

The Royal Commission in to the Protection and Detention of Children in the Northern Territory

**Submission of the National Justice Project on
Behalf of Jane Jones***

15 June 2017

*names have been changed to protect privacy

Contact

George Newhouse

Principal Solicitor

National Justice Project

Level 2

2 Guilfoyle Avenue

Double Bay NSW 2028

T: Privacy

E: georgen@justice.org.au

W: <http://www.justice.org.au>

About the National Justice Project

The National Justice Project (NJP) is a legal centre whose mission is to promote social justice, liberty, accountability and equality for all people.

We advance human rights through evidence based advocacy, strategic litigation, research and conducting test-case litigation in particular for the Australians in need.

We advance the collection, assessment and dissemination to the community of information relating to the law.

We advance the education of the community with respect to the law, their rights and responsibilities.

We promote social, economic and legislative reforms for the purpose of immediately relieving the distress, disadvantage and suffering experienced by the Indigenous Australians and other Australians who are in need.

Contents

1. Foreword.....	4
2. Acknowledgements.....	5
3. Introduction.....	5
4. Summary of Recommendations.....	6
5. Background.....	8
5.1. Anna: Her Story.....	8
5.2. Anna’s Family: Their Treatment.....	12
6. Legal Framework.....	13
6.1. International Law.....	13
6.2. Domestic Law.....	16
6.2.1. Federal Law.....	16
6.2.2. Northern Territory Law.....	16
7. Child Removals.....	17
7.1. Principles of Child Removal and Protection.....	17
7.2. Removal of Aboriginal Children.....	18
7.3. Pathway from Intervention to Placement.....	21
7.3.1. Child Privacy.....	22
7.3.2. Diversion Procedures.....	22
8. Out of Home Care.....	24
8.1. Youth Detention Facilities.....	24
8.2. Standard of Care.....	25
9. Alternatives to Child Removals – A Therapeutic Approach.....	28
9.1. Community Based and Culturally Appropriate Responses.....	29
9.2. Individually Tailored Care Plans.....	29
9.3. Mental Health Assessment and Support.....	30
10. Raising the Age of Criminal Responsibility.....	32
11. Conclusion.....	33

Foreword

Anna Jones (whose name has been changed to protect her privacy) is a [redacted] Aboriginal girl who is a ward of the state. She was removed from her family by the Northern Territory Department of Children and Families in [redacted]. [redacted] has been treated with neglect in Government care. Consequently, she has been in and out of the youth detention system. Her great-grandmother Jane Jones (whose name has also been changed to protect Anna's privacy) was Anna's primary care giver before Anna became a ward of the state. She has been denied contact with Anna and involvement in her care. Her family wants reform of the system to prevent such neglect from occurring in the future.

This submission on behalf of Anna's great-grandmother, Jane, focuses on the following critical aspects:

- The overrepresentation of Aboriginal children in out of home care;
- Removal of children from their families and communities, and the pathway to detention from out of home care;
- The experience of children and their families while children are in out-of-home care;
- The lack of agency and self-determination afforded to Indigenous families and communities; and
- The systemic failures of the existing child protection framework which require reform and reallocation of resources.

Anna's family hope that she will be reunited with them, and that they be given the support and resources necessary for this to be a smooth transition. If this is not possible, they hope that Anna can be placed in a foster family that provides a safe and supportive environment for her to live in, and that she can return to school to pursue her education. They hope this submission will be able to cast a light on the failings of the youth detention and out of home care systems. Anna's experience should spur on reform of Northern Territory policies regarding child removals, and the treatment of children and young people in youth detention facilities.

George Newhouse

Principal Solicitor

National Justice Project

1. Acknowledgements

NJP acknowledges and pays respect to Anna, her family, and the Indigenous peoples of Australia. Anna and her family are First Nations **CI** residing in the Northern Territory.

2. Introduction

The Northern Territory Royal Commission is authorised and required to inquire into the protection and detention of children in the Northern Territory, with particular reference to:

- a) Failings in the child protection and youth detention systems;
- b) The treatment of children and young persons detained at youth detention facilities;
- c) Whether any such treatment may:
 - i. Amount to a breach of a law of the Commonwealth; or
 - ii. Amount to a breach of a law in force in the Northern Territory; or
 - iii. Amount to a breach of a duty of care, or any other legal duty, owed by the Government of the Northern Territory to a person detained; or
 - iv. Be inconsistent with, or contrary to, a human right or freedom that:
 - A. Is embodied in a law of the Commonwealth or of the Northern Territory; and
 - B. Is recognised or declared by an international instrument; or
 - v. Amount to a breach of a rule, policy, procedure, standard or management practice that applied to any or all of the relevant facilities;
- d) Both:
 - i. What oversight mechanisms and safeguards were in place to ensure that the treatment of children and young persons detained is appropriate; and
 - ii. Whether those oversight mechanism and safeguards have failed, or are failing to prevent inappropriate treatment, and if so, why;
- e) Whether there were deficiencies in the organisational culture, structure or management in, or in relation to, the relevant facilities.

The National Justice Project is making this submission on behalf of our client, Jane Jones, whose granddaughter Anna was taken into the care of the Northern Territory Department of Children and Families in **CI**. NJP believes that Anna's case relates to each of the above terms of reference.

3. Summary of Recommendations

Recommendation 1: Indigenous families should have autonomy to care for their own children and should be supported through family training and funding for community-led intervention and rehabilitation programs. While removal of children must only be used as an option of last resort, where children are to be removed, the Aboriginal community should be consulted and Aboriginal Child Placement Principle must be put into action to ensure kinship care for Indigenous children.

Recommendation 2: The family and the Aboriginal community should have input in life decisions for children in the care and custody of the state, and, unless there are child safety issues, should be kept regularly informed about the child's welfare.

Recommendation 3: Young people's right to privacy should be incorporated into and protected by Northern Territory legislation.

Recommendation 4: Schools should be a place of safety and trust for children. An arrest or removal from a school environment should take place only in the most extreme and urgent circumstances, and then in a discreet and sensitive manner. A heavy police presence and the use of restraints should be avoided at all costs.

Recommendation 5: Courts should be further empowered to facilitate the diversion of young people away from the criminal justice system.

Recommendation 6: International standards of care for young people in out-of-home care and detention should be reflected in domestic law, to strengthen accountability for the care of young people and protect their human dignity.

Recommendation 7: Staffing policies for youth care and detention facilities should be reviewed to ensure that staffing levels are adequate and that staff have the professional capacity to undertake the work.

Recommendation 8: Staff should be required to complete comprehensive training on the issues of cultural sensitivity and the management of mental health issues.

Recommendation 9: An independent oversight body should be established in order to report on the standards of care and condition in youth detention facilities.

Recommendation 10: Case plans should be tailored to the unique circumstances and characteristics of the young person.

Recommendation 11: Treatment plans should be communicated with the young person's family and carers, to assist in reintegration.

Recommendation 12: The Northern Territory Government should initiate a study into the health of young people in the out-of-home care and youth justice systems.

Recommendation 13: Health assessments should be provided to all young people identified as being at risk, as soon as they come into contact with the justice system or the Department of Children and Families. This should include screening for FASD, mental health issues, and drug and alcohol abuse. Young people should be referred to specialists depending on the outcome of this initial assessment.

Recommendation 14: The Northern Territory Government should commit to funding and providing resources for community based therapeutic care and rehabilitative service options for young people, particularly in regional and remote areas. These should include specialist mental health and drug and alcohol rehabilitative services.

Recommendation 15: Programs should be developed to manage and reduce the rate of young people in youth detention who are at risk of suicidal or self-harming behaviour.

4. Background

4.1. Anna: Her Story

Anna is a [redacted] Aboriginal girl of the [redacted] people. When she was [redacted], her mother was moved to a mental health facility. Since then, her great-grandmother Jane has been her primary caregiver, until Anna became a ward of the state in [redacted]. Family members and friends of the family have commented that the household in which Anna was raised was loving, supportive and healthy.

