



**Submission to the Royal Commission into the Protection and
Detention of Children in the Northern Territory**

29 November 2016

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About UNICEF Australia

1. UNICEF is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF supports child health and nutrition, clean water and sanitation, quality basic education for all boys and girls, and the protection of children from violence, exploitation, abuse and HIV. UNICEF is unique among world organisations in our rights based and participatory approach to working with children and young people.
2. UNICEF Australia is a national committee of UNICEF which advocates for the rights of all children and works to improve public and government support for child rights and international development.
3. UNICEF is one of 13 member agencies of the Interagency Panel on Juvenile Justice which is a network mandated by the United Nations Economic and Social Council (ECOSOC) to provide technical assistance in juvenile justice.¹

Parameters of this submission

4. This submission will focus on the following matters outlined in the Letters Patent:
 - what measures should be adopted by the Government of the Northern Territory, or enacted by the Legislative Assembly of the Northern Territory, to prevent inappropriate treatment of children and young persons detained at the relevant facilities (g); and
 - what improvements could be made to the child protection system of the Northern Territory, including the identification of early intervention options and pathways for children at risk of engaging in anti-social behaviour (h).
5. In this submission, the terms “children”, “young people” and “juvenile” mean persons under 18 years of age.
6. UNICEF Australia’s submission is informed by our global programs and policy work for children, and the international human rights law and associated standards outlined in Appendix 1 – Relevant international law and standards. Specifically, our approach is informed by the following rights of the child:

¹ United Nations Economic and Social Council, *Administration of juvenile justice*, ESC Res 1997/30, 36th plenary meeting, (21 July 1997) (*‘The Vienna Guidelines’*).

- Right to non-discrimination (art 2, *Convention on the Rights of the Child (CRC)* and art 2 *International Covenant on Civil and Political Rights (ICCPR)*);
- Best interests of the child as a primary consideration (art 3, CRC);
- General measures of implementation (art 4, CRC);
- Respect for the rights and duties of parents (art 5, CRC);
- Right to life, survival and development (art 6(2), CRC);
- Right to birth registration (art 7);
- Preservation of identity and, in particular, family relationships (art 8, CRC);
- Right not to be separated from parents except when in the best interests of the child (art 9, CRC);
- Right to be heard and participate in decisions affecting the child (art 12, CRC);
- Right to be free from all forms of violence (art 19, CRC);
- Rights of children who are deprived of family environment (art 20, CRC);
- Rights of children with disabilities (art 23, CRC);
- Right to health (art, 24 CRC);
- Right to periodic review of treatment (art 25, CRC);
- Right to education (art 28, CRC);
- Right to culture (art 30, CRC);
- Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (art 37(a), CRC and art 7, ICCPR);
- Detention as a measure of last resort and the prohibition of arbitrary detention (art 37(b), CRC);
- Right of children in conflict with the law to be treated with humanity, to have their inherent dignity respected, to treatment which is in accordance with their age and to be kept separate from adults (art 37(c), CRC);
- Right to rehabilitation for victims of torture (art 39, CRC);
- Right to liberty and security of person (art 9, ICCPR);
- Right to humane treatment in detention (art 10, ICCPR);
- Right to be presumed innocent until proved guilty according to law (art 14(2), ICCPR); and
- Right to equality before the law and special protection as a child (art 24(1), ICCPR).

Executive summary

7. The Royal Commission into the Protection and Detention of Children in the Northern Territory (**Royal Commission**) is a welcome development, and UNICEF Australia

commends the Prime Minister, the Attorney-General and the then Giles Country Liberal Party Government for its establishment.

8. UNICEF Australia also commends the efforts of the Royal Commission to engage with children and communities to fulfil its terms of reference. UNICEF Australia recommends that the timeframe for the production of the Royal Commission's report should be adequately extended to enable culturally appropriate, safe, genuine and meaningful consultations and hearings involving children and communities.
9. Similarly to Counsel Assisting the Royal Commission,² UNICEF Australia observes that many of the issues under consideration have been thoroughly canvassed in over 50 inquiries held and reports produced over the last 25 years. Commencing with the *Royal Commission into Aboriginal Deaths in Custody* in 1991, and its subsequent 339 recommendations. If those recommendations had been fully implemented, significant progress would have been made towards reducing the over-incarceration of Aboriginal and Torres Strait Islander people (including children) and enhancing safety in custody. Internationally, there has been recognition stemming back at least half a century that the needs of children in conflict with the law and children in need of care and protection are generally very similar.³ It is therefore disappointing that children in the Northern Territory, and Aboriginal and Torres Strait Islander children and families in particular, have not benefited from the collective analysis and recommendations for reform which could have improved the youth justice and care and protection systems in the jurisdiction.
10. Although there are strong indications that the situation in the Northern Territory is particularly acute, other state and territory governments across Australia have been and remain on notice that similar issues are likely to exist across most, if not all jurisdictions. We note that subsequent to the establishment of the Royal Commission, further reports of ill treatment of children in youth justice settings have continued to surface and a number of jurisdictions have subsequently announced reviews into conditions and practices in youth detention centres.⁴ As such, UNICEF Australia

² Counsel Assisting opening address, Royal Commission into the Protection and Detention of Children in the Northern Territory, 11 October 2016 <<https://childdetentionnt.royalcommission.gov.au/Public-Hearings/Documents/evidence-2016/Evidence11October/Opening-Senior-Counsel-Assisting.pdf>>.

³ Her Majesty's Stationery Office, *The Kilbrandon Report*, re-published 1995, <<http://www.gov.scot/Resource/Doc/47049/0023863.pdf>>, p. 9.

⁴ For example, author unknown, 'Queensland youth detention: Independent review ordered by Attorney-General Yvette D'Ath', *ABC News*, 19 August 2016 <<http://www.abc.net.au/news/2016-08-19/queensland-youth-detention-centres-independent-review-ordered/7767580>> and Sarah Gerathy, 'Juvenile Justice: NSW to review

recommends that the Federal Government, and State and Territory Governments, seek to learn from and implement the recommendations of this Royal Commission in so far as it is appropriate to do so within their own jurisdictions.

11. The Letters Patent require the Royal Commission to inquire into what measures should be adopted to prevent inappropriate treatment of children and young persons detained. The fundamental starting point to respond to this must be to acknowledge that children in custody are at high risk of violence.⁵ Accordingly, the best means of ensuring children are not subject to inappropriate treatment in detention is first to prioritise preventative supports to children, families and communities to help ensure that children do not come into conflict with the law in the first place. In the event that preventative measures fail, the youth justice system should adopt a human rights-based approach to the young person and fully utilise methods of support (wherever possible, not involving detention) to enable the young person and his or her caregivers to address factors contributing to the offending behaviour. Failure to do so is inconsistent with the rights of the individual child, and will also inevitably fail to deliver on objectives of reduced offending and increased community safety.

12. There are many actions that the Northern Territory Government, the Legislative Assembly of the Northern Territory and the Federal Government could take to this end. Many of these measures are linked and mutually reinforcing and must be seen as part of a holistic system of protection for children. This submission outlines that the most effective means of achieving such outcomes is through:

- 1) Prioritising structural reform, systems and investments to address the causal drivers of children coming into conflict with law (prevention);
- 2) Establishing a child-centred youth justice system;
- 3) Ensuring detention is only used as a measure of last resort through full and proper use of diversion measures and alternatives to detention, and ensuring the child experiences conditions and supports aimed at his or her rehabilitation and reintegration; and
- 4) Ensuring the strict adherence to legal safeguards in places of detention.

youth detention centres amid detainee isolation claims', *ABC News*, 27 October 2016
<<http://www.abc.net.au/news/2016-10-27/nsw-to-review-juvenile-detention-centres/7970194>>.

⁵ Human Rights Council, *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 21st sess, UN Doc A/HRC/21/25 (27 June 2012), para 5.

13. Such measures would be further strengthened by an overarching system of human rights protections created by a human rights act, and transparent, accountable and participatory institutions.

14. UNICEF Australia recognises that to effectively implement a policy and legislative framework which establishes and upholds such a system and approach is a complex undertaking. This is particularly so given economic and social conditions in communities across the Northern Territory, and in remote and rural areas. However, the *Convention on the Rights of the Child*,⁶ alongside the *United Nations Declaration on the Rights of Indigenous Peoples*⁷ and the *Convention on the Rights of People with Disabilities*⁸ provide a rights-based framework for Governments, communities, families and children themselves to work together to progressively improve the situation and experiences of children and families in the Northern Territory. UNICEF Australia submits that a rights-based approach built on the principles outlined in this submission will, over time, be the most effective way to reduce recidivism, enhance community safety, keep children out of detention and assist all children in the Northern Territory reach their full potential.⁹

Observations about youth justice and child protection systems in the Northern Territory

15. UNICEF Australia as a co-convenor of the Australian Child Rights Taskforce, and many other civil society member organisations, have expressed significant concern about the functioning of both youth justice systems and care and protection systems across Australia. These concerns have been documented through shadow reports to the United Nations Committee on the Rights of the Child (Committee on the Rights of the Child).¹⁰ Most recently, these concerns were again raised in May 2016 in the *CRC25 Australian Child Rights Progress Report*.¹¹

⁶ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷ General Assembly, *United Nations Declaration on the rights of indigenous peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

⁸ Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁹ Committee on the Rights of the Child has also concluded "...the preservation of public safety is a legitimate aim of the justice system. However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC." *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) ('*General Comment No. 10*'), para. 14.

¹⁰ Australian Child Rights Taskforce, *Listen to Children*, May 2011

<http://www.unicef.org.au/Upload/UNICEF/Media/Documents/ListenToChildren2011report.pdf>.

¹¹ Australian Child Rights Taskforce, *CRC25 Australian Child Rights Progress Report*, May 2016

<http://www.unicef.org.au/Upload/UNICEF/Media/Documents/CRC25-Australian-Progress-Report.pdf>.

16. Likewise, the United Nations Committee on the Rights of the Child has consistently raised concerns about the over-representation of Aboriginal and Torres Strait Islander children in both the juvenile justice and care and protection systems across Australia.¹² Globally, UNICEF, United Nations Agencies, numerous UN Special Rapporteurs, academics and members of civil society have also continually highlighted the risks to children created by institutional environments, including detention settings.¹³

17. UNICEF Australia does not propose to revisit the findings of the numerous inquiries which form a compelling body of evidence about the systemic underlying social and economic factors contributing to young people at risk of offending, and the ineffectiveness and inappropriateness of punitive responses. However, for the purposes of this submission, it is necessary to highlight some observations made by four significant reviews into the Northern Territory youth justice and child protection systems on which UNICEF Australia largely relies, namely:

- Office of the Children's Commissioner, Northern Territory, (Colleen Gwynne), *Own Initiative Investigation Report – Services provided by the Department of Correctional Services at the Don Dale Youth Detention Centre*, August 2015 (**2015 Children's Commissioner Report**);
- Michael Vita, *Review of the Northern Territory Youth Detention System Report*, January 2015 (**2015 Vita Review**);
- Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report*, September 2011 (**2011 NT Government Review**); and
- Board of inquiry report into the child protection system in the Northern Territory (2010), *Growing them Strong, Together: Promoting the safety and wellbeing of the Northern Territory system*.

18. Additional observations are made using statistics available on the youth justice and care and protection systems in the Northern Territory (including specifically *Northern Territory Department of Correctional Services Annual Statistics 2014-2015*, the Productivity Commission's *Report on Government Services 2016*, statistics and

¹² Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), para 29(a), Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005), para 72; and Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 16th sess, UN Doc CRC/C/15/Add.79 (21 October 1997), para 22.

¹³ See, for example, United Nations General Assembly, *Report of the Independent expert for the United Nations study on violence against children*, 61st sess UN Doc A/61/299 (29 August 2006).

observations published by the Australian Institute of Health and Welfare regarding youth justice.

19. Key data that establish a picture of the context of the protection and juvenile justice system in the Northern Territory, and that have informed this submission include:

- A total of 1,073 children in the Northern Territory were the subject of some form of care and protection order as of 30 June 2015.¹⁴
- A total of 86% of children subject to care and protection order in 2014-2015 were Aboriginal or Torres Strait Islander¹⁵
- In the Northern Territory, the response time for completion of a child protection investigation are 37.5% completed in the first 28 days, 24.1% completed in 29-26 days, 10.7% completed in 63-90 days and 27.7% completed in over 90 days.¹⁶
- 38.7% of notifications to child protection were substantiated.¹⁷
- 34.8% of Aboriginal and Torres Strait Islander children were placed in accordance with the Aboriginal Child Placement principle¹⁸
- 23% of child protection services is directed to family support services, compared to child protection and out of home care expenditure¹⁹
- Over 2014-2015, there was a total of 174 children in the Northern Territory under youth justice supervision with 136 of these (78%) supervised in the community and 41 (24%) in detention.²⁰
- The majority (78%) of young people in detention are unsentenced.²¹
- In terms of demographics of children under supervision on an average day in 2014-2015, 62% were aged between 15-17 years, 86% were male and 92% were Aboriginal or Torres Strait Islander. Aboriginal and Torres Strait Islander young people constitute 45% of the population aged 10–17 years.²²
- The rate of Indigenous young people aged 10–17 years under supervision on an average day in the Northern Territory was 112 per 10,000. This means that Aboriginal and Torres Strait Islander young people in the Northern Territory aged

¹⁴ Productivity Commission, *Report on Government Services 2016, Chapter 15 Child Protection* ('Report on Government Services 2016, Chapter 15 Child Protection'), 2016 <<http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/community-services/child-protection>>, table 15A.7.

¹⁵ Ibid.

¹⁶ Ibid, table 15A.16.

¹⁷ Ibid, table 15A.9.

¹⁸ Ibid, table 15A.24.

¹⁹ Ibid, table 15A.1.

²⁰ Australian Institute of Health and Welfare, *Northern Territory: youth justice supervision in 2014-15*, Youth Justice Fact Sheet 58, 2016, p. 1, <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554891>>.

