

Sub #21 to AHRC NGO OPCAT Consultation from Criminal Lawyers Association of the Northern Territory (CLANT)

From: Russell Goldflam <russell.goldflam@ntlac.nt.gov.au>
Sent: Friday, 21 July 2017 5:38 PM
To: Humanrights Commissioner
Subject: OPCAT Consultations
Attachments: F.pdf; D.pdf; E.pdf

Dear AHRC

This is a brief submission by the Criminal Lawyers Association of the Northern Territory (CLANT) in response to the AHRC OPCAT Consultation Paper.

Regrettably, we only became aware of the Consultation process today, the deadline for submissions. Accordingly, CLANT is only in a position to make a brief general submission, and we are unable to address the seven specific questions in the Consultation Paper.

CLANT has for several years publicly called for the ratification of OPCAT. Those activities are conveniently summarised in my Statement dated 24 November 2016 to the Royal Commission into the Protection and Detention of Children in the Northern Territory, in which I said:

[O]n 2 October 2014, on behalf of CLANT I was one of 11 signatories to a statement (annexed hereto and marked 'D') calling for, among other things, an Independent Custodial Inspector. On 2 June 2015, CLANT endorsed a statement issued by the Making Justice Work Coalition (annexed hereto and marked 'E') renewing that call. On 30 May 2016, I wrote on behalf of CLANT to the National Children's Commissioner (annexed hereto and marked 'F') urging the immediate ratification of the Optional Protocol to the Convention Against Torture (OPCAT), which would provide a mechanism for independent oversight of youth detention facilities in the Northern Territory. The associated Bill then before the Northern Territory was however allowed to lapse.

...

I welcome the indication that has been provided by the recently elected Northern Territory government that an Independent Custodial Inspectorate will be established.

...

Australia should accede to OPCAT, and the NT should pass OPCAT legislation, to guarantee independent oversight of detention.

There should also be independent oversight of the administration of community-based bail and sentencing orders imposed on children.

The Annexures referred to above are attached.

I have read and understand the AHRC Submissions Policy (August 2014).

CLANT would welcome the opportunity to participate in any proposed consultation roundtables that are held in the Northern Territory.

Yours faithfully,



Russell Goldflam
PRESIDENT, CLANT

t: 040 1119020

w: www.clant.org.au

e: russell.goldflam@ntlac.nt.gov.au



Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Dean Mildren • PO Box 969 ALICE SPRINGS NT 0871 • ABN: 64 391 168 310•

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D JOINT STATEMENT



Berrimah Prison is not good enough for Territory's most vulnerable kids

We call for urgent action from the Northern Territory Government to improve youth detention facilities and commission a purpose-built youth detention facility.

We are extremely concerned that children and young people in the Northern Territory are being subjected to unsafe, developmentally inappropriate detention that contravenes National and International protocols.

In August 2014, six youths allegedly involved in a 'riot' were subjected to tear gas, then removed from Darwin's Don Dale Youth Detention Centre to the punishment unit of Darwin Correctional Centre ('Berrimah').

The boys are aged between 14 and 16. Amnesty International called for an independent investigation into the incident and there have been indications that the Northern Territory's Children's Commissioner, Dr Howard Bath is investigating.

Since that time, the Northern Territory Government announced that the Don Dale centre would be immediately closed and all youths in detention moved first to the Complex Behaviours Unit at the new Darwin Correctional Precinct, and when adult prisoners were moved to the new prison, to Berrimah Prison.

On 13 and 14 September 2014, five youths allegedly damaged cells in the new Complex Behaviours Unit, with some also getting onto the roof of the facility. These youths were then transferred to the maximum security unit until the damaged areas were repaired.

Berrimah Prison

At a coronial inquest in 2011, the Commissioner of Northern Territory Correctional Services, Ken Middlebrook said that Berrimah prison was so run down that it should be bulldozed.¹

Amnesty International's Rodney Dillon urged that Berrimah Prison not be used as a youth detention centre: "Berrimah's not child-appropriate. If we're genuinely interested in helping kids with repeat offending, putting them in an old run-down jail, no matter what the refurbishment, won't solve any problems"².

