

Human Rights Brief No.5

Best practice principles for the diversion of juvenile offenders

What is diversion?

Diversion is the term applied to various measures to 'divert' offenders from the formal criminal justice system. Several diversionary options exist for young offenders in Australia, although the extent of their use varies considerably among jurisdictions. These include verbal and written warnings, formal cautions, victim-offender or family conferencing and referral to formal or informal community-based programs. However, this list does not exhaust the range of appropriate diversionary options which could be developed.

Human rights obligations and diversionary options for young offenders

The UN *Convention on the Rights of the Child* (CROC) recognises the importance of diverting young offenders from the formal processes of the criminal justice system. CROC was adopted in 1989 and ratified by Australia in 1990.

By becoming a party to CROC, Australia has voluntarily undertaken to introduce appropriate diversionary measures for juvenile offenders and to ensure that such measures comply with a number of minimum standards. Article 40.3 of CROC states:

States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

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

The obligation in CROC to develop diversionary options is elaborated upon by several United Nations rules and guidelines.

- UN *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (Beijing Rules)
- UN *Standard Minimum Rules for Non-Custodial Measures* 1990 (Tokyo Rules)
- UN *Guidelines for the Prevention of Juvenile Delinquency* 1990 (Riyadh Guidelines)
- UN *Rules for the Protection of Juveniles Deprived of Their Liberty* 1990.

Diversions options must also pay regard to Australia's general human rights obligations under CROC, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR).

Principles for juvenile diversion

These international standards establish the following principles for the development of diversionary options.

- **Viable alternatives to detention.** Diversion requires the provision of viable community-based alternatives to detention. Options that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are specifically commended. However, the specific form of diversion should be adapted to meet local needs. Public participation in the development of all non-custodial options should be encouraged (Tokyo Rule 17.1).
- **Availability of diversionary options.** Diversion may be used at any point of decision-making by the police, the prosecution or other agencies such as the courts or tribunals (Beijing Rule 6.1). It is clear that the earlier in the process diversion occurs, the more effective it can be in avoiding stigmatisation of the young offender. However, diversion should also be possible in the later stages of proceedings when the young person is before the court.

The fact that a juvenile has previously participated in a pre-court diversionary option should not preclude future diversion or referral to diversion in subsequent legal proceedings. If a juvenile offender breaches the conditions of a diversionary option, this should not automatically lead to the imposition of a custodial measure (Tokyo Rule 14.3).

- **Offences where diversion is appropriate.** Diversionary measures should not be restricted to minor offences. Diversion should be an option 'whenever appropriate'. There may be mitigating circumstances which make diversion appropriate even when a more serious offence has been committed (Commentary on Beijing Rule 11.4).
- **Criteria for diversion.** Agencies with the discretionary power to divert young people from formal proceedings must exercise that power on the basis of established criteria. Access to diversionary programs must not be arbitrary. Tokyo Rule 3.1 requires that the 'introduction, definition and application of non-custodial measures shall be prescribed by law'.
- **Training of justice personnel.** All law enforcement officials involved in the administration of juvenile diversion should be specially instructed and trained to respond to the needs of young persons (Riyadh Guidelines 58; Beijing Rule 12.1). Justice personnel should reflect the diversity of juveniles who come into contact with the juvenile justice system (Beijing Rule 22.2). Beijing Rule 6.3 requires that those who exercise discretion at all levels of juvenile justice administration shall

be specially qualified or trained to exercise that discretion ‘judiciously and in accordance with their functions and mandates’.

- **Consent.** Diversion requires the informed consent of the young offender (or the parent or guardian) to the particular diversionary option (Beijing Rule 11.3). Young people should be given sufficient information about the diversionary options available and any consequences of withholding consent. They should not feel pressured into consenting to diversion programs (for example, to avoid a court appearance). Care should be taken to minimise the potential for coercion at all levels in the diversion process.
- **Procedural safeguards.** Diversionary options must respect procedural safeguards for young people as established in CROC and the ICCPR. These include the presumption of innocence, the right to be informed promptly and directly of the charges, the right to silence, respect for the privacy of the young person and their family at all times, equal treatment before the law, the right to access to legal assistance, to the presence of a parent or a guardian and access to an interpreter.
- **Review and accountability.** Any discretion exercised in the diversion process should be subject to accountability measures. The Beijing Rules emphasise the provision of specific guidelines on the exercise of discretion and the provision of systems of review and appeal to permit scrutiny of decisions and accountability in juvenile justice administration (Beijing Rule 6.2). They do not specify precise mechanisms of review and accountability because it is not possible to cover all differences among justice systems. However, efforts must be made to ensure sufficient accountability for the exercise of discretion at all stages and levels.
- **Complaints.** Tokyo Rules 3.5 and 3.6 provide that the participant in a non-custodial program shall be entitled to make a complaint to a judicial or other competent independent authority on matters affecting their individual rights in the implementation of a non-custodial measure and in respect of any grievance relating to non-compliance with human rights.
- **Monitoring.** An effective, fair and humane juvenile justice system requires mechanisms for monitoring and evaluation to curb any abuses of discretionary power and to safeguard the rights of young offenders. Beijing Rule 30 also requires that ‘efforts be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration’. Tokyo Rule 2.4 similarly requires non-custodial measures to be monitored and ‘systematically evaluated’.

