# Human Rights and Equal Opportunity Commission

**Submission to the Inquiry by the**

**Senate Legal and Constitutional References Committee**

**into the**

***Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999***

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**Submission to the Inquiry by the Senate Legal and Constitutional References Committee into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999***

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# Part I - Introduction

In August 1999 the Human Rights and Equal Opportunity Commission (HREOC) prepared a briefing paper titled *Mandatory detention laws in Australia: an overview of current laws and proposed reform* (attached). That paper highlights a number of issues relating to the mandatory detention laws in the Northern Territory and Western Australia. It examines the impact of those laws including their disproportionate impact on disadvantaged and marginalised groups, in particular Indigenous children. This submission supplements that paper.

In making a submission to the Senate Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* the Commission will focus on term of reference (b)

> *Australia's international human rights obligations in regard to mandatory sentencing laws in Australia*.

This submission contains two sections. The first section details how laws that provide for the mandatory detention of juveniles violate Australia's human rights obligations. The second section explains how the development of alternatives to mandatory detention is supported by Australia's international human rights obligations.

Mandatory detention laws were enacted in Western Australia and the Northern Territory in 1996 and 1997 respectively. Essentially these laws require courts to impose minimum sentences of detention or imprisonment for people convicted of certain offences. They effectively remove judicial discretion in relation to those offences.

The WA laws came into effect on 14 November 1996 through amendments to the Criminal Code (WA). These amendments provide that when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months imprisonment or detention (the "three strikes and you're in" legislation). The provisions contain some allowance for both adults and juveniles to be released under supervision.

The NT laws came into effect on 8 March 1997 through amendments to the NT *Sentencing Act 1995* and the *Juvenile Justice Act 1983*. The *Sentencing Act* provisions apply only to persons aged 17 years or over.[1]

Under Section 78A of the *Sentencing Act* persons found guilty of certain property offences shall be subject to a mandatory minimum term of imprisonment of 14 days for a first offence. For a second property offence the mandatory minimum sentence is 90 days. For a third property offence the period of imprisonment is one year.

The NT *Sentencing Act* was recently amended again to provide that courts are not required to impose a sentence of detention under these provisions in certain "exceptional circumstances". However, this applies to adults only and not to juveniles.

[1] *Sentencing Act 1995* (NT), s4.

Unlike the laws relating to adults which can be invoked at the first conviction, the mandatory detention provisions relating to juveniles in the NT require at least one prior conviction. Under section 53AE of the NT *Juvenile Justice Act* a person aged 15 or 16 years who has been convicted of a relevant property offence and has had at least one prior conviction for such an offence must be subject to detention for at least 28 days.

The NT criminal justice system treats people as adults once they attain the age of 17 years. This means that 17 year olds will be subject to the adult mandatory detention provisions in the *Sentencing Act*. As indicated above, those provisions are not limited to repeat offenders and can be invoked on a first conviction. In addition, under the *Juvenile Justice Act* a person who turns 17 while serving a term in a juvenile detention facility is required to be transferred to an adult prison to serve out the remainder of the sentence.

## Part II - International human rights law and mandatory detention

There are two United Nations (UN) human rights treaties that have particular relevance to mandatory detention laws. They are the *International Covenant on Civil and Political Rights* 1966 (ICCPR) and the *Convention on the Rights of the Child* 1989 (CROC). The ICCPR and CROC were ratified by Australia in 1980 and 1990 respectively. These and other treaties define "human rights" for the purposes of the Commission's functions and powers. The ICCPR is scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)[2] and CROC is a "declared instrument" under section 47 of the Act. This gives HREOC power to investigate complaints that rights under those treaties have been violated by or on behalf of the Commonwealth or a Commonwealth agency but only in the exercise of a discretion or in abuse of power. It also enables HREOC to include those treaties in its broader role of monitoring and promoting compliance with human rights. In addition, the High Court has held that ratification by Australia of an international treaty gives rise to a legitimate expectation that decision makers will not violate its provisions.

Both the ICCPR and CROC are binding on the Australian Government at an international level. Federal legislation, policy or practice that is inconsistent with either will be in breach.

The position is more complex with respect to State and Territory laws that are inconsistent with international treaty obligations. In a federal system, the question often arises whether the federal government can be excused for failing to implement an international obligation on the ground that it has no constitutional power to do so, the matter being entirely within the jurisdiction of the States and Territories.[3] However, the general rule under international law is that a country cannot rely on its internal law as a reason for breaching its international obligations. This includes the situation of federal States.[4] In addition, it is standard practice in Australia for treaties to be circulated to all States and Territories for their comment and approval prior to ratification. An extensive process of consultation was undertaken prior to ratification of CROC.

In addition to binding treaties, there are various standards and guidelines promulgated through the UN that elaborate on the basic principles set out in the international treaties. While they do not have the status of binding law they are highly authoritative and persuasive and can in fact acquire binding status by incorporation into treaties. They have the broad support of the international community through their adoption by the General Assembly. Australia was a leading participant in the drafting of these instruments and sponsored them at the General Assembly stage. Since their adoption the following instruments have been extensively relied on by the Committee on the Rights of the Child as detailing the contents of key articles of CROC , notably articles 37 and 40.

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[2] *Human Rights and Equal Opportunity Act 1986* (Cth), Schedule 2.

[3] This matter seems to have been resolved in Australia by the High Court's interpretation of the external affairs power as extending to the Commonwealth the power to pass laws for the implementation of its treaty obligations, within limits: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.

[4] Vienna Convention on the Law of Treaties 1969 art 27. See also I Brownlie *Principles of Public International Law* 4th edn, Oxford: Clarendon Press, 1990, 35-36.

- the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (Beijing Rules)
- the *United Nations Guidelines for the Prevention of Juvenile Delinquency* 1990 (Riyadh Guidelines)
- the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* 1990.

Laws that provide for the mandatory detention of juveniles violate a number of fundamental principles in the ICCPR and CROC.

## 1. General principles

The "best interests of the child" is one of the guiding principles in CROC. Article 3.1 states

> *In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The enactment of mandatory detention provisions for juveniles clearly constitutes an "action concerning children" undertaken by "legislative bodies". Neither the Northern Territory nor Western Australian Government has indicated, in the legislation or associated debates and policy statements, that the interests of children were considered in the development of the mandatory detention laws. On the contrary, these provisions are harsh and punitive and were specifically intended to achieve deterrence and retribution rather than rehabilitation. The HREOC briefing paper *Mandatory detention laws in Australia: an overview of current laws and proposed reform* (1999) details some of the ways in which these laws prejudice the well-being of the children to whom they are applied.

