NATIONAL OVERVIEW

A brighter tomorrow

Keeping Indigenous kids in the community and out of detention in Australia

AMNESTY INTERNATIONAL

Original language: English

Published in May 2015 by:
Amnesty International Australia
ABN 64 002 806 233
Locked Bag 23
Broadway NSW 2007

www.amnesty.org.au

Front cover: Australian landscapes; kids play in their community © Ingetje Tadros; An Aboriginal Elder shows red ochre to researchers © Richard Wainwright

Inside covers: © Ingetje Tadros

Design: pollen creative

Index: ASA 12/1641/2015

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FOREWORD

Mick Gooda
Aboriginal and Torres Strait Islander
Social Justice Commissioner

Our young people do not belong in prison. Unfortunately, the over-representation of Aboriginal and Torres Strait Islander Peoples within the criminal justice system has reached epidemic proportions. Two and a half decades on from the Royal Commission into Aboriginal Deaths in Custody, our people are more likely than ever to be incarcerated.

This is particularly so for our young people. Not only has the rate of incarceration doubled, but as this report sets out, over half of the young people in detention are Indigenous. Aboriginal and Torres Strait Islander young people are 26 times more likely to be in juvenile detention than their non-Indigenous counterparts.[1]

I find it shocking that we are better at keeping our young people locked up in detention than in school.[2]

This is a national emergency. This must change, urgently.

This report is a call to action to our communities, to the wider community, and to all governments.

There are many reasons why our young people find themselves locked up. A lot of these reasons are preventable. Mandatory sentencing prevents courts from diverting young people out of the system. Some cannot get bail because they have nowhere to be bailed to. Some are locked up because they have an undiagnosed disability and are not receiving the support that they need. Some end up in prison when they would be better being disciplined and guided by their community.

There are also broader historical reasons. The ongoing legacy of colonisation, the resulting systemic social and economic disadvantage of Aboriginal and Torres Strait Islander people, as well as the everyday experience of racism of our peoples cannot be overlooked as contributing factors.

This report sets out a number of recommendations or steps that are needed in order to start addressing what has become one of the most challenging human rights issues facing our country today.

We need an approach that starts to address the underlying causes of crime and starts to divert resources away from imprisonment and into local communities. This is a justice reinvestment approach that suggests that both early intervention and community responses are necessary to achieving long-term change.

Our mob needs to be in control of this change. We know what works best for our communities. I have been inspired by the courage of the Bourke community in tackling the over-representation of their young people in the justice system. This has been a long, difficult conversation, addressing the underlying issues of health, education, jobs and support for families. I strongly advocate for this justice reinvestment approach, which is echoed by the recommendations of this report.

I've also seen the transformative power of culture. In Redfern, the community takes care of young men who were in frequent contact with the police.[3] Community leaders recently took some young men on a five-day intensive bush camp with Indigenous mentors. Afterwards there was a ceremony welcoming these young men back to community. Instead of being made invisible, they were embraced.

This report highlights how justice cannot be viewed separately to other social factors. For this reason, if we are serious about closing the gap in life outcomes between Aboriginal and non-Aboriginal people, we need to adopt justice targets.

Justice targets will provide clear benchmarks for change and enhance visibility and cooperation between Aboriginal and Torres Strait Islander people and government. Elevating this issue to the national agenda and through engagement with the National Justice Coalition will be the circuit breaker in this area that is so urgently needed.

There is no silver bullet solution to the question of the over-representation of Aboriginal and Torres Strait Islander youth in the criminal justice system. But the recommendations in this report provide a framework to begin that change for our young people.

I urge governments, service providers and communities to carefully review this report. It is time to work with our peoples in creating this urgently needed change, so that we are able to look after the precious resource that are our young people. Investing in their development – socially, culturally, financially – is the way to a better future.

ACKNOWLEDGEMENTS

Amnesty International is indebted to the many Indigenous organisations and individuals who have generously shared their stories, perspectives and insights in the course of this research. Amnesty International researchers have witnessed the passion, commitment and resilience of Indigenous community leaders and organisations working with and for their young people and families.

Children are vital to any community. Under the Convention on the Rights of the Child, Indigenous children, like children everywhere, have the right to 'develop their personalities, abilities and talents to the fullest potential, to grow up in an environment of happiness, love and understanding.[4] The Convention recognises each child as an individual *and* a member of a family and community. The Declaration on the Rights of Indigenous Peoples recognises the right of the right of Indigenous families and communities to secure the well-being of their children and to have greater control over decision-making about their own lives and futures.[5] Community is everything when it comes to ensuring all young people have what they need to enjoy their rights as children. 'We know what works best for our communities' as Mr Gooda says in the foreword to this report.

Indigenous youth detention in Australia is a national crisis – and the crisis is getting worse. Indigenous young people are "more likely to be incarcerated today than at any other time since the release of the Royal Commission into Aboriginal Deaths in Custody final report in 1991" said the Australian House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in 2011.[6]

The most recent data, from 2013–14, shows that Indigenous young people are 26 times more likely to be in detention than non-Indigenous young people.[7] Aboriginal and Torres Strait Islander young people make up just over 5 per cent of the Australian population of 10–17 year-olds but more than half (59 per cent) of those in detention.[8] The situation is bleaker still among the youngest Indigenous children, who made up more than 60 per cent of all 10-year-olds and 11-year-olds in detention in Australia in 2012–13.[9]

The Aboriginal and Torres Strait Islander population has more people in younger age brackets than the non-Indigenous population, with larger proportions of young people.[10] In light of this, the National Congress of Australia's First Peoples noted in 2013 that "unless the rate of increase in youth detention can be reduced, rates of incarceration across the Aboriginal and Torres Strait Islander population are likely to continue to increase into the future."[11]

This report details the nature of this crisis, and makes practical recommendations on ways the Australian Government can reduce these escalating rates. It is based on field and desk research carried out between 2013 and early 2015 by Amnesty International.

In Australia, each state and territory government is responsible for its own laws, policies and practices for dealing with young people accused of committing, or convicted of, offences. However, it is the Federal Government ('Australian Government'), as a signatory to international human rights conventions, which bears ultimate responsibility for fulfilling the rights of Indigenous young people in all states and territories.[12] In 2012 the UN Committee on the Rights of the Child expressed regret that, despite its previous recommendations, "the juvenile justice system of the [Australia] still requires substantial reforms for it to conform to international standards."[13]

This report highlights state and territory-based laws that breach international human rights obligations. The Australian Government should invalidate these laws, or work with the states and territories to have them repealed. Importantly, across all Australian states and territories children are held criminally responsible from just 10 years of age,[14] despite the Committee on the Rights of the Child having concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.[15]

The Western Australian *Criminal Code Act 1913 (WA)* requires magistrates to impose mandatory minimum sentences on young offenders in a number of circumstances. The Committee on the Rights of the Child in 2012 again recommended that the Australian Government take steps to abolish this practice.[16] Far from accepting this recommendation, at the time of writing, the West Australian Legislative Assembly had in fact just passed a Bill that will increase the number of offences attracting a mandatory minimum sentence.[17]

Queensland treats 17-year-olds as adults in its criminal justice system.[18] In 2012 the Committee on the Rights of the Child again recommended that Australia remove children who are 17 years old from the adult justice system in Queensland.[19] Ignoring this recommendation, in 2014, the Queensland Government amended its *Youth Justice Act 1992* to require all 17-year-olds with six months or more left of their sentence to be transferred to adult jails.[20] This is contrary to Article 37(c) of the Convention on the Rights of the Child. In 2014 the Queensland Government introduced a further law that is in direct conflict with the Convention on the Rights of the Child, which says that the court must disregard the principle that detention must be a last resort.[21]

This report sets out further actions that the Australian Government should take to comply with international legal obligations across all states and territories. For example, Australia should withdraw its reservation to the UN Convention on the Rights of the Child, as this reservation has been justified to detain children with adult prisoners where separation is not "considered to be feasible having regard to the geography and demography of Australia."[22] The Committee on the Rights of the Child has repeatedly noted that the reservation should be withdrawn.[23]

The Convention on the Rights of the Child says that every child deprived of their liberty must be treated with humanity, taking into account the needs of a person of that age. In the course of this research, Amnesty International heard from legal representatives in the Northern Territory that youth detention conditions do not appear to comply with the international human rights standards.[24] The Committee on the Rights of the Child has commented that Australia needs "an effective mechanism for investigating and addressing cases of abuse at [Australia's] youth detention centres."[25] The Optional Protocol to the Convention Against Torture provides an avenue for doing so and should be ratified by Australia.[26]

Australia should also sign and ratify the Third Optional Protocol to the Convention on the Rights of the Child, which came into force in 2014 and establishes an individual complaints mechanism for children about alleged violations of their rights under the Convention on the Rights of the Child.[27]

The report further outlines that funding uncertainty, shortfalls and cuts mean that many Indigenous young people do not get the culturally sensitive legal assistance they need which likely contributes to their rate of over-representation in the justice

system and in detention.[28] The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) provide specialised, culturally tailored services for Indigenous people, including young people. Numerous inquiries have concluded that both of these Indigenous legal services are significantly underfunded,[29] and the Committee for the Elimination of Racial Discrimination has encouraged Australia to increase this funding.[30]

In March 2015 the Australian Government reversed cuts to the state and territory-based ATSILS, which were to take effect from June 2015.[31] However the national peak body, National Aboriginal Torres Strait Islander Legal Services (NATSILS) will be completely defunded from 30 June 2015, which means governments and organisations will not have coordinated access to locally informed, evidence-based advice about how the Australian justice system impacts on Indigenous people across the country.[32]

The FVPLS play an essential role in preventing family violence and improving community safety, which stops many matters from escalating into criminal justice issues.[33] Since August 2014, Australian Government funding for the FVPLS has been uncertain because they are no longer recognised as a stand-alone program or core service providing frontline legal assistance.[34]

While the FVPLS heard in March 2015 that their funding will be maintained, 60 per cent of the FVPLS centres are only funded for one year.[35] Given the identified levels of unmet legal need and no guarantee of funding beyond mid-2016 in most cases, the future remains highly uncertain for these crucial services.

This report highlights the inconsistencies and gaps between states and territories in collection and availability of data relating to contact with the youth justice system. The inadequacy of this information is one of the barriers preventing policy makers from responding to the over-representation of Indigenous young people in detention. The Australian Juvenile Justice Administrators (AJJA) are making an effort to improve data collection and use.[36] However, the Australian Government must do much more to better collect and use data across Australian states and territories.

This report outlines the role that the Australian Government should play through the Council of Australian Governments (COAG) in adopting a justice target within the 'Closing the Gap' strategy. COAG has a strategy and specific timeframes for achieving six 'Closing the Gap' targets, relating to Indigenous life expectancy, infant mortality, early childhood development, education and employment. The Australian Government should immediately develop a dual target to close the gap between Indigenous and non-Indigenous Australians, in incarceration rates and rates of experienced violence.

This report then outlines the need for the Australian Government to take the lead, through a coordinated COAG approach, on adopting justice reinvestment in Australia. Justice reinvestment invests in communities as an approach to address expanding prison populations.[37]

The UN Committee for the Elimination of Racial Discrimination has recommended that Australia "dedicate sufficient resources to address the social and economic factors underpinning indigenous contact with the criminal justice system" and encouraged Australia to adopt "a justice reinvestment strategy."[38] One promising example of such a community-led approach is in Bourke, a town in north-west New South Wales which is working towards adopting a justice reinvestment approach.[39] The Australian Government should work with the states and territory governments to ensure that community-designed and led solutions are embedded in a coordinated COAG approach for implementing justice reinvestment in Australia.

The report also highlights particular issues that fetal alcohol spectrum disorders (FASD) presents for some Indigenous young people, which make contact with the criminal justice system more likely.[40] FASD is an umbrella term used to describe a range of impacts caused by exposure to alcohol in the womb. An official diagnostic tool must urgently be finalised, and FASD should be formally recognised as a disability, so that people affected by FASD and their carers can access adequate funding and support.[41] Community-designed and led programs must be better resourced so that young people affected by FASD get the early support they need, so that their behaviour does not get dealt with as a criminal justice issue.[42] Diagnosis is also essential to ensure a fair trial for people affected with FASD and who are prosecuted for criminal offences. The current process for making diagnosis is time consuming, which can lead to young people being held in detention on remand awaiting a diagnosis for longer than they otherwise would.

In July 2014, the Australian Government announced $9.2 million dollars to fund the National FASD Action Plan. Amnesty International welcomes this step, but notes that the plan does not undertake to recognise FASD as a disability nor include a budgetary allocation to assist the families of young people who are at risk of contact with, or already enmeshed in, the justice system.[43]

This report outlines the need for better Australian Government support for bail accommodation options to prevent Indigenous young people being unnecessarily held on remand. International human rights standards require that detention for persons awaiting trial must be the exception rather than the rule.[44] But between June 2013 and June 2014 Indigenous young people were 23 times more likely than their non-Indigenous counterparts to be in un-sentenced detention on a per capita basis.[45] The Australian Government must ensure that Indigenous young people are not held in detention on remand solely due to homelessness, or a lack of suitable accommodation and support to comply with bail conditions.

In summary, this report finds many areas where the Australian Government can improve its efforts to reduce the numbers of young Indigenous people incarcerated across the country, and to support Indigenous-led initiatives to keep young people, in their communities, in school and with their families.

Recommendations for the Australian Government

1

Legislate in order to override state and territory-based laws that do not conform with the Convention on the Rights of the Child, including by the introduction of legislation to the effect that:

- Notwithstanding any state or territory law which provides otherwise, in sentencing or considering a bail application for any person up to and including the age of 17, the court must observe the principle that detention is a measure of last resort.
- Any state or territory law that requires the imposition of a mandatory minimum sentence on a child or young person up to and including the age of 17 is invalid.
- Any state or territory law treats a person up to and including age 17 as an adult for the purpose of criminal prosecution is invalid.
- Any state or territory laws that treats a person below the age of 12 as criminally responsible is invalid, and the doctrine of doli incapax continues to apply to 12, 13 and 14-year-olds.

2

Immediately withdraw the reservation to Article 37(c) of the Convention on the Rights of the Child.

3

Ratify the Optional Protocol to the Convention Against Torture (OPCAT) without delay, and create an independent National Preventative Mechanism (NPM) under the guidance of the Subcommittee on the Prevention of Torture (SPT). Allow both the NPM and SPT access to all places where people are deprived of liberty, including youth detention facilities.

4

Take immediate steps to become a party to the Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

5

Ensure that ongoing funding is made available to so that the managing and coordinating role played by the NATSILS can continue.

Ensure sufficient ongoing funding is available to continue the work undertaken by the Family Violence Prevention Legal Service (FVPLS).

6

Work with the state and territory governments to quantify the level of unmet legal need currently experienced by Indigenous young people and their families; and

Take immediate steps to make up the shortfall in funding to ensure that all young people facing criminal proceedings are granted full access to legal assistance.

7

Commence work with all state and territory governments, through COAG, to identify and address gaps in the collection of standard and disaggregated data related to youth contact with the justice system. This should include taking immediate steps to integrate information on arrest and police diversion into the Juvenile Justice National Minimum Data Set (JJ NMDS) and better link JJ NMDS data with child protection and adult corrections data.

8

Work with the Western Australian and Northern Territory governments to ensure that they provide JJ NMDS data in the required standard format.

9

Begin a process, through COAG, to develop justice targets to reduce Indigenous youth detention rates and create safer communities (through reduced rates of experienced violence). Such targets should be developed in consultation with Indigenous Peoples and their organisations that represent offenders and victims.