Jane and other relatives of Anna had concerns about Anna's mental health from a young age. Anna's mother had persistent mental health issues, drank heavily and used drugs whilst pregnant. Anna's great-aunt believes Anna displays symptoms of Foetal Alcohol Spectrum Disorder (FASD). As a result of these concerns, Anna's family made repeated requests for a psychological assessment of Anna. They hoped to be able to support and provide appropriate care for her.

Anna was first taken into the care of the Department of Children and Families (NT) in [redacted] when Anna was [redacted]. She had been staying in [redacted] with another family for a week when an 'incident' occurred. That family responded to the incident by taking Anna to the hospital in [redacted]. Jane has never been informed of what the incident was, nor of the medical findings of the hospital.

Following a psychological assessment of Anna by [redacted], a report was prepared by [redacted]. This report observed that Anna's caregiver history has been stable since the age of [redacted]. It also found that Jane has provided consistent and sensitive care for Anna, and that there is no evidence to suggest that Anna was neglected in Jane's care. Jane encouraged Anna to engage in activities such as athletics and Girl Guides, and Anna had plenty of opportunity for social interaction. Noting that Anna's absconding had increased since being in care in [redacted] [redacted] attributed Anna's behavioural issues to a loss of "her secure base, her connection with family members and familiarity of her environment. This has increased her level of anxiety and in turn her reactivity." Central to Anna's behaviour and mental health issues was the loss of a predictable routine, consistency, and familiarity with her surroundings and carers. [redacted] argued that unless the Department of Children and Families had the facilities to provide individual long term care and stability for Anna for the next [redacted], it would be better if she were placed with her family.

[redacted] envisaged that that Anna's behaviour "would improve in the care of her family, who have some calming influence with her. The family need a support plan for her immediate return and in providing professionals to work with Anna for assessment purposes and therapy." She found that it would be in Anna's best interests to return to [redacted] to live with her family in a familiar

environment, reenrol in school, and have normality returned to her life. Her other recommendations included engaging a tutor to support Anna academically, and for Anna to receive counselling with an emphasis on teaching her self-soothing strategies. [CII] noted that Jane's intention to reenrol Anna in school had the support of the School Principal, who was aware of Anna's behavioural indicators, and had the ability to utilize anger management strategies.

Anna previously had an excellent school attendance record, and had identified her education as a personal goal. Ms Griffin noted that the longer Anna remained out of school, the less likely Anna was to re-establish a habit of attendance.

Jane expressed a willingness to work with the Department of Children and Families, to accept Ms Griffin's recommendations, and that she was able to take Anna to her scheduled assessment appointments. Anna herself said that she wanted to return to [CII] to live with Jane. [CII] recommendations were echoed in the [CII] psychological report by [CII] of the [CII].

Despite these recommendations, Anna was moved to [CII] from the hospital in [CII], and was put into the care of the State by court order in [CII]. Throughout this process, Anna's family had very limited contact with her, and was not consulted as to options for Anna's care. Anna's family expressed concerns that [CII] was not an appropriate, positive or safe environment for Anna to grow up in. She was not able to attend school. Little regard was given to the effect of separation from her family, community, and culture on her mental health.

Anna lived with older boys and girls, many of whom engaged in illegal behaviours. They negatively influenced Anna's behaviour. This led to her becoming involved with them in theft, and breaking and entering offences. Anna began a pattern where she would run away from [CII], be taken to [CII], and then be returned to [CII]. Her family experienced extreme stress when Anna ran away. Anna's phone calls home to reassure them that she was safe created the impression that she was staying with older men, who may have used illicit drugs and exposed her to abuse.

On one occasion, Anna was missing for [CII] weeks after running away in [CII]. Remarkably, [CII] failed to notify the Northern Territory Police Department that Anna was missing for [CII] weeks. The response of the Northern Territory Police Department is also of concern. They disregarded her privacy by [CII]. [CII] and [CII] continued to treat her punitively, rather than sensitively addressing Anna's underlying issues.

Anna returned home to live with her family for a brief period in [redacted]. She began to attend school again for the first time since [redacted]. Her family, teachers and peers found her behaviour changed by what Anna had experienced while in [redacted] and [redacted]. Anna began to run away from home, which her family commented that she had never attempted before being taken into the care of the State. Anna's teacher noted that she had "good days, and not so good days" when attending school. On "not so good days", Anna presented as upset and angry, which she sometimes directed at her teacher and peers. Anna was also uncooperative when the teacher directed her to do her schoolwork. Her teacher regards her behavioural issues as different to Anna's behaviour in her class the previous year, which had previously been ordinary for a girl of Anna's age.

On [redacted] a particularly concerning incident again displays the police treatment of Anna without appropriate regard for her privacy and dignity. Police Detectives arrived at Anna's school to investigate a property offence. Anna's teacher has indicated that Anna may have spoken to police about the property offence the day before. Anna was removed from the classroom, before being handcuffed and accompanied to the police vehicle, where she was seated in the back. This was performed in plain view of students and teachers, causing Anna a great deal of humiliation and distress.

The security precautions taken by the police officers in handcuffing Anna, seating her in the back of the police vehicle, and having her accompanied by a number of police officers, was not proportionate to any harm that could have been posed by a slight [redacted] girl. Anna's arrest in full view of her peers and teachers represents absolute disregard for her privacy and welfare. Anna's family questioned the necessity of handcuffs, and whether she could have been arrested in a more appropriate place and manner. At the police station, Anna was placed in an adult holding cells. She was isolated from any adults in her cell, but she was held there for over eight hours. She was described as "hysterical" and "traumatised" during these eight hours. Anna was then taken to [redacted] and placed in the care of the Department of Children and Families (NT), once again without consultation of her family.

In [redacted], Anna [redacted] while in [redacted]. She was evacuated to [redacted] from [redacted] for urgent medical attention. This raises serious concerns about what attention was given to supporting Anna's mental health while in [redacted] and [redacted].

Although two family members were flown to [redacted] to be with her, the family was not given adequate information about Anna's medical condition and care. Once Anna had been treated in [redacted] and returned to [redacted], her family was not given any update on her medical treatment, or the circumstances surrounding the incident. They have not been told whether it was a deliberate attempt at self-harm, or if Anna has made further attempts at self-harm. Their continued and ongoing uncertainty about Anna's wellbeing has further elevated their anxiety about Anna.

Upon Anna's return to [CII], she came into contact with [CII] while a patient at [CII] for some weeks. [CII] indicated to Territory Families that she was willing to take Anna in as part of her family. While the CEO of Territory Families gave a very positive and supportive response to [CII], she experienced resistance and disdain from Territory Families' staff and contractors.

[CII] encouraged Anna to engage with her own family and children, and organised activities such as kick boxing and trips to the movies. These activities corresponded with Anna's psychologist's recommendations. [CII] also took Anna on a [CII], where Anna was able to meet with [CII] as well as [CII]. Anna and [CII] telephoned Jane and spoke with her together. Anna spent more time staying at [CII] house immediately before and after [CII]. [CII] commented that the visit to [CII] was a very positive experience for Anna, and Anna's great-aunt indicated that Anna's involvement with [CII] had brought about a very positive change in Anna's behaviour and outlook. Anna was also placed on Attention Deficit Hyperactivity Disorder (ADHD) medication which helped with Anna's anger and negative thoughts. Anna's great-aunt commented that Anna was filled with positivity when she saw her, and that [CII] provided her with a safe stable and supportive home environment.

Despite indicators that Anna's involvement with [CII] was having a very positive impact on her, [CII] experienced resistance from the Department of Children and Families staff, and a reluctance to facilitate Anna's relationship with [CII]. She found an unwillingness to modify or be flexible with Anna's care plan to accommodate the long-term goal of Anna living with [CII] full time, despite indicators that [CII] involvement was bringing positive change to Anna's life. She also cited a lack of productivity at meetings regarding Anna, where repetitive discussion was had, and no practical plans were made to achieve this long-term goal. She stated that her opinions and input were ignored. For example, suggestions were made at meetings that Anna should not be unsupervised at [CII] house, but no solutions were put forward as to how to overcome this.

