



**A better future for Australia's Indigenous young people: Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system**

**22 December 2009**

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# 1. Introduction

## 1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's work on Indigenous young people and the criminal justice system

The Indigenous Justice Program (IJP) was initiated by PIAC, with the financial support of law firm Allens Arthur Robinson, in 2001. The aims of the IJP are to:

- identify public interest issues which impact on Indigenous people;
- conduct public interest advocacy, litigation and policy work on behalf of Indigenous clients and communities; and
- strengthen the capacity of Indigenous people to engage in public policy making and advocacy.

The IJP has conducted policy and advocacy work in relation to issues such as policing in Indigenous communities, the effectiveness of police complaint systems in NSW, children in detention, improving access to justice, race discrimination and a wide range of other civil matters. The IJP has acted for family members of Aboriginal inmates who have died in custody.

The IJP also works on a joint project with the Public Interest Law Clearing House and Legal Aid NSW known as the Children in Detention Advocacy Project (CID<sup>2</sup>AP). CID<sup>2</sup>AP aims to challenge the unlawful and unnecessary detention of young people through policy work and litigation and find appropriate solutions to systemic problems that contribute to the over-representation of juveniles in the criminal justice system.

CID<sup>2</sup>AP provides legal representation on a *pro bono* or legal aid grant basis to minors who may have a cause of action arising from a false arrest, unlawful detention, malicious prosecution and/or the use of excessive force by police, transit authorities and/or private security companies. The project also works with relevant organisations to identify and rectify the causes of these detentions.

### 1.3 This inquiry and the scope of this submission

PIAC welcomes the opportunity to provide this submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (the Committee) Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system (the Inquiry).

PIAC's submission to the Inquiry is limited to those terms of reference that encompass the work undertaken by its Indigenous Justice Program. PIAC, through this submission, will address two of the terms of reference.

- Best practice examples of programs that support the diversion of Indigenous people from juvenile detention centres and crimes, and provide support for those returning from such centres.
- The scope for the clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the justice system.

Although PIAC often advocates on public interest issues on a national basis, the Centre is located in NSW, and therefore this submission focuses largely on NSW law, policy and initiatives.

## 2. Diversionary options

### 2.1 Introduction

Diversionary options aim to avoid the stigma associated with prosecution and the danger of trapping young people in a pattern of offending behaviour. They seek to temper the punitive nature of criminal justice processes in recognition of the particular vulnerabilities of juvenile offenders. They also recognise that most juvenile offending is episodic and transitory – most young people mature out of criminal behaviour.<sup>1</sup>

The increasing over-representation of juveniles in general, and Indigenous juveniles in particular, in the criminal justice system is an issue that has been at the forefront of commentary and inquiry for many years, yet has still not been effectively addressed in Australia. The statistics are alarming: while Indigenous people constitute only around two per cent of the entire Australian population, according to the most recent statistics available from the Australian Institute of Criminology, more than half of young people aged 10–17 years in juvenile correction institutions in 2007 were Indigenous,<sup>2</sup> and an Indigenous young person is 28 times more likely to be in detention than a non-Indigenous young person.<sup>3</sup> The statistics also indicate a worsening problem, as a comparison of the data for the past 20 years shows that the over-representation ratio was the highest in 2007 than it had been since 1994.<sup>4</sup>

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<sup>1</sup> *Best Practice Principles for the diversion of juvenile offenders*, Human Rights Brief No 5 (2001) Australian Human Rights Commission <[http://www.hreoc.gov.au/human\\_rights/briefs/brief\\_5.html](http://www.hreoc.gov.au/human_rights/briefs/brief_5.html)> at 14 December 2009.

<sup>2</sup> Australian Institute of Criminology, *Australian Crime Facts and Figures 2008* (2009) 103.

<sup>3</sup> Australian Institute of Criminology, *Juveniles in Detention in Australia, 1981-2007* (2009) 19.

<sup>4</sup> *Ibid* 29.

These statistics are most alarming when considering the effects of time spent in custody on later life. Studies have shown that custodial penalties for juveniles at best have no specific deterrent effect and at worse increase the likelihood of further offending.<sup>5</sup> The earlier a child has an interaction with the criminal justice system, the more likely they are to be involved with that system in the future, leading to more serious penalties.<sup>6</sup> A criminal record and/or time spent in custody from a young age also has a detrimental impact on other aspects of life, such as education, stability of employment, and family relationships.

There is a need for increased diversion at all stages of the criminal justice process, as the reduction of time spent in juvenile detention can assist in reducing the criminal behaviour of young people. Increasing diversion prior to arrest should be a key focus.

This submission commences with an examination of the international landscape, the *Young Offenders Act 1997* (NSW), and the *Bail Act 1978* (NSW) in order to provide practical recommendations to reduce the number of children on remand in NSW. PIAC then considers measures that support diversion from courts, detention centres and crime, through support during the bail period, or after sentencing, and lastly examines measures being implemented by government to increase the effectiveness of provision of services to Indigenous young people.

