



**ABORIGINAL JUSTICE ADVISORY COUNCIL**

SUBMISSION TO THE REVIEW OF THE  
CHILDREN AND YOUNG PERSONS  
(CARE AND PROTECTION) ACT 1998

MARCH 2006

# **AJAC Submission to the review of the *Children and Young Persons (Care and Protection) Act 1998***

## **Introduction**

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This submission by the Aboriginal Justice Advisory Council (AJAC) will address key issues relating to how the legislation impacts on Aboriginal people in the NSW welfare and criminal justice systems, and provide recommendations to improve the legislation where applicable and as it relates to Aboriginal children, young people and their families. Due to the review's limited timeframe for responses, this submission is unable to comment all of the issues contained in the DoCS scoping paper, which may impact on Indigenous children, young people and families in NSW.

The review of the *Children and Young Persons (Care and Protection) Act 1998* (the Act) is an important opportunity to assess whether changes should be made, in the care, protection and support of Aboriginal children, young people and their families. The objects and principles of the Act have a number of positive aspects, particularly as it considers the need for early intervention and prevention, as well as Aboriginal and Torres Strait Islander principles of self-determination and participation. However, AJAC have concerns with the Department of Community Services (DoCS) implementation of the legislation and best practice, least intrusive intervention, the lack of culturally sensitive and appropriate services, and the limited opportunities for the empowerment of Indigenous people. These concerns have ongoing implications in the cycle of disadvantage that Aboriginal people face, such as the breakdown of family and community structures, and over-representation in both the child protection and criminal justice systems. Therefore, the recommendations provided not only relate to the legislation itself, but also matters regarding its implementation.

It is also of concern that the Minister for Community Services is responsible for directing this review, whilst also being responsible for the administration of the Act that is currently under review. The potential for a conflict of interest in these dual roles, raise questions of accountability and transparency. Arguably, these issues could be overcome by engaging an independent body, in addition to input from the Ministerial Advisory Committee, to take responsibility for the coordination of information received in the review process.

### *Historical Perspective*

The contemporary legislative needs of Aboriginal people are inextricably connected to their history. Since colonisation, Aboriginal people in NSW have been subjected to adverse welfare laws, policies and practices. Generations of grief, trauma, anger and oppression are still evident in the lives of many Aboriginal people today. The legacy of the past, the loss of family and community ties, and traditional roles and models of parenting, need to be acknowledged in the policy and practice of government, to support cohesion and reconciliation with Aboriginal people.

Aboriginal people have been denied their rights in determining their own needs and participating in decision making. They have been separated from their community networks and isolated from accessing appropriate resources and supports that are sensitive to their cultural identity. Therefore, the need to improve outcomes via the legislation as it affects Aboriginal children, young people and their families, is of critical importance in this review.

## *Methodology*

This submission is provided in accordance with AJAC's role to provide advice to the NSW government on the priorities, principles and best practices that should underpin government programmes of assistance to Aboriginal people, to work together in preventing and reducing their contact with the welfare and criminal justice systems.

The outcomes of several studies referred to in this submission provide evidence-based support to Indigenous disadvantage as an underlying cause of the over-representation in the justice systems. Legislation that has been cumbersome to enact and based on non-Indigenous Australian values, inconsistent policies, entrenched discriminatory practices, and exclusion from services, have been identified in the literature as inherent problems in both the welfare and criminal justice systems.

Limited anecdotal evidence based on the field experience of former Indigenous and non-Indigenous staff from DoCS and other government departments has been considered in this review to assess the legislation's impact on Aboriginal clients. This submission would also have included the views of regional Aboriginal communities however the short timeframe defined by DoCS for the review process, did not allow for such broader consultation to take place. Attempts by the AJAC to consult with Indigenous workers in DoCS to discuss practice-based issues relating to the legislation were not permitted by Department officials.

## **Priority Areas for Improvement**

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### *NSW Aboriginal Justice Plan and Two Ways Together*

The *Children and Young Persons (Care and Protection) Act 1998* will be reviewed in terms of two defining strategies for the AJAC: the *NSW Aboriginal Justice Plan: Beyond Justice*<sup>1</sup> and *Two Ways Together: the NSW Aboriginal Affairs Plan*.<sup>2</sup> These strategies require a collaborative and whole-of-government response to map the way forward for Aboriginal children, young people, families and communities. The *Aboriginal Justice Plan* and the *Two Ways Together* address the need for collaborative action in policy, funding, resource allocation and service delivery for Aboriginal people that is culturally appropriate to empower them to best define their own needs and solutions.

This submission considers the following five priority issues for AJAC in terms of the goals, principles and strategic directions of the *NSW Aboriginal Justice Plan* (the Justice Plan) and *Two Ways Together*:

1. The need for systemic government reform, leadership and change, to coordinate and support Aboriginal justice in NSW
2. The link between disadvantage and the over-representation of Indigenous people in both the care and protection and criminal justice systems
3. The need to enhance early intervention and prevention services and resources for Aboriginal children, young people and their families
4. The empowerment of Indigenous people in their cultural identity, self-determination and participation in decision making and placement
5. The strengthening of Aboriginal and Torres Strait Islander (ATSI) Placement Principles in care plans, permanency planning and out-of-home care arrangements.

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<sup>1</sup> NSW Aboriginal Justice Plan: Beyond Justice 2004-2014, NSW Aboriginal Justice Advisory Council, Sydney, 2000.

