



## *Children's Court of New South Wales*

7 September 2017

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

By email: [indigenous-incarceration@alrc.gov.au](mailto:indigenous-incarceration@alrc.gov.au)

Dear Ms Sabina Wynn,

The Children's Court of New South Wales welcomes the opportunity to provide a submission to the Australian Law Reform Commission Discussion Paper 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples'.

Whilst it is understood that recommendations will not be made specifically in respect of Aboriginal and Torres Strait Islander youths in detention and the criminal justice system, the Children's Court notes that some of the questions raised in the Discussion Paper may have implications for children where the same legal framework applies to both adults and children in NSW. Notwithstanding this, I have not sought to respond to the specific questions posed but I seek to provide some general observations of the issues from the perspective of the Children's Court.

Engagement in youth crime and the child protection system are key predictors of involvement in the adult criminal justice system. Given that the over-representation of Aboriginal and Torres Strait Islander youths is manifested in both the youth crime and the care and protection jurisdiction it is important to understand the drivers impacting upon the issue of overrepresentation in the youth context if the incarceration rates of Aboriginal and Torres Strait Islander peoples in the adult system are to be understood and addressed.

It is a widely accepted view that the primary cause of the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system is social, economic and cultural disadvantage.<sup>1</sup> Distrust and disconnection from the criminal justice system is also seen as an important factor impacting on over-representation.<sup>2</sup>

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<sup>1</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 15; The Senate Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Discussion paper (2010) p 24-25.

<sup>2</sup> H. Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2008) 11.

Whilst noting that these causes may, to a large extent, operate independently of the legal system it is useful to consider how the legal system can respond to these issues and this submission examines the work being done to improve the outcomes for Aboriginal and Torres Strait Islander children who come before the Children's Court in NSW within current legal frameworks.

### **Child protection jurisdiction**

Social and cultural disadvantage has been the outcome for many Aboriginal and Torres Strait Islander children that have been removed from their parents through statutory child protection systems. However, in recent years the Children's Court has sought to drive a shift in approach by requiring greater focus on cultural planning for Aboriginal and Torres Strait Islander children who cannot live with their family. Provided this focus can be sustained by carers and caseworkers until the child reaches adulthood this initiative has the potential to improve the mental health of young people taken into care and reduce the cultural disadvantage that has developed over several generations. This in turn has the potential to reduce the number of Aboriginal and Torres Strait Islander children becoming involved in the criminal justice system.

Another initiative within the care jurisdiction is the *Joint protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system*, which was implemented in 2016 to address a damaging pathway for children from care to crime.<sup>3</sup> The Protocol recognises that children and young people in out-of-home care exhibit challenging behaviour, particularly when they have experienced some form of trauma, abuse or neglect, and that this behaviour is better managed within the out-of-home-care service wherever possible, rather than by police or in court. The Protocol is designed to provide guidance to both police and residential service providers to consider alternatives to court action and anecdotally, the Children's Court has seen a reduction in the number of children from residential care homes coming before the Court for low-level offences.

The Children's Court is also aware of recent reforms within NSW Department of Family and Community Services which aim to reduce the number of children in out-of-home-care by providing intensive supports to families to encourage preservation or work towards restoration. It is hoped that the provision of funding and specialised services to Aboriginal and Torres Strait Islander families will assist in addressing both the over-representation of Aboriginal and Torres Strait Islander children in care, as well as impact on the cross-over pathway.

### **Focus on diversion from the criminal jurisdiction**

The vast majority of young offenders do not engage in criminal behaviour beyond adolescence and diversion from the court system is an effective way of dealing with relatively minor infringements of the law.<sup>4</sup> Conversely, interactions with the court system may in fact increase the likelihood of a young person re-offending, particularly where a young person is detained, either on remand or following sentence.

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<sup>3</sup> NSW Ombudsman, Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system:

<http://www.acwa.asn.au/Pages/Conf2016/Mon/HeritageRoom3/1330/MonHeritageRoom31350Demetrius/CareandCrimeJuliannaDemetriusNSWOmbudsman15August2016.pdf>.