## 2. Juvenile justice principles

CROC and the ICCPR contain very specific provisions dealing with juvenile justice, including sentencing. They include

CROC article 37(b): "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

CROC article 40.2(b): "Every child … accused of having infringed the penal law has at least the following guarantees … (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law."

CROC article 40.4: "A variety of dispositions … shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

ICCPR article 9: "No one shall be subjected to arbitrary arrest or detention."

ICCPR article 14.5: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

These provisions embody a number of fundamental principles of juvenile justice.

Detention as a sentence of last resort

CROC article 37(b) requires that imprisonment or detention must be a sentence of last resort for all juvenile offenders. Mandatory detention laws, by contrast, make detention the penalty of sole resort for offences that fall within their provisions. This is a direct violation of article 37(b). Furthermore, the application of this principle clearly requires the exercise of judicial discretion to consider other alternatives to detention. Mandatory detention laws remove this discretion.

For the shortest appropriate time

CROC article 37(b) also requires that imprisonment or detention, if it must be imposed, shall be for the shortest appropriate period of time. What is "appropriate" can be determined only by reference to the individual case rather than a blanket statutory rule of the type that applies in mandatory detention laws. What is "appropriate" in the individual case is guided in the first instance by the principle of the best interests of the child. Article 40 of CROC also imposes limits on what is appropriate. The State and the courts are limited in how they may treat a young offender. All action must be "consistent with the promotion of the child's sense of dignity and worth", must take into account the child's age and also "the desirability of promoting the child's re-integration and the child's assuming a constructive role in society". Here the principle of "rehabilitation" is clearly spelt out as the aim of actions taken in the case of all juvenile offenders.

The principle of rehabilitation is reinforced in the Beijing Rules. The commentary to Rule 17 states that "strictly punitive approaches are not appropriate". In sentencing a juvenile offender, "just desert and retributive sanctions … should always be outweighed by the interest of safeguarding the well-being and the future of the young person".

The mandatory detention laws in the Northern Territory and Western Australia, by mandating minimum sentences for certain specified offences, breach the requirement that detention be for the shortest appropriate time. For some at least, who may be prosecuted under these laws, a shorter sentence will be "appropriate". This is illustrated by a number of the examples in the HREOC briefing paper, describing young people incarcerated for extremely minor offences, some involving property of only a few dollars value.

Must not be arbitrary

Both CROC article 37(b) and ICCPR article 9 require that detention must not be "arbitrary". The term "arbitrary" is wide and perhaps somewhat vague. Nevertheless, it is used in the jurisprudence of many countries and we may properly rely on its

common usage in interpreting its meaning in international human rights provisions.[5] Generally, it refers to actions that are "unjust". Thus "arbitrary" detention is detention "incompatible with the principles of justice or with the dignity of the human person".[6] In the Australian context, we might first consider the accepted sentencing principles relating to individually tailored sentencing such as proportionality between the sentence and the offence.[7] On that criterion alone, mandatory detention falls outside accepted principles of just sentencing.

Sentencing may still be arbitrary notwithstanding that it is authorised by law. The term >arbitrary= includes not only actions which are unlawful *per se* but also those which are unjust or unreasonable.[8] In 1990, in the case of *Alphen v The Netherlands*, the Human Rights Committee stated

> *The drafting history of article 9, paragraph 1, confirms that >arbitrariness= is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.*[9]

The question whether a particular restriction on liberty is necessary and reasonable or arbitrary for the purposes of the ICCPR is not a matter of purely subjective judgement. The jurisprudence of the Human Rights Committee indicates that, to avoid the taint of arbitrariness, detention must be a *proportionate* means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights.[10]

Sentencing that is discriminatory in its impact may also be arbitrary. Where sentencing is influenced by the offender's race, sex, age, religion or other status to the offender's detriment relative to another case which is similar in other respects, the sentencing is arbitrary. Where a pattern of sentencing reveals that certain groups of children are more likely to receive the harshest penalties, sentencing is suspect.[11]

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[5] The ICCPR drafting committee explicitly acknowledged this in the final stages of its consideration of art 9, when it was argued that the term "arbitrary" should not be excluded because it is "legally valid" and commonly used in many countries and their courts: M J Bossuyt *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* Martinus Nijhoff Publishers, Boston, 1987 201.

[6] Ibid 198, 201.

[7] *Veen v The Queen (No.2)* (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ, 472.

[8] Documentary references and a summary of these debates are given in M Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, 343.

[9] Communication No. 305/1988, Human Rights Committee Report 1990, Volume II, UN Doc. A/45/40, paragraph 5.8.

[10] In *A v Australia*, Communication No. 560/1993, the Committee stated 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context': Views of the Human Rights Committee, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993.

[11] Human Rights and Equal Opportunity Commission *Human Rights Brief No.2: Sentencing Juvenile Offenders*, 5.

There is evidence to suggest that this is the case with the mandatory detention laws in the Northern Territory and Western Australia, given the large number of Indigenous children prosecuted under those laws.

Must be proportionate

CROC article 40.4 requires that the sentence imposed be proportionate to the circumstances of both the offender and the offence. This is a further statement that sentencing, in the case of juveniles at least, must be individually tailored. Mandatory detention laws clearly ignore the individual circumstances of the offender.

The principle of proportionality is described in more detail in the commentary to Beijing Rule 5.

> *The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example, social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reaction (for example by having regard to the offender's endeavour to indemnify the victim or to his or her willingness to turn to a wholesome and useful life).*

Proportionality must also refer to general principles of sentencing and community standards. A sentence is disproportionate if it is guided by aims that are unjust, merely punitive or inhumane. Government and parliamentary statements associated with enactment of the mandatory detention laws in the Northern Territory and Western Australia make it clear that those laws are punitive in intent. Outcomes in a number of cases prosecuted under these laws strongly support claims that they are unjust in their operation.

Proportionality must also refer to the specified and internationally agreed aims of juvenile justice: the rehabilitation or re-integration of the young offender and the protection and promotion of his or her best interests. There is strong evidence that detention is relatively ineffective in promoting rehabilitation. With mandatory detention, the overriding aim is incapacitation and not rehabilitation.

Must be capable of review

CROC article 40.2(b) and ICCPR article 14.5 require that both the conviction and sentence be capable of review. The mandatory detention laws in Northern Territory and Western Australia do not allow for a right of appeal against the sentence.[12]

[12] CROC article 40.2(b) and ICCPR article 14.5 both refer to a right of review "according to law". The Human Rights Committee (established by the ICCPR) has interpreted the phrase "according to law" in article 14.5 as "not intended to leave the very existence of the right to review to the discretion of the States parties": D McGoldrick *The Human Rights Committee* Clarendon, Oxford, 1991, 431.

