

20. BREAKING THE CYCLE: PROGRAMS FOR ABORIGINAL YOUTH (RECOMMENDATIONS 234-245)

The RCIADIC recognised that the relationship young Indigenous people have with their family and community is crucial to their empowerment.¹ The RCIADIC identified a number of program options which showed promise in engaging Indigenous youth, noting that those which had community involvement and were sensitive to their cultural needs were more successful.² However, the National Report indicated that there was a lack of support services available to Indigenous youth in many parts of Australia.³

Chapter 30 of the National Report addresses the issue of Indigenous youth at risk of entering the criminal justice system, the preventive measures available and the treatment of Indigenous youth in the criminal justice system. It reports on non-custodial correction options, programs that are available to those for whom custody is a practical necessity, and recidivism.

The RCIADIC made a number of Recommendations addressing the way in which the wider community should be working toward diverting young Indigenous people from the criminal justice system. Those Recommendations can be broadly described as follows:

1. provision of adequate legal advice and representation (Recommendation 234);
2. family and community involvement in the development of programs aimed at improving the welfare of young Indigenous people (Recommendations 235-236);
3. preference for the employment and training of Indigenous people in roles directed toward the welfare of young Indigenous people (Recommendations 237-238);
4. diverting young Indigenous people away from the court system (Recommendations 239-241); and
5. appropriate arrangements and provision of support for young Indigenous people in custody (Recommendations 242-245).

This Chapter looks to the efforts made to implement these Recommendations by the Federal, State and Territory governments.

¹ *Royal Commission into Aboriginal Deaths in Custody*, National Report, 1991, Chapter 30, at 30.1.1.

² *Ibid.* at 30.1.4.

³ *Ibid.* at 30.1.5, referring to a “critical situation” in Victoria, and also making specific mention of South Australia.

1. Provision of Adequate Legal Advice And Representation

The RCIADIC envisaged that the Aboriginal Legal Services would have a key role to play in the provision of education to Indigenous youth about their legal rights and obligations. It further noted that an adequate level of legal representation and advice to young Indigenous people is essential, and the Aboriginal Legal Service, being best placed to provide it, should be adequately funded.⁴ Hence the first of the RCIADIC's Recommendations with respect to addressing Indigenous youth in the justice system was as follows:

Recommendation 234: *That Aboriginal Legal Services throughout Australia be funded to such extent as will enable an adequate level of legal representation and advice to Aboriginal juveniles.*

1.1 Commonwealth Government

With regard to funding policies at Commonwealth level, the Government introduced the Indigenous Legal Assistance and Policy Reform Program Guidelines in July 2011. The Government replaced those guidelines with the Indigenous Legal Assistance Programme Guidelines with effect on 1 July 2014. The guidelines state that the objective of the Indigenous Legal Assistance Programme is to "deliver for clients and communities, culturally sensitive, responsive, accessible, equitable and effective legal assistance and related services to Indigenous Australians".⁵ This program is the primary source of funding for eight Indigenous legal service providers, servicing every State and Territory. A number of the Indigenous legal service providers have programs that are aimed at meeting the needs of young people. For instance, the Victorian Aboriginal Legal Service has introduced the Youth Referral and Independent Person Program, and the Aboriginal Legal Service of Western Australia provides literature specifically catering for young people.⁶

1.2 State and Territory Governments

With respect to State funding and initiatives relevant to young Indigenous people, the Aboriginal and Torres Strait Islander Legal Service (Queensland) Limited advises Indigenous juveniles on the understanding that applicants under the age of 18 automatically satisfy the means test requirements. Just Reinvest NSW launched the Justice Reinvestment for Aboriginal Young People Campaign in May 2012, with the support of Aboriginal Legal Service (NSW/ACT) Ltd. Justice reinvestment diverts a portion of the funds spent on incarceration to communities where there is a high concentration of young offenders. The Justice Reinvestment for Aboriginal Young People Campaign "continues to advocate addressing the over-representation of Aboriginal young people in custody".⁷

⁴ Ibid. at 31.1.34.

⁵ Australian Government Attorney General's Department, Indigenous Legal Assistance Programme Guidelines, July 2014, under section titled "OBJECTIVE", at 1.

⁶ Their booklet, "Young People and the Law", is available at <http://www.als.org.au/images/stories/publications/Pamphlets/young%20people%20and%20the%20law.pdf>.

⁷ As reported in the Aboriginal Legal Service (NSW/ACT) Limited Annual Report of 2013-2014, at 28 <available at:

There are other, non-Indigenous specific youth advocacy groups which assist young Indigenous people that operate on a State-wide basis. For instance, in Victoria, Your Rights On Track is a project coordinated by the Federation of Community Legal Centres in partnership with Smart Justice for Young People and the Mental Health Legal Centre. Although the program is not designed specifically to advocate to and for young Indigenous people, it is of benefit to them. In South Australia, Aboriginal Legal Rights Movement Inc. Criminal Section provides Youth Court duty solicitor services.

With respect to the adequacy of this funding, we note that on 17 December 2013 the Treasurer announced in his Mid-Year Economic and Fiscal Outlook that \$43.1m was to be cut across the legal assistance sector over the next four financial years.⁸ Subsequently, on 26 March 2015, the Commonwealth Attorney-General's Department confirmed that it will restore \$11.5m of funding that was originally slated to be cut from Indigenous Legal Aid and Policy Reform Program over the two years to 30 June 2017.^{9,10}

Overall, this Report shows that there are a number of legal service providers for Indigenous youth in each of the States and Territories, although it is not always clear where they receive their funding.¹¹ Currently, it seems that service to young Indigenous people often falls to Legal Aid,¹² and this may become a more significant trend if the Commonwealth Government re-instates its plan to cut funding to Indigenous legal service providers.

2. Family and Community Involvement in Programs for Indigenous Youth

Recognising that parental control of young Indigenous people had often been undermined by many years of reliance on the external controls of the welfare system, the RCIADIC acknowledged that it was appropriate for Indigenous communities to institute programs which address the family unit.¹³ It also recognised that the provision of sport, recreation and entertainment as an antidote to boredom would be a key factor in preventing Indigenous juvenile crime.¹⁴ The RCIADIC advised that if such programs are to be successful, Indigenous organisations and

<http://www.alsnswact.org.au/media/BAhbBlSHOgZmSSI5MjAxNC8xMC8yMi8wM18wNI8wM180MDFQW5udWFsX1JlcG9ydF9WOF9MT1dfUkVTLnBkZgY6BkVU>>.

⁸ Letter dated 22 August 2014 from the Chairperson, National Aboriginal & Torres Strait Islander Legal Services to the Presiding Commissioner Access to Justice Arrangements Public Inquiry Productivity Commission.

⁹ <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Legal-aid-funding-assured-to-support-the-most-vulnerable-in-our-community.aspx>

¹⁰ Letter dated 22 August 2014 from the Chairperson, National Aboriginal & Torres Strait Islander Legal Services to the Presiding Commissioner Access to Justice Arrangements Public Inquiry Productivity Commission.

