dealt with by a family conference?

- 15 Assuming that there was power to refer the matter to a family conference, the question whether the judge erred in the exercise of his discretion to do so is not raised on the grounds of appeal. However, both counsel have made submissions on this issue. Section 22(2) of the Youth Court Act requires that this issue, if raised on appeal, is to be dealt with by a single judge of this court. A ground of appeal relating to the exercise of the judge's discretion would not raise a question of law and so could not be reserved for the consideration of the Full Court pursuant to s 49 of the Supreme Court Act.
- 16 In my view, it would be inappropriate for this court to express any view on the exercise of the discretion, as this issue is not properly before the court.
- 17 In my capacity as a member of the Full Court, I now propose to answer the question of law which has been referred to the court. I will continue to use the terms "appellant" and "respondent" for the sake of convenience.
- 18 Counsel for the appellant argued that the court had no power to refer the matter to a family conference. In the alternative, it was argued that, if the court had power to make the referral, there was an error in the exercise of the discretion to divert the matter to a family conference.
- 19 Family conferences were introduced into the juvenile justice system in this State as a result of the passing of the Young Offenders Act in 1993. This Act retained the concept of diversion by replacing the system of Aid Panels which existed under earlier legislation with a diversionary system involving either police cautioning or referral to a family conference.

- 20 The power to divert a matter for police cautioning or to a family conference may be exercised by a police officer or the court depending upon the stage to which the matter has progressed.
- 21 An *informal* caution by the police may be administered if a youth admits the commission of a minor offence and a police officer is of the opinion that the matter does not warrant any formal action under the Act (s 6).
- 22 Section 7 provides for more formal proceedings which can be directed by the police. Section 7(1) provides:

If a youth admits the commission of a minor offence, a police officer may deal with the matter as follows:

- (a) the officer may deal with the matter under Division 2; or
- (b) the officer may notify a Youth Justice Co-ordinator of the admission so that a family conference may be convened to deal with the matter; or
- (c) the officer may lay a charge for the offence before the Court.

The reference to the matter being dealt with under Division 2 relates to the powers to administer a *formal* caution. Pursuant to s 8 of the Act which appears in Division 2, the police officer may administer a formal caution against further offending and exercise other powers to require the youth to enter into an undertaking, pay compensation to the victim, carry out community service or enter into an undertaking to apologise to the victim of the offence. If all the requirements made of the youth are complied with the offence cannot be prosecuted.

23 Procedural aspects of family conferences are outlined in s 11 of the Act which provides as follows:

(1) A family conference consists of—

- (a) a Youth Justice Co-ordinator (who will chair the conference); and
- (b) the youth; and
- (c) such of the persons invited to attend the conference as attend in respect to that invitation; and
- (d) a representative of the Commissioner of Police.

- (2) A family conference should act if possible by consensus of the youth and such of the persons invited to attend the conference as attend in response to that invitation.
- (3) A decision by a family conference is not however to be regarded as validly made unless the youth and the representative of the Commissioner of Police concur in the decision.
- (4) A youth is entitled to be advised by a legal practitioner at a family conference.
- (5) If a family conference fails to reach a decision, the Youth Justice Co-ordinator must refer the matter to the Court and the Court may decide any question, and exercise any power, that could have been decided or exercised by the family conference.

24 The powers of a family conference are set out in s 12 which states:

(1) A family conference has the following powers:

- (a) the conference may administer a formal caution against further offending;
- (b) the conference may require the youth to enter into an undertaking to pay

compensation to the victim of the offence;

(c) the conference may require the youth to enter into an undertaking to carry out a specified period (not exceeding 300 hours) of community service;

(d) the conference may require the youth to enter into an undertaking to apologise to the victim of the offence or to do anything else that may be appropriate in the circumstances of the case.

(2) In exercising powers under this section, the family conference must have regard to sentences imposed for comparable offences by the Court.

(3) If a formal caution is administered, the caution must be put in writing and acknowledged in writing by the youth.

(4) An undertaking will have a maximum duration of 12 months.

(5) If a youth enters into an undertaking to pay compensation, a copy of the undertaking must be filed with the Registrar and payments of compensation must be made to the Registrar who will disburse the compensation to the victims named in the undertaking.

(6) If a youth enters into an undertaking to carry out community service, a copy of the undertaking must be filed with the Registrar.