## 2.2 International context

Australia ratified the United Nations *Convention on the Rights of the Child* (the Convention) in 1990. The Convention outlines human rights protections that should be specifically afforded to children, including the rights to freedom from arbitrary arrest and detention and the right to access legal assistance.<sup>7</sup> Article 40.3 of the Convention provides that States Parties should establish measures that deal with children alleged to have committed offences without resorting to judicial proceedings wherever possible. PIAC submits that this provides the basis for Australia's obligation to introduce appropriate diversionary measures for juvenile offenders.

There are numerous United Nations rules and guidelines in relation to juveniles, which while non-binding can provide useful benchmarks and examples of best practice for the interaction of juveniles and the justice system. Three sets of international 'rules' in particular provide guidance, from community-focused education and prevention in the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the Riyadh Guidelines),<sup>8</sup> methods for handling crime and diversion in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules)<sup>9</sup> and guidelines for detention in the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules).<sup>10</sup>

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<sup>5</sup> D Weatherburn *et al*, 'The specific deterrent effect of custodial penalties on juvenile reoffending' (2009) 33 *Australian Institute of Criminology Reports: Technical and Background Paper* 10

<sup>6</sup> S Vignaendra and J Fitzgerald, *Reoffending among young people cautioned by police or who participated in a youth justice conference* (2006).

<sup>7</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(b), (c) (entered into force 2 September 1990), ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991).

<sup>8</sup> *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, GA Res 45/112, UN GAOR, 45<sup>th</sup> sess, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/112 (1990).

<sup>9</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, GA Res 40/33, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/RES/40/33 (1985).

<sup>10</sup> *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN GAOR, 45<sup>th</sup> sess, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/113 (1990).

The Beijing Rules in particular provide a valuable basis for best practice by organisations interacting with juveniles who are alleged to have committed crimes, outlining clear practices that should be adopted to protect the human rights of the juvenile in relation to investigation of alleged crimes, exercise of discretion in relation to prosecution and diversion by police specialising in juvenile justice, standards of detention pending trial, conduct of trials and institutional treatment. PIAC submits that particular sections, if not the entirety, of the Beijing Rules could be adopted as the standard for policies for dealing with juveniles by the police and courts, as the Rules are well-expressed, clearly suited to the needs of juveniles, and provide commentary on the history and application of each rule.

### **Recommendation**

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1. *That consideration be given to the adoption of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) as the standard for police and court policies on dealing with juvenile offenders.*

## **2.3 The Young Offenders Act 1997 (NSW)**

The *Young Offenders Act 1997* (NSW) was introduced in NSW to provide alternatives to arrest and processing through the court system for offenders aged between 10–18 years. The Act provides for three levels of diversion, increasing in formality and penalty: warnings, which can be issued on the spot; cautions, which require notice to the offender and take place in a police station; and referral to youth justice conference, which involves the offender meeting with a number of people, which can include their family and the victim, to determine an outcome plan for dealing with the offence. While courts can direct that the offender be subject to either a caution or a youth justice conference, the Act gives police officers wide discretion to apply diversionary measures prior to a court appearance when dealing with juvenile offenders. The factors that can be taken into account to determine which diversionary method is appropriate include the seriousness of the offence, the harm to the victim, the degree of violence, any previous offending history and ‘any other matter the official thinks appropriate’.<sup>11</sup> Police are also given power under section 27 of the Act to ask a ‘respected member of the community’ to give a caution to a juvenile offender, in relation to which the Act uses the example of Aboriginal elders: ‘for example, a caution may be given by a respected member of the Aboriginal community if the child is a member of that community’.<sup>12</sup>

A number of studies have shown that this Act is largely effective in diverting young offenders in general from court. Youth justice conferences in particular can have a positive effect on re-offending.<sup>13</sup> However, the Act has been less successful in diverting Indigenous juveniles than non-Indigenous juveniles. A 2008 study by the Australian Institute of Criminology that compared rates of diversion for offenders of similar age, gender, prior contact with police and juvenile justice in Western Australia, South Australia and New South Wales found that:

[I]n all three states Indigenous young offenders were significantly more likely than their non-Indigenous counterparts to be referred to court. In Western Australia and New South Wales, Indigenous young offenders were also more likely to be referred to a conference rather than cautioned. Non-Indigenous offenders in all three states were significantly more likely to receive a police caution.<sup>14</sup>

This indicates a widespread problem in relation to the use of alternative methods of crime management for Indigenous juveniles. The decisions to process Indigenous juveniles at a higher level of formality and

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<sup>11</sup> *Young Offenders Act 1997* (NSW) ss 20, 37.

<sup>12</sup> *Young Offenders Act 1997* (NSW) s 27.

<sup>13</sup> The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW, volume 2* (2008) 563.

