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*Erasmus*

# **Banksia Hill Detention Centre: Aboriginal youth discrimination, exploitation, and injustice in Western Australia**

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## List of Acronyms

ACT	Australian Capital Territory
ALSWA	Australian Legal Services Western Australia
ASD	Autism Spectrum Disorder
BHDC	Banksia Hill Detention Centre
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FASD	Fetal Alcohol Spectrum Disorder
ICCPR	International Convention on Civil and Political Rights
MSC	Minister for Corrective Services
OISC	Office of the Inspector of Custodial Services
OPCAT	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
WA	Western Australia
WASC 257	CRU by Next Friend CRU2 v Chief Executive Officer of the Department of Justice, 2023
WASC 274	VYZ by Next Friend XYZ v Chief Executive Officer of the Department of Justice, 2022
YOA	Young Offenders Act
YOR	Young Offenders Regulations

## **Abstract**

Banksia Hill Detention Centre has been at the forefront of human rights debates within Australia since its opening in 1997. Western Australia's existing political majority and the constitution provide a challenging backdrop for actualised structural long-lasting reform to take place. This research paper problematises this issue by providing a socio-legal approach as to how and why various actors right these violations and laws. It is argued that legal and non legal actors have shifted towards utilising strategies of legal mobilisation in order to bring about social transformation. Through quantitative interviews and analysis of judgements conclusions were drawn on the recent success of lawyers being on this transition towards strategic litigation. However, while success can be identified within lawyers actions, contradictions can be found within the social movements which are yet to shift towards sustainable mobilisation of the law. As such this juxtaposition between the two exists demonstrating reasons as to why structural change is slow passed and takes bureaucratic routes. Collective legal consciousness is needed to provided a space for these actors to work together to hold institutions accountable to the law.

## **Relevance to Development Studies**

Human rights and child rights make up core components of international human rights law and as a result are interlinked with society and communities development. What are meant to be invariable treaties and laws instated by protecting bodies and governments find themselves giving way to allow violations against the most vulnerable of our society. Legal mobilisation can be seen as a tool for development as it is a rights-based approach focusing on law-based strategies to claim human rights (Handmaker, 2019, p.5). The link between legal mobilisation, Indigenous rights, child rights and human rights is imperative to development. As actions and outcomes that result because of legal mobilisation strategies are actions that fight for the development of human rights.

## **Keywords**

Aboriginal and Torres Strait Islanders, legal mobilisation, youth justice, Western Australia, solitary confinement, state obligations

## **Disclaimer:**

This paper when referring to Aboriginals is referring to the Indigenous population of Australia (First Nations People) and Includes Torres Island Strait peoples.

## Chapter 1: Introduction

According to Shine (2022), echoes of abuse and discrimination surrounding Banksia Hill Detention Centre (BHDC) in the outskirts of Perth, Western Australia (WA) have included “physical abuse, restriction, restrain, breaches of the Disability Discrimination Act and inhumane treatment”. Similar allegations of abuse were the subject of a class action lawsuit involving more than 700 children and young adults who have been held at BHDC since 1997, which was filed with the Federal Court in 2023 (Trigger, 2023). The legal mobilisation-based BHDC class action has centred around many cases but has had a particular focus on the experience of Nicole (not her real name) a now 18-year-old woman with autism spectrum disorder (ASD). Yolanda was held at the centre on and off from May 2018 to March 2020 (Shine, 2023). During her time at BHDC, Yolanda would frequently be locked in a cell alone for 23 hours of the day and would only be let out into a small room or into an enclosed fenced area. On the occasions when visits from her parents were not banned, which had been utilised as a form of punishment, Yolanda would be taken out of solitary confinement with her legs shackled and her hands cuffed (Ibid). Due to her extensive stays in solitary confinement, Yolanda had little access to education and was given inadequate support for her ASD (Ibid).

The case of Nicole was not an isolated incident. On May 9th of 2023, a riot broke out at BHDC following Mark Griffen, a custodial officer, was found guilty for assaulting a boy at committing dozens of offences (Barter 2023), (Burmas, et al, 2023). There were calls both from those detained and from protestors on the street, demanding the facility be shut down (Torre, 2023). The riot lasted over 14 hours and saw inmates holding authorities off by starting fires and climbing onto the roof, and then throwing parts of the roof structure at police and staff (Burmas, et al, 2023). The riot came to an end when Corrective Service Special Operations officers in riot gear stormed the roof holding the inmates at gunpoint and forced them to lay flat on their stomachs on the roof before detaining them (Ibid). Alongside these officers there was a large contingent of police, Polair helicopters and K9 units brought in to assist in the operation (Ibid). Out of the 47 detained, only 6 were over the age of 18 (Ibid). Speaking on the issue, Aboriginal and Social Justice



Commissioner, June Oscar stated that “(t)he vast majority of young people in the youth justice system, including those involved in this morning’s events, have experienced significant trauma in their lives, which impacts on their health and wellbeing” (Duggan, 2023). Showcasing the awareness of the Australian Human Rights Commission to address the action of those held at BHDC outside of a vacuum of the rhetoric of ‘kids being kids’. The youth’s actions were not only a response to the inhumane conditions they have endured on a daily basis but were rooted in long-term systemic trauma. Oscar further addresses that “every decision made about them, and every response to their behaviour needs to be aimed towards care and rehabilitation” a far step away from Premier McGowan’s stance (Ibid).

In March 2023, then Premier Mark McGowan took a vastly different approach to the riots, labelling them as “a form of terrorism” (Collard, 2023). McGowan stated that the violent behaviour carried out by the children is what was inhibiting plans for improvement at BHDC. Furthermore, he stated that those who claim disabilities such as Fetal Alcohol Spectrum Disorders, were using their disabilities as “an excuse” for their “appalling behaviour” (Knowles, 2023). McGowan’s statement did not go unnoticed by human rights organisations. Amnesty International’s Roney Dillon chastised the use of extreme force on the children by holding them at gun point stating, “it is unconscionable that Premier McGowan would describe property damage by traumatised, antagonised children as a ‘form of terrorism’ while his department sends in special forces to point guns at children” (Amnesty International, 2023). McGowan faced continued criticism from international and local non-governmental organisations and from Aboriginal and Indigenous advocacy groups during his time as Premier (Torres, 2023). However, his stance on the BHDC riots and his ease in which he refers to the children as terrorists demonstrated how important it is to look beyond individual violations and to recognise how systemic and ingrained the current actions in the youth justice system are, including – as I will explain – in relation to the states constitutional order. As such, this paper addresses how, legal mobilisation can be used as a tool in bringing about constitutional change to grant rights to Aboriginal youths in the justice system.

As with a consequence of the youth justice crisis that is happening within WA, and in particular with regard to both Mark McGowan's remarks about the May 2023 riots and the lack of embedded Aboriginal and Indigenous rights into the constitution, operating as a federal state allows for much of the state to remain conservative in reform policies. This can be seen through other regions such as Australian Capital Territory (ACT) which has made amends to their charters raising the age of responsibility from 10 to 14 (Raise the Age, 2020). Moreover, the political education and conservative make up of WA and more specifically the greater Perth metropolitan area does not see benefits to placing pressure on political leaders to bring about reforms as many believe that the children deserve to be locked up and do not understand the extent of BHDC's violations (Penglis, 2023).

Nicole's case demonstrates the system of 'rolling lockdowns' which is argued by custodial officers to be a result of understaffing (Levitt, 2023). Whilst understaffing is at the core of the problems at BHDC the use of 'rolling lockdowns' is a violation of many of the existing laws and regulations in WA, as will be discussed later (Ibid). It is vital to understand the events and violations occurring at BHDC not as a result of the children's actions but as a failure of the state to provide adequate numbers of staff as well as staff with the correct child and trauma based training (Barter, 2023) (Levitt, 2023). As such these lockdowns are at the forefront of debate as they do not exist in a vacuum. For example, if a child is locked in solitary for days on end, they are unable to receive the education and support they are entitled to. In the case of BHDC where majority of detainees suffer from cognitive disorders, they have their right to adequate support stripped away from them. For this reason, the 'rolling lockdown' are the key focus of this thesis.

## **1.1 Background of the Research Problem**

The Constitution of Australia establishes Australia as a federation under a constitutional monarchy and outlines the three constituent parts of Australia's governments power: the executive, legislature, and judiciary. As a result of the Federation of Australia the six states, New South Wales, Queensland, South Australia, Tasmania, Victoria, and WA each have their

own constitutions. With the ACT and Northern Territory due to them being recognised as self-governing territories opposed to states, they do not hold their own constitution but rather operate almost indistinguishably without constitutional status which leaves them with territorial legislation which can be overridden (Department of the House of Representatives, 2018, p. 1-47).

Western Australia is a bicameral parliamentary system, with the premier of WA acting as the head of government for the state. The premier is appointed by the governor of WA by selecting whoever has the majority support in the WA Legislative Assembly. The premier is typically the leader of the party or group of parties with the majority seats in the Legislative Assembly which acts as the lower house of the bicameral system and Legislative Council as the upper house. The Premier's role is to lead the executive branch of the Government of WA and is accountable to the Parliament of WA. Under their duties the Premier is expected to:

- advise the governor as to who to appoint to cabinet and which portfolios are given to which minister.
- Set out the responsibilities of ministers and the acts they administer.
- Lead the cabinet and chairs cabinet meetings.
- Act as the communicator between the governor, cabinet, state government, other states and territories governments, federal government, and overseas governments.
- Advise the governor on when state elections should be held.
- Oversee the department of the Premier and Cabinet. (Parliament of Western Australia, 2021)

Mark McGowan came into premier office in March 2017 after the Labor party won a majority of 41 out of the available 59 seats, which meant the Labor party became the largest majority government in Western Australian history (Green, 2017). McGowan maintained the view throughout his two terms that he was a centrist and believed in “pleasing everyone” (Shine, 2021). However, regarding Aboriginal and more particularly youth justice, McGowan frequently showed a lack of empathy and knowledge on Aboriginal traumas and trauma care. An example of this could be seen in his February 2023 remark that “parents need to parent” when questioned about youth crime

and alcohol related violence in regional towns (Perpitch, 2023). Neglecting to acknowledge the complexity of Aboriginal trauma, such as the effects of the Stolen Generation, and the massive over-representation of children in out-of-home care (Ibid).

BHDC has been at the forefront of a discourse surrounding the treatment of detained youths between 10 and 18. In 2021 the Office of the Inspector of Custodial Service (OICS) compiled a report on the centre, identifying Aboriginal youths making up 74% of detainees (OICS, 2021, p.4). The report recognised the previous three years as being the “most settled period for many years” additionally with historically low numbers of detainees with 77 in custody at the time of inspection, with these increasing to 110 in 2021 (Ibid, p.iii).

However, in November 2022, the Juvenile Detention Centre returned to headlines after a class action was launched against the facility with 700 children and young adults who had been detained at the facility. The case is partly centred around Nicole who was confined to her cell for 23 hours a day, denied visits and forced to earn bedding leading her to view her treatment as being “felt like she was being treated like a dog and responded to this by sleeping on the concrete floor and pretending that she was a dog” (Collard, 2023). Stating that her human rights were violated as she was additionally subjected to shackling and seven months of solitary confinement on top of physical abuse (Ibid). Leading this class action is Levitt Robinson, a Sydney-based law firm which has gathered the testimonies from over 700 people who are or have been detained at BHDC. Addressing concerns of unlawful solitary confinement, excessive use of force and little or poor quality out of cell time (Beentobanksia, 2023).

In addition to Levitt Robinson, ALSWA is at the forefront of the fight for BHDC detainees. Based within Perth, ALSWA is on the ground and their lawyers are actively involved in visiting BHDC for legal, moral and or emotional support (Barter 2023). ALSWA was founded under the Justice Committee for the New Era Aboriginal Fellowship Inc in the 1970s (ALSWA, 2018). At the time there was no existing legal services that met the specific needs for Aboriginals, offering trauma-based support, awareness of nuanced experiences and situations, and worked with Aboriginals rather than against.

At the time of its establishment in 1973, it operated out of Perth with 2 lawyers, 3 Aboriginal court officers and a secretary, expanding to serve state-wide by 1983 (Ibid). ALSWA operates under the goal to deliver comprehensive, culturally matched quality legal services. To provide leadership through participation, empowerment and recognition. To ensure state government and Aboriginals address underlying issues that lead to social inequalities and implement the relevant recommendations collectively. Finally, they aim to create a positive and culturally-matched work environment (Ibid). In striving to achieve these goals, ALSWA work across several services; it is governed by a board of all Aboriginal directors who oversee 11 legal support teams and services combined (Ibid). For the purpose of this thesis, when discussing ALSWA, the Civil Law and Human Right Unit will be the main focus which at the start of writing was led by Alice Barter. Barter stepped down in October 2023. The unit's goals have been reflected in a myriad of actions; most notably, Coronial investigations and inquests, police accountability, young people in the system, and government accountability.

