

IN THE SUPREME COURT OF WESTERN AUSTRALIA

No. CIV 1522 of 2013

IN THE MATTER of an application for a Writ of
Certiorari against the Honourable Joseph Michael
Francis MLA the Minister for Corrective Services
for the State of Western Australia and Ian Johnson
the Chief Executive Officer of the Department of
Corrective Services; ex parte Coral Wilson

BETWEEN:

CORAL WILSON

Applicant

- and -

**JOSEPH MICHAEL FRANCIS MLA, THE MINISTER
FOR CORRECTIVE SERVICES**

First Respondent

- and -

**IAN JOHNSON, CHIEF EXECUTIVE OFFICER
OF THE DEPARTMENT OF CORRECTIVE SERVICES**

Second Respondent

**SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION AS
TO THE MINIMUM STANDARDS OF JUVENILE DETENTION**

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1. These submissions represent the views of the Australian Human Rights Commission and not the Commonwealth of Australia.

2. The Australian Human Rights Commission was granted leave to intervene in this proceeding on 10 April 2013 pursuant to the inherent power of the Court and s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. Pursuant to s 11(1)(o) of the AHRC Act, the Commission has the function of intervening in proceedings that involve human rights issues where the Commission considers it appropriate to do so and with the leave of the court hearing the proceedings, subject to any conditions imposed by the court.
4. The phrase "human rights" is defined by s 3 of the AHRC Act to mean the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* (ICCPR),¹ (Annexure A) and the rights and freedoms declared by any relevant international instrument.
5. On 22 October 1992, pursuant to a declaration of the Attorney-General (Cth), made under s 47 of the AHRC Act, the *Convention of the Rights of the Child* (CRC)² (Annexure B) became a relevant international instrument.
6. On 20 April 2009, pursuant to a declaration of the Attorney-General (Cth), made under s 47 of the AHRC Act, the *Convention of the Rights of Persons with Disabilities* (CRPD)³ (Annexure C) became a relevant international instrument.

1 The Application

7. The Applicant seeks an order quashing the decision to declare two units at Hakea Prison as a juvenile detention centre and the decision to transfer children from Banksia Hill Detention Centre to the units. The Applicant claims that one of the bases that the decisions are invalid is that the respondent failed to take into account relevant considerations. The Commission supports the application and contends that determination of the relevant considerations will be assisted by reference to principles of international law relevant to the human rights of children in detention.
8. The High Court has held:

What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in

¹ *International Covenant on Civil and Political Rights*, opened for signature 16/12/1966, United Nations, Treaty Series 999 (entered into force 23/03/1976). Ratified by Australia on 13 August 1980.

² *Convention on the Rights of the Child*, opened for signature 20/11/1989, 1577 United Nations, Treaty Series 3 (entered into force 2/09/1990). Ratified by Australia on 17 December 1990.

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30/03/2007, A/RES/61/106, (entered into force 3/05/2008). Ratified by Australia on 20 April 2009.

statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.⁴

9. Section 13 of the *Young Offenders Act 1994 (WA)* (YO Act) does not set out any considerations for the Minister to take into account when declaring a place to be a detention centre in which children are to be detained. Therefore, the factors relevant to that decision must be determined by implication from the subject matter, scope and purpose of the Act.
10. The purpose of the Act can be taken from its objectives. These are set out in s 6 of the YO Act and are as follows:

The main objectives of this Act are —

- (a) to provide for the administration of juvenile justice; and
 - (b) to set out provisions, embodying the general principles of juvenile justice, for dealing with young persons who have, or are alleged to have, committed offences; and
 - (c) to ensure that the legal rights of young persons involved with the criminal justice system are observed; and
 - (d) to enhance and reinforce the roles of responsible adults, families, and communities in —
 - (i) minimising the incidence of juvenile crime; and
 - (ii) punishing and managing young persons who have committed offences; and
 - (iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens;
- and
- (e) to integrate young persons who have committed offences into the community; and
 - (f) to ensure that young persons are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity.⁵

11. The general principles of juvenile justice, referred to in s 6(b) of the YO Act, are set out in s 7 of the YO Act and are as follows:

- (a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences; and

⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.* [1986] HCA 40; (1986) 162 CLR 24, p 39 - 40.

⁵ *Young Offenders Act 1994 (WA)*, s 6.

- (b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and
- (c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult; and
- (d) the community must be protected from illegal behaviour; and
- (e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so; and
- (f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so; and
- (g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so; and
- (h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and
- (i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner; and
- (j) punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; and
- (k) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and
- (l) in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered; and
- (m) a young person who commits an offence is to be dealt with in a way that —
 - (i) strengthens the family and family group of the young person; and
 - (ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and
 - (iii) recognises the right of the young person to belong to a family.

