

# 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

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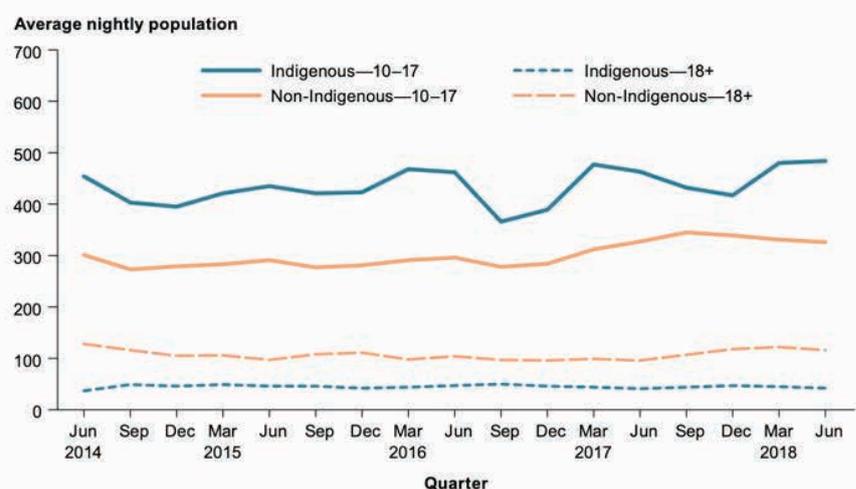
WA has the highest rate of over-representation of Indigenous youth in detention in Australia. Change is needed.

Although Aboriginal and Torres Strait Islander young people only made up about 5% of the Australian population aged 10-17, they represented 50% of the young people aged 10-17 under supervision in 2016-17.<sup>1</sup> Indigenous young people made up 48% of young people under community-based supervision, and 58% of young people in detention.<sup>2</sup> In 2016-17, Aboriginal and Torres Strait Islander young people were 24 times more likely to be in detention than non-Indigenous young people, with Western Australia having one of the highest rates of over-representation in the country.<sup>3</sup>

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.”

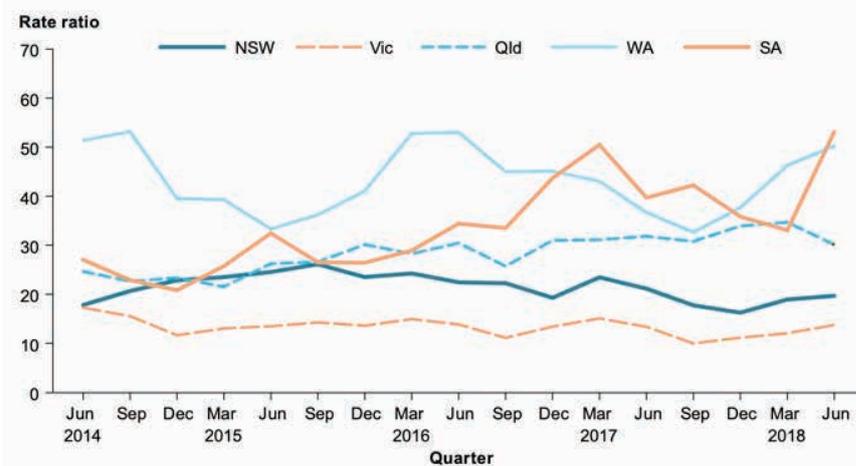
The Law Society of Western Australia adopts the position as set out in Amnesty International Australia’s National Summary of its report ‘A brighter tomorrow, Keeping Indigenous kids in the community and out of detention’ (2015) at Annexure A.

**Figure 4.2: Young people in detention on an average night, by Indigenous status and age group, Australia, June quarter 2014 to June quarter 2018 (number)**



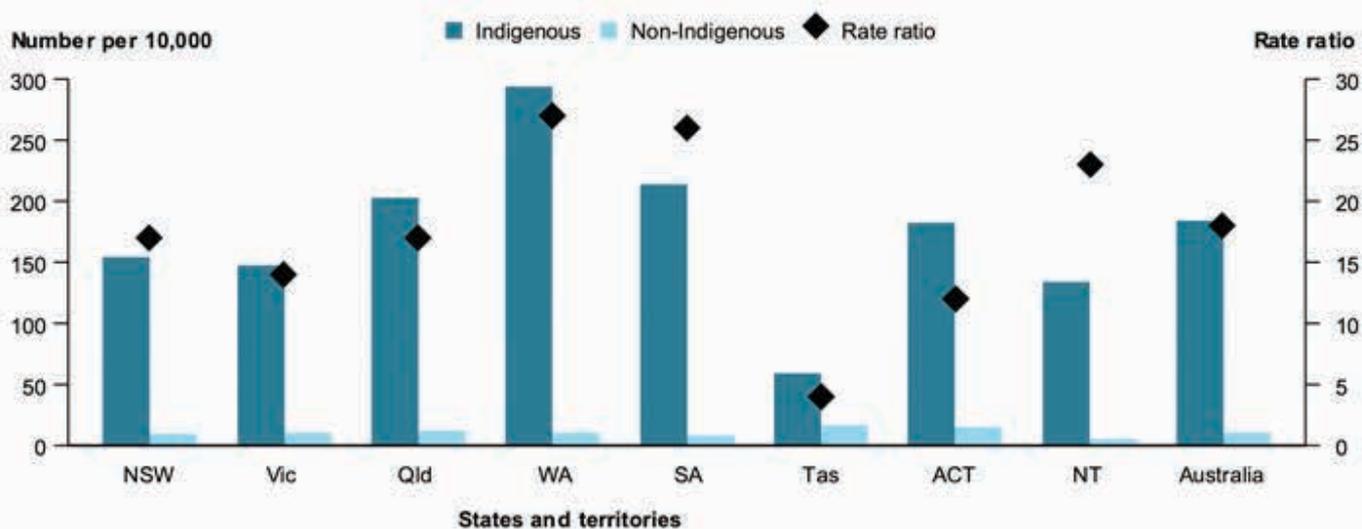
Note: Trends among small populations should be interpreted with caution. Numbers tend to fluctuate from quarter to quarter due to random variation, and this might affect the appearance and interpretation of trends.