(7) If a youth enters into an undertaking under this section to apologise to the victim of the offence, the apology must be made in the presence of an adult person approved by the family conference or a Youth Justice Co-ordinator.

(8) If a youth--

(a) fails to attend at the time appointed for a family conference; or

(b) does not comply with a requirement of the family conference; or

(c) does not comply with an undertaking under this section, a police officer may lay a charge before the Court for the offence in relation to which the conference was convened.

(9) A charge may be laid under subsection (8) even though a period of limitation relating to the commencement of proceeding for the relevant offence has expired, but the charge must be laid not more than 12 months after the expiration of that period of limitation.

(10) If--

(a) a youth is cautioned, and no further requirements are made of the youth, under this section; or

(b) all requirements made of the youth under this section (including obligations arising from an undertaking given by the youth) are complied with, the youth is not liable to be prosecuted for the offence.

(11) If a family conference deals with an offence under this Division, the Youth Justice Co-ordinator must--

(a) ask the victim of the offence whether he or she wishes to be informed of the identity of the offender and how the offence has been dealt with; and

(b) if the victim indicates that he or she does wish to have that information -- give the victim that information.

25 The power of a police officer to proceed with a matter by way of a formal or informal caution or by diversion to a family conference is restricted to a "minor offence".

26 "Minor offence" is defined in s 4 of the Act as:

an offence to which this Act applies that should, in the opinion of the police officer in charge of the investigation of the offence, be dealt with as a minor offence because of--

(a) the limited extent of the harm caused through the commission of the offence; and

(b) the character and antecedents of the alleged offender; and

(c) the improbability of the youth re-offending; and

(d) where relevant -- the attitude of the youth's parents or guardians.

27 The Youth Court's power to refer a matter for police caution or to a family conference arises after a charge has been laid before the court. Section 17(2) of the Act provides:

The Court may, even though a charge has been laid, refer the subject matter of the charge (after the youth's guilt has been established either by admission or by the Court's findings) to be dealt with by a police officer or by a family conference.

28 The primary argument of the appellant is that the court's power under s 17(2) to refer a matter to be dealt with by a family conference can only be exercised in the case of a "minor offence" as defined in s 4.

29 The first difficulty which that argument encounters is that the wording of s 17(2) contains no such restriction. The term "minor offence" is used in ss 6(1) and 7(1) when identifying the type of offence which a police officer may deal with by way of caution or by diversion to a family conference. However, there is no such restriction in the wording of the power given to the court to utilise the diversionary procedures.

30 Secondly, it would be impractical to introduce into s 17(2) the concept of a "minor offence" as defined in s 4. The essence of the definition of "minor offence" is the formation of the relevant opinion by the police officer in charge of the investigation of the offence. There may be some cases in which the mind of a police officer in this respect would be known to the court, but these occasions would be rare. Furthermore, it would be impractical for the court to investigate such an issue at the stage of the proceedings when it was considering whether to make an order under s 17(2).

31 These difficulties were acknowledged by counsel for the appellant who suggested that the concept of a "minor offence", which he argued is implicit in s 17(2), need not meet the strict requirements of the term as defined in s 4 of the Act. As I understand the argument, the court would be bound to satisfy itself of the criteria referred to in paras (a) to (d) of the definition of "minor offence".

32 There is nothing in the Act which would support the inference that the power of the court under s 17(2) is to be restricted by reference to a modified version of s 4 which is not referred to in s 17(2) or elsewhere in the Act.

33 There is the further difficulty that the definition of "minor offence" is not capable of being modified in some way by excluding the opinion of a police officer. The opinion of the police officer is central to the definition of "minor offence" in s 4. The remainder of the definition sets out the factors which are relevant and necessary in the formation of the opinion. If the opinion is formed and the offence admitted, it is open to the police officer to make the further assessments pursuant to s 6 or s 7 to determine whether the matter should be diverted for cautioning or referred to a family conference. The question whether a matter should be diverted at this early stage is dependent upon the subjective views and assessment of the police officer after having regard to the criteria prescribed in the Act. In these circumstances, it is highly unlikely that the concept of a "minor offence" with its emphasis on the opinion of a police officer, was intended also to restrict the exercise of the discretion by the court at a later stage in the proceedings when diversion was under consideration. Counsel for the appellant enlisted support for his argument by relying on the qualifying words at the commencement of the definition section, s 4 "unless the contrary intention appears". However, this qualification which is included in most definition sections applies in situations where a word or phrase is employed in

a statute in a context which removes it from the defined meaning of the term. It has no application in the present case where, as has been pointed out, s 17(2) makes no reference to a "minor offence".

