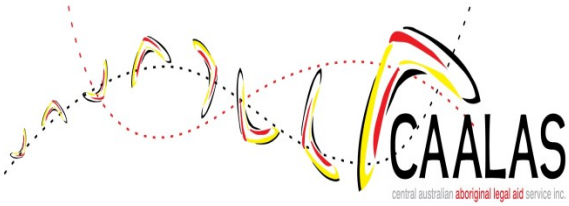
NATSILS SHADOW REPORT TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD

July 2011

Victorian Aboriginal Legal Service Co-operative Ltd

Aboriginal Legal Service of Western Australia

Aboriginal Legal Rights Movement Inc



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1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services Forum (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander justice issues in Australia. The NATSILS have almost 40 years experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples.

The NATSILS represent the following Aboriginal and Torres Strait Islander legal services:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS);

2. Introduction

The NATSILS make this submission to the United Nations (UN) Committee on the Rights of the Child (the Committee) to highlight serious concerns about the worsening situation of Aboriginal and Torres Strait Islander young people[1] in contact with the justice system in Australia.

The Committee has previously noted its concerns and made recommendations in relation to the problems faced by Aboriginal and Torres Strait Islander young people.[2] These are not being adequately addressed by the Australian Government. While some positive steps are being taken to 'Close the Gap' on health and education outcomes for Aboriginal and Torres Strait Islander young people, little progress is being achieved in the justice system and in some circumstances the situation is worsening. The current situation has been detailed in the recently released report 'Doing Time – Time for Doing'[3] which describes the relationship between Aboriginal and Torres Strait Islander young people and the justice system of Australia as a "national crisis".[4]

The NATSILS seek a new commitment from the Commonwealth, State and Territory governments of Australia to overhaul the justice system with particular regard as to how it affects and deals with Aboriginal and Torres Strait Islander young people. Such a commitment will require a holistic national strategy between the Commonwealth, State and Territory governments that is prepared in collaboration with Aboriginal and Torres Strait Islander peoples (including young people) and organisations. This commitment must also recognise the rights of Aboriginal and Torres Strait Islander young people and be based on partnership, collaboration, responsibility, agreed

[1] Throughout this document the term 'young people' is chosen to refer to children and young people aged 17 years or younger.
[2] Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, CRC/C/15/Add.268, 2005.
[3] Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Doing Time - Time for Doing, Indigenous Youth in the Criminal Justice System* (2011).
[4] Ibid 2.

outcomes and the principles of free, prior and informed consent, in accordance with the Declaration on the Rights of Indigenous Peoples.

This submission acknowledges and endorses the comprehensive report of the Australian Non-Government Organisation (NGO) National Child Rights Taskforce and does not seek to duplicate the information presented in that report. The NATSILS will instead focus on key issues and their specific effect on Aboriginal and Torres Strait Islander young people in contact with the justice system and seek to provide information that has not already been sufficiently detailed by the Taskforce.

It is hoped this report will assist the Committee in understanding the situation from an Aboriginal and Torres Strait Islander perspective, to ensure targeted questions can be asked of the Australian Government during its review in 2012 and for solid recommendations to be made with respect to Aboriginal and Torres Strait Islander young people in the Committee's Concluding Observations. To assist in this process we provide a list of suggested questions and recommendations for the Committee's consideration.

Unless otherwise stated, the questions and recommendations made below are directed at the Australian Commonwealth Government as the body responsible for ensuring that the rights within the Convention on the Rights of the Child (CRC) are protected within all jurisdictions of Australia. This however, is based on the understanding that in implementing the CRC the Commonwealth Government will need to work with State and Territory governments in areas of their jurisdiction.

3. Family environment and alternative care

3.1 Over-representation of Aboriginal and Torres Strait Islander Young People in Alternative Care (arts 2, 4 and 27)

The Committee has previously voiced its concerns regarding the over-representation of Aboriginal and Torres Strait Islander young people in alternative care.[5] Despite repeated calls for government action, Aboriginal and Torres Strait Islander young people continue to be over five times more likely to be the subject of child protection substantiations than non-Aboriginal and Torres Strait Islander young people.[6] In Queensland for example, Aboriginal and Torres Strait Islander young people comprise only 6.3 per cent of the child population yet comprise 31.5 per cent of all young people in the child protection system.[7] This over-representation continues to increase. In 2009-10, approximately 32 per cent per of all young people in alternative care were identified as Aboriginal or Torres Strait Islander, a 9 per cent increase from the previous year.

3.2 Protection from abuse and neglect (art 19)

Data shows that neglect is the most common form of maltreatment experienced by Aboriginal and Torres Strait Islander young people.[8] Neglect is the failure to provide for a young person's basic needs such as adequate food, shelter, clothing, supervision, education, hygiene and standards of

[5] Committee on the Rights of the Child, above n 2, [37].
[6] Richards, K, 'Juveniles Contact with the Criminal Justice System in Australia' (2009) *AIC Monitoring Reports 07*, 19.
[7] Ibid.
[8] Berlyn, C, Bromfield, L and Lamont, A, 'Child Protection and Aboriginal and Torres Strait Islander Children' (2011) *National Child Protection Clearinghouse Resource Sheet April*, 2.

health. The high rates of neglect amongst Aboriginal and Torres Strait Islander young people are consistent with, and reflective of, the high levels of disadvantage experienced by many Aboriginal and Torres Strait Islander peoples.[9]

It is widely accepted that there is a close link between abuse and neglect and the broader issues of poverty, in all indicators of which Aboriginal and Torres Strait Islander peoples rate as the most disadvantaged group in Australia. For example, the Steering Committee for the Review of Government Service Provision in its *Overcoming Indigenous Disadvantage: Key Indicators 2009 Overview*[10] found that:

- The infant mortality rate is between two to three times higher for Aboriginal and Torres Strait Islander infants than non-Aboriginal and Torres Strait Islander infants and the mortality rate for young people is between two to four times higher for Aboriginal and Torres Strait Islander young people than non-Aboriginal and Torres Strait Islander young people (p.14).
- The rate of hospitalisation of young people under the age of five for potentially preventable diseases and injuries is twice as high for Aboriginal and Torres Strait Islander young people than non-Aboriginal and Torres Strait Islander young people (p.30).
- The death rate from external causes and preventable diseases for young people aged less than five years is two to five times as high for Aboriginal and Torres Strait Islander young people than non-Aboriginal and Torres Strait Islander young people (p.30).
- The adult Aboriginal and Torres Strait Islander hospitalisation rate for potentially preventable chronic conditions is six times higher than the rate for non-Aboriginal and Torres Strait Islander adults (p.38).
- Aboriginal and Torres Strait Islander men and women are five and four times as likely as non-Aboriginal and Torres Strait Islander men and women to die from avoidable causes (p.39).
- Aboriginal and Torres Strait Islander peoples have higher treatment rates for mental health issues in community clinics, residential care facilities and hospitals compared with non-Aboriginal and Torres Strait Islander people (p.41).
- Aboriginal and Torres Strait Islander females and males are 35 and 21 times as likely to be hospitalised due to family violence related assaults as non-Aboriginal and Torres Strait Islander females and males (p.24).
- Unemployment is over three times higher for Aboriginal and Torres Strait Islander peoples than for non-Aboriginal and Torres Strait Islander people (p.19).
- The average income of Aboriginal and Torres Strait Islander households is only 65 per cent of the average income of non-Aboriginal and Torres Strait Islander households (p.22).
- Aboriginal and Torres Strait Islander peoples are five times more likely to live in overcrowded households than non-Aboriginal and Torres Strait Islander people (p.49).

These statistics show that despite Government initiatives aimed at improving living standards, such as the Close the Gap campaign and the Northern Territory Intervention, efforts are failing to

[9] Approximately 40 percent of Aboriginal and Torres Strait Islander peoples living in major cities, outer regional, remote and very remote areas of Australia live below the poverty line and this rate increases to over 50 percent in inner regional areas (B. Hunter, *Assessing the evidence on Indigenous socioeconomic outcomes: A focus on the 2002 NATSISS* (2006) 100).

[10] Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009) Productivity Commission.

address the levels of poverty and disadvantage experienced by many Aboriginal and Torres Strait Islander young people. The Committee's previous Concluding Observations have repeatedly raised concerns over the disparate living standards of Aboriginal and Torres Strait Islander young people.[11]

The ongoing living standards of Aboriginal and Torres Strait Islander young people remain inconsistent with Australia's obligation to protect the right of every young person to an adequate standard of living under article 27 of the CRC and consequentially, its obligation under article 19 to protect young people from abuse and neglect.[12]

Proposed Question to the Australian Government:

How is the effectiveness of initiatives to improve the living standards of Aboriginal and Torres Strait Islander young people measured and what plans are in place to amend such initiatives if they are proven to be ineffective?

Suggested Recommendations:

1. That the Government strengthen its current efforts to address the living conditions of Aboriginal and Torres Strait Islander peoples so that fewer Aboriginal and Torres Strait Islander young people are taken into alternative care by:

    a) committing to improving evidence gathering mechanisms through the incorporation of Aboriginal and Torres Strait Islander methodologies in relation to standards of living of Aboriginal and Torres Strait Islander young people;

    b) implementing independent reviews with the involvement of Aboriginal and Torres Strait Islander peoples of the success of the Closing the Gap campaign and the Northern Territory Intervention and committing to amend these initiatives in light of the reviews' results; and

    c) developing a system in consultation, partnership and collaboration with Aboriginal and Torres Strait Islander peoples for increased early and therapeutic family interventions and parental support which focuses on increasing the chances of young people remaining within their families.

3.3 Indigenous Child Placement Principle and Preservation of Identity (arts 20 (3) and 8)

Given the over-representation of Aboriginal and Torres Strait Islander young people in the child protection system, and in light of a desire to avoid a repetition of the trauma suffered by victims of the Stolen Generations, the Government has introduced the Indigenous Child Placement Principle.[13] This outlines the priority of placement for Aboriginal and Torres Strait Islander young people being placed into alternative care. The order of priority for placement is as follows:

[11] Committee on the Rights of the Child, above n 2, [17-18, 24-25, 37, 47, 55, 56, 57].
[12] *Convention on the Rights of the Child*, opened for signature 20 November 1989, I-127531, arts 27, 19 (entry into force 2 September 1990).
[13] See http://www.communities.qld.gov.au/childsafety/about-us/our-performance/ongoing-intervention-phase/indigenous-child-placement-principle#what-is-the-indigenous-child-placement-principle.

1) a member of the young person's family,
2) a member of the young person's community or language group,
3) another Aboriginal or Torres Strait Islander person who is familiar with the young person's community or language group, and
4) another Aboriginal or Torres Strait Islander person who does not come under point 2 or 3 above.

Only when an appropriate placement cannot be found in the groups listed above can Aboriginal or Torres Strait Islander young people be placed with a non-Aboriginal and Torres Strait Islander carer.