Department of Children and Families' staff also displayed a lack of commitment to short-term plans. For example, staff requested to change plans for Anna to stay overnight at [CII] house on the day the plan was set to happen, despite it being scheduled over two weeks prior. Another issue arose over a [CII] had organised for Anna and her children. This trip had been booked and paid for, and the Department of Children and Families had acknowledged and approved the plans. However, Territory Families proceeded to schedule a string of appointments for Anna during the time of the [CII], disregarding plans made by [CII]. Additionally, Anna has moved locations multiple times during [CII], denying her a constant and stable environment. Initially she lived near [CII], before being moved to [CII] [CII] believes that Anna is currently in [CII].

These experiences led CII ██████ to believe that Territory Families has little experience in actively working to incorporate difficult children into foster families. The lack of support and active resistance experienced by CII ██████ took a toll on her mental health and ultimately her work, and she felt that she would never be supported by Territory Families in the long-term goal of having Anna live full time with her. As a result, she ceased working with the Department of Children and Families to care for Anna.

Anna's family felt immense frustration at this turn of events. They saw that Anna had been removed from a positive environment just as she had begun to exhibit positive behaviour and progress. Yet again, Anna's family was not consulted throughout this process.

4.2. Anna's Family: Their Treatment

At every stage of Anna's care under the Department of Children and Families (NT), Anna's family has been excluded from decisions and processes involving the care of Anna. They have been isolated from communicating with her, deprived of knowledge about her wellbeing, and even been misled about her situation.

Jane is upset about how she was treated at the time of Anna's arrest at school. Jane was not informed by police or the school's administration staff of Anna's arrest. Instead, she learned about the arrest by a member of the public who had witnessed the event. When Jane attended the Police Station to wait for Anna, she was shouted and sworn at by a police officer, who demanded she leave the station. Despite the trauma this incident inflicted on both Jane and Anna, no apology or other form of support was offered to the family.

Anna's family members have repeatedly called Anna's case workers and the Department of Children and Families (NT), seeking information about her care, management, and upcoming court appearances. They have received little or no response to their numerous inquiries. On the many occasions that Anna ran away from CII ██████, the staff lied to Jane. They claimed that Anna had not in fact run away, but was temporarily somewhere off the premises, such as at the shops.

Anna's family has never been consulted about changes in Anna's accommodation or care, and her medical reports and other records have never been provided. This lack of communication has exacerbated family concerns, particularly involving more traumatic events, such as Anna's medical evacuation to CII ██████.

5. Legal Framework

5.1. International Law

Under international law, all people – including children – have the right to a fair trial and procedural rights, which states are obligated to respect and protect. In recognition of the fact that indigenous youth are a particularly vulnerable group, there are specific youth justice protections incorporated into international legal standards, which can be summarised as follows:

1. Aboriginal people have the right to make decisions in accordance with principles of self-determination regarding the care and custody of children;
2. The right of Aboriginal people to create, control, and manage the policies, programs and institutions that apply to and affect their own communities;
3. The right of Aboriginal people to transmit their culture and languages from generation to generation; and
4. That Aboriginal children and youth are entitled to care that supports and respects their needs and rights, including participating in and maintaining their cultural identities, spiritual practices and languages.

5.1.1 International Covenant on Civil and Political Rights (ICCPR)

Australia voluntarily committed to the ICCPR in August 1980. This requires that Australia take the necessary steps to give effect the provisions of the ICCPR in domestic law. At the Federal level, Australia is still the only democracy in the world not to have passed a direct law that implements the provisions of the ICCPR. The ICCPR defends fundamental human rights, including the right to life, and stipulates that no person can be subjected to torture, enslavement, or arbitrary detention, or be restricted from freedom of movement, expression, and association.

5.1.2 United Nations Convention on the Rights of the Child (UNCRC)

Since ratifying the UNCRC in 1990, Australia has been under an international obligation to ensure that all children enjoy the full range of rights set out in the treaty. The UNCRC emphasises the rights of children to protection against abuse, neglect, and exploitation, and further addresses issues of education, health care, and juvenile justice.

Article 3(1) of the UNCRC reads:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

According to the Australian Human Rights Commission, this covers decisions made by government bodies, as well as decisions made by public social welfare institutions. Specifically, the child's best interests must be the paramount concern in relation to government decisions about custody, residence, contact, care, and protection.¹ Whilst the UNCRC does not explicitly define what a child's best interests are, it is important to note that the Convention makes clear that it is in the best interests of Aboriginal children to be raised within the Aboriginal community.²

Key human rights obligations under the CRC:

- Children should not be separated from their parents unless it is determined to be necessary and in the best interests of the child. This determination is to be made by a competent authority that is subject to judicial review.³
- The arrest, detention, or imprisonment of a child must only be used as a measure of last resort, and should occur for the shortest appropriate period of time.⁴
- Every child who has been imprisoned or otherwise detained shall be treated with humanity and respect for the inherent dignity of the human person, in a manner that considers the age and unique needs of the child in question.⁵
- Appropriate alternatives to imprisonment should be in place to ensure that children are dealt with in a manner that is proportionate to their circumstances and the nature of their offence.⁶
- All children should have readily available access to prompt and adequate legal representation, as well as the chance to challenge charges brought against them.⁷

5.1.3 United Nations Declaration on the Rights of Indigenous People (UNDRIP)

In 2007, the United Nations approved UNDRIP, the preamble of which specifically recognises the right of indigenous families and communities to “retain shared responsibility for the upbringing, training, education, and wellbeing of their children, consistent with the rights of the child.” The Rudd government decided in 2009 to formally support the declaration, though it is not binding on domestic law.⁸

¹ Australian Human Rights Commission, *The Best Interests of the Child* Human Rights Brief No 1 (1999) <<http://www.humanrights.gov.au/publications/human-rights-brief-no-1>>.

² United Nations Convention on the Rights of the Child (1989) Arts 5, 8.2 and 30.

³ *Ibid*, Art 9.

⁴ *Ibid*, Art 37(b).

⁵ *Ibid*, Art 37(c).

⁶ *Ibid*, Art 40(4).

⁷ *Ibid*, Art 37(d).

⁸ Emma Rodgers, 'Aust adopts UN Indigenous declaration', *ABC News* (online) 3 April 2009 <[p://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444](http://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444)>.

Key human rights obligations under the UNDRIP:

- Article 7(2) recognises the collective right of indigenous people to live in freedom, peace and security, without being subjected to any act of genocide or other act of violence, “including forcibly removing children of the group to another group.”
- Article 13(1) enshrines the right of indigenous people to “develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures.”

5.1.4 United Nations Convention for the Prevention and Punishment for the Crime of Genocide

In a draft of what later became the United Nations Convention for the Prevention and Punishment of the Crime of Genocide, the Secretary-General explained that separating children from their parents imposes, “at an impressionable and receptive age, a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.”⁹

The definition of genocide contained in Article 2 of the Convention stipulates that genocide involves certain acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as... forcibly transferring children of the group to another group.”¹⁰

5.1.5 United Nations Convention against Torture (UNCAT) [LA1] and Optional Protocol to the Convention Against Torture (OPCAT)

Australia has a duty to prevent torture and other ill-treatment, including the responsibility to independently investigate and ensure accountability for perpetrators under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.¹¹ In 2009, Australia signed the First Optional Protocol to the Convention Against Torture (OPCAT).¹² The OPCAT requires the government to commit to developing and implementing expanded oversight mechanisms in order to prevent torture, as well as cruel, inhuman, and degrading treatment in places like Youth Detention Centres. It is intended to aid States in implementing their commitments under the UNCAT, and encourage greater transparency in the treatment of detainees. Ideally, ratification of the OPCAT

⁹ Secretary-General of the United Nations, Draft Convention on the Crime of Genocide, UN Doc E/447 (26 June 1947) 5 (‘Draft Convention on the Crime of Genocide’); http://www.un.org/ga/search/view_doc.asp?symbol=E/447

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide (Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951)

¹¹ UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46, 1465 UNTS 85, entered into force 26 June 1987.