## Part II - International human rights law and alternatives to mandatory detention

The previous section of this submission demonstrated how mandatory detention of juveniles is inconsistent with Australia's international human rights obligations. This section takes the analysis further and explains how those obligations support and in some instances require the development of positive alternatives to mandatory detention. In doing this, the submission considers three main alternatives

- crime prevention programs
- diversionary programs
- non-custodial sentencing options.

All three categories represent alternatives to mandatory detention that are more consistent with the "best interests of the child" principle, more humane, more effective and potentially less costly in reducing juvenile crime and promoting community safety. This submission gives most attention to crime prevention programs because they are considered the most desirable of the three alternatives and the one that reaps most benefits to young people and the community.

It is not within the scope of this submission to consider all programs that have been developed or proposed under these three headings. The Commission acknowledges the worthwhile programs already operating at both Commonwealth and State and Territory levels and encourages their continued development. The main focus in this submission is on programs recommended in the reports of two major national inquiries undertaken by HREOC.

- *Seen and heard* (1997), the report of the National Inquiry into Children and the Legal Process, a joint project of HREOC and the Australian Law Reform Commission
- *Bringing them home* (1997), the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.

Mandatory detention was an issue of significant concern in both inquiries. Their recommendations provide a framework for positive and effective strategies to deal with juvenile offending through means other than detention. In developing these strategies the Commission was concerned about the need to protect the human rights of young people, the importance of rehabilitation of young offenders and wider community concerns about safety and the cost of crime.

### 1. Crime prevention programs

The Riyadh Guidelines confirm the importance of preventive programs in addressing juvenile offending.

1. *The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.*

2. *The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.*

These principles have been reinforced in other research. Early intervention and social support programs are essential as a means of protecting against later offending. They are relatively inexpensive and have major long term benefits in terms of children's physical and social development. Intervention and welfare programs are far less effective once young people have reached their late teens and are already in a lifestyle of offending.

The most effective anti-crime programs are the ones that address poverty, homelessness, discrimination, child abuse and neglect, family breakdown, exclusion from education and other problems. Programs that provide support for people at risk of offending are the most successful in preventing crime.

The following is an extract from *Pathways to Prevention - Early Intervention* (1999), a research report commissioned by the Commonwealth Government as part of the National Crime Prevention Strategy.

> *The risk of crime is exacerbated by creating a community that is not inclusive of a diversity of families and youth, and it is exacerbated by not providing meaningful social pathways for its members. In the past 25 years, the percentage of dependent children living below the poverty line has nearly doubled (King, 1998), increasing greatly the number of young people who are denied the opportunity to participate in social and economic life. Programs such as quality pre-school education, poverty alleviation, and practical provisions (e.g. adequate housing) are strategies which attempt to compensate for the impact of these trends and promote the attachment of individuals and communities to mainstream social supports and developmental institutions. These social institutions form an essential backdrop to a targeted crime prevention program through the creation of a 'child friendly' society, a society which fosters meaningful social pathways and membership for its citizens.*

CROC contains detailed provisions that recognise the importance of early intervention and support programs for children and their families. They include:

Preamble: "[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."

CROC article 3.1: "In all actions concerning children…the best interests of the child shall be a primary consideration."

CROC article 18.2: The State "shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities."

CROC article 20.1: "A child…deprived of his or her family environment…shall be entitled to special protection and assistance provided by the State."

CROC article 24.1: Every child has "the right to the highest standard of health and to facilities for the treatment of illness and the rehabilitation of health."

CROC article 26.1: Every child has the right "to benefit from social security."

CROC article 27.1: Every child has the right "to a standard of living adequate for his or her physical, mental, spiritual moral and social development." [Article 27]

Every child has the right to education. [Article 28] Education shall aim at developing the child's personality, talents and mental and physical abilities to the fullest extent. Education shall prepare the child for an active adult life in a free society and foster respect for the child's parents, his or her own cultural identity, language and values, and for the cultural background and values of others. [Article 29]

The Riyadh Guidelines state that comprehensive prevention plans should be instituted at every level of government. The Guidelines place particular emphasis on preserving and supporting the family as the central unit of society responsible for children.

The Guidelines envisage a central role for the education system in crime prevention.

Guideline 24: ""Educational systems should extend particular care and attention to young persons who are at social risk. Specialised prevention programs and educational materials, curricula, approaches and tools should be developed and fully utilised."

Guideline 25: "Special attention should be given to comprehensive policies and strategies for the prevention of alcohol, drug and other substance abuse by young persons. Teachers and other professionals should be equipped and trained to prevent and deal with these problems. Information on the use and abuse of drugs, including alcohol, should be made available to the student body."

Guideline 26: "Schools should serve as resource and referral centres for the provision of medical, counselling and other services to young persons, particularly those with special needs and suffering from abuse, neglect, victimisation and exploitation."

Guideline 30: "Special assistance should be given to children and young persons who find it difficult to comply with attendance codes and to "drop-outs"."

Community based crime prevention programs are also very important under the Riyadh Guidelines.

Guideline 32: "Community-based services and programs which respond to the special needs, problems, interests and concerns of young persons and which offer appropriate counselling and guidance to young persons and their families should be developed, or strengthened where they exist."

Guideline 33: "Communities should provide, or strengthen where they exist, a wide range of community-based support measures for young persons, including community development centres, recreational facilities and services to respond to the special

problems of children who are at social risk. In providing these helping measures, respect for individual rights should be ensured."

Guideline 35: "A range of services and helping measures should be provided to deal with the difficulties experienced by young persons in the transition to adulthood. Such services should include special programs for young drug abusers which emphasise care, counselling, assistance and therapy-oriented interventions."

The Guidelines recognise that ultimate responsibility for providing the resources for youth crime prevention rests with governments.

Guideline 45: "Government agencies should give high priority to plans and programs for young persons and should provide sufficient funds and other resources for the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other relevant services, including drug and alcohol abuse prevention and treatment, ensuring that such resources reach and actually benefit young persons."

This section of the submission looks at four key areas that need to be addressed in developing programs to prevent juvenile offending.

### 1.1 Children experiencing poverty and homelessness

Low socio-economic status increases the risk of children becoming involved in the juvenile justice system. Many of the young people affected by the mandatory detention laws in the Northern Territory and Western Australia fall into this category. This is illustrated by numerous case studies in the HREOC briefing paper *Mandatory detention laws in Australia: an overview of current laws and proposed reform* (1999). Youth crime must be seen in the context of the family, geographic, cultural and educational circumstances that affect children's behaviour and opportunities.

A study of young people in detention convicted of theft found that overwhelmingly the main reason for their offending was to obtain food or money for their survival.

> *For many disenfranchised and marginalised young people, it seems illegal activity of various kinds is increasingly being seen as part and parcel of economic survival - a routine way of managing one's day to day living expenses.*[13]

In a survey conducted by the Australian Youth Foundation many young people described crime as a "way to get by".[14]

Providing adequate support services for young people who experience poverty and homelessness is an essential part of crime prevention.

