

“There is always a brighter future”

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





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

www.amnesty.org.au

Front cover: Western Australia's landscape; 17-year-old Phillip
in Broome © Ingetje Tadros. Nowanup © Richard Wainwright.

Inside covers: Nowanup © Richard Wainwright

Design: pollen creative

"There is always a brighter future" is a quote from 17-year-old
Phillip, a young man from Broome. See page 23 for his story.

© Amnesty International 2015

Index: ASA 12/1642/2015

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publishers. To request permission or for any other enquiries, please contact publications@amnesty.org.au

Foreword	3	Chapter 07: Diversionary options available to the courts	27
Acknowledgements	4	Juvenile Justice Teams	27
Executive summary	5	Court conferencing	28
Recommendations	7	Other court-ordered diversion options	28
Research details	11	Case studies: Nowanup and Yiriman camps	29
Methodology	11	Non-custodial sentencing options	30
Research focus locations	11	Chapter 08: Bail and remand	31
Data requests for this report	11	Youth Bail Service and Youth Bail Options Program	32
A note on terminology	11	Department of Child Protection and Family Support	33
Chapter 01: Introduction	13	Chapter 9: Bail conditions	35
Overview of Aboriginal youth justice in Western Australia – mass over-representation	13	Chapter 10: Mandatory sentencing	37
The situation for Aboriginal boys and girls	13	Existing mandatory minimum sentences	37
Reasons for over-representation	14	Serious Assault and Grievous Bodily Harm in 'prescribed circumstances'	37
Chapter 02: Brief overview of the Western Australian youth justice system	15	Three strikes home burglary	37
Chapter 03: International legal framework	17	Children's Court interpretation of three strikes burglary law	37
Convention on the Rights of the Child	17	Proposed extension of mandatory minimum sentencing laws	38
International Convention on the Elimination of Racial Discrimination	18	Chapter 11: Age of Criminal responsibility	39
Declaration on the Rights of Indigenous Peoples	18	Chapter 12: Fetal alcohol spectrum disorders	41
Chapter 04: Availability of data	19	FASD and the youth justice system	42
Data and justice reinvestment	20	Diagnosis	42
Chapter 05: Early intervention, prevention and diversion	21	Fitness to stand trial	43
Support for Aboriginal designed and led solutions	22	Chapter 13: Conclusion	45
Police crime prevention focus	23	Appendix A: Description of the youth justice system of Western Australia	46
Chapter 06: Police diversion: cautions and Juvenile Justice Team referrals	25		
Investigation warranted into possible discrimination	26		
Police Manual	26		



Photo © Ingetje Tadros

This report into Aboriginal youth justice in Western Australia by Amnesty International Australia demands a comprehensive response from all governments. It is also a call for action by the Aboriginal and wider community. The report brings together official and other data with observations and insights of Aboriginal people and various government and non-government agents working in frontline services that paint the story of an unacceptable tragedy about excessive numbers of Aboriginal youth held in detention in Western Australia.

The statistics are horrifying. As the report grimly states, “Western Australian Aboriginal young people are 53 times more likely than their non-Aboriginal peers to be in detention – the highest rate of over-representation of Aboriginal young people in detention in Australia,” and the situation is getting worse. In 2012/13, 62 per cent of all young people arrested by police were Aboriginal, compared to 50 per cent in 2005, says the report.

So often reports that present a grim recital of shocking data about Indigenous disadvantage can often be numbing with a tendency to deter action. Aboriginal over-representation in Western Australian jails and youth detention centres is seen by governments and the mainstream community as too hard to change. As a result the unconscionable reality of mass Indigenous imprisonment is normalised, with the statistics worsening every year.

This report is different. It shows that with practical reforms to institutional practice, justice laws, community collaboration and strategic resourcing of diversion from custody and other community-building initiatives, Western Australia can bring about positive change to the devastatingly high numbers of Aboriginal youth in detention.

The report identifies the growing recognition of the huge reality of fetal alcohol spectrum disorders and the fact that so many young people in detention are afflicted with this cruel condition. The report recommends establishing facilities and processes to diagnose youth living with FASD so that young people with this condition can be cared for and not unjustly imprisoned.

That one in every 77 Aboriginal boys is in detention at any one time is an appalling indictment on Western Australia. Amnesty International’s report reveals Western Australia is failing international human rights standards regarding the detention of Aboriginal youth, and is in breach of key international instruments such as the Convention on the Rights of the Child, the UN Declaration on the Rights of Indigenous Peoples and the Convention on the Elimination of all Forms of Racial Discrimination. The report recommends “special” and other measures to conform with international standards and in doing so immeasurably improve Western Australia’s current rates of Aboriginal youth detention.

This report highlights the complex issues of Western Australia’s colonial legacy and argues succinctly that the entrenched response by the state’s justice agencies is not only a continuing catastrophe for young Aboriginal people and their families but very costly to the whole community. There is clearly a need for a collaborative approach and for building an effective partnership between government and Aboriginal communities. The report highlights successful initiatives in this regard in Western Australia and other parts of the nation where partnerships and diversion from custody is working for the benefit of the whole community.

There are courageous efforts all over the world where Indigenous Peoples are exploring innovative approaches to dealing with inherited trauma and injustice. In Western Australia we could learn much from these efforts. As a global non-governmental organisation with a commitment to justice, Amnesty is well placed to connect Indigenous Peoples across the planet in our endeavours to deal with issues such as youth imprisonment. I commend Amnesty International Australia’s investigation and report into detention of Aboriginal youth in Western Australia as a considered and practical blueprint for action.

ACKNOWLEDGEMENTS

Amnesty International is indebted to the many Aboriginal organisations and individuals across Western Australia who generously shared their stories, perspectives and insights with us in the course of this research. Throughout Western Australia we witnessed the passion, commitment and resilience of Aboriginal communities and organisations working with and for their young people and families.

Amnesty International hopes that this report will help build much needed support for the work of the many Aboriginal organisations and individuals across Western Australia who are committed to creating a better future for their young people.

Amnesty International would also like to thank the other organisations and individuals interviewed for this report, including community organisations working with Aboriginal youth, legal practitioners, magistrates, members of the Western Australian Police, and officers of the Departments of Corrective Services and Child Protection and Family Support.

Children are vital to any community. Under the Convention on the Rights of the Child, Indigenous children, like children everywhere, have the right to “develop their personalities, abilities and talents to the fullest potential, to grow up in an environment of happiness, love and understanding.”¹ The Convention recognises each child as an individual and a member of a family and community. The Declaration on the Rights of Indigenous Peoples recognises the right of Indigenous families and communities to secure the well-being of their children and to have greater control over decision-making about their own lives and futures. Community is everything when it comes to ensuring all young people have what they need to enjoy their rights as children. As June Oscar says in the foreword to this report, “there is clearly a need for a collaborative approach and building an effective partnership between government and Aboriginal communities.”

Indigenous youth detention in Australia has reached a crisis point. And of all the states and territories, Western Australia consistently detains Aboriginal young people at a vastly higher rate than any other. What’s more, the rate of over-representation is rising.² The most recent data, from 2013–14, shows that the over-representation of Aboriginal young people in detention in Western Australia was the highest it has been in five years. Aboriginal young people are 53 times more likely to be in detention than their non-Aboriginal peers.³

Aboriginal young people make up just over 6 per cent of the Western Australian population of 10–17 year olds but more than three quarters of those in detention.⁴ The situation is bleaker still among the youngest children. Almost nine out of 10 children in detention aged between 10 and 13 are Aboriginal.⁵

Aboriginal children and young people make up about 40 per cent of the total Aboriginal population in Western Australia; around twice the proportion of non-Aboriginal people in the same age group.⁶ Unless the extremely high rate of Aboriginal youth detention is urgently addressed, an increasing number of Aboriginal young people will move into the adult justice system.

This report is based on field and desk research carried out between 2013 and early 2015 by Amnesty International right across Western Australia.

The report highlights a number of strong Aboriginal community designed and led programs that have transformed the lives of young participants who have been in contact with the law. However, as outlined in Chapters 6 and 8, the Western Australian Government inadequately supports such programs.

Western Australia is failing to collect, disseminate and make use of information that would help to identify failures in the existing approach to justice for Aboriginal young people. The Department of Corrective Services told Amnesty International

that problems with data were currently affecting its own capacity to plan for programs.⁷ Data that is publicly available is not adequately disaggregated; reports about the number of young people in detention, previously updated regularly, have not been provided since mid-2014 and Western Australia has failed for several years to provide standard data to an important national project on youth justice. Data collection and use must be improved to conform to international legal standards and better target Aboriginal over-representation in the youth justice system.

International legal standards say that juvenile justice policies must focus on prevention of youth offending.⁸ Western Australia is inadequately investing in and referring young Aboriginal people to programs that address the underlying causes of offending behaviour before it becomes a criminal justice issue. The National Crime Prevention Framework outlines the need to involve Indigenous communities in the design and delivery of such strategies,⁹ but of the 12 organisations that deliver prevention and diversion services, only two are Aboriginal organisations. In the 2013/14 financial year the Department of Corrective Services budget for prevention and diversion services was just \$7.83 million dollars,¹⁰ compared to the \$46.8 million spent on detention in the same year.¹¹ However, some positive developments are highlighted, such as the separation of Regional Youth Justice Services out from adult corrections, the employment in the regions of Prevention and Diversion Officers and the Broome Police and Community Youth Centre (PCYC) Training Centre.

Once Aboriginal young people come into contact with the police, they are more likely to be charged, rather than cautioned, compared to non-Aboriginal young people. Aboriginal young people are diverted by police by cautioning or referral to a Juvenile Justice Team only 35 per cent of the time, whereas non-Aboriginal young people are diverted 59 per cent of the time.¹²

Failure to caution is a missed opportunity for referral to services to address the causes of offending. Young people cautioned at the beginning of their contact with the justice system generally do not go on to have further contact.¹³

When matters come before the court, Western Australia is failing to provide Aboriginal young people with appropriate diversionary programs as an alternative to judicial proceedings. There is also a lack of adequate non-custodial sentencing options, particularly in regional and remote areas. According to the Department of Corrective Services, of the programs available to the courts prior to sentencing and as part of community-based orders, “none ... is currently Aboriginal owned or controlled, however they are designed to be culturally appropriate to address the over-representation of Aboriginal young people in the criminal justice system.”¹⁴ Western Australia must urgently invest in Aboriginal designed and led alternatives to court proceedings and custodial sentences.

Inadequate supported bail accommodation is contributing to the high rates at which Aboriginal young people are held in police custody and in detention without conviction. Over half of all young people in detention are on remand and 70 per cent of them are Aboriginal.¹⁵ The Department of Corrective Services' Youth Bail Options Program (YBOP), which provides supervised bail accommodation in locations across the state, has improved the situation. However, existing supervised bail accommodation in Perth is often at capacity and YBOP accommodation throughout the state cannot be accessed by young people in the care of the Department of Child Protection and Family Support. Remand in custody solely due to a lack of accommodation, where no responsible adult is available, is contrary to international legal standards and Western Australia must address this issue.¹⁶

The application, monitoring and enforcement of curfews imposed as a condition of bail is an issue of concern. Amnesty International consistently heard of police shining a torch through the front window of young peoples' homes up to four times a night, including in the early hours of the morning, and requiring young people to present at the front door on demand.¹⁷ The practice is disruptive of whole families and may escalate early contact with the justice system and cause deterioration in relationships between the community and police. While curfews may be appropriate in certain circumstances, the current approach to curfews needs transparent investigation by the Western Australian Government.

The report highlights that Western Australia is the only jurisdiction in Australia where mandatory minimum sentences of detention apply to young people. Mandatory minimum sentences prevent magistrates from considering all the relevant circumstances and are contrary to the international legal obligation that for children detention should be a last resort and for the shortest appropriate period of time.

Despite mandatory sentences being contrary to international law, the Western Australian Government was in the process of expanding the mandatory minimum sentencing regime for home burglaries as this report went to print.

In Western Australia, children are held criminally responsible from just 10 years of age.¹⁸ Internationally, it's accepted that 12 is the lowest minimum age of criminal responsibility.¹⁹ Chapter 11 outlines that, based on available data, this low age of criminal responsibility impacts most on Aboriginal young people.

The report notes particular issues that fetal alcohol spectrum disorder (FASD) presents for some Aboriginal young people which make them likely to come into contact with the criminal justice system.²⁰ Amnesty International heard from Aboriginal organisations, in particular in the Fitzroy Valley, about impressive community-driven responses to issues presented by FASD. Aboriginal women have played a particularly strong role in driving and shaping these responses and should be supported to expand such work. Early diagnosis and treatment of FASD is of paramount importance, well before a young person finds themselves before a court. There is, however, also an urgent need for diagnosis in the court setting to guarantee a fair trial for those affected by FASD.

Amnesty International notes the need to amend current legislation to avoid possible unintended consequences of having a FASD diagnosis. Currently, where a court forms the opinion that a person is unfit to stand trial due to mental impairment, the court must dismiss the charge. It has only two options: either release the person unconditionally or make them subject to an indefinite custody order,²¹ which amounts to arbitrary indefinite detention and is contrary to international law. Courts urgently need the option to order the supervised and supported release of a young person deemed unfit to stand trial.

Recommendations

1

That the Western Australian Government take immediate steps to improve the collection and public dissemination of data relevant to the youth justice system, including by ensuring that:

- The Department of Corrective Services collect and provide data in the format required for the Australian Institute of Health and Wellbeing's *Juvenile Justice National Minimum Data Set*.
- Western Australian Police data is of sufficient consistency and quality for incorporation into Australian Bureau of Statistics publications on police proceedings and Aboriginal and Torres Strait Islander offenders.
- Disaggregated data is collected and made publicly available in at least the following areas:
 - police cautions and Juvenile Justice Team referrals
 - decisions to arrest/summons by offence type
 - decisions around grant or refusal of bail by offence type
 - court referral to Juvenile Justice Teams or Court Conferencing
 - total numbers in held detention (sentenced and on remand) throughout each year
 - young people identified as Prolific Priority Offenders by offence type
 - numbers of young people subject to mandatory minimum sentences, broken down by category (e.g three strikes home burglary, assault public officer etc)
 - length of sentences imposed by offence type
- The data should be disaggregated at least by age, gender, Aboriginal status (also disaggregated by gender), place of origin, place of residence, disability status, socio-economic status.
- De-identified disaggregated data measuring alcohol and other drug use, mental health issues, experience of family violence, disability and other social issues affecting young people is made available to Aboriginal and community sector organisations so they can better conduct research, devise and contribute to policy solutions.

2

That the Department of Corrective Services' Youth Justice Division increase its focus on and investment in early intervention, prevention and diversion, in conformity with international legal obligations.

3

That the Western Australian Government commit to funding Aboriginal organisations and communities, including through preferential tendering, to support Aboriginal designed and led programs at all stages of the justice system.

- This should include programs addressing gender-specific needs, and the needs of those experiencing fetal alcohol spectrum disorders (FASD) and other health-related issues (see Chapter 14) in the following areas:
 - early intervention, where Aboriginal young people are identified as at risk of offending by police, community representatives or other agencies (e.g Department for Child Protection and Family Support, Youth Justice Services)
 - prevention, as services to which a young Aboriginal person may be referred by a Prevention and Diversion Officer when a written caution is issued
 - diversion, as options for referral by the courts as an alternative to Juvenile Justice Teams and Court Conferencing
 - as part of non-custodial sentence orders (e.g Youth Community Based Orders, Intensive Youth Supervision Orders and Juvenile Conditional Release Orders)
 - locally relevant cultural awareness training for police and other agencies.

4

That the Minister for Corrective Services issue the Youth Justice Division a clear direction to work with local Aboriginal organisations throughout Western Australia to:

- encourage and, where necessary, assist them to apply for funding for the programs mentioned in Recommendation 3
- assist, where required, to develop appropriate programs
- address any procedural barriers that would prevent them from delivering these programs
- monitor and evaluate those programs.

5

That the Police Manual be amended to require that a 'failure to caution notice' be prepared on all occasions where a young person is proceeded against by way of Juvenile Justice Team referral or charge; and that the form be:

- provided to the legal representative of the young person appearing before the court, and to the magistrate
- centrally recorded for data collection purposes so that the reason for the discrepancy in referral of Aboriginal and non-Aboriginal young people can be better understood.

6

That the Western Australian Government conduct an investigation to address the reason for the lower rate of cautions issued to Aboriginal young people by police as compared to non-Aboriginal young people.

7

That the Department of Corrective Services inquire into and report publicly on the reasons for the consistent decline in referral of young people to Juvenile Justice Teams by police and the courts.
The review should consider:

- the appropriateness of excluded offences set out in Schedules 1 and 2 of the *Young Offenders Act 1994 (WA)*
- steps that might be taken to improve the cultural appropriates of the Juvenile Justice Team process
- any other relevant considerations.

8

That the Department of Corrective Services provide funding and appropriate training to enable respected local Aboriginal community representatives to be recruited and remunerated to participate in the Juvenile Justice Team process throughout Western Australia.

9

That the Department of the Attorney-General and Department of Corrective Services review the requirement that a responsible adult must sign a bail undertaking, with reference to the approach adopted in other states and territories and the obligation that the best interests of the child be the paramount consideration and that detention must be a last resort.

10

That the Western Australian Government urgently provide more funding to expand the Youth Bail Options Program to provide more supervised bail accommodation in the Perth Metropolitan area.

11

That the Western Australian Government increase funding for the Youth Bail Service and Youth Bail Options Program and that the Department of Corrective Services explore further options for Aboriginal community controlled bail accommodation in regional and remote areas.

12

That Western Australia Police and the Department of Corrective Services work together to ensure that Youth Bail Options Program accommodation or other appropriate supervised accommodation is made available for young people who would otherwise be remanded in police custody pending a bail hearing where no responsible adult is able to sign a bail undertaking.

13

That the Department of Corrective Services and Department of Child Protection and Family Support immediately reach formal agreement to allow Youth Bail Options Program accommodation to be made available to children in state care.

14

That the Western Australian Government immediately fund the Department of Child Protection and Families Support to provide greater supported accommodation options and supervision to those released into their care on bail.

15

That the Department of Child Protection and Family Support urgently review its criteria for refusing to sign a bail undertaking to ensure compliance with the *Act 1982 (WA)* and the Convention on the Rights of the Child.

16

That the Western Australian Government immediately fund youth specific residential mental health facilities which can provide supervised bail accommodation for those with complex needs so that detention on remand does not occur merely due to a lack of accommodation.

17

That Western Australia Police institute an investigation into the application and enforcement of curfews as a condition of bail to consider and publicly report on:

- the development of appropriately confined criteria for the use of curfews
- the impact of curfew enforcement on the number of young people held in detention on remand and particularly Aboriginal young people
- the nature and appropriateness of criteria used to categorise a young person as a Prolific Priority Offender
- the impact of the monitoring and enforcement of curfews on police-community relations
- any other issues arising out of the way in which curfews are imposed, monitored and enforced.

18

That the Western Australian Government immediately repeal all of the provisions of the *Criminal Code Act Compilation Act 1913 (WA)* that require the imposition of mandatory minimum sentences for young people.

19

That the Western Australian Government immediately withdraw those parts of the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* that would extend the application of mandatory minimum sentencing to young people.

20

That the Western Australian Government commit to detention as a measure of last resort for all young people by ensuring that no future legislation will impose mandatory minimum sentences for young offenders.

21

That the Western Australia Government amend section 29 of the *Criminal Code Act Compilation Act 1913 (WA)* to provide that "A person under the age of 12 years is not criminally responsible for any act or omission."

22

That the Western Australian Government commit to taking adequate measures to deal with FASD, including by:

- urgently developing, in partnership with Aboriginal health organisations, a culturally appropriate diagnostic tool for FASD
- funding a FASD diagnostic unit in Perth and at the location of each of the Regional Youth Justice Services
- allocating funding to Aboriginal community controlled health organisations to deliver training to government agencies including the police, Youth Justice Services, regional magistrates and Children's Court, about FASD and its impacts for young people coming into contact with the youth justice system.

23

That the WA Government commit to providing adequate facilities and treatment options for those deemed unfit to stand trial including by:

- Amending sections 16(5) and 19(4) of the *Criminal Law (Mental Impaired Accused Act) 1996 (WA)* to enable a court to make a supervised release order for a person deemed unfit to stand trial. Such supervision should include support programs and supervision in a safe, therapeutic environment rather than in detention.
- Empowering the court to regularly review such supervised release orders.
- Amending the *Criminal Law (Mental Impaired Accused Act) 1996 (WA)* to provide that a custody order must not be made unless the statutory penalty for the alleged offence includes imprisonment or detention. Such an order should not be permitted to run for longer than the alleged offences, if proved, would have justified.



○ Kununurra

○ Derby

○ Mowanjum

○ Halls Creek

○ Fitzroy Crossing

○ Broome

○ Geraldton

○ Kalgoorlie

PERTH ●

○ Bunbury

○ Nowanup

○ Albany

Research focus locations

Photo © Ingetje Tadros

Methodology

This report is based on research carried out between mid-2013 and early 2015 by Amnesty International. The report is informed by conversations and interviews with Aboriginal people, including representatives of Aboriginal organisations working with young people; court officers and lawyers of the Aboriginal Legal Service of Western Australia (the ALSWA) and other Aboriginal organisations throughout Western Australia. A number of these people spoke to Amnesty International on the condition that their anonymity be guaranteed. Many have requested that certain details not be made public. In order to respect these wishes, some names and locations have been withheld.

Amnesty International also interviewed officials working in the area of youth justice across Western Australia, including magistrates, police, staff within the Youth Justice Services division of the Department of Corrective Services;²² lawyers working with young people and representatives of the Department of Child Protection and Family Support. In total Amnesty International interviewed over 150 people in the course of this research.

Amnesty International also reviewed case law; legislation; parliamentary debates; questions put by Members of Parliament;²³ existing government and academic reports and inquiries into the Western Australian youth justice system; and commentary from members of the judiciary. Data from the 2013–14 financial year is used where available, but earlier data is cited where 2013–14 data has not been accessible.

Amnesty International has focused on the ‘front end’ of the youth justice system in Western Australia because while international legal standards on the rights of the child require that arrest and detention be measures of last resort, for Aboriginal young people this is not the reality.

This report considers factors from the point of initial contact with police (including availability of early intervention, prevention and diversion programs and police decisions around cautioning); decisions around bail and bail conditions; options available to the court, including appropriate diversionary and non-custodial sentencing options; and the impact of mandatory minimum sentencing laws. The report also briefly considers fetal alcohol spectrum disorders (FASD) and other health issues that impact on and may compound a young person’s contact with the justice system. The report does not consider conditions of detention or transitions out of detention.

In Western Australia the independent statutory Office of the Inspector of Custodial Service is active in its monitoring and reporting on conditions of detention.²⁴ Rehabilitation is too broad and complex a topic to have integrated within the current report but is an important issue for other research.

Research focus locations

Amnesty International conducted in-depth research through semi-structured interviews in three focus locations: Metropolitan Perth, Geraldton and Fitzroy Crossing (including interviews in Broome to the extent that relevant services provided to Fitzroy Crossing are located there).

Due to the vast scale of Western Australia (which is twice the size of South Africa) these locations were chosen in order to build an understanding of the way the youth justice system operates in metropolitan, regional and more remote contexts.

Amnesty International also carried out research and interviews in Albany, Bunbury, Derby, Mowanjumb, Halls Creek, Kalgoorlie and Kununurra. Amnesty International is aware that this report cannot provide a comprehensive picture of all the varied issues that impact Aboriginal young people and their contact with the youth

justice system throughout the state. In particular, due to limited resources making travel to all regions prohibitive, no research was undertaken in the Central Desert or Pilbara regions for this report.

Amnesty International notes that a number of interviews that were to take place with Aboriginal young people for the purpose of this research failed to proceed. Reasons included deaths in the community and some young people expressed fear of repercussions from police if they were known to have spoken with us.

Data requests for this report

Due to the lack of publically available disaggregated data for Western Australia (see below, Chapter 6), Amnesty International made formal data requests in early August 2014 to the Department of Corrective Services, following earlier written requests in May 2014. Data requests were also made of the Western Australia Police.

In response to those data requests the Department of Corrective Services provided some disaggregated data in relation to Juvenile Justice Team referrals and young people in detention disaggregated by sex, Aboriginal status and region of residence. Information, including about the year of birth of those in detention, suburb and local government area was also formally requested but was not provided.²⁵

Amnesty International also requested information from the Department of Corrective Services about programs and activities available to the courts prior to sentencing and as part of community-based orders.

Western Australia Police undertook to provide disaggregated data in relation to arrest, cautions and remand for failure to comply with bail conditions. Unfortunately, such data was not made available.

The report draws on the best available data from a range of sources. However, the lack of data inhibits full identification of areas where the system is failing Aboriginal young people.

A note on terminology

Amnesty International strives to use terminology that respects the wishes of the Indigenous Peoples concerned. This report uses the term Aboriginal rather than Indigenous, due to the more widespread use of this term by Aboriginal organisations across Western Australia and in available data sources. Amnesty International acknowledges the diversity of Aboriginal experiences and language groups across Western Australia. It is also noted that the preferred spelling of Aboriginal language group names may vary from the chosen spelling in this report. Amnesty International further acknowledges the distinct history and customs of Torres Strait Islander Peoples, a number of whom also reside in Western Australia. It is not always made clear whether statistics referring to Aboriginal Western Australians also include Torres Strait Islander Peoples.

Both the Convention on the Rights of the Child (the Convention) and the Young Offenders Act 1994 (WA) (Young Offenders Act) apply to young people aged up to and including 17 years. The age of criminal responsibility in Western Australia is 10, so this report is primarily concerned with young people aged between 10 and 17 inclusively.

Where referring to Aboriginal children aged between 10 and 17, this report uses the general term Aboriginal young people and the terms Aboriginal girls and Aboriginal boys where gender-specific references are made. Amnesty International acknowledges that some Aboriginal young people in Western Australia who have been through ceremonial business or initiation are considered to be men and women.

No disrespect is intended by the use of these general descriptors.