<sup>14</sup> L Snowball, ‘Diversion of Indigenous juvenile offenders’ (2008) 355 *Trends & Issues in Crime and Criminal Justice* 3.

penalty may not be racially motivated (although certain studies suggest that racial bias may be an influence in certain areas),<sup>15</sup> but these decisions are certainly disproportionately affecting Indigenous juveniles. While the Special Commission of Inquiry into Child Protection Services in NSW, conducted by The Hon James Wood AO WC (the Wood Inquiry), suggested that police can and should actively divert juveniles through their Youth Liaison Officers,<sup>16</sup> the NSW Ombudsman submitted that there is a significant discrepancy in the use of diversionary options amongst individual police and command areas.<sup>17</sup> What appears to be the lack of coherent policy at a state and local level in the police force is leading to regular misuses of police discretion that disadvantage Indigenous juveniles, when in fact the Act specifically has as one of its objects to 'address the over representation of Aboriginal and Torres Strait Island children in the criminal justice system through the use of youth justice conferences, cautions and warnings'.<sup>18</sup>

PIAC supports the NSW Ombudsman's recommendation that the issue should be more closely monitored by the NSW Police Force to identify how referral rates could increase.<sup>19</sup> The Department of Juvenile Justice in NSW (Juvenile Justice) is currently funding research into why courts are more likely to refer juveniles to conferences than are police.<sup>20</sup> While this type of research is beneficial and necessary, it is only effective if it is followed up by the development of clear and consistent policy. PIAC submits that there is scope for the NSW Police Force to formulate and implement policy to appropriately increase the use of diversionary measures for Indigenous juvenile offenders in accordance with the Act.

### **Recommendation**

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2. *That the NSW Police Force and other police services should formulate and implement policy to increase the use of diversionary measures for Indigenous juvenile offenders.*

## **2.4 The Bail Act 1978 (NSW): section 22A**

A major cause of the high prevalence of juveniles in detention centres in NSW is the changes to the *Bail Act 1978* (NSW) in 2007, and specifically the introduction of section 22A.<sup>21</sup> This section provides that children and young people can only apply once for bail, unless special circumstances exist, such as the lack of legal representation during the first bail application, or the court is satisfied that new facts or circumstances have arisen since the first application. This section has led to a direct increase in the number of children placed on remand until their charges are finalised, when previously they might have only been on remand for a few days until they had mounted a successful bail application.<sup>22</sup> Although section 22A was initially aimed at eliminating repeated bail applications in relation to more serious offences in adults, it has unfortunately been equally and consistently applied to young people, without consideration of its effects on this more vulnerable group. Further, it has had a far more serious effect on young people than on adult offenders.<sup>23</sup>

The ability of a child, particularly one who is unfamiliar with the legal system, to adequately instruct a legal representative is often compromised by their youth and inexperience, and if the young person has just spent their first night in a juvenile detention facility, the associated trauma of this experience may hinder

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<sup>15</sup> See C Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329-346.

<sup>16</sup> Wood, above n 13, 562.

<sup>17</sup> Ibid 563-4.

<sup>18</sup> *Young Offenders Act 1997* (NSW) s 3(d).

<sup>19</sup> Wood, above n 13, 563-4.

<sup>20</sup> Department of Juvenile Justice, *Annual Report 2008–2009* (2009) 16.

<sup>21</sup> S Vignaendra *et al*, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Crime and Justice Bulletin* 3.

<sup>22</sup> Ibid 3.

<sup>23</sup> K Wong, B Bailey and D Kenny, *Bail me Out: NSW Young Offenders and Bail* (2008) 4.

their ability to effectively communicate with their legal representative. This is particularly a problem for young Indigenous people, who often do not have experience of positive examples of interaction with authority figures, and may be unwilling or unable to provide information in a form that will assist a lawyer. A duty solicitor from Legal Aid or the Aboriginal Legal Service often represents the young person in any bail applications. As a result of the high volume of cases that duty solicitors handle on a daily basis, these solicitors sometimes do not have the time or resources to adequately address all the circumstances of the young offender that will impact on their ability to comply with bail conditions.<sup>24</sup>

As UnitingCare Burnside notes in its recent report about bail and young people, ‘in these circumstances, a child or young person is not guaranteed sufficient representation by the duty solicitor despite it being their only opportunity to access bail’.<sup>25</sup> This amounts to a breach of the obligations under the Convention to use detention only as a measure of last resort and for the shortest possible period of time,<sup>26</sup> a principle that is enshrined in domestic legislation through section 8 of the *Children’s (Criminal Proceedings) Act 1987* (NSW). In order to maintain the purpose of section 22A, but reduce its unintended impact on juveniles, PIAC recommends that section 22A be amended, either to exempt young people appearing in the Children’s Court entirely, as suggested by the Youth Justice Coalition,<sup>27</sup> or to allow the Children’s Court to exercise greater discretion in relation to additional bail applications.

