

**AMNESTY
INTERNATIONAL**



Submission to the
AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO
INCARCERATION RATES OF ABORIGINAL AND TORRES
STRAIT ISLANDER PEOPLES

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Submitted by

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

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1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide this submission to the Australian Law Reform Commission's Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples. Our submission will draw particularly on our research, since 2013, on the over-representation of Aboriginal and Torres Strait Islander children in the Australian justice system.
- 1.2 Our research has focussed on the jurisdictions where over-representation of Aboriginal children in the justice system is most stark - Western Australia, Queensland and the Northern Territory.
- 1.3 Amnesty International published a National Overview of this issue, *A brighter tomorrow*,¹ and a research report on the youth justice system in Western Australia, *There is always a brighter future*, in June 2015.²
- 1.4 In September 2016, Amnesty International released *Heads Held High: Keeping Queensland kids out of detention, strong in culture and community*,³ which raised serious concerns about the treatment of children in Queensland detention centres and prisons.
- 1.5 Our three reports include recommendations for developing policies at a national, state and territory levels to reduce and ultimately end the over-representation of Aboriginal children in the criminal justice system, and to improve youth justice policies Australia-wide.
- 1.6 We also note that there is significant work currently or has recently taken place, which could benefit this inquiry. There have been inquiries into youth justice in every jurisdiction except South Australia.⁴ Youth justice is an admittedly difficult policy area in which governments must engage, a fact highlighted by the amount of activity taking place around the country right now. 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

¹ Amnesty International Australia, 2015, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, viewed 14 September 2017, available at https://static.amnesty.org.au/wp-content/uploads/2016/09/A_brighter_future_National_report.pdf?x85233 (Amnesty International Australia, *A brighter tomorrow*)

² Amnesty International Australia, 2015, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, viewed 14 September 2017, available at https://static.amnesty.org.au/wp-content/uploads/2016/02/CIE_WA-Report_low-res.pdf?x66249 (Amnesty International Australia, *There is always a brighter future*)

³ Amnesty International Australia, 2016, *Heads held high: Keeping Queensland kids out of detention, strong in culture and community*, viewed 14 September 2017, available at https://static.amnesty.org.au/wp-content/uploads/2016/12/Heads_Held_High_-_Queensland_report_by_Amnesty_International.pdf?x85233 (Amnesty International Australia, *Heads held high*)

⁴ 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."

coordinate.

- 1.7 Our submission and recommendations will attempt to address the issues presented with a focus on Aboriginal and Torres Strait Islander children and young people.

Recommendations

1.8 Amnesty International recommends that:

- (1) COAG works in partnership with Aboriginal and Torres Strait Islander peak organisations to develop a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates.
- (2) Commonwealth, State and Territory governments work with Aboriginal and Torres Strait Islander communities and organisations to develop a national plan of action on youth justice with clear targets and ongoing monitoring of progress.
- (3) All state and territory governments adopt a provision that requires bail authorities to consider 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations.
- (4) The Western Australian Department of the Attorney-General and Department of Corrective Services review the requirement that a responsible person must sign a bail undertaking, with reference to the approach adopted in other states and the obligation that the best interests of the child be the paramount consideration and that detention must be a last resort.
- (5) The Western Australian Youth Bail Options program, Queensland's Youth Advocacy Centre's bail support program and Alice Spring's Bushmob program be used by governments as examples from which other jurisdictions can develop beneficial bail support alternatives.
- (6) All state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide Indigenous-led, culturally appropriate bail support and diversion options where needed, and 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.
- (7) In relation to recommendation 6, that priority be given to children in out-of-home care, and those with mental health issues and cognitive impairments, including those with Fetal Alcohol Spectrum Disorder (FASD).
- (8) In the absence of the adoption of recommendation 8, that the Australian Government intervenes as soon as possible so that laws related to mandatory sentencing that are contrary to obligations under international human rights law, are invalidated and repealed.
- (9) The Western Australian Government immediately abolishes mandatory sentencing; and the Australian Government invalidates any new or expanded mandatory sentencing or presumptive sentencing provisions in any Australian jurisdiction.

- (10) Culturally appropriate programs, designed and delivered by Indigenous people, such as healing, health, mentoring, cultural connection, employment and education programs be made available to children who are held on remand, in addition to those serving sentences.
- (11) All levels of Government provide sufficient resources to Indigenous community designed and led initiatives to address the effects of FASD and cognitive impairment to ensure that it is treated as a disability rather than becoming a criminal justice issue.
- (12) The Australian Government explore linkages between the court system and the National Disability Insurance Scheme, to ensure adequate support services are available to children with FASD and cognitive impairment.
- (13) In order to prevent indefinite and arbitrary detention and safeguard the best interests of children with FASD and other conditions that may affect fitness to plead, there is an urgent need for courts to have the option to order the supervised and supported release of a young person who is deemed unfit to stand trial.
- (14) The Government immediately ends the abuse and overrepresentation of Indigenous girls in detention and invest in early intervention, prevention and rehabilitation programs that are tailored to the needs of girls, and for Indigenous girls, support programs designed and run by Aboriginal and Torres Strait Islander people.
- (15) Commonwealth, State and Territory governments adopt and resource the 18 recommendations of the the Over-Represented and Overlooked report.
- (16) Federal, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies, to forge agreement through COAG to set the following justice targets:
 - i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, with an interim target of halving the gap by 2030; and
 - ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040.
- (17) Australian governments conduct investigations to address the reason for the lower rate of cautions issued to Indigenous children by police as compared to non-Indigenous children.
- (18) On a national level, Government institutes an investigation into the application and enforcement of curfews as a condition of bail and publicly report on the findings.
- (19) All levels of government implement a justice reinvestment approach through consultation with Indigenous communities, effective data collection and use, and compliance with international obligations.
- (20) All levels of government to commit to a youth justice approach which is at all times consistent with Australia's international human rights obligations, including by ensuring children are only ever detained as a last resort.

- (21) The Federal, State and Territory governments ensure sufficient and sustainable funding for National Aboriginal and Torres Strait Islander Services and Family Violence Prevention & Legal Services, including reversing any planned funding cuts to ATSILS, and:
- i. meet existing demand for services, including Indigenous-led culturally appropriate prevention and intervention programs for young people;
 - ii. address unmet need currently experienced by Indigenous young people and their families, regardless of geographic location; and
 - iii. develop models of holistic support and case management for young women.

2. International Legal Frameworks

2.1 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 and the Special Rapporteur on the Rights of Indigenous Peoples in her recent report on the situation of Australia.⁵

Convention on the Rights of the Child

2.2 The Convention on the Rights of the Child (CRC) is the primary source of the rights referred to in 2.1. Unique among the major UN human rights treaties, it explicitly recognises the particular needs of Indigenous children.

2.3 Australia is a state party to the CRC, having signed and ratified the Convention in 1990. Relevant obligations under the CRC include responsibilities 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; and
- 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 to their circumstances.

2.4 Article 1 of the CRC 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.” 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.”

2.5 Article 37 of the CRC 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.”

⁵ Committee on the Rights of the Child, 2012, *Concluding Observations – Australia*, CRC/C/AUS/CO/4, 28 August 2012, viewed 14 September 2017, available at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf; Committee Against Torture, 2008, *Concluding Observations – Australia*, CAT/C/AUS/CO/3, 22 May 2008, viewed 14 September 2017, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F3&Lang=en; Office of the High Commissioner for Human Rights, 2017, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2, 8 August 2017, viewed 14 September 2017, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/37/Add.2 (Office of the High Commissioner for Human Rights, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*).