12. The Commission contends that to give meaning to the objects of the YO Act, and therefore to the relevant considerations, the court will be assisted

by reference to relevant principles of international law. Most relevant for current purposes are:

- 12.1. The Convention on the Rights of the Child,⁶
- 12.2. The International Covenant on Civil and Political Rights,⁷
- 12.3. The Convention on the Rights of Persons with Disabilities,⁸
- 12.4. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (Havana Rules),⁹ (Annexure D)
- 12.5. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules),¹⁰ (Annexure E)
- 12.6. The United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines),¹¹ (Annexure F) and
- 12.7. The Standard Minimum Rules for the Treatment of Prisoners (General Rules).¹² (Annexure G)

2 Australia's international obligations and the construction of the Young Offenders Act

2.1 Role of international law in statutory construction

13. It is well settled that, as a general proposition, legislative provisions that are ambiguous are to be interpreted by reference to the presumption that Parliament did not intend to violate Australia's international obligations.¹³

⁶ CRC, note 2.

⁷ ICCPR, note 1.

⁸ CRPD, note 3.

⁹ UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* ("Havana Rules"): resolution / adopted by the General Assembly, 14 December 1990, A/RES/45/113.

¹⁰ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules"): resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33.

¹¹ UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency* ("The Riyadh Guidelines"): resolution / adopted by the General Assembly, 14 December 1990, A/RES/45/112.

¹² United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, UN Doc. A/CONF/611, annex 1, ESC Res. 663C, (XXIV) (1957), UN ESCOR, Supp. No. 1, at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076, (LXII) (1977), UN ESCOR, Supp. No. 1, at 35, UN Doc. E/5988 (1977) 30 August 1955, available at:

<http://www.unhcr.org/refworld/docid/3ae6b36e8.html> [accessed 13 April 2013].

¹³ This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by this Court on many occasions: see, eg, *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Re Minister for Immigration and Multicultural and Indigenous Affairs ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Coleman v Power* (2004) 220 CLR 1

The requirement of ambiguity has been interpreted broadly; as Mason CJ and Deane J observed in *Teoh v Minister for Immigration*:¹⁴

There are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.

14. The Commission contends that this principle applies to state legislation as much as to federal legislation. As Gummow and Hayne JJ observed in *Kartinyeri v Commonwealth*:¹⁵

It has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. On the other hand, the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law.

15. The principle that legislation is to be construed so as to give effect to, and not breach, Australia's international obligations assists in minimising the risk of legislation inadvertently causing Australia to breach international law; rather, any breach of international law occasioned by an Act of Parliament ought to be the result of a deliberate decision of the Parliament in question.
16. It is possible for state legislation to cause Australia to be in breach of Australia's international obligations.¹⁶ Thus application of the principle to state legislation assists in ensuring that States do not inadvertently place Australia in breach of Australia's international obligations. As with the Commonwealth Parliament, it ought to be presumed that States do not intend to violate international law, whilst recognising that they remain capable of doing so.¹⁷

at 27 (Gleeson CJ), 91-4 (Kirby J). Despite his stringent criticism of the rule, in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [63]-[65] McHugh J acknowledged that "it is too well established to be repealed now by judicial decision".

¹⁴ (1995) 183 CLR 273 at 287-288.

¹⁵ (1998) 195 CLR 337 at 384 (footnotes omitted). See also *Cornwell v R* (2007) 231 CLR 260 at 320-322, where Kirby J applied the principle in relation to the construction of a State Act.

¹⁶ For an example of where this occurred, see *Toonen v Australia* CCPR/C/50/D/488/1992 (Jurisprudence), where Australia was found by the UN Human Rights Committee to be in breach of the ICCPR by reason of Tasmanian legislation criminalising sex between males.

¹⁷ The presumption that legislation is construed so as not to violate international law has always recognised that a legislature may choose to legislate inconsistently with Australia's international obligations and that it retains the power to do so; in other words, international law is not a limitation on legislative power. See, eg, *Polites* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Zhang v Zemin* (2010) 79 NSWLR 513 at [125] (Spigelman CJ).

17. The principle has been regarded as limited to statutes enacted after Australia's entry into the treaty in question;¹⁸ in this case, the YO Act was enacted in 1994, after Australia's ratification of the CRC in 1990.

