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The Victorian Aboriginal Legal Service Co-operative Limited submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in response to *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system.*

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INTRODUCTION

Thank you for the opportunity to comment on the *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*. It is positive that the inquiry is focusing on prevention and early intervention as many inquiries focus heavily on the tertiary end of the criminal justice system. The ongoing challenge is to not just talk about prevention and early intervention but translate this into action and devote funding towards this. Early intervention programs are cost effective and end up saving dollars that are spent in the short, medium and long term if such programs are not introduced. For instance, research as early as the 1960s Perry Preschool Project in the US found that the program had produced a saving to the community of \$13 for every dollar invested.¹ Despite evidence of cost effectiveness, the punitive “law and order”, or “tough on crime” approach endures as the more attractive option.

Juveniles and young adults are often spoken about as a “problem” group of people. They are frequently the subject of suspicion, viewed as being “up to no good”, “no hopers”, “hooligans” and general trouble makers. VALS would like to begin this submission by abandoning these stereotypes by reiterating some of the Statements of Principles underlying the Recommendations of the Victorian Governments 2009 *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report*:²

- *Young people make an important contribution to the well-being of the community.*
- *A minority of young people due to a variety of factors are at risk of engaging in criminal or antisocial conduct. These factors must be understood and addressed in an effort to tackle the range and complexity of problems faced by the minority at risk.*
- *There is no one cause or single factor contributing to juvenile offending. Criminal and antisocial behaviour by young people, as with adults, is a complex phenomenon that is attributable to a range of intersecting and overlapping factors.*
- *Strategies developed to address youth offending and its causes should be grounded in a rights based framework that places the needs of the child as paramount. At the same time these strategies should address the need for young people to respect others within the community.*³

Young Aboriginal and Torres Strait Islanders make up a large part of the Aboriginal and Torres Strait Islander population. The experience of the criminal justice system by Aboriginal and Torres Strait Islander is distinct, and for that reason programs should meet the specific needs of Aboriginal and Torres Strait Islander youth. In this submission VALS will highlight some of the distinct characteristics of youth offending through statistics and a discussion of risk and protective factors with regard to the terms of reference and more broadly (for example looking at policy and practice issues around policing).

¹ Schweinhart (2004) in AIC (2007) ‘Cost Effectiveness of Early Intervention’ Crime Reduction Matters no 54 [online]

www.aic.gov.au/documents/4/1/1/%7B4113B008-0349-427D-BA96-3DA3BCB163E6%7Derm054.pdf

² The following principles are based on the deliberations of the Drugs and Crime Prevention Committee and the evidence it has received..

³ Drugs and Crime Prevention Committee, Parliament of Victoria (2009) *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report* Melbourne: Drugs and Crime Prevention Committee, Parliament of Victoria, p v.

VALS is aware of the need to include the voice of Aboriginal and Torres Strait Islander youth in any discussion about high volume offending by young people. According to a survey of Aboriginal and Torres Strait Islander young people, the extent to which Aboriginal and Torres Strait Islander young people felt that their voice and input on issues and services was being listened by local Aboriginal or Torres Strait Islander community was 55% in the affirmative and 45% in the negative.⁴ The survey sends a strong message to the State Government as results for State Governments hearing Aboriginal and Torres Strait Islander young people's voice was 19% in the affirmative and 81% in the negative.

Risk and Protective Factors

Risk Factors

Risk factors can operate at individual, parental, family, community and service delivery levels. The Royal Commission into Aboriginal Deaths in Custody Report (RCIADIC) states that:

*...the underlying issues of racism, education, employment and economic status, housing, families and children, health and well-being, alcohol and other substances, community capacity, land needs and cultural survival, and reconciliation all continue to negatively contribute to Indigenous contact with the juvenile and criminal justice systems.*⁵

The fact that some RCIADIC Recommendations have been fully implemented, but others have only been partially implemented, or no progress has been made at all, contributes to the continued risk of imprisonment of Aboriginal and Torres Strait Islanders.

According to Willis and Moore '[t]he issues and needs that characterise the lives of many Indigenous people, and contribute to their offending behaviour, also create barriers for Indigenous offenders trying to reintegrate into society and establish lives free from offending'.⁶ VALS is aware that offending and repeat offending is attributable to multiple contributory factors. Evidence for this argument is in the links outlined below:

- In 2002, maltreated Aboriginal and Torres Strait Islander children were 4.3 times more likely to subsequently offend than non-Aboriginal and Torres Strait Islander children.⁷ Indigenous children are 11 times more likely to be placed in out-of-home care.⁸
- Low birth weight is a risk factor with a long reaching impact on school readiness, transition and academic achievement.⁹

4 National Indigenous Youth Leadership Group (2004-2005) *Having our voices heard: Aboriginal and Torres Strait Islander Youth Perspectives* [online] www.thesource.gov.au/involve/niylg/pdf/having_our_voices_heard.pdf

5 Victorian Indigenous Youth Advisory Council (VIYAC) (2006) *Voices Telling It How It Is: Young Aboriginal Victorians on Culture, Identity and Racism* Melbourne: VIYAC and the Youth Affairs Council of Victoria, p. 43

6 Willis and Moore (2005) 'Reintegration of Indigenous prisoners' Australian Institute of Criminology: Research and Public Policy Series, No. 90 page 2 as at www.aic.gov.au/publications/rpp/90/rpp90.pdf.

7 Dr Anna Stewart et al (2002) 'Final Report: Pathways from Child Maltreatment to Juvenile Offending (School of Criminology and Criminal Justice Griffith University) Australian Institute of Criminology Trends and Issues Paper in Crime and Criminal Justice no: 241, p. 97

8 Minister for Aboriginal Affairs Media Release (2005) 'A Fairer Victoria: Building A Brighter Future For Indigenous Victorians' 28 April.

- 47 per cent of Indigenous children live in households with an unemployed single parent and 42 per cent had no employed adult living with them (Daly and Smith, 2005: 46-7). Unemployment and welfare dependency are symbiotic with poverty and stress and may contribute to the high rates of mental health.¹⁰

A study by the Victorian Indigenous Youth Advisory Council (VIYAC) titled *Voices Telling It How It Is: Young Aboriginal Victorians on Culture, Identity and Racism* found the following as issues affecting Aboriginal and Torres Strait Islander young people:

1. Addictions and Substance Abuse;
2. Crime and Justice;
3. Education;
4. Home environment/family;(including physical, emotional and mental well-Being);
5. Health and Well-Being;
6. Cultural Identity;
7. Youth are confused by life;
8. Employment;
9. Nothing to Do;
10. Young Girls Having Babies;
11. Getting Young Aboriginal People off the Street;
12. Community;
13. Bad Influences;
14. Poverty; and
15. Having a Say.¹¹

Point 6 above is further extrapolated by a young Aboriginal and Torres Strait Islander woman who took part in the survey (21 year old Kurnai woman):

I guess at times it can be pretty negative, the broader society's expectations - and I've heard this said by many people. This can be a huge weight for Koori youth to carry. If we don't have the support around us it can play a huge impact on our identity. If you have people thinking and telling you that you're something negative, it's hard to break free from that cycle.¹²

The VIYAC Report highlights that 68% of young people surveyed felt that there are not adequate programs and services aimed at improving or promoting positive lifestyle choices for Aboriginal and Torres Strait Islander young people. A section of the report by the Youth Affairs Council of Victoria contains Aboriginal and Torres Strait Islander youth perspective on culture which highlights the risks that exist if connection to culture is broken. According to a 24 year old Yorta Yorta man:

9 Huffman et al (2001) in McTurk Nick et al (2008) 'The School Readiness of Australian Indigenous Children: A Review of the Literature' Menzies School of Health Research and School for Social and Policy Research Northern Territory: Charles Darwin University, p. 23

10 ibid

11 VIYAC (2006) op cit

12 VIYAC (2006) op cit, p. 26

*Without our culture we have nothing. Our value is our identity. It's who we are and what we are. I can't stress that enough. Without something to put your faith in or to put your value on, you pretty much stand out there on your own.*¹³

*Culture is the reason I work so hard, I work to make myself, my family, my Elders and my community proud. I'm very, very proud of my community, I'm very proud of my culture.... I am also very proud of the mistakes that my community has made. You have to struggle through in the dark sometimes before you can find the light switch and, as a broader culture, the Aboriginal people are looking for that light switch, and we're getting closer. Accepting my culture and living my culture and breathing my culture, and being my culture, as it's strengthened me to make choices that I've had to have and make sacrifices that I've had to make along the way.*¹⁴

Other sources about risk factors relating to culture, external to the VIYAC report, are:

- Elders, some of whom say that youth are losing their respect for Elders.
- ATSISS 2002 survey which found in exploring 15-24 year old Indigenous young people's connection to family and culture in Victoria, few identified with a clan, tribal or language group (40.1%) or currently lived in their homelands or traditional country (12.8%).¹⁵
- Tough on crime trend
- Systemic/institutional discrimination;
- Poor Koori police relations.¹⁶
- Trauma

The intergenerational nature of trauma is apparent through the following: 46 per cent of Aboriginal and Torres Strait Islander Victorians said they or a relative had been removed. Of those aged 35 years and over, 16 per cent said they themselves had been removed according to the ABS 2002 National Aboriginal and Torres Strait Islander Social Survey.¹⁷ One response to trauma is anger and violence, which occurs for Indigenous offenders in a culturally meaningful way.

13 VIYAC (2006) op cit, p. 13

14 Ibid, p. 18

15 Ibid, p. 37

16 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper 2008

17 Department of Justice (2005) 'Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody Statistical Information' Volume 2 p. 38

As noted in Willis and Moore, Daly argues that:

[f]or Indigenous offenders, anger was experienced in the context of pervasive community violence and it was often seen as being intergenerational, passed down through communities and families...

*...anger among Indigenous offenders was also experienced alongside feelings of powerlessness linked to family trauma and witnessing violence at an early age...
...discrimination and loss, both at a personal level and at an institutionalised level linked to intervention by family and community services bodies, were major triggers for anger and violence.¹⁸*

- Cautioning

Aboriginal and Torres Strait Islanders are less likely to be cautioned than non-Aboriginal and Torres Strait Islanders. One reason for the success of VALS' Police Cautioning and Youth Diversion Program is that it attempts to address risk factors (see below).¹⁹

- Economic disadvantage

Only 12 per cent of adult Indigenous Victorians report fully owning their own home without a mortgage, compared to 41 per cent of non-Indigenous people.²⁰ 'Victoria had the largest difference between Indigenous and non-Indigenous rates of homelessness, with the rate of Indigenous homelessness more than five times the rate for non-Indigenous people'. Figures show a disproportionately high level of homelessness within the Victorian Indigenous community, making up 5% of Supported Accommodation Assistance Program (SAAP) clients in 2003-04, but only 0.5% of the general population.²¹

- Unemployment

The unemployment rate of Victorian Aboriginal and Torres Strait Islander young people was 26.4% - more than double that of overall Victorian young people at 12.8%.²²

- Stressors

A West Australian study on Aboriginal and Torres Strait Islander health and wellbeing found that a typical family with indigenous children had in the past year experienced seven of the 14 recognised "major stress events", which include a death in the family, violence, a close family member's drug or alcohol problem, a close family member going

18 Willis M and Moore J (2005) op cit, p. 35

19 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper -- sent 23 September 2008

20 Department of Justice (2005) op cit, p. 29.

21 VIYAC (2006) op cit, p. 43

22 Ibid, p. 40

to prison, a close relative losing their job or being admitted to hospital, a family breakup or financial difficulty.²³

- Health

Studies show that three out of four Aborigines experience racism in everyday life, and that racist experiences are associated with depression, psychological distress and substance abuse.²⁴

- Alcohol and other drug abuse

In 2001, 57.1% of Aboriginal and Torres Strait Islanders reported ever using illicit drugs, whereas 37.7% of non-Aboriginal and Torres Strait Islanders reported this.²⁵

- Access to adequate legal advice/representation

In a 2005 inquiry it was recognised that ATSILS operate in a climate of static funding and increasing demand.²⁶ Funding levels to Aboriginal and Torres Strait Islander Legal Services (ATSILS) 'provide a cheap form of legal representation for Indigenous people' (Blagg, Morgan, Cunneen & Ferrante 2005:51)²⁷. This climate of static funding heavily impacts on ATSILS ability to provide the best legal advice, representation, and outreach work possible for young Aboriginal and Torres Strait Islander people.

Protective Factors

Aboriginal and Torres Strait Islander communities should define their own strengths.²⁸ The following strengths were identified by the Victorian Aboriginal Health Service Co-operative Limited's *Strengths of Young Kooris* (2000). The Report contained information collected from focus groups, surveys and peer interviews with young Koori people and other community members.

1. Strong family links, including extended family;
2. Friends;
3. Connection with the Koori community and culture;
4. Sense of identity;
5. Aspirations;

23 Taylor Paige (2006) 'Aboriginal Children 'More Stressed' The Australian, Thursday 23 November 2006 as at www.theaustralian.news.com.au/story/0,20867,20805931-2702,00.html [accessed 5 Jan 2009].

24 Smiles S (2008) 'Racism weakens indigenous health' The Age March 14th 2008 as at <http://www.theage.com.au/news/national/racism-weakens-indigenous-health/2008/03/13/1205126111249.html> [accessed 5 Jan 2009].

25 Department of Justice (2005) op cit, p. 57

26 Joint Committee of Public Accounts and Audit 2005 in Law Reform Commission of Western Australia 2005.

27 Blagg H, Morgan N, Cunneen C & Ferrante A (2005) *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System* [online] www.cjrn.unsw.edu.au/news_&_events/documents/Systemic%20Racism%20Report_update.pdf [accessed 7th September 2009].

28 Lawrence R (2007) 'Series of Research Briefs designed to bring research findings to policy makers: Research on strong Indigenous communities' Written for the Indigenous Justice Clearinghouse, p. 6

6. Responsibility; and
7. Sport and creative activities.²⁹

The Report drew an interesting comparison between the experiences of Koori and non-Koori young people when it comes to cross-generational relationships within family and community networks. The Report notes that ‘spending most time with people of the same age is a characteristic of adolescence in Western society. Aboriginal and Torres Strait Islander young people tend to spend time with a wider range of age groups’. The Report acknowledged the special importance of the cross-generational relationship between Elders and young people in that respect for Elders, and listening to the stories of Elders is an important source of strength and learning for young Kooris.

The young people in the survey reported that ‘they are stronger when they know who their family is, who their community is, and where their country is’.³⁰ Also, having responsibilities within the community was viewed as a protective factor that helped young Kooris to develop skills and knowledge: ‘Koori young people do tend to grow up more quickly than non-Aboriginal and Torres Strait Islander kids, and are given responsibility at an earlier age.’³¹

Theories of crime prevention and intervention that resonate with Aboriginal and Torres Strait Islanders are those that emphasise building the capacity of protective factors rather than addressing deficits role, importance of “relationship” and the theory of social capital.

