

Indigenous young people with cognitive disabilities & Australian juvenile justice systems

A report by Aboriginal and Torres Strait Islander Social Justice Commissioner,
Human Rights and Equal Opportunity Commission

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Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice Systems – A report by the Aboriginal and Torres Strait Islander Social Justice Commissioner

Human Rights and Equal Opportunity Commission, Sydney, December 2005

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Indigenous young people with cognitive disabilities and Australian juvenile justice systems

Background

This report has been prepared by the Aboriginal and Torres Strait Islander Social Justice Unit of the Human Rights and Equal Opportunity Commission.

The genesis of this report is a discussion paper, *Criminal Justice and Indigenous People with Cognitive Disabilities*, developed in 2004 for the Aboriginal and Torres Strait Islander Services (ATSIS).¹ That discussion paper found that Indigenous people with cognitive disabilities in the criminal justice system are more likely to experience further discrimination once involved in the system. To progress the findings of the discussion paper the Commonwealth Attorney General's Department has provided funding to the Human Rights and Equal Opportunity Commission to develop a more detailed examination of some of the issues raised in the discussion paper.

The initial discussion paper was broad in its scope in relation to Indigenous people with a cognitive disabilities and the criminal justice system. After initial consultations it was decided this report be inclusive of broader intellectual disability issues as well as mental health issues of Indigenous young people involved in Australian juvenile justice systems.

The funding has provided for a series of meetings and consultations with relevant state and territory government agencies and a National Roundtable. Consultations were held with a range of agencies including Indigenous peak agencies and state and territory departments of juvenile justice and other stakeholder departments. The timeframe of the project however did not allow for community consultations to be undertaken.

A National Roundtable was held in Sydney on the 15 June 2005 with a range of agencies and individuals invited to participate including commonwealth and state/territory agencies, academics and community representatives.² The views expressed and information supplied by the participants of the roundtable are provided throughout this report.

Accordingly this report will:

- Provide an overview of the issues relating to Indigenous young people with a cognitive disability and/or mental health concern;
- Provide a brief statistical overview of Indigenous young people in the juvenile justice system, as well as the prevalence of cognitive disabilities and mental health of Indigenous young people;
- Highlight some current policy and program approaches;
- Present main findings from the research and consultations, including outcomes from the National Roundtable; and
- Consider possible strategies and areas for further research

¹ Simpson, J. & Sotiri, M. (2004) *Criminal Justice and Indigenous People with Cognitive Disabilities*, www.beyondbars.org.au

² A list of Roundtable participants and others consulted is attached as Appendix 1 to this report.

Due to the short timeframe provided for completion of this research project it was not possible to conduct extensive community consultations nationally. The research however did identify and consult with significant stakeholders. This paper will therefore develop a series of recommendations concerning further research required in order to understand the issues more fully and hence be able to develop appropriate policy and programs. The researchers acknowledge the expertise existing in the Indigenous community as well as the broader justice communities on the matters raised in this paper and hope that an engagement on the issues raised here will encourage a continued dialogue.

Definitions

The following definitions are formal definitions and ones that are applied to individuals by health professionals when presenting with particular symptoms. They are also provided here as a useful resource to understanding the terms used throughout this report.

Such disabilities fall within the definition of disability under the *Disability Discrimination Act 1992 (Cth)*.

Cognitive disability - The category of cognitive disabilities includes a range of disorders relating to mental processes of knowing, including awareness, attention, memory perception, reasoning and judgment. Cognitive disabilities include intellectual disabilities, learning difficulties, acquired brain injury, foetal alcohol syndrome, dementia, neurological disorders and autism spectrum disorders.

Intellectual Disabilities – People with *intellectual disabilities* and some people with cognitive disabilities experience:

significantly lower than average intellectual ability and deficits in social and adaptive functioning, that is, limitations in such areas as communication, social, daily living or movement skills.³

Sometimes the term developmental disability is used as an alternative to intellectual disability:

But it is generally considered to be a broader term than intellectual disability, in that it can include a number of other disabilities (such as cerebral palsy) which arise during the ‘developmental’ period (usually defined as the period up to 18 years of age) but which may be of a physical, rather than an intellectual nature.⁴

Mental Illness – a condition that:

severely impairs (temporarily or permanently) the mental functioning of the person and is characterised by the presence of one or more of the following symptoms: delusions, hallucinations, serious disorder of thought, a severe disorder of mood, and sustained or repeated irrational behaviour ...⁵

However, while these definitions assist in understanding the issue from a medical perspective, even more crucial to this discussion is an awareness and appreciation of an Aboriginal perspective of mental illness and cognitive disability.

³ NSW Law Reform Commission (1994) *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, LRC, Discussion paper 35, p2.

www.lawlink.nsw.gov.au/lrc.nsf/pages/DP35CHP2 downloaded 21 June 2005

⁴ *ibid*

⁵ Freeman, K. (1998) ‘Mental Health and the Criminal Justice System’, *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research, No.38, Oct 1998, p.2

Definitions of mental illness and intellectual disabilities can be potentially problematic when rigidly applied for many groups in the community. In particular there are specific issues to consider when discussing cognitive disabilities and mental health with regards to Indigenous peoples.

An Indigenous view of health

The Indigenous view of health, including mental health, is a holistic one. Defining the Indigenous concept of mental health *Ways Forward – A National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health* submitted:

Aboriginal concept of health is holistic, encompassing mental health and physical, cultural and spiritual health.⁶

This holistic concept does not merely refer to the “whole body” but in fact is steeped in the harmonising inter-relations which constitute cultural well-being. These inter-related factors can be categorised largely as spiritual, environmental, political, social, economic, mental and physical. Crucially, it must be understood that when harmony of these inter-relations is disrupted, Aboriginal ill health will persist.⁷

Ways Forward acknowledges the impact of colonisation on Indigenous people’s health and expresses the relation between historical and contemporary social issues as:

Any delineation of mental health problems and disorders must encompass recognition of the historical and socio-political context of Aboriginal mental health including the impact of colonisation; trauma; loss and grief; separation of families and children; the taking away of land; and the loss of culture and identity; plus the impact of social inequity, stigma, racism and ongoing losses.⁸

In 2003 the Social Health Reference Group, a group comprised of Aboriginal and Torres Strait Islander people with expertise in health including social and emotional well being stated:

The social and emotional well being of individuals can be affected by their state of physical health, family relationships (including family violence, history of child abuse, family removals), sexual health and gender identity, education, employment and community relationships (including access to language and culture) and spirituality.⁹

Other studies undertaken by Indigenous health researchers acknowledge that western concepts find it difficult to comprehend Indigenous concepts of mental health because:

⁶ Swan, P. & Raphael, B. (1995) *Ways Forward – A National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health*, National Mental Health Strategy, AGPS, Canberra, p.13.

⁷ *ibid*

⁸ *ibid*, p.2.

⁹ Social Health Reference Group (2003) *Consultation Paper for the Development of a National Strategic Framework for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Well Being 2004-2009*, Commonwealth Department of Health and Ageing, p.vii.

... the English language does not have the intellectual code to communicate comprehension of Indigenous conceptualisation of wholeness or well-being.¹⁰

This holistic perspective is crucial in providing an understanding of an Indigenous person's approach to health. Social and emotional well being is as equally vital to a person's health as is physical well being – the two are not separated into different spheres of being. Analogous to this perspective is the incorporation of the social, the political and the economic as being a fundamental component of an individual's, and therefore a community's well being.

¹⁰ Poelina, A. & Perdrisat, I. (2000) *A Study into Indigenous Mental Health Terminology and Mental Health Promotion Using Principles of Ethnographic Participatory Action Research*, Centre for Mental Health Services Research, June 2000, p.6.

Statistical Overview

As is well acknowledged the juvenile and criminal justice systems have a deleterious affect on Indigenous communities. The over-representation of Indigenous people in custody, in large, is due to historically derived disadvantage and ongoing systemic discrimination. Experiences of separation through the criminal justice system, juvenile justice and care and protection systems, combined with dysfunctional behaviours such as family violence and alcohol and other substance misuse are indicative of the inequality and extreme marginalisation faced by Indigenous Australians.

The Australian Bureau of Statistics (ABS) has estimated that the Aboriginal and Torres Strait Islander population in 2001 was 458,500 people or 2.4% of the total Australian population.¹¹ The Aboriginal and Torres Strait Islander population is growing faster than the non-Indigenous population. The annual rate of growth for Indigenous people has been estimated at 2.3% compared with approximately 1.2% for non-Indigenous people. It is estimated that the Indigenous population will grow to more than 550,000 by the year 2011.¹²

Indigenous young people comprise 26% of the total Indigenous population, whereas young non-Indigenous people comprise 18% of the non-Indigenous population. The Indigenous population has a median age of 20 year, which means that 50% of the population are aged 20 years or below.¹³ In 2001, the percentage of Indigenous young people aged 12-24 years was estimated to be 3% of the total percentage of young people in Australia.¹⁴

Given that a significant characteristic of the Indigenous population is youth, and considering the challenges that face Indigenous young people it is imperative that innovative solutions be sought to address the overrepresentation of Indigenous people in the Australian criminal justice system.

Indigenous Australians, including youth, are the fastest growing prison population in all states and territories. Since the release of the report of the Royal Commission into Aboriginal Deaths in Custody in 1991 there has been an increase in the overall national adult prison, but a decline in the juvenile prison population.

As at June 2003 there were 640 juveniles in detention in Australia, and of these 302 were Indigenous young people, representing 47 percent of the juvenile justice population.¹⁵

Indigenous males comprise 46 percent of the total national male juvenile detention population and Indigenous females comprise 57 percent of the total national female juvenile detention population.

¹¹ Australian Bureau of Statistics (2003) *Population characteristics: Aboriginal and Torres Strait Islander Australians 2001*, cat no 4713.0, Commonwealth of Australia, Canberra, p.15.

¹² *ibid*

¹³ AIHW, (2003) *Australia's Young People: Their Health and Wellbeing 2003*, AIHW, Canberra, Chap.2, p.16

¹⁴ *ibid*

¹⁵ Charlton, K. & McCall, M. (2004) *Statistics on Juvenile Detention in Australia: 1981-2003*, Australian Institute of Criminology, Canberra, Technical and background paper, No.10, p.21-33.

Although overall there has been a decline in rates of detention for both Indigenous and non-Indigenous juveniles, the ratio of over-representation continues in a stable trend.¹⁶ Indigenous young people are 20 times more likely to be incarcerated than non-Indigenous young people. This ratio varies between state and territories depending on size of Indigenous youth population.