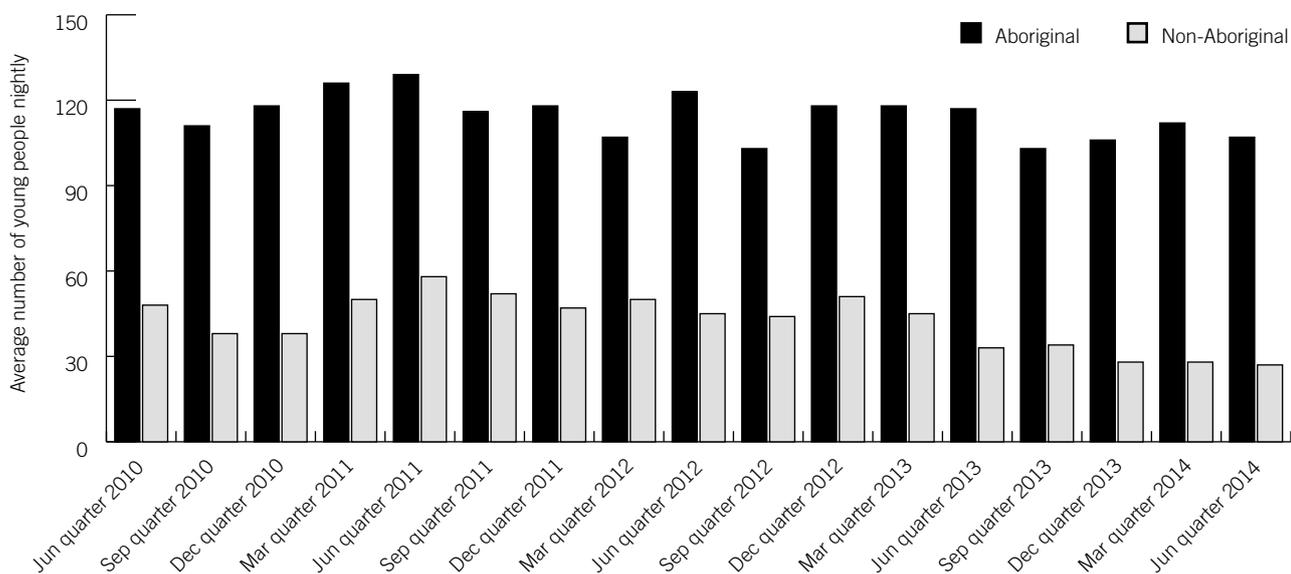


Figure 1
Average number of young people aged 10–17 years in detention. Quarter June 2010 – Quarter June 2014, Western Australia²⁷

	Aboriginal youth	Total (Aboriginal and non-Aboriginal youth)	% Aboriginal young people
Population of 10 to 17-year-olds in Western Australia (2014) ²⁸	15,995	248,391	6.4%
Cautions (2012–13) ²⁹	1,527	4,486	34.0%
Police referrals to Juvenile Justice Team (2012–13) ³⁰	554	1,099	50.4%
Arrests (2012–13) ³¹	3,854	6,236	61.8%
Cases lodged in the Children’s Court (2012–13) ³²	3,301	7,211	45.7%
Community-based orders (2012–13) ³³ – average day	441	667	66.1%
Unsentenced detention (2012–13) ³⁴ – average day	52	68	76.4%
Sentenced Detention (2013–14) ³⁵ – average day	55	69	79.7%
Detention (2013–14) ³⁶ – average day	107	137	78.3%

Table 1
Statistical overview³⁷

Overview of Aboriginal youth justice in Western Australia – mass over-representation²⁶

Aboriginal young people currently make up just over 6 per cent of the Western Australian population of 10–17 year olds (approximately 15,995 out of 232,397).³⁸ In 2013–14 Aboriginal young people made up, on average, more than 78 per cent of all young people in detention in Western Australia (107 out of 137 on an average day).³⁹

Nationally, Indigenous young people were 26 times more likely to be in detention than non-Indigenous young people between June 2013 and June 2014 (34.47 per 10,000 compared to 1.35 per 10,000 for non-Indigenous young people).⁴⁰ This national rate at which Aboriginal young people are over-represented in youth detention centres was recently characterised as a ‘national crisis’ by the Federal House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs.⁴¹ Yet, in Western Australia, the situation is significantly worse; in the same year Aboriginal young people were 53 times more likely than their non-Aboriginal peers to be in detention (66.95 per 10,000 compared to 1.26 per 10,000 for non-Aboriginal young people).⁴² This is by far the highest rate at which Indigenous people are in detention in Australia as well as being by far the highest over-representation of Indigenous young people in detention. Aboriginal young people are heavily over-represented at every stage of the youth justice system and most over-represented at the more punitive stages of the system.

Between 2009/10 and 2013/14, 87 per cent of children aged 10–13 in detention were Aboriginal (an average of 38 out of 44);⁴³ 79 per cent of these Aboriginal children were boys (30 of those 38).⁴⁴ In 2013–14, an average of 41.4 per cent of all young people in detention in Western Australia were from outside the Perth metropolitan area (57 out of 137),⁴⁵ despite comprising only around 27 per cent of the population of 10–17 year olds.⁴⁶ On an average day, of those young people in detention from outside the Perth metropolitan area, 93 per cent were Aboriginal (53 out of 57).⁴⁷

In 2012–13, Aboriginal young people made up 46 per cent of those who came before the Children’s Court of Western Australia (3,301 out of 7,211).⁴⁸ Sixty-two per cent of all young people arrested by police were Aboriginal (3,854 out of 6,236),⁴⁹ compared to 50.2 per cent in 2005.⁵⁰

Aboriginal young people alleged to have committed an offence are diverted away from the courts by police through cautions and Juvenile Justice Team referrals at a much lower rate than their non-Aboriginal peers: Aboriginal young people were diverted 35.1 per cent of the time, whereas non-Aboriginal young people were diverted 58.2 per cent of the time.⁵¹

The top three types of offences that went to court, which account for 58 per cent of all charges laid against Aboriginal young people in 2012–13, were non-violent offences (property offences, including theft and burglary, and offences against justice procedures).⁵²

In 2014 Aboriginal young people aged 0–17 made up an estimated 39 per cent of all Aboriginal people in Western Australia.⁵³ This is just under twice the proportion of non-Aboriginal people in the same age group.⁵⁴ Unless the extremely high rate of Aboriginal youth detention is urgently addressed through a concerted focus on early intervention, prevention and diversion, the number of Aboriginal young people ultimately moving into adult prisons is likely to remain high.

The situation for Aboriginal boys and girls

In 2013–14 Aboriginal boys made up an average of 78.7 per cent of all boys aged 10–17 in detention in Western Australia (100 out of 127).⁵⁵ On an average day in 2012–13, one in 77 Aboriginal boys in Western Australia were in detention (compared to one in 3012 non-Aboriginal boys).⁵⁶

If the rate of detention for all young boys were the same as for Aboriginal boys, there would have been 1,645 boys in detention on an average day in 2012–13 rather than 127.⁵⁷ Conversely, if Aboriginal boys were detained at the same rate as non-Aboriginal boys, there would be less than three Aboriginal boys in detention on an average day.⁵⁸

While the proportion of boys in detention who are Aboriginal has been unacceptably high for a long time, the recent further rise in the proportion of Aboriginal boys in detention is due to a gradual decline in the non-Aboriginal male detention population rather than a rise in Aboriginal boys in detention. In 2012–13 Aboriginal boys also made up 65 per cent of those on community-based orders on an average day (359 out of 550).⁵⁹

The number of girls in detention is much lower; however Aboriginal girls are also significantly over-represented. One in 753 Aboriginal girls is in detention on an average day. For non-Aboriginal girls, it is one in around 28,500.⁶⁰ In 2013/14 girls made up an average of only 7.3 per cent of the total youth detention population in Western Australia (10 out of 137).⁶¹ Due to the low number of girls overall, the percentage of girls in detention who were Aboriginal varied much more over the five year period but in 2013/14 they comprised an average of 70 per cent of all girls in detention (7 out of 10).⁶² Sixty-five per cent of the Aboriginal girls in detention were from metropolitan Perth.⁶³ A recent national study, relying on JJ NMDS data, identified that:

young women are less likely than young men to enter the juvenile justice system and even less likely to progress to the most serious processes and outcomes. In 2010–11, young men were around twice as likely as young women to be proceeded against by police, more than three times as likely to be proven guilty in the Children’s Court, four times as likely to experience community-based supervision and five times as likely to be in detention.⁶⁴

In 2012–13 Aboriginal girls made up, on average, 63 per cent of girls on community-based orders (80 out of 128).⁶⁵

Reasons for over-representation

As a Commissioner of the Royal Commission into Aboriginal Deaths in Custody, Yawuru Elder Patrick Dodson reported on the underlying issues that contribute to the 'extremely alarming' statistics about the number of Aboriginal people in custody.⁶⁶ Despite having been written over two decades ago, the following extract reflects the issues raised by interviewees in the course of Amnesty International's research. It demonstrates how little has changed since 1991:

Interpretations as to what these figures and percentages mean have been variously provided to me. They range from perceptions that Aboriginal people in this State are just more criminally inclined, to the way junior police officers, without a lot of adult maturity, go about their task of targeting Aboriginal people, and asserting their new authority and zeal for law enforcement over their peers in the Aboriginal population.

Other views have related to the broader issues of alcohol use, unemployment, lack of educational achievement and matters integral to the disadvantaged social and economic circumstances of Aboriginal people. There were yet other views that concern continuing Aboriginal resistance to non-Aboriginal social, cultural and legal imperatives, and that of not being able to understand that there is only one legal system. Police have to enforce the law so they are generally hated by younger Aboriginal people. In my view these explanations, while extremely broad, are not to be dismissed. They are not exclusive but nor are they exhaustive. They most certainly contribute to an understanding of the situation.

Until there is a concerted effort to assist those who are working in this area, in a more positive direction aimed at reducing custodies by being more culturally sensitive and knowledgeable, this intolerable situation will continue. Aboriginal societies need to find, within their own histories of survival, ways of extricating Aboriginal people out of this tragic situation, a situation which seems to have become more pronounced since the late 1960s.⁶⁷

Aboriginal organisations and community representatives consistently echoed the views expressed in the final paragraph to Amnesty International researchers, highlighting sentiments to the effect that "we are the solution to our problems."⁶⁸

Aboriginal people and organisations interviewed in the course of this research consistently outlined the need for more support to address the factors that contribute to the high rates of offending and contact with the justice system by Aboriginal young people: unresolved intergenerational trauma; cultural

dislocation and dispossession; overcrowding and homelessness;⁶⁹ family violence; poverty; lack of parental supervision; lack of education; boredom and peer pressure; alcohol and drug abuse; absence of youth drop-in centres; policing practices; fetal alcohol spectrum disorder and other physical and mental health issues.

You can see the generational change from when I was growing up, there are a lot more drugs and kids are starting a lot younger ... kids haven't got a space where they can go and be safe and they need one, they are growing up fast now ... It's pretty hard for some of them, their family environment is tough.

Interview with Aboriginal youth support worker (identity withheld), August 2014

A recurring and troubling concern raised in the course of this research was that alcohol and drug use is starting at an earlier age among Aboriginal young people than in the previous generation. Many of those interviewed raised concern about the recent availability and use of heavier drugs like ice (methamphetamine) and speed (though Amnesty International heard that this is not an issue in the Fitzroy Valley).

What are the things that are impacting the family and the community? Not just the western or contemporary issues that we are facing, also cultural issues. The absence of strong authority for the role of community leaders, their levels of influence ... The effects of alcohol, drugs, access to food, sleep, access to financial support.

Interview with June Oscar, Marninwartikura Women's Resource Centre, 3 September 2014

Some of the reasons for high levels of contact with the justice system are gender-specific. The Office of the Inspector of Custodial Services recently noted that many of the older Aboriginal girls in detention are victims of family violence.⁷⁰ Legal representatives in Perth noted that as a trend the girls they represent were more likely to be appearing in court for a serious one-off offence than boys, and the girls appearing in the drug court were often victims of serious domestic violence who had retaliated following sustained abuse.⁷¹

Each state and territory in Australia has responsibility for its own criminal laws, including youth justice legislation. The Western Australian *Young Offenders Act 1994 (WA)* (hereafter Young Offenders Act), together with the *Criminal Code Act Compilation Act 1913* and the *Bail Act 1982 (WA)*, provides the framework for dealing with 10 to 17-year-olds alleged to have committed a criminal offence in Western Australia.

At the time of its introduction, the Young Offenders Act was characterised as being based “on the simplest of policy foundations – tough but fair.”⁷² The general principles that “are to be observed” in performing functions under the Young Offenders Act are:

- there should be special provision to ensure the fair treatment of young persons who are alleged to, or have, committed offences
- a young person who commits an offence is to be dealt with in a way that encourages them to accept responsibility for their conduct
- a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if they were an adult
- the community must be protected from illegal behaviour
- victims should be given the opportunity to participate in the process
- responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported to do so
- consideration should be given to the possibility of taking measures other than judicial proceedings for the offence if the circumstances make it appropriate and this would not jeopardise the protection of the community
- detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort.⁷³

The diversionary intent of the Young Offenders Act scheme was described in the second reading speech as follows:

- First point of contact between police and young offenders, provided they have committed a non-scheduled offence, 74 will be a police caution.
- When the police have exhausted their cautioning options, and provided the offence is a non-scheduled offence, the offender will be referred to the [Juvenile Justice Team].
- The Children’s Court will deal with scheduled offences, offences where the police decide to proceed by notice to attend or arrest, and cases where the offender does not admit to the offence.⁷⁵
- ...The [Juvenile Justice] teams will also deal with matters referred by the Children’s Court in certain circumstances.⁷⁶

The diversionary options are aimed towards dealing with young people who commit minor offences. This is in recognition that the vast majority of young people commit minor offences and are “best dealt with using strategies which avoid the formal processes of the criminal justice system.”⁷⁷ More serious offences, or offences that are part of a “well-established pattern of offending” are dealt with in court.⁷⁸ In these instances, the Young Offenders Act sets out a range of non-custodial orders, the Government intent being that “the least intrusive option be tried first by the court” with the custodial order characterised as “the final sentencing provision available to the court.”⁷⁹ The way the system was intended to operate is broadly consistent with the obligation in the Convention on the Rights of the Child that detention be a measure of last resort and that measures for dealing with children without resorting to judicial proceedings be promoted.⁸⁰ A more detailed description of the youth justice system, from the point of first contact with police to sentencing consideration is outlined in Appendix A.

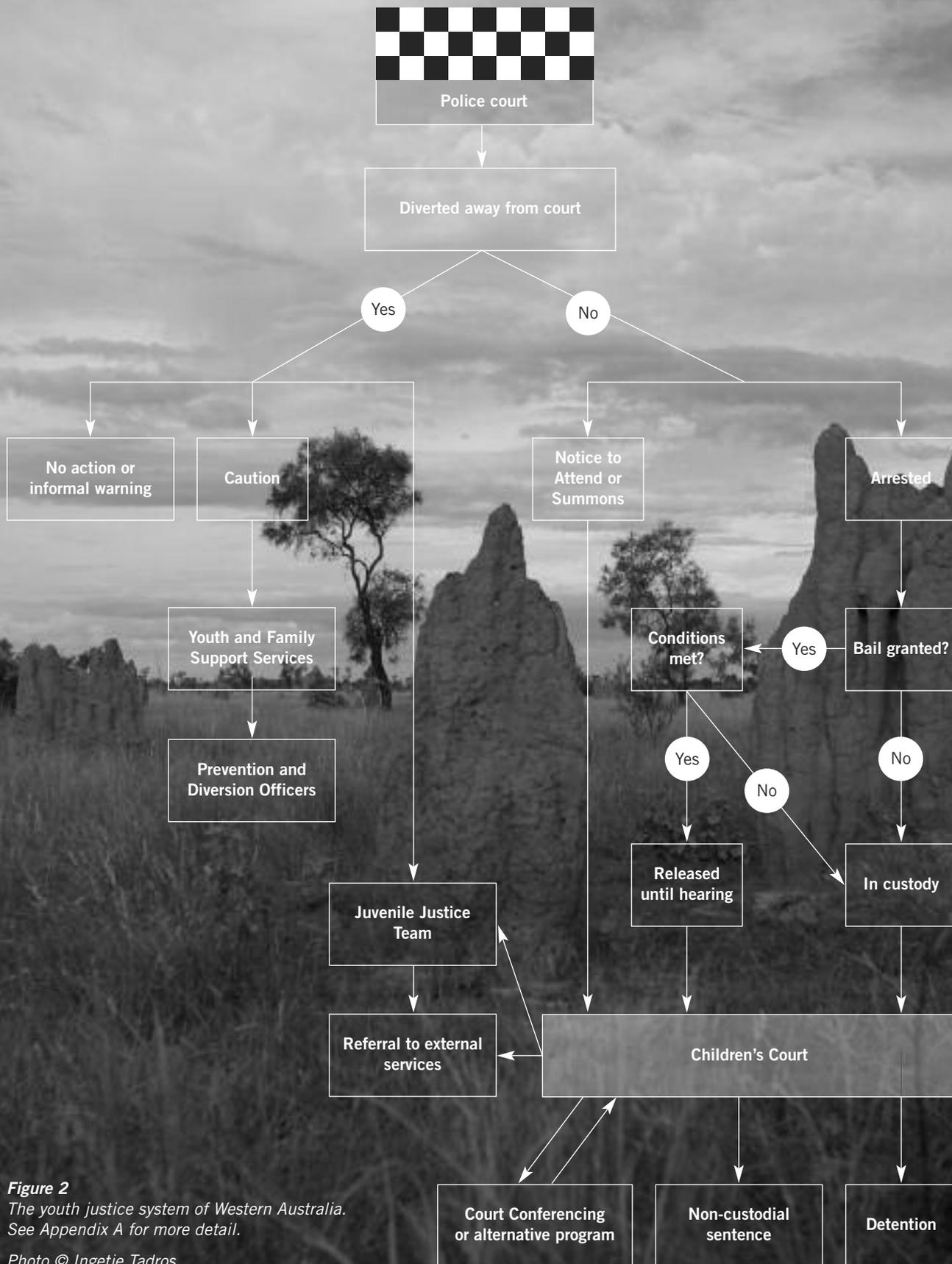


Figure 2
 The youth justice system of Western Australia.
 See Appendix A for more detail.

Photo © Ingetje Tadros

The massive over-representation of Indigenous young people in the criminal justice system has been recognised as a human rights issue by a number of human rights treaty bodies.⁸¹ Through ratification of binding international human rights treaties and the adoption of United Nations (UN) Declarations, governments have committed to ensuring that all people enjoy universally recognised rights and freedoms.

Convention on the Rights of the Child

Children coming into contact with the justice system are entitled to additional protections in recognition that they differ from adults in their physical and psychological development. All fair trial and procedural rights that apply to adults apply equally to children, but additional juvenile justice protections exist under the international human rights framework to ensure that the child's best interests are protected. The Convention on the Rights of the Child is the primary source of these rights. It provides that all rights contained in the Convention are to be enjoyed by all children without discrimination and, unique among the major UN human rights treaties, it explicitly recognises the particular needs of Indigenous children.

The Convention on the Rights of the Child is the most widely ratified human rights treaty in history. Australia signed and ratified the Convention in 1990.⁸² However, the Committee on the Rights of the Child, the body that monitors States Parties' implementation of the Convention, has noted concern that while the Convention may be considered and taken into account in Australia, "in order to assist courts to resolve uncertainties or ambiguities in the law, it cannot be used by the judiciary to override inconsistent provisions of domestic law."⁸³ In 2012 the Committee expressed regret that despite its previous recommendations "the juvenile justice system of the State party still requires substantial reforms for it to conform to international standards."⁸⁴

Article 1 of the Convention defines a child as "every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier."⁸⁵

The Convention establishes the 'best interests of the child' as a fundamental principle underpinning children's rights. Article 3.1 states that "in all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37 provides that States Parties shall ensure that "the arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time." Article 40(3) requires States Parties to "promote the establishment [of] measures for

dealing with such children without resorting to judicial proceedings ... to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

In General Comment 10, the Committee on the Rights of the Child (the Committee) says that "a comprehensive policy for juvenile justice must deal with ... the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings."⁸⁶

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

In General Comment 11 the Committee noted "with concern that the incarceration of indigenous children is often disproportionately high and in some instances may be attributed to systemic discrimination within the justice system and/or society."⁸⁷

The Committee also noted that "through its extensive review of State party reports ... indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children." In order to address this, the Committee urges States Parties to consider "the application of special measures in order to ensure that indigenous children have access to culturally appropriate services in the [area of] juvenile justice." Such special measures should "take into account the different situation of Indigenous children in rural and urban situations" and "particular attention should be given to girls in order to ensure that they enjoy their rights on an equal basis as boys."⁸⁸ The Committee further notes that special measures should be designed to "address the rights of indigenous children with disabilities."⁸⁹

In its most recent Concluding Observations in 2012 on the implementation of the Convention in Australia the Committee expressed particular concern about:

The serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant over-representation in the criminal justice system [and the] inadequate consultation and participation of Aboriginal and Torres Strait Islander persons in the policy formulation, decision-making and implementation processes of programmes affecting them⁹⁰

International Convention on the Elimination of Racial Discrimination

Australia ratified the International Convention on the Elimination of Racial Discrimination (ICERD) in 1975.⁹¹ It prohibits any distinction on the basis of race which has either the purpose or effect of restricting the enjoyment of human rights.⁹²

Consistent with General Comments of the Committee on the Rights of the Child outlined above, the ICERD recognises that there are circumstances where special and concrete measures are required in order to ensure the protection of certain groups, including Indigenous Peoples,⁹³ “for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”⁹⁴ The Committee on the Elimination of Racial Discrimination has noted that “States parties should ensure that special measures are designed on the basis of prior consultation with affected communities and the active participation of such communities.”⁹⁵

In its most recent Concluding Observations in 2010, the Committee recommended that Australia dedicate sufficient resources to address the social and economic factors underpinning Indigenous contact with the criminal justice system and encouraged:

... the adoption of a justice reinvestment strategy, continuing and increasing the use of indigenous courts and conciliation mechanisms, diversionary and prevention programmes and restorative justice strategies, and recommends that, in consultation with indigenous communities, the State party take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identifying those which remain relevant with a view to their implementation.⁹⁶

Declaration on the Rights of Indigenous Peoples

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

Many of the rights set out in the Declaration are relevant in the context of Aboriginal over-representation in the youth justice system. The Declaration was adopted by the UN General Assembly on 13 September 2007 after more than two decades of negotiations and deliberations in which Indigenous people from around the world participated as experts on their own rights.⁹⁷

Founding Chairperson of the Working Group on Indigenous Populations Erica-Irene Daes has noted that “no other UN instrument has been elaborated with such an active participation of all parties concerned.”⁹⁸ An overwhelming majority of States voted in favour of the Declaration; only four States voted against it – Australia, Canada, New Zealand and the United States – and each has subsequently endorsed it (Australia on 3 April 2009).⁹⁹ The former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya noted that:

The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights.¹⁰⁰

The Declaration states that it constitutes “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world” and recognises “the right of indigenous families and communities to retain shared responsibility for the upbringing ... and well-being of their children.”¹⁰¹

While Declarations, as soft law, do not create binding international legal obligations, the Declaration on the Rights of Indigenous Peoples is acknowledged as generating “reasonable expectations of conforming behaviour.”¹⁰²

It recognises the right of Indigenous Peoples to promote, develop and maintain their distinct institutions, customs, spirituality, traditions and practices, including juridical systems. It also recognises the right “to the improvement of their economic and social conditions” without discrimination.¹⁰³ The Declaration states that particular attention should be given to “the rights and special needs of Indigenous ... youth, children and persons with disabilities.”¹⁰⁴

Under the Declaration, Indigenous Peoples have “the right to participate in decision-making in matters which would affect their rights” through their own representatives chosen in accordance with their processes.¹⁰⁵ Indigenous Peoples also have the rights to “maintain and develop their own indigenous decision-making institutions.”¹⁰⁶ Under the Declaration, States are required to take steps to ensure continuing improvement of Indigenous Peoples’ economic and social conditions.¹⁰⁷

International human rights bodies highlight the importance of coordinated collection and use of data to identify gaps and barriers to the exercise of rights and appropriately allocate resources, design laws and implement policies and programmes to address the issues faced by Indigenous young people in conflict with the law. The Western Australian Government has failed to collect and make available relevant disaggregated statistical data to allow for such analysis within the justice sector or by those who wish to monitor and offer potential solutions from outside government.

Amnesty International encountered considerable difficulties in obtaining disaggregated statistical data about the experience of Aboriginal young people in the Western Australian youth justice system. This is due to gaps in disaggregated data available publicly; standard data not having been provided to national studies on youth justice; and incomplete information being provided in response to Amnesty International's requests for data and information.

A representative of the Department of Corrective Services told Amnesty International that problems with data were currently affecting their own capacity to plan for programs.¹⁰⁸ As the state with the highest rate of over-representation of Aboriginal young people in detention, Western Australian must improve its collection and dissemination of disaggregated data in order to adequately understand where the system is failing Aboriginal young people.

The situation has further deteriorated recently. Weekly statistics and monthly graphical reports about the number of young people in detention, previously published by the Department of Corrective Services, have not been provided since June 2014.¹⁰⁹ The 2013–14 annual report of the Department of Corrective Services deviates from the format used in previous years and provides less information that is disaggregated by Indigenous status (for example relating to the referral to Juvenile Justice Teams).¹¹⁰

The Committee on the Rights of the Child notes in General Comment 11 that:

Among the positive measures required to be undertaken by States parties is disaggregated data collection and the development of indicators for the purposes of identifying existing and potential areas of discrimination of Indigenous children ... The identification of gaps and barriers to the enjoyment of the rights of indigenous children is essential in order to implement appropriate positive measures through legislation, resource allocation, policies and programmes.¹¹¹

In its 2012 Concluding Observations in relation to Australia, the Committee on the Rights of the Child reiterated its recommendation, first made in 2005, that Australia:

strengthen its existing mechanisms of data collection in order to ensure that data are collected on all areas of the Convention in a way that allows for disaggregation ... by children in situations that require special protection. In that light, the Committee specifically recommends that the data cover all children below the age of 18 years and pay particular attention to ethnicity, sex, disability, socio-economic status and geographic location.¹¹²

The Committee on the Elimination of Racial Discrimination have also noted that appraisals of the need for special measures “should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.”¹¹³

Western Australia has also failed to provide standard data to the Juvenile Justice National Minimum Data Set (JJ NMDS) for several years. JJ NMDS is a project run by the Australian Institute of Health and Welfare (AIHW), a national agency set up by the Australian Government to provide regular information and statistics on Australia's health and welfare.¹¹⁴ The main aim of the JJ NMDS is to bring together state and territory juvenile justice data into a national data set that can “facilitate comparison of juvenile justice policies across states and territories.”¹¹⁵ It is also relied on by the Productivity Commission in its annual reviews of Government Services, including Youth Justice Services and the Overcoming Indigenous Disadvantage Reports “for consistency across jurisdictions.”¹¹⁶ It is the most comprehensive data source relating to youth justice in Australia. The AIHW recently noted that:

Western Australia did not provide JJ NMDS data between 2008–09 and 2012–13. For these years, it provided only limited data in a non-standard format ... These data contribute to the national totals where possible, but are not reliable enough for separate reporting.¹¹⁷

For this reason, disaggregated data that is generally available for other states has not been available in the Western Australian context. This has also undermined the quality of national information, as a big piece of the national picture is missing. The AIHW also uses JJ NMDS data to consider trends for Indigenous youth specifically and common pathways through the youth justice system. The failure by the Western Australian Government to provide data since 2008–09 has undermined full identification of such trends and pathways.

The recent AIHW Youth Detention 2014 report includes more data from the Western Australian Government than has been available since prior to 2008–09.¹¹⁸ However that information was again provided in a non-standard format and is, therefore, not able to be fully integrated into national studies trying to build an evidence base to address issues in relation to youth justice.

Data was also provided by the Western Australian Government to the Productivity Commission for its recent *Overcoming Indigenous Disadvantage 2014* report, but this is more limited than what is required under the JJ NMDS.

The Australian Bureau of Statistics (ABS) recently presented statistics about police proceedings during the period 1 July 2012 to 30 June 2013 for all states and territories except Western Australia. The ABS explained that:

Due to Western Australian police utilising two separate offender recording systems, data on police proceedings could not be matched between systems resulting in national data are not available for police proceedings and the number of times an offender is proceeded against by police.¹¹⁹

Further, the ABS only presented data about Aboriginal and Torres Strait Islander offenders for New South Wales, Queensland, South Australia and the Northern Territory, for 2008–09 to 2012–13 because, based on their assessment, such data for Western Australia and other jurisdictions is “not of sufficient quality and/or do not meet ABS standards for self-identification for national reporting in 2012–13.”¹²⁰

Western Australia needs to improve its data collection, which is currently geared only towards operational purposes, so that such information can be analysed for public policy purposes also. Recommendation 1 of this report outlines some of the areas relevant to the justice system.

Improved data collection and use by the Western Australian Government is essential in order that the state can identify where the system is working well and where it is failing so that action can be taken to make the necessary improvements to conform with human rights obligations. Better collection of relevant data will facilitate informed decisions regarding how resources are best allocated to design and implement special and concrete measures to ensure that the best interests of Aboriginal young people are adequately protected. The coordinated collection and availability of data is also essential for the identification of areas of focus under a justice reinvestment approach, recommended by the Committee against the Elimination of Racial Discrimination.

Data and justice reinvestment

Justice reinvestment is a data driven approach to addressing expanding prison populations. It “is premised on the fact that it is possible to identify which communities produce large numbers of offenders, and to strategically use that information to guide investment in community programs to most effectively reduce imprisonment numbers.”¹²¹ A recent Productivity Commission report on *Overcoming Indigenous Disadvantage* noted that “addressing over-representation of Aboriginal and Torres Strait Islander Australians in ... youth detention requires testing new approaches.”¹²² The Productivity Commission identified justice reinvestment as an approach that has been shown to work and which should be trialled in Australia.¹²³ An inquiry by the Western Australian Legislative Assembly Community Development and Justice Standing Committee in 2010 recommended that the Western Australian Government initiate “a properly-funded, evidence based, collaborative Justice Reinvestment strategy in one metropolitan and one regional ‘high stakes’ community identified by the recommended mapping exercise, as a pilot, to be evaluated against adequate performance measures.”¹²⁴ The recommendation has not been acted on.

