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Submission to the House of Representatives Committee on Aboriginal and Torres Strait Islander Issues

Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system

January 2011

ANTaR Submission to the House of Representatives Committee on Aboriginal and Torres Strait Islander Issues Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system, January 2011

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About ANTaR

ANTaR is the pre-eminent non-Indigenous national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander people. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR seeks to persuade governments, through advocacy and lobbying, to show genuine leadership and build cross-party commitment to Indigenous policy.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Indigenous Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR campaigns nationally on key issues such as Close The Gap, constitutional change, the Northern Territory Emergency Response, reducing Aboriginal incarceration, eliminating violence and abuse, racism and other significant Indigenous issues.

ANTaR has been working with Indigenous organisations and leaders on rights and reconciliation issues since 1997.

Introduction

ANTaR is an Australia-wide, community-based organisation committed to the rights of Australian Aboriginal and Torres Strait Islander peoples. ANTaR was established in 1997 and comprises member organisations in the states and territories. Our mission is to generate in Australia both a moral and legal recognition of, and respect for, the distinctive status of Indigenous Australians as the First Peoples of this land, and for the protection of their rights, including their relationships to land, the right to self-determination, and the maintenance and growth of their unique cultures.

ANTaR is aware that the Committee has already received many detailed submissions to this Inquiry and held many public hearings. We do not wish to repeat at length the same information and examples that the committee has already received. The enormous disparity in the levels of imprisonment between Indigenous and non-Indigenous people – a disparity that is even more scandalous when applied to youth and juveniles - has been well known and widely noted over many years.

Prioritisation

ANTaR welcomes the fact that one of the five goals in the National Indigenous Law and Justice Framework adopted by the Standing Committee of Attorneys General is to reduce over-representation of Aboriginal and Torres Islander offenders, defendants and victims in the criminal justice system, but unless there is consistently adequate resourcing and more consistently rigorous implementation and assessment, we are concerned that the legacy of failure in this area will continue.

There have been many reports, many recommendations and many programs focusing on this issue over many years. As a number of other submissions to this current inquiry have also highlighted, many of the recommendations from the Royal Commission into Aboriginal Deaths in Custody have not been adequately implemented, nearly twenty years after they were first published.

This failure to properly follow through is just one example amongst many. It is understandable that there is a high degree of scepticism amongst many Aboriginal and Torres Strait Islander organisations and people about whether sufficient political will exists to enable major improvements to occur.

ANTaR agrees with the assertion made in the joint submission from a number of Aboriginal legal organisations that "the essential characteristics of laws, policies and program that will reduce the rate of Aboriginal and Torres Strait Islander juvenile justice detentions are established, but they have not been applied in a rigorous, consistent way, supported by adequate human and financial resources."[1]

As the submission from the Chief Justice of Western Australia stated:

> *the over-representation of Aboriginal people in the criminal justice system (in the state of WA) is the biggest single issue confronting that justice system…..*

[1] Submission 66 from Aboriginal Legal Service NSW/ACT, North Australian Aboriginal Justice Agency and Queensland Aboriginal and Torres Strait Islander Legal Service, page 1.

> *unless and until there is greater success in addressing the many facets of Indigenous disadvantage, such as low rates of participation in education, low rates of participation in employment, poor health – both mental and physical – poor housing and chronic overcrowding, substance abuse, social and cultural dislocation, and so on, the general pattern of Indigenous over-representation in the criminal justice system is unlikely to change significantly.*[2]

This is not to suggest that there is nothing new to be learnt or new proposals to investigate. On the contrary, ANTaR supports the view of the Australian Human Rights Commission that there should be an increased focus on justice reinvestment approaches as a way to reduce imprisonment rates.[3]

However, we believe a core problem is that there is a lack of prioritisation of these issues, manifested by inadequate ongoing resourcing and inconsistent implementation of policies and programs. We remind the Committee of Recommendation 2 in the November 2009 Report from the Senate Committee on Regional and Remote Indigenous Communities:

> *that the Commonwealth government take a more active role in driving reform of the criminal justice system with the aim of reducing the alarming high level of contact of Indigenous Australians, particularly Indigenous young people.*

We encourage this Committee to do all that it can to pressure governments and political parties at all levels to make this issue a high priority.

Recognising Key Principles and Getting the Basics Right

Nothing about us without us

ANTaR strongly believes that programs which seek to assist Aboriginal or Torres Strait Islander people have a far greater chance of success - particularly over the longer term - when those programs are developed, designed, implemented and controlled by Indigenous peoples themselves or at least as genuinely equal partners with a non-government or government agency.

Wherever possible, governments should try to take a role of enabling or facilitating programs, rather than implementing them. As the North Australian Aboriginal Justice Agency stated in their submission, "Aboriginal people need to be the owners and leaders of solutions."[4] This is particularly the case when programs are place-based or working with whole communities, rather than solely with individuals. Many programs which seek to keep young people out of the criminal justice system, such as diversionary programs or anti-recidivism projects, fit this description.