<sup>2</sup> Two Ways Together: the NSW Aboriginal Affairs Plan 2003-2012 in Aboriginal Justice Plan, *ibid*.

The following sections of the Act are reviewed by AJAC, in order of relevancy, impact and their inter-relationships with the above key areas:

- (i) Roles of the Minister and Director-General (Chapter 2, Part 3, Sections 15-18)
- (ii) Assistance comprising provision and exchange of information (Chapter 2, Part 3, Sections 19; Chapter 17, Section 248)
- (iii) Requests for assistance (Chapter 3, Part 1, Sections 20-22)
- (iv) Aboriginal and Torres Strait Islander principles (Chapter 2 Part 2, Sections 11-13)
- (v) Care plans and Permanency planning (Chapter 5, Part 2, Sections 78-78A)
- (vi) Voluntary out-of-home care (Chapter 8, Part 3, Divisions 1-2, Sections 151-156)

**Priority 1: Aboriginal Justice and the need for systemic government reform, leadership and change**

The *Aboriginal Justice Plan* highlights the clear desire for Aboriginal communities to resolve their own child protection and crime problems, and for communities to work together to improve the safety of their people. The review of the Act should not be addressed in isolation of the *Aboriginal Justice Plan* and *Two Ways Together*. The *Aboriginal Justice Plan* strategic directions give consideration to the following actions in addressing the key issue of Aboriginal justice and the need for government reform, leadership and change:

- Create a justice system that openly engages and responds to the needs of Aboriginal people
- Improve central coordination and accountability for Aboriginal justice issues in NSW
- Entrench structures which ensure stronger Aboriginal involvement in the development and review of policy at state, regional and local levels of government
- Ensure government policies and practices incorporate performance measures to meet the needs of Aboriginal clients, evaluate programs, and identify legislative barriers that inhibit the needs of Aboriginal people
- Consider cultural practices in the drafting of legislation
- Establish uniform data standards across governments concerning the collection, use and management of data about Aboriginal people
- Address the needs of Aboriginal juveniles in detention centres, ensure Aboriginal defendants have full access to bail, and establish local Aboriginal community justice mechanisms to reduce discriminatory practices against Aboriginal people.

*Risk of harm and risk of crime*

There appears to be a strong correlation between ‘risk of harm’ and ‘risk of crime’ amongst the Indigenous population of Australia. A review of the literature indicates that the offending behaviour of Indigenous children and young people may be symptomatic of underlying socio-economic and welfare problems, often requiring the intervention of DoCS to meet their care and protection needs.

Legislative changes introduced in 1988, meant that children and young persons appearing before the court on care and protection matters, could be diverted and dealt with separately from the juvenile justice system, which had historically subjected them to the same range of punitive sanctions as juvenile offenders. The Act separates care issues from the issues of

juvenile offending, even though the NSW Children's Court has dual jurisdiction to determine both care matters and criminal matters relating to children and young people.

Studies indicate that remand centres for Indigenous young offenders in NSW (particularly females), may still be used to meet their welfare needs, and highlight the concern that the juvenile justice system is frequently used by carers, welfare authorities, police and magistrates for the purpose of 'protecting' girls whose 'survival conduct' (in charges of prostitution and petty theft as examples), is considered to justify their enforced care, even in cases where bail has been granted.<sup>3</sup>

AJAC are concerned at the significant rate of Aboriginal young people granted bail, who have been placed in custodial facilities. Lack of DoCS representation and support at court, and a lack of culturally appropriate family and community-based bail support accommodation options for Aboriginal young offenders, who are at the same time under the parental responsibility of the Department, are just two major issues of injustice and disadvantage faced by this group.<sup>4</sup> It is therefore imperative for this review to initiate a whole-of-government approach to DoCS' policies and procedures in enacting the legislation, together with forging partnerships with other government, non government and Aboriginal community stakeholders, to meet the needs of self-determination and participation in decision making for Indigenous families caught between both justice systems.

#### *Intersection between care and juvenile justice*

While DoCS has a commitment in its legislation to appropriate service provision to Indigenous families, arguably, they fail to translate this policy into practice in their day-to-day intervention and case management strategies. A review of the literature shows that this is due to bureaucratic procedures that fragment policies at a practical level, limited resources and funding for Aboriginal programmes, a lack of awareness of Indigenous culture and history, which leaves caseworkers unable to 'connect' with Aboriginal clients with whom they are working, entrenched methods of casework that do not facilitate a holistic approach, but rather facilitates a crisis, symptomatic response, and casework that fails to address the underlying issues of disadvantage and over-representation faced by Aboriginal families who straddle both welfare and criminal justice systems.

The current law therefore does not provide adequate safeguards to ensure that Aboriginal children's rights are protected by the roles of the Minister and Director-General of the DoCS, nor does the Department adequately meet the needs of Aboriginal people in their requests for assistance or in the provision and exchange of information relating to their cases. The literature shows an encompassing need for legislative amendment to cut across portfolio and jurisdictional boundaries in order to:

- clarify the joint responsibilities and accountabilities of heads of government departments (such as Community Services and Juvenile Justice)
- meet requests for assistance from children, young people, parents or others
- provide and exchange information in relation to Indigenous young persons who are in contact with multiple departments and agencies.

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<sup>3</sup> Cain, M.(1994), *Juveniles in Detention: Special Needs Groups*, Department of Juvenile Justice, Information and Evaluation Series No 3; Gale, F., Bailey-Harris, R. & Wundersitz, J. (1990), *Aboriginal Youth and the Criminal Justice System*, Cambridge University Press, Melbourne.