Following an inquiry into the value of a justice reinvestment approach, a recent Australian Government Senate report highlighted that in Western Australia “there is currently a lack of quality data measuring alcohol and other drug use, mental health rates, and other social issues.”¹²⁵ The report further noted that “the current lack of accessibility of government held data by non-government organisations impedes research and non-partisan policy development by community sector organisations.”¹²⁶ In evidence to the Senate inquiry, the Western Australian Council of Social Services, a peak body for community sector organisations, noted that:

It is actually critically hard to get hold of that data out of many of the government agencies that are funding programs, particularly if we are talking about corrective services and police and so on. The data sharing – and making sure that the data is comparable and consistent – is really critical.¹²⁷

Amnesty International experienced this problem first hand and also heard that it presents difficulties for Aboriginal organisations and services seeking to prove the efficacy of their programs in order to secure ongoing funding.¹²⁸

The Committee on the Rights of the Child has noted that a comprehensive policy for juvenile justice must focus on prevention of youth offending.¹²⁹ The Australian Institute of Criminology, in its National Crime Prevention Framework, recognises the importance of strategies to address the underlying reasons for offending. The National Crime Prevention Framework outlines the need to involve Indigenous communities in the design and delivery of such strategies.¹³⁰ Western Australia has an inadequate focus on early intervention, prevention and diversion programs that would effectively address the underlying causes of offending behaviour by Aboriginal young people before they come before a court.

Statistically, Aboriginal young people are more likely to be in contact with police in the youngest age group (10–12) and are most over-represented among the youngest cohort who are subject to court orders and detention.¹³¹ Criminologists have identified that contact with the youth justice system increases the likelihood of criminality in adulthood, and the more intensive and restrictive the justice intervention, such as detention, the greater the likelihood of adult criminality and judicial intervention.¹³²

Amnesty International heard from police, Aboriginal organisations and legal services that Aboriginal children as young as eight are coming to the attention of police for being out in the streets alone and committing low level theft offences, in some cases in order to get something to eat. Those interviewed linked these issues to families and young people who need more support to deal with issues such as overcrowding, trauma, mental health, family violence and substance abuse and fetal alcohol spectrum disorders.¹³³ Early intervention, prevention and diversion strategies that work with young people and their families in a holistic way to address these issues are therefore critical to protect the best interests of Aboriginal young people and prevent formal contact with the justice system.¹³⁴

It's really about, not making the justice system better, but keeping them out of the system ... away from the criminal justice system, at an early age, because that's where offending starts from an early age ... I just know that at some stage somebody has got to say, this is important, these young children are important ... they are going to be the parents of the next generation. It's a community issue, it's our community.

Interview with Aboriginal service provider (identity withheld), August 2014

While changes by the Western Australian Government over the past seven years have placed somewhat more focus on prevention and diversion, the over-representation of Aboriginal young people in the Western Australian justice system continues to increase. Youth justice is the responsibility of the Department of Corrective Services in Western Australia, which handles adult corrective services. Western Australia is now the only jurisdiction in Australia where the department responsible for adult offenders is also responsible for youth justice. This has been criticized by the Commissioner for Children and Young People, the Office of the Inspector of Custodial Services and

the President of the Children's Court, who have said there is excessive influence of an adult corrections mentality and an absence of youth specific focus.¹³⁵ The Office of the Inspector of Custodial Services of Western Australia recently recommended that "responsibility for youth justice services should lie with an agency whose primary responsibility is youth justice, not adult imprisonment."¹³⁶

Amnesty International notes that the Department of Corrective Services, through its Regional Youth Justice Services (RYJS),¹³⁷ has, since 2008, gradually made clear steps in relation to separating out youth justice responsibilities, establishing RYJS bases in the regions that are physically separate from adult corrections staff and focus more on prevention and diversion.¹³⁸

The Department of Corrective Services has established a Youth Justice Division and currently has 11 agreements with local government and non-governmental organisations across the state to provide Youth Diversion Services.¹³⁹ However, according to the Department of Corrective Services, only two of these are with Aboriginal organisations, one in Geraldton and one in Roeburn.¹⁴⁰

A Youth Justice Board, chaired by the Commissioner of Corrective Services, was established in April 2014 "to lead the implementation of a new approach to youth justice with a strong focus on diversion."¹⁴¹ Amnesty International has been advised that \$2 million of the youth justice budget will be re-directed towards implementing prevention and diversion services. Further, the Department of Corrective Services recently advised that it will now be "focused on strengthening youth diversion services throughout the State, for Aboriginal young people in particular."¹⁴² A Youth Justice Innovation Fund was recently announced, which the Board sees as "an opportunity to bring some smaller, community based providers into view."¹⁴³ Amnesty International welcomes these steps, provided that Aboriginal-led prevention and diversion initiatives are adequately supported as part of the approach and more funds are allocated to prevention and diversion.

The commitment to prevention and diversion remains inadequate. In the 2013/14 financial year the Department of Corrective Services' budget for prevention and diversion services was \$7.83 million dollars.¹⁴⁴ This is a very small amount compared to the \$46.8m spent on detention in the same year.¹⁴⁵ Further, the recent passage through the Legislative Assembly of laws that will expand mandatory minimum sentences for young people is inconsistent with the stated focus on prevention and diversion for young people in Western Australia (see Chapter 11). The Western Australian Government has conceded that these laws will lead to at least a further 60 places being required at Banksia Hill Detention Centre,¹⁴⁶ which will cost a further \$18 million dollars in costs of detention alone.¹⁴⁷ The President of the Children's Court has highlighted that these laws "will result in the last window of opportunity to rehabilitate young offenders before they turn 18 years of age being lost."¹⁴⁸

To conform to international legal obligations, more needs to be invested in early intervention, prevention and diversion programs, in particular those delivered by or in partnership with Aboriginal organisations.

Support for Aboriginal designed and led solutions

In General Comment 11 the Committee on the Rights of the Child notes that:

States parties should seek to support, in consultation with Indigenous peoples, the development of community based policies, programmes and services which consider the needs and culture of Indigenous children, their families and communities. States should provide adequate resources to juvenile justice systems, including those developed and implemented by indigenous peoples.

Further, in recommendations to Australia the Committee recommended the Australian Government “ensure that Indigenous children have access to culturally appropriate services in the [area of] juvenile justice.”¹⁴⁹

A recent study for the Indigenous Justice Clearinghouse, which looked at the evidence about promising interventions to prevent Aboriginal youth from offending noted “the importance of community involvement in the design and delivery of programs” to ensure that the program addresses “the particular needs of a community.”¹⁵⁰ Other identified features of successful programs include “intergenerational, family and cultural support (or mentoring) mechanisms within Indigenous communities.”¹⁵¹

In the course of this research a number of police and other service providers noted the need to better resource youth workers, the Department of Child Protection and Family Support and other services to provide greater support to families and young people. Aboriginal leaders consistently emphasised the importance of working with families as well as young people to address issues faced by Aboriginal young people. In line with international legal standards, stronger collaboration is needed between police, other service providers and Aboriginal community organisations to address the underlying issues that lead to offending (including trauma, substance abuse and family violence) in a way that is locally relevant and accessible to Aboriginal people.

Where you have families who have long-standing historical traumatic experiences, there is a whole need for healing ... It has got to be a process where there are people who have the skills and the expertise that can work with families, communities, nations of Indigenous people in the right way, acknowledging the strengths of Indigenous cultural frameworks around healing ... For too long policies have been designed by people who are not living in our reality.

Interview with June Oscar, Marninwarntikura Women’s Resource Centre, Fitzroy Crossing, 3 September 2014

Interviews with Aboriginal individuals and service providers also indicated that programs that assist young people to embrace their Aboriginal identity and connect to their culture were

having an impact.¹⁵² A young woman, who has asked to be referred to as Sarah, told Amnesty International that the Yiriman Project women’s program had a positive influence in her life. Sarah had a difficult patch when her parents separated:

I thought I can do whatever I want. Mum didn’t come back into my life until I was 13, so I grew into a teenager without mum. I was in between homes, I moved around alot.

Sarah was formally cautioned by police for a schoolyard fight, but has not been in trouble since. Sarah said of a Yiriman Project trip she took part in:

I got out of it a sense of belonging. People say you find yourself more when you enter your inner self. When I went out there I took a step back and said, this is me, this is where family come from, my ancestors walked this land, so I sort of found myself. I find that a sense of belonging gives you a sense of respect.

Sarah is now employed at a local Aboriginal organisation, and is planning to start her own business. She attributes the change to her involvement with the Yiriman Project.

While there are a number of impressive programs for young people delivered by and in partnership with Aboriginal people in Western Australia,¹⁵³ many struggle for sustained funding and support. Culturally relevant services are also critical in terms of the diversionary options available to police and the courts. Amnesty International heard from a number of magistrates and police at the local level that there is a strong interest in being able to work with local organisations and draw on cultural authority to address offending behaviour.¹⁵⁴ Judicial officers and a police officer who spoke with Amnesty International identified the lack of funding and support for such options by the Department of Corrective Services and other agencies as a current barrier in doing so.¹⁵⁵

In order to turn this around and fulfil the obligations of the Convention on the Rights of the Child, Aboriginal communities and organisations must be better supported to develop local solutions that address the issues faced by Aboriginal young people and their families.¹⁵⁶

To facilitate this, the Western Australian Government should implement a process of preferential tendering,¹⁵⁷ and provide support for local Aboriginal organisations, including women’s organisations, to apply for funding and comply with reporting obligations where this support is needed. This will help to ensure Aboriginal children have access to culturally appropriate services consistent with the recommendation of the Committee on the Rights of the Child.

The Department of Corrective Services said in mid 2014 that, following its review of diversion services and programs, “tenders will be publicly sought through the government tender process consistent with the State Supply Commission Act 1991.”¹⁵⁸ This should be reconsidered in light of the need to ensure that smaller Indigenous community based providers are not disadvantaged.

Police crime prevention focus

Amnesty International notes that Western Australia Police are involved in some strong crime prevention initiatives such as the Broome Police and Community Youth Centre (PCYC) Learning Centre, run in partnership with a local high school and the Regional Youth Justice Service.¹⁵⁹ Western Australia Police have also recently recruited three local Aboriginal Community Relations Officers in Broome and further recruits in Kununurra under a pilot program.¹⁶⁰ These are promising developments that should be considered elsewhere in Western Australia. Phillip, a young participant in the Broome Senior School Engagement Program (SSEP) located at the PCYC, who had previously been in trouble with the police, told us how the program helped him and gave him the support he needed to stay out of trouble:

When I was younger I got a bit carried away with things ... when I was young I really enjoyed school, but as soon as I got older I started being a very nasty person to everyone. I stopped going to school for weeks ... I was probably more out on the streets being dumb...

As soon as this thing, this program came up, I thought I'd see what it was like – I really enjoyed it. They helped me, they gave me support ... They helped me get ready for things, helped me look around for options. Even if I'm feeling down, they always talk to me ... I'll always talk to the boys [program officers].¹⁶¹

Phillip is now being supported by the Broome PCYC to enrol in TAFE and is looking to the future:

I've experienced family loss, a lot of bad things you know, I've been up and down ... but I had to stop and make a change in my life ... that's what I'm doing right now.

Phillip, 17 years old, SSEP participant, Broome

WA Police have, since 2013, adopted an approach that the President of the Children's Court Dennis Reynolds has described in positive terms.¹⁶² Youth Crime Intervention Officers (YCIOs) are tasked specifically to work with families and children deemed to be 'prolific priority offenders' to address the underlying causes of offending. Here police have "greater flexibility ... to connect children and families to programs which are not run by WA Police."¹⁶³ Police told Amnesty International that the YCIOs will then monitor the young person, ensure they attend the programs and do home visits to check on their progress.¹⁶⁴ Data cited by Dennis Reynolds suggests that this approach has brought about a major reduction in detected offending.¹⁶⁵

Amnesty International notes, however, that many people reported concerns about the intense police scrutiny and intrusive monitoring of bail conditions that occurs for those identified as prolific priority offenders (see Chapter 10).¹⁶⁶

The approach could be further improved by increasing the role Aboriginal people play in the design and delivery of the programs utilised by the police. The Australian Institute of Criminology's National Crime Prevention Framework Community highlights the importance of police adopting initiatives "that engage the community in the development and implementation of crime prevention strategies."¹⁶⁷ A local police officer, who spoke with Amnesty International researchers, said the following about the need to work with local Aboriginal organisations:

What I'd be interested in is to ... get people to draw on the old cultural ways of dealing with these issues. Because we can sit here and do our job forever; if we don't engage and get the community involved too we will be fighting a losing battle.

Interview with Sergeant Andy Stevens, Officer in Charge at Fitzroy Crossing, 4 September 2014

The Kimberly Aboriginal Law and Culture Centre was recently advised that it had been successful in receiving \$25,000 to undertake a Yiriman Camel Trek project, which will be delivered in partnership with the Fitzroy Crossing police.¹⁶⁸ The grant application was supported by Sergeant Andy Stevens and is a promising example of local collaboration.¹⁶⁹

Unfortunately, when Amnesty International asked about the role for Aboriginal community-led programs at Police Headquarters and elsewhere in Perth there was a profound lack of interest in these types of partnerships and little faith in the potential role of Aboriginal organisations or Elders as part of the solution.¹⁷⁰ Amnesty International finds this attitude concerning, and counterproductive to community policing and crime prevention strategies being adopted in a systematic rather than ad hoc manner.

Amnesty International also heard concerns, in particular in Geraldton, about the absence of a community policing ethos and a lack of Aboriginal community engagement by police.¹⁷¹ This is a barrier to crime prevention initiatives. Amnesty International heard that cultural competency training is provided at the Police Academy when recruits first join the police force but that there is little follow up by way of cultural training in the local context once the police have taken up their posts. Familiarisation with the local cultural context through discussions with a local Aboriginal organisation or Elders, is done only in an ad hoc way.¹⁷²

Amnesty International recommends that local cultural competency training, delivered by Aboriginal community controlled organisations, should be funded and rolled out throughout Western Australia to improve community policing and relationships between police and Aboriginal communities. Aboriginal community organisations must also have a role in police early intervention and prevention initiatives.



Eugene Eades, Noongar Elder and organiser of the Nowanup Camp for Aboriginal youth (see page 29).

Photo © Richard Wainwright

The Young Offenders Act requires that police first consider whether taking no action or issuing a caution would be more appropriate than charging a young person who has committed an offence, unless the alleged offence is listed in the Schedule 1 or 2 of the Young Offenders Act.¹⁷³ This is consistent with the obligation under Article 37(b) of the Convention that arrest be a measure of last resort.¹⁷⁴ The Young Offenders Act requires a police officer to then consider referral to a Juvenile Justice Team. This is similarly consistent with international law (see Appendix A for further information in relation to cautions and Juvenile Justice Team referrals).

Aboriginal young people are cautioned at a significantly lower rate than non-Aboriginal young people. On average between 2008–09 and 2012–13, Aboriginal young people were diverted by police 35 per cent of the time, whereas non-Aboriginal young people were diverted 59 per cent of the time.¹⁷⁵ The reasons for the discrepancy are not clear.

The low proportion of cautions issued to Aboriginal young people compared to arrests is particularly concerning because

Australian Institute of Criminology research indicates that most young people cautioned at the beginning of their contact with the justice system do not go on to have further contact,¹⁷⁶ and have lower re-offending rates than young people who go to the Juvenile Justice Team or court (figures 3 and 4 below show the comparison between Aboriginal and non-Aboriginal young people).¹⁷⁷

Where police issue a written caution, Prevention and Diversion Officers from the Department of Corrective Services follow up with the young person and their family “to prevent further offending actively including by referring to external program providers and other agencies to offer counselling and other assistance/support targeting offending behaviours.”¹⁸⁰ A police officer at Fitzroy Crossing noted in relation to the Prevention and Diversion Officer role that “for us there is a benefit because it opens that child up to that range of services, they’ll be case managed by youth justice.”¹⁸¹ However, the approach appears to be undermined by the low proportion of cautions issued to Aboriginal young people compared to arrests.

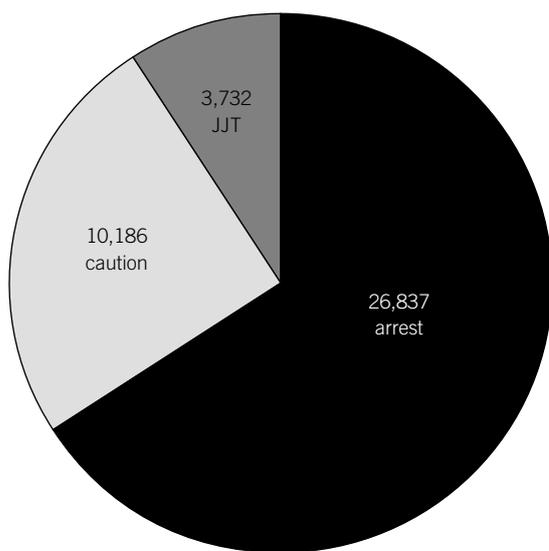


Figure 3
Western Australia Police diversions and arrests of Aboriginal young people 2008/09–2012/13 ¹⁷⁸

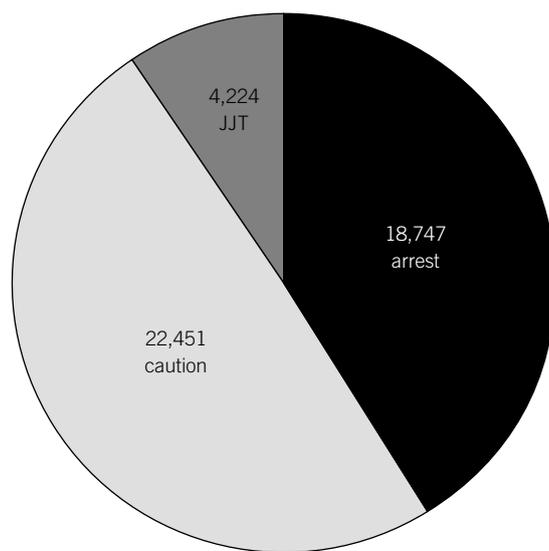


Figure 4
Western Australia Police diversions and arrests of non-Aboriginal young people 2008/09–12/13 ¹⁷⁹

Investigation warranted into possible discrimination

A study in 2008 by the Australian Institute of Criminology that considered Western Australian data found that Aboriginal young offenders were much more likely than other young people to have had multiple contacts with the criminal justice system and were much more likely to have been in custody before.¹⁸² These factors were found to greatly reduce the likelihood of police diversion (by way of caution or Juvenile Justice Team referral).

However, the study found that this was not the complete answer to the lower numbers of Aboriginal young people diverted by police. When controls were introduced for age, sex, characteristics of the current case and the prior criminal history of the offender, the discrepancy between Aboriginal and non-Aboriginal offenders in rates of diversion decreased but remained “significant and relatively strong.”¹⁸³ According to the study, the Western Australian data “suggests that an Indigenous offender with the same characteristics as a non-Indigenous offender” is less than half as likely (0.426 times) to be diverted even when all the other factors are taken in to account [emphasis added].¹⁸⁴

The study concluded that it was “impossible to say” from the data whether this could be attributed to racial bias in the exercise of police discretion because certain factors are unable to be measured by the data, including whether a young person who was not diverted by police refused to admit responsibility for their actions.¹⁸⁵

Due to the lack of publicly available data, Amnesty International has not been able to access information relating to cautions, Juvenile Justice Team referrals, offence types and arrests disaggregated by Aboriginality and prior criminal history to update the 2008 study. The WA Government must ensure that de-identified data is made publicly available and must collect and analyse the relevant data to assess whether the discrepancy can be explained or if it points to discriminatory practice.

Police Manual

A Police Cautioning and Youth Diversion Pilot initiated by the Victorian Aboriginal Legal Service (VALS), in collaboration with the Victorian Police, addressed the low level of cautions issued to Aboriginal young people in Victoria. As part of the pilot the Victorian Police Manual was amended to include an agreed protocol around cautioning which included a requirement that police give a caution whenever appropriate and provide a notice of ‘failure to caution’ to VALS and the local Youth Justice Services equivalent.¹⁸⁶ The protocol was part of a broader process to improve the efficacy of cautioning involving the local Aboriginal community and youth justice staff. Meetings were held to follow up with the Aboriginal young person two to six weeks after the caution was issued. An evaluation conducted by VALS found that there was an increase in cautions issued and that 94 per cent of those cautioned under the pilot did not re-offend after the follow-up meeting.¹⁸⁷ The pilot involved culturally tailored follow-up support for the young person and family through Koori Youth Justice Workers.¹⁸⁸

Amnesty International considers that amending the Western Australian Police Manual to require a failure to caution notice be issued, would help to provide transparency and ensure that young Aboriginal people are diverted wherever possible in conformity with the obligations in the Convention on the Rights of the Child.

A notice of failure to caution would also help legal representatives to understand the reason why a young person has not been cautioned where a matter comes before the court. This would give the court the ability to better consider the circumstances and rationale for not proceeding by way of caution.

The Convention on the Rights of the Child requires that alternatives to judicial proceedings must be in place for young people who are charged with an offence. In Western Australia, the options available to courts are relatively limited and not necessarily culturally appropriate.

Juvenile Justice Teams

If the police decide not to refer a young person to a Juvenile Justice Team the courts may then do so.¹⁸⁹ Figure 5 shows that court referrals to Juvenile Justice Teams have declined dramatically since early 2010.¹⁹⁰

The Western Australian Law Reform Commission have suggested that the Juvenile Justice Teams are not a culturally appropriate option, including “because they may not be seen as legitimate from the point of view of Aboriginal people.”¹⁹² and that this may be one of the reasons for the decline in the use of this option.¹⁹³ ALS WA noted that they “have represented clients who do not engage with the Juvenile Justice Team process and it appears that this is often due to the lack of representation of Aboriginal people on the team.” Amnesty International heard from a number of Aboriginal people who have had experience of the Juvenile Justice Teams, including a court officer and a youth justice worker, that the Juvenile Justice Team can be a useful process for Aboriginal young people.¹⁹⁴

We've got a young girl who is going to be doing that now [referred by the court]. And she's already said I want to go back there and do the right thing, so they are kids that are aware that what they did is wrong and are remorseful.

Nine times out of ten that's a better way to go because they're actually sitting face to face with the people they've done wrong to and it's that shame job as well as being apologetic.

Interview with Steven Carter, ALS Aboriginal Court Officer (4 September 2014)

A provision was introduced into the Young Offenders Act in 2004 that allows for a member of an Aboriginal community to take part in the team.¹⁹⁵ This change was intended to “introduce a capacity to involve responsible members of Aboriginal communities in providing community supervision of Aboriginal young offenders [by enabling] Elders ... or other suitable community members to substitute for juvenile justice or police officers on Juvenile Justice Teams.”¹⁹⁶ This occurs on occasions in Fitzroy Crossing and Amnesty International heard that it is useful when it does:

Any influence from the Elders helps. I mean these kids have English as their second language, and they are growing up in towns where the Aboriginal culture is still strong so when they are actually being confronted by an Elder that works a lot more than when the magistrate does it.¹⁹⁷

In Geraldton, Broome and Perth, the involvement of respected Elders in the Juvenile Justice Team process is not occurring.¹⁹⁸ An Aboriginal interviewee working with youth in Geraldton told Amnesty International that it would be “brilliant” if this option were available.¹⁹⁹ A police Juvenile Justice Officer in Broome raised confidentiality as a reason for this not occurring. While the young person's confidence in their ability to openly raise matters in the context of a Juvenile Justice Team meeting is a legitimate concern, it is one that would apply equally to the other members of the team. It should be addressed through proper training and selection of Elders rather than as a reason not to involve them. The Department of Corrective Services told Amnesty International that:

Within the regions, members of approved Aboriginal communities are encouraged to participate in the Juvenile Justice Team process and do participate where possible, although not in a formal sense. In the metropolitan area, each Juvenile Justice Team has an Aboriginal Support Officer to provide support for Aboriginal referrals and address Aboriginal cultural issues within the Juvenile Justice Team process.²⁰⁰

Amnesty International considers the Juvenile Justice Team model is a useful diversionary option which should be one of a wider range of available diversionary options for police and magistrates dealing with young Aboriginal people. However the utility of this option will depend on circumstances.

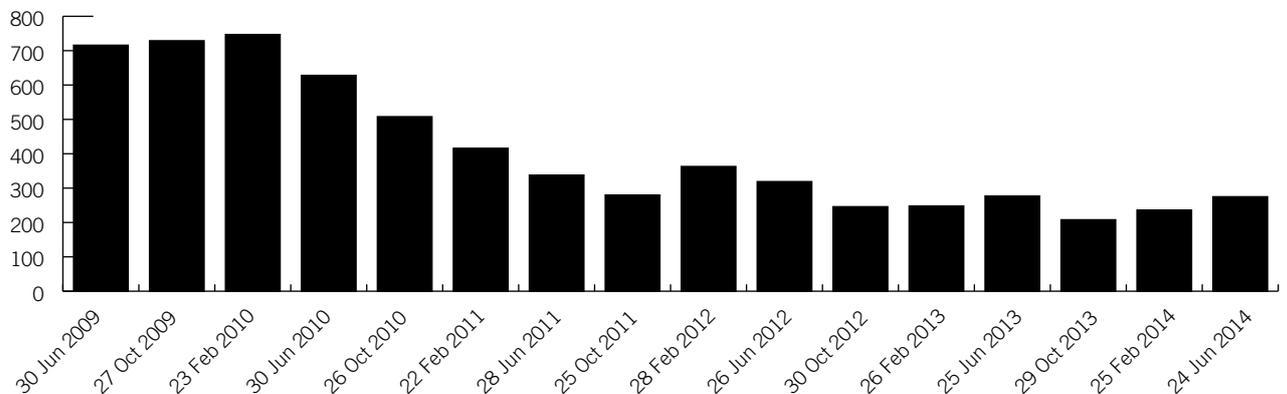


Figure 5
Weekly Census of Distinct Persons with Active JJ Team referrals by Agency' 30 June 2009 to 1 July 2014 ¹⁹¹

To be meaningful and effective for Aboriginal young people the direct input of Aboriginal community members should be better facilitated. The ALSWA noted that:

It would be ideal if the Juvenile Justice Team included a respected Aboriginal community member or, at the very least, an Aboriginal person who holds an appropriate position in one of the participating government agencies.²⁰¹

The involvement of Aboriginal Support Officers in the metropolitan area is a positive development. Paid Aboriginal involvement in the Juvenile Justice Team process is an option that should be more widely available outside metropolitan areas and could include participation in order to improve the relevance of the Juvenile Justice Team approach. Where all the other members of the JJT are paid it is only appropriate that an Aboriginal Elder or community representative also be paid. It should not be expected, as Amnesty International understands is sometimes the case, that only the Aboriginal community member or Elder will volunteer their time.

Court conferencing

Where a matter cannot go to a Juvenile Justice Team because it is an offence listed in Schedule 1 or 2 of the Young Offenders Act, the court also has the option to refer to court conferencing. This is not a legislated option, but rather makes use of the court's power to adjourn sentencing for any purpose,²⁰² and consider whether it is appropriate to dismiss the matter where the conference is satisfactorily completed.²⁰³

Similar to the Juvenile Justice Team, a young person participating in court conferencing completes an action plan, developed in consultation with the Department of Corrective Services Coordinator, a parent/guardian and the victim (police are not involved). Such a plan may include substance abuse counselling, education or programs aimed at reducing re-offending.²⁰⁴ Again admission of guilt is required. The program runs for 12 weeks while the young person is released on bail. Unlike Juvenile Justice Teams, successful completion results in the matter returning to court for sentencing.

Data for the number of matters that go to court conferencing show that it is not an option that is used particularly often (in 2012–13, 7,211 cases came before the court and only 77 went to conferencing).