- 2.6 In its General Comment 10, on children’s rights in juvenile justice, the Committee on the Rights of the Child 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.”
- 2.7 Article 2(1) of the CRC 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.”
- 2.8 Article 37 of the CRC requires that “every child deprived of liberty shall be treated with humanity and respect ...and in a manner which takes into account the needs of persons of his or her age.”
- 2.9 What this means in practice is set out in more detail in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. These rules include that solitary confinement or any other punishment that may compromise the physical or mental health of the child must be strictly prohibited.⁶
- 2.10 The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) define solitary confinement as confinement for 22 hours or more a day without meaningful human contact. The rules say that women and children should never be subject to solitary confinement, and prohibit the use of prolonged solitary confinement, defined as confinement in excess of 15 days.⁷
- 2.11 This is the overarching international human rights law framework governing the detention of children.
- 2.12 Amnesty International calls on all levels of Government to commit to a youth justice approach which is at all times consistent with Australia’s international human rights obligations, including by ensuring children are only ever detained as a last resort.

⁶ UN General Assembly, 1991, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, 1991, resolution 45/113, entered into force 14 December 1990, viewed 14 September 2017, available at <http://www.refworld.org/docid/3b00f18628.html>.

⁷ UN General Assembly, 2015, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)* : note / by the Secretariat, A/C.3/70/L.3, adopted 17 September 2015, viewed 14 September 2017, available at <http://www.refworld.org/docid/56209cd14.html>.

3. Need for national leadership on justice

- 3.1 In 1967, the Constitutional Referendum bestowed on the Australian Government powers to make laws for Aboriginal and Torres Strait Islander people, and in doing so, gave a responsibility at a national level for the Commonwealth to be involved in issues affecting Indigenous people.
- 3.2 For this reason, the Federal Government cannot delegate its role in addressing the overrepresentation of Indigenous people in the justice system. This is clearly a national issue that requires national leadership. When Aboriginal and Torres Strait Islander people, who are just 3% of the Australian population, make up 27% of the adult prison population, it is undeniable that race is a factor and that this issue concerns Indigenous people.
- 3.3 The Change the Record Coalition's Blueprint for Change maps out the leadership role to be played by the Federal Government in addressing the broader overrepresentation of Aboriginal and Torres Strait Islander people in the justice system, including the policy principles and solutions that should be adopted by all levels of government.
- 3.4 The United Nations Special Rapporteur on Indigenous Peoples Rights has recommended that Australian Government "adopt, through the Council of Australian Governments, solid commitments and a national plan of action to address the incarceration crisis of Aboriginals and Torres Strait Islander peoples as a matter of national priority".⁸
- 3.5 Amnesty International respectfully agrees and recommends that COAG works in partnership with Aboriginal and Torres Strait Islander peak organisations to develop a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates
- 3.6 Amnesty International further recommends that Commonwealth, State and Territory governments work with Aboriginal and Torres Strait Islander communities and organisations to develop a national plan of action on youth justice with clear targets and ongoing monitoring of progress.

4. Bail and the Remand Population

- 4.1 International human rights standards require that detention for persons awaiting trial must be the exception rather than the rule.⁹ Detention pending trial must be based on an individualised determination that 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."¹⁰

⁸ Office of the High Commissioner for Human Rights, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*.

⁹ 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]

¹⁰ Van Alphen v The Netherlands, Communication No. 305/1988, CCPR/C/39/D/305/1988, [5.8]

- 4.2 In 2015-16, on an average day Indigenous children were 25 times more likely to be in unsentenced detention than non-Indigenous children.¹¹ 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 33 per cent at 30 June 1994 to 55 per cent at 30 June 2008.¹² This has increased again: on an average day, 58 per cent of all Indigenous young people in detention from 2015-2016 were unsentenced.¹³
- 4.3 Amnesty International has made several recommendations regarding bail in each of our reports relevant to the proposals outlined by the Australian Law Reform Commission. These mainly relate to homelessness, or a lack of suitable accommodation and support to comply with bail conditions, which are “raised repeatedly in the literature as key factors underpinning rises in custodial remand”.¹⁴
- 4.4 Amnesty International research in Queensland also found that further reasons why bail may be refused for Aboriginal and Torres Strait Islander children at the court stage including that a bail application is not made, a guardian is not available to attend the bail application hearing, or the court identifies the child is at risk of reoffending or is unable to find an appropriate bail address.¹⁵

Proposal 2.1

- 4.5 Amnesty International supports the Australian Law Reform Commission proposal for all states and territories to adopt a provision that requires bail authorities to consider ‘issues that arise due to the person’s Aboriginality’, including cultural background, ties to family and place, and cultural obligations.
- 4.6 Amnesty International found that in Western Australia, difficulties in locating a responsible adult contributed to the high number of Aboriginal young people in detention awaiting trial or sentencing.¹⁶ The *Bail Act 1982* (WA) says that a child can be released on bail only if a responsible person signs a bail undertaking to say that the child will comply with the conditions of bail.¹⁷
- 4.7 While it is important that a suitable person is able to take care of the young person, this legislative requirement is based on a subjective assessment by police in the first instance

¹¹ Australian Institute of Health and Welfare, 2017, *Youth Justice in Australia 2015-2016*, ‘Figure 6: Table ‘Young people aged 10–17 in detention on an average day by sex and Indigenous status, states and territories’, 2015–16 (rate)’, p.12, viewed 14 September 2017, available at <https://www.aihw.gov.au/getmedia/b85be60c-9fef-436d-85df-82d8e5c5f566/20705.pdf.aspx?inline=true> (Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-2016*).

¹² Kelly Richards, 2011, *Trends in juvenile detention in Australia*, p 4, available at www.aic.gov.au/media_library/publications/tandi_pdf/tandi416.pdf.

¹³ Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-2016*, ‘Detention Population in Australia 2014, Table S109a ‘Young people in detention on an average day(a) by legal status, detention type and Indigenous status, states and territories, 2015–16’.s 20’.

¹⁴ K Richards and L Renshaw, 2013, ‘Bail and remand for young people in Australia: A national research project’, *Australian Institute of Criminology*, (No 125), p 65, viewed 14 September 2017, available at <http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125.html> (K Richards and L Renshaw, *Australian Institute of Criminology*).

¹⁵ Amnesty International Australia, *Heads held high*, p 22.

¹⁶ Amnesty International Australia, *There is always a brighter future*, p 32.

¹⁷ *Bail Act 1982* (WA), Schedule 1, Part C.

and then by the courts and creates a further hurdle to detention being a measure of last resort, as to comply with the Convention. The provision has been identified as contributing to the high rate at which young Aboriginal people are held in police custody and then on remand in detention awaiting a hearing by the Auditor General, the University of Western Australia in a Review of the Children's Court, and most recently by the Australian Institute of Criminology in a national review of Bail and Remand for young people.¹⁸

- 4.8 Amnesty International recommends that the Western Australian Department of the Attorney-General and Department of Corrective Services review the requirement that a responsible adult must sign a bail undertaking, with reference to the approach adopted in other states and the obligation that the best interests of the child be the paramount consideration and that detention must be a last resort.¹⁹
- 4.9 Amnesty International notes that Australian Law Reform Commission Proposal 2.1 would strengthen the principles of the "best interests of the child" test by ensuring that any issues arising from the Aboriginality of the child also being taken into consideration.