¹² United Nations Treaty Collection, Status of Convention against Torture, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en. Australia ratified the Convention against Torture on 8 August 1989. Australia signed the Optional Protocol on the Convention against Torture in May 2009

will involve a process where the Commonwealth, in conjunction with the states and territories, implements legislation and policies that proactively prevent mistreatment occurring in the first place. The Australian Government has stated that it intends to ratify OPCAT by December 2017.¹³

5.2. Domestic Law

5.2.1. Federal Law

In Australia, State and Territory legislation provide the framework for managing young people who encounter the youth justice system. The Commonwealth has additional responsibilities toward juvenile offenders under international instruments. As such, the Commonwealth plays an important role in ensuring that national standards for juvenile justice give effect to Australia's obligations under international law. Anna's case highlights several shortcomings in the way Australia has incorporated international human rights legal standards into existing domestic laws, policies, and practices.

5.2.2. Northern Territory Law

The primary legislative instruments governing juvenile criminal activity and involvement in the justice system are the *Youth Justice Act 2005* (NT), the *Criminal Code Act* (NT), and the *Police Administration Act* (NT). Under s 38(1) of the *Criminal Code*, the minimum age of criminal responsibility is set at 10 years old.

The *Youth Justice Act* was intended to repeal and replace the existing *Juvenile Justice Act*, under key guiding principles of:

- Holding young people accountable for their offences;¹⁴
- Dealing with youth in a way that acknowledges his or her needs and provides him or her with the opportunity to develop in socially responsible ways;¹⁵
- Dealing with young people in a manner consistent with his or her age and maturity;¹⁶
- Reintegration;¹⁷
- The preservation of family relationships;¹⁸
- Avoiding unnecessary removal from the young person's family and school environment;¹⁹
- Acknowledging and maintaining a young person's sense of racial, ethnic or cultural identity.²⁰

¹³ Alexandra Beech, 'OPCAT: Australia makes long-awaited pledge to ratify international torture treaty' *ABC News* (online) 9 February 2017 <<http://www.abc.net.au/news/2017-02-09/australia-pledges-to-ratify-opcat-torture-treaty/8255782>>.

¹⁴ *Youth Justice Act 2005* (NT) s 4(a).

¹⁵ *Ibid*, s 4(b).

¹⁶ *Ibid*, s 4(d).

¹⁷ *Ibid*, s 4(f).

¹⁸ *Ibid*, s 4(h).

¹⁹ *Ibid*, s 4(i).

²⁰ *Ibid*, s 4(j).

6. Child Removals

6.1. Principles of Child Removal and Protection

When any decision concerning a child is made, the central principle in operation is acting in the best interest of the child. This is articulated in Article 3 of the United Nations Convention on the Rights of the Child, which Australia has ratified,²¹ and is also represented under section 10 of the *Care and Protection of Children Act 2007* (NT).²² This consideration should come into play at each stage in the process of child protection.

The Aboriginal Child Placement Principle [LA2] operates in conjunction with the requirement of serving the best interests of the child. This principle states the preferred order of placement of Aboriginal children who have been removed from their birth family; beginning first with the child's extended family, followed by the child's Indigenous community, and other Indigenous people.²³ If an appropriate placement from these options is not available, the child can be placed with a non-Indigenous carer.²⁴ This hierarchy of placement options aims to ensure that Aboriginal children are raised in a culturally appropriate environment, and are able to retain their cultural identity. This principle has been recognised by Northern Territory legislation.²⁵

However, the recognition of the Principle in legislation "is itself not a measure of self-determination."²⁶ Factors such as the shortage of Indigenous foster carers, the inconsistent support for Indigenous organisations in child protection decision making, and deficiencies in the provision of culturally sensitive care, have been identified by the Australian Institute of Family Studies as creating barriers to the full realisation of the Aboriginal Child Placement Principle.²⁷

²¹ United Nations Convention on the Rights of the Child [1989] Article 3 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>; see also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* [1985] Article 1.1 <<http://www.un.org/documents/ga/res/40/a40r033.htm>>.

²² *Care and Protection of Children Act 2007* (NT) s 10.

²³ Child Family Community Australia, *Child protection and Aboriginal and Torres Strait Islander children* (October 2016) Australian Institute of Family Studies <<https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>>.

²⁴ Ibid.

²⁵ *Community Welfare Act 1983* (NT) s 69, as amended by *Care and Protection of Children Act 2007* (NT).

²⁶ Australian Institute of Family Studies, *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations*, CFCA Paper No. 34 (2015) <<https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/implementation>>.

²⁷ Ibid.

National and international legislation emphasise that youth detention should only be used as a last resort. Article 37 of the Convention on the Rights of the Child states 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.”²⁸ This is echoed in Section 4 of the *Youth Justice Act* (NT)²⁹ and Section 19.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.³⁰ It is emphasised that the ultimate goal is for a young person to returned to society and their community.³¹

Anna’s story demonstrates a failure in the commitment of the Northern Territory to these principles, and to its own legislation and policies. Not only has Anna been removed from her family, her extended family, and her community, she has largely been placed in residential care facilities such as Yirra House. This is not only against the Aboriginal Child Placement Principle, it is also against the direct recommendations of a report by a Darwin-based psychologist which found that it would be in Anna’s best interests to return to Tennant Creek to live with her family in a familiar environment, reenrol in school, and have normality returned to her life. Anna’s family has never been consulted about changes in Anna’s accommodation or care, and her medical reports and other records have never been provided.

6.2. Removal of Aboriginal Children

Aboriginal children are ten times more likely than non-Indigenous children to be in contact with the child protection system,³² with Aboriginal and Torres Strait Islander children currently representing over 35 per cent of all children in out of home care as of 2016.³³ This rate has escalated by 65 per cent since the 2008 Apology to Australia’s Indigenous Peoples.³⁴ The Northern Territory Children’s

²⁸ United Nations Rules for the Protection of Juveniles Deprived of their Liberty [1990] Article 37(b) <<http://www.un.org/documents/ga/res/45/a45r113.htm>>.

²⁹ *Youth Justice Act 2005* (NT) s 4C.

³⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice [1985] Section 19.1; see also United Nations Rules for the Protection of Juveniles Deprived of their Liberty [1990] Rule 1 <<http://www.un.org/documents/ga/res/45/a45r113.htm>>.

³¹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty [1990] Rules 79 and 80 <<http://www.un.org/documents/ga/res/45/a45r113.htm>>; see also United Nations Standard Minimum Rules for the Treatment of Prisoners [1977] Rule 65 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>>.

³² ‘Australia’s Aboriginal peoples face “tsunami” of imprisonment, UN expert finds’, *OHCHR* (online), 4 April 2017 <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21475&LangID=E#sthash.djMcg8Dz.dpuf>>; see also ‘End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpus on her visit to Australia’, *OHCHR* (online) 2017 <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>>.

³³ Aboriginal and Torres Strait Islander Peak Organisations Unite, ‘Redfern Statement’, (online) 14 February 2016. <<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>> p 17.

³⁴ *Ibid.*

Commissioner’s Annual Report indicated that 89 per cent of children in out-of-home care are Aboriginal, a significantly higher rate than in other states.³⁵ Of particular concern is the fact that many children under care and protection orders “are placed in environments outside of their communities and cultures.”³⁶

The United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, commented that “the prolonged impacts of intergenerational trauma from the Stolen Generation, dispossession and entrenched poverty continue to inform Aboriginal and Torres Strait Islanders’ experiences of child protection interventions.”³⁷ Many people affected by past policies of forcible removal have experienced the process of second or subsequent generation removal,³⁸ and it is recognised that the “inter-generational effects of previous separations from family and culture, poor socio-economic status and systemic racism”³⁹ are underlying causes of the over-representation of Aboriginal children in out-of-home care. The Bringing Them Home Report found that “Indigenous families face both race and class prejudice among many welfare officers”,⁴⁰ which directs blame for ‘dysfunction’ to be placed on the family, rather than “structural circumstances which are part of a wider historical and social context.”⁴¹

Key recommendations for remedying the over-representation of Aboriginal children in out of home care include working with Aboriginal communities and their representative organisations to develop a national strategy and target figures,⁴² as well as the participation of Indigenous families⁴³ in determining appropriate care strategies. The lack of “robust community governance and meaningful

³⁵ Office of the Children’s Commissioner, *Annual Report 2015-2016, Northern Territory Children’s Commissioner* (2016) p 37.