Relevant sub-indicators under the target might include the following (disaggregated by age, gender, remoteness and disability status):

- The rate at which Indigenous young people are cautioned or otherwise diverted by police compared to non-Indigenous young people.
- The rate at which Indigenous young people are held in un-sentenced detention compared to non-Indigenous young people.
- The rate at which Indigenous young people are referred to court conferencing by police and courts compared to non-Indigenous young people.
- The rate at which Indigenous young people are diverted by the courts into programs compared to non-Indigenous young people.
- The rate at which Indigenous young people are given non-custodial orders compared to non-Indigenous young people.
- The rate at which Indigenous young people receive custodial sentences compared to non-Indigenous young people.
- The rate at which Indigenous young people reoffend compared with non-Indigenous young people.
- The rate at which Indigenous young people are victims of crime compared with non-Indigenous young people.
- The number of Indigenous-led and designed programs as diversionary options available to the courts and community-based alternatives to detention.

10

Take a leading role, through COAG, to identify the data required to implement a Justice Reinvestment approach, including by tasking a technical body with assisting states and territories and coordinate a national approach to the data collection.

11

Work with state and territory governments to ensure that the adoption of a justice reinvestment approach occurs in close consultation with Indigenous communities and their representatives.

12

Recognise Fetal Alcohol Spectrum Disorders (FASD) as a disability under the National Disability Insurance Scheme and on the Department of Social Services' List of Recognised Disabilities.

13

Provide sufficient resources to Indigenous community-designed and led initiatives to address the effects of FASD to ensure that it is treated as a disability rather than becoming a criminal justice issue.

14

Urgently finalise an official diagnostic tool for FASD.

15

Work with state and territory governments to identify areas of unmet need for bail accommodation. Fund Indigenous community controlled bail accommodation and support services to ensure that Indigenous young people are not held in detention on remand solely due to a lack of other options. Particular focus should be given to young girls and boys in out-of-home care, and those with mental health issues and cognitive impairments, including those with FASD.

16

Work with the state and territory governments to develop youth bail legislation requiring that pre-trial detention should occur only as a last resort where there is a risk of flight or where release would interfere with the administration of justice. Under the uniform youth bail legislation, pre-trial detention should occur only after a case-by-case assessment of necessity and proportionality.

A note on terminology

The report is primarily concerned with young people aged between 10 and 17 inclusively. Both the Convention on the Rights of the Child (the Convention) and Australian state and territory-based criminal justice legislation apply to young people aged up to and including 17 years (with the exception of Queensland where 17-year-olds are treated as adults). The age of criminal responsibility in all Australians states and territories is 10, which falls below the international standard of 12.

In this report Amnesty International generally uses the term 'Indigenous' to refer to Aboriginal and Torres Strait Islander Peoples in Australia. We note that many people prefer to use the terms Aboriginal, Aboriginal and Torres Strait Islander and/or names of specific language groups. The term Indigenous has been chosen because of the international context of the report and its use in official data sets.

Where referring to Aboriginal and Torres Strait Islander children aged between 10 and 17, this report uses the general term 'Indigenous young people', and 'Indigenous girls and boys' where gender-specific references are made.

Amnesty International acknowledges that some Indigenous young people in Australia who have been through ceremonial business or initiation are considered to be men and women. No disrespect is intended by the use of these general descriptors.

Methodology

In Australia, each state and territory's government is responsible for its own laws, policies and practices for dealing with young people accused of committing, or convicted of, offences. These laws, policies and practices vary considerably from one state or territory to another. Between 2015 and 2017 Amnesty International will release three reports based on primary research into Indigenous youth detention in Western Australia, Queensland and the Northern Territory. These jurisdictions have, respectively, the highest rate of over-representation of Indigenous youth in detention, the fastest-growing rate of Indigenous youth detention and the highest proportion of youth in detention who are Indigenous. Each report will be based on field research in these jurisdictions and will make recommendations for changes to the specific laws, policies and practices that contribute to this national crisis. While Amnesty International has chosen to focus in detail on the above jurisdictions, this is not to suggest that change is not urgently needed in South Australia, New South Wales, Victoria, the Australian Capital Territory or Tasmania. Most of the recommendations in this National Overview apply to all Australian states and territories.

The Australian Government bears ultimate responsibility for respecting, protecting and fulfilling the rights set out in the Convention and other international legal instruments,[46] including that:

- the best interests of the child is a fundamental principle to be observed, including in the context of criminal justice
- arrest and detention must be measures of last resort
- a variety of appropriate alternatives to detention should be in place to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

This national overview briefly outlines the ways in which the Australian Government must demonstrate leadership and fulfil its human rights obligations, in particular under the Convention on the Rights of the Child, by addressing the unacceptably high rates at which Indigenous young people are detained.

This report is based on field and desk research carried out between 2013 and 2015 by Amnesty International. It identifies areas where the Australian Government has a role, both in its own right and through the Council of Australian Governments (COAG).[47] Amnesty International is part of the National Justice Coalition, a coalition of Indigenous peak organisations and community sector organisations working towards addressing over-representation of Indigenous people in the criminal justice system.[48] Amnesty International has been informed by the expertise of member organisations to the National Justice Coalition and by individual conversations with representatives of those organisations.

Amnesty International reviewed existing government and academic reports and inquiries into the Australian youth justice system, case law, legislation, parliamentary debates and answers to questions on notice by relevant Government Ministers,[49] and commentary from members of the judiciary.

The report is also informed by conversations and interviews with Indigenous people, including: representatives of Indigenous organisations working with young people; court officers and lawyers of the Aboriginal and Torres Strait Islander Legal Services; and other Indigenous organisations throughout Western Australia. It further draws on preliminary research and conversations with Indigenous and community sector organisations in Queensland and the Northern Territory. A number of people spoke to Amnesty International on the condition that their anonymity be guaranteed. Many have requested that certain details not be made public. In many cases this request was due to concerns about losing funding if they were known to be speaking out. In order to respect these wishes, some names and locations have been withheld.

Photo © Ingetje Tadros

In 2011, 20 years after the Royal Commission into Aboriginal Deaths in Custody,[50] the Australian Government House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ('the Standing Committee') identified the rate at which Indigenous young people are over-represented in detention as a "national crisis".[51] The Standing Committee stated that the problems affecting Indigenous young people were "so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems."[52]

The final report of the Royal Commission into Aboriginal Deaths in Custody was released in 1991, following four years of extensive research and testimony across Australia. The final report found that, while Aboriginal people did not die at a greater rate than non-Aboriginal people in custody, the gross over-representation of Aboriginal people compared with the general community led to a rate of deaths that was "totally unacceptable" and which "would not be tolerated if it occurred in the non-Aboriginal community … Too many Aboriginal people are in custody too often."[53] The situation of Indigenous young people was considered in detail. The Royal Commission investigated the deaths in police custody, prison and detention of five Indigenous boys and the death of one Indigenous girl in a children's home.

The report highlighted that the issues faced by Indigenous young people required "very particular consideration" because "the Aboriginal population is growing much more rapidly than is the general population and in precisely the age groups at which the majority of persons are imprisoned."[54] In its 2011 report, the Standing Committee identified that Indigenous young people "are more likely to be incarcerated today than at any other time since the release of the Royal Commission into Aboriginal Deaths in Custody final report in 1991."[55] The Aboriginal and Torres Strait Islander population still has "a younger age structure, is growing more rapidly than the non-Indigenous population and has a larger proportion of young people."[56] The number of Indigenous children aged zero to 14 years is projected to increase by 19–31 per cent by 2026 and the number of young people and young adults, aged 15 to 24 years is projected to increase by 21 per cent over the same period.[57] In light of this, the National Congress of Australia's First Peoples noted in 2013 that:

> Unless the rate of increase in youth detention can be reduced, rates of incarceration across the Aboriginal and Torres Strait Islander population are likely to continue to increase into the future.[58]

While the issue of over-representation has been documented, and detailed recommendations made to address the problem, for almost 25 years Australian governments have failed to adequately respond to this national crisis.

On an average night in 2013–14, there were 430 Indigenous young people in detention in Australia. Despite making up only 5.5 per cent of the population of 10 to 17-year-olds,[60] Indigenous young people made up over half of all young people in detention on an average night (430 out of 724).[61] Between July 2013 and June 2014, Indigenous young people were 26 times more likely to be in detention than non-Indigenous young people in Australia.[62]

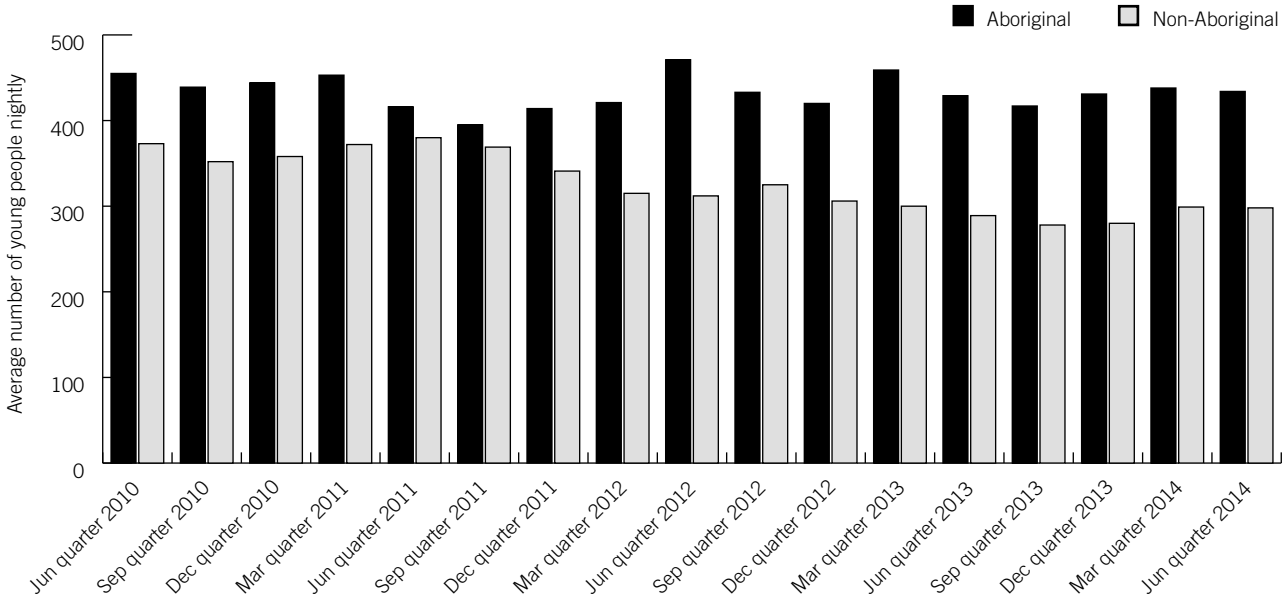

Figure 1
Youth (aged 10 to 17) detention population in Australia, June 2010–June 2014, average night[59]

In the most recent year for which data is available, from 2012–13, one in every 28 Indigenous boys and one in every 113 Indigenous girls spent time in detention. Over the same period, one in 554 non-Indigenous boys and one in 2,439 non-Indigenous girls spent time in detention.[63]

Indigenous young people are also over-represented as victims of crime.[64] While there are deficiencies in national data around rates of experienced violence,[65] the 2008 National Aboriginal and Torres Strait Islander Social Survey showed Aboriginal and Torres Strait Islander Australians experience violence at rates well above those of non-Indigenous Australians. Those aged between 15 and 24 are identified as being at particular risk.[66]

Reasons for over-representation

The 2011 Standing Committee inquiry found that high levels of contact with the criminal justice system by Indigenous young people is "a symptom of the broader social and economic disadvantage faced by many Indigenous people in Australia."[67] The foreword to this report by Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda reiterates this and adds that the "ongoing legacy of colonisation" and "everyday experience of racism of our peoples cannot be overlooked as contributing factors." Similar conclusions were reached during the Royal Commission into Aboriginal Deaths in Custody.[68] In the course of this research Indigenous leaders and community organisations consistently highlighted that more needs to be done to address the underlying factors that contribute to the crisis, through early intervention, prevention and diversion programs.

Amnesty International was told that there is a need for greater support for community-led responses and partnerships to address the following issues: unresolved intergenerational trauma; cultural dislocation and dispossession; poverty; overcrowding and homelessness; family violence; boredom; alcohol and substance abuse; fetal alcohol spectrum disorders (FASD).

The numbers of boys in contact with the justice system is much higher than girls. A recent study about girls and young women in the justice system by the Australian Institute of Health and Welfare identified that girls and young women in contact with the justice system are likely to have a history of childhood abuse or neglect, psychological or mental health issues such as mood and anxiety disorders, a history of out-of-home care or unstable accommodation and chronic illness or disability.[69] While the study did not look at these issues for Indigenous girls specifically, Amnesty International heard from legal representatives that such issues are prevalent among Indigenous girls they represent across the country.[70]

Through ratification of binding international human rights treaties and the adoption of United Nations (UN) declarations, the Australian Government has committed to ensuring that all people enjoy universally recognised rights and freedoms. The massive over-representation of Indigenous young people in the criminal justice system has been recognised as a human rights issue by a number of UN treaty bodies.[71]

Convention on the Rights of the Child

Under international law, all fair trial and procedural rights that apply to adults apply equally to children, but additional juvenile justice protections exist under the international human rights framework in recognition that children differ from adults in their physical and psychological development. The Convention on the Rights of the Child is the primary source of these rights. Unique among the major UN human rights treaties, it explicitly recognises the particular needs of Indigenous children.

The Convention is the most widely ratified human rights treaty. Australia signed and ratified the Convention in 1990.[72] However, the Committee on the Rights of the Child (the Committee), the body that monitors State Parties' implementation of the Convention, has noted concern that while the Convention may be considered and taken into account in Australia, "in order to assist courts to resolve uncertainties or ambiguities in the law, it cannot be used by the judiciary to override inconsistent provisions of domestic law."[73] In 2012 the Committee expressed regret that despite its previous recommendations "the juvenile justice system of the State Party still requires substantial reforms for it to conform to international standards."[74]

Article 1 of the Convention defines a child as "every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier."[75] Article 3.1 states that "in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37 provides that States Parties shall ensure that "the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time." Article 40(3) requires States Parties to "promote the establishment [of] measures for dealing with such children without resorting to judicial proceedings … to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

In its General Comment 10, on children's rights in juvenile justice, the Committee says that "a comprehensive policy for juvenile justice must deal with … the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings."[76]

Article 2 (1) of the Convention requires parties to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour … ethnic or social origin … or other status."

In General Comment 11, on the rights of Indigenous children, the Committee noted "with concern that the incarceration of Indigenous children is often disproportionately high and in some instances may be attributed to systemic discrimination within the justice system and/or society."[77] The Committee also noted that "through its extensive review of State Party reports [it has identified that] Indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children."[78]

In order to address this, the Committee urges States Parties to consider "the application of special measures in order to ensure that Indigenous children have access to culturally appropriate services in the [area of] juvenile justice." These should "take into account the different situation of Indigenous children in rural and urban situations" and "particular attention should be given to girls … to ensure that they enjoy their rights on an equal basis as boys."[79]

In its 2012 concluding observations on the implementation of the Convention in Australia, the Committee expressed, among other issues, particular concern about:

> The serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant over-representation in the criminal justice system [and the] inadequate consultation and participation of Aboriginal and Torres Strait Islander persons in the policy formulation, decision-making and implementation processes of programmes affecting them … [80]

The Committee further expressed concern that:

- No action had been undertaken by Australia "to increase the minimum age of criminal responsibility" and recommended it be increased to at least 12;
- Mandatory sentencing legislation (so-called 'three strikes laws') still exists in the Criminal Code of Western Australia for persons under 18 and recommended that the Australian Government take steps to abolish mandatory sentencing for children.
- All "17-year-old child offenders continue to be tried [as adults] under the Criminal Justice system in Queensland", and recommended Australia remove those children who are 17 years old from adult prisons.
- Instances of abuse of child detainees had been reported. It recommended that Australia allocate resources so child offenders are held in separate facilities and expeditiously establish an accessible and effective mechanism for investigating and addressing cases of abuse at its youth detention centres.
- No measures have been taken "to ensure that children with mental illnesses and/or intellectual deficiencies who are in conflict with the law are dealt with using appropriate alternative measures without resorting to judicial proceedings" and recommended that this should occur.[81]

The Committee reiterated its recommendation, made in 2005, that Australia "strengthen its efforts to bring its domestic laws and practice into conformity with the principles and provisions of the Convention, and to ensure that effective remedies will be always available in case of violation of the rights of the child."[82]

Further international standards relevant to youth justice

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); and Rules for the Protection of Juveniles Deprived of their Liberty provide further international guidance relevant to the rights of children in contact with the youth justice system.

