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The Hon Margaret White AO and Mr Mick Gooda
Royal Commissioners
Royal Commission into the Protection and Detention of Children in the Northern Territory
ChildDetentionNT@royalcommission.gov.au

Dear Madam and Sir

Submission to the Royal Commission from the Institute of Public Affairs

On behalf of the Institute of Public Affairs (IPA), I would like to submit this letter presenting our views regarding the maladministration of juvenile detention in the Northern Territory, its implications for the youth justice system in that jurisdiction, and its context within wider concerns about the operation of criminal justice in Australia.

Specifically, I will be responding to terms 7 and 8 of the Terms of Reference outlined in the Letters Patent establishing the Royal Commission.

The central contention of this submission is that while there is rightly significant community concern about the operation of youth justice facilities in the Northern Territory, this concern should not be used to indict the entire youth justice system in the Territory. Underlying the problems affecting these facilities are social, economic, and cultural factors that better explain the unique aspects of youth justice in the Northern Territory than do blanket denunciations of institutional prejudice.

Nonetheless, there is good reason to believe that Australia's criminal justice system as a whole is failing the public. This submission concludes by placing the problems of the Northern Territory's youth justice system in the context of the growing need for criminal justice reform in Australia.

About the Institute of Public Affairs

The IPA is an independent, non-profit research organisation, which develops and promotes public policy based on individual freedom and opportunity. In criminal justice, the IPA supports evidence-based reforms that improve community safety and limit inefficient spending, while ensuring that criminals are punished in ways that fit their crimes.

Known problems in the operation of juvenile detention facilities in the Northern Territory

On 26 July 2016, the ABC program, *Four Corners* aired a report on the treatment of juvenile offenders at the Don Dale Youth Detention Centre in the Northern Territory. The report included security footage from the facility showing young people being held in isolation, tear-gassed, assaulted, and strapped down and hooded. The images shocked the nation, and the Prime Minister immediately announced this Royal Commission to establish how these events were allowed to occur and what might be done to prevent their repetition.

Many of the incidents featured in the report took place some years ago and had been previously investigated by the Northern Territory government.

The *Review of the Northern Territory Youth Detention System* was released in January 2015. This report found that found that the issues at Don Dale were caused in part by an increase in the number of juveniles held there, from 34 to 42, and an increase in the number of those detained who were "exhibiting complex and violent behaviours". This is consistent with statistics showing a huge

increase in the number of juveniles being charged with violent crimes, up 130 percent between 2007-08 and 2013-14. These issues were compounded by a lack of proper training for the staff at juvenile detention facilities, outdated procedures, and inadequate rehabilitation programs.

The *Report of the Office of the Children's Commissioner of the Northern Territory about services at Don Dale Youth Detention Centre*, released August 2015, made a similar determination. This report analysed a number of different incidents at the Don Dale facility and found, among other things, that staff felt they were underprepared for their daily duties. It recommended that training for staff be revised and that psychometric testing for potential staff hires be considered as a way of determining those individuals' fitness for the job.

It would be simplistic to attribute every single wrong act committed at Don Dale to these factors, but it would also be misguided to ignore them in favour of denigrating the youth justice system as a whole.

Are the problems at Don Dale indicative of an unfair youth justice system?

The operational problems outlined above are sometimes claimed to be indicative of a youth justice system that is at best non-functional and negligent and at worst malicious and racist. In the wake of the ABC report, there were calls in the media for this inquiry to focus on whether the structure and nature of the youth justice system is prejudiced against Indigenous Australians.

This submission cannot speak to the motivations of the staff at Don Dale and other facilities. It is apparent that they committed a number of bad acts, the wrongness of which does not turn on their motivations. However, it should be noted that neither of the abovementioned reviews attributed the actions of the staff at Don Dale in the relevant incidents to racism. The Review of the Northern Territory Youth Detention System noted that the "vast majority of staff... are working well" and have "good intentions".

That said, the overall fairness of the Northern Territory's youth justice system does not depend on a defence of the actions of the specific guards in those specific cases. A comparison of relevant statistics with nationwide equivalents illustrates that there is very little exceptional about the structure of the Northern Territory's youth justice system.

The use of juvenile detention in the Northern Territory

There are two juvenile detention statistics in which the Northern Territory is an outlier.

The first is that, on any given day (according to the Australian Institute of Health and Welfare, using 2014-15 figures), 95 percent of juveniles in detention in the Northern Territory are Indigenous Australians. Nationwide, this figure is about 53 percent.