For this reason, each of these legal actors have chosen to be the focal point of my research into the ability of legal mobilisation to act as an adequate and effective tool to bring about social justice for Aboriginal youths in WA.

## **1.2 Inside BHDC: Human Rights Violations**

This section will outline specific abuses that the cases and movements discussed in this thesis will cover. BHDC is ridden with human rights violations; detailing each case linked to a form of abuse would not be possible in a thesis of this length. Instead, this thesis has focussed on one core abuse which has been at the forefront of recent ongoing cases and activism and represented in the example of Nicole, namely: 'rolling lockdowns'.

'Rolling lockdowns' as outlined by state law is a form of solitary confinement in which a detainee may be subjected to ongoing solitary confinement on the bases of a detention offense or on the basis of 'good government, good order or security.' State law stipulates that a detention offense can fall under property damage, assaults, disorderly or riotous behaviour as seen in

criminal law (Copeland, Nunez, 2017, p. 718). However, in practise a detention offense is seen as disobeying rules, insulting or threatening languages and acts of insubordination that put the security and safety of the detention centre at risk (Ibid). To fall under the “good government, good order or security” category, which is loosely defined, can be interpreted as any form of behaviour that does not amount to a detention offence (Australia, *Young Offender Act*, 1994, s196(2)(e)) (Ibid, p.719). When a superintendent makes the decision to utilise lockdown, they must ensure the living quarters meet the requirement of safety, such as ventilation and lighting to ensure lockdowns do not impact health or mental being (Ibid). Lockdowns are not allowed to last more than 24 hours and must include 30 minutes of fresh air every three hours (Ibid). Testimonies and reports from BHDC demonstrate that these laws and regulations are not kept up by staff. There is no attention to the wellbeing of detainees, and lockdowns regularly exceed the 24-hour period. As such, the use of ‘rolling lockdowns’ can be back-to-back lockdowns that ensure detainees are unable to access out of cell time due to the language surrounding mandatory lockdown time (such as night time) (Barter, 2023).

### **1.3 Context of the Study**

Aboriginal peoples have been facing oppression since the 18<sup>th</sup> century upon the arrival of the European settlers, which began the process of colonisation, dispossession, and systemic discrimination. Colonialism led to dispossession of land, destruction of cultural heritage and traditions. Force removal from ancestral land led to vast displacement, loss of traditional practices and ongoing social and economic marginalisation. The ‘Stolen Generation’ which legal took place from the 1800s to the mid-1900s included the forced removal of Aboriginal children from their families to assimilate them into the European settler culture (Lewis, et al, 2006, p. 130). This was carried out in over 480 institutions known as ‘schools’ or adoption by non-Indigenous people. Under this system, children were regularly subjected to abuse and were denied all access to their culture, denied the rights to speak their language and were punished if they did (Healing Foundation, 2023). There are currently over 17,000 Stolen Generation survivors in Australia with WA represented

the largest population with 57% of the Indigenous population having ties to the Stolen Generation (Ibid). As a result, the effects of this are still being felt till this day through a disconnect from culture which has generated vast generational trauma. Tony Hansen from Bring them Home WA demonstrates this by stating that many of the children today parents were part of an institution in which they were neglected, not show love and through their isolation and segregation were not taught how to take on the responsibilities of nurturing a child (Perpitch, 2023).

The 20<sup>th</sup> century saw a recognition of many of the human rights violations that the Aboriginal people were subjected to and saw adjustments in policies making the removal of Aboriginal children no longer legal (Australian Human Rights Commission). However, this still exists through alternative means such as incarceration or lack of access to adequate health care or education. Aboriginal communities still face significant challenges, whilst the international community has further become aware of the atrocities forced upon the communities, structural racism, institutional biases, and marginalisation continue to affect the indigenous population. Calls for self-determination gained popularity in the 1960s and 1970s, which led to the adjustment of the stolen generation policies and a wider international movement for indigenous rights (Ibid). Within the context of Australia, it was largely based around addressing the power imbalances and paternalistic approaches that shaped the government's policies towards indigenous communities. In 1990 the Aboriginal and Torres Strait Islander Commission was established showcasing a large step towards self-determination, however this was abolished in 2005 showing that whilst there was a commitment made by the state it was not created to achieve longlisting social justice (Ibid).

## **1.4 Justification of the Research**

The justification for pursuing this research started with my general interest in legal mobilisation as a means to fight for representation and rights within marginalised communities. Through this interest I investigated various Indigenous populations and found a large gap in literature within the Australia context. Much of the existing literature surrounding self-determination and

access to processes of legal mobilisation typically fall under the context of Canada and South Africa and their experiences with transitional justice methods of reparations and reforms. As a result, I began to research the situation within Australia and the failures of the state to enact a structured reforms.

On the topic of Aboriginal rights, I studied the 2021 Australian Universal Periodic Review to gain insights into the states existing failures to uphold human rights and learnt about the vast discrepancies in Aboriginal youth incarceration rates. The Universal Periodic Review working group was made up of Liechtenstein, Uruguay, United Kingdom, and Sweden, and demonstrated a continued trend of over representation of incarcerated Aboriginals. With Aboriginal and Torres Strait Islanders making up 28% of all prisoners, whilst accounting for 3.3% of the national populations, within this, Indigenous women make up 33% of the total female population (United Nations, 2021, p. 10). Based upon this, looking at the statistics released by the Australian Bureau of Statistics (2022), Aboriginal and Torres Strait Islander's made up 32% of the total imprisoned population. Additionally, on an average night in June 2022, 56% of all incarcerated young people were Indigenous, whilst in the 10-17 years of age range Indigenous people represent only 6% of the national population (Australian Institute of Health and Welfare, 2022, p. 18)

Furthermore, the debate within this context currently centres around the Australian constitution's age of criminal responsibility being at aged 10. This goes against the common law doctrine of *doli incapax* which refers to the presumption that a child is "incapable of crime" due to their insufficient understanding of the difference between "right" and "wrong" (Ibid, p. 14).

Increasing attention has been drawn towards the issue since the late 1990's when the Australian Royal Commission into Aboriginal Deaths in Custody (RCIADIC) released a national report with 339 recommendations, which intended to guide future Indigenous justice policies. However, as I will demonstrate in this thesis, whilst these recommendations have been presented to the government, actualisation and reform has failed to take place.



In wanting to study the legitimacy of using legal mobilisation to grant equal rights within a colonial settlement such as Australia the relevance of the constitution's contradiction to the promised commitment to self-determination interested me especially.

As previously mentioned, there is a large gap in literature surrounding Aboriginal self-determination. Much of the existing literature takes the standpoint of that of possible failed Aboriginal self-determination like that of Ian Anderson's (2007) "The end of Aboriginal self-determination", which focuses on the Howard Coalition governments rejection of a rights-based approach to Aboriginal affairs on a national level. Additionally, other well cited literature such as Kolma Tsey's (2008) "Aboriginal self-determination, education and health: towards a radical change in attitudes in education" is centred around community-controlled organisations failure to succeed in achieving social and health gains. Arguing that the tie between education and health is vital in understanding the failures of self-determination, as the lack of formal education structures in Aboriginal communities is leading directly to social and health decline (Ibid, 78). Furthermore, the article draws a direct correlation between the governments lack of accountability in upholding their constitutional responsibility to aboriginal education (Ibid, 82). As a result, much of the literature has been based in health and educational failures of the state. Instead, I chose to take the avenue of youth incarceration. Additionally, I chose to move away from self-determination due to the large scope of existing literature and instead assess what action is being taken by varying actors to bring about change. For this I chose to analyse the role of lawyers and social movements in bringing about actualised change through modes of legal mobilisation. Looking into the failure to uphold existing laws, treaties and recommendations and how varied legal mobilisation strategies work to instill these existing policies in the WA context.

## **1.5 Analytical Concepts and Approaches**

This paper focussed on two main analytical concepts and approaches taken from human rights theories. Together the two enabled a holistic understanding of how WA fails to uphold human rights in BHDC, whilst also enabling analysis of existing efforts to be assessed against such frameworks.

### ***1.5.1 Legal Mobilisation***

This paper is built upon the use of legal mobilisation, both in practice and as an analytical tool. Legal mobilisation refers to the process by which individuals, groups, or organisations use legal means to advance social, political, or policy goals. It involves the strategic use of litigation, advocacy, and legal expertise to bring about social change and address grievances. Legal mobilisation encompasses various activities, including filing lawsuits, lobbying for legal reforms, participating in public interest litigation, and engaging in legal advocacy campaigns. Legal mobilisation recognises the power of law as a tool for social transformation and operates on the premise that legal institutions and mechanisms can be harnessed to challenge existing norms, policies or practices that are perceived as unjust or discriminatory.

The exact definition of what legal mobilisation is has generated much theoretical discourse across varying disciplines and interdisciplinary fields (Matthews, 2023, p.27). Lisa Vanhala is regarded as the one of the leading scholars of the field, she argues against the Lehoucq and Taylor (2020, p. 178) definition of “the use of law in an explicit, self-conscious way through the invocation of a formal institutional mechanism” addressing administrative procedures, quasi-judicial processes, and litigation. Vanhala rejects this idea due to its risks of restriction it has in regard to the “full range of conceptualisations of what law is and does, as well as its wider meaning-making and world-framing role” (Vanhala, 2022, p. 104). Instead, she puts forward the definition of “any process by which individuals or collective actors invoke legal norms, discourse or symbols to influence policy or behaviour” (Vanhala & Kinghan 2018, p. 5). This definition comes alongside a shift in social movements strategies in the courts and their “transformation of traditional forms of political participation” by way of favour strategic litigation (Fuchs, 2013;

Buckel et al. 2023, p. 2). Approaching legal mobilisation from this perspective allows the user to identify a link between social movements appeal to generate public attention within public civil discourse, such as through media attention and or protesting, whilst attempting to achieve *political* victory before courts (Buckel, 2023, p. 2).

Legal mobilisation in practice is commonly split into two strands. Firstly, the influence of social movement theory to account for law-based advocacy aims, objectives and law-based campaigns through a formal court-based approaches (Handmaker, 2018, p. 6). Much of the research into this strand is conducted by Lisa Vanhala who identifies three key aspects to conceptualise legal mobilisation under this lens: the *activities* which constitute legal mobilisation (is it just litigation or is there a broader view?) , the *object* of legal mobilisation (is it exclusively targeted towards the state or can private actors be targeted?), and the *types* of claims that encompass legal mobilisation (is it just political claims or does it stem beyond this framework?) (Ibid).

Strategic litigation is a core tenet of practical legal mobilisation and is often noted as relying on “legal action as a means to bring about certain social, political or legal changes” (Ibid, p. 7). This enables litigation goals to shift from focusing on purely winning cases towards developing the impact a legal procedure can have on the interests of a community (Ibid). Viewing litigation in this manor allows it to work hand in hand with other change methods such as; lobbying, advocacy, community organising and protests. Thus, lawyers carrying out strategic litigation become core allies of activities, NGOs and grass root organisations which base themselves in social mobilisation (Ibid).

Turning to the second strand, legal mobilisation from an analytical perspective enables it to be applied to cases to understand “how interactions with the law can be productively combined with an approach based on legal pragmatism” allowing one to approach law as a means to an end (Ibid, p. 9) This complex relationship demonstrates the importance of legal consciousness awareness within the context of legal mobilisation. Understanding various actors’ individual awareness and approach to the law allows for a deeper analysis of the choice of actions taken (Ibid). For example, in the context of

BHCD, an Aboriginal led social movement will have a vastly different approach to calling for reforms than a settler-created law association. This is due to the systemic treatment of Aboriginals within Australia and how generational trauma from institutions has rightfully so, created highly sceptical and cynical perceptions of the legitimacy of law. The mentioned law association however, whilst still having a critical view of the law would take an approach that fits within the law allowing them to utilise it as an end-meets to achieve and carry out policy reforms for their benefit. This can be seen as *against the law* and *with the law* respectively (Ibid).

So, how will this generate an analytical framework to apply to the case of BHBC? According to Handmaker (2019), legal mobilisation can be divided into three sectors: *capacity, translation, and structural bias* (Ibid, p. 12).