### **Recommendation**

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3. *That section 22A of the Bail Act 1978 (NSW) be amended to either exempt young people appearing in the Children’s Court, or to allow the Children’s Court greater discretion in relation to additional bail applications.*

## **2.5 ‘Reside as directed’ bail conditions**

Another issue that has led to an increase of children on remand is the ability—or inability—to comply with bail conditions, particularly in relation to place of residence. The aim of bail conditions is to either ensure appearance at court at a future date, by restricting movement or travel, and/or reduce re-offending. The Youth Justice Coalition recently surveyed bail conditions imposed on juveniles in NSW, and found that there were usually more than three conditions imposed, such as comply with a curfew, reside as directed or specified, non-association with particular people and reporting to police.<sup>28</sup> The survey concluded that these types of bail conditions were often imposed with little assessment of the young person or their family circumstances, and reflected a welfare-based approach to supervision without the corresponding support and counselling that would make such conditions effective.<sup>29</sup>

An example of such a condition is the condition to ‘reside as directed by the Department of Community Services or Department of Juvenile Justice’. This condition aims to provide children who are homeless or with unstable accommodation with an opportunity to be bailed to an appropriate and safe place, instead of being refused bail and forced to stay on remand. However, the lack of acceptable accommodation placements available has resulted in many children being kept on remand, although technically granted bail, because the Department of Community Services (DoCS) and/or Juvenile Justice cannot find them a place to stay. Keeping children on remand because there is no alternative accommodation available is a

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<sup>24</sup> UnitingCare Burnside, *Releasing the pressure on remand: Bail support solutions for children and young people in New South Wales* (2009) 4.

<sup>25</sup> *Ibid* 4.

<sup>26</sup> *Convention on the Rights of the Child*, above n 7.

<sup>27</sup> Wood, Bailey and Kenny, above n 23, 24.

<sup>28</sup> *Ibid* 15.

<sup>29</sup> *Ibid* 15.

considerable problem in NSW in particular, and has led to a situation of 'warehousing' juveniles rather than enforcing the responsibility of the NSW Government and DoCS to adequately care for these children and young people. Juvenile Justice reviewed remand cases over a three-month period in 2007, finding that:

... 90 per cent of these did not meet bail conditions in the first instance and spent an average of eight days in custody. Ninety-five per cent of those remanded during the review period had court imposed bail conditions to 'reside as directed'.<sup>30</sup>

While there are pilot programs in relation to bail placement currently operating in certain areas of NSW (see discussion below), these have not yet been operating for a significant period to address these problems.

PIAC submits that a residential bail support program should be introduced in NSW, as a pilot program initially, as outlined by UnitingCare Burnside.<sup>31</sup> This program would provide 24-hour support and accommodation for a maximum of six young people on bail aged between 12–17 years, who are already homeless, under the care of the Minister for Community Services and/or receive a 'reside as directed' order. The program should be funded by the NSW Government, and delivered by the non-government sector, focusing on establishing appropriate education, therapeutic and community support services for the young people. The benefits of these types of accommodation as opposed to remand is the reduction of the pressure on the juvenile justice system, the increased support to young people, and the reduction of the risk of recidivism due to a reduction in unnecessary contact with juvenile detention facilities.<sup>32</sup> The UnitingCare Burnside report, which is supported by a number of peak and service provider organisations including the Aboriginal Child, Family and Community Care State Secretariat, notes that these types of supported programs are 'particularly important for Aboriginal and Torres Strait Island children and young people', as they can be established in key regional locations such as Dubbo, Wagga Wagga, Lismore and Newcastle,<sup>33</sup> and be culturally sensitive and effective.

### **Recommendation**

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4. *That a residential bail support program, as outlined by UnitingCare Burnside in its 2009 report, Releasing the pressure on remand: Bail support solutions for children and young people in New South Wales, be funded by government and introduced in NSW as a pilot program.*

## **2.6 Policing breaches of bail conditions**

The number of children on remand for breach of bail conditions has also been increasing, due in part to the policy of the NSW Government in relation to reducing crime. The NSW State Plan (the State Plan), released in 2006, aimed to reduce re-offending by 10 per cent by 2016 through 'proactive policing of compliance with bail conditions' and 'extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring'.<sup>34</sup> The State Plan does not distinguish between adult and juvenile offenders or acknowledge the need for a different approach to be used to reduce juvenile offending.

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<sup>30</sup> Wood, above n 13, 558.

<sup>31</sup> UnitingCare Burnside, above n 24, 6.

<sup>32</sup> Ibid 6-7.

<sup>33</sup> Ibid 7.

<sup>34</sup> NSW Government, *NSW State Plan* (2006) [30] <<http://more.nsw.gov.au/StatePlan2006%20>> at 14 December 2009.

Recent studies have shown that up to 71 per cent of the juveniles on remand are detained for breaching their bail conditions, for reasons such as not complying with their curfew, not residing in the place directed, not being in the company of the directed parent or guardian, or being in the company of someone listed on a non-association order.<sup>35</sup> These breaches are often relatively minor, such as being 10 minutes late for curfew, or being with a different family member rather than the parent specified on the bail condition. The Youth Justice Coalition in its recent report, *Bail Me Out*, defines this category of breaches of bail as 'technical breaches',<sup>36</sup> this term describing circumstances in which a young person is arrested for a breach of a bail condition which in itself is not a new offence, and does not harm the young person, another person or the community. Examples of such technical breaches include when young people returned home after a curfew, were not accompanied by a person stated on the bail undertaking, or were in the company of someone listed on a non-association order.<sup>37</sup> This issue particularly impacts on Indigenous young people, as sharing responsibility for the care of children by different family members is more common in Indigenous communities, but is often not considered when imposing bail conditions. Consequently, when a young person stays with another family member, this is prosecuted as a breach of bail.<sup>38</sup>