Relationships

According to Matthews (2003), ‘to a developing youth, especially one who is socially marginalized, a positive, supportive relationship can make all the difference between success and failure in terms of rehabilitation.’³² It is VALS’ experience that conventional correctional treatment for young people downplays these things. However, more current treatments, such as Group Conferencing, capitalise on relationships. It is significant that Group Conferencing originated from the Maori people of New Zealand. Whilst Aboriginal and Torres Strait Islander culture is distinct to that of Maori culture, to generalise, the value placed on kinship connections and communal approaches over individual approaches, resonates with Aboriginal and Torres Strait Islander culture.

Social capital

According to Matthews (2003), ‘social capital is the cornerstone of effective crime prevention’.³³ Social capital is a protective network of supportive relationships among children, parents, families, social institutions and all community members.’ When strong and working effectively, social capital helps improve the ability of a community to meet the material, emotional, physical, mental, and spiritual needs of its members.

29 VIYAC (2006) op cit, p. 46

30 *ibid*, p. 48

31 *ibid*, p. 47

32 Mathews (2003) op cit, p. 54

33 op cit p. 13

Communities with strong social capital help reduce risk factors, isolation, and vulnerability in children and families. Social structures that engender community safety, trust, reciprocity, and inclusion, cultural traditions, practices and the networks also comprise part of social capital.³⁴ Social capital is linked to self-determination.

Culture

Following along the theories of social capital, and culture being a part of social capital, correctional research indicates that cultural content is crucial to the success of Aboriginal and Torres Strait Islander correctional programming. For instance, a Canadian study examined recidivism and responses to blended treatment (traditional healing tempered by contemporary approaches) among Aboriginal and non-Aboriginal Canadian sex offenders residing in the community (Ellerby & MacPherson 2002). They found that the lower rates of treatment completion initially found within the Aboriginal offender sample disappeared once culturally relevant programs became available.

The Aboriginal and Torres Strait Islander offenders who received the blended treatment also had significantly lower recidivism rates than Aboriginal and Torres Strait Islander matched controls.³⁵ The interviewees involved in the research identified the following elements of the program as Aboriginal and Torres Strait Islander specific:

- having mostly Indigenous specific participants;
- incorporating Indigenous community issues ;
- using Aboriginal and Torres Strait Islander facilitators; and
- having Elders involved in program delivery.³⁶

The inclusion of Aboriginal and Torres Strait Islander people within the treatment process could enhance the perceived legitimacy of the intervention and subsequently the offenders' responsiveness to the content.

The importance of culture and how to use it as a protective factor by strengthening comes from the voice of Aboriginal and Torres Strait Islander youth:

24 year old Yorta Yorta man:

My connection to culture could be strengthened, definitely. For me to be able to portray an image to my youth and to instil that cultural identity in them, I need to learn it myself, and unfortunately it's fairly difficult to learn in a culture that's systematically been raped and taken away from us. ...There's a lot of great work going on out there as well - don't get me wrong - about, you know, trying to reclaim our culture and integrate it back into what is now our mainstream or more broader culture. If there was, you know, a little bit more commitment from various outsourced agents as far as making sure that those programs continue to run, it might

34 Zubrick, Lawrence et al (2004) 'The Western Australian Aboriginal Child Health Survey: The Health of Aboriginal Children and Young' People., Perth: Telethon Institute for Child Health Research, p297

35 Willis Matthew, Moore John-Patrick (2005) op cit, p 56.

36 ibid p. 75

37 VIYAC (2006) op cit, p. 16

*not be able to, in my lifetime, strengthen my culture or my connection to my culture, but definitely my child and my grandchildren would benefit greatly from that.*³⁷

21 year old Arernte woman:

*I believe the Indigenous culture can be strengthened using the culture's two greatest assets - the Elders and the youth. All it takes is for one young person to ask an Elder a question regarding the Indigenous culture. By listening to the responses of Elders, one young person can take that Elder's story and share it with another young person. Young people, however, must have the desire to listen and learn and, more importantly, have patience.*³⁸

Some specific recommendations from recent reports that relate to culture are at Appendix A.

Aboriginal and Torres Strait Islander Juvenile Contact with the Justice System

Aboriginal and Torres Strait Islanders have been over-represented in the criminal justice system over an extended period. Incarceration rates for Aboriginal and Torres Strait Islanders continue to worsen more than 20 years after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) began in October 1987.

The chronic and disproportionate incarceration rate of the Aboriginal and Torres Strait Islander population is strongly established and widely reported in local and international research. Aboriginal and Torres Strait Islanders now make up 24% of the total prison population which is an increase of 14% in 1992. This statistic is staggering considering that Aboriginal and Torres Strait Islander peoples make up only 2.5% of the total Australian population.³⁹ The proportion of Aboriginal and Torres Strait Islanders in prison in Victoria is 6%, and whilst this is the lowest rate in the country, Aboriginal and Torres Strait Islanders are still over-represented in the criminal justice system at a level which is unacceptable.⁴⁰

Aboriginal and Torres Strait Islander youth enter the criminal justice system for a number of reasons, including: offence type, age when it was committed, intervention by the criminal justice system and re-offending patterns. In Victoria, Aboriginal and Torres Strait Islander people aged 10–17 years represent a small proportion of the population (1%) however Aboriginal and Torres Strait Islander young people are nearly 14 times as likely to enter juvenile justice supervision as non-Indigenous young people.⁴¹

Only five per cent of Australians between the ages of 10 and 17 are Aboriginal and Torres Strait Islander and they make up 36 per cent of those under supervision, either in detention or the community during 2006-2007. This means that on an average day, over a third of those in

38 Ibid

39 Cooperative Research Centre for Aboriginal Health et al (2008) 'Health care for Aboriginal prisoners the key to reducing offending and recidivism' Media Release, 20 August.

40 Willis Matthew, Moore John-Patrick (2005) 'Reintegration of Indigenous prisoners' *Australian Institute of Criminology Research and Public Policy Series*, No. 90, page 8 [online] <http://www.aic.gov.au/publications/rpp90/rpp90.pdf>

41 'Juvenile justice supervision figure hits 4yr high' ABC News, Wed Aug 27, 2008 as at www.abc.net.au/news/stories/2008/08/27/2347444.htm

community-based supervision and nearly half of those in detention were young Aboriginal and Torres Strait Islander People.⁴²

The ongoing and growing nature of the over-representation of Aboriginal and Torres Strait Islander youth in the criminal justice system is evident in statistics such as during 2000–01 to 2004–05, the average daily number of Aboriginal and Torres Strait Islander young people in community supervision increased by 15%, which compares with the 5% decrease for non-Aboriginal and Torres Strait Islander young people.⁴³

There is concern that this over-representation will continue to grow given the distinct age structure of the Aboriginal and Torres Strait Islander population and fears of what result, in terms of contact with the justice system, if their needs are not met. People over 15 comprise 61% of the total Aboriginal and Torres Strait Islander population and 49% are under 15 years. This contrasts with 80% of the non-Aboriginal and Torres Strait Islander population being over 15 and 20% being under 15.⁴⁴

Type of over-representation

There are multiple contributing factors to the over-representation of Aboriginal and Torres Strait Islanders in the criminal justice system. The following distinct trends that increase the chances of Aboriginal and Torres Strait Islanders entering, or re-entering the criminal justice system, should be targeted in a response to Aboriginal and Torres Strait Islander youth offending.

- *Early Contact*

Nationally, Aboriginal and Torres Strait Islander young people experience their first juvenile justice supervision at an earlier age than non-Aboriginal and Torres Strait Islander young people. 56% of Indigenous young people were aged 14 years or less during their initial supervision compared with 29% of non-Indigenous Australia young people.⁴⁵ Evidence exists that entering the justice system earlier increases the chance of further contact with the system.

In Victoria 2007-2008, juveniles of 'Aboriginal appearance' comprised a higher proportion of those aged less than 10 years apprehended by police (10%) than those aged 10-14 years (4%) and those aged 15-17 years (2%).⁴⁶ Richards (2009) suggests that a relationship may have existed between juveniles' ages and 'racial appearance' with juveniles of 'Aboriginal appearance' comprising a higher proportion of younger juveniles apprehended by police.

42 Sydney Morning Herald (2008) 'Young More Likely To Be Jailed, Report Says' *Sydney Morning Herald*, 26 August, 2008

43 'Drop in juvenile detention cases', *The Australian* 28 March 2007, as at <http://www.theaustralian.news.com.au/story/0,20867,21461127-29277,00.html> , page 43

44 VIYAC (2006) op cit, p 34.

45 Ibid, p 38

46 Victoria Police Data (2008) in Richards (2009) op cit.

- *Gender*

Indigenous young people under juvenile justice supervision include a greater proportion of females than non-Indigenous young people.⁴⁷

Police data suggest that in some jurisdictions, Aboriginal and Torres Strait Islander female juveniles are disproportionately apprehended by police in comparison with Aboriginal and Torres Strait Islander male juveniles.⁴⁸ In Victoria in 2006-07, the number of juvenile females police apprehended 'of Aboriginal appearance' comprised 4% of all juvenile females apprehended by police during this time, compared with 3% of males.⁴⁹

- *Supervision*

During the 2007-2008 financial year, Aboriginal and Torres Strait Islander juveniles were over-represented among juveniles under supervision in all jurisdictions (although this varied considerably by jurisdiction). 39% of all juveniles under supervision were Aboriginal and Torres Strait Islander during this period - indicating that Aboriginal and Torres Strait Islander juveniles are dramatically overrepresented among juveniles under supervision in Australia.⁵⁰

Therefore, non-Aboriginal and Torres Strait Islander juveniles were under supervision at a rate of 2.8 per 1,000 during the period, compared with 39.3 per 1,000 Aboriginal and Torres Strait Islander juvenile. This means that Aboriginal and Torres Strait Islander juveniles were under supervision at a rate 14 times that of non-Aboriginal and Torres Strait Islander juveniles.⁵¹

Aboriginal and Torres Strait Islander young people tend to complete shorter supervision periods than those of non-Indigenous young people.⁵² Nearly one-quarter (24%) of Indigenous prisoners at 30 June 2007 had an aggregate sentence of under 12 months, while nearly half (48%) had an aggregate sentence under two years (ABS 2007). In comparison, only 14% of non-Indigenous prisoners had been sentenced to less than 12 months and just under one-third (30%) to under 12 months.⁵³ Due to the short-term nature under care, this may prevent some young Aboriginal and Torres Strait Islander people from qualifying for services and programs that work on a longer time frame.

- *Cycle*

In 2004-05, young Aboriginal and Torres Strait Islander people had a higher proportion of two or more supervision periods during the year than non-Indigenous young people. Approximately 22% of young Aboriginal and Torres Strait Islander people completed two or more supervision periods during the year, compared with around 15% of young non-Aboriginal and Torres Strait

47 'Drop in juvenile detention cases', *The Australian* 28 March 2007

48 Richards K (2009) *Juveniles' contact with the criminal justice system in Australia* Canberra: Australian Institute of Criminology.

49 Per Victoria Police Data 2008, Richards (2009) op cit p. 40-41.

50 Richards (2009) op cit. Whilst Richard warns that this data must be interpreted with caution – as Aboriginal and Torres Strait Islander status is determined in varied ways among Australia's jurisdictions.

51 Richards (2009) op cit.

52 *The Australian* (2007) op cit.

53 Willis Matthew, Moore John-Patrick (2005) op cit, p. 13

Islander people.⁵⁴ Aboriginal and Torres Strait Islander offenders are readmitted to prison sooner and more frequently than non-Aboriginal and Torres Strait Islander offenders. Aboriginal and Torres Strait Islander prisoners are nearly twice as likely to have been readmitted to prison within two years than non-Aboriginal and Torres Strait Islanders.⁵⁵

- *Not community-based*

In 2004–2005, a lower proportion of the supervision periods of young Aboriginal and Torres Strait Islander people contained episodes of community-based supervision, and a higher proportion contained episodes of detention, than comparable supervision periods of young non-Aboriginal and Torres Strait Islander people.⁵⁶ In 2004–05, 51% of supervision periods of young Aboriginal and Torres Strait Islander contained sentenced community-based supervision compared with around 57% for young non-Aboriginal and Torres Strait Islander young people (Percentages will not add to 100% because each supervision period may contain more than one type of episode).⁵⁷

- *Remand*

In the June quarter of 2005 the remand rate for Indigenous Victorians was approximately 15 times higher than for non-Indigenous Victorians.⁵⁸

- *Difference*

Aboriginal and Torres Strait Islander's distinct experience of the criminal justice system may be one factor why an early offender who is an Aboriginal and Torres Strait Islander continues to offend, whereas a non-Aboriginal and Torres Strait Islanders do not. Aboriginal and Torres Strait Islanders have a particular relationship with police and Courts which is often poor and results in cultural alienation. This is discussed further in the section below on a post-colonial paradigm.

The point can be illustrated by evidence that police use their discretion to arrest rather than caution Aboriginal and Torres Strait Islander youth in comparison to non-Aboriginal and Torres Strait Islander youth (see evidence in cautioning section below). Arguably, underlying racism influences the actions of police to arrest more Aboriginal and Torres Strait Islanders than non-Aboriginal and Torres Strait Islanders. According to a VALS' Client Service Officer:

[f]or some reason the police and the wider community equate blackness with trouble. Because of been over-policed Koori children use up their 'out of jail cards' and compile a lengthy juvenile record early in their teens. Every Koori child

54 The Australian (2007) op cit, page 71

55 Willis Matthew, Moore John-Patrick (2005) op cit.

56 The Australian (2007) op cit, p. 73

57 Ibid, p. 74

58 Victorian Law Reform Commission (2005) *Review of Bail Act Consultation Paper* p.14

*between 10 and 18 I know of has had a negative experience with the police in Swan Hill.*⁵⁹

The current submission will address the following terms of reference:

- 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;
- 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;
- The scope for the clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the justice system;
- The extent to which current preventative programs across government jurisdictions are aligned against common goals to improve the health and emotional well-being of Indigenous adolescents, any gaps or duplication in effort, and recommendations for their modification or enhancement.

The current submission will additionally address the dangers and ineffectiveness inherent in 'Tough on Crime' policies and policing practices to the detriment of marginalised groups, especially youth and the Aboriginal and Torres Strait Islander community.

59 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper – sent 23 September 2008

VALS' submission to the *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system.*

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.

The high level of young Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system as a result of alcohol and other substance abuse is not due to the substance use alone, but is also attributed to by the laws and policing practices that aim to “deal with” these behaviours. Both the use and “control” of alcohol and other substances will be addressed in relation this term of reference.

Alcohol and other Substance abuse data

Alcohol and other substance abuse data is extremely hard to capture in relation to people *before* they come into contact with the criminal justice system. And, even though data and records have documented alcohol and other drug use among prisoner populations, there is only limited research that differentiates between Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander.

The likely severity of the issues being faced by Aboriginal and Torres Strait Islander prisoners is highlighted by recent research demonstrating that approximately 60% of all offenders report drug use on at least one occasion during their current term of imprisonment, while approximately 33% of people who inject drugs continue to inject drugs in prison (Joudo 2008 in NIDAC 2009)⁶⁰. A smaller percentage also begin using drugs and injecting drugs for the first time when in prison. While Aboriginal and Torres Strait Islander-specific data are not available, there is ample anecdotal evidence that the above figures also reflect Indigenous prisoner behaviour (NIDAC 2009).