*Capacity* relates to the ability for civic actors to promote and impost state, individual, and corporate accountability towards national and international legal obligation. This can be done by way of mobilising resources such as people, money, and public support (Ibid, p. 13). In addition to this Handmaker puts forward to notion of *capacity* to bring formal claims or asserting against legal-normative expectations (Ibid).

*Translation* relate to the ability of civic actors to challenge the state and to mediate international legal norms in a correct, culturally-relevant context. This involves a greater awareness of international law its international enforcement/framing to be able to review and apply to the local/national context (Ibid).

*Structural Bias* relates to “the way in which patterns of fixed preference are formed and operate inside international institutions’ and tend to favour elite interests” (Koskenniemi, 2009, p. 9; Handmaker, 2019, p. 14). As such, civic actors must consider the fragmentation of international law. The varying vocabulary and institutions have enabled international law and national law to be shaped in a way that prioritizes the elite.

This paper will be using both strands of legal mobilisation as tool to address and answer the research question. Firstly, the *in-practice* strand will be used to identify what forms of legal mobilisation have historically and currently are being implemented in WA to combat the human rights violations in BDHC. Secondly, the *analytical tool* of legal mobilisation will be used to assess the potential legal mobilisation has to bring about social transformation by way of reforms within the youth criminal justice system.

### ***1.5.2 Critical Constitutionalism***

This research paper is additionally takes on an additional smaller concept, critical constitutionalism, the legal theory that examines and critiques constitutional law and institutions through a critical lens (Seidman, 2006, p. 584). The focus is based in power dynamics, social inequalities, and the political nature of constitutional interpretation (Ibid). Critical constitutionalists argue that constitutions are not neutral or objective but rather reinforce existing power structures and societal hierarchies (Ibid). Stating that constitutional law needs to consider further issues of race, gender, class, and other forms of oppression (Ibid). Through this critique of the constitution, I will analyse the ability legal mobilisation has in granting rights to those who face oppression as a result of the failures of the constitution.

## **1.6 Research Objectives and Questions**

The objective of this thesis is to generate analysis of the ability of Aboriginal peoples in WA to achieve their rights by way of legal mobilization. This will be done through a lens of the application of legal mobilisation both through analysing its role in practise and its role as an analytical tool. In addition to this, elements of critical constitutionalism will be engaged to better develop an understanding as to how and why the constitution within WA allows for such violations to occur. This will be carried out through a case study into the case of human rights violations carried out in Banksia Hill Detention Centre in WA against the backdrop of WA's constitutions existing human rights frameworks. WA was selected for this thesis due the fact that

the state has only one juvenile detention centre. Given the size of WA in comparison to the others the states, it stands out as failing to provide enough facilities. Furthermore, BHDC is often seen under scrutiny by national and international media and human rights agencies for its human rights violations. This presents itself with a far larger amount of gathered data and thus meant it fit this thesis more appropriately.

### ***1.6.1 Research Question***

How has the Western Australia Aboriginal Legal Services mobilised the law to address the abuse of Aboriginal youths in Banksia Hill Detention Centre?

### ***1.6.2 Sub questions***

1. What is the socio-legal potential of legal mobilisation in addressing the rights of those detained in Banksia Hill Detention Centre?
2. How have social movements more generally framed the problem and mobilised legal opportunity structures to address juvenile detainees Banksia Hill Detention Centre?

## **1.7 Methods of Data Collection**

The methodology of this research is “virtual qualitative research” (Roberts et al., 2021, p.2). A selection of various regional, national, and international human rights agencies was selected. Through their selection as research participants, the primary data was collected through online semi-structured interviews using Zoom and email correspondents. This method was chosen due to the financial and environmental limitations of traveling to Australia for face-to-face interviews, as will be discussed in limitations. Furthermore, this paper relies heavily on the reporting of media sources such as: Australia Broadcasting Corporation, National Indigenous Times, and The Guardian. WA has only two major newspapers, the West Australia and WA Today. Both newspapers operate behind a pay wall and with being the only sources within the state their bias is far harder to ascertain. For this reason I have stuck with the three nation-wide papers above. In addition to this reason, I selected them

due to their open criticism of McGowan's campaign, use of academic voices in articles and their connection with Aboriginal communities.

### ***1.7.1 Data Collection***

Data collection for this thesis as mentioned centred around virtual qualitative research. Contacts were compiled through emailing a large scope of human rights-based agencies and advocates. In the preliminary design for data collection 6 interviews were stated to be carried out. However, as a result of the personal and traumatic nature of the topic many of those contacted were not interested in participating. Three relevant people were identified who were willing to be interviewed due to their varying influence and experience in the field. This included Alice Barter, a managing lawyer at ALSWA whose relevance lay in working directly for those at BHDC as one of their main lawyers, visiting and representing youths in both parliament and court on a daily basis. Tom Penglis, the founder of Western Australian Justice Association who created the association after personal lived experience in the Western Australian judicial system after witnessing the failures of the criminal justice system was also interviewed.. Further, Dana Levitt of Levitt Robinson, the Sydney-based law firm carrying out the Been to Banksia Hill class action lawsuits. Finally, an Aboriginal advocate for shutting down BHDC and advocate for mass criminal justice reform within the state to grant educational and necessary health reforms to the system, Megan Krakouer was contacted for interview

When carrying out qualitative interviews a bias report was created for each interviewee. Doing this enabled the interviews to target specific themes which the interviewee is developed in. When interviewing Levitt Robinson lawyers for example interview themes were clear on the positionality of the interviewee and approached appropriately. Likewise, when interviewing ALSWA lawyer similar tactics were employed. But due to each of the interviewees personal connection to BHDC, emotional awareness was needed to ensure answers were not too guided or evoked too much emotion. This was combatted by creating a detailed interview questionnaire with both question

and sub-questions but also a focus on themes to allow for a more semi-structured format. The semi-structured approach allowed for interviews across the various levels of involvement to be attuned to the specific person whilst allowing coding to identify the commonalities and disconnects.

I have chosen to not do fieldwork for my research paper as whilst I would like to, I see many ethical challenges with traveling to Australia in person. As I am not Australian nor Aboriginal, I believe it is more ethical to carry out my research online opposed to entering communities on the ground. Additionally, I do not see any advantages to going in person and with the limited research period we are given I do not believe it is enough time to build relationship and trust to do interviews in person, to do so I would need several months to develop relationships.

### ***1.7.2 Scope and Limitations to the Study***

The initial scope of this research paper was far too vast, focusing on the whole of Australia is an unobtainable goal given the research period. Furthermore, Australia is a federal state made up of six states – New South Wales, Victoria, Queensland, WA, South Australia, and Tasmania. And two territories – Northern Territory and the ACT. Each of the six states have their own constitution which dictates the powers of the state's parliaments and the abilities to make laws. As such carrying out a nationwide research paper based in critical constitutionalism is not possible.

In trying to narrow the scope of my topic I looked to current ongoing examples of legal mobilisation within the country surrounding Aboriginal youth incarceration rates. WA only has one youth detention centre, Banksia Hill. And thus stood out.

By focusing on Banksia Hill, the research paper carried out interviews with Western Australian Legal Service lawyers, Sydney based law-firm Levitt Robinson, alongside activist such as Tom Penglis of WA Justice Association. Through these interviews I developed upon the case study of Banksia Hill and how the mistreatment of Aboriginal Youths counters Australian image of a human rights nation. Banksia Hill as a case study will enable insights into clear failures of the Western Australian state to uphold their commitment



to human rights laws and treaties and will act as a platform to study how methods of legal mobilisation such as strategic litigation, alongside protesting and boycotting is in achieving justice under the WA system.

Limitations however to interview became very apparent whilst in the data collection stages of my research. Organising and scheduling interview with lawyers and social activists posed a large issue due to their busy schedules. One example of this was the rescheduling of the interview with Megan Krakouer over six times with an eventual interview never being able to take place. Megan is the voice of many of the Aboriginal activist groups and as such travels to attend panels, protests, and court hearing on a daily basis. This made our interview impossible to carryout. Thankfully however, Megan's vast media presents, and public discourse is documented and whilst a personal interview was no possible, I will be able the plethora of secondary data to make up for it.

Additionally, Alice Barter of ALSWA, was due to be my main contact at the service as no other lawyer had time or the ability to discuss their work openly with me. Our first interview went smoothly and aided in my research. However, after scheduling a follow up interview to discuss ALSWA positionality I lost contact with her and she left the company. However, I was able to build upon our first interview and locate financial and annual reports to fill the gaps needed.

Regarding secondary data, due to the involvement of the OCIS and the ongoing class action cases much of the data needed to achieve my research objectives and answer my research questions is documented through existing works. As such, a field trip was not necessary to gather first hand data. As a master student I would not be comfortable interviewing those at BHDC but I can use media sources, lawyers accounts and official reports to gather this data.

### ***1.7.3 Analysis***

The primary data collected during the interviews were analysed thematically. Each interview was audio recorded, with consent, and transcribed. In addition to the audio recording live notes were taken during the interview

with an attention to body language, emotion, and intonation as each cannot be recorded through audio transcriptions but allows for deeper analysis of the collected data. Following the completion of the transcripts and addition of notes, the data was processed using Atlas.ti. The software allowed for manual themes to be identified through coding. During this, three key themes were acknowledged: socio-legal potential of legal mobilisation, framing of the crisis, and failure to uphold the constitution.

## **1.8 Structure of the Paper**

This paper has five main body chapters with an introduction and a conclusion. Chapter 2 focuses on the legal framework in which the Western Australian constitution is based upon. Exploring international treaties, national reports, and local political structure of WA. Chapter 3 explores the process in which legal mobilisation has thus far enabled for reform and change to take place through the efforts of lawyers and strategic litigation. Chapter 4 turns away from the role of lawyers and looks at other actors to understand the disconnect between the legal and social side of the fight. Finally, the last chapter, the conclusion will wrap up the analysed data and present a holistic answer to the research question.

## **Chapter 2: Legal Framework for Aboriginal Youth Rights in WA**

Australia in the post-World War Two context and into the turn of the century was seen as a forerunner of human rights. Signing many treaties and beginning the process of implementing actions across the federal states and territories. However, with the clear evidence of the failing youth and Indigenous criminal justice system, how is it that a country once seen on top has failed some of its most vulnerable people? When discussing the case of BHDC two key violation stand out, ‘rolling lockdown’ (solitary confinement) and excessive use of force. This chapter will explore the existing international and national treaties and bodies that exist which should be enforced within BHDC but are not.

### **2.1 International Level**

In the post-World War Two international human rights arena, Australia was often looked at as a leading nation, establishing a precedent for ratifying many of the major UN human rights conventions. However, in the 21<sup>st</sup> century it does not take a lot to identify that whilst these conventions have been ratified, recent governments have put little pressure on upholding and complying with the ratified treaties. This is abundantly clear in the government’s treatment of children, Indigenous peoples, and persons with disabilities. The Convention of the Rights of the Child (CRC) was ratified in December 1990 and both the Convention on the Rights of Person with Disabilities (CRPD) and Declaration of the Rights of Indigenous Peoples (UNDRIP) were endorsed in 2008 and 2009 respectfully. With Australia being one of the original state signatories to the former. Yet there are a myriad of examples of the states breaches of these treaties. One example can be found in the 2006 case of *Brough v Australia* which centred around the treatment of an incarcerated Aboriginal 16-year-old boy. After being convicted of burglary and assault, Brough participated in a riot Kariong Juvenile Detention Centre, New South Wales. Following this he was transferred to Parklea Correctional Centre. During his time at Parklea Brough was subjected to solitary confinement, forced nakedness, forced anti-psychotic medication and 24-hour lighting. As a result

of this treatment, Brough attempted to commit suicide and when he resisted officers attempt to prevent this he was charged with 'failing to comply with reasonable order' and sentenced to a further 48-hours of additional solitary confinement. In response to this miss treatment the UN Human Rights Committee concluded that the treatment by the state was in violation of Article 10, Paragraph 1 and 3 and Article 24, Paragraph 1 of the International Convent on Civil and Political Rights (ICCPR) which Australia ratified in 1980.

Article 10: the right to humane treatment in custody

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 24: protection of the rights of children (HRC, 2006).

In addition to concluding the violations of Article 10 and 24, the HRC recognised Brough's additional vulnerability as an Indigenous person as well as his mild intellectual disability which should have granted him access to additional care. In response to these claims the Australian government rejected the finding stating that:

Mr Brough was dealt with in a manner appropriate to his age, Indigenous status and intellectual disability, with due consideration to the challenges presented by his behaviour and the risk he presented to himself (Naylor et al., 2015, p. 230).