There is rarely a custodial or other penalty imposed for such 'technical breaches' once the matter is heard before the court, and often juveniles are again granted bail on the same or similar conditions. Therefore in NSW, a situation has arisen in which children are arrested and often kept overnight on remand for breach of a bail condition, in circumstances where they will not receive a custodial sentence for the substantive offence for which they have been bailed or for the technical breach of bail. Juvenile Justice noted that 'about 84 per cent of young people remanded to custody do not go onto received a custodial order after sentencing'.<sup>39</sup>

## 2.7 Unlawful arrests and detention due to administrative errors

An issue of concern to PIAC, identified through its work on CID<sup>a</sup>AP, is that a number of children are being arrested, not only for 'technical breaches' of bail, but for breach of bail conditions that are out of date or have been removed. The Youth Justice Coalition describes a category of cases in which 'administrative errors' have led to the breach and subsequent arrest, being cases in which either there are several bail conditions that are contradictory and in meeting all conditions a breach must necessarily occur, or a young person is arrested on a breach when there are no cases pending or bail conditions, that is, the matter has been finalised or the conditions changed.<sup>40</sup>

The case of Jenny,<sup>41</sup> a young Indigenous girl who was arrested for breaching a bail condition that no longer existed, provides an example of this serious problem. Jenny had been on bail on conditions that included being with her mother at all times. Jenny was then sentenced to a youth justice conference that finalised her matter and removed all bail conditions. Approximately two weeks later, Jenny was in the city with her friends in the afternoon, and was arrested by police for not being with her mother. She informed them that her bail conditions were no longer in force, but the police officers did not believe her as their computer said that her conditions still applied. Her mother rang the police station, offering to fax over the order that showed that the bail conditions were no longer applicable, but was told that if she had been wrongly arrested it was the court's fault for not updating the system. Her mother tried calling the juvenile detention

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<sup>35</sup> Vignaendra *et al*, above n 21, 3.

<sup>36</sup> Wong, Bailey and Kenny, above n 23, 18.

<sup>37</sup> Ibid. PIAC adopts this term and its definition in this submission.

<sup>38</sup> R McCausland and A Vivian, *Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee* (2009) 27.

<sup>39</sup> Wood, above n 13, 559.

<sup>40</sup> Wong, Bailey and Kenny, above n 23, 18-19.

<sup>41</sup> Names have been changed to protect the privacy of the individuals.

centre where Jenny had been taken, and was told that she would have to wait until morning to sort it out. When the young girl appeared before the magistrate early the next morning, after spending the night in a juvenile detention centre, the prosecutor told the magistrate that the computer system had not been updated, and that the girl was not subject to any bail conditions. She was therefore released without further penalty.

This case study highlights that deficiencies in systems such as computer records, and an inflexible approach to breaches of bail by police, can increase the contacts that juveniles have with the justice system. If Jenny had been given a warning or a caution, or been brought to court by a summons or a court attendance notice, the mistaken situation could have been resolved without her spending an unnecessary and possibly unlawful night in custody. PIAC is particularly concerned at the frequency with which these types of administrative errors lead to unnecessary custodial experiences for young people. The Youth Justice Coalition, in just two weeks of observation at Parramatta Children's Court in 2008–09, identified two cases of this nature, which were not corrected until the young person appeared in court,<sup>42</sup> indicating a wider problem in relation to the administration of bail conditions for young people.

CID<sup>AP</sup> has identified a number of these cases through its work over the past few years, and as well as representing the young people affected in actions against the police, has sought to achieve more systemic change through advocacy and policy work. This has included letters, submissions, and attending a number of meetings with government representatives, including staff of the NSW Attorney General's Department and the Office of the NSW Ombudsman, to expose this problem and suggest options for its resolution. However, PIAC notes that despite CID<sup>AP</sup>'s work in this area there has not been a change in the administration of bail conditions to decrease the number of errors in the system, and cases of this sort continue to affect young people far too frequently. PIAC recommends that the relevant government agencies convene a meeting to discuss this issue and formulate proposals for its resolution in early 2010, which should then be released for public comment prior to implementation.

### **Recommendation**

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- 5. That the relevant government agencies, including the NSW Police Force, Justice and Attorney General's NSW and the NSW Ombudsman convene a meeting in early 2010 to discuss this issue and formulate policies and proposals for its resolution.*

## **2.8 NSW State Plan**

The NSW Government recently released an updated State Plan that, while having the same aims of reducing re-offending by 10 per cent by 2016, has introduced more inclusive and responsive measures to achieve these aims, including:

- widening the use of early intervention programs, particularly to reduce juvenile crime and re-offending, for example, the Intensive Supervision Program that works with young offenders and their families on the reasons they commit crime;
- reducing court appearances by young people through better use of warnings, cautions and Youth Justice Conferencing;
- introducing a 24-hour bail hotline to assist young people who are at risk of being remanded in custody because they cannot meet their bail conditions;
- improving the way government agencies share information and services to manage repeat offenders in an integrated way; and

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<sup>42</sup> Wong, Bailey and Kenny, above n 23, 6.

