7

The criminal justice system

7.1 The Committee has heard evidence that there are many ways that Indigenous juveniles and young adults can be diverted from the criminal justice system. Research suggests that diversionary alternatives can be effective both in keeping young Indigenous people out of detention, and as a process that reduces reoffending.[1] However, research shows that young Indigenous offenders are less likely than their non-Indigenous counterparts to receive a police caution and more likely to be referred to court.[2]

7.2 This chapter traces an offender's pathway through the criminal justice system and discusses areas that need to be improved in order to reduce the overrepresentation of Indigenous juveniles and young adults in detention. Topics covered in the first section of this chapter include police relations, over-policing, diversion by police, language barriers and legal representation.

7.3 The second section examines young Indigenous people and the courts, with a discussion of accommodation options for Indigenous youth on bail and the implications of a sentencing culture that has developed in Australian courts. The section discusses court alternatives, including conferencing, Indigenous sentencing courts, and drug and alcohol courts.

7.4 The third section examines Indigenous youth in detention and a range of factors that influence recidivism, including a lack of post-release accommodation and support. The section examines in-custody and post-release education and training, and programs that can assist offenders to transition effectively back into their communities.

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1 G Luke and B Lind, Reducing Juvenile Crime: Conferencing Versus Court, *Crime and Justice Bulletin* no. 69, April 2002.

2 L Snowball, 'Diversion of Indigenous juvenile offenders', *Trends and Issues in Crime and Criminal Justice*, no. 355, June 2008.

The point of first contact

7.5 An effective police presence is critical to securing safe, stable and resilient communities. The relationships and interactions between the police and Indigenous youth are of great significance to this inquiry as the police are generally the first point of contact an Indigenous youth has with the criminal justice system.

7.6 Some Indigenous communities and local police have forged strong positive relationships and work collaboratively to build safe and strong communities. Unfortunately, other examples of Indigenous-police relations are marred by attitudes of distrust, suspicion and fear. This negatively influences the potential outcomes of young Indigenous people's contact with the police. This section discusses the effects of these poor relations, as well as over-policing and access to diversionary schemes. The section includes a discussion of language barriers that negatively impact on Indigenous youths' contact with the justice system and challenges relating to young Indigenous people obtaining adequate legal representation.

Police relations

7.7 Numerous studies point to a history of poor relations between Indigenous people and the police.[3] During the process of colonisation, the police have often played a damaging role in the implementation of government policy, including:

> … enforcing work relations and prohibiting movement, in controlling day-to-day lives of Indigenous people, [and] in the removal of children in some parts of Australia.[4]

7.8 Contemporary relations between Indigenous people and police cannot be viewed in isolation from the past. Several Aboriginal and Torres Strait Islander Legal Services (ATSILS) noted that 'there remains a legacy of

3 Commonwealth of Australia, *Royal Commission into Deaths in Custody*, 1991; M Finnane, *Police and Government: Histories of Policing in Australia*, Oxford University Press, Melbourne, 1994; J Chan, *Changing Police Culture: Policing in a Multicultural Society*, Cambridge University Press, Melbourne, 1997; C Cunneen, 'Policing in Indigenous communities', in M Mitchell and J Casey (eds), Police Leadership and Management, Federation Press, Sydney, 2007.

4 C Cunneen, 'Policing in Indigenous communities', in M Mitchell and J Casey (eds), Police Leadership and Management, Federation Press, Sydney, 2007, p. 233.

profound distrust towards the police, welfare and other government agencies … flowing from past practices'.[5]

7.9 It is not within the scope of this report to explore fully the issue of distrust between Indigenous people, particularly youth, and the police. Numerous studies have addressed this issue in detail.[6]

7.10 The Committee recognises that in recent years significant effort has been made by police in all jurisdictions to address the issue of distrust between Indigenous people and police. However, the Committee remains concerned that police relations with young Indigenous people continue to be compromised in many instances by a lack of cultural awareness. Good will on the part of police is important, but it is not enough. The 1991 *Royal Commission into Aboriginal Deaths in Custody*, and subsequent reports have drawn attention to the need for more adequate cultural training for police working in Indigenous communities.[7]

7.11 A submission to a Victorian inquiry into youth and the criminal justice system maintained that 'comprehensive police training and education in the area of juvenile justice and welfare is absolutely crucial' when dealing with Indigenous and other ethnic minority youth.[8]

7.12 Unfortunately, police recruits receive minimal Indigenous specific cultural awareness instruction in their academy training. Northern Territory police recruits receive only two days of cultural awareness training and 'for most police officers, this is all the cultural awareness training that is received throughout the course of their careers'.[9]

7.13 A survey conducted by Northern Territory Aboriginal Legal Aid Services found that a lack of cultural training and awareness was a common complaint at the new police stations set up under the Northern Territory

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5 Aboriginal Legal Service (NSW/ACT), North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, s*ubmission* 66, p. 5.

6 For example: Report of the *Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, 2002; Report of the *Children of State Care Commission of Inquiry*, 2008; *Cape York Justice Study Report*, 2001; *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, 1999.

7 *Royal Commission into Deaths in Custody*, Commonwealth of Australia, 1991; Queensland Crime and Misconduct Commission, *Restoring Order: Crime prevention, policing and local justice in Queensland's Indigenous Communities 2009,* pp. 183-184.

8 Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People July 2009*, p. 220.

9 Allen Consulting Group, 'Independent Review of Policing in Remote Indigenous Communities in the Northern Territory', 2010, p. 82, <www.allenconsult.com.au/publications/download.php?id=342&type=pdf&file=1> accessed 2 July 2010.

Emergency Response (NTER) intervention.[10] This is not surprising given that interstate police officers deployed under the NTER received only two or three hours of cultural training prior to their posting.[11] Given the extensive and expert training provided to police officers in other areas, it is essential that sufficient cultural training is included in order that they may appropriately perform the expert job they have been trained to do.

7.14 The Association for Prevention and Harm Reduction Programs called for a national approach to be taken in terms of education and training of police in relation to cultural awareness and safety.[12]

7.15 More positively, the Committee was informed about a mentoring program operating in Victoria with police and Indigenous youth. At a public hearing in Melbourne, the Committee heard about a positive change that was occurring between Indigenous youth and police as a result of mentoring programs:

> A lot of young kids do not have parental support in those circumstances and so might need a mentor who comes from somewhere else. One interesting change that has taken place, certainly in Victoria, is that there is, I think, a much better relationship with police than there was 10 or 15 years ago. Therefore, police are much more involved in some of these programs, especially in these mentoring programs. I think that is proving to be a helpful thing. It is breaking down some attitudes as well as giving some sort of positive support.[13]

7.16 The Committee heard further evidence regarding efforts being made by the Victorian Indigenous Youth Advisory Council to engage more positively with Victoria Police. A community spirit police award is presented to 'police members who are doing great work with Aboriginal young people'.[14]

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10 See J Pilkington, 'Aboriginal Communities and the Police's Taskforce Themis: Case Studies in Remote Aboriginal Community Policing in the Northern Territory', October 2009, <www.naaja.org.au/documents/Themis%20Report.pdf> accessed 2 July 2010.

11 Allen Consulting Group, 'Independent Review of Policing in Remote Indigenous Communities in the Northern Territory', 2010, p. 82, <www.allenconsult.com.au/publications/download.php?id=342&type=pdf&file=1> accessed 2 July 2010.

12 Elizabeth Sutton, Association for Prevention and Harm Reduction Programs, *Committee Hansard,* Melbourne, 3 March 2010, p. 46.

13 Geoffrey Eames, *Committee Hansard*, Melbourne, 3 March 2010, p. 9.

14 Tim Kanoa, Victorian Indigenous Youth Advisory Council, *Committee Hansard,* Melbourne, 3 March 2010, p. 24.

7.17 Other positive stories include Redfern, where the number of Aboriginal youth committing robberies reduced by 80 percent in one year. The New South Wales Police Local Area Commander in Redfern put this success down to the interaction he had with the Aboriginal leaders on a daily basis and the forums and programs they had been running in unison.[15]

7.18 Good connections with local Indigenous communities are vital. In addition, the recruitment of Indigenous police, as sworn officers or liaison officers, can vastly improve relations between law enforcement and Indigenous Australians. Indigenous police can diminish the mistrust and build positive relationships between police and communities by legitimising law enforcement, acting as good role models for young Indigenous people, and interpreting cultural issues to police and legal processes to offenders.[16]

7.19 The National Indigenous Law and Justice Framework Good Practice Appendix identified several Indigenous Liaison Officer programs as 'good' or 'promising', including:

- Police Liaison Officers in the Queensland Police Service, who are mostly of Indigenous background, promote trust and understanding between their respective culturally-specific communities and the police
- A network of Aboriginal Liaison Officers that exists in all police districts in Tasmania
- Victoria Police's Cultural Respect Training Officer who is responsible for developing training courses in consultation with the Koori community, Aboriginal Community Liaison Officers and the Aboriginal Community Justice Panels, and Police Aboriginal Liaison Officers who promote trust and understanding
- Aboriginal Community Liaison Officers who provide cultural support to New South Wales police, and
- South Australia Police trial of Police Aboriginal Liaison Officers in the Anangu, Pitjantjatjara and Yankunytjatjara (APY) Lands.[17]

7.20 The New South Wales Department of Education and Training noted two programs established by New South Wales TAFE and New South Wales

15 Superintendent Freudenstein, New South Wales Police, *Committee Hansard,* Sydney, 28 January 2011, p. 6.

16 Queensland Crime and Misconduct Commission, *Restoring Order: Crime prevention, policing and local justice in Queensland's Indigenous Communities 2009,* p. 143.

17 Standing Committee of Attorneys-General Working Group on Justice, *National Indigenous Law and Justice Framework: Good Practice Appendix*, 2010.

Police that support Indigenous students on a career path into the police force.[18]

7.21 The Committee notes, however, that increasing Indigenous employment in law enforcement does not negate the need for comprehensive cultural training among non-Indigenous police.

Over-policing

7.22 The Committee is concerned about evidence suggesting that over-policing of Indigenous communities continues to be an issue affecting not only relations between Indigenous people and the police, but also the rate at which Indigenous people come into contact with the criminal justice system.

7.23 Over-policing, through increasing police numbers or patrols and surveillance, results in higher contact between the police and community members, which potentially leads to greater opportunities for cautions or arrests. Some of these arrests can be made for very trivial matters.

7.24 Chris Charles of the Australian Legal Rights Movement (ALRM) told the Committee:

> I spoke to my colleague who services the youth court this morning. His estimation is that per week two or three, and up to four, Aboriginal cases before the youth court in Adelaide are deliberately sent back by the judges because the subject matter of the charge is not worthy of the attention of the court.[19]

7.25 There have been several high-profile instances in the Australian media referring to excessive utilisation of police power in relation to minor offences committed by Indigenous juveniles.

7.26 One such case identified by the ALSWA was of a 12 year old Aboriginal boy who was charged with receiving stolen goods after he was given a chocolate bar that was allegedly stolen by his friend. After missing his first court appearance due to a misunderstanding about court dates, the boy was taken into custody by police and detained for several hours.[20] Western

18 New South Wales Department of Education and Training, s*ubmission 43*, p. 23.

19 Chris Charles, Australian Legal Rights Movement (ALRM), *Committee Hansard*, Adelaide, 20 May 2010, p. 32.

20 ALSWA, s*ubmission 19*, p. 3.

Australian Police initially defended their actions before the charges were withdrawn.[21]

7.27 ALSWA identified over-policing practices as one of the main factors contributing to the high level of contact Indigenous people had with the criminal justice system. Its submission provided details of other cases to support their claim, including:

- a 15 year old boy charged with attempting to steal an ice cream and ultimately spending 10 days in custody before having his matter dealt with in the Perth Children's Court
- a 16 year old boy charged with criminal damage after he unsuccessfully attempted to commit suicide by throwing himself in front of a moving vehicle, and
- an 11 year old girl, with no prior contact with the justice system, charged with threats to harm following an incident at her primary school where she allegedly threatened her teachers whilst holding plastic scissors. The girl was arrested by police at her school, sprayed with capsicum spray, hosed down with cold water in the yard of her school after the capsicum spray was administered and then transported in police custody, without notifying her family, to a Perth police station.[22]

7.28 ALRM in South Australia told the Committee that 'the majority of the participation of Aboriginal people in the justice system is a result of targeting'.[23] The ALRM gave the examples of an Aboriginal youth who was arrested for the theft of a lemon from a tree overhanging a fence,[24] and an Aboriginal youth was arrested for breach of curfew when the teenager was unaware that the end of daylight savings had brought the time forward by an hour.[25]

21 T Clarke, 'Freddo Frog Meltdown: Police Chief Wants Charge Withdrawn against Boy, 12', *Sydney Morning Herald*, 17 November 2009.

22 ALSWA, *submission 19*, p. 8.

23 Neil Gillespie, Aboriginal Legal Rights Movement, *Committee Hansard*, Adelaide, 20 May 2010, p. 33.

24 Neil Gillespie, *Committee Hansard*, Adelaide, 20 May 2010, p. 31.

25 Aboriginal Legal Rights Movement, *submission 98*, p. 5.

Diversion by police

7.29 The nature and consequences of police contact experienced by Indigenous youth directly influence their subsequent involvement with other areas of the criminal justice system, such as remand and the courts.

7.30 In this sense, the police are in a position of 'gate-keepers' to the criminal justice system. The perceived over-policing of Indigenous communities is further exacerbated by the use, or lack thereof, by police of their discretionary power to divert youth from the criminal justice system. In fact, 'these powers initially predetermine who is and who is not likely to proceed through the criminal justice system'.[26]

7.31 Current legislation governing diversionary schemes allows police significant discretion in determining whether an individual should be charged and then referred to court or to a conference, or whether they should simply be cautioned.[27]

7.32 Commenting on the use of diversionary options by New South Wales Police, the Public Interest Advocacy Centre submission noted a 'significant discrepancy in the use of diversionary options amongst individual police and command areas … [and] regular misuses of police discretion that disadvantage Indigenous juveniles'.[28]

7.33 This view was echoed by a number of Aboriginal and Torres Strait Islander Legal Services (ATSILS). The combined ATSILS submission noted that 'the entire issue of front-end entry to the criminal justice system as the result of decisions made by police at the point of first contact with Indigenous youth is a deep systemic problem'.[29] The Victorian Aboriginal Legal Service submission stated a 'need for procedures that overcome police bias in the use of diversion options for Aboriginal and Torres Strait Islanders'.[30] The Central Australian Aboriginal Legal Aid Service (CAALAS) submitted that 'despite this commendable intention [of the *Youth Justice Act* (Northern Territory) which encourages diversion by police], our experience is that many young people are not being diverted,

26 R Tanimu, *Does the Promotion of Sport for Aboriginal Youth Help Reduce the Risk of Offending Behaviour?,* Unpublished Honours Thesis, Flinders University, 2010, p. 43.

27 L Snowball, 'Diversion of Indigenous juvenile offenders', *Trends and Issues in Crime and Criminal Justice*, No. 355, June 2008, p. 5.

28 Public Interest Advocacy Centre, s*ubmission 23*, p. 5.

29 Aboriginal Legal Service (NSW/ACT), North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, *submission 66,* p. 18.

30 Victorian Aboriginal Legal Service (VALS), *submission 40,* p. 37.

as the investigating officer does not consider them an appropriate candidate'.[31]

7.34 An Australian Institute of Criminology (AIC) study of youth diversion in Western Australia, New South Wales and South Australia found that Indigenous juveniles were 'significantly more likely' to be referred to court than non-Indigenous youth, who are more likely to receive just a caution.[32] In Queensland, the rate of arrest for Indigenous juveniles who come into contact with the police is twice that of non-Indigenous juveniles; the latter are more likely to receive a caution or be diverted than Indigenous juveniles.[33]

Committee comment

7.35 The Committee acknowledges that there are many stories of inspirational police officers working with Indigenous communities and elders to develop positive relationships between communities and the police force. However, when this is not the case, the outcomes for Indigenous youth can be extremely serious, and can lead to negative consequences for whole communities.