2.2 Interpretation of international law

18. Australia has relevant international legal obligations under the CRC, being obligations to respect and ensure the rights of the CRC, without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.¹⁹ The CRC elaborates on the substantive rights found in the ICCPR with a focus on the particular vulnerabilities and needs of children.
19. The Commission contends that these obligations are to be interpreted in accordance with international legal principles governing the interpretation of treaties. The High Court has, in a series of cases, taken the view that where a statute implements a treaty, the treaty (and hence the statute) is to be interpreted in light of international norms of interpretation, and further that treaties ought to be interpreted uniformly by contracting states.²⁰ The Commission contends that the same approach to treaty interpretation applies where a treaty is being used as an aid to the interpretation of a statute that was not enacted for the purpose of implementing a treaty obligation.
20. Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)²¹ set out the following relevant principles applicable to the interpretation of treaties:

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- ...

¹⁸ See, eg, *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ & Deane J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 71 (Dawson J); *Coleman v Power* (2004) 220 CLR 1 at 27-8 (Gleeson CJ), *contra* 94-6 (Kirby J).

¹⁹ CRC, note 2, Article 1.

²⁰ See, eg, *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [24]-[25] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Shipping Corporation of India Ltd v Lamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142, 158-60; *A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 239-240 (Dawson J); *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350 (Dawson J).

²¹ [1974] ATS 2; entered into force for Australia and generally on 27 January 1980. The principles contained in the VCLT may properly be utilised even though the VCLT entered into force after the ICCPR because the VCLT is a codification of the customary law rules of the interpretation of treaties: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356 (McHugh J).

3. There shall be taken into account, together with the context: ...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; ...

21. Where the rights provided for in the CRC, expressed as they are at a high level of generality, are ambiguous in their application recourse may be had to supplementary means of interpretation, including the Havana Rules, Beijing Rules, Riyadh Guidelines and General Rules (together, the International Standards).

22. The International Standards are relevant and persuasive on their own account. More importantly, however, they have also been adopted by the Committee on the Rights of the Child (CRC Committee) as filling out the content of the CRC itself.²² The CRC Committee has repeatedly made calls, in its concluding observations, for countries to take steps to ensure the minimum standards set out in these rules and guidelines are met.²³ It has done so specifically in relation to Australia in its concluding observations where it said:

The Committee recommends that the State party bring the juvenile justice system fully in line with the Convention, in particular articles 37, 39 and 40, and with other relevant standards, including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee's general comment No. 10 (2007) on the rights of the child in juvenile justice.²⁴

23. The Beijing Rules are specifically referred to in the Preamble to the CRC.²⁵ Therefore, to understand fully what is required by the CRC the court may rely on the International Standards.

²² United Nations Children Fund (UNICEF), 'Implementation Handbook for the Convention on the Rights of the Child' (2008), p 548.

²³ See for example UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Mongolia*, 13 February 1996, CRC/C/15/Add.48 [29] and UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: New Zealand*, 2011, CRC/C/NZL/3-4, [55].

²⁴ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Australia*, 29 August 2012, CRC/C/AUS/CO/4, [84].

²⁵ CRC, note 2, Preamble.

24. Article 4 of the CRC requires State parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC. To that end, the Australasian Juvenile Justice Administrators (AJJA) have created *Standards for Juvenile Custodial Facilities* (1999) (AJJA Standards).²⁶ (Annexure H) Pursuant to a resolution at the time of development of the AJJA Standards, the State of Western Australia developed the *Youth Custodial Rules* (YC Rules) to implement some, but not all, of the AJJA Standards.²⁷ (Annexure I) The AJJA Standards are appended to the YC Rules. The YC Rules were endorsed in 2008 and updated in 2012.²⁸ The AJJA Standards state that:

Following each of the standards in this document are "references" to United Nations rules. These are meant to indicate the moral – and possibly legal – authorities on which the AJJA's standards are based.²⁹

3 Application of rights and obligations to the issues before the court

3.1 Bests interests of the child

25. An overriding obligation in relation to all decisions and actions taken by the Respondents is to have the best interests of the child as a primary consideration.³⁰
26. In General Comment No. 5, the CRC Committee emphasised that article 3 requires active measures to be taken by the State. It commented:

Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.³¹

²⁶ Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities* (1999) http://www.dji.nsw.gov.au/pdf_htm/publications/general/finalstandards.pdf. The Australasian Juvenile Justice Administrators (AJJA) is a sub-group of the Children, Youth and Community Services Policy Research Working Group (CYCSPRWG) which is a standing committee of the Standing Council on Community and Disability Services Advisory Council (SCCDSAC). AJJA Membership comprises a minimum of one senior executive officer from each of the Australian state or territory departments and New Zealand who is responsible for the delivery of youth justice services. <http://www.ajja.org.au/>.

²⁷ Youth Custodial Rules, <http://www.correctiveservices.wa.gov.au/youth-justice/juvenile-custodial-rules.aspx>.