Australia can neglect the treaties which it has ratified due to its dualistic approach towards international treaties which means they are not separately enforceable unless they are written and incorporated into domestic law. Not only does this mean it is very hard for those within the criminal justice system to utilise treaties such as the ICCPR or rely on the HRC for aid in cases of human rights violations, it also means that each individual states constitution is able to incorporate teaties differently. In the case of WA, a conservative state, there is little push for change to be made within the constitution to uphold and regulate the following of these treaties. Whilst there has been a significant worldwide movement to strive for further human rights in the current globalised system without adequate awareness and education to bring about

change to the socio-political culture of the state and bring forth a Premier prepared to ensure stricter measures and policies international criticism does little to promote change.

### ***2.1.1 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)***

The OPCAT is an international human rights treaty that came into force in 2006 and assists in the implementation whilst building upon the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) to help states meet their obligations (Australian Human Rights Commission, 2021). The sole objective is to prevent the mistreatment of people in detention. This is done through the creation of an independent National Preventative Mechanism (NPM) whose job is to conduct inspections of all places of detention and closed environments. Alongside such NPM's signatures agree to international inspections of spaces through the United Nations Subcommittee on the Prevention of Torture. Reports from international inspections remain confidential and are not allowed to publish recommendations unless approved by the involved state (Ibid).

In the case of Australia, CAT was ratified in 1989 and signed OPCAT in 2009 with ratification taking place in 2017 (Ibid). Yet many extensions have been granted to the country due to its failure to appoint appropriate NPM's to every state. WA in this instant, stands out as the first jurisdiction to nominate NPM's—the Commonwealth Ombudsman, the Office of the Inspector of Custodial Services and the Western Australian Ombudsman. OICS would focus on justice related facilities including police lockups and the WA Ombudsman would oversee mental health and other secure facilities (Australian Human Rights Commission, 2022). OPCAT pushed the idea of human rights protection within WA away from treaties to be utilised in court and towards a more preventive process through inspections and monitoring. Providing much needed avenues for accountability and development of 'good government'. Australia had already founded the Ombudsman offices and Australian Human Rights Commission and in 2000 WA became the first state to implement the OICS demonstrating a need and push from local government

to strengthen the effective monitoring systems. In order to be effective monitoring systems, OPCAT requires such bodies to be fully independent of government to allow for a non-biased approach to reporting, to have full access, to be well resourced, to have all necessary expertise, and be able to report on their findings publicly and openly (OHCHR, OPCAT, Part 4, 2002).

So, if mobilisation has taken place to put forth NMP's within WA and a socio-political desire has been created within the state to abide by the OPCAT how come the ratification and implementation is seen as a failure? Whilst WA was the first state to begin the process and the OICS is seen as an incredible tool at generating accountability and ensuring the prevention of human rights violations. The step of selecting NMPs is as far as the state has gone to abide by the treaty. Resource allocation has yet to be accounted for in enabling either body to undertake their roles as inspectors adding further stress to the already weak criminal justice system. OICS has already highlighted many of the disturbing conditions and violations at BHDC with its little funding and support. But without adequate support, a fundamental aspect as outlined by OPCAT, the bodies are unable to sustain their roles of holding the state justice system accountable. Ratification was ultimately a promise that all places of detention would be held accountable, a promise which is yet to be carried out.

## **2.2 Domestic Level**

### ***2.2.1 Royal Commission into Aboriginal Deaths in Custody***

While Australia was at the height of international human rights in the late 1980s, the promise of state accountability surrounding Aboriginal and Indigenous conditions in detention centres began to be addressed. Under Prime Minister Hawke in August of 1987, the formation of a Royal Commission to investigate the causes of Aboriginal deaths in custody was announced. The announcement came in reaction to the growing public concern that Aboriginal deaths in custody were becoming too common, poorly documented, and poorly explained. The commission was to examine each of the 99 deaths that occurred in custody across Australia between 1<sup>st</sup> January 1980 and 31<sup>st</sup> May 1989, taking into consideration cause and action taken in respect to the

deaths. The report was to consider both the primary causes of death as well as the secondary factors that resulted in Aboriginal and Torres Strait Islander people being incarcerated. Upon completion of the report 339 recommendations with the largest number referencing policy, criminal justice, incarceration, and death in custody and health, education, and self-determination representing factors leading to incarceration (Deloitte, 2018, p. 1). Of these 339 recommendations, they can be sorted into 10 themes:

1. **Coronial matters:** overview.
2. **The justice system:** Aboriginal society today, relations with the non-Aboriginal community, the criminal justice system, and young Aboriginal people and the juvenile system.
3. **Aboriginal and Torres Strait Islander disadvantage:** the harmful use of alcohol and other drugs, schooling, housing and infrastructure, and self-determination and local government.
4. **Non-custodial approaches:** diversion from police custody, and imprisonment at a last resort
5. **Prison safety:** custodial health and safety, and the prison experience
6. **Self-determination:** the path and accommodating difference
7. **Cycle of offending:** improving the criminal justice system and breaking the cycle.
8. **Health and education:** towards better health, coping with alcohol and other drugs, and educating for the future.
9. **Equal opportunity:** increasing economic opportunity and improving the living environment.
10. **Reconciliation, land needs and international obligations** (Ibid, p. vii).

The RCIADC has remained a vital tool in analysing Australia's ability to implement change through accountability monitoring systems recommendations. A report released in 2018, acknowledged that of the 339 recommendations, 64% have been implemented in full, 14% mostly implemented, 16% partially implemented, and 6% not implemented. The most addressed themes have been those of prison safety, justice system, reconciliation, land needs, and international obligations (Ibid, p. 701). On paper the RCIADC was seen as a triumph with over 60% of recommendation being implemented and many more in the process, it would appear to have enabled for vast reform within the country.

### **2.2.1.1 Recommendation 62**

Yet, looking to WA, recommendation 62 which is as follows:

Governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise (Ibid, p. 125).

One would assume that if RCADC is praised with achieving such a high level of success in reforming states policies that WA would have taken the nuanced position of Aboriginal youth into account when sentencing and incarcerating them. In a report in 2018, it was noted that the WA has successfully implemented the recommendation through legislation and policies which seek to promote diversion and to aid children in maintaining a connection to their families (Ibid, p. 127). The argument for WA is based in the introduction of the 1994 Young Offenders Act which aimed at establishing Juvenile Justice Teams which aid in bringing together Aboriginal people to participate in team meeting to support Aboriginal youth. Additionally, in 2004 the Children and Community services Act was implemented to enable a link between family, culture and community and enable their participation in decision making alongside an Aboriginal Justice Agreement focused on mutual participation in the criminal justice system (Ibid).

Whilst each of these do show a level of reform taking place to allow for better judicial treatment of incarcerated Aboriginal youth, one does not have to look far to recognized elements of the judicial system that fail to abide by this recommendation. Firstly, there is an emphasis on reducing the rate in which Aboriginal youth are separated from their communities including through incarceration. The graph below does showcase a decline in number held at BHDC from the 2020 OICS inspection into the detention center, the 2023 issue reports that at time of inspection 100 young people were being



held. Of these 100 people 82 represented those from First Nations backgrounds (OICS, 2023, p. xi). Demonstrating that whilst those being held are lower than previous years, there has not been a significant change. Furthermore, as we know from the case of *Brough v Australia*, Brough was moved to an adult facility at the age of 16. With no recorded data on how many young people are transferred out of Banksia before the age of 18 is it hard to know how many are underrepresented in the OICS statistics.

In addition to viewing the statistics through this lens, we can additionally investigate how WA currently only has a single permanent juvenile detention center, BHDC which is situated outside of Perth. In July 2022, Unit 18 at Casuarina, an adult prison, was ‘temporarily’ to house a select ‘difficult cohort’ of young offenders (Bourke, 2023). The ‘temporary’ facility was due to close in the first quarter of 2023 however Corrective Services Minister Paul Papalia has since announced that there are no plans to close the facility in the near future (Ibid). Whilst calls have been continuously made by the public and various advocate groups for an additional center to be established, a ‘temporary’ fix inside an adult male prison was not their intention. Initially created to allow for upgrades to be made for BHDC, only those who needed to be separated were to be transferred there for the safety of others. As a result of BHDC’s scrutiny, Unit 18 has ensured to be fully staffed, offer more intense support services and engagement with non-custodial staff, and grant privileges that are not at BHDC. In response to this, some young people began misbehaving in order to be transferred to the ‘temporary’ facility (OICS, 2023, p. 10). It is still important however to acknowledge that these conditions were better than BHDC but far from perfect. Inmates still faced 21 to 23 hours in solitary confinement a day and adult prison officers were used (Ibid). Furthermore, due to the two centers locations it was reported that 49% of people held at BHDC were from outside of regional areas (Ibid, p, xi). In 2020 the OICS recorded that whilst a small amount 9% were from the Pilbara, 8% Kimberly and 8% Goldfields regions. Being 1280km, 2540km and 600km respectfully (OICS, 2020, p. 4). These children being incarcerated in BDHC and Unit forcibly displaces them from their families, culture and community

which recommendation actively goes against the supposedly implemented recommendation 62.

### ***2.2.2 Young Offenders Act***

The main statute that governs the treatment of juvenile's in detention in WA is the 1994 Young Offenders Act (YOA) and the subsequent Young Offenders Regulations (cite). Under the YOA and the YOR there are the three rules of Youth Custodial Rules, Standing Orders, and Operational Procedures (Nunez, Copeland, 2017, p. 717). Combined the collective YOA states that juvenile offenders should be treated differently from adult offenders, and there is the need for consideration of specific matters that only affect children (Young Offenders Act, 1994, p.7). Collectively, the systems of laws that exist within WA as a result of the YOA outline use of solitary confinement within BHDC. Solitary confinement or 'rolling lockdowns' are the main human rights violation that is at the center of previous cases such as VYZ by Next Friend XYZ v Chief Executive Officer of the Department of Justice, 2022 and the ongoing Been to Banksia class action case. YOA states that solitary confinement is allowed to be utilized as a punishment for a detention offence and or it can be used on the basis that it is required for the 'good government, good order or security' of the detention center' (Nunez, Copeland, 2017, p. 718). Chapter 3 will return to these cases brought forward by ALSWA and Levitt Robinson against the government have utilized this failed language to bring about reform and grant justice to those effected by YOA.

## **Chapter 3: Lawyers use of Legal Mobilization**

This chapter centers around the potential avenues that ALSWA and Levitt Robinson has in combatting the human rights violations taking place in BHDC. Through identifying each of these avenues legal mobilization analysis will be used to analyse the capacity, translation, and structural bias against which various approaches have been taken. This data has been drawn from annual reports, OCIS reports, and interviews. This analysis has allowed me to make an analytical description that has centered on sub-question one, namely:

What is the socio-legal potential of legal mobilisation in addressing the rights of those detained in Banksia Hill Detention Centre?

### **3.1 Aboriginal Legal Service of Western Australia**

An analysis of the potential that legal mobilisation holds in the context of BHDC would be remiss if it did not provide an inquiry of each of the legal actors: Aboriginal Legal Service of WA Limited (ALSWA) and Sydney-based law firm Levitt Robinson. The ALSWA is at the cornerstone of the children at BHDC's fight against the WA constitution and state. They have represented the children both as legal counsel, as media representatives, and have supported them emotionally (Barter, 2023); as such their work is the focal point of ongoing strategic litigation. In order to develop a cohesive investigation into the legal choices made by the service an awareness of the structure, operations, and funding of the company are vital. Developing this internal mapping of each actor will allow for a deeper nuanced understanding of how and why certain actions were and are chosen over others.

#### ***3.1.1 Positionality: Structure and operations***

Founded in the late 1960s out of the Justice Committee of the New Era Aboriginal Fellowship Inc at the time ALSWA filled the gap in WA becoming the state's first legal service to meet the needs of the Indigenous population. In 2023, the Aboriginal Board of Directors remained the governing

body of the company made up of 7 members, 2 women and 5 males. Following the Aboriginal Board of Directors is the Management Board led by CEO Wayne Mammup who took over from Dennis Eggington in 2023 who held the role of CEO since January 1996 (ALSWA, Annual Report 2022, p.4, 8). Operating as a not-for-profit public company and a Public Benevolent Institution, ALSWA maintains its commitment to working in “collaboration and partnership with our communities and key government and non-government partners to rectify legal policies and practices” which disproportionately impact WA First Peoples under Australian Law (Ibid, p. 6). The company strives for this through its key services of Civil and Human Rights Law, Criminal Law and Family Law and, Child Protection all of which partake in pro-bono work and the Civil and Human Rights Unit being the most relevant to the case of BHDC (Ibid). The conditions at BHDC remain at the forefront of ALSWA’s work. However, they also focus on other prisons such at Roebourne Regional Prison and a series of additional services including; Bail Support Service, Prison In-Reach Program, Community Legal Education, Custody Notification Service, Work and Development Permit Service, Your Story Disability Legal Support, and Youth Engagement Program (Ibid). As such BHDC is not the sole focus of ALSWA and this must be accounted for whilst analysing the effect of their work.

