



THE LAW SOCIETY
OF NEW SOUTH WALES

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The Secretary of the Committee
House Standing Committee on Aboriginal and Torres Strait Islander Affairs
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Dear Committee Secretariat,

Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) welcome the opportunity to provide comments to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry.

It is of great concern to the Committees that over 50 per cent of young people in juvenile justice centres in NSW in 2007-2008 were Indigenous (NSW Department of Juvenile Justice, Young People in Custody Statistics, 2007-2008). This is despite the fact that Indigenous young people make up only around 3 per cent of the population of 10-17 year olds in New South Wales (ABS Census profile 2001).

The issues surrounding the high level of involvement of Indigenous juveniles and young adults in the criminal justice system are complex. The Committees refer the Inquiry to the extensive research undertaken by the NSW Bureau of Crime Statistics and Research (BOCSAR) into Indigenous over-representation in the criminal justice system, and to the large volume of published work by Harry Blagg, Chris Cunneen, and Larissa Behrendt that has identified and analysed the social and political conditions under which the level of involvement of Aboriginal juveniles and young adults in the criminal justice system has continued to increase.

The Committees believe that continued reliance on juvenile and criminal justice responses will never be sufficient to reduce the overwhelming number of these children and young people in the criminal justice system. The Committees consider that other social measures need to be taken to assist Indigenous families to raise their children before they become enmeshed in criminal processes and outcomes. Culturally appropriate early childhood, primary, secondary and tertiary education, health care, access to income support and self determination at the local level are some of the areas that have been identified as in need of improvement.

The scope of the Inquiry is far reaching. In the short time available the Committees will focus specific issues that are within their areas of expertise.

The Committees will focus on the following matters addressed in the attached submission:

- The impact drug and alcohol abuse has on Indigenous contact with the criminal justice system, and specifically the need for diversionary programs and residential rehabilitation;
- The promotion of participation and retention of Indigenous children and young people within the education system;
- The need for significantly increased funding of the Aboriginal Legal Service (ALS) to ensure continuity and quality of solicitors and field officers;
- The importance of facilitating earlier screening and assessment of young Indigenous people when they first come into contact with the criminal justice system and referrals to appropriate services to provide necessary assistance;
- A need for increased police awareness and training in relation to diversionary options such as cautions, warnings and conferences and a better understanding of the principles contained in the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*; and
- The increasing number of young Indigenous people on remand and the impact of onerous bail conditions.

Addressing these issues requires a significant resource commitment from both the Federal and State Governments. It also requires a shift in Government policy away from 'law and order' populist policies to more effective early intervention and diversionary and rehabilitative models, to work towards long-term reductions in the over representation of Indigenous children and young adults in the criminal justice system.

Yours sincerely,



Joseph Catanzariti
President

The impact that alcohol use and other substance abuse has on the level of Indigenous juvenile and young adult involvement in the criminal justice system and how health and justice authorities can work together to address this.

The National Indigenous Drug and Alcohol Committee report '*Bridges and Barriers: Addressing Indigenous Incarceration and Health*' 2009, comments on the strong links between substance abuse and Indigenous incarceration, and the need for early intervention programs and diversionary options into education and treatment. Interventions that address drug and alcohol misuse have the potential to decrease the over-representation of Indigenous children and young people in the criminal justice system.

The BOCSAR Report '*The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey*' 2006, shows that the Indigenous Australians were far more likely to have been prosecuted or imprisoned for an offence if they abused drugs or alcohol, failed to complete year 12 or were unemployed. Illicit drug use was the strongest predictor of both criminal prosecution and imprisonment. High-risk alcohol consumption was the second most important predictor of criminal prosecution and the third most important predictor of imprisonment.

These reports suggest that one of the key ways to reduce Indigenous contact with the criminal justice system is through expanding treatment programs such as the NSW Youth Drug and Alcohol Court and the NSW Drug Court to areas outside of metropolitan Sydney. This will require a commitment to significantly increased Federal and State funding dedicated to addressing one of the most serious of the underlying issues, and that can contribute to reducing the incidence of Indigenous drug and alcohol related offending.

