

## THE CRISIS OF INDIGENOUS YOUTH DETAINED IN AUSTRALIA

### WRITTEN STATEMENT

#### ITEM 3: INTERACTIVE DIALOGUE WITH THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES

UN Human Rights Council  
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#### Background

Indigenous children in Australia make up less than six per cent of young people aged 10 to 17 years, but make up 54 per cent of children detained,<sup>1</sup> and are 25 times more likely to be in youth prison than non-Indigenous children.

The Aboriginal and Torres Strait Islander Legal Services (ATSILS)<sup>2</sup> have played a major role in exposing and challenging abuses to ensure the safety and wellbeing of Indigenous children in prison. In 2011 the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) highlighted cases of abuse and maltreatment of Indigenous children during arrest and detention in a [report](#) to the Committee on the Rights of the Child,<sup>3</sup> which included recommendations for law reform, community led solutions and a holistic national strategy in collaboration with Indigenous peoples and organizations.

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<sup>1</sup> Australian Institute of Health and Welfare 2017. [Youth justice in Australia 2015–16](#). Bulletin 139. Cat. no. AUS 211. Canberra: AIHW: Indigenous children are now 25 times more likely to be locked up than non-Indigenous children. One of out every 35 Indigenous boys spent time in prison last year, compared to one out of every 650 non-Indigenous boys. See also, Commission for Children and Young People, 'The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian Youth Justice System', which finds that while Koori children made up 15 per cent of all children at Malmsbury, they accounted for 30 per cent of this who were isolated, p. 56.

<sup>2</sup> The North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS) in the Northern Territory, the Victorian Aboriginal Legal Service Co-Operative Limited (VALS) in Victoria, the Aboriginal Legal Rights Movement Inc. (ALRM) in South Australia, the Tasmanian Aboriginal Community Legal Services (TACLS) in Tasmania, the Aboriginal Legal Service of Western Australian Inc. (ALSWA) in Western Australia and the Aboriginal and Torres Strait Islander Legal Services (ATSILS Qld) in Queensland.

<sup>3</sup> NATSILS, Shadow Report to the United Nations Committee on the Rights of the Child (2011).

In June 2015, Amnesty International released a [National Report](#)<sup>4</sup> and a report on [Western Australia](#),<sup>5</sup> which both found that Australia was likely to be in breach of international conventions and made recommendations on law reform, supporting Indigenous led solutions and accountability.

In the past 12 months, in addition to the overrepresentation of Indigenous children in prison, abuse and torture have been exposed. In July 2016 shocking footage was aired by [ABC Four Corners](#) exposing the horrific situation in the Northern Territory Don Dale Youth Detention Centre where children were subjected to prolonged abuse including isolation, restraint chairs, spit hoods and tear gas.

The Australian Government responded by convening a [Royal Commission into the Protection and Detention of Children in the Northern Territory](#), due to table recommendations on 30 September 2017.

In September 2016, an Amnesty International report about [Queensland](#)<sup>6</sup> exposed abuse of children at the Cleveland Youth Detention Centre including issues of self-harm, the use of dogs to intimidate children, invasive search procedures and mechanical restraints, and made recommendations for reform, many of which are being addressed by the Queensland Government following an independent review.<sup>7</sup> More abuse has come to light since including at Barwon in Victoria,<sup>8</sup> Reiby in New South Wales,<sup>9</sup> Bimberi in the ACT,<sup>10</sup> and most recently the Banksia Hill Detention Centre in Western Australia.<sup>11</sup>

In March 2017 the Special Rapporteur on the Rights of Indigenous peoples Ms Victoria Tauli-Corpus conducted a country visit to Australia, identifying the situation as a major human rights concern. In her [End of Mission Statement](#) she said:

*It is completely inappropriate to detain these [Indigenous] children in punitive, rather than rehabilitative, conditions. They are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime. I found meeting young children, some only twelve years old, in detention the most disturbing element of my visit.*

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<sup>4</sup> Amnesty International, [A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia](#) (2015).

<sup>5</sup> Amnesty International, [There's always a brighter future: keeping Indigenous kids in the community an out of detention in Western Australia](#) (2015).

<sup>6</sup> Amnesty International, [Heads held high: Keeping Queensland kids out of detention, strong in culture and community](#) (2017).

<sup>7</sup> [Independent review of youth detention centres in Queensland](#) (2017).

<sup>8</sup> Amnesty International, [Victorian Children report facing Don-Dale Abuse in Adult Prison](#) (3 April 2017) and also see Victorian Aboriginal Legal Service, Submission to the Inquiry into Youth Justice Centres (March 2017) and NATSILS, Submission to the Inquiry into Youth Justice Centres in Victoria (March 2017) as well as NATSILS, 'Media Release: A Government sanctioned 'shake-up' to Youth Justice'(7 February 2017).

<sup>9</sup> Amnesty International, [NSW sexual abuse: Allegations of detention abuse pile up, Prime Minister must act](#)' (5 July 2017).