Under the Beijing Rules all possible resources, including family and community groups, should be mobilised to promote the well-being of a young person to reduce the need for intervention under the law.[83]

The Riyadh Guidelines set out that community-based services and programs should be developed for the prevention of youth offending and that "[f]ormal agencies of social control should only be utilized as a means of last resort."[84] They further provide that "[e]very society should place a high priority on the needs and well-being of the family and of all its members" and "should establish policies that are conducive to the bringing up of children in stable and settled family environment."[85]

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty set out that the youth justice system should "uphold the rights and safety and promote the physical and mental well-being of juveniles" and reinforce that imprisonment should be a last resort.[86] They further outline that "because of their high vulnerability, juveniles deprived of their liberty require special attention and protection and that their rights and well-being should be guaranteed during and after the period when they are deprived of their liberty."[87] The Rules provide that young people deprived of their liberty "have the right to facilities and services that meet all the requirements of health and human dignity … the design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment."[88]

International Convention on the Elimination of All Forms of Racial Discrimination

Australia ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1975.[89] ICERD prohibits any distinction on the basis of race which has either the purpose or effect of restricting the enjoyment of human rights.[90]

Consistent with the General Comments of the Committee on the Rights of the Child outlined above, the ICERD recognises that there are circumstances where special and concrete measures are required in order to ensure the protection of certain groups, including Indigenous Peoples,[91] "for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[92] The Committee on the Elimination of Racial Discrimination has noted that "States parties should ensure that special measures are designed on the basis of prior consultation with affected communities and the active participation of such communities."[93]

In its 2010 concluding observations on Australia, the Committee recommended that sufficient resources be dedicated to address the social and economic factors underpinning Indigenous contact with the criminal justice system and encouraged:

> the adoption of a justice reinvestment strategy, continuing and increasing the use of indigenous courts and conciliation mechanisms, diversionary and prevention programmes and restorative justice strategies, and recommends that, in consultation with indigenous communities, the State party take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identifying those which remain relevant with a view to their implementation.[94]

Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Indigenous Peoples (the Declaration) recognises the specific rights of Indigenous Peoples; including the right to maintain their distinct collective identities and to have greater control over decision-making about their lives and futures.

Many of the rights set out in the Declaration are relevant in the context of Aboriginal over-representation in the youth justice system. The UN General Assembly adopted the Declaration on 13 September 2007, after more than two decades of negotiations and deliberations in which Indigenous people from around the world participated as experts on their own rights.[95]

Founding Chairperson of the Working Group on Indigenous Populations Erica-Irene Daes has noted that "no other UN instrument has been elaborated with such an active participation of all parties concerned."[96] An overwhelming majority of States voted in favour of the Declaration; only four states voted against it – Australia, Canada, New Zealand and the United States – and each has subsequently endorsed it (Australia on 3 April 2009).[97] The former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya noted that:

> The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights.[98]

The Declaration states that it constitutes "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" and recognises "the right of indigenous families and communities to retain shared responsibility for the upbringing … and well-being of their children."[99]

While Declarations, as soft law, do not create binding international legal obligations; the Declaration on the Rights of Indigenous Peoples is acknowledged as generating "reasonable expectations of conforming behavior."[100]

It recognises the right of Indigenous peoples to promote, develop and maintain their distinct institutions, customs, spirituality, traditions and practices, including juridical systems. The right "to the improvement of their economic and social conditions" without discrimination, is also recognised."[101] The Declaration states that particular attention should be given to "the rights and special needs of indigenous … youth, children and persons with disabilities."[102]

Under the Declaration, Indigenous Peoples have "the right to participate in decision-making in matters which would affect their rights" through their own representatives chosen in accordance with their processes.[103] Indigenous Peoples also have the rights to "maintain and develop their own indigenous decision-making institutions."[104] Under the Declaration, States are required to take steps to ensure continuing improvement of Indigenous Peoples' economic and social conditions.[105]

In 2013–14 Indigenous young people were 26 times more likely to be in detention nationally (34.47 per 10,000 for Indigenous young people, compared to 1.35 per 10,000 for non-Indigenous young people). The rates of Indigenous and non-Indigenous youth detention vary from one jurisdiction to another as outlined below.

Western Australia

In Western Australia, the situation is significantly worse than the national picture. Between July 2013 and June 2014 Indigenous young people were on average 53 times more likely than their non-Indigenous peers to be in detention.[108] Indigenous young people in Western Australia were in detention at twice the average rate at which Indigenous young people are detained nationally (66.95 per 10,000 Indigenous young people in Western Australia, compared to 34.47 per 10,000 Indigenous young people nationally).[109]

Despite making up only 6.4 per cent of the population of 10 to 17-year-olds in Western Australia, Indigenous young people made up an average of 78 per cent of the youth detention population (107 out of 137).[110] This included 100 Indigenous boys (of 127 boys in total) and seven Indigenous girls (out of 10 girls in total).[111]

Northern Territory

From July 2013 and June 2014 Indigenous young people made up an average of 96 per cent of all young people in detention in the Northern Territory (45 out of 47) while comprising around 44 per cent of the population aged between 10 and 17.[112] This included 41 Indigenous boys (out of 43 boys in total) and four Indigenous girls (out of a total of four girls).[113]

The rate at which Indigenous young people are detained in the Northern Territory has been higher than the national average rate between July 2013 and June 2014 (38.17 per 10,000 Indigenous young people in the Northern Territory, compared to 34.47 per 10,000 Indigenous young people nationally).[114]

Between June 2010 and June 2014 the number of Indigenous young people in detention in the Northern Territory nearly doubled from 25 young people (out of 28 in total) to 47 (out of 48 in total).[115]

South Australia

From July 2013 to June 2014 Indigenous young people in South Australia were detained at about a similar rate as the national average (33.46 per 10,000 Indigenous young people in South Australia, compared to 34.47 per 10,000 Indigenous young people nationally).[116] They were 22 times more likely to be in detention than their non Indigenous peers.[117] The lower rate of over-representation of Indigenous young people when compared to the national average is partly due to the rate of non-Indigenous detention being slightly higher than the national average.[118]

Despite representing about 4.3 per cent of the population among 10 to 17-year-olds, Indigenous young people in South Australia made up half of the youth detention population (23 out of 46).[119] This included 18 Indigenous boys (out of 38 boys in total) and five Indigenous girls (out of nine girls in total).[120]

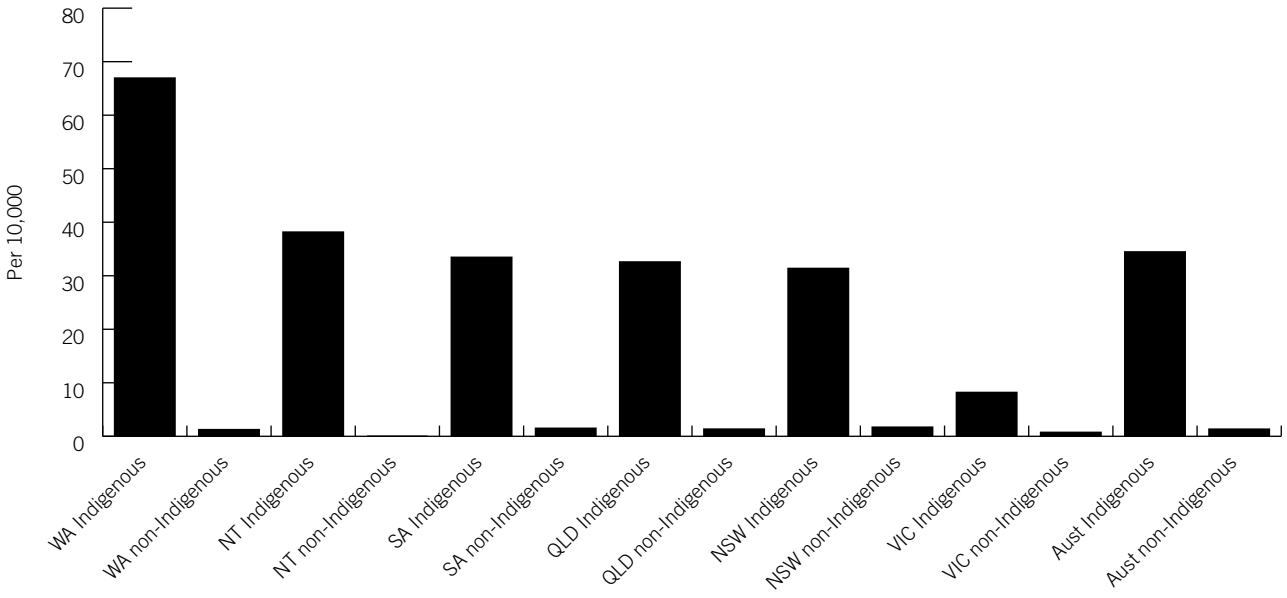

Figure 2
Rate per 10,000 young people (aged 10 to 17) in detention on an average day 2013–14 by Indigenous status and state/territory[107]

Queensland

From July 2013 to June 2014, Indigenous young people were detained at just below the national average for Indigenous young people (32.59 per 10,000 Indigenous young people in Queensland compared to 34.47 per 10,000 Indigenous young people nationally). However, the rate at which Indigenous young people are detained in Queensland was higher than it has been at any other time over the past four years and is increasing as a trend.[121] Indigenous young people in Queensland were 24 times more likely to be in detention than their non-Indigenous peers.[122]

Indigenous young people in Queensland make up around 7.5 per cent of all 10 to 17-year-olds but 65 per cent of the youth detention population (119 out of 181).[123] This included 96 Indigenous boys (out of 149 boys in total) and 22 Indigenous girls (out of 32 girls in total).[124]

New South Wales

Between July 2013 and June 2014 the rate at which Indigenous young people were in detention in New South Wales was slightly lower than the national average (31.38 per 10,000 compared to 34.37 per 10,000 nationally). Nonetheless, Indigenous young people were 18 times more likely to be in detention when compared to their non-Indigenous peers. The lower rate of over-representation is partly due to the rate of non-Indigenous detention being somewhat higher than the national average.[125]

Indigenous young people made up around 5.5 per cent of the population of 10 to 17-year-olds in New South Wales and just over half of the youth detention population (124 out of 245).[126] This included 115 Indigenous boys (out of 224 boys in total) and nine Indigenous girls (out of 21 girls in total).[127]

Victoria

Indigenous young people in Victoria are in detention at around a third of the national rate.[128] However, between June 2013 and June 2014 Indigenous young people were, on average, still 11 times more likely to be in detention than their non-Indigenous counterparts.[129]

Indigenous young people made up around 1.6 per cent of the population of 10 to 17-year-olds in Victoria and around 16 per cent of the youth detention population (seven out of 47). This included seven Indigenous boys (out of 44 boys in total) and zero Indigenous girls (out of three girls in total).[130]

Australian Capital Territory (ACT)

Indigenous young people make up about 2.9 per cent of the population of 10 to 17-year-olds in the ACT. From July 2013 to June 2014 they made up, on average, 35 per cent of the youth detention population (five out of 13).[131] This included four Indigenous boys (out of 11 boys in total) and one Indigenous girl (out of two girls in total).[132] No rate of Indigenous detention is provided in the data due to less than five Indigenous young people having been in detention in two of the four quarters.[133]

Tasmania

In Tasmania Indigenous young people make up about 8.8 per cent of the population aged between 10 and 17.[134] In Tasmania one Indigenous young person has been in detention in each quarter from July 2013 to June 2014 out of 10 young people in detention in total.[135]

No rate of Indigenous youth detention is provided in the data due to less than five Indigenous young people having been in detention in each of the four quarters.[136]

Minimum age of criminal responsibility in all states and territories

In all Australian states and territories the age of criminal responsibility is 10.[138] The Committee on the Rights of the Child has concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.[139] In its Concluding Observations in 2005 the Committee on the Rights of the Child said that the age of criminal responsibility in Australia is "too low",[140] and recommended raising it to 12.[141] This recommendation was reiterated in 2012.[142]

The Committee acknowledged that, under the common law doctrine of *doli incapax*,[143] children between 10 and 14 in Australia are assumed to be criminally responsible only if they have the required maturity to realise the consequences of their actions. However, the Committee has noted:

> The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.[144]

Indigenous young people are more heavily over-represented among 10 and 11-year-olds in contact with the criminal justice system and in detention than those in older age brackets. In 2012–13, they made up 62 per cent of all 10-year-olds and 11-year-olds in detention in Australia throughout the year (34 Indigenous young people out of 55 young people in total, excluding Western Australia and the Northern Territory, who did not provide this data).[145]

The Committee has encouraged States Parties, like Australia, who have a minimum age (in Australia, 10) but different criteria up to a higher age (in Australia, 14), to make 12 years "the absolute minimum age."[146]

In order to conform with the minimum internationally acceptable level, Australia must raise the minimum age of criminal responsibility to 12. Retaining the doctrine of *doli incapax* for those young people aged 12 to 14 years of age will enable children in this age group to be dealt with more appropriately outside of the justice system.

Mandatory sentencing in Western Australia

Contrary to the Convention on the Rights of the Child, the Western Australian Criminal Code Act 1913 (WA) requires magistrates to impose a mandatory minimum sentence on a young offender in three circumstances. The first is where a young offender already has two relevant convictions for a home burglary.[147] This is commonly known as the 'three strikes' home burglary law and mandates a minimum sentence of 12 months. The other two relate to serious assault and grievous bodily harm where the victim is a 'public officer' (i.e. a police officer or a juvenile custodial officer).[148] The latter laws mandate a minimum sentence of three months in detention.[149]

You are bashing your head against the wall. That's the thing with mandatory sentencing, it limits the power of the Magistrate. It doesn't give the Magistrate any leeway to look at the charges themselves. There's no way around it. It doesn't stop crime.

Interview with Steven Carter, Aboriginal Court Officer, ALS WA Fitzroy Crossing, 25 February 2015

Because of these laws, the Children's Court is prevented from ensuring that detention is a measure of last resort, that the best interests of the child are a primary consideration, and that each child is dealt with in a manner proportionate to their circumstances and the offence.[150] The Australian Law Reform Commission (ALRC) found that the Western Australian 'three strikes burglary' laws:

> violate the principle of proportionality which requires the facts of the offence and the circumstances of the offender to be taken into account, in accordance with Article 40 of [the Convention]. They also breach the requirement that, in the case of children, detention should be a last resort and for the shortest appropriate period … [The Convention requires] that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed.[151]

The ALRC Inquiry found these violations of international law to be so serious that it recommended that the Australian Government override the three strikes burglary laws.[152] The recommendation was not acted on by the Federal Government. Since the ALRC made this recommendation the Western Australian Government has enacted two further mandatory sentencing provisions applicable to young people (outlined above).