<sup>4</sup> Aboriginal Legal Service Submission to Aboriginal Justice Advisory Council on Bail Review, 2005; Department of Juvenile Justice Submission to Aboriginal Justice Advisory Council Bail Review, 2005.

*Roles of the Minister and Director-General, Director-General's Request for Services from Other Agencies, Obligation to Cooperate*

The Act is problematic in terms of accountability and transparency where the Minister and Director-General of DoCS and other government departments have shared responsibilities and obligations to cooperate in meeting the needs of Indigenous children and young people caught between the child protection and criminal justice systems.

At present, the Minister for Community Services acts as the guardian of children who have been removed from the care of their parents and placed in the care of the State. The reality is however, that the guardianship functions of the Minister are carried out at the local level by caseworkers and managers in each Community Services Centre. Practical problems relating to the Minister's role as guardian, including high staff turnover, mean that officers who have responsibility for a child, may have little direct contact with the child; lack knowledge of the child's circumstances, or lack an understanding of Aboriginal history and culture in their decisions about an Indigenous child or family.

Anecdotally, the problematic nature of the legislation relating to the role of the Minister and Director-General is also demonstrated when DoCS representation is absent in criminal jurisdictions where a juvenile offender who is under the parental responsibility of the Minister as a State Ward, is left possibly unsafe and in need of assistance, in circumstances when seeking bail or facing sentence. The failure of the Minister to meet the care and protection needs of a child who falls within the criminal jurisdiction of the Children's Court (where the Care Order was made) perpetuates the over-representation of Aboriginal youth in both systems.<sup>5</sup>

**Recommendation 1**

**a) Roles of Ministers and Directors-General**

Sections 15-18 of the Act needs to include measures of responsibility, transparency and accountability in a whole-of-government approach and 'obligation to cooperate' in working with 'at risk' Indigenous children, young people and families.

**b) Support for juvenile offenders in DoCS care**

Legislative agreement and joint protocols/memorandums of understanding are needed especially in cases requiring the Minister to ensure that Aboriginal juvenile offenders in need of assistance, who are already in the care of the DoCS, should be properly supported at court and after court by an Indigenous staff member of DoCS, or a relevant support agency, particularly in the provision of appropriate and safe accommodation placements whilst on bail.

**c) Exchange of information**

The accurate provision and exchange of information relating to clients is critical. The Act needs to direct the review of departmental guidelines to reflect best practice and least intrusive interventions, as well as accountability and transparency in record keeping and information sharing by caseworkers and others. Also, the Act should require the Minister or Director-General to outline any reasons for inaction by the department where deemed appropriate, and in accordance with the objects and principles of the Act.

*Provision and Exchange of Information*

Aboriginal young people entering both the child protection and criminal justice systems often fall within the cracks of one, if not both these systems. In practice, a coordinated exchange of information and records is needed between overlapping government departments and

<sup>5</sup> Miller, S. (2005), DoCS Place in the Criminal Jurisdiction, Children and the Law Seminar.

Indigenous groups to formulate case plans that address both the care and protection and juvenile justice needs of the young person.

The need for a holistic approach in risk assessment and intervention relies on a thorough exchange of information between relevant parties and across various socio-economic indicators of risk (for example the drug histories of parents need to be considered in assessing their overall parenting capacities)<sup>6</sup>. It is also crucial in this exchange, that the Minister and Director-General direct the principles of self-determination and participation in decision making and placement for Aboriginal children and young people who may be represented in both systems.

Anecdotal evidence suggests that the manner in which files are kept and managed by DoCS, impede the effective implementation of section 19 and section 248 of the Act relating to the provision and exchange of information concerning DoCS clients. In particular, a study that reviewed files held by DoCS, found that data compiled which would enable identification of Indigenous children known to the Department was unsatisfactory, inaccurate and incomplete.<sup>7</sup>

## **Recommendation 2**

### **a) Information and data collection**

The following points are offered for consideration of section 19 and section 248:

- Improved data collection to track the demography of the Department's Indigenous client base, to enable the planning and allocation of resources
- Retaining important information and documents relating to Indigenous clients (such as notifications, court documents, voluntary care undertakings)

### **b) Record keeping practice and procedure**

Introducing standardised reviews of all departmental files relating to Indigenous clients and introducing guidelines for good practice in casework, minimum standards of procedures and practices for responding to, recording and acting upon the child protection needs of Indigenous children and young people within a defined timeframe.

## *Requests for Assistance*

It is important to acknowledge Indigenous socio-economic disadvantage as an underlying cause of Aboriginal children, young people and their families coming to the attention of child protection and/or criminal justice authorities. With this in mind, this submission supports the inclusion of Sections 20, 21 and 22 of the Act, which relates to requests for assistance made to the DoCS by a child, young person, parent or other government/non government agency. However, a weakness of this part of the Act is that there is no specific mention or linking of these sections to the principles relating specifically to Aboriginal and Torres Strait Islander people, namely the need for self-determination and participation in their requests for assistance from the Department. The Act also fails to provide for the secure care of offending children and young persons who are 'at risk' and 'in need of assistance', particularly if they require additional stability, assessment and/or treatment services. Many children and young people experience multiple admissions into State care or custody.<sup>8</sup> Thorough a review of the legislation, services and facilities should be made available to meet the needs of these children and young people in exceptional circumstances, through court order and be of short duration for a definitive purpose to benefit

<sup>6</sup> NSW Ombudsman Report on Reviewable Child Deaths (2004), NSW Legislative Council Hansard.