<sup>4</sup> Judge Mark Marien 'Cross over kids' – Childhood and adolescent abuse and neglect and juvenile offending, Paper delivered to the National Juvenile Justice Summit, March 2012

It has been found that no experience is more predictive of future adult difficulty than confinement in a juvenile facility.<sup>5</sup> Confinement all but precludes healthy psychological and social development.<sup>6</sup> For young Aboriginal and Torres Strait Islander people, confinement in a detention facility has a further effect on intergenerational trauma, and a further loss of connection to family, culture and kin.

In NSW the *Young Offenders Act 1997* (YOA) is a statutory embodiment of early intervention and diversion, providing the option of warnings, cautions and Youth Justice Conferences (YJC's). A YJC brings young offenders, their families and supporters face-to-face with victims, their supporters and police to discuss the crime and how people have been affected. Together, they agree on a suitable outcome that can include an apology, reasonable reparation to victims, and steps to reconnect the young person with their community to help them desist from further offending. These diversionary options have the capacity to improve trust in the criminal justice system and there is further scope to reinforce cultural connections for Aboriginal and Torres Strait Islander young people through YJCs. In the past five years the referrals of Aboriginal and Torres Strait Islander young people to YJCs has increased from 24.4% to 29.6% as a proportion of all referrals.<sup>7</sup>

The Protected Admissions Scheme was in recent years implemented in NSW by police to further increase the opportunity for diversion under the YOA. Under this scheme a young person can make an admission of guilt for the purpose of allowing police to defer the young person under the YOA but that admission cannot be used against them as evidence supporting the commission of the offence. Whilst more can be done to increase the use of diversionary options under the YOA the support of police is crucial to reducing Aboriginal and Torres Strait Islander contact with formal court processes.

Furthermore, there are programs such as Youth on Track, which operates before a young person is referred to court, and the Youth Diversion Process which operates at Parramatta Children's Court and draws on the skills and expertise of trained professionals to identify children with complex needs, and divert them from the criminal justice system through appropriate programs, plans and supports to address the social, health and economic causes of offending.

Children and young people exhibiting signs of mental illness can also be diverted from the criminal justice system under section 32 of the *Mental Health Act (2007)*, which then ensures the young person receives a medical assessment.

## **Bail conditions**

The Children's Court submits that bail is an important process to consider when addressing the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and this is reflected in the *Bail Act 2013* which provides that Aboriginal and Torres Strait Islander people have a special vulnerability in the assessment of bail concerns. Breach of bail conditions is a common reason for the incarceration of Aboriginal and Torres Strait Islander young people.

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<sup>5</sup> M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: <http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf> (accessed 18 April 2017).

<sup>6</sup> Ibid.

<sup>7</sup> Juvenile Justice, *Year in Review 2015-16*, Department of Justice NSW <http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/publications/2015-16%20Year%20in%20Review.pdf> (accessed 6 September 2017).

If bail is to be complied with it is important to ensure that bail conditions are understood. In recent years the Children's Court undertook some work to re-formulate the standard bail conditions used in the Children's Court to ensure that they were framed in language that a child with poor literacy skills could understand. Consideration was also given to the fact that in Aboriginal and Torres Strait Islander culture, the concept of 'home' may have a more expansive definition, and may consist of multiple places for a young person. As a result, judicial officers are encouraged to consider whether a curfew condition need only prohibit the young person from being in a public place between certain hours rather than requiring them to be at a particular home between certain hours. This type of condition also allows children to remove themselves from a home if it becomes unsafe due to domestic violence or other reasons.

### **Adapting the sentencing process**

In considering what work was already being done within the criminal justice system and the community more broadly, the Children's Court identified that the court process itself has a role in relation to the distrust and disconnection from the criminal justice system. Although disconnection with the court process is not uncommon for young people whether or not they are Aboriginal, the perception of bias and the lack of connection to the process have an historical context for Aboriginal and Torres Strait Islander people and must to be addressed by the criminal justice system if the legal process is to have any deterrent effect.

The Youth Koori Court in NSW was designed and established as a pilot program in February 2015 and has been modelled on similar alternative processes in other states. It seeks to contribute to a solution through the inclusion of Elders and professionals who are Aboriginal, providing low volume case management mechanisms that will facilitate greater understanding of and participation in the court process by the young person, identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and monitoring appropriate therapeutic interventions to address these risk factors.