²¹ Ibid, p. 3.

²² Ibid, p. 2.

10–17 years were about 17 times as likely as non-Indigenous young people to be under supervision on an average day.²³ This rate is slightly higher than the national rate of 15 times as likely.²⁴

20. The reports listed above outline that multiple children within the Northern Territory youth justice system in recent years have experienced:

- Prolonged and improper use of confinement;²⁵
- Facilities with no running water, natural ventilation or natural light for at least 22 hours per day;²⁶
- An absence of programs to support children to regulate their emotions and manage their own behaviours;²⁷
- Basic rights withheld for inappropriate periods of time;²⁸
- Exposure to staff who were not properly trained to work with children in detention based settings;²⁹
- Lack of appropriate safeguards around the use of force;³⁰
- Subjective and variable decision-making;³¹
- Poor physical infrastructure and antiquated facilities that is not conducive to children, their recreation or development;³² and
- Inappropriate and unsafe use of restraint.³³

21. These publications also indicate serious structural and management problems with NT youth justice system (at least as it then existed), including:

- Grossly inadequate training of personnel employed in detention facilities;³⁴
- Poor case management (including a lack of a multi-disciplinary team approach) and staff communication;³⁵
- Outdated and inadequate procedures manuals;³⁶

²³ Ibid.

²⁴ Ibid, p. 2.

²⁵ Office of the Children’s Commissioner, Northern Territory, *Own initiative investigation report – Services provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* August 2015 (‘2015 Children’s Commissioner Report’), p. 36-37.

²⁶ Ibid, p. 32.

²⁷ Michael Vita, *Review of the Northern Territory Youth Detention System Report*, January 2015 (‘2015 Vita Review’), p. 13.

²⁸ Ibid, p. 28.

²⁹ Ibid, p. 12.

³⁰ Ibid, p. 13.

³¹ Ibid, p. 13.

³² 2015 Children’s Commissioner Report, above n 25, p. 32.

³³ Ibid, p. 29.

³⁴ 2015 Vita Review, above n 27, p. 12.

³⁵ Ibid, p. 13.

³⁶ Ibid, p. 21.

- Failures to engage proper de-escalation techniques and poor management of high risk young people;³⁷
- Sub-standard facilities described by staff as “in-humane”;³⁸
- Incomplete and poor record keeping;³⁹
- Serious transparency and accountability concerns, including the provision of inaccurate information;⁴⁰
- Lack of meaningful offence focused programming;⁴¹
- Lack of quality assurance;⁴²
- Absence of a philosophy and framework to drive the purpose of youth detention;⁴³
- Seriously deficient approach to work health and safety;⁴⁴
- Increasing numbers of children held in detention on remand;⁴⁵ and
- Lacking diversionary measures.⁴⁶

22. The NT Children’s Commissioner has observed that several practices were not in compliance with the *Youth Justice Act 2006* (NT) and relevant procedures.⁴⁷ It has been widely observed and commented that such conditions are likely to amount to a breach of many international human rights standards. In addition to the apparent ways in which this system has likely breached the rights of children, aspects of it have also failed to deliver on the organisational goals of reducing offending, with Michael Vita concluding “...it is highly doubtful that meaningful headway is being made to reduce re-offending, certainly in a detention centre environment”.⁴⁸

23. UNICEF Australia is aware that numerous reforms have occurred subsequent to these and other reviews. We note, for example, that the Don Dale Youth Detention Centre as the site of many incidents in 2014 has been subsequently decommissioned and young people moved to a new location, a professional qualification scheme for Youth

³⁷ Ibid, p. 13.

³⁸ 2015 Children’s Commissioner Report, above n 25, p. 35.

³⁹ 2015 Vita Review, above n 27, p. 43.

⁴⁰ 2015 Children’s Commissioner Report, above n 25, p. 28.

⁴¹ 2015 Vita Review, above n 27, p. 13.

⁴² Ibid, p. 34.

⁴³ Ibid, p. 13.

⁴⁴ Ibid, p. 43.

⁴⁵ Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report*, September 2011 (‘2011 NT Government Review’), p. 49

<https://justice.nt.gov.au/data/assets/pdf_file/0009/269793/2014-15-NTDCS-Annual-Statistics.pdf>.

⁴⁶ Ibid, p. 96-98 <https://justice.nt.gov.au/data/assets/pdf_file/0009/269793/2014-15-NTDCS-Annual-Statistics.pdf>.

⁴⁷ 2015 Children’s Commissioner Report, above n 25, p. 38.

⁴⁸ 2015 Vita Review, above n 27, p 38.

Justice Officers has been developed⁴⁹ and a youth bail support program has been introduced to help courts consider bail for low-level offences.⁵⁰ We further note the recent proposal to further limit the use of restraints including restraint chairs. However, it is a significant gap that the 2015 Vita Review did not involve meaningful participation from young people, and that several previous reports have focused on discrete issues. As such, it is important that the current Royal Commission includes child and community participation, and looks at the linkages between the youth justice and care and protection systems in a holistic way and in light of current knowledge.

24. UNICEF Australia observes that the publicly reported conditions, culture and incidents at youth detention centres, particularly that at Don Dale Youth Detention Centre in 2014, and the consistently concerning youth justice statistics prevailing in the Northern Territory, are the responsibility of many, including past governments at both the Territory and Federal levels. We further note the Northern Territory Emergency Response and Stronger Futures legislation has largely failed to correct chronic disadvantage for Aboriginal and Torres Strait Islander children and families.⁵¹ Through listening to children and communities and observing international human rights law, the Northern Territory Government, in partnership with the Federal Government, has the opportunity now to build a youth justice system and a care and protection system which will achieve better outcomes for individual children and families, and which would result in better community safety and more effective expenditure over time.

Recommendations

UNICEF Australia recommends:

The Guiding Principles of the Convention on the rights of the Child and implications for children's policy

Best interests

1) That the Northern Territory Government introduce into in all relevant youth justice legislation a specific reference to the *Convention on the Rights of the Child*, and include a requirement that decision-makers at every level to take into account the best interests of the child as a primary consideration.

⁴⁹ Northern Territory Government, Northern Territory Whole of Government Youth Justice Framework 2015-2020 – *Youth Justice Framework 2015-2020* ('NT Youth Justice Framework 2015-2020'), p. 3.

⁵⁰ Ibid, p. 5.

⁵¹ Ben Schokman, "'Stronger Futures' is disempowering, damaging and doomed to fail" (2012) 7(30) *Indigenous Law Bulletin*, 17.

2) That the Northern Territory Government provide dedicated funding for specialist, ongoing training for all relevant personnel involved in the administration of the youth justice and child protection system on the meaning and application of a rights-based approach to working with children in conflict with the law, including the best interests of the child as a primary consideration

Non-discrimination

3) That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, which includes:

- a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies.
- d) Investing sufficient resources to ensure practical implementation.

4) That the Australian Government and state and territory governments provide the necessary human, technical and financial resources to fully implement the recommendations of the Senate Standing Committee on Community Affairs report on *Violence, abuse and neglect against people with disability in institutional and residential settings*.⁵²

Children's right to participate

5) That the Northern Territory Government reviews current mechanisms for children to participate in decisions that affect them (as individuals and as a group, or a cohort of children) and, where appropriate, seek to expand and enhance this participation through child-centred and accessible avenues. This should include consideration of opportunities for children to be heard in criminal proceedings and child protection processes, particularly alternative care processes.

The need for a human rights act

⁵² Senate Standing Committee on Community Affairs, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 25 November 2015, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>.

6) That the Northern Territory Government introduce a human rights act and provide the resources ensure that all children, and children in contact with youth justice and care and protection services in particular, are provided with full information on their rights.

The need for effective, accountable, transparent and inclusive institutions

7) That the Australian Government ratify, as soon as practicable, the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, and that all governments (federal, state and territory) adopt legislation and other policy measures to give it full effect.

8) That the Australian Government establish and adequately resource an independent National Preventative Mechanism (or bodies which could collectively constitute the NPM), through open and inclusive consultation. The established NPM should have the following:

- a) A human rights-based approach to monitoring.
- b) A mandate which is sufficiently broad so as to include all circumstances in which children and others could be at risk of experiencing torture or cruel, inhuman or degrading treatment or punishment.
- c) The express power to access all places of detention without restriction, have access to all relevant information and speak to individuals in private.
- d) Staff who are skilled in communicating with children in a manner that is appropriate to their age, stage of development, level of maturity, culture, and other circumstances.
- e) A framework which includes specific reference to children and young people.
- f) Sufficient resources, staff, expertise, mandate and powers to discharge its function.

9) That the Northern Territory Government establish an independent, transparent and effective body responsible for the monitoring and oversight of all places of detention in accordance with human rights standards (including the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*).

10) That the Australian Government ratify the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.

11) That the Northern Territory Government review current data collection systems to identify and address gaps, and enhance investment and capability to ensure the collection of regular and accurate information, particularly about vulnerable and at risk children, with information made publicly available when in the public interest. In the context of youth justice for example, critical issues to report on should include use of diversion and within detention centres, the use of force and use of isolation/solitary confinement.

Cultural rights and special measures

12) That the Australian and the Northern Territory Governments support self-determination measures through enhancing Aboriginal and Torres Strait Islander decision-making in relation to child protection. This may include increased investment in service delivery by community controlled organisations, positions within government, adequately funded peak bodies and other professional mechanisms established with communities.

13) That the Australian and the Northern Territory Governments work with Aboriginal and Torres Strait Islander leaders, organisations and mental health professionals to and adequately fund healing programs to address intergenerational trauma for whole of communities.

14) That the Northern Territory Government appoint a Deputy Children's Commissioner with a special focus on Aboriginal children living in the Northern Territory.

Prevention

15) That the Australian Government assign a Commonwealth Ministry for Children with lead responsibility and coordination in providing a whole of government approach to policy regarding children and young people with inter-disciplinary approaches through education, health, protection and social services.

16) The Commonwealth Attorney-General's Department establish a joint civil society and Commonwealth Interdepartmental Committee and to coordinate and monitor implementation of the Convention on the Rights of the Child.

17) That the Australian and the Northern Territory Governments develop strategies to address the causal drivers of children's experiences of violence, including poverty, mental health and drug and alcohol misuse (including, for example, through justice reinvestment strategies).

Part A: Social protection for children and families

18) That the Australian and Northern Territory Governments provide adequate social security income support and subsidies, housing, and other measures that address unemployment and underemployment.

19) That the Australian Government increase income support payments for young people and the Family Tax Benefit for low income families. Payments to be indexed to wage movements to ensure an adequate standard of living can be maintained and children do not fall into poverty as the cost living increases.

20) That the Northern Territory Government develop a strategy to identify effective, secure housing models for young people experiencing, or at risk of homelessness, with particular focus on young people in or transition from the out of home care system.

21) That the Australian and Northern Territory Governments expand implementation and investment in Aboriginal and Torres Strait Islander bilingual and cultural education initiatives. Mechanisms for implementation are recommended in the *Indigenous Languages Programmes in Australian Schools A Way Forward* report.⁵³

22) That the Australian Government provide high quality free early childhood care and education for at least two days per week for all children regardless of activity tests.

23) That the Australian and Northern Territory Governments provide long term funding for Aboriginal and Torres Strait Islander early childhood centres and integrated services focusing on free and affordable access and other services targeting vulnerable children.

Part B: Child protection system

24) That the Australian Government adequately fund and prioritise implementation of the *National Framework for Protecting Australia's Children*, including the Third and Fourth Action Plans to fulfil its stated intention of prevention and early intervention.

25) That the Australian and the Northern Territory Governments increase access to, and resources for, high quality, culturally strong, intensive family support services for at risk families.

26) That the Australian Government set targets and develop a national strategy to address the over-representation of Aboriginal and Torres Strait Islander children in the child protection and out of home care system.

27) That the Northern Territory Government ensure all Aboriginal and Torres Strait Islander children have access to a cultural connection and care plan, and practical supports for out of home carers for effective implementation.

28) That the Northern Territory Government implement mandatory support and transition plans up to 25 years of age for all children exiting out of home care.

29) That the Northern Territory Government increase resources for and access to Aboriginal and Torres Strait Islander service providers and consider community based child protection models in remote communities.

⁵³ Purdie et al, *Indigenous Languages Programmes in Australian Schools A Way Forward*, 2008.

30) That the Northern Territory Government develop and implement strategies to increase the number of senior Aboriginal and Torres Strait Islander child protection employees and provide ongoing professional support development.

31) That the Northern Territory Government invest in recruiting and retaining non-indigenous child protection teams with skilling to work cross culturally and to manage highly vulnerable cases.

32) The Northern Territory Government increase investment in and recruitment of high quality out of home care options and supports for trauma informed care and therapeutic services for children, carers and families.

Youth justice system

Part A: A child-centred justice system based on a human rights-based approach to offending

33) That the Northern Territory Government raise the minimum age of criminal responsibility to at least 12 years of age.

34) That the Northern Territory Government commit to the full implementation of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* through appropriate legislative, policy and practical measures. This should include, for example, ensuring the availability of a child-centred, properly resourced and accessible children's court.

Part B: Detention as a measure of last resort and responses aimed at rehabilitation and reintegration

35) That the Northern Territory Government increase legal protections to ensure detention is only ever used as a measure of last resort and for the shortest possible period. Specifically, consideration should be given to:

- a) Increasing legal eligibility and practical availability for diversion (for example, through abolishing the prohibition on diversion (section 39(3)(c) *Youth Justice Act 2006* (NT)) and through increasing availability and quality of bail support programs.
- b) Strategies to significantly reduce the number of unsentenced children in detention as a matter of urgency.
- c) Investments in safe, community-based accommodation options across the territory.
- d) Commitments to adequately fund and expand culturally appropriate and community-led and based diversion programs and alternatives to detention.
- e) Review the use of community-based orders with a view to expanding their use for the purposes of bail conditions and sentencing, and consider introducing measures to

help ensure that bail conditions imposed are reasonable, proportionate and appropriate for the individual child.