The Indigenous Child Placement Principle is consistent with article 20 of the CRC which requires states to consider ensuring continuity in the young person's upbringing and to the young person's ethnic, cultural and linguistic background. There is, however, a lack of consistency in the implementation of the Indigenous Child Placement Principle. Aboriginal and Torres Strait Islander young people are often not placed according to the preferred placement hierarchy because there is a shortage of Aboriginal and Torres Strait Islander carers. There are several explanations in regards to this shortage. These include:

- the sheer number of young people being placed into out of home care and the small population from which carers may be recruited;
- overly bureaucratic requirements within the recruitment screening process and the time it takes to complete these;
- many Aboriginal and Torres Strait Islander adults suffer an inability to care for young people on account of trauma and disadvantage associated with the Stolen Generations;
- some Aboriginal and Torres Strait Islander adults are unable to reconcile their attitudes and emotions associated with the welfare system, on account of past government practices, including forced removal; and
- the requirement to undergo a police check. A high number of Aboriginal and Torres Strait Islander adults have police records and whilst for many, the records relate to minor offences such as public intoxication, they are often used against them. Furthermore, Aboriginal and Torres Strait Islander adults may choose not to volunteer as a carer so as to avoid the emotional trauma associated with past charges that may possibly reflect previous discrimination against them, particularly in relation to policing practices.[14]

To date there is no policy or practice framework in relation to the Indigenous Child Placement Principle to aid its implementation.

Disappointingly, once an Aboriginal or Torres Strait Islander young person enters the child protection system there is no guarantee that they will no longer suffer from abuse and neglect. Abuse and neglect can continue to occur as the cultural and spiritual needs of Aboriginal and Torres Strait Islander young people are often not met. Connections with families and communities are often lost particularly when young people are removed and placed in different communities with non-Aboriginal and Torres Strait Islander families. One way in which this issue can be

[14] Bromfield, L M et al, 'Why Standard Assessment Processes are Culturally Inappropriate' (2010) *Australian Institute of Family Studies National Child Protection Clearinghouse Promising Practices in Out-of-Home Care for Aboriginal and Torres Strait Islander Carers and Young People: Strengths and Barriers, Paper 3,* 4.

addressed is through the development of a cultural plan which encompasses how cultural, spiritual, family and community connections are to be developed and maintained. However, it is a major concern that only 20 per cent of Aboriginal and Torres Strait Islander young people considered to require a Cultural Plan have one developed.[15]

In addition, there is a focus by State and Territory governments on indicators that measure a young person's administrative status (e.g. reasons for coming into care, time in care, racial and ethnic identity, compliance with the Aboriginal and Torres Strait Islander Child Placement Principle, continuity of caseworkers and location of placement), rather than on indicators that reflect a young person's wellbeing and functioning. When indicators of wellbeing are assessed they tend to only include health, educational progress and social development. Wellbeing indicators for Aboriginal and Torres Strait Islander young people should also include cultural and spiritual dimensions as well as physical, emotional and social status. Other indicators of the young person's community, including housing, employment and other economic indicators should also be included when assessing wellbeing.

If a young person's needs are not met they can exhibit disruptive and anti-social behaviour, and a concerning pattern has developed whereby this type of behaviour by young people in alternative care is being criminalised when the situation gets beyond the control of the carer. For example, a young person may break a window because of unaddressed anger management issues and the carer (or refuge worker etc) then calls the police to deal with this behaviour. It is the NATSILS experience that young people in alternative care can accumulate large numbers of insignificant charges and convictions in this way.

These same concerns have been raised by the Committee in the past.[16]

Proposed Question to the Australian Government:

What capacity building and oversight measures are in place to ensure that the Indigenous Child Placement Principle achieves 100 per cent implementation and that Aboriginal and Torres Strait Islander young people retain their connections to community and culture once they are placed in alternative care?

Suggested Recommendations:

2. That a policy and practice framework be developed in consultation with Aboriginal and Torres Strait Islander peoples and organisations in relation to the Indigenous Child Placement Principle to aid its implementation.

3. That a review occurs of the screening processes of Aboriginal and Torres Strait Islander carers, in particular, kinship carers, and that resources be allocated to support and increase the number of potential carers.

[15] Brouwer G E, *Own motion investigation into the Department of Human Services Child Protection Program* (2009) Ombudsman's report presented to Parliament 25 November 2009, 77.
[16] Committee on the Rights of the Child, above n 2, [37 (b) -38 (c), 39].

4. That Cultural Plans be developed and updated at least every six months for each Aboriginal and Torres Strait Islander young person in care in consultation with the young person's family and community.

5. That wellbeing indicators be developed in consultation with Aboriginal and Torres Strait Islander peoples and Aboriginal and Torres Strait Islander organisations and peak bodies to assess and enhance the wellbeing of Aboriginal and Torres Strait Islander young people.

3.4 Family Reunification after Separation (art 10)

Reunification is a long standing issue for Aboriginal and Torres Strait Islander peoples, tracing back to the Stolen Generations. Aboriginal and Torres Strait Islander young people are less likely than non-Aboriginal and Torres Strait Islander young people "to have contact with their families, particularly in the first few months after being placed into care, and are also less likely to be reunified with their families."[17] This is because Aboriginal and Torres Strait Islander young people can often be placed outside of their communities and resource issues arise in respect to reunification.

Proposed Question to the Australian Government:

What measures are in place to ensure that the child protection system focuses on family reunification as a priority, when in the best interest of the young person?

Suggested Recommendation:

6. That, when in the best interest of the young person, the child protection system focus on family reunification as a priority and that until reunification is achieved Cultural Plans (see recommendation 4) be strictly followed so as to maintain the young person's connection to community and culture.

3.5 Separation from Parents Due to Detention or Imprisonment (art 9)

Aboriginal and Torres Strait Islander adults are disproportionately over-represented in the criminal justice system. The rate of imprisonment for Aboriginal and Torres Strait Islander adults was 14 times higher than the rate for non-Aboriginal and Torres Strait Islander adults at 30 June 2009 and between 2000 and 2008, the Aboriginal and Torres Strait Islander adult imprisonment rate rose by approximately 40 per cent.[18]

As a result of such incarceration rates, separation from parents due to detention or imprisonment is a core issue affecting Aboriginal and Torres Strait Islander young people as the Committee recognised in its most recent Concluding Observations.[19] The management of this issue and ensuring that Aboriginal and Torres Strait Islander young people maintain personal relations and direct contact with a detained or imprisoned parent/s on a regular basis, where it is in the young person's best interest, is far from consistent and is regularly unsatisfactory.

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[17] Richardson, N et al, 'Cultural Considerations in Out-of-Home Care' (2007) *Australian Institute of Family Studies National Protection Clearinghouse Research Brief, No. 8*, 5.
[18] Australian Bureau of Statistics, *Prisoners in Australia* (2009).
[19] Committee on the Rights of the Child, above n 2, [40].

The case study below captures what can be at stake when a young person's right to maintain relations and have regular contact with an incarcerated parent is not protected.

Case Study: access to an incarcerated parent

"Joel" is a young Aboriginal boy who has been removed from his mother's care and placed in a youth group home between the ages of 11-14 after unsuccessful foster care placement. Joel's father is in prison and Joel has no contact with his mother. Joel's father calls Joel regularly from prison.

In order for Joel to visit his father, the Department of Human Services (DHS) has to arrange a prison visit and a case worker has to ensure Joel is mentally prepared to see his father in a prison environment and cope with going to a prison himself. Both Joel and his father reportedly have a positive and calming effect on each other.

Joel is moved from one group home to another. Joel's father has no knowledge of where his son has gone and is unable to speak to Joel on the phone for 2 weeks. Unable to contact his son, Joel's father becomes increasingly agitated and displays aggression. As a result, Joel's father is moved to a higher security prison. As a result of this relocation, all links and support networks between Joel, the DHS caseworker and the prison needed to be reconstructed which further delayed Joel's access to his father. This is an extremely onerous task considering Joel's fathers poor literacy and consequent difficulties fulfilling the paperwork requirements to gain telephone and face-to-face contact with his son. This results in considerable time passing before Joel and his father can have visitation.

A VALS staff member involved in the above case stated that Joel and his father better cope with their lives when in contact with each other and that the difficulty they had in accessing time with each other made life extremely stressful for both parties. The staff member also stated that it is a common perception that prison visits are the bottom of the priority list for DHS workers.

Given the over-representation of Aboriginal and Torres Strait Islander adults in detention and the over-representation of Aboriginal and Torres Strait Islander young people in alternative care, it is likely that many other Aboriginal and Torres Strait Islander young people are in similar situations to that of Joel and his father. As the Committee has recommended previously,[20] the Government must do more to ensure that Aboriginal and Torres Strait Islander young people with an incarcerated parent/s are provided with adequate support and that contact between the young person and parent/s is maintained.

Proposed Question to the Australian Government:

To what extent is arranging contact between Aboriginal and Torres Strait Islander young people in alternative care and their incarcerated parent/s and other family members, where it is in the young person's best interest, a priority within the child protection system and what oversight mechanisms are in place to monitor the regularity of such visits?

Suggested Recommendation:

7. That the child protection system educate its staff on the importance of maintaining relations between Aboriginal and Torres Strait Islander young people in alternative care and their incarcerated parent/s and ensure that such contact is designated as a priority area within their case work obligations.

[20] Committee on the Rights of the Child, above n 2, [41].

4. Aboriginal and Torres Strait Islander Young people and the Justice System

4.1 Over-representation of Aboriginal and Torres Strait Islander Young people in the Criminal Justice System

Aboriginal and Torres Strait Islander young people remain significantly over-represented in the criminal justice system. While rates of non-Aboriginal and Torres Strait Islander young people in detention have decreased, rates of Aboriginal and Torres Strait Islander young people in detention continue to increase.[21] Aboriginal and Torres Strait Islander young people comprise 54 per cent of all young people in detention, despite comprising only 5 per cent of the 10-17 year old age group, and are detained at a rate 26 times higher than that of non-Aboriginal and Torres Strait Islander young people.[22] There are a number of causal factors related to this over-representation.

In the recent Senate Committee report 'Doing Time – Time for Doing' the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system has been linked to the broader social and economic disadvantage faced by many Aboriginal and Torres Strait Islander peoples, including:

- poor education outcomes;
- high rates of unemployment;
- high levels of drug and alcohol abuse;
- over-crowded housing and high rates of homelessness;
- over-representation in the child protection system;[23]
- high levels of family dysfunction; and
- a loss of connection to community and culture.[24]

In addition to these, through their experience on the ground the NATSILS have also identified the following as critical factors that contribute to the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system:

- over-policing and poor utilisation of diversionary schemes by police;
- absence of crisis care accommodation, bail hostels and rehabilitation programs;
- limited access to legal advice;
- mandatory sentencing and other punitive laws; and
- Aboriginal and Torres Strait Islander young people being remanded in custody at higher rates.

[21] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 3, 8-9.
[22] Australian Institute of Criminology, *Australian Crime: Facts and Figures* (2009), 113.
[23] Stewart, A, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) at <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf>. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.
[24] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 3, 12-13.

Proposed Question of Australian Government:

To what extent does the Government's approach to the criminal justice system and Aboriginal and Torres Strait Islander young people focus on addressing the broader causal factors of offending and over-representation?

Suggested Recommendations:

8. That the Government work with State and Territory Governments to create a holistic youth justice system that responds effectively to the causal factors of offending and over-representation by diverting young people from contact with the criminal justice system and judicial proceedings and referring them to appropriate support and rehabilitative services wherever possible.