The following table indicates the rates of detention in each state and territory for both Indigenous and non-Indigenous young people.¹⁷

State/Territory	Indigenous rate	Non-Indigenous rate
NSW	339.2	18.0
Victoria	169.1	12.6
Queensland	237.4	9.5
Western Australia	578.4	12.7
South Australia	610.0	24.8
Tasmania	133.2	27.4
Northern Territory	152.5	48.4
Australian Capital Territory	384.6	57.1
TOTAL	320.9	16.1

Recidivism

Very few studies have been undertaken examining juvenile recidivism. However a national picture can be gleaned from the studies that have been undertaken.

A Queensland study on youth criminal trajectories reveals that Indigenous young people were most likely to progress from the juvenile system to the adult criminal justice system. Of the cohort being tracked in the Queensland study¹⁸, 86 percent of the Indigenous young people progressed from the juvenile system to the adult correctional system (65 percent serving a prison term) this as compared with 75 percent of non-Indigenous young people (41 percent serving a prison term).

The study found that:

The intersection of gender and Indigenous status intensifies the risk of maintaining a criminal trajectory from youth to adulthood. ...Indigenous males were most likely to enter the adult system, compared to non-Indigenous males and all females. Nearly 90 per cent of Indigenous males entered the adult system compared to 78 per cent of non-Indigenous males. Indigenous females, however, were more likely than non-Indigenous females to enter the adult system.¹⁹

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ The cohort selected for the research consisted of young offenders who in 1994-95 had received supervised juvenile justice orders. The cohort consisted of 1503 young people aged between 10 and 17 years including 193 females (69 Indigenous females or 35.8%) and 1310 males (474 Indigenous males or 36.2%). Institute of Criminology, *Youth Justice: Criminal Trajectories*, Trend and Issues, No.265, September 2003.

¹⁹ *ibid*

A recent NSW study on youth criminal trajectories reported that the court reappearance rate for Indigenous juveniles is about 187 per cent higher than that of non-Indigenous juveniles.²⁰ The study also reports that:

The odds of an Indigenous juvenile defendant appearing in an adult court within eight years of his or her first court appearance are more than nine times higher than those for a non-Indigenous defendant.²¹

A 2001 Victorian study revealed similar results with 65 per cent of Indigenous young people in the juvenile justice system having committed more than one offence as compared with 47 per cent of non-Indigenous young people in the juvenile justice system.²²

However, while we are able to gauge the amount of times an Indigenous young person may end up in juvenile detention and the likelihood of entering the adult criminal justice system, there is less known about the extent and the future offending trajectories of Indigenous young people with a cognitive disability and/or mental health problem.

Indigenous youth with disabilities in juvenile justice system

In the scoping paper prepared by Simpson and Sotiri for ATSISS, the complications of estimating prevalence of cognitive disability in Indigenous people in the criminal justice was raised. The paper indicated four key factors that hinder identification of the number of people affected:

1. The absence of solid statistical data examining more generally the extent of disability in Indigenous populations (further influenced by the mode in which such information is collected) including the fact that tools for assessing cognitive disability may not be culturally appropriate;
2. The limited solid information in the extent of cognitive disabilities in the criminal justice system settings;
3. Differing frameworks in Indigenous and non-Indigenous communities for defining and understanding cognitive disabilities;
4. The tendency for cognitive disability to be 'masked' in Indigenous populations as a consequence of the many other disadvantages endured by Indigenous people.²³

Given these barriers it is difficult to provide precise information on the prevalence of Indigenous young people with cognitive disabilities in the juvenile justice system.

Nevertheless, information can be assembled from a variety of sources which indicate the issue is extensive. In a recent submission made to the Senate Community Affairs References Committee Inquiry into children in institutional care, People With Disabilities Australia (PWD) noted that a large percentage of juvenile detainees have a disability. PWD's submission claimed:

²⁰ Chen, S., Matruglio, T., Weatherburn, D. & Hua, J. (2005) *The transition from juvenile to adult criminal careers*, Crime and Justice Bulletin, No.86, May 2005, p.3.

²¹ *ibid*, p.4.

²² Department of Human Services (2001) *Recidivism Among Victorian Juvenile Justice Clients 1997-2001*, Department of Human Services, Victoria, p.2.

²³ Simpson, J. & Sotiri, M. (2004) *Criminal Justice and Indigenous People with Cognitive Disabilities – A scoping paper*, Aboriginal and Torres Strait Islander Services (ATSISS), Canberra, p.6.

a lack of assessment, treatment and services for children with a mental illness means that many of these children fall through a range of service systems and end up in the juvenile justice system, 'consigned to incarceration rather than treatment.'²⁴

The Inquiry also reported on a 1997 South Australian study which found that:

... many of the young people then entering the State's juvenile justice system could be classified as intellectually impaired; 28 per cent were of borderline or below average intellectual functioning.²⁵

The *Young People In Custody Health Survey*²⁶ conducted by the NSW Department of Juvenile Justice revealed the following:

- 88% of young people in custody reported symptoms consistent with a mild moderate or severe psychiatric disorder;
- 30% reported symptoms consistent with Attention Deficit Hyperactivity Disorder;
- 21% reported symptoms consistent with schizophrenia;
- 10-13% were assessed as having an intellectual disability;
- 8% of young men and 12% of young women reported having attempted suicide in the previous 12 months;
- 21% of young men and 56% of young women reported drinking in the hazardous/harmful range; and,
- 51% reported that drug use had caused them problems.²⁷

With regards to cognitive ability the report sets out:

The pattern of results suggests that compared to other adolescents, many young people in custody may have difficulty comprehending, communicating and problem solving using language or numbers. Conversely, their practical reasoning (fluid intelligence skills or ability to solve non-verbal problems) is close to a typical adolescent's.²⁸

With further regard paid to Aboriginal and Torres Strait Islander young people in custody the report formulates that a 'culture fair' estimate for Aboriginal and Torres Strait Islander young people in custody with an intellectual disability would be 10 percent.²⁹

Simpson and Sotiri comment that:

Within the context of the criminal justice system, a cognitive disability may have many disadvantaging implications including:

- Reducing a person's capacity to understand laws and societal norms.

²⁴ The Senate Community Affairs References Committee (2005) *Protecting vulnerable children: A national challenge – Second report on the inquiry into children in institutional or out-of-home care*, Senate Community Affairs References Committee Secretariat, Commonwealth Government, Canberra, p.173.

²⁵ ALRC Submission to The Senate Community Affairs References Committee (2005) *Protecting vulnerable children: A national challenge – Second report on the inquiry into children in institutional or out-of-home care*, Senate Community Affairs References Committee Secretariat, Commonwealth Government, Canberra, p.173.

²⁶ *2003 NSW Young People in Custody Health Survey – Key Findings Report* (2003) NSW Department of Juvenile Justice, Sydney, ISBN:0 7347 6518 5.

²⁷ NSW Department of Juvenile Justice, *Disability Action Plan 2004-2006*, NSW Government, p.5

²⁸ *2003 NSW Young People in Custody Health Survey – Key Findings Report, op cit*, p.21

²⁹ *ibid*

- Reduced planning skills and impulse control.
- Being easily lead and eager to please.
- Increasing a person's vulnerability to be a victim of crime.
- Reduced communication skills.
- Inaccurate and devaluing community attitudes.

Being both Indigenous and having a cognitive disability is potentially a major dual disadvantage.³⁰

Simpson and Sotiri further observe:

The problem of disability being masked by other factors of disadvantage is perhaps most evident when it comes into contact with the criminal justice system. If brain injury is acquired early in life, and is never properly assessed, there is potential that behaviours that are a consequence of that brain injury will never be properly attributed. During contact with police, behaviour is much more likely to be connected with the immediate influence of drugs and alcohol, or perhaps implicitly linked to the fact of Aboriginality rather than being a brain injury. A lack of response to questions may be viewed as being the consequence of language and cultural barriers, rather than reflecting a lack of understanding.³¹

Indigenous young people with cognitive disability in the education system

Similarly, there is very little data on the numbers and proportions of students *per se* with forms of cognitive disability such as learning disabilities, autism and acquired brain injury.³² There is even less information regarding the actual numbers and proportions of Indigenous students with cognitive disabilities. Compounding the lack of data is the varying definitions between the Commonwealth, State and Territory departments of education of what constitutes a disability.³³

Therefore, inferences and connections have been drawn from separate data in order to gain a rough picture of the prevalence of cognitive disabilities amongst Indigenous students in the education system.

For example, Education Queensland reports that in 2002 students requiring additional learning support in Year 2:

- 47.2 per cent of Indigenous students required additional support in numeracy (compared to 22.5 per cent for total students requiring additional support in number);³⁴

³⁰ Simpson, J. & Sotiri, M. (2004) *Criminal Justice and Indigenous People with Cognitive Disabilities – A scoping paper*, *op cit*, p.6.

³¹ *ibid*, p.11.

³² The Senate Employment, Workplace Relations and Education References Committee (2002) *Education of students with disabilities*, Commonwealth of Australia, Canberra, p.13.

³³ The Senate Employment, Workplace Relations and Education References Committee, *Education of students with disabilities*, *op cit*, p.15.

³⁴ Education Queensland, *Which Year 2 Students Receive Additional Learning Support in Number?* Queensland Government, <http://education.qld.gov.au/schools/statistics/stat-support.html> accessed 9 March 2005.

- 38.7 per cent of Indigenous students required additional support in writing (compared to 17.2 per cent for total students requiring additional support in writing).³⁵

Further, 21 per cent of Indigenous students entered the reading recovery program in 2002 compared to 10.5 per cent of the total student population that entered the same program.³⁶ While this data does not specify whether these students have learning difficulties, or other form of cognitive disability, it may be inferred that some of the students may have some form of cognitive disability which requires them to have additional learning support.

While there is no data that shows a causal connection between students with detected or undetected cognitive disabilities moving into the criminal justice system, the data available does show that individuals with learning difficulties and cognitive disabilities are prevalent in the schooling system.

³⁵ Education Queensland, *Which Year 2 Students Receive Additional Learning Support in Writing?* Queensland Government, <http://education.qld.gov.au/schools/statistics/stat-support.html> accessed 9 March 2005.

³⁶ Education Queensland, *Which Students Participate in the Reading Recovery Program?* Queensland Government, <http://education.qld.gov.au/schools/statistics/stat-support.html> accessed 9 March 2005.