Part C: Proper safeguards and the protection of rights when a child is detained

36) That the Northern Territory Government take all reasonable steps to adopt and incorporate the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* and the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* into law, policy and practice. As a priority, it is recommended that the Northern Territory Government:

- a) Strictly prohibit the use of isolation and/or solitary confinement against children and provide a remedy and appropriate rehabilitative supports for any children who have been subject to such measures historically.
- b) Ensure that the use of force and restraints against children is generally prohibited by law, but permitted only in exceptional cases where all other control measures have been exhausted and failed, with a requirement that they be used restrictively and only for the shortest possible period of time and under the strict supervision of medical and other relevant personnel.
- c) Require youth detention facilities to record accurately and promptly record all uses of force, control or restraint in both records of the individual detainee and facility records, and for these to be publicly available at regular intervals.
- d) Mandate that children have unrestricted and confidential access to effective complaints mechanisms at all times.
- e) Amend s 27 of the *Youth Justice Act 2006* (NT) to require a child to be brought before a court as soon as practicable and in any case within 24 hours after the arrest.
- f) Ensure legal protections and practical provision exist to support children in detention to maintain connection to culture to the maximum extent possible.

37) That the Northern Territory Government invest in:

- a) Establishing small scale and decentralised detention facilities which facilitate contact with family, community and culture.
- b) Increasing the availability of rehabilitation programs and ensure that these are premised on rehabilitation and not punishment.

The Guiding Principles of the Convention on the Rights of the Child and implications for policy

25. The *Convention on the Rights of the Child* (**CRC** or **Convention**) is the fundamental articulation of the rights of children which must be respected, protected and fulfilled by governments at all times. It outlines the circumstances that must be created to enable all children to grow up to reach their full potential and to enjoy conditions of dignity, respect and equality. Four rights outlined in the CRC have elevated status of guiding principles and these must be used to interpret and understand the Convention as a whole. These are:

- Article 2 – The right to non-discrimination;
- Article 3 – The right to have best interests taken as a primary consideration;
- Article 6 – The right to survival and development; and
- Article 12 – The right to participate.

26. UNICEF Australia has concerns about the degree to which these rights are upheld in numerous areas of children’s policy in the Northern Territory.

Best interests

27. A child’s right to have their best interests taken as a primary consideration in all actions concerning a child is one of the most important provisions of the Convention.⁵⁴ The Committee on the Rights of the Child has explained that “[t]he full application of the concept of the child’s best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.”⁵⁵ An approach which protects the best interests of the child must be distinguished from paternalistic or welfare based approaches which can neglect the agency and views of the child.

28. The best interests of the child is a threefold concept:

- 1) A substantive right – To have rights assessed and taken into account as a primary consideration when different factors are being assessed. This is essentially an obligation of outcome.

⁵⁴ Milka Sormunen “In All Actions Concerning Children?” *International Journal of Children’s Rights* 24 (2016) 155-184, 156.

⁵⁵ Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) (*General Comment No. 14*), para. 5.

- 2) A fundamental interpretive legal principle – In instances where multiple interpretations are open, the interpretation which serves the child’s best interests must be selected.
- 3) A rule of procedure – Requiring procedural guarantees for the proper identification, assessment and proper consideration of the best interests of an individual child, cohort of children or children generally (including articulation of the criteria to be considered and the weighting given to different considerations).⁵⁶

29. Realising the best interests of the child means realising the rights outlined in the Convention.⁵⁷ Therefore, achieving the best interests of the child necessitates that a human rights-based approach be adopted for all policy, law and programs that directly or indirectly concern children. Significantly, the concept must be applied for the benefit of an individual child, a cohort of children and also children in general.

30. Assessing and or determining the best interests of an individual child requires understanding and appreciation of the individual characteristics and circumstances of the child or children concerned, for example:

- a) identity factors such as the age, culture, sexual orientation, nationality, faith of the child;
- b) the specific care and protection needs of the child;
- c) the family environment;
- d) health or mental health considerations;
- e) the child’s access to quality education;
- f) the level of maturity of the child; and
- g) the views of the child.⁵⁸

31. Depending on the individual child or situation, an assessment of a child’s best interests will mean that some of these elements will take on more importance than others. It is important that decision makers retain some degree of adaptability so that the best interests of the child can be “defined on an individual basis according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.”⁵⁹ In terms of weighting against other factors, the child’s best interests “...have high priority and [are] not just one of several considerations...a

⁵⁶ Ibid, para. 6.

⁵⁸ Ibid, para 52-79.

⁵⁹ Ibid, para. 32.

larger weight must be attached to what serves the child best.”⁶⁰ This is an overarching requirement of the CRC which means that decisions about children as a group (for example, by the legislature when passing laws affecting children), and decisions relating to an individual child (for example, by a magistrate), must always include the child’s children’s best interests as a primary consideration.

32. In order for a youth justice system and care and protection system to properly protect the best interests of children, it is necessary that all stakeholders understand the concept, and properly protect the best interests of children (whether an individual child or children as a group) in the decisions they make. Such stakeholders include:

- Legislators;
- Judicial officers;
- Prosecutors;
- Police;
- Personnel employed in youth detention centres;
- Carers (appointed by the state etc.);
- Child protection services providers in government and delegated to external bodies (social workers, advocates); and
- Public servants responsible for policy development.

33. The *Youth Justice Act 2006* (NT) does not currently provide an explicit requirement for decision-makers to consider the best interests of the child as a primary consideration.⁶¹ This is a glaring omission. In the absence of such a requirement, it is unlikely that decisions will be made which uphold the best interests of children who are in conflict with the law.

Recommendations:

1) That the Northern Territory Government introduce into in all relevant youth justice legislation a specific reference to the *Convention on the Rights of the Child*, and include a requirement that decision-makers at every level to take into account the best interests of the child as a primary consideration.

2) That the Northern Territory Government provide dedicated funding for specialist, on-going training for all relevant personnel involved in the administration of the youth justice and child protection system on the meaning and application of a rights-based approach to working

⁶⁰ Ibid, para. 39.

⁶¹ Except when a Court is making a family supervision order under Part 6A of the Act.

with children in conflict with the law, including the best interests of the child as a primary consideration.

Non-discrimination

34. The right to non-discrimination in the context of criminal justice requires governments to ensure that all children in conflict with the law are treated equally in law and in fact.⁶² The Committee on the Rights of the Child has, however, observed that many vulnerable groups of children, including indigenous children, often experience de facto discrimination and disparities through the functioning of criminal justice systems.⁶³
35. Numerous statistics indicate that criminal justice systems across Australia disproportionately impact upon Aboriginal and Torres Strait Islander people, and people with a disability.⁶⁴ For example, there are indications that Aboriginal and Torres Strait Islander people (children and adults) are less likely to be subject to diversion nationally.⁶⁵ In the Northern Territory in particular, there are strong indications that Aboriginal and Torres Strait Islander children are disproportionately affected by the criminal justice system. As outlined above, Aboriginal and Torres Strait Islander young people constitute 45% of the population aged 10–17 but made up 92% of those aged 10–17 under supervision on an average day in 2014–15.⁶⁶ Accordingly, Indigenous young people in the Northern Territory aged 10–17 were about 17 times as likely as non-Indigenous young people to be under supervision on an average day.⁶⁷ This rate is slightly higher than the national rate of 15 times as likely.⁶⁸ Once in the youth detention system, there are also indications of de facto discrimination as well. For example, the proportion of young people with case plans prepared within 6 weeks of commencing sentenced orders indicates that non-Indigenous young people are much more likely to have a case plan prepared within this timeframe.⁶⁹ This is deeply concerning and also stands in sharp contrast to the prevailing trends across virtually

⁶² *General Comment No. 10*, above n 9, para. 6.

⁶³ *Ibid*, para. 6.

⁶⁴ See, for example, Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*, October 2015, University of New South Wales.

⁶⁵ Australian Institute of Health and Welfare, *Alcohol and other drug treatment and diversion from the Australian criminal justice system 2012-13*, Bulletin 125, October 2014, p. 11, <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549012>>.

⁶⁶ Australian Institute of Health and Welfare, above n 20, p. 2.

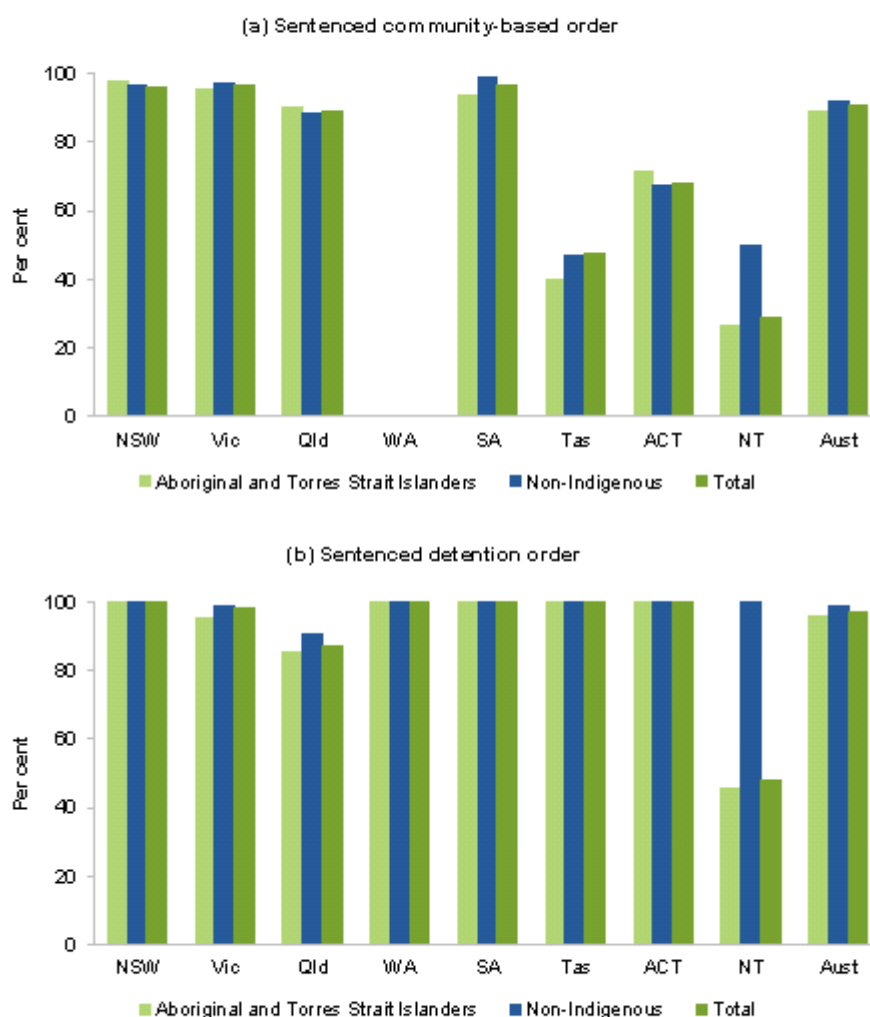
⁶⁷ *Ibid*, p. 2.

⁶⁸ *Ibid*.

⁶⁹ Productivity Commission, *Report on Government Services 2016 – Chapter 16 Youth Justice Services* (January 2016) (*Report on Government Services 2016 – Chapter 16 Youth Justice Services*), Figure 16.9, <<http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/community-services/youth-justice>>.

all other jurisdictions as can be seen from the below table produced by the Productivity Commission:⁷⁰

Figure 16.9 Proportion of young people with case plans prepared within 6 weeks of commencing sentenced orders, by Indigenous status, 2014-15^{a, b}



^a See box 16.11 and table 16A.22 for detailed definitions, footnotes and caveats. ^b Data were not available for WA for community-based case plans.

Source: State and Territory governments (unpublished); table 16A.22.

36. UNICEF Australia is of the view that all governments must urgently commit to addressing the over-representation of Aboriginal and Torres Strait Islander children and adults, and people with a disability, within the criminal justice system and commit to ensuring such systems and processes do not, in law or in fact, discriminate against any group of children or adults.

⁷⁰ Ibid.

Recommendations:

3) That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, which includes:

a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.

b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.

c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies.

d) Investing sufficient resources to ensure practical implementation.

4) That the Australian Government and state and territory governments provide the necessary human, technical and financial resources to fully implement the recommendations of the Senate Standing Committee on Community Affairs report on *Violence, abuse and neglect against people with disability in institutional and residential settings*.⁷¹

Children's right to participate

37. Children have the right to express views freely in matters affecting the child and specifically to be heard in any judicial and administrative proceedings.⁷² The Committee on the Rights of the Child has explained that this requirement applied not just to a "child as an individual, but to groups of children and children in general....the Committee has always interpreted participation broadly in order to establish procedures not only for individual children and clearly defined groups of children, but also for groups of children, such as indigenous children, children with disabilities, or children in general, who are affected directly or indirectly by social, economic or cultural conditions of living in their society."⁷³ UNICEF Australia suggests

⁷¹ Senate Standing Committee on Community Affairs, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 25 November 2015.

⁷² http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report.

⁷³ CRC, art 12.

⁷³ Committee on the Rights of the Child, *General Comment No. 12 (2009) The right of the child to be heard*, 51st sess (1 July 2009), UN Doc. CRC/C/GC/12, para 87.

that the Royal Commission and, in turn, the Northern Territory Government, should review and consider the appropriateness of existing measures of child participation (both regarding decisions affecting individual children and decisions affecting children general) and seek to expand and improve these where possible.

Recommendation:

5) That the Northern Territory Government reviews current mechanisms for children to participate in decisions that affect them (as individuals and as a group, or a cohort of children) and, where appropriate, seek to expand and enhance this participation through child-centred and accessible avenues. This should include consideration of opportunities for children to be heard in criminal proceedings and child protection processes, particularly alternative care processes.