9. That necessary resources be made available by Commonwealth, State and Territory Governments to prevent young people coming into contact with the criminal justice system in terms of investing in education, housing, rehabilitation services, youth bail hostels, support services, employment and training and recreational activities under a framework of justice reinvestment.

4.2 Discriminatory Laws (art 2)

Due to their public presence, it is generally accepted that young people are over-policed particularly if they have mental health issues, are homeless or are dark-skinned.[25] There are a number of laws within Australia which discriminate against Aboriginal and Torres Strait Islander young people. For example, a range of public space 'move on' laws across Australia are discriminatory as they disproportionately affect Aboriginal and Torres Strait Islander young people who are highly visible in public space as it is used as cultural space and used for congregation and socialisation as well as living space due to high levels of homelessness and low levels of property ownership. Also, these laws are implemented by police at disproportionate rates against young people. The Committee has raised concerns about these laws in the past and despite ongoing domestic lobbying efforts, they continue to remain in place.[26] There is considerable evidence to show that move-on powers are used disproportionately against Aboriginal and Torres Strait Islander young people.[27] A survey of young people conducted in Queensland following the expansion of move on powers highlighted police practices such as a failure to inform young people of the nature or details of their move on notice (including its duration and what constitutes a breach) and disproportionate use of the powers against Aboriginal and Torres Strait Islander young people.[28]

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[25] National Crime Prevention Attorney General's Department, *Hanging out: Negotiating Young People's Use of Public Space* (1999) at http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)~no7_summary.pdf/$file/no7_summary.pdf; Grosman, M and Sharples, J, *Don't Go There: Young People's Perspectives on Safety and Community Policing* (2010) at http://www.vu.edu.au/sites/default/files/mcd/pdfs/dont-go-there-study-may-2010.pdf .

[26] Committee on the Rights of the Child, above n 2, [73 (e), 74 (h)].

[27] NSW Ombudsman, *Policing Public Safety* (1999) at http://www.ombo.nsw.gov.au/publication/PDF/Other%20Reports/PPS%20Report-part%201.pdf

[28] Paul Spooner, 'Moving in the wrong direction' (2011) *Youth Studies Australia,* vol. 20 no. 1, 29-30 in Youthlaw, *Position Paper: Police Powers in Victoria* (2011).

Recent changes increasing the onerous nature of bail conditions has also elevated the risk of young people either being denied bail because they cannot meet the requirements, or being remanded in detention for conditional or technical breaches of bail. As a result of some of the broader social and economic disadvantages faced by Aboriginal and Torres Strait Islander peoples, as described above, changes to bail laws disproportionately impact upon and therefore, indirectly discriminate against Aboriginal and Torres Strait Islander young people. For example, it is the NATSILS' experience that Aboriginal and Torres Strait Islander young people are often being denied bail because they lack access to appropriate accommodation or due to family dysfunction, a responsible adult to whom they can be bailed. As a result, it is also the NATSILS' experience that many young people will choose to enter a plea of guilty simply to finalise their court matters quickly and avoid lengthy periods detained on remand.

The following case studies show how social and economic factors can both restrict Aboriginal and Torres Strait Islander young people's access to bail and make it difficult for them to comply with bail conditions once bail is granted, resulting in extended periods being spent detained on remand:

Case Study: Family Dysfunction and Bail

1. A 17 year old Aboriginal boy was arrested early on a Saturday morning in July 2010 in Karratha for breach of bail in relation to breaches of a conditional release order and a trespass charge. He was remanded in custody to the following Tuesday. On that Tuesday he was granted bail in relation to the charges on which he was arrested and other fresh charges. However, no responsible adult could be located until Wednesday and the boy therefore spent five days in the police lockup.

2. A 12 year old Aboriginal boy spent nine days in isolation in May 2011 in a police lockup designed for adult offenders in a small regional town in the Kimberley. No responsible adult could be found nor a bail hostel arranged for the boy to be released under supervision. The boy had been charged for burglary offences, later released and then remanded in custody by a Justice of the Peace after breaching a court-imposed curfew. He was remanded in custody while Juvenile Justice staff attempted to contact a responsible adult. He was eventually flown down to a youth remand centre in Perth, sentenced for the burglaries, and then flown back to the small town.

3. A 10 year old Aboriginal boy from Broome, with foetal alcohol syndrome and other behaviour issues, spent five days in police custody in August 2010. Whilst in custody he was allegedly mistreated by police who threatened to withhold food and take away his blanket. The boy was in custody for breaching bail conditions arising from a stealing charge. The boy had been trying to run away at night from the remote community where he was located. There was no responsible adult available for the boy. The boy was in custody after being refused bail by a Justice of the Peace on a Saturday in Broome due to the absence of a responsible adult. His family attended Broome shortly afterwards but the Justice of the Peace refused to re-list the matter and the boy was remanded in custody until Monday. On that Monday, he was granted bail to reside at Mt Barnett Station but was to remain in custody until a responsible adult could transport him. As no responsible adult appeared and the road to Mt Barnett was flooded, the boy was driven by police to Mr Barnett after five days in police custody, after the floods had subsided.

4. In November 2010 a 14 year old Aboriginal boy from Geraldton spent an excessive period of 29 days in custody despite his young age and lack of criminal record. The boy had a lack of adult supervision or support which contributed to his offending and time in custody. Despite having an open file with the Department of Child Protection (DCP), no DCP case worker ever attended court as a responsible adult on upward of nine court appearances. The boy spent 29 days in custody before the matters were dealt with by way of no further punishment due to time spent in custody. Essentially, it would appear that the boy was subjected to excessive periods in detention for welfare, rather than criminal justice purposes.

A worrying pattern has also emerged whereby strict bail conditions of Aboriginal and Torres Strait Islander young people are being 'over-policed' in some communities. For example:

Case Study: Over-Policing of Bail

1. A 15 year old Aboriginal boy from Geraldton was released on bail to reside at his girlfriend's house as he had no suitable family with whom to stay in May 2009. His bail conditions included a curfew between 7.00pm and 7.00am that required him to present at the front door when requested by police. The police attended the address at different times every day, usually after midnight to confirm his compliance with his curfew. On one occasion, the police attended at his address in Geraldton at 4:30am. No one responded to police knocks as the household was asleep. Inside at the time was a responsible adult, the boy, his girlfriend and two other younger, primary school aged children. Two days later police attended the address at 9.00am and arrested the boy for breaching his curfew. He was held in custody until he appeared in court at midday. ALSWA submitted in court that given the natural state of deep sleep experienced at 4.30am, it is to be expected that no one was awakened by police knocks. ALSWA submitted it was unfair to charge the boy because no one answered the front door. The Magistrate agreed and stated if people were asleep in the house it hardly constituted a breach.

2. A 14 year old Aboriginal boy from Geraldton spent an unnecessary night in custody in May 2010 for associating with a boy whom the police wrongfully believed he was precluded from associating with as a result of bail conditions. The boy was on bail for a number of offences. At varying times, he was subject to a myriad of bail conditions imposed under different bail undertakings for the different charges. He had been bailed by both police and a Magistrate at different times on different charges. One condition of bail imposed by the Magistrate precluded the boy from contacting his co-accused. The boy pleaded guilty to all the charges and his matters were adjourned for a pre-sentence report. During this period of adjournment, police sought to revoke his bail stating he had been seen (not by the police) breaching his bail by talking to a person included in the non-association bail condition. The boy was arrested and questioned by police for the alleged breach of bail and spent one night in police custody. The boy instructed ALSWA he had not spoken to the person police alleged he had been speaking with. It became apparent the person whom police alleged he had spoken with had never been the subject of a non-association condition of the boy's bail.

In instances where Aboriginal and Torres Strait Islander young people are granted bail, cultural obligations can sometimes make the onerous conditions difficult to abide by and can thus, increase the risk of young people breaching those conditions and being taken into custody. The following is a case study example:

Case Study: Cultural Obligations vs. Strict Bail Conditions

Sam has been charged with unlawful entry, criminal damage and stealing from an incident which occurred at night time involving a group of young people breaking into the Sports Store and stealing sporting goods.

Sam was placed on bail which involved curfew and residential conditions. Sam's matter was mentioned in court and adjourned to allow Sam's lawyer to write representations for the charges to be amended.

In the meantime, a death occurred in Sam's immediate family. According to traditional custom, Sam's family had to vacate the house in which they lived and reside at an alternative location. The police breached Sam's bail because he was not residing at the prescribed address. Sam spent the morning in custody before being bailed to an alternative address.

The police continually checked on Sam throughout the night, irrespective of the fact that his family was going through Sorry Business.

One week later the end of the football season arrived and Sam decided to attend a party and celebrate with his friends. Sam was again breached and spent time in custody for not complying with his curfew bail condition.

Sam's family decided to move him to a remote community where some family lived, due to this trouble with the police. There was no High School on the community so Sam stopped attending school for a period of time. Three weeks later, facts had been agreed upon and Sam's matter was before the court. Sam received a without conviction good behavior bond for the offending.

Proposed Question to the Australian Government:

What action is the Government taking to ensure that legislation does not have a discriminatory effect on Aboriginal and Torres Strait Islander young people?

Suggested Recommendations:

10. That all legislation be reviewed for its impact upon Aboriginal and Torres Strait Islander peoples, including young people specifically, and that all future bills introduced into Australian parliaments include a statement of impact in relation to Aboriginal and Torres Strait Islander peoples, including young people specifically.

11. That where legislation is identified as having a discriminatory impact upon Aboriginal and Torres Strait Islander young people, such legislation be amended so as to not be discriminatory, or that implementation and support measures be put in place to assist young people coming into contact with the legislation to achieve an equitable outcome.

12. That the Government work with State and Territory governments to expand the availability of youth bail hostels so that young people without access to appropriate accommodation or a responsible adult are not inappropriately remanded in custody.

13. That legislation in each jurisdiction dictating bail considerations and presumptions be amended to create a presumption in favour of bail for young people and to ensure that bail conditions take account of social and cultural factors and can be reasonably met by Aboriginal and Torres Strait Islander young people.

14. That immediate action be taken to dramatically reduce the numbers of Aboriginal and Torres Strait Islander young people on remand.

4.3 Cautioning, Restorative Justice Approaches and Diversion Options (art 40 (3) (b))

There is evidence to suggest that while police cautioning and restorative justice measures have been successful in diverting young people from the criminal justice system, Aboriginal and Torres Strait Islander young people are often not afforded access to, or the benefits of, these and other diversionary measures.[29] While there are a range of diversionary options provided for in the legislation of each State and Territory, there is major concern surrounding the underutilisation of these options by police, particularly in relation to Aboriginal and Torres Strait Islander young people. For example, Aboriginal and Torres Strait Islander young people in Western Australia receive only 28 per cent of all cautions issued by police but represented 80 per cent of the total population of in young people in detention. Also, 80 per cent of non-Aboriginal and Torres Strait

[29] Richards, K, 'Trends in Juvenile Detention in Australia' (2011) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice no.416, 6.*

Islander young people are diverted whereas only 55 per cent of Aboriginal and Torres Strait Islander young people are diverted.[30]

As a means to try and address this situation, for the last three years ALRM have requested funds from the Commonwealth Attorney-General's Department to establish a youth diversion solicitor who would focus on giving advice to Aboriginal young people in Adelaide and ensure that as many as possible are diverted by police to formal and informal cautioning as well as family conferencing. Despite support from the South Australia Police Commissioner and a Senior Judge of the Youth Court, ALRM's requests have been consistently denied.