<sup>10</sup> Amnesty International, [Not just Don Dale: new Canberra child abuse allegations](#)' (4 July 2017) and also see NATSILS, [NATSILS calls for national action following reports from the Bimberi youth justice centre \(4 July 2017\)](#)'.

<sup>11</sup> Australian Broadcast Corporation News 'Banksia Hill: Damning report prompts call for specialised centres for young detainees' (18 July 2017).

## Recommendations for change

The Australian Government has consistently said that criminal justice is a jurisdictional issue and have refused to intervene. However, the Australian Government cannot excuse itself of responsibility for implementing its human rights obligations and has the power to address these issues.<sup>12</sup> It is responsible for ensuring all of Australia, including the jurisdictions, comply with international human rights law and to ensure that special measures are taken to redress systemic discrimination.<sup>13</sup>

There have been inquiries into youth justice in every jurisdiction except South Australia.<sup>14</sup> Measures to address these issues must not be developed in isolation. The jurisdictions must learn from each other, and the Australian government must lead and coordinate.

Amnesty International and the NATSILS are therefore calling on Australia to adopt the following recommendations:

1. **Raise the age of criminal responsibility to at least 12 and address laws that breach children's rights.** Currently the age of criminal responsibility across Australia is 10 years old. Children as young as 10 and 11 have been detained by police for alleged crimes as petty as breaching bail by missing school and arriving home moments after a bailed imposed curfew. The Committee on the Rights of the Child<sup>15</sup> and the National Children's Rights Commissioner<sup>16</sup> consider the age of criminal responsibility as unacceptably low. The low age of criminal responsibility impacts disproportionately on Indigenous children because of their over-representation in the criminal justice system.
2. **End detention of children who have not been sentenced.** The arrest and detention of children must be a measure of last resort, and pre-sentence detention is supposed to be the

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<sup>12</sup> For example see the [Australian Constitution](#), section 51(xxix) gives the Australian Government the power to legislate for "external affairs"; and section 51 (xxvi) gives the Australian Government the power to legislate for "the people of any race, for whom it is necessary to make special laws." Regarding the race power however, note the concerns from many advocates and academics and the last [CERD review](#) of Australia in 2010 that the power itself raises issues of racial discrimination. UN doc. CERD/C/AUS/CO/15-17, 13 September 2010, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f15-17&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f15-17&Lang=en).

<sup>13</sup> See for example CERD General Comment 32: "The internal structure of States parties, whether unitary, federal or decentralized, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralized States, the federal authorities shall be internationally responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary."

<sup>14</sup> These include the Royal Commission into Child Protection and Youth Detention in the Northern Territory, the Queensland Independent Review of Youth Detention Centres, Victorian Children's Commissioner Inquiry into the use of isolation, separation and lockdown at places of youth detention in Victoria, Western Australia's Office of the Inspector of Custodial Services' examination of "behaviour management" practices at Banksia Hill, New South Wales' Inspector of Custodial Services' inquiry into use of force against detainees in Juvenile Justice Centres in NSW. In Tasmania a police investigation resulted in charges of common assault being laid against a guard from Ashley Youth Detention Centre, the case is being heard in 2017. In the ACT an incident at Bimberi Youth Justice Centre on 6 May 2016 is according to the ACT Human Rights Commission: "subject to three separate external enquiries, including an investigation by the AFP."

<sup>15</sup> Committee on the Rights of the Child, Concluding Observations – Australia (20 October 2005) CRC/C/15/Add.268, [73].

<sup>16</sup> Australian Human Rights Commission: National Children's Commissioner, [Children's Rights Report 2016](#), pages 189-191 and Recommendation 9.

exception, not the rule. However evidence suggests this is not the case.<sup>17</sup> On average, nearly 60 per cent of all Indigenous children detained in 2015/16 were unsentenced.<sup>18</sup> The consequences of this are severe and damaging and include separation from family and community; lack of access to therapeutic programmes; a greater likelihood of receiving a remand period following a future court appearance and receiving a sentence of imprisonment than young people who are released on bail;<sup>19</sup> and it increases the likelihood of repeated contact in the future.<sup>20</sup>

- 3. Ensure treatment and conditions in youth prisons provide children with the best chance to thrive.** Australia must ensure that every child deprived of their liberty is treated fairly and humanely. Currently across Australia children detained are at risk of abuse and torture, including solitary confinement, inappropriate use of restraints, and the use of dogs.<sup>21</sup> This must end immediately; these institutions must provide children with the best possible chance of reaching their potential, and respond to their needs, which vary based on culture, gender, age and disability. Growing evidence demonstrates the current youth prison model is ill-conceived, often exacerbates trauma, inhibits positive growth and fails to address community safety.<sup>22</sup> The current youth prison model should be replaced with a continuum of community-based programmes and, for the few youth who require secure confinement as a last resort, smaller homelike facilities that prioritize age-appropriate rehabilitation. The Government must fully resource independent inspectors and grant them unimpeded access to all forms of youth detention and immediately commence work to ensure that Australia's approach and inspection regimes are compliant with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>23</sup>

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<sup>17</sup> K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, Australian Institute of Criminology (No 125), iii; Convention on the Rights of the Child, Article 37, 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].