The need for a human rights act

38. A human rights act is of fundamental importance to creating a culture in which rights are understood, respected, protected, promoted and fulfilled. A human rights act has the potential to encourage a culture in which all people, children and families included, are treated with respect and dignity; throughout interactions with public institutions, private entities and within the community at large. Victoria and the Australian Capital Territory have already introduced a human rights act, and the Queensland Government has recently announced a commitment to introduce a human rights act also. As such, there is a growing recognition across Australia that such overarching human rights protections are of foundational importance.⁷⁴

39. Human rights acts have been observed to:

- (a) improve law making and government policy;
- (b) improve public service delivery;
- (c) protect marginalised people by addressing disadvantage;
- (d) contribute to the development of a human rights culture;
- (e) create and add economic value;
- (f) assist fulfil Australia's human rights obligations; and

⁷⁴ See also National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Commonwealth of Australia (September 2009), p. 127.

- (g) enable human rights complaints to be heard and determined within the state.⁷⁵

40. In relation to children and young people in particular, there are illustrative examples of how the Victorian Charter has:⁷⁶

- effectively protected a girl who experienced abuse from giving evidence against an alleged perpetrators;
- helped a boy with a learning disability access the supports required for him to stay in school; and
- helped protect the right to housing of a young woman and her three younger siblings after the death of her father and incarceration of her mother.

41. In addition to these, UNICEF Australia has previously outlined how a human rights act can protect the rights of children through, for example:

- helping siblings stay together, receive the care of their family and be connected to culture;
- ensuring the youth justice system adopts a child rights based approach; and
- realising a child's right to birth registration.⁷⁷

Recommendation:

6) That the Northern Territory Government introduce a human rights act and provide the resources ensure that all children, and children in contact with youth justice and care and protection services in particular, are provided with full information on their rights.

The need for effective, accountable, transparent and inclusive institutions

42. The issues currently under consideration in the Northern Territory highlight the need for effective, accountable, transparent and inclusive institutions, whether they be involved in child protection, youth justice, or any other area of public administration. Without effective, accountable, transparent and inclusive institutions, there is a real risk that institutions will fall below community expectations and human rights standards, potentially risking the rights of the most vulnerable.

⁷⁵ Emily Howie, Human Rights Law Centre, *It's time for a Queensland Human Rights Act – Submission to the Legal Affairs and Community Safety Committee's Human Rights Inquiry* (24 March 2016), p. 2-3.

⁷⁶ A Human Rights Act for Queensland, 13 April 2016, <<http://www.humanrights4qld.com.au/resources>>.

⁷⁷ UNICEF Australia, *Submission to the Legal Affairs and Community Safety Committee, Queensland Parliament – Human Rights Inquiry*, 18 April 2016, para [22] and Appendix 1.

43. To this end, the Sustainable Development Goals (SDGs) are highly relevant. The SDGs were agreed by the United Nations General Assembly in August 2015⁷⁸ and are aimed at eradicating poverty in all its forms by 2030. Goal 16 requires governments and others to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”⁷⁹ This goal recognises that effective, accountable and inclusive institutions are essential to sustainable development in all societies.⁸⁰ Governments of all countries (including Australia) have agreed to the following targets to achieve this goal:

16.1 Significantly reduce all forms of violence and related death rates everywhere

16.2 End abuse, exploitation, trafficking and all forms of violence against and torture of children

16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all

...

16.6 Develop effective, accountable and transparent institutions at all levels

16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels

16.9 By 2030, provide legal identity for all, including birth registration

16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

...

*16.b Promote and enforce non-discriminatory laws and policies for sustainable development.*⁸¹

44. The conditions that have prevailed in the youth justice system in the Northern Territory indicate the need for the Northern Territory Government to improve the effectiveness, accountability and transparency of the institutions working with children and families in both child protection and youth justice. In particular, it is deeply concerning that there has been very limited data on trends for vulnerable young people⁸² and the Productivity

⁷⁸ United Nations General Assembly, *Draft outcome document of the United Nations summit for the adoption of the post-2015 development agenda*, 69th sess, UN Doc A/69/L.85 (12 August 2015).

⁷⁹ *Ibid*, p. 26.

⁸⁰ United Nations, *Sustainable Development Goals*, 2016 <<http://www.un.org/sustainabledevelopment/peace-justice/>>.

⁸¹ United Nations General Assembly, above n 78, p. 26.

⁸² *2011 NT Government Review*, above n 45, p. 23.

Commission has reported that because data is manually collected in the NT its integrity cannot be assured.⁸³ Throughout the reports listed above, there were also recurrent observations that concerns raised by Children's Commissioners,⁸⁴ corrections staff and the Professional Standards Unit often went unactioned.⁸⁵ These structural failings indicate the lack of priority given to ensuring quality standards within public systems which should be supporting often the most vulnerable in our communities. There is an urgent need for better systems of accountability and transparency of public administration in the Northern Territory.

45. As a first step, the Northern Territory Government should introduce a system of monitoring and oversight of places of detention, including youth detention. Such monitoring and oversight could be achieved through a model similar to that adopted in Western Australia's Office of the Custodial Inspector (IOCS). However, this oversight and inspection should include all forms of detention, including police cells and transport. It should also be complemented by full and regular reporting about conditions and practices within the youth justice and care and protection systems, much of which currently appears to be lacking.⁸⁶
46. The Northern Territory Government should also work collaboratively with the Australian Commonwealth Government and other state and territory Governments to establish a National Preventative Mechanism in full compliance with the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.⁸⁷ Governments should further observe all associated guidance provided by the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).
47. Additionally, child-centred complaints mechanisms should be available and accessible for children at every level. In this respect, both the Northern Territory and Federal Governments have a role to play. The Northern Territory Government should establish an independent, transparent and effective body responsible for the monitoring and oversight of all places of detention in accordance with human rights standards (see also paras 109-110 below). Additionally, the Australian Government should sign and ratify the *Optional Protocol to the Convention on the Rights of the Child on a*

⁸³ See, for example, *Report on Government Services 2016 – Chapter 16 Youth Justice Services*, above n 69, page 6 of Table 16A.22.

⁸⁴ *2015 Children's Commissioner Report*, above n 25, p. 38-39.

⁸⁵ See, for example, *2015 Vita Review*, above n 27, pp. 21 and 54.

⁸⁶ See, for example, *2011 NT Government Review*, above n 45, pp.12 and 23.

⁸⁷ Opened for signature 18 December 2002, 2371 UNTS 237 (entered into force 22 June 2006).

*communications procedure*⁸⁸ so that children across Australia (including the Northern Territory) can benefit from access to the Committee on the Rights of the Child in appropriate circumstances.

Recommendations:

7) That the Australian Government ratify, as soon as practicable, the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, and that all governments (federal, state and territory) adopt legislation and other policy measures to give it full effect.

8) That the Australian Government establish and adequately resource an independent National Preventative Mechanism (or bodies which could collectively constitute the NPM), through open and inclusive consultation. The established NPM should have the following:

a) A human rights-based approach to monitoring.

b) A mandate which is sufficiently broad so as to include all circumstances in which children and others could be at risk of experiencing torture or cruel, inhuman or degrading treatment or punishment.

c) The express power to access all places of detention without restriction, have access to all relevant information and speak to individuals in private.

d) Staff who are skilled in communicating with children in a manner that is appropriate to their age, stage of development, level of maturity, culture, and other circumstances.

e) A framework which includes specific reference to children and young people.

f) Sufficient resources, staff, expertise, mandate and powers to discharge its function.

9) That the Northern Territory Government establish an independent, transparent and effective body responsible for the monitoring and oversight of all places of detention in accordance with human rights standards (including the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*).

10) That the Australian Government ratify the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.

11) That the Northern Territory Government review current data collection systems to identify and address gaps, and enhance investment and capability to ensure the collection of regular and accurate information, particularly about vulnerable and at risk children, with information made publicly available when in the public interest. In the context of youth justice

⁸⁸ Opened for signature 19 December 2011 (entered into force 14 April 2014).

for example, critical issues to report on should include use of diversion and within detention centres, the use of force and use of isolation/solitary confinement.

Cultural rights and special measures

Aboriginal and Torres Strait Islander children

48. Both the CRC and UNDRIP protect the cultural rights of Indigenous children and allow for special measures to be implemented for their benefit.⁸⁹ The Committee on Economic, Social and Cultural rights defines culture as a living process that exists in the past, present and future that changes and evolves over time. This is manifested in many ways, including art, ways of life, traditional knowledge, belief systems, ceremonies, food and environment for example. It has been observed that culture "...is how humans express their humanity, give meaning to their existence and build their world view."⁹⁰ The cultural rights of Aboriginal and Torres Strait Islander peoples have been systematically harmed and undermined in Australia.

49. The UNDRIP acknowledges the colonisation, dispossession and violence experienced by indigenous peoples worldwide. It describes special measures required to redress historic injustices and address the continuing racism and systemic discrimination that prevents indigenous peoples from fully realising their economic, social, cultural and human development in their own best interests. This includes foundational rights of self-determination, free prior and informed consent, freedom from discrimination and self-government.⁹¹

50. Colonisation, genocide, dispossession, forcible removal from family and traditional lands, and ongoing discrimination have created a sharp disparity in outcomes between Aboriginal and Torres Strait Islander peoples and non-indigenous peoples. Disconnection from culture fundamentally undermines the foundations for well-functioning communities. The ongoing individual and collective suffering and

⁸⁹ See, for example, CRC, art 30, and UNDRIP, art 21(2).

⁹⁰ Committee on Economic, Social and Cultural rights, *General Comment 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 43rd sess, 21 December 2009, UN Doc E/C.12/GC/21, pp. 3-4.

⁹¹ General Assembly, *United Nations Declaration on the rights of indigenous peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

challenges that result must be acknowledged, while building on the wisdom, knowledge and strengths of Aboriginal and Torres Strait Islander communities.⁹²

51. Reform to address the overrepresentation of Aboriginal and Torres Strait Islander children in both the child protection and youth justice must include more and improved mechanisms for self-determination and trauma informed healing.

Recommendations:

12) That the Australian and the Northern Territory Governments support self-determination measures through enhancing Aboriginal and Torres Strait Islander decision-making in relation to child protection. This may include increased investment in service delivery by community controlled organisations, positions within government, adequately funded peak bodies and other professional mechanisms established with communities.

13) That the Australian and the Northern Territory Governments work with Aboriginal and Torres Strait Islander leaders, organisations and mental health professionals to and adequately fund healing programs to address intergenerational trauma for whole of communities.

14) That the Northern Territory Government appoint a Deputy Children's Commissioner with a special focus on Aboriginal children living in the Northern Territory.

Children with disabilities

52. Children with disabilities are entitled to special protection measures under the CRC⁹³ and the *Convention on the Rights of Persons with Disabilities*, as well as the right to non-discrimination. Despite the insufficient data it is understood that children with cognitive disability and chronic mental health issues are overrepresented within the juvenile justice system.⁹⁴ Special measures to ensure children are assessed and identified, receive the support and services required, family carers for children and targeted programs and case management in juvenile justice system.

53. Aboriginal and Torres Strait Islander children experience a disproportionately higher rate of preventable hearing loss. Hearing loss can cause a number of psychosocial development and learning gaps for young people. In the context of juvenile justice,

⁹² Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (2007), p. 139.

⁹³ CRC, art 23.

⁹⁴ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2009).

this means that undiagnosed or unassisted children may have difficulty in communicating with police, legal support and officers of the court. Hearing loss may also cause young people to experience social isolation during periods that they are detained.⁹⁵

Other groups who may require special protection

54. In addition particular consideration should be given to safety, wellbeing and of girls, children from culturally and linguistically diverse backgrounds and LGBTI children and young people in the juvenile justice system.

Prevention

55. It is well understood that early experiences of childhood, in family and community settings, will affect the likelihood of children being in contact with the law.⁹⁶ Responses to juvenile justice concerns should seek to address causal drivers of children entering the juvenile justice system, and provide the structures required to support children to thrive and therefore minimise their contact with the law. This is required both by the CRC and other international standards including the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the “Riyadh Guidelines”).

56. There is no single intervention that can overcome the multitude of barriers many children are confronted with. Children do not experience their lives in silos of income, health, family, education and protection policy. A child-centred approach requires interdisciplinary and coordinated responses from government departments and services that respond to the specific development, circumstances and experiences of the child within their family and community. However, there are positive examples of “justice reinvestment” approaches in Australia and other jurisdictions which redirect funds from imprisonment to preventative service provision and supports aimed at addressing the underlying causes of offending.⁹⁷ We encourage such approaches to be examined by the Royal Commission.

⁹⁵ Australian Human Rights Commission, *Australian Human Rights Commission Submission to the Senate Community Affairs Committee – Inquiry into hearing health in Australia* (16 October 2009) <<https://www.humanrights.gov.au/inquiry-hearing-health-australia-2009>>.

⁹⁶ Daryl Higgins and Kristin Davis, Australian Institute of Health and Welfare, *Law and justice prevention and early intervention programs for indigenous youth*, Close the Gap Clearinghouse, Resource sheet no 3 (July 2014) <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Our_publications/2014/ctg-rs34.pdf>.

⁹⁷ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Justice reinvestment and its importance to Aboriginal communities* (2012), Aboriginal Legal Service Annual Conference, Novotel Hotel, Wollongong, 1 August 2012 <https://www.humanrights.gov.au/news/speeches/justice-reinvestment-and-its-importance-aboriginal-communities-2012>

Recommendations:

15) That the Australian Government assign a Commonwealth Ministry for Children with lead responsibility and coordination in providing a whole of government approach to policy regarding children and young people with inter-disciplinary approaches through education, health, protection and social services.

16) The Commonwealth Attorney-General's Department establish a joint civil society and Commonwealth Interdepartmental Committee and to coordinate and monitor implementation of the Convention on the Rights of the Child.