Detention or incarceration as a last resort:

The 1991 Royal Commission into Aboriginal Deaths in Custody very clearly stated the principle that indigenous incarceration should be utilised only as a sanction of last resort.[5]

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[2] Page 2-3, Submission 47, The Hon Wayne Martin, Chief Justice of WA.
[3] Australian Human Rights Commission, Social Justice Report 2009, Chapter 2.
[4] Paragraph 1.2, Submission 15, North Australian Aboriginal Justice Agency.
[5] Recommendation 92 and following, Final Report, Royal Commission into Aboriginal Deaths in Custody.

ANTaR is pleased that the current National Indigenous Law and Justice Framework incorporates this principle in one of its agreed action points for "police training to promote the use of caution with arrest as a sanction of last resort where appropriate".[6]

However, it is clear that this basic principle is still not being consistently implemented in many instances across most states and territories.

Adequate funding:

Increasing funding is no guarantee of addressing a problem. Funds still need to be spent wisely and in partnership with the communities affected. But inadequate funding of basic support services is almost a guarantee that core problems will not be adequately addressed. As an example, the statements in the submission from the Aboriginal Legal Rights Movement in South Australia detail a consistent picture of under-funding over a number of years, which means not only inadequate legal support for Aboriginal youth at a crucial time but would also play a role in the inadequate enforcement of the diversion objectives in the existing *Young Offenders Act 1993* also detailed in the submission.[7]

Justice Reinvestment

As mentioned above, ANTaR supports further examination being given by governments to a justice reinvestment approach, as outlined by the Australian Human Rights Commission, amongst others.

ANTaR supports the explicit recommendations made by the Australian Human Rights Commission in the Social Justice Report 2009 "that the Standing Committee of Attorneys General *Working Party* identify justice reinvestment as a priority issue under the National Indigenous Law and Justice Framework, with the aim of conducting pilot projects in targeted communities in the short term" and "that the Australian Social Inclusion Board, supported by the Social Inclusion Unit, add justice reinvestment as a key strategy in the social inclusion agenda."[8]

Justice reinvestment entails investing money on a whole community, rather than just specifically identified individuals or groups of people. But it also involves re-prioritising public expenditure, diverting a proportion of the funding currently spent on prisons into programs designed to reduce the rates of criminal behaviour and imprisonment.

Recognising that the current approach is not sustainable, the former Minister for Juvenile Justice in New South Wales, Mr Graham West, indicated that it cost $542 per day in 2010 to incarcerate a young person, excluding court and police time.[9] ANTaR believes detention is the least effective yet most expensive option for dealing with young offenders.

In an article which specifically explores the potential application of justice reinvestment to reducing the vastly disproportionate rate of imprisonment of Aboriginal people, Melanie Schwartz details the potential economic as well as social benefits of this

[6] Action item 2.3.1a, page 18, National Indigenous Law and Justice Framework 2009-2015, Standing Committee of Attorneys General.
[7] Pages 2-4, Submission 98, Aboriginal Legal Rights Movement Inc.
[8] Recommendations 2 and 3, Social Justice Report 2009, Australian Human Rights Commission.
[9] Speech by Mr Graham West to AGM of ANTaR NSW, reported in ANTaR NSW newsletter, May 2010, accessible at http://www.antar.org.au/nsw/newsletters

approach. She outlines the approach as "calculat[ing] public expenditure on imprisonment in localities with a high concentration of offenders, and divert[ing] a proportion of this expenditure back into those communities to fund initiatives that can have an impact on rates of offending."[10] Thus "the channelling of funds away from communities into prisons is reversed."[11]

The Queensland branch of ANTaR has been working with Aboriginal groups and communities in an effort to reduce Aboriginal and Torres Strait Islander incarceration in that state as part of a campaign called Project 10%, which seeks to encourage and assist the Queensland government to reduce Indigenous imprisonment rates by ten per cent per year for ten consecutive years.

ANTaR Queensland, Campaign Working Group members and Project 10% partners, Murriwatch and the Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service, presented a submission to the Queensland government late last year entitled Reducing Imprisonment Rates - A Three Year Plan in the lead up to the release of the new Justice Strategy in Queensland. A full copy of this submission is included as an Appendix to this submission.

That Submission reflected 18 months of community engagement around the issue of over-representation of Aboriginal and Torres Strait Islander people in the Queensland criminal justice system, and captures the insights of over 200 Elders, leaders and community members from around the State.