The last publicly available data on the impact of three strikes burglary laws is the Western Australia Department of Justice's 2001 review of the legislation. The review found that 81 per cent of the 119 young people sentenced under the three strikes burglary laws were Indigenous.[153] In 2001 the Aboriginal Justice Council described the three strikes burglary laws as "profoundly discriminatory in their impact on Aboriginal Youth."[154]

In 2012, the Committee on the Rights of the Child recommended that the Australian Government "take measures with a view to abrogating mandatory sentencing in the criminal law system of Western Australia."[155] In its Concluding Observations in 2014, the Committee Against Torture also reiterated its previous concern about over-representation of Indigenous young people in the detention and that mandatory sentencing continues to disproportionately affect Indigenous people.[156] The Committee Against Torture recommended that Australia "should also review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances."[157] The Australian Government should intervene so that these laws that are contrary to its obligations under international human rights law, are invalidated or repealed.

Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)

At the time of writing, a Bill that will increase the number of offences attracting a mandatory minimum sentence was before the Western Australian Parliament and had just passed the Legislative Assembly. The *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)* amends the counting rules for determining 'repeat offender' status for young people aged 16 and 17. Under the changes multiple offences dealt with in court on one day will no longer be counted as a single 'strike'.[158]

These changes will mean that a 16-year-old appearing in court for the first time could immediately accumulate three strikes, such that they must receive a mandatory minimum sentence of 12 months detention or imprisonment, even if the offender had no prior record.[159]

The changes will introduce mandatory minimum three year terms of detention for further violent offences committed in the course of an aggravated home burglary for 16 and 17-year-olds.[160] Circumstances of aggravation include committing a burglary in company with another person, being armed or pretending to be armed with a dangerous weapon, threats to injure and detaining a person.[161]

The President of the Western Australian Children's Court, President Dennis Reynolds, recently expressed serious concerns that the proposed amendments will lead to a "significant increase in the detention population."[162] The Commissioner of the Department of Corrective Services has noted that his modelling "suggests that space for an extra 60 juveniles will be required at Banksia Hill by the fourth year of the laws operation.[163] President Reynolds also noted that the changes:

> will likely result in an increase in the number of Aboriginal young people from country WA being sentenced to lengthy terms of detention … if the court is obliged to impose a term of detention or imprisonment of at least a year, it will have little or no scope to properly reflect the level of seriousness of the particular offence in the sentencing option and the length of the term imposed.[164]

Contrary to the Convention on the Rights of the Child, this would further undermine judicial discretion to ensure that children are dealt with in a manner proportionate to the offence on a case by case basis and that detention be used only as a last resort. Amnesty International urges the Australian Government intervene to ensure that the Western Australian Government not pass these laws or, alternatively, to override these laws should they be passed.

Detention no longer a last resort for children in Queensland

The State of Queensland treats 17-year-olds as adults in its criminal justice system.[165] The Committee on the Rights of the Child has called for juvenile justice protections to extend to all individuals who were under the age of 18 at the time of the offences, regardless of the age of majority in the particular jurisdiction and regardless of their actual age at the time of trial or sentencing.[166] In 2012 the Committee on the Rights of the Child reiterated its recommendation, first made in 2005, that Australia remove children who are 17 years old from the adult justice system in Queensland.[167]

In 2014, the Queensland Government introduced an amendment to the *Youth Justice Act 1992* that requires the automatic transfer of all 17-year-olds with six months or more left to serve of their sentence to adult corrective service facilities on their seventeenth birthday. Under this section, if a young person is already 17 at the time of sentencing they will automatically be sent to an adult prison.[168] This is contrary to Article 37(c) of the Convention on the Rights of the Child which provides that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so."

In 2014 the Queensland Government also introduced a provision providing that "in sentencing a child for an offence, the court must not have regard to any principle that a detention order should be imposed only as a last resort." This provision is in direct contravention with the Convention on the Rights of the Child.[169] The Explanatory Notes accompanying the legislation acknowledge that the new measures breach international legal obligations.[170] The Explanatory Notes acknowledge that the removal of the sentencing principle that detention is a last resort could "increase the likelihood that some children who come in contact with the youth justice system will spend time in detention, either on remand or subject to a detention order."[171] The amendments came into force in March 2014.[172] The Australian Government did not comment on these amendments which are contrary to the Convention on the Rights of the Child, to which Australia is a party. The Australian Government should work with the new Queensland Government to ensure that these laws are repealed or intervene to override them.

The Australian Government's reservation to Article 37(c) of the Convention on the Rights of the Child

Article 37 (c) of the Convention on the Rights of the Child provides as follows:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

When it ratified the Convention, Australia made the following reservation to this article:

> the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.[173]

However, the Committee on the Rights of the Child has repeatedly noted that the reservation "is unnecessary since there appears to be no contradiction between the logic behind it and the provisions of article 37 (c) of the Convention."[174] This is because the provision of the Convention provides that every child deprived of their liberty shall be separate from adults unless it is in the best interests of the child not to do so. The Committee has, in 1997, 2005 and 2012, recommended that the reservation be withdrawn.[175] In 2003 the Australian Government said that: "The small centres of population in remote areas and the distance of some of these centres from larger towns and cities necessitate this reservation." However, in its fourth periodic report to the Committee on the Rights of the Child in 2008, the Australian Government said it was:

> considering the feasibility of withdrawing its reservation to article 37(c) of the Convention. As detention of young people is primarily a matter for the States and Territories, considerable consultation with those Governments is necessary before a decision to withdraw the reservation can be made.[176]

It has been seven years since that comment was made. The reservation should be immediately withdrawn.

Ensuring young people are held in conditions which take account of their age-specific needs

The Convention on the Rights of the Child establishes that every child deprived of their liberty must be treated with humanity and in a manner that takes into account the needs of a person of that age. Article 37(a) of the Convention on the Rights of the Child reinforces the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment contained in several other international human rights treaties to which Australia is a party.[177]

In the course of this research, Amnesty International was told by representatives of the Indigenous legal services in the Northern Territory that, based on their observations, conditions under which young people are detained in the Northern Territory do not comply with the obligations under the Convention and other international standards.[178]

Amnesty International heard concerns about the Alice Springs Youth Detention Centre, where young people are only separated from the adult prisoners by an opaque fence (previously only a wire fence). Given the lack of visitor space, young people have to be taken to the visiting block at the adult prison to speak with visitors and are handcuffed on their way to and from the visiting block.[179]

All of the young people in detention in Darwin were transferred to a dilapidated former adult facility at Berrimah on 23 December 2014.[180] The previous government had planned to demolish this facility because it was old, in a poor state of repair and had an "inappropriate and outdated design."[181] Legal representatives told Amnesty International that they do not think it is appropriate for young people.[182] All the adult prisoners were transferred to a new adult facility prior to the transfer of the young people.

Whatever the operational needs, you can't put kids into a prison that was closed because it was too old and rundown to meet the needs of adults.

John Patterson, CEO, Aboriginal Medical Services Alliance Northern Territory[183]

A review into youth detention centres in the Northern Territory was conducted by the CEO of the New South Wales Juvenile Justice Michael Vita, who was seconded to the Northern Territory for this purpose. Mr Vita made a series of recommendations about things that should occur prior to the transfer of young people to the Berrimah facility.[184]

Among other things, Mr Vita had recommended that renovations be completed before the juveniles enter the facility. Legal representatives advise that renovations had not been completed prior to the transfer of young people to the Berrimah prison.

Available information about the conditions in the Northern Territory youth detention facilities reinforces the recommendation of the Committee on the Rights of the Child regarding the need for "an effective mechanism for investigating and addressing cases of abuse at [Australia's] youth detention centres."[185]

The Optional Protocol to the Convention Against Torture provides an avenue for doing so. Under it, States Parties are required to establish an independent National Preventive Mechanism to conduct inspections of all places of detention. It also provides a mechanism for Australia to give the sub-committee on Prevention of Torture permission to conduct inspections of places of detention.[186] This would apply to youth detention facilities and other places where young people are deprived of their liberty. This is necessary because Western Australia and New South Wales are the only jurisdictions with an independent inspector of custodial services that publicly reports on and makes recommendations in relation to conditions of detention and incidents that occur.[187]

Although Australia signed the Optional Protocol to the Convention Against Torture in 2009, the Parliamentary Joint Standing Committee on Treaties recommended in 2012 that Australia ratify the Optional Protocol to the Convention Against Torture (OPCAT) and establish a National Preventative Mechanism (NPM) as soon as possible without deferral. The Australian Government has not yet acceded to it.[188] In light of ongoing concerns with conditions under which young people are held in detention, Amnesty International calls on the Australian Government to ratify the OPCAT immediately and establish an NPM as soon as possible.

The Third Optional Protocol on the Convention on the Rights of the Child

In April 2014, the Third Optional Protocol to the Convention on the Rights of the Child came into force for the States Parties that had ratified it.[189] It establishes an individual complaints mechanism for children, or their representatives, to make complaints about alleged violations of their rights under the Convention on the Rights of the Child.[190]

This means that young people in those states have an international mechanism to appeal to when national remedies do not exist or are ineffective. The Optional Protocol also enables the Committee to launch investigations into grave or systematic violations of children's rights.[191]

During the consideration of the fourth periodic review of Australia before the Committee on the Rights of the Child in 2012, the Committee encouraged Australia to sign and ratify the Optional Protocol "in order to further strengthen the fulfillment of children's rights" in Australia.[192] The Australian Government has yet to sign or ratify it. The Australian Government should accede to the Third Optional Protocol.

In order to protect the right of Indigenous young people to be heard in criminal proceedings affecting them, the Committee on the Rights of the Child has outlined that "States parties should adopt measures to ensure that … the child is guaranteed legal assistance, in a culturally sensitive manner."[193] The Royal Commission into Aboriginal Deaths in Custody recommended that, to break the cycle of youth offending, Indigenous legal services should "be funded to such extent as will enable an adequate level of legal representation and advice to Aboriginal juveniles."[194]

Inadequate funding of Indigenous legal services, cuts and funding uncertainty are undermining the provision of culturally-sensitive legal assistance for Indigenous young people.

The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) provide specialised, culturally-tailored services for Indigenous Australians.[195] These services were established by Indigenous people to address the barriers Indigenous people have historically faced, and continue to face, in engaging with the Australian legal system.[196]

The ATSILS and FVPLS play specialised complementary roles in ensuring access to justice for Indigenous people. The complementary nature of the work undertaken by the two Indigenous legal services has been recognised by the Australian Government's independent research and advisory body, the Productivity Commission.[197] ATSILS focus on criminal and civil law needs, while the FVPLS specialise in helping victims of family violence with legal and other assistance, which most often means Indigenous women, children and young people.[198] Further, the FVPLS often represent clients that the ATSILS are unable to represent because they are representing the alleged perpetrator of family violence.[199]

Unmet legal need

Funding to the ATSILS and FVPLS is provided almost exclusively by the Australian Government, rather than the State or Territory Governments.[200] Numerous previous parliamentary inquiries have concluded that both of these Indigenous legal services are significantly underfunded.[201] On 3 December 2014, the Productivity Commission released the report of its major inquiry into access to justice. The report confirmed that there is significant unmet legal need among Indigenous Australians. It further noted that combined real funding per person for these two services has "declined by about 20 per cent between 2000–01 and 2010–11".[202] The Productivity Commission noted that the "inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system."[203] The Chair of the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), the peak body and secretariat for the ATSILS, told Amnesty International that the current inadequacy of funding inhibits access to justice, particularly for those young people in remote areas, due to the high costs of contesting a charge.[204]

The Productivity Commission found that the distinctive needs and service delivery challenges presented by cross cultural issues, remoteness and language barriers of many Indigenous people necessitate the "continuation of specialised Indigenous specific legal assistance services" provided by the ATSILS and FVPLS. The Productivity Commission further highlighted that additional resources are needed to meet unmet legal need,[205] and that funding uncertainty has affected these services for too long.[206] The Productivity Commission highlighted that "[es]timating the size of the additional funding required to ameliorate unmet need is highly problematic given the paucity of data."[207] However it recommended that an additional $200 million be invested across the legal sector to both Indigenous and non-Indigenous legal aid providers to address unmet need.[208]

In 2010, the Committee for the Elimination of Racial Discrimination encouraged Australia to:

> increase funding for Aboriginal legal aid in real terms, as a reflection of its recognition of the essential role that professional and culturally appropriate indigenous legal and interpretive services play within the criminal justice system.[209]

Indigenous legal aid funding cuts

On 26 March 2015, the Australian Government reversed previously announced funding cuts to the state and territory based Aboriginal and Torres Strait Islander Legal Services, meaning that they will continue on their current funding for the remainder of the existing two year funding cycle.[210] However, NATSILS, the national peak body, will be completely defunded from mid-2015 and will likely cease to operate.

The defunding of the national peak body is likely to significantly impact on the ATSILS due to the key role NATSILS plays in policy direction and capability building. The Productivity Commission, in their report on access to justice, observed that "the expertise of ATSILS staff in giving a voice for Aboriginal people and helping to avoid unintended consequences is … demonstrated by requests for them to participate on consultative panels, steering groups and in commenting on draft legislation."[211] The ability of ATSILS to do this work will be undermined by the loss of the managing and coordinating role of the NATSILS in responding to these requests. This may lead to an increased rate of over-representation of Indigenous young people in the justice system and in detention, because the unintended and disproportionate impacts of existing and proposed laws may go unidentified.[212]

No guarantee of future funding for Family Violence Prevention Legal Services

The Riyadh Guidelines provide that governments "should establish policies that are conducive to the bringing up of children in stable and settled family environment."[213] The role of the FVPLS in preventing family violence is essential to improving community safety. It also stops many matters from escalating into criminal justice issues.[214] As noted above, legal representatives told Amnesty International that girls coming into contact with the system are often victims of family violence, which has escalated to the extent that the young women have reacted with violence. Prevention of this escalation is a key element of what the Family Violence Prevention Legal Services work towards.

Further, there is a widely recognised link between family violence, out of home care for children, homelessness and youth offending.[215] Through the delivery of programs that address family violence, the FVPLS play a role in preventing homelessness and the involvement of child protection workers. The Indigenous Legal Needs Project (ILNP), coordinated by James Cook University and involving 12 project partners,[216] is a national research initiative directed towards identifying unmet civil legal need among Indigenous Australians. The ILNP has identified that the breakdown in family ties resulting from removal of young people under care and protection orders is a risk factor for offending among those young people.[217] The Productivity Commission report notes that an increase in child protection orders, caused by inadequate funding for services such as the FVPLS, "may ultimately lead to higher levels of juvenile detention."[218]

Under the 'Indigenous Advancement Strategy', the new Australian Government funding guidelines, the FVPLS are "no longer recognised as a stand-alone program or as a core service model that provides frontline legal assistance."[219] The FVPLS are instead subject to competitive tendering with all those seeking funds under the broad heading of 'Safety and Wellbeing Programmes' alongside health, welfare and other service providers.[220]

The FVPLS heard on 5 March 2015 that their current funding levels, previously uncertain beyond 30 June 2015, will be maintained. This announcement was met with great relief as many FVPLS offices were going to have to close their doors on 30 June 2015.[221] However, for 60 per cent of the FVPLS centres, the funding is only for one year (to 30 June 2016); the remainder for three years. No rationale has been given for only one year of funding having been provided for 60 per cent of the centres.[222] Due to identified levels of unmet legal need and no guarantee of funding beyond mid-2016 in most cases, the future remains highly uncertain for these crucial services.