17) That the Australian Government and the Northern Territory Governments develop strategies to address the causal drivers of children's experiences of violence, including poverty, mental health and drug and alcohol misuse (including, for example, through justice reinvestment strategies).

Part A: Social protection for children and families

Social Security and housing

57. Children have the right to benefit from social security assistance.⁹⁸ This is an essential element of preventative strategies, as children living in poverty, social or economic disadvantage are at significantly increased risk of both experiencing violence and entering the criminal justice system.⁹⁹ The Northern Territory has some of highest incidence of chronic poverty, overcrowded housing, homelessness and deprivation in Australia, particularly in remote Aboriginal and Torres Strait Islander communities.¹⁰⁰

58. Families and communities require income and services that can sustain an adequate standard of living and the capacity to provide the physical and emotional environment for children to survive and thrive.

Recommendations:

18) That the Australian and Northern Territory Governments provide adequate social security income support and subsidies, housing, and other measures that address unemployment and underemployment.

⁹⁸ CRC, art 26.

⁹⁹ Daryl Higgins and Kristin Davis, Australian Institute of Health and Welfare, *Law and justice prevention and early intervention programs for indigenous youth*, Close the Gap Clearinghouse, Resource sheet no 3 (July 2014) <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Our_publications/2014/ctg-rs34.pdf>.

¹⁰⁰ Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander Health Performance Framework 2014 report: detailed analysis (June 2014), section 2.09 Index of Disadvantage. <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554000>>.

19) That the Australian Government increase income support payments for young people and the Family Tax Benefit for low income families. Payments to be indexed to wage movements to ensure an adequate standard of living can be maintained and children do not fall into poverty as the cost living increases.

20) That the Northern Territory Government develop a strategy to identify effective, secure housing models for young people experiencing, or at risk of homelessness, with particular focus on young people in or transition from the out of home care system.

Education

59. The right to quality education is established in multiple human rights instruments including the CRC, the *Convention on the Elimination of Discrimination against Women*,¹⁰¹ the *Convention on the Rights of Persons with Disabilities* and others.¹⁰²

60. Particular attention should be given to high quality early childhood education and care. Early childhood is the most rapid period of brain development in the lifetime of a child, when the foundations and framework for all other learning and development is established for the lifespan of each child.¹⁰³

61. Access to high quality education is critical to children's healthy development and enables them to reach their social and economic potential. High quality education includes an environment that provides a high standard of academic learning, a sense of safety and belonging for all students, respect for and adaption to diverse cultural ways of knowing, respectful relationship between children and adults, and provides targeted support for children experiencing vulnerability.¹⁰⁴ It is a safeguard against risk factors that place some children at increased likelihood of entering the juvenile justice system, and a safeguard against other risk factors including poverty, exclusion, unemployment and substance misuse.¹⁰⁵

¹⁰¹ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁰² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁰³ Center on the Developing Child *The Impact of Early Adversity on Child Development* (InBrief), (2007) <www.developingchild.harvard.edu>.

¹⁰⁴ Committee on the Rights of the Child, *General Comment No. 11 (2009) Indigenous children and their rights under the Convention*, 50th sess, UN Doc CRC/C/GC/11, 12 February 2009 (General Comment No. 11), paras 56-63.

¹⁰⁵ *United Nations Guidelines for the Prevention of Juvenile Delinquency* ('*The Riyadh Guidelines*'), G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990).

62. Further investment to close the gap between indigenous and non-indigenous education is required. The Northern Territory has the lowest proportion of Aboriginal and Torres Strait Islander students at or above the target for reading and numeracy in Australia.¹⁰⁶ The Convention has special measures provisions for the benefit of Aboriginal and Torres Strait Islander children including adapting mainstream education so that it is responsive and culturally strong, and to ensure the provision of indigenous led education services, and bilingual language education. Additional investment is required for those children who live in remote areas or who, for multiple reasons, may be hard to reach.¹⁰⁷ Indigenous leadership, high levels of community involvement, high expectations of students, respectful relationship between adults and children and a culture of non-discrimination are effective in improving academic outcomes and community engagement in the formal education system.¹⁰⁸

Recommendations:

21) That the Australian and Northern Territory Governments expand implementation and investment in Aboriginal and Torres Strait Islander bilingual and cultural education initiatives. Mechanisms for implementation are recommended in the *Indigenous Languages Programmes in Australian Schools A Way Forward* report.¹⁰⁹

22) That the Australian Government provide high quality free early childhood care and education for at least two days per week for all children regardless of activity tests.

23) That the Australian Government and Northern Territory Governments provide long term funding for Aboriginal and Torres Strait Islander early childhood centres and integrated services focusing on free and affordable access and other services targeting vulnerable children.

Part B: Child protection system

63. Children have the right to be free from all forms of violence.¹¹⁰ Violence affects the realisation of many other rights, such as the right to survival and development.¹¹¹ The Australian child protection model is 'protection' orientated with a focus on crisis or tertiary intervention. Because of this, it can be experienced as adversarial and punitive process for children and families. The *National Framework for protecting Australia's*

¹⁰⁶ Australian Government, *Closing the Gap*, 2016, Chapter 2, p. 20.

¹⁰⁷ General Comment No. 11 (2009) above n 104.

¹⁰⁸ Chris Sarra *Armed for success. Griffith Review: Getting smart: the battle for ideas in education*, 2006, p. 187-94.

¹⁰⁹ Purdie et al, above n 53.

¹¹⁰ CRC, art 19.

¹¹¹ Committee on the Rights of the Child, *General comment No. 13 (2011) The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) (General comment No. 13), para 15.

children 2009-2020 is a public health model intended to shift Australia's system to a more family service orientated model. It is focused on ensuring families have the support and services they need across services for prevention and early intervention before children experience harm.¹¹²

64. The key causal drivers of experiences of violence or neglect are well understood as poverty, domestic and familial violence, mental health and substance misuse.¹¹³ In the Northern Territory neglect is the most frequently substantiated form of child protection notification, which is strongly correlated with experiences of poverty.¹¹⁴

65. The implementation of the National Framework is currently under resourced and subsequently it is not meeting its intended objectives. Resources remain channelled in the crisis end of child protection notifications, investigations and out of home care. Far greater investment in prevention and strengthening with intensive services through inter-disciplinary child centred pathways in health, education, welfare, family services and housing are required.¹¹⁵ Intensive and early interventions are then directed to families at increased or demonstrated risk with intensive family support.¹¹⁶

66. The overrepresentation of Aboriginal and Torres Strait Islander children in the child protection and out of home care systems in the Northern Territory and across Australia is acute and demands urgent action by decision makers in consultation with community leaders.¹¹⁷

67. The Aboriginal and Torres Strait Islander Child Placement Principle adopted by agreement of COAG has been in effect for over 30 years and yet remains poorly implemented across jurisdictions. While hierarchy placement is well understood, the aspects of prevention, decision-making and connection to culture that this principle requires remain underutilised.

¹¹² Australian Government, National Framework for Protecting Australia's Children 2009–2020, 2009, https://www.dss.gov.au/sites/default/files/documents/child_protection_framework.pdf

¹¹⁴ Board of Inquiry into the Child Protection System in the Northern Territory, *Growing them strong together*, 2010.

¹¹⁵ *Report on Government Services 2016, Chapter 15 Child Protection*, above n 14, table 15A.1.

¹¹⁶ Bromfield L, Arney, F, Higgins, D, *Contemporary issues in child protection intake, referral and family support*, 2014 <<https://aifs.gov.au/publications/families-policy-and-law/13-contemporary-issues-child-protection-intake-referral-and>>.

¹¹⁷ *Report on Government Services 2016, Chapter 15 Child Protection*, above n 14, table 15A.7.

68. Culturally appropriate measures to prevent children from entering the child protection system by addressing causal drivers in mental health, substance misuse and familial violence must be adopted and resourced.

Recommendations:

24) That the Australian Government adequately fund implementation of the *National Framework for Protecting Australia's Children*, including the Third and Fourth Action Plans to fulfil its stated intention of prevention and early intervention.

25) That the Australian and the Northern Territory Governments increase access to, and resources for, high quality, culturally strong, intensive family support services for at risk families.

26) That the Australian Government set targets and develop a national strategy to address the over-representation of Aboriginal and Torres Strait Islander children in the child protection and out of home care system.

27) That the Northern Territory Government ensure all Aboriginal and Torres Strait Islander children have access to a cultural connection and care plan, and practical supports for out of home carers for effective implementation.

28) That the Northern Territory Government implement mandatory support and transition plans up to 25 years of age for all children exiting out of home care.

29) That the Northern Territory Government increase resources for and access to Aboriginal and Torres Strait Islander service providers and consider community based child protection models in remote communities.

30) That the Northern Territory Government develop and implement strategies to increase the number of senior Aboriginal and Torres Strait Islander child protection employees and provide ongoing professional support development.

31) That the Northern Territory Government invest in recruiting and retaining non-indigenous child protection teams with skilling to work cross culturally and to manage highly vulnerable cases.

32) The Northern Territory Government increase investment in and recruitment of high quality out of home care options and supports for trauma informed care and therapeutic services for children, carers and families.

Youth justice system

Part A: The need for a child-centred justice system based on a human-rights based approach to offending

69. Children in conflict with the law are, first and foremost, children. This should always be an important consideration as the systems, structures, cultures, processes and personnel with a youth justice framework are built and assessed.

70. As a complement to addressing underlying social and economic factors which might increase the risk of a child coming into conflict with the law (discussed at paras 55-68 above), it is essential that governments establish a child-centred youth justice system based on a human rights-based approach to offending. Because of the vulnerability of children in conflict with the law, the CRC and other international standards outline specific rights to which they are entitled. A child-centred justice system is one which fully integrates articles 37¹¹⁸ and 40¹¹⁹ of the CRC. This means, in summary, that every

¹¹⁸ Article 37 provides: *States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*

¹¹⁹ Article 40 provides: *1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

child alleged as, accused of, or recognized as having infringed the criminal law is to be treated in a manner consistent with the promotion of the child's sense of dignity and worth and the processes, institutions and personnel reinforce the child's respect for the human rights and fundamental freedoms of others.¹²⁰ Children must be treated in a way which takes into account the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society.¹²¹ Governments must ensure safeguards exist to protect the dignity of the child throughout entire youth justice system; from first contact with police through to conditions of detention. Detention should only ever be a measure of last resort (discussed further below at paras 77-92). Additionally, the guiding principles of the CRC remain relevant for both the youth justice system as a whole (i.e. the structures, investments, people and organizational cultures) and for each and every individual child which comes into contact with the system.

71. It is well understood that the brains of adolescents are developing and undergo significant structural change throughout adolescent years. We also know that “[y]outh is a time of increased risk-taking behaviour, and, in keeping with that reality, young people tend to constitute a disproportionately high share of recorded criminal offenders”.¹²² Children and young people, by their very stage of human development, can engage in negative risk-taking behaviour, might not consider the negative consequences of decision-making and be particularly vulnerable to peer influence.¹²³ As most young people transition to adulthood, behaviour which amounts to offending tends to disappear.¹²⁴ Only a small proportion of the already small population of young people who offend will go on to offend into adulthood.¹²⁵ Additionally, only a small

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

¹²⁰ CRC, art 40.

¹²¹ CRC, art 40.

¹²² UNICEF Office of Research, *Regional Monitoring Report No. 7, 2000* <<https://www.unicef-irc.org/publications/pdf/monee7/CHAPT-5.pdf>>.

¹²³ Australian Institute of Criminology, *Trends and issues in crime and criminal justice No. 409 - What makes juvenile offenders different from adult offenders?* February 2011, p. 3-4.

¹²⁴ The Riyadh Guidelines, above n 105, I Fundamental Principles, para (5)(e).

¹²⁵ Australian Institute of Criminology, above n 123, p. 2.

fraction (approx. 11%) are classified as “chronic offenders” in that they are responsible for a disproportionate amount of offending.¹²⁶

72. Evidence also demonstrates that excessive and repeated stress on the developing brain can impair brain development, meaning that exposure to abuse, neglect, harm and exploitation during childhood (particularly early years) can have life-long negative consequences for a child. This has been observed, for example, through the high correlation between a child’s experience of maltreatment and subsequent offending behavior.¹²⁷

73. When a child offends therefore, it may frequently be attributable to the stage of human development and/or a child’s experiences. Because of this children are less culpable for their behaviour.¹²⁸ In order to accommodate the specific needs, rights and vulnerabilities of children within the criminal justice system, governments must implement “a child-centred juvenile justice system”.¹²⁹ This system should be structured so as to divert children away from formal responses and provide a range of proportionate, community-based responses aimed at rehabilitation and the child assuming a constructive role in society. This system must be separate and distinct from the adult criminal system and take full account of the evolving capacities of the child. The obligation to protect the best interests of children applies equally to children in the criminal justice system and protecting the best interests of a child who is in conflict with the law requires that “...the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”¹³⁰

74. Establishing a child-centred youth justice system requires in the first instance an appropriate minimum age of criminal responsibility (MACR). Currently in the Northern Territory, the minimum age of criminal responsibility is 10 years of age. The Committee on the Rights of the Child has consistently observed that a MACR of less than 12 years is not in line with good practice,¹³¹ and has recommended that Australian jurisdictions

¹²⁶ Ibid.

¹²⁷ Center on the Developing Child, Harvard University, ‘Toxic stress’ <<http://developingchild.harvard.edu/science/key-concepts/toxic-stress/>> and UNICEF, *Building Better Brains: New Frontiers in Early Childhood Development*, 2014 https://www.unicef.org/argentina/spanish/Building_better_brains_web.pdf.

¹²⁸ General Comment No. 10, above n 9, para 10.

¹²⁹ CRC, art 40(3) and Vienna Guidelines, above n 1, 14(a).

¹³⁰ General Comment No. 10, above n 9, para. 10.