The second is that the rates of supervision and detention among juveniles aged 10-17 is much higher in the Northern Territory than in other Australian jurisdictions: 16 per 10,000 juveniles are in detention in the Northern Territory, while the national average is 3.3.

These two numbers might be construed to imply that the Northern Territory is a jurisdiction that prefers to detain juvenile offenders, especially those who are Indigenous. A closer examination, however, does not admit this interpretation.

In absolute terms, we are discussing only a small number of people. Juvenile detention is not widely used in the Northern Territory or in other Australian jurisdictions. On any given day there were on

average 41 juveniles in detention in the Northern Territory, versus 883 nationwide. These figures were both lower than the average of the preceding four years.

This is because most juvenile offenders who are placed under supervision are allowed to remain in the community: on an average day, in the Northern Territory there were 136 juveniles in community supervision (78 percent of the total); nationwide there were 4,785 in the community (85 percent). Moreover, a large number of juvenile offenders are diverted from court proceedings by the police. In 2014-15, this figure in the Northern Territory was 37 percent, the same rate as Queensland and much higher than Victoria (22 percent).

In 2014-15, 252 young people in the Northern Territory completed 502 periods of detention. The median length of these periods was only 12 days (and 11 for Indigenous Australians). What is actually happening in juvenile detention is that accused offenders are spending short periods of time in detention, and they are doing so multiple times. The number of juveniles sentenced to prolonged stints in detention is very small. On any given day, only nine juveniles are serving sentences in detention.

Instead, a large majority of juveniles in detention are on remand pending a determination of their charges. 78 percent of detainees in the Northern Territory throughout the year are unsentenced. This is higher than the national average of 54 percent. In part, this is because of the nature of the offences being committed. Because many juvenile offences are not recorded or reported, it is difficult to know the offences being committed by juveniles in the Territory. At the adult level, however, across the country Indigenous Australians are more likely to be incarcerated for serious offences like assault. If a similar pattern obtains at the juvenile level, this would explain in part both the higher bail refusal rate and the higher rate of detention in the Northern Territory.

The high number of those on remand is also attributable to bail being denied, often because the offender does not have a stable home to which to return. This is a pointer towards the complex issues underlying the high rate of Indigenous juvenile detention in the Northern Territory.

Social, economic, and cultural factors

It is well-understood that certain characteristics are correlated with the commission of crime: low educational attainment, unemployment, drug and alcohol abuse, and economic disadvantage. Unfortunately, across the country these factors are also more likely to be present in Indigenous communities.

In 2011, only 54 percent of Indigenous Australians had completed Year 12 or an equivalent. Unemployment among the Indigenous population is approximately four times the national level. The abuse of drugs and alcohol is more common in Indigenous communities. Indigenous Australians are homeless at a rate 14 times higher than non-Indigenous people.

There is also a strong correlation between location and youth offending. Detention rates are higher in remote and very remote areas. This is consistent with the concentration of crime in remote and very remote areas: in the Northern Territory six of the top ten areas for offending are regional areas. Moreover, many of the above negative factors are worse in remote and very remote areas. In general, there are lower educational attainment, higher unemployment, and worse living conditions in more remote areas.

In the Northern Territory, juvenile offenders commonly live in disadvantaged areas. Almost one third of those under youth supervision on a given day come from the lowest socioeconomic areas. This rate is higher among Indigenous juvenile offenders.

Responding to the problems of juvenile detention in the Northern Territory: first principles

These correlations suggest that efforts to reduce the number of Indigenous youth being detained or placed under supervision should concentrate on raising the standard of living within Indigenous communities. This is a challenge well outside the scope of the youth justice system.

Nonetheless, it is vital that the youth justice system is well-ordered and premised on sound philosophy and reliable evidence.

The guiding principle of youth justice is that the system should support youth offenders to develop into productive members of society. Because of their ongoing neurological development, juveniles are more prone to making bad decisions and are more readily influenced by their peers. One important implication of this is that many young people will simply age out of crime as they develop. Research from Queensland suggests that the number of juvenile offenders who will become chronic offenders is as low as 11 percent, although these young people are responsible for a third of juvenile offending. Whether or not a young person becomes part of this cohort likely depends on the other influences in his or her life. The youth justice system, then, must steward juvenile offenders through the riskiest part of their lives, instilling in them the discipline required to respond to influences more positively.