### ***3.1.2 Positionality: Funding***

ALSWA operates within WA as a legal Public Benevolent Institution meaning that it is a form of charitable institutions which is organised, conducted or promoted for the relief of poverty, destitution, helplessness, suffering, misfortune, disability or distress (Australian Government). However, whilst a charity and not-for-profit public company, the funding for ALSWA showcases how and why certain limitations exist within their practice. Importantly, funding does not come from the WA government, this grants ALSWA the ability to fight against the WA constitution without having to abide by any prior funding agreements. As such, media releases, legal representation, and policy reform can all be approached from a non-bias perspective in regards to how they discuss, include and criticise the WA government.

Yet, whilst no funding is given from the WA government, they are largely dependent on funding from the Australian Government through the Commonwealth Attorney General's Department (ALSWA, Financial Report 2022, p11). The 2022 fiscal year saw 18,153,470 AUD in grants coming from various Australian Government grant schemes such as the Indigenous Legal Assistance Programme grant, Youth Justice grant, Disability Legal Assistance grant etc (Ibid, p. 17). This grant money is used for the every-day operations of ALSWA alongside any legal fees that are needed to be covered due to pro-bono work (Ibid). Additional finance comes from other undisclosed institutional, community and corporate donations (Ibid, p.11).

Structuring their financial base upon the Australian Government enables a reliable source of fiscal flow each year, but it does not come without problems. Firstly, ALSWA must apply for each grant, for some this is annually and other are every x year. This process is time consuming and means that not every grant is guaranteed. Whilst this is important to take note of, the biggest drawback of their funding source is that it means that the Australian Government has control over what ALSWA does and does not do within their practice (ALSWA). This can affect cases taken onboard, approach to strategic litigation and largely the legal consciousness of the company. Having to comply with the terms of each grant when fighting for the rights of those who are being affected by the constitution of the state (WA) which is under the Australian Government without question will always shape the consciousness of lawyers. This element of ALSWA will be discussed later in the paper.

### ***3.1.3 VYZ by Next Friend XYZ v Chief Executive Officer of the Department of Justice, 2022, WASC 274***

ALSWA has been utilising legal mobilisation methods to achieve the rights of those detained at BHDC, namely they utilise strategic litigation. VYZ by Next Friend XYZ v Chief Executive Officer of the Department of Justice, 2022, WASC 274 (to be referred to as WASC 274) which was heard in July 2022 with ALSWA as the acting solicitors of the case is an example of the strength that legal mobilisation has in granting rights.

WASC 274 was based upon the lived experiences of a 14-year-old boy (VYZ) who was detained at BHDC from January 20<sup>th</sup> to July 19<sup>th</sup>, 2022. Not only was VYZ vulnerable due to his young ages, but he also suffered various serious cognitive impairments, and was from a remote part of the state meaning he had no access to support (ALSWA Annual Report, 2022, p.11). During his time at BHDC, VYZ was locked in his cell for over 20 hours for 19 days within his first month whilst placed in the Karakin Unit as a result of ‘rolling lockdowns’ (Judgement 2022, p. 7-8). The only times he was let out on many occasions was to make a 10-minute phone call, although this right was often denied to him (ALSWA Annual Report, 2022, p.11). As Alice Barter explained, BHDC WA must follow the Mandela Rules which outline’s that “the use of prolonged solitary confinement should be prohibited” in under these rules, solitary is defined as up to 22 hours and over a prolonged period of 15 days (Barter, 2023) (UNODC, 2015, p.14). In addition, the YOA states that solitary confinement may be used under two circumstances: the ‘good government, good order and security’ of the detention centre or as a result of poor behaviour.

ALSWA won the case against chief executive officer of the department of justice, in which the supreme court of WA declared that the ongoing lockdowns that occur at BHDC are unlawful. So how can we analyse the actions of Barrister Marina Georgiou who appeared pro bono as counsel on behalf of ALSWA’s client VYZ and the actions of Alice Barter and the Human Rights Law Unit at ALSWA to better understand how legal mobilisation, namely strategic litigation, prevailed in the ongoing dispute to recognise the failures, rolling lockdowns, of BDHC to uphold state commitments such as YOA?

As previously discussed, legal mobilisation is a double-edged sword used to utilise the strengths of law to bring about social change. To better understand WASC 274 impact on the treatment of youths at BHDC the second element of legal mobilisation, that which develops an analytical perspective will be applied. Doing so will generate an understanding of “how interactions with the law can be productively combined with an approach based on legal pragmatism” (Handmaker, 2018, p. 6).

The capacity of actors relates to their role in holding states, institutions and corporation's accountability of their national and international legal obligations, in this case we can additionally zoom in on the WA specific obligations (Ibid, p.13). 'Rolling lockdowns' were not a new concept within BHDC, with the limited staff members as a result of the severe understaffing at all detention centres across WA superintendents were utilising any means of power, they had to do what they viewed as following the good governance of the centre (Barter, 2023). ALSWA did not start fighting for the correct interpretation of the YOA by filing for judicial review in the supreme court of WA, this was the final step which was taken as a result of continued neglect from all other levels of authority. ALSWA has been able to maintain a good relationship with senior levels of the department of justice which Barter states is a result of their continued dialogue (Ibid). Yet, it could be seen as a result of their funding from the Australian Government which grants them access to those who are often hard to maintain a relationship with. Barter and her team sent over 70 individual complain letters to the Deputy Commissioner for Women and Children who is under the Department of Justice since the end of 2021 (Ibid). Furthermore, engagement with the Minister for Corrective Services (MCS) started in December 2021. Letter sent regarding complaints of lockdown conditions to the MCS showcase a continued push from ALSWA to hold the state accountable for the actions that were taking place in BHDC. Letters depict the situation from the identification of lockdowns not being an isolated event with clear signs of "prolonged confinement, segregation and 'rolling lockdowns'" such statements can be find in letters from December 2021 till May 2022 (Annex 6) Each letter details the accounts of those at BHDC, the unlawful use of lockdowns, puts forwards recommendations and calls for the immediate accountability of those in control.

Turning to the final letter in May 2022, ALSWA acknowledges the success of their dialogue with the MCS demonstrating the efforts of their resources through the investment of 25.1 million AUD into improving youth detention systems in WA (Annex 5). However, ALWA continued to push for the acknowledgment and accountability for the mistreatment of those at

BHDC reiterating the issues of FASD, inadequate support for those with disabilities and calling for the abolishment of solitary confinement. When calling for the abolishment ALSWA acts as a translator bringing together evidence of the OICS finding the environment detrimental (Ibid, p.6). Furthermore, they address the need to uphold the Mandela Rules, Beijing Rules, the Havana Rules all of which were classified as being breached by the OICS (Ibid, p6 - 7). Such letter included a call to replace the existing YOA with a new framework to ensure the adequate protections for young people (Ibid).

Reviewing these letter create the backdrop in which WASC 274 manifested. It showcases that the case was not a stand-alone treatment of one detainee but part of a long-term string of human rights violations that clearly infringed on both WA state law, YOA, and international law. Demonstrating the mistreatment in this manner acts as the building blocks to allow ALSWA to take the case of VYZ to supreme court the following month.

The choice to move towards strategic litigation in supreme court was made possible as a result of the ongoing push from ALSWA towards MSC. Clear misinterpretations of YOA had become apparent allow for Justice Tottle, to agree BHDC abused their power over VYZ. Superintendents and custodial officers were abusing their power of good governance to lock people up for days and regularly exceeding 20 hours (Judgment, 2022, p. 40). The YOA however, is written in such a way that defining what ‘good governance, good order or security’ is a vastly broad and widely interpreted justification for solitary confinement. One could argue, as Tottle did, that confining a detainee because of a COVID-19 infection falls under confinement as a means of security. Yet superintendent Reid argued that that VYZ needed to be confined in order to support the safety of BHDC due to the lack of staff on sight to support detainees having time outside their cells. The YOA states that one may be confined in response to a detention offence:

by ordering that the detainee be confined to the detainee’s sleeping quarters, or to a designated room —

1. (i) for a period not exceeding 24 hours if the order is made by the superintendent; or



2. (ii) for a period not exceeding 48 hours if the order is made by a visiting justice; (Young Offenders Act, 1994, s 173(2)(e))

VYZ had committed no detention offences in their time held at BHDC and as a result this became a core focus of ALSWA's counsel M. Georgiou. Acting as the translator for VYZ's experiences at BHDC, ALSWA was able to offer the context of YOA and how the various loose interpretations of reasons for confinement enabled BHDC to continue using 'rolling lockdowns'. Whilst not the first case brought forward by ALSWA, WSC 274 laid the ground works that continued pressure of those in power such as the MSC and focusing on legal mobilisation created powerful avenues for the rights of those in BHDC. Although VYZ only granted rights to one individual, those held at BHDC represent the most vulnerable percentage of the Australian population. Aboriginal, youths of which main have cognitive development disorders. Their position represents a system which is working against them, with Premier McGowan offer no avenue for actualised policy reform using the resources that they have ALSWA can bring about change. This one detainee represented the possibility for actualised change to be realised.

### ***3.1.4 CRU by Next Friend CRU2 v Chief Executive Officer of the Department of Justice, 2023, WASC 257***

In addition to WASC 274, CRU by Next Friend CRU2 v Chief Executive Officer of the Department of Justice, 2023, WASC 257 (to be referred to as WASC 257) can be seen as an example of effective strategic litigation carried out by ALSWA. Similarly to WASC 274, WASC 257 was a supreme court judgement made by Justice Tottle with Marina Georgiou acting as counsel on behalf of ALSWA. The case centred around three individuals, one female (HBS) and two males (CRU and OPS) who applied for declaration under the failure to uphold YOA, OPS and CRU were additionally held at Unit 18. All members argued they were held in unlawful solitary confinement for prolonged periods (Judgement CRU, 2023, p.6) HBS was confined unlawfully on 12 days, CRU was unlawfully confined on 22 days and OPS was confined on 133 days, of which 19 days were consecutive, combined amounting to 167 days. (Ibid, p.7, 8, ALSWA 2023). During which the confinement did not

abide by YOA or when it did abide by the law they were denied access to exercise which is required. Similarly to WASC 274, the lockdowns in question were not related to disorderly actions but rather an abuse of power by the officers through the regulations of ‘rolling lockdowns’ (YOR, 1995, 74 (2)). Again as previously stated this allows ‘rolling lockdowns’ if it falls under maintaining the ‘good government, good order or security’ of the detention centre which must abide by regulation 79 (YOR, 1995, 79, p. 42). Section 4 of reg. 79 addresses the need for detainees to have access to one hour of exercise every six hours outside of their cells if their confinement is for 12 hours or longer, however, this was not upheld (Ibid). The judgement outlined that failing to allow detainees their specified exercise time, even if environmental factors create circumstances that make it harder to grant, is a failure to provide physical and mental wellbeing. As such any limitations put on the entitlement to exercise can be seen as a direct observation of unlawful confinement (Judgement, 2023, p. 20 – 21).

WASC 257, which utilised elements of VYZ to demonstrate the construed and conflicting definitions understood by various actors within the system, was approached in a different manor to previous litigations. Opposed to using the avenue of accountability through the MCS, WASC 257 began in December 2022 with a hearing regarding *writ of habeas corpus*. Rather than continuing with the hearings ALSWA and the applicant chose to apply for interlocutory injunctions— a court order to compel or prevent a party from certain acts (Ibid, p. 9). In this case the members of CRU, advised by ALSWA, focused on restraining the superintended from placing them in solitary confinement, unless it was lawful under YOA and YOR (Ibid). Taking this civil litigation route proved to be an effective tool, as Tottle moved to implement an obligatory report to the courts by way of affidavits from the superintends between 19 December 2022 and 2 January 2023 in which:

- a. each applicant was confined to their sleeping quarters;
- b. whether an order for such periods of confinement were made; and
- c. identifying the person who made any such order, the reason for it, and detailing compliance with the conditions of confinement specified in the regulations.

Doing so allowed for a larger picture of the unlawful lockdowns that were placed upon each of the applicants to be created which gave way for following hearing and consequently the ability for ALSWA to take the case of CRU to the supreme court.