Consequence of inadequate funding, cuts to NATSILS and FVPLS funding uncertainty

Australia is obliged under Article 14(3)(d) of the International Covenant on Civil and Political Rights to provide legal assistance to a person in any criminal case where the interests of justice require it and where the person does not have sufficient means to pay for such assistance. Therefore, the burden of justifying *any* cuts that impact significantly on the provision of legal aid falls on the government including whether all feasible alternatives have been considered. This is particularly the case with respect to young people, whom the Committee has noted require special protection.

While the reversal of many of the announced ATSILS cuts is welcome, the rights of Indigenous young people to access to justice and to be heard will be affected by NATSILS funding cuts and ongoing FVPLS funding uncertainty in a context where existing funding for Indigenous legal services has been widely acknowledged as currently inadequate.

Relevant data relating to contact with the youth justice system is not consistent between states and territories. This means there are gaps in available information that would assist policy makers to respond to the over-representation of Indigenous young people in detention. The Australian Government has an important role to play in coordinating standard and disaggregated data collection and publication across jurisdictions, so that evidenced-based solutions for reducing the high rates of Indigenous youth detention can be devised. In its 2012 Concluding Observations, the Committee on the Rights of the Child reiterated its recommendation, first made in 2005, that Australia:

> strengthen its existing mechanisms of data collection in order to ensure that data are collected on all areas of the Convention in a way that allows for disaggregation, inter alia by children in situations that require special protection. In that light, the Committee specifically recommends that the data cover all children below the age of 18 years and pay particular attention to ethnicity, sex, disability, socio-economic status and geographic location. [223]

The Committee on the Elimination of Racial Discrimination has noted that appraisals of the need for special measures should be carried out on the basis of accurate data, which should be disaggregated on characteristics including Indigenous status, gender, and socio-economic status.[224] The Australian Government House of Representative Standing Committee report into the high rates of Indigenous youth contact with the justice system found that:

> there are many gaps in the information available that can assist in coordinating strategies to reduce Indigenous youth offending and contact with the criminal justice system.[225]

As identified in the 2014 Overcoming Indigenous Disadvantage report, "nationally comparable data on youth diversions by Indigenous status is a key data gap."[226] Further gaps are outlined below in relation to the Australian Institute of Health and Welfare's (AIHW) youth justice research and the Juvenile Justice National Minimum Data set (JJ NMDS).[227]

Amnesty International notes that efforts are being made, with leadership by the Australian Juvenile Justice Administrators (AJJA), to improve data collection and use.[228] However, more work needs to be done to improve collection and to better coordinate and make use of available data across Australian states and territories in order to better target efforts to reduce Indigenous youth over-representation in the justice system.

One avenue through which improvements can occur is the JJ NMDS, which is a joint project between the AJJA and the AIHW. The main aim of the JJ NMDS is to bring together state and territory juvenile justice data into a national data set that can "facilitate comparison of juvenile justice policies across states and territories."[229] The Productivity Commission also relies on the JJ NMDS for "consistency across jurisdictions" in its annual report on government services and its triennial Overcoming Indigenous Disadvantage reports.'[230]

The AIHW provides information on youth justice supervision and detention in Australia using JJ NMDS data. It is used to consider trends for Indigenous youth specifically and common pathways through the youth justice system. There are, however, limitations in what data is made available under the JJ NMDS. These limitations should urgently be addressed to improve understanding of pathways through the youth detention system and understanding of patterns of reoffending. For example the JJ NMDS data does not include state and territory data on police diversions, nor does it incorporate data on arrests or unsupervised court orders.[231] The data is also not linked to information on adult contact with the justice system, so it is difficult to track rates of recidivism as a longer term trend through entry of young people into the adult system.

The AIHW recently noted that integrating the above data "would allow for a more informed analysis of recidivism."[232] The AIHW has also noted that existing national data collection on child protection is currently collected in a format which makes it "unsuitable for linkage" with youth justice system data. Promisingly, however, the AIHW notes that, with the support of the states and territories, it is involved in a project to link child protection data to youth justice and other data collections, such as data on homelessness.[233]

Another problem is that both the Western Australian and the Northern Territory governments have failed to provide JJ NMDS data since 2008–09.[234] This has undermined the quality of national information and the ability to identify trends in youth justice pathways, as a big piece of the national picture is missing.[235] The Australian Government should work with the Western Australian and the Northern Territory governments – the two jurisdictions with the highest rates of Indigenous young people in detention – to ensure they contribute to the JJ NMDS.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into Indigenous youth contact with the justice system noted that "an area that would benefit from further study and collection of data is a geospatial comparison (or visual representation by geographic area) of offending and offenders correlated with the state of community services and resources."[236]

Consistent with the comments and recommendations by different international human rights mechanisms, the Australian Government must take a lead role to improve data collection across states and territories. Standardised and disaggregated data is essential to implement evidenced-based solutions and to better monitor the compliance with Australia's human rights obligations towards Indigenous young people. Such data would allow the identification of areas where the juvenile justice system is working well and where it is failing, so that further questions can be asked about why and action can be taken to make the necessary improvements.

The improved collection of relevant data will facilitate informed decisions about how resources are best allocated to design and implement special and concrete measures to ensure that the best interests of Indigenous young people are adequately protected. It will aid the Australian Government to monitor and address any indirect discrimination in the effect of youth justice laws, policies and programs relating to Indigenous youth. It will further assist in monitoring progress against such targets as are developed to address the over-representation of Indigenous young people in the justice system and as victims of violence.

Photo © Ingetje Tadros

Although criminal justice law and policy is primarily the responsibility of the states and territories, the Australian Government currently plays a role in promoting "policy reforms that are of national significance, or which need coordinated action by all Australian governments."[237] COAG provides a mechanism through which the Australian Government can work with the state and territory governments to improve the coordinated collection and use of data to reform the youth justice system in conformity with international standards.[238]

COAG has agreed to a strategy and specific timeframes for achieving six 'Closing the Gap' targets, relating to Indigenous life expectancy, infant mortality, early childhood development, education and employment.

Amnesty International heard from Indigenous health experts, working with the Australian Indigenous Doctors Association and the National Indigenous Drug and Alcohol Council, that Closing the Gap targets have improved data collection, coordination, and tracking of efforts to address Indigenous disadvantage across all states and territories.[239]

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda, in his annual Social Justice and Native Title report, recently noted that Closing the Gap targets:

> encourage policy makers to focus on outputs and outcomes, rather than just inputs. It is not enough for governments to continue to report on what they do and spend, especially if that appears to be making little positive difference. Targets move us towards accountability and ensure that tax payer's money is being spent in a results-focused way.
>
> Of course, it is not the targets in and of themselves that have led to changes but the enhanced level of cooperation at the Council of Australian Governments level and targeted increases in funding. However, without the targets in place to guide this work, and a mechanism whereby the Prime Minister annually reports to Parliament against these targets, there is a real risk that our progress would stall.
>
> …Targets have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians visible. This is exactly what needs to happen on the issue of over-representation [within] the criminal justice system as victims and offenders.[240]

Between 2009 and 2011 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs conducted an inquiry into the over-representation of Indigenous young people in the justice system. The committee received 110 submissions, including from Indigenous legal services, youth advocates, members of the judiciary, academics and government departments. The committee also held 17 public hearings across the country in capital cities and regional and remote towns. The Standing Committee found that while the states and territories are primarily responsible for developing and administering criminal justice policy:

> a national approach is required to address the causes of young Indigenous people coming into contact with the criminal justice system. Overcoming Indigenous disadvantage is both a national responsibility and a significant national challenge … Currently this national approach is represented by the [COAG's] Closing the Gap program of generational change … Indigenous rates of offending, incarceration, recidivism and victimisation are alarming. It is essential that reducing these rates is realised as a national target, and that the appropriate agreement is in place to direct coordination across levels of government to most effectively target intervention strategies.[241]

The Standing Committee recommended that targets be developed as a part of the solution to address the over-representation of Indigenous young people in the justice system:

> The Committee recommends that the Commonwealth Government endorse justice targets developed by the Standing Committee of Attorneys-General for inclusion in the Council of Australian Governments' Closing the Gap strategy. These targets should then be monitored and reported against.[242]

Australian Government, state and territory Attorneys-General further "discussed the unacceptable rates of incarceration of Indigenous Australians" and the aforementioned report of the Standing Committee in July 2011. The Standing Committee of Attorneys-General agreed in July 2011:

- To significantly reduce the gap in Indigenous offending and victimisation and to accurately track and review progress with a view to reviewing the level of effort required to achieve outcomes.
- To ask First Ministers to refer to COAG the possible adoption of justice-specific Indigenous Closing the Gap targets, acknowledging that in many instances their relative occurrence are due to variable factors outside the justice system.[243]

However, in the time since then, no plan or targets have been adopted. On 19 November 2014 the Australian Government's Minister for Indigenous Affairs Nigel Scullion, after having previously expressed support for them, said his government would not be committing to a justice target as part of the Closing the Gap framework.[244] Minister Scullion said that many of the people "who are incarcerated are incarcerated because of circumstances invariably involved with alcohol and violence" against other Aboriginal people:

> So we think that, by action rather than targets, we can change … the circumstances that people find themselves in where they are so disconnected that they self-medicate, particularly with alcohol, and then lash out at their own families and their own communities. We need to engage them.[245]

National Aboriginal and Torres Strait Islander Legal Services (NATSILS) Chairperson, Shane Duffy responded to this announcement by saying that:

> One of the glaring omissions in the original Closing the Gap targets developed in 2008 was that of over-imprisonment, and the Commonwealth Government needs to accept that without tackling incarceration rates, the ability of all Australian governments to achieve the other existing targets is in serious jeopardy.
>
> Reducing incarceration rates is going to take commitment, action and coordination from all Australian governments, and the Commonwealth Government and the Minister for indigenous Affairs in particular, need to stand up and show some leadership on this issue.[246]

The National Congress of Australia's First Peoples (Congress),[247] an Indigenous representative organisation with members across all states and territories, has also consistently called for justice targets to be included in the Closing the Gap strategy. Congress has proposed that such targets be set to:

> halve the gap in the rates of incarceration for Aboriginal and Torres Strait Islander people [and] halve the rate at which Aboriginal and Torres Strait Islander people report having experienced physical or threatened violence within the past 12 months.[248]

The Aboriginal and Torres Strait Islander Social Justice Commissioner's 2014 report also includes a recommendation that:

> The Australian Government revises its current position on targets as part of Closing the Gap, to include holistic justice targets aimed at promoting safer communities.[249]

The Committee on the Rights of the Child has noted that States are required to actively identify "groups of children whose rights may demand special measures."[250] The Committee highlights the need for disaggregated data collection to identify existing and potential areas of discrimination of Indigenous children and implement appropriate positive measures through legislation, resource allocation, policies and programs.[251] COAG is the primary mechanism through which coordinated action across all states and territories in Australia can be taken to do so.

The Australian Government should reverse its decision on justice targets for inclusion in the Closing the Gap strategy and immediately begin a process to develop targets to reduce indigenous youth over-representation in detention. Targets should be developed in consultation with Indigenous peoples and organisations.

Coordinated data, across states and territories can inform progress against a target to close the gap in Indigenous youth detention. Data must be analysed to identify existing discrepancies, then the reasons for the discrepancies must be researched and understood. Possible solutions to close the gap should be devised in light of the improved collection and use of this information. Relevant sub-indicators that can contribute to an improved understanding are outlined in Recommendation 9.

In its most recent concluding observations of 2010, the Committee for the Elimination of Racial Discrimination recommended that Australia "dedicate sufficient resources to address the social and economic factors underpinning indigenous contact with the criminal justice system."[252] The Committee specifically encouraged Australia to adopt 'a justice reinvestment strategy' in order to do so.[253]

Justice reinvestment is an approach to addressing expanding prison populations through investment in communities. It is premised on the fact that it is possible to identify, by analysing data, which communities produce large numbers of offenders, and to strategically use that information to guide investment in community programs to most effectively reduce imprisonment numbers.[254] The approach was developed in the United States "as a means of curbing spending on corrections and reinvesting savings from this reduced spending in strategies that can decrease crime and strengthen neighbourhoods."[255]

In his most recent Social Justice Report, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda recommended that "the Australian Government takes a leadership role on Justice Reinvestment."[256] Mr Gooda further noted that:

> Justice reinvestment is a powerful crime prevention strategy that can help create safer communities by investing in evidence based prevention and treatment programs. Justice reinvestment looks beyond offenders to the needs of victims and communities.
>
> …While justice reinvestment approaches vary depending on the needs of communities, justice reinvestment does have a consistent methodology around analysis and mapping. This work is the basis for the justice reinvestment plan.[257]

In their inquiry into Indigenous youth over-representation in the justice system the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs said that it:

> supports the principles of justice reinvestment and recommends that governments focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate the justice reinvestment approach in Australia.[258]

The Australian Government initially accepted the above recommendation by tasking a working group of National Justice Chief Executive Officers to consider justice reinvestment.[259] That group finalised a report in November 2011.[260] A subsequent Australian Government Senate Inquiry was held into the value of a justice reinvestment approach. The Senate Standing Committee on Legal and Constitutional Affairs finalised a report on the value of a justice reinvestment approach to criminal justice in Australia in 2013.[261] In it, the Senate Committee recommended that the Australian Government "take a leading role in identifying the data required to implement a justice reinvestment approach and establish a national approach to the data collection of justice indicators."[262]

There has been no official response to the Senate Committee report by the Australian Government.[263] However, a minority report was prepared by Senators of the Liberal/National Coalition, which is now in Government. In the minority report, Coalition Senators said that, while justice reinvestment "holds great appeal", they could not endorse the recommendation, including because the "criminal justice system (for the most part) and the prison system (in its entirety) are the responsibility of the states and territories, not the Commonwealth … The fact is that the cockpit for implementation and reform on [justice reinvestment] is the states and territories, not the Commonwealth."[264] This position is at odds with the international legal obligations agreed to by the Australian Government which, notwithstanding the federal structure, place an onus on the Australian Government to address human rights issues. The Committee on the Rights of the Child has emphasised that a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings and that States Parties should fully integrate into their comprehensive national policy for juvenile justice the United Nations Guidelines for the Prevention of Juvenile Delinquency.[265] A justice reinvestment approach is focussed on prevention of youth offending by addressing the underlying causes and could underpin such a comprehensive national policy, led by the Australian Government.

In 2013/14 around $409 million was spent on the costs of detaining young people in Australia, up from $399 million two years prior.[266] This translates to over $1200 dollars per day or $440,000 per year for each young person in detention on an average day.[267]

The 2014 Productivity Commission report on Overcoming Indigenous Disadvantage noted that "addressing over-representation of Aboriginal and Torres Strait Islander Australians in … youth detention requires testing new approaches."[268] It specifically identified justice reinvestment as an approach that has been shown to work and which should be trialled in Australia.[269]

The coordinated collection and availability of data is essential for identifying areas of focus under a justice reinvestment approach. As noted above, Amnesty International recommends that the Australian Government take a lead on coordinating the collection of such data through COAG.

The need to support Indigenous community-led and designed initiatives

While political leadership, bipartisan support and law reform are essential elements of justice reinvestment, so too are "localism, community control and better cooperation between local services."[270] While justice reinvestment appears to have been successful in a number of US states, some have expressed concern that, in practice, it has often been a top-down, law reform oriented approach.[271] Amnesty International considers that, consistent with international standards, a justice reinvestment approach must be rolled out in a way that involves Indigenous people in making decisions and that it is inclusive of Indigenous-led and designed programs (and those delivered in partnership with Indigenous communities).