The ALSWA raised concerns with Amnesty International about the fact that release on bail to participate in court conferencing is regularly accompanied by bail conditions such as residential requirements and curfews. A representative of the ALSWA in Broome noted that, given how vigorously police enforce curfew requirements,²⁰⁶ a six to 12 week period under such conditions can set young people up to fail and get them in further trouble.²⁰⁷ A representative of the Department of Corrective Services' West Kimberley Youth Justice Service raised similar concerns.²⁰⁸

Information provided by the Department of Corrective Services indicates that, in 2013–14, 53.57 per cent Aboriginal young people referred to Court Conferencing completed their action plans compared to 93.33 per cent for non-Aboriginal young people.²⁰⁹ The absence of available data makes it difficult to conclusively say, however the low success rates may be linked, at least in part, to police enforcement of curfews (addressed in

Year	Court conferencing cases open	Number of Aboriginal youth referred	Per cent Aboriginal
30 June 2011	104	34	33 %
30 June 2012	89	39	44 %
30 June 2013	77	41	53 %

Table 2

*Court conferencing in Western Australia: Data derived from DCS Annual Reports (data not available prior to 2011 and not included in the Department of Corrective Services 2013/14 annual report)*²⁰⁵

greater detail in Chapter 10). This is something that Amnesty International heard frequently in the course of this research.²¹⁰ The low success rate and relatively low use of this option suggest that further options, such as the Aboriginal led programs delivered at Nowanup and in the Fitzroy Valley, need to be available to the court for offences listed in the Schedules to the Young Offenders Act and others deemed inappropriate to go to Juvenile Justice Teams.

Other court-ordered diversion options

Amnesty International heard from a number of magistrates that they have a strong interest in being able to work with local organisations and draw on cultural authority to address offending behaviour. A lack of funding and support for such options by the Department of Corrective Services was identified as a current barrier in doing so.²¹¹ In light of the failure of existing diversionary options to address the over-representation of Aboriginal young people in the justice system, Aboriginal community leaders and organisations, magistrates, legal representatives and many others working in the youth justice space are calling for greater investment in and support for Aboriginal community led diversionary options. The President of the Children's Court recently noted that:

Aboriginal mentors and cultural programs designed and delivered by Aboriginal people must be included in any proposed solution. A knowledge of and positive sense of self identity and connection with culture are fundamental to the rehabilitation of a young Aboriginal person.

There are many Elder, senior and young Aboriginal people wanting to enter the youth justice space to assist Aboriginal young people and the community generally. It is essential and in the best interests of our community as a whole that the Aboriginal people presenting themselves to work in the youth justice space are given the necessary capacity building supports and encouragement by Government to enable them to actually bring culturally appropriate programs into operation.²¹²

This is consistent with the international legal framework as it applies to Indigenous young people. Article 34 of the Declaration on the Rights of Indigenous Peoples provides that:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

The Committee on the Rights of the Child has said that States Parties should support the development of community-based programs and services that consider the needs and culture of Indigenous children, their families and communities.²¹³ The United Nations Expert Mechanism on the Rights of Indigenous Peoples recently prepared a study on access to justice. As part of that study the Expert Mechanism recommended that:

States should work with indigenous peoples to develop alternatives for indigenous children in conflict with the law, including the design and implementation of culturally appropriate juvenile justice services and the use of restorative justice approaches ... including restorative justice and indigenous juridical systems.²¹⁴

In 2005, the Western Australian Law Reform Commission concluded that there is an “urgent need” for more effective diversionary options for Aboriginal youth that deal with underlying problems and involve families. They found that diversionary options that are managed or controlled by Aboriginal communities should be encouraged and that “in all cases government support is required in developing and resourcing diversionary programs.”²¹⁵ This is echoed in a recommendation made 14 years earlier in the National Report of the Royal Commission into Aboriginal Death in Custody.²¹⁶ Such programs are not being supported at present, though three examples where such options were used in 2009 and 2010 showed promising results.

Case studies: Nowanup and Yiriman camps

On three occasions in recent years the courts in Western Australia have adjourned proceedings so Aboriginal boys appearing before them could attend programs designed by local Elders. This is possible under the Young Offenders Act in the same manner as court conferencing.²¹⁷ Two such programs, in 2009 and 2010, were run by Cultural Bosses in the Fitzroy Valley as part of the Kimberley Aboriginal Law and Culture Centre’s (KALACC) Yiriman Project. One such program was run in 2009 by Noongar Elders at Nowanup, north east of Albany. Each involved nine or ten week cultural programs after which the boys returned to court for sentencing.

In 2009 at Fitzroy Crossing, Magistrate Bob Young bailed 15 boys to attend an intensive diversionary program run by the community Elders of the Yiriman Project, following a spike in youth offending in the community. The camp took place at Mt Pierre and Kupartiya pastoral stations in the Kimberley, was led by local Elders and involved traditional knowledge transfer, work and counseling by drug and alcohol, educational and vocational counselors over nine weeks.²¹⁸ It was described by the Aboriginal liaison officer to the Magistrates Court as:

an alternative to juvenile justice orders, which by reason of distance, staffing/resourcing issues ... are very superficial, often involving little more than telephone contact. The camp was not only more relevant to the boys but also more intensive than a [Juvenile Justice] order. I must emphasise that it

wasn’t an easy option for them, and indeed many of them struggled at first with the routine and discipline. However the young men all successfully completed the project and returned to court for sentencing with a range of different outcomes ... The families of the young defendants were appreciative of the opportunity their children had been given to address issues and difficulties they were experiencing [while] dealing with the legal aspect of their offending at the same time.²¹⁹

The Elders sat alongside Magistrate Bob Young at the bar table for sentencing of each of the 15 Aboriginal boys involved.

It was a long day but I must say I have never seen young offenders in court remain so attentive and engaged ... The respect for Elders was evident as was the compassion and care held by Elders towards the boys ... each parent reported seeing positive changes in their child ... I think it is also important to note that the project received the full support of police prosecutors and the Fitzroy Crossing police.

Magistrate Bob Young, on the court process following on from the Yiriman project camp, 2009 ²²⁰

A similar 10-week diversionary bush trip occurred in 2010 in partnership with Magistrate Col Roberts. It occurred at the remote community of Jilgi Bore. KALACC noted that, “[o]f the 30 youths involved in [the two] camps we are not aware of any that reoffended within 12 months.”²²¹ Amnesty International heard from a number of Aboriginal people about the lasting impact such programs have on the boys involved.²²²

In 2009 a program took place at the Nowanup, a meeting place designed by and for Noongar people 200km north of Albany in the south west of Western Australia. Following a nine week cultural program, Magistrate Elizabeth Hamilton held a court sitting on country at Nowanup.

Going back to 2009, those four young fellas that I had here, the outcome from them being [on Nowanup] for those nine weeks and what they learnt about their culture and heritage and dreamtime, it changed their lives forever. They learnt the song and dance about respect for self. They learnt about the stories of their old people that were the first caretakers for the country they were dancing on ... They walked the trails that their old people used to take young people on a long time ago to learn them about respect for the land that provides for us continuously ... At the end of the day, these young blokes started to say they were sorry for what they were doing in the community, and they felt proud like a young Noongar man would after learning such things.

Eugene Eades, Noongar Elder and organiser of the Nowanup Camp, 17 June 2014

Despite the reported success of these programs, they, and many other Aboriginal led programs, have not managed to receive any funding or support from the Western Australian Government as alternatives options for the courts (though both continue to work with young people in other contexts). The program run by Eugene Eades at Nowanup was entirely unfunded. Mr Eades worked without pay and the boys' board and keep was funded by their parents.²²³ The first camp run by the Yiriman Project was run without any funding, drawing entirely on the limited resources and in-kind contributions of KALACC staff and the Elders. The second camp run by the Yiriman Project was a one-off grant from the Federal Government.²²⁴

Despite repeated applications, the Yiriman Project has not secured any funding from the Department of Corrective Services to deliver programs in the youth justice space. Eugene is not currently receiving any funding or delivering any programs for youth in contact with the justice system despite a wish to do so.

In 2012 the Yiriman Project won an Indigenous Governance Award. It was featured in the recent Australian Productivity Commission Overcoming Indigenous Disadvantage Report 2014 under 'Things that Work':

The Yiriman Project (WA) takes young people, accompanied by elders, on trips back to country, to immerse them in the stories, song and knowledge that are their cultural heritage. This builds young people's confidence and improves their self-worth, and is considered to have helped curb suicide, self-harm and substance abuse in the participating communities. A 2010 qualitative study of the program found that it contributed to healing of young people as they walk on country, provided an opportunity to develop and assert culture, language and bush skills, and created meaningful employment that valued and maintained culture.²²⁵

In light of recent announcements by the Department of Corrective Services about their intention to focus on prevention and diversion and support small Aboriginal organisations (outlined in Chapter 6) Amnesty International would expect to see a willingness to work with and provided the necessary support to organisations such as the as the Yiriman Project and Noongar Elders wishing to build on the success of the programs in the Fitzroy Valley and at Nowanup. Any procedural issues or concerns around risk management (including Working with Children Checks) should be worked through in partnership with the organisations.

Non-custodial sentencing options

With the important exception of mandatory minimum sentencing (see Chapter 11 below), the court cannot impose a custodial sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter.²²⁶ Amnesty International heard that in regional and remote areas of Western Australia there is a "lack of meaningful programs"²²⁷ and community service work options for non-custodial sentences.²²⁸ The lack of such options was highlighted as being a particular issue for girls in regional and remote areas, because the few programs that

do exist are targeted towards boys.²²⁹ Amnesty International heard that Indigenous young people on community-based orders in these areas might only get a phone call every two weeks, asked a few questions and "that's about it."²³⁰

The Department of Corrective Services noted that as part of their pre-sentencing reports they look at what programs are available and, "in the regions, more often than not they are not available" but they are "working hard to make them available."²³¹ The ALSWA explained that the effect of this is that the court has little available to it to construct "appropriate community-based, non-custodial sentencing orders." Further, Aboriginal young offenders placed on such orders often have little actual intervention or rehabilitation made available to them.²³²

This often means that an offender's history in relation to community-based orders creates the impression, in the minds of Judges and Magistrate's, that the offender has had multiple 'opportunities' to rehabilitate him or herself but has failed to make the most of these 'opportunities' and is therefore a poor candidate for rehabilitation in the community. In reality, all the offender may have done as part of the past community based orders is report weekly by telephone.²³³

Amnesty International is aware of a number of Aboriginal organisations and groups that have the desire and capacity to deliver such programs as part of community based orders.²³⁴

Aboriginal designed and led programs have struggled for Department of Corrective Services support and ongoing funding. To the extent Aboriginal diversionary programs have been used by the courts it has generally been ad hoc. Amnesty International requested information from the Department of Corrective Services about programs and activities available to the courts prior to sentencing and as part of community-based orders. Amnesty International requested a list of approved programs and service providers for each region; how many such programs are run by Aboriginal organisations or in partnership with Aboriginal groups/communities; and the policy criteria for getting a program approved and on the list. No list was provided. The Department of Corrective Services noted, however, that:

None of the programs are currently Aboriginal owned or controlled, however they are designed to be culturally appropriate to address the over-representation of Aboriginal young people in the criminal justice system.²³⁵

While the Department also noted that the extent to which proposed youth programs meet the needs of Aboriginal people is formally considered prior to contracting,²³⁶ the lack of Aboriginal owned or controlled programs is a major concern. It is important that such programs are supported in an ongoing way. Consistent with international standards, such programs should be funded and recognised by the Western Australian Department of Corrective Services alongside existing options available to the courts in order to more fully ensure that detention is a measure of last resort.

Difficulties in locating a responsible adult and inadequate alternative supervised bail accommodation contribute to the high number of Aboriginal young people in detention awaiting trial or sentencing. Remand in custody solely due to a lack of other accommodation options is contrary to the obligation, under the Convention on the Rights of the Child, that detention must be a last resort. Other relevant international human rights standards require that detention of persons awaiting trial must be the exception rather than the rule.²³⁷ Detention pending trial must be based on an individualised determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.²³⁸

On average around 50 per cent of young people in detention in Western Australia are unsentenced. That is, they have been arrested, bail has been refused by a court and they have been remanded in detention awaiting trial or sentencing (referred to as unsentenced detention).²⁴⁰ Over 70 per cent of those in unsentenced detention are Aboriginal.²⁴¹

The first decision around bail is made by police. Where police decide to arrest a young person accused of offending, that young person has a qualified right to bail.²⁴² That is, they have the right to be granted bail unless certain factors apply.²⁴³ These factors include whether a police officer considers that the accused is unlikely to come back to court, is likely to re-offend or needs to be held in custody for his [or her] own protection.²⁴⁴ The police manual notes that “[a] member may exercise discretion with respect to the bail of juveniles where there is a known tendency to re-offend on bail, or where there is doubt about the welfare of the child.”²³⁵ In these circumstances a child should still be bailed unless police or the magistrate considers that there is no conditions that could be imposed that would diminish the likelihood of re-offending or address the need for a child to be remanded in custody for their own protection.²⁴⁶ Where bail is refused by police this decision is reviewed by a magistrate at the next available court sitting and the same considerations apply.

The Bail Act 1982 (WA) says that a child can be released on bail only if a responsible person signs a bail undertaking to say that the child will comply with the conditions of bail.²⁴⁷ A responsible person is a “parent, relative, employer or other person who, in the opinion of the judicial officer or [police] officer, is in a position to both influence the conduct of the child and provide the child with support and direction.”²⁴⁸ Western Australia is the only state where this requirement is in place.²⁴⁹ The Young Offenders Act requires that a “young person in custody who is not released on bail ... [is] to be taken to and placed in a detention centre as soon as practicable.”²⁵⁰

Remand in police custody and then in detention is detrimental to the best interests of the child and more needs to be done to prevent unnecessary periods of remand in police custody for children in order to ensure that arrest and detention are measures of last resort. While it is important that a suitable person is able to take care of the young person, this legislative requirement is based on a subjective assessment by police in the first instance and then by the courts and creates a further hurdle to detention being a measure of last resort, consistent with the Convention. The provision has been identified as

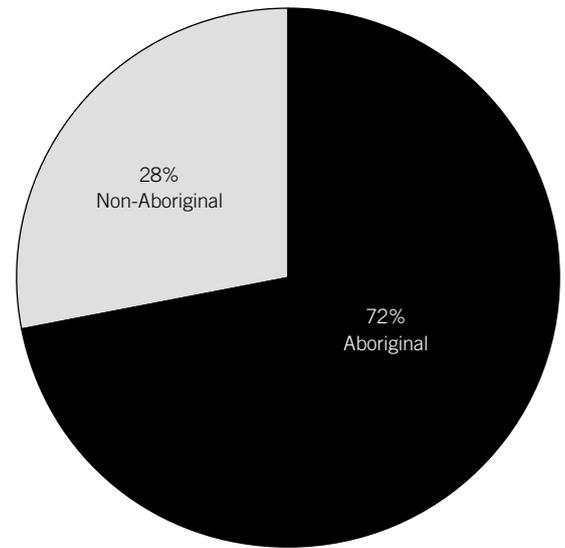


Figure 6
*Unsentenced young people in detention by Aboriginal status (June 2010–June 2014)*²³⁹

contributing to the high rate at which young Aboriginal people are held in police custody and then on remand in detention awaiting a hearing by the Auditor General, the University of Western Australia in a Review of the Children’s Court, and most recently by the Australian Institute of Criminology in a national review of Bail and Remand for young people.²⁵¹

In 2013, the Australian Institute of Criminology noted that:

[t]his provision has been criticised at length in the literature as it is seen to disadvantage young people from remote and regional areas. It should also be noted that meeting this provision is outside of the control of the young alleged offender...²⁵²

Police noted that concerns around the welfare of the child were often a factor in refusing bail and noted that they are the only service on the ground 24 hours a day that can respond in circumstances where the lack of a responsible adult and/or welfare concerns meant a young person could not be, in their assessment, be released on bail:

If you are going to release a child back into an environment which will be at risk for them we aren’t going to do it. Not without [the Department of Child Protection] or an appropriate service ... So if they commit an offence which is reasonably serious and they don’t have a responsible adult to go back to no matter what politics may be in play my first or our first thoughts are about safety and welfare about the child. We can talk about keeping kids in custody and politics later... so if we haven’t found anyone we take them to the next available court; that’s what we have to do and generally people like DCP who haven’t responded have to respond.²⁵³

Amnesty International recognises that this is a legitimate concern and that the best interests of the child must be the primary consideration, consistent with the Convention. However, Amnesty International was informed by the President of the Children's Court that courts are granting bail in two out of three cases where it has been refused by police.²⁵⁴ Data from 2012–13 shows that police refuse bail for Aboriginal young people 43 per cent of the time (and 37 per cent of the time for non-Aboriginal young people), whereas courts refuse bail for Aboriginal young people 25 per cent of the time (and 19 per cent for non-Aboriginal young people).²⁵⁵ There are a range of other factors, outlined at the beginning of this chapter, that also have a bearing on decisions around bail, however police remand of a young person in police custody due to welfare concerns was raised by a number of interviewees as a serious concern.²⁵⁶

The Royal Commission into Aboriginal Deaths in Custody, which the Committee on the Elimination of Racial Discrimination and the Committee Against Torture have recommended be implemented,²⁵⁷ noted that “except in exceptional circumstances, juveniles should not be detained in police lockups.”²⁵⁸ It recommended, among other things, that government “should approve informal juvenile holding homes, particularly the homes of Aboriginal people, in which juveniles can lawfully be placed by police officers if bail is in fact not allowed.”²⁵⁹ The Western Australia Government must ensure that other accommodation options are available to prevent remand in police custody and in detention.

Given that the only remand centre in Western Australia is in Perth, young people in custody who have not been sentenced are liable to be transported thousands of kilometers away from their families and communities to Perth because a responsible adult cannot be located. This disproportionately impacts on Aboriginal young people due to the a greater proportion of Aboriginal people living in remote areas and almost all young people from non-Metropolitan areas in unsentenced detention being Aboriginal (93 per cent).²⁶⁰ The connection those young people have to their land and community and the combination of high costs and low incomes often making the expense of visiting young people held on remand prohibitive. A recent assessment of the Children's Court by the University of Western Australia noted the “severe and potentially traumatic consequences” of bail refusal given the absence of secure facilities outside of Perth “resulting in children being transported great distances.”²⁶¹

Youth Bail Service and Youth Bail Options Program

Since 2008 there have been gradual improvements in Western Australia that have seen the Regional Youth Justice Services and Metropolitan Youth Bail Service provide assistance to locate a responsible adult through their youth bail services. In the interim their bail is set to the Regional Youth Justice Service (RYJS) or Metropolitan Youth Bail Service (MYBS) as the ‘responsible adult’. The Department of Corrective Services note that “from February 2013 to March 2014, MYBS diverted 779 young people (51 per cent Aboriginal) from being remanded in custody ... Since the implementation of RYJS, more young people are being referred to its youth bail service rather than being refused bail.”²⁶²

The Department of Corrective Services have recently funded the Youth Bail Options Program, which is a service run by two non-governmental organisations (Life Without Barriers and Hope Community Services) in Perth, Geraldton, Kalgoorlie, South Hedland, Broome and Kununurra.²⁶³ The Youth Bail Options program provides young people on bail with supported accommodation (bail hostel), day programs, supervision, provision of meals and access to facilities, mentoring programs and support services.²⁶⁴ At each of these sites there is accommodation for 3–4 boys or girls. Amnesty International met with both providers, who appear to be delivering strong programs and support and demonstrated an awareness of the cultural context and needs of young people in their care.²⁶⁵

With only three beds in Perth, however, there is urgent need for a great deal more such accommodation.²⁶⁶ A number of interviewees expressed a view that the facility in Armadale, a suburb of Perth, is “limited in capacity”²⁶⁷ or that there was no bail hostel in Perth.²⁶⁸ Amnesty International heard from the Youth Bail Options Program providers in Perth that “more often than not” they are at capacity and that they “experience that there is a need for more.”²⁶⁹ This is unsurprising given they are funded to provide only four beds in a city of nearly 1.7 million residents.

The ALSWA raised concern with Amnesty International about “instances where a child has spent a number of days or even up to a couple of weeks in custody even though bail has been set to the Metropolitan Youth Bail Service” and that this “may occur because the service is assessing the suitability of the child's proposed home environment or because there is no appropriate accommodation available” in Perth.²⁷⁰

Amnesty International considers that the combination of the youth bail services (metropolitan and regional) and YBOP is a positive development which, in many cases, will prevent the unnecessary remand of young Aboriginal boys and girls in detention and provide much needed support to them. However more needs to be done to prevent the pre-sentence detention and remand in police custody of Aboriginal young people. These initiatives should continue to be funded, and expanded. More YBOP accommodation should be funded in Perth in order to ensure detention is a measure of last resort and not the result of a lack of suitable accommodation options.

Department of Child Protection and Family Support

Amnesty International also heard concerns that, where the court had granted bail, the Department of Child Protection and Family Support would sometimes refuse to sign a bail undertaking as the responsible person for Aboriginal young people in their care or that children have nonetheless remained in Banksia Hill detention centre for significant periods of time before the Department signs the responsible person undertaking.²⁷¹

ALSWA noted that this may often be due to a lack of suitable accommodation and that in particular, the Department of Child Protection and Family Support does not have sufficient accommodation options for children with significant mental health issues or complex needs. The Department of Child Protection and Family Support told Amnesty International that they are not currently able to place young people in their care in the bail hostels funded by the Department of Corrective Services in the regions due to formal agreement not having been reached about how this should occur, despite the Auditor General, in his review of the youth justice system, having recommended in 2008 that the two Department should “work together to provide statewide alternatives to detention for young people who need supervision and accommodation while on bail.”²⁷² The Department of Child Protection and Family Support noted that a process for formalising an agreement was underway.²⁷³

In an interview with Amnesty International, Department of Child Protection and Family Support staff confirmed that their crisis accommodation, to which a bail referral can be made, provides breakfast only. After this young people are required to leave the accommodation and must care for themselves during the day. There is no supervision or support for these young people. The Department of Child Protection and Family Support noted that other non-government hostels operate similarly and are therefore not generally appropriate for young people out on bail. This leads to those young people who have been granted bail but are not provided with a suitable place to stay while on bail remaining in detention.²⁷⁴

The Department for Child Protection and Family Support also told Amnesty International that there are situations where they will not sign a bail undertaking, but, under their new policy, the reasons for such refusal need to be put in writing and their Director must give permission and will only do so if there is a good rationale.²⁷⁵ The Department noted that this would not happen in many cases, as the Director would need to accept that there is a good rationale for refusal.

The Department for Child Protection and Family Support Casework Practice Manual, last updated on 28 October 2014, does not fully reflect this. Circumstances where signing a bail undertaking ‘should be refused’ are set out in the manual.²⁷⁶ In any case where the Child Protection worker is proposing to refuse to sign a bail undertaking, they must get the approval

of the district director, who “may consult directly with the Director, District Support and Coordination Metropolitan Services or with the Department’s court officer” and the decision must be documented and placed on file.²⁷⁷

The Department noted that situations where signing a bail undertaking might be refused were where the child may be a risk to themselves or others, or has significant mental health issues.²⁷⁸ The Practice Manual provides that where “the child’s behaviour is of such concern to the Department that he/she may not comply with the bail conditions [and] when the Department does not have the capacity, despite strenuous efforts, to ensure the safety of the child and/or the community the bail undertaking should be refused.” Relevant circumstances identified include that:

- the child may pose a significant risk to the safety of others
- there is a risk that the child may endanger him/herself or self-harm
- the court has imposed conditions such as a curfew or 24-hour supervision, and this cannot be provided in the placement arrangement
- the child has a history of extreme violence or sexual assault.

As noted above, under the Bail Act a young person has a right to be granted bail unless in the opinion of the magistrate one of a number of factors are present, including that they are likely to endanger the safety of others or need to be held in custody for their own protection. If a magistrate has granted bail it is because they are satisfied these factors are not present, or that the conditions they have imposed on the grant of bail remove the possibility that they will be a danger to others or need to be in detention for their own protection.

It is contrary to the *Bail Act 1994 (WA)* and entirely at odds with the Convention on the Rights of the Child obligation that detention be a measure of last resort that they should nonetheless be held in detention because the Department has second guessed the decision of the magistrate. According to the above criteria, it is also likely that those placed on a curfew and in the care of the Department will not be able to be bailed due to a lack of supervision in existing accommodation options.

Article 7 of the Convention on the Rights of Persons with Disabilities provides that “States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.” It further affirms that in all actions concerning children with a disability, their best interests must be the primary consideration. It is contrary to the Convention on the Rights of Persons with a Disability and the Convention on the Rights of the Child that a young person with mental health issues be held in detention merely due to a lack of suitable accommodation options.



Photo © Ingetje Tadros

Amnesty International heard the nature and enforcement of bail conditions set by police is a factor that contributes to the high rates at which Aboriginal young people are held in remand. A large number of people interviewed by Amnesty International expressed concern, in particular, in relation to the way in which curfews imposed as a condition of bail are enforced by police.²⁷⁹ Curfews are often from as early as 7pm, after which a young person is required to be at a specified address.²⁸⁰ The nature of their imposition is potentially contrary to the Young Offenders Act which provides that young people are “not to be treated more severely because of the offence than the person would have been treated if they were an adult.”²⁸¹

In Western Australia, the Bail Act specifically lists the following conditions that the police and then the magistrate should consider when granting bail to a young person:

- any period in each day during which the child is to remain at a particular place
- any person with whom the child is not to associate or communicate
- any place that the child is not to frequent
- the attendance by the child at a school or other educational institution.²⁸²

The Bail Act also notes that a condition may be imposed in relation to the young person’s conduct while on bail, where the accused must live while on bail or “any other matter.”²⁸³ If conditions of bail are breached by a young person, police are then authorised to arrest them and they will be brought back before the courts. If the magistrate then decides that a young person is unable to comply with her or his bail conditions they must be remanded in custody awaiting trial.

Breach curfews are the ones that cause the most problems ... Police checking up on kids in the middle of the night. This happened [to my grandson] virtually every night at age 14 ... By age 15 he was in jail. Our family would make arrangements for him to be somewhere else for a family event – they would turn up to find out where he was and uproot that household to assert themselves. He was seen as a problem for the family – creating a disconnect – disrupting the lives of others in the family. It was not only alienating him from the family, but also from broader society.

Interview with Aboriginal Elder, Broome ²⁸⁴

Amnesty International consistently heard of the police shining a torch through the front window up to four times a night and requiring young people on curfews, which include a residential requirement, to present on request.²⁸⁵ A recent review of the Children’s Court noted that:

the common practice of imposing a curfew as a condition of bail was also criticised, and the need expressed for police officers to be better informed about the implications for children’s wellbeing of the inappropriate use of these interventions, particularly with Aboriginal young people in rural communities.²⁸⁶

Amnesty International heard from a number of interviewees that the residential requirements that accompany curfews do not take in to account that young Aboriginal people, particularly in rural and remote areas, are highly mobile and often have to stay with extended family, or may leave a house where consumption of alcohol or fighting has made it unsafe for them to stay. Aboriginal cultural requirements to attend sorry-business²⁸⁷ and funerals at short notice was also highlighted as a factor that made compliance with residential requirements problematic.²⁸⁸

Police confirmed the practice of checking on young people on curfews at all times of the night by those on patrol, but noted that the frequency related to staff availability to perform the checks and that the more intensive monitoring of curfews occurs in relation to those they have identified as ‘Prolific Priority Offenders’.²⁸⁹ This status is determined using a range of police intelligence that indicates a pattern of offending behaviour, but is not based on convictions for offences alone. One Aboriginal youth support worker noted that in his experience, this type of intensive monitoring usually occurs for repeat offenders, but that:

It disrupts the whole family, a lot of our kids live with their Nannas and a whole lot of other young ones. The other kids are tired for school the next day and the Nannas are tired too.²⁹⁰

Police at Mirabooka told Amnesty International that, in relation to Prolific Priority Offenders, “we deliberately harass them.” They noted that they knock on the front doors of those young people on curfews up to four times a night, and that if they get off side with the families they do not care, as it is one of the strongest tools to assure community safety.²⁹¹

A number of legal practitioners and a representative of the Department of Corrective Services expressed concern that the heavy monitoring of such curfew conditions by police and a failure to exercise discretion not to enforce the breach has caused a large number of Aboriginal young people to find themselves in police custody, back before the courts and ultimately remanded in custody awaiting sentence or trial.²⁹²

This was also raised in a recent commissioned assessment of the Western Australian Children's Court by the University of Western Australia:

With respect to the increasing use of detention, the primary problem is that increasing numbers of young people are being detained on remand in Western Australia largely as a result of changes in police practice and enforcement of bail conditions as well as repeat breaches of bail conditions.²⁹³

A representative of the ALSWA in Broome noted that by the time Aboriginal young people attend court, bail conditions mean they may have already received a punishment far greater than the offence could attract, or that an adult would attract for the same offence.²⁹⁴ An example given by another ALSWA lawyer was where a young person is arrested for stealing goods below the value of \$1000, for which detention is not an option, released by police on bail with a curfew, which would not be imposed on an adult. The curfew is vigorously monitored and the young person is then arrested for failing to comply with it and could ultimately end up in detention on remand.²⁹⁵ Failure to divert a young person, followed by imposition and vigorous enforcement of bail conditions, which Aboriginal young people may find difficult to comply with due to their family circumstances or cultural obligations, undermines the obligation that detention be a last resort.