<sup>7</sup> Libesman, T. & Cunneen, C. (2001), Report Into Substantiated Cases of Emotional Abuse and Neglect Against Indigenous Children in NSW, Institute of Criminology, University of Sydney.

<sup>8</sup> Overcoming Indigenous Disadvantage Key Indicators 2005, Steering Committee for the Review of Government Service Provision, Productivity Commission, Canberra.

the child, involve community participation by Aboriginal members; and be monitored jointly by DoCS, Juvenile Justice, Courts and other specialist representatives.

With a history of prioritising services to the younger age group, it is also concerning that DoCS has minimised its responsibility to ‘young people’, particularly Indigenous adolescent offenders who are in the care of the department. Early intervention approaches in ‘requests for assistance’, rather than ad-hoc crisis assistance, need to consider the long term impact on Indigenous young people as the next generation of parents-to-be entering the child protection system. Research shows that the early entry of children into the welfare and/or criminal justice systems perpetuates their ongoing contact within these systems.<sup>9</sup>

### **Recommendation 3**

#### **Requests for assistance**

Requests for assistance by Indigenous children, young people and their parents need to be considered in terms of the Aboriginal and Torres Strait Islander Principles of self-determination and participation. Legislative amendment needs to strengthen support for special requests for assistance relating to Indigenous children and young people (particularly adolescent offenders who are in the care of DoCS), who may require secure containment to meet their safety, assessment and/or treatment needs for a defined period of time, and under the joint review of relevant bodies (including Aboriginal members). This may relate to changes to the Act in terms of how the roles of the Minister and Director-General the provision and exchange of information, and requests for assistance are put into practice by the DoCS.

Sections 15 to 22 and section 248 of the Act need strengthening to ensure that DoCS and all other government agencies have an obligation to cooperate, and are responsible and accountable for their decisions in relation to requests for assistance and provision and exchange of information, involving ‘at risk’ children, young people and their families. The legislation needs to enhance the leadership role Aboriginal people have in relation to the resolution of justice issues that effect them in the care and protection system.

### **Priority 2: Indigenous Disadvantage and Over-representation in the Child Protection and Criminal Justice Systems**

Within this review, DoCS should consider - Does ‘Risk of Harm’ mean ‘Risk of Crime’ for Aboriginal people? It is imperative that DoCS acknowledges Indigenous disadvantage in its review process. In doing so, a review of the legislation’s impact on Aboriginal people should again consider the *Aboriginal Justice Plan* and *Two Ways Together*, which provide strategic directions for change and improved outcomes for Aboriginal people in terms of:

- Providing Aboriginal children with the best start in life, by supporting their early child development, growth and schooling, and giving attention to the needs of carers and families
- Improving the quality of services for Aboriginal children
- Maximising opportunities for access to services and programmes
- Building the skill capacity, self-worth and resilience of Aboriginal young people
- Creating a sustainable economic base for Aboriginal people.

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<sup>9</sup> Weatherburn, D., Lind, B. & Hua, J. (2003), Contact with the NSW Court & Prison Systems: The Influence of Age, Indigenous Status and Gender, Crime & Justice Bulletin No.78.

### *Indigenous disadvantage*

Research overwhelmingly shows that Indigenous people in Australia suffer grossly disproportionate rates of disadvantage against all measures of socio-economic status. The obstacles they face in both welfare and correctional systems also relate to a history of discrimination and displacement, marginalisation and social exclusion. Indigenous children are among the most vulnerable to abuse and early death due to a number of associated socio-economic factors.<sup>10</sup>

The association between socio-economic disadvantage and crime for the Indigenous population is well documented across a diverse range of indicators that include: a lack of access to resources and infrastructure in health, housing, education, training, employment and justice. This inequity is often manifested in high mortality, poor nutrition, substance abuse (alcohol, drugs, petrol sniffing), homelessness, incomplete schooling and poor literacy levels, loss of income and poverty, violence, delinquency and adult crime.<sup>11</sup> Yet research indicates that government programmes are inadequate in raising Indigenous people to a position of equality.<sup>12</sup>

Disadvantage and the over-representation of Aboriginal people occur within both the child protection system (as victims and as perpetrators of abuse, neglect, domestic violence) and within the criminal justice system (as victims of crime and as offenders). Research indicates a link between inter-generational abuse and inter-generational offending histories amongst Aboriginal people. Cycles of intergenerational abuse, neglect and offending, for example, is common for Indigenous families where children of prisoners who have been raised in families where poor parenting, dysfunction, sexual abuse, violence and poor socio-economic factors are underlying, also commit offences that result in their own imprisonment.<sup>13</sup> The subsequent entrenchment in criminal activity and life in custody does not auger well for the future of these children.

### *Child sexual assault, abuse, neglect and the stolen generations*

The NSW AJAC conducted a report entitled *Speak Out, Speak Strong*.<sup>14</sup> The report found that 70% of Aboriginal women in custody, who were surveyed, were victims of child sexual assault. These females were also more likely to use drugs; the primary reason behind their imprisonment. Similarly, the HREOC report *Bringing Them Home* found that people who had been removed from their families were twice as likely to have been arrested more than once in the last five years as those who had not. Separation and removal into care of Aboriginal children and young people, has significantly undermined the parenting skills of subsequent generations of Aboriginal families.<sup>15</sup>

A publication of the Australian Bureau of Statistics also noted that Indigenous children are more likely than non-Indigenous children to be the subjects of substantiated cases of abuse and neglect (with rates about 2-8 times higher in most jurisdictions in 1997-98), under care and protection orders (about 4 times higher in 1998) and on out-of-home placements (almost 6 times higher in 1998). Further, Indigenous children are over-represented in the juvenile

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<sup>10</sup> UNICEF Innocenti Research Centre (2004), *Ensuring the Rights of Indigenous Children*, Innocenti Digest No 11, Florence.