NSW Drug Court

The NSW Drug Court is an example of the justice system providing an interagency response to a major health problem in Western Sydney that has led to a reduction in criminal activity by drug dependent offenders. It has been extensively evaluated and discussed by NSW Government researchers at BOCSAR. Studies by BOCSAR have found that the Drug Court program is more cost-effective than prison in reducing drug-related crime (BOCSAR '*The NSW Drug Court: A re-evaluation of its effectiveness*', 2008).

The Drug Court is a form of 'coerced treatment' which integrates the authority of the justice system with intensive treatment services. The approach is non-adversarial. Intensive supervision of participants includes frequent appearances before the court to ensure compliance with treatment plans and program rules, frequent and/or random urine checks and ongoing community supervision. Non-compliance usually results in immediate sanctions. Progress in achieving goals is praised and often explicitly rewarded (BOCSAR '*New South Wales Drug Court evaluation: Cost-effectiveness*', 2002).

The interaction of probation and parole, Police, the NSW DPP, Legal Aid NSW and Corrections Health as a team monitoring, supporting, and sanctioning where necessary, is the most striking example of successful intervention in NSW. It is world standard in evaluation and success.

Indigenous offenders need support that extends to the provision of housing and

addressing domestic issues, which are often highly complex and difficult. They are often in remote country areas where resources are stretched thin by the distance to be covered by all agencies dealing with them. The lesson to be learnt from evaluations of the Drug Court is that the intensive use of justice system resources in the community, and the evaluation and monitoring of an offender who gets treatment for drug dependency, is effective in changing lives and is evidence based. The model will not currently work in country NSW due to a lack of resources, though it is readily capable of working in urban areas. A court with an Indigenous focus in urban NSW would be worthwhile. Given the current costs of incarceration and the evidence based effectiveness of the Drug Court, there appears to be a case for this.

Courts operating on a similar model should be expanded to major country centres such as Tamworth, Broken Hill, Wagga, Moree, etc where Department of Juvenile Justice (DJJ) officers work with Department of Community Services (DoCS) and trained Aboriginal liaison officers, along with Police and ALS and the DPP. The wonder of the Drug Court model is the team-based interagency approach, where Government agencies with traditionally opposed views about complex justice issues to adapt and work together collaboratively. Together they can then deal with the complexity of the juvenile Indigenous offenders in the local community and the complex needs that exist for these people. They can efficiently use existing resources with new information from sharing perspectives, information and skills.

The Committees strongly support the expansion of the Drug Court to include alcohol-dependent offenders. The expansion of the Drug Court would help to ensure that a greater number of drug and alcohol dependent offenders are offered the most appropriate treatment and rehabilitation which will assist in reducing recidivism.

Youth Drug and Alcohol Court

The Youth Drug and Alcohol Court (YDAC) in NSW is a pilot program that has been trailed in Western Sydney since July 2000 and is expanding to central and eastern Sydney. The evaluators of the then Youth Drug Court found that overall the program was having a positive impact on the lives of many of the people participating, and should possibly be expanded to other selected geographical areas (University of NSW, Social Policy and Research Centre, *'Evaluation of the NSW Youth Drug Court Pilot Program'*, 2004).

The YDAC program lasts for six months and provides offenders with an opportunity to participate in an intensive program of rehabilitation before being sentenced. Participants undergo detoxification and rehabilitation, attend educational and vocational courses, and appear regularly throughout that period before the YDAC Magistrate. The aim of the program is to rehabilitate young offenders entrenched in the criminal justice system with alcohol and/or drug problems. The program also attempts to address health, welfare, housing, family and educational problems. The program is another successful example of government and non-government agencies working together to address the young person's issues in a holistic way through intensive case management.

YDAC should be rolled out to all areas of NSW as it currently does not operate in regional and remote areas. Again this highlights the crucial need for increased funding and resources to expand these programs to increase access by Indigenous offenders. The Committees note, however, that Drug and Alcohol Courts for both adults and young people cannot be run successfully without the availability of appropriate service providers required for intensive case management.

Residential and custodial drug and alcohol rehabilitation for juveniles

There is a chronic shortage of drug and alcohol residential rehabilitation centres for juveniles. Correctional centers and juvenile justice centres are also in need of increased drug and alcohol programs.