VALS notes that the above data is not Aboriginal and Torres Strait Islander youth-specific, however can be used as an anecdotal indication of the critical likelihood that young Aboriginal and Torres Strait Islanders will graduate to these levels of alcohol and other drug use if prevention and diversionary efforts fail.

Alcohol

One of the major issues confronting the criminal justice system is the strong link that alcohol consumption and drug misuse have with the risk of imprisonment (Weatherburn et al. 2006 in NIDAC 2009). Alcohol is well known as a precursor to offending among Aboriginal and Torres Strait Islanders (and non- Aboriginal and Torres Strait Islanders), with indications that it could be a factor in up to 90% of all Aboriginal and Torres Strait Islander contacts with the justice system (Hazelhurst 1987 as cited in Forensic and Applied Psychology Research Group 2005 in NIDAC 2009).

60 National Indigenous Drug and Alcohol Committee NIDAC (2009) Bridges and barriers: addressing Indigenous incarceration and health Australian Capital Territory: Australian National Council on Drugs.

These findings highlight the importance of implementing strategies to address alcohol and substance misuse as a means of diverting Aboriginal and Torres Strait Islander offenders away from the criminal justice. It would also help to reduce the disproportionately higher re-offending and re-incarceration rates among Aboriginal and Torres Strait Islander people, estimated to be close to three-quarters of Aboriginal and Torres Strait Islander prisoners with a previous prison sentence, compared with just over half of non- Aboriginal and Torres Strait Islander prisoners (Australian Institute of Criminology 2008 in NIDAC 2009).

How health and justice authorities can work together

Efforts to address the effects of alcohol and other substance abuse must be aligned with principles such as the following:

- *Strategies developed to address youth offending and its causes should be grounded in a rights based framework that places the needs of the child as paramount. At the same time these strategies should address the need for young people to respect others within the community.*
- *Policy and program interventions to address youth offending must be based on best evidence. An essential part of any policy development is the ability to rely and draw upon comprehensive and up-to-date data.*
- *Strategies and program interventions are not of themselves enough. It is essential that any project developed to address youth offending and antisocial behaviour be subject to ongoing monitoring and evaluation.*
- *Prevention and early intervention programs and approaches that address the needs of all young people are an essential component of any strategy to prevent or reduce youth offending.*
- *Incarceration for young people should only be used as a last resort. For most young people alternative strategies such as diversionary programs have proven to be more successful.*
- *Engaging young people in education, training, constructive leisure activities and/or meaningful employment empowers young people and assists in preventing youth offending.*
- *There is a need for an 'all of community' approach by which the responsibility for preventing youth offending is shared by all levels of government, the private sector, parents, carers and the community at large. As part of such an approach a coordinated and appropriately funded strategy to reduce youth offending is essential.*
- *A range of interventions, methods and approaches is necessary to address youth offending – a 'one size fits all' response is insufficient to tackle the complexities of the problem. Targeted approaches will need to be tailored to different groups of young*

*people at risk in addition to more generalist methods that apply equally to all young people in the community.*⁶¹

Ineffectiveness of Alcohol Free Zones (AFZ)

Alcohol related programs are more important than just implementing an Alcohol Free Zone (AFZ):

AFZs are most effective if they are part of a larger program directed at irresponsible alcohol consumption in which the local community is actively involved. Used in isolation they may only move the problem from one place to another' (2007:40).

One council area visited for a NSW report that had no AFZs had been successfully managing alcohol-related behaviour by utilising multiple and complimentary measures. What is interesting is that in this council area there was evidence that 'community change had not involved the council. In this case many sectors of the community are working on alcohol related problems without reference to council (2007:41). The measures include:

- Focusing on general community pride and improvement, rather than specific problems – street drinking is a symptom of a wider issue;
- Education and social programs that focus on the future i.e. providing better living skills for the next generation;
- Utilising supportive community leaders such as local doctors and community workers etc.

The combined evidence from the recent research appears to indicate that an emphasis on the social determinants of substance use, rather than on particular substances, is most appropriate in the context of developing approaches that address substance use within communities. Given issues of co-morbidity and the correlation between substance use and mental health issues, holistic approaches that address the reasons for substance use are more likely to achieve long term success and reduce risks associated with the so-called "substitution effect". The substitution effect occurs when a person ceases problematic use of one substance but then commences problematic use of another substance because of an underlying lack of appropriate coping mechanisms.⁶²

Australian National Council on Drugs report on best practice

In 2004, the Australian National Council on Drugs (ANCD) released a report entitled *Indigenous drug and alcohol projects: elements of best practice*. The primary aim of the 2004

61 Drugs and Crime Prevention Committee (2009) op cit, pp. v-iv.

62 Public Health Association Australia 'Aboriginal and Torres Strait Islander substance use policy' (2008) page 2 as at <http://www.phaa.net.au/documents/policy/20081002newATSIpeoplesubstanceusepolicy.pdf>

study was to identify and promote programs that could be suitable models for other communities to develop and implement. The report identified best practice projects in five categories:

1. Acute interventions – primarily harm reduction strategies such as Night Patrols and Sobering-up Shelters;
2. Prevention projects – health promotion campaigns, provision of alternatives to alcohol and other drug use;
3. Non-residential treatment projects;
4. Residential treatment projects; and
5. “Multi-service” projects – projects that provided a range of services but in which those services were not administered as discrete projects.

The diverse categories reflect the range of intervention and treatment models required to ensure that service delivery reflects the differing needs of clients. Of the fourteen projects short-listed for consideration as part of the ANCD’s best practice research, only one was a government delivered project. The other thirteen were all community-controlled projects. The report went on to identify elements common to each of the five projects that received top ranking under the categories listed above, which were seen as contributing to best practice:

- Clearly defined and effective management structures and procedures;
- Trained staff and ongoing staff development programs;
- Good multi-strategy and collaborative approaches;
- Strong leadership; and
- Adequate and continuing funding.

Local Law 8

On 20th October 2009, Yarra City Council passed Local Law 8 – a measure to ban not only the consumption, but the possession of alcohol in public places. Local Law 8 is an example of what *not* to do to address crime. VALS responded to the City of Yarra’s proposal of Draft Local Law No.8 [2009] *Consumption of Liquor in Public Places* by arguing against it because of the potential impact it will have on the Aboriginal and Torres Strait Islander community. This is particularly the case because it appears targeted at the Aboriginal and Torres Strait Islander community who are known to congregate and drink on Smith Street, Collingwood.

Local Law 8 gives increased police power to instruct a person to not drink in public. If the person fails to comply a Penalty Notice will be issued. VALS is critical of Local Law 8 because it goes further than a ‘tough on crime’ approach, in that it adopts a tough tactic towards so called “crime prevention”.

James (1993), who did a study on councils in regard to public drinking laws, argues that 'councils identify strongly as active instruments in the effecting of "law and order" in the community' and that the context in which crime and drunkenness is perceived by councils 'has direct implications for the structure, scope and targets of the local law'.⁶³

The following quote is a good summation which seeks to highlight the ineffectiveness of laws such as Local Law 8:

*The implications of the local law serve to contradict the ideals of public drunkenness decriminalisation as recommended by the RCIADIC. That is, the objective of diversion from custody can be contravened at the local level through fine default following the non-payment of a local law infringement notice. Further, the desire to reduce interaction and conflict between police and Aboriginal people will not be fulfilled, because of the legitimating power the local law provides police in the increased surveillance of Aboriginal and other targeted groups. This increased tension provides the potential climate for other charges such as offensive language and resisting arrest and is therefore a further avenue through which Aboriginal people can be fed back into the criminal justice system.*⁶⁴

The proposed Local Law 8 is additionally problematic because there is evidence of the potential negative results and there is no evidence that Local Law 8 and its measures are effective.

VALS is concerned that the reasoning used by Yarra City Council are misplaced in the following sense.

1. *Masquerading as a Public Health Approach*

It is VALS' impression that Local Law 8 is a "law and order" approach as opposed to what it masquerades as - a public health or harm minimisation approach. VALS considers a public health approach to fulfil society's interest in assuring conditions in which people can be healthy. VALS considers harm minimisation to involve a focus on safety. Flowing from the law and order approach is the following characteristic of Local Law 8: it is a political tool to be 'seen' to be doing something in relation to complaints about the amenity of the local area.

VALS is concerned that Local Law 8 is geared towards accommodating concerns of local residents and traders, who have a heightened sense of crime in their community, rather than an awareness of public health or harm minimisation issue. Large-scale surveys of public opinion about crime and punishment in the United States, United Kingdom, Canada, Australia and New Zealand show that people tend to perceive crime to be constantly increasing and over-estimate the proportion of recorded crime that involves violence. Interestingly, Gelb (2006) draws attention to representative surveys that shown that people with the lowest levels of knowledge hold the most punitive views. Gelb observes that 'public perceptions of crime and the criminal justice system are based not on the *reality* of crime but on the *reporting* of crime'⁶⁵

63 ibid

64 James S (1993) 'Aboriginal people and Public Drunkenness' Aboriginal Law Bulletin 59 p 12

65 Gelb K (2006) *Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing* Sentencing Advisory Council

Local Law 8 responds to the most visible signs of urban disorder and has no regard for the causes for, and addiction to, the abuse of alcohol and other substances. This is the public health ‘gap’ that Local Law 8 leaves. VALS is concerned that Local Law 8 is being represented as a harm minimisation tactic, through its objective (a) *promoting alcohol harm minimisation by restricting the opportunity for unregulated public drinking within the municipality*. VALS doubts the intention here. Harm minimisation is not necessarily about restricting/stopping the drinking itself, but treating it as a public health issue and controlling the drug use in a safe a way as possible.

VALS notes that Yarra City Council has set in the Draft Municipal Public Health Plan 2009-2013 four priorities to drive improvements in the health of the community over the next four years, which includes:

- (2) reducing and minimising the harm from tobacco, alcohol and other drugs; and
- (4) improving health of Aboriginal and Torres Strait Islander persons.

VALS notes that the Plan does not include Local Law 8, but more appropriate approaches, such as continue to work with public drinkers, this group includes Aboriginal community members, to minimise alcohol related harm and offer alternative and culturally appropriate, activities.

Equally, Local Law 8 does not reflect the World Health Organisation’s (WHO) thoughts on social determinants of health that need to be considered when developing initiatives to improve public health which are:

... ways to prevent people falling into long-term disadvantage, the impact of the social and psychological environment on health, the problems of unemployment and job insecurity, the dangers of social exclusion and the effects of alcohol and other drugs (Wilkinson and Marmot 1998).

The WHO report highlights the complex social, economic, physical and political influences on public health.⁶⁶

2. *Ineffectiveness of Local Law 8*

Local Law 8’s *Objective c) providing an effective means for police to deal with unregulated public drinking* cannot be achieved. An “effective” means of dealing with public drinking is not to simply deal with the behaviour in the short-term, but instead to deal with public drinking as a public health issue, for instance to focus on rehabilitation or restorative justice and introduce sobering up centres.

⁶⁶ King R, Richards J, 2003 *Australian Local Government: Alcohol Harm Minimisation Projects A good practice guide* A report prepared by Turning Point Alcohol and Drug Centre, Melbourne).

The *Evaluation of Alcohol Free Zones in NSW: Final Report (2007)* found through evaluation that people who want to drink alcohol in public will always be able to find somewhere to have a drink and it was generally viewed that AFZs are not effective for people who have an alcohol drinking problem, i.e. AFZs in NSW are a short-term solution to what may be a long-term problem for the offender. It was found that:

- ‘AFZs are not effective for people who have an alcohol drinking problem. AFZs are a short-term solution to what may be a long-term problem for the offender’ (39).
- ‘There is evidence that communities view alcohol related programs to be more important than just implementing an AFZ’ (40).
- The views from communities visited supports the statement in the Ministerial Guidelines on AFZs that ‘AFZs are most effective if they are part of a larger program directed at irresponsible alcohol consumption in which the local community is actively involved. Used in isolation they may only move the problem from one place to another’ (p40).

One Police Officer stated during the consultations for this report ‘(t)he AFZs aim to stop people congregating and drinking, but they don’t minimise the alcohol consumption’ (Department of Local Government NSW 2007:39). Other interviewees from the same evaluation report raised concerns that when confiscation provisions are used on people with a drinking problem, they will just buy more alcohol which leaves them with less money to spend on food and other necessities. As one community organisation representative stated:

If you repeatedly take alcohol away from people, they just go and buy more, which means their kids will go hungry that week. Also, people can get aggro when that happens – particularly if they have a problem with alcohol, or they are mental patients (Department of Local Government NSW 2007:39).

A question was asked of VALS at the City of Yarra Council Meeting on 6th October 2009 where VALS gave an oral submission as to whether if Smith Street was exempt from the law could VALS see value in it, such as for Swan Street in Richmond. VALS’ response to this question is that:

- Local Law 8 is ineffective for everyone; and
- If Local Law 8 is introduced in one street, there is the potential for it eventually to be expanded which will then cause consequences for the Aboriginal and Torres Strait Islander community.

3. *Direct and Indirect Discrimination.*

The NSW evaluation found that 2.3 % of fines for AFZs were issued to Aboriginal and Torres Strait Islander people. This is a disproportionate number of fines per population (page 59). The national Aboriginal and Torres Strait Islander population is around 2%. In regards to this disproportional finding, VALS has the following concerns about Local Law 8.

Some people who advocate for Local Law 8 deny that it is targeted at the Aboriginal and Torres Strait Islander community and is direct discrimination. James (1993) did a study

which involved interviewing a sample of those local councils in Victoria which have enacted public drinking local laws under the legislative authority of the *Local Government Act 1989* (Vic). At the time of interview, 30 local councils had such local laws in operation and twenty of these 30 participated in the interviews.

The research centred around determining council perceptions of crime and drunkenness; understanding council rationale for enacting the public drinking local laws; analysing the role of local government in crime prevention strategies and correctly locating the importance of local responses to public drinking within the context of the state level approach of continuing criminalisation.

Those councils which have relatively high numbers of Aboriginal people in the municipality were quick to deny that the local law was targeted at any group in particular. Interestingly, the 'anonymous' groups of people drinking in public that councils referred to as the source of great concern, were eventually identified in a number of ways as being Aboriginal. The underlying racism that pervades the justification for enacting the public drinking local law in these towns was evident throughout the study.⁶⁷

Local Law 8 will have a disproportionate impact on the Aboriginal and Torres Strait Islander community because it will be ineffective in serving as a tool for police to use before public drunkenness occurs (i.e. intervene in a way that doesn't involve criminal charges). In practice, when primacy is given to a law and order approach (as is the case with Local Law 8), another trend becomes evident - the over-representation of Aboriginal and Torres Strait Islanders in the criminal justice system.

Current public drunkenness laws have a disproportionate impact of Aboriginal and Torres Strait Islanders. In October 2002, custody incidents were 17 times more likely to involve Aboriginal and Torres Strait Islander peoples than non-Aboriginal and Torres Strait Islander peoples and 19 percent of all Aboriginal and Torres Strait Islander people's custody incidents were for public drunkenness compared with eight percent of all non-Aboriginal and Torres Strait Islander peoples (Taylor and Bareja 2005).