**Figure 5.3 Indigenous over-representation among young people aged 10-17 in detention, by selected states, June quarter 2014 to June quarter 2018 (rate ratio)**



- Notes
1. Rate ratio is calculated by dividing the Indigenous rate by the non-Indigenous rate.
  2. Rates (and the resulting rate ratios) are calculated from the unrounded average nightly population, and are not published when there were fewer than 5 young people in the numerator. There might be instances when a numerator is presented as 5, and the rate is not calculated due to rounding (see 'Technical notes'). In this figure, rate ratios are not published for Tasmania, the Australian Capital Territory, and the Northern Territory.
  3. Trends among small populations should be interpreted with caution. Numbers tend to fluctuate from quarter to quarter due to random variation, and this might affect the appearance and interpretation of trends.
  4. In Queensland, legislation to increase the age limit in the youth justice system from 16 to 17 was enacted in the March quarter 2018. This resulted in a rise in young people aged 17 under youth justice supervision.

Figure 3.2: Young people aged 10–17 under supervision on an average day by Indigenous status, states and territories, 2016–17 (rate)



Note: Includes non-standard data for the Northern Territory, as JJ NMDS data were not supplied for 2016–17 (see Appendix 1).

## Current Initiatives

### Raising the Age of Criminal Responsibility

In 2018, the Northern Territory committed to raising the age of criminal responsibility following the final report of the Royal Commission into the Protection and Detention of Children, becoming the first government to do so.<sup>4</sup> Calls have been made for this to be followed through, and for other states to take similar action.

In Western Australia, it is s29 of the Criminal Code Act Compilation Act 1913 that would require amendments to raise the age of criminal responsibility.<sup>5</sup>

### Yiriman Project

The Yiriman Project is a non-incorporated Aboriginal organisation that was established in 2000, and is based out of Fitzroy Crossing, Western Australia.<sup>6</sup> Part of the Yiriman Project targets Indigenous youth, aiming to reconnect them with their culture and develop positive relationships between young people and mentors.<sup>7</sup> There have been positive reports of re-engagement of Indigenous young people, but a chronic underfunding of the program, which is mostly funded by private donors and philanthropic organisations.<sup>8</sup> Although recommendations have been made by the State Coroner and Auditor-General, the State Government’s commitment is unclear.<sup>9</sup>

## Policy Position

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 unsentenced 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 a flight risk or risk to the 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.

## NOTES

1. Australian Institute of Health and Welfare, 'Youth Justice in Australia 2016-17'(JUV 116, 2018) 8 <<https://www.aihw.gov.au/getmedia/19707990-1719-4600-8fce-f0af9d61331c/aihw-juv-116.pdf.aspx?inline=true>>.
2. Ibid.
3. Australian Institute of Health and Welfare, 'Youth Justice in Australia 2016-17'(JUV 116, 2018) Table 3.1 <<https://www.aihw.gov.au/getmedia/19707990-1719-4600-8fce-f0af9d61331c/aihw-juv-116.pdf.aspx?inline=true>>.
4. 'Northern Territory set to be the first government in Australia to raise the age of criminal responsibility' Human Rights Law Centre (Article, 1 March 2018) <<https://www.hrlc.org.au/news/2018/3/1/nt-to-be-the-first-government-to-raise-age-of-criminal-responsibility>>.
5. 'Explainer: Raising the age', Human Rights Law Centre (Factsheet, 20 March 2018) <<https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age>>.
6. 'Yiriman Story', Yiriman Project (Web page) <<http://www.yiriman.org.au/>>.
7. 'Yiriman Project', Department of Health (Web page January 2014) <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/suicide-prevention-activities-evaluation-Appendices-appendix-a-project49>>.
8. Tom de Souza, 'Yiriman Project takes kids off the beaten tracks to keep them on the straight and narrow', The West Australian (Article, 6 January 2018) <<https://thewest.com.au/news/indigenous-australians/yiriman-project-takes-kids-off-the-beaten-tracks-to-keep-them-on-the-straight-and-narrow-ng-b88695126z>>.
9. Ibid.

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