MERIT

The Committees strongly support the Magistrates Early Referral into Treatment (MERIT) program as an effective pre-sentence diversionary program for adult defendants with drug problems, to receive targeted drug treatment. The Committees are of the view that MERIT should be rolled out to all of regional NSW and expanded to cater for defendants with alcohol abuse problems. The recent research by BOCSAR has shown that MERIT is having great success in reducing rates of reoffending. The Auditor-General also evaluated MERIT and recommended the expansion of the program to defendants with alcohol abuse problems.

MERIT is a successful model that could be adapted to suit the needs of juvenile offenders. Although it should be noted when MERIT was at the planning stage that the decision was made not to make MERIT available to children and young people, but to focus on using cautions and youth justice conferences as entry points to specialised drug and alcohol services.

One of the benefits of MERIT, is that unlike the adult or youth Drug Court program, the defendant does not have to enter a plea of guilty in order to participate. Many Indigenous young people spend time in custody on remand, often due to their inability to comply with bail conditions. Access to support offered by MERIT at an early stage of proceedings would help reduce breaches of bail and further offending, and would lessen the need for young people to be held in custody on remand.

To expand MERIT to regional areas of NSW, to include defendants with alcohol problems and young offenders, will require a massive injection of resources. The Committee considers that the demonstrated success of MERIT in reducing recidivist behaviour, particularly in light of the strong link between Indigenous drug and alcohol abuse and crime, justifies the allocation of substantial resources to the program.

Any initiatives which would improve the effectiveness of the education system in contributing to reducing the levels of involvement of Indigenous juveniles and young adults with the criminal justice system.

Participation and retention

There is a clear need to promote participation and retention of Indigenous children and young people within the education system.

In 2006, year 12 completions for Indigenous Australians were 45.3%, compared to 86.3% for non-Indigenous Australians (*Closing the gap on Indigenous disadvantage: the challenge for Australia*, 2009, Department of Families, Housing, Community Services and Indigenous Affairs).

The BOCSAR report *'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey'* 2006, refers to the close relationship between poor school performance and early school leaving and

involvement in crime; and that measures that improve school performance and retention reduce the risk of juvenile involvement in crime.

Consideration should be given to the possibility of providing vocational training through the school environment at an earlier age than is currently available.

Indigenous school counsellors

The Legislative Council General Purpose Standing Committee No. 2 Report '*Bullying of children and young people*' recommended that immediate action be taken to recruit additional school counsellors. The Committees support this recommendation and the need for more Indigenous counsellors to look after the welfare of Indigenous children at school.

Suspensions and exclusions

School suspensions and exclusions are a huge problem and lead to children becoming disengaged with the education system. There is an over-representation of Indigenous students suspended (see '*Suspension and Aboriginal Students in NSW "One Size Does Not Fit All....."*' 2006, NSW Aboriginal Education Consultative Group Inc.) Indigenous children need to be encouraged to stay in school, and initiatives are required to reduce suspensions and exclusions.

Best practice examples of programs that support diversion of Indigenous people from juvenile detention centres and crime, and provide support for those returning from such centres.

(Also see commentary on the Drug Court and MERIT above)

The National Indigenous Drug and Alcohol Committee report '*Bridges and Barriers: Addressing Indigenous Incarceration and Health*' 2009, suggests a change in the eligibility criteria to enable greater Indigenous participation rates in diversion programs, and would provide an effective way to address the overrepresentation of Indigenous Australians in prison. Increased participation would also be likely to have a positive impact on the health of communities, recidivism rates and the social and economic disadvantages that are prevalent among Indigenous people.

There is a need for increased resources for culturally appropriate programs, preferably run by trained, skilled Indigenous people that have been specifically designed for Indigenous young people (and their families) who are at risk of entering, or who have entered, the criminal justice system.

Intensive Court Supervision

A pilot program called the "Intensive Court Supervision" (ICS) program was run at Brewarrina and Bourke Courts in 2005-6. It was auspiced by the Attorney General's Department. The major stakeholders involved in the program were the Department of Juvenile Justice (DJJ), ALS, the Courts, Department of Health and Education, TAFE and of course the Aboriginal elders in each of the communities.