²⁸ Youth Custodial Rules, Rule 101 <http://www.correctiveservices.wa.gov.au/files/youth-justice/juvenile-custodial-rules/jc-rule-101.pdf>.

²⁹ AJJA Standards, note 30, p 7.

³⁰ CRC, note 2, Article 3.

³¹ Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, [12].

27. The UNICEF Implementation Handbook for the CRC provides the following commentary on article 3:

The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests...

The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.³²

28. Similarly, Mason CJ and Deane J noted in *Minister for Immigration and Ethnic Affairs v Teoh*,³³ that article 3 of the CRC is 'careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations, as may, in the circumstances of a given case, require equal, but not paramount, weight'.³⁴
29. Protection of the rights and interests of children needs to be balanced with the protection of other members of the community from real harm. Human rights law recognises the right of everyone to personal security (for example, ICCPR article 9). The CRC makes clear that community safety is a relevant factor in sentencing. The treatment of the young offender must 'reinforce the child's respect for the human rights and fundamental freedoms of others' with the aim of the child 'assuming a constructive role in society' (article 40.1). At the same time the sentence must be 'consistent with the promotion of the child's sense of dignity and worth', taking into account the child's age and the desirability of reintegration (article 40.1).

3.2 Particular issues relating to children on remand

30. The Commission understands a large proportion (32% as at 4 April 2013) of those children detained at Hakea are on remand.³⁵ It also understands that a very high percentage, 85.6%, of those on remand will not receive a custodial sentence once they are sentenced.³⁶
31. It is fundamental to the administration of justice in Australia that a person accused of a criminal offence is presumed innocent until proven guilty

³² Implementation Handbook, note 28, 38–39. Note Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.

³³ (1995) 128 ALR 353.

³⁴ (1995) 128 ALR 353, 363 (Mason CJ and Deane J).

³⁵ Department of Corrective Services, Weekly Offender Statistics (WOS) Report as at 4 April 2013 00:00 hours, <http://www.correctiveservices.wa.gov.au/files/about-us/statistics-publications/statistics/2013/cnt130404.pdf>, p 4.

³⁶ Commissioner for Children and Young People Western Australia, <http://www.ccp.wa.gov.au/files/Policy%20Brief%20-%20Youth%20Justice%20-%20Wellbeing%20Monitoring%20Framework.pdf>, (viewed 13 April 2013) based on an email communication from the Department of Corrective Services.

beyond all reasonable doubt. There is no need for recourse to international principles in this regard, however, for reference, the right is enshrined in Article 14(2) of the ICCPR and Article 40(2)(b)(i) of the CRC.

32. Rule 17 of the Havana Rules provides a timely reminder that children awaiting trial are presumed innocent and should be treated as such. It also notes that detention should be limited to exceptional circumstances and all efforts shall be made to apply alternative measures. Accepting this will not always be possible, it provides that if detention is used, 'juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention.' Importantly it requires that untried detainees should be separated from convicted juveniles.³⁷
33. The CRC Committee has frequently expressed concern at the length of pre-trial detention permitted in States parties. In its General Comment No. 10 on Children's rights in Juvenile Justice, the Committee emphasises that an effective package of alternatives to pre-trial detention must be available.³⁸
34. The Beijing Rules make specific provision for children on remand (pre-trial detention). Rule 13 sets out the Minimum rules for children on remand. The rule reinforces that detention should be a last resort and for the shortest possible time. Rule 13.2 provides that:

Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.
35. The UN Office of Drugs and Crime has published a compendium of standards and norms developed by it in relation to crime prevention and criminal justice with a view to contributing to a wider awareness and dissemination of those standards and to reinforce respect for the rule of law and human rights in the administration of justice (UN Compendium).³⁹
36. The commentary in the UN Compendium notes that:

The danger to juveniles of "criminal contamination" while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, rule 13.1 encourages the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile.⁴⁰

³⁷ Havana Rules, note 9, Rule 17.

³⁸ Implementation Handbook, note 28, 558

³⁹ United Nations Office of Drugs and Crime, *Compendium of United Nations standards and norms in crime prevention and criminal justice*, New York (2006), p viii
http://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf

⁴⁰ UN Compendium, above, p 62.