7.36 The Committee understands the particular difficulties in attracting police to rural or remote communities and recognises that positive relationships require sustained effort and investment. The Police Federation of Australia acknowledged that more could be done to improve relations between Indigenous communities and police and the need for 'dedicated police services in each community [to] allow for trusting relationships to be formed'.[34]

7.37 Unfortunately the police are not successful always in this respect. For example, the Queensland Police Service rotates junior officers into Indigenous communities for six months at a time, without any community induction, which is insufficient to develop significant rapport with, or

31 Central Australian Aboriginal Legal Aid Service (CAALAS), *submission 26*, p. 10.

32 L Snowball, *Diversion of Indigenous Juvenile Offenders*, Australian Institute of Criminology, Canberra, 2008, p. 3.

33 Law Council of Australia (LCA), *submission 46*, p. 4.

34 Police Federation of Australia, *submission 14*, p. 5.

knowledge of, the community.[35] The police taskforce set up under the NTER also has a high turnover of personnel.[36]

7.38 The Committee considers Indigenous cultural awareness training to be integral to effective policing in communities with high Indigenous populations and is not assured by the minimalist nature of cultural training that is currently provided to police who are expected to work closely in and with Indigenous communities. The Committee considers that this current situation is potentially detrimental to the community and to the police officers who should never be placed in situations for which they have not had appropriate training.

7.39 The Committee agrees that police personnel in Indigenous communities should be stationed for long-term periods in order for trust and positive relations to develop with community members. In addition, police careers, as sworn police officers or Indigenous Liaison Officers, should be encouraged further among Indigenous people, particularly youth. Recruitment of Indigenous police officers was discussed in the previous chapter.

7.40 While the Committee does not suggest that over-policing of Indigenous communities is common practice, the Committee believes that every effort should be made to eradicate over-policing where it exists in Indigenous communities. The Committee notes the damaging effects of media reports of over-policing on police-community relations everywhere.

7.41 The Committee further supports the National Indigenous Law and Justice Framework objective to 'eliminate discriminatory attitudes, practices and impacts where they exist within police … agencies'.[37]

7.42 The Committee recognises that there may be some underlying factors behind the statistical discrepancy in the utilisation of diversion between Indigenous and non-Indigenous youth, such as the greater chance of an Indigenous offender having a longer history of offending or a higher probability of violent offences. However, the Committee is convinced that more work is needed to ensure that Indigenous youth are dealt with by the criminal justice system only as a last resort.

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35 Queensland Crime and Misconduct Commission, *Restoring Order: Crime prevention, policing and local justice in Queensland's Indigenous Communities 2009,* p. 183.

36 J Pilkington, 'Aboriginal Communities and the Police's Taskforce Themis: Case Studies in Remote Aboriginal Community Policing in the Northern Territory', October 2009, p. 188, <www.naaja.org.au/documents/Themis%20Report.pdf> accessed 2 July 2010.

37 Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009-2015*, p. 13.

7.43 The Committee is of the view that more extensive training is required for police personnel regarding young Indigenous people in terms of risk factors for offending behaviour and the impact that an early entry into the criminal justice system can have on an Indigenous person's criminal trajectory. The Committee considers that better training on the available forms of diversion and on best methods for caution or referral, rather than arrest, are essential.

Recommendation 23 – Police training and Indigenous employment

7.44 **The Committee recommends that the Commonwealth Government work with the Ministerial Council for the Administration of Justice to address the following priorities at its next meeting:**

- **The development of a national framework for the provision of comprehensive Indigenous cultural awareness training for all police employees that:**
  - ⇒ **Promotes better understanding and relations between police and Indigenous communities**
  - ⇒ **Addresses the specific circumstances of Indigenous youth over-representation in police contact, and**
  - ⇒ **Outlines the diversionary options that are available, and the positive impact that diversion can have.**
- **An expanded national network of Indigenous Liaison Officers, with facilities to share information and knowledge across jurisdictions, and**
- **Incentives to increase the employment of Indigenous police men and women and opportunities for mentoring and police work experience for Indigenous students.**

Language barriers

7.45 According to the Australian Bureau of Statistics (ABS) 2006 census, more than 50 000 Indigenous people speak an Indigenous language, almost 10 000 of whom indicated they speak English 'not well' or 'not at all'.[38] Indigenous people in the Northern Territory and Western Australia are less likely to speak English as a first language than their national cohort. In the Northern Territory, where there are many remote communities, as

38 Australian Bureau of Statistics (ABS), *Census of Population and Housing 2006*, cat. no. 2068.0.

many as 60 percent of Indigenous people do not have proficient English language skills.[39]

7.46 Although many Indigenous people with limited English language skills can get by in everyday social situations, the misunderstandings and confusion that can occur in communicating with police or justice officials has the potential for serious consequences.

7.47 Language barriers need to be addressed not only in courts, but throughout all areas of the justice system. However, often little attention is paid to the linguistic needs of Indigenous youth (including victims of crime) in dealings with the police, legal services, or correctional and rehabilitation staff. A 2002 study revealed that Aboriginal and Torres Strait Islander Legal Services staff had difficulty communicating with over half of their clients.[40]

7.48 The Committee did not receive firm evidence on the numbers of Indigenous people who come in contact with the police that need interpreting services but anecdotal evidence suggests that this need is not met on a regular basis. In the Northern Territory, police officers generally resort to communicating in a form of Pidgin English rather than seek an interpreter.[41] ALSWA submitted that 'young people are routinely dealt with by police and appear in court without the assistance of an interpreter'.[42]

7.49 It is in the courts, however, where the lack of adequate interpreting services is most visible. The Australian Broadcasting Commission (ABC) reported that South Australian Magistrate Clive Kitchin believed the unreliable availability of casually-employed interpreters in his Port Augusta court was denying Indigenous defendants fair hearings and prolonging their time in detention.[43]

7.50 Accessing interpreters in remote areas is even more difficult. For example, the Northern Territory is home to a high diversity of Indigenous languages, inaccessible geography and a scarcity of qualified

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39 C Heske, 'Interpreting Aboriginal Justice in the Territory', *Alternative Law Journal*, vol. 33, no. 1, March 2008, p. 5.

40 C Cunneen and M Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', *Criminal Law Journal*, vol. 38, no. 1, 2008, pp. 41-42.

41 C Heske, 'Interpreting Aboriginal Justice in the Territory', *Alternative Law Journal*, vol. 33, no. 1, March 2008, p. 6.

42 ALSWA, *submission 19*, p. 14.

43 'Magistrate Calls for Full-time Aboriginal Interpreters', 28 January 2010, ABC News, <www.abc.net.au/news/stories/2010/01/28/2803375.htm> accessed 9 March 2010.

interpreters.[44] In Western Australia, the only specific Indigenous interpreter service is in the Kimberley.[45]

7.51 The Director of the ALSWA, Peter Collins, noted his state 'desperately' requires an Aboriginal interpreter service:

> It is a scandalous state of affairs that an Aboriginal person who does not speak English as their first language will go to every court in Western Australia and not have an interpreter available to them. We have to go to the NT to get interpreters to come to this state to interpret so we can take instructions from our clients. It should not happen in 2010—in a state as affluent as Mr Chair has observed Western Australia is—when people from other countries will have, appropriately so, access to an interpreter at the end of a phone call.[46]

7.52 Another obstacle to fair hearings in the court system is the likelihood of Indigenous interpreters having kinship ties with the defendant.[47] Northern Territory Assistant Commissioner Mark McAdie explained to the Committee:

> You firstly need a person who is fluent in the two languages that are involved in the translation: the Aboriginal language that the person speaks and English. The second quality, which is actually the more problematic one, is that the person must be a disinterested party. Again, some Aboriginal languages are spoken by a relatively small number of people. The primary language that an Aboriginal person might speak might be spoken by only 100 or 200 people. It is pretty hard to find a disinterested player in that circumstance.[48]

7.53 There do not appear to be standards of court protocol governing the use of interpreters for Indigenous defendants. Chantelle Bala, a solicitor with North Australian Aboriginal Justice Agency (NAAJA), related to the Committee that:

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44 C Heske, 'Interpreting Aboriginal Justice in the Territory', *Alternative Law Journal*, vol. 33, no. 1, March 2008, p. 6.

45 Western Australia Police, 'Indigenous Communities', <www.police.wa.gov.au/Ourservices/Indigenouscommunities/tabid/995/Default.aspx> accessed 28 June 2010.

46 Peter Collins, ALSWA, *Committee Hansard*, Perth, 30 March 2010, p. 47.

47 '*Family Ties a Barrier to Indigenous Justice: Interpreter*', 15 April 2010, ABC News, <www.abc.net.au/news/stories/2010/04/15/2873534.htm> accessed 9 March 2010.

48 Mark McAdie, Northern Territory Police, *Committee Hansard*, Darwin, 6 May 2010, p. 7.

> As far as my experience of the Northern Territory courts goes, the responsibility of finding interpreters falls upon me if my client requires that. The court does not seem to take any proactive role in facilitating that, whether we are sitting in Darwin or in, say, a community court in a remote community. It would certainly assist your client's understanding. … [W]e are very much hamstrung, in the sense that it is sometimes difficult to find interpreters and they are not readily accessible. There are often delays because of it.[49]

7.54 The lack of effective interpreter services and protocols for their use is characteristic of other interactions between Indigenous communities and government administrators and service providers. Cath Halbert from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) acknowledged that 'it is not necessarily built into government business that they will always use an interpreter and we are very conscious that that needs to be much more automatic where they are required'.[50]

7.55 There is now Commonwealth Government funding for Indigenous language interpreting and translating services under the Closing the Gap initiative. In addition to providing funding to strengthen these services in the 29 Remote Service Delivery National Partnership priority locations, the Commonwealth has committed to establishing a 'national framework for the effective supply and use of Indigenous language interpreters and translators'.[51]

7.56 FaHCSIA told the Committee that 'states and territories will be the ones delivering the actual interpreter services, but we will be looking at accreditation [and] training'.[52] The National Approach to Indigenous Languages has also identified support for Indigenous languages as one its objectives, although explicit funding programs have not been specified.[53]

Committee comment

7.57 The Committee supports the plans for a national framework for Indigenous language interpreters and translators. However, the

49 Chantelle Bala, North Australian Aboriginal Justice Agency (NAAJA), *Committee Hansard*, Darwin, 6 May 2010, p. 60.

50 Cath Halbert, FaHCSIA, *Committee Hansard*, Canberra, 27 May 2010, p. 18.

51 Department of the Environment, Water, Heritage and the Arts, 'Indigenous Languages - A National Approach' <www.arts.gov.au/indigenous/languages_policy> accessed 21 June 2010.

52 Cath Halbert, FaHCSIA, *Committee Hansard*, Canberra, 27 May 2010, p. 18.

53 Department of the Environment, Water, Heritage and the Arts, 'Indigenous Languages - A National Approach' <www.arts.gov.au/indigenous/languages_policy> accessed 21 June 2010.

Committee does not believe that such a framework is sufficient to uphold the principles of procedural fairness in the criminal justice system.

7.58 The Committee is of the firm view that access to interpreter services for Indigenous people at any stage of the criminal justice system is a fundamental right. Just as a defendant from a non-English speaking background is entitled to interpreter assistance, an Indigenous defendant for whom English is not a first language should have a qualified interpreter present when being questioned or cautioned by police, or subject to court proceedings. The Committee is concerned by the evidence it received indicating that in many cases qualified interpreters are not available to Indigenous youth who come into contact with the criminal justice system.

7.59 The Committee concludes that a national Indigenous interpreter service is of great importance, not only in terms of cultural identity and linguistic diversity, but especially so within a criminal justice system that deals with such a high proportion of Indigenous people. An effective interpreter service would ensure Indigenous people have sufficient access to justice and that justice systems are able to fulfil the principles of procedural fairness.

7.60 The Committee further concludes that all criminal justice system guidelines, including police protocols, should include formal recognition of the need to ensure timely access to interpreters when required in order for current practices to change.

Recommendation 24 – Court interpreter service and hearing assistance

7.61 **The Committee recommends that the Attorney-General present to the Standing Committee of Attorneys-General a revision of criminal justice guidelines to include formal recognition of the requirement to ascertain the need for an interpreter service or hearing assistance when dealing with Indigenous Australians.**

Recommendation 25 – National interpreter service

7.62 **The Committee recommends that the Commonwealth Attorney-General's Department, in partnership with state and territory governments, establish and fund a national Indigenous interpreter service that includes a dedicated criminal justice resource and is suitably resourced to service remote areas.**

The Committee recommends that initial services are introduced in targeted areas of need by 2012 with full services nationwide by 2015.

Legal representation

7.63 Indigenous specific legal services play a critical role in the experience of Indigenous Australians in the criminal justice system. ATSILS provide culturally appropriate services and advice to victims, offenders and their families.

7.64 The Law Council of Australia acknowledged that 'there needs to be an improvement in the understanding of the importance and value of ATSILS to Indigenous Australians'.[54]

7.65 A joint submission from three ATSILS (Aboriginal Legal Service (NSW/ACT), NAAJA and Queensland Aboriginal and Torres Strait Islander Legal Service) noted that 'we are part of the communities that we serve. We not only have deep local knowledge of needs, we act as a trusted broker to link up our people with the services and facilities of government and non-government agencies'.[55]

7.66 An ATSILS solicitor explained to the Committee that:

> When you are presented with a youth in detention, very often you are the only resource available to that youth when they have hit that stage where they are at the court, and it is then up to the NAAJA lawyer to take on the role of social worker, to liaise with schools, to see that they are in the good care of the department, to liaise with [Family and Community Services] and to try to implement all these strategies into a young child's life.[56]

54 Law Council of Australia (LCA), *submission 46*, p. 10.

55 Aboriginal Legal Service (NSW/ACT), North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, *submission* 66, p. 30.

56 Chantelle Bala, NAAJA, *Committee Hansard*, Darwin, 6 May 2010, p. 60.

7.67 Victoria Legal Aid (VLA) recognises the importance of Indigenous run legal services for Indigenous Australians:

> In VLA's view, the complexity of legal need experienced by indigenous young people and young adults requires a wrap around, integrated service for the person that considers all their civil, family and criminal law needs alongside preventative community based models - pre and post incarceration that actively involves indigenous people in all aspects of their design and delivery.[57]

7.68 Furthermore, ATSILS have been found to be more effective than mainstream legal services, which are often avoided by Indigenous people.[58] VLA noted and supported:

> …the consistent findings that indigenous people experience a greater and more successful engagement with indigenous specific services provided by indigenous people. And conversely, the lack of indigenous specific programs has been consistently identified as a major barrier to indigenous participation and successful reintegration from prison.[59]

7.69 The Commonwealth Government, through the Attorney-General's Department, administers the Legal Aid for Indigenous Australians program which aims to promote culturally-sensitive legal services that enable Indigenous Australians to access their full legal rights.[60] This program funds eight Indigenous-controlled legal aid organisations across Australia:[61]

- New South Wales (including the Australian Capital Territory and Jervis Bay Territory) – Aboriginal Legal Service (NSW/ACT) Limited
- Victoria – Victorian Aboriginal Legal Service Co-operative Limited
- Queensland North and South Zone – Aboriginal and Torres Strait Islander Legal Services (Qld) Limited
- Western Australia – Aboriginal Legal Service of Western Australia Incorporated

57 Victorian Legal Aid, *submission 39*, p. 3.

58 LCA, *Legal Aid and Access to Justice Funding: 2009-2010 Federal Budget,* p. 6.

59 Victorian Legal Aid, *submission 39*, p. 3.

60 Attorney-General's Department, *Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians July 2008*, p. 1.

61 Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 27 May 2010, p. 13.

- South Australia – Aboriginal Legal Rights Movement Incorporated
- Tasmania –Tasmanian Aboriginal Centre Incorporated
- Northern Territory North Zone – North Australian Aboriginal Justice Agency Limited, and
- Northern Territory South Zone – Central Australian Aboriginal Legal Aid Service Incorporated.