The following cases demonstrate an emerging pattern of police preferring to lock up Aboriginal and Torres Strait Islander young people for minor offences rather than divert them from the criminal justice system.

Case Studies: Locking Up Our Young people For Minor Offences

1. A 15 year old boy from Onslow was charged with attempting to steal a $2.05 ice cream, where the offence could have been the subject of diversion or a Juvenile Justice Team referral. The boy was arrested by police, refused police bail, remanded in custody by a court, transported to a youth detention centre in Perth and then spent 10 days in custody prior to his matter being dealt with in Perth Children's Court. The charge was dealt with by way of a dismissal on the basis that the boy had already been punished as a consequence of the time spent in pre-sentence detention.

2. A 16 year old boy from Kalgoorlie attempted to commit suicide by throwing himself in front of a moving vehicle. The attempt was unsuccessful. The police were called and arrested the boy. The boy was charged with damaging the vehicle. At the time of the attempt the boy had a visible scar on his neck from a previous attempted suicide when he tried to slash his throat with a knife. The charge was later withdrawn after numerous representations to police were made by ALSWA.

3. An 11 year old girl, with no prior contact with the justice system, was charged with threats to harm following an incident at her primary school where she allegedly threatened her teachers whilst holding plastic scissors. The girl was arrested by police at her school, sprayed with capsicum spray, hosed down with cold water in the yard of her school after the capsicum spray was administered and then transported in police custody, without notifying her family, to a Perth police station. The case was not dealt with by way of either a police caution or a referral by police to a Juvenile Justice Team, but instead proceeded by way of a formal prosecution. The girl was ultimately found not guilty by a Magistrate at a defended hearing.

4. A 13 year old boy from Wyndham was throwing water balloons at his friends. A water balloon was thrown through the open window of a passing car. The balloon burst on impact inside the car. A rear seat passenger was covered in water. It was not suggested that the passenger was injured or that the driver's capacity to control the car was affected. The boy was charged with common assault. Repeated representations to police to withdraw the charge, effectively endorsed by the local Magistrate, have failed. The charge will be the subject of a defended hearing.

5. A 12 year-old boy faced the Children's Court in Northam on 16 November 2009 charged with receiving a stolen Freddo Frog chocolate bar, allegedly stolen by his friend. The Freddo Frog cost 70 cents. The boy had no prior convictions and faced a further charge involving the receipt of a stolen novelty sign from another store, which read, "Do not enter, genius at work". The boy missed the first court appearance due to a misunderstanding about Court dates and was then apprehended by police at 8.00am on a school day and taken into custody where he was imprisoned for several hours.[31] When the boy appeared before Justices of the Peace, after spending most of the

[30] The Hon Dennis Mahony AO QC Special Inquirer, *Inquiry into the Management of Offenders in Custody and in the Community* (2005), 341

[31] Farouque, F, 'Stolen Freddo: boy, 12, charged', *The* Age, November 16 2009 at http://www.theage.com.au/national/stolen-freddo-boy-12-charged-20091115-igec.html.

day in the police lock-up, he was released to bail with conditions that he remain at his home between the hours of 7.00pm and 7.00am and that he not attend the central business district of Northam except in the company of his mother or older brother. The charges were eventually withdrawn and costs awarded to the boy, despite police defending their actions as "technically correct". ALSWA maintained the charges were scandalous and would not have occurred if the boy had come from a middle-class non-Aboriginal or Torres Strait Islander family.

Proposed Question to the Australian Government:

What practical measures does the Australian Government have in place to guarantee that young people are diverted from the justice system in appropriate circumstances and what oversight mechanisms are in place to assess the rate at which Aboriginal and Torres Strait Islander young people are being diverted in comparison to non-Aboriginal and Torres Strait Islander young people?

Suggested Recommendation:

15. That the Australian Government work with State and Territory governments to introduce legislation that requires the police to lodge a written document with the court upon the commencement of criminal proceedings against a young person outlining why all diversionary processes were inappropriate in the circumstances.

16. That Commonwealth, State and Territory governments commit to working with police to increase the rate at which Aboriginal and Torres Strait Islander young people are diverted from the formal justice system.

17. That statistics be recorded by police and courts in regards to diversions and the stated offence/s.

4.4 Specialised and Separate Courts

There are separate specialist children/youth courts in every State and Territory in Australia except for the Northern Territory. While every other State or Territory has a separate children/youth courts with specially trained magistrates and workers, in the Northern Territory the Youth Justice Court sits as a subsidiary of the adult Magistrate's Court with magistrates acting in both jurisdictions, and simply putting on their youth justice hats when the Youth Justice Court sits. The outcome of this is that young people are denied access to a specialist court service which is geared towards addressing the specific issues faced by young people.

In addition to specialist children/youth courts, Victoria and Queensland also have specialist sentencing courts for Aboriginal and Torres Strait Islander young people who plead guilty. In these courts Elders and other respected persons from Aboriginal and Torres Strait Islander communities are involved in the sentencing process and restorative justice principles are utilised. ATSILS (Qld) however, has noted that in practice Aboriginal and Torres Strait Islander young people are not often referred to this court.

Western Australia also has a specific Children's Court Drug Court which has had some success however, this has been limited with Aboriginal and Torres Strait Islander young people. Of the 36 young people who have graduated from the Drug Court since it's commencement in 2000, only four have been Aboriginal. A lack of culturally appropriate rehabilitation services offered through

the Children's Court Drug Court continues to be a barrier that inhibits the success of Aboriginal and Torres Strait Islander young people.

A critical issue for young people seeking to participate in the Drug Court is the lack of residential rehabilitation facilities available. There is only one such facility in all of Western Australia, which is inadequate in relation to the large number of young people who have substance abuse problems that bring them into contact with the criminal justice system.[32] Consequently a number of young people are in custody waiting for a bed to become available in a facility so that they can participate. This raises obvious concerns about the appropriateness of young people spending unnecessary time in custody where they are not receiving proper support and assistance in overcoming substance abuse issues. A further issue is that upon completion of the program, many participants are simply left to return to dysfunctional environments which can lead to reoffending.

The following case study demonstrates the consequences of letting drug and substance abuse issues go unaddressed and what happens to young people in contact with the criminal justice system when there is a chronic lack of rehabilitation and support facilities.

Case Study: Substance Abuse, a Lack of Rehabilitation Facilities and Detention

A 14 year old Aboriginal boy from Bunbury with no prior criminal record became engaged in volatile substance use and minor offending behaviour. The boy, who was in the care of the Department of Child Protection (DCP) , was being cared for by an Aunt and had to relocate from his community due to family feuding and violence which saw him hiding with siblings in the roof of a neighbouring house while his own home was destroyed. Despite being a suitable candidate for bail, the boy was remanded in custody in February 2011 due to continued use of volatile substances and consequent inability by family to regulate his behaviour. His family strongly opposed his use of volatile substances given that two cousins had sniffing related deaths and his older brother had been attempting to stop his sniffing through violence. No community services were available to assist the family or the boy to overcome the volatile substance use. DCP representatives appeared as the responsible adult for the boy at Court and opposed his release on bail, causing him to be remanded at Rangeview Remand Centre in Perth. The matter remains ongoing.

Proposed Question to the Australian Government:

What action is the Government taking to ensure that in each State and Territory there are well resourced specialised courts for young people which focus on diverting them from the criminal justice system by addressing the underlying causes of offending and connecting offenders to appropriate support and rehabilitation services?

Suggested Recommendation:

18. The development and expansion of a specific justice system for young people which is adequately funded, coordinated and dynamic and which works towards the implementation of culturally appropriate restorative justice initiatives (such as the Victorian Children's Koori Court and the Queensland Youth Murri Court). We further consider it imperative that any youth justice system be framed in youth friendly terms so that young people understand the court system and experience it as meaningful and restorative rather than alienating.

[32] Auditor General's Report, 'Performance Examination, The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994' (2008) *WA Report No 4*, 7.

19. That the Commonwealth, State and Territory Governments commit to working with Aboriginal and Torres Strait Islander communities and Elders in the development and dispensation of youth justice.

20. Increased provision of culturally appropriate support and treatment facilities for young people with drug and substance abuse issues in metropolitan, regional and remote areas.

4.5 Provision of Legal Assistance (art 37 (d))

A core issue affecting the provision of legal assistance to Aboriginal and Torres Strait Islander young people is the chronic underfunding of the ATSILS, Family Violence Prevention Legal Services (FVPLS) and Aboriginal and Torres Strait Islander interpreter services. Without adequate funding, and access to trained interpreters, the capacity of the ATSILS and FVPLS to provide quality legal assistance services to Aboriginal and Torres Strait Islander young people in metropolitan, regional and remote communities is severely restricted. In particular, FVPLS are not funded to provide services in metropolitan areas, denying many perpetrators and victims of family violence specialised legal and support services. Furthermore, , despite recent increases in funding, the ATSILS still remain well below parity with mainstream legal aid services and are being forced to close some of their offices.

Many police prosecutions involving Aboriginal and Torres Strait Islander young people are underpinned by admissions made by the accused in police interviews. In many instances, the only evidence of guilt comes from a confession made in a police interview. Common law tradition and legislation provide that an arrested suspect is entitled to a reasonable opportunity to communicate or attempt to communicate with a legal practitioner. In most instances when a young person contacts an ATSILS lawyer advice is given that the young person should exercise their right to silence and not participate in an interview with police. In order for a young person to properly exercise their right to silence on advice from a lawyer, it is essential that the lawyer be in a position to communicate that advice to police.

In some jurisdictions, automatic notification systems exist whereby the relevant ATSILS is contacted whenever an Aboriginal and Torres Strait Islander person is arrested. Furthermore, some States, such as Victoria, have additional programs that provide independent support people to Aboriginal and Torres Strait Islander young people to ensure that their rights whilst in custody are protected.[33] Such protections do not exist in every State and Territory however, and Aboriginal and Torres Strait Islander young people suffer the consequences.

The NATSILS have concerns in relation to police practices whereby police insist on conducting a video recorded interview with a young person as "a matter of fairness" so as to "put the allegations to the young person", or refuse to speak with the ATSILS lawyer so that the advice given to the young person cannot be communicated. If police proceed to commence an interview to record a refusal to participate, it is then a short step for police to place subtle pressures on vulnerable young people to answer questions and make admissions against their interest. Once a refusal is communicated by the lawyer to the police, a young person should not be taken into the interview room to formally decline the record of interview. Communication by the lawyer should be sufficient.

[33] Youth Referral and Independent Person Project (YRIPP).

The following case studies are provided by way of illustration.

1. In October 2009, a lawyer with ALSWA's office in Broome, received a telephone call from a police officer advising that four Aboriginal and Torres Strait Islander boys, aged between 13 and 14, were in custody at Derby Police Station, having been arrested on suspicion of stealing a motor vehicle. The police wished to formally interview all of them by electronic means.