Proposal 2.2

- 4.10 Early intervention, prevention and diversion is critical. A recent report from Price Waterhouse Coopers found that justice system costs related to Indigenous incarceration nationally in 2016 were \$3.9 billion, and are forecast to grow to \$10.3 billion annually by 2040. Welfare costs associated with the issue will rise to \$110 million by 2040, while economic costs will reach over \$9 billion annually. The report found that annual savings to the economy of nearly \$19 billion could be achieved by 2040 if the gap between Indigenous and non-Indigenous rates of incarceration was closed. A key recommendation of the report is that Governments must have a "greater focus, and investment in, prevention and early intervention initiatives that address the key drivers of Indigenous incarceration".²⁰
- 4.11 Investment in early intervention, prevention and diversion from the youth justice system should be in culturally appropriate programs, particularly those designed and run by local Aboriginal and Torres Strait Islander people and organisations. International and domestic studies and inquiries have found that Indigenous designed and led justice programs consistently outperformed those that were externally imposed.²¹

¹⁸ Richards and L Renshaw, *Australian Institute of Criminology*, 71, citing Auditor General for Western Australia 2008; ACCG 2010; Clare et al. 2010; Denning Cotter 2008.

¹⁹ Amnesty International Australia, *A brighter tomorrow*, p 31.

²⁰ PWC, 2017, *Indigenous incarceration: Unlock the facts*, Recommendation 4, p 11, viewed 14 September 2017, available at <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

²¹ See: The Harvard Project on American Indian Economic Development, 2015, *Justice in Indian Country*, viewed 14 September 2017, available at <http://hpaied.org/exhibits/justice-indian-country>. See also Steering Committee for the Review of Government Service Provision, 2014, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, para. 4.106; A Daly, G Barrett and R Williams, 2015, *A Cost Benefit Analysis of the Yuendumu Mediation and Justice Committee: the economic case for local dispute management services*, Occasional seminar AIATSIS, online video, viewed 14 September 2017, available at <http://aiatsis.gov.au/news-and-events/news/cost-benefit-analysis-ymjc>; Senate Legal and Constitutional Affairs References Committee, 2013, *Value of a justice reinvestment approach to criminal justice in Australia*, viewed 14 September 2017, available at http://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index

- 4.12 Australia has international obligations under the CRC and the United Nations Declaration on the Rights of Indigenous people to develop culturally sensitive policy and programming, and to support Indigenous Peoples to design and implement restorative justice systems and community-based programmes and services that consider the needs and cultures of Indigenous children, their families and communities.²²
- 4.13 A 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.”²³ The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 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.”²⁴
- 4.14 In our National Overview, Amnesty International called on the Australian Government to work with state and territory governments to identify areas of unmet need for bail accommodation, and 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. We called for a particular focus to 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.²⁵
- 4.15 However, Amnesty International notes serious issues with current bail accommodation models operating in Australia. For example, in Queensland, children, magistrates, police, lawyers, Indigenous and non-Indigenous organisations, communities and Elders, all raised concerns with Amnesty International about the existing residential facilities.²⁶ This included concerns about the quality of supervision and cultural competency of the youth workers supervising the children, and practices including alerting police of breaches of bail rather than assisting the child to comply.²⁷
- 4.16 Another concern raised repeatedly by Aboriginal and Torres Strait Islander children and parents, community members, lawyers and magistrates is that children were being charged with criminal offences by residential care staff.²⁸ According to interviews held by Amnesty International, the most common charges were assault, wilful damage to property, and breaching bail.²⁹ This issue was highlighted by the Carmody Inquiry: “It is damning that, as

²² Committee on the Rights of the Child, 2009, *General Comment No 11: Indigenous children and their rights under the Convention*, CRC/C/GC/11, para. 75; See also Human Rights Council, 2014, *Expert Mechanism on the Rights of Indigenous Peoples, Advice No 6: Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities*, A/HRC/EMRIP/2014/3/Rev.1, 7th sess, rec B.10; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), Arts. 11, 18.

²³ K Richards and L Renshaw, *Australian Institute of Criminology*, p 65.

²⁴ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2017, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, viewed 28 August 2017, available at www.aphref.aph.gov.au-house-committee-atsia-sentencing-report-fullreport.pdf .

²⁵ Amnesty International Australia, *A brighter tomorrow*, recommendation 15, p 8.

²⁶ Amnesty International Australia, *Heads held high*, p 22.

²⁷ Amnesty International Australia, *Heads held high*, p 22.

²⁸ Amnesty International Australia, *Heads held high*, p 22.

²⁹ Amnesty International Australia, *Heads held high*, p 22.

at 30 June 2012, 27.6% of children in licensed care services had been charged with placement-related offending.³⁰

- 4.17 One culturally-appropriate option for governments to consider is Indigenous-run on country programs as bail accommodation models. For example, Dylan Voller was bailed to the Aboriginal-run Bushmob program in Alice Springs, and has spoken publicly about the benefits of that program to help him comply with bail obligations and to prevent return to prison.³¹
- 4.18 In the course of our research in Western Australia, 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 children.³²
- 4.19 These three jurisdictions had the highest rate and percentage of Indigenous children in unsentenced detention in 2015/16 on an average day, and each exceeded the national average rate of detention on remand for Indigenous children. For example 58% of unsentenced children in detention on an average day are Indigenous children, compared with 68% in Qld, 73% in WA and 94% in NT.³³ Nationally, Indigenous children are 25 times more likely to be in unsentenced detention than non-Indigenous children, compared with 27 times more likely in Queensland and 41 times more likely in Western Australia.³⁴
- 4.20 In our Queensland report, Amnesty International recommended for the State Government to fund culturally appropriate, Indigenous community-controlled bail accommodation and support services.³⁵
- 4.21 Amnesty International has identified the Western Australian Department of Corrective Services Youth Bail Options program, a service run by Life Without Barriers and Hope Community Services, as an effective provider of supported accommodation to young people on bail.³⁶
- 4.22 The Youth Bail Options program however, is seriously underfunded and can only serve a very limited number of young people. Amnesty International recommended that the Western Australian Government increase funding for the Youth Bail Service and Youth Bail

³⁰ Queensland Child Protection Commission of Inquiry, 2013, *Taking Responsibility: A Roadmap for Queensland Child Protection*, p. 265.

³¹ Lawford, E., 2017, 'Dylan Voller: Life outside after a decade behind bars', *NITV*, 22 May 2017, viewed 14 September 2017, available at

<http://www.sbs.com.au/nitv/nitv-news/article/2017/05/18/dylan-voller-life-outside-after-decade-behind-bars>;

Clarke, A., 2017, 'Inside the program hoping to save Dylan Voller', *Buzzfeed News*, 4 February 2017, viewed 14 September 2017, available at

https://www.buzzfeed.com/allanclarke/inside-the-program-hoping-to-save-dylan-voller?utm_term=jaXyMQw5d#_evBxOPzg2.

³² Amnesty International Australia, *A brighter tomorrow*, p 31.

³³ Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-2016*, 'Table S109a 'Young people in detention on an average day(a) by legal status, detention type and Indigenous status, states and territories, 2015-16'.

³⁴ Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-2016*, 'Table S111a: Young people aged 10-17 in detention on an average day by sex and Indigenous status, states and territories, 2015-16 (rate)'.