Ensuring respect for general human rights principles

CROC requires that diversionary alternatives to formal judicial proceedings must respect human rights.

CROC requires that in all actions concerning children the best interests of the child is a primary consideration. The scope of this principle is considered in Human Rights Brief No.1 www.hreoc.gov.au/human_rights/brief.

CROC also requires that diversionary options are developed and implemented in such a way that they meet the following standards.

- Applicable to all juveniles without discrimination of any kind, including on the basis of race, sex, ethnic origin and so on. Discrimination can be found where a law or policy has a disparate impact or effect, notwithstanding that it is neutral on its face.
- Protect and guarantee the physical integrity of the child (For example, punishment that is cruel, inhuman or degrading is prohibited).
- Provide conditions under which children can develop their full human potential. Treatment should be appropriate to the age of the child. Children require special protection because of their particular vulnerability and stage of maturation.
- Allow children to participate and to express their views (CROC, article 12). For example, the child has a right to participate and express views in judicial and administrative proceedings.
- Culturally appropriate for Indigenous children or children belonging to ethnic, religious or cultural minorities. Positive steps to protect their cultural characteristics may be required.
- Recognise that in most circumstances the best interests of the child will be served by remaining with their family, and for the family to be involved in the child's development.

CROC, article 40, requires governments to recognise the right of every child accused or convicted of a criminal offence to be treated in a manner

- consistent with the promotion of the child's sense of dignity and worth
- that reinforces the child's respect for the human rights and fundamental freedoms of others
- that takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

In addition, the ICCPR requires that criminal procedures for young people take into account the desirability of promoting their rehabilitation (article 14.4).

Diversions options in Australia

At present, diversionary programs in Australia tend to be limited to either police cautioning or conferencing. The specific nature of these schemes and the legal framework within which they operate vary among jurisdictions.

Police have traditionally exercised discretion to divert young people from court proceedings by warning or cautioning them. In some jurisdictions cautions are governed to a limited extent by police instructions. In Queensland, Western Australia, South Australia, Tasmania, Northern Territory and NSW cautioning is covered by legislation. The caution must be expressed in language readily capable of being understood by the juvenile. The fact of a caution should not be referred to in subsequent legal proceedings, since this would amount to a conviction being recorded against a juvenile without the due process of a judicial hearing or the need to establish guilt beyond a reasonable doubt.

Victim-offender or family conferences are also used increasingly in states and territories either to divert young offenders prior to trial or as a sentencing option. All existing models of victim-offender conferencing used in Australia have been the subject of criticism. In their joint 1997 report, *Seen and heard*, HREOC and the Australian Law Reform Commission recommended that national standards for juvenile justice should incorporate best practice guidelines for conferencing. Matters for consideration should include

- the desirability of diversionary options being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer
- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence
- the need to ensure that young people do not acquire a criminal record as a result of participating in conferencing
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person
- the child's access to legal advice prior to agreeing to participate in a conference
- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less ad hoc
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system.

Despite the shortcomings of existing diversionary options in Australia, they offer a number of advantages. They are more likely to recognise the particular vulnerabilities of juvenile offenders. They avoid the stigma associated with prosecution and conviction and the contamination of a first/minor offender by more serious or recidivist offenders. Diversionary options may create better opportunities to identify any family, behavioural and health problems contributing to the offending behaviour, and they may enable the child to participate meaningfully in the proceedings. They may also save resources for law enforcement and criminal justice agencies.

Aborigines and Torres Strait Islanders

The rate of over-representation of Indigenous young people and adults in detention in Australia is widely acknowledged. Indigenous juveniles are particularly vulnerable to being trapped in a cycle of contact with criminal justice processes. Yet studies show that Indigenous juveniles are less likely than non-Indigenous youth to benefit from mechanisms, such as conferencing, to divert juveniles from custody (*Bringing them home*, p 521-527; *Social Justice Report 1996*, 2). Similarly, there is evidence that Indigenous children have not received the benefit of police cautioning at the same rate as the general youth population (*Bringing them home*, p 513-516; *Seen and heard*, p 479).