Main Findings

The research project consulted with a range of Indigenous people and agencies, federal and state/territory government departments, community organisations and the university sector. In addition to meetings and consultations the Aboriginal and Torres Strait Islander Social Justice Commissioner wrote to Ministers of health, justice (juvenile justice), education and Indigenous affairs in each state and territory requesting information on policies and programs relating to Indigenous young people with a cognitive disability and the juvenile justice system.³⁷

Emerging from the consultations were the following themes:

- Early childhood intervention and engagement with education;
- Diversion from the juvenile justice system – alternative sentencing mechanisms;
- Culturally relevant and appropriate assessment tools;
- Resources in the community; and
- Coordinating government services - joint care management.

What follows then is a brief discussion of the concerns raised regarding each of the main themes. Included in the discussion are outlines of some policy and program responses to the issue as well as (if appropriate) some best practice examples addressing the issues.

Early childhood intervention and engagement with education

Aboriginal and Torres Strait Islander Australians, as is well known and documented, experience poorer levels of socioeconomic outcomes than non-Indigenous Australians. Indigenous Australians experience higher rates of unemployment, family violence, incarceration, poorer health, including earlier death, poorer access and participation in education and inferior and inadequate housing choices. It is against this background that many Aboriginal and Torres Strait Islander people, including children, come into contact with the criminal justice system.

Given that many Indigenous families and communities experience lower socioeconomic status than non-Indigenous communities generally, then it should come as no surprise to find that some Indigenous young people living in poor physical and social environments experience higher rates of cognitive/intellectual disabilities and poorer mental health.

Participants at the Roundtable discussion raised the socio-economic environment of many Indigenous communities as major concern and an area which needed immediate attention. Participants also discussed a range of developmental issues that impact on the cognitive functioning and mental health of Indigenous young people and their communities such as Foetal Alcohol Syndrome³⁸, petrol sniffing, physical and emotional violence and poor nutrition.

A presentation delivered to the Roundtable participants outlined the major findings of the *Western Australian Aboriginal Child Health Survey (WAACHS)* which was conducted by

³⁷ See Appendix 1 for further details.

³⁸ See text box further in section for details on Foetal Alcohol Syndrome.

the Telethon Institute of Child Health Research. The presentation reiterated the concerns of the Roundtable, especially in relation to the well being and development of babies and children.

The *WAACHS* revealed that Aboriginal children experience a high risk of clinically significant emotional or behavioural difficulties.³⁹ The survey highlighted the facilitators of poor social and emotional well being as being:

- Biological stress such as low birth weight and poor nutrition;
- Stress that accumulates and overwhelms the individuals ability to cope;
- Chaotic and unpredictable environments, such as those resulting from multiple family stresses, high levels of residential mobility and changes to household composition;
- Social exclusion; and
- Social inequities arising from differences in the accumulation and use of resources and reduced access to the means to generate these resources.⁴⁰

The survey stresses the importance of positive experiences in early childhood as crucial to the development of good health and well being. It notes that early care and nurturing have a decisive and long-lasting impact on how people develop, their ability to learn, and their capacity to regulate emotions.⁴¹ The survey comments:

The brain's plasticity also means that there are times when negative experiences or the absence of appropriate stimulation are more likely to have serious and sustained effects.

And,

The major risks to early brain development include exposure to abuse/or neglect: maternal depression; parental substance abuse; poor nutrition and poverty.⁴²

The *WAACHS* also observes:

There are clear associations between family and household factors and risk of clinically significant emotional and behavioural difficulties experienced by Aboriginal children and young people.

The factor most strongly associated with high risk of clinically significant emotional or behavioural difficulties in children was the number of major life stress events (e.g. illness, family break up, arrests or financial difficulties) experienced by the family in the 12 months prior to the survey.⁴³

³⁹ Telethon Institute for Child Health Research (2005) *Western Australian Aboriginal Child Health Survey – Summary Booklet Volume Two*, ICHR, University of Western Australia, Perth, Vol 2, p.28.

⁴⁰ *ibid*

⁴¹ *WAACHS* (2005) *Powerpoint presentation*, National Roundtable on Indigenous Young People With Cognitive Disabilities, p.15.

⁴² *ibid*, p.18

⁴³ Telethon Institute for Child Health Research (2005) *Western Australia Aboriginal Child Health Survey, The Social and Emotional Wellbeing of Aboriginal Children and Young People*, ICHR, Vol.2, Summary, p.11.

The Productivity Commission has also noted concern about the development of Indigenous children and young people. The Steering Committee for the Review of Government Service Provision (SCRGSP) has been tasked by the Council of Australian Governments (COAG) to examine Indigenous disadvantage, and further, to develop a strategic framework to address that disadvantage. The *Overcoming Indigenous Disadvantage - Key Indicators* report⁴⁴ identifies key areas for improvement and encourages mainstream agencies to adopt the proposed benchmarks when developing policy and programs aimed at addressing disadvantage in Indigenous communities.

One of the priority outcomes identified in the report is positive childhood development. To address the current disadvantages confronting Indigenous communities in relation to child development the report identifies the following strategic areas for action and strategic change indicators:

Early child development and growth (pre natal to aged 3)

- Rates of hospital admission for infectious disease
- Infant mortality
- Birth weight
- Hearing impediments

Early school engagement and performance (preschool to year 3)

- Preschool and school attendance
- Year 3 literacy and numeracy
- Primary school children with dental caries

Positive childhood and transition to adulthood

- Years 5 and 7 literacy and numeracy
- Retention at year 9
- Indigenous cultural studies in school curriculum and involvement of Indigenous people in development and delivery of Indigenous studies
- Participation in organised sport, art or community group activities
- Juvenile diversions as a proportion of all juvenile offenders
- Transition from school to work⁴⁵

Similarly *Pathways to Prevention*, a report developed for the National Crime Prevention strategy examining the developmental and early intervention approaches towards crime prevention, urges government to focus on early developmental phases of a child as a means to thwarting future contact with crime. The report asserts that:

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 increasing greatly the number of young people who are denied the opportunity to participate fully in social and economic life. Programs such as quality preschool education, poverty alleviation, and practical provisions (eg 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 situations. These social institutions form an essential backdrop to a targeted crime prevention program through the creation of a

⁴⁴ Steering Committee for the Review of Government Service Provision (2003) *Overcoming Indigenous Disadvantage, Key Indicators 2003*, Productivity Commission, Melbourne.

⁴⁵ *ibid*, p.2.5

‘child friendly’ society, a society which fosters meaningful social pathways and membership for its citizens.⁴⁶

The report, while predominantly approaching intervention and prevention from a mainstream viewpoint, acknowledges the neglect in this area of Indigenous and minority ethnic groups and urges specific strategies be developed to address the particular issues of a particular community. The report warns:

... children from minority groups may be particularly exposed to some specific risk factors: factors related, for example to racism, group powerlessness and the conflicting demands of different cultures. Discrimination against children from minority groups may also involve responses that produce particular chains of risk.⁴⁷

The Australian Institute of Health and Welfare (AIHW) also observe the links between socioeconomic status and childhood development but warn:

... low socioeconomic status alone cannot explain the differences between the health of different groups in society. A number of additional factors are thought to be important determinants of health. These include the social environment in which people live (which encompasses social connections with family members, friends and the community), the degree of inclusion or exclusion from the society, and the sense of control that people feel they have over their lives. Loss of control and feelings of hopelessness and the marginalisation and exclusion of Indigenous Australians from wider society are thought to explain, in part, the higher rates of morbidity and mortality and the higher prevalence of risk-taking behaviours among Indigenous Australians.⁴⁸

The AIHW comments further:

Aboriginal and Torres Strait Islander peoples suffer disadvantage at a young age and continue to be disadvantaged throughout their lives. Although children and young people also suffer from the disadvantages that affect the whole community, problems and issues that are particularly pertinent to young people tend to affect Indigenous young people disproportionately.⁴⁹

In 1991 the Royal Commission into Aboriginal Deaths in Custody identified the links between early disengagement with the formal education system and early involvement in the criminal justice system.⁵⁰ Supporting this claim the Australian Bureau of Statistics (ABS) identified that 37.1 percent of Indigenous adults coming into contact with the criminal justice system had ceased schooling before year 10.⁵¹

⁴⁶ National Crime Prevention (1999) *Pathways to Prevention: Developmental and early intervention approaches to crime in Australia*, National Crime Prevention, Attorney-General's Department, Canberra, p.5.

⁴⁷ *ibid*, p.143.

⁴⁸ Australian Institute of Health and Welfare (2003) *Australia's Young People: Their Health and Wellbeing 2003*, *op cit*, p.321.

⁴⁹ *ibid*.

⁵⁰ Royal Commission into Aboriginal Deaths In Custody, *National Report*, Chapter 33 - <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/> downloaded 5 July, 2005.

⁵¹ Australian Bureau of Statistics (ABS) 2004, *National Aboriginal and Torres Strait Islander Survey 2002*, ABS, Cat. Canberra, No. 4714.0.

In recognising early and ongoing engagement with the education system as a crucial development pathway in minimising later contact with the juvenile and criminal justice system *Overcoming Indigenous Disadvantage* emphasises the importance of high quality early childhood education.

The report also places a strong emphasis on the importance of continuing importance of educational outcomes throughout the transition between childhood and early adulthood. The report notes:

For most students, compulsory education ends in year 9 or 10. Many of the Indigenous students who elect to leave at this point have poor literacy and numeracy skills. They are, as a result, limited in what their options may be for the future. As stressed by many of the Indigenous people consulted, this all too often leads into boredom, despair, substance abuse, and criminal activity. The retention of Indigenous students at this stage in their education is, therefore, one of the potential milestones in breaking the cycle of disadvantage.⁵²

The AIHW *Australia's Young People* notes:

At age 19, the proportion of Aboriginal and Torres Strait Islander males who were still at school or who had completed Year 12 is 29% (compared with 68% of other Australian males), and for Aboriginal and Torres Strait Islander females, 38% were still at school or had completed Year 12, compared with 78% of other Australian females.⁵³

The report continues:

The disparity between Aboriginal and Torres Strait Islander and other Australian young people among those aged 24 years with skills training is even greater; 45% of other Australian males, compared with 16% of Indigenous males, and 43% of other Australian females, compared with only 12% of Indigenous females.⁵⁴

For those Indigenous young people with a cognitive/intellectual disability or a mental health issue the difficulties of remaining in the education sector are vast. However maintaining links with the sector including vocational programs is vital to social and emotional well being. Remaining in education has been shown to greatly reduce contact with the juvenile justice system. Gaining an education can contribute to self esteem as well as greatly enhance the potential to positively contribute to the community and the society more broadly.