³⁵ Amnesty International Australia, *Heads held high*, recommendation 11, p 6.

³⁶ Amnesty International Australia, *There is always a brighter future*, p 32.

Options Program and that the Department of Corrective Services explore further options for Aboriginal community controlled bail accommodation in regional and remote areas.³⁷

- 4.23 In Queensland, an evaluation of Youth Advocacy Centre's Youth Bail Accommodation Support Service shows that bail support services can be successful in reducing the number of young people in detention on remand.³⁸ However, it is important that these bail support services be run in partnership with Aboriginal and Torres Strait Islander people and by Indigenous staff, and where possible be provided by Indigenous-run organisations.³⁹
- 4.24 In regards to Australian Law Reform Commission Proposal 2.2, Amnesty International recommends that all state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide Indigenous-led, culturally appropriate bail support and diversion options where needed, and 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.
- 4.25 Amnesty International recommends that the Western Australian Youth Bail Options program, Queensland's Youth Advocacy Centre's bail support program and Alice Spring's Bushmob program be used by governments as examples from which other jurisdictions can develop beneficial bail support alternatives.
- 4.26 Furthermore, as an overarching principle, Amnesty International strongly advocates for all levels of government to work with Indigenous-led organisations with the aim of delivering culturally appropriate programs and services, including holistic family support and early intervention services. This is reflected in recommendations from all of our research reports.

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5. Sentencing Options

- 5.1 Amnesty International agrees with the Australian Law Reform Commission's preliminary finding that judicial discretion should be maximised in sentencing matters for Indigenous people,⁴¹ and submit that this is particularly important for Indigenous children and young people.
- 5.2 Amnesty International's research has included significant investigation into the effects of mandatory sentencing on Indigenous children and young people, particularly in Western Australia.⁴²
- 5.3 Amnesty International notes the 2017 policy paper by Just Reinvest NSW on smarter sentencing and parole law reform. This paper recommends that governments should take

³⁷ Amnesty International Australia, *There is always a brighter future*, recommendation 11, p 8.

³⁸ Jenny Gilmore, Youth Bail Accommodation Support Service: Service Evaluation 2004, 37. Provided by Youth Advocacy Centre to Amnesty International by email dated 26 October 2015.

³⁹ For example, Murri Watch previously ran these services in Townsville, but lost funding.

⁴⁰ Amnesty International Australia, *There is always a brighter future*, recommendations 3 and 4; Amnesty International Australia, *Heads held high*, recommendation 6; Amnesty International Australia, *A brighter tomorrow*.

⁴¹ Australian Law Reform Commission, 2017, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples Discussion Paper*, viewed 14 September 2017, available at <https://www.alrc.gov.au/publications/indigenous-incarceration-rates-dp84>.

⁴² Amnesty International Australia, *A brighter tomorrow*.

steps to reduce the imposition of sentences of six months or less, by encouraging greater use of ICOs and other non-custodial options, and to consider strategies to encourage courts to provide reasons as to why an eligibility assessment for an ICO was not made.⁴³

Question 4.1

- 5.4 Amnesty International has consistently supported the abolition of mandatory sentencing, including by recommendation in our Western Australian report,⁴⁴ and in meetings with the former and current Governments of Western Australia.
- 5.5 Amnesty International agrees that Commonwealth, state and territory governments should review provisions that impose mandatory or presumptive sentences.
- 5.6 Amnesty International recommends that the *Western Australian Criminal Code Act 1913* (WA) be prioritised for review. In its current state, contrary to the CRC, the Act 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.⁴⁵ 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).⁴⁶ The latter laws mandate a minimum sentence of three months in detention.⁴⁷
- 5.7 In 2014 the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA) was passed. This law 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’.⁴⁸ These changes 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.⁴⁹ The changes also introduced 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.⁵⁰ Circumstances of

⁴³ Just Reinvest NSW, 2017, *Policy Paper 1: Smarter Sentencing and Parole Law Reform*, viewed 28 August 2017, available at <http://www.justreinvest.org.au/wp-content/uploads/2017/08/Just-Reinvest-NSW-Policy-Paper-Key-Proposals-1.pdf>.

⁴⁴ Amnesty International Australia, *There is always a brighter future*, recommendation 18, p 9

⁴⁵ 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.

⁴⁶ *Criminal Code Act Compilation Act 1913* (WA), sections 297(5) and 318(2).

⁴⁷ 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, 2014, ‘Youth Justice in Western Australia – Contemporary Issues and its future direction’ *Eminent Speakers Series*, The University of Notre Dame, p 19.

⁴⁸ *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA), clause 20.

⁴⁹ *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA), clause 20.

⁵⁰ *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

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.

- 5.8 Under 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.⁵¹
- 5.9 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.⁵²
- 5.10 Amnesty International supports the ALRC's previous finding that these violations of international law to be so serious that the Australian Government must override the three strikes burglary laws.⁵³ The recommendation was not acted on by the Federal Government.
- 5.11 Since the ALRC made this recommendation the Western Australian Government has enacted two further mandatory sentencing provisions applicable to young people. 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.⁵⁴ In 2001 the Aboriginal Justice Council described the three strikes burglary laws as "profoundly discriminatory in their impact on Aboriginal Youth."⁵⁵

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).

⁵¹ 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 Australia, *There is always a brighter future* for more details in relation to these laws.

⁵² Australian Law Reform Commission, 1997, *Seen and Heard: Priority for Children in the Legal Process*, Report 84, paragraph 19.55 views 14 September 2017, available at www.alrc.gov.au/publications/19-sentencing/sentencing-options (Australian Law Reform Commission, *Seen and Heard*)

⁵³ Australian Law Reform Commission, *Seen and Heard*, paragraph 19.64.

⁵⁴ Department of Justice (WA), Review of section 401 of the Criminal Code, (2001), 24.

⁵⁵ N Morgan, H Blagg and V Williams for the Aboriginal Justice Council, 2001, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, viewed 2 January 2015, available at www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2002_04/hra_mandsent/submissions/sub89_pdf.ashx, p 3.

- 5.12 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.”⁵⁶
- 5.13 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.⁵⁷
- 5.14 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.”⁵⁸
- 5.15 Amnesty International recommends that the Western Australian Government immediately abolishes mandatory sentencing; and the Australian Government invalidates any new or expanded mandatory sentencing or presumptive sentencing provisions in any Australian jurisdiction.

6. Prison Programs

- 6.1 Amnesty International has been monitoring the conditions and treatment of children in youth detention in Australia. Amnesty International notes that abuses of children in detention, which led to the Royal Commission into the Protection and Detention of Children in the Northern Territory, is not only occurring in the Northern Territory.
- 6.2 Evidence heard by the Royal Commission as well as the findings of three independent inquiries show a litany of breaches of the rights of children in detention in Australian youth detention. These abuses include solitary confinement, sometimes for prolonged periods; deprivation of food and medication as punishment; excessive use of force; inappropriate use of restraints including handcuffs; use of dogs for intimidation; partially clothed body searches; physical abuse including punching, choking and kicking; sexual abuse; verbal racial abuse; high rates of self-harm and attempted suicide; use of chemical agents such as tear gassing.⁵⁹

⁵⁶ United Nations Committee on the Rights of the Child, 2012, *Concluding Observations – Australia*, CRC/C/AUS/CO/4, [82], viewed 14 September 2017, available http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf.