¹¹ In 2010, the Aboriginal Legal Service (NSW/ACT) reported a funding boost from the Federal government budget; Victoria Aboriginal Legal Service likewise reported a three year grant (2011-2014) from the Federal government.

¹² For instance, through NSW Legal Aid's Children's Legal Service.

¹³ Royal Commission into Aboriginal Deaths in Custody, National Report, 1991, Chapter 30 at 30.1.7-30.1.9.

¹⁴ *Ibid.* at 30.1.11.

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communities will need to have a central role in their construction and implementation.¹⁵

Specifically, the RCIADIC's Recommendations were:

Recommendation 235: *That policies of government and the practices of agencies which have involvement with Aboriginal juveniles in the welfare and criminal justice systems should recognise and be committed to ensuring, through legislative enactment, that the primary sources of advice about the interests and welfare of Aboriginal juveniles should be the families and community groups of the juveniles and specialist Aboriginal organisations, including Aboriginal Child Care Agencies.*

Recommendation 236: *That in the process of negotiating with Aboriginal communities and organisations in the devising of Aboriginal youth programs governments should recognise that local community based and devised strategies have the greatest prospect of success and this recognition should be reflected in funding.*

This Report has found a significant number of programs aimed at developing the welfare of young Indigenous people which have been developed by or in consultation with the local Indigenous communities. An exhaustive list is beyond the scope of this Chapter, which seeks to provide an indication of the type of work that Indigenous community organisations are doing for their young people at a local level. For example, the Gugan Gulwan Youth Indigenous Corporation in ACT seeks to provide a safe and supportive environment for Indigenous young people, and to foster their education and cultural awareness. In WA, the Yiriman Project arose out of the concern of Elders for their young people, and operates as an important intergenerational, "on-Country" cultural program in the Kimberley. In western NSW, the Tirkandi Inaburra Cultural and Development Centre provides on-site schooling for young Indigenous men, with the aim of empowering them to "develop and draw on their own resilience in order to take responsibility for their own lives, develop strategies to deal with their problems and minimise the risk of becoming involved in the criminal justice system".¹⁶ In the Northern Territory, the Yuendumu Community has run a number of programs designed to rehabilitate and educate young Indigenous people through the Warlpiri Youth Development Aboriginal Corporation for twenty years.

However, government support of these local programs is piecemeal and inconsistent, and while there is evidence of some funding to community based strategies,¹⁷ it is not clear whether it is provided in preference to non-community based strategies. Some exceptions should be noted: in Tasmania, various State departments worked in consultation with Indigenous Elders to develop the Meenah Mienne Arts Mentoring Program, whose mission was to provide a mentoring service which is a "safe, welcoming, supportive and creative place for Indigenous young

¹⁵ Ibid. at 30.1.30-30.1.32.

¹⁶ Tirkandi Inaburra Cultural and Development Centre website, available at <http://www.tirkandi.org.au/>.

¹⁷ For instance, the Tirkandi Inaburra Cultural and Development Centre reports that it receives funding from the NSW government, and the Yiriman Project website lists a number of Commonwealth government departments as partners.

people at risk", and the above-mentioned Justice Reinvestment for Aboriginal Young People Campaign has received significant support from the NSW Government.

There is also substantial evidence of attempts by State Government departments and agencies to incorporate consultation with Indigenous people in the services that they offer. For instance in Queensland, the State Government's Youth at Risk Initiative has made funding contingent upon consultation with the local community, and its program guidelines state that services for young Indigenous people "should ideally be delivered by an appropriate service or individual who is from the young person's community or language group".¹⁸

3. Recruitment of Indigenous People to Work in Programs that Support Young Indigenous People

Related to the RCIADIC's Recommendations that youth welfare programs should be developed in consultation with Indigenous communities, is the principle that Indigenous people would ideally work in the programs directly with young Indigenous people. To this end, the RCIADIC recognised that "the provision of Aboriginal youth workers would seem to be a key provision in the prevention of offending",¹⁹ and specifically recommended as follows:

Recommendation 237: *That at all levels of the juvenile welfare and justice systems there is a need for the employment and training of Aboriginal people as youth workers in roles such as recreation officers, welfare officers, counsellors, probation and parole officers, and street workers in both government and community organisations. Governments, after consultation with appropriate Aboriginal organisations, should increase funding in this area and pursue a more vigorous recruitment and training strategy.*

Recommendation 238: *That once programs and strategies for youth have been devised and agreed, after negotiation between governments and appropriate Aboriginal organisations and communities, governments should provide resources for the employment and training of appropriate persons to ensure that the programs and strategies are successfully implemented at a local level. In making appointment of trainers, preference should be given to Aboriginal people with a proven record of being able to relate to, and influence, young people even though such candidates may not have academic qualifications.*

There has not been a concerted move toward introducing policies that promote employment and training of Indigenous people specifically in youth welfare roles across the country.

¹⁸ For other examples of government initiatives where the involvement of the local Aboriginal community is at least referred to, see Tasmania's Aboriginal Education Framework (2012-2015); the ACT Aboriginal and Torres Strait Islander Justice Agreement (although this has been criticised for inadequate resourcing);

¹⁹ Royal Commission into Aboriginal Deaths in Custody, National Report, 1991, Chapter 30.1.35.

3.1 Commonwealth Government

At Commonwealth level, the COAG National Partnership Agreement on Indigenous Economic Participation includes a number of general education, training and recruitment policies, but nothing caters specifically for juvenile welfare and justice.

3.2 State and Territory Governments

Likewise WA and the ACT have employment strategies to attract Indigenous people to the public sector generally, but there appears to be no targeted effort with respect to youth or justice. While again not youth-specific, the Tasmanian Department of Police and Public Safety has introduced a Tasmania Police Aboriginal Strategic Plan, which includes as a recruitment strategy "Engagement with the Aboriginal community to promote the option of recruitment to Tasmania Police".²⁰

The Department of Justice & Regulation in Victoria, has the most extensive program for employing young Koori people. Its Koori Employment Strategy includes "Gateways to Justice", which "strives to encourage, motivate and inspire Koories to seek career opportunities in justice", a Graduate recruitment and development scheme, scholarships and cadetships. The Department is also a part of the "Youth Employment Scheme", a whole of Government initiative that provides young people with traineeships and apprenticeships across the Victorian Public Service. The Department maintains that in 2012, Koori employees represented 1.78 per cent, and has committed to an employment target of 2.5% by 2015.²¹ The Department also runs the Koori Youth Justice Program, which was developed in 1992 in response to the findings of the RCIADIC, and "employs Koori Youth Justice Workers to support young Aboriginal people who are at risk of offending and also clients on community-based and custodial orders".²²

Juvenile Justice NSW has adopted the broader Government's commitment to workforce diversity,²³ although little detail is available as to what specific programs are in place to achieve this goal. In Queensland, as mentioned above, the Youth at Risk Initiative aims to "employ Aboriginal and Torres Strait Islander workers and ensure the inclusion of, and access to, Aboriginal and Torres Strait Islander people",²⁴ although again, further detail as to how this is to be achieved was not provided at the time of research. The South Australian Department For Communities and Social Inclusion provides funding for the Aboriginal Youth Development Program, which "employs community based youth workers and provides funds to

²⁰ Tasmania Police "Aboriginal Strategic Plan" 13 February 2014 at 8 which is available at <<http://www.police.tas.gov.au/uploads/file/Corporate%20Documents/Brochures%20%26%20Publications/DPEM%20Aboriginal%20Strategic%20Plan%202014-2022.pdf>>

²¹ The Victorian Department of Justice's "Koori Employment Strategy" is available at <<http://www.justice.vic.gov.au/utility/careers/koori+employment/>>.