3.3 Particular issues relating to Aboriginal children

37. The Commission also understands that a high percentage of the children detained at Hakea are Aboriginal (68% as at 4 April 2013).⁴¹ One of the most entrenched challenges facing Australia is the over-representation of Aboriginal and Torres Strait Islander people in the prison system. Recent data highlights this:
- The rate of adult Aboriginal and Torres Strait Islander imprisonment is 14 times higher than the non-Aboriginal and Torres Strait Islander rate.⁴²
 - Aboriginal and Torres Strait Islander young people are 35 times more likely to be in detention than non-Aboriginal and Torres Strait Islander young people and almost 3 in 5 (59%) of those in detention were indigenous.⁴³
 - The Aboriginal and Torres Strait Islander imprisonment rate has increased by 51.5% between 2000 and 2010. At the same time, the non-Aboriginal and Torres Strait Islander imprisonment rate has increased only marginally.⁴⁴
38. While the overall rate of juvenile detention has been decreasing, the statistics in relation to Indigenous young people are very concerning. It is also known that the young people who are in detention have very complex needs and require intensive intervention. For example, data in NSW showed that 59% of young people in detention had a history of child abuse or neglect.⁴⁵
39. Similarly, offenders with psychosocial disability, cognitive impairment and hearing impairment present a unique set of challenges to the justice system. Research from NSW shows:
- Almost half of all prisoners have been treated for a mental health problem.⁴⁶
 - 87% of juveniles in detention could be diagnosed with a psychological disorder.⁴⁷

⁴¹ Department of Corrective Services, note 35, p 4.

⁴² Australian Bureau of Statistics, *Prisoners in Australia 2011*(2011), p 8.

⁴³ Australian Institute of Health and Welfare. *A picture of Australia's Children 2012*. P 102

⁴⁴ SCRGSP (Steering Committee for the Review of Government Service Provision) 2011, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (2011), Productivity Commission, p 4.132.

⁴⁵ D Indig, C Vecchiato, L Haysom, R Beilby, J Carter, U Champion, C Gaskin, E Heller, S Kumar, N Mamone, P Muir, P van den Dolder and G Whitton, *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health Statewide Service, NSW Health (2010), p 17.

⁴⁶ D Indig, L Topp, B Ross, H Mamoon, B Border, S Kumar and M McNamara, *2009 NSW Inmate Health Survey: Key Findings Report*, Justice Health Statewide Service, NSW Health (2010), p 17.

⁴⁷ Indig et al, note 47, p 15.

- 45.5% of juveniles in detention could be diagnosed with either an intellectual disability or borderline intellectual disability.⁴⁸
40. It is an object of the YO Act to ensure that young persons are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity. The CRC Committee has recognised that incarceration of indigenous children is often disproportionately high.⁴⁹ The CRC Committee has drawn the attention of States to the Riyadh Guidelines, which encourage the development of community programs for the prevention of juvenile delinquency.
 41. The CRC Committee considers that States should seek to support, in consultation with indigenous peoples, the development of community based policies, programmes and services which consider the needs and culture of indigenous children, their families and communities.⁵⁰ These principles are reflected in s 6(f) and 10(l) of the YO Act.

3.4 Particular issues relating to children with disabilities

42. The CRC and the CRPD recognise that children who have a disability may have additional vulnerability. As indicated above, it is likely that a very significant proportion of children in detention will have a mental illness or intellectual disability, learning disability or both.
43. The CRPD provides that people with disabilities, including children, should be provided with reasonable adjustments to allow them to fully and effectively participate in society.⁵¹ In the context of the children being held in Hakea prison, this may mean modification of educational programs and recreation or leisure activities to allow all children to participate. Modification to premises may be necessary for children with a physical disability. It may be a reasonable adjustment for a child with a mental illness or intellectual disability or learning disability that behavioural standards are modified to take account of the child's disability.

3.5 Rights and obligations regarding detention generally

44. Where the International Standards that are specific to children are silent, recourse may be had to the General Rules. The Beijing Rules provide that those general standards are applicable, and require efforts to be made to implement them to the largest possible extent.⁵²

⁴⁸ Above, p 15.

⁴⁹ Committee on the Rights of the Child, General Comment No 11, Indigenous Children and their Rights under the Convention, 30 January 2009, CRC/C/GC/11, [74].

⁵⁰ Above, [75].

⁵¹ CRPD, Article 5(3).

⁵² Beijing Rules, note 10, Rule 27.

45. The requirement to ensure that the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period is applied to all children in addition to those on remand.⁵³ The General Rules have particular relevance in relation to accommodation, architecture, bedding, clothing, complaints and requests, contact with the outside world, food, medical care, religious service, separation of ages, staffing, work, etc.⁵⁴

4 Specific Areas of concern for children at Hakea

4.1 Physical Facilities

46. The AJJA Standard 9.1 specifies the building design should provide a physical environment that is safe and secure and has due regard to the rehabilitative expectations of custodial care. That standard references rules 31, 30, 32-34 of the Havana Rules which require that the children have a right to facilities and services that meet all the requirements of health and human dignity. In particular, 'the design and physical environment should be in keeping with the rehabilitative aim of residential treatment with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities.'⁵⁵ This AJJA Standard is not adopted or reflected in the YC Rules.