⁵⁷ United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2014, *Concluding observations on the fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, [12] viewed 14 September 2017, available <http://alhr.org.au/wp/wp-content/uploads/2015/01/UNCAT-Concluding-Observations.pdf>.

⁵⁸ Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, [12]

⁵⁹ See Amnesty International Australia, *Heads Held High*; P Armytage and Prof J Ogloff AM, *Youth Justice Review and Strategy: meeting needs and reducing offending* (2017), <http://www.justice.vic.gov.au/home/justice+system/youth+justice/youth+justice+review+and+strategy+meet+ng+needs+and+reducing+offending>; Prof M Davis and K McMillan QC, *Independent Review into Youth Detention in Queensland*; Inspector of Custodial Services in Western Australia, Prof N Morgan, *Behaviour management practices at Banksia Hill Detention Centre* (2017), <http://www.oics.wa.gov.au/wp-content/uploads/2017/07/Full-report.pdf>; Evidence submitted the Royal Commission into the Protection and Detention of Children in the Northern Territory 2017.

- 6.3 Further, there are issues with the oversight mechanisms and complaints processes within youth detention. In several youth detention centres there has been evidence of CCTV footage being deleted, going missing or being duplicated.⁶⁰
- 6.4 While the focus of policy reform must be on early intervention and prevention, where children are held in prison it is important for appropriate prison programs to be in place that meet their human rights needs.

Proposal 5.1

- 6.5 Amnesty International recommends that culturally appropriate programs, designed and delivered by Indigenous people, such as healing, health, mentoring, cultural connection, employment and education programs be made available to children who are held on remand, in addition to those serving sentences.

Question 5.1

- 6.6 The best practice for prison programs suitable for Aboriginal and Torres Strait Islander children are those that are culturally appropriate and designed and run by Indigenous people - preferably, people from that child's community and run in their language.
- 6.7 One example is Red Dust Healing in Townsville, which works in detention centres and schools to deliver cultural healing programs for at risk children, with a focus on dealing with rejection and having positive relationships and role models. Randal Ross told Amnesty International that in 2006, the Red Dust program ran in Cleveland Youth Detention Centre with 40 boys, and their progress was monitored for two years: none of the children returned to detention in that time and only eight boys reoffended, on minor offences.⁶¹
- 6.8 A number of independent inquiries have recommended the need for rehabilitation and healing programs to be run by or in partnership with Aboriginal and Torres Strait Islander people.
- 6.9 To end the overrepresentation of Indigenous children in youth prison, Governments must support these Indigenous-led early intervention and prevention programs which can help children before they reach prison, rather than focusing on prison-based programs.
- 6.10 Amnesty International has identified a number of programs run by or in partnership with Aboriginal and Torres Strait Islander people that are of benefit to children in the justice system.⁶²

⁶⁰ Prof M Davis and K McMillan QC, 2017, *Independent Review into Youth Detention in Queensland*, viewed 14 September 2017, available at <http://www.youthdetentionreview.qld.gov.au/> (Prof M Davis and K McMillan QC, 2017, *Independent Review into Youth Detention in Queensland*); Inspector of Custodial Services in Western Australia, Prof N Morgan, *Behaviour management practices at Banksia Hill Detention Centre*; Evidence submitted the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).

⁶¹ Amnesty International Australia, *Heads Held High*, p26.

⁶² Amnesty International Australia, *A brighter tomorrow*; Amnesty International Australia, *Heads Held High*, Amnesty International Australia, *There is always a brighter future*.

Proposal 5.2 and Question 5.2

6.11 Please see section 8 below on Female Offenders.

7. Alcohol

- 7.1 Foetal Alcohol Spectrum Disorder (FASD) is an umbrella term used to describe a range of impacts caused by exposure to alcohol in the womb.⁶³ 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.⁶⁴
- 7.2 Aboriginal and Torres Strait Islander people are more likely to have a cognitive disability, and Indigenous people with cognitive impairment are over-represented in criminal justice across Australia. Studies have found that particularly for children, disability-related behaviours and the responses to life circumstances are criminalised.⁶⁵
- 7.3 In 2015, the Indigenous Australians with Mental and Cognitive Disability in the Criminal Justice System Project found that Indigenous people with mental and cognitive impairment are “significantly more likely to have experienced earlier and more frequent contact with the justice system.”⁶⁶ This is particularly so for Indigenous women with complex needs, who had significantly higher convictions and episodes of imprisonment than males and non-Indigenous women.⁶⁷
- 7.4 First Peoples Disability Network suggests that many Indigenous children in detention are affected by FASD.⁶⁸ Preliminary findings from a study in Western Australia support this

⁶³ L Burns et al, 2013, ‘Counting Fetal Alcohol Spectrum Disorder in Australia: The evidence and the challenges’, 32 *Drug and Alcohol Review*, p. 461.

⁶⁴ Department of the House of Representatives Standing Committee on Social Policy and Legal Affairs, 2012, *Inquiry into Fetal Alcohol Spectrum Disorders (FASD: The Hidden Harm)*, p. viii, viewed 14 September 2017 available at www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/splaf/asd/report/fullreport.pdf.

⁶⁵ E Baldry, L Dowse, and M Clarence, 2012, *People with mental and cognitive disabilities: Pathways into Prison, Background Paper for Outlaws to Inclusion Conference*, p. 16, viewed 14 September 2017, available at <https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/MHDCDbackgroundOutlaws%20Conf1.pdf>; N Rushworth, for Brain Injury Australia, 2011, *Out of Sight, Out of Mind. People with ABI and the Criminal Justice System*; J Simpson and M Sotiri, for Aboriginal and Torres Strait Islander Services, 2004, *Criminal Justice and Indigenous People with Cognitive Disabilities*; E Baldry, R McCausland, L Dowse and E McEntyre, 2015, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*, p. 19, viewed 14 September 2017, available at <https://www.mhdcd.unsw.edu.au/>. (Baldry et al. *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*)

⁶⁶ Baldry et al. *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*, p.10.

⁶⁷ Baldry et al. *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*

⁶⁸ First Peoples Disability Network, 2016, *Aboriginal and Torres Strait Islander perspectives on the recurrent and indefinite detention of people with cognitive and psychiatric impairment*, p 8, viewed 14 September 2017, available at

statement, with the Telethon Institute finding that one in three children in Banksia Hill Detention Centre FASD.⁶⁹

- 7.5 Amnesty International recommends that all levels of Government provide sufficient resources to Indigenous community designed and led initiatives to address the effects of FASD and cognitive impairment to ensure that it is treated as a disability rather than becoming a criminal justice issue.
- 7.6 Amnesty International recommends that the Federal Government explore linkages between the court system and the National Disability Insurance Scheme, to ensure adequate support services are available to children with FASD and cognitive impairment.