²² <<http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/programs/youth-specific/youth-justice-koori-programs>>

²³ Section 63 of the *Government Sector Employment Act 2013* (NSW) provides that "workforce diversity" includes (but is not limited to) diversity of the workforce in respect of gender, cultural and linguistic background, Aboriginal people and people with a disability and makes the head of a government sector agency responsible for ensuring that workforce diversity is integrated into workforce planning in the agency.

²⁴ Youth at Risk Initiative, Program Guidelines March 2012, at 14.

promote positive engagement for young Aboriginal people in recreational, cultural and life skill development activities".²⁵ Specific detail as to how many community based youth workers were trained and where, was not available at the time of research. The Department also has an Aboriginal Employment Strategy that established a target to increase the participation of Aboriginal people in the South Australian public sector to 2% by 2014 and maintain or better those levels through to 2020.²⁶

4. Diversion from The Court Process

Chapter 30 of the National Report provided some detail on attempts to divert juveniles away from the court process through the introduction of panels which, in appropriate cases, cautioned rather than punished children for admitted offences, and focused on counselling. The RCIADIC relied on an inquiry into the effectiveness of these panels in South Australia and Western Australia,²⁷ which found that the panel system had failed to reduce the disproportionate involvement of Indigenous youth in the criminal justice process, and has even potentially increased their involvement by net-widening.²⁸

The RCIADIC noted several problematic aspects of the panels in WA and SA, but the most significant contributor to the overrepresentation of Indigenous juveniles was explained as follows:²⁹

"The main factor which determined whether a youth was referred to court or to an Aid Panel was the police method of apprehension. Irrespective of the nature and number of offence charges, prior offending records or family circumstances, youths who had been arrested were virtually guaranteed a court appearance, while those who had been reported were more likely to go to a panel. Since Indigenous youths were more likely to be arrested than non-Indigenous youths, it followed that they were more likely to be referred by Screening Panels to the Children's Court because of this. This illustrates how decisions taken at one level of the system (in this case, the police decision to arrest) significantly influences decisions taken at subsequent levels of the justice system. This means that because Indigenous youths are disadvantaged at the point of arrest, this disadvantage is compounded as they move through the system. "

Another problematic aspect of the panel system was that, in order to be dealt with by a panel, the child had to first admit to committing the offence, and was thereby induced into admitting to offences they may not have committed.³⁰ Reference was also made to the trial of these panels in regional New South Wales, but it was noted, again, that they provided too great an incentive for a young person to admit guilt of

²⁵ Department for Communities and Social Inclusion, *Annual Report 2011-2012*, 46, available at http://www.dcsi.sa.gov.au/__data/assets/pdf_file/0014/5315/dcsi-annual-report-2011-12-bw.pdf.

²⁶ Department for Communities and Social Inclusion, *Aboriginal Employment Strategy 2012 - 2015*, at 5, available at http://www.dcsi.sa.gov.au/__data/assets/pdf_file/0004/5593/aboriginal-employment-strategy.pdf.pdf.

²⁷ Gale, Bailey-Harris & Wundersitz, *Aboriginal youth and the criminal justice system : the injustice of justice?*, Cambridge University Press, 1990.

²⁸ Final Report, at 30.2.1.

²⁹ Final Report, at 30.2.7.

³⁰ Final Report, at 30.2.10.

an offence, and a "very large" number of the juveniles who participated could have been dealt with by police caution.

In summary, the RCIADIC associated these panels with a real danger that juveniles were coming into the system in circumstances which could have been better dealt with by way of police caution.³¹ Rather than reducing the instances in which Indigenous children went through the official and recorded criminal justice process, panels had the effect of increasing their involvement. In addition, the RCIADIC noted that the panel system could be made more relevant to young Indigenous people by including more Indigenous people on the panels, and allowing alternative community members other than parents and guardians to accompany the child to the proceedings.³²

Following from this analysis, the RCIADIC made three Recommendations relating to encouraging police to proceed by way of caution rather than arrest; ensuring the presence of family or other support persons when such cautions were delivered; and while neither encouraging nor discouraging the introduction of diversionary panels, the RCIADIC recommended important amendments to the process. The text of each Recommendation is as follows:

Recommendation 239: *That governments should review relevant legislation and police standing orders so as to ensure that police officers do not exercise their powers of arrest in relation to Aboriginal juveniles rather than proceed by way of formal or informal caution or service of an attendance notice or summons unless there are reasonable grounds for believing that such action is necessary. The test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults. The general rule should be that if the offence alleged to have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time then arrest should not be effected.*

Recommendation 237: *That:*

- a) *Police administrators give police officers greater encouragement to proceed by way of caution rather than by arrest, summons or attendance notice;*
- b) *That wherever possible the police caution be given in the presence of a parent, adult relative or person having care and responsibility for the juvenile; and*
- c) *That if a police caution is given other than in the presence of any such person having care and responsibility for the juvenile such person be notified in writing of the fact and details of the caution administered.*

Recommendation 241: *The Commission notes that in some jurisdictions (in particular South Australia and Western Australia) Children's Aid Panels or Screening Panels apply. These panels provide an option lying between police cautions, on the one hand, and appearances in children's courts, on the other hand. The Commission is unable to recommend that such panels be*

³¹ Final Report at 30.2.14.

³² Final Report at 30.2.14.

established in places where they do not presently exist, nor that panels be abolished in places where they do exist. The Commission, however, draws attention to evidence suggesting that the potential benefits which may flow from the provision of such panels are not fully realised in the case of Aboriginal juveniles. The Commission draws attention to the desirability of studies being done on a wide scale to determine the efficacy of such initiatives. The Commission recommends that for South Australia and Western Australia the following matters should be made clear by legislation, standing orders or administrative directions so as to provide:

- a) That the fact of arrest is not to be taken into account in determining whether a child is referred to a Children's Court as opposed to being referred to an alternative body such as a Children's Aid Panel;*
- b) That the decision to proceed by way of summons or attendance notice rather than by cautioning a juvenile should not be influenced by the existence of such panels;*
- c) That there should be adequate representation of Aboriginal people on the list of panel members;*
- d) That the panels should be so constituted that there be adequate representation of Aboriginal members of the panel on any occasion in which an Aboriginal juvenile's case is being considered;*
- e) That in no case should there be consideration of the case of an Aboriginal juvenile unless one member, at least, of the panel is an Aboriginal person; and*
- f) That an Aboriginal juvenile should not be denied consideration by a Children's Aid Panel by virtue of the juvenile's inability, on financial grounds, to make restitution for property lost, stolen or damaged.*

4.1 Encouraging police caution over arrest in appropriate circumstances (Recommendation 239)

In every jurisdiction but the ACT, there is specific provision made for police cautions, and arrest of juveniles is expressed to be a "last resort".³³ However, only in WA is it made clear that a caution should be provided in preference to a referral to a youth justice conference (or its equivalent). It is therefore possible that, as foreshadowed by the RCIADIC, police are more inclined to refer Indigenous children to these youth justice conferences and their equivalents rather than simply administer a caution, thereby involving them in the criminal justice system more than is strictly necessary. However, the conferences and their equivalents are generally more informal than the panels which concerned the RCIADIC in 1991.