   The lawyer then spoke individually to the parents of the boys and advised them that their children did not have to participate in a video recorded interview with police. As a consequence of this advice, each parent agreed that their child would not participate in a police interview. Further, each parent indicated to the lawyer that they did not wish their child to do a police interview for the sole purpose of recording the child's refusal to participate and that they would inform officers from the Derby Police Station of their decision, namely, that they did not consent to their child being interviewed for any purpose.

   After providing this advice to the parents, the lawyer then asked to speak to an officer at Derby Police Station to inform the officer of the advice given and to reiterate that no interviews were to take place. No officer would come to the telephone to speak with the ALSWA lawyer, and the ALSWA lawyer heard an officer in the background say "we don't talk to the ALS".

2. An 11 year old boy from Broome was arrested by police. Broome police advised an ALSWA lawyer that the boy was in police custody as a suspect and that police wished to interview him. Ten minutes later, an ALSWA lawyer telephoned and spoke to a police officer at Broome Police Station.

   The ALSWA lawyer then spoke to both the boy and his grandmother. The boy supplied instructions that he wished to exercise his right to silence and decline to be interviewed. The ALSWA lawyer conveyed those instructions to the police officer. The police officer responded in terms that he intended to conduct a video record of interview with the boy nonetheless, so as to put the allegations to him and obtain a recorded refusal from the boy. The ALSWA lawyer made it clear to the police officer that this was unnecessary and improper, that the boy was a juvenile declining to be interviewed through legal Counsel, and that there was no need to conduct a video record of interview to properly record those matters. The police officer refused to alter his position, an interview was conducted, admissions were made by the boy and he was further charged.

Proposed Questions to the Australian Government:

What measures are in place to ensure Aboriginal and Torres Strait Islander young people have access to culturally appropriate and accessible legal advice?

What role do police play in protecting Aboriginal and Torres Strait Islander young people's rights to legal advice, representation and silence whilst in police custody?

Suggested Recommendations:

21. That the ATSILS' funding is increased so as to achieve parity with mainstream legal aid services.

22. That FVPLS be funded to provide services in metropolitan areas.

23. That increased funding is provided for the expansion of Aboriginal and Torres Strait Islander interpreter services so as to create a coordinated national Aboriginal and Torres Strait Islander interpreter service that covers all metropolitan, regional and remote areas.

24. That laws be amended to make it mandatory for police to contact an Aboriginal and Torres Strait Islander Legal Service in every circumstance where an Aboriginal and Torres Strait Islander young person is taken into police custody, and that adequate funding is sufficiently provided to support this additional service.

4.6 Protection of Privacy and Protection of the Image (art 16)

Western Australia recently introduced laws that involve the naming and shaming of offenders who commit anti-social offences. The *Prohibitive Behaviour Order Act 2010 (WA)* ('PBO Act') enables courts to issue a Prohibitive Behaviour Order (PBO) to a person from the age of 16 who has been convicted of an offence, if he or she has committed an anti-social offence more than once in three years and the person is likely to commit a further relevant offence unless constrained from certain otherwise lawful activities.[34] The PBO Act broadly defines anti-social behaviour as "behaviour that causes or is likely to cause ... harassment, alarm, fear or intimidation to one or more persons; or ... damage to property".[35]

The orders are to be imposed in addition to any penalty imposed for a criminal offence. Of particular concern is that the PBO Act provides for the publication of the order, including the name of the young person and their residential address and photograph, and permits anyone to republish that information. This is a complete departure from current laws protecting the privacy and identity of young people so as to best aid their rehabilitation. This law may lead to government sanctioned vigilantism. Further, the law is likely to have a demoralising effect on Aboriginal and Torres Strait Islander young people.

In addition to the publication of the order and images of young offenders, the terms of an order may restrict freedom of movement and association. For example, a young Aboriginal and Torres Strait Islander person who engages in graffiti and is dealt with by a Court for criminal damage may also be subjected to a prohibited behaviour order preventing them from going to an area where the graffiti occurred.

The likelihood of young people complying with such orders is very low. A breach of a PBO is punishable by a fine of up to $2000 or two years imprisonment or both, for matters dealt with in the Children's Court of Western Australia.[36]

Proposed Question to the Australian Government:

What measures are in place to protect young people aged 16-18 years from publication of their personal details and photographs on government departmental websites, or on the internet and other publications generally?

[34] *Prohibitive Behaviour Order Act, 2010* (WA) s 8.
[35] *Prohibitive Behaviour Order Act 2010* (WA) s 3.
[36] *Prohibitive Behaviour Order Act 2010* (WA) s 35(1).

Suggested Recommendation:

25. That the Australian Government urge the Western Australian Government to amend legislation to prevent the publication of personal information and photographs of young offenders subject to Prohibitive Behaviour Orders to ensure their privacy is protected.

4.7 Minimum Age that a Person Can Be Tried as an Adult

The Committee has previously voiced its concerns in relation to the minimum age that a person can be tried as an adult in Queensland.[37] Despite repeated calls for action, the minimum age that a person in Queensland can be tried as an adult remains at 17 years of age.

Proposed Question to the Australian Government:

What progress has been made to bring the minimum age that a person can be tried as an adult in Queensland up to a more acceptable level that is in line with other States and Territories in Australia and international human rights jurisprudence?

Suggested Recommendations:

26. That the age for adult criminal responsibility be raised from 17 to 18 years old in Queensland.

27. That a time specific commitment is made to transfer 17 year olds in Queensland from adult prisons to youth detention centres and that all young people under the age of 18 years fall within the jurisdiction of the *Youth Justice Act* 1992 (Qld) and have access to the Charter of Youth Justice Principles.

5. Young People Deprived of Their Liberty, Including Any Form of Detention, Imprisonment or Placement in a Custodial Setting

5.1 Detention as a Last Resort (art 37 (b))

Aboriginal and Torres Strait Islander young people are frequently placed in custody despite legislative recognition that detention and imprisonment of a young person shall only be used as a measure of last resort.

The percentage of young people that are in detention on remand has increased significantly over the past 30 years. In June 1981, 33.1 per cent of female young people in detention were remanded.[38] By June 2008 this had nearly doubled to 64.8 per cent.[39] For male young people the proportion has almost trebled, from 20 per cent being remanded in June 1981 to 59.2 per cent in June 2008.[40] Given the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system, this pattern severely impacts upon the detention rates of these

[37] Committee on the Rights of the Child, above n 2, [73 (c), 74 (g)]
[38] Richards, above n 29, 4
[39] Ibid.
[40] Ibid.

young people. For example, the proportion of Aboriginal and Torres Strait Islander young people in detention on remand increased from 32.9 per cent in 1994 to 55.1 per cent in 2008.[41]

The widespread and increasing use of remand is inconsistent with article 37 (b) and the principle of detention as a last resort.[42] It is also not proportional to the level of offending as only a small proportion of remand episodes result in the young person being convicted and sentenced to a custodial order.[43]

In addition to the socio-economic reasons that can sometimes prevent Aboriginal and Torres Strait Islander young people from being granted bail, as described above, a concerning pattern is also developing whereby police are opposing bail unnecessarily in favour of keeping young people in custody. The following case studies show the high occurrence of detention of Aboriginal and Torres Strait Islander young people in circumstances that were unnecessary or could have been avoided:

Case Studies: Bail, Remand and Detention as the First Resort

1. A 13 year old Aboriginal boy from a small town near Kalgoorlie was arrested and brought before a Justice of the Peace in May 2011 for breaching bail conditions and providing false information to the police. The boy had no prior record and the matters for which the boy was on bail had been referred to court conferencing and would not involve a term of detention. No responsible adult was available for the boy to be released on bail. ALSWA submitted the best option for the boy would be to release him on bail to a local bail hostel to receive constant supervision, rather than to remand him in custody until the matter could be dealt with by a Magistrate. The police prosecutor opposed bail on the basis that the boy had breached his bail and stated "I just know that they've taken off from the bail hostel on previous occasions, so there's just no guarantees." This generalisation was made despite the fact the boy had never attended the bail hostel and submissions by ALSWA that the boy was willing to agree to the conditions and stay at the hostel. The boy was remanded in custody and stayed at the police lockup in Kalgoorlie for three days.

2. In February 2010 a 15 year old Aboriginal boy was arrested at 11.10am for disorderly behaviour outside a high school in Geraldton and refused bail by police. The boy had a minimal criminal record. ALSWA was not immediately notified the boy was in custody, despite ALSWA staff being contactable until after 5.00pm. ALSWA was only notified that the boy was in custody the following morning by fax. By the time the boy appeared in court that morning he had been in police custody for over 24 hours. There was no issue as to locating a responsible adult for bail as his sister and father were both contactable and able to act as responsible adults. Police indicated bail had been refused because of police fears that the boy would commit further offences if released on bail. The prosecutor and Magistrate agreed this was inappropriate and the matter was dealt with by way of no further punishment given the time the boy had spent in custody.

Another concern for the NATSILS is the failure of police to deal with mental illnesses and/or intellectual deficiencies of a young person who has come into contact with the criminal justice system without resorting to judicial proceedings and detention. Remand is increasingly being used by police in order to manage mental health concerns experienced by young people. This can either be because the mental illness or intellectual deficiency goes unidentified or the chronic lack of support and treatment facilities. The case studies below illustrate types of situations which the NATSILS often witness:

[41] Richards, above n 29, 4.
[42] Ibid 5.
[43] Mazerolle, P and Sanderson, J, 'Understanding Remand in the Juvenile Justice System in Queensland' (2008) *Griffith University*, 10.

Case Studies: Dealing with Mental Illness through Prosecution and Detention

1. A 16 year old Aboriginal girl with no criminal record was kept in custody for an unreasonable period in order to address her mental health needs. The girl was charged with two disorderly conduct offences that allegedly occurred on a Saturday in August 2009 in Geraldton. The allegations related to behaviour she exhibited at the hospital when taken by her family for a mental health assessment. According to the Statement of Material Facts, when police arrived they offered to restrain her while she was assessed but the hospital refused to assess her. She was taken into custody at about 6.00pm and appeared in court on the following Monday. The girl was very agitated and exhibited worrying behaviour in Court. She was granted bail but her family who were present indicated they would not take responsibility for her until her mental health was assessed. The girl was remanded in custody for the purpose of being observed and assessed and she was held in the police lockup in Geraldton. Upon arriving at the police lockup, ALSWA was informed the girl was naked in her cell. ALSWA queried why she was not being assessed and treated at the hospital and was informed by police that there was nothing else to demonstrate she had a mental health problem. A female officer persuaded the girl to put on clothes and ALSWA spoke to her. The girl was behaving erratically. She had shredded a polystyrene cup and scattered it like confetti over the mattress. She alternated between appearing willing to speak to ALSWA and being aggressive. She made a number of seemingly random statements and claimed that her name was something else. Her biggest preoccupation throughout the day was that someone had "killed" her babies. The girl was taken to Perth on Tuesday morning. She was admitted to the Bentley Adolescent Mental Health ward prior to her Court appearance on Friday and there was a report confirming her unfitness to plead. The prosecution, on invitation by the Magistrate, withdrew the charges effectively explaining that they were only "holder charges" intended to get the girl some treatment.