As with the case of WASC 274, the judgement was focused around three individuals rather than on the broader human rights violations at BHDC. Tottle addresses this by stating “the court does not have the power to direct the application of the resources necessary to prevent rolling lockdowns” (Ibid, p. 8). ALSWA’s litigation against the actions of the superintendents amounted in the supreme court granting an injunction restraining Department Staff from confining young people without appropriate orders and without providing them with their entitled out of cell exercise hours (ALSWA, 2023). Whilst acknowledging that this judgement does not have the capacity to put an end to the rolling lockdowns he later states that “I very much doubt that Parliament envisaged that a superintendent’s power to order a young person to be confined in his or her cell would be exercised as frequently or in the circumstances in which it has...” (Judgement, 2023, p.8). Rolling lockdowns are a result of the ongoing staff shortages BHDC is experiencing. However, Tottle identified that beyond this issue continuous lockdowns which are not supported by YOA and YOR are justified. Thus it marks a fundamental step in acknowledging that from CRU forward staff members will be held accountable to ensure only lawful confinement is carried out.

### **3.2 Levitt Robinson**

As previously mentioned, ALSWA is not the only actor working to achieve the rights of those in BHDC, alongside their work is Levitt Robinson, a Sydney-based law firm. Levitt and Robinson have put together a class action lawsuit against the Western Australian government for the cruel and unusual punishment as well as the punitive measures at BHDC and Unit 18 covering:

- rolling lockdowns; solitary confinement
- excessive use of force including being folded up
- little or poor quality out of cell time

When filed in December 2022, the class action included testimonies from around 600 people who have been mistreated whilst at BHDC or its predecessor, Rangeview. Levitt (2022) whilst speaking to news outlet ABC stated the class action “alleges effectively... physical abuse, restriction, restrain, breaches of the Disability Discrimination Act and inhumane treatment”. Likewise, with ALSWA before analysing how legal mobilisation, class actions in this instance, support those at BHDC and understanding of why Levitt Robinson chose to represent the case is vital.

### ***3.2.1 Positionality of Levitt Robinson***

Levitt Robinson Solicitors, run by senior partner Stewart Levitt was founded upon the principle of their commitment to bringing about strong social change through helping marginalised communities who are often overlooked (Levitt, 2023). The firm was based upon the groundworks laid out by Levitt upon his successful suing of the Government in achieving a public apology for institutional racism in relation to the Palm Island riots resulting in 30 million AUD worth of compensation to the 447 claimants (Ibid). The precedent set by the success of such a class action case pushed the firm to strive for human rights by leading cases against large corporations, state, federal or foreign government that other firms often neglect.

### ***3.2.2 #beentobanksia***

Levitt Robinson solicitors identify that the ongoing crisis of BHDC is a vastly nuanced yet empirically simple issue. Western Australia still operates under mandatory sentencing, meaning that if you steal an apple then a water the next time your caught you immediately are placed into three months of detention (Ibid). This means that the Aboriginal children that make up the majority of BHDC are stripped away from their homes, which as a result of systemic racism often have very little, and placed into a punitive system that further traumatises them. If they make it out of BHDC and are not transferred to an adult prison, they are left with nothing, there are no systems of rehabilitation, therapy or trauma or age informed support (Ibid). It is this circular cycle which they identified as the cornerstone of the claims made for the class action. There is simple no hope once entering the system, the Australia public

is not empathetic to the violations occurring in BHDC leaving them no choice but to pursue the class action (Ibid).

Whilst identifying that the work of agencies and not-for-profits such as ALSWA is fundamental in applying pressure and ensuring the accountability of the state and advocating for clients on an individual or small group scale. It is not the end solution; it will not be about social justice. Instead, Dana Levitt states several reasons as to why external litigation is currently the best solution that those at BHDC has. Levitt Robinson is a private firm and as has no obligations to any institutions including the state. When looking at legal mobilisation angles this gives the firm an upper hand over those such as ALSWA. Structural

Bias and Capacity is a massive oversight in the actions carried out by ALSWA. Although they have the capacity to bring cases to the supreme court the way in which they must interpret the law and distribute their resources will always be held back by those in government which can be seen as their forced framing into the hands of the elites. This issue, however, does not stand with Levitt Robinson. They are able to use the law *against* the law utilising its flaws as a *sword* opposed to as a *shield*. State politics such as the actions of Mark McGowan and later Roger Cooke do not dictate their actions. Not only are they private but furthermore, they are operating from outside the state allowing them to strategically work around and actively challenge the state constitution. The failures of those inside WA to actualise long-term sustained justice forces those such as themselves to use their resources to litigate (Ibid).

An avenue which Levitt Robinson views as highly vital in winning the class action is to work alongside the media. Social movements and the modern-day media cycle are the key to unlocking sustained success in Levitt's eyes (Ibid). Sub-question two focuses on this by way of the role of social movements to facilitate change. Whilst there are movements linked to BHDC with regular ongoing rallies calling for it to shutdown, which will be addressed in the following chapter. The current state of the Australian public's approach to politics demonstrates that mainstream media is the strongest movement that can be utilised (Ibid). Levitt addresses this though acknowledging "in Australia, white people are quite happy to lock up Black kids and

throw away the key... people who don't live and see it... its just a kind of ignorance is bliss." (Ibid). But Levitt states that if they are able to "ruin peoples f\*cking sunrise morning by making sure that you're making headlines about Banksia Hill and the Department of Justice lying" then there is a chance to foster real and positive political will and generate political support for those at BHDC (Ibid). This is supported by Nicole, the lead applicant in #beentobanksia<sup>1</sup>. She chose to be named and was supported by Levitt as this class action is making history within Australia. Having her name on the media posts, court proceeding, activism puts a name to her and the other 700 applicants' experiences. Instead of headlines using acronyms such as VYZ or CRU, the public is now confronted with a far more realistic and emotionally charged case. Actions taken by Levitt Robinson such as these are only possible as a result of their removal from the government itself which is often seen suppressing victims' identities to remove the humane connection one has when reading about human rights violations (Ibid).

The team at Levitt Robinson ensuring that they are doing everything in their capacity to make sure that the violations at BHDC come to an end through this class action. They are enforcing their capacity by way of state accountability, capitalising on their unique position as a private out of state firm to enable their far harsh tactics in bringing forth formal claims. Whilst secondly using this ability to develop a connection with the Australian public to ensure a personal connection is made through the use of names and constant daily media headlines. Additionally, as with ALSWA #beentobanksia is based upon not only breaches of state law through the RCIADIC, YOA, and YOR but also on the UNODC Nelson Mandela Rules and the states commitment to implementing OPCAT bridging the gap between state and international law. Helping those in BHDC by identifying their rights that are being broken and aiding in translating their experiences into legal claims. Levitt additionally states, that it is hard to gain someone's trust when they are in

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<sup>1</sup> Nicole has chosen to be named for her case, however due to the on going case this has not been made public knowledge yet. Her lawyers offered her true name to be used however, due to the case centering around violation that occurred when she was a child it was decided a pseudonym was chosen. Once the case is taken to court Nicole's real name can be used.

such system but their work meeting with and generating personal relationship which mean that why are available at all times for support. Furthermore, they have support teams in Perth which help with ensuring that if paperwork is needed it can be signed and sent off immediately, but also if a child needs in person support that can be given regardless of the firm being based in Sydney (Ibid). These personal relationships are at the forefront in what has enabled the firm to generate such as large class action case and without acting as the children's translators and being their legal voice, showing they are a "force for good, not for evil" Levitt does not believe the class action would have been able to become as strong as it has (Ibid).

Handmaker states that a fundamental point of strategic litigation is through viewing litigation through a shift away from winning and towards developing legal procedures which have an impact on a community (Handmaker, 2019, p.6). Exploring the evidence set out above covering how Levitt Robinson is taking time and effort into developing personal relationships with members of the class action is a testification to their focus on creating impact. Furthermore, working alongside activists, and grassroots organisation is a core pillar to generating an allyship with the community at risk (Ibid). Megan Krakouer is a Menang Woman of the Noongar Nation (South-West WA) and is a renowned activist, prominent social justice advocate and arbitrator for the marginalised and voiceless. When looking to media post from ABC News or the Guardian surrounding BHDC, Krakouer is often present giving statements and attesting to the strength of the Aboriginal people to fight the case. Levitt Robinson have acknowledge her strength in activism and worked with her to collect testimonies from those effected by BHDC (Noongar Radio, 2022). Dana Levitt, the leading manager on the class action is not Aboriginal, but working along Krakoeur, an Aboriginal women who can connect further with lived experiences aided in gathering testimonies and accounts. Working with an activist such as Krakoeur demonstrates to the Aboriginal children and now adults who they are supporting that the firm is an ally to them and is fighting for social justice and impact opposed to just striving to win a case.

## **Chapter 4: Beyond Strategic Litigation**

As seen in previous chapters, lawyers play a pivotal role in the fight against the human rights violations at BHDC through their use of legal mobilisation tactics such as strategic litigation. Whilst this has brought about success through WASC 274 and WASC 257 and is providing Levitt Robinson the ability to create the largest class action surrounding BHDC to date, #beentobanskia. There is another element of legal mobilisation in play within Western Australia, that of social movements, which will aid in developing an answer to sub-question two:

How have social movements more generally framed the problem and mobilised legal opportunity structures to address juvenile detainees in Australian Detention Centres?

Madlingozi, in the context of post-Apartheid South Africa, introduces us to the core elements of social movements legal mobilisation. Identifying the two key sub-classes of social movements: national ‘rights-based’ movements and local ‘counter-hegemonic’ movements. This chapter will showcase how the lack of developed social movements both local and nationally create a divergence away from the roles of lawyers. Demonstrating the current legal consciousness of the Aboriginal peoples and how this factors into the current social movement climate.

### **4.1 National ‘rights-based’ movements**

To explore national ‘rights-based’ movements, first an understanding of their make-up, as presented Madlingozi, is needed. Although based upon the movements within post-Apartheid South Africa, through the use of Madlingozi’s definitions similarities can be drawn to the case of WA. In the context of SA, these ‘rights-based’ movements were a product of international and domestic efforts aimed at constructing a ‘human rights State’ and instilling a ‘culture of human rights’ (Madlingozi, 2014, p.98-99). This ‘right based’ characterisation is based upon the notion that such movements aim to



hold governments to “constitutionally enshrined rights *within the current liberal order*” (Ibid). Which can be identified through their human rights framing of grievances and claims, which Madlingozi suggests aids in moulding collective identity, catalys[ing] their struggles, [and] secures elite support, to extract resources from the state” (Ibid). Highlighting that many of these ‘rights-based’ movements are founded upon the ideology of arguing by way of holding governments accountable for upholding constitutions through methods such as parliamentary submissions, lobbying, media campaigns, educational workshops, and litigation (Ibid). Furthermore, it is noted that many of these national movements operate as ‘professionalised social movements’ working with marginalised members, but structured internally with permanent paid staff, with offices, resources, are registered and collect donor support (Ibid).

#### ***4.1.1 Raise the Age***

So how can this idea of national ‘rights-based’ movements be removed from the SA context and viewed within the BHDC locale? Raise the Age (RTA) could be classified as one of the most direct representations of this idea of ‘rights-based’ movements. Founded in 2020, out of a coalition of Aboriginal and Torres Strait Islander organisations alongside legal, medical, and human rights groups the campaign was created to place pressure on every state, territory, and federal government to change the existing age of criminal responsibility nationwide (Raise the Age, 2020). RTA has mobilised its socio-legal strategies through lobbying, holding press conferences, events, and rallies, written letters, emails, and op-ends, created social media actions, and created alliances (Ibid). These alliances have enabled a cohesive collective identity to be formed across the nation with now over 100 organisations and tens of thousands of people involved in the campaign (Ibid). 2023 marked a historic year for the RTA campaign with the ACT announcing after a three-year long deliberation and structuring that the *Justice (Age of Criminal Responsibility) Legislation Amendment Bill, 2023* had been passed in the Legislative Assembly (ACT Government, Justice, and Community Safety Directorate). This landmark reform changes the minimum age of criminal responsibility from 10 to 12 with it going to 14 in 2025.

The ‘rights-based’ approach of RTA is clearly outlined by their acknowledgement of international institutions calling out Australia’s minimum age. A media report by Change the Record, an alliance of RTA, outlined this in 2019 stating that “it feels like every day there is a new expert calling on Australia to raise the age. A fortnight ago it was the United Nations Committee on the Rights of the Child. This week it was High Commissioner Michelle Bachelet, and UN Expert Manfred Nowak.” (Change the Record, 2019, p.1). RTA has identified the failure of the Australian state to uphold the CRC and uses this as a basis for their legal reasoning calling for an adjustment from 10 to 14 years old nationwide.