A Department of Family and Community Services (FaCS) research paper on early intervention strategies also acknowledges the increasing recognition being paid to positive experiences in early childhood development as being crucial to an individual's future outcomes. While supporting the broad range of programs and initiatives developed to assist young people who may experience disadvantage, the report highlights the concern:

⁵² Steering Committee for the Review of Government Service Provision (2003) *Overcoming Indigenous Disadvantage, Key Indicators 2003*, *op cit*, p.7.2

⁵³ Australian Institute of Health and Welfare (2003) *Australia's Young People: Their Health and Wellbeing 2003*, *op cit*, p.325.

⁵⁴ *ibid*

...that disadvantages experienced by children, families and the community will not be solved by ameliorative programs alone and that structural causes must also be addressed.⁵⁵

The paper continues:

... that the effectiveness of community-based programs should not lead to the replacement of individually-targeted programs. Also, while providing prevention services can reduce the need for spending on compensatory or remedial services, not all social expenditures are preventable or can be eliminated. Not all prevention efforts will reach those who need them, or will always be successful with those they reach.⁵⁶

The paper concludes:

When programs are directed at families with children who have yet to complete primary school, they are more effective in terms of social outcomes (such as reduced substance abuse, reduced maltreatment, reduced future involvement with the justice system, increased school completion rates, future employment and so on). They are also considerably more cost effective in terms of program expenditure per participant.⁵⁷

Field note

The Round Table heard that many young Indigenous people are discouraged from attending school for a range of reasons. One consultation heard about a young Aboriginal boy who had been suspended from school 36 times for a range of inappropriate behaviours. The boy had not been referred by the school to any outside agencies for support or counselling nor had Elders or community representatives been invited to the school discuss likely solutions with the boy's teachers. At 15 he left school permanently and he soon found himself in front of a magistrate.

This account highlights the experience of some young people, not just Indigenous young people, but when bundled together with other experiences and social disadvantages faced by young Aboriginal people, it may explain to a degree why Indigenous youth are overrepresented in the criminal justice system. The combination of a lack of appropriate intervention at important transitional stages, as well as a lack of resources available within the education system and the community potentially contribute towards a young person coming into contact with the juvenile justice system.⁵⁸

It is imperative therefore that when authorities consider crime prevention strategies, especially those that focus on juvenile offending or youth recidivism, a broad approach is adopted, not one that merely looks at what can be done once an offence has been committed.

⁵⁵ Gauntlet, E., Hugman, R., Kenyon, P. & Logan, P. (2000) *A meta-analysis of the impact of community-based prevention and early intervention action*, Commonwealth Department of Family and Community Services, Policy Research Paper No.11, p.39.

⁵⁶ *ibid.*

⁵⁷ *ibid.*, p.54.

⁵⁸ National Roundtable, 15 June 2005, Human Rights and Equal Opportunity Commission, Sydney.

Foetal Alcohol Syndrome

An issue that was raised several times throughout the consultations was the impact of Foetal Alcohol Syndrome on Indigenous young people and offending behaviour.

Foetal alcohol Syndrome (FAS) is a condition affecting the foetuses of some pregnant women who drink alcohol excessively. Large amounts of alcohol can affect embryonic/foetal development resulting in a range of abnormalities including malformation, growth deficiency, central nervous system abnormalities, heart defects, poor muscle tone, inability to suckle and poor co-ordination in infancy.⁵⁹ Children with FAS experience significant developmental delays and behavioural problems.

The number of children born with FAS in Australia is unclear. A paper developed for the National Alcohol Strategy observed:

Indigenous people are reported as having higher incidence/prevalence of FAS than (sic) the wider community, but ... this association may be determined more by socio-cultural variables such as SES (socioeconomic status) and drinking patterns rather than racial characteristics.⁶⁰

The paper revealed the prevalence of FAS in Western Australia, for example, was 0.02 per 1,000 for non-Aboriginal children and 2.76 per 1,000 for Aboriginal children and these may be underestimates.⁶¹

Otitis Media

Another issue raised frequently among research participants was the problems associated with Otitis Media.

Otitis Media (OM) results from an infection of the middle ear. There are many types of OM such as acute, with and without eardrum perforation, recurrent, chronic and chronic suppurative.⁶²

During middle ear infection some hearing loss may be experienced, however inadequate treatment (or no treatment at all) may result in permanent hearing loss. Treatment for OM is usually antibiotics and an analgesic for the pain.⁶³

The Western Australian Aboriginal Child Health Survey (WAACHS) revealed 29 percent of Aboriginal children (aged 0-17) had a perforated eardrum and 65 per cent of Aboriginal children experienced hearing loss as a result of OT.⁶⁴

⁵⁹ Williams, N. (1999) 'Foetal Alcohol Syndrome – What Is It and What Are The Possible Implications?', paper presented at *Best Practice Interventions in Corrections for Indigenous People Conference*, Australian Institute of Criminology, Adelaide, October, 1999.

⁶⁰ O'Leary, C. (2002) *Fetal Alcohol Syndrome – A Literature Review*, National Expert Advisory Committee on Alcohol, Commonwealth Department of Health and Aging, Canberra, p.20.

⁶¹ *ibid*, p.19

⁶² Australian Indigenous HealthInfonet: www.healthinfonet.ecu.edu.au, downloaded 13 July 2005.

⁶³ *ibid*

⁶⁴ Telethon Institute for Child Health Research (2005) *Western Australian Aboriginal Child Health Survey*, summary downloaded 25 Aug 2005, www.ichr.uwa.edu.au/research/themes/childhealth.lasso

In a research project conducted by the National Aboriginal Community Controlled Health Organisations (NACCHO) investigating Otitis Media and school attendance of Aboriginal children revealed that 54 per cent of children taking part in the study had a hearing loss serious enough to warrant hearing aids.⁶⁵ NACCHO also observe that hearing loss as a result of OT leaves a “legacy of educational and social disadvantage.”⁶⁶

Hearing loss, as a result of OM seriously impacts on the child’s development especially the ability to learn effectively. The SCRGSP’S *Overcoming Indigenous Disadvantage* indicates hearing impediments as a significant public health issue requiring immediate attention. The report notes:

Indigenous children suffer significantly from conductive hearing loss from early infancy due to otitis media; and that their hearing level may not recover fully before adulthood. Hence ... the fluctuation of hearing level during childhood has implications for the children’s auditory and linguistic development.⁶⁷

The Australian Institute of Health and Welfare have recently observed that children with hearing impairments as a result of OM are less likely to attend school. However, AIHW point out there is a lack of solid quantitative evidence that show the effects of OM on Indigenous educational outcomes.

Nevertheless, there is information available that indicates a child’s health is an influential factor in the child’s ability to learn. The AIHW reiterate the National Indigenous English Literacy and Numeracy Strategy (NIELNS) recognition of:

... the importance of improving the health of Indigenous children in order to enable them to increase their educational participation and attainment and consequently, their opportunities for a prosperous and healthy lifestyle.⁶⁸

As discussed earlier in this report, early disengagement with school can lead a young person into participating in antisocial activities, including offending behaviour and consequently into contact with the juvenile justice system. If early disengagement with education comes as a result of a poor, but preventable, health outcome, then immediate action must be taken to remedy what is an educational and social disadvantage among Indigenous young people.

⁶⁵ National Aboriginal Community Controlled Health Organisation, *NACCHO Ear Trial and School Attendance Project*, NACCO, Canberra, July 2003, p.17.

⁶⁶ National Aboriginal Community Controlled Health Organisation (1998) *Systematic Review of Existing Evidence and Primary Care Guidelines on the Management of Otitis Media in Aboriginal and Torres Strait Islander Populations*, NACCHO, Canberra, p.10.

⁶⁷ Steering Committee for the Review of Government Service Provision (2005) *Overcoming Indigenous Disadvantage, Key Indicators 2005*, Productivity Commission, Melbourne, p.5.15.

⁶⁸ National Indigenous English Literacy and Numeracy Strategy as cited in Australian Institute of Health and Welfare (2005) *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples 2005*, AIHW, Canberra, p.22.

Diversion from the juvenile justice system – alternative sentencing mechanisms

Several consultations, including the National Roundtable, raised the potential for diversionary programs as a way to address the specific issues confronting Indigenous young people with a cognitive disability and/or a mental illness who come into contact with the juvenile justice system.

Diversionary programs aim to divert the offender, in this case a juvenile offender, away from the formal criminal justice system. Diversion can include oral or written warnings, formal cautions, victim-offender and family conferencing or referral to a community based program. There are also innovative sentencing mechanisms such as circle sentencing and drug courts, which divert offenders from the normal court sentencing process. Juvenile diversionary programs have been developed recognising:

contact with the formal system can contaminate young people who would otherwise avoid involvement in further criminal activity if just left alone'.⁶⁹

There have been a range of reports published throughout the last two decades highlighting the concerns and failures of juvenile justice systems in Australia. Studies have shown a strong correlation between custodial penalties and recidivism. As far back as the 1970s studies revealed that:

Even a relatively short term on custody on remand was found to significantly increase subsequent offending (64.3 percent) compared to being placed on remand at home (36.6 per cent).⁷⁰

Some reports and strategies have focussed on the importance of early intervention. When examining the criminal trajectories of juvenile offenders Lynch *et al* comment:

... by the time young people come to the attention of the juvenile justice system, it is difficult to modify a trajectory whose 'direction' has already been substantially determined by a very wide range of precursor factors that can no longer be effectively addressed by any single government agency.⁷¹

The report continues:

What this fact points to is the crucial importance of targeted early interventions that address the precursors to juvenile offending before they give rise to attitudes and behaviours that will ultimately bring individuals into conflict with the criminal justice system.⁷²

In recognising the benefits of diversion the Senate Committee's inquiry in children in institutional care provided the following recommendation:

⁶⁹ Blagg, H and Wilkie, M. (1995) *Young People and Police Powers*, Australian Youth Foundation, Sydney, p.56.

⁷⁰ Kraus and Smith (1978) in Lynch, M. Buckman, J. & Krenske, L. (2003) 'Youth Justice: Criminal Trajectories', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, No.265.

⁷¹ Lynch, M., Buckman, J. & Krenske, L. (2003) 'Youth Justice: Criminal Trajectories', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, No.265

⁷² *ibid*

Recommendation 16

6.43 That the Commonwealth Government take note of the merits of the restorative justice programs in helping to keep young people out of the juvenile justice system (and later gravitation to the adult prison system), and increase its involvement, support and funding for such programs, to ensure that the coverage of such programs across Australia is wider than is presently the case. It is recommended that the Commonwealth Government introduce restorative justice programs that would assist in reducing the high numbers of Indigenous youth in juvenile justice centres.⁷³

Encouragingly, and increasingly, legal systems in Australia are employing, in varying degrees, a range of restorative justice practices to address accelerating incarceration rates of Indigenous people. Moreover, a range of diversionary programs exist for young offenders in Australia, although the type and extent of their use varies considerably between each state and territory. An overview of existing diversionary approaches is Appendix 2 to this report.