2. A 15 year old Aboriginal boy with a minor criminal history was charged with offences despite police knowledge about his mental health concerns. Additionally, he unnecessarily spent two nights in custody in late 2009 due to police delays in granting bail and his mother was granted a Violence Restraining Order (VRO) against him despite her maintaining contact with him. In September 2009 the boy spent one night in custody on charges of threatening behaviour and criminal damage, instigated by his mother, after police refused to grant him bail. It was evident that the boy had mental health concerns and prior to his arrest, police had taken the boy to hospital due to his behaviour causing an appointment to be arranged with Central West Mental Health Service. Despite these mental health concerns, charges were laid and police bail refused because the boy was in breach of a previous bail condition to reside with his grandfather when police arrested him at his brother's house. The arrest was purportedly due to "welfare concerns" and on this occasion the boy spent one night in custody before being granted bail by a Magistrate. As a result of the charges, the boy's mother applied for a VRO against the boy. In November 2009, the boy was charged with breaching the VRO with his mother. He was granted bail for the offence with a curfew condition which he breached. He instructed ALSWA that he had not understood that the curfew applied for the entire period of bail but had believed it was for only one night. As a result of the curfew breach, the boy spent a second night in police custody.

3. A 16 year old Aboriginal boy from the Goldfields was charged with serious violent offences against another boy, in a similar fashion to offences he witnessed his father commit against his mother at a young age that resulted in her death. The boy did not receive counselling at the time of the domestic incident but has now been diagnosed with schizophrenia and had been living a shambolic life in the care of his maternal grandmother. He was illiterate and innumerate. He did not have assistance to regularly take medication for his schizophrenia or diabetes and had no access to psychological services. The Community Adolescent and Mental Health Services in the Goldfields were responsible for managing his mental health needs but did not provide services to the Central Desert where he resided nor was there a psychiatric service in this region. Prior to the offending, he was twice admitted to the Mental Health ward at Kalgoorlie Hospital in 2009 demonstrating a deteriorating mental state. The boy was sentenced to 15 months detention.

Hence, whether it is due to socio-economic factors such as homelessness or family dysfunction, the punitive approach preferred by police, or because of a lack of other means by which to deal with mental illness, Aboriginal and Torres Strait Islander young people are routinely being placed in detention unnecessarily.

Proposed Question to the Australian Government:

Beyond legislation, what measures are in place on the ground to ensure that detention is only used as a measure of last resort and that young people are not sentenced to remand unnecessarily because of socio-economic factors or mental illness issues?

Suggested Recommendations:

28. That in cases where bail is difficult due to an inability to locate a responsible adult and where remand is highly inappropriate, an out-of-court caution or referral to a Juvenile Justice Team or equivalent be recognised as the most suitable outcome.

29. That all States and Territories introduce legislation to ensure that a judicial officer review all police decisions in relation to bail as soon as reasonably possible after charging to ensure that appropriate bail conditions are set and to minimise the numbers of young people detained in custody.

30. That stronger measures to be put in place to require police and courts to deal with young people with mental health concerns and or/intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings and detention.

31. Increased provision of culturally appropriate support and treatment facilities for young people with mental health issues in metropolitan, regional and remote areas.

5.2 Suspended Sentences and Other Non-Detention Sentences (art 37 (b))

In relation to suspended sentences, Victoria has recently passed legislation to remove suspended sentences for serious offences for both young people and adults with the intention to incrementally remove suspended sentences for all criminal offences. Furthermore, the Victorian Government is also legislating to remove home detention as a sentencing option. Such actions impede upon the discretion and expertise of members of the judiciary to consider the circumstances and merits of each case and make an appropriate judgement accordingly. By removing non-detention and tailored sentencing options from the discretion of the Victorian judiciary, the risk of young people ending up in arbitrary detention is dramatically increased.

In relation to other non-detention sentencing options, there is an overwhelming scarcity of community based sentencing options for Aboriginal and Torres Strait Islander young people in many parts of Australia. More specifically, there is lack of community based projects available and high levels of disadvantage can also rule out home detention as an option for many Aboriginal and Torres Strait Islander young people. The remoteness of some communities can also be an issue when it comes to the application of supervision orders and has led some to say that this results in "justice by geography". In Western Australia, Chief Justice Martin has observed that

> The judges and magistrates sentencing Aboriginal offenders in regional Western Australia commonly have no practical alternative to a custodial sentence because of the unavailability of non-custodial programmes, and limited availability of non-custodial supervision. Imprisoning offenders because of a lack of non-custodial options is expensive and counter-productive. It discriminates between regional and metropolitan residents, and has the consequence that the former are more likely to go to

prison.[44]

These issues were also recently highlighted by Magistrate Oliver from the Northern Territory in testimony before the House of Representatives 'Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system.' Her Honour stated:

> I mentioned before that I am going to Borroloola next week. Last time I was out there, a month ago, there were no community projects. That is the case across many, many communities. Community work is not available. Home detention is not a viable option, sometimes because of overcrowding in the house or the sort of conduct that is being engaged in by other people who are living in the house. There are no surveillance officers available to go and check on people who have been ordered to serve home detention. So the sentencing dispositions are very limited.[45]

Her Honour concluded by saying "the other thing I would note about rehabilitation is that it is basically only available in the major centres."[46] A lack of alcohol, drug and substance abuse facilities outside of major centres often means that offenders from outside these areas cannot access these services as part of their sentence.

Proposed Question to the Australian Government:

What action is the Government taking to ensure that a full range of non-custodial sentencing options are available to courts and that offenders residing in regional, remote and very remote communities are afforded the same options for sentencing as those residing in metropolitan areas?

Suggested Recommendations:

32. That the Government urge State and Territory Governments to maintain separation of powers and not intrude upon the independence and expertise of courts by introducing legislation that restricts sentencing options (such as suspended or mandatory sentences).

33. That the Government work with State and Territory governments to extend the availability of community sentencing options in regional and remote areas so that justice is not determined by geography and young people from these areas are not placed in detention unnecessarily.

34. That the Government work with State and Territory Governments to achieve the provision of culturally appropriate alcohol, drug and substance abuse rehabilitation facilities in regional and remote areas.

5.3 Mandatory Sentencing (art 37 (b))

One reason why Aboriginal and Torres Strait Islander peoples are imprisoned more often than non-Aboriginal and Torres Strait Islander people is that they are disproportionately affected by an increasingly rigid approach to offending. A recent study examined the substantial rise in the

[44] The Hon Wayne Martin Chief Justice of Western Australia, *Corrective Services for Indigenous Offenders – Stopping the revolving* Door (2009) Presentation to Joint Development Day Department of Corrective Services, 14.
[45] See the transcript of proceedings from the Darwin hearings at ATSIA 49: http://www.aph.gov.au/hansard/reps/commttee/R12981.pdf (last viewed 4 June 2010)
[46] See the transcript of proceedings from the Darwin hearings at ATSIA 51: http://www.aph.gov.au/hansard/reps/commttee/R12981.pdf (last viewed 4 June 2010).

Aboriginal imprisonment rate between 2001 and 2008 and noted that there had not been a corresponding rise in the conviction rate for Aboriginal and Torres Strait Islander peoples over this period.[47] As a result, it concluded that "the substantial increase in the number of Indigenous people in prison is mainly due to changes in the criminal justice system's response to offending rather than changes in offending itself."[48]

Western Australia has had mandatory sentencing laws for some years and Victoria has recently announced plans to introduce statutory minimum sentencing laws for young people aged 16-17 (and adults) who commit the yet to be defined offence of "gross violence". The Victorian proposal would remove any discretion that the judiciary would have in certain cases to consider the wider circumstances and address those factors leading to the offending. VALS provides the following case study by way of example.

Case Study: "Jo"

Jo is an Aboriginal person aged between 16-17 years of age charged with recklessly causing a serious injury in circumstances that would likely equate to "gross violence" (should the term be defined). The plea was heard in the Victorian Children's Koori Court. The young person was told by the Magistrate that custody would be the likely outcome given the nature of the offending. However, sentencing was deferred to enable Jo to engage in a detoxification program, and link in to education, training and employment programs with the supervision of Youth Justice. At the time of the offending, Jo had been a daily user of marijuana, and was not enrolled in school or any educational program. Nor was the young person employed.

During the deferral period, Jo successfully completed a detoxification program. Jo then enrolled in TAFE, and was engaged in a program with an Aboriginal organisation. Jo, with the support of family, successfully participated in training with this organisation, and now has prospects of on-going, paid employment through the organisation. The organisation will also provide support in relation to ongoing TAFE studies. Further, Jo has access to ongoing drug and alcohol counselling through the organisation.

The matter returned for sentencing, and the Magistrate was impressed with Jo's progress. The Magistrate emphasised the seriousness of the offending and noted again that Jo was at serious risk of being placed in custody. However, the Magistrate decided to place Jo on a Youth Supervision Order, which requires on-going supervision from Youth Justice, continued engagement with the training program, TAFE and drug and alcohol counselling. The Magistrate did, nonetheless, record a conviction to reflect the serious nature of the offending.

It is clear that the discretion afforded to the Magistrate in relation to this matter enabled Jo to access programs and support that addressed the causes of the offending, and were directed at reducing the risk of re-offending in the future. The sentence was also in line with the sentencing considerations set out in the *Children, Youth and Families Act*, in particular, in having regard to the need to "continue the child's education, training and employment," and "strengthening and preserving the relationship between the child and the child's family."

Had this offending attracted a mandatory sentence of imprisonment, the programs critical to Jo reconnecting with culture, gaining skills for meaningful employment and addressing drug and alcohol use would not have been available.

The program that Jo was enrolled in was culturally appropriate and assisted Jo in re-engaging with community and family. This was critical for a young person who had been estranged from their wider family members. It is notable that the Magistrate found it important that Jo remain in community with access to the tailored program.

[47] Fitzgerald, J, 'Why are Indigenous Imprisonment Rates Rising?' (2009) *NSW Bureau of Crime Statistics and Research Crime and Justice Statistics Issue Paper no. 41*, 6.
[48] Ibid.

Western Australia has two types of mandatory sentencing laws. Adults and young people convicted of a home burglary must be sentenced to a minimum of 12 months imprisonment or detention if they have been convicted of two or more previous home burglaries.[49] Additionally, adults, and young people between the ages of 16 and 18 years, who are convicted of an assault on police or other public officers, causing either bodily harm or grievous bodily harm, must be sentenced to a mandatory term of imprisonment or detention ranging from 3 to 12 months.[50] Furthermore, Western Australia has recently announced a proposed extension to its mandatory sentencing laws by introducing legislation requiring a mandatory term of imprisonment for adults and young people who breach a Violence Restraining Order for a third time.[51]

Mandatory sentencing laws are arbitrary, often disproportionate to the crime and do not allow regard for the circumstances of the particular offence or offender.[52] Furthermore, mandatory sentencing has been shown to be costly, ineffective in deterring criminal activity, increase the likelihood of reoffending and breach Australia's human rights obligations. The NATSILS consider it essential to an effective criminal justice system that a decision maker be allowed to take into account an offender's unique circumstances, and have the full host of sentencing options available when applying sentencing principles of general and specific deterrence and rehabilitation, and subsequently, when making a decision as to sentence.