<sup>11</sup> Aboriginal Over-representation Strategic Plan, NSW Department of Juvenile Justice September 2001; Standing Committee on Law and Justice 2000, *Crime Prevention through Social Support*, Second Report, Report No 14, Legislative Council.

<sup>12</sup> Royal Commission Into Aboriginal Deaths In Custody, 1995.

<sup>13</sup> Cain, M. (1995), *Juveniles In Detention: Issues of Over-representation*, Department of Juvenile Justice, Information and Evaluation Series No 4.

<sup>14</sup> Lawrie, R. (2003), *Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody*, NSW Aboriginal Justice Advisory Council, Sydney.

<sup>15</sup> HREOC (1997), *Bringing Them Home*, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.

justice system, with about 40% of children in ‘corrective institutions for children’ identified as Indigenous in the 1996 Census, whilst the imprisonment rate for Indigenous adults was over 14 times than for non-Indigenous adults.<sup>16</sup>

As mentioned earlier, the legislation relating to the Roles of the Minister and Director-General, the Provision and Exchange of Information, and Requests for Assistance, should direct the development of protocols and memorandums of understanding to be negotiated between relevant government, non-government and Aboriginal stakeholders, to recognise the disadvantage and discriminatory practices faced by Indigenous people, to meet the overall socio-economic and justice needs of Indigenous children and young persons in NSW, who are ‘at risk’ and ‘in need of assistance’.

This is especially so in cases where Indigenous youth (whose circumstances place them at inherent disadvantage) come to the attention of authorities in both the child protection and criminal justice systems. As outlined previously, this is the case in juvenile justice matters, where a magistrate needs to determine the issue of bail for an Indigenous juvenile offender who is also in the State’s care, or for an Indigenous child who is placed in out-of-home care, but drifts within the child protection system. The scattering of guardianship responsibility by the Department amongst a large number of ‘delegated’ people makes it difficult for any consistency, accountability, transparency, least intrusive, or cultural sensitivity in decision-making. Information sharing and decision-making responsibilities are also compromised in the care, protection and support of an Indigenous child at a practice-base level within the department.

**Recommendation 4**

a) Indigenous disadvantage  
DoCS to review the legislation in terms of acknowledging an underlying link between disadvantage and the over-representation of Aboriginal people, in both the welfare and correctional systems.

b) Aboriginal child sexual assault  
The review of the Act should also consider outcomes and recommendations arising from the Aboriginal Child Sexual Assault Taskforce when it releases its report and findings.

### **Priority 3: Early Intervention and Prevention Strategies**

An endemic cycle of injustice exists for Aboriginal families, where the early stages of social disadvantage for Aboriginal children are a significant factor in delinquency, criminal offending and recidivism.<sup>17</sup> It is critical in this review, that the Indigenous community are empowered to develop and implement their own ways of supporting and guiding Aboriginal young people.

The *Aboriginal Justice Plan* and *Two Ways Together* identify several strategic directions and actions which are associated with early intervention and prevention strategies, to reduce the over-representation of Aboriginal people in both the child protection and criminal justice systems. These include:

- Creating safe households for Aboriginal children by recognising Aboriginal family and kinship structures in legislation, policy and programs

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<sup>16</sup> Australian Bureau of Statistics (1999), *The health and welfare of Australia’s Aboriginal and Torres Strait Islander Peoples*, ABS, Canberra. See further: Australian Institute of Health and Welfare, *Child Protection Australia 1998-99*, AIHW, Canberra, 2000.

<sup>17</sup> Cunneen, C. (2001), *The Impact of Crime Prevention on Aboriginal Communities*, NSW Crime Prevention Division and Aboriginal Justice Advisory Council, Sydney.

- Improving the safety of Aboriginal people in their homes from violence
- Ensuring child protection policy and practices actively engage Aboriginal communities
- Developing strategies to reduce the incidence of child sexual assault, physical abuse and neglect in Aboriginal communities, and empowering Aboriginal children to break the silence on sexual abuse
- Improving support and counselling mechanisms for Aboriginal children
- Improving access to services for young Aboriginal people who are victims of crime
- Building the capacity, self-worth and life skills of Aboriginal children's carers (by improving parenting, budgeting and conflict resolution skills amongst Aboriginal families)
- Building the skill capacity, self worth and resilience of Aboriginal people to create strong functioning families and extended family structures
- Providing Aboriginal staff with flexibility and professional development supports to assist in the provision of culturally acceptable services to Aboriginal communities
- Supporting local Aboriginal communities to develop early intervention and prevention programs

### *Aboriginal population statistics*

The Australian Indigenous population has a significantly younger population than the non-Indigenous population.<sup>18</sup> This statistic has significant importance in the future directions of welfare and criminal justice systems for Aboriginal children, young people and their families. The interplay of socio-economic factors associated with Indigenous youth entering the welfare and/or judicial systems, sets them on a 'merry-go-round' of disadvantage.<sup>19</sup>

