

“There is always a brighter future”

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



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Amnesty International is indebted to the many Aboriginal organisations and individuals who have generously shared their stories, perspectives and insights in the course of this research.

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This summary uses the term Aboriginal rather than Indigenous or Aboriginal and Torres Strait Islander. However, Amnesty International acknowledges the distinct history and customs of Torres Strait Islander Peoples. An explanation of the choice of terminology can be found in the full Western Australian report.

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Inside cover: Nowanup © Richard Wainwright

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"There is always a brighter future" is a quote from 17-year-old Phillip, a young man from Broome.

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FOREWORD

June Oscar AO
Bunuba Leader
Fitzroy Valley, Western Australia

That one in every 77 Aboriginal boys is in detention at any one time is an appalling indictment on Western Australia. There is clearly a need for a collaborative approach and for building an effective partnership between government and Aboriginal communities.

Reports that present a grim recital about Indigenous disadvantage can so often be numbing, with a tendency to deter action. This report is different. It shows that with practical reforms and strategic resourcing, Western Australia can bring about positive change to the devastatingly high numbers of Aboriginal youth in detention.

This report highlights successful initiatives in Western Australia and other parts of the nation where partnerships and diversion from custody is working for the benefit of the whole community. There are courageous efforts all over the world where Indigenous Peoples are exploring innovative approaches to dealing with inherited trauma and injustice. In Western Australia we could learn much from these efforts.

Kids have healthy, happy childhoods when they live in loving and nurturing communities. It is kids' connections with family and community that allows them to flourish, and sets them up for a good life.

But government policies are separating Aboriginal kids from their communities. By locking up kids as young as 10, we are repeating our past mistakes and threatening our future as a fair, just and harmonious community.

Western Australia consistently detains Aboriginal young people at a vastly higher rate than any other state or territory; and the rate of over-representation is rising. Currently Western Australia is inadequately investing in and referring young Aboriginal people to programs that address the underlying causes of offending behaviour before it becomes an entrenched criminal justice issue.

This report finds many ways that the Western Australian Government can reduce the numbers of young Aboriginal people incarcerated, including through ensuring Western Australia complies with international legal obligations, and through increased state funding to the many successful Aboriginal-led initiatives that keep young people in communities and out of detention.

The statistics

Nationally in 2013–2014, Indigenous young people in Australia were 26 times more likely to be in detention than non-Indigenous young people. In Western Australia, they were 53 times more likely to be in detention.¹ Aboriginal young people make up just over 6 per cent of Western Australia's 10 to 17-year-olds, but more than three quarters of those in detention.² The situation is bleaker still among Western Australia's youngest children – in 2014 almost nine out of 10 children in detention aged between 10 and 13 were Aboriginal.³

Aboriginal children and young people make up about 40 per cent of the total Aboriginal population in Western Australia; around twice the proportion of non-Aboriginal people in the same age group.⁴ Unless the high rate of Aboriginal youth detention is urgently addressed, an increasing number of Aboriginal young people will move into the adult justice system.

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- 1 Calculation based on the average over the four quarters of the 2013–14 financial year. In the June 2014 quarter Aboriginal young people were on average 58 times more likely to be in detention (66.95 per 10,000 compared to 1.16 per 10,000 for non-Aboriginal young people). More recent data is not yet available. AIHW, 'Youth Detention Population Australia in Australia 2014', Table s 10.
 - 2 107 out of 137 on an average night. AIHW, 'Youth Detention Population Australia in Australia 2014', Tables s 2, s 8 and s 31.
 - 3 An average of 38 out of 44 or 87 per cent: Data provided to Amnesty International by Department of Corrective Services on 31 October 2014.
 - 4 37,029 out of 93,778 based on 2014 projections. Australian Bureau of Statistics, *3222.0 Population Projections, Australia, TABLE A5. 'Population projections, by age and sex, Western Australia – Series A'*; Australian Bureau of Statistics, *3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2011*, 'Estimated resident Aboriginal and Torres Strait Islander and Non-Indigenous population, Remoteness Areas, Single year of age, 30 June 2011'.