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[13] R White "The business of youth crime prevention" in P O'Malley & A Sutton (eds) *Crime Prevention in Australia: Issues in Policy and Research* Federation Press, Sydney, 1997, 166.
[14] R White et al *Any Which Way You Can: Youth Livelihoods, Community Resources and Crime* Australian Youth Foundation, Sydney, 1997, 58.

> *Reducing welfare benefits, cutting expenditure on education, disbanding family counselling and related support services, and failing to resolve problems such as housing and unemployment are sure ways of encouraging the incidence of juvenile crime.*[15]

Homeless young people are particularly at risk of adverse contact with the juvenile justice system. They are one of the groups of children most in need of support. However, gaining access to benefits can be problematic because their lifestyle is transient and does not fit in well with official processes.

Some of the young people who attended focus groups for the National Inquiry into Children and the Legal Process talked about the frustration they experienced when applying for benefits. One girl had to provide three statutory declarations including one from her parents and one from a counsellor. Another 13 year old girl was forced to return to a violent home after 6 months of trying to get income support because the refuge where she was living could not afford to support her any more and there seemed to be no alternative place of safety. A Tasmanian boy told the inquiry it had taken 6 months from the time he applied for benefits until his first payment. During that period he sold drugs to survive. In Queensland the inquiry met a young girl who had a similar experience. Each time her application for benefits was refused she would stay with friends and steal food to survive.

The recently introduced common Youth Allowance was supposed to simplify procedures and overcome a lot of these problems. The Commission is not in a position to provide an authoritative assessment of the new system. However, a number of peak bodies and community organisations dealing with youth issues have raised questions about its adequacy to meet the needs of financially disadvantaged young people.

The *Seen and heard* report made a series of recommendations to address these problems.

- Youth Service Units should be established in each region as part of the Centrelink system. Youth Service Units are essential to ensuring that the particular needs of young income support applicants and recipients are met. Their role should be to ensure that needy young people are able to get income security, not to keep as many out as possible. [Recommendation 15]

- Models of income support delivery should be designed specifically for young Indigenous people and young people from non-English speaking backgrounds to take account of cultural differences and family relationships. [Recommendation 16]

- Evidential requirements, particularly those concerning identification, should be interpreted flexibly for young homeless people and should not of themselves bar them from receiving income support. [Recommendation 18]

[15] M Findlay, S Odgers & S Yeo *Australian Criminal Justice* Oxford University Press, Melbourne, 1994, 226.

- The adequacy of the rates of benefit payable to homeless and other disadvantaged young people should be subject to regular detailed reviews to ensure that appropriate minimum rates are maintained. [Recommendation 20]

- Support programs for young homeless people should be publicised extensively in the youth sector and the community. Government agencies need to ensure that their publicity campaigns are effective. Support services are of limited use if young people don't know of their existence or how to access them. [Recommendation 21]

## 1.2 Children in the care and protection system

Children who have been extensively involved in the care and protection system are drifting into the juvenile justice system at alarming rates. A New South Wales study showed that wards of the state were 25 times more likely to enter a juvenile justice detention centre than the rest of the juvenile population.[16] This is partly because the care and protection system itself often fails to provide an environment conducive to a child's healthy development. In addition, children leaving care often do not receive the support they require. Rather, they often experience inadequate housing, unemployment, loneliness and poverty, all at rates far in excess of those not entrusted to the care of the state.

The *Seen and heard* report recommended the development of National Care and Protection Standards for Children. [Recommendation 161] Many of the proposed standards are aimed at addressing, either directly or indirectly, the drift of young people from the care and protection system to the juvenile justice system. The standards include:

- There must be a commitment of resources necessary to ensure that family services departments are able to supervise adequately and provide services to families with children under care and protection orders living at home. Although those children come under state supervision they are often forgotten, ignored and left unsupported unless and until they come into contact with the police. [Recommendation 174]

- Every child in care should have a detailed case plan within 6 weeks of entry into care. The case plan should cover the educational needs, recreational opportunities and behavioural and/or medical intervention requirements for the child. Where appropriate, it should include intensive support, therapeutic and rehabilitation programs. [Recommendation 178] It should be regularly reviewed and updated. [Recommendation 179]

- The case plan should be developed, reviewed and updated in consultation with the child and due weight should be given to the child's wishes in accordance with his or her level of maturity. As the child becomes an adolescent and approaches adulthood, his or her views should be given greater weight. [Recommendations 178, 179]

[16] NSW Community Services Commission *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* NSW Community Services Commission, Sydney, 1996.

- At least 6 months prior to the child's 18th birthday or planned exit from care a transitional case plan should be developed. The plan should be directed towards assisting the child in the transition to independence or family reunification. It should designate the support services necessary for this transition both before and after leaving care. And that support should be provided. A parent does not reject all responsibility for a young person who turns 18. Nor should the state when it assumes the role of parent for a child. [Recommendation 181]

- Caseworkers and in particular staff in residential care settings should receive specialist training in identifying children and young people at risk of juvenile justice contact and in implementing early intervention and prevention strategies. [Recommendation 182]

## 1.3 Children in the school system

Support programs aimed at crime prevention must have the school system as a major focus area. The education system is one of the "make or break" factors in determining whether young people will enter a lifelong cycle of involvement with the criminal justice system. Children are not criminals when they begin school at 5. Yet some are by the time they leave at 12 or 15 or 17. Schools play an important role in preventing juvenile offending.

Children at risk in the education system

There is considerable evidence that early school leaving is related to unemployment, poverty, homelessness and conflict with the legal system. Longitudinal research conducted to determine what individual, environmental and social factors increase the risk of juvenile offending suggests that school failure is a major factor.[17]

Attention must be given to identifying and addressing as early as possible the needs of children at risk of dropping out - for example, those who come from difficult family environments and those with behavioural or learning difficulties. In 1997 the federal Minister for Schools, Vocational Education and Training reported that 30% of young Australian teenagers could not read properly and that there had been no improvement in literacy standards in the last 20 years.[18]

Appropriate intervention at the right point in the school life of these children at risk increases their chances of completing and succeeding in education. The Federal Government's Students at Risk (STAR) Program played a very important role in this regard. However, it was wound up in December 1996. The Children and the Legal Process Inquiry recommended that the program be reinstated. [Recommendation 40][19]

[17] DP Farrington "Implications of criminal career research for the prevention of offending" *Journal of Adolescence* 13 (1990) 93, 109.
[18] D Kemp, Minister for Schools, Vocational Education and Training *Media Release* 14 March 1997.
[19] Current programs are also being investigated in the HREOC National Inquiry into Rural and Remote School Education. Information about the inquiry can be found at http://www.hreoc.gov.au/news_info/rural/

The *Seen and heard* report also recommended the development of National Standards for Student Support Services. [Recommendation 42] These standards should include professional development training for all teachers and counsellors in identifying disadvantaged and at-risk children and referring them to appropriate government and non-government support services and programs.