Amnesty International requested data from police about how often breach of curfew results in remand in custody for young Aboriginal offenders. Unfortunately, such data was not provided.

Magistrates and lawyers interviewed by Amnesty International suggested that police are inclined to impose and seek that the

court impose such conditions where the alleged offences do not appear to warrant it. Police indicated that any offending that occurs at night would generally lead them to impose a curfew. Police suggested that the seriousness of the alleged offence was also a factor and so was a *propensity* to commit crimes at night, based on past offences, even when the alleged offence happened in the day time.²⁹⁶ A senior police officer in Broome, when asked how they decide whether curfews are an appropriate condition, expressed the view that young people simply shouldn't be out in the evening and that this alone is a strong justification for curfews:

If you're a child, you shouldn't be out wandering the streets at night. If you're looking at between 7pm to six in the morning, they're at risk times for anybody, let alone someone who is of that age; particularly if you are prone to offending or being around people who may access liquor as a 16 or 17-year-old, well then your movements need to be curtailed for a certain period of time ... it's like being grounded.²⁹⁷

A police officer at Gosnells talked about those on curfew having been "given the luxury of being out on bail."²⁹⁸ Amnesty International is concerned that the imposition and intrusive monitoring of curfew conditions may contribute to the high numbers Aboriginal young people ending up in custody awaiting trial. Further, ALSWA lawyers told Amnesty International that young people hate curfews so much that they often want to plead guilty despite not having committed the offence in order to avoid having to live under such close monitoring.²⁹⁹ Despite their possible utility as a policing tool, curfew conditions raise a number of human rights concerns and warrant investigation.

Existing mandatory minimum sentences

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

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

The Young Offenders Act says that where a written law requires a mandatory or minimum penalty to be imposed for an offence, a court dealing with a young person is not obliged to impose such a penalty.³⁰⁰ However, the *Criminal Code Act 1913 (WA)* is interpreted as overriding this general provision in three circumstances. The first two relate to serious assault and grievous bodily harm where the victim is a 'public officer' (a police officer or a juvenile custodial officer).³⁰¹ The third applies where a young offender already has two relevant convictions for a home burglary.³⁰² The latter is commonly known as the 'three strikes' home burglary law.

Serious Assault and Grievous Bodily Harm in 'prescribed circumstances'

The Criminal Code was amended in 2009 to introduce mandatory minimum sentences for assaulting a police officer.³⁰³ This was further amended in 2013 to apply to assault of a juvenile custodial officer.³⁰⁴ Sections 297 and 318 say, despite the Young Offenders Act, a court must sentence a 16 or 17-year-old to at least three months detention or imprisonment, where they are found guilty of grievous bodily harm or serious assault of a police officer or juvenile custodial officer.³⁰⁵ Any term of imprisonment must not be suspended (but see below in relation to detention). Between 2009 and 2013 there were no charges of grievous bodily harm of a public officer laid against a 16 or 17-year-old.³⁰⁶

Three strikes home burglary

The *Criminal Code Amendment Act (No. 2) 1996* introduced a mandatory minimum sentence of 12 months detention or imprisonment for anyone convicted of a 'third strike' home burglary. This provision also overrides section 46(5a) of the Young Offenders Act.³⁰⁷ It applies to young people aged 10 to 17 convicted of a burglary at a "place ordinarily used for human habitation" where that young person is a "repeat offender."³⁰⁸ A young person is a repeat offender where they have been convicted of a home burglary on two prior occasions.³⁰⁹ A conviction includes a finding or an admission of guilt that led to a punishment being imposed or an order being made, whether or not a conviction was recorded.³¹⁰

Children's Court interpretation of three strikes burglary law

In February 1997 the Children's Court decided that the three strikes laws permitted the imposition of a Conditional Release Order for a third strike as an alternative to immediate detention.³¹¹ This interpretation was on the basis that section 401(5) of the *Criminal Code Act Compilation Act 1913* dictates that a period of imprisonment (in an adult prison) cannot be suspended but is silent on periods of detention (served in a youth detention centre).³¹²

A Conditional Release Order (CRO) is a suspended order of detention served in the community with intensive supervision. Such an order must be imposed for a minimum of 12 months for a third strike. If a CRO is breached, this "usually results in a sentence of at least 12 months immediate detention."³¹³

The Children's Court interpretation would apply equally to the above mandatory sentences for assault of a public officer, as each of these provisions similarly provide that a period of imprisonment cannot be suspended but say nothing about periods of detention.³¹⁴

While the court retains a small amount of discretion, it is prevented from ensuring that detention is a measure of last resort; that the best interests of the child is the primary consideration; and that each child is dealt with in a manner proportionate to their circumstances and the offence because the only options in the case of a 'third striker' are a minimum of 12 months detention or a minimum of 12 months on conditional release. While noting the small amount of discretion retained by the Children's Court, the Australian Law Reform Commission (ALRC) found that the Western Australian 'three strikes burglary' laws:

violate the principle of proportionality which requires the facts of the offence and the circumstances of the offender to be taken into account, in accordance with Article 40 of [the Convention on the Rights of the Child]. They also breach the requirement that, in the case of children, detention should be a last resort and for the shortest appropriate period ... [The convention requires] that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed.³¹⁵

The ALRC Inquiry found these violations of international law to be so serious that it recommended that the Australian Government override the three strikes burglary laws.³¹⁶ This recommendation was not acted on by the Federal Government.

Problematically, available statistics for property offences don't differentiate between those committed in relation to a home and those committed in other locations,³¹⁷ and no recent information is available about the number of young people in detention under a mandatory minimum sentence.

Amnesty International considers it unacceptable that data on the number of young people in detention due to mandatory sentencing and is not publically available or regularly reported on given the human rights implications of these laws.

The last available data is from a review of the legislation conducted by the Department of Justice in 2001. The review found that 81 per cent of the 119 young people sentenced under the three strikes burglary laws were Aboriginal.³¹⁸ In 2001 the Aboriginal Justice Council described the three strikes burglary laws as “profoundly discriminatory in their impact on Aboriginal Youth.”³¹⁹

The President of the Children’s Court recently noted that 37 of the 93 sentenced young people in detention in Western Australia on 15 May 2012 were there due to third strike home burglaries (39.7 per cent of the total number of sentenced detainees).³²⁰ President Reynolds did not specify what proportion of these were Aboriginal young people and this information is not otherwise publicly available. However, 63 of the 93 young people in sentenced detention at 15 May 2012 were Aboriginal (68 per cent of the total number of sentenced detainees).³²¹

Amnesty International considers that mandatory minimum sentences are a violation of the Convention on the Rights of the Child. They prevent courts from ensuring that the best interests of the child are the primary consideration and that children are “dealt with in a manner proportionate to their circumstances and the offence.”³²² Such laws are inconsistent with the obligation that detention be a measure of last resort and for the shortest appropriate period of time. In its Concluding Observations in 2014, the Committee Against Torture reiterated its previous concern about over-representation of Indigenous young people in prisons and that mandatory sentencing continues to disproportionately affect Indigenous Peoples. It recommended that Australia “should also review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances.”³²³

Proposed extension of mandatory minimum sentencing laws

CRIMINAL LAW AMENDMENT (HOME BURGLARY AND OTHER OFFENCES) BILL 2014 (WA)

Notwithstanding that mandatory minimum sentences are in contravention of the Convention on the Rights of the Child, there is a Bill that has now been passed by the Legislative Assembly, and has been introduced into the Legislative Council, that expands the range of circumstances where a mandatory minimum sentence will apply. The *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)* will amend the counting rules for determining ‘repeat offender’ status for those aged 16 and 17. Under the changes multiple offences dealt with in court on one day will no longer be counted as a single ‘strike’.³²⁴ Under the proposed changes, a magistrate would have no option but to impose a one year term of detention or Conditional Release Order on a 16-year-old for their first court appearance if they had been charged with three counts of home burglary.

The Bill will also introduce mandatory minimum three year terms of detention for further offences committed in the course of an ‘aggravated’ home burglary for 16 and 17-year-olds.³²⁵ Circumstances of aggravation include committing a burglary in company with another person, being armed or pretending to be armed with a dangerous weapon and threats to injure and detaining a person.³²⁶ While the offences to which these laws apply are extremely serious in nature, they already attract considerable penalties.³²⁷

The President of the Children’s Court recently expressed serious concerns that the proposed amendments will lead to a “significant increase in the detention population.”³²⁸ President Reynolds noted that he had been informed that an additional 130 beds may be required for young offenders at Banksia Hill detention centre within two years.³²⁹ President Reynolds also notes that the changes:

[W]ill likely result in an increase in the number of Aboriginal young people from country WA being sentenced to lengthy terms of detention ... if the Court is obliged to impose a term of detention or imprisonment of at least a year, it will have little or no scope to properly reflect the level of seriousness of the particular offence in the sentencing option and the length of the term imposed.³³⁰

Contrary to the Convention on the Rights of the Child this would further undermine judicial discretion to ensure that children are dealt with in a manner proportionate to the offence.

In Western Australia, the age of criminal responsibility is 10.³³¹ The Committee on the Rights of the Child has concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.³³² In its Concluding Observations in 2005 the Committee on the Rights of the Child said that the age of criminal responsibility in Australia is “too low”,³³³ and recommended raising it to 12.³³⁴ This recommendation was reiterated in 2012.³³⁵

The Committee acknowledged that, under the common law doctrine of *doli incapax*,³³⁶ children between 10 and 14 in Australia are assumed to be criminally responsible only if they have the required maturity to realise the consequences of their actions. However, the Committee has noted

The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.³³⁷

No data is publicly available for Western Australia about the number of 10 and 11 year olds in detention.³³⁸ Amnesty International formally requested this information, but it was not provided, only information about those in the age range of

10–13 was provided. Among 10–13 year olds in detention in Western Australia in 2013/14, 87 per cent were Aboriginal (an average of 38 out of 44).³³⁹

Across states and territories for which data is available, Indigenous young people are more heavily overrepresented among 10 and 11 year olds in contact with the criminal justice system and in detention. In 2012–13, they made up 62 per cent of all 10 and 11 year olds in detention in Australia throughout the year (34 Indigenous young people out of 55 young people in total, excluding Western Australia and the Northern Territory, who did not provide this data).³⁴⁰

The Committee has encouraged States Parties, like Australia, who have an minimum age (in Western Australia: 10) but different criteria up to a higher age (in Western Australia: 14), to make 12 years “the absolute minimum age.”³⁴¹

In order to confirm with the minimum internationally acceptable standard, Western Australia should raise the minimum age of criminal responsibility to 12, while retaining the doctrine of *doli incapax* for those young people aged 12 to 14. This will enable children in this youngest age group to be dealt with more appropriately outside of the justice system.



Photo © Ingetje Tadros

Aboriginal young people are over-represented among those who are affected by physical and mental health issues that make contact with the criminal justice system, and escalation of that contact, more likely.³⁴² The ALSWA notes that such conditions also restrict the ability of their clients “to participate in criminal justice processes and to obtain appropriate support and treatment.”³⁴³ The ALSWA further note that the “experience of clients with FASD in the criminal justice system is of particular concern” given their understanding that it is “disproportionately prevalent among Aboriginal Peoples.”³⁴⁴

FASD is an “umbrella term to describe a range of disorders resulting from pre-natal alcohol exposure.”³⁴⁵ The consequences occur “along a spectrum of disabilities including: physical, cognitive, intellectual, learning, behavioural, social and executive functioning abnormalities and problems with communication, motor skills, attention and memory.”³⁴⁶ In many cases the damage is not physically apparent “but can manifest itself in lifelong learning difficulties and cognitive impairment.”³⁴⁷ The seriousness of disability varies from one child to another along a continuum.

While it is beyond the scope of this study to consider health issues in detail, Amnesty International considers that diagnosis, in particular, of FASD must urgently be improved in order for it to be responded to well before formal contact with the justice system occurs. The development of a culturally appropriate approved clinical diagnostic tool for FASD and resources to enable diagnosis to occur in a timely manner will allow those living with FASD to be better accommodated prior to and within the youth justice and court systems.

In the course of carrying out this research Amnesty International heard from many Aboriginal people and organisations about the link between intergenerational trauma and the damaging effects of alcohol and substance abuse. Amnesty International heard from Aboriginal organisations, in particular in the Kimberley, about impressive community driven responses to these issues based around healing, peer support, cultural resilience, therapeutic interventions and alcohol supply reduction. Aboriginal women have played a particularly strong role in driving and shaping these responses.³⁴⁸

Recommendations 2, 3 and 4 of this report, relating to support for Aboriginal designed and led early intervention, prevention and diversion programs must also take account of the need to

support such programs for young Aboriginal people that are affected by FASD and related issues such as early life trauma,³⁴⁹ and acquired brain injury.³⁵⁰

A recent federal inquiry into the over-representation of Indigenous young people in the youth justice system received “compelling evidence on the issue of fetal alcohol spectrum disorder and [its] links with offending behaviour.”³⁵¹ The ALSWA considers that “[u]ndiagnosed and untreated FASD is a major problem facing the justice system in Western Australia.”³⁵²

However, a recent study about the prevalence of FASD in the Fitzroy Valley by the Liliwan Project,³⁵³ initiated and led by the local Aboriginal community, has shown that one in eight children born in 2002 or 2003 have fetal alcohol syndrome (FAS) or partial FAS, which is at the most severe end of the FASD spectrum.³⁵⁴ Around 90 per cent of the Fitzroy Valley population is Indigenous,³⁵⁵ and 95 per cent of mothers involved in the study were Indigenous.³⁵⁶ The study is the first population based prevalence study about FASD in Australia and the first to provide accurate data on the prevalence of FASD in a remote Australian community.³⁵⁷ It highlighted that FASD prevention programs, adequately resourced mental health, drug and alcohol services are urgently needed to address this.³⁵⁸

We were able to do the first FASD prevalence study in this country... In the Fitzroy Valley it's very high. It's going to have huge impact on the families at every level. We are just seeing now that some of the young people that have committed these offences, we know some of them to be FASD kids. The challenge for us is that the governments of this country really don't have any knowledge around FASD.

These kids are born with a brain defect, they are not able to understand the consequences of their actions and that's where the challenge is going to be for these kids... They are coming in contact with court system but they need support of a different kind.

Interview with Maureen Carter, Nindiligarri Cultural Health Centre, Fitzroy Crossing, 4 September 2014

FASD and the youth justice system

Awareness that FASD is an issue affecting young people across Western Australia is increasing in some circles, including among judicial officers. Chief Justice of the Supreme Court of Western Australia Wayne Martin has noted that FASD:

is an increasing problem in our courts. It is one of those conditions that are almost certainly chronically under-diagnosed ... It is a condition that is inherently likely to put them in conflict with the justice system.³⁵⁹

The Equality Bench Book of the Supreme Court of Western Australia, a publication for use by the judiciary about the potential barriers people from different backgrounds may face in relation to court proceedings in Western Australia, notes that the “complex learning and behavioural difficulties observed in people with FASD increase their risk of undertaking or being guided into criminal behaviour.”³⁶⁰ Children’s Court Magistrate Catherine Crawford recently noted there is an “increasing ... suspicion that a significant proportion of repeat offenders in the juvenile justice system may be FASD affected.”³⁶¹ This would be consistent with research from other jurisdictions. For example in the US one study found that 61 per cent of adolescents with FASD have been in trouble with the law, and that 35 per cent of those with FASD over the age of 12 had been incarcerated at some point in their lives.³⁶²

Amnesty International heard that young people affected by FASD are more vulnerable to suggestion than other young people, will struggle to learn from the consequences of their actions, and are more inclined to confess to things they haven’t done without awareness of the consequences.³⁶³ Magistrate Crawford noted the following issues FASD presents in the youth justice context:

There can be difficulties with processing information, there can be difficulties with memory. So, for example, a young person may not be able to remember that they have a curfew, they have to be home by 7pm in the evening.³⁶⁴

Issues with memory will also impact on recalling court dates and requirements to undertake community work or report to a youth justice officer as part of a community based order. Other concerns include an inability to “organise thoughts, recall and explain their story chronologically or in sufficient detail ... make informed decisions on basic legal processes, vulnerability to suggestion and misunderstanding of judicial processes.”³⁶⁵

The symptoms of FASD impact on how young people are dealt with at all points of contact with the justice system, from initial contact with police and interrogation for alleged offending, to capacity to recall and comply with bail conditions, to the conduct of hearings in court and legislative frameworks governing those deemed unfit to stand trial. The ALSWA further notes that “the presence of FASD will inevitably mean that the young person is unlikely to be able to refrain from reoffending without significant, targeted and specialist support.”³⁶⁶ Police in the West Kimberley appear to have a good awareness of the issues presented by FASD and have worked in collaboration with local Aboriginal organisations to incorporate information about FASD in police induction materials.³⁶⁷ Amnesty International welcomes this step and considers that similar efforts are necessary elsewhere in Western Australia.

Diagnosis

Diagnosis of FASD is important in order to ensure those affected with the disorder are guaranteed a fair trial. The Committee on the Rights of the Child notes that the setting and conduct of court proceedings must take in to account the child’s intellectual and emotional capacity.³⁶⁸ The Convention on the Rights of the Child requires alternatives to detention to be in place that are appropriate to the wellbeing of the child and proportionate to their circumstances. While early diagnosis and treatment outside of the formal justice system and well before a young person finds themselves in court is of paramount importance, there is a particular need for diagnosis in the court setting. As Magistrate Crawford explains:

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

In particular, in Western Australia, there is no diagnostic unit which can undertake an assessment and make a diagnosis of a youth involved in the criminal justice system. An adolescent and child psychiatrist asked to complete a report for the court, or a neuropsychologist may report that there are some signs which are consistent with FASD but that does not constitute a diagnosis conforming with the diagnostic protocols. There are significant delays obtaining such reports.³⁶⁹

Currently, demonstrating that a young person is affected by FASD is complex, time consuming and can lead to young people being held in detention on remand awaiting a diagnosis.³⁷⁰ This is contrary to the obligation that detention be a last resort. There are no diagnostic units in Western Australia. By contrast, there are approximately 35 diagnostic units in Canada that complete FASD assessments and reports. Magistrate Crawford notes that in these reports the diagnostic team make a diagnosis and set out a series of recommendations tailored to the individual, focussing on their strengths and weaknesses:

so as to provide a roadmap for Courts, public agencies and/or service providers, be they care and protection, education/vocational, health, etc. That means that the same report can be used by each agency to work out how best to cater to the needs of or deliver their service to the FASD affected individual.

...without a diagnosis injustice is likely to occur. Young offenders will be put on orders they cannot comply with, will re-offend and be re-sentenced on the basis that they have knowingly and deliberately failed to comply with their order, leading inevitably to more serious penalties, including detention being imposed.³⁷¹

There is an urgent need for improved diagnostic capacity for FASD in Western Australia and improved awareness and training for those working in the youth justice space.

Fitness to stand trial

Concerns were raised with Amnesty International about the possible unintended consequences of having a FASD diagnosis under current legislation.³⁷² *Under the Criminal Law (Mentally Impaired Accused Act) 1996 (WA)*, where a court forms the opinion that a person is unfit to stand trial due to mental impairment but is not of unsound mind,³⁷³ the court must dismiss the charge and has only two options: they may either release the person unconditionally or make them subject to an indefinite custody order.³⁷⁴

If a custody order is made, the young person must to be detained in an authorised hospital, a detention centre or a prison.³⁷⁵ A young person may only be detained in a hospital if they have a 'treatable mental illness.' Otherwise, as in the case of those affected by FASD, acquired brain injury or other cognitive impairments, the only option is detention or prison.³⁷⁶ There is currently no option to issue a supervised release order. The Mentally Impaired Accused Act provides the option of detention in a 'declared place', but no such facility has been declared in the 18 years since the Act was passed. The Mentally Impaired Accused Review Board recently noted that the "lack of an appropriate secure residential facility for accused who present too high a risk to the safety of the community for them to be released ... continues to impede the effective discharge of the Board's functions."³⁷⁷

According to the Office of the Inspector of Custodial Services:

People subject to a custody order are held indefinitely until they can re-enter the community without posing an unacceptable risk. This is usually a graduated process that can take a number of years depending on individual circumstances. Subject to assessments of risk, the person will be provided increasing amounts of freedom from their place of custody until they are released.³⁷⁸

The above process is overseen by the Mentally Impaired Accused Review Board but they have no power to approve a leave of absence, conditional or unconditional release. This is at the discretion of the Governor of Western Australia, acting on the advice of the Attorney General.³⁷⁹ The Office of the Inspector of Custodial Services recently commented that "our current system for managing mentally impaired accused is unjust, under resourced and ineffective."³⁸⁰

At the end of June 2014 there were 18 people indefinitely detained in prison in Western Australia.³⁸¹ The Officer of the Inspector of Custodial Services recently noted that 60 per cent of those indefinitely detained are Aboriginal.³⁸²

The construction of a Disability Justice Centre with 10 beds was announced in February 2015 which, when completed, will be a 'declared place' which will finally provide an alternative to prison for those indefinitely detained.³⁸³ This is a welcome and

necessary development. However, with 18 people indefinitely detained at the end of 2014, there appears to be a capacity issue. The Disability Services Commission have noted that "the requirement for a second disability justice centre will be reviewed once the first centre is up and running."³⁸⁴ Only young people aged 16 and over will have access to this facility. 10 to 15-year-olds remain "the responsibility of WA's Department of Corrective Services."³⁸⁵ Banksia Hill Detention Centre will remain the only option for 10 to 15-year-olds deemed unfit to plead.

At June 2014 no young people were indefinitely detained in juvenile detention,³⁸⁶ however Amnesty International is aware of one Aboriginal man who has been detained since 2003 when he was 14, due to unfitness to stand trial.³⁸⁷ Chief Justice Martin of the Supreme Court of Western Australia recently noted that it is likely that a significant proportion of those indefinitely detained due to mental impairment suffer from FASD. Chief Justice Martin further noted that there is a generation of young people with FASD that is already coming through the courts and "locking them up for the rest of their life is not ... an appropriate outcome."³⁸⁸ Amnesty International agrees; doing so amounts to a human rights violation.

Indefinite detention due to mental impairment, with release entirely at the discretion of the Executive, is contrary to Article 9 of the International Covenant on Civil and Political Rights, which prohibits arbitrary detention. The Human Rights Committee, in 2014, noted that detention:

may be authorised by domestic law and nonetheless be arbitrary. The notion of 'arbitrariness' ... must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality.

Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.³⁸⁹

Indefinite detention is also a violation of the obligation that detention be a measure of last resort. The law, as it stands, also limits the discretion of judicial officers to consider the most appropriate course of action where a person is deemed unfit to plead. In order to prevent arbitrary detention and safeguard the best interests of the children with FASD and other conditions that may affect fitness to plead, there is an urgent need for courts to have the option to order the supervised and supported release of a young person who is deemed unfit to stand trial.



Photo © Ingetje Tadros

Western Australia is failing to safeguard the best interests of Aboriginal young people by its failure to invest in programs that address the underlying causes of offending behaviour for Aboriginal young people in a culturally relevant and accessible way (early intervention and prevention programs). In order to prevent contact with the justice system, there is a particular need for improved resources to address issues such as FASD and to better support families.

Once Aboriginal young people are in contact with the police, there is an inadequately explained discrepancy in the rate at which Aboriginal young people are charged by police rather than diverted, when compared to non-Aboriginal young people. The reasons for this discrepancy must be investigated and solutions devised to address the reasons for the discrepancies.

For Aboriginal young people, the low rate of caution and referral to Juvenile Justice Teams when compared to arrest means the state is further failing to uphold international legal obligations to provide measures for dealing with Aboriginal young people without resorting to judicial proceedings. Inadequate supported bail accommodation for young people is also contributing to the high rates at which Aboriginal young people are held in police custody and in detention without conviction.

When matters do proceed to court there is a further lack of diversionary options available to the courts and a lack of adequate non-custodial options, particularly in regional and remote areas, which is also contrary to international legal standards.

Mandatory minimum sentences applicable to young people prevent magistrates from considering all the relevant circumstances and are contrary to the obligation that detention be a measure of last resort and for the shortest appropriate period of time.

The imposition and enforcement of curfews as a condition of bail appears to be a factor that is contributing to contact with the justice system escalating and young people becoming enmeshed in the youth justice system. The imposition and nature of enforcement of curfews should be investigated.

Western Australia is further failing to collect and disseminate information that would help the state and others to understand where failures are occurring and better target efforts to address the underlying factors leading to Aboriginal young people being over-represented in the justice system and in detention.

Police diversion (See Chapter 6)**CAUTION**

Before charging a young person a police officer must first consider whether it would be more appropriate to take no action or administer a caution to the young person.³⁹⁰ A member of the police force “is to use the power to caution in preference to laying a charge ... unless the alleged offence is listed in the Schedule 1 or 2 of the Young Offenders Act,³⁹¹ or because of the number of previous offences with which the person has been charged or for which the person has been dealt with ... it would be inappropriate only to give a caution.”³⁹²

Where police issue a written caution, Prevention and Diversion Officers from the Department of Corrective Services follow up with the young person and their family “to prevent further offending actively including by referring to external program providers and other agencies to offer counselling and other assistance/support targeting offending behaviours.”³⁹³

JUVENILE JUSTICE TEAMS

Where a caution is not given (due, for example, to a young person having been issued a number of cautions already) the Young Offenders Act notes discretion to refer the young person to a Juvenile Justice Team should be exercised for first offenders.³⁹⁴

Juvenile Justice Teams involve a facilitated meeting between the young person, the Juvenile Justice Team coordinator and police. It may also include the victim, family members/guardians, a representative of the Department of Education or a member of a relevant Aboriginal community.³⁹⁵ During the meeting all parties discuss the offence, its impact, and make an action plan that encourages the young person to take responsibility for their actions. This may include the young person providing a verbal or written apology to the victim, undertaking voluntary work for a community agency as reparation to the community or victims, undertaking work for the victim if practicable and referral to programs and services.

Successful completion of the action plan will mean that the matter does not proceed any further and no criminal conviction is recorded for the offence. An offender can only be diverted to a Juvenile Justice Team if they accept responsibility for the offence and agree to have the matter dealt with by a Juvenile Justice Team rather than by a court.³⁹⁶

Arrest or summons

Where police decide it is not appropriate to divert a young person by cautioning them or referring them to a Juvenile Justice Team, the Young Offenders Act says a notice to attend court is to be preferred rather than charging and bailing or detaining a young person in custody.³⁹⁷

A notice to attend (or summons) is issued by the court, telling a person that they must go to court on a specified date. They are then released until that date without any conditions attached.

If a young person is charged, they are either released on bail or kept in custody awaiting trial.