A report prepared in 2003 by the Premier's Department on programmes and outcomes relating to Aboriginal people in NSW, indicates that compared to the rest of the NSW general population, Indigenous people have four times the rate of child abuse or neglect, as assessed by DoCS/Police investigation teams. Similarly, an increased trend of notifications to DoCS involving Indigenous children between 1997 and 2000 was noted.<sup>20</sup> Figures of further concern from the NSW Ombudsman, found that Aboriginal children continued to be over-represented both in deaths of children generally in NSW and in reviewable deaths.<sup>21</sup>

### *Violence*

A review of the literature shows that violence towards children is having major adverse consequences for the future of Indigenous families and communities. The witnessing and experiencing of violence from a young age has been shown to manifest later in life as being strongly associated with both a desensitisation towards violence, and a predisposition towards violence in one's own relationships, which may lead to violent crime.<sup>22</sup> The research also suggests that by focusing on the indicators of disadvantage which lay behind Indigenous offending, may do more to reduce crime in Indigenous communities, than policies designed to apprehend and imprison them.<sup>23</sup>

One highly significant factor resulting in Indigenous incarceration is that the early involvement of young people in the criminal justice system puts them at much higher risk of

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<sup>18</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage* (2005), op.cit.

<sup>19</sup> Cain (1995), op.cit.

<sup>20</sup> *Programs and Outcomes Relating to Aboriginal People in NSW* (2003), NSW Premier's Department.

<sup>21</sup> NSW Ombudsman Report (2004), op.cit.

<sup>22</sup> *Violence in Indigenous Communities* (2001), Commonwealth Attorney-General's Department, Crime Prevention Branch, Canberra.

<sup>23</sup> Hunter, B.H. (2001), *Factors Underlying Indigenous Arrest Rates*, NSW Bureau of Crime Statistics & Research, Sydney.

being imprisoned as adults, often as a result of violent crimes. A recent study undertaken by the NSW Bureau of Crime Statistics and Research (BOCSAR), highlights the critical importance for Indigenous young people, of intervening as early as possible in reducing socio-economic disadvantage, abuse and violence, in an attempt to break the cycle of juvenile involvement in crime and their entry into adult offending behaviour.<sup>24</sup>

### *Requests for Assistance*

Sections 20, 21 and 22 of the Act have been discussed above. The review should strengthen these sections with an emphasis on early intervention strategies to reduce abuse, neglect and violence in Indigenous families, which often leads to a cycle of crime where Indigenous people are both victims and offenders. The legislation recognises the importance of early intervention and prevention supports for families, however, the development and provision of appropriate services and recognition of the principles of participation for Indigenous families, is an area requiring greater focus. The recruitment of more Indigenous caseworkers is also priority at a practice base level.

Anecdotal evidence suggests that many requests for assistance and the provision of early supports are not responded to or met. Further work in this review process is needed to develop and look at funding early intervention and prevention services that meet the needs identified by Aboriginal people, to prevent their entry into the care and protection and criminal justice systems. Legislative reform that is appropriately implemented by DoCS, needs to look at ways to enhance support for Indigenous children and young people, given their vulnerability in entering and remaining in one or both child protection or criminal justice systems. Overall, the Department needs to develop at a practical level, safe, healthy and supportive family environments with strong communities and cultural identity, and improved socio-economic sustainability for Aboriginal people.

### **Recommendation 5**

#### **DoCS programs, early intervention and cultural awareness**

The review process should the implementation of appropriate programmes funded by DoCS, in partnership with Indigenous people and other agencies:

- Broaden responsibility for protecting children beyond the child protection statutory system, by increasing the community's responsibility for 'at-risk' and vulnerable children at an earlier stage of intervention and prevention
- Implement early intervention and prevention programs as a crime prevention strategy
- Provide mentor support, living and social skills development for Indigenous children and young people
- Recognise the network of identified Aboriginal workers in DoCS involved in child protection and out-of-home care, and their ties to local Aboriginal communities
- Increase the recruitment of Aboriginal workers in DoCS with appropriate training and education
- Provide cultural awareness training for non-Indigenous staff in DoCS. Workers must gain awareness and understanding in Aboriginal history, diversity, kinship, family, cultural identity, communication, self-determination and participation principles in order to provide culturally sensitive assistance and support to Aboriginal people.

The need for DoCS to acknowledge, implement and fund early intervention and prevention programmes as both child protection and crime prevention strategies, is a key issue for the AJAC in terms of reducing the over-representation of Indigenous people in the welfare and criminal justice systems.

<sup>24</sup> Chen, S., Matruggio, T, Weatherburn, D. & Hua, J. (2005), *The Transition from Juvenile to Adult Criminal Careers*, No86, NSW Bureau of Crime Statistics & Research, Sydney.

#### **Priority 4: Empowering Aboriginal Cultural Identity: Self-Determination and Participation in Decision Making and Placement**

The empowerment of Indigenous people's self worth and resilience through their cultural identity, self-determination and participation is yet another priority underpinning the *Aboriginal Justice Plan* and *Two Ways Together*, and also falls within the mandate of the Aboriginal and Torres Strait Islander Principles of the Act.

##### *Cultural identity*

Aboriginal youth often experience loss of cultural identity and breakdown of family relationships, which may increase their risk in entering the child protection and criminal justice systems. The strategic directions of the *Aboriginal Justice Plan* focuses on safeguarding Aboriginal culture and building the resilience of Aboriginal identity for children, young people, families and communities, to enable them to take charge of their own lives and make important decisions about their futures. The AJAC would welcome many of the strategic actions of the *Aboriginal Justice Plan* to be included in the Act in terms of promoting Aboriginal and Torres Strait Islander principles of self-determination and participation (sections 11-14 of the Act).