³⁶ James Anaya, ‘Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, on the situation of indigenous peoples in Australia’, A/HRC/15/37/Add.4 (1 June 2010) p 45; see also Committee on the Rights of the Child, *Concluding observations: Australia*. RC/C/AUS/CO/4. (28 August 2012) s 51.G.

³⁷ ‘End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia’, *OHCHR* (online) 2017
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>>.

³⁸ Human Rights and Equal Opportunity Commission Report, ‘*Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*’ (1997), Chapter 11.

³⁹ *Ibid*, Chapter 21.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² Aboriginal and Torres Strait Islander Peak Organisations Unite, ‘Redfern Statement’, (online) 14 February 2016.
<<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>> p 17.

⁴³ ‘Australia’s Aboriginal peoples face “tsunami” of imprisonment, UN expert finds’, *OHCHR* (online), 4 April 2017
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21475&LangID=E#sthash.djMcg8Dz.dpuf>>; see also ‘End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia’, *OHCHR* (online) 2017
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>>.

Aboriginal and Torres Strait Islander participation are major contributors to past failures of Government policy.”⁴⁴

The Royal Commission into Aboriginal Deaths in Custody Report commented:

If there is one lesson we can learn from history, it is that solutions imposed from the outside will only create their own problems. The issue of giving back to Aboriginal people the power to control their own lives is therefore central to any strategies which are designed to address these underlying issues.⁴⁵

Sustainable, effective, and culturally appropriate policy on the protection and detention of young people requires the active engagement and participation of the Indigenous community. Supporting families to care for children should be prioritised,⁴⁶ as well as investing in community-led intervention programs attuned to the specific needs of children and families, in order to prevent children from entering the child protection system in the first place.⁴⁷ This would require a shift in funding from being focussed on child protection and out of home care, to investing in supporting families, in order that responses are preventative, rather than reactive.⁴⁸ The Redfern Statement notes that the removal of Aboriginal children “is a national crisis that needs all of our urgent attention. It requires a national commitment to a holistic, respectful approach to Aboriginal and Torres Strait Islander child safety and wellbeing.”⁴⁹

Recommendation 1: Indigenous families should have autonomy to care for their own children and should be supported through family training and funding for community-led intervention and rehabilitation programs. While removal of children must only be used as an option of last resort, where children are to be removed, the Aboriginal community should be consulted and Aboriginal Child Placement Principle must be put into action to ensure kinship care for Indigenous children.

⁴⁴ Aboriginal and Torres Strait Islander Peak Organisations Unite, ‘Redfern Statement’, (online) 14 February 2016. <<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>> p 17.

⁴⁵ Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report*, Volume 4, (1991).

⁴⁶ Aboriginal and Torres Strait Islander Peak Organisations Unite, ‘Redfern Statement’, (online) 14 February 2016. <<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>> p 17.

⁴⁷ ‘End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpus on her visit to Australia’, *OHCHR* (online) 2017 <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>>.

⁴⁸ Aboriginal and Torres Strait Islander Peak Organisations Unite, ‘Redfern Statement’, (online) 14 February 2016. <<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>> p 16.

⁴⁹ *Ibid*, p 17.

Recommendation 2: The family and the Aboriginal community should have input in life decisions for children in the care and custody of the state, and, unless there are child safety issues, should be kept regularly informed about the child’s welfare.

6.3. Pathway from Intervention to Placement

Failings of the out of home care system lead to young people’s involvement in the criminal justice system, with Katherine McFarlane commenting that children in out of home care are more likely to be charged with offences than those who remain with their families, and that few of those children engaged in criminal behaviour before being removed from their family environment.⁵⁰ McFarlane reflects that her research on the involvement of children in out of home care with the criminal justice system demonstrates that “children in care make up less than 1% of the NSW child population but comprise half of all the cases before the NSW Children’s Court...the earlier a child comes into contact with the justice system, the more deeply he or she is enmeshed, and the more protracted their exposure to crime is likely to be.”⁵¹ Contributing factors include “badly trained and poorly supported staff, inadequate matching of children of different ages, experiences and background, and a readiness to call police to manage children’s behaviour.”⁵² Disconnection from education and a negative peer influence are also generally accepted as factors that increase susceptibility to criminal behaviour in youth,⁵³ as well as the fact that carers may feel ill equipped to manage children with behavioural issues.⁵⁴ Although the removal of a child from their family is seen as a measure of last resort, the Australian Institute of Health and Welfare noted that between 2005 and 2010, the number of children in out-of-home care rose by 51%.⁵⁵

⁵⁰ Katherine McFarlane, ‘The faulty child welfare system is the real issue behind our youth justice crises’ *The Conversation* (online) 13 February 2017 <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Northern Territory Government, *Review of the Northern Territory Youth Justice System*, (September 2011) p 33, <https://www.nt.gov.au/_data/assets/pdf_file/0017/238211/youth-justice-review-report.pdf>.

⁵⁴ Erin Gough, ‘The Drift from Care to Crime: a Legal Aid NSW issues paper’, *Legal Aid* (October 2011) p 4 http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf.

⁵⁵ Ibid, p 2.

6.3.1. Child Privacy

The Convention on the Rights of the Child⁵⁶ and the UN Standard Minimum Rules for the Administration of Juvenile Justice⁵⁷ both refer to young people's right to privacy at all stages of the juvenile justice system, "in order to avoid harm being caused to him or her by undue publicity or by the process of labelling."⁵⁸ In the Northern Territory, there is no legislation protecting young people's right to privacy in the juvenile justice system, although publication can be restricted by a court order made under the *Youth Justice Act*.⁵⁹ This is despite the fact that public condemnation of a young person's offences "have no deterrent effect, and can in fact increase recidivism rates among young people through their stigmatising potential."⁶⁰ The NSW Privacy Commissioner stated that "to allow the public naming of children convicted of mid-level crimes will deprive children of their human dignity, and damage their chances of rehabilitation."⁶¹

Recommendation 3: Young people's right to privacy should be incorporated into and protected by Northern Territory legislation.

6.3.2. Diversion Procedures

In the interests of using the arrest and detention of juveniles as a last resort option, it should be ensured that diversion procedures are being used appropriately. Section 39 of the *Youth Justice Act* mandates that young people be diverted in the case of non-serious offences, resulting in a verbal warning, a written warning, the convening of a Youth Justice Conference, or referral to a diversion program.⁶² This section also permits conferencing with the young person's family.⁶³ The September 2011 Review of the Northern Territory Youth Justice System suggests that the involvement of family in conferencing is "designed to discuss the behaviour and what can be done to improve it."⁶⁴

⁵⁶ United Nations Convention on the Rights of the Child [1989] Article 16
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>

⁵⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice [1985] Section 8.

⁵⁸ *Ibid*, Rule 8.1.

⁵⁹ *Youth Justice Act 2005* (NT) s 50.

⁶⁰ Hosser et al, Chappell and Lincoln in Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28:2 *Current Issues in Criminal Justice* 173, 180.

⁶¹ *Ibid*, 180.

⁶² *Ibid* s 39(2)(d).

⁶³ *Ibid* s 39(7).

⁶⁴ Northern Territory Government, *Review of the Northern Territory Youth Justice System*, (September 2011) p 92, <https://www.nt.gov.au/_data/assets/pdf_file/0017/238211/youth-justice-review-report.pdf>.