Detention may play some role in this. There is mixed evidence for the connection between juvenile detention and recidivism. According to research from New South Wales, juvenile detention has no specific deterrent effect. That is, detained young people are no more or less likely to reoffend than young people placed under supervision in the community. This implies that it is the quality, rather than the nature, of supervision that is more important to reducing recidivism.

However, detention is also correlated with worse employment outcomes. This may not be a causal relationship: it might be that the offenders who are detained were already more likely to have worse employment outcomes because of their exposure to other factors associated with both crime and unemployment. But to the extent that this relationship is causal it implies that detention should be avoided for juvenile offenders where possible.

Even more so than the adult system, the juvenile system should impose detention primarily in cases where the community needs to be protected from the offender. The adult criminal justice system is mainly about delivering retribution: free individuals are held responsible for actions taken that cause harm to others or the community and given a punishment that fits their crimes. By contrast, the juvenile detention system deals with individuals who are held to be less responsible (because of the level of their mental and neurological development) for their actions and so its focus is less on retribution and more on rehabilitation.

It should be noted, however, that in the Northern Territory the low percentage of juvenile offenders who are detained and the likelihood that many of those detained have committed or are accused of committing violent crimes perhaps indicate that this principle is already being applied.

Criminal justice reform in Australia

The problems of the youth justice system in the Northern Territory should be considered against the background of growing concern about the administration of criminal justice in Australia.

Australia's incarceration rate is now 196 per 100,000 adults, the highest it has been since just after Federation and much higher than many comparable countries. A forthcoming IPA research report, *The Use of Prisons in Australia*, attributes much of this growth to deliberate policy choices.

For example, the most serious offence of approximately 46 percent of individuals in Australian prisons was a nonviolent offence. And sentence lengths have gotten longer, with the average time served being extended not only for serious crimes with heavy penalties but for mid-range offences as well.

These choices come at a cost. The criminal justice system costs $15.2 billion each year. Australian governments now spend almost $4 billion annually on incarceration, including as much as $1.8 billion to incarcerate nonviolent offenders, at a per prisoner rate of $110,000 annually. There are also downstream costs, such as worse lifetime economic performance for criminals and negative impacts on their children.

This would be easier to accept if Australian prisons were effectively reducing crime and recidivism. But instead, there is evidence to suggest that offending has increased in recent years, and 59 percent of prisoners have been imprisoned before.

For this reason, the IPA argues that Australian jurisdictions should implement punishment reform: the expansion of the use of punishments like home detention, community corrections orders, fines and restitution orders for nonviolent offenders. There can be no question that the community must be protected from violent and antisocial criminals by isolating them in prison. But there is significant scope in many jurisdictions for reforming the system as it relates to nonviolent offenders by redirecting funding from prisons to other parts of the criminal justice system, including the police, simultaneously reducing recidivism and public expenditure. This is a path worn by reformers in Texas, Georgia and other parts of the United States.

But the applicability of this argument to the Northern Territory, especially at the juvenile level, is debateable. The Northern Territory youth justice system already diverts a high number of offenders from detention and overall expenditure is quite low. The Northern Territory government spent about $23.3 million on youth justice services in 2014-15. 64 percent of this was spent on detention-based services, which is very similar to the national average of 61 percent. Additionally, the Northern Territory already has proportionally many more police than any other jurisdiction. There are 661 operational police officers per 100,000 people, more than twice as many as the next jurisdiction.

Conclusion

Prima facie, the available statistics indicate that the youth justice system in the Northern Territory is similar in design and intent to the systems of other Australian jurisdictions.

Instead, the problems at Don Dale are likely to be a symptom of a much deeper socio-cultural problem in the Northern Territory. Evidence suggests that all of the known factors that make crime a more attractive choice for individuals, and therefore more likely, are sadly prevalent in Indigenous communities.

Legal and policy reform should therefore focus, at the macro level, on improving the quality of life for Indigenous Australians, and at the micro level, on ensuring that the quality of care and rehabilitation provided in youth detention facilities is sufficient to achieve the goal of stewarding

juvenile offenders into responsible maturity. Policymakers should not allow attempts to indict the youth and adult justice systems to distract from these tasks.

Thank you for the opportunity to make this submission. The IPA would be pleased to present our submission and answer any questions at a public hearing of the Royal Commission if that would be of assistance. Please do not hesitate to address any questions to me, by writing at L2, 410 Collins Street, Melbourne 3000, by telephone on 03 9600 4744, or by email at abushnell@ipa.org.au.

Yours faithfully

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