¹³¹ Ibid, para 32.

raise this to 12 years of age.¹³² Accordingly, UNICEF Australia recommends that the Northern Territory legislature do so (along with all other Australian jurisdictions).

75. Additionally and as outlined above at para 9, there has been a progressive move towards the creation of child-centred courts and systems which combine criminal and care and protection considerations due to the frequent overlap of these jurisdictions and the need to consider the unique needs and circumstances of the individual child to develop an appropriate response. UNICEF Australia recognises the steps taken in 2015 to create a specialist children's court in Darwin, and encourages further development of this court to ensure it is child-centred, properly resourced, is accessible across the state and has appropriate jurisdiction.

76. Protecting and promoting the best interests of the child is not necessarily in conflict with the rights of others, such as victims and the community at large. On the contrary, evidence often indicates that protecting the best interests of the child through a process with due safeguards (both inside and outside of custody), an emphasis on diversion and alternatives, is more effective to reduce recidivism and enhancing community safety than punitive, "tough on crime" approaches.¹³³ Adopting a human rights-based approach to young people in conflict with the law can be mutually reinforcing of community safety.¹³⁴

Recommendations:

33) That the Northern Territory Government raise the minimum age of criminal responsibility to at least 12 years of age.

34) That the Northern Territory Government commit to the full implementation of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* through appropriate legislative, policy and practical measures. This should include, for example, ensuring the availability of a child-centred, properly resourced and accessible children's court.

¹³² Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), para 84(a), Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005), para 74(a); and Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 16th sess, UN Doc CRC/C/15/Add.79 (21 October 1997), para 29.

¹³³ See for example also commentary on the use of diversion in *2011 NT Government Review*, above n 45, p. 94.

¹³⁴ General Comment No. 10, above n 9, para. 10.

Part B: Detention as a measure of last resort and responses aimed at rehabilitation and reintegration

77. All governments must ensure that children are only ever subject to detention as a measure of last resort and for the shortest appropriate period of time (article 37, CRC). Rule 17.1(c) of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) provides further that the “[d]eprivation of the personal liberty of the juvenile shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.”¹³⁵ As such, detention should only be used in the most serious of cases.

78. Additionally, a child in conflict with the law must always be treated consistently with the principle of proportionality which requires consideration of two factors:¹³⁶

- a) the offence; and
- b) the child’s individual circumstances.

79. Two highly effective ways that Governments can keep children out of detention and respond to the child’s behaviour in a proportionate way is through ensuring the availability and effective use of diversion and alternatives to detention.¹³⁷ If implemented with appropriate legal safeguards, the use of diversion and alternatives to detention will help ensure that children in conflict with the law are treated consistently with their rights as set out in the CRC.¹³⁸ These measures can also aid in the rehabilitation and reintegration of the individual child. This is particularly so with restorative justice approaches which seek to address the harm, needs, accountability and obligations between the young offender, victim/survivor and society and aid the child to reintegrate and assume a constructive role in their community.¹³⁹ The Committee on the rights of the Child has In this respect, we encourage the Royal Commission “to support, in consultation with indigenous peoples, the development of community-based policies, programmes and services which consider the needs and

¹³⁵ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) GA Res 40/33, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985).

¹³⁶ CRC, art 40(4) and Beijing Rules, Rule 5.1.

¹³⁷ Human Rights Council, *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 21st sess, UN Doc A/HRC/21/25 (27 June 2012), para 19.

¹³⁸ UNICEF *Toolkit on Diversion and Alternatives to Detention* (‘UNICEF Toolkit on Diversion and Alternatives to Detention’), ‘Restorative Justice’ (2010) https://www.unicef.org/tdad/index_55653.html.

¹³⁹ *Ibid*, ‘Restorative Justice’.

culture of indigenous children, their families and communities.”¹⁴⁰ In this regard, we recommend that the Royal Commission examine the potential benefit that the introduction of specialist Aboriginal courts (such as the Children’s Koori Court in Victoria) which involve elders and respected persons could bring to children and communities in the Northern Territory.

80. The *Youth Justice Act 2006* (NT) currently provides that a young person should only be kept in custody or sentenced to detention as a measure of last resort and for the shortest appropriate period of time,¹⁴¹ and also incorporates the principle that criminal proceedings should not be continued unless required by the public interest.¹⁴² However, UNICEF Australia is concerned that in practice, children are not being detained as a measure of last resort. These concerns are discussed below and primarily relate to the limitations on diversion (see paras 81-85), the apparent limited availability of alternatives to detention (see paras 86-88) and the extraordinarily high numbers of unsentenced children in detention in the Northern Territory (see paras 89-92).

The use of diversion

81. The CRC requires governments to promote, whenever appropriate, measures for working with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (article 40(3)(b)). However, the use of diversionary measures facilitates the protection and promotion of numerous rights of the child, including to help ensure that that child is treated in a manner that promotes their reintegration and assuming a constructive role in society (article 40(1)) and in a manner that is proportionate to the offence and the child’s circumstances (article 40(4)). The availability and proper use of diversionary measures will also help ensure that a child is detained as a measure of last resort (article 37).

82. States are provided with discretion around what measures they can adopt to work with children in conflict with the law without resorting to judicial measures. However, diversion generally includes options such as the decision maker taking no action, issuing an informal or formal caution or warning, an apology, payment, referral to a structured diversion program or a restorative justice process.¹⁴³ Where offences are

¹⁴⁰ General Comment No. 11, above n 104, para 75.

¹⁴¹ *Youth Justice Act 2006* (NT), ss 4(c) and 81 (6).

¹⁴² *Youth Justice Act 2006* (NT), s 4(q).

¹⁴³ *UNICEF Toolkit on Diversion and Alternatives to Detention*, above n 138, ‘Diversion’.

not serious and other actors close to the child have responded to the behaviour, no intervention will likely be the best response.¹⁴⁴ On other occasions, referral to social services might be appropriate (for example, when the young person is experiencing homelessness, has substance misuse issues or a mental illness).¹⁴⁵ Decision-makers including police, prosecutors and judicial officers should have the ability to divert a child at any and every stage of the process (i.e. pre-arrest up to and including final disposition, including after pre-trial detention).¹⁴⁶ The *Beijing Rules* and the Committee on the Rights of the Child have outlined standards that states should adopt to ensure that diversion is used appropriately and with proper safeguards. These include, for example, that resort to a diversionary measure requires compelling evidence that the child committed the offence, he or she voluntarily admits responsibility and also that the child or his or her parents or guardian consent to the diversionary measure in writing.¹⁴⁷

83. The *Youth Justice Act 2006* (NT) permits the use of diversion in certain circumstances by the police (s 39) and by the court, with the consent of the prosecution (s 64). However, decisions regarding diversion are not generally subject to review.¹⁴⁸ The Act also limits the use of diversion, with s 39(3)(c) providing that if the young person has been dealt with by a Youth Justice Conference or diversion program on two previous occasions, the diversion options listed in section 39(2) are not available (essentially, a “3 strikes” limitation).

84. Current data sets do not currently illustrate the nature or level of diversion undertaken in Australian jurisdictions, including the Northern Territory.¹⁴⁹ Having full information about the use of diversion is very important to understanding where, when and how it is being utilised and for which children. However, some data are available regarding the use of diversion by police. Concerningly, these data indicate a general decline in the use of diversionary measures in the Northern Territory in recent years. In 2010-2011, 49% of juvenile offenders were subject to police diversion, however this figure had decreased to 37% in 2014-2015.¹⁵⁰ This compares to 61% in Tasmania, to 22%

¹⁴⁴ Beijing Rules, Part 11 Diversion, commentary.

¹⁴⁵ Beijing Rules, Part 11 Diversion, commentary.

¹⁴⁶ UNICEF Toolkit on Diversion and Alternatives to Detention, above n 138, ‘Diversion’.

¹⁴⁷ See General Comment No. 10, above n 9, para 27 and *Beijing Rules*, rule 11.3.

¹⁴⁸ *Youth Justice Act 2006* (NT), s 44.

¹⁴⁹ *Report on Government Services 2016 – Chapter 16 Youth Justice Services*, above n 69, 16.1.

¹⁵⁰ Productivity Commission, *Report on Government Services 2016 – Chapter 6 Police* (January 2016), Table 6.2 Juvenile diversions as a proportion of juvenile offenders <<http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/police-services>>.

in Victoria.¹⁵¹ Additionally, the 2011 NT Government Review noted a number of shortcomings with diversion arrangements as they then existed.¹⁵² It is unclear how many of these issues remain ongoing, although UNICEF Australia believes that many of these issues persist.

85. UNICEF Australia believes that the issues raised in the 2011 NT Government Review, alongside the very concerning statistics of unsentenced children in detention, indicate the need for the Royal Commission to further understand the degree to which diversion is being utilised in the Northern Territory and what changes might be required to ensure that such measures are available and appropriately utilised.

Alternatives to detention

86. Ensuring that detention is used only as a measure of last resort also requires full use of alternatives to detention. In contrast to the use of diversion, the use of alternatives to detention do not require the consent of the child, however, as with all decisions affecting a child, he or she nevertheless has the right to participate in the consideration of which alternative is appropriate in the circumstances. Only child offenders who are assessed as posing a real danger should be detained, and even then only as a measure of last resort and for the shortest possible period.¹⁵³

87. In addition to helping ensure a proportionate response to an individual child and the particular offence, the use of alternatives to detention is required by article 40(4) which states that governments must provide “[a] variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are treated in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”¹⁵⁴

88. UNICEF Australia is concerned that alternatives to detention are not being fully utilised in the context of the Northern Territory. This seems clear from the exceptionally high rate of unsentenced children in detention. The Australian Institute of Health and Welfare has observed that “[o]n an average day in 2014-15, the majority (78%) of

¹⁵¹ Ibid, Table 6.2 Juvenile diversions as a proportion of juvenile offenders.

¹⁵² 2011 NT Government Review, above n 45, pp. 96 - 98.

¹⁵³ Human Rights Council, *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 21st sess, UN Doc A/HRC/21/25 (27 June 2012), para 7.

¹⁵⁴ CRC, art 40(4).

young people in detention in the Northern Territory were unsentenced...This proportion was higher than the national average, where just over half (54%) of those in detention were unsentenced.”¹⁵⁵ This compares with an almost inverse situation with the adult prison population across Australia with around a quarter (27% or 9,898 prisoners) being unsentenced as at 30 June 2015.¹⁵⁶ In Northern Territory specifically, “[u]nsentenced prisoners comprised 30% (482 prisoners) of the adult prisoner population.”¹⁵⁷ Such figures warrant the Royal Commission to pay particular consideration to bail and remand laws and practices and other factors contributing to such high rates of unsentenced children in detention in the Northern Territory.

Children remanded to custody as a measure last resort and the need for proportionate bail conditions

89. In the Northern Territory, the rates of young people held on remand are extremely concerning. In 2014-2015, which covers late 2014 when several significant events occurred at the Don Dale Youth Detention Centre, official statistics report that remand orders comprised 84% of order type commencements.¹⁵⁸ As young people who have not yet been found guilty of an offence, this is a concerning statistic, and it compares nationally to an average of 54%.¹⁵⁹ The Northern Territory has the highest proportion of young people held on remand. The table below, published by the Australian Institute of Health and Welfare, clearly indicates that the numbers of unsentenced young people in NT is both remarkably high compared to sentenced children and is the largest proportion of across all jurisdictions of young people per 10,000 who are unsentenced but in detention.

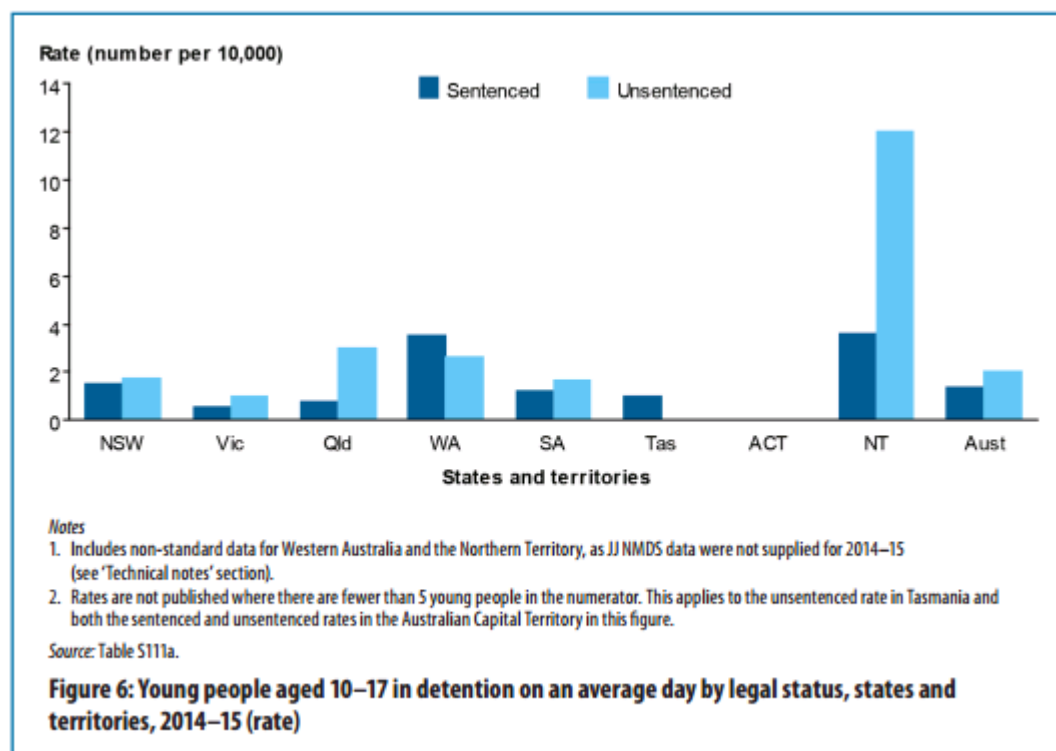
¹⁵⁵ Australian Institute of Health and Welfare, above n 20, p. 3.