The move to Berrimah Prison will only exacerbate the current problems in youth detention.

The Northern Territory Government has committed to spend \$800,000 to upgrade the Berrimah Prison facility.

At the same time, the Northern Territory Government recently announced that it will spend \$5 million to refurbish the Living Skills section of Berrimah Prison to be fit for purpose for adults undertaking mandatory alcohol rehabilitation (NT News, 18 September 2014).

Spending \$800,000 to refurbish Berrimah will include painting, installation of CCTV and some additional internal fencing, and removal of grills and bars to 'soften' the buildings.

These refits will not change the fact that Berrimah was a place no longer acceptable to house adults – so how can it be considered acceptable to house our most vulnerable young people?

Berrimah was formerly known for overcrowding, oppressive conditions and cultural inappropriateness. We therefore question its suitability as a site to safely and adequately meet the emotional and mental wellbeing of young people.

The Australasian Juvenile Justice Standards (AJJA) sets out national juvenile justice standards. These standards are linked to state and territory legislation and take into account the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Standard Minimum Rules for Non-Custodial measures and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

The Standards include infrastructure guidelines to ensure age-appropriate youth justice services and resources that support safe, secure and positive environments for staff and young people, that promote rehabilitation and ensure that critical incidents are managed using the least intrusive developmentally appropriate options.

An adult prison 'fit for a bulldozer' is just not good enough for the Territory's most vulnerable kids.

¹ <http://www.abc.net.au/news/2014-09-14/juveniles-escape-cells-in-new-darwin-prison/5742710>

² <http://www.amnesty.org.au/news/comments/35449/>

We call upon the Northern Territory Government to urgently:

1. establish purpose-built detention facilities in Darwin and Alice Springs for the Northern Territory's most vulnerable children and young people, or, alternatively, properly invest to upgrade existing youth detention centres to acceptable contemporary standards;
2. reduce the number of Aboriginal young people exposed to youth detention by:
 - improving the availability of diversionary and non-custodial options for dealing with young offenders, and
 - reviewing punitive bail laws and increasing supported bail accommodation;
3. establish an Independent Custodial Inspector (such as exists in Western Australia) who has unfettered access to youth detention centres to ensure national and International standards are being complied with.

Signatories:

- Aboriginal Medical Services Alliance Northern Territory (AMSANT)
- Amnesty International
- Anglicare NT
- Balunu Foundation
- Central Australian Aboriginal Legal Aid Service (CAALAS)
- Criminal Lawyers Association of the Northern Territory (CLANT)
- Danila Dilba Health Service
- Human Rights Law Centre
- North Australian Aboriginal Justice Agency (NAAJA)
- Northern Territory Council of Social Services (NTCOSS)
- Secretariat of National Aboriginal and Islander Child Care (SNAICC)
- YWCA of Darwin



JOINT STATEMENT

New Youth Detention Crackdown Not the Answer

Seven months ago today, a coalition of non-government organisations from the Northern Territory and across Australia put out a joint statement, 'Berrimah Prison is not good enough for Territory's most vulnerable kids.'

We warned of the dangers of the Northern Territory Government turning its back on human rights and putting children in a run-down prison that was too run-down to house adult prisoners.

We called for urgent action from the Northern Territory Government to commission a purpose-built youth detention facility for the Top End – something that exists in every other state and territory.

Our calls were ignored.

Instead, the NT Government has moved further from the Australasian Juvenile Justice Administrators (AJJA) Standards that require age-appropriate youth justice services and resources that support safe, secure and positive environments for staff and young people.

They have tightened security but restricted access to basic services. For the young people in maximum security, they have all but removed access to education, counselling and treatment, and structured recreational activities. Maximum security detainees face excessive periods of lockdown and have nothing to do.

For the small number of detainees who have behaved inappropriately, they have been isolated in degrading conditions. Some have been transferred for days at a time to the adult prison.

The latest move by Corrections to place adult prison officers in the youth detention centre raises alarm bells about not detaining children in an age-appropriate way. We believe that it will not address the core problems.