Justice reinvestment re-directs money spent on prisons to community-based initiatives which address the underlying causes of crime.

Children everywhere have the right to develop their personalities, abilities and talents to the fullest potential, and to grow up in an environment of happiness, love and understanding. Community is everything when it comes to ensuring kids are set up for life. It's because of this that youth justice policies must focus on keeping kids in communities through early intervention, prevention of youth offending and diversionary options.

The Convention on the Rights of the Child is the primary source for internationally agreed children's rights. It establishes the 'best interests of the child' as a fundamental principle underpinning children's rights. Article 37 of the Convention provides that States Parties shall ensure that "the arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time." Article 40(3) requires States Parties to "promote the establishment [of] measures for dealing with such children without resorting to judicial proceedings ... to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

Justice reinvestment

Aboriginal leaders and community organisations have consistently highlighted that more needs to be done to address the underlying factors that contribute to Aboriginal youth in detention through early intervention, prevention and diversion programs.

In the 2013/14 financial year the Department of Corrective Services budget for prevention and diversion services was just \$7.83 million dollars,⁵ compared to the \$46.8 million spent on detention.⁶

The UN Committee for the Elimination of Racial Discrimination has recommended that Australia "dedicate sufficient resources to address the social and economic factors underpinning indigenous contact with the criminal justice system" and encouraged Australia to adopt "a justice reinvestment strategy."

Supporting and funding Aboriginal-led programs

Kids flourish when they are with their communities and connected to their culture, which is why funding Aboriginal-led youth programs works.

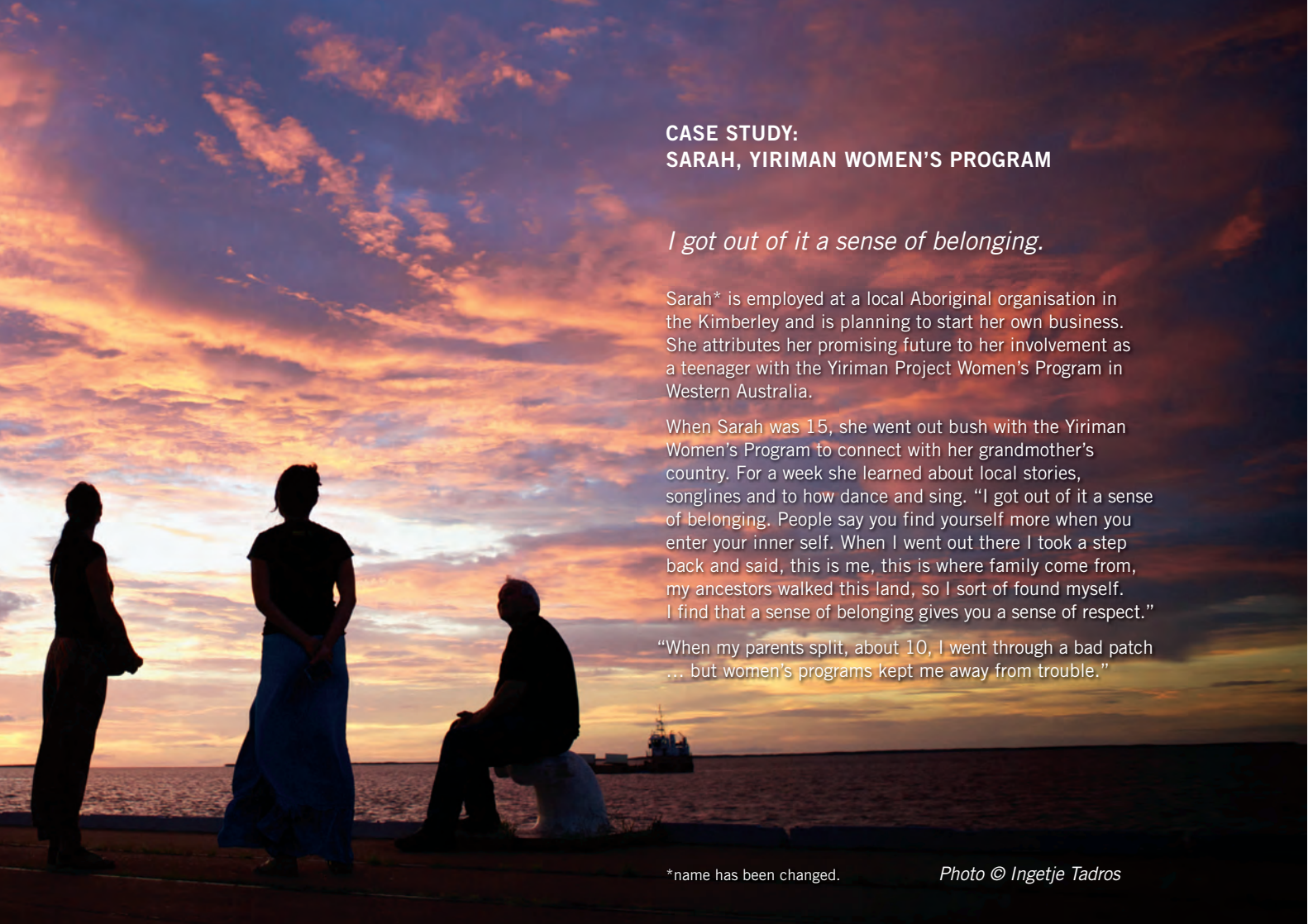
Aboriginal designed and led programs are culturally relevant early intervention, prevention, diversion and support services run by Aboriginal communities, for Aboriginal communities. In Western Australia a number of successful Aboriginal community designed and led programs have transformed the lives of young participants. However, many such programs are struggling under a lack of government support and funding.