4.1.1 Northern Territory

In the Northern Territory, section 4 of the *Youth Justice Act 2006* (NT) provides a set of general principles to be kept in mind when administering the Act, which relevantly state that "a youth should only be kept in custody for an offence... as a last resort and for the shortest appropriate period of time". Further, the principles

³³ Note that in Victoria, this is not stated in legislation, but the Victorian Police Manual - Policy Rules - Arrest and preventative action, provides: "Arresting Children- Generally only arrest where it is a serious offence and the child is likely to repeat the offence or commit other offences at the time."

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state that, if practicable, an Indigenous youth should be dealt with in a way that involves the youth's community. Section 39 elaborates further,³⁴ and states that, except in circumstances where:

- the youth has left the Territory or his or her whereabouts is unknown;
- the alleged offence is serious;
- the youth involved has already been referred to a Youth Justice Conference or other diversion program on two prior occasions; or
- the youth has some other history that makes diversion an unsuitable option (including a history of previous diversion or previous convictions),

then a police officer may only give a verbal or written warning to the youth in respect of an alleged offence, or convene a Youth Justice Conference or refer them to a diversion program.

4.1.2 Queensland

In Queensland, section 11 of the *Youth Justice Act 1992* (Qld) provides that before starting proceedings against a child for an offence that is not a serious offence, a police officer must first consider whether it would be more appropriate to:

- take no action;
- administer a caution;
- refer the offence to a conference;
- if involving a minor drugs offence, refer the child to a drug diversion assessment program; or
- if involving a graffiti offence, attend a graffiti removal program.

The police officer is to have regard to the circumstances of the alleged offence, the child's criminal history and any other dealings in making this assessment. If a caution is to be administered to a child who is a member of an Indigenous community, an authorised officer must consider whether there is a respected person of the community who is available and willing to administer the caution, and if such a person is available and willing, must request the person to administer the caution (section 17).³⁵

4.1.3 South Australia

In South Australia, section 6 of the *Young Offenders Act 1993* (SA) provides that if a youth admits to committing a minor offence, and a police officer is of the opinion that the matter does not warrant any formal action, the officer may informally caution the youth against further offending and proceed no further against the youth. However, the police officer may equally decide to pursue more formal proceedings, such as a formal caution or referral to a family conference, or if the matter cannot be adequately dealt with by that means, committal to a preliminary examination and trial in the Youth Court.³⁶ Under a formal caution,

³⁴ Section 16(1) of the *Youth Justice Act 2006* (NT) anticipates that the Commissioner of Police may provide further guidelines in relation to the arrest of youths, but none existed at the time of research.

³⁵ See further part 5.5.9 of the Queensland Police Service Operational Procedures Manual, available at <http://www.police.qld.gov.au/Resources/Internet/services/OperationalPolicies/documents/Chapter5.pdf>.

³⁶ Section 7 of the *Young Offenders Act 1993* (SA).

the police officer has the power to require the youth to enter into an undertaking to pay compensation to the victim of the offence, or commit to up to 75 hours of community service, or apologise to the victim, or do anything else that may be appropriate in the circumstances of the case.³⁷

4.1.4 Tasmania

In Tasmania, section 5 of the *Youth Justice Act 1997* (Tas) includes among its "general principles of youth justice" that "detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary". Other relevant principles include: paying due attention to the family relationships, which should be preserved and strengthened; that a youth should not be withdrawn unnecessarily from his or her family environment, education or employment; that the youth's sense of racial, ethnic or cultural identity should not be impaired; and that an Aboriginal youth should be dealt with in a manner that involves his or her cultural community.³⁸ The *Youth Justice Act 1997* allows police the discretion to direct a young offender to an informal caution (section 8) or "more formal proceedings" (section 9) if the youth admits to the offence. "More formal proceedings" includes a formal caution, reference to a community conference, or a complaint to be filed before the Court. A formal caution may involve the youth in a number of undertakings, such as paying compensation, community service or an apology to the victim (section 10), and in the case of Indigenous youths, may be administered by an Indigenous Elder or a representative of a recognised Indigenous organisation (section 11). An arrest may only be made in the very limited circumstances described in section 24.

4.1.5 Australian Capital Territory (ACT)

In the ACT, the *Children and Young People Act 2008* (ACT) refers to the principle of detaining children as a last resort only,³⁹ but does not go on to provide for warnings or cautions. ACT Policing is a subset of the Australian Federal Police, and is guided by the ACT Policing Practical Guide, which includes the "AFP Practical Guide on diversionary conferencing". This practical guide does not indicate if and when cautions will be given, to the general population as well as to young Indigenous people, but it does specify the terms under which people will be referred to a "restorative justice" conference under the *Crimes (Restorative Justice) Act 2004* (ACT). "Restorative justice" involves a conference involving both the victim and offender, and applies specifically to young offenders charged with less serious offences under section 14 of the *Crimes (Restorative Justice) Act 2004* (ACT).

4.1.6 New South Wales

In NSW, section 7 of the *Young Offenders Act 1997* (NSW) not only states the principle that criminal proceedings should not be instituted against a child if there are alternative and appropriate means of dealing with the matter, but makes specific reference to the need to address the overrepresentation of Indigenous

³⁷ Section 8 of the *Young Offenders Act 1993* (SA).

³⁸ See subs. 5(2)(b)(c)(d)(e) and (f) of the *Youth Justice Act 1997* (Tas).

³⁹ See subs. 94(1)(f) of the *Children and Young People Act 2008* (ACT).

children in the criminal justice system by the use of cautions, warnings and youth justice conferences. Parts 3 and 4 of the *Young Offenders Act 1997* address the conditions in which warnings and cautions should be issued respectively. As is the case in Tasmania and Queensland, a caution may be given by a respected member of the Indigenous community to which the child belongs, at the request of a police officer (section 27).⁴⁰

4.1.7 Western Australia

In WA, section 7(h) of the *Young Offenders Act 1994 (WA)* likewise provides as one of its "general principles" that the detention of a young person should be a last resort and any such detention should be for the shortest time possible. Further, the cultural background of the young person must be considered, and should be dealt with in a way that "fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons" (section 7(m)(ii)). Under section 22B, a police officer must, before starting a proceeding against a young person, consider whether it would in the circumstances be more appropriate to take no action, or administer a caution. For offences other than those listed in Schedule 1 or Schedule 2 (section 22), a caution is to be preferred over laying a charge, unless it would be inappropriate, taking into account the seriousness of the offence and the number of previous offences (section 23, with further relevant principles outlined in section 24). Alternatively, under section 37, a matter may be referred for consideration to a juvenile justice team.