##### *Effective participation and realising self determination*

Research has shown the detrimental and inter-generational impact that the separation of Aboriginal children and young people from their families has had to this day.<sup>25</sup> In ensuring the best possible outcomes for children and young people, it is crucial that decisions made by DoCS in relation to their children and young persons are made with the effective participation of Indigenous people. Effective participation necessarily requires engagement, negotiation, facilitation and consultation. The legislation states that Aboriginal people and their communities are to be given the opportunity to participate in decisions that concern their children, including placement decisions. Anecdotal evidence suggests that attempts within DoCS to facilitate Indigenous participation are tokenistic, inadequate and ill informed.

On a practical level, DoCS caseworkers need to facilitate Indigenous participation in their intervention plans, for example, by seeking the support and assistance of community elders, Aboriginal foster care groups and Aboriginal Land Councils, in situations where decisions are being considered about the future of an Aboriginal child or young person. Further, in promoting self-determination in a real sense, this may be assisted by the recruitment of Aboriginal staff with cultural knowledge and expertise at all levels of the Department, together with the participation of other Aboriginal community members in the interviewing process. The review of the Act can also acknowledge that the level of Aboriginal cultural awareness training for non Indigenous staff at all levels of the department needs to be enhanced.

##### *Aboriginal and Torres Strait Islander Placement Principles*

The Aboriginal child placement principle is a legislative strategy for seeking to ensure that Aboriginal children and young persons who cannot be cared for by their parents remain a part of the Aboriginal community within a hierarchy of placement. Given the consequences associated with the stolen generations experienced by many Aboriginal people, the permanency planning provisions in the Act need to be sensitively handled regarding the Aboriginal and Torres Strait Islander Placement Principles.

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<sup>25</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home*, [www.humanrights.gov.au/social\\_justice/stolen\\_children/index.html](http://www.humanrights.gov.au/social_justice/stolen_children/index.html).

The Aboriginal and Torres Strait Islander Placement Principles outline a preference for placement when Indigenous children need to be placed in out-of-home care. Placing Indigenous children in circumstances consistent with the Aboriginal and Torres Strait Islander Child Placement Principles is generally considered to be in their best interests, according to the objects and principles of the Act. The way the principle is applied in practice, however, is critical to its enhancement of the wellbeing and safety of Indigenous children.

Anecdotal evidence suggests that the placement principles are applied inconsistently by DoCS caseworkers who manage high and varied caseloads, and are not adequately trained in issues relating to Indigenous people. The outcomes of these practical shortcomings in the Act include placement breakdowns or 'drift', exclusion from culturally appropriate support services and programmes for Indigenous people, and limited availability of appropriate Indigenous placements. The 'merry-go-round' of over-representation and inter-generational disadvantage continues at so many levels for the Indigenous of NSW.

#### **Recommendation 6**

##### **a) Effective participation of Aboriginal people**

It is recommended that the principles of self-determination and participation in decision-making be strengthened in the implementation of the legislation, as being necessary for Aboriginal and Torres Strait Islander people to overcome historical and continuing disadvantage.

##### **b) Elders and engaging the community**

The principle of self-determination is important in child protection legislation and policy, as the role of elders is defined in customary law, where part of the decision making responsibility of children and young persons is made by the elders of a community. It is recommended that the Act enhance the role of elders in the decision making responsibilities of care matters involving Indigenous children and young people.

#### **Priority 5: Strengthening the Aboriginal and Torres Strait Islander Placement Principles in Care Plans, Permanency Planning and Voluntary Out-of-Home Care Arrangements**

The strategic directions of the *Aboriginal Justice Plan* and *Two Ways Together* map the way forward for government legislation and processes to ensure Indigenous people have a real say in issues determining their justice, particularly in the formal removal of care of Indigenous children from their families. The placement principles outlined above are supported in the legislation, despite the difficulties Aboriginal people experience in the implementation of these principles.

#### *Kinship*

The current legislation fails to include all kinship care arrangements in the definition of out-of-home care. Aboriginal kinship systems define the relationships that Indigenous people have with one another, and the differences they have in their child rearing practices, compared to non-Indigenous ways of life. These relationships are imperative to the child to ensure the continuity of identity, spirituality, and cultural heritage. Legislative reform and the services set up to assist Aboriginal children and young people, must acknowledge the different approach Aboriginal families and communities have in terms of raising their children. Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be actively supported to participate in decisions regarding the placement, and all other significant decisions about their children and young persons in care.

The importance of kinship care in Aboriginal communities cannot be underestimated, as research shows that these placements have higher rates of stability, are non-stigmatising for children and young people, preserve cultural identity, and preserve contact with families.<sup>26</sup> Figures indicate that historically, Aboriginal children account for a disproportionate number of children in out-of-home care in NSW.<sup>27</sup> Reports acknowledge that they continue to be over-represented in the child protection and out-of-home care service systems in NSW. The number of children and young people entering out-of-home care is increasing by approximately 10% each year, and Aboriginal children and young people are now estimated to represent more than 25% of those in out-of-home care in NSW.<sup>28</sup>

Problems associated with the growing use of kinship care for Aboriginal children and young people, is the lack of training and support given to them; the lack of information provided in relation to the placement of an Indigenous child; and the effects of the inadequate financial reimbursement given to kinship carers, who are more than often disadvantaged in other socio-economic areas. Those who remain in care for long periods of time, also experience drift in multiple and unplanned placements, which impact adversely on long term outcomes in terms of education, unemployment, standards of living, physical and emotional health, interpersonal relationships, and entry into crime.