7.70 It has been argued that mainstream Legal Aid Commissions are underfunded.[62] However, Aboriginal legal aid services are even less resourced and more over-stretched. Funding for ATSILS has remained constant – becoming reduced in real terms – for more than ten years while funding for mainstream legal services has more than doubled during the same period.[63] Between 2005 and 2010, funding for legal aid programs increased by around 50 percent, whereas funding for legal aid for Indigenous Australians programs increased by less than 10 percent.[64] At the same time, the number of court cases involving Indigenous people has grown.[65]

7.71 As a consequence, access by Indigenous Australians to ATSILS is diminished. Neil Gillespie from ALRM told the Committee that:

> One consequence of the underfunding is that, historically, ALRM has never had sufficient resources to provide adequate representation in the youth court jurisdiction. In fact, historically, ALRM has only ever had one dedicated Adelaide Youth Court solicitor, whereas mainstream legal aid have had three—and yet we generally cover about 60 per cent of those appearing in the courts.[66]

7.72 Moreover, static funding levels have led to some ATSILS no longer being able to provide some services to their clients. For example, Aboriginal Legal Service (NSW/ACT) recently closed both its civil and family law services due to the lack of increase in Commonwealth funding.[67]

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62 ACT Council of Social Services (ACTCOSS), *submission 34*, page 19; Law Council of Australia, *submission 46*, p. 10.

63 Australian Legal Rights Movement, *submission 98*, p. 16; Victoria Legal Aid, *submission 39*, p. 3; Law Council of Australia, *Legal Aid and Access to Justice Funding: 2009-2010 Federal Budget,* p. 6.

64 Senate Legal and Constitutional Affairs Committee, *Access to Justice*, 2009, p. 145.

65 Australian Human Rights Commission, *submission 30*, p. 7.

66 Neil Gillespie, Australian Legal Rights Movement, *Committee Hansard*, Adelaide, 20 May 2010, p. 30.

67 Australian Human Rights Commission, *submission 30*, p. 7; Aboriginal Legal Service (NSW/ACT), <www.alsnswact.org.au/> accessed 29 June 2010.

7.73 In addition to lower funding levels compared to mainstream legal aid commissions, ATSILS practitioners have higher workloads than their mainstream counterparts.[68]

7.74 To compound the problems of underfunding for ATSILS, providing legal aid to Indigenous Australians is, on average, more costly than for non-Indigenous Australians, particularly in Queensland, Northern Territory and Western Australia where there are significant Indigenous populations in remote or regional areas.[69]

7.75 This chronic underfunding has serious ramifications for the effectiveness of ATSILS. The capacity of ATSILS to provide quality services is hindered by the lack of resources to recruit and retain staff. A joint submission from several ATSILS noted that 'we cannot match the salaries and conditions of government agencies. Our ability to respond adequately to the high level of demand is constantly stretched'.[70] The Law Council of Australia identified the gap between ATSILS salaries and Legal Aid Commission salaries as 'perhaps the single most important issue' for attracting and retaining legal practitioners.[71]

7.76 ALRM argued that there has been 'an exodus of experienced lawyers from Aboriginal legal aid due to static remuneration'.[72] The resulting situation of widespread 'practitioner inexperience has been a cause for concern among clients and magistrates alike'.[73]

Committee comment

7.77 The Committee finds the lack of adequately staffed legal aid resources available to Indigenous people involved in the criminal justice system situation a cause for concern. The new National Partnership Agreement on Legal Assistance Services may improve the funding conditions for legal

68 C Cunneen and M Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', *Criminal Law Journal*, vol. 38, no. 1, 2008, p. 50.

69 C Cunneen and M Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', *Criminal Law Journal*, vol. 38, no. 1, 2008, p. 48; Peter Arnaudo, AGD, *Committee Hansard*, Canberra, 27 May 2010, p. 17; Aboriginal Legal Service (NSW/ACT), North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, *submission* 66, p. 32.

70 Aboriginal Legal Service (NSW/ACT), North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, *submission* 66, p. 32.

71 Law Council of Australia, *Legal Aid and Access to Justice Funding: 2009-2010 Federal Budget,* p. 6.

72 Australian Legal Rights Movement, *submission 98*, p. 16.

73 C Cunneen and M Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', *Criminal Law Journal*, vol. 38, no. 1, 2008, p. 49.

services, especially in the area of early intervention.[74] However, the Committee supports the view of many ATSILS that Indigenous specific legal services are essential for the provision of equitable legal access to Indigenous people.

7.78 The Committee is of the opinion that Indigenous Australians have the right to enjoy the same legal representation as non-Indigenous Australians and that the Commonwealth Government must demonstrate its commitment to this principle through the provision of adequate and equitable funding for legal aid services, including those dedicated to Indigenous Australians.

7.79 The Committee supports the Law Council of Australia's recommendation that ATSILS funding be increased at least to that of Legal Aid Commission funding.[75] The Committee further reiterates the Senate Legal and Constitutional Affairs Committee's recommendation for the 2009 *Access to Justice* report that funding for Indigenous legal services be increased to a sufficient level that 'meets the needs of Indigenous peoples, including appropriate loadings for extra service delivery'.[76]

Recommendation 26 – Legal services funding

7.80 **The Committee recommends that the Commonwealth Government increase funding for Aboriginal and Torres Strait Islander Legal Services to achieve parity per case load with Legal Aid Commission funding in the 2012-13 Federal Budget, with appropriate loadings to cover additional costs in service delivery to regional and remote areas.**

Indigenous youth and the courts

7.81 The combination of the higher rate of contact with the police and the lower rate of diversion experienced by Indigenous youth translates to a higher rate of contact with the judicial system. This, in turn, contributes to the

74 Attorney-General for Australia, '*National Partnership Agreement on Legal Assistance Services*', 2 July 2010, <www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_2July2010-*NationalPartnershipAgreementonLegalAssistanceServices*> accessed 5 August 2010.

75 Law Council of Australia, *submission 46,* p. 11.

76 Senate Legal and Constitutional Affairs Committee, *Access to Justice*, 2009, p. 147.

higher rate of detention and imprisonment of Indigenous youth compared to non-Indigenous youth.

7.82 This section will outline evidence about sentencing trends for Indigenous youth, as well as the criminal legislation that disadvantages young Indigenous people. National patterns for juveniles are difficult to identify because not all children's courts record information on the Indigenous status of defendants.[77] This is yet another area where consistent and broader data needs to be collected so that informed policies can be devised. However, the data and research available point to differences in the experiences of Indigenous young people compared to their non-Indigenous counterparts.

Sentencing culture

7.83 Magistrates who gave evidence to the Committee painted similar pictures of the profile of Indigenous youth who appeared before them. Former Northern Territory Chief Magistrate Jenny Blokland stated that:

> …our Courts are very familiar with the profile of Indigenous young people who appear as defendants. If they are repeat offenders from the major regional centres, they have often had involvement or interaction from family services due to neglect or to violence in the home; parental drug and/or alcohol abuse; lack of school attendance or encouragement to attend school; alcohol and drug use themselves; mental illness and homelessness. On the more remote communities … young offenders may well be subject to the same exposures to violence and drugs and alcohol - there may also be kinship and cultural obligations that are relevant.[78]

7.84 Northern Territory Magistrate Sue Oliver told the Committee that 'many of the young people or young adults who appear in the criminal justice system come from backgrounds of dysfunction'[79] and Victorian Magistrate Edwin Batt said that 'one hundred percent of the young people that come before me who are Aboriginal offenders in the juvenile area are not going to school'.[80]

7.85 The Committee noted in previous chapters that in general, juveniles who have adverse contact with the criminal justice system are more likely to

77 K Richards, *Juveniles' Contact with the Criminal Justice System in Australia*, Australian Institute of Criminology, 2009, p. 86.

78 Jenny Blokland, s*ubmission 41*, p. 2.

79 Sue Oliver, *Committee Hansard*, Darwin, 6 May 2010, p. 41.

80 Edwin Batt, *Committee Hansard*, Melbourne, 3 March 2010, p. 14.

have backgrounds of family dysfunction, negative social norms, drug and alcohol problems, poor health and poor education. However, Indigenous youth face additional misrepresentation issues in court proceedings.

7.86 In South Australia, where juveniles are recorded as Aboriginal or non-Aboriginal according to appearance, juveniles of 'Aboriginal appearance' come into contact with courts at an earlier age than their 'non-Aboriginal appearance' counterparts.[81] In Western Australia, Indigenous juveniles who appear before courts are also younger than the overall average.[82]

7.87 According to the Australian Bureau of Statistics and Australian Institute of Health and Welfare:

> Most young people under juvenile justice supervision during 2005–06 were aged 16 years or over (64%). However, 14% of Indigenous young people under supervision were aged 13 years or less, compared with only 6% of non-Indigenous young people. There are also differences in the age at which young people were first placed under juvenile justice supervision. Of those under juvenile justice supervision in 2005–06, Aboriginal and Torres Strait Islander young people were younger, on average, at the time of first ever supervision than non-Indigenous young people. Just over half (56%) of Indigenous young people were aged 14 years or less during their initial supervision, compared with 30% of non-Indigenous young people.[83]

7.88 Western Australian statistics show that the rate of conviction for Indigenous juveniles, especially females, was much higher compared to non-Indigenous juveniles.[84] Furthermore, Indigenous juveniles before Western Australian courts were more likely to receive custodial sentences than their non-Indigenous peers,[85] a trend that the Law Council of Australia corroborated in their submission.[86]

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81 K Richards, *Juveniles' Contact with the Criminal Justice System in Australia*, Australian Institute of Criminology, 2009, p. 87.

82 K Richards, *Juveniles' Contact with the Criminal Justice System in Australia*, Australian Institute of Criminology, 2009, p. 89.

83 ABS/Australian Institute of Health and Welfare (AIHW), *Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, 2008, pp. 230-231.

84 K Richards, *Juveniles' Contact with the Criminal Justice System in Australia*, Australian Institute of Criminology, 2009, p. 90.

85 K Richards, *Juveniles' Contact with the Criminal Justice System in Australia*, Australian Institute of Criminology, 2009, p. 91.

86 Law Council of Australia, *submission 46*, p. 4.

7.89 The types of offences for which Indigenous people appear before courts also differ significantly from non-Indigenous people. A study of Indigenous youth in New South Wales found that their rate of court appearances for public order offences was more than 10 times the rate for non-Indigenous youth.[87] Furthermore, as the New South Wales Ombudsman noted, since 'Aboriginal defendants are more likely to be dealt with by arrest, they are more likely to face a bail determination and the possibility of being unable to meet bail conditions, breaching bail conditions or being refused bail'.[88]

7.90 There is a variety of reasons behind these different patterns, but the fact remains that Indigenous juveniles' contact with courts is more likely to occur at a younger age than average and result in a custodial sentence.

7.91 The current National Indigenous Law and Justice Framework incorporates the principle for 'police training to promote the use of caution with arrest as a sanction of last resort where appropriate'.[89] However Australians for Native Title and Reconciliation (ANTaR) are concerned 'that this basic principle is still not being consistently implemented in many instances across most states and territories'.[90]

7.92 The New South Wales Bar Association urges that 'the time has come for radical action to address this current sentencing reality'.[91] Among a number of recommendations, the association proposes that:

- Statutory provisions be introduced in respect of Aboriginal people (subject to appropriate definition of relevant persons, the character of the offending and relevant subjective matters) which displace the existing requirements to approach sentencing from the perspective of 'punitive' purposes as statutorily defined, unless there are special or 'appropriate' circumstances for so doing, and
- In relation to provisions such as s 5 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (and similar provisions elsewhere in the Commonwealth), which purports to identify 'imprisonment' as an option of 'last resort', there should be express reference to the sentencing of Aboriginal people in this context and express promotion of alternatives to imprisonment which will address both restoration of the offender and

87 C Cunneen, *The Impact of Crime Prevention on Aboriginal Communities*, Australian Institute of Criminology, 2001, p. 37.

88 New South Wales Ombudsman, *submission 56,* p. 10.

89 Standing Committee of Attorneys General, *National Indigenous Law and Justice Framework 2009-2015*, p. 18.

90 Australians for Native Title and Reconciliation (ANTaR), *submission 109*, p. 5.

91 New South Wales Bar Association, *Criminal Justice Reform Submission*, 2010, p. 4.

> restoration of the offenders community where that can be addressed in the sentencing context.[92]

7.93 A number of issues have been brought to the Committee's attention regarding the different types of offences that Indigenous people tend to be charged with, as well as the issues impacting on whether Indigenous people receive custodial sentences or not. These include bail laws and the lack of accommodation for youth on bail, driving offences, and incarceration for fine defaults.

Implications of sentencing culture

7.94 The consequences of the sentencing culture that Indigenous youth experience, coupled with the accruing nature of the offences that are frequently committed, are that Indigenous juveniles are highly likely to appear in court. This, in turn, means that as young adults, they are highly likely to appear subsequently in an adult court. A study of juveniles in Queensland found that:

> … young people whose first offence contact resulted in a court appearance were more likely to have re-contact, and to do so sooner, than those who were cautioned at their first contact. Additional analyses revealed that of young people who had re-contact, those who were cautioned had re-contact less frequently than those whose first contact resulted in a court appearance.[93]

7.95 As Indigenous juveniles are more likely to have contact with a court at a younger age than non-Indigenous juveniles, their risk of appearing in court as an adult is also higher, as it increases inversely with the age of first appearance in a children's court.[94]

7.96 Furthermore, the higher likelihood that an Indigenous youth will receive a custodial sentence means that their rate of recidivism is likely to be higher. And once again, the younger average age at which Indigenous juveniles experience a custodial sentence increases the chance that 'an offender will reoffend and enter a cycle of recidivism'.[95]

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92 New South Wales Bar Association, *Criminal Justice Reform Submission*, 2010, pp. 4-5.

93 S Dennison et al, *Police Cautioning in Queensland: the Impact on Juvenile Offending Pathways*, Trends & Issues no. 306, Institute of Criminology, February 2006, p. 5.

94 S Chen et al, *The Transition from Juvenile to Adult Criminal Careers,* Crime and Justice Bulletin no. 86, NSW Bureau of Crime Statistics and Research, May 2005.

95 Law Council of Australia, *submission 46*, p. 5.

7.97 One part of the solution to the escalating effect of exposure to the criminal justice system is to disrupt and delay contact with the courts, thereby reducing recidivism rates. The question, however, is how this can be done.

7.98 The Committee heard, as a common refrain, that there are not enough sentencing alternatives available to judges even in cases where incarceration is evidently not the best means of achieving justice. This is especially the case in rural and remote areas where a larger proportion of offenders are Indigenous. The Law Council of Australia notes that:

> … there may be limited sentencing options available to the courts, particularly in regional and remote areas, due to the lack of infrastructure or local public administration to carry out or monitor alternative sentences. This may contribute to the number of young Aboriginal people sentenced in a court rather than diverted to other remedial or therapeutic options.[96]

Bail laws

7.99 Despite the stated intentions of every state and territory government to reduce juvenile incarceration rates, particularly among the Indigenous population, young offenders continue to be remanded in custody at high rates. Even more disturbingly, a large proportion of the juveniles on remand have not been and will not be sentenced to custodial penalties, but are in detention due to their inability to meet increasingly strict bail conditions. In Western Australia, 45 percent of Indigenous juveniles in custody were not sentenced.[97] According to a recent paper from New South Wales, the rate of juveniles on remand who will not receive a custodial sentence is 84 percent.[98]

7.100 Table 7.1 provides data on the percentage of young Indigenous people who are on remand in detention during 2007-08 (figures do not include those from New South Wales).

7.101 About half of those Indigenous young people in detention on an average day were on remand. The AIHW reports that nearly 60 percent of young people on remand on an average day were Aboriginal and Torres Strait Islander young people, who were particularly over-represented in the younger age groups. Of all young people on remand on an average day, 72 percent of those aged 10–13 years, 56 percent of those aged 14–17 years

96 Law Council of Australia, *submission 46*, p. 7.

97 Peter Collins, ALSWA, *Committee Hansard*, Perth, 30 March 2010, p. 42.

98 UnitingCare Burnside, *submission 4a,* p. 5.

and 29 percent of those aged 18 years or older were Aboriginal and Torres Strait Islander young people.[99]

Table 7.1: Number of Indigenous young people in detention and the number of those young people on remand on an average day by jurisdiction during 2007-08.

Jurisdiction	Vic	Qld	WA	SA	Tas	ACT	NT	Aust./ excl. NSW
Total in Detention	22	89	122	31	14	7	32	317
No. on Remand	6	66	64	13	7	5	21	182
Percentage	27%	74%	52%	42%	50%	71%	66%	57%

Source AIHW, *Juvenile Justice in Australia 2007-08*, p. 59 and p. 104.