4.1.8 Victoria

In Victoria, section 345 of the *Children, Youth and Families Act 2005 (Vic)* provides that a registrar must not issue a warrant to arrest a child unless the circumstances are "exceptional". Beyond this, Victoria is the only state in Australia which does not provide for police cautioning within its juvenile justice legislation, although the Police Operating Procedures provide for a Police Cautioning Program (which relates to adults as well as children). That program includes the Victorian Aboriginal Justice Agreement Phase 3 (AJA3) of March 2013, which tasks Victoria Police with continuing to "increase the proportion of Koories who are cautioned when processed by police, and ensure the cautioning process includes referral to appropriate services that address factors driving the problem behaviour".⁴¹ Further commitments include working in partnership with Victorian Aboriginal Legal Service to facilitate appropriate training of police, raise awareness of the cautioning program among Koori communities and build reporting and monitoring capacity to record the cautioning rates for Indigenous people relative to the general population. AJA3 records a proposal to develop an initiative referred to as the "Victoria Police Koori Youth Cautioning Project", and at the time of research, the Victorian Aboriginal Legal Service and Victoria Police Youth Contact Cautioning Program had been funded under phase 2 of the AJA3.

⁴⁰ See further the NSW Police Youth Policy Statement (undated), at 14, available at http://www.police.nsw.gov.au/___data/assets/file/0016/4345/Youth_Policy_Statement.pdf.

⁴¹ Victorian Aboriginal Justice Agreement Phase 3, at 97, available at https://assets.justice.vic.gov.au/justice/resources/f4b38365-f9bc-48ef-bf3e-47ac8e6149de/aja3_web.pdf.

This pilot program was run in Mildura and LaTrobe, with a reported increase in cautioning rates.

4.2 Caution in the presence of a person having care and responsibility for the juvenile (Recommendation 237)

The Recommendation that cautions should only be administered in the presence of an adult having care and responsibility for the juvenile can be described as "partially implemented" in most jurisdictions. In Victoria, WA and the ACT, no requirement appears to exist, and in the remaining jurisdictions a parent or other responsible adult must be invited to attend if practicable, but the legislation does not specifically go on to require written notification if not.⁴²

4.2.1 Western Australia

In WA, there is no requirement that cautions be given in the presence of a parent or guardian, although a caution certificate with all the relevant details is to be provided (section 23A of the *Young Offenders Act 1994* (WA)). In Tasmania, formal cautions must be explained and an admission signed in the presence of the young offender's guardian or other responsible adult, if practicable (section 9(5) *Youth Justice Act 1997* (Tas)). In Queensland, a police officer must, if practicable, arrange for the parent or another adult chosen by the child to be present at the administration of a caution.⁴³ In South Australia, a police officer must, if practicable, administer the caution in the presence of a guardian of the youth, or if a guardian is not available, an adult nominated by the youth who has a close association with the youth or has been counselling, advising or aiding the youth.⁴⁴ In the Northern Territory, a responsible adult must consent to a youth being diverted, if practicable, which includes verbal and written warnings.⁴⁵

4.2.2 New South Wales

In NSW, the parents of a child may be notified of a warning issued, provided it would not pose an unacceptable risk to the safety, welfare or well-being of the child (section 16A *Young Offenders Act* (NSW)). Before issuing a caution, the issuing police officer must explain the caution to the child in the presence of a person responsible for the child or another adult chosen by the child (including a lawyer).⁴⁶ When issuing the caution, only the issuing police officer, the child, a person responsible for the child and specified supporting adults may be present.⁴⁷

4.2.3 Australian Capital Territory

⁴² In WA, there is provision for written notification, but not presence of a responsible adult at the time of cautioning.

⁴³ Section 16(2) of the *Youth Justice Act 1992* (Qld).

⁴⁴ Section 8(2)(b) of the *Young Offenders Act 1993* (SA).

⁴⁵ Section 40 of the *Youth Justice Act 2006* (NT).

⁴⁶ Section 22 *Young Offenders Act* (NSW).

⁴⁷ Section 28 *Young Offenders Act* (NSW).

In the ACT, it does not appear that there is any legislation or executive order in place directing that a parent or other suitable adult should be present when a young Indigenous person is issued with a caution. Finally, as mentioned above, there is no legislation in Victoria detailing the procedure of issuing cautions. However, the procedures relating to cautions are set out in the Victoria Police Manual Operating Procedures & Guidelines in the chapter relating to dispositions and in section on cautions.

4.3 Panels are to be appropriately organised for young Indigenous people (Recommendation 241)

This Recommendation has been partially implemented in some jurisdictions. In only four jurisdictions is specific provision made for Indigenous people to sit in on a youth justice conference or its equivalent when a young Indigenous person is involved, and in each of these jurisdictions, their invitation to sit is discretionary.⁴⁸ Further, in order to have access to the conferences, the child must first admit to the offence. However the financial capacity of the child to meet any compensation order is not a relevant consideration in any jurisdiction.

4.3.1 Western Australia

In WA, the Children's (Suspended Proceedings) Panels have been replaced with Juvenile Justice Teams, which "provide the opportunity for the victim, the offender and the offender's family to discuss the best way to deal with the young person and the offence. This is achieved through family group meetings... (where) everyone has an opportunity to sit down face-to-face, talk things through and agree on a penalty".⁴⁹ A matter can only be referred to a juvenile justice team if the alleged offender accepts responsibility for the act or omission constituting the offence, and agrees to having the matter dealt with by a juvenile justice team rather than by a court (section 25(4) of the *Young Offenders Act 1994* (WA)). The matter may be referred by a prosecutor or a court only "where there is sufficient evidence to justify charging a young person with the commission of an offence" (sections 27 and 28), and only if an infringement notice is inappropriate or not preferable in the circumstances (section 25). Furthermore, where considerations of practicality, distance or cultural sensitivity make it appropriate, the Juvenile Justice Team is to include "a member of an approved Aboriginal community" who has been nominated by the community council, and approved by the Commissioner of Police and chief executive officer (section 37).

4.3.2 Tasmania, Queensland, New South Wales and Australian Capital Territory

Tasmanian, Queensland, NSW and ACT, young offenders may be referred to a community conference, with the young person's agreement and upon their

⁴⁸ Those jurisdictions being Victoria, Tasmania, WA and Queensland.