In addition to school-based programs the *Seen and heard* report recommended community initiatives to identify students with particular problems and encourage their continued participation in education. These programs should include providing transport to schools, assistance with meals, primary health care and homework support.

Support programs should deal with basic issues of health and nutrition for children from poorer families. Addressing these needs helps children to concentrate in class and means they are less likely to be excluded from school because of hunger related behavioural problems or easily treated contagious conditions. This should include programs to address hearing impairment which is a major health issue for many children, particularly Indigenous children. The HREOC Inquiry into Rural and Remote School Education has found high levels of otitis media in many rural and remote schools. Evidence was given to the Inquiry that 40% of students at Yuendumu school in the Northern Territory had significant hearing loss due to otitis media.[20]

School violence

Addressing violent behaviour at school is an essential part of crime prevention, both in terms of its immediate consequences and the longer term development of the young people involved. Preventive programs and school-based anti-bullying policies are necessary to address the problem of school violence. They are also an effective means of instilling a sense of responsibility in students. Some schools have developed very good programs aimed at eliminating harassment and assault on school premises.

In 1995 the New South Wales Standing Committee on Social Issues recommended that resources be available for schools to function as models of co-operative, tolerant and non-violent communities. It said that schools should

- provide programs that foster tolerance and acceptance
- offer integrated programs to develop skills in acceptable problem solving behaviour
- work to eliminate the destructive practices of bullying
- support students exhibiting problem behaviours.[21]

The *Seen and heard* report endorsed these principles. The report recommended a national campaign to reduce school violence. The national campaign should focus on the benefits for youth crime prevention of anti-bullying policies, anti-harassment policies, peer mediation and peer support schemes. It should establish clear benchmarks in these areas. [Recommendation 38]

[20] Evidence by Peter Toyne, Shadow Minister for Education and Training, NT, Public Hearing, Darwin, NT, 10 May 1999.
[21] NSW Legislative Council Standing Committee on Social Issues Report 8 *A Report into Youth Violence in NSW* NSW Government, Sydney, 1995, rec 86.

Truancy

Addressing truancy is also an important element in crime prevention. Truancy increases the risk of involvement in the juvenile justice system. Evidence received from young people during focus groups for the Children and the Legal Process Inquiry suggested that some children are absent more than they attend. Reasons included boredom at school, embarrassment and frustration at poor performance, fear of bullying or harassment, drug dependency, family stress or conflict and homelessness. Addressing the situation of these students requires a coordinated government response to truancy. The *Seen and heard* report recommended the development of a national strategy to reduce truancy. The strategy should be a joint project involving the federal Government, all State and Territory education departments, peak groups from the Catholic and independent school sectors and relevant community groups. [Recommendation 45]

The national strategy should include the development of early intervention and family support programs to address truancy. During the Children and the Legal Process Inquiry the Commission observed some good models of these programs - models that should be developed further. For example, in Kalgoorlie there was a very comprehensive program of assistance and monitoring of those children identified as most at risk of truancy and absenteeism. It was a co-ordinated program operating across a number of schools. The Rural and Remote School Education Inquiry has also observed some worthwhile initiatives to address truancy. In Bourke, NSW, the "Streetbeat" Project, a co-operative scheme involving the school and the local community, has lifted school attendance by 60% and led to reduced crime rates. In Walgett, NSW, the "Community of Schools" Project, operated by the Department of Education and Training with local community involvement, provides individual support for "at risk" students in the local area.

The *Seen and heard* report did not support some of the more punitive and legalistic proposals for dealing with truancy such as imposing fines on students or parents. Not only do they not reduce truancy, but the fact is that chronically truant students are often from poorer families who cannot afford to pay fines anyway. These approaches in fact encourage young people in offending behaviour by drawing them into the criminal justice system on the basis of educational failure.

School discipline

School discipline is a significant factor which can influence whether young people enter the criminal justice system. Accordingly, it is important that policies and practices relating to school discipline be included in the consideration of crime prevention strategies. School exclusion is a particular area of concern. There is strong anecdotal evidence to suggest that a substantial proportion of young offenders had previously been excluded from school. While there is no doubt as to the connection between exclusion and juvenile offending, there is a need for systemic research to determine more clearly the nature and consequences of that connection. This was one of the recommendations of the Children and the Legal Process Inquiry. [Recommendation 46]

That Inquiry heard evidence that exclusion and other disciplinary measures are often imposed in an arbitrary and ad hoc manner. We were told that some young people regarded as difficult have been paid by teachers not to attend classes and others not formally excluded have simply been told not to bother coming back to school.

Many students are denied natural justice in these processes. A national survey of 66 young people suspended or expelled from school, undertaken by the National Children's and Youth Law Centre, suggested that many children are not told their rights during the disciplinary process.[22]

The serious consequences of exclusion make it imperative that these decisions are made according to clearly laid out procedures. The *Seen and heard* report recommended the development of National Standards for School Discipline, setting out permissible grounds for exclusion and the processes to be followed when a government school proposes to exclude a student. [Recommendation 47] To ensure impartiality in reviews of exclusion decisions, the report recommended that they be conducted by a panel of school and community representatives, at least one of whom is from outside the particular school community. The report also considered that students subject to exclusion should be entitled to an advocate during any interviews related to the disciplinary process and review proceedings. [Recommendation 48]

The National Standards on School Discipline should also require that

- the legislative provisions regarding discipline be widely publicised to students and their carers in readily understandable language, including Indigenous community languages where appropriate
- each State and Territory collect and publish annual statistics on truancy and on excluded students including age, sex, race, length of exclusion, reasons for exclusion and the support provided to excluded children
- each State or Territory department of education establish a unit with responsibility for ensuring appropriate arrangements are made for each excluded child, including counselling or other support and alternative schooling or education. [Recommendation 47]

Civics education and participation

More broadly, schools can play a role in crime prevention by encouraging civic mindedness and respect for human rights. This is important not only for children at risk but for all children. They have a right and a responsibility to know about human rights.

In partnership with families, schools should assist children in understanding their rights and responsibilities in a liberal democratic society. Young people in focus groups repeatedly told us that schools need to place more emphasis on teaching about life skills. This was seen as a way of enabling children to deal with their problems effectively rather than resorting to anti-social or offending behaviour.

[22] J Taylor *School Exclusions: Student Perspectives on the Process* National Children's and Youth Law Centre, Sydney, 1995, 15.