8. Female Offenders

- 8.1 Amnesty International recommends that Commonwealth, State and Territory governments adopt and resource the 18 recommendations of the Change the Record and Human Rights Law Centre report, *Over-represented and Overlooked*.⁷⁰
- 8.2 The number of Aboriginal and Torres Strait Islander girls in detention is rising: 65% of girls in detention are Aboriginal and Torres Strait Islander girls, who are 27 times more likely to be locked up than non-Indigenous girls.⁷¹
- 8.3 Evidence suggests many girls in youth detention across Australia, in particular Aboriginal and Torres Strait Islander girls, are victims of violence, abuse and disadvantage.⁷² The Change The Record Coalition and Human Rights Law Centre recently reported that many Indigenous girls are involved in the justice system due to prior violations of their human rights.⁷³

http://fpdn.org.au/wp-content/uploads/2016/10/FPDN-Senate-Inquiry-Indefinite-Detention-Submission_Final.pdf

⁶⁹ Western Australian Office of the Inspector of Custodial Services, 2017, *Behaviour management practices at Banksia Hill Detention Centre*, p 9. available at [http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-tp---oics-report---banksia-hill/\\$file/Banksia%20Hill%20report.pdf](http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-tp---oics-report---banksia-hill/$file/Banksia%20Hill%20report.pdf)

⁷⁰ Change The Record and Human Rights Law Centre, 2017, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, viewed 14 September 2017, available https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf (Change The Record and Human Rights Law Centre, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*).

⁷¹ Australian Institute of Health and Welfare, 2016, *Youth Justice in Australia 2015-2016*, Table S76a: Young people aged 10–17 in detention on an average day(a) by sex and Indigenous status, states and territories, 2015–16, viewed 14 September 2017, available <https://www.aihw.gov.au/getmedia/b85be60c-9fef-436d-85df-82d8e5c5f566/20705.pdf.aspx?inline=true>.

⁷² Australian Institute of Health and Welfare, 2012, *Girls and Young Women in the Juvenile Justice System*, viewed 14 September 2017, available <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737423105>.

⁷³ Change The Record and Human Rights Law Centre, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*.

- 8.4 Following a visit to Australia earlier this year, UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, acknowledged the rate of incarceration of Aboriginal women and girls is growing fast and needs to be urgently addressed.⁷⁴
- 8.5 Indigenous girls face discrimination in the justice system on the basis of their race and gender.
- 8.6 There is evidence that there are a number of abuses occurring to girls in detention including cough and squat search practices, unnecessary solitary confinement, sexual abuse and discrimination.⁷⁵ These pose serious breaches of Australia's international human rights obligations including the Convention on the Rights of the Child, Convention against Torture and other Cruel, Inhuman and Degrading Treatment and the Mandela Rules.
- 8.7 Independent reviews of detention in Queensland, WA and Victoria recommend local governments support tailored programs and services for girls. There are many Indigenous-led prevention, diversion and rehabilitation programs that can have a huge impact on girls' lives.
- 8.8 Amnesty International has identified some of programs run by or in partnership with Aboriginal and Torres Strait Islander people for girls, including: Young Luv run by Family Violence Legal Prevention Services⁷⁶; Deadly Sista Girlz by Wirrpanda Foundation⁷⁷; Sisters Inside's programs including their painting workshops⁷⁸; and the Yiriman Project.⁷⁹
- 8.9 Amnesty International recommends that the Government immediately ends the abuse and overrepresentation of Indigenous girls in detention and invest in early intervention, prevention and rehabilitation programs that are tailored to the needs of girls, and for

⁷⁴ United Nations Special Rapporteur on the Rights of Indigenous Peoples, 2017, *End of Mission Statement by UNSR on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia*, viewed 14 September 2017, available at

<http://unsr.vtaulicorpuz.org/site/index.php/statements/181-end-statement-australia>.

⁷⁵ See Evidence to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017, *Statement of AN*; Queensland Ombudsman, 2014, *The Strip Searching of Female Prisoners at the Townsville Correctional Facility*; P Armytage and Prof J Ogloff AM, 2017, *Youth Justice Review and Strategy: meeting needs and reducing offending*, viewed 14 September, available at <http://www.justice.vic.gov.au/home/justice+system/youth+justice/youth+justice+review+and+strategy+meeting+needs+and+reducing+offending>; Prof M Davis and K McMillan QC, *Independent Review into Youth Detention in Queensland*; Inspector of Custodial Services in Western Australia, Prof N Morgan, 2017, *Behaviour management practices at Banksia Hill Detention Centre* viewed 14 September 2017, available at <http://www.oics.wa.gov.au/wp-content/uploads/2017/07/Full-report.pdf> (Inspector of Custodial Services in Western Australia, Prof N Morgan, *Behaviour management practices at Banksia Hill Detention Centre*).

⁷⁶ See Family Violence Legal Prevention Services, *Young Luv*, <http://www.fvpls.org/images/files/Young%20luv%20flyer%20web.pdf>.

⁷⁷ See Wirrpanda Foundation, *Deadly Sista Girlz*, <https://www.wf.org.au/programs/programs-education/33-deadly-sista-girlz>.

⁷⁸ See Sisters Inside, *Current programs*, viewed 14 September, available at <http://www.sistersinside.com.au/programs.htm>; Amnesty International, *Indigenous Girls at Risk in Detention*, viewed 14 September, available at <https://www.amnesty.org.au/indigenous-girls-risk-detention/> (Amnesty International, *Indigenous Girls at Risk in Detention*).

⁷⁹ See Yiriman Project, viewed 14 September, available at <http://www.yiriman.org.au/>; Amnesty International, *Indigenous Girls at Risk in Detention*.

Indigenous girls, support programs designed and run by Aboriginal and Torres Strait Islander people.

- 8.10 This must form part of a national plan to end the over-representation of Aboriginal and Torres Strait Islander children in detention.

9. Aboriginal Justice Agreements

- 9.1 Amnesty International has previously recommended that the Australian Government, through the Council of Australian Governments (COAG), adopt a dual target to close the gap between Indigenous and non-Indigenous Australians, in incarceration rates and rates of experienced violence.⁸⁰

Question 10.1

- 9.2 The Federal Government plays a role in promoting policy reforms that are of national significance, or which need coordinated action by all Australian governments. The Australian Government currently works with state and territory governments through 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.
- 9.3 Targets are a proven mechanism to achieve real progress and accountability for change, where they have national reporting obligations and measures of transparency.⁸¹
- 9.4 The lack of a focus on the overrepresentation of Aboriginal and Torres Strait Islander people in prisons and disproportionate experience of Aboriginal women and children as victims of violence in the Closing the Gap framework remains a glaring omission. With numerous Closing the Gap targets being "refreshed" in 2017, a focus on the horrifying overrepresentation of Aboriginal and Torres Strait Islander people in the justice system must become part of this framework.
- 9.5 Amnesty International recommends that Federal, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies, to forge agreement through COAG to set the following justice targets:
- i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, with an interim target of halving the gap by 2030; and
 - ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040; with priority strategies for women and children.

10. Access to Justice Issues

Question 11.1

⁸⁰ Amnesty International Australia, *A brighter tomorrow*.

⁸¹ Amnesty International Australia, *A brighter tomorrow*, p 25.

- 10.1 Diversion and early intervention approaches and programs are critical in order for Australia to fulfil its obligations under the CRC and other applicable norms and standards under international law.⁸²
- 10.2 The UN Committee on the Rights of the Child has stated that States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system.⁸³
- 10.3 States are required to consult with Indigenous communities and children to “develop policy and programming efforts in a culturally sensitive manner”.⁸⁴
- 10.4 The Committee on the Rights of the Child has also encouraged States to support Indigenous Peoples to design and implement restorative justice systems and community-based programmes and services that consider the needs and cultures of Indigenous children, their families and communities.⁸⁵
- 10.5 A key finding from Amnesty International's research is that diversionary programs are most effective when they are Indigenous-led. As such, Amnesty International recommends that the Australian Government fund and support, including through preferential tendering and building the capacity of, Indigenous organisations and communities to support culturally appropriate, Aboriginal and Torres Strait Islander designed and led programs.