4.2 Custodial regime – lockdown

47. The Commission understands that the minors who are detained in Hakea are required to stay in lock down for at least 17 hours per day, and that sometimes placement in lock down is used as a form of punishment.⁵⁶
48. Individuals, including children, should not be arbitrarily detained and should be treated with humanity and with respect of the inherent dignity of the human person.⁵⁷
49. To avoid being arbitrary, detention should occur in the least restrictive manner possible.⁵⁸

⁵³ Beijing Rules, note 10, Rule 19

⁵⁴ UN Compendium, note 42, p 74

⁵⁵ Havana Rules, note 9, rules 30 – 34.

⁵⁶ Transcript Of Proceedings *State of Western Australia v BAJG and Ors* (Children's Court of Western Australia, KT 35 of 2012, KT 118 of 2012 and CC 1904 of 2012, Reynolds J, Wednesday, 27 March 2013) p 47-50.

⁵⁷ CRC, Article 37; ICCPR, Article 10; CRPD, Articles 14 and 15.

⁵⁸ *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, *Van Alphen v Netherlands* communication No 305/1988, UN Doc CCPR/C/76/D/900/1999.

50. The Havana Rules state:

All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.⁵⁹

51. In addition to being inhumane,⁶⁰ long periods of lockdown prevent meaningful participation in sports, physical exercise and leisure-time activities. These activities are particularly important for young males. It also prevents participation in education and other programmes.

4.3 Use of Restraints

52. The Commission understands that restraints, such as handcuffs, are regularly being used on the children detained at Hakea.⁶¹

53. The circumstances under which restraints may be used are set out in the YO Act. The chief executive officer, or superintendent, may authorise and direct the restraint of a young offender where in his or her opinion such restraint is necessary:

- to prevent the young offender from injuring himself or herself, or any other person; or
- upon consideration of advice from a medical practitioner, on medical grounds; or
- to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.⁶²

54. The CRC, the ICCPR and the CRPD reflect the right of persons: not to be arbitrarily detained, not to be subject to cruel, inhuman or degrading punishment and to be treated with humanity and with respect for the inherent dignity of the human person.⁶³

55. AJJA Standard 7.7 on the use of force goes further than the YO Act and provides that restraints should be used for the shortest possible period of time, and in such a way as to avoid or minimise feelings of humiliation or degradation. The AJJA Standard references rule 64 of the Havana Rules.

56. The Havana Rules prohibits the use of restraints except in limited circumstances namely where all other control methods have been

⁵⁹ Havana Rules, note 9, Rule 67.

⁶⁰ Transcript of Proceedings, note 57, p 47.

⁶¹ Transcript of Proceedings, note 57, p 52.

⁶² YO Act, note 5, s11D(1)

⁶³ CRC, articles 19(1), 37 and 40; ICCPR, articles 7, 9 and 10; CRPD, articles 14, 15, and 16.

exhausted and failed, and only as explicitly authorised and specified by law or regulation.

57. In its General Comment 8 the CRC Committee commented on the use of restraints on children, stating:

The Committee recognises that there are exceptional circumstances in which ... those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it. Here too there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimise the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control.⁶⁴

58. The CRC Committee stated in its General Comment 10:

Restraint or 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 or 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. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately.⁶⁵

59. Under both the YO Act and international human rights law, restraints may only be applied to children if necessary, for the shortest time possible and by order of the director of the institution in question.

4.4 Strip searching

60. The Commission understands that strip searches are regularly being performed on the children detained in Hakea prison.⁶⁶ The Commission understands that strip searches have been performed on children before and after they receive visits, and after attending court and meeting with their legal representative.⁶⁷

⁶⁴ 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, 2 March 2007, CRC/C/GC/8,[15].

⁶⁵ Committee on the Rights of the Child, General Comment 10 (2007), Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, [89].

⁶⁶ Transcript of Proceedings, note 57, p 21 and 53

⁶⁷ Transcript of proceedings , note 57, 20, 34, 53

61. Every child deprived of liberty should be treated with humanity and with respect of the inherent dignity of the human person⁶⁸ and should not be subject to arbitrary interference with his or her privacy.⁶⁹
62. In concluding observations on the United Kingdom, the United Nations Human Rights Committee (UNHRC) expressed concern about the practice of conducting strip searches in the context of a low security risk.⁷⁰
63. In its General Comment 16 the UNHRC stated:
- So far as body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body searches by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.⁷¹
64. Professor Nowak states that 'interference with personal integrity is permissible only when it transpires in accordance with the national legal system under non-arbitrary circumstances i.e. primarily when it serves a legitimate purpose and observes the principle of proportionality.'⁷²
65. It is submitted that strip searches that are conducted as part of a routine compliance regime without regard to the individual circumstances or risk posed by the child, may not be proportional to any likely benefit to be achieved from conducting the search and are therefore contrary to international law. Under international human rights law, strip searches should not be conducted unless they are reasonably necessary. The vulnerability of children who are in custody and their age should be factors relevant to assessing whether it is necessary to conduct a strip search.