7.102 The New South Wales Juvenile Justice Department reports that in 2007-08, the average daily number of young people in custody was 390 and the average daily number of young people remanded in custody was 210 (53.8 percent).[100] The New South Wales Auditor-General reported that 38.8 percent of all young people on remand during 2007-08 were Aboriginal or Torres Strait Islander.[101]

7.103 Research suggests that the increase in Indigenous imprisonment rates is due to the severity in bail decisions. The Bureau of Crime Statistics and research (BOCSAR) found that one quarter of the increase in the New South Wales Indigenous imprisonment rate between 2001 and 2008 was the result of a greater proportion of Indigenous offenders being refused bail and an increase in the time spent on remand.[102]

7.104 BOCSAR found no significant effect on the likelihood of re-offending for juveniles given a custodial penalty compared to a non-custodial penalty. The study recommended custodial penalties ought to be used very sparingly with juvenile offenders.[103]

7.105 The Committee heard from a large number of witnesses that the denial of bail to Indigenous juveniles and young adults was common to all jurisdictions. On the weight of the evidence received by the Committee, it

99 AIHW, *Juvenile Justice in Australia 2007-08*, p. 71.

100 New South Wales Juvenile Justice, *Annual Report 2008-09*, p. 51.

101 New South Wales Auditor-General, *Auditor-General's Report: Financial Reports*, vol. 5, 2008, p. 197.

102 Jacqueline Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?*, Issue Paper no. 41, BOCSAR, August 2009, p. 1.

103 D Weatherburn, S Vignaendra & A McGrath, *The specific deterrent effect of custodial penalties on juvenile re-offending*, Crime and Justice Bulletin no. 132, BOCSAR, July 2009.

does appear, however, that it is an especially acute issue in New South Wales.

7.106 Recent changes in legislation have contributed to the increased numbers of Indigenous youth in remand, particularly in New South Wales where a 2007 amendment to the *Bail Act 1978* (New South Wales) resulted in soaring detention rates among young Indigenous people. Further changes in 2007 to the *Bail Act 1978* may have contributed to a significant rise in detainee numbers in New South Wales juvenile detention centres. The Public Interest Advocacy Centre (PIAC) highlighted amendments made in 2007 as a primary driver of increases in the number of Indigenous juveniles detained, pointing specifically to section 22A:

> This section provides that children and young people can only apply once for bail, unless special circumstances exist, such as the lack of legal representation during the first bail application, or the court is satisfied that new facts or circumstances have arisen since the first application. This section has led to a direct increase in the number of children placed on remand until their charges are finalised, when previously they might have only been on remand for a few days until they had mounted a successful bail application. Although section 22A was initially aimed at eliminating repeated bail applications in relation to more serious offences in adults, it has unfortunately been equally and consistently applied to young people, without consideration of its effects on this more vulnerable group. Further, it has had a far more serious effect on young people than on adult offenders.[104]

7.107 The New South Wales Ombudsman drew the Committee's attention to a recent paper by BOCSAR,[105] noting a number of its key findings relating to the application of bail in New South Wales, including:

- police activity in relation to breach of bail putting upward pressure on the juvenile remand population
- the introduction of section 22A of the *Bail Act* putting upward pressure on the juvenile remand population by increasing the average length of stay on remand, and
- among those juveniles remanded solely for not meeting bail conditions, the most common bail conditions that were breached were failure to

104 Public Interest Advocacy Centre, *submission 23*, pp. 5-6.

105 New South Wales Bureau of Crime Statistics and Research (BOCSAR), 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime', *Crime and Justice Bulletin*, No. 128, 2009.

> adhere to curfew conditions and not being in the company of a parent.[106]

7.108 Due to the disproportionate numbers of Indigenous people involved in the criminal justice system, 'whenever the justice system gets tougher, as it has in New South Wales and other states, it always has a bigger impact on Aboriginal people than it does on non-Aboriginal people'.[107] Young people are a more vulnerable group than adult offenders, and are therefore more seriously affected by the toughening of bail laws.[108]

7.109 The Commonwealth Attorney-General's Department acknowledged that:

> One of the biggest growth rates in relation to detention for Indigenous juveniles is in remand. These are not children who have actually been convicted of anything but, because they are unable to meet bail conditions, often because they do not have functional homes to go to, they either breach their bail or do not get bail in the first place.[109]

7.110 The single biggest factor in being unable to comply with bail conditions is the lack of appropriate accommodation available to young offenders whilst they are awaiting sentencing.

7.111 The Western Australia Corrective Services submission stated that:

> Young people are required to be bailed into the care of a responsible adult. However, there are ongoing issues where a responsible adult cannot be located, or is unwilling to sign the bail undertaking.[110]

7.112 In such situations, there are limited options to custody, and young offenders are then remanded in detention.[111] This is more likely to occur in rural and remote areas where accommodation and treatment services are lacking. The Law Society of New South Wales notes that 'there are negligible services to assist those who come before the court with a mental health issue in rural NSW, and there is little in the way of treatment programs available'.[112]

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106 New South Wales Ombudsman, *submission 56*, pp. 10-11.

107 Don Weatherburn, BOCSAR, *Committee Hansard*, Sydney, 4 March 2010, p. 18.

108 Public Interest Advocacy Centre, *submission 23*, p. 5.

109 Kym Duggan, Attorney-General's Department, *Committee Hansard*, Canberra, 26 November, p. 3.

110 Western Australia Corrective Services, *submission 54*, p. 5.

111 Western Australia Police, *submission 78,* p. 9.

112 Law Society of New South Wales, *submission 29,* p. 11.

7.113 The impact on family members in rural and remote areas is also greater. As the Committee heard in Cairns, 'any child in our part of the world that is remanded in custody goes to Townsville so family are not able to maintain … connection'.[113]

7.114 Stringent bail conditions on juveniles who are not remanded in custody are also compounding the rising numbers of juveniles in detention. PIAC submits that 70 percent of juveniles in detention are remanded for bail breaches, usually of a minor or technical nature.[114] Technical breaches are described as 'circumstances in which a young person is arrested for a breach of a bail condition which in itself is not a new offence, and does not harm the young person, another person or the community'.[115]

7.115 As example of this, a recent media report highlighted the case of a 13 year old boy who spent three nights in the Kalgoorlie police cells after being denied bail for allegedly breaching bail conditions and giving a false name to police. The boy was denied bail by a Justice of the Peace on a Friday and was remanded into custody until he appeared in court on Monday. While Kalgoorlie has a regional youth justice service and a bail hostel to support young people who cannot be safely bailed with family members, in this case those support services were not used and the 13 year old spent the weekend in a secure adult facility.[116]

7.116 The Law Society of New South Wales claims that 'punitive attitudes towards children and young people, including the refusal of bail or the imposition of onerous conditions have become commonplace, particularly for Indigenous children and young people'.[117] The Australian Children's Commissioners and Guardians (ACCG) submission suggests that these 'onerous bail conditions imposed on young people are cycling some young people back into the justice system unnecessarily'.[118]

7.117 Some of these inflexible bail conditions do not take into account the 'mobile lifestyle' of some Indigenous people in remote areas.[119] Moreover, some conditions can in fact impede the development of positive social norms and behaviours that reduce offending risk factors; 'for example, a

113 Lynda Coon, ACT for Kids, *Committee Hansard*, Cairns, 7 May 2010, p. 25.

114 Public Interest Advocacy Centre, *submission 23*, p. 8.

115 Public Interest Advocacy Centre, *submission 23*, p. 8.

116 ABC News, 'Answers demanded over boy's lock-up', 11 May 2011 http://www.abc.net.au/news/stories/2011/05/11/3213459.htm> accessed 11 May 2011.

117 Law Society of New South Wales, *submission 29,* p. 11.

118 Australian Children's Commissioners and Guardians (ACCG), *submission 59*, p. 20.

119 Denis Reynolds, *submission 36*, p. 4.

young person may not be allowed to attend a Blue Light Disco, or go to football or other sport training because it is outside of curfew hours'.[120]

7.118 A 2003 report for the Attorney-General recommended that:

> … one of the most direct ways of reducing the numbers of young offenders in detention is to find non-custodial alternatives for those who do not seem to warrant pre-trial detention. ... It is worth noting that even small gains here can have the direct consequence of reducing significantly the numbers of juveniles in detention.[121]

Accommodation options for Indigenous youth on bail

7.119 Joan Baptie, a Magistrate from the Children's Court of New South Wales, spoke about the issue of lack of accommodation for youth on bail:

> ... in the Children's Court considerations of bail can be as fundamental as: who is going to be responsible for this child's accommodation? That often cannot be resolved, and you have government departments that say, 'That's fine. Just lock them up. That will solve the problem of accommodation'. And it sure does, but it is not in those young persons' best interests, one would think, because ultimately, at some stage, they are going to be released back into the community and they are going to be angrier and less able to integrate for their very important futures.[122]

7.120 Katherine McFarlane from New South Wales Corrective Services Women's Advisory Council was similarly concerned about this situation:

> One of the problems is that in the Children's Court a lot of the time DOCS advocates for a child to remain in custody—despite, often, the parents or grandparents or other relatives—because the accommodation is not deemed suitable and they do not have a placement. So you get a not unusual situation where a state agency that is responsible for the care and protection of children—an agency where the child's best interest is the prime concern—comes

120 Central Australian Aboriginal Legal Aid Service (CAALAS), *submission 26*, p. 5.

121 K Polk et al, *Early Intervention: Diversion and Youth Conferencing – A National Profile and Review of Current Approaches to Diverting Juveniles from the Criminal Justice System*, Attorney-General's Department, Canberra, 2003, p. 53.

122 Joan Baptie, Magistrate, Children's Court of the New South Wales, *Committee Hansard*, Sydney, 28 January 2011, p. 10.

> to court and says, 'Put them in jail; at least we know they are going to be safe'.[123]

7.121 Accommodation for Indigenous youth on bail is an issue which was frequently brought to the attention of the Committee during the inquiry. Bail laws attempt to strike the right balance between not infringing upon the liberty of an accused person who is entitled to the presumption of innocence, and ensuring that an accused person will attend court and will not interfere with witnesses or commit other offences.

7.122 Indigenous youth spend a significant amount of time in detention on remand. The AIHW reports the average length of time Indigenous youth spent on remand during 2007-08 and across all jurisdictions except New South Wales was 52 days.[124]

7.123 Some research indicates that a high number of Indigenous youth on remand do not receive a custodial sentence. Figures published by New South Wales Juvenile Justice show that in 2008-09, only 22 per cent of young people with a remand episode received a sentence of detention within 12 months.[125] In October 2009, a coalition of 12 non-government organisations released a paper noting only one out of every seven remandees in New South Wales will receive a custodial order at sentencing. The paper commented on the effect of this high rate of remand:

> … thousands of children are being unnecessarily exposed to an environment that can have a detrimental effect on their future life chances, and a higher number of young people are at risk of cycling through the prison system.[126]

7.124 Several witnesses and submissions attributed the lack of suitable accommodation options for young people who would otherwise be released on bail to the increase in the number of juveniles on remand.[127] The ACCG expressed their concern to the Committee about the tendency for children to be remanded in custody, even when eligible for bail, due to a lack of safe accommodation options:

> It appears that remand is viewed and used as an accommodation option for a child if a responsible adult cannot be found or if

123 Katherine McFarlane, New South Wales Corrective Services Women's Advisory Council, *Committee Hansard*, Sydney, 28 January 2011, p.15.

124 AIHW, *Juvenile Justice in Australia 2007-08*, p. 107.

125 New South Wales Juvenile Justice, *Annual Report 2008-09*, p. 54.

126 Uniting Care Burnside, *submission 4a*, p. 3.

127 Uniting Care Burnside, *submission 4a*, p. 3.

> authorities are concerned for the child's safety. The ACCG strongly rejects this position. It is an extraordinary act of public policy that would see children and young people who are eligible for bail and not yet convicted of any crime being placed in detention simply because they have nowhere else to go.[128]

7.125 The Law Society of New South Wales advised the Committee of possible breaches of the United Nations Convention on the Rights of the Child when children were held on remand as a result of not being able to provide them with safe accommodation:

> Bail may be made conditional on the provision of appropriate supervised accommodation. 'Reside as directed by [Department of Juvenile Justice]' is a condition frequently imposed on homeless young people. A 'reside as directed' condition often means that juveniles are held in detention until accommodation is found. While the motivation of Magistrates may be that they prefer juveniles to be in a detention rather than homeless, this use of bail rules is contrary to the principles in the UN Convention on the Rights of the Child (CROC) and the intention of Parliament in 1987 when it separated the children's criminal and children's care and protection jurisdictions (see *Children's (Criminal Proceeding) Act 1987*) … Detention should be a last resort as a criminal sanction, not as a 'placement'.[129]

7.126 A joint ATSILs submission stated that secure accommodation or a space in a rehabilitation program, rather than detention, is critical to diversion from criminal activity:

> Detention is a criminal sanction: not a 'placement' for children in need of care. Responsibility for such detention - its inherent unfairness, stress and negative engagement with criminal justice system - lies squarely with the Australian governments. It is clear and predictable that young people at risk of entry to the criminal justice system will come from homes where it is unsafe for them to be. The need to provide accommodation, other than police cells or detention centres, is chronic.[130]

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128 ACCG, *submission 59*, p. 19; Central Australian Youth Justice Committee (CAYJ), *submission 50*, p. 9; ALSWA, *submission 19*, pp. 11-14.

129 Law Society of New South Wales, *submission 29*, p. 8.

130 Aboriginal Legal Service (NSW/ACT), NAAJA, Queensland Aboriginal and Torres Strait Islander Legal Service, *submission 66*, pp. 17-18.

7.127 The adverse consequences to Indigenous youth on remand were referred to in many submissions. The 2008 Special Commission of Inquiry into Child Protection Services in New South Wales stated:

> In the absence of dedicated bail facilities for young people, many have been held remanded in detention for significant periods, with potentially adverse consequences for their prospects and rehabilitation.[131]

7.128 Some states have created supervised bail programs to divert young people from incarceration whilst awaiting trial. These programs may take the form of relatively simple accommodation facilities such as bail hostels or more sophisticated programs that aim to offer the young person a suite of options to address their individual needs.

7.129 The Victorian Drugs and Crime Prevention Committee recommended 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.[132]

7.130 Two of the strategic actions of the New South Wales Government in its Aboriginal Justice Plan 2004–14 are to ensure Aboriginal defendants have full access to bail and to reduce the overrepresentation of Aboriginal young people in the criminal justice system. Part of these strategic actions include examining options for developing family and community based bail support and accommodation mechanisms and programs, and reviewing bail legislation and administrative processes to ensure Aboriginal defendants have full access to bail.[133]

7.131 There have been proposals to set up 'bail houses' to accommodate young people released on bail. Such initiatives would give the Court an option other than detaining a person in a juvenile justice centre where the Court is of the view that the person does not have a stable home to go to, or a

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131 The Hon. James Wood AO QC, *Special Commission of Inquiry into Child Protection Services in New South Wales*, November 2008, vol. 2, p. 558.

132 Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People – Final Report*, July 2009, p. 247.

133 New South Wales Aboriginal Advisory Justice Advisory Council, *NSW Aboriginal Justice Plan: Beyond Justice 2004-2014*, pp. 15, 20.

sufficient support network to ensure their appearance at their court hearing.[134]

7.132 The Committee notes that there are some programs aimed at assisting young people with accommodation and support needs while on bail, including:

- the Central After Hours Assessment and Bail Placement Service (CAHABPS) in Victoria, which is an after-hours program that aims to be a single point of contact for police in matters where police and/or a bail justice are considering remanding a young person outside business hours. A CAHABPS worker employed by the Department of Human Services conducts an assessment of a young person's suitability for bail placement and acts as a facilitator for that placement. This role may include advice in addition to referrals to other youth and family support services
- the Youth Bail Accommodation Support Service in Queensland targets young people who are homeless or at risk of homelessness, and provides referrals and financial support for the young person to secure appropriate accommodation. Queensland also has a Youth Opportunities Program which assists young people charged with offences to establish and maintain stable accommodation in order to comply with bail conditions[135]
- the Intensive Bail Support Program in New South Wales provides intensive support for young offenders aged 10 to 14 years including Indigenous youth.
- the Bail Options Project in Tasmania refers young people who are homeless to accommodation and other support services,[136] and
- the Youth Bail Service in Western Australia provides for an after-hours seven-day-a-week bail service to help police identify responsible adults to provide bail for young people and provide limited short-term bail accommodation as a last resort for young people who are granted bail but do not have anywhere suitable to stay before their court appearance.[137]

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134 Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice,* April 2010, p. 73.