VALS has identified the trends that contribute to the disproportionate impact of current public drinking laws on Aboriginal and Torres Strait Islander peoples and VALS is concerned that the above trends will continue as a result of Local Law 8:

- inability to recognise use of public space as cultural space;
- indirect discrimination of public drunkenness legislation and direct or indirect discrimination in the way that public drunkenness legislation is policed;
- poor relations between some members of Victoria Police and some members of the Aboriginal and Torres Strait Islander person community (i.e. mistrust of authority as a result of past and present injustices) which can result in what VALS refers to as the

⁶⁷James (1993) op cit p12.

trifecta (i.e. charges are added to an original charge which relate to how the Police and person in custody interact); and

- low socio-economic status of Aboriginal and Torres Strait Islander persons which contributes to inability to pay fines and potential imprisonment.

Cultural Space

Local Law 8 is ineffective in recognising the trend of Aboriginal and Torres Strait Islander people use public space as ‘cultural space.’ Given the communal nature of Aboriginal and Torres Strait Islander culture, the low socio-economic status, poor health, transgenerational trauma following dispossession of cultural space in the past (i.e. colonisation), over-crowding in houses some Aboriginal and Torres Strait Islander peoples choose to drink in public.

Specifically in relation to the Smith Street area of the City of Yarra, Aboriginal and Torres Strait Islander persons have a historical connection to Fitzroy and Smith Street has been defined as a ‘one stop shop’ for meeting the needs of Aboriginal and Torres Strait Islanders. It is through word of mouth that occurs on the streets that people link in with appropriate services or reconnect with family etc. Local Law 8 is a law that if enacted will impose essentially non-Aboriginal and Torres Strait Islander standards of public behaviour (Cunneen 1999).⁶⁸ Such standards equate the same behaviour (i.e. drinking in public) as appropriate in cafes, restaurants, nightclubs and bars.

Local Law 8 is ineffective in promoting human rights such as equality and freedom from discrimination. There is a trend whereby with no intention laws whilst are not directed at a particular people end up having a disproportionate impact on those people. It is the responsibility of the Local Government as a Public Authority to make every attempt against this happening. This is known as indirect discrimination or institutional racism. For instance, zero tolerance policing, which Local Law 8 can be categorised as, is problematic for minority groups due to the following:

- It mirrors a return to old fashioned punitive approaches to law and order marked by the over-policing of the poor and marginalised (Aboriginal and Torres Strait Islander Commission 1999).
- It involves heavy-handedness such as the employment of forms of geographical policing that focus police attention on specific zones or areas seen to be a “problem”. It involves ‘stop and search’ practises, raids, and people are made to account for themselves and personal details are to be made available. This is clear evidence of a shift to presumptions of guilt till proven innocent instead of the reverse.
- It runs contrary to a multitude of principles underlying the recommendations of the Royal Commission into Aboriginal Deaths Custody pointed out by the Aboriginal and Torres Strait Islander Commission (ATSIC) (1999), such as:
 - Indigenous self-determination (Recommendation 188);

⁶⁸ This is commonly referred to as “Zero Tolerance Policing”.

- Community policing (Recommendation 88, 214, 215 and 220);
- Arrest as a last resort (Recommendation 87);
- Non-arrest for trivial offences (Recommendation 86);
- Alternatives to arrest for juveniles (Recommendations 62, 239-242); and
- Diversion from police custody for public drunkenness (Recommendations 79-85).

There is a trend whereby Aboriginal and Torres Strait Islander peoples are highly visible to non-Aboriginal and Torres Strait Islander persons which may be a result of direct or indirect discrimination. Local Law 8 has the potential to replicate the trends of public drunkenness laws in terms of high level of policing of Aboriginal and Torres Strait Islander persons given Local Law 8 will give Victoria Police more discretion than exists for laws of public drunkenness. Police will no longer have to prove drunkenness. Under Local Law 8 not only is drinking in public is in itself sufficient to warrant intervention, but also is having possession of an unsealed alcohol.

Furthermore, there is potential for Local Law 8 to allow a situation where a Police officer asks a person to comply by tipping out their bottle, or a Police officer completes an infringement notice, and the person reacts angrily and carries out one or all of the following: swear at police (i.e. offensive language) resist arrest or assault police to name a few. This example clearly demonstrates the snowball effect enabled by Local Law 8. So while it may be the intention of the City of Yarra that Local Law 8 not criminalise public drinking, indirect discrimination does not operate in terms of intention.

Fines

The fine system that Local Law 8 employs is arguably indirectly discriminatory and ineffective in light of trends that flow from the imposition of fines for the following reasons:

- People of low socio-economic status face difficulty in paying fines and risk potential imprisonment. In the City of Yarra, there are high levels of disadvantage as indicated in the Disadvantage Index from the Australian Bureau of Statistics. The City of Yarra is also home to around 8,000 residents living in public housing, the highest number for a municipality in Victoria.⁶⁹ Aboriginal and Torres Strait Islander persons in Yarra live predominantly in public housing.⁷⁰

69 Australian Government Preventative health taskforce (2009) 'Australia: the healthiest country by 2020 National Preventative Health Strategy – the roadmap for action' 30 June [online] /www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap-toc-nphs-roadmap-1~nphs-roadmap-1.7~nphs-roadmap-1.7.5~nphs-roadmap-1.7.5.vi page 5

70 Australian Government Preventative health taskforce (2009) op cit

- The fine system is inherently flawed because it contributes to over-representation in the criminal justice system of people from low socio-economic backgrounds.
- It is a possibility that the alleged offender may not be the one who ends up paying the fine, if at all. Partners or relatives could be left with this burden, therefore undermining the purpose of the infringement process.
- Fines can often be an ineffective deterrent to future outcomes due to a failure to address to offending behaviour.
- Fines have no rehabilitative effect nor do they act to improve the safety of the community.
- Fines can have further negative consequences and so are ineffective as they:
 - further impoverishes people which can have flow-on effects for their families including domestic violence, impact on the ability to feed and clothe children, pay bills and maintain housing (Department of Local Government NSW 2007).
 - overlook low literacy levels and in effect punish someone for not understanding what the infringement notice is.

NSW Work and Development Order Scheme

In the event that Local Law 8 is introduced it should be amended and based on evidence that the NSW Work and Development Order Scheme is effective. The scheme enables homeless and disadvantaged people in the community to pay off fines by doing charity work or treatment programs. Evidence of effectiveness is as follows:

- According to the NSW Attorney-General Mr Hatzistergos '[t]he first participants have been issued with Orders and the early signs are that this program will make a real difference in helping some of our most vulnerable groups.'
- According to Father Chris Riley, CEO and Founder of "Youth off the Streets", 'the first participants in the scheme are showing positive signs of improving their lives. Work and Development Orders have provided an extra incentive for young people to keep regular contact with our Counsellors, giving them the best chance at making a full recovery from their addictions.'⁷¹

The scheme is also backed up by the Sentencing Council as the changes were based on recommendations made by the Sentencing Council in its 2006 report on the effectiveness of fines as a sentencing option.⁷²

Mr Hatzistergos described the trial two year scheme at the launch on 15 September 2009 as:

⁷¹ Street Corner (2009) 'Homeless to do charity work to pay off fines' Street Corner 15 September 2009, as at www.streetcorner.com.au/news/showPost.cfm?bid=11964&mycomm=WC

⁷² *ibid*

- offering ‘people experiencing hardship the chance to pay off debt and avoid being drawn into the criminal justice system.’
- aiming to ‘address a phenomenon known as ‘secondary offending’, which occurs when disadvantaged people can’t pay their fines and descend deeper into the criminal justice system.’
- providing ‘an opportunity for these young people to reconnect with the community and move forward with their lives.’⁷³

Any initiatives that 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.

While the issue of education is not best suited to VALS as an area of informed and specialised knowledge, there are some worthwhile points to note. VALS urges the enquiry to seek expertise from the Victorian Aboriginal Education Association Incorporated (VAEAI) and their recent research publications such as the *Koorie State Training Plan 2010*. VAEAI highlight how TAFE Koori Units are playing a pivotal role in supporting Koori students by providing by providing advice about careers pathways that is personalised to account for each student’s skills and aspirations. Victorian Universities also have in place support centres for Koori students. One example is the Centre for Indigenous Studies (CIE) at the Melbourne University which provides comprehensive support for Koori students assisting with course selection, tutorials, accommodation, study, personal support, community networking, cross-cultural development and career counselling. Koori Support Units in TAFEs and Universities provide a culturally welcoming environment for students is essential to promoting enrolment and retention.

The school retention rate of Indigenous Victorians to Year 10 is 81.1%, compared to 97.5% for all Victorians, and drops markedly in the senior years to 36.5% for retention to Year 12, compared to 81.4% for all Victorians. The level of attainment of a Year 12 certificate for Indigenous Victorians was almost half that of the non-Indigenous population at 44.6%, compared to 82.7%.²² (The *Victorian Government Indigenous Affairs Report July 2004 – June 2005*.)⁷⁴

Daily Average Number of Prisoners in Victoria - Highest Education Completed, Corrections Victoria

2006-7	Aboriginal and Torres Strait Islander	Non-Aboriginal and Torres Strait Islander
No Formal Schooling	0	6
Part Primary	4	28
Completed Primary	12	80
Part Secondary	192	3,183
Completed Secondary	6	200

⁷³ ibid

⁷⁴ VIYAC (2006) op cit, pg 38

Technical/Trade/Apprenticeship	0	2
Tertiary	0	103
Unknown	7	123

Review of the *Australian Directions in Indigenous Education 2005 to 2008* strategy

Through a review of the strategy *Australian Directions in Indigenous Education 2005 to 2008* it was recently reported that the Australian education system has failed to deliver any significant improvement in Aboriginal and Torres Strait Islander literacy and numeracy standards following a four-year national strategy to target the learning crisis.⁷⁵

The landmark review, commissioned by State and Federal Education Ministers, finds that the evidence overwhelmingly reveals that much remains the same and gaps are not closing at anywhere near the rates contemplated or required by the government. The chief investigator, Peter Buckskin, has said that ‘[T]here is a level of cultural arrogance from bureaucracies that they know best’.⁷⁶

Despite the report reveals the four-year Commonwealth strategy has failed to deliver any significant improvement in outcomes for Aboriginal and Torres Strait Islander students, the Aboriginal and Torres Strait Islander educators who conducted the review believe the national strategy had the correct focus on:

- school and community education partnerships;
- school leadership;
- Early childhood learning; and
- Pathways to training and employment and higher education.⁷⁷

They felt the improvement needs to come from the facility of time, commitment and resources to produce significant outcomes. Professor Buckskin also stress that improvements in teacher training and school leadership are crucial: ‘We need to change the way pre-service teachers are being trained in terms of attitudes and expectations around Aboriginal people’ and stereotypes need to be confronted to prevent graduate teachers from entering classrooms with low expectations of Aboriginal and Torres Strait Islander students.⁷⁸ Professor Buckskin states that students are quick to pick up on low expectations and their response was often to meet these low expectations.

Social and Cultural Relationships

*A significant problem of Aboriginal education in Australia has been the failure to recognise the Aboriginal identity of children—their Aboriginality.*⁷⁹

75 Patty A (2009) ‘Education plan earns poor report’ *Brisbane Times* 25th November 2009.

76 *ibid*

77 *ibid*

78 *ibid*

79 Howard and Perry (2001) *op cit*, p. 11

Gray (1990) describes learning as a fundamentally social process ‘and recognition of the social purposes of learning as well as the social learning processes through which such learning is achieved is important in the teaching of Aboriginal children’.⁸⁰ Considering the notion of learning as a crucial socialising factor, Howard and Perry (2001) describe how Aboriginal and Torres Strait Islander children respond best when there are positive personal relationships with teachers: ‘it is often more important who does the teaching than what is actually taught’.⁸¹

Andrews & Hughes (1988) argued that teaching methodologies which include strong teacher-pupil relationships, reducing competition, restricting verbal communication, limiting direct questioning, emphasising practical experience and group cooperation will benefit Aboriginal and Torres Strait Islander students.⁸² Teachers need ‘an appreciation of the cultural, social, environmental and economic factors that can seriously impair the academic potential of Aboriginal children’.⁸³

Howard and Perry (2001) describe how another is the use of administered tests to gauge student performance levels. Tests are a phenomenon of a differing cultural view to learning than was traditionally the view of Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander children will not perform well in tests ‘until they start to perceive the connection between tests and achieving their ultimate goals in the Western domain’.⁸⁴

‘Both ways’ education

Bowman (2004) describes Australia’s national vocational education and training policy for Aboriginal and Torres Strait Islander people in *Partners in a learning culture 2000* and captures in its title a concept that vocational education for Indigenous people can only be achieved via a partnership which itself builds a learning culture, one in which learning has to go both ways. Bowman acknowledges that this is not an entirely new concept and that Indigenous educators have been talking about ‘both ways’ education for several decades. And, for most of this period, people have tended to think of this as a methodology for Indigenous students only.⁸⁵

The Victoria Government’s *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report* (2009) recommends that:

- The State Government expedite the implementation of the recently released Student Engagement Policy Guidelines. This would require supporting schools to provide a range of prevention and early intervention strategies to support engagement and

80 Gray, B (1990) ‘Natural language learning in Aboriginal classrooms: reflections on teaching and learning style for empowerment in English’ Language: Maintenance, power and education in Australian Aboriginal contexts Darwin: Northern Territory University Press, p. 135.

81 Collins G (1993) as in Howard and Perry (2001) Count me in too Indigenous: Progress report on the effectiveness of the Count Me In Too Indigenous Project during 2001 Report prepared for the New South Wales Department of Education and Training, as at www.curriculumsupport.education.nsw.gov.au/primary/mathematics/asseis/pdf/ind_report01.pdf

82 Andrews R & Hughes P (1988) Toward a theoretical framework for the development of an Aboriginal pedagogy Canberra: Curriculum Development Centre.

83 Collins (1993) in Howard and Perry (2001) op cit, p. 11.

84 Harris & Harris (1988) in Howard and Perry (2001) p. 11.

85 Bowman K (ed.) Australian National Training Authority (2004) Equity in vocational education and training: Research Findings South Australia: National Centre for Vocational Education Research Ltd

improved educational outcomes, including: programs to support parental involvement with schools, including effective parenting programs; transition support programs for children moving from primary to secondary school, and for students nearing the compulsory school leaving age; strategies for identifying at-risk students (including those in out-of-home care) and linking them to appropriate specialist support services (for example, youth workers or counsellors); the introduction of restorative justice practices in schools; training for teachers in the delivery of emotional well-being curriculum materials, and in strategies for working with vulnerable and 'difficult' students (recommendation 9).

- The Committee identified that where employment is provided as a strategy to reduce reoffending it needs to be combined with support programs that focus on the continued growth and development of the young person involved. As such the Committee recommends that the government support an extension of specialist education, training, mentoring and employment programs for young offenders, such as the models provided by Whitelion and the Bridge Project. This would include support for work with employers to encourage employment of young offenders (recommendation 13).