The process that has been developed for the YKC involves an application of the deferred sentencing model (s 33(1)(c2) *Children (Criminal Proceedings) Act 1987*) as well as an understanding of and respect for Aboriginal culture. Mediation principles and practices are employed in a conference process to identify issues of concern for the young person, identify ways in which those concerns can be addressed, and develop an Action and Support Plan for the young person to focus on for three to six months prior to sentence.

The Youth Koori Court has been sitting for over two years, and a formal process evaluation is being conducted by Western Sydney University. Anecdotally, many young people have become genuinely engaged in the process and have taken positive steps towards improving their life chances, and, given the participatory nature of the process, many young people have developed a strong sense of accountability for their actions.

The YKC pilot was established within existing resources and without the need for legislative change but, as acknowledged in the Discussion Paper, these alternate processes are resource intensive. However, in the Children's Court's view these alternative court processes need to be viewed in the long term with the aim of challenging the distrust that Aboriginal and Torres Strait Islander people have with the criminal justice system. Whilst it is hoped that this process will also provide the first step for many young people to find an alternative path for themselves, Koori Courts cannot alone address the social, economic and cultural disadvantages that Aboriginal and Torres Strait Islander people experience. Any assessment of these processes should not focus on re-offending alone.

## **Specialist nature of the Children's Court jurisdiction**

Finally, the specialist nature of the Children's Court ensures that the judicial officers dealing with youth offending and child protection matters across the State are specialist Children's Magistrates who have an acute understanding of the linkages between various forms of disadvantage, the impact of interventions in the child protection area and pathways to criminal offending. Children's Magistrates also observe the cycle of disadvantage play out when young people move back into the child protection system as young parents.

To break this cycle, professionals in all systems, including judicial officers, lawyers, social workers and health professionals need to understand these linkages and to work co-operatively to identify the needs for each individual child.

The well-informed professionals and practitioners who appear before the Children's Court jurisdiction across the State bring the benefits of specialisation, which include knowledge-informed decisions, an understanding of therapeutic jurisprudence, child development theories including an understanding of the developing brain and good case management as well as greater uniformity in decision making.

Currently, specialist Children's Magistrates hear roughly 90 per cent of care cases across the State, up from 45 per cent in 2011 and roughly 67 per cent of criminal matters, up from roughly 60 per cent in 2015.

The Children's Court of NSW submits that specialist children's courts need to be sufficiently resourced and have sufficient autonomy to ensure that specialist court services are available to service the criminal and care and protection jurisdictions. There is inherent value in applying expert knowledge and experience consistently across the state, as this ensures that experts are able to identify and address disadvantages faced by Aboriginal and Torres Strait Islander children and young people.

## **The reduction of the number of juveniles in custody over the past five years**

The Children's Court is of the view that through a combination of these strategies there has been a positive impact on the incarceration rates of Aboriginal and Torres Strait Islander youth. The Bureau of Crime Statistics and Research reported on 31 July 2017 that the number of juveniles in detention in NSW has now fallen by 28 per cent, from a peak of 405 detainees in June 2011 to 290 in June 2017.<sup>8</sup> This is in stark contrast to the adult prisoner population, which has increased by 32 per cent over the same period.<sup>9</sup>

Whilst Aboriginal and Torres Strait Islander youths remain over-represented in youth detention, the overall reduction in the numbers of young people entering detention means that there are less Aboriginal and Torres Strait Islander youths entering detention and this is likely to have a positive effect on the adult incarceration rates over time.

However, there is more that can be done and sustained effort over the long term is required by all those who are involved in the delivery of services to Aboriginal and Torres Strait Islander people, not only by those involved in the legal system but also in education, health and child protection.

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<sup>8</sup> Bureau of Crime Statistics and Research, *New South Wales Custody Statistics, Quarterly Update*, December 2017, [http://www.bocsar.nsw.gov.au/Documents/custody/NSW\\_Custody\\_Statistics\\_Dec2017.pdf](http://www.bocsar.nsw.gov.au/Documents/custody/NSW_Custody_Statistics_Dec2017.pdf), accessed 4 September 2017.

<sup>9</sup> *Ibid.*

## **Conclusion**

I look forward to the outcomes of this Discussion Paper. I hope some of the matters I have raised will be of assistance in the discussions which will inform areas for improvement and reform in the criminal justice system.

Yours faithfully



Judge Peter Johnstone  
**President of the Children's Court of New South Wales**