135 Queensland Government, *submission 91*, p. 17.

136 Gabrielle Denning-Cotter, *Bail support in Australia*, Indigenous Justice Clearinghouse, Research Brief 2, April 2008, pp. 4-5.

137 Western Australian Department of Indigenous Affairs, *submission 83*, p. 11.

Committee comment

7.133 The Committee is concerned about the large amount of evidence it has received indicating that bail laws are having a serious impact on the incarceration of young people, especially Indigenous young people, despite no legislative intention in this regard.

7.134 The Committee is concerned that inadequate accommodation is sufficient to result in a refusal of bail in cases where Indigenous youth are not in other respects at risk to themselves or the community.

7.135 One of the most significant deficiencies in bail support programs for young people throughout all states and territories is the lack of available and appropriate accommodation for young Indigenous people.

7.136 The Committee notes the need to provide accommodation options in urban and regional areas, not just remote areas. The Committee's recommendation in chapter 8 to invest in justice reinvestment mapping to identify areas of concentrated offending and gaps in services, would assist in understanding where the gaps are in accommodation services for Indigenous youth.

7.137 The Committee recognises the need to address the lack of suitable bail accommodation for Indigenous youth. This is an area where governments could significantly contribute to reducing the high rates of Indigenous youth in detention and consequently reduce recidivism.

Recommendation 27 – Post-release accommodation

7.138 **The Committee recommends that the Attorney-General take to the Standing Committee of Attorneys-General the proposal to increase funding for appropriate accommodation options for youth who are granted bail, in order to prevent the unnecessary detention of Indigenous youth.**

Driver licensing offences

7.139 It is difficult to determine how many Indigenous young adults are imprisoned for driver licensing offences, for two reasons. First, no published data exists that identifies the number of prisoner receptions in by Indigenous status, nor by category of offence. Second, the number of people imprisoned for driver licensing offences is not specifically

published by the ABS. Anecdotal evidence suggests that Indigenous youth are no more likely than non-Indigenous youth to be detained for driver licensing offences. Figures provided by the Western Australia Attorney-General indicate that 'Indigenous kids are not highly represented, despite what a lot of people think, in traffic offences—only around 16 percent'.[138]

7.140 The Committee was told by Dr Kelly Richards from the AIC that the tendency for Indigenous people to drive without a licence 'is a problem but … in relation more to adults than to young people. Our data shows that Indigenous young people tend not to be overrepresented among … traffic offences'.[139]

7.141 However the Committee heard from a significant number of judicial officials, including Judge Rod Madgwick (New South Wales),[140] Magistrate Margaret Quinn (New South Wales),[141] Magistrate Stephanie Tonkin (Qld)[142] and Chief Magistrate Jenny Blokland (NT)[143] who identified driver licensing offences as one of the main categories of offence for which Indigenous people are incarcerated.

7.142 In addressing the issue of driver licensing offences in Queensland, Magistrate Stephanie Tonkin commented that young offenders 'come before the courts regularly for offences of this nature'.[144]

7.143 Magistrate Stephanie Tonkin observed that despite the *Juvenile Justice Act 1992* (Qld) providing sentencing courts with the discretion not to disqualify young people who committed driver licensing offences, magistrates more commonly ordered licence disqualification than did the higher courts when called upon to review original sentencing decisions.[145]

7.144 The issue of disqualification is especially important because it is often the pathway that leads to detention, as explained by the Law Society of New South Wales:

> Often a person's licence is suspended or cancelled for fine default, the person is subsequently charged for driving whilst unlicensed,

138 Andrew Marshall, Western Australia Department of the Attorney-General, *Committee Hansard*, 30 March 2010, p. 27.

139 Dr Kelly Richards, Australian Institute of Criminology (AIC), *Committee Hansard*, Canberra, 11 February 2010, p. 4.

140 Rod Madgwick QC, *submission 72*, p. 2.

141 Margaret Quinn, *Committee Hansard*, Sydney, 4 March 2010, pp. 5-7.

142 Stephanie Tonkin, *submission 88*, p. 4

143 Jenny Blokland, *submission 41*, p. 17.

144 Stephanie Tonkin, *submission 88*, p. 4.

145 Stephanie Tonkin, *submission 88*, p. 7.

> this often snowballs into a driving whilst disqualified conviction and can result in a prison term.[146]

7.145 As such, although it is not intended in legislation that driver licensing offences result in custodial sentences, these offences can still have the delayed effect of leading to a custodial sentence. The review of the New South Wales juvenile justice system by Noetic Solutions (Noetic Review) noted that even where youth do not serve terms of detention for driver licensing offences, they are particularly susceptible to being incarcerated once they become adults as a result of their previous offending in this area.[147]

7.146 Individuals imprisoned for driver licensing offences are included within the category of Traffic and Vehicle Regulatory Offences. This category is a sum of the number of people imprisoned not only for driving licensing offences, but also for vehicle registration and road worthiness offences, regulatory driving offences, and pedestrian offences.

7.147 In regional and remote communities, where there is either very little or no public transport available at all, Indigenous people are more likely to drive without licences. As outlined in the submission by Magistrate Tonkin, 'it is almost normal for [Indigenous people] to accept that driving illegally is part of life for them and getting caught is merely an expected consequence of doing something they have to do.[148]

7.148 *The Australian* reported that in a remote prison in Western Australia, where more than 90 percent of the inmates are Indigenous, approximately 60 percent are remanded for unlicensed driving.[149]

7.149 The high rate of driver licensing offences among Indigenous people dovetails into the high rate of incarceration for minor justice breaches such as fine default. Due to the difficulties discussed in chapter 6 that some Indigenous youth face in obtaining a driver licence, driving unlicensed is a common offence. This leads to the imposition of fines, which go unpaid, the inability subsequently to attain a driver licence, resulting in more driving unlicensed offences and fines, and the eventual likelihood of receiving a custodial sentence for fine default.

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146 Law Society of New South Wales, *submission 29,* p. 10.

147 Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System*, 2010, pp. 111-112.

148 Stephanie Tonkin, *submission 88*, p. 12.

149 N Perpitch, 'Rio Helps Indigenous Convicts Back to Work', *The Australian*, 20 July 2010, p. 8.

7.150 A report on the effectiveness of fines discussed 'the inevitable relationship between a young person's inability to obtain a drivers licence as a result of fines accumulated as a child, together with the subsequent likelihood of secondary offending and possible imprisonment'.[150] The report included evidence from a Dubbo Local Court magistrate who said that 'youth … are coming before court primarily because of unpaid fines'.[151]

7.151 The National Aboriginal Law and Justice Framework acknowledges that while:

> ... it is always important that serious offences be dealt with by the criminal justice system in a proportionate manner …, Aboriginal and Torres Strait Islander peoples are sometimes incarcerated for relatively minor matters such as fine default.[152]

7.152 A Children's Court of Western Australia judge submits that 'fines which are so obviously beyond the financial capacity of [A]boriginal people can contribute to a sense of hopelessness and lead [A]boriginal people to disregard them and eventually lead to imprisonment'.[153] Thus the use of excessive fines as a sentencing option 'simply opens the door to excessive interaction with the criminal justice system'.[154]

7.153 Even minor fines may be defaulted due to lack of a fixed address or low levels of literacy. If a young Indigenous person is 'unable to read the penalty notice, unlikely to seek legal or financial advice or assistance, and lacking the means to pay, the matters invariably accumulate until fine default licence sanctions apply'.[155]

Committee comment

7.154 The Committee is concerned that driving licensing offences appear to constitute a significant part of the normative sentencing culture for Indigenous youth. The Committee understands that driving without a driver's licence is an offence however it is of the view that the

150 New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices: Interim Report 2006*, p. 23.

151 New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices: Interim Report 2006*, p. 23.

152 Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009-2015*, p. 16.

153 Denis Reynolds, *submission 36*, p. 4.

154 New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices: Interim Report 2006*, p. 20.

155 New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices: Interim Report 2006*, p. 27.

Commonwealth Government is in a position to provide some assistance to encourage Indigenous people in rural and remote areas to obtain driver's licences. There is a Commonwealth responsibility to provide intervention in this area, particularly given that driver licensing offences can be a pathway to fine accumulation, further offending and incarceration.

7.155 The issue of driver licensing offences, particularly in remote areas, is of particular concern, and while precise numbers are difficult to determine, the Committee is of the view that the number of people in prison for driver licensing offences is higher than it should be and that all jurisdictions should take immediate steps to address the difficulties Indigenous people face in obtaining a licence.

7.156 As discussed in the previous chapter, a person's employment options can be seriously impeded by not having a driving licence and this problem is exacerbated by the incidence of driving offences and accumulated fines in Indigenous communities. The Committee reiterates the urgent need to put in place a remote and regional driver licensing program and to provide driver education training resources in appropriate formats to assist Indigenous learner drivers.

Court alternatives

7.157 Academics who spoke to the Committee expressed concern at the lengthy lapse of time between the offence and the sentence that often results in mainstream court proceedings.

7.158 Kelly Richards, of the AIC, noted that:

> If a young person who commits an offence goes to court in three months or six months, which is very often the case, it is an eternity in a young person's life. So there is not therefore in their mind a clear and timely response to their offending. It would be better—and the evidence clearly shows—to provide a response to a young person very quickly, so that in their mind there is a clear link between what they have done wrong and the consequence. Even if that consequence is quite minor—an apology to the victim, for example—those two things should be clearly linked.[156]

7.159 Teresa Cunningham, of the Menzies School of Health Research, explained that the court system 'does not actually deal with the problem when it is

156 Kelly Richards, AIC, *Committee Hansard*, Canberra, 11 February 2010, p. 6.

happening. It happens months after something has occurred. There is no link between an offence and any punishment'.[157]

7.160 The Law Council of Australia submitted that:

> Aboriginal sentencing courts, youth courts, drug and alcohol courts and other 'therapeutic' or restorative justice mechanisms have been demonstrated to have a greater impact on recidivism, particularly among young people.[158]

7.161 The Committee firmly acknowledges that there needs to be alternatives to the regular court process, especially for Indigenous youth. Some alternative models to court that have been used in Australia include conferencing, Aboriginal courts, and specialist courts (such as Drug and Alcohol courts).

Conferencing

7.162 Conferencing – referred to across Australia variously as restorative justice conferencing, youth conferencing or family conferencing – involves bringing together a young offender with family members, the victim(s), police and community leaders to discuss the impact of the crime and agree to a plan for the offender to make amends and avoid reoffending. Conferencing is a common feature of juvenile justice systems in Australia.

7.163 Through this process, young offenders can make the connection between their actions and the consequences to the victim as well as themselves through the agreed punishment. They are able to avoid a criminal record. However, admission of guilt is a prerequisite for a conferencing referral.

7.164 There are opportunities for young adults to bypass court through conferences, such as forum sentencing in New South Wales which is for 18-24 year olds.[159] However, a recent study of forum sentencing found little evidence of its effectiveness, perhaps due to the older age of the participants.[160]

7.165 There have been several studies conducted in New South Wales on the reoffending rates of youth who have been referred to conferencing and youth who have gone through the traditional court process,

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157 Teresa Cunningham, Menzies School of Health Research, *Committee Hansard*, Darwin, 6 May 2010, p. 27.

158 Law Council of Australia, *submission 46*, p. 9.

159 Graeme Henson, *submission 74*, p.11.

160 C Jones, Does Forum Sentencing Reduce Re-offending?, *Crime and Justice Bulletin,* no. 129, June 2009.

demonstrating that youth who have had the option of conferencing are less likely, or are slower, to reoffend.[161]

7.166 Dr Cunningham, from the Menzies School of Health Research, told the Committee about her study:

> I did a five-year evaluation of the youth diversion program for the Northern Territory Police. It was to do with reoffending, obviously. It was one of the major outcomes of it. But I came from the area of restorative justice, and I was looking at the way in which diversions and conferences actually helped kids to get back on track—which they seemed to, whereas the court system had a negative impact on reoffending. In other words, kids who went through the court system tended to reoffend more quickly and also to reoffend more often than those juveniles who had gone through diversions and conferences.[162]

7.167 In addition to the statistical success in reducing recidivism rates, conferencing provides young offenders with an opportunity not only to realise immediately the consequences of their actions, but to address the factors in their lives which may have led to them committing the offence.

> In many respects, the major goals of conferencing are concerned with a widening of the social participants in the process of dealing with youth offending to include both victims and more effective involvement of the family of the offender and to increase the role of police in the determination of outcomes within the criminal justice process.[163]

7.168 Rosanne McInnes, a magistrate from regional South Australia, points out that 'conferences are effective because more time can be spent on trying to address risk of reoffending factors at an earlier stage in the offending cycle than is available in court'.[164]

7.169 Magistrate McInnes suggests that conferences, which do not require the presence of a judge, work well in regional or remote areas where circuit

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161 See for example, S Vignaendra and J Fitzgerald, *Reoffending Among Young People Cautioned by Police or Who Participated in a Youth Justice Conference,* Crime and Justice Bulletin no. 103, NSW Bureau of Crime Statistics and Research, October 2006, and G Luke and B Lind, *Reducing Juvenile Crime: Conferencing Versus Court,* Crime and Justice Bulletin no. 69, NSW Bureau of Crime Statistics and Research, April 2002.

162 Teresa Cunningham, Menzies School of Health Research, *Committee Hansard*, Darwin, 6 May 2010, p. 26.

163 K Polk et al, *Early Intervention: Diversion and Youth Conferencing – A national profile and review of current approaches to diverting juveniles from the criminal justice system,* Attorney-General's Department, Canberra, 2003, p. 53.

164 Rosanne McInnes, *submission 103*, p. 2.

courts are infrequent: 'Youth Courts are too far away for [Anangu, Pitjantjatjara & Yankunytjatjara Lands] juveniles, who can't afford public transport if it exists; and a judge is only required if the charge is contested'.[165]

Indigenous Sentencing Courts

7.170 Circle sentencing is an alternative Indigenous court system which incorporates the participation of respected community elders. Indigenous sentencing courts exist in all states and territories, with the exception of Tasmania, under various names: Circle Courts in New South Wales and the Australian Capital Territory, Nunga Courts in South Australia, Koori Courts in Victoria, Murri Courts in Queensland, and Community Courts in Northern Territory and Western Australia.[166] Victoria and Queensland also have children's versions of Koori and Murri courts, respectively.

7.171 Most of these courts are based on one of two models: the Nunga Court, which modifies a mainstream courtroom, and the Circle Court, where participants are seated around a circle in a place of cultural significance.[167]

7.172 The Committee appreciates that there is a range of opinions regarding the success and effectiveness of Indigenous courts. A recent study conducted by BOCSAR found that circle sentencing in New South Wales did not have a short-term impact on the levels of reoffending among its clients compared to those who went through a mainstream court.[168] However, other evaluations have noted success in reducing recidivism rates.[169] Furthermore, an evaluation of Nunga courts in South Australia found that the Port Adelaide Aboriginal Court 'frequently achieves a participation rate of over 80 percent for Aboriginal offenders, compared to a less than 50 percent rate for general Magistrates' Courts'.[170]

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165 Rosanne McInnes, *submission 103*, p. 2.

166 E Marchetti, *Indigenous Sentencing Courts*, Indigenous Justice Clearinghouse, Brief 5, December 2009, pp. 5-6.

167 K Daly and G Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending*, School of Criminology and Criminal Justice, Griffith University, Brisbane, 2009, pp. 5-6.

168 J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?*, Crime and Justice Bulletin no. 115, NSW Bureau of Crime Statistics and Research, May 2008, p. 7.

169 LCA, *submission 46*, p. 9; ATSILS, *Minimum Standards for Aboriginal and Torres Strait Islander Courts in Western Australia, South Australia, Victoria, Queensland and Northern Territory (North) 2007-2010*, p. 3.

170 J Tomaino, *Aboriginal (Nunga) Courts*, *Information Bulletin* #*39,* Office of Crime Statistics and Research, South Australia, p. 4.