Transformations in Indigenous Higher Education

Currently, enrolments and graduations for Aboriginal and Torres Strait Islander people are at record levels. Aboriginal and Torres Strait Islander women aged 18 to 59 are doing especially well, commencing tertiary study at a better rate (2.45 per cent) than non-Aboriginal and Torres Strait Islander men (2.26 per cent).⁸⁶ Annual graduation numbers have risen by 43 per cent between 200 and 2007 (nearly 6 per cent per year) suggesting a doubling in annual graduate numbers in the next twelve years.⁸⁷

Lane (2009) suggest that the success story of tertiary study for Aboriginal and Torres Strait Islander people is thanks to the dedication of the students themselves, but also to the student support services who have helped boost Aboriginal and Torres Strait Islander graduate numbers from a few hundred to tens of thousands.

Many Aboriginal and Torres Strait Islander people, however, are being progressively shut out from higher education opportunities, particularly in rural and remote areas. Lane (2009) argues that 'student support services – not just universities – will have to be strengthened and re-constituted if these people are to have the chances taken for granted by other Australians.'⁸⁸

According to Lane (2009) Tertiary study is becoming more inaccessible for some sections of the Aboriginal and Torres Strait Islander population as lower-level awards are phased out and support staff are co-opted into the teaching of Indigenous Studies to non-Aboriginal and Torres Strait Islander students. Therefore, Aboriginal and Torres Strait Islander people who are in welfare environments with relatively poor education and are remote from tertiary education centres, can be progressively shut out from participation.

86 Lane J (2009) 'Transformations in Indigenous Higher Education' *On Line Opinion* 9 December 2009.

87 *ibid*

88 *ibid*

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.

Just as important as providing examples of what *should* be done in terms of best practice of programs that support diversion of Aboriginal and Torres Strait Islander young people from crime, is to provide examples of what *not* to do. As such, this section will address firstly what measures should be avoided because of their criminalisation of young Aboriginal and Torres Strait Islander people and thereby increasing their contact with the criminal justice system, and then providing alternative best practice examples to deal with offending and the factors that contribute to that offending.

What not to do

Treat public drunkenness a criminal behavior

Victorian law considers the public drunkenness as a criminal justice issue. VALS argues there is a need to treat public drinking as a public health issue and not as a criminal issue. A trend that VALS has observed about strategies to address crime is the primacy given to a law and order approach or what we refer to as a ‘tough on crime’ approach as opposed to a ‘smart on crime’ approach. A ‘smart on crime’ approach acknowledges that imprisonment is not the only answer to addressing crime, and rather than taking a retributive point of view it takes a restorative or rehabilitative point of view.

Over-police public space

Much of the conflict in this area surrounds conflicting definitions of what constitutes legitimate and illegitimate use of public space. Certain behaviours, gatherings, areas and times draw attention to what is considered appropriate use. As zero tolerance policing is aimed at increasing police activity in relation to public behaviour, it is inevitable that policing policies such as this will see the imposition of essentially non-Indigenous standards of public behaviour.⁸⁹ Herein lies a failure to consider Aboriginal and Torres Strait Islander’s use of open space as *cultural* space.

If there is a renewed concentration on policing of street offences, it is understandable that many Indigenous people will perceive such an action as aimed directly to *their* use of public space. While it is not an offence to be drunk *per se*, to be drunk in a public place in Victoria is. Legislation that allows for drunken people to be locked up because the occurrence exists out in the open, or what is deemed “public space”, is discriminatory. It assumes that individuals using the public space when consuming alcohol have access to an alternative space that would render their behaviour legal.

Summary Offences and Control of Weapons Acts Amendment Act (2009)

⁸⁹ Cunneen (1999), op cit.

Zero tolerance policing is considered by some commentators as incoherent, uncivil and dangerous as a criminal policy.⁹⁰ Police discretionary powers also fall under the zero tolerance guise where 'stop and search' practises are legitimised, raids are justified, people are made to account for themselves and personal details are to be made available. Here is clear evidence of presumptions of guilt till proven innocent in place of the reverse. In addition, demanding name, details and a search based on a belief of 'reasonable grounds' or a 'reasonable cause to suspect' that a person may assist an inquiry of an offence or suspected offence is highly discretionary.

As young people in particular lack the advantage of legal knowledge in cases such as these, a vast imbalance of power exists. If society is participating in the construction of youth stereotypes as a threat, as intruders, as violators in public space, urban life for young people becomes increasingly exclusionary.

Victorian legislation in recent history has permitted police to perform a basic search of persons who are reasonably believed to be carrying weapons, drugs of dependence and volatile substances. Additional powers became available to police under the State's anti-terrorism legislation. Now that the *Summary Offences and Control of Weapons Acts Amendment Act* (2009) has been rushed through the Upper House of Parliament with the support of the Victorian Premier and Opposition Leader, there are further increased police powers which could potentially impact the lives of tens of thousands of Victorians.

The Act introduces new 'move on' powers which will enable police to order anyone to move away from public spaces even if they haven't committed a crime in addition to conducting random searches including strip searches. Powers that enable police to force people to 'move on' if they *think* that they *may* breach the peace in the future dangerously engages a pre-crime law enforcement strategy and is clearly discriminatory.

In Queensland similar powers have created a huge spike in minor charges being laid and courts as a result experiencing a flood of cases resulting from 'move on' laws. The Queensland Crime and Misconduct Commission are reviewing the laws as it becomes clear that these laws are being applied unfairly to marginalised groups such as the homeless, Aboriginal and Torres Strait Islander communities, and youth. A similar examination of laws is also currently being undertaken in NSW and also in Western Australia where similar proposed legislation has been sent for investigation by an Upper House Committee due to the public uproar about the impact of proposed invasive powers on the community.

It has been argued that instances where police are conducting stop and search methods on suspicion alone are in fact breaking the law and people's rights.⁹¹ This creates disproportionately higher levels of police contact for these social groups over others. The Flemington and Kensington Community Legal Centre (Victoria) have released reports on young people enduring humiliating experiences when encountering police, being asked to empty their pockets, lift their shirts and provide their mobile phones.

90 Dixon D (1999) Beyond Zero Tolerance. Paper presented 3rd National Outlook Symposium on Crime in Australia, Canberra, Australian Institute of Criminology; Cunneen C (1999) 'Zero tolerance policing and the experience of New York City' *Current Issues in Criminal Justice*, 10, 299-313.

91 Blagg H and Wilkie M (1997) 'Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child' *Australian Journal of Human Rights*, 6.

As these individuals gave no consent to the search, it is suggested that they were arbitrarily and unlawfully targeted, searched, deprived of their property and effectively deprived of liberty through their detention for the duration of the search.⁹² What is more, a public search of a person is a significant invasion of privacy that can result in a humiliating, degrading and stigmatising experience. Cases such as these are not restricted to certain parts of the country.

The Youth Advocacy Centre in Brisbane reported research showing that 'street harassment' of young people was a common problem.⁹³ Again young people from marginalised backgrounds were seen to spend most of their lives in public where their behaviour is highly visible.

*...in any contact with a police officer, the child depends on the conduct of the officer for the enjoyment of their rights, relies on the officer to fully respect those rights and is at the mercy of any officer who chooses to infringe or violate those rights. We therefore place the full burden for respecting the child's rights and for protecting the child from rights violations on the officer dealing with the child.*⁹⁴

VALS believes that the *Summary Offences and Control of Weapons Acts Amendment Act (2009)* needs to be referred to a Parliamentary Committee to investigate its full impacts.

Subscribe to 'tough of crime' point of view

Brown (2001) argues that populist roots for the 'tough on crime' policies lie in the 'thirst for retribution and vengeance, the felt need to strike back in some way at a range of disparate social anxieties and fears, to offer up sacrifices or scapegoats through the imprisonment and social exclusion of particular individuals and particular communities' (12). And as a result laws such as Local Law 8 'serves to polarise the community on the basis of marginality. There is a clear placement of blame for these activities upon certain groups in the community. Young people, Aboriginal people and homeless people are overtly defined in this way' (James 1993:1).⁹⁵

'Tough on crime' measures do not reduce crime rates, do not reduce recidivism rates, mandatory sentencing does not act as a crime deterrent, and prisons remain the primary tool of criminal justice despite established and emerging alternatives. VALS argues that in places where 'tough on crime' mechanisms exist, serious attention if *real* and *viable* solutions to address crime are unlikely to be achieved. There is a need for investment and extension of new and existing restorative justice mechanisms.

Research for the Fitzroy Legal Service (2009) in the context of anti-social behaviour orders found that:

92 Hopkins T (2007) 'Policing the Public: The role for human rights in exploring the acceptable limits of police practice', Flemington and Kensington Community Legal Centre [online] <http://www.eoc.vic.gov.au/conference/Material/default.htm>, [accessed 21 August 2008].

93 Youth Advocacy Centre (1993) *Juvenile Justice: Rhetoric or Reality. A critique of Queensland's Juvenile Justice Act 1992*. Brisbane: Youth Advocacy Centre.

94 Blagg & Wilkie (1997) *op cit*, p. 5.

95 As at www.austlii.edu.au/au/journals/AboriginalLLB/1993/59.html

- ‘The community safety agenda can be characterised as the “criminalisation of social policy” in that the focus of policy attention is placed upon behaviours and activities of certain groups rather than the underlying socioeconomic causes of distress.’⁹⁶
- Governments are moving towards a zero tolerance of those who are perceived as inhibiting the process of revitalisation, of deterring the consuming majority.
- Common themes and issues raised by these laws are: Lack of evidence of effectiveness; laws are used with discretion; laws policing public space disproportionately affect certain groups; the subjective definition of anti-social behaviour; and increased criminalisation of behaviours and exclusion and alienation.
- These laws increase the number of behaviours and people defined as criminal that are subject to formal social control.
- In relation to the alcohol restriction zones, there appears to be no official evaluation process.
- There is a lack of evidence that alcohol restriction zones are effective in their aim of harm minimisation related to the behaviours of the people that are targeted. Such laws are likely to simply move people to different areas, and to further marginalise certain community groups.
- Street bans will displace drinking to other areas or into homes where it will be harder for services to identify and access those with drinking and health problems.
- Effective crime reduction approaches recognise that genuine community safety has more to do with education, health, housing, community services and stabilising the family unit than with simply punishing and locking people away.

VALS offers the following quotes by agents of the criminal justice system to discredit a ‘tough on crime’ approach:

- According to Superintendent Thurtell in the New South Wales Kempsey region, the Neighbourhood Watch has survived because ‘the committee “maintained the rage” so to speak.’⁹⁷ VALS argues that at the root of a tough on crime approach is anger and at the opposite spectrum of this is fear. VALS argues that such subjective emotions should not drive strategies to address crime. Instead, the notion of ‘what works’ should influence such strategies. VALS questions whether Local Law 8 will be effective in the section below.
- New South Wales District Court Judge Stephen Norrish, speaking in the context of strategies to address the trend in recent times of NSW jailing almost four times more

96 Crofts J (2009) ‘Who’s Public in Public Space? Public Space, Human Rights and Law enforcement’ Paper produced for the University of Melbourne Criminology and Sociology internship program for the Fitzroy Legal Service p, 10

97 The MacKay Argus (2009) ‘Cooperation Key To Beating Crime’ The MacKay Argus, 20 October, as at www.macleayargus.com.au/news/local/news/general/cooperation-key-to-beating-crime/1654012.aspx

young people than in Victoria, states that, 'Victoria has the Koori courts which is another option. Again you must admit the offence. But the options are far better than being sent to jail.'⁹⁸

While the current Inquiry is focused on early intervention, it is worth mentioning reporter Matthew Carney who did an investigation in August 2009 for the ABC's *Four Corners* program entitled 'Kids Doing Time'. Carney meets Chloe who been arrested for drug taking and dealing. But rather than imprison her, the police and the system got behind her. 'The government, the justice system and the non government organisations, which are very strong here in Victoria, share a philosophy of maintaining a role in keeping kids out of the system. We work very hard on diversion' (Bernie Geary, Child Safety Commissioner, Victoria, in Carney 2009). Carney acknowledges that this is not an easy road for any government as allowing young offenders out of detention creates a political risk if they re-offend. Carney observes that in Victoria, the judgement so far is that this is a risk worth taking.

We've had occasions here in Victoria where our dual justice system has been challenged and it's taken some bravery... we've had a succession of human services ministers from both parties... that have stuck fast with our juvenile justice system (Bernie Geary, Child Safety Commissioner, Victoria, in Carney 2009).

What should be done: Best practice alternatives

Think 'Smart Justice'

'Smart Justice' approaches recognise that genuine public safety from the effects of crime has more to do with education, housing, health, community safety and supporting the family unit than what can ever be achieved by simply imprisoning people. It is argued that a shift to 'smart on crime' initiatives proves essential if we are to move away from privileging increasingly punitive tendencies. It is with this change in focus that sustainable and long-term capacities and solutions can be sought.

'Smart Justice' approaches recognise that genuine public safety from the effects of crime has more to do with education, housing, health, community safety and supporting the *family unit* than what can ever be achieved by simply imprisoning people.

Best practice in addressing issues around the abuse of alcohol and other substances (especially public use) must acknowledge bodies such as the World Health Organisation (2001) who acknowledge 'the dynamic and complex nature of community is the first crucial step in the development of effective community-based responses. WHO also has a longstanding commitment to solving alcohol-related problems and advocates a comprehensive range of strategies to reduce alcohol-related harm. WHO emphasises that approaches must be consistent with local cultures, and that each country must develop its own unique mix of strategies'.⁹⁹

98 Judge Made Didgeridoo Custodian Tuesday (2009) *ABC Riverina NSW* 21 July as at www.abc.net.au/news/stories/2009/07/21/2631793.htm?site=riverina

99 King R and Richards J(2003) *Australian Local Government: Alcohol Harm Minimisation Projects A good practice guide* Melbourne: A report prepared by Turning Point Alcohol and Drug Centre, p 5

Police

Leadership in the Police is required like that by Superintendent Peter Thurtell in NSW. He has said in the media that 'greater co-operation between police and the local indigenous community will be the chief focus' The head of the Mid-North Coast Local Area Command has already approached the local Lands Council for assistance in establishing Aboriginal and Torres Strait Islander consultative committees in the Kempsey area. Superintendent Thurtell feels such committees would assist police, namely by working with the Aboriginal and Torres Strait Islander community to aid in crime reduction, prevention and detection.¹⁰⁰

Protocols regarding indirect discrimination must also be considered and extended. However, protocol between Victoria Police and the Aboriginal and Torres Strait Islander community to attempt to address the potential for Local Law 8, for example, to indirectly discriminate against Aboriginal and Torres Strait Islander peoples will not be effective without Victoria Police culture fundamentally changing; and Victoria Police providing data that is requested for the purposes of monitoring and evaluation of Local Law 8 in a timely fashion.