### *Permanency Planning*

Many of the out-of-home care options relating to permanency planning are not accessible or culturally appropriate for Aboriginal and Torres Strait Islander families in NSW. With respect to these children and young people, section 78A of the Act then states that ‘a permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander placement principles in section 13 of the Act’. From a traditional Aboriginal perspective, the European concept of permanency planning (which includes adoption) does not exist, because Aboriginal children and young people are brought up by the community as a whole.

### **Recommendation 7**

#### **Cultural care plans**

The Act needs to provide detail for the development of ‘cultural care plans’ under section 78. The Act also needs to recognise the different needs of Aboriginal kinship groups and have regard to the principles of self-determination and participation in decision making and placement, in the making of appropriate care plans for Indigenous children who are in the care of DoCS. Accredited policies and procedures specifically relating to out-of-home care services for Aboriginal children and young people also need to be tailored to reflect their unique needs.

### *Voluntary Out-of-Home Care*

When Aboriginal organisations are supported and empowered to make out-of-home care arrangements for Aboriginal children and young people, self-determination and participation principles contained in the Act would be upheld. In practice however, this does not seem to be the case.

Where placements have been negotiated with families as temporary or voluntary arrangements to protect children, it seems from anecdotal evidence that DoCS do not support such placements. Children placed in voluntary out-of-home care do not benefit from the case planning, protection and support services that are associated with formalised placement

<sup>26</sup> Framework for the Future of Out-of-Home Care in NSW (2004), Out-of-Home Care Policy Directorate, NSW Department of Community Services.

<sup>27</sup> Review of the Children (Care and Protection) Act 1987, Law and Policy in Child Protection: A Summary of Key Issues, NSW Department of Community Services Legislation Review Unit.

<sup>28</sup> ‘Inside Out’ (January-February 2005), NSW Department of Community Services, op.cit.

through Children’s Court orders, or through licensed foster care agencies. Further, sufficient financial support is often not made available to fund voluntary placements with alternative carers, a significant economic disadvantage that many of these Aboriginal families experience, which in turn escalates a cycle of placement breakdown for Indigenous children and young people who are already in crisis and already ‘at risk’.

### **Recommendation 8**

#### **a) Promoting best practice casework**

Legislation must clearly set out the requirements for good casework practice in developing with Aboriginal people strategies to prevent Aboriginal children and young people entering out-of-home care where possible, with the implementation of early intervention and prevention programmes for Indigenous families.

#### **b) Out-of-home care**

Kinship care needs to be formally recognised as an out-of-home care placement arrangement in the Act, with adequate and appropriate structures and supports provided for kinship carers. Similarly, Indigenous voluntary out-of-home care arrangements need to be strengthened in the Act, along with equity of support and assistance made available to these carers by the Department. The Act should state that all carers including kinship carers be eligible for the same remuneration and access to services for the care of Indigenous children and young people.

## **Conclusion**

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Any constructive review of the *Children and Young Persons (Care and Protection) Act 1998* in terms of its impact on Aboriginal children, young people and their families, must take heed of the history of welfare policy and practices in Australia in relation to Indigenous people. This legacy has contributed to the over-representation of Indigenous people in both the child protection and criminal justice systems. The impact of disadvantage as an underlying cause of Indigenous over-representation in these systems continues today, perpetuating a cycle of inter-generational abuse and offending behaviours amongst Aboriginal children, young people and their families. A ‘merry-go-round’ of breakdowns in family and community structures and placements, together with poor access to culturally appropriate resources and services, undermine the resilience of Aboriginal people in their identity and culture. Society needs to acknowledge and share responsibility for effective change and justice for Aboriginal people.

This submission has highlighted a number of pertinent issues relating to the impact of the Department’s legislation and practices on the safety, wellbeing and welfare of Indigenous children and young people. These are summarised below for consideration in this review:

- Acknowledgement of the priorities and strategic directions outlined in the *NSW Aboriginal Justice Plan* and *Two Ways Together*
- Acknowledgement of the recommendations contained in other key studies, reports and inquiries referred to in this submission, which relate to Aboriginal justice issues that are yet to be implemented by the government. Encouraging continued research in these areas.
- Implementation of whole-of-government obligations to cooperate in partnerships with Aboriginal people
- Practice of accountability and transparency across government jurisdictions
- Practice of best practice, least intrusive, consistent and supportive casework interventions, including the appropriate exchange of information between parties

- Development of early intervention and prevention programmes as crime prevention and child protection strategies, to break cycles of disadvantage
- Enhancement of cultural awareness training and acknowledgment of Aboriginal history and discrimination in government policies
- Strengthening of culturally appropriate care arrangements and provision of appropriate training, support and socio-economic/financial benefits to kinship carers
- Recognition of the empowerment and resilience of Aboriginal people through self-determination and participation principles.

The AJAC welcomes changes to the *Children and Young Persons (Care and Protection) Act 1998* to ensure that its operation provides as much support as possible for Aboriginal people. Mechanisms for recognising the key priorities outlined in this submission must be introduced to support justice for Aboriginal people in NSW in both the child protection and criminal justice systems.