The Committee on the Rights of the Child has said that States Parties should support the development of community-based programs and services that consider the needs and culture of Indigenous children, their families and communities.[272] The UN Expert Mechanism on the Rights of Indigenous Peoples recently prepared a study on access to justice which recommended that:

> States should work with indigenous peoples to develop alternatives for indigenous children in conflict with the law, including the design and implementation of culturally appropriate juvenile justice services and the use of restorative justice approaches … including restorative justice and indigenous juridical systems.[273]

Article 5 of the Declaration on the Rights of Indigenous Peoples, provides that states must consult and cooperate with Indigenous Peoples and their representative institutions in order to obtain their free, prior and informed consent before implementing laws

and policies that may affect them. This approach is also echoed in a recommendation made in the national report of the Royal Commission into Aboriginal Deaths in Custody.[274] The National Report of the Royal Commission recognised that the relationship young Indigenous people have with their family and community is crucial to their empowerment. The report noted that programs that had community involvement and were sensitive to their cultural needs were more successful and recommended that:

> in the process of negotiating with Indigenous communities and organisations in the devising of Indigenous 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.[275]

Consistent with these findings, justice reinvestment must be rolled out in a way that is community led, rather than top down. This will contribute to ensuring that culturally relevant and effective solutions are available to address the underlying causes of offending such that detention is a measure of last resort for Indigenous young people.

That's the role I see for the justice system: helping young people address trauma and why they are in that situation. We want young people to leave with a positive image of themselves, to have a bright future. It has to be a holistic approach that works with families. It has to be cultural, it has to be therapeutic. And I've seen how that works; and I know it works.

Glenda Kickett , WA Child Protection Advocate and Indigenous Adviser

Amnesty International considers that the work currently being done with philanthropic funding in the town of Bourke in regional NSW to make the case for the adoption of justice reinvestment, is a promising example of a community-led approach.[276]

Too many of my community were being locked up. Kids were being taken away. Families were being shattered, again and again … And this was happening despite the huge amount of money government was channelling through the large number of service organisations in this town.

So we started talking together … We decided that a new way of thinking and doing things needed to be developed that helped our children. We decided it was time for our community to move beyond the existing service delivery model, a model which had clearly failed.

The Maranguka proposal captures this through its clear focus on creating better coordinated support to vulnerable families and children in Bourke.

Alistair Ferguson, Chair of the Bourke Aboriginal Community Working Party[277]

Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, outlines aspects of the story of the Bourke community and the justice reinvestment trial in his most recent Social Justice and Native Title Report:

> The Aboriginal community leadership in Bourke has courageously stepped up to take on the challenge of creating a safer community. The Bourke Aboriginal Community Working Party (BACWP), led by Mr Alistair Ferguson, approached Just Reinvest NSW[278] in October 2012.
>
> They told [Just Reinvest NSW] that they had been working over many years to build the capacity of the Aboriginal community. Based on this work, they felt ready to trial justice reinvestment to try and break the intergenerational cycle of offending and incarceration. One of Bourke's strengths is the established local governance structure.
>
> Since 2002, the BACWP has been the peak representative organisation for the local Aboriginal community. The BACWP includes community members and representatives from 18 different organisations and receives funding from the New South Wales Government. The Bourke Aboriginal leadership has also developed a comprehensive agenda for change. The strategy and structure is called Maranguka, a word from the language of the Ngemba Nation which, when translated into English, carries the meanings of 'to give to the people', 'caring' and 'offering help'. The first priority of Maranguka is to reduce Aboriginal contact with the criminal justice system.
>
> This approach has been successful in establishing funding and in-kind support to commence the justice reinvestment project. Starting in March 2014, for a two-year period, a consortium of partners will work with, and alongside, the Bourke community to develop a watertight social and economic case for justice reinvestment to be implemented in Bourke. The Bourke Community, the champions and supporters of Just Reinvest NSW and others will then take that compelling case for change to the New South Wales Government for response and action.[279]

At a community meeting in the Bourke community in 2012, local Aboriginal community leaders and young people articulated a vision for a more coordinated and community-led approach to problems faced by their community. As part of the initial trial community members have worked with their young people and partners to:

- distribute information about justice reinvestment across the community
- establish a data hub, for better coordination and use of New South Wales Government data
- worked towards building a common agenda across organisations in Bourke to better share resources
- map the services that are provided in the community and consider how resources can be better used and identify overlapping services.[280]

Their aim is that, when the two year project is complete, the community will have assembled enough evidence to enable a case for justice reinvestment to be put to the New South Wales Government. The plan is to identify savings under the existing arrangement and, from savings, outline where re-investment could improve justice system outcomes for young people. The project is seeking to simultaneously tackle some initial issues that contribute to young peoples' involvement with the justice system in partnership with the police. This has included work to establish a driver's license program and a program to support people not to breach bail conditions.[281] They are also setting up a warrant clinic to assist young people who have committed less serious offences to stay out of remand.[282]

The Australian Government should work with the states and territory governments to ensure that community-designed and led solutions are embedded in a coordinated COAG approach to the implementation of justice reinvestment in Australia.

FASD is an umbrella term used to describe a range of impacts caused by exposure to alcohol in the womb.[283] The consequences vary along a spectrum of disabilities including: physical, cognitive, intellectual, learning, behavioural, social and executive functioning disabilities, and problems with communication, motor skills, attention and memory.[284] The condition falls within the definition of disability set out in the Convention on the Rights of Persons with Disabilities "those who have long-term physical, mental, intellectual or sensory impairments, which … may hinder their full and effective participation in society on an equal basis with others."[285]

In many cases the damage is not physically apparent "but can manifest itself in lifelong learning difficulties and cognitive impairment."[286] The seriousness of disability varies from one child to another along a continuum. The Standing Committee inquiry into over-representation of Indigenous young people in the justice system "received compelling evidence on the issue of [FASD] and their links with offending behavior."[287]

The First Peoples' Disability Network, an Indigenous controlled network of people with disabilities, has noted that in the experience of its members "it is not uncommon to meet Aboriginal people who are either in jail or are in contact with the justice system who it would appear have some form of FASD."[288] Western Australian Children's Court Magistrate Catherine Crawford recently noted there is an "increasing … suspicion that a significant proportion of repeat offenders in the juvenile justice system may be FASD affected."[289] The two Northern Territory based Aboriginal Legal Services recently noted that because FASD often goes unidentified, many defendants in the criminal justice system do not receive the support they need to find their way out of the system.[290]

Due to the lack of an official FASD diagnostic tool, little reliable information is available about the prevalence of FASD. However, a study released in 2015 on the prevalence of FASD in the Fitzroy Valley, which made use of an unofficial diagnostic tool, improves the situation.[291] The study, by the Lililwan Project, was initiated and led by the local Aboriginal community and conducted in a partnership between Nindilingarri Cultural Health Services, Marninwarntikura Woman's Resource Centre, the George Institute for Global Health and the Discipline of Paediatrics and Child Health at The University of Sydney Medical School.[292]

The study involved mothers from the Fitzroy Valley who gave birth to a child in 2002 or 2003. The results show that one in eight children born in those years have fetal alcohol syndrome (FAS) or partial FAS, which are at the most severe end of the FASD spectrum.[293] Around 90 per cent of the Fitzroy Valley population is Indigenous[294] and 95 per cent of mothers involved in the study were Indigenous.[295] The study is the first population-based prevalence study about FASD in Australia and the first to provide accurate data on the prevalence of FASD in a remote Australian community.[296] The study highlights that FASD prevention programs and adequately-resourced mental health, drug and alcohol services are urgently needed to address the prevalence of FASD.[297]

Community-led FASD programs

Amnesty International heard from Indigenous organisations, in particular in the Kimberley in Western Australia, about impressive community-driven responses to FASD and trauma, based around healing, peer support, cultural resilience, therapeutic interventions and alcohol supply reduction. Indigenous women have played a particularly strong role in driving and shaping these responses and should be further supported to do so.[298]

Indigenous organisations emphasise that community-designed and led programs must be better resourced so that those affected by FASD can be treated well before their behaviour becomes a criminal justice issue.[299]

Recognition of FASD as a disability

A recent Australian Government House of Representatives inquiry into FASD noted that:

> it is likely that young people with FASD who do not receive adequate support and management in care will become adults who continue to rely on social services through life, even when they achieve a level of success. Many will become involved in the criminal justice system.
>
> Individuals with FASD who come into contact with the criminal justice system may not have their disabilities taken into account by judicial officers.[300]

The inquiry recommended, among other things, that the Australian Government include FASD in its Commonwealth Department of Social Services' List of Recognised Disabilities, which would make carers of a person under 16 with a FASD diagnosis immediately eligible for Carer Allowance.[301]

The First Peoples' Disability Network, Indigenous community-controlled health and wellbeing services and other experts are also calling for FASD to be recognised as a disability in order that those experiencing FASD can access disability support services, in particular to ensure eligibility for Carer Allowance and funding under the National Disability Insurance Scheme.[302]

Diagnosis

Diagnosis of FASD is important in order for it to be treated as a disability and for the adoption of appropriate strategies to prevent those living with FASD from coming into contact with the justice system. It is also essential to ensure those FASD-affected individuals who are prosecuted for criminal offences, are guaranteed a fair trial. The Committee on the Rights of the Child notes that the setting and conduct of court proceedings must take into account the child's intellectual and emotional capacity.[303] The Convention requires alternatives to detention be in place that are appropriate to the wellbeing of the child and proportionate to their circumstances. The Convention on the Rights of Persons with Disabilities provides that there is a particular need for diagnosis before cases get to court. As Western Australia Children's Court Magistrate Catherine Crawford explains:

> Unless there is evidence that the accused has FASD the court is unable to take that into account in determining sentence. Courts need evidence of impairment, and the connection between the impairment and the offending in order to take it into account in sentence.[304]

The process currently used for diagnosis is problematic. For example, the Aboriginal Legal Service of Western Australia have noted that demonstrating that a young person is affected by FASD is complex, time consuming and can lead to young people being held in detention on remand, for longer than they would otherwise be, awaiting a diagnosis due to a lack of suitable alternative accommodation (see Chapter 10).[305] This is contrary to the obligation that detention "before trial shall be avoided to the extent possible and limited to exceptional circumstances."[306]

NAAJA and CAALAS recently highlighted that "urgent steps are needed to improve diagnostic capacity [for FASD] within the criminal justice system."[307] The Committee on Persons with Disabilities, in its 2013 Concluding Observations, recommended that Australia, as a matter of urgency:

> End the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with disabilities.[308]

National FASD Action Plan

In July 2014, the Australian Government announced $9.2 million dollars to fund the National FASD Action Plan. The plan includes money to finalise and disseminate a FASD diagnostic tool, which the Assistant Minister for Health has said will be concluded in 2015.[309] It also includes funding for a mother and babies services program, FASD research grants, and resources to help doctors and other health professionals to promote abstention from alcohol while pregnant.[310] The National Plan foreshadows "looking at targeted measures to prevent and manage FASD in Indigenous and other communities."[311]

Amnesty International welcomes these steps by the Australian Government, but notes that the plan does not include any undertaking or steps to recognise FASD as a disability as a means to facilitate improved care and does not include a budgetary allocation to assist Indigenous young people and their families, or young people generally, who are at risk of contact with or already enmeshed in the justice system.

Amnesty International considers that recognition of FASD as a disability, improved diagnostic capacity, and the allocation of resources to community-designed and led programs for Indigenous young people with FASD and their families are essential to address the over-representation of Indigenous young people in the justice system. This is consistent with Article 25(b) of the Convention on the Rights of Persons with Disabilities, which provides that States Parties must provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate.[312]

International human rights standards require that detention for persons awaiting trial must be the exception rather than the rule.[313] Detention pending trial must be based on an individualised determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as "to prevent flight, interference with evidence or the recurrence of crime."[314]

Between June 2013 and June 2014 Indigenous young people were 23 times more likely to be in unsentenced detention on a per capita basis.[315] Young people are held in unsentenced detention if they have been refused bail awaiting trial or sentencing. An Australian Institute of Criminology study from 2011 noted that, across Australia, the proportion of Indigenous juveniles in detention who were on remand has increased from 32.8 per cent at 30 June 1994 to 55.1 per cent at 30 June 2008.[316] The proportion is now higher again. On average 58 per cent (250 out of 420) of all Indigenous young people in detention from June 2013 to June 2014 were unsentenced.[317]

While it varies between states and territories, bail can be refused after a young person is "arrested by police in relation to a suspected criminal offence, before entering a plea, while awaiting trial, during trial or awaiting sentence."[318] Refusal of bail and detention on remand can occur for a range of reasons, including due to breach of conditions of bail, lack of suitable accommodation options, the lack of a responsible adult, the seriousness of offending or due to the unlikelihood of the accused appearing in court.

Amnesty International concurs with the authors of an Australian Institute of Criminology report into bail and remand of young people that "minimising the unnecessary use of remand is important given the obligations Australia has … to use youth detention of any kind as a last resort only."[319]

There are a range of state and territory laws and police practices that appear to contribute to the rate at which Indigenous young people are held in detention on remand.[320] It is beyond the scope of this national overview to consider these laws in detail (see, however, the concurrently released Amnesty International report on Western Australia).[321]

Amnesty International considers that the Federal Government has a clear role to play in ensuring that Indigenous young people are not held in detention on remand solely due to homelessness, or a lack of suitable accommodation and support to comply with bail conditions. These are factors that have been "raised repeatedly in the literature as key factors underpinning rises in custodial remand."[322]

The lack of suitable accommodation has been identified as an issue "likely to impact more on particular groups of young people, including young people from regional, rural and remote areas … and by extension, Indigenous young people.[323] The Australian Government Standing Committee report on the high rates of Indigenous youth involvement in the justice system noted that "the single biggest factor in being unable to comply with bail conditions is the lack of appropriate accommodation available to young offenders whilst they are awaiting sentencing."[324]

In the course of our research in Western Australia and preliminary research in Queensland and the Northern Territory, Amnesty International heard that a lack of suitable supervised bail accommodation is a significant issue that impacts on the high rates of remand of Indigenous young people.[325] These three jurisdictions had the highest rates of Indigenous youth in unsentenced detention in 2013/14 and each exceeded the national average rate of detention on remand for Indigenous young people.[326] Consistent with the findings of a number of recent reports and inquiries,[327] Amnesty International also heard that a lack of suitable accommodation impacts heavily on young people in out-of-home care,[328] and those with mental health issues, because there are limited accommodation options with sufficient supervision for young people with complex needs.[329]

Amnesty International considers that the Federal Government must meet its human rights obligations to ensure that detention of children is a measure of last resort, including through providing funding for suitable supervised bail accommodation and other support services for those with complex needs.

1 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Table s 10: 'Young people in detention aged 10–17 on an average night, states and territories, June quarter 2010 to June quarter 2014 (rate)'. Calculated average based on figures for September quarter 2013 to June quarter 2014 (2013/14 financial year). On average Indigenous young people were in detention at a rate of 34.47 per 10,000 compared to 1.35 per 10,000 for non-Indigenous young people

2 Australian Bureau of Statistics, *Repeat Imprisonment, Australian Social Trends, March Quarter 2010*, p 18: Ten years after release, the re-imprisonment rate for the youngest age group (17-19 year olds) was 61 per cent www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/26D48B9A4B E29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf (accessed 27 March 2015). Overcoming Indigenous disadvantage: *Key indicators 2014*, [4.34]: Nationally in 2011–13, 58.5 per cent of Aboriginal and Torres Strait Islander 20–24-year-olds reported completing year 12 or equivalent or AQF certificate level II or above. www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/ key-indicators-2014/04-key-indicators-2014-chapter4.pdf (accessed 27 March 2015).