- expanding specialised early intervention programs that are aimed at keeping Aboriginal offenders out of prison, and that address the offending behaviour in a culturally effective manner.<sup>43</sup>

PIAC commends the NSW Government for introducing these aims into the State Plan, however it is concerning that details are lacking about how these aims will be achieved. There also remains a concern that diversionary measures, such as warnings, cautions or referral to youth justice conferences, which have been available to police in NSW under the *Young Offenders Act 1997* (NSW) since April 1998, are still not being used effectively when it comes to Indigenous juveniles. Under section 50 of the *Bail Act 1978* (NSW), police may arrest someone for breach of a bail condition, or they may request an authorised justice to issue a summons to appear in court, yet arrest appears to be the most common method of police handling breaches of bail conditions. PIAC is concerned that police are not exercising their discretion in relation to the arrest of juveniles for breaches of bail, and are therefore not complying with domestic or international law principles of using detention as a last resort.

PIAC recommends that this situation could be improved by amending the *Young Offenders Act 1997* (NSW) and the *Bail Act 1978* (NSW) to adopt the definition of ‘technical breach’ proposed by the Youth Justice Coalition, and to require the use of a diversionary method such as a warning, caution, summons or court attendance notice in relation to a breach of a bail condition if it qualifies as a ‘technical breach’. This approach would require that police not arrest juveniles for minor breaches of bail, limiting the possibility of police discretion being misused and reducing the amount of juveniles on remand for minor offences for which they will not receive a custodial penalty. PIAC believes that enshrining this requirement in legislation is the most effective way to ensure that the rights of juveniles are upheld, to provide a greater level of accountability for the police, and a clear right of redress for juveniles whose rights are breached.

### **Recommendation**

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6. *That the Young Offenders Act 1997 (NSW) and the Bail Act 1978 (NSW) be amended to require NSW police officers to use a diversionary method such as a warning, caution, summons or court attendance notice in relation to a breach of a bail condition if the breach is a ‘technical breach’.*

## **2.9 Bail support programs**

Bail support programs can provide an alternative to remand, and can help to ensure that young people are supported and diverted more effectively away from the criminal justice system. Best practice programs in relation to bail support should be voluntary, holistic, and focus on support and intervention rather than supervision and monitoring. It is essential that such programs are also adaptable and responsive to local conditions.<sup>44</sup>

### **2.9.1 After-hours bail assistance line**

The Wood Inquiry formally recommended that an after-hours bail placement service, similar to services successfully operating in Victoria and Queensland, should be established in NSW.<sup>45</sup> It was recommended that the service should cater for young people aged between 10 and 18 years, who are at risk of being remanded in custody, or who require bail accommodation. The service will be established on a 12-month trial basis in three areas of NSW, beginning in March 2010. Police operating in these areas will be able to contact the Bail Assistance Line for young people who need bail support after hours and the service includes transport for children to suitable accommodation.<sup>46</sup>

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<sup>43</sup> NSW Government, *NSW State Plan* (2009) [57-58] <<http://more.nsw.gov.au/stateplan>> at 14 December 2009.

<sup>44</sup> G Denning-Cotter, ‘Bail Support in Australia’ (2008) 2 *Indigenous Justice Clearinghouse Research Brief*1.

<sup>45</sup> Wood, above n 13, xxvii.

<sup>46</sup> Department of Juvenile Justice, above n 20,21.

At this stage, very few details about the practical way in which the Bail Assistance Line will function have been provided. It is not known whether police are required or simply encouraged to use it, whether lawyers will have access to its services, and what range of services will be available to young people through the assistance line. The Queensland model provides referrals and financial support to fund accommodation for young people when suitable accommodation cannot be found by child welfare agencies. This differs from the Victorian model where the service assists the child to find accommodation with family or friends, rather than funding alternative accommodation. Without having information about the model the NSW Government will adopt, it is difficult to comment on its appropriateness and effectiveness, particularly in relation to Indigenous juveniles, who often experience additional challenges as a result of their remote or regional location. PIAC therefore submits that the details of this trial assistance line should be made publicly available as soon as possible, and detailed evaluations of its effectiveness should be regularly available throughout its trial process. Following the pilot, the Bail Assistance Line should be rolled out throughout NSW, with any lessons learned from the pilot implemented.

### **2.9.2 Additional support for those on bail**

A key issue for Indigenous juveniles is having access to support to comply with bail conditions and adequately prepare for court appearances. Two relatively informal initiatives were identified in NSW in 2008 that assist adult offenders with compliance with their bail conditions. PIAC submits that these initiatives should be adapted to assist juvenile offenders.

The first initiative provides defendants on bail with a pocket-sized book in which their bail conditions are recorded, so that they can be easily carried with the person and referred to when required. This would greatly assist young people who are routinely subject to numerous conditions whilst on bail with restrictions on where they can live, places they can visit, what times they can be outdoors and what activities they can engage in. A pocket-sized book, which outlines bail conditions, could serve as a useful reminder for young defendants and allow them to show the conditions to their family and friends so that they can support the young person's compliance with the bail conditions.