Juvenile diversionary programs have been developed recognising, that if a young person comes into contact with the formal criminal justice system, especially the custodial system, then they are more likely to have ongoing contact with the system, than those individuals initially diverted from the system. In other words, if involvement with the criminal justice system can be avoided then the chances of re-offending are decreased. According to the offence diversion can be implemented as pre-court or pre-detention.

However there have been no studies conducted examining the impact of diversionary practices with Indigenous young people with cognitive/intellectual disabilities or mental health issues, therefore no comment can be made as to the effectiveness of diversion for this group. However community consultations revealed a concern about the adequacy of resources available in some communities to support those Indigenous young people with a cognitive disability and/or mental illness being diverted from formal justice settings.

Aboriginal Courts

The introduction of innovative sentencing mechanisms in several states, such as Circle Sentencing and Aboriginal Courts, has provided alternative sentencing environments for Indigenous adult offenders.

The objective of Circle Sentencing (or Circle Court) and Aboriginal Courts is to ‘shift the process of sentencing from blame to rehabilitation and responsibility.’⁷⁴ The sentencing process takes place after the offender has plead guilty or has been found guilty, and then assumes responsibility of the offence. The offender is then offered (depending on circumstances and availability) an opportunity to be sentenced by a Circle Court or Aboriginal Court. The offender meets with members of his or her community and is ‘presented with the impact of their actions in front of respected community members, elders, peers, family, the victim and their family, stimulating an opportunity for real change.’⁷⁵

⁷³ The Senate Community Affairs References Committee, *Protecting vulnerable children: A national challenge – Second report on the inquiry into children in institutional or out-of-home care*, op cit, p.181.

⁷⁴ Native Law Centre of Canada, ‘Circle Sentencing: An General Overview and Guidelines’,

<http://www.usask.ca/nativelaw/publications/jah/circle.html>

⁷⁵ *ibid.*

An evaluation of a pilot Circle Sentencing scheme in NSW commented that:

The participation of Aboriginal representatives in the sentencing process also enables creative sentencing options to be implemented. This is because members of the community have a unique understanding of the offender's problems and are best placed to assist with a solution after they leave court.⁷⁶

Some jurisdictions are now considering implementing Aboriginal Court models to address sentencing of Indigenous juvenile offenders.

Children's Koori Court – Victoria

In September 2005, Victoria will establish the Children's Koori Court. The Court will be based on the Adult Koori Courts, which have been operating in Victoria since 2003. Similar to other Aboriginal courts operating in Australia, it will provide a less formal approach to sentencing procedures. It aims for greater participation by the Koori community by attempting to reduce 'perceptions of cultural alienation and tailors sentencing orders to the cultural needs of Koori offenders.'⁷⁷

Aboriginal young people who have plead guilty or who have been found guilty to an offence (with the exception of sexual or violent offences) can elect to be sentenced in the Children's Koori Court. Present at the sentencing is the young person, their legal representative, family members or other community representative, including Elders and Aboriginal Youth Justice Worker. A hearing can also include the victim (if any) and their family or community representative. The Victorian Government have advised that:

The Children's Koori Court will focus on the individual child through close collaboration with family, community service providers and criminal justice agencies. The partnership approach aims to assist the child offender to comply with the completion of sentencing orders by enabling the Court to receive the appropriate advice to design sentencing orders which meet the needs of the individual child offender in a culturally appropriate manner. In this way the Children's Court considers and deals with the sentencing of Indigenous child offenders in a culturally appropriate and aware manner. In this forum, the individual needs of the young person (such as cognitive disability) can be specifically highlighted and managed.

Conferencing

One of the most intensive forms of diversion to emerge has been *conferencing*.

The *conference* provides a forum for restorative solutions to be developed. Advocates stress that conferencing is not a soft option. It directly confronts young people with the consequences of their behaviour and provides avenues for direct reparation and restitution for victims. The agreements reached by conferences can be tailored to meet the direct wishes of the participants and often involve the offender in community work, a direct apology to the victim and some kind of – often symbolic - restitution. Families of offenders may leave the conference empowered by the process, having re-claimed control over their children.

⁷⁶ Potas, I., Smart, J. Brignall, G., Thomas., B.. & Lawrie, G. (2003) *Circle Sentencing in New South Wales – A review and evaluation*, Judicial Commission of New South Wales, Sydney, p.52.

⁷⁷ Magistrates Court of Victoria, Specialist Court Jurisdictions, Koori Court, www.magistratescourt.vic.gov.au

There are two (sometimes seemingly contradictory) ways of seeing diversion. The first is relatively minimalist: diversion is about giving first or minor offenders 'a second chance'. The second is more radical and ambitious: diversion becomes not just a mechanism for re-routing individual cases away from contact with the existing criminal justice system but a vehicle for directing cases into an alternative process of community based justice.

The importance of community participation in this process is underscored, as non-participatory models tend to result in short-lived and superficial outcomes:

Too often planners fail to identify and nurture the community commitment and this results in the under-utilisation of local knowledge and skills and the relegation of the "community" contribution to a secondary role in the process. This detracts from real community development and continues the process of disempowerment.⁷⁸

The conference provides a forum for restorative solutions to emerge. Proponents stress that conferencing is not a soft option. It directly confronts young people with the human consequences of their behaviour and provides avenues for direct reparation and restitution for victims. The agreements reached by conferences can be tailored to meet the direct wishes of participants and often involve the offender in community work, a direct apology to the victim and some kind of – often symbolic – restitution. Families of offenders may leave the conference empowered by the process, having re-claimed control over their children.

Pre- Court Diversion - Northern Territory

In 2000 the Northern Territory introduced, in response to continued criticism to mandatory detention policy, a Juvenile Pre-Court Diversion Scheme in order to reduce the number of young people coming into contact with the juvenile justice system. The introduction of the Pre-Court Diversion program was accompanied by an Aboriginal Interpreter Service which aimed to alleviate the language barriers faced by some Aboriginal people in the Northern Territory. In the six month period ending 28 February 2005, 28% of Indigenous young people apprehended by Police were offered diversion.⁷⁹

The Northern Territory Parliament is currently considering the *Youth Justice Bill*:

which incorporates and enhances the current juvenile diversionary scheme administered under the *Police Administration Act*. The Bill contains a statutory presumption in favour of diversion save for some specific serious offences. A New Youth Justice court to be established will have the power to refer a youth to a diversion program, regardless of the offence, at any stage of the proceedings prior to a finding of guilt.⁸⁰

This approach has potential benefits to those young Indigenous people with a disability or a mental health problem. It allows, at any stage throughout the hearing, for the magistrate to consider diversion if appropriate. It may be that a young person may not exhibit signs of a disability or mental illness at the time of the arrest, but may in fact show symptoms throughout a court process, if this is the case the magistrate has some flexibility to halt proceedings and consider diversion.

⁷⁸ *ibid*, p10.

⁷⁹ Department of Justice, Northern Territory Government, correspondence received 17 June 2005.

⁸⁰ *ibid*.

Culturally relevant and appropriate assessment tools

The consultations, including the Roundtable discussion, revealed that often young people, have not received any kind of assessment (either for cognitive disability or mental health) prior to their incarceration.

Young people who have received an assessment, prior to a first custodial sentence, have usually displayed obvious signs of a disability or mental illness. The magistrate will only be advised of the young person's condition if legal counsel or other involved agency, such as community services, have raised concerns about the young person's ability to understand the situation he or she is facing. Many of those consulted for this project expressed concern only those young people displaying 'obvious' signs of cognitive/intellectual disability or mental illness, will be referred for assessment. For those young people with a mild disability or mental illness, or perhaps a serious condition that is not manifest at the time of their arrest or court appearance, an assessment will not be carried out until they enter the detention centre.

Further concerns were raised by research participants about the cultural suitability of assessment and subsequent health services provided to Indigenous young people in detention. Concern was raised at to the access to Aboriginal Medical Services and other Indigenous specific services such as Indigenous mental health professionals, which was minimal to none.

Of even further concern is access to services available to young people in detention. The Victorian Youth Parole Board and Youth Residential Board have recently expressed concern that some young people in juvenile detention still do not have access to regular psychiatric services.⁸¹

However most of the responses received from relevant government departments outlined comprehensive health (including mental health) programs delivered to young people in detention. The responses also acknowledged (although few provided detailed information) the importance of culturally sensitive assessments with some jurisdictions having implemented appropriate assessment procedures.

Simpson and Sotiri have observed:

In recent decades, there has been a movement away from an over-reliance on IQ scores for assessing disability. For example, IQ scores have a cultural bias and are ill-equipped to assess conditions such as autism. Also, many people in contact with the justice system have multiple diagnoses, such as an intellectual disability and a psychiatric disability, drug or alcohol disorder, and/or a brain injury.

The issue of the degree of a person's 'support needs' has taken greater prominence as a flexible way to assess the nature and extent of a person's need for assistance in everyday living.⁸²

⁸¹ Youth Parole Board and Youth Residential Board (2005) *Annual Report 2003-2004*, Department of Human Services, Victorian Government, p.14.

⁸² Simpson, J. & Sotiri, M. (2004) *Criminal Justice and Indigenous People with Cognitive Disabilities – A scoping paper, op cit*, p.4.

In Victoria for example the *Offending Needs Indicator for Youth (ONIY)* has been developed which has an emphasis on the developmental needs and well-being of the young person.

Demographic factors are noted so that workers are alerted to any particular needs a young person may have. These include Indigenous status and a range of health and developmental needs including:

- Risk of self-harm or suicide
- Mental Health
- Cognitive function
- Developmental level
- Poor literacy/numeracy
- Health issues⁸³

Equally, moves are being made in several jurisdictions to address not only the assessment procedure but the delivery of services to Indigenous youth in detention. For instance in South Australia:

Children, Youth and Family Services, in partnership with Child Adolescent Mental Health Services, has established “Indigenous Well-Being” workers to provide mental health assessment, follow up services and referral for Indigenous young people (including those with cognitive disabilities) in the State’s two juvenile detention centres.⁸⁴

In Victoria also, the Juvenile Justice and the Youth Services Branch and the Mental Health Branch of the Department of Human Services have joined forces to address and enhance access to services for young people in juvenile justice with mental health problems. Although this is not an Indigenous specific program, it does acknowledge the high rates of young Indigenous people in detention with mental health issues.