Diversion

Best practice examples of programs that support diversion of Aboriginal and Torres Strait Islander people from juvenile detention centres and crime, and provide support for those returning from such centres involve the following elements:

- Early intervention should not be forgotten about or replaced with a notion of 'diversion'. Diversion should not redirect funding from programs in the community for people not at risk of entering the criminal justice system (i.e. community mental health programs).
- Diversion programs should :
 - reduce contact of Kooris with the criminal justice system;
 - be accessible to Kooris (i.e. funding for Koori organisations to develop more culturally appropriate options, information about diversion programs should be accessible, appeal to both genders);
 - be effective due to cultural appropriateness and this should be monitored (i.e. a monitoring system should be implemented to check effects, success, accessibility of diversion for Kooris);
 - include education of gatekeepers of the program about Aboriginal and Torres Strait Islander peoples (i.e. otherwise potential for bias);
 - not place discretion about eligibility for diversionary options entirely in the hands of Police. Reasons should be provided by Victoria Police as to why a diversionary pathway was not chosen; and

100 'Cooperation Key To Beating Crime' The MacKay Argus, Tuesday, 20 October, 2009 as at <http://www.macleayargus.com.au/news/local/news/general/cooperation-key-to-beating-crime/1654012.aspx>

- not exclude the provision of legal advice or assistance.
- A framework based on diversion is all well and good, but if funding is not dedicated towards establishing an adequate pool of diversionary options, then the framework does not have the capacity to work.

Principles

VALS supports the development of diversion programs as a means of increasing the flexibility, effectiveness and meaningfulness of the justice system. Gate keeping of diversion programs should avoid cultural stereotyping or culturally inappropriate policies. Listed below are some principles for diversion program which could form part of a diversions strategy which is currently lacking in the Victorian Government. Many of the principles outlined below are attributes of the Police Cautioning and Youth Division Program, particularly cultural input in the diversion process.

Placing a young person 'back on track' is not necessarily the best criterion of success of diversion. Rather the criterion should be whether the system enabled a child to return to his or her community and have that community make a commitment to the young person in an encompassing way.

The recent *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report* Recommendations 16-17 relate to diversionary approaches, strategies and support programs to prevent or reduce youth offending (i.e. expansion of range of programs, evaluations of existing programs, incorporation in legislation and expansion of Youth Justice Group Conferencing). VALS is pleased by comments in the Report such as: 'the most successful approaches to offending by young Aboriginals, including diversionary strategies, are generally believed to be those grounded in and drawing upon the family, kinship, social and cultural networks of the young person.'¹⁰¹

If diversion programs are adequate and appropriate, they will help keep Aboriginal and Torres Strait Islanders out of jail and reduce reoffending. If diversion programs are inappropriate they will:

- Lead to increased contact of Aboriginal and Torres Strait Islanders within the criminal justice system;
- Be inaccessible to Aboriginal and Torres Strait Islanders;
- Be ineffectual due to lack of cultural appropriateness.

VALS suggests that diversion programs should:

- Clearly articulate objectives and strategies to implement.

¹⁰¹ Parliament of Victoria Drug and Crime Prevention Committee (2009) 'Inquiry into strategies to prevent high volume offending and recidivism by young people: Final Report' Melbourne: Drug and Crime Prevention Committee p 253.

- Be subject to ongoing evaluation and periodical independent review to ensure that programs are working effectively and that the legislative, financial and policy factors affecting programs are considered in all these reviews. There should be assessment of diversion programs in relation to their impact on Aboriginal and Torres Strait Islanders.
- Be based on community cultural input as the Aboriginal and Torres Strait Islander community should be involved in the development, implementation and monitoring of diversion programs. The involvement of traditional owners, local community programs and especially family and extended family is essential to the success of diversion. Such people should received equality in pay.
- Be provided by both Aboriginal and Torres Strait Islander agencies and non-Aboriginal and Torres Strait Islander agencies. Aboriginal and Torres Strait Islander agencies should receive proper funding and an emphasis should not be on police and court based programs to the detriment of other programs that can be managed by Aboriginal and Torres Strait Islander agencies.
- Identify whether a participant is of Aboriginal and Torres Strait Islander descent and cater for Aboriginal and Torres Strait Islanders.
- Not exclude the need for legal advice.
- Enable Magistrates to have power to override a decision of police about access to diversion which would enable review of alleged discriminatory practices by police as gate keepers. There is need for procedures that overcome police bias in the use of diversion options for Aboriginal and Torres Strait Islanders.
- Contain base eligibility requirements on whether diversion would benefit the offender rather than criminal history. Alternatively, prior convictions should no be the sole basis for excluding people from diversion.
- Be provided to young people at risk generally, not only to those who have committed offences
- Remove the requirement of informant approval so that diversion can be initiated by the Magistrates or legal practitioners. Legal practitioners should address Magistrates as to suitability for diversion where an unfavourable recommendation is made. According to a participant in a study “the program relies too much on the idiosyncratic subjective assessment of individual informants”.¹⁰²
- Incorporate training for police, Magistrates, Judges, Court staff to such an extent that the culture of the police force and Courts is changed.

102 Springvale Monash Legal Service Inc (2006) ‘Criminal Justice Diversion Program - Discussion Paper’, p 24

- Be made available consistently, not just in some regions. Diversion can be improved by providing a legislative basis for it. In the absence of such legislation it is unfortunate that programs do not have to be made available.
- Be supported by holistic service delivery.

Effectiveness of diversion also depends on compliance with best practice guidelines identified in Cunneen's 'review of best practice models for Indigenous diversion programs':

- Developmentally appropriate;
- Meaningful (not tokenistic) involvement of Aboriginal people;
- Involvement of family and community;
- Community based, where possible;
- Emphasise Aboriginal heritage, culture and law;
- Focus on remediating educational deficits in the basic skills to raise social competence;
- Help people to develop market place work skills which can lead to further training opportunities, qualifications and real jobs;
- Assist in establishing and strengthening relationships with significant others who can become mentors and role model.¹⁰³

Diversionary strategies are positive because they:

- Create opportunities for the offender to have less involvement with the justice system;
- Encourage the offender to take responsibility for the offences;
- Enable the victim to understand the offender, express hurt and influence the way the offence is dealt with; and
- Increase resolution of disputes within the community without Government intervention.

Youth Conferences

VALS supports group conferencing and is encouraged by the following statistics which indicate the success of group conferencing in terms of recidivism rates of Aboriginal and Torres Strait Islanders:

- Aboriginal juveniles attending conferences appeared to have a lower risk of reoffending than those Aborigines attending court¹⁰⁴

¹⁰³ Cunneen (2001) 'Review of best practice models for Indigenous diversion programs', p. 7

- ‘Within 500 days of their first apprehension half of the Indigenous juveniles who had a court appearance would not have reoffended, compared with two-thirds (67%) of Indigenous juveniles who received a diversion. At end of the five year period, only one-third (34%) of Indigenous juveniles who had been to court would not have reoffended, compared with 44 percent of those who had been diverted’.¹⁰⁵

However, recidivism should not be the only measure of success of group conferencing and VALS has concerns about access to group conferencing by Aboriginal and Torres Strait Islanders. VALS is concerned that in practice the extent to which Aboriginal and Torres Strait Islanders benefit from the program is lower than it should be. The cause of this may be attributable to:

- Basing the program in the criminal justice system which means police have the power to veto people entering the program. Police as gate keepers tend to emphasise the ‘no prior convictions’ eligibility requirement for diversion, and this is arguably a bigger impediment to Aboriginal and Torres Strait Islanders than non-Aboriginal and Torres Strait Islanders who experience poor relations with police (i.e. systemic discrimination).
- The conferencing model can place too much emphasis on the offender/victim relationship. It would be better to involve a wider group which would place major emphasis on ensuring the offender was diverted into positive community activities and was dealt with by his/her community. The need to strengthen the family group, given the level of disadvantage and dysfunction in the Aboriginal and Torres Strait Islander community, should not be overlooked.
- Koori youth are likely to be isolated without supports if their families are not local to a conference.
- There are no Aboriginal and Torres Strait Islander conveners in Victoria as far as VALS is aware.
- Group conferencing has the potential to stigmatise Indigenous families as being uncaring, incompetent, failures, etc.¹⁰⁶
- The fact that group conferencing is assumed to be accessible to Aboriginal and Torres Strait Islanders because it has its roots in New Zealand Maori culture. According to Loretta Kelly ‘a conferencing process based on Maori traditions will not necessarily be effective in the Aboriginal and Torres Strait Islander context’.¹⁰⁷

104 Luke and B Lind (2002) ‘Reducing Juvenile Crime: Conferencing versus Court’ *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, No 69, p 1 at 3

105 Cunningham Teresa (2007) ‘Pre-court diversion in the Northern Territory: impact on juvenile reoffending’ *AIC, issue 339*, p 4-5

106 Kelly Loretta, Oxley Elvina ‘A Dingo in Sheep’s Clothing? The Rhetoric of Youth Justice Conferencing and the Indigenous Reality’, *Indigenous Law Bulletin* 12, 1999 as at <http://www.austlii.edu.au/au/journals/ILB/1999/12.html>

107 Ibid

Recommendation 19 of the Victorian Governments *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report* (2009) holds that Youth Justice Group Conferencing programs should be expanded to all areas of the state.

Koori Court

Recidivist studies are useful in developing policy and practice. The extent to which recidivism research informs policy and practice is apparent in the example of the Koori Court. One contributing factor to the roll out of the Koori Courts is the reduction of offending. A 2005 review of the Koori Courts in Victoria found they had been very successful in reducing repeat offenders, with recidivism rates of 12.5% and 15.5% compared to the general Koori rate of 29.4%. There are seven Koori Courts throughout the State, two of them are for children. Victoria has also introduced a County Koori Court. Caution should be exercised, however, in placing too much emphasis on recidivism as has been identified through a recent review of circle sentencing in NSW.¹⁰⁸

Cautioning

From July 2000 to June 2001, the level of under-utilisation of cautioning of Aboriginal and Torres Strait Islander young people was in the order of 10-15% when you focus on people who have had no prior police contact¹⁰⁹

- the offence of bicycle theft resulted in the cautioning of 6.7% of Aboriginal and Torres Strait Islander juveniles compared to 22.6% of non-Indigenous juveniles;
- the offence of regulated public order resulted in the cautioning of 10.5% of Aboriginal and Torres Strait Islander juveniles compared to 30.7% of non- Aboriginal and Torres Strait Islander juveniles;
- the overall cautioning rate for Aboriginal and Torres Strait Islander juveniles was 13.3% compared to 30.8% of non-Indigenous juveniles”.¹¹⁰

The trend outlined above in cautioning of Aboriginal and Torres Strait Islander youth is part of the *amplification process* that Aboriginal and Torres Strait Islander experience throughout the justice system. If Aboriginal and Torres Strait Islander youth are not being equally cautioned this has a carry through affect that escalates outcomes for Aboriginal and Torres Strait Islanders further along the justice system.

In response to the trend outlined above, VALS appointed a Project Officer to implement the Police Cautioning and Youth Division Program which commenced as a Pilot at two sites, Mildura and the La Trobe Valley. The Pilot was developed in consultation with relevant parties (i.e. Government, Police, Aboriginal and Torres Strait Islander people, youth, and workers

108 Fitzgerald Jacqueline (2008) 'Does circle sentencing reduce Aboriginal offending?' NSW Bureau of Crime and Statistics Research Crime and Justice Bulletin, no 115.

109 Victorian Aboriginal Legal Service, 'Police Cautioning of Indigenous Juvenile Offenders in Victoria' 2003.

110 *ibid*

involved with youth). The pilot commenced in March 2007 and has been evaluated and deemed successful.

The Program is being rolled out to 6 other locations. It is also the recommendation from the committee of the *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People* (Victoria Government 2009) that the Victorian Aboriginal Legal Service 'Police Cautioning and Youth Diversion Program' be supported and expanded (recommendation 25)..

The Program contains a caution and follow-up component. The protocol that originated from the pilot is documented at Police Cautioning Program (Victoria Police Manual Operating Procedures - 7.8.5).

Caution component

- Police give a caution whenever appropriate (i.e. admit offence, no more than third offence, consent of accused/parent).
- If police do not give a caution they must complete a 'Failure to Caution Form' which provides a reason why no caution was given and this reason is reviewed to determine if it is appropriate.
- Police attempt to locate the parent or guardian to be present at the caution. This may require postponing the caution until the parent or guardian is available. Alternatively the Youth Resource Officer at the police station may choose another family member or respected Aboriginal community member to stand in for the parent or guardian.
- Police should consult with the local Koori Justice workers as to the most effective way to deliver a caution.
- The caution will be delivered by an elected Police Officer who is of high ranking to ensure consistency in the cautioning process.
- The following people should be present at the caution, and provided notice, or if not possible told that a caution has been given: Youth Resource Officer who reviews the caution, parent or guardian, support people, elected members of the community, justice worker and VALS Client Service Officer.
- The Youth Resource Officer (and possibly justice worker) creates a 'Background File' which contains information about the accused gathered at the caution (i.e. factors involved in the offence such as alcohol and other factors such as whether the youth lives at home). A joint discussion occurs between the parties at the caution about who the youth should be referred to and whether a mentor is appropriate.
- A caution should take place at a neutral location, or where necessary, a less 'formal' room within the Police Station.

Follow-Up component

A follow up meeting occurs 2-6 weeks after the caution. The meeting will be held with the

offender, police representative, family or community member, Koori Educator and any other individual who has since been involved with the offender. The purpose of this meeting is to 'check-in' on the progress of the offender since receiving the caution. The follow up process can continue for up to 3 months.

The success of the Program is the cultural input it facilitates to enable Aboriginal and Torres Strait Islanders to access diversion and ensure the accessed diversion program is successful. The Program contains several strategies for improving diversion which are broader than simply increasing the cautioning rate. It involves improving the effectiveness of cautioning. The Program identifies any obstacles to cautions operating successfully to divert a young people from offending. The Program involves identifying people who could explain to young people the effect of a caution in a culturally appropriate way.

The evaluation of the Pilot in quantitative terms is that 94% of individuals do not re-offend after completing the Follow-Up program. The qualitative value of the Pilot is apparent in the following case study and more information is available at Appendix B which contains the evaluation of the Pilot.

Case Study 1: After School Activities

Area of Referral: EDUCATION
Gender: M Age: 12 Offence: Handle Stolen Goods
<p>Referral Description: Post-caution meeting indicated that lack of school attendance and boredom were factors in initial offending. Subsequently attendance was arranged for the school-based activity program and involving extracurricular activities. This also included involvement with an after school program run by a Koori Educator.</p> <p>Follow-Up: Programs are to run for the remainder of the school year. Additionally, three subsequent meetings are held with the youth, mother, YRO and ACLO to assess progress. An additional meeting was held with the Vice-Principle regarding reintegration into school.</p> <p>Comments: Mother and Vice-Principle report 'easier and more structured' integration into school. Youth reports subsequently avoiding criminal activity when the opportunity was presented. Mother, YRO and ACLO note that the youth has had no further contact with the police and a more positive experience with school.</p>

The current Inquiry should consider recommendations found in the 2008 *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report* concerning youth crime prevention strategies.¹¹¹

111 Parliament of Victoria, Drugs and Crime Prevention Committee (2009) op cit, p. vii.

- *Recommendation 3*

The Committee recommends the implementation of youth offending teams similar to those operating under the New Zealand Youth Offending Strategy in order to coordinate service delivery when dealing with young offenders. Such teams should comprise representatives of Victoria Police, the Department of Justice, the Department of Education and Early Childhood Development, and the Department of Human Services Youth Justice Branch, in addition to input from community agencies and representatives involved in the areas of youth welfare and youth justice. The Department of Human Services Youth Justice Branch should act as the central lead agency responsible for coordinating all aspects of service delivery to young offenders or young people 'at risk'.