Young people who are diverted from the court system were less likely to be engaged in the criminal justice system.⁶⁵ However, Aboriginal young people are less likely to be diverted than non-Aboriginal young people.⁶⁶ NAAJA suggests this is a result in part of a lack of access to diversion programs in remote areas, and notes that “the impact of this discrepancy is that Aboriginal young people have a higher rate of entrenchment in the more punitive aspects of the criminal justice system.”⁶⁷

Police in the Northern Territory effectively have an unfettered discretion as to whether a juvenile offender is diverted from the court system.⁶⁸ The court has a power of referral for diversion, however police can refuse to facilitate diversion on a case by case basis.⁶⁹ In practice, this greatly restricts the application of diversion in a jurisdiction where “courts appear more willing than police to refer Aboriginal youth” for diversion.⁷⁰

Recommendation 4: Schools should be a place of safety and trust for children. An arrest or removal from a school environment should take place only in the most extreme and urgent circumstances, and then in a discreet and sensitive manner. A heavy police presence and the use of restraints should be avoided at all costs.

Recommendation 5: Courts should be further empowered to facilitate the diversion of young people.

⁶⁵ Troy Allard et al, ‘Police Diversion of Young Offenders and Indigenous Over Representation’ *Australian Institute of Criminology* (March 2010) <<http://www.aic.gov.au/documents/0/9/2/{092C048E-7721-4CD8-99A6-1BC89C47D329}tandi390.pdf>>.

⁶⁶ North Australian Aboriginal Justice Agency ‘*Submission to the Youth Justice Review Panel: A Review of the Northern Territory Youth Justice System*’ (online) July 2011 <<http://www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf>> p 34.

⁶⁷ *Ibid*, p 34.

⁶⁸ *Youth Justice Act 2005* (NT) s 44.

⁶⁹ *Ibid* s 64.

⁷⁰ North Australian Aboriginal Justice Agency ‘*Submission to the Youth Justice Review Panel: A Review of the Northern Territory Youth Justice System*’ (online) July 2011 <<http://www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf>> p 35.

7. Out of Home Care

7.1. Youth Detention Facilities

Recently there has been increased recognition of the unsuitability of facilities such as Yirra House and Don Dale Youth Detention Centre to provide care for young people. A Four Corners report on Don Dale that aired in July 2016 revealed the use of solitary confinement for extended periods of time, and extreme restraints such as spit hoods and shackles.⁷¹ Observers recalled that young people did not have access to running water, and were kept in highly restrictive cells in unhygienic conditions. Tear gas was used on young boys,⁷² and racial slurs were directed at detainees by guards.⁷³ Suggestions were made that facilities were understaffed, and staff undertrained.⁷⁴ Treatment of detainees at Don Dale may not comply with the standards mandated by the UN Convention Against Torture.⁷⁵ A previous resident of Yirra House reported to ABC that she was denied privacy and respect for human dignity, and did not receive education while living there.⁷⁶ Both Don Dale Youth Detention Centre and Yirra House have since been closed.

The Royal Commission has presumably heard these accounts, and many further of a similarly distressing nature, in the course of their hearings, leading to the Commission's comment in their interim report that "the evidence presented to the Commission so far reveals a youth detention system that is likely to leave many children and young people more damaged than when they entered. We have heard that the detention facilities are not fit for accommodating children and young people, and not fit for the purpose of rehabilitations...they are harsh, bleak and not in keeping with modern standards. They are punitive, not rehabilitative."⁷⁷ Practice in youth detention and out of home care facilities must be reviewed in order to ensure compliance with international and national standards of care for young people.

⁷¹ Caro Meldrum-Hanna et al, 'Australia's Shame' *ABC* (online) 25 July 2016 <<http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm>>.

⁷² Sydney Morning Herald, 'Don Dale: Youth detention centre was 'spiralling out of control' before gassing incident' *Sydney Morning Herald* (online) 22 March 2017 <<http://www.smh.com.au/national/don-dale-youth-detention-centre-was-spiralling-out-of-control-before-gassing-incident-20170322-gv46f2.html>>.

⁷³ Neda Vanovac, 'Don Dale detainees called 'camp dogs' by officers, some staff 'enjoyed seeing them suffer' *ABC News* (online) 24 March 2017 <<http://www.abc.net.au/news/2017-03-24/don-dale-detainees-called-camp-dogs-by-officers-commission-hears/8384218>>.

⁷⁴ Sydney Morning Herald, 'Don Dale: Youth detention centre was 'spiralling out of control' before gassing incident' *Sydney Morning Herald* (online) 22 March 2017 <<http://www.smh.com.au/national/don-dale-youth-detention-centre-was-spiralling-out-of-control-before-gassing-incident-20170322-gv46f2.html>>.

⁷⁵ Adam Fletcher, 'NT Royal Commission is the cost of failing to meet international standards on torture' *The Conversation* (online) 6 September 2016 <<https://theconversation.com/nt-royal-commission-is-the-cost-of-failing-to-meet-international-standards-on-torture-64214>>.

⁷⁶ Felicity James, 'Darwin's Yirra House youth care home shut down' *ABC News* (online) 14 April 2017 <http://www.abc.net.au/news/2017-04-14/darwins-yirra-house-prison-youth-residential-care-home-shut-down/8444318?smid=Page:+ABC+News-Facebook_Organic&WT.tsrc=Facebook_Organic&sf70465880=1>.

⁷⁷ Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017) p 3.

7.2. Standard of Care

Various international, national, and state specific rules define the minimum standard of care for young people in out of home care and detention. The body of international rules include The UN Standard Minimum Rules for the Administration of Juvenile Justice, known as ‘The Beijing Rules’, the UN Rules for the Protection of Juveniles Deprived of their Liberty, the Standard Minimum Rules for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Underpinning this body of rules is the principle that all people shall be treated in a humane manner and with respect for their inherent human dignity.⁷⁸ These rules create a requirement that States act in the best interests of the young person,⁷⁹ foster their development and education,⁸⁰ and mobilize family and community groups as resources to support and promote the wellbeing of the young person.⁸¹

Upon admission, young people must be assessed in order to identify factors relevant to the type and level of care they require, and their care programme should be adapted to the findings of this assessment.⁸² They must be provided with all necessary psychological, educational and medical assistance,⁸³ and the facilities provided to them must meet requirements of health and human dignity,⁸⁴ including the right to privacy.⁸⁵ Young people should only be detained under conditions that take full account of their particular needs according to their age, personality, sex, type of offence, mental and physical health, in order to ensure their protection from harmful influences and risk situations.⁸⁶ All staff should receive training in relevant areas such as child welfare, standards of human rights and the rights of the child, to allow them to carry out their roles effectively.⁸⁷ The rules emphasise that responses to juvenile offenders must be proportionate to the circumstances of the

⁷⁸ *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* [1988] Principle 1.

⁷⁹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* [1985] Rule 1.1.

⁸⁰ *Ibid*, Rule 1.2; see also *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 38 <<http://www.un.org/documents/ga/res/45/a45r113.htm>>; see also *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1977) Rule 77.

⁸¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* [1985] Rules 1.3 and 25.1.

⁸² *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 27; see also *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1977) Rules 24 and 69.

⁸³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* [1985] Rule 26.2.

⁸⁴ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 31; see also *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1977) Rule 10.

⁸⁵ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 32.

⁸⁶ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 28.

⁸⁷ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 85; see also *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1977) Rule 47.

offender and the offence,⁸⁸ and that treatment constituting cruel, inhuman or degrading treatment, including solitary confinement, and certain instruments of restraint and force,⁸⁹ should be prohibited.⁹⁰

These international principles are consolidated in the Australasian Standards for Juvenile Custodial Facilities⁹¹ and the Principles of Youth Justice in Australia.⁹² These import standards including; the promotion of young people's individuality and diversity through individualised support,⁹³ respect for human dignity,⁹⁴ and the compulsory provision of education and training.⁹⁵ These standards also mandate a physical and mental health screening upon admission,⁹⁶ and limit the use of force and the use of instruments of restraint to extreme circumstances where there is a risk of harm.⁹⁷ They further support the transition of young people back into the community.⁹⁸

The Northern Territory Youth Justice Regulations⁹⁹ creates restrictions surrounding the isolation of¹⁰⁰ and use of force against detainees,¹⁰¹ and mandate that a comprehensive medical and health assessment be carried out within 24 hours of admission.¹⁰² However, these regulations are insufficient in addressing the standard of care that must be provided to young people in detention and out of home care. Currently, reports on the conditions in centres are provided by 'Official Visitors', appointed under the *Youth Justice Act*.¹⁰³ Official visitors must also inquire into the treatment and behaviour of detainees¹⁰⁴, and provide his or her report to the Minister,¹⁰⁵ and the Commissioner if so directed by the Minister.¹⁰⁶ The Australian Children's Commissioners and Guardians suggest that "external oversight and review of youth justice facilities is likely to be strengthened if the Australian Government decides to ratify the *Optional Protocol to the Convention against Torture and Other*

⁸⁸ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* [1985] Rule 5.1.