<sup>18</sup> 270 out of 455 - Australian Institute of Health and Wellbeing, *Youth Detention Population in Australia 2017*, Tables s 2 and s 12. The proportion of non-Indigenous young people who were unsentenced rather than sentenced was slightly higher than for Indigenous young people (64 per cent) but the rate at which they are in unsentenced detention is 23 times lower.

<sup>19</sup> K Richards and L Renshaw, [Bail and remand for young people in Australia: A national research project](#), Australian Institute of Criminology (No 125), iii.

<sup>20</sup> Jesuit Social Services and Effective Change Pty Ltd 2013, *Thinking Outside: Alternatives to remand for children*, Summary Report, Jesuit Social Services, [http://www.jss.org.au/files/Thinking\\_Outside\\_summary\\_report\\_FINAL.pdf](http://www.jss.org.au/files/Thinking_Outside_summary_report_FINAL.pdf).

<sup>21</sup> The use of dogs in youth prisons were exposed in Cleveland Detention Centre's Inspection Report in September 2015 and were reported in Amnesty International's '[Heads Held High](#)' report (2016), pages 25-27.

<sup>22</sup> See [The Royal Commission into Aboriginal Deaths in Custody \(RCIADIC\)](#) (1987-1991) which was the first national report in Australia examining the social, cultural, and legal issues behind the large numbers of Aboriginal Deaths in custody; and [The Royal Commission into the Protection and Detention of Children in Northern Territory Interim Report](#) (2017) which was triggered after Australian Broadcasting Corporation's Four Corners television programme aired shocking images of children and young people in prison in the Northern Territory.

<sup>23</sup> Available at <http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>. See Australian Human Rights Commission, "[In safe hands? Protecting the rights of children and young people in youth justice centres - A summary of material contained in the National Children's Commissioner's Children's Rights Report 2016](#)" and Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment '[Guidelines on national preventive mechanisms](#)', Note recommendations 5-15, and 24-29.

4. **Prioritize investment in early intervention, prevention and diversion to address the underlying causal factors of offending and ensure detention is a last resort.** The high overrepresentation of Indigenous children in prison must be addressed by strategies which confront the underlying causal factors which pushed them into the youth justice system. There is an urgent need for greater recognition of Indigenous culture as a positive support of children through Elders, law and justice groups, Indigenous communities and organizations. Indigenous designed and led prevention and diversion programmes for Indigenous children are the best chance for long-term, sustainable change.<sup>24</sup>
5. **Improve data collection and use it to track progress, learn and get it right.** Data collection on youth justice in Australia is insufficient in all jurisdictions to inform a policy approach effectively. We need to be able to identify and consider better the needs of people with disabilities and children's experiences of child protection, family violence, homelessness and previous contact with the justice system. The Australian Government must establish or task a suitable national body to coordinate a national approach to data collection and policy development relating to Indigenous imprisonment and violence rates.
6. **Adequately fund Indigenous community-controlled legal services.** Legal services must be culturally appropriate to be effective.<sup>25</sup> The Australian Productivity Commission released a report confirming that there is significant unmet legal need among Indigenous people, the consequence being "further cementing" of their overrepresentation in the justice system. The Australian Government has not adopted these recommendations. There must be adequate funds for Indigenous legal services, and five-year funding agreements with CPI increases for all Family Violence Prevention Legal Services (FVPLS) and the ATSILS.
7. **Set targets to end the overrepresentation of Indigenous children in prison.** The Australian Government plays a role in promoting national policy reforms which need coordinated action. The Australian Government currently works with jurisdictions through the Council of Australian Governments (COAG) to address Indigenous disadvantage, focussing on six 'Closing the Gap' targets, relating to Indigenous life expectancy, infant mortality, early childhood development, education and employment. Targets are a proven mechanism to achieve real progress and accountability for change, where they have national reporting obligations and measures of transparency.<sup>26</sup> The omission of targets to address on the

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<sup>24</sup> Many diversionary programmes across Australia have resulted in a reduction to the recidivism rates of participating offenders. In the Northern Territory, 76% of participants in a juvenile diversion scheme did not reoffend in the following 12 months after their participation in the programme, see PricewaterhouseCoopers, Indigenous incarceration: Unlock the facts (2017) <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

<sup>25</sup> Productivity Commission, Access to Justice Arrangements, Inquiry report, Volume 2, p 761; Committee on the Elimination of Racial Discrimination, Concluding Observations – Australia CERD/C/AUS/CO/15-17 [19]; 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." [i]: E Johnson (1991) Royal Commission into Aboriginal Deaths in Custody: National Report. Canberra: AGPS RCIADIC, Volume 5, Recommendation 234 (4: 177).

<sup>26</sup> Amnesty International, [A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia](#) (2015), p 25.

overrepresentation of Indigenous people in the justice system and the disproportionate experience of Indigenous people as victims of violence in the Closing the Gap framework remains glaring. The Australian Government should immediately commit to setting justice targets within the Closing the Gap framework, in consultation with Indigenous people and organizations.