

**BRIEFING PAPER**

**ISSUES AFFECTING  
INCARCERATION  
RATES OF ABORIGINAL  
AND TORRES STRAIT  
ISLANDER CHILDREN**

**THE ESSENTIAL MEMBERSHIP FOR  
THE LEGAL PROFESSION**

Prepared by the Law Society of Western Australia

[lawsocietywa.asn.au](http://lawsocietywa.asn.au)

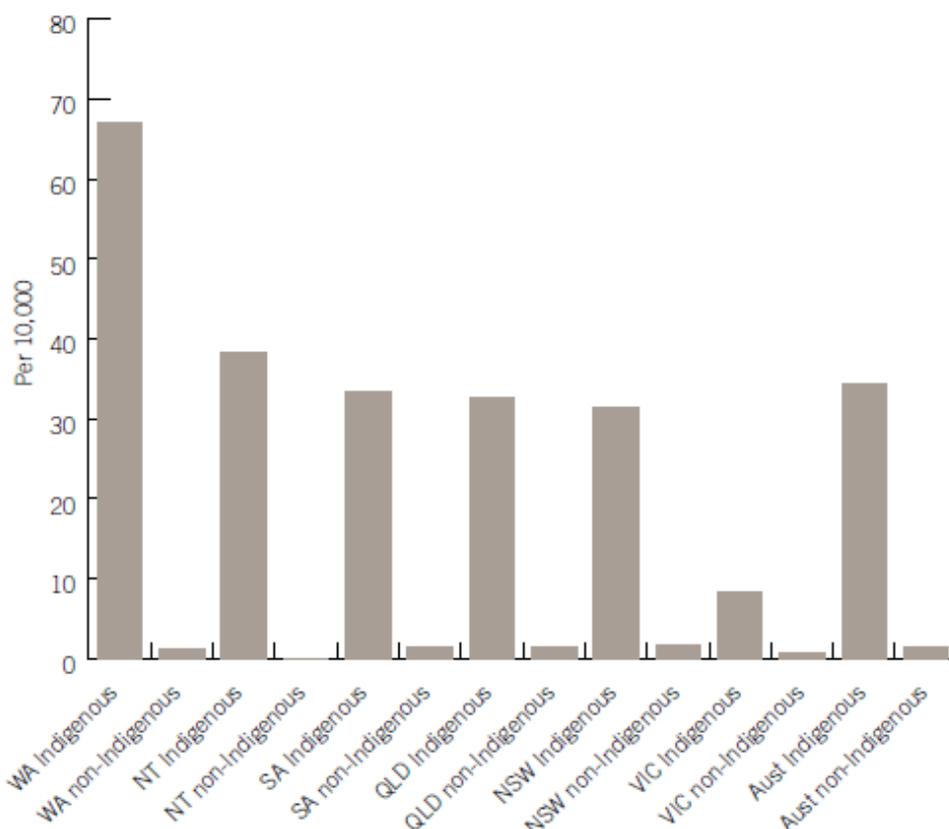
OCTOBER 2017

# ISSUES AFFECTING INCARCERATION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN

**WA has the highest rate of over-representation of Indigenous youth in detention in Australia. Change is needed.**

In 2013–2014, Indigenous young people in Australia were 26 times more likely to be in detention than non-Indigenous young people. Aboriginal and Torres Strait Islander young people make up just over 5% of Australia’s population (10 - 17-years old), but 59% of those are in detention.

The Aboriginal and Torres Strait Islander population has more people in younger age brackets than the non-Indigenous population. The National Congress of Australia’s First Peoples noted in 2013 that “unless the rate of increase in youth detention can be reduced, rates of incarceration across the Aboriginal and Torres Strait Islander population are likely to continue to increase into the future.”



Young people (aged 10 to 17) in detention on an average day 2013–14

The Law Society of Western Australia adopts the position as set out in Amnesty International Australia’s National Summary of its report ‘A brighter tomorrow: Keeping Indigenous kids in the community and out of detention’ (2015) at Annexure A.

## Recommendations

The Law Society of Western Australia recommends the State Government addresses the high rates of incarceration of young Indigenous people in WA in the following ways:

- 1. Legislate to amend laws that do not conform with the Convention on the Rights of the Child (ConRC), with regards to detention as a measure of last resort, mandatory sentencing and age of criminal responsibility.** Across Australia children are criminally responsible from 10 years of age despite the Committee on the Rights of the Child (CRC) having concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.

The *Criminal Code Act 1913 (WA)* sometimes requires magistrates to impose mandatory minimum sentences on young offenders. This directly contravenes the ConRC, which states that detention for those under 18 must only be a measure of last resort, and that all sentences must prioritise the best interests of the child. The CRC have recommended the laws be repealed. Instead the WA Government continues to extend mandatory sentencing.

- 2. Legislate to ensure that children and adults are detained in separate facilities.** When Australia ratified the ConRC, it made a reservation to Article 37(c), which requires children to be separated from adults in prison, unless it is in the child's best interests not to do so. This is used as justification for children being detained with adult prisoners where separation is not "considered to be feasible having regard to the geography and demography of Australia." The CRC has repeatedly recommended that the reservation be withdrawn.
- 3. Commence work with all state and territory governments, through COAG, to identify and address gaps in the collection of standard and disaggregated data related to youth contact with the justice system.** The Council of Australian Governments (COAG) provides an avenue for federal, state and territory governments to improve the coordinated collection and use of data to reform the youth justice system. There are many inconsistencies and gaps between states and territories in collecting relevant data. Inadequate information is one of the barriers preventing policy makers from more effectively responding to the over-representation of Indigenous young people in detention.
- 4. Work with relevant WA agencies and stakeholders to identify areas of unmet need for bail accommodation. Fund Indigenous community controlled bail accommodation and support services to ensure that Indigenous young people are not held in detention on remand solely due to a lack of other options. Particular focus should be given to young girls and boys in out-of-home care, and those with mental health issues and cognitive impairments.** Between June 2013 and June 2014 Indigenous young people were 23 times more likely than their non-Indigenous counterparts to be in un-sentenced detention. Indigenous young people are often held in detention on remand simply due to a lack of suitable accommodation and support to comply with bail conditions.
- 5. Develop justice targets to reduce Indigenous youth detention rates and create safer communities.** These should be developed in consultation with Indigenous People and their representative offender and victim organisations.
- 6. Develop youth bail legislation to require that pre-trial detention should occur only as a last resort where there is flight risk or risk to administration of justice upon release. Assessment should be case-by-case regarding necessity and proportionality.** International human rights standards require that detention for persons awaiting trial must be the exception rather than the rule.