That submission identifies justice reinvestment as a key strategy in reducing imprisonment rates. It defines this approach as follows:

> *Justice reinvestment identifies who is in prison, where they come from and how much that crime is costing the community. The cost of crime is then reinvested positively in crime prevention strategies in the home areas of those prisoners. Justice reinvestment answers the "how much should we spend?" and "where should we spend it?" questions.*[12]

We also note that the Senate Legal and Constitutional Affairs Reference Committee's report on their inquiry into access to justice recommended that "the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system."[13]

Unfortunately the Federal Government's response to this recommendation was non-committal, simply 'noting' the recommendation and stating that the funding of such a pilot program "is primarily a State and Territory responsibility." In ANTaR's view, the government response suggests an inadequate understanding of how a justice reinvestment approach can differ from other crime prevention and diversionary

[10] Melanie Schwartz, "Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment", Australian Indigenous Law Review, Vol 14 No 1, 2010
[11] Ibid
[12] Page 4, "Reducing Incarceration Rates in Queensland: A Three Year Plan". Submission to the Queensland government by Project 10%, Nov 2010. Accessible at http://antarqld.org.au/node/78
[13] Recommendation 21, Paragraph 6.56, Senate Legal and Constitutional Affairs References Committee, *Access to Justice* Report, 8 December 2009.

projects.[14] It also suggests the Federal Government is not prepared to take a sufficiently strong leadership role in this area, despite the clear need for coordinated national leadership.

The Committee would be aware that the New South Wales government commissioned a strategic review of that state's Juvenile Justice system in July 2009. That review produced a comprehensive report, which was finalised in April 2010.[15] While advancing three different options, the review explicitly recommended a justice reinvestment approach:

> *because it provides the greatest long term return on investment through tangible benefits such as reduced crime, reduced re-offending and cost savings…. Justice Reinvestment … seeks to address the causes of crime through investing resources in social programs that would otherwise have been spent on dealing with the consequences of crime – most notably the construction of prisons and detention centres.*[16]

Unfortunately, while the response from the New South Wales government took on board some of the issues and suggestions in the report, it did not commit to adopting the justice reinvestment approach,[17] reinforcing the importance of strong leadership at a federal level. A funding initiative through COAG and the Standing Committee on Attorneys General would be a good mechanism to demonstrate such leadership.

ANTaR's New South Wales branch has also been campaigning for the adoption of a justice reinvestment approach and has also called on the State and Federal governments to urgently fund the implementation of justice reinvestment under a national COAG initiative to reduce juvenile incarceration.[18]

Because the detention of Indigenous young people is such a strong precursor to their subsequent re-offending and detention, every effort should be made to find alternatives to detention for young people. Police discretion is a major determinant in whether detention occurs or not. All statistics show that Aboriginal juveniles are far more likely to be detained than non-Aboriginal juveniles.

ANTaR is encouraged by the results of the Intensive Supervision Program for young offenders adopted by the New South Wales government in pilots in Newcastle and Western Sydney. Early results have been very positive, showing a 60 per cent drop in offending by young people during the program and 74 per cent during the six months

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[14] Page 21, "Government response to Senate Legal and Constitutional Affairs References Committee report Access to Justice". 20 July 2010. Accessible at http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/gov_response.pdf

[15] Noetic Solutions, A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister for Juvenile Justice, April 2010. Accessible at http://www.djj.nsw.gov.au/strategic_review.htm

[16] Page ix, op cit.

[17] "Government Response to NSW Juvenile Justice Review". May 2010. Accessible at http://www.djj.nsw.gov.au/pdf_htm/publications/general/Government%20Response%20to%20the%20Strategic%20Review%20of%20the%20NSW%20Juvenile%20Justice%20System.pdf

[18] Media Release, 28 May 2010, "NSW ANTaR urges Government to act on Justice Reinvestment recommendations". Attached as Appendix B

after completing the program.[19] While such a program requires government expenditure, it is less costly than detention and imprisonment.

Justice reinvestment does require additional up front expenditures, as the economic rebalancing that derives from shifting spending priorities will take a number of years to become evident. In the long term, justice reinvestment should be revenue neutral, or potentially even provide a net positive in budgetary terms. But given that both the political cycle and budget forward estimates often don't look beyond a three to four year time frame, there is a need for strong leadership and political will, ideally across all main political parties, to adopt such reform.

The lack of positive government responses to the various reports which have already recommended a justice reinvestment approach indicates that the requisite amount of political will is yet to develop, despite the widely acknowledged reality that current policies and programs are failing young Aboriginal and Torres Strait Islander people.

Conclusion

Many submissions to this inquiry have noted the numerous previous inquiries held and recommendations made into this issue. Many of these have not been adequately acted on, either because of a failure to give the issue due priority by governments or inadequate ongoing resourcing.

ANTaR believes the single most important outcome from this particular inquiry is for the Committee and its report to convince governments and parties at all levels to give greater priority to the issue, and to recognise the well established fact that programs and policies to assist Aboriginal and Torres Strait Islander people and communities are far more successful when are they developed and implemented in partnership with those people.

If this inquiry is seen as just another inquiry which produces just another report which is responded to by lip service from government, it could have the perverse effect of increasing the cynicism and alienation already felt by many Aboriginal and Torres Strait Islander Australians.

ANTaR at a national level intends to build on our work already done at state level in places such as Queensland and New South Wales to give priority to reducing Indigenous imprisonment. This will include working with those organisations and individuals who are encouraging the use of a justice reinvestment approach. We would be glad to work cooperatively with Government and Parliamentary representatives in this endeavour.

[19] Mr Graham West, Minister for Juvenile Justice, NSW Parliamentary Hansard, 19 May 2010, Page 23077