¹⁵⁶ Australian Bureau of Statistics, *4517.0 Prisoners in Australia, 2015*, ‘Prisoner characteristics, Australia’, 11 December 2015, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Prisoner%20characteristics,%20Australia~28>>.

¹⁵⁷ Australian Bureau of Statistics, *4517.0 Prisoners in Australia, 2015*, ‘Northern Territory’, 11 December 2015 <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Northern%20Territory~26>>.

¹⁵⁸ Northern Territory Government, *Northern Territory Department of Correctional Services – Annual Statistics 2014-2015*, p. 35

¹⁵⁹ Australian Institute of Health and Welfare, *Bulletin 133 - Youth Justice in Australia*, April 2016, p. 1 <<http://aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554930>>.



Source: Australian Institute of Health and Welfare, *Bulletin 133 - Youth Justice in Australia*, April 2016, p. 11. (Note the use of non-standard data in NT).

90. Regarding remand, the 2011 NT Government Review included an extract from the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011 report *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*.¹⁶⁰ It notes that the biggest growth rate of detention for Indigenous young people was due to children remanded to custody and that young people are not often able to meet bail conditions due to lack of appropriate accommodation. This was said to be occurring in both NSW and the Northern Territory. Regarding the Northern Territory in particular, the 2011 NT Government Review went on to state:

The Youth Magistrate advised that often she could not be satisfied there were sufficient supports and programs available for young offenders and, as a result, they would be refused bail. Lack of suitable accommodation, inadequate parental or adult supervision, an inability to locate a responsible adult, lack of access to appropriate education and training opportunities, drug and alcohol

¹⁶⁰ Parliament of the Commonwealth of Australia – House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, June 2011.

dependence, and health concerns were among the reasons cited for young offenders being refused bail and held in detention facilities.

...

As stated in the joint submission from the Aboriginal Legal Services and Torres Strait Islander Legal Services to the Standing Committee's Doing Time—Time for Doing report: detention is a criminal sanction: not a 'placement' for children in need of care ... It is clear and predictable that young people at risk of entry to the criminal justice system will come from homes where it is unsafe for them to be. The need to provide accommodation, other than police cells or detention centres, is chronic.¹⁶¹

The Review was advised that while there are a range of sentencing options in the YJA, many of them were difficult, and at times impossible, to implement because of the lack of availability, particularly in remote settings. This particularly applies in respect of treatment and rehabilitation options (references omitted).¹⁶¹

91. A situation described in this report, namely, for a child to be detained in effect because programs and supports are unavailable to them, is inconsistent with the right of the child to be detained as a measure of last resort. Detention of a child in such circumstances punishes an already vulnerable child. Appreciating the difficulties of providing services in rural and remote locations, it is of fundamental importance that the Northern Territory Government and communities work together in partnership to ensure the provision of safe and appropriate accommodation for children in need of care and supervision.

92. Where imposed, bail conditions must also be proportionate having regard to the circumstances of the offence and the individual child. Although we are unable to make detailed observations on the appropriateness of bail conditions due the lack of data, there are indications that bail practices in the Northern Territory should be reviewed. We note that the Northern Territory Youth Justice Framework 2015-2020 outlines an intent to apply "strict bail conditions".¹⁶² It is also significant that in 2014-2015, "breach of justice order" was responsible for 33 receptions to youth justice.¹⁶³ In that year and the year prior (2013-2014), "breach of justice order" offences were ranked third in offences which resulted in a young person being detained, behind only to "acts intended to cause injury" and "unlawful entry with intent/burglary, break and enter".¹⁶⁴

¹⁶¹ 2011 NT Government Review, above n 42, p. 50-51.

¹⁶² NT Youth Justice Framework 2015-2020, above n 49, p. 5.

¹⁶³ Northern Territory Government, above n 152, p. 38.

¹⁶⁴ Ibid, p. 38.

Although presumably “breach of justice order” includes not just breach of bail but other types of orders, UNICEF Australia considers these numbers to be of significant concern and suggests that the Royal Commission should investigate further whether bail conditions are being applied in a manner that is reasonable, necessary and proportionate, and that young people who are subject to bail receive appropriate supports to help them comply with any and all conditions imposed.

Recommendation:

35) That the Northern Territory Government increase legal protections to ensure detention is only ever used as a measure of last resort and for the shortest possible period. Specifically, consideration should be given to:

- a) Increasing legal eligibility and practical availability for diversion (for example, through abolishing the prohibition on diversion (section 39(3)(c) *Youth Justice Act 2006* (NT)) and through increasing availability and quality of bail support programs.
- b) Strategies to significantly reduce the number of unsentenced children in detention as a matter of urgency.
- c) Investments in safe, community-based accommodation options across the territory.
- d) Commitments to adequately fund and expand culturally appropriate and community-led and based diversion programs and alternatives to detention.
- e) Review the use of community-based orders with a view to expanding their use for the purposes of bail conditions and sentencing, and consider introducing measures to help ensure that bail conditions imposed are reasonable, proportionate and appropriate for the individual child.

Part C: Safeguards and the protection of rights when a child is detained

93. The United Nations General Assembly has recognised that “...juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights”.¹⁶⁵ This vulnerability is often compounded by virtue of the child’s status as a minor, status as a detainee and prevailing institutional culture. It can also be exacerbated by other factors, such as where a child has had previous experiences of abuse and violence, is experiencing poverty and disadvantage, belongs to a cultural

¹⁶⁵ Preamble, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, General Assembly, 45/113, 68th plen mtg, UN Doc. A/RES/45/113 (14 December 1990) (*‘The Havana Rules’*).

minority or has a disability. Circumstances of detention make possible “...the abuse of power and authority and invites insensitivity to the experiences of those who come into the process.”¹⁶⁶ Because of these risks created by conditions of detention, a child who is detained is entitled to numerous special protections at international law.

94. Amongst other things, the CRC obliges governments to ensure that “[i]nstitutions, services and facilities for care or protection of children must conform with the standards established by competent authorities, particularly in the areas of safety, health, number and suitability of staff and competent supervision.”¹⁶⁷ This requirement applies to youth detention facilities.¹⁶⁸ Additionally, the international standards relevant to youth justice are very clear in the minimum safeguards and rights that a young person is entitled to when deprived of liberty. The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*¹⁶⁹ outlines the minimum protections that a young person should be entitled to when deprived of their liberty, although all rights articulated in the CRC remain relevant and require realization.

95. With the appropriate safeguards, facilities and personnel, custodial settings *can* present an opportunity to provide positive interventions, services and supports to a child in conflict with the law. As discussed above at paras 71-72, the period of adolescence is a period characterised by rapid change in the human brain.¹⁷⁰ Because of this, there is incredible potential for young people to change behaviours and reach their potential if given proper supports. Through their own conduct, personnel employed in detention settings play an important role through modelling good behaviour which can reinforce demonstrating respect for the rights of others. The Committee on the Rights of the Child has therefore appealed to states to ensure such personnel are appropriate for the job, observing: “[i]f the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedoms of others?”¹⁷¹

¹⁶⁶ Danny Sandor “7. Kids, cops, lock ups and the convention on the rights of the child” in *Citizen child: Australian law and children’s rights*, Australian Institute of Family Studies (December 1996) <<https://aifs.gov.au/publications/citizen-child-australian-law-and-childrens-rights/7-kids-cops-lock-ups-and-convention>>.

¹⁶⁷ CRC, art 3(3).

¹⁶⁸ CRC, art 3(3). See also UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 2007, p. 41.

¹⁶⁹ *The Havana Rules*, above n 165.

¹⁷⁰ Australian Institute of Criminology, *Trends and issues in crime and criminal justice No. 409 - What makes juvenile offenders different from adult offenders?* February 2011, p. 4, citing Steinberg L. Cognitive and affective development in adolescence, *Trends in Cognitive Sciences* 9(2): 69-74.

¹⁷¹ General Comment No. 10, above n 9, para. 13.

96. The reports listed above, and the 2015 Vita Review in particular were very clear that there has been grossly inadequate training for staff in youth detention facilities¹⁷² and that multi-disciplinary approaches have only recently been incorporated. UNICEF Australia is of the view that such circumstances warrant the Royal Commission to consider specifically the appropriateness of human resources (including recruitment, training, retention etc.) within the youth justice system, including, specifically youth detention facilities.

Prompt appearance before Court

97. A child has the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.¹⁷³

98. Currently, s 27 of the *Youth Justice Act 2006* (NT) requires that a young person who is arrested must be brought before a court “as soon as practicable and in any case within 7 days after the arrest.” It is deeply concerning that a child in the Northern Territory could potentially be in police custody for up to a week without being brought before a court. The Committee on the Rights of the Child has indicated that a child should be brought before a competent authority within 24 hours of the arrest.¹⁷⁴

Prohibition against torture and cruel, inhuman or degrading treatment or punishment and respect for inherent dignity

99. Governments are under an unequivocal obligation to ensure that no child is ever subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹⁷⁵ The Committee on the Rights of the Child has explained that this right is “...complemented and extended by article 19, which requires states to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. There is no ambiguity: “all forms of physical or mental violence” does not leave room for any

¹⁷² 2015 Vita Review, above n 27, p. 12.

¹⁷³ CRC, art 37.

¹⁷⁴ General Comment No. 10, above n 9, para 83.

¹⁷⁵ CRC, art 37. Also required under the *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 7, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them”.¹⁷⁶ Therefore, the prohibition of torture of children must also be seen in light of the right of children to be protected from all forms of violence and the right of children and to be treated with dignity, respect and in accordance with their best interests and with special protection due to their age.

100. Whether an act constitutes torture, or cruel, inhuman and degrading treatment or punishment, or violence generally can be an issue of degree and can depend also on the individual child or person affected (such as belonging to a minority group or having a disability). Given reports of conditions and practices at the Don Dale Youth Detention Centre, it is important to consider the use of isolation, force and restraint against children.

101. The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* strictly prohibit corporal punishment, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other measures that may compromise the physical or mental health of a young person.¹⁷⁷ This position is also supported by the Committee on the Rights of the Child.¹⁷⁸ The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment has found that solitary confinement of any duration imposed on children constitutes cruel, inhuman or degrading treatment and violates article 7 ICCPR and article 16 CAT.¹⁷⁹ He has also found that the prolonged restraint or seclusion of people with disabilities can constitute torture.¹⁸⁰

102. The use of force and restraint should be prohibited generally and allowed only in “exceptional cases, where all other control measures have been exhausted and failed, and only as explicitly authorized and specified by law and regulation...[and] used restrictively and only for the shortest possible period of time.”¹⁸¹ The Committee

¹⁷⁶ Committee on the Rights of the Child, *General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19, 28, para 2, and 37, inter alia)* UN Doc. CRC/C/GC/8 (2 March 2007), para 18.

¹⁷⁷ *The Havana Rules*, above n 165, rule 67.

¹⁷⁸ General Comment No. 10, above n 9, para. 89.

¹⁷⁹ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/66/268 (5 August 2011), para 77.

¹⁸⁰ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175 (28 July 2008), paras 55- 56.

¹⁸¹ *The Havana Rules*, above n 165, rules 63-65.

on the Rights of the Child has outlined that instruments of restraint and force “can only be used when the child poses an imminent threat of injury to him or herself or others and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment.”¹⁸²

103. In addition to protections against torture and cruel, inhuman and degrading treatment or punishment, all children deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.¹⁸³ The Committee on the Rights of the Child has explained that: “[t]he concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy.”¹⁸⁴

104. Conditions which have existed at the Don Dale Youth Detention Centre raise very serious concerns about the degree to which the system, as it then existed, protected children against torture and cruel, inhuman and degrading treatment. There is compelling information indicating that that conditions at Don Dale Youth Detention Centre were inconsistent with the requirement to treat children consistently with their age, the need to rehabilitate and reintegrate and to treat children with dignity and respect. Undoubtedly such conditions would be inconsistent with the best interests of the children who were in the care of the state whilst in detention.

105. Staff at the Don Dale Youth Detention Centre themselves described conditions as ‘unhygienic’ and ‘inhumane’.¹⁸⁵ Former NT Children’s Commissioner Howard Bath has described footage from incidents showing “...children were being restrained when they were not harming themselves or others...being grabbed by the neck, thrown to the ground...restrained using methods that put intense pressure on their lower backs, which are practices that are prohibited because of the well-known risk that they might cause serious injury or death.”¹⁸⁶ He has also indicated that children in the Don Dale Youth Detention Centre have been kept in isolation for 17 days and potentially

¹⁸² General Comment No. 10, above n 9, para 89.

¹⁸³ CRC, art 37.

¹⁸⁴ General comment No. 13, above n 111, para 3.

¹⁸⁵ *2015 Children’s Commissioner Report*, above n 22, p. 43.

¹⁸⁶ Howard Ian Bath, Statement, Royal Commission into the Protection and Detention of Children in the Northern Territory, 1 October 2016.

longer,¹⁸⁷ have been subjected to “brutalising and humiliating assaults”¹⁸⁸ and experienced treatment from staff which was in apparent violation of the principles of safe physical intervention.¹⁸⁹ Because these conditions were allowed to occur, there is an urgent need for the Royal Commission to consider specifically what changes are necessary to ensure appropriate legal and practical protections against torture and cruel, inhuman and degrading treatment or punishment of children.