4.5 Staffing

66. Article 3(3) of the CRC requires State parties to ensure institutions and facilities responsible for the care and protection of children conform with minimum standards in relation to a number of things including the number and suitability of their staff and competent supervision.⁷³ The specific requirements for staffing are set out in the Havana Rules.

⁶⁸ CRC, article 37(c); ICCPR, article 10; CRPD, article 15(2).

⁶⁹ CRC, article 16(1); ICCPR, article 17(1); CRPD, article 22.

⁷⁰ (1995) UN doc CCPR/C/79/Add.55 [12].

⁷¹ United Nations Human Rights Committee (HRC), CCPR, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, [8].

⁷² Nowak M, UN Covenant on Civil and Political Rights CCPR Commentary MP Engel, Germany, 1993, p 387.

⁷³ CRC, note 2, Article 3.

67. As to the selection and training of appropriate staff the Rules provide as follows:

81. Personnel should be qualified and include a sufficient number of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists.

82. The administration should provide for the careful selection and recruitment of every grade and type of personnel, since the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity to deal with juveniles, as well as personal suitability for the work.

83. ...The personnel of juvenile detention facilities should be continually encouraged to fulfil their duties and obligations in a humane, committed, professional, fair and efficient manner, to conduct themselves at all times in such a way as to deserve and gain the respect of the juveniles, and to provide juveniles with a positive role model and perspective.

85. The personnel should receive such training as will enable them to carry out their responsibilities effectively, in particular training in child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the present Rules.

68. As to levels of staffing, although not specifically mentioned in the CRC, the CRC Committee has expressed its concerns about staff-child ratio.⁷⁴ The Committee Against Torture has also recommended that countries should appoint a sufficient number of staff to ensure that detention conditions in police stations, prisons and other detention facilities are in conformity with the Beijing Rules.⁷⁵ Logically, to enable the minimum standards to be met there must be sufficient numbers of adequately and appropriately trained staff.

4.6 Education

69. The Commission understands that the children detained in Hakea have access to approximately nine hours of education per week.⁷⁶

70. A child's right to education as set out in Article 18 of the CRC extends to all children, including those in detention. Education and training is particularly important to children in detention as part of their rehabilitation and with a view to assisting them to assume socially constructive and

⁷⁴ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 9 October 2002, CRC/C/15/Add.188, available at: <http://www.unhcr.org/refworld/docid/3df58f087.html> [accessed 14 April 2013].

⁷⁵ UN Committee Against Torture (CAT), *UN Committee against Torture: Concluding Observations, Greece*, U.N. Doc. CAT/C/GRC/CO/5-6 (2012).

⁷⁶ Transcript of proceedings, note 57, p 51.

productive roles in society.⁷⁷ This was reiterated by the CRC in its General Comment No. 10, Children's Rights in Juvenile Justice.⁷⁸

71. The Havana Rules note there should be special attention given to children of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.⁷⁹ This is reinforced in article 24 of the CRPD.
72. The Commission understands the children in Hakea have very limited access to education.⁸⁰ The ability to access education will also be limited due to the extensive amount of time in lockdown.

4.7 Programme availability – vocational, behavioural and culturally relevant

(a) Vocational programmes

73. As indicated above, one of the overriding objectives of juvenile detention is to assist them to return to the community in a manner and with appropriate skills to avoid re-offending.⁸¹ As set out in rule 42 of the Havana rules, every juvenile should have the right to receive vocational training in occupations likely to prepare him or her for future employment.
74. This is reflected in AJJA Standard 4.2 which requires at a minimum, that
The centre's coordinated and varied educational and accredited vocational programs are suited to individual needs, interests and market-place opportunities, provide positive learning experiences, and systematically assess and improve the numeracy levels, literacy levels and the work-place knowledge, experience, and qualifications of young people.
75. This standard is not adopted in the YC Rules.

(b) Behavioural programmes

76. AJJA standard 4.3 on offender programmes requires the centre provide specialised programs that assist young people to understand why they offend and what measures they can take to stop or reduce their offending.

⁷⁷ Beijing Rules, note 10, Rule 26. Havana Rules, note 9, Rule 38.

⁷⁸ Committee on the Rights of the Child, General Comment 10 (2007), Children's Rights in Juvenile Justice, 25 April 2007, [89].