Bail (see Chapters 8 and 9)

Where police decide to arrest a young person, the young person has a “qualified right to bail.”³⁹⁸ That is, they have the right to be granted bail unless a police officer considers that they are unlikely to come back to court, are likely to re-offend or need to be held in custody for their own protection.³⁹⁹ The police manual notes that “[a] member may exercise discretion with respect to the bail of juveniles where there is a known tendency to re-offend on bail, or where there is doubt about the welfare of the child.”⁴⁰⁰ In these circumstances a child should still be bailed unless police or the magistrate considers that there is no conditions that could be imposed that would diminish the likelihood of re-offending or address the need for a child to be remanded in custody for their own protection.⁴⁰¹

Where they are released on bail it is on the condition that they will appear in court at a later date to answer the charge. Other conditions can also be attached to bail, such as a condition not to associate with a particular person or a curfew to be home at a certain time. A person on bail who does not comply with these conditions can be arrested and may be charged with a further offence related to the breach of bail conditions or kept in detention until trial.

Where bail is refused by police this decision is reviewed by a magistrate at the next available court sitting and the same considerations apply. The *Bail Act 1982 (WA)* says that a child under the age of 18 can only be released on bail if a responsible person signs a bail undertaking.⁴⁰² Western Australia is the only state where this requirement is in place.⁴⁰³

Options available to the court (see Chapter 7)

Where a young person is charged and brought before a court in Perth, the hearing takes place within the specialist Children's Court. Where a young person is charged and brought before a court elsewhere in Western Australia, the hearing takes place before the local magistrate who is responsible both for matters relating to adults and children. In the latter case the magistrate effectively sits as the Children's Court.

JUVENILE JUSTICE TEAMS

If the police decide not to refer a young person to a Juvenile Justice Team the court may then do so if they consider it appropriate, unless the offence is in Schedule 1 or 2 of the Young Offenders Act.⁴⁰⁴

COURT CONFERENCING

Where a matter cannot go to a Juvenile Justice Team because it is a more serious offence listed in Schedule 1 or 2 of the Young Offenders Act, or the young person has a history of offending, the Children's Court also has the option to refer to Court Conferencing.⁴⁰⁵ A young person participating in court conferencing completes an action plan, developed in consultation with the Department of Corrective Services Coordinator, a parent/guardian and the victim (police are not involved). This plan may include substance abuse counseling, education or programs aimed at reducing re-offending. Admission of guilt is required. The program runs for 12 weeks while the young person is released on bail.⁴⁰⁶

OTHER OPTIONS FOR THE COURT

The only other officially recognised options for diversion are the Drug and Mental Health Courts. These specialized courts operate only in Perth. The Drug Court involves referral to Drug and Alcohol youth services or Community Drug Services teams, fortnightly court attendance, counseling, case management and treatment to support rehabilitation. The Mental Health Court (Links Program) is a pilot initiative "to reduce further offending behaviour by providing access to early assessment and interventions for mental health issues" which commenced in April 2013.⁴⁰⁷ Legal representatives which Amnesty International spoke with in Perth spoke positively of these options and their efficacy for Aboriginal young people in Perth.⁴⁰⁸

Magistrates Courts outside Perth have more limited options. On occasion in recent years magistrates in regional and remote areas have adjourned proceedings so Aboriginal boys appearing before them could attend programs designed by local Elders, though this has only happened sporadically.⁴⁰⁹ This report highlights three such occasions (see Chapter 8).

Sentencing considerations (See Chapter 10)

When dealing with a young person who has been found guilty of an offence, the court is to consider the above mentioned principles of juvenile justice and ordinary sentencing principles.⁴¹⁰ The court is also to consider the nature and seriousness of the offence; any history of offending; the age and cultural background of the offender; and the extent to which any person was affected as a victim of the offence.⁴¹¹

The court must have regard to the fact that rehabilitation is facilitated by the participation of the offender's family and giving the offender opportunities to engage in educational programs and employment. The absence of such opportunities is not to result in the offender being dealt with more severely.⁴¹²

The court cannot impose any custodial sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter (see, however, Chapter 11 regarding mandatory minimum sentences).⁴¹³ Non-custodial options, or community-based orders, are to be preferred, which can include conditions requiring community work, attendance at course and requirements to be supervised and report to a youth justice officer.⁴¹⁴

There are three categories of community-based orders which are respectively more intensive, Youth Community Based Orders, Intensive Youth Supervision Orders and Conditional Release Orders.⁴¹⁵ In practical terms the last of these is a suspended sentence that is coupled with an Intensive Youth Supervision Order, if that order is cancelled due to non-compliance, the young person must serve the term of detention set out in the Conditional Release Order.⁴¹⁶

The Young Offenders Act says that where a written law requires a mandatory or minimum penalty to be imposed for an offence, a court dealing with a young person is not obliged to impose such a penalty.⁴¹⁷ However, the *Criminal Code Act 1913 (WA)* overrides this general provision in three circumstances. The first two relate to serious assault and grievous bodily harm where the victim is a 'public officer' (relevantly, a police officer or a juvenile custodial officer).⁴¹⁸ The third applies where a young offender already has two relevant convictions for a home burglary.⁴¹⁹

The way the Young Offenders Act and other relevant legislation applies in practice, including in relation to cautions, Juvenile Justice Team referrals, other court ordered diversion options and mandatory sentencing are considered in greater detail in Chapters 7, 8 and 12.

- 1 UNICEF, Convention on the Rights of the Child, Frequently Asked Questions.
- 2 Australian Institute of Health and Welfare (AIHW), *Youth Detention Population in Australia 2014*, Table s 10 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 20 April 2015).
- 3 Calculation based on the average over the four quarters of the 2013–14 financial year. In the June 2014 quarter Aboriginal young people were on average 58 times more likely to be in detention (66.95 per 10,000 compared to 1.16 per 10,000 for non-Aboriginal young people). More recent data is not yet available. AIHW, *Youth Detention Population in Australia 2014*, Table s 10.
- 4 107 out of 137 on an average night. AIHW, *Youth Detention Population in Australia 2014*, Tables s 2, s 8 and s 31.
- 5 An average of 38 out of 44 or 87 per cent: Data provided to Amnesty International by Department of Corrective Services on 31 October 2014.
- 6 37,029 out of 93,778 based on 2014 projections. Australian Bureau of Statistics, *3222.0 Population Projections, Australia, TABLE A5. 'Population projections, by age and sex, Western Australia – Series A'* [www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220a5.xls&3222.0&Time%20Series%20Spreadsheet&59D5AB1CE77B53E7CA257C310019E556&0&2012%20\(base\)%20to%202011&29.11.2013&Latest](http://www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220a5.xls&3222.0&Time%20Series%20Spreadsheet&59D5AB1CE77B53E7CA257C310019E556&0&2012%20(base)%20to%202011&29.11.2013&Latest) Australian Bureau of Statistics, *3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2011*, 'Estimated resident Aboriginal and Torres Strait Islander and Non-Indigenous population, Remoteness Areas, Single year of age, 30 June 2011'.
- 7 Meeting with Mala Dharmananda, Department of Corrective Services, Perth (18 June 2014).
- 8 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [15].
- 9 Australian Institute of Criminology, *National Crime Prevention Framework*, 2012, pp 13-14 www.aic.gov.au/media_library/aic/ncpf/ncp_framework.pdf (accessed 23 March 2015).
- 10 Department of Corrective Services Annual Report 2013/14, p59 www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/annual-reports/DCS-2013-2014/dcs-annual-report-2013-2014.pdf.
- 11 Productivity Commission, *Report on Government Services 2015*, Table 16A.1 'State and territory government real recurrent expenditure on youth justice services, (2013-14 dollars)' www.pc.gov.au/_data/assets/excel_doc/0003/135741/ic-2014-volume-f-chapter16-attachment.xlsm (accessed 6 March 2015).
- 12 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008-09 to 2012–13'.
- 13 Dennison, Stewart and Hurren. 'Police cautioning in Queensland: The impact of juvenile offending on pathways'. *Trends and Issues in Crime and Criminal Justice* no. 306, Australian Institute of Criminology, 2006, pp 1-6, www.aic.gov.au/media_library/publications/tandi2/tandi306.pdf (accessed 2 January 2015).
- 14 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 15 Unsensetenced detention population includes those who have been refused bail and are awaiting trial and those found guilty and awaiting sentence. AIHW, *Youth Detention Population in Australia 2014* Tables s 12 and s 18.
- 16 Human Rights Committee, *General Comment 35* and Article 9 of the ICCPR, [38], United Nations Rules for the Protection of Juveniles Deprived of their Liberty, [17]
- 17 Interview with Aboriginal community member, July 2014 (details withheld); Interview with Aboriginal youth support worker August 2014 (details withheld); Interview with legal practitioners, July 2014 (details withheld); Interview with Ben White, Aboriginal Legal Service Western Australia, Broome (22 July 2013).
- 18 *Criminal Code Act Compilation Act 1913* (WA), s 29.
- 19 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice', [32] www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (accessed 16 January 2015).
- 20 Aboriginal Legal Service of Western Australia, *Submission to the Australian Human Rights Commission*, 'Access to justice for people with disability' Issues Paper, April 2013, p 2.
- 21 *Criminal Law (Mental Impaired Accused Act) 1996* (WA), sections 16(5) and 19(4).
- 22 Information provided by the Department of Corrective Services indicates that 79 of their staff within the Youth Justice Services division identify as Aboriginal and/or Torres Strait Islander. The total number of staff was not provided.
- 23 Parliamentary Questions are used by members of Parliament to ask the relevant Minister about matters within a Minister's portfolio. Responses must be provided in writing to such questions and are available via a searchable database of the Western Australian Parliament.
- 24 In Western Australia the Office of the Inspector of Custodial Services is an independent statutory body that monitors and reports on the conditions of youth detention facilities and prisons. The OICS has recently reported on the management of young women and girls at the state's only youth detention facility Banksia Hill and also extensively reported on a riot that occurred at that facility in 2013 which temporarily led to the transfer of young people to the adult Hakea Prison. See www.oics.wa.gov.au/facility/banksia-hill-juvenile-detention-centre/ for copies of those reports.
- 25 Information provided included whether a young person was 10-13, 14-17 or 18+.
- 26 See Chapter 5 in relation to deficiencies in available data for Western Australian context.
- 27 AIHW, *Youth Detention Population in Australia 2014*, Tables s 2 and s 8 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549673 (accessed 22 December 2014).
- 28 AIHW, *Youth Detention Population in Australia 2014*, Table s 31.
- 29 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008-09 to 2012-13' www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/11-key-indicators-2014-chapter11-attachment.xlsx (accessed 22 December 2014).
- 30 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008-09 to 2012–13'.
- 31 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008-09 to 2012-13'. Source- WA Police (unpublished) Frontline Incident Management System.
- 32 Department of Attorney General (DOTAG) Western Australia, *Report on Criminal Cases in the Children's Court of Western Australia 2008/09 to 2012/13* www.department.dotag.wa.gov.au/_files/Childrens_Court_Report_2008_09_to_2012_13.pdf (accessed 22 December 2014) and *Report on Indigenous Defendants in the Children's Court of Western Australia 2008/09 to 2012/13* 'Criminal Case Lodgments' figures. This includes all matters against young people throughout the state. Criminal cases can relate to multiple charges. www.department.dotag.wa.gov.au/_files/Childrens_Court_Indigenous_Report_2008_09_to_2012_13.pdf (accessed 22 December 2014).
- 33 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.12 'Daily average number and rate (per 100,000) of young people aged 10–17 years subject to community-based supervision, by sex, by Indigenous status, by State and Territory, 2012-13' www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/04-key-indicators-2014-chapter4-attachment.xlsx (accessed 22 December 2014).
- 34 AIHW, *Youth Detention Population in Australia 2014*, Tables s 12 and s 18: calculated average over the four quarters of the 2013–14 financial year.
- 35 AIHW, *Youth Detention Population in Australia 2014*, Tables s 22 and s 28: calculated average over the four quarters of the 2013–14 financial year.
- 36 AIHW, *Youth Detention Population in Australia 2014*, Tables s 2, and s 8: calculated average over the four quarters of the 2013-14 financial year.
- 37 Multiple cautions, Juvenile Justice Team referrals and arrests may have been given to a single individual and totals include a small number of young people whose ethnicity is unknown. Data relating to the total number of young people on community-based orders and in detention throughout the year are not available so daily averages are presented.
- 38 AIHW, *Youth Detention Population in Australia 2014*, Table S31, derived from Australian Bureau of Statistics data.
- 39 AIHW, *Youth Detention Population in Australia 2014*, Tables s 2 and s 8: calculated average over the four quarters of the 2013-14 financial year.
- 40 AIHW, *Youth Detention Population in Australia 2014*, s 10: calculated average over the four quarters of the 2013-14 financial year. www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675 (accessed 22 December 2014).
- 41 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, pp 7 and 8. www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report/fullreport.pdf (accessed 1 October 2014).
- 42 In the most recent quarter (June 2014) Aboriginal young people were 58 times more likely to be in detention (66.95 per 10,000 compared to 1.16 per 10,000 for non-Aboriginal young people. AIHW, *Youth Detention Population in Australia 2014*, Table s 10: calculated average over the four quarters of the 2013–14 financial year.
- 43 Data provided to Amnesty International by Department of Corrective Services on 31 October 2014.

- 44 Data provided to Amnesty International by Department of Corrective Services on 31 October 2014.
- 45 Data provided by Department of Corrective Services on 31 October 2014 for week ending 1 July 2014: calculation excludes Perth and Midland.
- 46 Commissioner for Children and Young People (Western Australia), *The State of Western Australia's Children and Young People (CCYP)*, Edition Two, p 301 www.cryp.wa.gov.au/content.aspx?cid=740#sthash.WFTOUCDG.dpuf (accessed 18 December 2014).
- 47 Data provided by Department of Corrective Services on 31 October 2014: calculation excludes Perth and Midland.
- 48 Department of Attorney General (DOTAG) Western Australia, *Report on Criminal Cases in the Children's Court of Western Australia 2008/09 to 2012/13 and Report on Indigenous Defendants in the Children's Court of Western Australia 2008/09 to 2012/13*, 'Criminal Case Lodgements' figures. References to matters before the Children's Court of Western Australia include regional magistrates court hearing matters in relation to children under the *Young Offenders Act 1994 (WA)*: Telephone correspondence with Children's Court 3 February 2015.
- 49 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008–09 to 2012–13.
- 50 N Loh et al, *Crime and Justice Statistics for Western Australia: 2005*, Crime Research Centre, University of Western Australia, 2007, p 43. www.law.uwa.edu.au/_data/assets/pdf_file/0005/118364/Crime_and_Justice_Statistics_for_WA-2005.pdf (accessed 22 December 2014).
- 51 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008–09 to 2012–13'.
- 52 Department of Attorney General (DOTAG) Western Australia, *Report on Criminal Cases in the Children's Court of Western Australia 2008/09 to 2012/13 and Report on Indigenous Defendants in the Children's Court of Western Australia 2008/09 to 2012/13*, 'Criminal Case Lodgements' figures.
- 53 Australian Bureau of Statistics, *3222.0 Population Projections, Australia*, TABLE A5. Population projections, By age and sex, Western Australia - Series A, [www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220a5.xls&3222.0&Time%20Series%20Spreadsheet&59D5AB1CE77B53E7CA257C310019E556&0&2012%20\(base\)%20to%202101&29.11.2013&Latest](http://www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220a5.xls&3222.0&Time%20Series%20Spreadsheet&59D5AB1CE77B53E7CA257C310019E556&0&2012%20(base)%20to%202101&29.11.2013&Latest) (37,029 out of 93,778 based on 2014 projections)
- 54 Australian Bureau of Statistics, *Estimated resident Aboriginal and Torres Strait Islander and Non-Indigenous population, Remoteness Areas, Single year of age, 30 June 2011*.
- 55 AIHW, *Youth Detention Population in Australia 2014*, Tables s 2 a and s 8: calculated average over the four quarters of the 2013–14 financial year.
- 56 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.10 'Daily average number and rate (per 100,000) of young people aged 10–17 years in detention, by sex, by Indigenous status, by State and Territory, 2012–13'. The rate per 100,000 is 1,301 compared to 33.2 per 100,000 for non-Aboriginal boys. This information is not available for the 2013/14 period.
- 57 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.10 'Daily average number and rate (per 100,000) of young people aged 10–17 years in detention, by sex, by Indigenous status, by State and Territory, 2012–13'. Calculation based on the rate of Aboriginal male rate of detention of 1,301 per 100,000, if it were the same for the estimated 126,483 total boys aged 10–17 in Western Australia in 2012–13: Australian Bureau of Statistics, *3222.0 Population Projections, Australia*, TABLE A5. Population projections, by age and sex, Western Australia - Series A [www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220a5.xls&3222.0&Time%20Series%20Spreadsheet&59D5AB1CE77B53E7CA257C310019E556&0&2012%20\(base\)%20to%202101&29.11.2013&Latest](http://www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220a5.xls&3222.0&Time%20Series%20Spreadsheet&59D5AB1CE77B53E7CA257C310019E556&0&2012%20(base)%20to%202101&29.11.2013&Latest) (accessed 2 December 2014).
- 58 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.10 'Daily average number and rate (per 100,000) of young people aged 10–17 years in detention, by sex, by Indigenous status, by State and Territory, 2012–13'. Calculation based on the rate of 1,301 per 100,000. AIHW, *Youth Detention Population in Australia 2014*: Table 31 shows that there are an estimated 15,995 Aboriginal young people in Western Australia. Assuming that roughly half of these are Aboriginal boys there are around 8,000 Aboriginal boys aged 10–17 in Western Australia. If those 8,000 Aboriginal boys were in detention at a rate of 33.2 per 100,000, or one in 3,012, which is the rate at which non-Aboriginal boys are in detention, there would be an average of 2.66 Aboriginal boys in detention on an average day.
- 59 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.12 'Daily average number and rate (per 100,000) of young people aged 10–17 years subject to community-based supervision, by sex, by Indigenous status, by State and Territory, 2012–13'. Figures are not available for the 2013/14 financial year.
- 60 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.12 'Daily average number and rate (per 100,000) of young people aged 10–17 years subject to community-based supervision, by sex, by Indigenous status, by State and Territory, 2012–13'. The rate per 100,000 is 132.8 compared with 3.5 per 100,000 for non-Aboriginal girls.
- 61 AIHW, *Youth Detention Population in Australia 2014*, Tables 2 and s 8, calculated average over the four quarters of the 2013–14 financial year.
- 62 AIHW, *Youth Detention Population in Australia 2014*, Tables s 2 and s 8.
- 63 Data provided by Department of Corrective Services on 31 October 2014.
- 64 Australian Institute of Health and Welfare (2012), *Girls and young women in the juvenile justice system: 2010–11*. Bulletin no. 107. Cat. no. AUS 162. Canberra, p 1 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737423105 (accessed 22 December 2014).
- 65 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 4A.12.12 'Daily average number and rate (per 100,000) of young people aged 10–17 years subject to community-based supervision, by sex, by Indigenous status, by State and Territory, 2012–13'. Data for 2013–14 is not yet available.
- 66 Commissioner Patrick Dodson, *Regional Report Of Inquiry Into Underlying Issues In Western Australia*, Royal Commission Into Aboriginal Deaths In Custody, 30 March 1991, p 65. www.austlii.edu.au/au/other/IndigLRes/rciadic/regional/wa_underlying/WA.RTF (accessed 28 November 2014).
- 67 Commissioner Patrick Dodson, *Regional Report Of Inquiry Into Underlying Issues In Western Australia*, Royal Commission Into Aboriginal Deaths In Custody, 30 March 1991, p 65.
- 68 Interview with Clem Rodney, Perth 6 August 2014.
- 69 A number of people raised concerns about the "three strikes and you're out" policy of the Department of Housing. Legal representatives and police drew a link between homelessness and youth offending.
- 70 Office of the Inspector of Custodial Services, *The Management of Young Women and Girls at Banksia Hill Detention Centre*, iv [www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/3911265af3ab9c35acf8adac48257c4500144ff6/\\$file/1265.pdf](http://www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/3911265af3ab9c35acf8adac48257c4500144ff6/$file/1265.pdf) (accessed 6 November 2014).
- 71 Interview, August 2014 (details withheld).
- 72 Parliament of Western Australia, *Legislative Assembly Hansard*, 12 May 1994, p 361 [www.parliament.wa.gov.au/Hansard/hansard1870to1995.nsf/vwMainBackground/19940512_Assembly.pdf/\\$File/19940512_Assembly.pdf](http://www.parliament.wa.gov.au/Hansard/hansard1870to1995.nsf/vwMainBackground/19940512_Assembly.pdf/$File/19940512_Assembly.pdf) (accessed 14 October 2014).
- 73 *Young Offenders Act 1994 (WA)*, s 7.
- 74 Offences contained in Schedules 1 and 2 of the *Young Offenders Act 1994(WA)* cannot be the subject of a caution or Juvenile Justice Team referral. Offences in Schedule 1 include acts or omissions, with intent to harm, causing bodily harm or danger; assault with intent to resist or prevent arrest or detention; sexual offences; drug possession and supply offences; driving without the appropriate driver's licence, reckless and unlicensed driving and offences for driving while drunk or drug affected, which are strict liability offences. Offences in Schedule 2 include murder; manslaughter; assault causing death; attempt to murder; acts intended to cause grievous bodily harm or to resist or prevent arrest; grievous bodily harm; assault occasioning bodily harm; assault with intent to commit or facilitate a crime; assault with intent to do grievous bodily harm; serious assaults; indecent assault and rape; stealing a motor vehicle, aggravated by reckless or dangerous driving; robbery; assault with intent to rob; criminal damage; arson; dangerous driving causing death, injury; and dangerous driving causing bodily harm.
- 75 Under section 25(4) of the *Young Offenders Act 1994 WA*, in order to be referred to a Juvenile Justice Team, a young person must admit responsibility for the alleged offence.
- 76 Parliament of Western Australia, *Legislative Assembly Hansard*, 12 May 1994, pp 365.
- 77 Parliament of Western Australia, *Legislative Assembly Hansard*, 12 May 1994, pp 364–365.
- 78 *Young Offenders Act 1994 (WA)*, sections 22, 24 and 25.
- 79 Parliament of Western Australia, *Legislative Assembly Hansard*, 12 May 1994, p 367.
- 80 With the exception that, for certain repeat offenders as set out in Division 9 of Part 7, the principles of the *Young Offenders Act 1994 (WA)* are overridden and community safety is said to be the primary consideration.
- 81 Committee on the Rights of the Child, *Concluding Observations – Australia*, 28 August 2012. CRC/C/AUS/CO/4, [29]; Committee Against Torture, *Concluding Observations – Australia*, 2008 CAT/C/AUS/CO/3 [23]; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, adopted by the Committee at its tenth session (2–13 September 2013), [31]. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en (accessed 18 March 2015).

- 82 United Nations Treaty Collection, No 11: Convention on the Rights of the Child (New York, 20 November 1989) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en (accessed 1 October 2014). 194 countries are party to it.
- 83 Committee on the Rights of the Child, *Concluding Observations – Australia*, 20 October 2005. CRC/C/15/Add.268, p 3. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqKb7yhsnXZ0ChBsrwmcY8%2f%2bFNoDGE9kezf6QQVhCpSu50DnholmUW11kikcmdS4vFnPoND%2bPodjbTyzuRqtYMXTVpT0JzXW8fLUQG%2bC2XatsTc4> (accessed 28 November 2014).
- 84 Committee on the Rights of the Child, *Concluding Observations – Australia*, 28 August 2012, CRC/C/AUS/CO/4, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqKb7yhs5X2w65LgIRF%2fS3dwpS4NXPTJivMuCl3J9Hn06KCDkN8AgEcc%2bN1wRMULqb84PSI9FicZROAZolAudnAZ3CxmSjW7k%2brD6GQTCcQ8b4gpWq> [82]
- 85 United Nations Treaty Collection, *No 11: Convention on the Rights of the Child* (New York, 20 November 1989). https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en (accessed 1 October 2014). The *Young Offenders Act 1994 (WA)* similarly applies to children up to the age of 17 (see *Young Offenders Act 1994 (WA)*, section 4).
- 86 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [15] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqKb7yhsqkirkKQZLK2M58RF%2f5F0vEZn%2b03pfhJYL%2b%2fo2i7lJgP6EjqSGKnB2CPSr6g7ed2POM8AO57Tg1kfwde7vhlwC0trQLDmAZWHVA9bVwzD%2b> (accessed 2 January 2015).
- 87 Committee on the Rights of the Child, *General Comment No. 11* (2009) Indigenous children and their rights under the Convention, [74] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqKb7yhsqkirkKQZLK2M58RF%2f5F0vHflzasS00EEddqWmq9j7BREhPNv8rsqw51P9yZnbTO%2bVctG7gTjUoMHKWMhfZjxkzJvW8MwfHmnb02XKphT> (accessed 2 January 2015).
- 88 Committee on the Rights of the Child, *General Comment No. 11* (2009) Indigenous children and their rights under the Convention, [29].
- 89 Committee on the Rights of the Child, *General Comment No. 11* (2009) Indigenous children and their rights under the Convention, [29].
- 90 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4, [29].
- 91 United Nations Treaty Collection, No 2. *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
- 92 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed 2 January 2015).
- 93 Committee for the Elimination of Racial Discrimination, *General Recommendation No. 23* (1997) on the rights of Indigenous Peoples, [1] http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_GlobaI/INT_CERD_GEC_7495_E.doc (accessed 2 January 2015).
- 94 International Convention on the Elimination of All Forms of Racial Discrimination, Article 2(2).
- 95 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32* (2009), The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, [18] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqKb7yhsyNNtgl51ma08Cma6o7BgkLJJRh2CxCoufHBTnFhzjrhnWoLY2sEfd6leTpf4ZDiyrcc%2frHMuxT4jdZqSeCxBnAj%2byFgxonXMTDHUMoQywn> (accessed 2 January 2015).
- 96 Committee on the Elimination of Racial Discrimination, *Concluding Observations – Australia* CERD/C/AUS/CO/15-17, [20] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqKb7yhsFzXvnsZjtq1Xnb4bcEJClAOkmqJQeV0zdr93%2ffv7%2fBSAk0n8Nc2CMTKCBgv25nw5etVi%2bkUMR9abtAFq1lgW095l%2btKhuhVTozo2kfkQV78slhAW5U9xPBqn413aeA%3d%3d> (accessed 2 January 2014).
- 97 United Nations General Assembly Resolution 61/295 (13 September 2007) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement> (accessed 14 October 2014). There were 11 abstentions to the resolution.
- 98 E.A Daes, *An overview of the history of indigenous peoples: self-determination and the United Nations* (2008) 21 Cambridge Review of International Affairs, p 24.
- 99 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009) www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf (accessed 2 January 2015).
- 100 Report of the Special Rapporteur James Anaya on the situation of human rights and fundamental freedoms of Indigenous people, [86] www.refworld.org/pdfid/4ad47c882.pdf (accessed 2 January 2015).
- 101 United Nations Declaration on the Rights of Indigenous Peoples, Article 43 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 2 January 2015).
- 102 M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly*, pp 957–983.
- 103 United Nations Declaration on the Rights of Indigenous Peoples, Article 21.
- 104 United Nations Declaration on the Rights of Indigenous Peoples, Article 21.
- 105 United Nations Declaration on the Rights of Indigenous Peoples, Article 18.
- 106 United Nations Declaration on the Rights of Indigenous Peoples, Article 18.
- 107 United Nations Declaration on the Rights of Indigenous Peoples, Article 21.
- 108 Meeting with Mala Dharmananda, Department of Corrective Services, Perth (18 June 2014).
- 109 Department of Corrective Services, 'Statistics' www.correctiveservices.wa.gov.au/about-us/statistics-publications/statistics/default.aspx (accessed 20 April 2015).
- 110 Department of Corrective Services, *Annual Report 2013–14* www.correctiveservices.wa.gov.au/files/about-us/statistics-publications/annual-reports/DCS-2013-2014/dcs-annual-report-2013-2014.pdf (accessed 20 April 2015).
- 111 Committee on the Rights of the Child, *General Comment No. 11* (2009) Indigenous children and their rights under the Convention, [24].
- 112 Committee on the Rights of the Child, *Concluding Observations – Australia* (2012), p 5.
- 113 Committee on the Elimination of Racial Discrimination, *General Recommendation 32*, [17].
- 114 The Australian Institute of Health and Welfare (AIHW) is a national agency set up by the Australian Government to provide regular information and statistics on Australia's health and welfare.
- 115 Australian Bureau of Statistics, 'Crime and Justice News' – Developments in Statistics. www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/4500.0Main%20Features22007?opendocument&tabname=Summary&prodno=4500.0&issue=2007&num=&view= (accessed 2 October 2014).
- 116 Productivity Commission, 'Chapter 16 Youth Justice Services', *Review of Government Services* (2014), 16.5.
- 117 AIHW 'Youth justice data quality and technical information' www.aihw.gov.au/youth-justice/data-quality/ (accessed 2 October 2014). The Attorney-General recently explained that "while recognising the value of the JJ NMD, it is the department's position that participation in the report is not cost effective when balanced against its involvement in other national reporting programs." Legislative Council of Western Australia, Reply by the Hon Michael Mischin to Question without notice no. 75 Asked by the Hon Linda Savage (21 May 2013).
- 118 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*.
- 119 Australian Bureau of Statistics, 4519.0 – Recorded Crime – Offenders, 2012–13, Explanatory Notes, [63] www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4519.0Explanatory%20Notes12010%E2%80%9311?OpenDocument (accessed 2 January 2015).
- 120 Australian Bureau of Statistics 4519.0 – Recorded Crime – Offenders, 2012–13, Explanatory Notes, [34].
- 121 M Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14 (1) *Australian Indigenous Law Review*, p 2 www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/articles/AILR%2014-1_Melanie%20Schwartz.pdf (accessed January 2015).
- 122 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, [4.106] www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/04-key-indicators-2014-chapter4.pdf (accessed 2 January 2015).
- 123 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, [4.106].
- 124 Western Australian Legislative Assembly Community Development and Justice Standing Committee, *Making our Prisons Work – Inquiry Into The Efficiency And Effectiveness Of Prisoner Education, Training And Employment Strategies, Final Report*, Recommendation 23, p 112 [www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/6228E6A9C090FDB9482578310040D2B8/\\$file/Report+No.+6+Final+report+Prisons+November+2010.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/6228E6A9C090FDB9482578310040D2B8/$file/Report+No.+6+Final+report+Prisons+November+2010.pdf) (accessed 2 March 2015).