Furthermore, as a result of the elevated contact of Aboriginal and Torres Strait Islander peoples with the criminal justice system, mandatory sentencing disproportionately affects Aboriginal and Torres Strait Islander peoples, resulting in greater Aboriginal and Torres Strait Islander incarceration rates. Importantly, mandatory sentencing laws breach Australia's obligations under international law[53] and under the CRC in particular.[54]

Proposed Question to the Australian Government:

What steps are being taken by the Government to guarantee appropriate sentencing options are afforded and tailored to individual Aboriginal and Torres Strait Islander young people in contact with the justice system, in particular those affected by mandatory sentencing laws currently in operation?

Suggested Recommendation:

35. The Government urge State and Territory governments to repeal mandatory and minimum sentencing laws.

5.4 The Right to be Separated from Adults whilst in Detention (art 37 (c))

There is a distinct lack of youth bail and detention facilities in Australia, especially in regional, rural and remote Aboriginal and Torres Strait Islander communities. As a result, young people are

[49] *Criminal Code 1913* (WA) s401(4).
[50] *Criminal Code 1913* (WA) s297, s318.
[51] See http://au.news.yahoo.com/thewest/a/-/breaking/9669122/warning-on-restraint-order-changes/.
[52] Australian Human Rights Commission, *Mandatory Detention Laws in Australia* (2009) *at* http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html.
[53] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, I-14668, [arts 9, 10, 14, 24, 2 , 26 and 50] (entry into force 23 March 1976).
[54] Convention on the Rights of the Child, above n 12, [arts 2, 3, 4, and 40].

inappropriately placed in adult detention facilities and lock-ups where they are not protected from adult detainees and offenders and are vulnerable to abuse. The following case study explains.

Case Study: 12 Year Old Boy Endures a Week in Adult Lock-Up

In May 2011 a 12 year old Aboriginal boy spent over a week in the Kununurra adult police lock-up after breaching bail conditions for two burglary offences. ALSWA report that Kununurra is over-policed and young people are regularly picked up for breaching bail conditions such as curfews.

He was remanded in custody on three separate occasions by both a Justice of the Peace and a Magistrate because no responsible parent could be found to meet the bail requirements and there are no youth bail facilities in Kununurra.

After a week in the adult lock-up the 12 year old boy was flown to a youth detention facility in Perth (a five hour flight away) where he spent several more days until he was sentenced via video link for the burglaries in Kununurra.

The NATSILS are particularly concerned by recent developments in the Northern Territory where by the minimum security cottages within the Alice Springs Correctional Centre, an adult custodial facility, have been made into the Alice Springs Juvenile Detention Centre (ASJDC). The ASJDC is a youth facility incorporated within an adult prison with minimal meaningful efforts having been made to separate young detainees from adult prisoners.

Case Study: A Detention Centre within a Prison

Young people detained in the ASJDC have continued aural and visual exposure to minimum security adult prisoners incarcerated within the Alice Springs Correctional Centre given that they are only separated from the adult facility by a mesh fence. Despite the fact that detainees can both see and hear adult prisoners and hear the Correctional Centre loudspeaker announcements, rules within the ASJDC preclude young detainees from communicating with adult prisoners. When a detainee was caught by guards speaking through the detention centre fence with an adult prisoner in early 2011, the detainee was disciplined through a period of isolation.

Proposed Question to the Australian Government:

What measures are the Government taking to ensure that adequate youth detention facilities are available so that when a young person must be placed in detention they are not inappropriately placed in adult detention facilities?

Suggested Recommendations:

36. That the Government work with State and Territory Governments to expand the availability of bail hostels and appropriate youth detention centres to regional and remote areas.

37. That the Government remove its reservation to art 37 (c) of the CRC and art 10 (2)(b) of the International Convention on Civil and Political Rights relating to the separation of young people from adults in detention.

5.5 The Right not to be Subjected to Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment, Including Corporal Punishment (arts 37 (a) and 28 para 2)

The NATSILS hold significant concerns in relation to the state of some of Australia's youth detention facilities. These concerns relate in particular to issues of over-crowding, personal safety, hygiene, appropriate heating and air-conditioning given the extreme climates in Australia and the mixing of remanded detainees with sentenced offenders. The case study below highlights some of these concerns.

Case Study: Melbourne Youth Justice Precinct

Early in 2010, the Victorian Ombudsman released a report[55] in response to allegations from a whistleblower regarding serious misconduct of staff at a Melbourne youth detention centre. The allegations related to staff at the Melbourne Youth Justice Precinct:

a) inciting assaults between detainees;
b) assaulting detainees;
c) restraining detainees with unnecessary force;
d) supplying contraband to detainees, including tobacco, marijuana and lighters; and
e) stealing goods and consumables.

The disclosure also included allegations relating to general mismanagement of the Precinct, overcrowding, poor adherence to operational procedures and an organisational culture that fostered unethical conduct. During site visits, the Ombudsman officers observed many design features within the Precinct that did not appear suitable for a custodial environment for young people, including hanging points throughout the Centre and land-fill which contained pieces of glass rising to the surface. Some of the safety and health concerns identified by the Ombudsman included:

a) mouldy and dirty conditions;
b) a high prevalence of communicable infections such as scabies, Staphylococcus - Aureus and school sores;
c) electrical hazards; and
d) unhygienic conditions in food preparation areas.

Investigation also identified the following concerns:

a) Overcrowding has resulted in mattresses being placed in isolation rooms with young people having to go to the toilet in buckets;
b) The number of beds in the Precinct is not sufficient for the number of remanded or sentenced detainees that the Precinct is required to accommodate. As a result, undesirable mixing of detainees of widely varying ages and different legal status occurs; and
c) Remanded detainees are being placed in units with sentenced offenders which has presented a significant problem. Mixing of remanded and sentenced detainees of varying ages occurs despite section 22(2) and 23(1) of *the Victorian Charter of Human Rights and Responsibilities 2006* and section 482(1)(c) of the *Children, Youth and Families Act*. Both the Charter of Human Rights and the Act discuss the separation of persons accused of an offence from persons convicted of an offence.

In the Ombudsman's view, the conditions of the Youth Justice Precinct in Victoria reflect little regard for human rights principles for young people in custody.

[55] Ombudsman G E Brouwer, *Whistleblowers Protection Act 2001: Investigation into conditions at the Melbourne Youth Justice Precinct* (2010) *at* http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_conditions_at_the_Melbourne_Youth_Justice_Precinct_Oct_20101.pdf .

In addition, the following are examples of reported cases of abuse and maltreatment of Aboriginal and Torres Strait Islander young people during their arrest and detention.

Case Studies: Abuse and Maltreatment

1. In December 2009 a slightly built 15 year old Aboriginal boy was arrested in Geraldton. He was charged with a burglary, possession of stolen property and stealing. The boy instructed ALSWA that when his pockets were being emptied during his arrest, a police officer put a knee in his neck. He also said that when he was being questioned an officer slapped him. He was arrested again the following Saturday for a burglary and granted bail. The boy instructed ALSWA that at the time of his arrest he initially ran from police towards his home. Upon arrival, he found the door locked and surrendered himself to police by standing facing them with his hands up. He instructs he was then taken to the ground by police with his arms twisted behind his back. He instructs that he said "my arms" and may have wriggled slightly. He instructs that a different officer took his legs and that officer kneed him in the back of the head. The boy hit his face against the concrete causing his front tooth to break in half. He instructs that when he saw the blood he moved more and was thrown into a paddy wagon. He further instructs that at some point he was also punched from behind to his left cheek. He says there were four male officers involved. His sister (the responsible adult) advised that she arrived when the boy was at the back of the paddy wagon. She objected to the police treatment of her brother. The police replied something along to the effect of, "well, he shouldn't do burglaries then".

2. A 13 year old boy from Mullewa was arrested in October 2010 for various serious burglary offences. He was remanded in custody due to having breached bail by committing fresh offences. Juvenile Justice contacted ALSWA on the morning of his court appearance and relayed concerns about the welfare and health of the boy. Youth and Family Services had conducted a welfare check on the boy while he was in police custody and described him as distraught, having been goaded by police, and referred to suicidal ideations. They advised the boy had a history of self harm. The boy had a wound on his leg about which Youth and Family Services were concerned and asked the police to take him for medical treatment. The police were initially reluctant as it would "tie up an officer", but eventually agreed. The boy told ALSWA that he did not receive medical attention as the police came to him at 12.00am, which he described as "too late". He said that he had not been placed in the cell with the television, that police kept "annoying" him and that police swore at him. He was given toast and a burger, but no fruit or vegetables to eat. The boy's responsible adult was his mother who Juvenile Justice described as "not in a good way". The boy is an open case with DCP. A DCP officer attended at court but only contributed words to the effect of "we've just found out about him being in custody, and suggest it's up to justice to work on some strategies". The boy was granted bail to be assisted by Youth Bail Services.

Proposed Questions to the Australian Government:

Given recent evidence on the unsatisfactory and unsafe conditions in some youth detention centres (e.g. Melbourne Youth Justice Precinct), what action is the Government taking to improve standards are ensure that they are in line with its international obligations?

What training and oversight measures are in place to ensure that during arrest and any subsequent detention, young people are not maltreated or subjected to excessive force?

Suggested Recommendations:

38. The Australian Government ratify the Optional Protocol to the Convention Against Torture, and implement a national preventative mechanism, similar to but expanding on the Office of the Inspector of Custodial Services in Western Australia,[56] that has the power to inspect youth detention centres and police lock up facilities.

[56] See http://www.custodialinspector.wa.gov.au/.

39. Implement training for all police officers on their obligations under the CRC in relation to the rights and treatment of young people.

6. Summary of Proposed Questions and Suggested Recommendations

Protection from abuse and neglect (art 19)

Proposed Question to the Australian Government:

How is the effectiveness of initiatives to improve the living standards of Aboriginal and Torres Strait Islander young people measured and what plans are in place to amend such initiatives if they are proven to be ineffective?

Suggested Recommendations:

1. That the Government strengthen its current efforts to address the living conditions of Aboriginal and Torres Strait Islander peoples so that fewer Aboriginal and Torres Strait Islander young people are taken into alternative care by:

    d) committing to improving evidence gathering mechanisms through the incorporation of Aboriginal and Torres Strait Islander methodologies in relation to standards of living of Aboriginal and Torres Strait Islander young people;

    e) implementing independent reviews with the involvement of Aboriginal and Torres Strait Islander peoples of the success of the Closing the Gap campaign and the Northern Territory Intervention and committing to amend these initiatives in light of the reviews' results; and

    f) developing a system in consultation, partnership and collaboration with Aboriginal and Torres Strait Islander peoples for increased early and therapeutic family interventions and parental support which focuses on increasing the chances of young people remaining within their families.

Indigenous Child Placement Principle and Preservation of Identity (arts 20 (3) and 8)

Proposed Question to the Australian Government:

What capacity building and oversight measures are in place to ensure that the Indigenous Child Placement Principle achieves 100 per cent implementation and that Aboriginal and Torres Strait Islander young people retain their connections to community and culture once they are placed in alternative care?