7.173 The BOCSAR report recognised that, regardless of the impact on recidivism, circle sentencing can have other positive impacts on Indigenous communities that are not easily quantifiable.[171] A New South Wales Chief Magistrate has noted that circle sentencing 'generally received positive feedback from participants',[172] and the South Australian Attorney-General's Department acknowledged that participants of Nunga courts have productive experiences of the Indigenous court process.[173]

7.174 Western Australian Chief Magistrate Wayne Martin told the Committee that:

> If we involve the Aboriginal people in the sentencing process, the sentencing process becomes a much more collegiate, constructive, cooperative, positive and collaborative process than merely the imposition of punishment—punishments that in the case of Aboriginal people are often irrelevant because they impose a fine that they cannot afford to pay or they go to prison yet again. It is a way of encouraging and facilitating the notion that this is an Aboriginal problem that needs to be addressed by Aboriginal people. They need to take ownership and control of the responsibility for addressing those problems. … The trouble is that these courts are measured in terms of their impact on recidivism rates, which is a very short-term, blinkered and narrow way of assessing their efficacy. In Kalgoorlie we know qualitatively that the process has formed a bridge between the Aboriginal community and the court process.[174]

7.175 Community as well as individual impacts should be considered when assessing the value of conferencing and alternative sentencing courts. Importantly, Indigenous sentencing courts provide an opportunity for increased Indigenous input into the criminal justice system in which Indigenous people are overrepresented.

> A consistently reported benefit of the Aboriginal courts has been the re-empowerment of Aboriginal elders who participate in the programs. The increased authority of Aboriginal elders is considered to increase social cohesion and order within

171 J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?*, Crime and Justice Bulletin no. 115, NSW Bureau of Crime Statistics and Research, May 2008, p. 7.

172 Graeme Henson, *submission 74*, p. 4.

173 Kylie O'Connell, South Australia Department of Attorney-General, *Committee Hansard*, Adelaide, 20 May 2010, p. 24.

174 Wayne Martin, Supreme Court of Western Australia, *Committee Hansard*, Perth, 30 March 2010, p. 14.

> communities which participate in Aboriginal sentencing courts. Aboriginal sentencing courts have also been said [to] break down cultural barriers between Indigenous offenders and the court system, by allowing community members to communicate with the offender throughout the proceedings. This is attributed with improving understanding between judicial officers and offenders about the offence and the circumstances in which it was committed, which can assist in developing an appropriate response.[175]

7.176 There has been some discussion regarding recognising the input of Indigenous elders in Indigenous courts through proper remuneration. The Minimum Standards for Aboriginal and Torres Strait Islander Courts states that Elders should be paid for their contribution just as magistrates, court staff and correctional officers are paid, most likely as casual employees.[176] Payment to elders varies across jurisdictions: there is no fee paid in addition to the provision of transport and meals in New South Wales; $36.50 meal allowance in Queensland; $100 per day in South Australia and the Australian Capital Territory; and $325 per day in Victoria.[177]

7.177 The Youth Advocacy Centre submitted that:

> This monetary undervaluing of this process has a significant impact on the value of the work of the Elders in the court. It is also indicative of the lack of system recognition and building of justice infrastructure around the administering of justice to indigenous young people in a culturally appropriate way.[178]

7.178 There is a need to fund more Indigenous sentencing courts in Australia, including outside metropolitan areas. The Aboriginal Legal Rights Movement in South Australia informed the Committee that Indigenous people living in 'regional and country areas … do not have access to the Nunga Courts which operate within Adelaide'.[179]

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175 Law Council of Australia, *submission 46*, p. 10.

176 Australia's Aboriginal and Torres Strait Islander legal services of Western Australia, South Australia, Victoria, Queensland and Northern Territory (North), *Minimum Standards for Aboriginal and Torres Strait Islander Courts in Western Australia, South Australia, Victoria, Queensland and Northern Territory (North) 2007-2010*, p. 36; Youth Advocacy Centre, *submission 21*, p. 10.

177 K Daly and G Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending*, Griffith University School of Criminology and Criminal Justice, Brisbane, p. 7.

178 Youth Advocacy Centre, *submission 21*, p. 10.

179 Michael Wanganeen, ALRM, *Committee Hansard*, Adelaide, 20 May 2010, p. 12.

7.179 The Law Council of Australia recommended that 'greater resources be allocated toward the expansion of Aboriginal court programs, in particular to enable the courts to sit more often in regional and remote areas'.[180] This is important 'to ensure that there is equity in access to the law delivered in this manner to all Indigenous people who wish to participate in such processes'.[181]

7.180 However, the success of Indigenous sentencing courts as a better alternative to mainstream sentencing requires the existence of programs that assist clients in fulfilling their sentences and contribute to their rehabilitation. As the Queensland Department of Justice and Attorney-General noted, 'just having a court with a special process is not necessarily helpful if you do not back it up with programs, like employment programs or education programs, that give people meaningful lifestyles away from the court'.[182]

7.181 Ken Zulumovski, from the PIAC believes Indigenous sentencing courts have the capacity to delay or divert young people from being incarcerated, but notes that there is a lack of appropriate services to refer to, such as drug and alcohol services.[183]

7.182 Wayne Applebee and Paul Collis noted in their submission that 'currently there are no programs being offered in the ACT which are structured for the rehabilitation of offenders'.[184] Mr Applebee, as a panel member of the Australian Capital Territory Circle Court, further commented that 'we have got a Circle Court which works effectively—and everything works fine—but we are still limited in the options that we have got for sentencing'.[185]

7.183 A recent evaluation of the Children's Koori Court of Victoria (CKC) found that while the recidivism rate was still relatively high, the participation rate of young Indigenous defendants appearing before the CKC was overwhelmingly positive. The evaluation interpreted this low failure to appear rate as evidence that the Koori community was felt connected to

180 LCA, *submission 46*, p. 10.

181 A Hennessy, *Indigenous Sentencing in Queensland Magistrates Court*, speech given at Law Council of Australia Rule of Law Conference, Brisbane, 31 August 2007, p. 11, <www.lawcouncil.asn.au/fms/speeches/Rule%20of%20Law/Session%205%20Annette%20Hennessy.pdf> accessed 9 July 2010.

182 Terry Ryan, Queensland Department of Justice and Attorney-General, *Committee Hansard,* Brisbane, 4 May 2010, p. 8.

183 Ken Zulumovski, PIAC, *Committee Hansard*, Sydney, 4 March 2010, pp. 28-9.

184 Wayne Applebee and Paul Collis, *submission 94*, p. 17.

185 Wayne Applebee, *Committee Hansard*, Canberra, 13 May 2010, p. 11.

the sentencing processes and had a sense of ownership of the CKC. The evaluation found that:

> ... the CKC is an important vehicle for satisfying the demands by Indigenous people for a more effective legal system through, among other things, including a significant role for ERP's [Elders and/or Respected Persons] in sentencing decisions.[186]

7.184 Dr Weatherburn from BOCSAR made similar remarks about Circle Sentencing in New South Wales:

> The thing to remember about Circle Sentencing is it may not have any immediate effect on reoffending but it certainly does not make things worse and if you had to choose between that and a classic court format and your concern was capacity building and strengthening Aboriginal communities, it would be better to go down that Circle Sentencing track. It is good to think about diversion programs not just in terms of the narrow focus on getting the imprisonment rate down now, or getting the reoffending rate down now, but looking to the medium to longer term.[187]

Drug and Alcohol Courts

7.185 Drug and alcohol courts link offenders with appropriate services and programs that address the underlying factors contributing to offending behaviour.

7.186 Scott Wilson, Aboriginal Drug and Alcohol Council (ADAC), explained that when offenders with drug or alcohol problems appear in court:

> …the problem is that the magistrate there really has no alternative but eventually to give that sort of client a good behaviour bond, a fine or incarceration, so we need these alternatives—a treatment centre or something like that—that they could refer them to.[188]

7.187 Michael Levy, a professor at the Australian National University, acknowledged that 'the courts struggle. Magistrates want alternatives'.[189]

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186 Borowski, A. 2009. *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria*. Latrobe University, Bundoora, p. 48.

187 Don Weatherburn, *Committee Hansard*, Sydney, 4 March 2010, p. 28.

188 Scott Wilson, Aboriginal Drug and Alcohol Court, *Committee Hansard*, Adelaide, 20 May 2010, p. 50.

189 Michael Levy, Australian National University, *Committee Hansard*, Canberra, 4 February 2010, p. 8.

An evaluation of drug court initiatives in rural and remote areas found that:

> Magistrates involved in [rural and remote] court diversion programs often noted that the very availability of *any* programs to divert offenders towards drug treatment, rather than a punitive sanction, was a positive. … Magistrates' support for diversion appeared to be based on their frustration with traditional sanctions, such as fines, custodial or noncustodial sentences, as mechanisms for dealing with drug-related offenders.[190]

7.188 It is evident that incarceration will not address or cure alcohol or drug addictions, and yet, as substance abuse plays a significant role in Indigenous youth offending, this is precisely what is required to reduce offending behaviour. Northern Territory Magistrate Oliver told the Committee:

> I often see reports of people who are now in their 20s, 30s or 40s who have a history of having started high-level alcohol and drug abuse at the age of 12 or 13. That it takes to 40 to address that issue and get someone into rehabilitation is a tragedy.[191]

7.189 A solution to this wide-spread problem is the establishment of drug and alcohol courts, especially for youth, where offenders receive rehabilitation and treatment as part of their sentence. The objective is to remove substance abuse as a risk factor for reoffending, thereby improving the offender's chances of avoiding further contact with the criminal justice system. Drug courts operate across Australia under the National Illicit Drug Diversion Initiative (IDDI).

7.190 It is increasingly recognised that these initiatives are also necessary for juveniles. Western Australia has a Drug Court in both the Magistrate's and Children's Courts of Perth.[192] South Australia offers a Youth Court Assessment and Referral Drug Scheme for youth to receive alcohol or drug treatment as part of their sentence or conferencing agreement.[193] In Tasmania, the Court Mandated Diversion of Drug Offenders program operates for both adult and juvenile offenders.[194]

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190 Australian Institute of Health and Welfare, *The Effectiveness of the Illicit Drug Diversion Initiative in Rural and Remote Australia,* April 2008, p. 97.

191 Sue Oliver, *Committee Hansard*, Darwin, 6 May 2010, p. 50.

192 Aboriginal Legal Service Western Australia, *submission 19*, p. 23.

193 South Australia Government, *submission 82*, p. 5.

194 Tasmanian Government, *submission 90,* p. 9

7.191 New South Wales has a specific court for youth between the ages of 14 and 18 that deals with both alcohol and drugs, the Youth Drug and Alcohol Court (YDAC). Its aim is 'to divert young offenders from further drug use and reoffending by providing specialist assistance in a number of areas'.[195] YDAC also addresses related issues that may contribute to offenders' criminal behaviour, such as homelessness, poor health or lack of education.[196] Although the court has been in operation for 10 years, it is still a pilot program.[197]

7.192 Several ATSILS view drug and alcohol courts favourably:

> The integration of alcohol and drug rehabilitation programs with diversionary justice programs has the twin benefits of reducing the incarceration of offenders while utilizing courts to intensively supervise and enhance compliance with health programs of rehabilitation. They are, in effect, symbiotic.[198]

7.193 The Law Society of New South Wales supports drug courts:

> The lesson to be learnt from evaluations of the Drug Court is that the intensive use of justice system resources in the community, and the evaluation and monitoring of an offender who gets treatment for drug dependency, is effective in changing lives and is evidence based.[199]

7.194 Unfortunately, consistent with low Indigenous participation rates for other diversionary measures, Indigenous people are less likely to be referred to drug courts than non-Indigenous people, and those who do participate are less likely to complete a drug program successfully.[200] Indigenous offenders, who are more likely to abuse alcohol or petrol than illicit drugs, and more likely to be involved in violent offences, tend to be considered ineligible for many drug diversion programs.[201]

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195 New South Wales Department of Education and Training, *submission 43,* p. 13.

196 Children's Court of New South Wales, *submission 55,* p. 1.

197 Hilary Hannam, *Committee Hansard*, Sydney, 4 March 2010, p. 32.

198 Aboriginal Legal Service (NSW/ACT), North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, *submission 66*, p. 11.

199 Law Society of New South Wales, *submission 29*, p. 3.

200 Western Australia Department of Indigenous Affairs, *submission 83,* p. 6; Australian Institute of Health and Welfare, *The Effectiveness of the Illicit Drug Diversion Initiative in Rural and Remote Australia,* April 2008, p. 20.

201 Western Australia Department of Indigenous Affairs, *submission 83,* p. 6; Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, January 2006, p. 308; Australian Institute of Health and Welfare, *The Effectiveness of the Illicit Drug Diversion Initiative in Rural and Remote Australia,* April 2008, p. xii.

7.195 Mental health problems can disqualify people from drug courts, despite the strong link between substance abuse and mental illness. Rosemary Connors of the Ipswich Community Justice Group expressed her frustration that:

> …even though they have drug and alcohol issues, they cannot meet the criteria for drug court because they have mental health issues and the drug court will not take them.[202]

7.196 The Alcohol and Other Drugs Council of Australia recommends that eligibility criteria for youth drug courts be expanded to include licit substances, such as solvents and inhalants.[203]

7.197 YDAC is one such youth court that accepts individuals regardless of the type of substance abuse. Another significant aspect of YDAC is that, unlike many drug courts under the Illicit Drug Diversion Initiative, people who have committed violent offences are not excluded. New South Wales Children's Magistrate Hilary Hannam explained to the Committee:

> I think one of the features in particular that makes it a good program for Indigenous young people is that, unlike other drug courts in Australia and around the world, we do not screen out violent offenders. … Historically, these kinds of programs screen out the most difficult offenders and the ones who need it most.[204]

7.198 YDAC's inclusion of alcohol dependency issues and violent offences – two factors that feature highly in Indigenous offending patterns – may explain how the court 'has proved very effective for Indigenous young people' even though it is not an Indigenous-specific court.'[205]

7.199 Recently the New South Wales Government announced that its Magistrates Early Referral into Treatment (MERIT) program for offenders with drug issues would be expanded to include alcohol abuse treatment in a bid to further reduce recidivism.[206]

7.200 However, despite the success of drug courts in reducing drug-related criminal behaviour, they are not available to all Australians, particularly those who live in rural or regional areas. Many drug courts, including YDAC, do not operate outside urban areas.

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202 Rosemary Connors, Ipswich Community Justice Group, *Committee Hansard*, Brisbane, 4 May 2010, p. 47.

203 Alcohol and Other Drugs Council of Australia, *submission 65,* p. 7.

204 Hilary Hannam, *Committee Hansard*, Sydney, 4 March 2010, p. 33.

205 Sarah Crellin, *submission 2,* p. 1.

206 B Robins, 'Court Program to Treat Alcoholics', *Sydney Morning Herald*, 26 July 2010, p. 5.

7.201 One of the limiting factors for drug and alcohol courts to work effectively in remote and regional Australia is the dearth of adequate treatment services and resources. A lack of local supporting infrastructure for drug and alcohol treatment simply brings magistrates back to the original bind of handing down ineffectual sentences. Recommendation 8 in chapter 4 calls for further support for alcohol and drug use services in Indigenous communities.

Committee comment

7.202 The Committee supports Indigenous sentencing courts for their cultural and social benefits to Indigenous communities and their long-term impacts on Indigenous involvement in the criminal justice system. The Committee acknowledges the progressive work of magistrates and court officials in forging the relationship with community elders and trialling new practices.

7.203 The Committee further commends the involvement of dedicated Indigenous elders and respected community members in Indigenous specific courts and their commitment to improving Indigenous youth contact with the criminal justice system. The Committee supports adequate remuneration, or similar recognition of the value of the work, for elders so that their role is acknowledged as a vital part of an effective court process rather than as an auxiliary bonus.

7.204 The Committee is concerned that the interconnectedness of drug and alcohol abuse and criminal behaviour is not being addressed adequately in efforts to reduce Indigenous involvement with the criminal justice system.

7.205 The Committee supports the role that drug and alcohol courts and Indigenous sentencing courts play in seeking to tackle the underlying factors behind criminal activity. However, the Committee understands that the success of these different courts requires the presence of social, education and health infrastructure that can support Indigenous offenders in avoiding the cycle of substance abuse and crime.

7.206 The Committee is concerned that, in many regional and remote areas where offending rates are high, alternative sentencing options are either sporadic or non-existent. In particular, the Committee strongly urges the Northern Territory Government to extend its alternative sentencing model to make it fully available to young Indigenous people in centres with high offending and incarceration rates.