In May 1997 the federal Government announced that from 1999 all students in years 4 to 10 would be required to take classes in civics and citizenship. This would be based on the national civics program *Discovering Democracy* which includes material on democracy, the Constitution and the roles of different levels of government.[23] This was a very important initiative.

However, it is important that information about the political system include information on human rights. There should be a particular focus on the rights and responsibilities of young people as set out in the *Convention on the Rights of the Child*. Article 42 requires that the rights contained in the Convention be made widely known to both children and adults. Most young people who responded to surveys for the National Inquiry said they were not given enough opportunities to learn about their rights. Nearly 65% stated that this material should be included in the school curriculum.

Children should be supported to participate in school decision making processes and in school dispute resolution. Participation is one of the rights in CROC.[24] Practical experience of mediation and negotiation helps young people develop a sense of responsibility, a sense that they are valued rather than disenfranchised and an appreciation of constructive methods of resolving issues.

Some submissions to the Children and the Legal Process Inquiry did not support educating children about their rights because of concern that young people would use that information against their parents. A number of schools displayed a similar attitude when they banned distribution of the National Children's and Youth Law Centre's community education package *Know Your Rights at School*.

Teaching children about their rights and responsibilities at school does not undermine parents' and teachers' authority. On the contrary, it is more likely to enhance their authority. Children are more amenable to observing rules they can understand and see the need for than rules that seem arbitrary and unreasonable.

The Children and the Legal Process Inquiry recommended the development of guidelines on national best practice for student participation in school decision making. The guidelines should include material that assists them to understand their rights and responsibilities in the context of school decisions affecting them. A handbook should be prepared and distributed to all schools in Australia.

## 1.4 Crime prevention and Indigenous youth

Indigenous young people warrant special mention in the context of crime prevention. Available information confirms that the mandatory detention laws overwhelmingly target Indigenous people. Indigenous youth are over-represented at all stages of the juvenile justice system from arrest through to sentencing and detention. Indigenous children and their families suffer massive disadvantage in health, education and other areas. Many Indigenous families suffer poverty and hardship at a level comparable with any developing country. For many Indigenous people, their treatment by authorities has been characterised by discrimination, prejudice and even brutality.

[23] D Kemp, Minister for Schools, Vocational Education and Training *Media Release* 8 May 1997.
[24] CROC article 12.

The extent of Indigenous disadvantage is demonstrated by statistics produced by the federal Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, in the papers to the 1998 federal budget.

- a life expectancy 20 years less than other Australians
- death from diabetes five times the national average
- an infant mortality rate five times higher than other Australians
- 30% of all maternal deaths though they make up inly 2% of the population
- a one in three chance of having some from of trachoma by the time a child is nine years old
- a one in four chance of being under-nourished
- chronic over-crowding due to lack of housing supply
- a lack of basic sewerage and roads in remoter communities and safe water
- a school retention rate to year 12 of 33%, compared with the national rate of 75%
- nearly half of all Aborigines over 15 with no formal education
- a one in eight chance of not even going to school between the ages of 5 and 9
- an unemployment rate four times the national average
- an unemployment rate of 46% for those aged 20 to 24
- annual income of less than $12,000 for nearly 60% of those aged 15 and over
- household income around half the national average
- children placed in institutional care at 19 times the national rate.
- children detained in a juvenile justice institution at 20 times the national rate.

In these circumstances it is no wonder that young Indigenous people fall so easily into the net of the criminal justice system.

The recommendations of *Bringing them home*, the report of the Commission's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, provide a framework for early intervention programs to address many of these problems. That inquiry was not solely concerned with the past removal of Indigenous children. Its terms of reference required it to investigate the contemporary removal of Indigenous children that occurs through the operation of the juvenile justice system among others.

The report recognised that social and economic disadvantage facing Indigenous people are among the root causes of contemporary removal. It recommended that the Council of Australian Governments address this by

- developing a social justice package for Indigenous families and children, the package to be developed in true partnership, not consultation, with ATSIC, the Council for Aboriginal Reconciliation, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner and relevant Indigenous organisations
- pursuing the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody which deal with issues of social disadvantage. [Recommendation 42]

The report recommended that processes be established for the implementation of self-determination in relation to the well-being of Indigenous children. This should involve national legislation establishing a framework for negotiation at the regional and local community levels on how self-determination is to be implemented. ATSIC,

the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Secretariat for National Aboriginal and Islander Child Care (SNAICC) and the National Aboriginal and Islander Legal Services Secretariat (NAILSS) should all be involved in negotiations for the legislation.

The legislation should have five key principles.

- It should bind every Commonwealth, State and Territory Government.
- As far as possible, Indigenous communities should be free to negotiate measures best suited to their individual needs concerning children, young people and families.
- Negotiated agreements should not be set in stone but should be open to revision when needed.
- Every Indigenous community is entitled to adequate funding and other resources to enable it to provide for families and children and make sure that removal of children is the last resort.
- The human rights of Indigenous children are to be guaranteed.

In addition, the legislation should allow negotiation with local communities on

- transfer of legal jurisdiction in relation to children's welfare, care and protection, adoption and/or juvenile justice to Indigenous communities and organisations
- transfer of police and associated functions to Indigenous communities and organisations
- all aspects of the relationship between Indigenous communities and police / court system, including Indigenous involvement in policy and program development
- funding of programs relating to children, young people and families.

The legislation should include national standards for Indigenous children.
The overriding standard is that in any judicial or administrative decision affecting the care and protection, adoption or residence of an Indigenous child the best interest of the child is the paramount consideration. There is to be a presumption that the best interest of the child is to remain within his or her Indigenous family, community and culture.

## 2. Diversionary programs

Diversionary programs are those that where appropriate keep offenders out of the formal court system. They include mechanisms such as cautions and family conferencing. These programs aim to avoid trapping young people with a previously good record in a pattern of offending behaviour.

The *Convention on the Rights of the Child* recognises that diversionary programs are more desirable methods of dealing with young offenders than measures involving recourse to the formal juvenile justice system. Article 40(3) requires State parties to develop a range of measures for dealing with young offenders including

> (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Article 40(3)(b) is reinforced by provisions in the Beijing Rules. Rule 11.1 provides that consideration shall be given, whenever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority. Rule 11.4 recommends specific types of diversionary programs including those involving temporary supervision and guidance, restitution and compensation of victims. The commentary to Rule 11 states

> *Diversion, involving removal from criminal justice processing, and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems … In many cases, non-intervention would be the best response … This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.*

Diversionary programs offer significant benefits for both the offender and the community. They avoid the stigma associated with prosecution and they also prevent first minor offenders from being "contaminated" through contact with serious or recidivist offenders. They provide a process for young people to take some responsibility for their actions. In addition, they may save law enforcement resources and enable funding and personnel to focus on more serious crimes that pose a far greater threat to society.