The National Crime Prevention Framework outlines the need to involve Indigenous communities in the design and delivery of such strategies,⁷ but of the 12 organisations that deliver prevention and diversion services in Western Australia, only two are Aboriginal organisations.

⁵ Department of Corrective Services Annual Report 2013/14, p59.

⁶ Productivity Commission, *Report on Government Services 2015*, Table 16A.1 'State and territory government real recurrent expenditure on youth justice services, (2013-14 dollars)'.

⁷ Australian Institute of Criminology, *National Crime Prevention Framework*, 2012, pp 13-14.



**CASE STUDY:
SARAH, YIRIMAN WOMEN'S PROGRAM**

I got out of it a sense of belonging.

Sarah* is employed at a local Aboriginal organisation in the Kimberley and is planning to start her own business. She attributes her promising future to her involvement as a teenager with the Yiriman Project Women's Program in Western Australia.

When Sarah was 15, she went out bush with the Yiriman Women's Program to connect with her grandmother's country. For a week she learned about local stories, songlines and to how dance and sing. "I got out of it a sense of belonging. People say you find yourself more when you enter your inner self. When I went out there I took a step back and said, this is me, this is where family come from, my ancestors walked this land, so I sort of found myself. I find that a sense of belonging gives you a sense of respect."

"When my parents split, about 10, I went through a bad patch ... but women's programs kept me away from trouble."

*name has been changed.

Photo © Ingetje Tadors



CASE STUDY: NOWANUP

The land can heal our people

Eugene Eades, Noongar Elder, Nowanup

Eugene has worked with Aboriginal young people for nearly 10 years. Together with other Noongar Elders in the South West of Western Australia, Eugene has run cultural knowledge camps for Aboriginal young people as an alternative to detention.

The camps, at a property called Nowanup, helped boys reconnect to themselves, their culture and community.

"They learn the song and dance about respect for self. They learn the stories of their old people that were the first caretakers of the country ... They walk the trails that their old people used to take young people on a long time ago, to learn about respect for the land."

"These young fellows then go back to support their Elders in their own towns...The answers are in the land ... The land can heal our young people."

Kids come back from Nowanup happier, healthier, and with a sense of belonging. But despite the program's success, Eugene is struggling to find the funding to keep it alive.