- *Recommendation 4*

The Committee believes that service delivery and programs aimed at supporting young people, particularly those who have been in youth detention, should not cease simply by reason only of that person reaching the age of 18. Where appropriate, transitional supports should remain in place and the young person should continue to be supported whilst it is necessary. Recent moves towards such policies of rationalisation by the Department of Human Services/Department of Justice are to be encouraged.

Prisoner Support Officer

VALS has funding from the Commonwealth Attorney General's Department to introduce the Prisoner Support Officer. VALS is in the process of introducing this role which is described as follows in the funding application:

The main goal of the project is to provide support to Indigenous Australian prisoners prior to imprisonment, during imprisonment and commence work on developing means for VALS to provide support after imprisonment also.

VALS would expect to accomplish Aboriginal and Torres Strait Islander access to justice whilst in prison. The project model is to act as a support person for prisoners. The content of the role of the Prison Support Officer is as follows:

- Prepare pre-sentence reports: present to the Courts the specific circumstances of the Aboriginal and Torres Strait Islander client, including the cultural dimensions of their circumstances, thereby enabling Magistrates' and Judges to incorporate these considerations in delivering sentences;
- Prisoner advocacy and support (i.e. parole issues);
- Monitor correctional policy, practices and legislation to ensure it accord with human rights standards;
- Field queries from prisoners (i.e. sentence calculations);
- Formal written submissions across pre-release issues (i.e. classification, assessments, transfers, visits);
- Make Referrals within and outside of VALS;
- Assist family members in relating to the needs of relatives in prison;

- Provide emotional support and breakdown the isolation often felt whilst in custody; and
- Source funding and program models to meet the needs of needs of Aboriginal and Torres Strait Islanders post release and commence work on establishing the model.

All activities will be targeted at providing ways to assist Aboriginal and Torres Strait Islander prisoners in addressing the background contributory issues to their offending behaviour, increasing community safety and enlisting support from community members towards the rehabilitation and integration of Aboriginal and Torres Strait Islander offenders. The method of delivery of the project is in person, over the telephone and via written and oral submissions.

The specific population group to be involved in the project are Aboriginal and Torres Strait Islanders in prisons within two hours of metropolitan Melbourne. The numbers of Aboriginal and Torres Strait Islanders in prison is growing and VALS will endeavour to provide a service to 40 people in jail each year of the project. The group will be recruited to the project by referrals being made to the Prison Support Officer from VALS' staff and external sources.

The expected outputs, outcomes and products of the project are:

- Early resolution of legal problems of prisoners;
- promotion of prisoner's human rights; and
- Pre -sentence and pre-release reports.

The ROPES program

Out of concern of the over representation of young people involving the police and the courts, the ROPES was launched in 2002 by Leading Senior Constable Mick O'Meara of Boronia Police Station. To enter the ROPES program:

- The young person must be under 18 years at the time of the offence;
- It must be the young persons first appearance at court; and
- The young person must acknowledge the circumstance of their offence.

The police officer who charged the young person has the discretion to recommend the young person for ROPES. If this occurs the Magistrate can adjourn to enable participation in the program. The program involves the young person and the police informant who brought them before the Court working together to achieve the various tasks. This is intended to break down the barriers between young people and police, encouraging them to:

- Communicate;
- take responsibility;
- work together to achieve a common goal; and
- confront and challenge their perceptions of each other.

Successful completion of the ROPES Course awards participants with a certificate (a copy of which is forwarded to the court). The matter can thereby be withdrawn. VALS would like to see a similar program tailored to Aboriginal and Torres Strait Islander offending.

Detention

This submission has already mentioned the limited Aboriginal and Torres Strait Islander young people have to diversion. VALS also notes that in the June quarter of 2005 the remand rate for Aboriginal and Torres Strait Islander Victorians was approximately 15 times higher than for non-Indigenous Victorians.¹¹² Therefore VALS recommends the introduction of Aboriginal and Torres Strait Islander specific bail support programs.

The *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People* (2009) recommends that the Department of Justice identify the issues pertaining to a young person being granted bail in the Children's Court. 'In particular, matters relating to accommodation and material support and the establishment of a formal bail support program should be considered with the express aim that no child or young person should be held in remanded custody unnecessarily (recommendation 20).'¹¹³

The 2008-2009 Report of the National Justice Chief Executive Officers Group (NJCEO) that reviewed 36 Australian and New Zealand post release programs assisting young Indigenous persons aged 18-25 years released from custody.¹¹⁴ Core principles identified include:

- addressing the cognitive and behavioural causes of offending;
- using programs that met the cultural competency in the design and planning of programs;
- reintegration at the beginning of the sentence and continue through post release;
- holistic practice;
- empowerment and offering practical life skills;
- using strengths based focus that builds on capacity;
- forming effective partnerships and information sharing between agencies (that includes joined up services); and
- recognises the needs of victims.

Research by the Australian Institute of Criminology addressing the reintegration of Aboriginal and Torres Strait Islander prisoners found that prisoners interviewed found the lack of "Indigenous-specific" programs and services is a major barrier to successful reintegration:

*Stakeholders highlighted the need for more knowledge on the role of culture and cultural content in prison-based and community-based programming, as well as more knowledge concerning the specific criminogenic needs of Indigenous offenders. A number of prisoners and stakeholders emphasised the need to address alcohol and substance use, particularly through Indigenous-specific approaches.*¹¹⁵

112 Victorian Law Reform Commission (2005) *Review of Bail Act Consultation Paper* p.14

113 Parliament of Victoria (2009) op cit, p. x

114 National Justice Chief Executive Officers' Group (2009) *Staying Strong on the Outside: Indigenous Young Adults Final Report* [online] www.indigenousjustice.gov.au/stayingstrong.pdf

115 Willis M (2008) 'Reintegration of Indigenous Prisoners: key findings' Australian Institute of Criminology No. 364, pp.1-6.

In the same study, a range of suggestions was put forward to increase the relevance of programs for Aboriginal and Torres Strait Islander offenders, including:

- incorporating an understanding of Aboriginal and Torres Strait Islander society and its collectivist approach;
- understanding the resistance of many Aboriginal and Torres Strait Islander people to disclose information about themselves;
- recognising the place of violence in Aboriginal and Torres Strait Islander communities and how it contributes to offending;
- applying holistic methods that address the mind, body and spirit;
- enhance skill development and education, making them relevant to life experiences;
- overcoming language and literacy barriers; and
- involve Elders and Aboriginal and Torres Strait Islander facilitators in development and delivery of programs.

Release

Research by Willis (2008) found an emerging theme in, that is, the importance of throughcare in the delivery of programs and services. Consultations revealed that there was a feeling that efforts to assist prisoners while in custody were often lost at the point of release. Stakeholders therefore raised the need to achieve transition between custodial and community corrections, linking with communities to provide ongoing support to offenders.

The scope for clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the criminal justice system.

The scope for the clearer responsibilities within and between Government jurisdictions to achieve better co-ordinated and targeted service provision for Aboriginal and Torres Strait Islander juveniles and young adults in the justice system are:

- Improved data should be made publically available about youth offending for researchers, policymakers and practitioners. Data is useful as it is used as evidence in funding applications for proposals to address youth offending. The type of data that should be available should:
 - Capture whether a person is of Aboriginal or Torres Strait Islander descent.
 - Track the progression of offenders from juvenile to adult criminal courts whilst at the same time ensuring privacy of the individual.
 - Address lack of cross-sector, or cross-jurisdictional databases. This overlooks the simple fact that the one sector of the Courts has inappropriate data collection. VALS is often approached by Government Departments for data and the reason given is that the Courts do not record the relevant information about Aboriginal and Torres Strait Islanders. VALS' funding is limited and we do not have the capacity to record information that the Government should be recording. Data requests are a drain on VALS' resources.

- Agreements or aspirations that are produced in some jurisdictions, such as the Justice Statement or Victorian Aboriginal Justice Agreement in Victoria, should be introduced Australia-wide.
- Improved communication between Government jurisdictions.
- National strategies about Aboriginal and Torres Strait Islander peoples and the criminal justice system should be more than aspirational.
- Rectify the situation of some State Governments not providing financial assistance to Aboriginal and Torres Strait Islander Legal Services.

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

Not only should preventative programs (both current and potential) be aligned against common goals to improve the health and wellbeing of Aboriginal and Torres Strait Islander young people, but governments *themselves* should also be aligned across common goals that embody:

- human rights;
- an understanding of the importance of the local level;
- cultural awareness;
- a 'smart on crime' rational;
- a post-colonial framework;
- holistic ambitions; and
- an appropriate understanding of "cost";

Human Rights

Punitive measures fail to correspond with various human rights standards. Examples include the Convention on the Elimination of All Forms of Racial Discrimination (CERD) which argues the need to eliminate racism in the administration of justice (Article 5). Article 3 of the *Convention on the Rights of the Child (CRC or UNCRC)* requires the best interests of the child be the primary consideration in all actions taken concerning children. It is easily conceivable that a child's best interest and the CRC are undermined by the very nature of a strict zero tolerance law enforcement policy. Additionally, Article 37 of the CRC stands to discourage the arrest of children and encourage alternatives.

Localised

It must always be remembered that it is the Aboriginal and Torres Strait Islander community that are the experts of their problems and experiences. As a result there must be recognition of the high quality diversion and rehabilitative programs being run in and by local communities with little resourcing.

Theories of crime prevention and intervention that resonate with Aboriginal and Torres Strait Islander communities are those that acknowledge the need for localised actions. In a discussion

of crime prevention, Kidd (1998) goes as far as to say that for Aboriginal and Torres Strait Islanders there is even more of a need to keep crime prevention planning local.¹¹⁶

Also, given Aboriginal and Torres Strait Islanders have a particular relationship with the criminal justice system, it makes sense for those who have first hand knowledge of a problem are involved in its solution. Aboriginal and Torres Strait Islanders stress that each Aboriginal and Torres Strait Islander community is distinct and that what may work for one community, may not necessarily work for the other.

Cultural Appropriateness

When given the opportunity to provide input on criminal offending some Aboriginal and Torres Strait Islander youth identified the following as potential solutions:

- Camps for leadership;
- Coming together with youth to find the activities they like doing.;
- Cultural youth camps;
- Decrease amount of drugs and alcohol in the community;
- Discos;
- Employment;
- Encourage to play sport;
- Equipment to keep kids occupied;
- Fitness days;
- More Indigenous role models - not only famous but those who are local too;
- Offender programs to build skills for workforce;
- Older people setting good example;
- Police visits to schools; and
- Police to encourage youth.¹¹⁷

The benefit of Aboriginal and Torres Strait Islander input in a program is that is more likely to be culturally appropriate and Aboriginal and Torres Strait Islanders can help others gain cultural competency. There is need for cultural appropriateness otherwise an intervention runs the risk of being counterproductive. This sentiment is reflected in the following:

*It is tragic watching combating and competing adult helpers replicate, at a systemic level, many of the same disempowering and dysfunctional patterns of relationship and communication troubled youth experience in their families of origin. How is healing and wellness to be achieved in our young when the adults around them are broken and mean in spirit?*¹¹⁸

The *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People: Final Report* (2009) reflects concern for cultural appropriateness and early intervention.

116 Kidd M (1998) 'Aboriginal Mental Health and Economic Rationalism: The Great Misunderstanding' Faculty of Social Inquiry, University of Western Sydney Hawkesbury. This paper was presented to the Social Justice, Social Judgement Conference, University of Western Sydney.

117 National Indigenous Youth Leadership Group 2(2005) op cit, p 6

118 Mathews F (2003) op cit, p. 46

The inquiry specifically asked questions about protective and resilience factors. It contains positive recommendations such as:

Recommendation 24: the Victorian Government work with Indigenous communities to develop strategies to support Aboriginal and Torres Strait Islander families in Victoria. Such strategies should include cultural heritage and community renewal programs in a variety of settings including school and higher education settings, juvenile justice detention, community and while in State Care.

Align with a ‘Smart on Crime’ rational

Proponents of a ‘smart on crime’ approach acknowledge that punishment is not an end in itself, but an angry and fearful public is not easily convinced of this fact. According to Matthews (2003) ‘[w]hen government takes the time to help adults understand that youth crime can be reduced and community safety improved substantially by rehabilitating young offenders, they are more likely to embrace this paradigm.’¹¹⁹ Also, ‘a response from a position of fear is often costly, only have short term impact and are usually ineffective because they fail to address the underlying causes of the problem’. Matthews makes the challenge of taking shame and blame out of the equation in order to ‘open up to the possibility of taking a wider view of the problematic issue at hand.’¹²⁰ The table below highlights the difference between a criminal justice and restorative justice approach and the value of the latter.¹²¹

CRIMINAL JUSTICE APPROACH	RESTORATIVE JUSTICE APPROACH
Crime is a legal or police matter	Crime is a whole school matter
Proceedings are impersonal	Proceedings include all persons involved
Resolutions utilize artificial supports	Resolutions utilize natural supports
Victim is excluded from resolution of matter	Victim is central to resolution of matter
Promotes victim helplessness	Promotes victim empowerment
Reinforces risk in perpetrator	Promotes resilience in perpetrator
Focus is on individual perpetrator	Focus is on context of behaviour
Ends are toward blaming, shaming, labeling	Ends are toward problem-solving
Adversarial nature of fault finding encourages denial and minimization	Encourages taking responsibility for actions and restoring harmony to relationships
Punishment focus	Supportive, rehabilitative focus
Is about revenge, banishment	Is about community building, inclusion
Marginalizes perpetrator in school and community environment	Enables capacity of perpetrator to contribute positively to the school environment
Relies on uniform, cookie-cutter responses	Uses localized and creative responses
Feeds fear	Creates hope

The notion that anything less than a punitive approach is a soft option is undermined by a 2005 survey of victims of non-violent crime which found seven out of ten victims want to see more

119 Mathews F (2003) op cit, p 44

120 ibid p 10

121 ibid p 23

treatment programmes in the community for offenders suffering from mental health problems, and for drug addicts, to tackle the causes of non-violent crime. Among the key findings were:

- two-thirds (62%) of victims think that going to prison does not prevent re-offending. more than half (54%) were in favour of making offenders work in the community - in schools, old people's homes or parks - to stop them returning to crime
- 51% of victims were also in support of making offenders meet their victims to make amends personally.¹²²

The 'smart on crime' rationale has been extensively discussed in this submission. Further to this, VALS 2008 research titled *The effect of 'Tough on Crime' policies on Indigenous Australians: A critique of current practices and an exploration on 'Smart on Crime' alternative*¹²³ makes points consistent with the following:

- The privileging of a 'smart on crime' approach over a 'tough on crime' approach does not mean that crime is being excused. Unfortunately, the entrenched nature of the 'tough on crime' approach in populist thought results in people who advocate for alternatives to this approach to be seen to be bleeding hearts or soft on crime.
- Mental health is a public health issue, not a criminal justice issue.
- The dominant discourse of the coloniser subjugates the voice of the marginalised Aboriginal and Torres Strait Islander community. The dominant discourse privileges a law and order approach and ignores the value that Aboriginal and Torres Strait Islanders can add to a discussion about strategies to address crime.
- Aboriginal and Torres Strait Islander peoples are experts on the issues that affect their communities.
- Various forms of marginalisation, not criminality, are the drivers to contact with the criminal justice system, but this goes unacknowledged by a justice system which often only serves to exacerbate marginalisation, and may increase reoffending (Smart Justice 2009).