⁴⁹ Department of Corrective Services, "Goldfields Youth Justice Services: Juvenile Justice Teams Factsheet", February 2010, available at http://www.correctiveservices.wa.gov.au/_files/youth-justice/gyjs-jjt-fact-sheet.pdf.

admission of the offence.⁵⁰ The community conference may involve the victim as well as the young offender and, in Tasmania and Queensland, if the youth is a member of an Indigenous community, an Elder or other representative of that community.⁵¹ The community conference, once convened, has the power to administer a caution against further offending, and impose one or more of the following sanctions: payment of compensation; undertake to perform community service; apologise to the victim; and anything else appropriate in the circumstances.⁵²

4.3.3 Northern Territory

In the Northern Territory, sections 39 and 40 of the *Youth Justice Act 2006* (NT) also provides for a Youth Justice Conference, and section 84 of the Act provides that a court may order a youth found guilty of an offence to a presentencing conference, which may involve the victim and their family, community representatives and members of the youth's family. The Act does not provide any further detail as to how these conferences are to be constituted and conducted. The Youth Justice System was subject to review in 2011, and a submission from the North Australian Aboriginal Justice Agency stated that section 84 was a "significantly under utilised provision," and recommended that the NT Government specifically fund the Community Justice Centre to convene youth justice conferences.⁵³ The NT Government's final report did not address conferences, but did recommend "that a new, comprehensive youth justice strategy be developed and implemented".⁵⁴

4.3.4 South Australia

In South Australia, a Youth Justice Co-ordinator convenes a family conference, which may involve the guardians, relatives and other people closely associated with the youth, as well as the victim/s and a representative of the Commissioner of Police.⁵⁵ The youth and the police representative must consent to any decision reached by the family conference, which may include a formal caution, payment of compensation, an apology to the victim or up to 300 hours of community service.⁵⁶

4.3.5 Victoria

⁵⁰ See s. 9(2) *Youth Justice Act 1997* (Tas); s. 22 *Youth Justice Act 1992* (Qld); s. 36 Section 22 *Young Offenders Act* (NSW); s. 19 *Crimes (Restorative Justice) Act 2004* (ACT).

⁵¹ Sections 14 and 38 *Youth Justice Act 1997* (Tas); s. 34 *Youth Justice Act 1992* (Qld); Section 83 *Children and Young People Act 2008* (ACT). There is no such equivalent provision in NSW.

⁵² Section 16 *Youth Justice Act 1997* (Tas); s. 37 *Youth Justice Act 1992* (Qld); s. 52 *Young Offenders Act* (NSW); s. 51 *Crimes (Restorative Justice) Act 2004* (ACT).

⁵³ North Australian Aboriginal Justice Agency Submission to the Youth Justice Review Panel, July 2011, at 14.8, available at www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf

⁵⁴ NT Government, *Review of the Northern Territory Youth Justice System: Report*, September 2011, Recommendation 2 available at http://www.correctionalservices.nt.gov.au/YouthJustice/ReviewOfTheNorthernTerritoryYouthJusticeSystem/Documents/youth_justice_review_report_introduction.pdf.

⁵⁵ Sections 10 and 11 of the *Young Offenders Act 1993* (SA).

⁵⁶ Section 12 of the *Young Offenders Act 1993* (SA).

20. BREAKING THE CYCLE: PROGRAMS FOR ABORIGINAL YOUTH (RECOMMENDATIONS 234-235)

Victoria does not at this stage have equivalent panels, although the Children's Koori Court proceeds on a similar principle. According to its website, the Children's Koori Court "aims to reduce offending behaviour and reduce the number of young Koori people being sentenced to a period of detention" by "involving the Koori community in the court process through the participation of Elders and Respected Persons the Koori Court".⁵⁷ A Magistrate presides over the court, with two Koori Elders or respected persons, and legal counsel are present. Proceedings are less formal than a mainstream criminal court: they take place around an oval table and involve a more consultative process with the accused child, their family and community members all having input into the proceedings. Sentencing options in the Koori Court are the same as those in the Criminal Division.

5. Support for Young Indigenous People in Custody

The RCIADIC went into considerable detail regarding the non-custodial options available to Indigenous youth across the country.⁵⁸ The RCIADIC also made reference to international standards, namely the Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations' Rules for the Protection of Juveniles Deprived of their Liberty, and the United Nations Convention on the Rights of the Child.⁵⁹ A number of the Recommendations concerning the detention of young Indigenous people were taken from these standards, as well as the NSW Youth Justice Project's recommendations.

The RCIADIC's Recommendations as to the procedure of arrest and custody for young Indigenous people were as follows:

Recommendation 242: *That, except in exceptional circumstances, juveniles should not be detained in police lockups. In order to avoid such an outcome in places where alternative juvenile detention facilities do not exist, the following administrative and, where necessary, legislative steps should be taken:*

- a) *Police officers in charge of lockups should be instructed that consideration of bail in such cases be expedited as a matter of urgency;*
- b) *If the juvenile is not released as a result of a grant of bail by a police officer or Justice of the Peace then the question of bail should be immediately referred (telephone referral being permitted) to a magistrate, clerk of Court or such other person as shall be given appropriate jurisdiction so that bail can be reconsidered;*
- c) *Government should approve informal juvenile holding homes, particularly the homes of Aboriginal people, in which juveniles can lawfully be placed by police officers if bail is in fact not allowed; and*
- d) *If in the event a juvenile is detained overnight in a police lock-up every effort should be made to arrange for a parent or visitor to attend and remain with the juvenile whether pursuant to the terms of a formal cell visitor scheme or otherwise.*

⁵⁷ Website of the Children's Court of Victoria, accessed on 1 November 2013, available at <http://www.childrenscourt.vic.gov.au/jurisdictions/koori-court>.

⁵⁸ Royal Commission into Aboriginal Deaths in Custody, National Report, 1991, Chapter 30, at 30.3.

⁵⁹ *Ibid* at 30.5.1.

*Such steps should be in addition to notice that the officer in charge of the station should give to parents, the Aboriginal Legal Service, or its representative.*⁶⁰

Recommendation 243: *That where an Aboriginal juvenile is taken to a police station for interrogation or as a result of arrest, the officer in charge of the police station at which the juvenile is detained should be required to immediately advise the relevant Aboriginal Legal Service and the parent or person responsible for the care and supervision of the juvenile of the fact of the child being detained at the police station (without prejudice to any obligation to advise any other person).*⁶¹

Recommendation 244: *That no Aboriginal juvenile should be interrogated by a police officer except in the presence of a parent, other person responsible for the care and supervision of the child or, in the absence of a parent or such other person, an officer of an agency or organisation charged with responsibility for the care and welfare of Aboriginal juveniles.*⁶²

Recommendation 245: *That legislation, regulations and/or police standing orders, as may be appropriate, be amended so as to require compliance with the above recommendations.*⁶³

5.1 Young Indigenous people are not to be detained in a police lock-up

The RCIADIC's Recommendation with respect to avoiding placing young Indigenous people in police lock-ups has largely not been implemented across the jurisdictions. Most jurisdictions provide for an expedited bail hearing if not granted by police, but this may not mean there will not be a period of time for which the child will be kept in police custody. Few of the States and Territories provide for an alternative holding home, and little detail about them is available. No jurisdiction provides for family members to remain with the child while detained overnight.