Photo © Richard Wainwright

Better data for better solutions

Western Australia is failing to collect, make available and make use of information that would help to identify how and why the existing approach to youth justice is failing Aboriginal young people.

The Western Australian Government told Amnesty International that problems with data are currently affecting its own capacity to plan for programs.⁸ Information that is publicly available is not of the quality required by international standards and reports about young people in detention, previously updated regularly, have not been provided since mid-2014. Western Australia has also failed for several years to provide standard data to an important national project on youth justice.⁹ This must be addressed to conform to international legal standards and better address Aboriginal over-representation in the youth justice system.

Failure to caution

Once Aboriginal young people come into contact with the police, they are more likely to be charged rather than cautioned when compared to non-Aboriginal young people. Aboriginal young people are cautioned or referred to a Juvenile Justice Team only 35 per cent of the time, whereas non-Aboriginal young people are diverted 59 per cent of the time.¹⁰

Under the Convention on the Rights of the Child, arrest should be a last resort. Failure to caution is a missed opportunity for referral to services to address the causes of offending. Young people cautioned at the beginning of their contact with the justice system generally do not go on to have further contact.¹¹

Not enough options available to courts

When a young person is charged, Western Australia is failing to provide Aboriginal young people with appropriate diversionary programs as an alternative to a court hearing. There is also a lack of adequate community-based sentencing options, particularly in regional and remote areas.

According to the Department of Corrective Services, of the programs available to the courts prior to sentencing and as part of community-based orders, "none ... is currently Aboriginal owned or controlled, however they are designed to be culturally appropriate to address the over-representation of Aboriginal young people in the criminal justice system."¹²

Inadequate bail options

A lack of adequately supported bail accommodation contributes to the high rates of Aboriginal young people held in police custody and in detention without sentence. Over half of all young people in detention are unsentenced and 70 per cent of them are Aboriginal.¹³ The Department of Corrective Services' Youth Bail Options Program (YBOP), which provides supervised bail accommodation in locations across the state, has improved the situation. However, existing supervised bail accommodation in Perth is often full and YBOP accommodation throughout the state cannot be accessed by young people in the care of the Department of Child Protection and Family Support. Remand in custody just because of a lack of accommodation is contrary to international legal standards.¹⁴

8 Meeting with Mala Dharmananda, Department of Corrective Services, Perth (18 June 2014).

9 AIHW 'Youth justice data quality and technical information', www.aihw.gov.au/youth-justice/data-quality (accessed 2 October 2014).

10 Productivity Commission, *Overcoming Indigenous Disadvantage 2014 Report*, Table 11A.3.24 'WA, juvenile diversions as a proportion of offenders (aged 10–17 years), by Indigenous status, 2008–09 to 2012–13'.

11 Dennison, Stewart and Hurren. 'Police cautioning in Queensland: The impact of juvenile offending on pathways'. *Trends and Issues in Crime and Criminal Justice* no. 306, Australian Institute of Criminology, 2006, pp 1–6.

12 Department of Corrective Services response to Amnesty International questionnaire (12 September 2014).

13 Unsensenced detention population includes those who have been refused bail and are awaiting trial and those found guilty and awaiting sentence. AIHW, 'Youth Detention Population in Australia 2014' Tables s 12 and s 18.

14 Human Rights Committee, *General Comment 35* and Article 9 of the ICCPR, [38], United Nations Rules for the Protection of Juveniles Deprived of their Liberty, [17].

Police curfews – disruptive and problematic

Amnesty International consistently heard of police shining a torch through the front window of young peoples' homes up to four times a night, including in the early hours of the morning, and requiring young people to present at the front door on demand.¹⁵ The way curfews are applied and monitored is disruptive of whole families and may escalate early contact with the justice system and deteriorate relationships between the community and police. While curfews may be appropriate in certain circumstances, the Western Australian Government needs to transparently investigate the current approach to curfews.