Proposal 11.2

- 10.6 Amnesty International has concerns about the possibility of indefinite detention for children with a FASD diagnosis under current Western Australian legislation.
- 10.7 Under the *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, where a court forms the opinion that a person is unfit to stand trial due to mental impairment but is not of unsound mind,⁸⁶ the court must dismiss the charge and has only two options: they may either release the person unconditionally or make them subject to an indefinite custody order.⁸⁷
- 10.8 If a custody order is made, the young person must to be detained in an authorised hospital, a detention centre or a prison. A young person may only be detained in a hospital if they have a ‘treatable mental illness.’ Otherwise, as in the case of those affected by FASD,

⁸² Convention on the Rights of the Child, Arts. 3(1), 37(b), 40(1), 40(3).

⁸³ Convention on the Rights of the Child, Art. 40(3)(b); *Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice*, 42nd session, UN Doc CRC/C/GC/10 (25 April 2007), para. 26.

⁸⁴ Committee on the Rights of the Child, *General Comment No 10: Children’s Rights in Juvenile Justice*, 42nd session, UN Doc CRC/C/GC/10 (25 April 2007), para. 80.

⁸⁵ Committee on the Rights of the Child, *General Comment No 11: Indigenous children and their rights under the Convention*, UN Doc No CRC/C/GC/11 (12 February 2009), para. 75; See also Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *Advice No 6: Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities*, 7th sess, UN Doc A/HRC/EMRIP/2014/3/Rev.1, 25 June 2014, rec B.10; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), Arts. 11, 18.

⁸⁶ *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, s 9

⁸⁷ *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, s 16(5) and 19(4)

acquired brain injury or other cognitive impairments, the only option is detention or prison.⁸⁸ There is currently no option to issue a supervised release order.

10.9 The Mentally Impaired Accused Review Board has noted that the “lack of an appropriate secure residential facility for accused who present too high a risk to the safety of the community for them to be released ... continues to impede the effective discharge of the Board’s functions.”⁸⁹

10.10 According to the Office of the Western Australian Inspector of Custodial Services:

People subject to a custody order are held indefinitely until they can re-enter the community without posing an unacceptable risk. This is usually a graduated process that can take a number of years depending on individual circumstances. Subject to assessments of risk, the person will be provided increasing amounts of freedom from their place of custody until they are released.⁹⁰

10.11 This process is overseen by the Mentally Impaired Accused Review Board but it have no power to approve a leave of absence, conditional or unconditional release. This is at the discretion of the Governor of Western Australia, acting on the advice of the Attorney General.⁹¹ The Office of the Western Australian Inspector of Custodial Services stated that “our current system for managing mentally impaired accused is unjust, under resourced and ineffective.”⁹²

10.12 Indefinite detention due to mental impairment, with release entirely at the discretion of the Executive, is contrary to Article 9 of the International Covenant on Civil and Political Rights, which prohibits arbitrary detention.

10.13 Indefinite detention is also a violation of the obligation that detention be a measure of last resort. The law, as it stands, also limits the discretion of judicial officers to consider the most appropriate course of action where a person is deemed unfit to plead.

10.14 Amnesty International recommends that in order to prevent indefinite and arbitrary detention and safeguard the best interests of children with FASD and other conditions that may affect fitness to plead, there is an urgent need for courts to have the option to order the supervised and supported release of a young person who is deemed unfit to stand trial.

Question 11.2

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

⁸⁸ Mentally Impaired Accused Review Board, *Annual Report 2013/14*, p 20.

⁸⁹ Mentally Impaired Accused Review Board, *Annual Report 2013/14*, p 13.

⁹⁰ Western Australian Office of the Inspector of Custodial Services, 2014, *Mentally impaired accused on ‘custody orders’: Not guilty, but incarcerated indefinitely*, p 4, viewed 14 September 2017, available at [http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3911629ae105e733bb91cb8e48257cf30029ad45/\\$file/1629.pdf](http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3911629ae105e733bb91cb8e48257cf30029ad45/$file/1629.pdf).

⁹¹ Western Australian Office of the Inspector of Custodial Services, 2014, *Mentally impaired accused on ‘custody orders’: Not guilty, but incarcerated indefinitely*, p 10.

⁹² Western Australian Office of the Inspector of Custodial Services, 2014, *Mentally impaired accused on ‘custody orders’: Not guilty, but incarcerated indefinitely*, p iii.

- 10.16 The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) provide specialised and complementary, culturally-tailored services for Indigenous Australians. 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.⁹³ They 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.⁹⁴
- 10.17 The role of the FVPLS in preventing family violence is essential to improving community safety. There is a widely recognised link between family violence, out of home care for children, homelessness and youth offending.^{95,96} Through the delivery of programs that address family violence, the FVPLS play a role in preventing risk factors for offending behavior among young people.
- 10.18 Amnesty International understands that FVPLS had confirmation in March 2015 that ‘after a grueling open tender process’ funding for FVPLS will be maintained for 2-3 years at 2013/14 levels. However, the future remains highly uncertain for these crucial services following the termination of the National Family Violence Prevention Program which previously provided a direct allocation of funding. On 13 May 2015, FVPLS indicated that they require, ‘a further \$2 million per service, per annum to begin meeting the rise in demand and increased reporting rates of family violence in Aboriginal and Torres Strait Islander communities’.⁹⁷ Amnesty International understands however that the actual unmet need is unclear, and that the current funding needed to close this gap may now be different.
- 10.19 Numerous parliamentary inquiries have concluded that both of these Indigenous legal services are significantly underfunded.⁹⁸ The Productivity Commission has confirmed that

⁹³ Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 761, viewed 14 September 2017. available at

http://www.pc.gov.au/_data/assets/pdf_file/0020/145406/access-justice-volume2.pdf

⁹⁴ Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 766.

⁹⁵ 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], viewed 14 September 2017, available at

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm.

⁹⁶ National Family Violence Prevention Legal Services Forum, 2014, *Submission to the Senate Community Affairs References Committee Inquiry Into Out Of Home Care*, p 10.

⁹⁷ National Family Violence Prevention Legal Services, 2015, *Federal Budget provides no relief for FVPLSs despite escalating rates of family violence*, viewed 14 September 2017, available at

http://www.nationalfvpls.org/images/files/MR_13052015_Federal_Budget_provides_no_relief_for_FVPLSs_despite_escalating_rates_of_family_violence.pdf.

⁹⁸ See Senate Standing Committee on Legal and Constitutional Affairs, 2013, *Value of a Justice Reinvestment approach to criminal justice in Australia*, viewed 14 September 2017, available at http://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011, *Doing Time - Time For Doing: Indigenous youth in the criminal justice system*, viewed 14 September 2017, available at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm; Senate Legal and Constitutional References Committee, 2004, *Inquiry into Legal Aid and Access to Justice*; Senate Legal and Constitutional Affairs Committee, 2009, *Inquiry into Access to Justice*.

there is significant unmet legal need among Indigenous Australians, and that real funding per person has 'declined by about 20 per cent between 2000–01 and 2010–11'.⁹⁹

10.20 The Productivity Commission recommended an additional \$200 million per year be invested across the legal sector to both Indigenous and non-Indigenous legal aid providers to address unmet need.¹⁰⁰

10.21 The Australian Government must address uncertainty and gaps in delivery of quality legal services to Indigenous young people.