The Victorian Youth Parole Board and the Youth Residential Board in their 2005 Annual Report expressed the following concern:

... that over the past several years there has been an increase in the number of young people on custodial sentences who present with mental health problems. These issues are often compounded by substance abuse and persistent behaviour problems. Young people with a ‘dual diagnosis’ (mental health/alcohol and other drugs) are often assessed as being outside the criteria for both mental health and substance abuse service systems.⁸⁵

The report continues:

The Boards do not underestimate the challenges inherent in service provision for these young people. However, they are concerned that, for those released into the community on parole, appropriate services and supports are often not available. In fact, it is the experience of the Boards that there is a lack of intensive support and treatment services

⁸³ Minister for Children and Minister for Community Services, Victorian Government, correspondence received 18 May, 2005, Attachment 1, p.2.

⁸⁴ Minister for Families and Communities, Minister for Disabilities, South Australian Government, correspondence dated 4 July 2007.

⁸⁵ Youth Parole Board and Youth Residential Board Victoria (2005) *Annual Report 2003-2004*, *op cit*.

available for extremely vulnerable young people with complex needs who are leaving the custodial system.⁸⁶

Moves to address these concerns are welcome, but whether these strategies are enough to address the specific challenges facing Indigenous young people with cognitive disabilities and/or mental health problems remains to be seen.

One example of a mainstream service provider being unable to correctly assess the mental state of an Indigenous young person in custody was relayed to a consultation:

Field Note

A 15 year old Aboriginal boy in a detention facility started behaving in a distressed manner. Staff witnessed the young boy talking to himself and crying mournfully, especially during the night. Staff started behaving towards him as though he had a delusional psychosis and were awaiting a mental health assessment by a visiting psychologist in a few days. Meanwhile an Aboriginal Youth Worker at the centre suggested the young boy might benefit from a visit from a family member. The boy's Grandmother came in and spent some time with him. She later spoke with the staff and explained that a relative had passed away recently and her Grandson's distress arose from his talking to spirit. She explained that the spirit of the relative had come to visit the boy and she had counselled him to be strong and listen to what the relative had to say to him. Staff reported that the young boy's distressed ameliorated and he soon returned to 'normal' behaviour patterns.⁸⁷

This story exemplifies in a very overt way, the cultural/spiritual differences existing between Indigenous and non-Indigenous groups. That one group can view a certain kind of behaviour and see it as a normal part of a life experience i.e. grief, while another group views the same behaviour and labels it as a symptom of a mental illness.

The criticism concerning cultural appropriateness stems from an inherent cultural bias present in most assessment tool.

Cognitive assessments usually use language, stimuli or normative data with a cultural bias towards western populations or non-Indigenous people, and therefore may produce misdiagnosis among those from other cultures. Performance deficits on these tasks that suggest brain dysfunction for Indigenous people may actually arise from cultural determinants such as socio-economic status, language or expectations of the assessment experience.⁸⁸

Westerman argues:

There is clearly a need for serious consideration of the mental health needs of Aboriginal youth, and particularly the (culturally) valid and reliable identification of those most at risk of developing mental health problems. Clearly, there is a need to explore the feasibility of providing a culturally and scientifically valid means of identifying mental health problems in Aboriginal youth.

⁸⁶ *ibid.*

⁸⁷ Research participant – telephone communication 2 June 2005.

⁸⁸ Cairney, S. & Maruff, P. (undated) *Computerised Tests of Brain Function for use with Indigenous People*, (yet to be published)

It is acknowledged and agreed that broad health assessments of young people entering juvenile detention facilities is required. It is important for the development of a case management approach, so the young person is able to access the support and services he or she may need. Equally important however is the provision of culturally appropriate assessment methods and programs and services.

Cog State – a culturally relevant cognitive assessment tool⁸⁹

A group of researchers have been studying for the past 10 years the neurological and cognitive effects of substance abuse and mental illness among Indigenous people from remote Aboriginal communities in Arnhem Land, NT. As part of their research they recognised a lack of available tools to assess cognition of Indigenous people. Consequently the team designed a cognitive assessment tool for use specifically in Indigenous communities.

CogState (the name given to the tool) is an assessment tool that uses playing cards as stimuli. CogState can be downloaded from an internet website and administered on any computer. The assessment is cultural and language free and measures the speed, accuracy and consistency of responses in tests of psychomotor function, attention, memory, associate learning and executive functions. CogState has also been developed to be sensitive of brain dysfunction caused by substance abuse, mental health problems or neurological injury. Assessments have been performed to test for the effects of cannabis and petrol sniffing. People who had never used a computer were able to perform the assessment effectively after a practice period of familiarisation and interpreters are used where necessary.

Because playing cards are universally recognisable, CogState assessments have been adopted effectively for other areas of research including sports related concussion, cardiac surgery, Alzheimer's disease, clinical drug and alcohol studies.

Currently CogState is being trailed in Berrimah prison in the Northern Territory to assess male prisoners who may have an undiagnosed condition. The aim of the trial is to apply a cross-cultural assessment tool to assess brain function, to investigate the proportion of prisoners with a cognitive impairment, including nature and extent of impairment and to determine specific patterns of cognitive impairment that relate to histories of substance abuse or mental illness.

Information received from the Northern Territory Department of Justice inform that the CogState assessment tool will be, subject to satisfactory completion of the trial in the men's prison, be implemented in the juvenile detention centre.⁹⁰

⁸⁹ Information supplied by Dr Sheree Cairney on 21 June 2005, unpublished.

⁹⁰ Department of Justice, Northern Territory Government, corresponded received 17 June 2005.

Resources in the community

The consultations heard that very few resources exist in the community that support Indigenous young people with a cognitive disability or a mental health problem especially those who are involved with or have been involved with the juvenile justice system.

However, the scope of the research has not extended to investigating the breadth of community resources available to Indigenous young people with cognitive disabilities and/ or mental health problems – this is an area for further investigation.

Discussions with research participants revealed concerns with regards access to community support services and the inadequacy of services to deliver specific services to Indigenous young people post-release or as part of a community corrections order.

If diversionary programs are to be supported by the community then the community sector needs to be adequately resourced and supported by appropriate funding bodies.

Simpson and Sotiri comment:

There are very few post-release services in Australia which are suitable and accessible for Indigenous people with a cognitive disability. When Indigenous people leave custody they frequently return to communities which are very disadvantaged with regards access to services. There is a strong need to connect families on release, but when communities are themselves dislocated, over-burdened or unsupported, this can be very difficult.⁹¹

One example of where this area of need is being addressed is in the ACT where an Intensive Treatment and Support Program has been established. Information supplied by the Minister for Disability, Housing and Community Services in the ACT informs that the program focuses:

... on people with a dual disability (that is they have an intellectual disability and a mental dysfunction/disorder) who are already in contact with, or likely to be in contact with the justice system.⁹²

A feasibility study of the program undertaken in 2004 revealed several individuals who met the criteria for the program, however no Indigenous people were identified as potential participants by the study and as such it was decided not to make Indigenous issues a separate focus of the program. However:

This decision was also made with the understanding that the ITAS program will develop a very tailored program approach to assessing and delivering programs and support around the needs of each individual that is part of the program. Therefore, if an indigenous client becomes part of the program in the future, the program will address any needs specific to them.⁹³

This approach illustrates a problem experienced by many programs. The lack of Indigenous clientele (this could be for a range of reasons) means that programs focus resources on a mainstream approach (providing a service aimed at the majority

⁹¹ Simpson, J. & Sotiri, M. (2004) *Criminal Justice and Indigenous People with Cognitive Disabilities – A scoping paper, op cit*, p.32.

⁹² Minister for Disabilities, Housing and Community Services, correspondence dated 5 June 2005.

⁹³ *ibid.*

population). The reliance of mainstream services (whether government or non-governmental) to provide support to Indigenous people has previously been identified as a major impediment to successful transition from detention to the community.

The *Social Justice Report 2004* highlighted the lack of appropriate community services available to Indigenous women upon their release from prison. Although the report focuses on the lack of appropriate accommodation options available to Indigenous women post release, the concern extends to community support services generally.⁹⁴

People With Disabilities Australia (PWD) expressed concern in their submission to the Senate Inquiry into children in institutional care about the high percentage of children in detention with a mental illness or cognitive disability. The submission said:

These findings link failures in the mental health, child protection, disability and community service systems with increased risk of children entering the juvenile justice system. These failures include lack of support services, appropriate treatment and behaviour intervention programs, family based care services and accommodation options; the use of inappropriate and harmful service practices, such as physical restraint and medication; the risk or actual occurrence of physical and sexual assault; and the reliance on the police to resolve challenging behaviour. There is also evidence to suggest that the lack of support services for children and appropriate policies and practices to deal with challenging behaviour often leads services to rely on or view juvenile justice facilities as 'providing a stable and secure care environment and ... as a solution to a complex problem.'⁹⁵

Clarke Island – Tasmania

The Clarke Island project provides an opportunity for Aboriginal youth at risk to participate in an Aboriginal cultural awareness program. The program encourages young people to take responsibility for their lives by immersing themselves in traditional activities which encourages healthy lifestyle, one which is respectful of elders.

The program is aimed at Aboriginal boys who are either at risk of offending, have offended and are at risk of entering the formal juvenile justice system or are in a detention facility but have been assessed as appropriate for participating in the program. Some young people have even served short sentences on the Island. More than 50 young people have been through the program.

Activities on the island include land management, fencing, eradicating weeds, mustering and sheering sheep, as well as other more traditional cultural activities. The program encourages the participation of parents and offers a range of family and parenting programs.

All young people are assessed prior to coming to the island to identify health and educational needs and programs are adapted to suit those needs.

⁹⁴ *Social Justice Report 2004*, Human Rights and Equal Opportunity Commission, Sydney, Chp.2, pp.11-66.

⁹⁵ People with Disabilities Australia, Submission 165 to The Senate Community Affairs References Committee, *Protecting vulnerable children: A national challenge – Second report on the inquiry into children in institutional or out-of-home care*, Senate Community Affairs References Committee Secretariat, Commonwealth Government, Canberra, March 2005, p.173.

Although no formal evaluation of the program has been undertaken, program coordinators assert that the program has reduced re-offending.

The success of the program is, according to the co-ordinator, due to it being developed and managed by Aboriginal people for Aboriginal people. Therefore all programs are culturally appropriate and sensitive to the needs of the participants.