The second program, used by the Aboriginal Client Service Specialist at Moree Local Court, involves sending an SMS message to defendants with a reminder close to their court date, to overcome the issues of non-appearance. This would be particularly effective with juveniles, who often respond well to SMS messages more readily than phone calls. As Denning-Cotter notes in describing these two mechanisms:

These programs address fundamental obstacles facing defendants meeting bail conditions in that they provide simple, easy to understand and accessible information regarding bail and conditions which is essential if people are to meet those conditions.<sup>47</sup>

PIAC submits that these programs should be funded by Juvenile Justice and implemented in all Children's Courts in NSW. Further, Juvenile Justice should identify, develop and provide funding for other measures to provide additional support for Indigenous juveniles on bail.

### **Recommendation**

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7. *That funding be provided to Children's Courts for pocket bail books and text message reminders of court dates for juveniles.*
8. *That the NSW Department of Juvenile Justice identify, develop and provide funding for programs that assist juveniles to comply with the conditions of bail.*

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<sup>47</sup> Denning-Cotter, above n 44, 3.

## 2.10 Diversionary programs for young Indigenous offenders

There are a number of other ways in which young people can be diverted from the criminal justice system, with purpose-designed and supported programs to assist them with resolving other issues in their lives that have led to the offending behaviour. PIAC submits that the policy focus of all governments with respect to juvenile offending needs to be more holistic and should support factors that positively influence a young person's life including improving family life and relationships, ensuring access to opportunities through education and employment, building self-esteem, improving health outcomes and focusing generally on rehabilitative measures in response to offending behaviour instead of incarceration.

### 2.10.1 Intensive Supervision Program: Newcastle and western Sydney

The Intensive Supervision Program was established in May 2008 by Juvenile Justice as a four-year pilot project based on successes with its multi-systemic therapy in other countries. It is aimed at juveniles aged between 10 and 14 who commit serious or repeat offences, with a particular focus on Indigenous offenders. The Program addresses issues such as substance abuse, financial problems, housing needs, family conflict and negative peer pressure, and assists in dealing with underlying problems that the juvenile is experiencing within their family and the wider community. The Program is co-ordinated by trained clinicians and a team of Aboriginal advisors who advise on cross-cultural issues and monitor the interventions to ensure they are achieving good outcomes. The team also works with the families and schools of the offenders to increase service provision and improve skills outcomes. In an annual report for the financial year ending 30 June 2009, Juvenile Justice reported 27 out of 35 families had successfully completed the program, with 11 out of 15 of those 35 families being Aboriginal and Torres Strait Islander families.<sup>48</sup>

PIAC submits that further information about how the Program operates should be made publicly available and considered by the Committee, as the only information currently available is a brief summary provided in the Juvenile Justice Annual Report. If the Program has led to positive outcomes for juveniles and their families, PIAC submits that Juvenile Justice should establish the Program in other areas in NSW. There should be a clear and ongoing evaluation of the Program to ascertain its long-term effects on participants.

#### **Recommendation**

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9. *That further information about the NSW Department of Juvenile Justice's Intensive Supervision Program be made publicly available and be considered by the Committee in this inquiry.*
10. *That the NSW Department of Juvenile Justice establish and fund other multi-systemic therapy programs in NSW for young people in the criminal justice system. Such programs should also be evaluated to determine the long-term effects on participants.*

### 2.10.2 The Pasifika Support Services project: south-west Sydney

An issue in relation to diversionary programs and Indigenous young people is often the lack of cultural awareness, specificity and involvement, as Indigenous young people may not fare as well in a generalised program as they would in a program that acknowledges and includes elements of their culture and background.

An example of a successful diversionary program that uses the community and culture of the particular juveniles to assist and support them is the Pasifika Support Services project, run as a partnership between the NSW Department of Premier and Cabinet and Mission Australia in south-west Sydney since 2005. The program integrates a holistic approach to young people referred by the NSW Police Force, engaging

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<sup>48</sup> Department of Juvenile Justice, above n 20, 44.

community-based workers and leaders with a Pacific Island background to set goals in a broad range of areas, including providing education on anger management and alcohol and drug use, conducting mediation with families and communities, and providing assistance in accessing benefits, education, employment and government programs. Evaluations of those who participated in the program, which runs between three to six months, found that rates of re-offending were reduced in the short to medium term following participation in the program.<sup>49</sup>

PIAC recommends that this program should be used as a best-practice model for similar Indigenous programs such as the Intensive Supervision Program.

### **Recommendation**

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**11. That the Pasifika Support Services project be considered by the Committee in this inquiry as a best-practice model for the approach to be preferred for culturally appropriate diversionary programs.**

#### **2.10.3 Gamarada and Indigenous men's access to justice**

The Gamarada Aboriginal Men's Healing and Capacity Development Program is an example of a local community initiative taking up the issue of healing and life skills. Men's groups have gained increasing support in Indigenous communities and are accepted as a diversionary option and a powerful way for community to be proactive and address issues common to members caught up in the criminal justice system. These include; healing, isolation, capacity to advocate for one's self and family/community, identity, connectedness to culture, mental health, substance use, family violence and wellbeing.