10.22 Amnesty International recommends that the Federal, State and Territory governments ensure sufficient and sustainable funding for National Aboriginal and Torres Strait Islander Services and Family Violence Prevention & Legal Services, including reversing any planned funding cuts to ATSILS, and:

(22) meet existing demand for services, including Indigenous-led culturally appropriate prevention and intervention programs for young people;

(23) address unmet need currently experienced by Indigenous young people and their families, regardless of geographic location; and

(24) develop models of holistic support and case management for young women.

Proposal 11.3

10.23 Amnesty International supports the introduction of a statutory custody notification service. Since this service has been in place in NSW and ACT, there has been a dramatic decrease in the number of Aboriginal and Torres Strait Islander deaths in custody.¹⁰¹

10.24 Further, Amnesty International's research suggests that access to justice is a critical issue for children. When children are being brought in for questioning or charge by police, Amnesty International's research shows that Aboriginal Legal Services or a guardian or other support person are not always contacted, which can have serious consequences for a child proceeding through the justice system.¹⁰²

10.25 Amnesty International recommends that, if a custody notification service is introduced, that Aboriginal and Torres Strait Islander legal services are sufficiently funded and supported to undertake this work.

11. Police Accountability

11.1 Amnesty International's research and work with Indigenous communities on youth justice has identified that the relationship between police and Aboriginal and Torres Strait Islander people is complex. As found by the Royal Commission into Aboriginal Deaths in Custody, this is due to the historical role that police have played in implementing policies that

⁹⁹ Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 700.

¹⁰⁰ Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 703.

¹⁰¹ Coroner's Court of Western Australia, 2016, *Record of Investigation into Death: Julieka Ivanna Dhu*, State Coroner Rosalinda Fogliani, viewed 14 September 2017, available at https://library.sydney.edu.au/subjects/downloads/citation/Harvard_Complete.pdf

¹⁰² Amnesty International Australia, *Heads held high*.

- discriminated against and, in some cases, harmed or resulted in the deaths of Indigenous people.
- 11.2 Since 2016, Amnesty International has been involved in two cases concerning police brutality towards Aboriginal and Torres Strait Islander people and children, not including the work Amnesty International has done to support families involved in cases of deaths in custody since the 1980s.
 - 11.3 Tragic and preventable deaths in custody, like 22-year-old Yamatji woman Ms Dhu, highlight the entrenched and continued nature of the issues affecting the relationship between police and Aboriginal and Torres Strait Islander people.
 - 11.4 There would certainly appear to be benefits in the changes proposed in the questions put by this inquiry. However, these questions do not interrogate the issue of discrimination by police.
 - 11.5 Amnesty International is concerned about the low rates of cautioning and diversion of Aboriginal and Torres Strait Islander children compared with non-Indigenous children. Across Australia, Indigenous children comprise 5% of the youth population and nationally on average 55% of the youth detention population, yet only 14 - 40% of diversions. Whereas non-Indigenous children comprise 95% of the youth population and 45% of the youth detention population, and 35 - 60% of diversions.¹⁰³
 - 11.6 While there is insufficient public data available to determine whether racial bias contributes to these figures, these low rates of diversion of Indigenous children compared with high rates of their over-representation in detention raise concerns about racial discrimination.
 - 11.7 Amnesty International recommends that Australian governments conduct investigations to address the reason for the lower rate of cautions issued to Indigenous children by police as compared to non-Indigenous children.
 - 11.8 Further, Amnesty International has raised concerns about the over-policing of the bail conditions of children by police. In Queensland, Amnesty International was told by police that door knock checks were being conducted up to six times a night in Townsville during 2015.¹⁰⁴
 - 11.9 In Western Australia, Amnesty International consistently heard from interviewees of the police shining a torch through the front window up to four times a night and requiring young people on curfews, which include a residential requirement, to present on request.¹⁰⁵
 - 11.10 Amnesty International recommends that on a national level, Government institutes an investigation into the application and enforcement of curfews as a condition of bail and publicly report on the findings.

¹⁰³ Productivity Commission, 2016, *Overcoming Indigenous Disadvantage: Key Indicators 2016*, 'Table 11.A.3.2', viewed 14 September 2017, available at <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016>

¹⁰⁴ Amnesty International Australia, *Heads held high*.

¹⁰⁵ Amnesty International Australia, *There is always a brighter future*.

12. Justice Reinvestment

- 12.1 Justice Reinvestment is an evidence-based approach to reducing incarceration rates by investing in, and supporting, communities to address the underlying social issues leading to offending. There has been growing momentum for justice reinvestment programs throughout Australia.
- 12.2 In NSW, the Maranguka Justice Reinvestment Project focuses on coordination and partnership between the community, service providers, government and police.¹⁰⁶
- 12.3 In the NT, Red Cross facilitates activity as guided by the Katherine Youth Justice Reinvestment Working Group.¹⁰⁷
- 12.4 In SA, the Government have committed to supporting two justice reinvestment trials.¹⁰⁸
- 12.5 In the ACT, the Community Safety Directorate (JACS) work closely with a range of government and community stakeholders, to identify drivers of crime and criminal justice costs.¹⁰⁹
- 12.6 The State government in QLD will trial a discrete program in Cherbourg. The Cherbourg trial aims to develop a culturally-specific integrated response to domestic and family violence, tailored to the needs of the local Aboriginal and Torres Strait Islander communities.¹¹⁰
- 12.7 In Australia, the national average cost per child per day in detention is approximately \$450,000 per child per year.¹¹¹ A justice reinvestment approach would reallocate funding to addressing the underlying causes of offending and rehabilitation, preventing children from becoming entrenched in the justice system or reoffending.
- 12.8 Amnesty International notes the importance of funding and supporting Indigenous-led justice reinvestment programs nationally,¹¹² and recommends that all levels of government implement a justice reinvestment approach through consultation with Indigenous communities, effective data collection, and compliance with international obligations.

¹⁰⁶ KPMG and Just Reinvest NSW, 2016, *Unlocking the Future: Maranguka Justice Reinvestment Project in Bourke*, viewed 14 September 2017, available at <http://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Maranguka-Justice-Reinvestment-Project.pdf>

¹⁰⁷ Northern Territory Government of Social Service, 2017, *Justice Reinvestment Project*, viewed 14 September, available at <http://www.ntcoss.org.au/current-projects/justice-reinvestment-project/>

¹⁰⁸ Government of South Australia Attorney General's Department, 2017, *Justice Reinvestment*, viewed 14 September 2017, available at <https://www.agd.sa.gov.au/projects-and-consultations/justice-reinvestment>

¹⁰⁹ The Australian Capital Territory Government, 2017, *Justice Reinvestment Strategy*, viewed 14 September 2017 available at <http://www.justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy>

¹¹⁰ Queensland Government, 2017, *Integrated service response trials*, viewed 14 September 2017, available at <https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/our-progress/enhancing-service-responses/integrated-service-response-trials>.

¹¹¹ Productivity Commission, 2016, *Report on Government Services*, 'Tables 16A.1, 16A.24', viewed 14 September 2017, available at <http://www.pc.gov.au/research/ongoing/report-on-government-services>.

¹¹² Amnesty International Australia, *Heads held high*.

13. Conclusion

- 13.1 Amnesty International calls for the adoption of each of the recommendations in this submission. Our research shows that these recommendations will lower the overrepresentation of Aboriginal and Torres Strait Islander children in the Australian justice system.