Coercive power – punitive engagement, denial of rights, crackdown methods – is the least effective way to exercise control. Getting the parties to *want* to cooperate is far more effective. Coercive power usually serves mainly to heighten resentment and anger.

The one lesson that should be learnt from the last six months is that punitive and restrictive measures are not working.

These are children who are at risk of severe harm – physically, emotionally and mentally. Surely one must wonder what is occurring in Detention to drive them to such a course that these youth are

willingly scouring razor wire to affect their escape, risking severe injury. One presently hospitalised with 110 stitches.

We hold real and serious concerns for the emotional and mental wellbeing of these children.

What are the custodians doing to ensure that these already vulnerable and damaged children are not further traumatised in Detention?

A new approach is needed, one that respects the basic rights of children in detention, one that balances security needs with rehabilitation.

We renew our call for the Northern Territory Government to urgently commission a purpose-built youth detention facility for the Top End.

In late 2014 in response to the tear gassing of children in detention, the then Children's Commissioner Dr Howard Bath announced an own initiative investigation into youth detention. Dr Bath prefaced that it would be publicly released.

But the NT Government has so far refused to publicly release this report.

We call on the Northern Territory Government to publicly release the previous Children's Commissioner's independent investigation into youth detention.

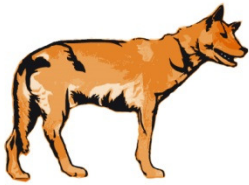
The public must be given the full story about what is happening in youth detention facilities and why problems continue to arise.

And the Government must commit to listening to the experts before even worse tragedies occur.

We call upon the Northern Territory Government to urgently:

1. establish purpose-built detention facilities in Darwin and Alice Springs for the Northern Territory's most vulnerable children and young people, or, alternatively, upgrade the former Don Dale youth detention centre to an acceptable contemporary standard;
2. publicly release the previous Children's Commissioner's independent investigation into youth detention.
3. Establish an Independent Custodial Inspector (such as exists in Western Australia) who has unfettered access to youth detention centres to ensure national and International standards are being complied with.

Jesuit Social Services
Central Australian Aboriginal Legal Service
North Australian Aboriginal Justice Agency
Aboriginal Peak Organisations (NT)
Northern Territory Council of Social Services
Larrakia Nation Aboriginal Corporation
Criminal Lawyers Association of the Northern Territory



Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Dean Mildren • President: Russell Goldflam (telephone: 040 1119020) •
Secretary: Sarah Gibbs • PO 969, ALICE SPRINGS NT 0871 • www.clant.org.au • ABN:64391168 310

Ms Megan Mitchell
National Children's Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

By email to: kids@humanrights.gov.au

30 May 2016

Dear Commissioner,

Re: Submission for ratification of the Optional Protocol to the Convention Against Torture

Thank you for inviting the Criminal Lawyers Association of the Northern Territory (CLANT) to make a submission on this important issue. We strongly support the urgent ratification by Australia of the Optional Protocol to the Convention Against Torture (OPCAT).

CLANT

For over 25 years, the CLANT has been an effective and powerful voice for the improvement of the criminal justice system in the Northern Territory, representing both defence lawyers and prosecutors, practitioners from the public sector, the private profession and the independent bar.

In a jurisdiction where offending rates, incarceration rates and recidivism rates are higher, and growing faster, than anywhere else in Australia, there are enormous challenges for the criminal justice system.

CLANT is strongly committed to addressing these problems. Among our Objects and Purposes are:

- to promote and advance the administration of the criminal justice system and development and improvement of criminal law throughout the Northern Territory
- to actively contribute in public debates in issues relating to the criminal justice system
- to promote and encourage the protection of human rights and compliance with international human rights principles in the Northern Territory

The Northern Territory youth detention system

CLANT members are highly troubled by the treatment of children and young people in detention in the Northern Territory (NT), particularly those who identify as Aboriginal or Torres Strait Islanders. Aboriginal children and young people in the NT suffer significant disadvantage. Although only approximately 30% of the NT population identify as indigenous, 96% of youths detained on remand or after sentence are Aboriginal. These are often very vulnerable youth. For example, 88% of children in out of home care during 2014-15 identified as indigenous¹ and 81% of families interacting with the Department of Children and Families (DCF) identified as indigenous.² Many of those children end up in detention. Indeed, 60% of people in youth detention in the NT are in the care of DCF.³