RTA is yet to be successful in WA, demonstrating the strength of the labor government, however their actions are representative of this national ‘rights-based’ approach that has proven successful in SA and has begun to show its effectiveness in Australia with NT and ACT. Whilst RTA is yet to declare their campaign in anyway complete, their resources, structure, and alliances have proven successful in getting one step closer to granting rights to those at BHDC. Although the movement is not focused only on BHDC, raising the age would aid in bringing justice to those detained. In 2020 three children were under the age of 14, whilst this has fallen from the 16 in 2017, it still demonstrates a need for the adjustment in the minimum age of responsibility (OICS, 2020, p.5) (OICS, 2017, p.5).

## **4.2 Local ‘counter-hegemonic’ movements**

Local movements on the other hand, are characterised by Madingozi by their ‘counter-hegemonic’ elements, stating that their largest struggles are those of macroeconomic policies and the nature of local democracy (Madingozi, 2014, p.107). Often, they can be seen returning back to learnt action repertoires such as barricades, obstruction, occupation and campaigning for election boycotts (Ibid). Further, they are made up of unemployed residents and rely on membership contributions and donations for funding with their focus being on local authorities (Ibid). Whilst there are no movements within WA that fit this specific mould, similarities can be drawn between the SA experience and the ongoing First Nation led protests outside of BHDC.

Following on from the May riots at BHDC, a group of 100 protesters gathered outside of BHDC to call for immediate change within the detention centre. Advocates focused their demands on local authorities and state government calling for a shift towards working with the local community and Indigenous elders to support youth and end the cycle of incarceration (Collard, 2023). At the forefront of the protests was Megan Krakouer demonstrating that the BHDC protesters do not fit the mould of ‘unemployed residents’, yet connections can be drawn to their focus on local authority and learnt action repertoires. A similar action had been held in December 2021, once again with Megan Krakouer at the forefront (Noongar Radio, 2021).

As we can see there is a large gap of local based social movements occurring within the context of WA. Previous discussion on the political demographics of WA can showcase a justification for this. As there is little push from the local government to respond to BHDC, there is little public opinion on the topic and as a result little room for social movements to develop under. This disproportionate Perth based voter base links into Madlingozi’s idea that lack of local democracy is one of local movements largest hurdles. Perth represents 79% of the state’s population, which means whoever wins Perth in elections wins the state, removing the votes from the urban areas which are predominantly Aboriginal (Australian Bureau of Statistics, 2018). Which demonstrates a level of lack of local democracy as the minority group affected, Aboriginals, have no ability to enter or change the system in which they live in. Demonstrating a possible reason as to why local movements are few and far between in WA.

Local movements surrounding BHDC are yet to transition out of their first stages into litigation-based strategies. Whilst Megan Krakouer works with ALSWA and helped collect testimonies for #beentobanksia on behalf of Levitt Robinson, the movements themselves have not taken this step. It could be argued that as a result of the work at ALSWA holding custodial officers accountable for their dishonest actions (Barter, 2023) there is less of a need for movements to carry these actions out themselves. Based upon Madlingozi’s SA observations, WA is yet to utilise their discourse to act as a ‘frame bridge’ between BHDC protests and the middle-class (Madlingozi,

2014, p.113). Yet, with the political make up and generational disconnect between Aboriginals and settlers there is little avenues for this bridge to be made. Furthermore, there are “only a handful of locally based social movements... [that] have engaged in proactive legal mobilisation’ showcasing that the collective action protests in WA are not outliers in their actions. Like in SA, within WA legal action from protestors against BHDC would create a dependency on elites (Ibid). Like SA, Australia has a deep routed state-driven racial domination, and as a result many see legal avenues as opportunities for the state to re-instate racial supremacy (Ibid) (Levitt, 2023). As a result, legal avenues have been left to those such as ALSWA and Levitt Robinson and local social movements are yet to develop to a large enough scale for actualised change.

## Chapter 5: Conclusions and Recommendations

“Nothing has changed in Banksia Hill since it opened in 1997” “The atrocities and human rights abuse continue” (Krakouer, Torre, 2022)

This paper has sought to address the role in which legal mobilisation can pose as an effective tool to bring about structural, constitutional, long-lasting change to the current youth justice system in WA. Through a socio-legal, qualitative perspective, focusing on critical constitutionalism and legal mobilisation both as a theoretical and analytical tool. This allowed for an assessment on how each of the chosen actors currently involved in the plight for bringing rights to those in BHDC has mobilised the law to their advantage.

Firstly, we can address how legal mobilisation has been successful thus far. Although small scale, ALSWA has utilised class actions by way of WASC 57 and WASC 274. Each of these judgements although only representing a total of 4 people represented a far larger strive for change. Showcasing the legitimacy of legal means to those held at BHDC. As this paper addressed in the limitation posed on lawyers, many Aboriginals have a hesitancy towards institutions and legal routes of action. As if often the case with minority groups, the systemic racism and overrepresentation of Aboriginals in the justice system has collapsed much of their belief and trust in the system. Additionally, these cases surround children who should not be expected to have a full grasp on the legal structures and operations of institutions they live under. In this regard, ALSWA has proven through their efforts and their dedication to providing the *translator* role of legal mobilisation.

Secondly, the ongoing #beentobanksia class action demonstrates a closer connection between the social and legal aspects of litigation. Levitt Robinson works far closer with the media and activists such as Megan Krakouer. This connect aids in their role as a *translator* as it adds a layer of humanity atop their large private firm. Additionally, Levitt Robinson has the positionality of not being tied to the WA government that enables them to take far larger risks in their class action and argue stronger cases.

So with both these legal actors working successfully in their field, how are violations still taking place in BHDC? And how it's the WA constitution

still failing to provide safety for Aboriginal youths in custody? This paper has strived to demonstrate that legal mobilisation is a double edge sword. In order for the role of lawyers to be elevated to a position of power, the public must be behind them ensuring accountability is upheld outside of review periods. The lack of developed local and national social movements focused on BHDC has meant that judgements are passed by the supreme court stating actions such as ‘rolling lockdowns’ are illegal, yet once the case is over they continue. The two judgements discussed in this paper did not lead to any changes in the constitution but rather showcased that the constitution was not being abided by.

Western Australia demonstrates how without public support and public drive that comes from sustained and developed social movements, bringing about social reform is a challenging feat. Which can be tied into critical constitutionalism. The finding from this paper which demonstrate the vast plethora of laws put in place to protect children and how they have been overlooked. Demonstrating that the WA constitution is built in a way that enforces the rights of the elite whilst being capable of ‘turning a blind-eye’ to those it deems less than.

Whilst lawyers can fight in courts through strategic litigation, granting rights to those who have been wrong by the system, these cases do not necessarily result in long-lasting reform. In order for class actions and strategic litigation to be optimised it must be in partnership with social movements. Social movements have the ability to work with a legal consciousness which is not the result of a ‘higher’ understanding of the law. And as such social movements are far more capable of engaging with the public and changing the public’s view on the current BHDC crisis. Lawyers can bring about regulation and judgements however in order to hold institutions truly accountable, public opinion must shift to ensure the masses are calling for accountability rather than just lawyers. It is for this reason that the below recommendations have been put forward:

Firstly, a bridge between social movements and lawyers must be made. Levitt Robinson has been able to develop the #beentobanksia class action due to their commitment to working with Aboriginal movements and activists.

Furthermore, Levitt Robinson's value placed in the media demonstrates their push to educate the public and ensure that BHDC does not fall out of the public's eyes. This bridging between lawyers, social activists and the media demonstrates the strength of legal mobilisation when actors from each corner are able to work hand in hand to achieve a common goal. In the case of social movements however, other than the continuous efforts of Megan Krakouer there are no single national or local movement focusing on BHDC. A further bridge can be seen through the coalition of Social Reinvestment WA forming in recent years which strives to address effective and connected approaches to justice in WA. However, this takes a far more academic, policy orientated avenue meaning the socio-legal bridge has still not been created.

Secondly, with the sole issue of BHDC already being identified as understaffing, politicians, such as McGowan and now Cook, should be placing all of their efforts lobbying to ensure an increase in budget to both correctly educate staff and ensure the hiring of more. However, it is clear from this paper's findings that the current conservative voting population of Perth will not place the rights of those at BHDC high enough to bring about needed change. A complete overhaul of the current youth justice system is needed. However, had the constitution been both written and enacted in a way that was not focused on benefitting the elites this would not be the case. RCIADIC in 1991 paved the way for radical reform to take place, yet funding and efforts were never placed into BHDC. This can equally be seen in the failure to meet the deadline for OPCAT.

In closing, ALSWA is actively pursuing modes of legal mobilisation through strategic litigation. Whilst their cases are small they are bringing justice to the individuals effected. However, Levitt Robinson as a result of being a private firm is currently demonstrating the strength of strategic litigation when used on a larger scale and alongside activists. Social movements are yet to reach a stage in which effective legal mobilisation can be utilised, however with the developments of #beentobanksia, there are avenues for socio-legal joint movements to develop. The main issue those at BHDC are currently facing is understaffing. Yet, the second issue is the lack of public support for their rights. Shifting the states legal consciousness to care for those detained

at BHDC will force the state to remain accountable to the treaties, acts, and laws that already exist but are so often broken as no one is watching.



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# Annex

## *Annex 1: Interview Form*

**Name:**

Role:

**Overarching Research Question:**

How has the Aboriginal Legal Services mobilised the law to address the abuse of aboriginal teenagers in the Banksia Hill Juvenile Detention Facility?

**Key themes:**

1. Socio-legal potential of legal mobilisation in addressing the rights of those detained.
2. How have social movements framed the problem and mobilised?
3. Current WA constitution inadequacy to address systemic violations?

**Base interview questions (not all will be asked):**

What is your connection to Banksia Hill Detention Centre / introduce your role.

What specific rights, both internationally and domestically, have been violated in the context of Banksia Hill juvenile detention centre?

How do these violations align with the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples? (Ratified, 2009)

What role does the Australian legal framework play in addressing and preventing human rights violations within detention centers, particularly in relation to Indigenous detainees?

Can you discuss any past legal precedents or cases that may be relevant to addressing human rights violations in detention centers like Banksia?

How has the Aboriginal Legal Service been involved in advocating for detainees' rights at Banksia and addressing the reported violations?

Have there been efforts to collaborate with international Human Rights Organizations or bodies to address the situation at Banksia Hill? If so, what has been the outcome?

Can you discuss any recent developments or progress made in holding individuals or institutions accountable for the reported human rights violations at Banksia Detention Centre?

How does the intersectionality of factors like race, gender, and socioeconomic status affect the experiences and legal representation of Indigenous detainees in situations of human rights violation?

From the standpoint of social movements and the general public what would you argue are the key modes of mobilisation taking place? (protesting, class actions, litigation etc.)

Do you see any tangible actions that can be taken by the government to address systemic violations? If so, what? If not, why

With the failure of the government to bring about change what would you argue is the most effective means to bring about change?

Discourse surrounding the Voice of Parliament is still actively ongoing, how do you see this? Do you believe till will aid as a catalyst for future development?

**Structure of the interview:**

Instead of basing the interview on structured interview questions, it will be based upon the semi-structured format. This means we will focus on the series of themes as mentioned above. This will allow for a non-hierarchical discussion to take place and enable for both a safe space to be created but further allow divergence from the main base. This method has been chosen as I am not by any means an expert in the topic nor am I personally affiliated. Thus, I would like to give agency to those connected to the issue through both personal and or professional means.

## *Annex 2: Alice Barter Transcript*

**M:** Audio is recording, there we go.

**M:** So I guess could you start off just by explaining your role and how you're linked with Banksia Hill?

**A:** Yeah, sure. Um so, I'm the Managing lawyer of the civil law and human rights, you know, at the Aboriginal legal service of WA. Um we have a big criminal law practice, and also care protection practice, and various other diversion programme and youth engagement programme and various other programmes. So the criminal lawyers represent a lot of the kids in their criminal matters. And then part of our role is to make sure that um children and adult prisoners are having their rights met. So they go and visit ALS clients or Aboriginal people in Banksia all the time, just check on them and see if they need any complaint style about things. Often, it's Police Complaints or things like that. And then, obviously, yeah, at Banksia we have a bit of over 70 complaints for the kids? And yeah, around seat in strategic litigation, judicial review matters. So we represented the heads of those.