Better solutions for fetal alcohol spectrum disorders

Fetal alcohol spectrum disorders (FASD) describes a range of impacts caused by exposure to alcohol in the womb. FASD presents a range of challenges which, if not addressed early, make contact with the criminal justice system more likely.¹⁶ The consequences vary along a spectrum of disabilities including: physical, cognitive, intellectual, learning, behavioural, social and executive functioning disabilities, and problems with communication, motor skills, attention and memory.¹⁷

Aboriginal organisations, in particular in the Fitzroy Valley, have driven impressive community responses to the issues presented by FASD. Aboriginal women have played a particularly strong role in driving and shaping these responses and should be supported to expand this work.

Early diagnosis and treatment of FASD is of paramount importance, well before a young person finds themselves before a court. But there is an urgent need for diagnosis in the court setting to guarantee a fair trial for those affected by FASD. Western Australia also needs to change current legislation to avoid possible unintended consequences of having a FASD diagnosis. At the moment, where a court finds a person unfit to stand trial because of mental impairment, the court only has two options: either release the person unconditionally or make them subject to an indefinite custody order.¹⁸ Unconditional release is often not an option, so the court only has the choice of indefinite detention. Indefinite detention due to mental impairment is contrary to international law. Western Australia's law should be changed and more funding provided to supervised alternatives.

Age of criminal responsibility too low

In Western Australia, children are held criminally responsible from just 10 years of age.¹⁹ Internationally, it's accepted that 12 is the lowest minimum age of criminal responsibility.²⁰ Based on available data, Aboriginal young people are impacted most by this low age of criminal responsibility.

Mandatory sentencing

Western Australia is the only state or territory in Australia where mandatory minimum sentences of detention apply to young people. Mandatory minimum sentences prevent magistrates from considering all the relevant circumstances and are contrary to the international legal obligation that, for children, detention should be a last resort and for the shortest appropriate period of time. Despite mandatory sentences being contrary to international law, the Western Australian Government was expanding the mandatory minimum sentencing regime for home burglaries as this report went to print.

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- 15 Interview with Aboriginal community member, July 2014 (details withheld); Interview with Aboriginal youth support worker August 2014 (details withheld); Interview with legal practitioners, July 2014 (details withheld); Interview with Ben White, Aboriginal Legal Service Western Australia, Broome (22 July 2013).
 - 16 Aboriginal Legal Service of Western Australia, *Submission to the Australian Human Rights Commission*, 'Access to justice for people with disability' Issues Paper, April 2013, p 2.
 - 17 Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Fetal Alcohol Spectrum Disorders (FASD: The Hidden Harm)*.
 - 18 *Criminal Law (Mental Impaired Accused Act) 1996 (WA)*, sections 16(5) and 19(4).
 - 19 *Criminal Code Act Compilation Act 1913 (WA)*, s 29.
 - 20 Committee on the Rights of the Child, *General Comment No. 10 (2007)* 'Children's rights in juvenile justice' [32].

1

That the Western Australian Government take immediate steps to improve the collection and public dissemination of data relevant to the youth justice system.

2

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

3

That the Western Australian Government commit to funding Aboriginal organisations and communities, including through preferential tendering, to support Aboriginal designed and led programs at all stages of the justice system. This should include programs addressing gender-specific needs, and the needs of those experiencing FASD and other health-related issues through early intervention, prevention, and diversion.

4

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

5

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

6

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

7

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

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

8

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

9

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

10

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

11

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

12

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

13

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

14

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

15

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

16

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

17

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

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

18

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

19

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

20

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

21

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

22

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

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

23

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

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



CASE STUDY: PHILLIP

There is always a brighter future.

Since 2012 Phillip has been involved in the Department of Education's Broome Senior School Engagement Program. Phillip, now 17, is being supported by Broome's Police and Citizen's Youth Club to enrol in TAFE. He is already looking forward to the future – one where he aspires to mentor other kids.

“What my dream is, what I really want to do, I just want to get my job ... and go out and have a big holiday... I'd really love to see different countries, it's like my dream.”

“When I was young I really enjoyed school, but as soon as I got older I started being a nasty person to everyone. I stopped going to school for weeks.

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

“I really want to be there for young people, help them live a brighter future, even if they have lost their family ... because you know I've been through that sort of stuff.”

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