3 The Tribal Warrior Mentoring program and Clean Slate Without Prejudice program involve partnership between the Redfern community-led Tribal Warrior Association and the Redfern area local command, for more information see http://tribalwarrior.org/training-and-mentoring/tribal-warrior-mentoring-program/

4 UNICEF, Convention on the Rights of the Child, Frequently Asked Questions.

5 United Nations Declaration on the Rights of Indigenous Peoples, Article 43 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 2 January 2015).

6 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [2.2].

7 AIHW, *Youth Detention Population in Australia 2014*, Table s 10, calculation based on the average over the four quarters (34.47 per 10,000 compared to 1.35 per 10,000 for non-Aboriginal young people). More recent data is not yet available.

8 AIHW, *Youth Detention Population in Australia 2014*, Tables s 2 and s 8: 430 out of 724.

9 Australian Institute of Health and Welfare, *Youth justice in Australia 2012–13*. Bulletin no. 120. Cat. no. AUS 179, Canberra, Table S76b: 'Young people in detention during the year by age, sex and Indigenous status, Australia (excluding WA and NT), 2012–13'. Data not yet available for 2013/14.

10 Australian Bureau of Statistics (ABS) *3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2011, Notes*. www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3238.0.55.001Main+Features1June%202011?OpenDocument (accessed 9 April 2015). ABS *3238.0 – Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026, Summary Australia*, www.abs.gov.au/ausstats/abs@.nsf/Products/C19A0C6E4794A3FACA257CC900143A3D?opendocument (accessed 9 April 2015).

11 National Congress of Australia's First Peoples, *National Justice Policy (February 2013)*, p 13 http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf (accessed 8 April 2015).

12 International law provides that a State cannot plead its federal structure to avoid complying with an international obligation. As a signatory to the Convention on the Rights of the Child and other binding international legal instruments which protect the rights of Indigenous young people, all Australian states and territories are bound by such law. Article 29 of the Vienna Convention on the law of treaties provides that 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory': https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed 10 March 2015).

13 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4 [82] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk5X2w65LgiRF%2fS3dwPS4NXPtJlvMuCI3J9Hn06KCDkN8AgEcc%2bNlwRMULqb84PSI9FicZROAZolAudnAZ3CxmSJw7k%2brD6GQTCcQ8b4gpWq

14 Australian Institute of Criminology, 'The age of criminal responsibility', *Crime facts info no. 106* ISSN 1445-7288 Canberra, 2005. www.aic.gov.au/publications/current%20series/cfi/101-120/cfi106.html (accessed 19 January 2015).

15 Committee on the Rights of the Child, *General Comment No. 10 (2007)* 'Children's rights in juvenile justice', [32], www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (accessed 16 January 2015).

16 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [82].

17 *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)*.

18 *Youth Justice Act 1992 (Qld)*, Schedule 4: 'child means a person who has not turned 17 years.'

19 Committee on the Rights of the Child, *Concluding Observations – Australia* CRC/C/AUS/CO/4 [84.d]

20 *Queensland Youth Justice and Other Legislation Amendment Act 2014*, section 20 amending Pt 8 Div 2A of the Youth Justice Act 1992 (Qld). See also Youth Justice And Other Legislation Amendment Bill, Explanatory Speech by Attorney General Jared Bleijie http://my.lawlex.com.au/default.asp?itid=0&ntid=0&nid=&cid=145503&jurid=&alpha=&alphaid=&ihl=&nhl=&fp=&rdt=&vaftype=&requirelogin=&tab=ind&pact=coredoc&top=exp&nav=col&docview=true&RelDocID=180937

21 *Youth Justice and Other Legislation Amendment Act 2014 (Qld)*, s 9, amending section 150(2)(e) of the *Youth Justice Act 1992 (Qld)* and s 34 which inserts section 9A into the Penalties and Sentences Act 1992 (Qld).

22 United Nations Treaty Collection, 11 Convention on the Rights of the Child, Declarations and Reservations.

23 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [10].

24 Correspondence with youth worker, Central Australian Aboriginal Legal Service (13 June 2014); Correspondence with legal representative, 16 January 2015 (details withheld); Conversation with Eddie Cubillo, NATSILS (2 February 2015).

25 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [84](f). See also Professor Neil Morgan, *What's the point of Independent Inspection Systems? Recent lessons from Western Australia*, www.slideshare.net/informaoz/professor-neil-morgan (accessed 9 February 2015).

26 United Nations Treaty Collection, 9.b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18 December 2002, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9-b&chapter=4&lang=en (accessed 9 February 2015).

27 United Nations Treaty Collection, 11.d Optional Protocol to the Convention on the Rights of the Child on a communications procedure New York, 19 December 2011 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (accessed 13 January 2015).

28 Correspondence with the Victoria Williams, Aboriginal Legal Service of Western Australia (5 February 2015).

29 See Productivity Commission, *Access to Justice Arrangements*, Inquiry report, Volume 2, www.pc.gov.au/__data/assets/pdf_file/0020/145406/access-justice-volume2.pdf (accessed 12 January 2014); 2013 Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index (accessed 12 January 2015); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time For Doing: Indigenous youth in the criminal justice system*, www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm; Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice (2004)*; Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Access to Justice* (2009).

30 Committee on the Elimination of Racial Discrimination, *Concluding Observations – Australia*, CERD/C/AUS/CO/15-17 [19] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoFZxvnsZjtq1Xnb4bcEJClA0kmqJQeV0zdR93%2ffv7%2fBSAkon8Nc2CMTKCBgv25nw5etVi%2bkUMR9abtAFqi1lgW095I%2btkhuhVTozo2kfkhQV78slhAW5U9xPBqn413aeA%3d%3d (accessed 27 March 2015).

31 Attorney-General and Minister assisting the Prime Minister for Women, (Joint media release), 'Legal aid funding assured to support the most vulnerable in our community'. Despite the acknowledged inadequacy of funding, in December 2013 the Australian Government announced $13.34 million in funding cuts to ATSILS around the country. *An update on our services*, Aboriginal Legal Services (NSW/ACT), 14 May 2014, www.alsnswact.org.au/news_items/110 (accessed 12 January 2015).

32 NATSILS media release, 'Government to defund Aboriginal Legal Services Peak Body and all Law Reform and Policy Positions', 17 December 2013, www.natsils.org.au/portals/natsils/Media%20Releases/17-12-13%20NATSILS%20MR%20Govt%20to%20defund%20NATSILS%20and%20all%20ATSILS%20Law%20Reform%20and%20Policy%20Positions.pdf (accessed 14 January 2015).

33 Interview with Alisoun Neville and Ashleigh Crees, National Family Violence Prevention Legal Services Forum (12 December 2014).

34 National Family Violence Prevention Legal Services, *Forum Submission to The Senate Select Committee Into The Abbott Government's Budget Cuts*, August 2014, p 4.

35 Alisoun Neville, National Justice Coalition Steering Committee Meeting (20 March 2014).

36 Meeting with Australian Bureau of Statistics, Canberra (25 February 2015). The Productivity Commission notes in its *Overcoming Indigenous Disadvantage 2014 Report* that the 'Australasian Juvenile Justice Administrators are overseeing several research projects to develop national youth justice policy, research and data capabilities. Current priorities include the development of a linked data collection to report on the relationships between child protection and youth justice, and a recidivism data collection project.

37 Justice Reinvestment is an approach based on analysing data to identify which communities produce large numbers of offenders, and strategically uses that information to invest in community programs to most effectively reduce imprisonment numbers: M Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14 (1) *Australian Indigenous Law Review*, p 2, www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/articles/AILR%2014-1_Melanie%20Schwartz.pdf (accessed 2 January 2015).

38 Committee on the Elimination of Racial Discrimination, *Concluding Observations – Australia*, CERD/C/AUS/CO/15-17, [20] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoFZxvnsZjtq1Xnb4bcEJClA0kmqJQeV0zdR93%2ffv7%2fBSAkon8Nc2CMTKCBgv25nw5etVi%2bkUMR9abtAFqi1lgW095I%2btkhuhVTozo2kfkhQV78slhAW5U9xPBqn413aeA%3d%3d (accessed 2 January 2014).

39 Notes of conversation with Sarah Hopkins, Just Reinvest NSW (2 February 2015); Social Justice Commissioner, *Social Justice and Native Title Report 2014*, 4.2 Justice Reinvestment, p 108, www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf (accessed 12 January 2015), p 110.

40 Aboriginal Legal Service of Western Australia, 'Submission to the Australian Human Rights Commission', *Access to Justice for People with Disability* Issues Paper, April 2013, p 2.

41 The List of Recognised Disabilities were introduced in July 1998 and are used in the assessment of eligibility for Carer Allowance for carers of children under 16 years of age with a disability or medical condition. According to the Department of Corrective Services this is 'an income supplement available to people who provide daily care and attention in a private home to a person with disability or a severe medical condition. Carer Allowance is not taxable or income and assets tested. It can be paid in addition to a social security income support payment. To be eligible for Carer Allowance, a person must be providing daily care and attention to a person with disability or a severe medical condition.' For automatic eligibility for dependent children aged under 16 years the disability must appear on the List of Recognised Disabilities. See www.dss.gov.au/about-the-department/publications-articles/corporate-publications/budget-and-additional-estimates-statements/2005-06-budget/carer-allowance-child-changes-to-the-lists-of-recognised-disabilities (accessed 16 January 2015).

42 Interview with Maureen Carter, Nindiligarri Cultural Health Centre, Fitzroy Crossing, 4 September 2014; Inteview with June Oscar, Marninwarntikura Women's Resource Centre, Fitzroy Crossing, 3 September 2014; Justin Mohamed, 'Calls for FASD to become a disability' (29 May 2014), www.skynews.com.au/news/health/2014/05/29/calls-for-fasd-to-become-a-disability.html.

43 Australian Government, *Responding to the Impact of Fetal Alcohol Spectrum Disorders in Australia: A Commonwealth Action Plan*.

44 Human Rights Committee, General Comment 35 and Article 9 of the ICCPR, [38], United Nations Rules for the Protection of Juveniles Deprived of their Liberty, [17]

45 Australian Institute of Health and Wellbeing, *Youth Detention Population in Australia 2014*, Table s 20: 19.98 per 10,000 Indigenous young people compared to 0.86 per 10,000 non-Indigenous young people.

46 International law provides that a State cannot plead its federal structure to avoid complying with an international obligation. As a signatory to the Convention on the Rights of the Child and other binding international legal instruments which protect the rights of Indigenous young people, all Australian states and territories are bound by such law. Article 29 of the Vienna Convention on the law of treaties provides that 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory': https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed 10 March 2015).

47 The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. Members of COAG are the Prime Minister, state and territory Premiers and Chief Ministers. The Prime Minister chairs COAG and its role is "to promote policy reforms that are of national significance, or which need co-ordinated action by all Australian governments."

48 The National Justice Coalition member organisations include Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda; Aboriginal Commissioner for Children and Young People (Victoria), Andrew Jackomos; National Aboriginal and Torres Strait Islander Legal Services; National Aboriginal Community Controlled Health Organisation; National Congress of Australia's First Peoples; National Family Violence Prevention and Legal Services (FVLPS) Forum; National; First Peoples Disability Network; Sisters Inside; Secretariat of National Aboriginal and Islander Child Care; Amnesty International Australia; Australian Council of Social Service; Australian; Australians for Native Title and Recognition; Federation of Community Legal Centres (Victoria); Human Rights Law Centre; Indigenous Doctor's Association; Law Council of Australia and Oxfam Australia. The National Coalition is Co-Chaired by Ms Kirstie Parker, Co-Chair of the National Congress of Australia's First Peoples; and Mr Shane Duffy, CEO of the National Aboriginal and Torres Strait Islander Legal Services.

49 Parliamentary Questions are used by members of the House of Representatives to ask the relevant Minister about matters of within a Minister's portfolio. Responses must be provided in writing.

50 On 10 August 1987 Prime Minister Hawke announced a Royal Commission to investigate the causes of deaths of Aboriginal people while held in state and territory police custody and gaols. This was in response to a growing public concern that deaths in custody of Aboriginal people were too common, poorly investigated and poorly explained. The Commission's terms of reference enabled it to take account of social, cultural and legal factors which may have had a bearing on the deaths under investigation.

51 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, pp 7 and 8, www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report/fullreport.pdf (accessed 1 October 2014).

52 E Johnson (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 5, Recommendation 62, [14.1] http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol2/113.html (accessed 2 January 2014)

53 E Johnson (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 1, p 6, www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol2/113.html (accessed 2 January 2014).

54 E Johnson (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 5, Recommendation 62, [14.1] http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol2/113.html (accessed 2 January 2014)

55 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [2.2].

56 Australian Bureau of Statistics, *3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2011*, Notes, www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3238.0.55.001Main+Features1June%202011?OpenDocument (accessed 9 April 2015); *ABS 3238.0 - Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026, Summary – Australia*, www.abs.gov.au/ausstats/abs@.nsf/Products/C19A0C6E4794A3FACA257CC900143A3D?opendocument (accessed 9 April 2015).

57 Australian Bureau of Statistics, *ABS 3238.0 - Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026, Summary Australia* http://www.abs.gov.au/ausstats/abs@.nsf/Products/C19A0C6E4794A3FACA257CC900143A3D?opendocument (accessed 9 April 2015).

58 National Congress of Australia's First Peoples, National Justice Policy (February 2013), p 13 http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf (accessed 8 April 2015).

59 Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Tables s 2 and s 8 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549673 (accessed 20 January 2015).

60 Indigenous young people make up an estimated 124,729 of the Australian population aged between 10 and 17 out of a total of 2,141,856 10 to 17 year olds: Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table S31: 'Australian population aged 10–17 by Indigenous status, states and territories, December 2010 to December' www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

61 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Calculation based on Table 2 and Table 8 figures for September quarter 2013 to June quarter 2014: On average 389 of the 433 Indigenous 10-17 year olds in detention were boys. Total figure includes a small number of young people whose Indigenous status is unknown.

62 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 10, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Between the September quarter 2013 and June quarter 2014, (34.47 per 10,000 for Indigenous young people, compared to 1.35 per 10,000 for non-Indigenous young people). Rates set out in Table s 10 are not disaggregated by gender.

63 Australian Institute of Health and Welfare, Youth justice in Australia 2012–13. Bulletin no. 120. Cat. no. AUS 179. Canberra, Table S75b: Young people aged 10–17 in detention during the year by sex and Indigenous status, states and territories, 2012–13 (rate): 352.65 per 10,000 for Indigenous Males, 18.04 per 10,000 for non-Indigenous Males, 88.87 per 10,000 for Indigenous females and 4.1 per 10,000 for non-Indigenous females. This figure includes estimates for the Northern Territory and Western Australia who did not provide data for the study. During the year statistics were not provided in the Australian Institute of Health and Welfare, *Youth Detention Population Australia in Australia 2014* publication.

64 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, [4.90] www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/04-key-indicators-2014-chapter4.pdf; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [3.17]-[3.24]: The incidence of violence and assault is higher among Indigenous youth compared to their non-Indigenous counterparts. Indigenous Australians aged 15–24 years are more likely to be hospitalised for assault than other Australians.

65 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, [4.89]

66 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, [4.89]

67 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [2.3] www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report/fullreport.pdf (accessed 1 October 2014).

68 E Johnson (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 5, Recommendation 62, [14.4.4], www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol2/113.html (accessed 2 January 2014).

69 Australian Institute of Health and Welfare 2012. *Girls and young women in the juvenile justice system: 2010–11*. Bulletin no. 107. Cat. no. AUS 162. Canberra: AIHW, p 3, www.aihw.gov.au/WorkArea/DownloadAsset.aspx? id=10737423105 (accessed 27 January 2015).