Gamarada—meaning 'comrades' or 'friends' in the Gadigal language—is based in Redfern, in NSW, and is a 10-week group program that incorporates traditional Indigenous culture and healing with holistic self empowerment. Men's group programs are commonly based around 'narrative-therapies'. Gamarada also teaches participants practical skills that develop capacity and strengths in connection with Indigenous spiritual concepts like Dadirri (deep listening and quiet stillness) and anger management or, as it is termed in Gamarada, 'non-reaction' techniques that are applicable to all negative emotions including anger. The program shows participants how they can apply these skills to their own life to evolve from issues that lead to despair and crime.

Through its established forum of program participants and community members, Gamarada provides education to those at risk of contact with the criminal justice system and in turn their families about the importance of regular health checks with their GP. This is fundamental to 'closing the gap' in Aboriginal health and stifling the disruptive cycles that lead to crime, prison and low socio-economic status.

Gamarada also provides a train-the-trainer component whereby participants are encouraged to gain the skills to run sessions themselves in the community. Of note, one of the Gamarada graduates, David Leha, a former prisoner, has now gone on to be paid to facilitate a session, 'Anger Management and Healing' for Corrective Services NSW.

PIAC is promoting access to justice for Indigenous men who have mental illness through working with Gamarada. The Mental Health Legal Services Project is an innovative example of a holistic approach to addressing issues that further compound the existing discrepancies in poor health (mental health) that often leads to contact with the criminal justice system. This role will involve further development of the Gamarada Men's Healing and Capacity building Program with the main focus on promoting access to social justice.

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<sup>49</sup> Mission Australia, *Young people and the criminal justice system: New insights and promising responses* (2009) 6.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, profiled the Gamarada Aboriginal Healing and Life Skills program in his 2008 Social Justice Report.<sup>50</sup> He did so to provide a positive example of a 'grass roots' community initiative with aims that include reducing crime, promoting social inclusion, reducing prison recidivism, and marginalisation. The Commissioner also called on government and community to act in collaboration to avoid further neglect of the mental health needs of children, adolescents and young people and warned of the high social and economic costs associated with high contact with the health and the criminal justice system.<sup>51</sup>

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**Recommendation:**

12. *That government be proactive in seeking out successful grass-roots community initiatives and work in accordance with the Federal Government's Re-setting the relationship with Indigenous Australians" model to improve options for juveniles and young adults at risk of or in contact with the criminal justice system.*
13. *That government seek the input of the Aboriginal and Torres Strait Islander Social Justice commissioner, Tom Calm on Justice reinvestment and Healing which relate directly to holistic long term prevention for Indigenous Australians at risk of contact with the criminal justic system.*

## 3. Inter-agency initiatives

### 3.1 Juvenile offender compact

In a submission to the Wood Inquiry, Juvenile Justice proposed a Juvenile Offender Compact, involving the Departments of Corrective Services, Education, Health, Community Services, Housing, Police and Attorney General, which would focus on Indigenous young people and prioritising and addressing their needs across multiple agencies.<sup>52</sup> This approach was said to be 'worthy of consideration' in the Wood Inquiry report,<sup>53</sup> and a proposed set of principles for agencies to use in servicing and prioritising the needs of young offenders was developed. The principles provide that:

- the reduction of re-offending requires a multi-agency approach;
- the needs of Aboriginal children and young persons require particular attention;
- there is a need to target the group of young offenders at highest risk of future offending, namely 10–14-year-old Aboriginal males;
- pre-court detention and post-order detention are areas of focus of agencies' interventions.<sup>54</sup>

The specific principles in this Compact relate directly to improving service provision to Indigenous juveniles, and could have a direct impact on reducing the number of Indigenous offenders and re-offenders.

PIAC notes that Juvenile Justice in its Annual Report 2008–09 states that the Juvenile Offender Compact is currently being developed,<sup>55</sup> and PIAC submits that this process should be expedited to improve service

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<sup>50</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *2008 Social Justice Report* (2009) Australian Human Rights Commission [171] <[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport08/](http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/)> at 21 December 2009.

<sup>51</sup> Ibid Chapter 4, 147 and following.

<sup>52</sup> Wood, above n 13, 568-9

<sup>53</sup> Wood, above n 13, 568

<sup>54</sup> Ibid 568-69.

<sup>55</sup> Department of Juvenile Justice, above n 20, 20.

provision to Indigenous juveniles. PIAC also submits that the Juvenile Offender Compact should have clear and binding targets for each agency, and be subject to reporting and evaluation requirements, to ensure better outcomes for Indigenous juveniles.

**Recommendation**

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- 14. That the Juvenile Offender Compact proposed by the NSW Department of Juvenile Justice be instituted by all appropriate agencies in 2010, and be subject to reporting and evaluation requirements.*