Suggested Recommendations:

2. That a policy and practice framework be developed in consultation with Aboriginal and Torres Strait Islander peoples and organisations in relation to the Indigenous Child Placement Principle to aid its implementation.

3. That a review occurs of the screening processes of Aboriginal and Torres Strait Islander carers, in particular, kinship carers, and that resources be allocated to support and increase the number of potential carers.

4. That Cultural Plans be developed and updated at least every 6 months for each Aboriginal and Torres Strait Islander young person in care in consultation with the young person's family and community.

5. That wellbeing indicators be developed in consultation with Aboriginal and Torres Strait Islander peoples and Aboriginal and Torres Strait Islander Peak Bodies to assess and enhance the wellbeing of Aboriginal and Torres Strait Islander young people.

Family Reunification after Separation (art 10)

Proposed Question to the Australian Government:

What measures are in place to ensure that the child protection system focuses on family reunification as a priority, when in the best interest of the young person?

Suggested Recommendation:

6. That, when in the best interest of the childyoung person, the child protection system focus on family reunification as a priority and that until reunification is achieved Cultural Plans (see recommendation 4) be strictly followed so as to maintain the young person's connection to community and culture.

Separation from Parents Due to Detention or Imprisonment (art 9)

Proposed Question to the Australian Government:

To what extent is arranging phone calls and visits between Aboriginal and Torres Strait Islander young people in alternative care and their incarcerated parent/s, where it is in the young person's best interest, a priority within the child protection system and what oversight mechanisms are in place to monitor the regularity of such visits?

Suggested Recommendation:

7. That the child protection system educate its staff on the importance of maintaining relations between Aboriginal and Torres Strait Islander young people in alternative care and their incarcerated parent/s and ensure that such contact is designated as a priority area within their case work obligations.

Over-representation of Aboriginal and Torres Strait Islander Young people in the Criminal Justice System

Proposed Question of Australian Government:

To what extent does the Government's approach to the criminal justice system and Aboriginal and Torres Strait Islander young people focus on addressing the broader causal factors of offending and over-representation?

Suggested Recommendations:

8. That the Government work with State and Territory Governments to create a holistic youth justice system that responds effectively to the causal factors of offending and over-representation by diverting young people from contact with the criminal justice system and judicial proceedings and referring them to appropriate support and rehabilitative services wherever possible.

9. That the necessary resources be made available by Commonwealth, State and Territory Governments to prevent young people coming into contact with the criminal justice system in terms of investing in education, housing, rehabilitation services, youthyouth bail hostels, support services, employment and training and recreational activities under a justice reinvestment framework.

Discriminatory Laws (art 2)

Proposed Question to the Australian Government:

What action is the Government taking to ensure that legislation does not have a discriminatory effect on Aboriginal and Torres Strait Islander young people?

Suggested Recommendations:

10. That all legislation be reviewed for its impact upon Aboriginal and Torres Strait Islander peoples, including young people specifically, and that all future bills introduced into Australian parliaments include a statement of impact in relation to Aboriginal and Torres Strait Islander peoples, including young people specifically.

11. That where legislation is identified as having a discriminatory impact upon Aboriginal and Torres Strait Islander young people, such legislation be amended so as to not be discriminatory, or implementation and support measures be put in place to assist young people coming into contact with the legislation to achieve an equitable outcome.

12. That the Government work with State and Territory governments to expand the availability of youth bail hostels so that young people without access to appropriate accommodation or a responsible adult are not inappropriately remanded in custody.

13. That legislation in each jurisdiction dictating bail considerations and presumptions be amended to create a presumption in favour of bail for young people and to ensure that bail conditions take account of social and cultural factors and can be reasonably met by Aboriginal and Torres Strait Islander young people.

14. That immediate action be taken to dramatically reduce the numbers of Aboriginal and Torres Strait Islander young people on remand.

Cautioning, Restorative Justice Approaches and Diversion Options (art 40 (3) (b))

Proposed Question to the Australian Government:

What practical measures does the Australian Government have in place to guarantee that young people are diverted from the justice system in appropriate circumstances and what oversight mechanisms are in place to assess the rate at which Aboriginal and Torres Strait Islander young people are being diverted in comparison to non-Aboriginal and Torres Strait Islander young people?

Suggested Recommendation:

15. That the Australian Government work with State and Territory governments to introduce legislation that requires the police to lodge a written document with the court upon the commencement of criminal proceedings against a young person outlining why all diversionary processes were inappropriate in the circumstances.

16. That Commonwealth, State and Territory governments commit to working with police to increase the rate at which Aboriginal and Torres Strait Islander young people are diverted from the formal justice system.

17. That statistics be recorded by police and courts in regards to diversions and the stated offence/s.

Specialised and Separate Courts

Proposed Question to the Australian Government:

What action is the Government taking to ensure that in each State and Territory there are well resourced specialised courts for young people which focus on diverting them from the criminal justice system by addressing the underlying causes of offending and connecting offenders to appropriate support and rehabilitation services?

Suggested Recommendation:

18. The development and expansion of a specific justice system for young people which is adequately funded, coordinated and dynamic and which works towards the implementation of culturally appropriate restorative justice initiatives (such as the Victorian Children's Koori Court and the Queensland Youth Murri Court). We further consider it imperative that any youth justice system be framed in youth friendly terms so that young people understand the court system and experience it as meaningful and restorative rather than alienating.

19. That the Commonwealth, State and Territory Governments commit to working with Aboriginal and Torres Strait Islander communities and Elders in the development and dispensation of youth justice.

20. Increased provision of culturally appropriate support and treatment facilities for young people with mental health and drug and alcohol abuse issues in metropolitan, regional and remote areas.

Provision of Legal Assistance (37 (d))

Proposed Questions to the Australian Government:

What measures are in place to ensure Aboriginal and Torres Strait Islander young people have access to culturally appropriate and accessible legal advice?

What role do police play in protecting Aboriginal and Torres Strait Islander young people's right to legal advice, representation and the right to silence whilst in police custody?

Suggested Recommendations:

21. That the ATSILS and FVPLS funding is increased so as to achieve parity with mainstream legal aid services.

22. That FVPLS be funded to provide services in metropolitan areas.

23. That increased funding is provided for the expansion of Aboriginal and Torres Strait Islander interpreter services so as to create a coordinated national Aboriginal and Torres Strait Islander interpreter service that covers all metropolitan, regional and remote areas.

24. That laws be amended to make it mandatory for police to contact an Aboriginal and Torres Strait Islander Legal Service in every circumstance where an Aboriginal and Torres Strait Islander young person is taken into police custody, and that adequate funding is sufficiently provided to support this additional service.

Protection of Privacy and Protection of the Image (art 16)

Proposed Question to the Australian Government:

What measures are in place to protect young people aged 16-18 years from publication of their personal details and photographs on government departmental websites, or on the internet and other publications generally?

Suggested Recommendation:

25. That the Australian Government urges the Western Australian Government to amend legislation to prevent the publication of personal information and photographs of young offenders subject to Prohibitive Behaviour Orders to ensure their privacy is protected.

Minimum Age that a Person Can Be Tried as an Adult

Proposed Question to the Australian Government:

What progress has been made to bring the minimum age that a person can be tried as an adult in Queensland up to a more acceptable level that is in line with other States and Territories in Australia and international human rights jurisprudence?

Suggested Recommendations:

26. That the age for adult criminal responsibility must be raised from 17 years old to 18 years old in Queensland.

27. That a time specific commitment is made to transfer 17 year olds in Queensland from adult prisons to youth detention and that all young people under the age of 18 years fall within the jurisdiction of the *Youth Justice Act* 1992 (Queensland) and have access to the Charter of Youth Justice Principles.

Detention as a Last Resort (art 37 (b))

Proposed Question to the Australian Government:

Beyond legislation, what measures are in place on the ground to ensure that detention is only used as a measure of last resort and that young people are not sentenced to remand unnecessarily because of socio-economic factors or mental illness issues?

Suggested Recommendations:

28. That in cases where bail is difficult due to an inability to locate a responsible adult and where remand is highly inappropriate, an out-of-court caution or referral to a Juvenile Justice Team or equivalent be recognised as the most suitable outcome.

29. Introduce legislation to ensure that a judicial officer review all police decisions in relation to bail as soon as reasonably possible after charging to ensure that only appropriate bail conditions are set and to minimise the numbers of young people detained in custody.

30. Stronger measures to be put in place that require police and courts to deal with young people with mental health concerns and or/intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings and detention.

31. Increased provision of culturally appropriate support and treatment facilities for young people with mental illness in metropolitan, regional and remote areas.

Suspended Sentences and Other Non-Detention Sentences (art 37 (b))

Proposed Question to the Australian Government:

What action is the Government taking to ensure that a full range of non-custodial sentencing options are available to courts and that offenders residing in regional, remote and very remote

communities are afforded the same options for sentencing as those residing in metropolitan areas?

Suggested Recommendations:

32. That the Government urge State and Territory Governments to maintain separation of powers and not to intrude upon the independence and expertise of courts by introducing legislation that restricts the sentencing options available to courts (such as suspended sentences).

33. That the Government work with State and Territory governments to extend the availability of community based sentencing options in regional and remote areas so that justice is not determined by geography and young people from these areas are not placed in detention unnecessarily.

34. That the Government work with State and Territory Governments to achieve the provision of culturally appropriate alcohol, drug and substance abuse rehabilitation facilities in regional and remote areas.

Mandatory Sentencing (art 37 (b))

Proposed Question to the Australian Government:

What steps are being taken by the Government to guarantee appropriate sentencing options are afforded and tailored to individual Aboriginal and Torres Strait Islander young people in contact with the justice system, in particular those affected by mandatory sentencing laws currently in operation?

Suggested Recommendation:

35. The Government urge State and Territory governments to repeal mandatory and minimum sentencing laws.

The Right to be Separated from Adults whilst in Detention (art 37 (c))

Proposed Question to the Australian Government:

What measures are the Government taking to ensure that adequate youth detention facilities are available so that when a young person must be placed in detention they are not inappropriately placed in adult detention facilities?

Suggested Recommendations:

36. That the Government work with State and Territory Governments to expand the availability of bail hostels and appropriate youth detention centres to regional and remote areas.

37. That the Government remove its reservation to art 37 (c) of the CRC and art 10 (2)(b) of the International Convention on Civil and Political Rights relating to the separation of young people from adults in detention.

The Right not to be Subjected to Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment, Including Corporal Punishment (arts 37 (a) and 28 para 2)

Proposed Questions to the Australian Government:

Given recent evidence on the unsatisfactory and unsafe conditions in some youth detention centres (e.g. Melbourne Youth Justice Precinct), what action is the Government taking to improve standards are ensure that they are in line with its international obligations?

What training and oversight measures are in place to ensure that during arrest and any subsequent detention, young people are not maltreated or subjected to excessive force?

Suggested Recommendations:

38. The Australian Government ratify the Optional Protocol to the Convention Against Torture, and implement a national preventative mechanism, similar to but expanding on the Office of the Inspector of Custodial Services in Western Australia, that has the power to inspect youth detention centres and police lock up facilities.

39. Implement training for all police officers on their obligations under the CRC in relation to the rights and treatment of young people.