It was based on the Youth Drug Court model in Sydney. The difference was that the young person did not need a drug problem as such, but problematic criminal behaviour that brought the young person before the court and the young person was in danger of incurring a gaol sentence. It was a diversionary program that was aimed at young

offenders above the age of 16 years old. The key players at court were the young person, the Magistrate, parents and/or guardians, the Police Prosecutor, the ALS solicitor and Juvenile Justice.

The ICS program at Brewarrina and Bourke Courts was discontinued due to a lack of funding (The Australian Institute of Criminology, *Responding to substance abuse and offending in Indigenous communities: review of diversion programs*, 2008). This is disappointing because the program had a lot to offer the young person and the community, and the program's integrity was sound. Certainly, the DJJ, Health, Education and TAFE were all in place to provide their specialised services for the young person, however, many of the young people were almost exclusively male, wanted to work. There was a huge lack of employment and training options available in the towns.

Many of the elders were involved not only in this program, but in Circle Sentencing for adults and also other community programs. A select few did most of the work, and were in danger of being burnt out by the tough workload, for no financial remuneration. The elders were the only group in the program that did not get paid for their contribution to the program.

Another issue that was difficult was the lack of age appropriate rehabilitation programs in the area. The nearest rehabilitation centre for young people was in Dubbo (PALM program, run by the Ted Noffs Foundation). It was difficult for these young people leaving their families and their community to travel some 400 kms from home. Consequently, many participants left the PALM program before time.

The cooperation between the various government bodies and the few NGOs involved in the program was good. However, the lack of payment to the Aboriginal elder component of the program was unjust and may have had a bearing on whether elders continued to support the program, given their overwhelming work load on other committees.

Intensive Supervision program

The Intensive Supervision Program (ISP) in NSW, which has been in operation since May 2008, in Newcastle and Western Sydney. The program is specifically aimed at juveniles who commit serious and/or repeat offences. A range of issues are addressed including substance abuse, financial problems, housing needs, family conflict and negative peer pressure.

The ISP team consists of trained clinicians, a clinical supervisor and an Aboriginal team advisor, who work systemically with each young person on an individual, family and community level. The Aboriginal team advisors work with the clinicians and families to ensure cross-cultural sensitivity, and monitor to ensure the interventions are best matched to the needs of Aboriginal clients, families and communities. Early indications are positive. As at 30 June, 2009, 27 families out of 35 (77 per cent) had successfully completed the ISP, and 11 Aboriginal and Torres Strait Islander families out of 15 (73 per cent) had successfully completed the ISP (DJJ Annual Report 2008-2009).

Young Offenders Act 1997 - diversionary options

The Young Offenders Act requires police to consider, for all relevant offences, whether a young person is eligible to be dealt by way of a warning, caution or youth justice conference before they can commence court proceedings.

A youth justice conference is a useful approach to dealing with young Indigenous offenders. A referral to a youth justice conference under the *Young Offenders Act 1997* or as a sentencing option under the *Children (Criminal Proceedings) Act 1987* is one of the variety of dispositions available to the court. This order is overtly intended to keep young people out of custody and designed to include the child's family and support people in the process, to reinforce respect for human rights and ensure that the child can assume a constructive role in society. A properly convened youth justice conference also provides victims of offences committed by children and young people with the opportunity to appropriately participate in the decision making process.

Conference referral rates for Indigenous young people are relatively low. The proportion of eligible Aboriginal and Torres Strait Islander young people attending a Youth Justice Conference was 20.5 per cent in 2008-09 (DJJ Annual Report 2008-2009). This could be improved by the use of the "tag and release" system where young people are given the opportunity to go and get face-to-face legal advice before deciding whether or not to participate in a police interview. The Youth Hotline is also in need of additional funding, as is the ALS Custody hotline, which deals with calls from Indigenous young people in custody.

Funding is also required for post conference programs and services to assist Indigenous children and young people.