- 125 Senate Standing Committees on Legal and Constitutional Affairs, 'Value of a Justice Reinvestment Approach to Criminal Justice In Australia', p 94 www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/-/media/wopapub/senate/committee/legc on_ctte/completed_inquiries/2010-13/justice_reinvestment/report/report.aspx (accessed 2 January 2015).
- 126 Senate Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, p 97.
- 127 Senate Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice In Australia*, pp 97–98.
- 128 Correspondence with Aboriginal representative body, Western Australia, October 2014 (details withheld).
- 129 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [15].
- 130 Australian Institute of Criminology, *National Crime Prevention Framework (2012)*, pp 13–14 www.aic.gov.au/media_library/aic/ncpf/ncp_framework.pdf (accessed 23 March 2015).
- 131 Australian Institute of Health and Welfare, *Indigenous young people in the juvenile justice system*, p 1 and Figure 6 www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542188 (accessed 22 March 2015).
- 132 K Richards 2011, *What makes juvenile offenders different from adult offenders? Trends and issues in crime and criminal justice*, No.409, February 2011, Australian Institute of Criminology, p 7.
- 133 Interview with A/Assistant Commissioner Laurence Panaia, 10 September 2014, Interview with Aboriginal service provider (identity withheld, August 2014), Interview with court officer (identity withheld September 2014), Interview with Maureen Carter, Nindilingarri Cultural Health Service (5 September 2014): "There needs to be more family support programs ... juvenile justice; they give very little relevance to Aboriginal programs that are developed to keep kids out of trouble, diversion programs like Yiriman, I think that they should be funded so that they can expand and have the workforce to support the Elders."
- 134 Kelly Richards, Lisa Rosevear, Robyn Gilbert, *Promising interventions for preventing Indigenous juvenile offending*, Indigenous Justice Clearinghouse www.indigenousjustice.gov.au/briefs/brief010.pdf (accessed 18 December 2014), pp 5–6.
- 135 Commissioner for Children and Young People, *Youth Justice in Western Australia*, prepared by Professor Harry Blagg www.ccp.ya.gov.au/files/article/Harry%20Blagg%20report%20-%20Youth%20Justice%20in%20Western%20Australia%20-%20FINAL.pdf, p 6. Office of the Inspector of Custodial Services, Directed Review of an Incident at Banksia Hill Detention Centre on 20 January 2013, x and 122 www.oics.wa.gov.au/reports/85-directed-review-incident-banksia-hill-detention-centre-20-january-2013/ (accessed 2 January 2014).
- 136 Office of the Inspector of Custodial Services, Directed Review of an Incident at Banksia Hill Detention Centre on 20 January 2013, x.
- 137 These were established in Geraldton and Kalgoorlie in 2008 and in the Kimberley and Pilbara from 2010: Commissioner for Children and Young People, (2013) *Issues Paper 13*, p 3 www.ccp.ya.gov.au/files/IssuesPapers/Youth%20Justice%20Issues%20Paper%20May%202013.pdf (accessed 2 January).
- 138 Interview with RYJS staff in Broome (8 September 2014). Office of the Inspector of Custodial Service, Directed Review of an Incident at Banksia Hill Detention Centre on 20 January, notes that there has been a "concerted effort to give the youth justice function a sharper focus within the Department." [8.19].
- 139 According to the Department of Corrective Services these services provide "assistance to young people at risk of offending and their families. YDS aim to provide an avenue for informal counselling, advice, referral, education, vocational support and mentoring." Response to Amnesty International questionnaire (12 September 2014).
- 140 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014): Geraldton Streetworkers Aboriginal Corporation (since 2010) and Yaandina Family Centre Inc (since 2013) in Roeburn.
- 141 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 142 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 143 Youth Justice Innovation Fund, Department of Corrective Services www.correctiveservices.wa.gov.au/youth-justice/youth-justice-innovation-fund.aspx (accessed 14 October 2014).
- 144 Department of Corrective Services Annual Report 2013/14, p 59 www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/annual-reports/DCS-2013-2014/dcs-annual-report-2013-2014.pdf
- 145 Productivity Commission, *Report on Government Services 2015*, Table 16A.1, 'State and Territory government real recurrent expenditure on youth justice services, (2013-14 dollars)' www.pc.gov.au/_data/assets/excel_doc/0003/135741/ic-2014-volumef-chapter16-attachment.xlsm (accessed 6 March 2015).
- 146 Western Australian Parliament, Legislative Assembly Estimates Committees 2014, Div 40: Office of the Director of Public Prosecutions (Thursday 22 May 2014), p 451. [www.parliament.wa.gov.au/Hansard/hansard.nsf/0/a42d546a8e7360d948257cf30013bccf/\\$FILE/A39+S1+20140522+p449b-454a.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/a42d546a8e7360d948257cf30013bccf/$FILE/A39+S1+20140522+p449b-454a.pdf) (accessed 6 January 2015).
- 147 According to the 2013/14 annual report costs of detention were \$817 dollars per young person per day. This equates to \$298,205 dollars per year (\$817 x 365). An additional 60 places (x \$298,205) = \$17.89 million.
- 148 President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia – contemporary Issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 21 www.childrenscourt.wa.gov.au/files/Speech_Notre_Dame_2014.pdf (accessed 2 October 2014).
- 149 Committee on the Rights of the Child, *Indigenous Children and their Rights under the Convention*, [25].
- 150 Kelly Richards, Lisa Rosevear, Robyn Gilbert, *Promising interventions for preventing Indigenous juvenile offending*, Indigenous Justice Clearinghouse www.indigenousjustice.gov.au/briefs/brief010.pdf (accessed 18 December 2014), p 5.
- 151 Kelly Richards, Lisa Rosevear, Robyn Gilbert, *Promising interventions for preventing Indigenous juvenile offending*, Brief 10 (2011), p 6 www.indigenousjustice.gov.au/briefs/brief010.pdf (accessed 23 March 2015).
- 152 Interview with young woman, Fitzroy Crossing, 4 September 2014 (details withheld); Interview with Josie Jansz, Deadly Sista Girlz (14 September 2014); Interview with Lloyd Pigram, Life Without Barriers, Broome (8 September 2014); Interview with youth worker (details withheld) (October 2013).
- 153 Programs that support Aboriginal young people that Amnesty International is aware of which are Aboriginal designed and/or run in partnership with Aboriginal people and communities include the Deadly Sista Girlz program run through the Wirrpanda Foundation; Alive and Kicking Goals, run in partnership by the Broome Saints Football Club and Men's Outreach Service in Broome; the Yiriman Project Men's and Women's Groups (funded through Federal Government programs); the Clontarf Academy; Youth Diversion Services undertaken by Geraldton Streetworkers Aboriginal Corporation and Yaandina Family Centre; the Kimberley Girl Competition; Marninwarntikura Women's Resource Centre and Big hArt's Yijala Yala Project.
- 154 Interview with President Reynolds (8 November 2013); Interview with Magistrate Sharrat (1 September 2014); Interview with OIC Andy Stevens, Fitzroy Crossing (4 September 2014) who noted that he is keen work with the Yiriman Project to fund for more camps led by the community Elders (see below under diversion below) for children identified by police and by the courts; Interview with Police officer, Derby, January 2015.
- 155 Interview with President Reynolds (8 November 2013); Interview with Magistrate Sharrat (1 September 2014); Interview with OIC Andy Stevens, Fitzroy Crossing (4 September 2014).
- 156 Kimberley Aboriginal Law and Culture Centre, *Juvenile Justice Diversion Scoping and Theoretical Framework*, 27 October 2013.
- 157 Preferential tendering would see Aboriginal community-controlled organisations or partnerships involving those organisations given preference to tender for contracts to deliver early intervention, prevention and diversion services. This could take the form of local organisations being given the exclusive right to tender, or an opportunity to tender for contracts in advance of other organisations.
- 158 Western Australian Parliament, *Response by the Hon Michael Mischin to Question Without Notice No. 732* asked in the Legislative Council on 26 June 2014 by Hon Sally Talbot.
- 159 The Broome PCYC Learning Centre is an alternate education program for young people that have become disengaged from mainstream schooling. The young people take part in programs to promote "healthier lifestyle choices, positive attitudes and giving these young people a second chance in life." It is run in partnership with Broome Senior High School, Western Australian Police and West Kimberley Youth Justice Services. See www.wapcyc.com.au/content/page/broome-pcyc.html (accessed 2 January 2015).
- 160 In Broome and Kununurra Aboriginal Community Relations Officers have recently been recruited as part of a pilot program that may be rolled out more widely in WA with a focus on creating "trust between police and Aboriginal families, with a focus on reducing juvenile offending" www.abc.net.au/news/2014-03-20/hope-for-new-indigenous-police-trial-to-go-state/5334468 (accessed 20 April 2015); Interview with Broome Police (2 September 2014).
- 161 Interview with Phillip, aged 17, Broome (March 2015).
- 162 President of the Western Australian Children's Court Dennis Reynolds, 'Youth justice in Western Australia – contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, pp 25–26. www.childrenscourt.wa.gov.au/files/Speech_Notre_Dame_2014.pdf (accessed 2 October 2014).

- 163 President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia', p 25.
- 164 Interview with A/Assistant Commissioner Laurence Panaia (10 September 2014).
- 165 President of the Western Australian Children's Court Dennis Reynolds, 'Youth justice in Western Australia - contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 27.
- 166 Interview with legal representatives, August 2014 (details withheld); Interview with Aboriginal community leader, August 2014 (details withheld); Interview with Ben White, ALSWA (5 September 2014).
- 167 Australian Institute of Criminology, *National Crime Prevention Framework*, 2012, p 9 www.aic.gov.au/media_library/aic/ncpf/ncp_framework.pdf (accessed 23 March 2015).
- 168 Hon Liza Harvey MLA (Media Release) *Funding boost for crime prevention projects* (24 February 2015) www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9123 (accessed 23 March 2015).
- 169 Correspondence with Wes Morris, KALACC, 23 February 2015.
- 170 Interview with Don Emmanuel-Smith, Inspector, Youth and Community Engagement Divisions; and Robert Skesteris, Executive Manager, Indigenous and Community Diversity Unit, Community Engagement Division, Strategy and Performance Directorate (11 September 2014). Interview with OIC Ray Thompson, Gosnells sub-district (15 September 2014). Interview with A/Assistant Commissioner Laurence Panaia (10 September 2014).
- 171 This concern was raised in three separate interviews with community organisations in August 2014 (details withheld).
- 172 Interview with OIC Ray Thompson Gosnells Police Station, 15 August 2014.
- 173 Offences contained in Schedules 1 and 2 of the *Young Offenders Act 1994(WA)* cannot be the subject of a caution or Juvenile Justice Team referral. Offences in Schedule 1 include acts or omissions, with intent to harm, causing bodily harm or danger; assault with intent to resist or prevent arrest or detention; sexual offences; drug possession and supply offences; driving without the appropriate driver's licence, reckless and unlicensed driving and offences for driving while drunk or drug affected, which are strict liability offences. Offences in Schedule 2 include murder; manslaughter; assault causing death; attempt to murder; acts intended to cause grievous bodily harm or to resist or prevent arrest; grievous bodily harm; assault occasioning bodily harm; assault with intent to commit or facilitate a crime; assault with intent to do grievous bodily harm; serious assaults; indecent assault and rape; stealing a motor vehicle, aggravated by reckless or dangerous driving; robbery; assault with intent to rob; criminal damage; arson; dangerous driving causing death, injury; and dangerous driving causing bodily harm.
- 174 United Nations Treaty Collection, No 11: Convention on the Rights of the Child (New York, 20 November 1989) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 1 October 2014).
- 175 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008–09 to 2012–13' and Productivity Commission, *Overcoming Indigenous Disadvantage 2011 Report*, Table 10A.5.31 'WA, annual breakdown of juvenile cautions issued, 1994–2007 (a)'. As outlined below, this may, to some extent be explained by variation in the crimes committed by the two cohorts groups and prior offending and criminal records, but as the Snowball study showed, even once these things are controlled for, the difference in the rates of diversion remains "significant and relatively strong": L Snowball, *Diversion of Indigenous Offenders: Trends and Issues in Crime and Criminal Justice* (June 2008, No 355), p 5 http://aic.gov.au/media_library/publications/tandi2/tandi355.pdf (accessed 2 January 2015). It is critical that the WA Government investigate and address the reasons for the difference in the rate of diversion of Aboriginal and non-Aboriginal youth.
- 176 Dennison, Stewart and Hurren (2006). Police cautioning in Queensland: The impact of juvenile offending on pathways. Trends and Issues in *Crime and Criminal Justice*, no. 306, pp 1-6. Canberra: Australian Institute of Criminology, p 6 http://www.aic.gov.au/media_library/publications/tandi2/tandi306.pdf (accessed 2 January 2015).
- 177 Dennison, Stewart and Hurren (2006). Police cautioning in Queensland: The impact of juvenile offending on pathways. Trends and Issues in *Crime and Criminal Justice*, p 6.
- 178 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008–09 to 2012–13' www.pc.gov.au/_data/assets/excel_doc/0007/179404/11-key-indicators-2014-chapter11-attachment.xlsx (accessed 20 November 2014).
- 179 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008–09 to 2012–13'.
- 180 Conducted as part of the Youth and Family Support Service (YFSS) in the regions and Metropolitan Youth Bail Services (MYBS) in the metropolitan area. Since August 2013, MYBS has appointed two Prevention Diversion Officers who are designated to the follow up of WAPOL cautions in the metropolitan area. Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 181 Interview with OIC Andrew Stevens (4 September 2014) Fitzroy Crossing.
- 182 L Snowball, *Diversion of Indigenous Offenders: Trends and Issues in Crime and Criminal Justice* (June 2008, No 355), p 5 http://aic.gov.au/media_library/publications/tandi2/tandi355.pdf (accessed 2 January 2015).
- 183 L Snowball, *Diversion of Indigenous Offenders: Trends and Issues in Crime and Criminal Justice* (June 2008, No 355), p 5.
- 184 Lucy Snowball, *Juvenile Diversion and Indigenous offenders: A study examining juvenile offenders in Western Australia, South Australia and New South Wales*, Table 3: Odds ratios (and 95% confidence intervals) for the two models, WA' www.criminologyresearchcouncil.gov.au/reports/200607-C02.pdf (accessed 2 March 2015).
- 185 L Snowball, *Diversion of Indigenous Offenders: Trends and Issues in Crime and Criminal Justice*, p 19: The other possible factor highlighted in the report was "the lack of diversionary alternatives in regional or remote rural areas", where a large proportion of Aboriginal young people live. Amnesty International considers that a lack of diversionary alternatives in regional and remote areas, as much as racial bias, is a factor that must be addressed by the Western Australian Government in order to overcome systemic discrimination against Aboriginal young people. The Commissioner for Children and Young People notes that "[a]round 60 per cent of Aboriginal children and young people aged 0 to 19 years live outside the Perth metropolitan area compared to 22 per cent of non-Aboriginal children and young people." The impact of a shortage of diversionary alternatives in rural areas will therefore fall heavily on Aboriginal young people. Aboriginal young people have also made up 84 per cent of young people from regional and remote areas in detention over the past five years).
- 186 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper, p 19. http://vals.org.au/static/files/assets/fb552b15/sub_230908.pdf (accessed 5 October 2014).
- 187 VALS submission to the Drugs and Crime Prevention Committee in response to the 'Inquiry into Strategies to prevent high volume offending by young people' Discussion Paper, p 18.
- 188 Sentencing Advisory Council (Victoria), 'Sentencing Children and Young People in Victoria (April 2012), p 33 www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentencing%20Children%20and%20Young%20People%20in%20Victoria.pdf (accessed 24 March 2015). This follow up would appear to be similar to the approach taken by Prevention and Diversion officers in Western Australia.
- 189 *Young Offenders Act 1994 (WA)*, section 28. Again this excludes alleged offences listed in Schedules 1 and 2 of the Young Offenders Act.
- 190 Data provided by the Department of Corrective Services (31 October 2014). Calculation based on figures at end of February, June and October 2009–14.
- 191 Data provided by the Department of Corrective Services (31 October 2014). Calculation based on figures at end of February, June and October 2009–14.
- 192 Western Australian Law Reform Commission (WALRC), Aboriginal Customary Laws Project 94, Discussion Paper, pp 255, 256.
- 193 Aboriginal Legal Service Of Western Australia, Submission to the National Justice CEOs Group, Standing Committee of Attorneys-General on 'National Guidelines or Principles for Restorative Justice Programs and Processes for Criminal Matters', September 2011, p 3.
- 194 Interview with Steven Carter, ALSWA (4 September 2014). Interview with youth justice worker, August 2014 (details withheld). Also conveyed in interviews with non-Aboriginal legal practitioners, August 2014 (details withheld).
- 195 *Young Offenders Amendment Act 2004*, s 19 (amending section 37 of the Young Offenders Act 1994 (WA)).
- 196 Western Australian Parliament, *Legislative Assembly Hansard, Young Offenders Amendment Bill 2004*, Second Reading Speech (18 August 2004) [www.parliament.wa.gov.au/Hansard/hansard.nsf/0/ed19fe8d437836efc82575700016e23e/\\$FILE/A36+S2+20040818+p5160b-5163a.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/ed19fe8d437836efc82575700016e23e/$FILE/A36+S2+20040818+p5160b-5163a.pdf) (accessed 2 January 2014).
- 197 Interview with Stephen Carter, Court Officer ALSWA Fitzroy Crossing (4 September 2014).
- 198 For example ALSWA noted that their "staff in Perth are not aware of any examples where a member of an approved Aboriginal community has been appointed as a Juvenile Justice Team coordinator." ALSWA Response to Amnesty International questionnaire (14 August 2014).
- 199 Interview with Aboriginal youth support worker (details withheld) August 2014.
- 200 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).

- 201 ALSWA Response to Amnesty International questionnaire (14 August 2014).
- 202 *Young Offenders Act 1994 (WA)*, section 68.
- 203 If satisfied that some punishment has occurred, see section 67 *Young Offenders Act 1994 (WA)*.
- 204 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 205 The 2013/14 annual report of the Department of Corrective Services does not show the number of JJT referrals for the most recent year.
- 206 Interview with Ben White, Aboriginal Legal Service Western Australia (5 September 2014). This is addressed in further detail below.
- 207 Interview with Ben White, Aboriginal Legal Service Western Australia (5 September 2014).
- 208 Interview with West Kimberley Youth Justice Services (8 September 2014).
- 209 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 210 As noted in relation to data requests at the beginning of this report, data relating to curfew breaches was requested of police, who agreed to, but did not, provide it.
- 211 Interview with President Reynolds (8 November 2013); Interview with Magistrate Sharrat (1 September 2014); Interview with OIC Andy Stevens, Fitzroy Crossing (4 September 2014).
- 212 President of the Western Australian Children's Court Dennis Reynolds (President Reynolds), 'Youth justice in Western Australia - contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 18.
- 213 Committee on the Rights of the Child, Indigenous Children and their Rights under the Convention, [75].
- 214 Expert Mechanism Advice No. 6 (2014): Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities A/HRC/EMRIP/2014/3/Rev.1, [10].
- 215 Western Australian Law Reform Commission, *Project 94 – Aboriginal Customary Laws*, Discussion Paper (December 2005) p 226. www.lrc.justice.wa.gov.au/_files/P94_DP.pdf (accessed 2 January 2015).
- 216 In 1991 the *Royal Commission into Aboriginal Deaths in Custody National Report* also considered the issues facing Indigenous young people. The National Report recognised that the relationship young Indigenous people have with their family and community is crucial to their empowerment. The report noted that programs that had community involvement and were sensitive to their cultural needs were more successful and recommended that "in the process of negotiating with Indigenous communities and organisations in the devising of Indigenous youth programs, governments should recognise that local community-based and devised strategies have the greatest prospect of success and this recognition should be reflected in funding." E Johnson, (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 5, Recommendation 236 www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading25 (accessed 2 January 2014).
- 217 As provided for under sections 67 and 68 of the *Young Offenders Act 1994 (WA)*.
- 218 Selina Swan, Senior Aboriginal Liaison Officer, Broome Magistrates Court in 'Report for Yiriman Kourd' (6 April 2009), unpublished.
- 219 Selina Swan, Senior Aboriginal Liaison Officer, Broome Magistrates Court in 'Report for Yiriman Kourd' (6 April 2009), unpublished.
- 220 Quoted in Selina Swan, Senior Aboriginal Liaison Officer, Broome Magistrates Court in 'Report for Yiriman Kourd' (6 April 2009), unpublished.
- 221 Draft Overview of Youth Justice Issues in the Kimberley, provided to Amnesty International by Yiriman Men's Group Coordinator Scott Herring, 3 October 2014.
- 222 Interview with Maureen Carter, Nindilingarri Cultural Health Services, Fitzroy Crossing (4 September 2014); Interview with Stephen Carter, ALSWA Court Officer, Fitzroy Crossing; Interview with young woman, Fitzroy Crossing, 4 September 2014 (details withheld). An external evaluation of a wider range of work undertaken by Yiriman recently noted that: "There is also evidence that Yiriman has assisted in the campaign to minimise young people's involvement in the justice system. Indeed, some, including a magistrate, conclude that Yiriman is more capable in this regard than most other diversionary and sentencing options. There is certainly evidence (tracked through case studies) that a range of young people have been nurtured through their involvement in Yiriman. Many young people have used Yiriman as a stepping-stone, moving into positions of leadership in community: Dave Palmer, 'We know they healthy cos they on country with old people': demonstrating the value of the Yiriman Project 2010–2013, 2013, Murdoch University, p 122 www.aph.gov.au/DocumentStore.ashx?id=a91d3581-42ce-4e10-881c-ef04b236e119&subId=205836 (accessed 16 October 2014).
- 223 Interview with Eugene Eades, 5 December 2014.
- 224 Conversation with KALACC coordinator 3 December 2014.
- 225 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, p 49.
- 226 *Young Offenders Act 1994 (WA)*, section 120.
- 227 Interview with Magistrate Steve Sharrat, Broome (1 September 2014).
- 228 Written response by the Aboriginal Legal Service to Amnesty International questionnaire (14 August 2014).
- 229 Interview with Ben White, Aboriginal Legal Service, Broome (5 September 2014).
- 230 Interview with Magistrate Steve Sharrat, Broome (1 September 2014), written response by the Aboriginal Legal Service to Amnesty International questionnaire (14 August 2014).
- 231 Interview with Mala Dharmananda, Department of Corrective Services, Perth (18 June 2014).
- 232 Written response by the Aboriginal Legal Service to Amnesty International questionnaire (14 August 2014).
- 233 Written response by the Aboriginal Legal Service to Amnesty International questionnaire (14 August 2014).
- 234 Interview with Clem Rodney, 6 August 2014; Interview with Eugene Eades, 17 June 2014; Interview with Scott Herring, Yiriman Project Men's Coordinator, 3 September 2014. See also Kimberley Aboriginal Law and Culture Centre 'Juvenile Justice Diversion Scoping and Theoretical Framework' (27 October 2013).
- 235 Department of Corrective Services, response to Amnesty International questionnaire (12 September 2014).
- 236 Department of Corrective Services, response to Amnesty International questionnaire (12 September 2014).
- 237 Human Rights Committee *General Comment 35* (2014), [38], International Covenant on Civil and Political Rights (ICCPR), Article 9, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, [17].
- 238 Human Rights Committee, *General Comment 35* (2014), [38], ICCPR, Article 9, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, [17].
- 239 Unsented detention population includes those who have been refused bail and are awaiting trial and those found guilty and awaiting sentence. AIHW, *Youth Detention Population in Australia 2014*, Tables s12, s15 and s18.
- 240 The Office of the Inspector of Custodial Services noted in Review of an Incident at Banksia Hill Detention Centre on 20 January 2013; the fact that roughly 50 per cent are on remand is not unusual of itself, [8.15]. However, young people are detained at twice the national rate in Western Australia so the rate of unsented detention in Western Australia is extremely high.
- 241 Unsented detention population includes those who have been refused bail and are awaiting trial and those found guilty and awaiting sentence. AIHW, *Youth Detention Population in Australia 2014*, Tables s12, s15 and s18.
- 242 *Bail Act 1982 (WA)*, Schedule 1.
- 243 *Bail Act 1982 (WA)*, Schedule 1, Item 2.
- 244 *Bail Act 1982 (WA)*, Schedule 1, Item 2 (2)(i).
- 245 *Police Manual*, JV 02.03 Juvenile Detainees.
- 246 *Bail Act 1982 (WA)*, Schedule 1, Item 2(2)(ii).
- 247 *Bail Act 1982 (WA)*, Schedule 1, Part C.
- 248 *Bail Act 1982 (WA)*, Schedule 1, Part C.
- 249 K Richards and L Renshaw, *Bail and remand for young people in Australia: a national research project*, Australian Institute of Criminology (No 125), p 45.
- 250 *Young Offenders Act 1994 (WA)*, section 19(2).
- 251 K Richards and L Renshaw, *Bail and remand for young people in Australia: a national research project*, Australian Institute of Criminology (No 125), 71, citing Auditor General for Western Australia 2008; ACCG 2010; Clare et al. 2010; Denning Cotter 2008.
- 252 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, Australian Institute of Criminology (No 125), p 71.
- 253 Interview with OIC Ray Thompson, Gosnells Sub-district (15 August 2014).
- 254 Interview with President of the Children's Court Dennis Reynolds (11 August 2013).
- 255 Amnesty International calculation based on data published by the Commissioner for Children and Young People (Western Australia) in the *State of Western Australia's Children and Young People (CCYP) – Edition Two*, Tables 9.11 and 9.14.
- 256 Interview with Ben White, Managing Solicitor ALSWA (22 July 2013), Interview with ex-police officer October 2013 (details withheld).
- 257 Committee Against Torture, *Concluding Observations – Australia* (2008), CAT/C/AUS/CO/3 [23] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRICAqKb7yhs0Q6oVJgGLf6YX4R0s1VbzFdesXsLhK4ggvdM2olt077cVrVlgiUqMyMIPupW28%2f%2f3eVlqkcKgfuf9HqYJFW3SYLaoAqnPu30bV7HNbtvOT> (accessed 2 January 2015).