70 Interviews, Western Australia August 2014 (details withheld), Interview with Alisoun Neville and Ashleigh Crees, National Family Violence Prevention Legal Services Forum (12 December 2014).

71 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [29], Committee Against Torture, *Concluding Observations – Australia* (2008), CAT/C/AUS/CO/3 [23], Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, adopted by the Committee at its tenth session (2-13 September 2013), [31] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en (accessed 18 March 2015).

72 United Nations Treaty Collection, No 11: Convention on the Rights of the Child (New York, 20 November 1989) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 1 October 2014). 194 countries are party to it.

73 Committee on the Rights of the Child, *Concluding Observations – Australia* (20 October 2005) CRC/C/15/Add.268, [9] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgnXZ0ChBsrwmcy8%2f%2bFNoDGE9kezfu6QQVHcPsu5ODnholmUW11ikkcmdS4vIFnPoND%2bPodjbTyzuRqtYMXTVpT0JzXW8fLUQG%2bC2XatsTc4 (accessed 28 November 2014).

74 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4 [82]http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk5X2w65LgiRF%2fS3dwPS4NXPtJlvMuCI3J9Hn06KCDkN8AgEcc%2bNIwRMULqb84PSI9FicZROAZolAudnAZ3CxmSJw7k%2brD6GQTCcQ8b4gpWq

75 *The Young Offenders Act 1994 (WA)* similarly applies to children up to the age of seventeen (see *Young Offenders Act 1994 (WA)*, section 4.

76 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [15] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEZN%2bo3pfhJYL%2b%2fo2i7IlJgP6EjqSGKnB2CPSr6g7ed2P0M8AO57Tg1kfwde7vhIIwcOtRQLDmAZWHVA9bVwzD%2b (accessed 2 January 2015).

77 Committee on the Rights of the Child, *General Comment No. 11* (2009) Indigenous children and their rights under the Convention, [74] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vHfIzasSO0EEdqdWmq9j7BREhPNv8rsqw5s1P9yZnbT0%2bVCtG7gTjfUoMHKWMhfZjxkzJvW8MwfhHmnb02XKphT (accessed 2 January 2015).

78 Committee on the Rights of the Child, *General Comment No. 11* (2009) 'Indigenous children and their rights under the Convention', [25].

79 Committee on the Rights of the Child, *General Comment No. 11* (2009) 'Indigenous children and their rights under the Convention', [29].

80 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [29].

81 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [83]

82 Committee on the Rights of the Child, *Concluding Observations – Australia* (20 October 2005) CRC/C/15/Add.268, [10].

83 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 1.3.

84 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), I.6.

85 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), [13].

86 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Fundamental Perspectives, 1.

87 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Preamble.

88 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, [31]-[32]

89 United Nations Treaty Collection, No 2. *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

90 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1) www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (accessed 2 January 2015).

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95 United Nations General Assembly Resolution 61/295 (13 September 2007) http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement (accessed 14 October 2014). There were 11 abstentions to the resolution.

96 E.A Daes 'An overview of the history of indigenous peoples: self-determination and the United Nations' (2008) 21 *Cambridge Review of International Affairs*, p 24.

97 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Speech delivered at Parliament House, Canberra, 3 April 2009), www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf (accessed 2 January 2015).

98 Report of the Special Rapporteur James Anaya on the situation of human rights and fundamental freedoms of indigenous people, [86] www.refworld.org/pdfid/4ad47c882.pdf (accessed 2 January 2015).

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100 M Barelli, The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples (2009) *58 International and Comparative Law Quarterly*, 957-983.

101 United Nations Declaration on the Rights of Indigenous Peoples, Article 21.

102 United Nations Declaration on the Rights of Indigenous Peoples, Article 21.

103 United Nations Declaration on the Rights of Indigenous Peoples, Article 18.

104 United Nations Declaration on the Rights of Indigenous Peoples, Article 18.

105 United Nations Declaration on the Rights of Indigenous Peoples, Article 21.

106 Ranking based on rate per 10,000. While the Australian Capital Territory had a higher rate of Indigenous youth detention than all states except Western Australia in two quarters of 2013/14, an average of less than five Indigenous young people have been in detention over this period. For this reason it is included towards the bottom of the list.

107 AIHW, *Youth Detention Population in Australia 2014*, Table s 10. Figures in table are based on a calculated average over the four quarters of June 2013 to June 2014, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549673 (accessed 20 January). No non-Indigenous rate for the Northern Territory is provided in Table 10 due to less than five non-Indigenous young people having been in detention for each reported quarter. Tasmania not included due to no rate having been calculated in Table s 10 for each of the relevant quarters due to less than five Indigenous young people having been in detention. ACT not included due to rate only having been calculated in two of the relevant quarters due to less than five Indigenous young people having been in detention in two of the relevant quarters.

108 AIHW, *Youth Detention Population in Australia 2014*, Calculation of average over four most recent quarters in Table s 10 (66.9 per 10,000 compared to 1.26 per 10,000 for non-Indigenous young people).

109 AIHW, *Youth Detention Population in Australia 2014*, Table s 10.

110 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014) Table s 2, s 8 and s 31. Totals may include a small number of young people whose Indigenous status is unknown. Indigenous young people represent an estimated 15,995 out of 248,391 10 to 17 year olds in Western Australia.

111 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

112 Australian Institute of Health and Welfare, *Youth Detention Population Australia in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014) Table s 31: Australian population aged 10–17 by Indigenous status, states and territories, December 2010 to December 2014. Indigenous young people represent an estimated 14,887 out of 26,610 10 to 17 year olds in the Northern Territory.

113 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

114 AIHW, *Youth Detention Population in Australia 2014*, Table s 10: 38.17 per 10,000 Indigenous young people in the Northern Territory, compared to 34.47 per 10,000 Indigenous young people nationally.

115 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014) Tables s 2 and s 8. No rate of over-representation is provided in Table 10 because the number of non-Indigenous young people in detention is too low.

116 AIHW, *Youth Detention Population in Australia 2014*, Table s 10

117 AIHW, *Youth Detention Population in Australia 2014*, Table s 10: Indigenous young people in South Australia are in detention at a rate of 33.46 per 10,000 compared to a rate of 1.51 per 10,000 for non-Indigenous young people.

118 AIHW, *Youth Detention Population in Australia 2014*, Table 10: 1.51 per 10,000 compared to 1.35 per 10,000 nationally.

119 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014) Table s 31, s 2 and s 8. Totals may include a small number of young people whose Indigenous status is unknown. Indigenous young people represent an estimated 6,874 out of 158,601 10 to 17 year olds.

120 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8, Total does not sum due to rounding. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

121 AIHW, *Youth Detention Population in Australia 2014*, Table s 10.

122 AIHW, *Youth Detention Population in Australia 2014*, Table s 10: Indigenous young people in Queensland are in detention at a rate of 32.59 per 10,000 compared to a rate of 1.36 per 10,000 for non Indigenous young people.

123 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Tables s 31, s 2, s 8. Totals may include a small number of young people whose Indigenous status is unknown. Indigenous young people represent an estimated 36,313 out of 482,695 10 to 17-year-olds.

124 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8. Total does not sum due to rounding. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

125 AIHW, *Youth Detention Population in Australia 2014*, Table 10: 1.72 per 10,000 compared to 1.35 per 10,000 nationally.

126 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8 and s 31. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Totals may include a small number of young people whose Indigenous status is unknown. Indigenous young people represent an estimated 39,384 out of 682,173 10 to 17-year-olds.

127 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014) Table s 2, s 8.

128 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, s 10 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014)

129 AIHW, *Youth Detention Population in Australia 2014*, Table s 10: 8.21 per 10,000 compared to 0.75 per 10,000 for non-Indigenous young people in Victoria.

130 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014) There was one Indigenous girl in detention in the June quarter 2014, but zero in the other three quarters.

131 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Tables s 31, s 2 and s 8. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Totals may include a small number of young people whose Indigenous status is unknown. Indigenous young people represent an estimated 1,021 out of 34,678 10 to 17-year-olds.

132 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Tables s 2, s 8. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

133 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, s 10 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

134 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 31. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). Indigenous young people represent an estimated 4,541 out of 47,234 10 to 17-year-olds.

135 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014). One Indigenous girl in the June 2013 quarter and one Indigenous boy in the other three quarters.

136 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, s 10, www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).

137 The Australian Government does not ordinarily have the constitutional power to intervene and invalidate state or territory laws unless it has specific constitutional authority to make laws in that area. The Australian Government has no general power to legislate in relation to criminal law. However, the High Court of Australia has found that the Australian Government has the power to enact legislation to specifically implement the terms of an international treaty to which Australia is a party. On the external affairs power in respect of treaties, see the *Commonwealth v Tasmania* (1983) 158 CLR 1, 129–30 (Mason J), 170–1 (Murphy J), 218–19 (Brennan J), 258 (Deane J), *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, *Victoria v Commonwealth* (1996) 187 CLR 416, Brennan CJ, Toohey J, Gaudron J, McHugh J And Gummow J [30]: 'According to basic constitutional principle, and with qualifications not presently relevant, the intrusion of Commonwealth law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Commonwealth law provided it is, in truth, a law with respect to external affairs'. www.austlii.edu.au/au/cases/cth/HCA/1996/56.html (accessed 8 April 2015). The Australian Government has, in the past, used this power to override state laws which are contrary to Australia's international human rights obligations, See also, for example, the *Human Rights (Sexual Conduct) Act 1994* (Cth) Long title: 'An Act to implement Australia's international obligations under Article 17 of the International Covenant on Civil and Political Rights'. By enactment of this law, the Australian Government overrode Tasmania's "anti-sodomy" laws, which the UN Human Rights Committee had found to be contrary to the International Covenant on Civil and Political Rights: See *Toonen and Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) www1.umn.edu/humanrts/undocs/html/vws488.htm (accessed 12 January 2014).

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141 Committee on the Rights of the Child, *Concluding Observations – Australia* (20 October 2005) CRC/C/15/Add.268, [73-74] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgnXZ0ChBsrwmcy8%2f%2bFNoDGE9kezfu6QQVHcPsu5ODnholmUW11ikkcmdS4vIFnPoND%2bPodjbTyzuRqtYMXTVpT0JzXW8fLUQG%2bC2XatsTc4 (accessed 28 November 2014).

142 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4 [84] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk5X2w65LgiRF%2fS3dwPS4NXPtJlvMuCI3J9Hn06KCDkN8AgEcc%2bNIwRMULqb84PSI9FicZROAZolAudnAZ3CxmSJw7k%2brD6GQTCcQ8b4gpWq

143 Doli incapax 'means a presumption that a child is "incapable of crime" under legislation or common law: see Australian Institute of Criminology, 'The age of criminal responsibility', Crime facts info no. 106, ISSN 1445-7288, Canberra (2005) www.aic.gov.au/publications/current%20series/cfi/101-120/cfi106.html (accessed 19 January 2015).

144 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [30] www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (accessed 2 April 2015).

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146 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [30]

147 A dwelling, or home, is defined in the *Criminal Code Act Compilation Act 1913 (WA)* Part 1, as a place ordinarily used for human habitation.

148 *Criminal Code Act Compilation Act 1913 (WA)*, sections 297(5) and 318(2).

149 In relation to young offenders, the court maintains the limited ability to order a Conditional Release Order. This is a suspended order of detention served in the community with intensive supervision. For a third strike, it must be imposed for a minimum of 12 months, and, if breached "usually results in a sentence of at least 12 months immediate detention." President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia – Contemporary Issues and its future direction' *Eminent Speakers Series*, The University of Notre Dame, p 19.

150 In February 1997 the Children's Court decided that the three strikes laws permitted the imposition of a Conditional Release Order for a third strike as an alternative to immediate detention. A Conditional Release Order (CRO) is a suspended order of detention served in the community with intensive supervision. Such an order must be imposed for a minimum of 12 months for a third strike. If a CRO is breached, this usually results in a sentence of at least 12 months immediate detention. See Amnesty International Indigenous Youth Justice Report for Western Australia for more details in relation to these laws.

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152 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report 84), 19.64.

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156 Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, [12] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/249/01/PDF/G1424901.pdf?OpenElement.

157 Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, [12] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/249/01/PDF/G1424901.pdf?OpenElement.

158 *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)*, clause 20.

159 Correspondence with ALSWA, 23 October 2014. See *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)*, clause 20.

160 *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)*. These include Murder (clause 5) Manslaughter (clause 6) Unlawful Assault Causing Death (clause 7), Attempt to unlawfully kill (clause 8), Acts intended to cause grievous bodily harm or prevent arrest (clause 9), Grievous bodily harm (clause 10), Sexual offences (clauses 11 and 12), Aggravated indecent assault (clause 13) , Sexual penetration without consent (clause 14), Aggravated sexual penetration without consent (clause 15), Sexual Coercion (clause 16), Aggravated sexual coercion (clause 17), Incapable person, sexual offences against (clause 18).

161 *Criminal Code Act Compilation Act 1913*, section 400.

162 President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia – Contemporary Issues and its future direction' *Eminent Speakers Series*, The University of Notre Dame, p 5.

163 Western Australian Parliament, Legislative Assembly Estimates Committees 2014, Division 68: Corrective Services (Thursday 22 May 2014), Mr James McMahon.

164 President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia – Contemporary Issues and its future direction' *Eminent Speakers Series*, The University of Notre Dame, p 8.

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179 Correspondence with youth worker, Central Australian Aboriginal Legal Service (13 June 2013); correspondence with policy officer at Central Australian Aboriginal Legal Service 11 February 2015).

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181 Findings of Inquest into the death of Robert Martin Johnson [2012] NTMC005, oral evidence of NT Correctional Services commissioner Ken Middlebrook [177]-[178], www.nt.gov.au/justice/courtsupp/coroner/documents/D00142010_johnson.pdf (accessed 8 April 2015).

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185 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [84](f): In 2013 in Western Australia over 100 young people spent 10 months in an adult prison, inadequately separated from adult prisoners following a disturbance/riot at the youth detention facility which occurred after inadequate staff led to lock downs for up to 23 hours. In October 2012 three Indigenous boys were held for several months in solitary confinement in an adult maximum security prison. For more information about these incidents see Amnesty International Submission to the United Nations Committee Against Torture: 53rd Session (3 – 28 November 2014) www.amnesty.org/en/library/asset/ ASA12/004/2014/en/9b81f8cd-aa6d-4943-92d0-58522f6dc3df/asa120042014en.html (accessed 9 February 2014). See also Professor Neil Morgan, What's the point of I*ndependent Inspection Systems? Recent lessons from Western Australia*, www.slideshare.net/informaoz/professor-neil-morgan (accessed 9 February 2015).

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196 Productivity Commission, *Access to Justice Arrangements*, Inquiry report, Volume 2, [2.22] p 766, www.pc.gov.au/__data/assets/pdf_file/0020/145406/access-justice-volume2.pdf (accessed 12 January 2014).

197 Productivity Commission, *Access to Justice Arrangements*, Inquiry report, Volume 2, p 691 www.pc.gov.au/__data/assets/pdf_file/0020/145406/access-justice-volume2.pdf (accessed 12 January 2014). The Commission provides independent advice and information to governments and conducts inquiries on priority policy areas on a range of economic, social and environmental issues affecting the welfare of Australians: www.pc.gov.au/about.

198 Productivity Commission, *Access to Justice Arrangements*, Inquiry report, Volume 2, p 761 www.pc.gov.au/__data/assets/pdf_file/0020/145406/access-justice-volume2.pdf (accessed 12 January 2014).

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