The Royal Commission into Aboriginal Deaths in Custody recommended the following in relation to non-custodial options for Indigenous juvenile offenders (recommendations 109-115).

- There should be a wide range of non-custodial sentencing options available in each jurisdiction.
- In reviewing options for non-custodial measures, governments should consult with Aboriginal communities and groups, particularly Aboriginal legal services and Aboriginal employees within government departments.
- Adequate resources should be made available to provide support by way of personnel and infrastructure to ensure that non-custodial sentencing options are capable of implementation in practice, particularly in rural and remote areas with significant Aboriginal populations.
- Where non-custodial measures provide for community work or development programs, the authorities responsible for the program should ensure the participation of the local Aboriginal community in the planning and implementation of the program – including through Aboriginal community organisations participating in such programs.
- Departments and agencies running non-custodial programs should, wherever possible, employ and train Aboriginal people to implement such programs and train Aboriginal people to assist in educating and informing the community about the range of non-custodial options and their implementation.
- Governments should ensure that statistical and other information is recorded to enable an understanding of Aboriginal rates of recidivism and the effectiveness of diversionary options.

Bringing them home also recommended national framework legislation for the implementation of the right to self-determination and national standards legislation to provide for the involvement of accredited Indigenous organisations in juvenile justice decisions affecting Indigenous children, including pre-trial diversion, bail decisions and sentencing decisions (recommendations 43, 49 and 50).

Further research

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www1.umn.edu/humanrts/instreet/k2crc.htm

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United Nations Rules for the Protection of Juveniles Deprived of their Liberty -
<http://www1.umn.edu/humanrts/instreet/j1unrjdl.htm>

United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)
www.un.org/documents/ga/res/45/a45r110.htm.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) - www1.umn.edu/humanrts/instreet/j3unsmr.htm

Practitioner checklist

1. Viable alternatives to detention

- Is there a wide range of diversionary options available as an alternative to detention?
- Are programs adequately resourced by way of personnel and infrastructure?
- Has there been adequate consultation with Indigenous communities and organisations in the planning and implementation stages (particularly in areas with significant Indigenous populations)?

2. Availability

- Is recourse to diversionary options available at all stages of the criminal justice process?
- In determining whether diversion is appropriate, can the decision-maker take into account the circumstances of the offence, including mitigation?

3. Criteria

- Do the referral process and the diversionary option have a legislative base?

- Are there established criteria (and specific guidelines) for decisions concerning referral to diversionary options?

4. Training

- Do those making decisions have appropriate professional qualifications and expert training in juvenile justice?

5. Consent and participation

- Does referral to the diversionary option require the informed consent of the child, or his or her parents or guardian?
- Is the child given sufficient information to understand his or her options for diversion?
- Can the child express his or her views during the referral process and during the diversion process?
- Are safeguards in place to minimise coercion and intimidation of young people?

6. Procedural safeguards

- Are the following safeguards in place in the referral and diversion process?
 - Direct and prompt information about the offences alleged?
 - Presumption of innocence?
 - Access to legal representation?
 - Access to an interpreter?
 - Right to have parent or guardian present?
 - Right to silence?
- Does the diversionary option ensure that the child does not acquire a criminal record as a result of participating in the scheme?

7. Human rights safeguards

- Are the best interests of the child a guiding factor throughout the process of diversion?
- Does the diversionary option promote the child's rehabilitation and social reintegration? Avoid stigmatisation? Take account of his or her age and stage of maturation?
- Does the option apply to all children without discrimination?
- Is the option culturally appropriate for Indigenous children and children of ethnic, religious and cultural minority groups? Do evaluations of the option reveal that it is, in fact, accessible to such groups?
- Is the option consistent with prohibitions against cruel, inhuman or degrading punishments?

8. Complaints and review mechanisms

- Can the child make a complaint or request a review about the referral decision (including potential coercion to agree to participate)?
- Can the child make a complaint about his or her treatment during the diversionary program?
- Can the child make a complaint or request a review about the outcome of his or her participation in the diversionary option?
- Are the complaint and review processes administered by an independent authority?

8. Monitoring

- Does the diversionary scheme provide for independent monitoring of the scheme?
- Does the monitoring process include the collection and analysis of statistical data?
- Does the diversionary scheme provide for a regular evaluation of its effectiveness? Is such an evaluation carried out?
- Are the outcomes of diversionary options monitored to ensure that penalties agreed to are not significantly more punitive than those a court would impose, and for consistency?
- In reviewing options for diversion, is there a role for consultation with Indigenous communities and organisations?

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