- 258 *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 5, Recommendation 242.
- 259 *Royal Commission into Aboriginal Deaths in Custody: National Report*. Canberra: AGPS RCIADIC, Volume 5, Recommendation 242 (c).
- 260 Data provided by Department of Corrective Services on 31 October 2014 (Calculation excludes Perth and Midlands but includes all other regions).
- 261 Clare et al, *An Assessment of the Children's Court of Western Australia*, 2011, p 31 www.law.uwa.edu.au/_data/assets/pdf_file/0005/1894847/2011-An-Assessment-of-the-Childrens-Court-of-Western-Australia.pdf (accessed 2 January 2015).
- 262 Department of Corrective Services Response to Amnesty International questionnaire (12 September 2014).
- 263 Life Without Barriers run the program in Broome and Kununurra and Hope Community Services (previously Drug Arm) run the program in Perth, Geraldton and Kalgoorlie.
- 264 Department of Corrective Services Response to Amnesty International questionnaire (12 September 2014).
- 265 Interviews with Life Without Barriers (1 and 8 September 2014) and Hope Community Services (11 September 2014).
- 266 Interview with Department of Child Protection and Family Support representatives (18 September 2014).
- 267 Interview with Assistant Commissioner Laurence Panaia (10 September 2014).
- 268 Court representative July 2014 (details withheld), Interview with Police, Mirabooka (15 August 2014), Interview with OIC Ray Thompson, Gosnells Sub-district (15 August 2014).
- 269 Interview with Hope Community Services (11 September 2015).
- 270 Written response by the Aboriginal Legal Service Western Australia to Amnesty International questionnaire (14 August 2014). Several attempts were made to arrange an interview with representatives of the Metropolitan Youth Bail Service but this did not eventuate.
- 271 Written response by the Aboriginal Legal Service Western Australia to Amnesty International questionnaire (14 August 2014), Interview June 2014 (details withheld).
- 272 Auditor General for Western Australia (2008) *Review of the Juvenile Justice System*, p 9.
- 273 Interview with Department of Child Protection and Family Support representatives (18 September 2014).
- 274 Interview with Department of Child Protection and Family Support representatives (18 September 2014).
- 275 Interview with Department of Child Protection and Family Support representatives (18 September 2014).
- 276 Department for Child Protection and Family Support, *3.10 Young Offenders – Including Children in the CEO's Care* <http://manuals.dcp.wa.gov.au/manuals/cpm/Pages/10YoungOffenders-IncludingChildrenintheCEO'sCare.aspx#CPMProcedure13> (accessed 3 December 2014).
- 277 Department for Child Protection and Family Support, *3.10 Young Offenders – Including Children in the CEO's Care*.
- 278 Department for Child Protection and Family Support, *3.10 Young Offenders – Including Children in the CEO's Care*.
- 279 Interview with Ben White, Managing Solicitor ALS WA Broome (22 July 2013); Interview with Aboriginal leader, July 2014 and February 2015 (details withheld); Interview with staff of West Kimberly Regional Youth Justice Service (8 September 2014); Interview with Xavier Sellathambu, Solicitor, ALSWA Geraldton (11 August 2014). Data in relation to bail condition breaches resulting in remands in custody is not available. As outlined in the introductory section relating to data request, Amnesty International sought such information from Western Australia Police. Despite undertaking to provide it, this information was not received.
- 280 Interview with Broome Police, 2 September 2014.
- 281 *Young Offenders Act 1994 (WA)*, s 7 (c).
- 282 *Bail Act 1982 (WA)*, Schedule 1, Item 2 (1a).
- 283 *Bail Act 1982 (WA)*, Schedule 1, Item 2 (1a).
- 284 Interviews June 2014 and February 2015, Details withheld.
- 285 Interview with Aboriginal community member, July 2014 (details withheld), Interview with Aboriginal youth support worker August 2014 (details withheld), Interview with legal practitioners, July 2014 (details withheld), Interview with Ben White, Aboriginal Legal Service Western Australia, Broome (22 July 2013).
- 286 Clare et al. *An Assessment of the Children's Court of Western Australia*, 2011, p 26. www.law.uwa.edu.au/_data/assets/pdf_file/0005/1894847/2011-An-Assessment-of-the-Childrens-Court-of-Western-Australia.pdf (accessed 20 April 2015).
- 287 This term refers to a wide range of Aboriginal and Torres Strait Islander protocols relating to the death of kin.
- 288 Interview with Ben White, Aboriginal Legal Service Western Australia, Broome (5 September 2014), Interview with West Kimberley Regional Youth Justice Service, Broome (8 September 2014).
- 289 Interview with OIC Ray Thompson, Gosnells Sub-district (15 August 2014).
- 290 Interview with Aboriginal youth support worker, August 2014 (details withheld).
- 291 Interview at Mirabooka Police Station with Acting Superintendent Wayne Dohmen, Detective Senior Sergeant Wilson and Senior Constable John Foster, 15 August 2014.
- 292 Interview with Murray Stubbs, Court Officer, Aboriginal Legal Service, Kalgoorlie (6 November 2013); Interview with Ben White, Aboriginal Legal Service, Broome (5 September 2014); Interview with Glen Dooley, Aboriginal Legal Service, Kununurra (25 July 2013); Interview with West Kimberley Regional Youth Justice Service, Broome (8 September 2014).
- 293 Clare et al. *An Assessment of the Children's Court of Western Australia*, 2011, p 9.
- 294 Interview with Ben White, Aboriginal Legal Service, Broome (5 September 2014).
- 295 Interview with Xavier Sellathambu, Aboriginal Legal Service, Geraldton (11 August 2014).
- 296 Interview with OIC Ray Thompson, Gosnells sub-district, Perth (15 August 2014).
- 297 Interview with Inspector Shayne Atkins, Broome Police Complex (3 September 2014).
- 298 Interview with OIC Ray Thompson, Gosnells sub-district, Perth (15 August 2014).
- 299 Interview with Xavier Sellathambu, Aboriginal Legal Service, Geraldton (11 August 2014); Interview with Ben White, Aboriginal Legal Service Broome.
- 300 *Young Offenders Act 1994 (WA)*, s 46(5a).
- 301 *Criminal Code Act Compilation Act 1913 (WA)*, sections 297(5) and 318(2).
- 302 A dwelling, or home, is defined in the *Criminal Code Act Compilation Act 1913 (WA)* Part 1, as a place ordinarily used for human habitation.
- 303 *Criminal Code Amendment Act 2009 (WA)*.
- 304 *Criminal Code Amendment Act 2013 (WA)*.
- 305 *Criminal Code Act 1913(WA)*, sections 297(8) and 318(5).
- 306 Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 September 2013, 4586 (John Quigly).
- 307 *Criminal Code Act Compilation Act 1913*, section 401(4)(b).
- 308 *Criminal Code Act Compilation Act 1913*, section 401(4).
- 309 The person must have been convicted of a home burglary offence and then, following that conviction, must again have been convicted of a home burglary offence: *Criminal Code Act Compilation Act 1913*, section 400 (3). See also *Young Offenders Act 1994 (WA)*, section 189.
- 310 *Criminal Code Act Compilation Act 1913 (WA)*, section 400(4)(b). It is common for a young person to be found guilty and have a sentence imposed without a conviction being recorded, where undertakings are made or alternative programs are considered 'punishment'; *Young Offenders Act 1994 (WA)*, s 55. A recorded conviction also expires for young people after two years (except for murder, attempted murder and manslaughter). These provisions are intended to have a beneficial effect in terms of juveniles who are found guilty not having a criminal record when they move into adulthood but these still count for three strikes legislation.
- 311 David Saylor, 'Three Strikes by the Burglar: The Police v DCJ (a child)', unreported (1997) 4(2) *Indigenous Law Bulletin*, p 1.4 www.austlii.edu.au/journals/ILB/1997/48.html (accessed 2 January 2015).
- 312 David Saylor, 'Three Strikes by the Burglar: The Police v DCJ (a child)', unreported (1997) 4(2) *Indigenous Law Bulletin*, p 14.
- 313 President of the Western Australian Children's Court Dennis Reynolds, 'Youth justice in Western Australia – contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 19.
- 314 *Criminal Code Act Compilation Act 1913*, sections 297(5)(b) and 318(2)(b).
- 315 Australian Law Reform Commission Report 84, *Seen and Heard: Priority for Children in the Legal Process*, 19.55 www.alrc.gov.au/publications/19-sentencing/sentencing-options (accessed 2 January 2015).
- 316 Australian Law Reform Commission Report 84, *Seen and Heard: Priority for Children in the Legal Process*, [19.64].
- 317 Western Australian Parliament, Legislative Assembly Estimates Committees 2014, Div 40: Office of the Director of Public Prosecutions (Thursday 22 May 2014), p 451, Mr J McGrath [www.parliament.wa.gov.au/Hansard/hansard.nsf/0/a42d546a8e7360d948257cf30013bccf/\\$FILE/A39+S1+20140522+p449b-454a.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/a42d546a8e7360d948257cf30013bccf/$FILE/A39+S1+20140522+p449b-454a.pdf) (accessed 6 January).
- 318 Department of Justice (WA), Review of section 401 of the Criminal Code, (2001), 24.
- 319 N Morgan, H Blagg and V Williams for the Aboriginal Justice Council, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, 2001, p 3, www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2002_04/hra_mandsent/submissions/sub89_pdf.ashx (accessed 2 January 2015).

- 320 President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia – contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 19.
- 321 Department of Corrective Services data provided to Amnesty International on 31 October 2014.
- 322 Convention on the Rights of the Child, Article 40(4).
- 323 Committee against Torture *Concluding observations on the fourth and fifth periodic reports of Australia* (2014) CAT/C/AUS/CO/4-5, [12]. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/249/01/PDF/G1424901.pdf?OpenElement>.
- 324 *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)*, clause 20.
- 325 *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)*. These include Murder (clause 5) Manslaughter (clause 6) Unlawful Assault Causing Death (clause 7), Attempt to unlawfully kill (clause 8), Acts intended to cause grievous bodily harm or prevent arrest (clause 9), Grievous bodily harm (clause 10), Sexual offences (clauses 11 and 12), Aggravated indecent assault (clause 13) , Sexual penetration without consent (clause 14), Aggravated sexual penetration without consent (clause 15), Sexual coercion (clause 16), Aggravated sexual coercion (clause 17), Incapable person, sexual offences against (clause 18).
- 326 *Criminal Code Act Compilation Act 1913*, section 400.
- 327 In the course of the parliamentary debate on the Bill, three cases were cited by the Western Australian Government in support of this aspect of the legislation. All three related to adult offenders. *Parliamentary Debates (Hansard)*, 18 March 2015, [www.parliament.wa.gov.au/Hansard/hansard.nsf/0/93C33D9D27B3B32448257E0E00300905/\\$File/A39%20S1%2020150318%20All.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/93C33D9D27B3B32448257E0E00300905/$File/A39%20S1%2020150318%20All.pdf) (accessed 23 March 2015).
- 328 President of the Western Australian Children's Court Dennis Reynolds, 'Youth justice in Western Australia – contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 5.
- 329 President of the Western Australian Children's Court Dennis Reynolds, 'Youth Justice in Western Australia - contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 5. The Commissioner for Corrective Services recently noted that on Department of Corrective Services Modelling suggests that a space for an extra 60 juveniles will be required at Banksia Hill by the fourth year of the laws operation: Western Australian Parliament, Legislative Assembly Estimates Committees 2014, Division 68: Corrective Services (Thursday 22 May 2014).
- 330 President of the Western Australian Children's Court Dennis Reynolds, 'Youth justice in Western Australia – contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p 8.
- 331 *Criminal Code Act Compilation Act 1913 (WA)*, s 29.
- 332 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice', [32] www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (accessed 16 January 2015).
- 333 Committee on the Rights of the Child, *Concluding Observations – Australia* (20 October 2005) CRC/C/15/Add.268, [73] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPpRiCAqKb7yhsnXZ0ChBsrwmcY8%2f%2bFNoDGE9kezfU6QQVhCpsu50DnholmUW11ikkcmdS4vFnPoND%2bPodjbTyzuRqTYMXTVpTOJzXW8fLUQG%2bc2XatsTc4> (accessed 28 November 2014).
- 334 Committee on the Rights of the Child, *Concluding Observations – Australia* (20 October 2005) CRC/C/15/Add.268, [73-74] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPpRiCAqKb7yhsnXZ0ChBsrwmcY8%2f%2bFNoDGE9kezfU6QQVhCpsu50DnholmUW11ikkcmdS4vFnPoND%2bPodjbTyzuRqTYMXTVpTOJzXW8fLUQG%2bc2XatsTc4> (accessed 28 November 2014).
- 335 Committee on the Rights of the Child, *Concluding Observations – Australia* (28 August 2012) CRC/C/AUS/CO/4 [84] <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPpRiCAqKb7yhsnXZ0ChBsrwmcY8%2f%2bFNoDGE9kezfU6QQVhCpsu50DnholmUW11ikkcmdS4vFnPoND%2bPodjbTyzuRqTYMXTVpTOJzXW8fLUQG%2bc2XatsTc4> (accessed 28 November 2014).
- 336 Doli incapax 'means a presumption that a child is "incapable of crime" under legislation or common law: see Australian Institute of Criminology, 'The age of criminal responsibility', Crime facts info no. 106 ISSN 1445-7288 Canberra (2005) www.aic.gov.au/publications/current%20series/cfi/101-120/cfi106.html (accessed 19 January 2015).
- 337 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [30] www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (accessed 2 April 2015).
- 338 Australian Institute of Health and Welfare, *Youth justice in Australia 2012–13*. Bulletin no. 120. Cat. no. AUS 179, 2014. Table S76b: 'Young people in detention during the year by age, sex and Indigenous status, Australia (excluding WA and NT), 2012–13'. Data not yet available for 2013/14. Western Australia and the Northern Territory did not provide JJ NMDs data (see Chapter 5 regarding data).
- 339 Data provided to Amnesty International by Department of Corrective Services on 31 October 2014.
- 340 Australian Institute of Health and Welfare 2014. *Youth justice in Australia 2012–13*. Bulletin no. 120. Cat. no. AUS 179, 2014. Table S76b: 'Young people in detention during the year by age, sex and Indigenous status, Australia (excluding WA and NT), 2012–13'. Data not yet available for 2013/14.
- 341 Committee on the Rights of the Child, *General Comment No. 10* (2007) 'Children's rights in juvenile justice' [30]
- 342 Australian Health Ministers' Advisory Council (2012), *Aboriginal and Torres Strait Islander Health Performance Framework 2012*, pp 95–96. [www.health.gov.au/internet/main/Publishing.nsf/Content/F766FC3D8A697685CA257BF0001C96E8/\\$File/hpf-2012.pdf](http://www.health.gov.au/internet/main/Publishing.nsf/Content/F766FC3D8A697685CA257BF0001C96E8/$File/hpf-2012.pdf) (accessed 28 November 2014).
- 343 Aboriginal Legal Service of Western Australia, Submission to the Australian Human Rights Commission, Access to justice for people with disability, Issues Paper, April 2013, p 2 www.humanrights.gov.au/sites/default/files/Sub45%20Aboriginal%20Legal%20Service%20of%20Western%20Australia_0.pdf (accessed 2 January 2014).
- 344 Aboriginal Legal Service of Western Australia Submission to the Australian Human Rights Commission, *Access to justice for people with disability* Issues Paper, April 2013, p 2.
- 345 L Burns et al, 'Counting Fetal Alcohol Spectrum Disorder in Australia: the evidence and the challenges', *Drug and Alcohol Review* (2013) 32, p 461.
- 346 Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (*FASD: The Hidden Harm*), p viii www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/spla/fasd/report/fullreport.pdf (accessed 2 January 2015).
- 347 Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (*FASD: The Hidden Harm*), p vii.
- 348 See e.g. Yajilarra: the story of the women of Fitzroy Crossing <https://fasdprevention.wordpress.com/2010/10/15/yajilarra-the-story-of-the-women-of-fitzroy-crossing/> (accessed 2 January 2015).
- 349 Early Life Trauma "generally refers to the traumatic experiences that occur to children aged 0–6...[R]esearch has shown that young children are affected by traumatic events, even though they may not understand what has happened. The traumas experienced can be the result of intentional violence – such as child physical or sexual abuse, or domestic violence – or the result of natural disasters or accidents. Young children may also experience traumatic stress in response to painful medical procedures or the sudden loss of a parent/carer or family member. Children suffering from traumatic stress symptoms generally have difficulty regulating their behaviours and emotions." Kimberley FASD Resource Group, *Understanding and addressing the needs of children and young people living with Fetal Alcohol Spectrum Disorders (FASD)*, http://kimberleyfasdresource.com.au/pdf/FASD_ResourceForTeachers.pdf (accessed 23 December 2014).
- 350 Acquired brain injury "refers to any damage to the brain that occurs after birth (with the exception of Fetal Alcohol Spectrum Disorder – FASD). That damage can be caused by an accident or trauma, by a stroke, a brain infection, by alcohol or other drugs or by diseases of the brain like Parkinson's disease." Brain Injury Australia, *About Acquired Brain Injury*, www.braininjuryaustralia.org.au/index.php?option=com_content&view=article&id=2&Itemid=3 (accessed 23 December 2014).
- 351 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, p 96.
- 352 Written response by the Aboriginal Legal Service to Amnesty International questionnaire (14 August 2014).
- 353 The Liliwan Project is a partnership between Nindilingarri Cultural Health Services, Marninwarntikura Woman's Resource Centre, The George Institute for Global Health and the Discipline of Paediatrics and Child Health at The University of Sydney Medical School. See www.georgeinstitute.org.au/projects/marulu-overcoming-fetal-alcohol-spectrum-disorders-fasd (accessed 2 January 2015).
- 354 Fitzpatrick, J. P., Latimer, J., Carter, M., Oscar, J., Ferreira, M. L., Carmichael Olson, H., Lucas, B. R., Doney, R., Salter, C., Try, J., Hawkes, G., Fitzpatrick, E., Hand, M., Watkins, R. E., Martiniuk, A. L., Bower, C., Boulton, J. and Elliott, E. J. (2015), Prevalence of fetal alcohol syndrome in a population based sample of children living in remote Australia: The Liliwan Project. *Journal of Paediatric Child Health*. p 6 <http://onlinelibrary.wiley.com/doi/10.1111/jpc.12814/pdf> (accessed 19 January 2015).
- 355 Francis Morphy, *Population, People and Place: The Fitzroy Valley Population Project*, <http://caepnr.anu.edu.au/system/files/Publications/WP/CAEPRWP70.pdf> (accessed 2 January 2015).
- 356 Fitzpatrick, J. P., Latimer, J., Carter, M., Oscar, J et al (2015), 'Prevalence of fetal alcohol syndrome in a population based sample of children living in remote Australia: The Liliwan Project'. *Journal of Paediatric Child Health*. p 4.

- 357 Fitzpatrick, J. P., Latimer, J., Carter, M., Oscar, J et al (2015), Prevalence of fetal alcohol syndrome in a population based sample of children living in remote Australia: The Lirilwan Project. *Journal of Paediatric Child Health*, p 6.
- 358 Fitzpatrick, J. P., Latimer, J., Carter, M., Oscar, J et al (2015), 'Prevalence of fetal alcohol syndrome in a population based sample of children living in remote Australia: The Lirilwan Project'. *Journal of Paediatric Child Health*, p 6.
- 359 Evidence of CJ Wayne Martin to the Perth Public Hearing of the House of Representatives, Inquiry into the Over-representation of Indigenous Young People in the Criminal Justice System, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommrep%2F12899%2F0000%22> (accessed 2 January 2015).
- 360 Supreme Court of Western Australia, Equality before the Law Bench Book, 4.1.6 www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf (accessed 2 January 2015).
- 361 Submission by Catherine Crawford to House of Representatives, Inquiry into The Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities. Catherine Crawford noted in this submission that "I am not speaking on behalf of the Children's Court. Any observations, or opinions expressed, are my own", p 4 www.aph.gov.au/DocumentStore.ashx?id=0960e852-2458-4615-b358-b90a3643623c&subId=253716 (accessed 13 October 2014).
- 362 Cited in Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Fetal Alcohol Spectrum Disorders (*FASD: The Hidden Harm*), p 137.
- 363 Interview with Jane Pedersen and Jen Schwab, Marninwarntikura Women's Resource Centre, Fitzroy Crossing (4 September 2014).
- 364 Catherine Crawford, 'Justice system failing to deal with Fetal Alcohol Spectrum Disorder', Radio National Law Report, 10 December 2013, www.abc.net.au/radionational/programs/lawreport/fetal-alcohol-spectrum-disorder/5144978 (accessed 2 October 2014).
- 365 Samantha Parkinson, 'What Impact does FASD have on the Juvenile Justice System?' Presentation to Australasian Youth Justice Conference—Changing trajectories of offending and reoffending, 22 May 2013, www.aic.gov.au/media_library/conferences/2013-youthjustice/presentations/parkinson.pdf (accessed 2 January 2015).
- 366 ALSWA written response to Amnesty International Questionnaire (12 August 2014).
- 367 Interview with Broome Police (2 September 2014); Interview with OIC Andy Stevens (4 September 2014); correspondence from Shayne Atkins, Inspector, Kimberley District Office (18 October 2014).
- 368 Committee on the Rights of the Child, *General Comment 12* (2009) 'The right of the child to be heard' CRC/C/GC/12, [34].
- 369 Submission by Catherine Crawford to House of Representatives, Inquiry into The Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities, p 5.
- 370 Interview with Magistrate Steve Sharratt, Broome (1 September 2014); Interview with Peter Collins, Victoria Williams and Julie Waud, ALSWA, Perth (16 July 2014).
- 371 Submission by Catherine Crawford to House of Representatives Inquiry into 'The Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities', p 5.
- 372 Interview with Magistrate Steve Sharratt, Broome (1 September 2014); Interview with Peter Collins, Victoria Williams and Julie Waud, ALSWA, Perth (16 July 2014).
- 373 *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, section 9.
- 374 *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, sections 16(5) and 19(4).
- 375 *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, sections 16(5) and 19(4), section 24.
- 376 Mentally Impaired Accused Review Board, Annual Report 2013/14, p 20 [www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912252a90dac2138245b7c948257d71002ad59a/\\$file/2252.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912252a90dac2138245b7c948257d71002ad59a/$file/2252.pdf) (accessed 28 November 2014).
- 377 Mentally Impaired Accused Review Board – Annual Report 2013/14, p 13.
- 378 Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, p 4 www.oics.wa.gov.au/wp-content/uploads/2014/05/MIA-Report-Final.pdf (accessed 28 November 2014).
- 379 Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, p 10.
- 380 Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, iii.
- 381 Mentally Impaired Accused Review Board – Annual Report 2013/14, p 24 [www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912252a90dac2138245b7c948257d71002ad59a/\\$file/2252.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912252a90dac2138245b7c948257d71002ad59a/$file/2252.pdf) (accessed 28 November 2014).
- 382 Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, p 18 www.oics.wa.gov.au/wp-content/uploads/2014/05/MIA-Report-Final.pdf (accessed 28 November 2014).
- 383 Correspondence with the Western Australian Disability Services Commission (5 March 2015), Media Release by Disability Services Minister Helen Morton, 'Western Australia leads on disability justice' www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9131 (accessed 5 March 2015).
- 384 Disability Services Commission, 'Disability Justice Centre' www.disability.wa.gov.au/reform1/reform/disability-justice-centre/ (accessed 24 March 2015).
- 385 Correspondence with the Western Australian Disability Services Commission (5 March 2015), Media Release by Disability Services Minister Helen Morton, 'Western Australia leads on disability justice' www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9131 (accessed 5 March 2015).
- 386 Mentally Impaired Accused Review Board– Annual Report 2013/14, p 24.
- 387 ABC News, 'Courts need options for dealing with mentally impaired: FPDN', 17 September 2014, 2014, www.abc.net.au/news/2014-09-17/calls-for-changes-to-indefinite-detention-laws/5751460 (accessed 17 October 2014).
- 388 ABC News, 'Indefinite jail terms for FASD sufferers inappropriate, WA Chief Justice Wayne Martin says', 18 September 2014, www.abc.net.au/news/2014-09-18/wa-chief-justice-opposes-indefinite-jail-for-fasd-sufferers/5754234 (accessed 2 January 2015).
- 389 Human Rights Committee, *General Comment 35* Article 9: Liberty and security of person (Advance unedited version) http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_35_7554_E.doc (accessed 2 January 2014).
- 390 *Young Offenders Act 1994 (WA)*, section 22B.
- 391 *Young Offenders Act 1994 (WA)*, Schedules 1 and 2: listed above in endnote 7.
- 392 *Young Offenders Act 1994 (WA)*, section 23(1): It further provides that "In deciding whether the number of previous offences would make it inappropriate only to give a caution for an offence, the seriousness of the offence and of previous offences is to be taken into account."
- 393 Conducted as part of the Youth and Family Support Service (YFSS) in the regions and Metropolitan Youth Bail Services (MYBS) in the metropolitan area. Since August 2013, MYBS has appointed two Prevention and Diversion Officers who are designated to follow up police cautions in the metropolitan area: Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).
- 394 *Young Offenders Act 1994 (WA)*, section 29. Under s 29(2): A young person is not to be taken to have previously offended against the law merely because he or she has been cautioned, or is participating, or about to participate in a Juvenile Justice Team.
- 395 Department of Corrective Services Juvenile Justice Team – Fact Sheet www.correctiveservices.wa.gov.au/_files/youth-justice/jjt-fact-sheet.pdf (accessed 16 October 2014).
- 396 *Young Offenders Act 1994(WA)*, section 25(4).
- 397 *Young Offenders Act 1994 (WA)*, section 42.
- 398 Bail Act 1982 (WA), Schedule 1.
- 399 *Bail Act 1982 (WA)*, Schedule 1, Item 2 (2)(i).
- 400 *Police Manual*, JV 02.03 Juvenile Detainees.
- 401 *Bail Act 1982 (WA)*, Schedule 1, Item 2(2)(ii).
- 402 *Bail Act 1982 (WA)*, section 19A.
- 403 K Richards and L Renshaw, *Bail and remand for young people in Australia: a national research project*, Australian Institute of Criminology (No 125), p 46 www.aic.gov.au/media_library/publications/rpp/125/rpp125.pdf (accessed 1 October 2014).
- 404 *Young Offenders Act 1994 (WA)*, sections 22 and 25.
- 405 Department of Corrective Services, written response to questionnaire prepared by Amnesty International (12 September 2014) and Interview with court representative – July 2014 (details withheld).
- 406 Department of Corrective Services, written response to questionnaire prepared by Amnesty International (12 September 2014).
- 407 Department of Corrective Services, written response to questionnaire prepared by Amnesty International (12 September 2014).
- 408 Interview with legal practitioners August 2014 (details withheld); Written response from the Aboriginal Legal Services to a questionnaire prepared by Amnesty International (14 August 2014).
- 409 As provided for under sections 67 and 68 of the Young Offenders Act 1994 (WA).
- 410 *Young Offenders Act 1994 (WA)*, s 46(1)(b).
- 411 *Young Offenders Act 1994 (WA)*,s 46(1)(e).
- 412 *Young Offenders Act 1994 (WA)*, s 46(5).
- 413 *Young Offenders Act 1994 (WA)*, s 120(1).
- 414 *Young Offenders Act 1994 (WA)*, Pt 7, Div 6.
- 415 *Young Offenders Act 1994 (WA)*, Pt 7.
- 416 *Young Offenders Act 1994 (WA)*, s 101.
- 417 *Young Offenders Act 1994 (WA)*, s 46(5a).
- 418 *Criminal Code Act Compilation Act 1913*, sections 297(5) and 318(2).
- 419 *Criminal Code Act Compilation Act 1913*, section 401(4)(b). Home is defined in the Criminal Code Act 1913 (WA) as a place ordinarily used for human habitation.



Amnesty International is a global movement of more than 7 million people in over 150 countries and territories who campaign to end grave abuses of human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We are independent of any government, political ideology, economic interest or religion – funded mainly by our membership and public donations.

**AMNESTY
INTERNATIONAL**



Amnesty International Australia
ABN 64 002 806 233
Locked Bag 23
Broadway NSW 2007

www.amnesty.org.au