Recommendation 28 – Study on sentencing options

7.207 **The Committee recommends that the Australian Institute of Criminology undertake an analysis of sentencing options and outcomes for Indigenous youth and young adults and the use of available diversionary options to determine whether alternative sentencing options are fully utilised before resorting to incarceration.**

Recommendation 29 – Alternative sentencing options

7.208 **The Committee recommends that the Attorney-General evaluate outcomes for alternative sentencing options, such as reduced recidivism and improved positive and independent living, and from this research develop a proposal for a range of Indigenous alternative sentencing options and present it to the Standing Committee of Attorneys-General for inclusion in the National Indigenous Law and Justice Framework.**

7.209 The Committee is concerned at the significant amount of time that elapses between a young Indigenous offender being charged by the police and their appearance in court. The Committee acknowledges that this period can lead to young offenders becoming disassociated with the consequences of their actions.

7.210 The Committee is of the view that diversion would be most effective if it began at the earliest stage of a young Indigenous person's involvement with the criminal justice system. The Committee observed a Marae Court (Te Kooti Rangatahi) in New Zealand which involves a process of family conferencing and behaviour modification that takes place prior to a young Maori person's day in court. In this context, the day in court marks an individual's and family's success in making behavioural changes, including improvements in school attendance. While acknowledging that New Zealand approaches to alternative sentencing and diversion are not directly transferable to the Australian context and that data is not available on the impact of the Marae Courts, the Committee was impressed by the conferencing process and the focus on behavioural change.

Recommendation 30 – Pre-court conferencing

7.211 **The Committee recommends that the Attorney-General takes to the Standing Committee of Attorneys-General the proposal for a nationwide program that begins the rehabilitation process of young Indigenous offenders from the point at which they are charged with an offence. The Committee recommends that such a program should include:**

- **Assigning a community services case worker to an individual immediately after they have been charged to organise a family conference**
- **A victim contact meeting where the offender hears the consequences and impacts of their unlawful actions on the victim**
- **Ascertaining, through family conferencing, any underlying problems that are influencing offending behaviour and setting out a plan for behavioural change with clear targets to be achieved prior to attending court. Pre-court plans for the youth could include:**
  - ⇒ **Regular attendance at drug and alcohol counselling and medical treatment as required**
  - ⇒ **Regular meetings or counselling sessions with a court approved community or family mentor or elder**
  - ⇒ **A genuine apology to the victim(s)**
  - ⇒ **The development of clear goals and aspirations for living a more productive and independent life**
  - ⇒ **Where appropriate, more regular and constructive family engagement**
  - ⇒ **A renewed commitment from significant family members to engage with the offender and involve them positively in family life**
  - ⇒ **Improvement in school attendance or retention in school, and**
  - ⇒ **Improvement in apprenticeship or training outcomes.**

Sentencing of individuals who have engaged with this program should take into account any genuine progress towards meeting these targets for behavioural modification.

Indigenous youth in custody

7.212 In most cases, Indigenous youth first come into contact with the criminal justice system through local policing. Continued appearances and sentencing often represents the next step in the progression of contact. Unfortunately, far too many Indigenous juveniles and young adults further progress into custody, either in juvenile detention centres or in adult correctional facilities. Furthermore, far too many young Indigenous people also cycle back into the criminal justice system upon finishing their custodial sentences. This section examines the critical link between rehabilitation and reducing recidivism, both through the provision of services and programs to Indigenous youth while they are in custody, and continuing that rehabilitation once they return to their communities.

Recidivism and rehabilitation

7.213 The exit point in the criminal justice system occurs when an offender completes his or her sentence. Unfortunately, many young offenders re-enter the system shortly after their release. This trend is even more marked for Indigenous youth, resulting in the exit point becoming instead a 'revolving door' of recidivism that takes them back into contact with the police, courts or prisons. Jurisdictions have a responsibility to ensure that young Indigenous offenders are provided with appropriate rehabilitation and support while they are in custody in order to reduce recidivism.

7.214 A Victorian magistrate stated that 'the detention of young persons in the prison system as we know it is not going to rehabilitate them and practically guarantees that they will be serving sentences in adult prison'.[207]

7.215 Dr Don Weatherburn from BOCSAR stressed to the Committee that reducing recidivism through rehabilitation is fundamental for reducing the overrepresentation of Indigenous people in the criminal justice system:

> It is important to know, though, that the population of any group in jail is far more sensitive to the rate at which people come back than to the rate at which they go there for the first time. One of the reasons the Aboriginal imprisonment rate is so high is not so much the differential in the rate of arrival for the first time as the huge differential in the rate at which they come back. For reasons that only a mathematician would care about, tiny changes in the rate of

207 Edwin Batt, *Committee Hansard*, Melbourne, 3 March 2010, p. 14.

> return to prison make big differences to the number of people in prison. So, if you are looking for a short- to medium-term strategy for reducing Aboriginal imprisonment, there could be no better place to start than rehabilitation strategies for reducing the proportion of Aboriginal people who, after release from prison, come back to prison.[208]

7.216 The evidence shows that incarceration in itself is not an effective deterrent to criminal behaviour because it does not address the underlying economic, social, psychological and physiological factors that increase the risk of offending behaviour. Furthermore, acute and repeated contact with the criminal justice system and exposure to custodial sentences are in fact risk factors for criminal activity. Again, because Indigenous people are more likely to come into contact with the front end of the criminal justice system, Indigenous people are also more likely to have higher recidivism rates.

7.217 Recidivism rates are difficult to identify, as is the definition of success in reducing recidivism. The AIC told the Committee that recidivism:

> …is very difficult to measure in a comparable way across the jurisdictions in Australia. The AIC is currently involved in a national research project to develop national counting rules that will allow us to more effectively measure recidivism and to break that down by Indigenous status.[209]

7.218 Also, there are different ways of viewing successful programs that combat recidivism. Some would consider a mere lessening of reappearance in the criminal justice system an achievement, whereas others would only consider the complete elimination of future criminal behaviour a success. There are other less tangible impacts on recidivist behaviour that are impossible to measure and not incompatible with continued criminal activity: recognition of unhelpful underlying conditions; better educational outcomes which enable a better future for one's children; and, improved engagement with the community.

7.219 Researchers and program managers point out that there are other benefits to addressing offending risk factors than reducing offending in the short-term. A journal article on the New South Wales Post Release Support Program (PRSP) noted that 'one of the interesting points to the [PRSP] was that, while the statistical results on re-offending were not conclusive, the

208 Don Weatherburn, *Committee Hansard*, Sydney, 4 March 2010, p. 18.

209 Kelly Richards, AIC, *Committee Hansard,* Canberra, 11 February 2010, p. 15.

qualitative interviews among staff and offenders were overwhelmingly positive about the program'.[210]

7.220 The Committee encountered similar attitudes among program providers, who generally found diversion programs to be invaluable for enabling youths to gain insight into their behaviour through meeting face-to-face with their victims and admitting their errors to their community.

7.221 Nevertheless, young people in detention often return to detention later in life, and the younger they are on their first contact, the more times they are likely to return. Indigenous youth are overrepresented in rates of reappearance in court and in detention.

7.222 An eight year study found that the rate of reappearance in court for Indigenous juveniles who had first encountered the New South Wales Children's Court was significantly higher compared to non-Indigenous juveniles.[211] From this same cohort, 90 percent of the male Indigenous population were destined to appear in an adult court, compared to 60 percent of their non-Indigenous counterparts.[212]

7.223 Data from Queensland corroborates this trend, with almost 90 percent of Indigenous youth who complete their sentence subsequently being arrested.[213] In Western Australia, the recidivism rate for Indigenous juveniles was 8 in 10 for males, and 6.5 in 10 for females.[214] At Roeburn Regional Prison in Western Australia, 'many of the same prisoners returned, mostly for the same offences'.[215]

7.224 Indigenous young adults are quicker to reoffend than their non-Indigenous counterparts:

> …61 per cent of younger Aboriginal adults, who we categorise as people under the age of 26, return to custody within two years, whereas 48 per cent of younger non-Aboriginal adults return to custody within two years.[216]

210 C Cunneen and G Luke, 'Recidivism and the Effectiveness of Criminal Justice Interventions: Juvenile Offenders and Post Release Support', *Current Issues in Criminal Justice,* vol. 19, November 2007, p. 198.

211 J Wundersitz, *Indigenous perpetrators of violence: Prevalence and Risk Factors for Offending*, AIC Report 105, 2010, p. 26.

212 J Wundersitz, *Indigenous perpetrators of violence: Prevalence and Risk Factors for Offending*, AIC Report 105, 2010, p. 26.

213 Queensland Government, *submission 91*, p. 16.

214 Wayne Martin, *Committee Hansard,* Perth, 30 March, 2010, p. 3.

215 N Perpitch, 'Rio Helps Indigenous Convicts Back to Work', *Australian*, 20 July 2010, p. 8.

216 Luke Grant, Corrective Services New South Wales, *Committee Hansard*, Sydney, 4 March 2010, p. 20.

7.225 These figures demonstrate the acute need for effective rehabilitation programs for young Indigenous offenders in custody as a means of reducing recidivism, and therefore reducing the overrepresentation of Indigenous juveniles and young adults in the criminal justice system.

7.226 The Committee has heard evidence of Indigenous specific diversionary programs in correctional facilities that are designed to rehabilitate young offenders. One example from New South Wales is Balund-a, which is a:

> …residential diversionary program located near the Clarence River in northern NSW. It is available to Indigenous people aged between 18 and 35 who are referred by a Magistrate, whether upon conviction or prior to sentence. The program, which officially opened in August 2009, can accommodate about 50 people.[217]

7.227 The Balund-a program:

> …includes offending behaviour programs based on cognitive therapy; a wide range of educational and vocational courses; relationship and family programs; cultural programs run by local Elders; practical farm and community work experience for offenders; and employment assistance.[218]

7.228 The New South Wales Ombudsman describes the program as having support from Indigenous communities because it offers a 'holistic, culturally appropriate approach…to the rehabilitation of Aboriginal offenders'.[219]

7.229 When in New Zealand, the Committee visited Te Whare Wakaahuru, which is a total immersion Maori focus unit in the Rimutaka Prison near Wellington. The unit works with Maori and non-Maori prisoners to change their behaviours through learning language and culture, and instilling a sense of community responsibility. Unfortunately, in Australia Indigenous focussed rehabilitation programs of this type are the exception rather than the rule in correctional facilities.

7.230 The Committee has heard that young Indigenous women have difficulty accessing gender specific support and rehabilitation services while they are in detention. The Australian Women's Coalition noted that 'because of their relatively smaller numbers compared to young men and boys, young

217 Chief Magistrate of the Local Court New South Wales, *submission 74*, p. 4

218 New South Wales Ombudsman, *submission 56*, p. 15.

219 New South Wales Ombudsman, *submission 56*, p. 15.

women and girls are sadly often over-looked as a distinct group with distinct risks and needs'.[220]

In-custody education and training

7.231 In-custody education and training is a key aspect of opening new pathways for offenders, building self esteem, and developing study and workplace skills. The opportunity for young offenders in custody to re-engage with the education system is crucial to continued education and training pursuits once they leave custody. Education and training helps to reduce re-offending by providing a sense of purpose through which detainees may prepare to reintegrate with the community in a positive way.

7.232 The Commonwealth and state and territory governments have implemented a variety of programs to assist youth at risk with education and training. Some are targeted specifically at those currently involved in the criminal justice system, while others are targeted more generally at disadvantaged youth but are also accessible to juvenile offenders.

7.233 The Department of Education, Employment and Workplace Relations (DEEWR) administers a number of programs and initiatives to foster positive aspirations, increase engagement, and improve education, training and employment outcomes for Indigenous young people. In addition the Department provides services that offer support and assistance to young people caught up in the criminal justice system by addressing their individual needs and helping them enter productive pathways.[221]

7.234 The South Australia Department of Correctional Service commented that:

> We have recently formed a partnership with BHP Billiton and accessed some Commonwealth funding for training of offenders in preparation for their release and giving them skills that will qualify them to work in mining operations connected to Roxby Downs and the BHP operation there. BHP owns a whole range of pastoral set-ups, farms, which need to be tended and looked after. The groups of offenders, predominantly Aboriginal offenders, go and learn a whole range of skills and at the same time look after some of these farming operations. It is too early to talk about a sustained success. However, out of the first group of 12

220 Australian Women's Coalition, *submission 76*, p. 1.

221 Department of Education, Employment and Workplace Relations, s*ubmission 63*, p. 6.

> participants, as soon as their sentence finished or they were granted parole, six of them were offered employment and have transitioned into employment with BHP Billiton. It is a very tangible example, albeit a small one at this stage, of enhancing the successful reintegration of Aboriginal people and other offenders as well into the community by providing some very tangible work opportunities.[222]

7.235 In the Northern Territory, a Job Services Australia provider has a highly productive working relationship with the Alice Springs Correctional Centre. The provider has also established strong working relationships with key employers in Alice Springs so that work experience and employment opportunities can be secured for pre-release prison activities.

7.236 The provider works closely with prisoners to develop their individual Employment Pathway Plan, identify potential training and employment options and discuss available assistance to address barriers which may prevent an individual from being able to easily transition back into the mainstream environment. Due to various work experience activities and employment placements undertaken during the prison period, several of these prisoners have moved immediately into employment upon release.

7.237 In addition, the provider has engaged with local high school principals to identify and work with young people who are either at risk of dropping out of school or leaving school without a further education or employment option. Together they are developing a network of support groups who can assist including the local youth focused programs called 'Bush Mob'.[223]

7.238 In New South Wales, a number of educational initiatives are run through Juvenile Justice, with the aim of facilitating ongoing educational opportunities for Indigenous juveniles in the criminal justice system. These include:

- Education and Training Units (ETUs): These are run in each of the eight detention centres around New South Wales. In the 2009 school year (up until the end of June), there were 1 311 detainees enrolled in ETUs and 633 enrolled in TAFE. 140 detainees enrolled in School Certificate Courses, 56 were enrolled to do their higher school certificate and 94 to complete their school certificate. Difficulties remain, however, with

222 Peter Severin, Department of Correctional Services, South Australia, *Committee Hansard*, 20 May 2010, p. 24.

223 Department of Education, Employment and Workplace Relations, *submission 63*, p. 7.

facilitating the re-admission of offenders into the mainstream schooling system when they are released from custody, and

- Budda Jitja: This is a culturally appropriate 12 week employment and mentoring program that provides Aboriginal young offenders with the opportunity to develop a greater understanding of their culture, obtain TAFE qualifications and connect with potential employers. The program links Aboriginal young offenders with Commonwealth funded job providers to better connect offenders with work and training opportunities.[224]

7.239 DEEWR discussed the support that is available to people in custody in relation to education and training. David Pattie from DEEWR made the following comment:

> Once a person is in custody, they cease to receive the other Abstudy payments but the lawful custody allowance is available to them. That allows for essential course costs on approved courses, and the prison or wherever they are held can apply to have that funding for that individual to do courses that can contribute to either their apprenticeship or their student studies and things like that. There is no limit on that funding; it just has to be an approved and appropriate course at an approved location.[225]

7.240 The Department of Human Services raised a concern with the Committee that there is a low take up rate of this payment. In its submission it stated:

> There is a low take up rate of this payment. Program responsibility for this payment rests with the Department of Education, Employment and Workplace Relations (DEEWR). Centrelink has raised this with DEEWR previously and will continue to work with DEEWR to explore opportunities to improve take up rates.[226]

7.241 Peter Muir, Chief Executive, Juvenile Justice for the Department of Human Services, New South Wales, commented that levels of education can improve in custody due in part to the support provided and the regular attendance of detainees:

> I have seen figures from the Department of Education and Training of young people entering custody with reading ages of

224 New South Wales Government, *submission 84,* p. 21.

225 David Pattie, Department of Education, Employment and Workplace Relations, *Committee Hansard,* Canberra, 17 June 2010, p. 21.

226 Department of Human Services, *submission 35*, p. 1.

> six and seven and leaving with reading ages of 14 or 15. So we actually do see significant increases in literacy and numeracy.[227]

Transitioning needs and post-release support

7.242 The Committee has heard many calls for greater access to accommodation, adequate rehabilitation programs including alcohol and substance abuse, appropriate links to educational programs and qualifications, transitions to employment and other services to be provided to young Indigenous offenders following their release from custody.