5.1.1 Western Australia

In WA, section 19 of the *Young Offenders Act 1994* (WA) provides that a young person in custody who is not released on bail, whether or not bail has been refused, is to be placed in a detention centre as soon as practicable after the person's apprehension. A young person may be held in the custody of the police until arrangements can be made for the person to be taken and placed in a detention centre.⁶⁴

5.1.2 Tasmania

⁶⁰ Ibid at 30.6; Recommendation 242

⁶¹ Ibid at 30.6; Recommendation 243

⁶² Ibid at 30.6; Recommendation 244

⁶³ Ibid at 30.7; Recommendation 245

⁶⁴ See also s. 21 of the *Young Offenders Act 1994* (WA) with respect to the detention of young people awaiting trial. [Note that, at the time of research, there was no evidence that the Commissioner of Police had made any rules, orders or regulations that altered this position (contra s. 19(1)).]

In Tasmania, there is no provision made for young people in relation to their detention in police lock-ups prior to their bail hearing, and there is no evidence that special expedited bail hearing is offered by a magistrate if bail is first refused by a police officer.⁶⁵ A young person who has not been granted bail by police is to be detained in a "watch-house" while waiting to be brought before a justice. A youth refused bail by a justice is detained in a detention centre if, in the opinion of the Secretary, it is practicable to do so. Otherwise the youth is detained in a prison. A youth who is over 19 who is refused bail by a justice is remanded in prison unless the Secretary determines the youth is to be held in a detention centre. (section 25 *Youth Justice Act 1997* (Tas)).

5.1.3 Queensland

In Queensland, children arrested on a charge of an offence must be brought "promptly" before the Children's Court.⁶⁶ If it is not practicable to promptly constitute the Children's Court to deal with the child, the police officer in charge of the station must give the child a release notice or notice to appear and release the child from custody, grant bail to the child and release the child from custody, or decide to keep the child in custody. If the child is kept in police custody, the officer must record the reasons for the decision in a record of the persons kept in custody at the place.⁶⁷ Further, the Commissioner of the police service must make arrangements for an arrested child wherever practicable to be placed in a detention centre until brought to court.⁶⁸

Furthermore, under the Queensland Police Service Operational Procedures Manual a child should only be held in custody as a last resort and for the least time that is justified in the circumstances. Where a child is likely to be kept in custody, due to a child's lack of support, accommodation, or the child's safety would be endangered, the "prescribed police officer is to consult with Child Safety Services, Department of Communities, Child Safety and Disability Services to ascertain whether suitable accommodation, support or alternative options to ensure the child's safety can be arranged".⁶⁹

5.1.4 Australian Capital Territory

In the ACT, a young detainee must not be admitted to, or detained at, a detention place unless the detention is authorized by a warrant or another authority under a Territory, State or Commonwealth law. The refusal of bail is an example of an authority authorising detention⁷⁰. In making a decision about a grant of bail to a child, the court or authorised officer must consider, as a primary consideration, the best interests of the child. In addition to the usual criteria applicable to decision to grant bail to adults, the court or officer must consider the Youth

⁶⁵ Section 34 *Justice Act 1959* (Tas).

⁶⁶ Section 49 *Youth Justice Act 1992* (Qld).

⁶⁷ Section 50 *Youth Justice Act 1992* (Qld).

⁶⁸ Section 54 *Youth Justice Act 1992* (Qld).

⁶⁹ Part 5.7.15 Queensland Police Service Operational Procedures Manual, available at <http://www.police.qld.gov.au/Resources/Internet/services/OperationalPolicies/documents/Chapter5.pdf>.

⁷⁰ Section 156 *Children and Young People Act 2008* (ACT). [1999 Act repeated by No 20 of 2008] - see S 10 for the A&TSI rules

Justice Principles in S.94 of the *Children and Young People Act 2008*⁷¹. These principles include that a child or young person may only be detained in custody for an offence (whether an arrest, on remand or under sentence) as a last resort and for the minimum time necessary.⁷²

5.1.5 Northern Territory

In the Northern Territory, if a youth charged with an offence has not been admitted to bail, a police officer must, as soon as practicable, apply to the Court or a magistrate for an order that the youth be detained at a detention centre or other appropriate place.⁷³ If the youth is charged with an offence and is not released from custody, he or she must be brought before the court as soon as practicable and in any case within 7 days of the arrest. If the youth is not brought before the court within 7 days, the youth must be immediately released.⁷⁴ No provision is made with respect to sourcing alternative accommodation for young offenders while awaiting bail, or on remand, and no evidence of any such place was publicly available at the time of research.

5.1.6 New South Wales

The NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)⁷⁵ directs NSW police officers as follows:

"Do not place an Aboriginal or Torres Strait Islander child in a cell, except in rare circumstances where it is necessary for the wellbeing of the child. In this case, if overnight detention is likely attempt to arrange for a support person to remain with the child... Do not place a child in a cell unless no other secure accommodation is available and it is not practical to otherwise supervise the child, or the cell provides more comfortable accommodation. Do not place a child in a cell with an adult, except in rare circumstances where it is necessary for the wellbeing of the child."

At the time of research, there was no publicly available material on Government-supported holding homes.⁷⁶ Under the *Children (Criminal Proceedings) Act 1987 (NSW)*, criminal proceedings should not be commenced against a child otherwise than by way of court attendance notice⁷⁷. Exceptions apply for serious offences, if the child is unlikely to comply with a court attendance notice or is likely to commit further offences, or if the violent behavior of the child or the offence indicates the

⁷¹ S.23 *Bail Act 1992*

⁷² S.94(i)(f) *Children and Young People Act 2008 (ACT)*

⁷³ Section 24(1) *Youth Justice Act 2006 (NT)*.

⁷⁴ Section 27 *Youth Justice Act 2006 (NT)*.

⁷⁵ As at January 2012, available at

http://www.police.nsw.gov.au/__data/assets/pdf_file/0007/108808/Code_CRIME_-_January_2012.pdf; page 47

⁷⁶ There are a number of non-government programs which provides alternative accommodation for young Aboriginal people, such as the Ja-Biah Bail Support Program in Western Sydney and the Nardoola Farm Accommodation Program in Moree.

⁷⁷ S.8(l) *Children (Criminal Proceedings) Act (NSW) 1987*

child should not be allowed to remain at liberty⁷⁸. If criminal proceedings are to be commenced against a child otherwise than by way of court attendance notice, and the child is not released (with or without bail under the *Bail Act 2013*), the child shall be brought before the Children's Court as soon as practicable⁷⁹. When a child is charged and bail is refused, or the bail conditions cannot be met immediately, they are to be placed before a court or transferred to the custody of Juvenile Justice at the earliest opportunity.⁸⁰

5.1.7 South Australia

In South Australia, if a young accused is not granted bail, they must be detained by the Chief Executive with a person (where practicable), or in a place (other than a prison), approved by the Minister. If a youth is arrested more than 40kms from the Adelaide GPO⁸¹ and it is not reasonably practicable to detain the youth in the manner described, the youth may be detained in a police prison, police station, watch-house or lock-up, and the police must take reasonably practicable steps to keep the youth from coming into contact with any adult person detained in that place.⁸² There is no provision for family members or others to attend.