Indigenous young people are under-represented in receiving cautions. Where Indigenous status was recorded, only 19% identified as Indigenous and 81% as non Indigenous (BOCSAR, *'Reoffending among young people cautioned by police or who participated in a youth justice conference'*, 2006). Indigenous young people are more likely to be taken to court (64 per cent compared to 48 per cent) and less likely to be cautioned (14 per cent compared to 28 per cent) by police (Chan, J., Barga, J., Luke, G., and Clancey, G. (2004), *'Regulating police discretion: An Assessment of the impact of the NSW Young Offenders Act 1997'* *Criminal Law Journal* 28).

The scope for the clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the justice system.

Accommodation

Bail may be made conditional on the provision of appropriate supervised accommodation. "Reside as directed by DJJ" is a condition frequently imposed on homeless young people. A "reside as directed" condition often means that juveniles are held in detention until accommodation is found. While the motivation of Magistrates may be that they prefer juveniles to be in a detention rather than homeless, this use of bail rules is contrary to the principles in the UN Convention on the Rights of the Child (CROC) and the intention of Parliament in 1987 when it separated the children's criminal and children's care and protection jurisdictions (see *Children's (Criminal Proceeding) Act 1987*). When DoCS fails to provide such accommodation, the result is that the child is placed or remains in a juvenile justice centre simply because of lack of accommodation. Detention should be a last resort as a criminal sanction, not as a "placement".

The Department of Juvenile Justice has announced that it will run a pilot of a bail-house program in western Sydney focusing on Indigenous youth. This is a positive initiative and will supply accommodation to young Indigenous people who might otherwise be denied bail due to a lack of an appropriate dwelling.

After care programs

There is a need for greater after-care once a young person is no longer under the care of DoCS. An example of successful after care funded by DoCS run by a non government organisation is the A.L.I.V.E. (Adolescents Living Independently Via Empowerment) programs run by CatholicCare.

One of the ALIVE programs, the ALIVE and Free Program, provides a holistic model with intensive case work. This program is a joint partnership between the Department of Housing, DJJ, and the South West Inner Sydney Housing Co-operative. The program is a four-phased support program that provides support and housing for young people within the juvenile justice system. The young people participate in a living skills program that aims to assist the young person to achieve independent living and positive alternatives to offending, while maintaining their Department of Housing accommodation. Successful completion of the program may lead to public housing tenancy.

These programs have been enormously successful in working with vulnerable young people from a range of backgrounds, many with extensive juvenile criminal histories. These young people have been maintained in stable housing, and out of custody, at a relatively modest cost. Similar programs targeted at Indigenous young people would help stop them becoming entrenched in the adult criminal justice system.

Lack of mental health services/assessments

The area of mental health is one of increasing importance in the criminal justice system. There are negligible services to assist those who come before the court with a mental health issue in rural NSW, and there is little in the way of treatment programs available. As a result of lack of services those with mental conditions are being refused bail and are receiving custodial sentences. A properly funded ALS could provide more comprehensive screening of Indigenous children and young people and link them in with appropriate services.

It is extremely difficult to get a young person assessed in remote and regional areas. Mental health nurses are attached to a number of Local Court locations in NSW to enable early diagnosis of defendants and facilitate treatment in conjunction with their progress through the criminal justice system. One possibility is to expand their role to enable children to be independently assessed. Currently DJJ will conduct clinical assessments prior to sentencing but only when the child is in custody or on remand. It would be useful to have a mechanism in place where DJJ or the Court can order a report when the child is not in custody but is starting to make an impact on the criminal justice system. Health issues, learning difficulties, mental health issues, literacy, and levels of understanding could be identified. Once an assessment has been made it is then critical that there are appropriate programs and services to refer the young person to provide them with the necessary assistance.

Access to community based sentencing options

The Committees are of the view that there is a clear need for the expansion of community based sentencing options into rural and remote areas of NSW. Community based sentencing options have an important role to play in addressing concerns over the increasing Indigenous prison population and recidivism.

There is an inequitable spread throughout NSW of these alternatives to custody, and funding is required for these programs and their necessary supporting services, particularly in rural NSW.

Driving

The Committee notes that driving offences provide a common entry point into the criminal justice system. Often a person's licence is suspended or cancelled for fine default, the person is subsequently charged for driving whilst unlicensed, this often snowballs into a driving whilst disqualified conviction and can result in a prison term. The Committees are strongly of the view that fine default should not be linked with a loss of licence. The loss of a licence disproportionately affects those who live in rural and remote areas, and those from lower socio-economic backgrounds.