7.243 Evidence given to the inquiry emphasises how important it is for young people to be prepared for life outside detention well before they end their sentence or are reviewed for parole. This applies equally to learning opportunities (education, training programs), material assistance (employment, apprenticeships, accommodation) and emotional and psychological support (counselling, drug rehabilitation).

7.244 Terry Ryan from the Queensland Department of Justice and Attorney-General, noted that court alternatives for Indigenous offenders are only effective if they are complemented by post-release support:

> We have had evaluations done on the Murri Court and the Queensland Indigenous Alcohol Diversion Program, which are currently under consideration by the government. The evaluations demonstrate that just having a court with a special process is not necessarily helpful if you do not back it up with programs, like employment programs or education programs that give people meaningful lifestyles away from the court.[228]

7.245 The importance of post-release programs was emphasised by the Children's Magistrate of the New South Wales Youth Drug and Alcohol Court at a public hearing in Sydney:

> We have recently done some analysis of our data…what it showed for Aboriginal men, in particular, was that the best correlates of the likelihood of reoffending were inadequately addressing education, employment, and alcohol and other drug issues.[229]

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227 Department of Human Services, New South Wales, *Committee Hansard*, Sydney, 4 March 2010, p. 21.

228 Terry Ryan, Queensland Department of Justice and Attorney-General, *Committee Hansard*, Brisbane, 4 May 2010, p. 8.

229 Hilary Hannam, Children's Magistrate, *Committee Hansard,* Sydney, 4 March 2010, p. 52.

7.246 Research on the post-release experience of young Indigenous adults has found that 'the four most important factors contributing to successful re-entry [into society] are accommodation, education and employment, treatment programs, and social networks'.[230] These same factors play positive roles in keeping Indigenous youth out of the criminal justice system in the first place. Unfortunately, these areas of importance to building resilience and buffering against criminal behaviour are of a poor standard for Indigenous Australians exiting custody.

7.247 The lack of adequate post-release support is considered to be one of the reasons that recidivist behaviour is inevitable. The ACT for Kids submission stated that 'research indicates that young people are at high risk of re-offending immediately following release from detention, it is therefore critical that supports are in place to reduce this risk'.[231]

7.248 The Queensland Government reports that nearly nine in ten Indigenous young people leaving youth supervision or detention will be arrested by police after completing their order or period in custody. In response, the Government has developed and is implementing a range of innovative programs to offer support for young people exiting detention, such as:

- youth Justice Workers who supervise young people involved in the youth justice system to address factors contributing to their offending and encourage young people to build positive connections in their communities
- the Transitions Program which aims to resolve potential post-release barriers by bringing community agencies into correctional centres to work with offenders, and
- the Youth Housing and Reintegration Service is a support service to assist young people aged 12 to 20 years who are homeless or at risk of homelessness, to transition to greater independence and stability by providing access to a range of accommodation options appropriate to clients' housing needs.[232]

7.249 In 2008, the Western Australian Departments of Education and Corrective Services signed a Memorandum of Understanding which outlines the responsibilities of each agency in the management of young people involved in the justice system. The memorandum supports the case

230 R Gilbert and A Wilson, *Staying Strong on the Outside: Improving the Post-Release Experience of Indigenous Young Adults*, Indigenous Justice Clearinghouse Research Brief, February 2009, p. 6.

231 ACT for Kids, *submission 51*, p. 4.

232 Queensland Government, *submission 91*, p. 16-23.

management of young people entering and exiting remand and detention and for those with court orders.[233]

7.250 Effective transitioning from detention back into the community is essential, albeit challenging. Transitioning requires case planning between custody and community, and the ability for young people to have access to similar programs in the community that will continue their rehabilitation. There may be a need for community specific individualised mental health, drug and alcohol, disability, grief and trauma support. Effective cultural, family and community links and supports may also need to be part of an effective transition plan.

7.251 A study by the AIC argued that effective transitioning had to be accompanied by overcoming disadvantage in Indigenous communities:

> Correctional approaches must involve throughcare principles and engage family, community members and respected persons like elders, within the context of much broader improvements to relieve social disadvantage, if lasting change is to be realised.[234]

7.252 In addition to social needs, homelessness and the availability of safe accommodation have been identified as a significant risk factor for reoffending. A 2006 study of 194 prisoners in New South Wales and Victoria (16 percent of whom were Indigenous) found that 18 percent were homeless prior to imprisonment and 21 percent were homeless post-release. Half the Indigenous participants were still homeless nine months after their release.[235]

7.253 The Australian Women's Coalition (AWC) urged that improvements in post-release support services are needed to reduce recidivism rates amongst young Indigenous women. The AWC noted that the lack of post-release accommodation is potentially a more significant issue for young Indigenous women:

> Homelessness is an area where girls are further disadvantaged by the fact there is no consistent national approach to their accommodation needs. Housing and homelessness issues are central to poorer outcomes for women and girls, many of whom

233 Department of Education, Western Australia, *submission 81*, p. 16.

234 M. Willis, Reintegration of Indigenous prisoners: key findings. *Trends and Issues in crime and criminal justice,* No. 364, 2008, p. 6.

235 Robyn Gilbert and Anna Wilson, Written for the Indigenous Justice Clearinghouse, *Staying strong on the outside: improving the post-release experience of Indigenous young adults*, February 2009.

> have had disrupted accommodation due to histories of neglect and abuse.[236]

7.254 The Australian Human Rights Commission identified a range of areas for improvement in relation to Indigenous women's needs following their release from prison, including:

> ... the importance of housing and emergency accommodation options for Indigenous women when released from prison; the importance of being able to access a broad range of programs upon release, including healing; and the lack of coordination of existing government and community services, which has the result of limiting the accessibility of services to Indigenous women. Anecdotal evidence suggests that Indigenous women have difficulty in accessing support programs upon their release and are left to fend for themselves, sometimes leading them to homelessness, returning to abusive relationships or reoffending.[237]

7.255 Continued education and employment training or placement is also a critical factor in establishing new pathways for young offenders. The Committee heard about a number of programs that assist young Indigenous people in obtaining employment following their release from custody. The evidence suggests that it is imperative to assist young offenders in either continuing education or finding employment as a way to reduce recidivism, increase social engagement and equip ex-offenders with the skills to live productive lives.

7.256 In the Narrogin region of Western Australia, the Department for Corrective Services provides 20 hours per week mentor support for juveniles released from detention centres to support successful reintegration to school. This is supported by school psychologists and school based student services teams. Department for Corrective Services officers liaise with teachers of children who have been in detention and request the educational program so schools can plan for students return to school. Similar programs are replicated in other areas of Western Australia.[238]

7.257 As mentioned in chapter 6, Rio Tinto is running a Work Readiness Program in Western Australia that provides opportunities for employment in the mining industry once prisoners have completed their sentences. Other companies and industry bodies are urged to similarly

236 Australian Women's Coalition, *submission 76*, p. 4.

237 Human Rights and Equal Opportunity Commission, *Social Justice Report 2004*, p. 8.

238 Department of Education, Western Australia, *submission 81*, p. 15.

address workforce needs through investing in local Indigenous communities and custodial centres with appropriate work readiness programs.

7.258 The Queensland Government's *Draft Aboriginal and Torres Strait Islander Justice Strategy 2011-2014* aims to transition 100 high risk young Indigenous people, including those who have had contact with the criminal justice system, into employment following the Active Trail project. The Strategy also plans to transition 200 adult Indigenous offenders each year into traineeships or employment through a range of initiatives and programs.[239]

7.259 At a public hearing, DEEWR informed the Committee that, in relation to collaborative arrangements between departments for day work release and licence work release, the following employment services are funded in Western Australia, South Australia, New South Wales and Victoria:

> …the Job Services Australia providers are working with young people pre-release and with Centrelink to coordinate support as they make that transition. That goes to helping them plan what happens after their release and ensuring they get the right kind of support to make a transition to employment.[240]

7.260 The pre-release prisoner (PRP) initiative aims to maximise employment opportunities for people leaving prison and reduce their reliance on welfare by improving job search skills and building connections with employers at the earliest opportunity. The PRP initiative is available to prisoners aged 15-20 who are not in full-time education or training and are fully eligible under Jobs Services Australia (JSA) and adult prisoners who are fully eligible under JSA. Participation in the PRP initiative is for prisoners who are in the final 12 months of their sentence and are considered likely to be available for work on partial or full day release. PRP participants have access to the full range of employment services.

7.261 In addition to the PRP initiative, there are a number of JSA providers who specialise in at-risk youth or Indigenous employment. These JSA providers can deliver specialist assistance to Indigenous young people who may be transitioning from detention or who have a criminal record.[241]

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239 Government of Queensland, *Draft Aboriginal and Torres Strait Islander Justice Strategy 2011-2014*, p. 29

240 Jo Wood, Department of Education, Employment and Workplace Relations, *Committee Hansard,* Canberra, 17 June 2010, p. 21.

241 Department of Education, Employment and Workplace Relations, *submission 63*, p. 9.

7.262 DEEWR noted that though the following projects do not specifically target, they do include support for young Indigenous offenders:

- Adult Voluntary Post Release Support Service (AVPRSS) - Job Futures. Through-care transition support for adult ex-prisoners returning to the Wollongong community, particularly from Silverwater and Parklea Prisons. The project will support people being released from detention centres, by assessing and addressing their barriers to community re integration
- Kitchen Social Enterprise - Jesuit Social Services - The project will be conducted in Abbotsford, Victoria, to provide accredited training and work readiness opportunities targeting ex-offender job seekers and those with complex needs, and
- Stay Connected - Outcare Incorporated - This project will initiate early intervention and prevention into the job loss faced by prisoners who are remanded in custody pending court appearances. Outcare will provide assessment and triage of risk factors to prisoners' employment, contact employers to maintain and re-secure prisoners' employment and provide quick response case management within a prisoner's first week at Hakea, Canning Vale, in Western Australia.[242]

7.263 While some positive transition initiatives do exist, the Committee heard evidence that post-release support is inadequate and inequitably accessed. The Queensland Government submission observed that the 'importance of developing integrated and structured arrangements for young people exiting detention is a consistent theme in the literature regarding what works to address youth offending and reoffending'.[243]

7.264 Mission Australia explained to the Committee that the post-release transition in New South Wales is 'done in a very patchy, piecemeal way' and provided for a maximum of 24 weeks, which 'is relatively short … for the sort of work that needs to be done on an ongoing basis'.[244] A study of the South Australian juvenile justice system concluded that 'transitional planning for young people exiting secure care to better equip them to return to the community and not re-offend is poor'.[245]

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242 Department of Education, Employment and Workplace Relations, *submission 63*, pp. 9-10.

243 Queensland Government, *submission 91*, p. 16.

244 Anne Hampshire, Mission Australia, *Committee Hansard*, Sydney, 3 March 2010, p. 35.

245 Monsignor David Cappo, 'To Break the Cycle: Prevention and Rehabilitation Responses to Serious Repeat Offending by Young People', 2007, p. 26, <www.socialinclusion.sa.gov.au/files/breakthecycle2007.pdf> accessed 20 July 2010.

7.265 Indigenous offenders do not have equal access to post-release programs, as there is a 'general lack of culturally appropriate services for Indigenous children and young people'.[246] An evaluation of the New South Wales Post Release Support Program found that although Indigenous young people benefited from the program, they were under-represented in participation rates.[247]

7.266 A justice advocate noted that people in prison have structure and routine in their lives that they do not have when they return home.[248] Often there are also environmental risk factors that contribute to offending behaviour, so when youth are released from custody and returned to their original environment, any rehabilitative influences in custody are negated. This is even more striking for Indigenous youth who live in remote communities. The ACCG submission notes that:

> … some children and young people (as young as 10) have to be transported the 3,000km to Perth to be held on remand, and after a stay in custody they are sent back to the community where they face the same issues with no supports for change. Without investments in culturally appropriate programs and follow-up services in these communities, there is little hope that the 'revolving door' of the justice system will cease for these children and young people.[249]

Committee comment

7.267 The Committee is of the view that, due to the nature of Indigenous offending trends, an emphasis on reducing recidivism through rehabilitation would have a significant impact on reducing Indigenous youth involvement in the criminal justice system. The Committee views adequate in-custody rehabilitation and transition assistance as an essential component of the states and territories' duty of care to young Indigenous people who have been removed from their communities, often for significant lengths of time, to serve custodial sentences.

7.268 The Committee considers that current rehabilitation during custody, through the provision of psychological support, education and training is of critical importance. The states and territories' responsibility for

246 Australian Children's Commissioners and Guardians, *submission 59,* p. 22.

247 C Cunneen et al, *Evaluation of the Aboriginal Overrepresentation Strategy*, Sydney Institute of Criminology, 2006, p. 10.

248 Lenore Ketchup, Ngooderi Mabuntha Justice Committee, *submission 1,* p. 1.

249 Australian Children's Commissioners and Guardians, *submission 59,* p. 23.

rehabilitating young offenders must also extend beyond the confines of custody and involve the delivery of practical services that provide safe accommodation, education and training and pathways to employment. In addition, there is a critical need for support for addictions and behavioural problems in order to socially and culturally reengage young Indigenous people with their communities once they have served out their sentences.

7.269 The Committee has heard of a number of transitioning and post-release support programs and services that are helping young Indigenous offenders return to life outside of custody. The Committee is concerned that these programs are often too short in duration to have any real impact on reducing recidivism through rehabilitation and support.

7.270 The Committee is concerned about the lack of appropriate post-release accommodation options for young Indigenous people. The Committee notes the importance of having safe accommodation to return to for young Indigenous people leaving custody, and recognises that young Indigenous women are vulnerable in this respect. The Committee advocates for more funding to be provided to address the issue of homelessness and inadequate safe accommodation for young Indigenous people leaving custody, particularly young women.

7.271 The Committee has heard that young Indigenous women have specific risks and needs, and strongly urges all jurisdictions to develop gender-specific programs of rehabilitation and post-release support.

7.272 The Committee notes that employment and training services specifically targeted at Indigenous youth already involved in the criminal justice system could assist in reducing high recidivism levels. Chapter 6 discussed specific problems relating to the transition from education to employment for Indigenous youth, and made recommendations for more support services to be provided. Upon release from custody, the Committee notes that young Indigenous offenders need similar support in transitioning into employment.

7.273 The Committee encourages the Department of Human Services and DEEWR to continue to work together to formulate a strategy to improve the take up rates of the Abstudy Lawful Custody Allowance for Indigenous people in lawful custody for more than 2 weeks.

7.274 The Committee commends the work being carried out by the Jobs Services Australia provider in conjunction with the Alice Springs Correctional Centre in the support and services they provide to youth, both in prison and post-release from the correctional centre. Assisting to place people in

either employment or training plays an important role in reducing recidivism.

7.275 The Committee commends those companies, such as Rio Tinto and BHP Billiton, who work in collaboration with correctional facilities to provide training and employment for young Indigenous offenders.

7.276 The Committee recognises that without adequate post-release support, offenders will return to the same environments in which they first offended. Often it is these very environments that contribute to offending behaviour, and as such they need to be addressed to counter recidivist behaviour.

7.277 The Committee commends the good work being done by many small, community-based programs and organisations to assist young Indigenous offenders to positively reengage with their communities on their return from custody. The Committee is concerned that, in many cases, such groups are operating without adequate funding.

7.278 The Committee recommends that an expansion of post-release programs—specifically targeting Indigenous youth and young adults in the areas of accommodation, education and employment, treatment programs, and social networks—is required to reduce recidivism rates among young Indigenous people.

Recommendation 31 – Indigenous offender programs

7.279 **The Committee recommends that the Commonwealth Government establish a new pool of adequate and long term funding for young Indigenous offender programs. Organisations and community groups should be able to apply for funding for programs that assist young Indigenous offenders with:**

- **Post-release or diversionary program accommodation**
- **reintegrating into the community and positive social engagement through volunteering and team involvement**
- **reconnecting with culture where possible**
- **drug, alcohol and other substance abuse rehabilitation**
- **continued education and training or employment, and**
- **life and work readiness skills, including literacy and numeracy**

The Committee recommends that this fund is geared towards small-scale community-based groups, operating in local areas, and includes a specific stream for programs that address the needs of young Indigenous female offenders. Local employers would be encouraged to mentor and train with a view to employment.