5.1.8 Victoria

In Victoria, a child taken into custody must be released unconditionally, released on bail, brought before the Children's Court, or brought before a bail justice (if the Court is not sitting at any convenient time) "within a reasonable time of being taken into custody but not later than 24 hours after being taken in to custody".⁸³ A child who has been refused bail may not be remanded for a period longer than 21 days.⁸⁴ A child remanded in custody by a court or a bail justice must be placed in a remand centre, or a police gaol in certain regional areas. Section 23 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that an accused child who is detained must be segregated from all detained adults, and brought to trial as quickly as possible.

No provision, however, is made for alternative places for custody, or for the arrangement of a parent or visitor to remain with the juvenile.⁸⁵ Children remanded in a police gaol are entitled to be kept separate from adults and to be kept separate according to their sex. Children remanded in a remand centre or a

⁷⁸ S.8/2 *Children (Criminal Proceedings) Act (NSW) 1987*

⁷⁹ S.9 *Children (Criminal Proceedings) Act (NSW) 1987*

⁸⁰ NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence), January 2012, at 60. Note, also, that the *Bail Act 2013* (NSW) applies. S9 of the *Children's Detention Centres Act (NSW)* provides that persons on remand must be detained in detention centres.

⁸¹ Regulation 8, *Young Offenders Regulations 2008*(SA)

⁸² Section 15 of the *Young Offenders Act 1993* (SA).

⁸³ Section 346(2) of the *Children, Youth and Families Act 2005* (Vic).

⁸⁴ Section 346(3) of the *Children, Youth and Families Act 2005* (Vic). Note a further period of remand not exceeding 21 days may be ordered when a child is brought before the court on the expiry period of a period of remand in custody: S.346(5).

⁸⁵ The Victorian Aboriginal Justice Agreement Phase 3 of March 2013 objectives 2.1.1 and 2.2.5 relate to increasing the access of Koori youths to bail, but nothing concrete with respect to alternative arrangements on bail is detailed.

police gaol are entitled to visits from parents, relatives and legal practitioners (subject to the *Corrections Act 1986*) and are entitled to have reasonable efforts made to meet their medical, religious and cultural needs including, in the case of Indigenous children, their needs as members of the Indigenous community⁸⁶.

5.2 Notifying a responsible adult once a young Indigenous person is apprehended for the commission of an offence and attendance during interrogation

This Recommendation has been partially implemented in all jurisdictions, with the exception of Victoria. The Victorian Police Manual provides for all persons in police care or custody to be entered into an "Attendance Module" prior to any interview or related procedure taking place. Entering persons identifying as being of Aboriginal/Torres Strait Islander descent in the Attendance Module will create a notification to the Victorian Aboriginal Legal Service. The Victorian Police Manual provides that this should be done within 60 minutes of arrival at a police station.⁸⁷ However, no special provision is made for Indigenous children with respect to contacting their parents or any other suitable adult after arrest, or their attendance during questioning.

5.2.1 Western Australia

In WA, before a police officer asks a young person apprehended for the commission of an offence about that offence or any other, the police are to ensure that a responsible adult has received notice of the intention to question the young person.⁸⁸ There is no provision, however, for Aboriginal Legal Service to be contacted in the case of young Indigenous offenders, or for them to be accompanied in the interrogation process by such an adult.

5.2.2 South Australia

In South Australia, a police officer must promptly take all reasonable steps to notify the guardian or other appropriate adult of the arrest and invite him or her to be present during any interrogation or investigation to which the youth is subjected while in custody.⁸⁹

5.2.3 Australian Capital Territory

In the ACT, if a police officer suspects a child or young person may have committed or been implicated in the commission of an offence, or is holding a child or young person under restraint, a police officer must not interview a child or young person about an offence, or cause the child or young person to do anything in relation to the investigation of an offence, unless an adult parent,

⁸⁶ 5.347(2) and 482 *Children, Youth and Families Act 2005 (Vic)*

⁸⁷ Victorian Police Manual - Guidelines - Attendance & Custody Modules.

⁸⁸ Section 20 *Young Offenders Act 1994 (WA)*

⁸⁹ Section 80 of the *Children and Young Person Act 1999 (ACT)*; s. 14 of the *Young Offenders Act 1993 (SA)*.

carer, family member, lawyer or other suitable person (not believed to be an accomplice) is present. If the police officer has taken reasonable steps to have one of these people present but it was not practicable for such a person to be present within 2 hours of being asked to be present, the interview or investigation can be conducted in the presence of someone else who is not a police officer and has not been involved with the investigation.⁹⁰

5.2.4 Queensland

In Queensland, the police must "promptly advise" the parent of an arrested child and the chief executive (communities) or departmental nominee (and chief executive (child safety)) if he or she has custody or guardianship under the *Child Protection Act 1999 (QLD)*.⁹¹ A police officer may not question a child until they have allowed the child to speak to a support person chosen by the child in circumstances in which the conversation will not be overheard. Furthermore, a support person must be present while the child is being questioned.⁹²

If the person arrested is an adult suspected of being of Indigenous descent, police officers must notify a legal aid organisation and must not question the person unless, before the questioning starts, the arrested person has been allowed to speak to the support person without being overheard and the support person is present while the person is being questioned.⁹³

5.2.5 Tasmania

In Tasmania, a police officer who arrests a youth must, as soon as practicable, ensure that, if practicable, the youth's guardian (parent, legal guardian, legal custodian or person who acts in place of a parent) is notified of the arrest.⁹⁴

5.2.6 Northern Territory

In the Northern Territory, as soon as practicable after the arrest or charge of a young person, the arresting police officer must take all reasonable steps to notify a responsible adult.⁹⁵ An officer may not interview a young person suspected of committing or implicated in the commission of an offence for which the punishment is imprisonment of 12 months or longer, unless accompanied by a support person.⁹⁶

5.2.7 New South Wales

The NSW Police Force Code of Practice for CRIME states that police officers are not to question a child suspected of committing a criminal offence unless a

⁹⁰ Section 252a *Crimes Act 1900(ACT)*

⁹¹ s. 392 *Police Powers and Responsibilities Act 2000 (Qld)*.

⁹² Section 421 *Police Powers and Responsibilities Act 2000 (Qld)*.

⁹³ Section 420 *Police Powers and Responsibilities Act 2000 (Qld)*.

⁹⁴ Section 24A *Youth Justice Act 1997 (Tas)*

⁹⁵ Section 23 of the *Youth Justice Act 2006 (NT)*.

⁹⁶ Section 18 of the *Youth Justice Act 2006 (NT)*.

support person is present.⁹⁷ Further, under section 13 of the *Children (Criminal Proceedings) Act 1987* (NSW), any statement made by a child is not admissible in proceedings unless a person responsible for the child or other appropriate adult was present, unless there was proper and sufficient reason for the absence of such an adult.

⁹⁷ NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence), January 2012, at 84.