Over the four years to June 2013 the rate of incarceration of young people in the NT increased by an astonishing 50%: from 12.2 per 10,000 to 18.7 per 10,000.⁴ Over the same period the national trend declined from 3.6 to 3.3 per 10,000.⁵ The NT rate of youth incarceration is now 6 times the national average. Roughly 30% of youths under justice system supervision in the NT are in detention. That is twice the national rate.⁶ 75% of youths in detention in the NT are unsentenced, compared to 50% nationally. The NT picture, and in particular the NT trend, is both disturbing and unsustainable.

¹ Office of the Children's Commissioner, Northern Territory, *Children's Commissioner Northern Territory Annual Report 2014-2015* (2015) 55.

² Office of the Children's Commissioner, Northern Territory, *Children's Commissioner Northern Territory Annual Report 2014-2015* (2015) 55. See also forthcoming Honours paper from CDU Law student Rebecca McLennan.

³ Sharp, J "[Does the NT Youth Justice deliver justice for vulnerable young offenders or their victims?](http://clant.org.au/images/images/the-bali-conference/2015/Sharp_ppt.pdf)" Conference paper (15th CLANT conference, June 2015) accessed at http://clant.org.au/images/images/the-bali-conference/2015/Sharp_ppt.pdf

⁴ Australian Institute of Health and Welfare, *Youth detention population in Australia 2013* (Juvenile Justice Series no. 13), p 50

⁵ *Ibid*, p 4

⁶ Australian Institute of Health and Welfare, *Youth justice in Australia 2013–14* (AIHW bulletin no. 127, 2015)

Recent events cause particular concern in relation to the detention, treatment and questioning of young people in the NT. This has included the high numbers of Aboriginal Youth currently detained, the placing of youth in a detention centre condemned as unfit for adult occupation, a Bill to remove the presumption in favour of bail for repeat property offenders (a high proportion of whom are young people), and the increased use of restraint techniques and devices in youth detention.

The findings of a recent report into the NT youth detention system are in equal measure straightforward and chilling:

Youth detention facilities in the Northern Territory are struggling to maintain service level standards in the absence of a coherent operating philosophy, staff training, direction, appropriate infrastructure, leadership and resourcing.⁷

In this rudderless environment, the youth detention system is particularly vulnerable to the encroachment of poor and even dangerous practices. Furthermore, the recent demonisation of young offenders both by politicians and sections of the media serves to lend a patina of legitimacy to increasingly punitive responses by custodians reacting to persistently provocative and defiant behaviour by detainees. Features of this vicious circle include: extended periods of isolation and lockdown in dilapidated cells; the use of force restraints (handcuffs, shackles, the cutting off of clothing, dogs, and in at least one incident, tear gas); the limitation or withdrawal of educational, recreational and other rehabilitative programs; the increased use of adult prisons to detain youths; and the abandonment of individualised case management.⁸

There is also a lack of cultural integrity in our criminal justice systems, as reported by Sharp:

Our justice system is not meeting the needs of Aboriginal people. We have a system of imposed justice, where Aboriginal people feel little sense of ownership or engagement. Decisions are made about Aboriginal people, not together with them. Aboriginal defendants are not engaged in court processes. They often don't

⁷ Vita, M *Review of the Northern Territory Youth Detention System Report* (February 2015), p 11

⁸ Sharp, J [*Does the NT Youth Justice deliver justice for vulnerable young offenders or their victims?*](http://clant.org.au/images/images/the-bali-conference/2015/Sharp_ppt.pdf) Conference paper (15th CLANT conference, June 2015) accessed at http://clant.org.au/images/images/the-bali-conference/2015/Sharp_ppt.pdf

understand technical language used in court, or have a shared understanding of Western legal concepts they are subjected to. In other ways, our processes do not create a culturally supportive environment for Aboriginal people. Courts seldom have detailed cultural information about an Aboriginal defendant when making life-changing decisions such as whether to sentence an Aboriginal person to prison or refuse them bail.