Many Indigenous young people have difficulty obtaining a licence. A better resourced ALS, or other appropriately funded services, would be in a position to run more licence training for the computer test element of gaining a licence.

Policing and bail

Despite the recommendations contained in the report of the Royal Commission into Aboriginal Deaths in Custody, over-representation of Indigenous juveniles has continued.

The Committee notes the prevalence of Indigenous people placed in custody for trivial offences where police initiated interventions result in the 'trifecta' – offensive language, resisting arrest and assaulting police.

Both CROC and the Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) provide that detention of young offenders awaiting trial should be a measure of last resort (Article 37(b), UN Convention on the Rights of the Child, and Beijing Rule 13.1). The principles included in the section 6 *Children (Criminal Proceedings) Act 1987* and section 7 the *Young Offenders Act 1997* stipulate that children are entitled to the least restrictive form of sanction that is possible in the circumstances of the offence, that wherever possible, children should be allowed to remain in their communities, preferably in their own home, so that family and community ties can be sustained and education and employment not disrupted, and that parents should be recognised and included in justice processes involving their children.

When commencing proceedings against children and young people, police must proceed by way of court attendance notice rather than by arrest, unless the offence is a serious children's indictable offence, an indictable drug offence, or unless there are reasonable grounds for believing that the child is unlikely to comply with the notice, or likely to commit further offences if proceedings are commenced by notice, or the violent behaviour or the violent nature of the offence indicates that the child should not be at liberty (s 8 *Children (Criminal Proceedings) Act 1987*). A court attendance notice means that bail is dispensed with and court proceedings can commence without the need to arrest the suspect or detain them in police custody. In NSW arrest is now a last resort for adults and children (s 99 *Law Enforcement (Powers and Responsibilities) Act 2002*).

Despite these clear provisions, bail was dispensed with or not required for only 3297 (37%) of the 8874 children and young people whose matters were finalised in the NSW Children's Court in 2006. Of the remainder, 4392 (49%) were granted bail (BOCSAR, *NSW Criminal Court Statistics 2006*). Police require further training in relation to the principles contained in the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

There are many indications that children and young people who are granted bail are often subject to onerous bail conditions with which it can be very difficult to comply. Common conditions include residential conditions, reporting to police, curfews, place restrictions, and non-association conditions. Punitive attitudes towards children and young people, including the refusal of bail or the imposition of onerous conditions have become commonplace, particularly for Indigenous children and young people.

The *Bail Act 1978* applies equally to children and adults, prevailing over children's legislation where there is an inconsistency (section 5 *Bail Act* and section 50 *Children (Criminal Proceedings) Act 1987*), and indirectly discriminating against children. Discrimination is pronounced in the reluctance of police and courts to release juveniles on their own undertaking (Stubbs, 1984, in Brown et al, 2006, 169) and the imposition of more onerous bail conditions on children than adults including place restrictions, non-association orders residential conditions and curfews. It is accompanied by zero tolerance policing which means that children are often arrested for minor breaches (Bergen, *Review of Children's Legal Service*, 2007, 36 and 41). Almost one quarter of Aboriginal children (23.7%) are brought before the court for breach of bail conditions that are not accompanied by fresh offences (Bureau of Crime Statistics and Research, 2007).

In NSW 38.8% of all children and young people on remand in 2008 were Aboriginal or Torres Strait Islander (NSW Auditor-General 2008, Auditor-General's Report Financial Audits Volume Five). Only 16% of children and young people on remand go on to receive a custodial sentence (Special Commission of Inquiry into Child Protection Services in NSW 2008).

(For recent research, detailed commentary and recommendations on the issue of bail and remand and the impact on young people in the juvenile justice system, see the following reports: '*Releasing the pressure on reman: Bail support solutions for children and young people in New South Wales*', UnitingCare Burnside, July 2009; '*Bail Me Out: NSW Young Offenders and Bail*', Youth Justice Coalition, Wong, Bailey, Kenny, September 2009.)