Adopt a post-colonial framework

It is smart to have a post-colonial framework when analysing the over-representation of Aboriginal and Torres Strait Islanders in the criminal justice system and attempting to find solutions. A post-colonial theory confronts a colonizer's reading of history.¹²⁴ Neo-colonialism is 'a re-inscription of colonization practices in contemporary society'¹²⁵. Boersig (2005) argues

122 Drugscope (2005) 'Victims say stopping re-offending is more important than prison' *Drugscope* 16th January, as at www.drugscope.org.uk/news_item.asp?a=1&intID=1281

123 This research is yet to be published.

124 Boersig J (2005) 'Indigenous Youth and the Criminal Justice System in Australia' In E. Elizabeth and M. Robert Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation*. Cullompton, UK: Willan Publishing, p 2

125 Boersig (2005) op cit, p. 3.

that 'a post-colonialist paradigm is crucial to both understanding contemporary society and plotting change to neo-colonial structures and systems'.

A post-colonial reading of the over-representation of Aboriginal and Torres Strait Islanders sees that the State as failing to 'address the fundamental socially-based flaws that arise from marginalization and exclusion from power'.¹²⁶ As a result the Court becomes the inter-racial site of conflict and rationalisation and an example of this is the result of legislation regulating public drunkenness. Whilst the legislation is not directly discriminatory, in practice the laws have more of an impact on Aboriginal and Torres Strait Islanders than non-Aboriginal and Torres Strait Islanders.

In the RCIADIC of 1991 drunkenness cases made up 57% of the Aboriginal custodies compared with 27% of non-Aboriginal custodies.¹²⁷ Words that are used to describe this occurrence: indirect discrimination or structural/institutional or systemic discrimination.

According to a VALS placement student studying alternative dispute resolution 'by locking out Aboriginal and Torres Strait Islander involvement from the development of policies and laws, and the subsequent locking up of Aboriginal and Torres Strait Islanders in our prisons, our traditional Westminster legal system has played and continues to play a great role in locking in repressive outcomes'.¹²⁸ Aboriginal and Torres Strait Islander inclusive alternatives to this system are therefore needed if we are to move towards achieving equitable results (Behrendt 1995). Aboriginal and Torres Strait Islanders should have input in such alternatives as Aboriginal and Torres Strait Islander's drive to self-determination is capable of effecting the change needed to neo-colonial structures.¹²⁹

It is the experience of VALS in a post-colonial context that explaining the Aboriginal and Torres Strait Islander perspective in order to prompt change is hindered by barriers. According to Matthews (2003) restrictive criminological theoretical views 'add barriers to the creation of comprehensive crime prevention strategies'.¹³⁰

VALS is concerned that theoretical understanding of criminal and antisocial behaviour that inform policy development and practice privilege subjective perceptions of youth as anti-social and criminalise Aboriginality. VALS argues that theories that lead to punitiveness as an end in itself are counterproductive.

Additional barriers to achieving the changed outlined above are: cultural difference, fear, urgency, individualism, and the need to being seen to be doing something. It is a tactic of VALS to attempt to overcome these barriers by explaining things in a way that non-Aboriginal and Torres Strait Islanders are most likely to understand and this involves identifying common

126 Boersig J (2005) op cit, p 9

127 Johnston, Commissioner Elliott QC (1991) Royal Commission into Aboriginal Deaths in Custody National Report Volume 2, para 21.1.2

128 Unpublished paper (will be made available shortly).

129 Boersig (2005) op cit, p. 3

130 Mathews Dr Fred (2003) 'Toward a transformational paradigm to Prevent youth involvement in crime' Central Toronto Youth Services Toronto, Ontario, Canada Conference Paper Prepared for: Beyond the Rhetoric in Early Prevention: Bridging the Gap Between Education, Health and Crime Prevention March 26-28, 2003 Adelaide, Australia p10

ground in theories that tend to be of the less restrictive type (i.e. therapeutic jurisprudence and restorative justice).

This means using non- Aboriginal and Torres Strait Islander concepts that contain similarities with Aboriginal and Torres Strait Islanders concepts and then highlighting specifics of these concepts that relate Aboriginal and Torres Strait Islanders.

Holistic

Theories of crime prevention and intervention that resonate with Aboriginal and Torres Strait Islanders are holistic approaches that do not just focus on punishment, but also addressing the underlying issues for offending (i.e. risk factors addressed). An example is therapeutic jurisprudence which contains a transformational paradigm.

The barriers to achieving a holistic response are multiple: subjugated knowledge that privileges a tough on crime sentiment as opposed to a smart on crime sentiment, emphasis on individual over the collective, operating in silos and limited resources for a comprehensive approach.

Whilst Aboriginal and Torres Strait Islanders have an Aboriginal Justice Agreement (phases 1 and 2 in 2000 and 2006 respectively) technicalities in funding make it difficult to seek dollars allocated by the Government for justice issues to address underlying issues, such as health. The value of a holistic approach or not just concentrating on the justice system is apparent in finding of the Institute of Health and Welfare and the Australasian Juvenile Justice Report.¹³¹

According to the 'Bringing Them Home Report' Aboriginal and Torres Strait Islander health is a holistic practice and can not be divorced from culture. It takes in many issues not usually associated with mental health and Aboriginal and Torres Strait Islanders must be part of primary (preventative) health care run by Aboriginal and Torres Strait Islanders (1997:396 rec 33 a, b, c).¹³² Mental health is a good example to demonstrate the notion of what 'holistic' means in the eyes of the Aboriginal and Torres Strait Islander community. The phrase 'Aboriginal prisoner health' is used here to mean much more than simply a biomedical model of health: it also includes the social, emotional and spiritual wellbeing.¹³³

According to McDermott (2007), cultural safety or security is affected by the relative *presence* or relative *absence* of Indigenous culture in the life of the nation.¹³⁴ Economic rationalism, by seeking efficiency and uniformity at the expense of cultural sensitivity has impacted on Aboriginal and Torres Strait Islander well being.¹³⁵ Economic rationalisation and mainstreaming promotes "efficiency and market force" as ends in themselves, whereas Aboriginal

131 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper – sent 23 September 2008

132 Kidd (1998) op cit, p. 51

133 Cooperative Research Centre for Aboriginal Health (2007) 'Discussion Paper Series: No. 6 Research Priorities in Aboriginal Prisoner Health: Recommendations and Outcomes from the CRCAH Aboriginal Prisoner Health Industry Roundtable' p. 1

134 McDermott Denis (2007) 'The Political Is The Clinical: Comfort zones, cultural safety and Indigenous mental health', presentation as VACCHO forum in 2007.

135 Kidd (1998) op cit, p 51

and Torres Strait Islander mental health is based on acknowledgment of Dreamtime, and suicide prevention and the reduction of depression as ends in themselves.¹³⁶

The holistic concept of health is expressed by Foster (2007):

Within the Aboriginal health service, there is a much more holistic view of health, not like the western idea where you have a hospital for babies, a hospital for surgery, a building for mental health, a church for your spirituality, and never those things will meet - in Aboriginal culture, those aspects are tied into one...

...In the mainstream mental health service, there is a fascination with categorising people and putting a label on an illness - but that doesn't exist in Aboriginal culture, and people are able to see Aboriginal health workers for things that are unaccounted for in the mainstream.¹³⁷

Rethink the measurement of “cost”

The cost measured to the Australian community is extremely high (\$35.8 billion in 2008).¹³⁸ VALS argues that this amount of money can be more effectively spent by focusing on prevention and early intervention. Research indicates that significant long term benefits (particularly financial) will accrue from effective developmental and early intervention programs.¹³⁹

CONCLUSION

Some of the main points made in the current submission can be summarised as follows:

- There is no one cause or single factor contributing to juvenile offending.
- Criminal and antisocial behaviour by young people, as with adults, is a complex phenomenon that is attributable to a range of intersecting and overlapping factors.
- Strategies developed to address youth offending and its causes should be grounded in a rights based framework that places the needs of the child as paramount.
- Social capital is the cornerstone of effective crime prevention.
- Correctional research indicates that cultural content is crucial to the success of Aboriginal and Torres Strait Islander correctional programming.

136 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper – sent 23 September 2008

137 Foster (2007) 'A holistic approach to Aboriginal health' Port Lincoln Times, 25 October 2007, as at www.portlincoln.yourguide.com.au/news/local/general/a-holistic-approach-to-aboriginal-health/1075571.html

138 Drugs and Crime Prevention Committee (2008) 'Inquiry into Strategies to Prevent High Volume Offending by Young People Discussion Paper' 2008, p. 1

139 Ibid 25

- The high level of young Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system as a result of alcohol and other substance abuse is not due to the substance use alone, but is also attributed to by the laws and policing practices that aim to “deal with” these behaviours.
- The combined evidence from the recent research indicates that an emphasis on the social determinants of substance use, rather than on particular substances, is most appropriate in the context of developing approaches that address substance use within communities.
- In 2004, the Australian National Council on Drugs (ANCD) identified elements common to five projects that received top ranking which were seen as contributing to best practice:
 - Clearly defined and effective management structures and procedures;
 - Trained staff and ongoing staff development programs;
 - Good multi-strategy and collaborative approaches;
 - Strong leadership; and
 - Adequate and continuing funding.
- The implications of the measures such as Local Law 8 serve to contradict the ideals of public drunkenness decriminalisation as recommended by the RCIADIC. (That is, the objective of diversion from custody can be contravened at the local level through fine default following the non-payment of a local law infringement notice).
- VALS urges the enquiry to seek expertise from the Victorian Aboriginal Education Association Incorporated (VAEAI)
- Learning as a fundamentally social process and recognition of the social purposes of learning is important in the teaching of Aboriginal and Torres Strait Islander children.
- What not to do
 - Treat public drunkenness a criminal behavior
 - Over-police public space
 - Subscribe to ‘tough of crime’ point of view

What should be done: Best practice alternatives

- Think ‘Smart Justice’
- Diversion programs should:
 - reduce contact of Kooris with the criminal justice system;
 - be accessible to Kooris (i.e. funding for Koori organisations to develop more culturally appropriate options, information about diversion programs should be accessible, appeal to both genders);

- be effective due to cultural appropriateness and this should be monitored (i.e. a monitoring system should be implemented to check effects, success, accessibility of diversion for Kooris);
 - include education of gatekeepers of the program about Aboriginal and Torres Strait Islander peoples (i.e. otherwise potential for bias);
 - not place discretion about eligibility for diversionary options entirely in the hands of Police. Reasons should be provided by Victoria Police as to why a diversionary pathway was not chosen; and
 - not exclude the provision of legal advice or assistance.
- Youth Conferences
 - Koori Court
 - Cautioning
 - Prisoner Support Officer
 - The ROPES program
- An emerging theme is importance of throughcare in the delivery of programs and services. Consultations revealed that there was a feeling that efforts to assist prisoners while in custody were often lost at the point of release. Stakeholders therefore raised the need to achieve transition between custodial and community corrections, linking with communities to provide ongoing support to offenders.
 - Agreements or aspirations that are produced in some jurisdictions, such as the Justice Statement or Victorian Aboriginal Justice Agreement in Victoria, should be introduced Australia-wide.
 - Rectify the situation of some State Governments not providing financial assistance to Aboriginal and Torres Strait Islander Legal Services
 - Not only should preventative programs (both current and potential) be aligned against common goals to improve the health and wellbeing of Aboriginal and Torres Strait Islander young people, but governments *themselves* should also be aligned across common goals that embody:
 - human rights;
 - an understanding of the importance of the local level;
 - cultural awareness;
 - a 'smart on crime' rationale;
 - a post-colonial framework;
 - holistic ambitions; and
 - an appropriate understanding of "cost";

APPENDIX A

The following recommendations are from the following report: A Report by Monsignor David Cappo AO Commissioner for Social Inclusion, 2007 'To Break the Cycle: Prevention and rehabilitation responses to serious repeat offending by young people).

Recommendation 29 (URGENT ACTION STATUS)

That the Government supports the introduction of programs for Aboriginal young people at risk, particularly young males, which use **cultural education and cultural activities to build confidence and pride**, as well as connect Aboriginal young people with education, training and employment pathways. As the first step, a demonstration project in Adelaide should be funded to develop and test approaches for using cultural education and activities in this way.

Recommendation 38

That the Department of Education and Children's Services, in consultation with Aboriginal communities, develop education units on Aboriginal history and culture. Such programs should be implemented across all primary schools and be presented with input from Aboriginal community members. Consideration should be given to including the implementation of such programs in the performance contracts of principals and district directors.

Recommendation 41

That the Government's Cultural Inclusion Framework is used as a basis for ensuring cultural competence of staff within Families SA, Courts Administration Authority, South Australia Police, Department of Education and Children's Services, and Department of Health with reporting against performance targets relating to:

- cultural awareness training which includes a focus on Aboriginal people. That this training include social and historical factors that have led to the disadvantaged position of many Aboriginal people and how such factors impact upon relationships between Aboriginal people and non-Aboriginal, and Aboriginal people and government service agencies,
- community partnerships
- workforce cultural diversity at all levels of the agency, with a focus on the recruitment of Aboriginal persons.

Recommendation 46

That the Government establishes a Chief Executive's Coordinating Committee on youth justice, comprising the Commissioner of Police and the chief executives of the Department for Families and Communities, Department of Education and Children's Services, Attorney-General's Department, Department of Health, Department of the Premier and Cabinet and Department for Correctional Services. The group should meet at a minimum quarterly and report to Cabinet annually through the Attorney- General. The Committee should be responsible for:

- development of an action plan and related timelines for the implementation of the recommendations in this report as adopted by the Government
- overseeing implementation of recommendations
- improvement in the quality and timeliness of the response of the youth justice system to the issues identified in this report.

The following recommendations are available from the following Report: VIYAC 'VIYAC VOICES TELLING IT LIKE IT IS: Young Aboriginal Victorians on Culture, Identity and Racism (2006) page 34.

Recommendation 2

That the State Government consider the potential to further invest in Indigenous young people's cultural expression and learning by creating more opportunities for Indigenous young people to access cultural expression programs in a variety of settings including school and higher education settings, juvenile justice settings, community service settings and cooperatives and while in State Care. Opportunities to participate should be available to all Indigenous young people in Victoria.

Recommendation 4

That the Victorian Government work with the Indigenous community to develop strategies to increase resources and support to Aboriginal and Torres Strait Islander families in Victoria, as the central source of support for young people.

Recommendation 5

YACVic calls on researchers, academics and governments to seek partnerships with Indigenous young people, Elders and their communities to pursue a greater understanding of Indigenous young people's experiences, aspirations and needs within a culturally sensitive and appropriate framework. Such research needs to be conducted with and not on Indigenous young people and their communities.