## 2.1 Cautioning

Police have traditionally exercised a discretion to divert young people from the court system by warning or cautioning them. The rules and procedures governing cautioning vary among the States and Territories. However, they generally apply where the offender admits to having committed the offence and the offence is of a relatively minor nature.

The Commission readily admits that cautioning alone is not necessarily an adequate response to some offences covered by the mandatory detention laws in Australia. However, there may be particular cases where it would be an appropriate response, such as very minor offences involving property of negligible value.

This submission does not give detailed consideration to cautioning as an alternative to mandatory detention except to emphasise that it should be applied in a fair and consistent manner. Evidence has indicated that some groups of children do not receive the benefit of cautioning at the same rate as the general youth population. For example, in 1994-95 only 11.3% of Aboriginal alleged juvenile offenders in Victoria received formal cautions compared with 35.65% of non-Aboriginal juveniles.[25] This is despite the fact that the Royal Commission into Aboriginal Deaths in Custody recommended that police administrators encourage officers to make greater use of cautioning for Indigenous suspects.[26]

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[25] M Mackay *Victorian Criminal Justice System Fails ATSI Youth: Discussion Paper* Monash University Koori Research Centre, Melbourne 1996, 9.
[26] *National Report* vol 4, AGPS, Canberra, 1991, rec 240a.

## 2.2 Conferencing

Family group conferencing is increasingly being used in the States and Territories either to divert young offenders from the courts or as a sentencing option. Conferences are a form of restorative justice, a mechanism whereby the offender can accept responsibility and make amends to the victim.

New Zealand pioneered the development of family group conferencing and provided the impetus for many subsequent schemes in Australia and elsewhere.

A family conferencing scheme was piloted in Wagga Wagga in rural NSW in 1991. Under that scheme the apprehending officer was able to refer minor matters for conferencing. The conferences were initially conducted by police. However, after considerable criticism of the level of police involvement in the scheme, responsibility for administering conferences was transferred to the Department of Juvenile Justice. The NSW Government has since developed a statewide legislative scheme of youth justice conferences based on the New Zealand model.

Western Australia has developed an innovative conferencing model involving juvenile justice teams. Under this scheme, juvenile justice teams consisting of a youth justice co-ordinator, a police officer, a Ministry of Education officer and an Aboriginal community worker can convene family meetings to deal with young people who have been apprehended for minor offences. Young offenders are encouraged to take responsibility for their actions and make amends to their victims. An action plan is developed in consultation with all relevant parties. If the offender complies with the plan he or she does not get a criminal record.

Conferencing schemes have many benefits. The young person generally avoids a conviction and gets a "second chance". The rehabilitative aspect of juvenile justice is emphasised, encouraging young people to take responsibility for their actions and learn from their mistakes. Victims and their families have the opportunity to participate meaningfully in the process.

A number of very promising conferencing schemes have been developed throughout Australia. They need to be developed further and given more serious consideration as an alternative to mandatory detention.

Despite their many positive features, some conferencing schemes have been the subject of criticism. Concerns have included the extent of police involvement, the child's lack of access to legal advice and the severity of penalties imposed.

To be truly effective in advancing the child's rehabilitation and addressing community concerns about safety and justice, conferencing schemes must be fair and accountable in the way they operate. In developing conferencing schemes, consideration should be given to

- the desirability of diversionary schemes being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer

- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence
- the need to ensure that young people do not get a criminal record as a result of participating in conferencing
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person
- the child's access to legal advice prior to agreeing to participate in a conference
- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less *ad hoc*
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system.

The *Seen and heard* report recommended the development of national best practice guidelines for family group conferencing. In recommending these guidelines, the Commission was concerned about the need for a national approach to conferencing. While it is appropriate for schemes to reflect regional needs and circumstances, young people in one jurisdiction should not be treated substantially differently from those in another. One of the problems with the present arrangements is that different States and Territories have approached conferencing with varying levels of enthusiasm and support.

Conferencing and diversionary programs generally raise particular issues for young Indigenous people. Despite increased focus in recent years on the chronic over-representation of Indigenous people at all stages of the juvenile justice system, they are still not being diverted from the system at the same rate as non-Indigenous children. This may be due partly to the effect of prior records or the manner of the exercise of discretionary powers in some cases.

In 1996 Mick Dodson, then Aboriginal and Torres Strait Islander Social Justice Commissioner, commented on the use of cautions in Western Australia.

> *Between August 1991 and December 1994 Western Australian police cautioned 12,887 juveniles: only 12.3 per cent were Indigenous. Considering that Aboriginal representation among juveniles who are charged is as high as 69 per cent, it is clear who is not benefiting from this diversionary option.*[27]

The New Zealand experience demonstrates that diversionary schemes have the potential to be very effective for young Indigenous offenders because of the scope for the extended family and community to be involved. However, some Australian models have been criticised because they lack commitment to negotiation with Indigenous communities and fail to recognise the principle of self-determination. Some have involved a "one size fits all" approach, imposing a rigid model without due regard to the needs and circumstances of particular communities. In addition, there is potential for conferencing to increase the already high level of blaming and stigmatisation directed to young Indigenous people who come into conflict with the law.

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[27] Aboriginal and Torres Strait Islander Social Justice Commissioner *Fourth Report* AGPS Canberra 1996, 38.

Governments should ensure that Indigenous communities are able to develop and run their own family group conferencing models. Existing conferencng schemes should be modified to be culturally appropriate.

## 3. Non-custodial sentencing options

Examples of non-custodial sentencing options include

*Probation*
Probation is an order for supervision in the community as an alternative to detention. Probation orders are intended to assist rehabilitation of the child by providing continuing guidance and support. The supervision may include conditions on matters such as reporting, residence, education, employment, personal contacts, counselling and treatment.

*Conferencing schemes*
Conferencing is discussed earlier in this submission as an option for diverting young offenders from the court system. However, conferencing can also pay an important role at the sentencing stage. It can help the court determine an appropriate sentence. It can also be used as a sentencing option, for example conferencing with the victim for the purpose of reconciliation or compensation.

*Community service orders*
Community service orders involve offenders engaging in unpaid work for the benefit of the community. They normally entail a specified number of hours on an approved work project.

*Treatment programs*
These include orders catering for offenders with a mental illness or intellectual disability, such as hospital or psychiatric orders.

*Fines*
Provisions dealing with financial penalties usually set monetary limits for juveniles. However, for some young offenders they are not an appropriate sentencing option. Many young offenders come from financially disadvantaged backgrounds. Indeed, poverty is one of the root causes of offending behaviour. They may have difficulty paying the fine on the terms set by the court. Non-payment may result in the young person being dragged further into the criminal justice system.