34 The appellant advanced a further argument based on s 21 of the Act which states:

If the Court finds a youth guilty of a major indictable offence, the Court should record a conviction for the offence unless there are in the opinion of the Court special reasons for not doing so, and a formal record of those is made in the Court's reasons for judgment.

35 It was argued that this provision is an indication that s 17(2) has no application to major indictable offences.

36 In my view, this argument must be rejected. Section 21 applies where the court decides to proceed with the matter in accordance with the usual court procedures. It is in the nature of diversionary procedures that the matter is taken outside the court system and dealt with in accordance with the procedures for police cautions and family conferences. In my opinion, s 21 must be read as being subject to any decision to divert a matter pursuant to s 17(2). Furthermore, as a police officer may divert a major indictable offence at an earlier stage in the proceedings, there would seem to be no reason for preventing the court from doing so.

37 In the course of the appeal attention was drawn to decisions of single judges of the Supreme Court dealing with the nature and extent of the Youth Court's power to refer a matter to a family conference under s 17(2).

38 In *SA Police v W* (1995) 64 SASR 408 the respondent was charged with a series of serious property offences. The prosecution appealed against the decision of a magistrate in the Youth Court to divert the matter to a family conference. Cox J made the following observations on the court's power under s 17(2) at 412:

The two procedures, family conference and court hearing, are fundamentally different. Section 17 apart, a matter cannot get to a family conference unless it meets the requirements of the definition of a minor offence in s 4, including the police officer's holding the requisite opinion, and unless the offender admits the commission of the offence. The typical occasion for the use by a court of subs (2) of s 17 will arise where the particular wrongdoing answers the requirements of pars (a) to (d) of the "minor offence" definition but the question whether the matter should be referred to a family conference never arose at the normal stage because, say, the youth did not admit his guilt or he preferred to be dealt with by the court. Where his guilt is established either by his subsequent admission or by the court's finding, s 17 enables the court to do what it judges that the police officer in charge would probably have done in the first place had he been able to do so, namely, refer the matter to a family conference. It is true that s 17 does not refer in terms to a minor offence; it could hardly do so, because it is unlikely in the nature of things that the police officer, faced with an unco-operative offender, formed and recorded the opinion that is needed to make an offence a minor offence within the meaning of s 4. One would expect, however, that a court would generally confine the application of s 17 to cases that answer the paragraphed requirements of the definition and also appear to be cases that may suitably be handled by a family conference. In other words, the section provides an opportunity for retrieving from the court system a case that should really never have got into it. It is not intended, in my opinion, simply to provide an additional sentencing option for a court that is hearing a charge against a youth.

39 His Honour's remarks are directed more to the discretionary approach which the court should take to the exercise of its power under the section, not whether the

power could only be exercised if the circumstances came within the definition of a "minor offence". Indeed he referred to the inappropriateness of a reference to "minor offence" in s 17(2). As I have attempted to point out, once it is recognised that the exercise of the power under s 17(2) is not confined to cases answering the precise definition of "minor offence", the question is not whether the power exists, but the manner in which the court's discretion should be exercised.

40 I acknowledge that the decisions in *H v Police* (1998) 198 LSJS 331 and *Police v CB and Others* [1999] SASC 371 support the view that only a "minor offence" as defined in s 4 of the Act can be made the subject of orders for diversion under s 17. However, I respectfully adopt the contrary conclusion reached by Gray J in *R v Police* (2002) 224 LSJS 210.

41 Although I am of the view that the exercise of the court's power under s 17(2) is not restricted to a "minor offence" as defined in s 4, the matters referred to in paras (a) to (d) inclusive of the definition are important considerations relevant to the exercise of the court's discretion. However, for the reasons which I have given, they are not to be regarded as constituting the definition of an offence to which the operation of the section is then confined.

42 I would answer "Yes" to the question reserved for the consideration of the Full Court.

43 **DAVID J.** I agree with the reasons of Duggan J. I would answer "Yes" to the question reserved for the consideration of the Full Court.

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