Aboriginal restorative justice practices like mediation that promote healing, restore relationships and repair harm done, are rarely part of how our justice system resolves a matter, with the consequence that relationships and underlying issues are left unaddressed.⁹

It is against this background that NT young people end up in detention with little access to effective and culturally appropriate rehabilitation, and in a cycle of criminalisation and recidivism.

In addition, there are significant health issues amongst those detained. CLANT refers as follows to its submission to the Senate Inquiry on the indefinite detention of those with cognitive and psychiatric impairment in Australia (citations omitted):¹⁰

The long term effects of colonialism (including brutal dispossession, forced removal and institutionalisation of children, and mass killings within living memory), failures to follow properly researched recommendations to address disadvantage, poverty, alcohol and abuse, particularly in relation to indigenous people, has led to high crime rates, high detention rates and a culture of cruelty. People with complex cognitive and psychiatric needs and offending behaviours, or who are assessed as a risk to the community, are incarcerated and held indefinitely in maximum-security prisons in the NT largely because there is no or no sufficient alternative provision and no services to effect crime prevention through health and welfare.

⁹ Sharp, J *Churchill Fellowship Report* (2013), accessed at: http://www.aic.gov.au/media_library/conferences/2013-youthjustice/presentations/sharp-paper.pdf

¹⁰ http://www.clant.org.au/images/images/Senate_Inquiry_on_cognitively_impaired_submission.pdf

A National Preventative Mechanism

Despite a plethora of reports in recent years into the NT youth justice system,¹¹ there appears to have been no substantial progress in addressing the identified problems. The repeated calls by stakeholders including CLANT for the establishment of an NT Independent Custodial Inspector¹² have been rebuffed. Part 9 (“Official Visitors”) of the *Youth Justice Act* (NT) provides a scheme for the oversight of youth detention centres which is rudimentary, limited in scope, lacking in independence and power, and inadequate and ineffective in practice.

Similarly, the Youth Justice Advisory Committee (YJAC), which is established by Part 13 of the *Youth Justice Act* (NT), lacks the resources and teeth to be an effective advocate and change agent in the youth justice system: the YJAC Chairman’s frustration about this in the YJAC 2014-2015 Annual Report is palpable.¹³

There is in our view a pressing need for effective, continuous, independent and strong oversight into the detention of young people in the Northern Territory. Attempts to provide this have to date been depressingly unsuccessful. What is required is a system of oversight backed by Northern Territory, Commonwealth and international law, together with the associated institutional framework which can best, and perhaps only, be achieved by ratifying OPCAT.

¹¹ Including: Carney, J *Review of the Northern Territory Youth Justice System: Report* (2011); Vita, M *Review of the Northern Territory Youth Detention System Report* (February 2015); Gwynne, C, *Own Initiative Investigation Report Services Provided By The Department Of Correctional Services At The Don Dale Youth Detention Centre* (August 2015) accessed at

<http://www.childrenscommissioner.nt.gov.au/publications/Childrens%20Commissioner%20DDYDC%20-%20Report%20to%20Minister%20170915.pdf>

¹² *Joint Statement* (2 October 2014), accessed at

<http://www.clant.org.au/images/images/youthdetentionjointstatement1014.pdf> ;

and *Joint Statement* (2 June 2015) accessed at

http://www.clant.org.au/images/images/New_Youth_Detention_Crackdown_Not_the_Answer.pdf

¹³ https://www.nt.gov.au/_data/assets/pdf_file/0008/238715/YJAC-Annual-Report-2014-15-web.pdf

Age of Criminal Responsibility

In October 2015, as part of the “Too Much Too Young” campaign led by Jesuit Social Services, CLANT joined many other organisations calling for the age of criminal responsibility to be raised to 12 years.¹⁴

A handwritten signature in blue ink, appearing to read 'R. Goldflam', with a long horizontal flourish extending to the right.

Russell Goldflam

PRESIDENT

CLANT

¹⁴ http://www.clant.org.au/images/images/Doli_letter_221015.pdf