⁷⁹ Havana Rules, note 9, Rule 38.

⁸⁰ Transcript of Proceedings, note 57, p 51.

⁸¹ Rules 12 and 79 of the Havana Rules provide:

12. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

79. All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release.

This reflects the standards in Rules 12 and 79 of the Havana Rules. As indicated above, there is also an overriding requirement, confirmed by s 6(f) of the YO Act, that all programmes be provided in a culturally appropriate manner which recognises and enhances their cultural identity.

4.8 Recreation and exercise

77. His Honour Judge Reynolds found that the young males in Hakea only have the opportunity for 4 hours per day for outdoor recreation.⁸² As his Honour suggests, this in itself is inadequate but when you take into account that these are young men, many of whom are Aboriginal and many of whom are not from urban areas, it is unacceptable.⁸³
78. Article 31 of the CRC establishes a child's right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child. The CRC Committee has recognised that play and recreational activities are different, and that recreational activities are more structured and supervised.⁸⁴ The CRC Committee has encouraged countries to ensure children have access to sport and recreation by developing specific sports and leisure programmes for children and adolescents.⁸⁵ These rights apply equally to children in detention. The Havana Rules require the design of detention facilities for juveniles and the physical environment to be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure time activities.⁸⁶ Specifically, the rules require:

47. Every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided. Adequate space, installations and equipment should be provided for these activities. Every juvenile should have additional time for daily leisure activities, part of which should be devoted, if the juvenile so wishes, to arts and crafts skill development. The detention facility should ensure that each juvenile is physically able to participate in the available programmes of physical education. Remedial physical education and therapy should be offered, under medical supervision, to juveniles needing it.

79. These minimum standards are reflected in AJJA Standard 4.5 on recreation and leisure which requires the centre to provide a broad range of coordinated physical and passive recreational and leisure activities that

⁸² Transcript of Proceedings, note 57, p 53.

⁸³ Transcript of Proceedings, note 57, p 53.

⁸⁴ Implementation Handbook, note 26, 471-472.

⁸⁵ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Mexico, 8 June 2006*, CRC/C/MEX/CO/3, [58] and [59].

⁸⁶ Havana Rules, note 9, Rule 32.

are enjoyable and improve the fitness levels, skills, self-esteem, and community integration of young people. These activities involve a reasonable level of community interaction, and include activities initiated by young people themselves. This AJJA Standard has not been adopted in the YC Rules.

4.9 Contact with family – visits and telephone

80. Article 37(c) of the CRC provides for the right of a child deprived of his liberty to maintain contact with his family through correspondence and visits, save in exceptional circumstances. The benefits of maintaining access to their family and the outside world is well recognised. The Havana Rules apply to both physical visits and telephone and other communication.

Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society.⁸⁷

81. The AJJA Standards impose the additional requirement that such visits occur in conditions that are dignified and relatively private.⁸⁸ This standard is adopted by the YC Rules which recognises that 'visits from family to detainees in detention enable the family to participate in the process of the detainee's reintegration back into the community. Social visits support the role and responsibility that parents, caregivers or significant others have in the detainee's development, whilst official visitors undertake specific duties and safeguard for the care, wellbeing and rights of detainees.'⁸⁹
82. Rule 603 of the YC Rules goes further, noting that the purpose of this YC Rule is to reduce the impact of detention on detainees by maintaining family, community and cultural ties and to facilitate access to legal representation, and independent statutory government agencies.

4.10 Health

83. Article 24 of the CRC imposes an obligation on State parties to strive to ensure that no child is deprived of the right to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. This is a universal right repeated in the ICCPR, CRPD and other treaties. It is reflected in all the international standards, the AJJA standards and to a limited extent in the YC Rules.⁹⁰

⁸⁷ Havana Rules, note 9, Rule 59

⁸⁸ AJJA Standards, note 30, Standard 5.1.

⁸⁹ YC Rule 501.

⁹⁰ ICCPR, Article 12; CRPD, Article 25; AJJA Standards, Standards 4.4, 6.1 and 6.4 and YC Rules, Rule 701.

4.11 Dietary regime

84. The requirement to ensure the children attain the highest attainable standard of health encompasses a requirement to provide adequate nutrition. The AJJA Standard 6.3 requires provision of a variety of foods of satisfactory quality in sufficient quantities; meals are nutritious, meet special dietary needs, and their choice and preparation is influenced by young people's preferences.⁹¹ This AJJA Standard references Rule 37 of the Havana Rules which adds that the provision of food should 'as far as possible, meet religious and cultural requirements'.⁹²

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⁹¹ AJJA Standards, note 30, Standard 6.3.

⁹² Havana rules, Rule 37