In Victoria a number of moves have also been made to address the over-representation of young Indigenous people in the juvenile justice system. The *Koori Juvenile Justice Program* - implemented in response to Royal Commission into Aboriginal Deaths in Custody recommendations is funded to provide local community Aboriginal corporations to employ and support a Koori Juvenile Justice Worker.

The project works with young Kooris at nine locations across Victoria. A Koori Juvenile Justice worker is also located at the three juvenile justice centres in Victoria. One of the responsibilities of the Koori Juvenile Justice worker is to assist with the development of strategies that meet the needs of Indigenous young people, including those with cognitive disabilities and mental health issues.

Aboriginal Legal Services (ALS) are another potential source of support in communities able to respond to the needs of Indigenous young people with cognitive disabilities and/or mental illness. The relationship between the Commonwealth Attorney General, as the funding body, and ALSs presents an opportunity for issues regarding assessment and referral to be addressed. The funding body could consider the advantages of incorporating into the National Indigenous Legal Advocacy training, a unit that addresses working with clients with a cognitive disability or mental health issue.

Coordinating government services – joint care management

Another issue that was raised repeatedly throughout the consultations and the Roundtable discussions was that often young people are referred from one service to another, with each agency working in isolation and rarely working together for the benefit of the young person. This contributes to the siloing of services i.e. disability services and juvenile offender services - which is to the detriment of the young person.

It is difficult for most young people to navigate themselves around the different services available to them, let alone if the young person has a cognitive disability or a mental illness. The young person may also be additionally disadvantaged if they are Indigenous and have an unfamiliarity, fear or mistrust of government officials.

Sometimes though a young person (especially if a co-morbidity exists) may require more immediate attention to a specific issue, suicidal behaviour for example. In this situation it may be more appropriate for a particular service to take charge and delay attention to the person's accompanying needs.

However many people we spoke with expressed the concern that once a young person is entrenched into a particular system (i.e. a mental health system) then it is unlikely that other issues will be adequately addressed. This is especially so for young people in detention.

Recently however there have been moves to address the problem of agencies not communicating and working effectively with each other.

In NSW the *Orana Joint Case Management Project Report* highlighted the difficulties and successes associated with cross agency case management.

Orana Joint Case Management Project

The project was jointly conducted the Department of Juvenile Justice (DJJ), Department of Ageing, Disability and Home Care (DADHC), Department of Health (Mental Health, Drug & Alcohol Services, Macquarie Area Health Service), Department of Education and Training (DET), Department of Community Services (DoCS) and NSW Police.

The project was initiated in response to the challenges encountered when attempting to work with Indigenous young people with complex and multiple needs in the juvenile justice system. The project formally acknowledges the need for “consistent cross-agency partnerships to address the risks of re-offending of this particular group.”

The project presented four case studies examining the results of cross-agency interventions with four Indigenous young people, presenting with a range of issues including intellectual disabilities, mental health issues and other health issues and who were involved in the juvenile justice system.

The final report made a series of observations and recommendations:

Some of the barriers encountered:

- Families not acknowledging there is an intellectual disability or mental health problem
- Young people not diagnosed with having an intellectual disability until they entered custody
- Lack of appropriate programs
- Lack of resources in rural remote communities
- Differing priorities of different stakeholders

Some of the recommendations made by the report:

- Aboriginal Community Liaison officers to assist in educating families around the special needs of their children
- Education of legal services, magistrates and other human services agencies to ensure early identification of intellectual disabilities
- Assessment/intervention model be established and funded to enable access to rural and remote communities
- Agencies be encouraged to develop recruitment strategies to attract suitably qualified persons
- Standardised mandatory reporting across all agencies

Summarising the findings the report found that:

There were few culturally appropriate services available to these young people living in rural and regional areas. Yet without support these young people face a high risk of re-offending and of eventually entering the adult criminal justice system. The project therefore highlights the need for flexible, coordinated service responses to meet the needs of young people with complex needs

especially young Aboriginal people, which may include support to the family so that the young person with disabilities can continue to live in a family setting with appropriate supports.⁹⁶

The NSW Department of Juvenile Justice's *Disability Action Plan 2004-2006* reflects the findings of the report and include in its objectives is a commitment to "advocate and actively seek support and coordination from government at all levels in meeting the needs of young people with disabilities in the juvenile justice system."⁹⁷

The *Koori Partnership Program* is a partnership developed between Disability Services (Vic) and Headway Victoria, an Acquired Brain Injury service that works with the Koori community. The project has commenced, with consultation currently being conducted. The outcomes are due in December 2005.

The aim of the project is to develop pathways and opportunities for Koori service providers to access secondary consultations from specialist ABI service providers. Specifically:

- Develop culturally appropriate screening tools for workers to utilise in the identification of acquired brain injury
- Provide strategies to support parents with acquired brain injury interfacing with the Child Protection system
- Highlight pathways to case management services
- Explore the role of a Koori project worker in the ABI sector⁹⁸

The projects highlighted above are examples of innovative interagency approaches to address the specific issues affecting Indigenous young people with cognitive disabilities and/or mental health problem in the juvenile justice system. While some of the programs are not specifically aimed at Indigenous young people, they will nevertheless provide a service that will aim to address their specific circumstance.

⁹⁶ Department of Disabilities and Home Care Senior Officers Group on Intellectual Disability and Criminal Justice (2005) *Orana Joint Case Management Project Final Report*, Department of Juvenile Justice - Lead Agency, – report provided by Department of Juvenile Justice.

⁹⁷ NSW Department of Juvenile Justice, *Disability Action Plan 2004-2006*, p.16.

⁹⁸ Minister for Children and Minister for Community Services, Victorian Government, correspondence received 18 May 2005, Attachment 1, p.5.

Report conclusions and summary

Juvenile detention facilities are meant to be the place of last resort for young people who have committed an offence. They are meant to be a place of rehabilitation – they are clearly failing in this capacity. Recidivism rates attest to this failing.

However justice and community agencies nationally are attempting to address the issue with innovative responses beginning to emerge.

Throughout the consultations and other meetings held throughout this research project it was revealed that there is not that much known about the extent of Indigenous young people with cognitive disabilities and/or mental health problems in juvenile justice system. Less is known about those young people who offend but do not receive a custodial order.

What is known however is that the early years of development are crucial to averting a cognitive disability or later mental health problems. The alleviation of socioeconomic adversity such as unemployment, family violence and incarceration can all impact on the well being and positive developmental progress of a young person. Studies, such as the *Western Australian Aboriginal Child Health Survey* have shown the negative impacts of poverty on a young person's physical and mental development.

Participants of the consultations also strongly supported diversionary programs as a means for addressing the specific issues that confront Indigenous young people with cognitive disabilities and/or mental health problems. While there has been little to no research undertaken on this, anecdotal evidence seems to be that a young person with a disability or mental health issue will benefit from a diversionary approach rather than a custodial sentence.

The consultations also heard concerns regarding the methods for assessing cognitive disabilities and mental illness are not culturally appropriate and that culturally sensitive testing needs to be further implemented not only in detention centres but in schools and other community environments. People involved with Indigenous young people, such as teachers, police and health professionals need to receive training on identifying symptoms and being able to address the issue in a culturally sensitive manner.

All this depends however on the availability of culturally appropriate services in the community. The research while not providing a mapping of services available in the community or in detention did hear from participants that this was an area require more support from government and community alike. The presence of culturally appropriate services in the community may serve not only as a source of prevention to offending in the first instance, but may be also crucial to providing ongoing support to young people, their families and their communities. Community support agencies can play a vital role in diversionary programs as well as in probation and parole programs.

Ways Forward

Responsibility for addressing the issues identified in this report lie across governments at the commonwealth and state/territory level. We note, however, that the Attorney General's Department has significant responsibilities which are central to the issues raised in this paper.

The *National Crime Prevention Strategy*, which is underpinned by the *National Crime Prevention Programme* and the *National Community Crime Prevention Programme* have identified Indigenous justice and crime prevention as a priority. It is noted that several pilot projects have received funding under these programs such as:

- *Indigenous Youth Mentoring Scheme – SA Capacity Building;*
- *Pathways to Prevention Project in Redfern and Waterloo; and*
- *Working with Indigenous young people to prevent domestic and family violence.*

The Attorney General's Department are to be commended on providing support to such innovative projects. This report urges that the programs remain to be supported by the Department and that such programs be expanded in order to develop projects that aim to address the issues pertaining to Indigenous young people with cognitive disabilities at risk of entering the juvenile justice system.

The Attorney General's Department is also responsible for providing funding to Aboriginal Legal Services and Family Violence Prevention Legal Services. It would be advantageous for funding to be built into current funding arrangements which would allow for legal officers to undertake training, perhaps provided by the National Indigenous Legal Advocacy Course (NILAC), to address specific issues as relates to the identification and referral of Indigenous young people with cognitive disabilities and/or mental health problems.

We also note that issues relating to contact with juvenile justice, mental health and educational attainment are integral to addressing the commitments of all Australian governments to overcome Indigenous disadvantage, as recognised in the strategic areas for action and the strategic change indicators of the *Overcoming Indigenous Disadvantage* framework and national principles for service delivery to indigenous communities.

Recommendations

National Crime Prevention Programme and the *National Community Crime Prevention Programme* be continued and expanded to fund specific projects to address Indigenous young people with cognitive disabilities and/or mental health problems at risk of entering the juvenile justice system;

- The Indigenous Law and Justice Division of the Attorney General's Department consider options for providing cognitive disability and mental health training for field officers and other relevant staff of Aboriginal and Torres Strait Islander Legal Services and Indigenous Family Violence Prevention Legal Services. Such training might appropriately be included as units of competency within nationally accredited training programs such as the National Indigenous Legal Advocacy Course (NILAC);

- The development of culturally sensitive assessment tools be considered nationally, taking into account the outcomes of the current pilot of the ‘CogState’ program in Berrimah Prison in the Northern Territory.
- Through the whole of government process for administering Indigenous affairs, the Attorney-General’s Department support the adequate funding and resourcing of projects targeting cognitive disability, mental health issues and contact with juvenile justice systems through programs for improving the social and emotional well being of Aboriginal and Torres Strait Islander children.

Future Research

The report has also identified a range of areas that would benefit from further investigation. They are:

- The experiences and impact of diversionary programs on Indigenous young people with a cognitive disability and/or mental health issue.
- An examination of the links between Indigenous young people with a cognitive disability and early disengagement with education and early engagement with the juvenile justice system.
- An examination of the impact of Otitis Media (and resultant hearing loss) in relation to educational outcomes and early involvement with the juvenile justice system.
- An examination of the impact of Foetal Alcohol Syndrome and other foetal abnormalities on cognitive ability in relation to educational outcomes and early engagement with the juvenile justice system.