CROC is particularly strong in its emphasis on non-custodial sentencing options as alternatives to detention.

CROC article 37(b) enshrines the fundamental requirement that detention of children should only be used as a measure of last resort. In doing this, it creates the imperative for non-custodial measures.

Article 40.4 deals more explicitly with non-custodial measures, stating

> *A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.*

As well as specifying a number of non-custodial sentencing options, article 40(4) also states the principle of proportionality. This principle requires that the sentence imposed be proportional to the seriousness of the offence. This principle creates a requirement for non-custodial measures because there are some offences in respect of which these measures will be the only proportional response. The experience of the mandatory detention laws in the Northern Territory and Western Australia illustrate this. Many of the cases in which sentences have been imposed under those laws have involved very minor offences for which detention is clearly not a proportional response.

The Beijing Rules also emphasise non-custodial options. Rule 18.2 provides that the placement of a juvenile in an institution shall always be a disposition of last resort. Rule 18.1 states that a large variety of disposition measures shall be made available to enable flexibility. These measures, which may be combined, should include

- care, guidance and supervision orders
- probation
- community service orders
- financial penalties, compensation and restitution
- intermediate treatment and other treatment orders
- orders to participate in group counselling and similar activities
- orders concerning foster care, living communities or other educational settings
- other relevant orders.

As alternatives to mandatory detention, non-custodial sentencing options are generally far more conducive to the child's rehabilitation. In the case of less serious offences, they represent a fairer and more proportional option than detention. In many cases, they provide an avenue through which the young offender can provide some form of reparation to the victim directly or to society at large.

In a submission to the Children and the Legal Process Inquiry the Youth Advocacy Centre in Queensland summed up the benefits of non-custodial sentencing options.

> *Programs that re-connect children with their communities, mainstream and social institution are more likely to reduce offending and make some changes in a child's life.* [Submission No.120]

Proponents of mandatory detention often claim that there has been a lack of success with other sentencing options. In some cases this may be true but it does not detract from the proven benefits of non-custodial programs and their superiority to detention as a means of promoting rehabilitation. Rather, it reflects the fact that some programs have been inadequately resourced and poorly designed. Criticisms of particular programs do not justify their abandonment in favour of a regime of mandatory detention. On the contrary, they highlight the need for greater commitment by Australian governments to addressing the shortcomings of existing programs and

delivering a system of properly resourced and co-ordinated sentencing options that meet the needs of young offenders and the community.

The adequacy of existing non-custodial sentencing options was examined in the *Seen and heard* report. It was noted that the sentencing options in legislation are not always reflected in the programs available to young offenders. Failure by governments to commit sufficient resources has restricted young people's access to suitable non-custodial programs. This includes lack of residential drug rehabilitation programs, lack of alternatives to mainstream education and lack of adolescent psychiatric inpatient and outpatient services.[28] Some potentially effective programs have been limited by stringent eligibility requirements and other restrictions on their applications.

In relation to probation programs, the report noted that there is often insufficient supervision for young offenders. One reason for inadequate supervision is a lack of available funding. Another is that magistrates and judges may not specify the agency responsible for supervising the child and as a consequence no agency takes responsibility for supervision. In a submission to the Legal Process Inquiry, the Law Society of NSW stated

> *The system of probation and parole, as applied to children, is of very little assistance. Children are supervised for short periods of time and the supervision is very superficial. This is caused by lack of resources. It is totally different to supervision of adults on probation and parole, which is much more appropriate.* [Submission No.209]

The *Seen and heard* report expressed similar concerns about the level of government commitment to community based orders for young people. The effectiveness of community based orders as sentencing options depends largely on the level of resources committed to their implementation. This was identified as a problem in all jurisdictions. There is also a need for a more streamlined and co-ordinated approach to the implementation of community service orders. It noted that in some cases there was confusion in the respective roles of the police, family service agencies and community organisations in the implementation of these orders.

Attention must also be given to the design of community service programs. They should not be so onerous that young people find it difficult to complete them. Courts must be aware of the problems children in difficult circumstances face in complying with these orders. For example, travel for a community service order may be problematic for a young person who is not receiving any assistance or support from parents and other family members and perhaps no income security payment.

In a submission to the Children and the Legal Process Inquiry, Community Services Australia said that sentencing options need to be better funded, more culturally appropriate and with a greater focus on integration in the community. [Submission No.201]

[28] Similar observations were made by the Commission in *Our Homeless Children* Report of the National Inquiry into Homeless Children (1989) and *Bush Talks* (1999).

The *Seen and heard* report recommended that a wide range of sentencing options be developed, based on minimum appropriate intervention by the formal justice system. Matters to be taken into account in the development of sentencing options should include

- the child's rehabilitation and reintegration into the community
- tailoring of programs to the individual needs and circumstances of young offenders, including the difficulties they may have in complying with certain orders
- the special health and other requirements of children and young people including drug treatment facilities, counselling and other practical programs
- treatment needs of young sex offenders.

## Part IV - Conclusion

Australia's international human rights obligations strongly support the abolition of mandatory detention of juveniles. Mandatory detention laws remove from the courts the ability to determine the most appropriate response in any given case. Detention has, to a large extent, been discredited in terms of its rehabilitative value. For many of the minor offences caught by existing mandatory detention laws, detention is an inappropriate, unjust and disproportionate response.

The abolition of mandatory detention would not result in the elimination of detention as a sentencing option for juvenile offenders. That option would still be available in those circumstances where it is warranted and there is no other alternative. However, it would be subject to the exercise of judicial discretion and the requirement that the severity of the penalty be proportional to the seriousness of the offence. It would also be subject to the requirement that detention of juveniles shall be a measure of last resort, a fundamental principle under international human rights law.

Australia's international human rights obligations also support and in some instances require the development of alternatives to mandatory detention for dealing with juvenile offending. Crime prevention programs, diversionary schemes and non-custodial sentencing measures all represent viable alternatives. Of these three categories, preventive programs are the most beneficial. The benefits of early intervention and social support programs in protecting against later offending cannot be stressed enough. These programs offer major long-term benefits in terms of children's development and life chances. The most effective crime prevention strategies are those that address issues of exclusion and disadvantage facing children and their families.

As this submission demonstrates, many strategies have been formulated that provide positive alternatives to mandatory detention. They include the programs recommended in *Seen and heard* and *Bringing them home*, the reports of two national inquiries of the Human Rights and Equal Opportunity Commission. While some limited action has been taken in relation to these reports, they are both awaiting full implementation. It is particularly noted that *Seen and heard*, the report of the National Inquiry into Children and the Legal Process, has not been the subject of a formal response by the federal Government although it was tabled in the Commonwealth Parliament in November 1997.