⁸⁹ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 64.

⁹⁰ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* [1990] Rule 67; see also *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1977) Rule 31.

⁹¹ Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities* (1999).

⁹² Australasian Juvenile Justice Administrators, *Principles of Youth Justice in Australia* (2014).

⁹³ Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities* (1999) Rule 1.1.

⁹⁴ *Ibid*, Rule 11.

⁹⁵ *Ibid*, Rule 4.2.

⁹⁶ *Ibid*, Rules 3.1 and 6.4.

⁹⁷ *Ibid*, Rule 7.7.

⁹⁸ *Ibid*, Rule 5.3.

⁹⁹ *Youth Justice Regulations 2005* (NT).

¹⁰⁰ *Ibid*, s 57.

¹⁰¹ *Youth Justice Act 2005* (NT) s 153.

¹⁰² *Youth Justice Regulations 2005* (NT) s 57.

¹⁰³ *Youth Justice Act 2005* (NT) s 169.

¹⁰⁴ *Ibid* s 170(1).

¹⁰⁵ *Ibid* s 170(2).

¹⁰⁶ *Ibid* s 170(3).

Cruel, Inhuman or Degrading Treatment or Punishment”, under which signatories agree to international and domestic inspections.¹⁰⁷

Recommendation 6: International standards of care for young people in out-of-home care and detention should be reflected in domestic law, to strengthen accountability for the care of young people and protect their human dignity.

Recommendation 7: Staffing policies for youth care and detention facilities should be reviewed to ensure that staffing levels are adequate and that staff have the professional capacity to undertake the work.

Recommendation 8: Staff should be required to complete comprehensive training on the issues of cultural sensitivity and the management of mental health issues.

Recommendation 9: An independent oversight body should be established in order to report on the standards of care and condition in youth detention facilities.

¹⁰⁷ Australian Children’s Commissioners and Guardians, submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, *Human Rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specifies practices*, April 2016, p 79 <<https://childdetentionnt.royalcommission.gov.au/public-hearings/Documents/evidence-2016/evidence13october/Exh-024-025.pdf>>.

8. Alternatives to Child Removals – A Therapeutic Approach

The 2010 review of Effective Practice in Juvenile Justice indicated that traditional penal approaches to reducing juvenile crime, such as incarceration and strict bail legislation, are ineffective and the costliest option.¹⁰⁸ The cost of detaining a young person for one year was estimated at \$216, 000.¹⁰⁹ The report reasoned that the ineffectiveness of these options was a result of their stigmatising effect on young offenders, their reinforcement of criminal behaviour through collective detention, their failure to provide a healthy environment, and their failure to address the underlying factors behind the offending behaviour of young people.¹¹⁰

The North Australian Aboriginal Justice Agency (NAAJA) proposes a therapeutic approach to juvenile justice as a means to best reach the goal of rehabilitation.¹¹¹ This requires a holistic approach to the needs of young people,¹¹² with the primary objective being the welfare of young people.¹¹³ It is also integral that responses be directed to the underlying causes of juvenile offending.¹¹⁴

Successful examples of a therapeutic approach to juvenile justice include Western Australia's Multisystemic Therapy Program.¹¹⁵ This program is home and community based for families of juvenile offenders with severe behavioural disorders, and was one of a number of programs to contribute to Western Australia's 53-percent drop in serious juvenile crime in 2013.¹¹⁶ While a number of therapeutic programs currently exist in the Northern Territory, they are not appropriately resourced and are often inaccessible, particularly in regional and remote areas.¹¹⁷

¹⁰⁸ Noetic Solutions, 'Review of Effective Practice in Juvenile Justice' (online) January 2010 <http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf> > p 4.

¹⁰⁹ Northern Territory Government, *Review of the Northern Territory Youth Justice System*, (September 2011) p v, <https://www.nt.gov.au/_data/assets/pdf_file/0017/238211/youth-justice-review-report.pdf>.

¹¹⁰ Noetic Solutions, 'Review of Effective Practice in Juvenile Justice' (online) January 2010 <http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf> > p 4.

¹¹¹ North Australian Aboriginal Justice Agency 'Submission to the Youth Justice Review Panel: A Review of the Northern Territory Youth Justice System' (online) July 2011. <<http://www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf>> p 21.

¹¹² Ibid, p 18.

¹¹³ Ibid.

¹¹⁴ Ibid, p 20.

¹¹⁵ Lori Cohen, *Western Australia's Multisystemic Therapy (MSY) Program Wins Prestigious Award* (23 September, 2014) MST Services <<http://info.mstservices.com/blog/western-australias-mst-program-wins-prestigious-award>>.

¹¹⁶ Ibid.

¹¹⁷ North Australian Aboriginal Justice Agency 'Submission to the Youth Justice Review Panel: A Review of the Northern Territory Youth Justice System' (online) July 2011. <<http://www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf>>, p 32.

8.1. Community Based and Culturally Appropriate Responses

Given that there are a disproportionate number of Indigenous youth in contact with the youth justice system in the Northern Territory, therapeutic approaches “must be measured against their cultural relevance for Aboriginal young people.”¹¹⁸ For these approaches to be successful, they must incorporate Aboriginal community and family consultation and participation.¹¹⁹ NAAJA states that “to properly address the mental, physical, cultural and spiritual needs of Aboriginal young people in the youth justice system, there needs to be more innovative thinking in terms of how the government and non-Government sectors can most effectively and meaningfully provide services for Aboriginal young people.”¹²⁰ This may include investing in community run programs and initiative, that are “driven by real community need rather than divorced governmental ideology.”¹²¹ These programs are able to be more flexible and culturally appropriate.¹²² Another focus must be maintaining and strengthening connections with family and community support systems, and fully mobilizing and empowering family as a resource for promoting wellbeing of the young person.¹²³ The Northern Territory Government recognises that “engagement with the young person’s family is an essential component of therapeutic interventions.”¹²⁴

Recommendation 10: Treatment plans should be communicated with the young person’s family and carers, to assist in reintegration.

8.2. Individually Tailored Care Plans

Intervention is more likely to be successful when it is grounded in a ‘client centred approach’ that is “tailored to the individual needs of the client as opposed to statutory, compliance-based and defined by rigid, bureaucratic systems.”¹²⁵ This requires the establishment of a relationship of trust with the young person, the identification of underlying issues affecting the young person, while building on their strengths and working collaboratively with them to resolve these issues.¹²⁶ NAAJA states care

¹¹⁸ Ibid, p 22.

¹¹⁹ Ibid, p 22.

¹²⁰ Ibid, p 25.

¹²¹ Ibid, p 27.

¹²² Ibid, p 27.

¹²³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* [1985] Rules 25.

¹²⁴ Northern Territory Government, *Review of the Northern Territory Youth Justice System*, (September 2011) p 72, <https://www.nt.gov.au/_data/assets/pdf_file/0017/238211/youth-justice-review-report.pdf>.

¹²⁵ North Australian Aboriginal Justice Agency ‘*Submission to the Youth Justice Review Panel: A Review of the Northern Territory Youth Justice System*’ (online) July 2011 <<http://www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf>>, p 28.

¹²⁶ Ibid p 29-30.

plans for young people should be flexible, culturally relevant, innovative, and focus on empowerment.¹²⁷

Anna's psychological report by Ms Griffin had provided a culturally appropriate approach that allowed for Anna to stay with her family, and to receive tailored therapy that addressed her needs. A tailored program can be supported by family and community without requiring the instability of taking a child away from their familiar environment and known support workers. Ms Griffin argued that unless the Department of Children and Families had the facilities to provide individual long term care and stability for Anna for the next 8 years, it would be better if she were placed with her family.