This is by no means an exhaustive list of areas requiring research. It merely highlights the issues raised by participants in this research project.

Appendix 1 – List of people and organisations consulted and National Roundtable participants

Roundtable participants

1. Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission
2. Natalie Walker, A/g Senior Policy Officer, Social Justice Unit, HREOC
3. Jim Simpson, Disability Advocate
4. Tim Goodwin, MindMatters Plus GP Reference Group
5. Adele Cox, Telethon Institute of Child Health Research, WA
6. Dr Sheree Cairney, Menzies Institute of Health Research
7. Luenne Evans, Forensic Mental Health Service, Queensland Health
8. Michael Beaton, Tasmanian Aboriginal Centre & Clarke Island Project
9. Jasmine Thompson, Department of Justice, Victoria
10. Bernadette McGinnes, Department of Families and Communities, SA
11. Roy Short, Department of Communities, Queensland
12. Dr Cynthia Lim, Department of Justice, Vic.
13. Kevin Liddy, Regional Aboriginal Justice Advisory Committee, Vic.

Other Consultations

14. Assoc. Prof Chris Cunneen, Institute of Criminology, University of Sydney
15. Tanya Koeneman, Dept of Juvenile Justice, NSW
16. Claudia Vecchiato, Dept Juvenile Justice, NSW
17. Dr Shefali Rovik, Dept of Juvenile Justice, NSW
18. Craig Jukes, National Aboriginal Community Controlled Health Organisations
19. Dr Mark Allerton, Department of Juvenile Justice, NSW
20. Dr Harry Blagg, Crime Research Centre, University of WA
21. Sarah Gebert, Aboriginal Courts, Supreme Court Victoria
22. Daniel Briggs, Aboriginal Courts, Supreme Court Victoria
23. Prof Paul Maruff – Cog State
24. Jan Noblett, Juvenile Justice and Youth Services, Victoria
25. Yvonne Luke, Juvenile Justice and Youth Services
26. Andrew Jacomos, Department of Justice, Victoria
27. Judge John Barnett, Youth Parole Board, Victoria
28. Collette Crehan, Youth Parole Board, Victoria
29. David Mason, Disability Discrimination Unit, HREOC
30. Paul Dixon, Police Pre-Court Diversionary Scheme, NT
31. Wendy Hunter, Assistant Commissioner, Corrections NT

Appendix 2 – Overview of juvenile diversionary schemes in Australian jurisdictions

New South Wales

Current system of juvenile diversionary programs came into force with the introduction of the *Young Offenders Act 1997* (NSW). The Act formalises a statutory hierarchy of warnings, cautions and youth justice conferences for diverting young people from the formal justice system. The Act also emphasises children's rights, drawing on principles in the Convention on the Rights of the Child (CROC).

Youth justice conferences are facilitated by conference convenors working for the Department of Juvenile Justice. Victims must be invited to the conference but it can be held without them. Only the young person and the victim have right of veto over the outcome plans of the conference.

Outcomes from youth justice conferences cannot be more severe than a court would impose for such an offence. Many outcome plans have to date provided innovative modes of reparation. For example, three Aboriginal boys attended a youth justice conference for a series of property offences. As part of the outcome plan, they spent several weeks painting a mural at a youth centre under the guidance of a teacher of Aboriginal art and were able to learn more about their culture.

Despite however, the progressive model of conferencing adopted in NSW, statistics suggest that Indigenous young people still do not get the benefit of diversion at the same rate as non-Indigenous young people. A review found that, whereas the overall rate of diversion (including cautioning and conferencing) was around 37 per cent, the rate for Indigenous youth specifically was lower, at just over 24 per cent.⁹⁹

South Australia

South Australia was the first State or Territory to establish a statutorily-based youth conference scheme. The *Young Offenders Act 1993* (SA) provides for informal cautions, formal cautions, family conferences and the Youth Court.

No offences are specifically excluded from the system by the legislation or the regulations. In the case of formal cautions and family conferences, but not informal cautions, an admission must be written and should be signed by the young person 'if possible', in the presence of a guardian. Referrals to family conferences are by consent of the young person and can only be made once he or she has been given an opportunity to obtain legal advice.

Family conferences are facilitated by Youth Justice Coordinators who are either magistrates or those appointed to the position on a contractual basis. Participants include the young person and support people, the victim and support people, a police representative and any other people whom the police informant considers it appropriate to invite. Decisions should be made by consensus if possible but only the agreement of the

⁹⁹ Hennessey, N. (1999) *Review of the gatekeeping role in the Young Offenders Act, 1997 (NSW)*, a report to the Youth Justice Advisory Council of New South Wales, Sydney.

young person and police representative is needed to validate them. The young person is entitled to be advised by a legal practitioner at the conference.

Since the legislation has been in operation some serious offences have been dealt with through conferencing, including robbery and sexual assault (where both victim and offender were under eighteen). Police hold the discretionary power to refer offenders to conferences. The Youth Court does not refer to family conferences.

Victoria

Victoria is the only Australian state not to have a legislatively based juvenile diversion scheme. There is no provision for police or court cautions under the *Children's and Young Persons' Act 1989* (Vic) but there is a long established practice of using them. Victim/offender conferences are only available as post-court diversion by way of a sentencing option.

However, since 1995 a Juvenile Justice Group Conferencing Program has been operating from Melbourne Children's Court. Young people who admit the offence and who would be likely to be sentenced to a supervisory order by the court are eligible. The Program is aimed at more serious matters and offenders who are considered at risk of progressing through the justice system. The case is adjourned while the conference is being convened.

Participants in a juvenile justice group conference include the young person and family, the police, relevant community members and legal representatives. The victim can attend in person or send a representative but the conference can proceed without them.

Queensland

The *Juvenile Justice Act 1992* (Qld) includes two diversionary options: police cautions and community conferences. Any officer can caution a young person for an offence provided the young person admits the offence and consents to being cautioned. Cautions can also be delivered by a respected person from the Aboriginal or Torres Strait Islander community. Importantly, the Act provides for a court to dismiss a charge against a young person if s/he pleads guilty and the court is satisfied the young person should have been cautioned. This provides a statutory check on the exercise of police discretion.

Since 1996, community conferences have been available on police referral as a pre-court diversion option or a court referral after a finding or admission of guilt. The conferencing program also accepts referrals for adult offenders under an administrative arrangement with the police.

Community conferences are facilitated by conference convenors recruited and trained by the Department of Families, Youth and Community Care. Convenors have the discretion not to convene a conference or to discontinue one if they believe the offence is unsuitable for community conferencing. Conference participants include the young person and their support persons, including a lawyer, if requested, the victim or a lawyer acting for him/her and a representative of the referring authority i.e. the police or the court.

Tasmania

In 1995 Tasmanian police introduced a victim/offender conferencing program based loosely on the Wagga Wagga model in NSW. In 1998, the *Youth Justice Act 1997* (Tas) came into operation. It establishes a scheme of pre-court diversions by way of informal

caution, formal caution and community conferencing. Diversions are only available where the young person admits the offence.

Before a formal caution is given or a referral is made to a community conference, the informant must determine whether the young person consents to diversion, obtain a signed admission and give the young person the opportunity to obtain legal advice. An authorised officer can request that an Aboriginal elder or representative administer a formal caution to a young person in the presence of the officer. An officer can also request that a caution be administered by a community representative from the young person's religious or ethnic group.

Once a young person has consented to diversion to a community conference, s/he must sign an undertaking to attend in the presence of a parent or guardian. The police officer then requests the Department of Health and Human Services (DHHS) to organise a community conference. Participants at conferences include the facilitator, the young person and family, support people for the young person, the victim and support people, and the informant or another police representative. If practicable, a conference should determine the outcome by consensus but if that is not possible the agreement of the young person, police officer and victim is sufficient.

A court can order a community conference instead of proceeding to sentence. Once the young person has fulfilled all undertakings given at the conference, the charge is dismissed. Formal cautions in practice can operate as victim/offender conferences. However, unlike the 'community conferences' organised by the DHHS, these are coordinated by the police (as they were before the introduction of the Act in 1998). Hence in Tasmania two models of conferencing co-exist.

The Act does not specifically exclude any offences from the pre-court diversion scheme. However, officers are unlikely to consider serious matters suitable for diversion, particularly those that cannot be dealt with by the Youth Justice Division of the Magistrate's Court.

Australian Capital Territory

There is no legislation governing juvenile diversion in the Australian Capital Territory (ACT). The *Children's Services Act 1986* (ACT) empowers courts to reprimand a young person found guilty of an offence (without conviction) but contains no reference to police cautioning.

Youth conferences are conducted by trained police facilitators and include the young person, a minimum of four supporters, the victim and supporters and any other relevant people, such as the police informant or an interpreter. Conferences can be held without victims present.

Northern Territory

In July 2000, as result of an agreement reached between the Commonwealth and the Northern Territory Governments, funding was provided to fund a program that aimed to divert young Indigenous people away from the criminal justice system. The funding also provide for an Aboriginal interpreter service.

A Juvenile Pre-Court Diversion Scheme was therefore established by the Northern Territory Police, which has been underpinned by relevant legislative change, including the amendment of relevant legislation increasing the age at which a young person is treated as an adult from 17 to 18 years.

For more serious offences, or where diversion fails, the use of courts remains appropriate. The scheme provides different levels of response to juvenile offenders, including:

- formal cautions
- verbal and written warnings
- family and/or victim conferencing
- substance and drug abuse programs
- community based programs
- prosecution

The scheme is flexible and is mindful of cultural considerations in the offence/response equation. The scheme also takes into consideration the needs of the victim (if any). Recognising the important role of parents/guardians have to play in the effective diversion of young people from the criminal justice system, the scheme encourages parents and guardians to take responsibility for the actions of their child.

Western Australia

Western Australia has a number of diversionary approaches for young offenders or those young people at risk of offending.

The Aboriginal Family Supervision Program aims to provide support young offenders and their families. The program uses Aboriginal mentors to provide direct support and advice to the young person and their family. Mentors report on the young person's progress to the juvenile justice officer or the community corrections officer and keep the family and the young person informed as to what other strategies might help.¹⁰⁰

Western Australia also has a juvenile conferencing program, similar to those operating in other States.

¹⁰⁰ www.justice.wa.gov.au/portal/server.pt/gateway, downloaded 21 July 2005.