106. Conditions which have existed at the Don Dale Youth Detention Centre were seemingly similar to those described in the individual communication of *Brough v Australia* (Human Rights Committee, 2006) which was submitted to the UN Human Rights Committee in 2003. This case involved the complaint of a young Aboriginal man with a disability who, when he was 16 years old, was placed in an adult correctional facility in NSW. His disability meant that he experienced “significant impairments of his adaptive behaviours, his communication skills and his cognitive functioning.”¹⁹⁰ Whilst at the facility, he was subjected to certain treatment which he claimed was a violation of his rights under the ICCPR. The Human Rights Committee concluded that his treatment constituted a violation of article 10 of the ICCPR, paragraphs 1 (providing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person) and article 3 (requiring that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status). The Human Rights Committee concluded: “[i]n the circumstances, the author’s extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition...”¹⁹¹ This case demonstrates the intersectional disadvantage faced by persons who are from Aboriginal and Torres Strait Islander communities and also faced by persons with a disability and children who are deprived of their liberty generally. The conclusion that the author, who was then a child, was treated inhumanely and in a manner that was inconsistent with his dignity and right to be treated in accordance with his age, indicates the real risks of

¹⁸⁷ Ibid, para. 99(a).

¹⁸⁸ Ibid, para. 99(g).

¹⁸⁹ Ibid, para. 78.

¹⁹⁰ Human Rights Committee, *Views – Communication No. 1184/2003 Brough v Australia*, UN Doc. CCPR/C/86/D/1184/2003 (27 April 2006), [2.1].

¹⁹¹ Human Rights Committee, *Views – Communication No. 1184/2003 Brough v Australia*, UN Doc. CCPR/C/86/D/1184/2003 (27 April 2006), [9.4].

inhuman treatment when children, particularly those from vulnerable or marginalised groups, are deprived of their liberty.

Separation from adults and separation of sentenced and unsentenced children

107. Both the ICCPR and the CRC require that children be kept separate from adults in detention settings.¹⁹² This is because “[t]here is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.”¹⁹³ Additionally, sentenced and unsentenced children should be kept separately.¹⁹⁴

108. Despite this requirement, the *Northern Territory Department of Correctional Services Annual Statistics 2014-2015* indicate that 2 children (people under 18 years) have been kept in the adult facility at Darwin Correctional Centre, although it is not known if they were held with adults or separately to them.¹⁹⁵

Access to complaints and inspections

109. Children in detention have the right to safely make complaints without censorship.¹⁹⁶ This is of critical importance both for the safety and wellbeing of the individual child and is linked also with the need for transparency, accountability and oversight (mentioned also at paras 42-47). It is also a basic requirement that detention facilities are subject to regular inspection by independent authorities.

110. It is deeply concerning both the current and former NT Children’s Commissioners have raised concerns about information flows to their office.¹⁹⁷ Additionally, the National Children’s Commissioner has observed that “...there is currently no single independent body responsible for monitoring and oversight of youth justice centres in the Northern Territory.”¹⁹⁸ We encourage the Royal Commission to specifically consider how best the Northern Territory can improve complaints mechanisms for children who are deprived of their liberty.

¹⁹² ICCPR, art 10(2)(b) and CRC, art 37(c).

¹⁹³ General Comment No. 10, above n 9, para 85.

¹⁹⁴ *The Havana Rules*, above n 165, rule 17.

¹⁹⁵ Northern Territory Government, above n 158, p. 16.

¹⁹⁶ *The Havana Rules*, above n 165, rules 75-78.

¹⁹⁷ See, for example, *2015 Children’s Commissioner Report*, above n 22, p. 41.

¹⁹⁸ Megan Goldinham Mitchell, Statement, Royal Commission into the Protection and Detention of Children in the Northern Territory, 9 October 2016, para 88.

Economic, social and cultural rights – Health, culture, education, leisure

111. Children in detention maintain rights to health, culture, education, recreation activities and other economic, social and cultural rights as outlined in the Convention. Full access to services and programs which support these rights are also inherently linked with effective rehabilitation measures. For Aboriginal and Torres Strait Islander children in particular, it is essential that special measures be taken to facilitate and protect connection to culture (discussed also at paras 48-51).
112. The 2015 Vita Report concluded that the Don Dale Youth Detention Centre lacked a multidisciplinary team¹⁹⁹ and ways of working which would have helped facilitate such rights. It is significantly concerning, for example, that the first clinical psychologist was only recruited relatively recently.²⁰⁰ This situation raises serious concerns over the extent to which young people detained have had full and proper access to services and programs which would have facilitated their education, health, contact with family, participation in cultural activities and recreation.
113. Additionally, statistics on the proportion of young people with case plans prepared within 6 weeks of commencing both community sentenced orders or a sentenced detention order are staggeringly low in the Northern Territory compared to the rest of the country. Concerningly statistics also indicate a marked difference in the experiences of Aboriginal and Torres Strait Islander children compared to non-indigenous children (discussed above at para 35). This significant delay in the preparation of such case plans risks a child receiving inappropriate, insufficient and/or un-individualised access to health, culture, access to family, education, and recreation opportunities that would be critical to putting the child on a path to rehabilitation and reintegration.

Access to family

114. Children who are deprived of their liberty also have the right to maintain contact with his or her family through correspondence and visits.²⁰¹ Family must be interpreted broadly with the Committee on the rights of the Child explaining that “[p]reservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts

¹⁹⁹ 2015 Vita Review, above n 27, p.13.

²⁰⁰ Ibid, p. 16.

²⁰¹ CRC, art 37.

as well as friends, school and the wider environment...”.²⁰² Family and caregivers play an important protective role for children and are often critical players in the rehabilitation and reintegration of children who have been found guilty of an offence.

115. Given the delay to case plan preparation as outlined above, we hold concerns about the extent to which children detained in the Northern Territory have had full and proper access and contact with family. This should be examined further by the Royal Commission.

Effective rehabilitation and reintegration programs

116. Every child in detention must be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.²⁰³ Governments are under an obligation to provide in detention settings a physical environment which is conducive of rehabilitation (including quality education, privacy, sensory stimuli, opportunities to develop peer friendships, to participate in sports, physical exercise, in arts, and in leisure activities).²⁰⁴ This is not only important for the individual child, but for the long-term needs of the community.

117. The 2015 Children's Commissioner Report outlined that there were no rehabilitation programs or services for young people, particularly those in the behavioural management unit at the Don Dale Youth Detention Centre.²⁰⁵ Similarly, the 2015 Vita Review highlighted many shortcomings of the system as it then was which would not have made it conducive to the rehabilitation of young people, including, for example:²⁰⁶

- *Lack of training and/or consistent use of an appropriate screening instrument or assessment tool that should drive the case management process by identifying risk factors that are criminogenic and significant in that particular young person's offending and re-offending history.*
- *A case management process that is un-coordinated and driven by individual staff who, in some cases, are without training and who, without consultation*

²⁰² General Comment No. 14 above n 55, para. 70.

²⁰³ CRC, art 40.

²⁰⁴ General Comment No. 10, above n 9, para 88.

²⁰⁵ 2015 Children's Commissioner Report, above n 25, pp 41 and 44.

²⁰⁶ 2015 Vita Review, above n 27, p.13.

with other government and non-Government stakeholders, other than custodial staff, drive the case management process in a very basic fashion.

- *Lack of direction and consistency in the provision of a behaviour management strategy that lacks understanding of adolescent behaviour, behaviour initiated by history of trauma, symptoms of foetal alcohol syndrome and behaviour associated with ADHD and other mental health issues.*
- *Lack of a multi-disciplinary team approach with available stakeholders in the decision-making processes in detention centres.*

118. Importantly, these observations were made of conditions at Don Dale Youth Detention Centre even though the *Youth Justice Act 2006* (NT) provides that rehabilitation is an objective (s 3 *Youth Justice Act 2006* (NT)).

119. The 2015 Vita Review concluded that the interventions then adopted were “not targeted” and concluded that “it is highly doubtful that meaningful headway is being made to reduce re-offending, certainly in a detention centre environment.”²⁰⁷ Such a situation is both a breach of the rights of the young people in detention and also fails to deliver on the objectives of the youth justice system in regard to rehabilitation and re-integrated into the community.

The proper administration of facilities

120. As an element of ensuring the best interests of children are duly protected, the CRC requires governments to ensure that “...institutions, services and facilities for care or protection of children must conform with established standards – this includes institutions as part of the juvenile justice system. Must include “safety, health, number and suitability of staff and competent supervision.”²⁰⁸ In addition, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* sets out detailed expectations relevant to the proper administration of juvenile facilities. These minimum standards require, amongst other things, that facilities:

- Keep and maintain appropriate and current records;²⁰⁹
- Proper administration of admission, registration, movement and transfer;²¹⁰

²⁰⁷ 2015 Vita Review, above n 27, p. 38.

²⁰⁸ CRC, art 3(3).

²⁰⁹ *The Havana Rules*, above n 165, rules 19-20.

²¹⁰ *The Havana Rules*, above n 165, rules 21-26.

- Appropriately classify and place a child based on his or her particular needs, status and special requirements “according to their age, personality, sex and type of offence, as well as mental and physical health...”;²¹¹
- Create a physical environment that meets requirements for health, human dignity and rehabilitation and provide services to this end; and
- Employ duly qualified personnel (in areas as education, vocational training, youth work, counselling, social work, psychiatry and psychology) who are permanent staff and are employed on a permanent basis.²¹²

121. The competencies and skilling of the staff involved in the administration of juvenile justice is a critical factor in the implementation of all safeguards and protections.²¹³ It is essential that all youth justice systems attract, employ and retain staff who understand adolescents’ “...physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities...and children belonging to racial, ethnic, religious, linguistic or other minorities”²¹⁴ and others (including girls). Treatment that takes into account the child’s age and promotes the child’s reintegration and the child assuming a constructive role in society “...requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being and the pervasive forms of violence against children.”²¹⁵

122. It is very clear from the 2015 Vita Review and the 2015 Children’s Commissioner Report that almost every aspect of the administration, facilities and personnel at the Don Dale Youth Detention Centre did not deliver on these minimum standards. UNICEF Australia understands that since 2014 however, a number of significant changes have been made which should improve previous facility administration, physical environment and personnel. In particular, we note that the original Don Dale Youth Detention Centre has been closed and relocated. However, we hold concerns about the appropriateness of a facility built for adults. Additionally, the 2015-2016 Annual report of the Northern Territory Office of the Children’s Commissioner highlights that “inadequate management and transparency of the classification assessment process for young people in youth detention” was an

²¹¹ *The Havana Rules*, above n 165, Part C.

²¹² *The Havana Rules*, above n 165, Part V.

²¹³ General Comment No. 10, above n 9, para 40.

²¹⁴ *Ibid*, para 40.

²¹⁵ General Comment No. 10, above n 9, para. 13.

observable trend in complaints received by the office.²¹⁶ Facilities for children should be small scale, involve minimal security measures and be decentralised and integrated into the social, economic and cultural environment of the child's community so as to facilitate access between a child and their family and community.²¹⁷ Additionally, administration should meet in international standards around the rule of law and be effective, accountable, transparent and inclusive (discussed above at paras 42-47).

Recommendations

36) That the Northern Territory Government take all reasonable steps to adopt and incorporate the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* and the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* into law, policy and practice. As a priority, it is recommended that the Northern Territory Government:

a) Strictly prohibit the use of isolation and/or solitary confinement against children and provide a remedy and appropriate rehabilitative supports for any children who have been subject to such measures historically.

b) Ensure that the use of force and restraints against children is generally prohibited by law, but permitted only in exceptional cases where all other control measures have been exhausted and failed, with a requirement that they be used restrictively and only for the shortest possible period of time and under the strict supervision of medical and other relevant personnel.

c) Require youth detention facilities to record accurately and promptly record all uses of force, control or restraint in both records of the individual detainee and facility records, and for these to be publicly available at regular intervals.

d) Mandate that children have unrestricted and confidential access to effective complaints mechanisms at all times.

e) Amend s 27 of the *Youth Justice Act 2006* (NT) to require a child to be brought before a court as soon as practicable and in any case within 24 hours after the arrest.

f) Ensure legal protections and practical provision exist to support children in detention to maintain connection to culture to the maximum extent possible.

37) That the Northern Territory Government invest in:

a) Establishing small scale and decentralised detention facilities which facilitate contact with family, community and culture.

²¹⁶ Office of the Children's Commissioner, Northern Territory *2015-2016 Annual Report* (2016), p. 31.

²¹⁷ *The Havana Rules*, above n 165, rule 30.

b) Increasing the availability of rehabilitation programs and ensure that these are premised on rehabilitation and not punishment.

Contact

123. UNICEF Australia is happy to provide the Commissioners with additional information. For further information, please contact Alison Elliott, Senior Policy Adviser, on (02) 8917 3247 or aelliott@unicef.org.au.

Appendix 1 – Relevant international law and standards

UNICEF Australia’s submission is informed by the following human rights instruments:

- *Convention on the Rights of the Child* 1990 (CRC);
- *Declaration on the Rights of the Child* 1959;
- *Universal Declaration of Human Rights* 1948;
- *International Covenant on Civil and Political Rights* 1966 (ICCPR);
- *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR);
- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* 1987 (CAT);
- *Convention on the Rights of Persons with Disabilities* 2006;
- *Convention on the Elimination of Discrimination against Women* 1979;
- *United Nations Declaration on the Rights of Indigenous Peoples*;
- *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* 2006 (OPCAT);
- *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* 2011;
- *UNESCO Universal Declaration on Cultural Diversity* 2001;
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (The Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (The Havana Rules);
- United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines);
- Administration of juvenile justice 1997 (The Vienna Guidelines).
- General Comments published by the United Nations Committee on the Rights of the Child, specifically:
 - General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19, 28, para 2, and 37, inter alia);
 - General Comment No. 10 (2007) Children’s rights in juvenile justice;
 - General Comment No. 11 (2009) Indigenous children and their rights under the Convention;
 - General Comment No. 12 (2009) The right of the child to be heard;
 - General comment No. 13 (2011) The right of the child to freedom from all forms of violence (2011); and

- General Comment No. 14 (2013) On the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1).
- Standard Minimum Rules for the Treatment of Prisoners (Section I) (the Nelson Mandela Rules) 2015;
- Guidelines for the Alternative Care of Children;
- United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice; and
- Sustainable Development Goals.