Recommendation 11: Case plans should be tailored to the unique circumstances and characteristics of the young person.

8.3. Mental Health Assessment and Support

Anna's mental health had clearly deteriorated rapidly while she was in detention. While in Don Dale Youth Detention Centre, she was evacuated to Melbourne from Darwin for urgent medical attention after causing self-inflicted harm by eating glass. This raises serious concerns about what attention was given to supporting Anna's mental health while in Don Dale and Yirra House.

While there is no data on the health of incarcerated youth in the NT,¹²⁸ the prevalence of mental health disorders among juvenile offenders is well recognised,¹²⁹ with surveys from NSW indicating that 83-88 per cent of young people in custody have a psychological disorder.¹³⁰ This rate is higher for Indigenous young people.¹³¹ The causes of incarceration are often related to the "impact of mental health problems, substance abuse and trauma."¹³² For example, one study indicated that nearly a quarter of young people on remand for committing a crime had FASD.¹³³ Also significant is the fact

¹²⁷ Ibid, p 30.

¹²⁸ Royal Australasian College of Physicians, 'Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory' (online) December 2016 <<https://www.racp.edu.au/docs/default-source/default-document-library/submission-royal-commission-protection-detention-children-nt-dec2016.pdf?sfvrsn=4>> p 3.

¹²⁹ Cunneen, Chris; Goldson, Barry; Russell, Sophie "Juvenile Justice, Youth People and Human Rights in Australia" [2016] *CrimJust* 23; (2016) 28(1) *Current Issues in Criminal Justice* 173.

¹³⁰ Ibid.

¹³¹ <http://www.austlii.edu.au/au/journals/CrimJust/2016/23.html>

¹³² Royal Australasian College of Physicians, 'Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory' (online) December 2016 <<https://www.racp.edu.au/docs/default-source/default-document-library/submission-royal-commission-protection-detention-children-nt-dec2016.pdf?sfvrsn=4>> p 2.

¹³³ Fast, D., Conry, J., Loock, C. (1999). Identifying Fetal Alcohol Syndrome (FAS) among youth in the criminal justice system. *J Dev Behav Pediatr*, 20, 370, in Royal Australasian College of Physicians, 'Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory' (online) December 2016

that the rate of suicide in young people in the youth justice system is four times higher than other young people, as 21 per-cent have a history of attempted suicide.¹³⁴ Applying a therapeutic approach to youth justice requires identifying and addressing mental health and the root causes of incarceration on an ongoing basis. It is imperative that mental health is appropriately assessed and managed as early as possible.

The Royal Australasian College of Physicians has submitted that the health care model for youth in the NT justice system is inconsistent with recommendations of health bodies, and recommends that “all incarcerated youth undergo a comprehensive medical history and examination promptly during and after incarceration”, including screening for FASD, mental health concerns, and drug and alcohol use.¹³⁵ This will allow better management of health issues, which may be incorporated into and monitored through an individually tailored care plan.

Recommendation 12: The Northern Territory Government should initiate a study into the health of young people in the out-of-home care and youth justice systems.

Recommendation 13: Health assessments should be provided to all young people identified as being at risk, as soon as they come into contact with the justice system or the Department of Children and Families. This should include screening for FASD, mental health issues, and drug and alcohol abuse. Young people should be referred to specialists depending on the outcome of this initial assessment.

Recommendation 14: The Northern Territory Government should commit to funding and providing resources for community based therapeutic care and rehabilitative service options for young people, particularly in regional and remote areas. These should include specialist mental health and drug and alcohol rehabilitative services.

Recommendation 15: Programs should be developed to manage and reduce the rate of young people in youth detention who are at risk of suicidal or self-harming behaviour.

<https://www.racp.edu.au/docs/default-source/default-document-library/submission-royal-commission-protection-detention-children-nt-dec2016.pdf?sfvrsn=4>.

¹³⁴ Putnins AL. ‘Recent drug use and suicidal behaviour among young offenders’ (1995) *Drug and Alcohol Review* 14, 151 in Royal Australasian College of Physicians, ‘Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory’ (online) December 2016 <<https://www.racp.edu.au/docs/default-source/default-document-library/submission-royal-commission-protection-detention-children-nt-dec2016.pdf?sfvrsn=4>> p 6.

¹³⁵ Royal Australasian College of Physicians, ‘Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory’ (online) December 2016 <<https://www.racp.edu.au/docs/default-source/default-document-library/submission-royal-commission-protection-detention-children-nt-dec2016.pdf?sfvrsn=4>>, p 5.

9. Raising the Age of Criminal Responsibility

Anna was arrested at school, and ultimately charged for property offences, when she was only eleven years old. She was below the age of criminal responsibility for many other countries, and below the age of criminal responsibility recommended by the Committee on the Rights of the Child (the Committee). Article 40(3)(a) of the CRC mandates the establishment of a minimum age of criminal responsibility, below which children shall be presumed not to have the capacity to infringe penal law. The Committee recommends that the minimum age of criminal responsibility for the commission of a crime should be no younger than 12 years of age.¹³⁶

In forming this recommendation, the Beijing Rules suggest that the “modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child...can be held responsible for essentially antisocial behaviour.”¹³⁷ This approach recognises that entering the criminal justice system can trigger negative consequences for young people,¹³⁸ and that the earlier they enter the system, the more deeply they are entrenched in it.¹³⁹ The primary rationale behind it is that adolescent brains are not fully mature, and therefore lack the same capacity as adults when it comes to impulse control, and risk avoidance.¹⁴⁰ Children should therefore not be considered as blameworthy as adult, and fully developed, offenders.¹⁴¹

Despite international minimum age of criminal responsibility standards and recognition of the harms that the criminal justice system poses to young people, every Australian jurisdiction has set the age of criminal responsibility at 10 years old.¹⁴² Australia has created two tiers of criminal responsibility; between the ages of 10 and 14 years, the rebuttable presumption of *doli incapax* deems a child incapable of having the intention to commit a criminal act, and distinguishing between right and wrong.¹⁴³ Between the ages of 14 to 17 or 18 years, dependant on jurisdiction, a young person may be held fully responsible for their acts.¹⁴⁴ Comparatively, the minimum age of criminal responsibility in

¹³⁶ Australian Institute of Criminology, *The Age of Criminal Responsibility* Report No. 181 (2000) p 2 <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi181.pdf>.

¹³⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice [1985] Section 4, Commentary.

¹³⁸ Nicola Carr, ‘Criminalising ten year olds is no way to run a justice system’ *The Conversation* (online) 20 February 2015 <<http://theconversation.com/criminalising-ten-year-olds-is-no-way-to-run-a-justice-system-37661>>.

¹³⁹ Katherine McFarlane, ‘Faulty child welfare system is the issue behind our youth justice crisis’ *The Conversation* (online) 13 February 2017 <<http://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

¹⁴⁰ Jodie O’Leary, ‘Rethinking youth justice: there are alternatives to youth detention’ *The Conversation* (online) 4 August 2016 <<http://theconversation.com/rethinking-youth-justice-there-are-alternatives-to-juvenile-detention-63329>>.

¹⁴¹ *Ibid.*

¹⁴² Australian Institute of Criminology, *The Age of Criminal Responsibility* Report No. 181 (2000) p 1 <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi181.pdf>.

¹⁴³ *Ibid.*, p 1.

¹⁴⁴ *Ibid.*, p 1.

many other countries is higher.¹⁴⁵ Raising the age of criminal responsibility, balanced with investment in community based rehabilitation services and therapeutic approaches as discussed earlier, may avoid the harms posed to young people by early entrenchment in the criminal justice system.

10. Conclusion

Anna's story demonstrates the failure of our system to provide protections that should be afforded to all young people. Through the Royal Commission, the Northern Territory has been provided with extensive research to enable it to provide care, protection and detention facilities for young people in a way that demonstrates a commitment to the best interests of the child. Anna's family requests the Commission's consideration of the recommendations made throughout this submission, so that Anna and other children may enjoy the basic standard of care that our domestic and international obligations require.

¹⁴⁵ Ibid, p 2.