**M:** Perfect, thank you very much.

**M:** So then just jumping into the meat of the questions. So what rights would specifically, both internationally and domestically, have been violated within the context of Banksia Hill?

**A:** Yeah, so the kids have been subjected to subjected to solitary confinement, which is against the Mandela rules, and also the youth ones can't think what they're called now. And then domestically, we've got a Young Offenders Act is legislation that governs the management of Banksia Hill, and so they're not supposed to be confined in their cell, unless the superintendent makes an order for the good order management or supervision of the detention centre. Or yeah, they weren't. They weren't doing that at the beginning. And now they have started doing that. Have you seen the judgments that we that we did?

**A:** So it'd be VZY

**M:** Yeah, yeah.

**A:** and CRU?

**M:** Yeah.

**A:** So yeah, we can probably get more of it from that. I can summarise if you want to, basically, for VZY, that they weren't making any orders, and they were just locking them down because of staff shortages. And then we started CRU, up to HBS. At the end of last year, they weren't doing the orders. And now they will then as that progressed, they started making these good order orders. And so then, the legislation says they have to have one hour out of their cell, one hour of exercise for every six hours of unlock hours. But the unlock hours are only from 8 Ah, hold on. Yeah, 8 am to 7:45pm. So that's less than 12 hours. So the way that we read it is if you don't get to the next block of six hours, that basically means that 23 hours a day locked down is law from under our Young Offenders Act. And that's what they've been doing quite a bit recently.

**M:** Okay, and so in regards to your role at the Aboriginal legal service, I know that there's been a series of class action lawsuits taken against Banksia Hill uh that are ongoing. But how would you say your role, because you mentioned

that you represent a lot of the children and you've done this cases, but on a day to day basis? How would you say that your role is shaped in helping fight and represent these children's rights?

**A:** Yeah, so we're in Banksia Hill, most days of the week, like I'm going there, um after I finish talking to you. So we're, we're there we're talking to um at the moment, we've got 70 files open, but you know, it'd be up over the last couple of years or be over 100 kids that we have spoken to it and like I said, various issues, but mainly around conditions in Banksia Hill. And so the ALS is very well placed in relation to that because we've got their connections with the children and the families, um generally. And but then yeah, we do. We talk to them all the time. And then we do all sorts of things with complaints. We ask for medical attention. And then yeah, doing strategic litigation is at the pointy end of it.

**M:** Okay, and as I mentioned in my description in the email, my thesis is focusing on the role that legal mobilisation can have in bringing forth whites and one at one point of legal mobilisation is walking website, working with external and international and even local NGOs in order to come together to pool resources and both in time and actual physical resources. Would you say that there's any specific organisations that you guys work with or any clear cases that you have carried forward with regards to help from other organization.

**A:** Um not really because we've got, we've got the youth engagement workers or Aboriginal support workers. And we've got the lawyers who represent in all different areas here. We mainly run it in house and we mainly just do it in ALS. Partly because for resourcing capacity reasons, it's quite difficult to get other partnerships going. We do get some pro bono support from both private law firms and from the bar. So the Baris who did the cases was pro bono. But perhaps it's that's reminded me I think one of the other questions is about how we've used not just litigation but other areas, like other sort of strategic things that we've done, so maybe I could segue into that.

**M:** Definetly

**A:** So for Banksia Hill, we Yeah, has ever written over 70 complaint letters, and they go directly to the Deputy Commissioner, for women and children as part of the Corrective Services, which is under Department justice. And so we talk with those senior levels of the Department of Justice, quite regularly, and we have a good working relationship, I guess. And we've raised our concerns with them right from the very beginning from the end of 2021. When I said the very beginning, things have been going on for a long time, but the most recent lockdowns, and then we also engage with the Minister for Corrective Services, right back at December 2021. And then we've also engaged with other politicians. So we've engaged with a greens Senator Brad Pettit, so he actually tabled not all of the lists, some of them, like all the ones at the time, so I think was 56 letters in parl[iament], to bring these stories from the kids, you know, before all the politicians before parliament before everyone basically, because the media could access them too. So it was really important that these stories are shared. And that was one of the tactics that we thought had been put pressure on the department to change. And then we've also had so, I guess the other thing with the working with other agencies, is there's a coalition called Social reinvestment WA, which is a coalition of i think about 50, NGOs, Aboriginal lead, and their mandate is to reduce over representation of Aboriginal people in custody. So

they've been running the raise the age of responsibility campaign for the last few years, and we've been heavily involved in that. So we've been working with them. And I guess like Wungening Aboriginal Corporation, sort of, but not really in specifically about Banksia. So we've been sort of, as you probably aware, there's and then there's been the media, which is hearing from people like SR WA, Judge Janice Reynolds, who is the ex president of the Children's Court, Professor Fiona Stanley, Australian of the Year [2003] and did a lot of research into children's development stuff. And so then we did a lot of media to talking about this issue. And the media has been quite supportive about hearing these stories. Plus, we've engaged with the Children's Commissioner, the Commissioner of WA and nationally, and also June Oscar, who is the Social Justice Commissioner for Australia, an Aboriginal woman, and also Lorraine Finley as the Social Justice [Human Rights] Commissioner nationally, plus our inspector of custodial services in WA, and corruption and crime commission, and the ombudsman here. And to us, and then the UN, to think as well. Then also we wrote to the Special Rapporteur for vehicles and Special Rapporteur for the prevention of cruel, inhumane pictures treatment [Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], I can't think what the title of it is now, anyway you know what it is, the torture Special Rapporteur and then the sub-committee for the prevention of torture, as you probably aware, as if it was came to Australia, wherever that was last year. And they we'd written to them, and we've been brief with brief them about Banksia, and also some other issues in WA, and they were going to come but then obviously, they weren't allowed in, in the exercises and never made it. So I'm not actually sure what's happening with that.

**M:** Um, that was quite a lot of very useful information. So I'll definitely have to go through and look at all those individual people.

**M:** But one thing that you mentioned was the role of the media. And that kind of links into one aspect of legal mobilisation in regards to the general public's role in strategic litigation, because you have obviously, direct litigation class actions, but then you have on the ground forms of protesting boycotting. Yeah, those are the two main ones that are seen. And I know that there's a very large protesting circle that's connect connected to these cases, which is But would you say that there? 'There's a direct correlation to protesting that takes place on the street, and the success of litigation that is taken by you and your team? And like the spread of it through media, and like awareness that puts pressure on the government, or is it kind of overlooked by the government and not really taken into account?

**A:** Yeah, that's a tricky one. Yeah, yes or no, I think, I think when you litigate in the Supreme Court, it's very confined to the evidence that's before the judge. And I think, to be honest, I think sometimes those protests and rallies and not helpful in relation to what the judge has to decide. I do, however, think they are helpful, putting pressure on the government. So the rallies outside Banksia Hill, all the rallies in Perth, I think, have put pressure on the McGowan government. And the West Australian, particularly because as you probably probably are aware, it's our only paper. And it's historically been quite conservative. So when the West Australian started really criticising premier McGowan and and the Minister Bill Johnson, I think that that that community feel, but really the West writing about it, I think had a huge impact. And I think, to be honest, I think, I don't know for sure. But I think I like to think anyway, that the change in Premier and

in minister was because of Banksia. And that's because the litigation is only one part like they totally just ignored B Y Z. So as lawyers are able to do the legal stuff, but it's only a very small, it's only one piece of the puzzle. There's all this other part of it, which sometimes we do, sometimes we don't do like the rallies and stuff. We don't get usually involved in those. But I do think it's good that other people are doing them to keep that sort of public pressure and keep people knowing about it. But I don't think it actually does help directly as litigation. I think it helps with the broader conversation.

**M:** Yeah, and making sure that it will means in conversation and in the general media, right yeah I mean, that's how I stumbled. That's how I came across this case, because I knew that I wanted to focus on Aboriginal rights and I was looking for different ways to analyse legal mobilisation. And I'd heard of Banksia, and it was through mass media that I think I might have even been something on Instagram, that was what first caught my attention of it and got me interested in it. So it definitely works internationally as well. And then, I think just kind of linking in with that. There's obviously the Voice of Parliament, which is ongoing at the moment. And that is enlarge due to the kind of more protesting boycotting aspect of legal mobilisation, which has allowed that to get to the point in which it's currently in. And I know on paper, they were like, it represents an opportunity for a lot of change and commitment to self determination and this equal commitment to maintaining self determination. But would you do you see it as that way? As like, obviously, it's a good thing. But do you see it as actually something that will help initiate change for you at ALS?

**A:** So the first thing is, -inaudible- I'm not Aboriginal. And so I'm a little bit reluctant to comment on the Voice from that. So because of that, because I think we should leave it to First Nation. Also, to be honest, I'm not totally like, I'm not, I've across it, but not fully. But what I what I do feel comfortable saying is that I think it's a very small step forward basically. I think, I think it's, you know, quite quite minor in the scheme of things. And I don't think it's gonna make a lot of difference to what's happening to those kids in Banksia Hill. I don't think it's going to, however, we're also campaigning for human rights act both nationally, and in WA. So we're going to have any bill of rights or Charter of Rights in WA or nationally. Some state have got them. I think that would help because I think that that were brings in the international rights around, you know, what, children children's rights, prisoner rights, you know, not having someone who certainly I think that actually could be really useful. So it's a little bit different, but that's how I think, you know, that sort of change at the federal level.

**M:** And I guess also if you doing that would also enable you to bring in Acts from like the UN Declaration on indigenous rights, which has been ratified by Australia and I know there's also aspects of common law that are because I'm from Hong Kong, so we have a common law system as well. And we have No child rights acts in Hong Kong never have because the way in which common law was Whedon allows it to be very, very skewed in order to the people who are in control. So if you bring in international acts and things and international representation within bringing in new laws, that will definitely be, yeah, will help with the unwritten rules of common law that allow you to get away with it.

**A:** So yeah, and they do have all like the class action, and also, you know, we've we've run some matters previously, like the false imprisonment claims, I think, you know, something that we advise on, and also battery where that had

excessive force using them. So using those common law tortious claims to weak like, yeah, we have been doing that.

**M:** Yeah, I mean, we've covered all the key themes that I wanted to address both in, getting annual analysis based questions, and also your opinion on certain things that I really wanted. I just kind of have one more technical question for the end. In regards to the children that you help out of all the cases that you've mentioned and stuff. How like, successful isn't the word that I want to use? Like, how, how long does it take to like for if you start helping someone out? How long would it take for the like, process to begin in terms of aiding them and getting help?

**A:** Yeah, that's a good question. So when we go and see a kid, so for example, sometimes they'll say, I really need to see a psychologist or a doctor and they're not letting me so we will just do an email literally gonna get back to the office and, and ask for that to be done. Obviously, you would have seen the media or the self harm rates are extremely high. And Brad Pittet has asked quite a few questions in Parliament around some of the stats around solitary confinement around self harm. So I don't know if that's something that's useful to you to look on the WA Parliament website. So we can do that immediate thing, but some of the. So these complaints that we've seen around the systemic issues around the lockdowns to the Deputy Commissioner, we sent the first lot in February 2022. And we haven't got responses to those. And that's in the media, you find that pretty easily. However, we so the lockdowns and systemic issues, just we haven't had responses to, apart from the, you know, what we've done through litigation. But in those letters, we've also put in other complaints around excessive use of force and inappropriate behaviour by officers. So then they get sent to the Department of Justice's Professional Standards division, where then they get investigated, and we've had ah probably 90% Come back unsubstantiated or no breach of discipline. We've had a few where they have said, like, yeah, that officer did the wrong thing. And they've been disciplined. And we've had two office Three hold on two officers, one at Banksia, who was charged with assaulting one of our clients, and that again, if you Google that, his name is Mr. Grifen, Mark Grifen, G-R-I-F-E-N So he was convicted of kids at Banksia Hill. So that, you know, that, that complaints process while I'm not totally that I have full trust in, like, you know, they have charged this guy and he's, I think he's gonna like he's lost his job, we're gonna lose his job. And then we've had another prison officer who was assaulted a child in unit 18. And the trial was parked here that hasn't been finished yet. If he'll get convicted or not, but that's where these professional sounds people look at the footage and and get the police and and actually end up charging them. So that's quite powerful for the kids to know. Because the kids feel like, we're told that we're doing the wrong thing. And like, Yeah, that's fine. We're getting punished for it. But then these guys assault us, pepper spray us, you know, lock us down unlawfully and nothing happens to them. So I think yeah, that's the other sort of side of it that can that can take, I don't know, a few months like not not that long in the scheme of things, I guess. And then to go to court and stuff it takes ages. -inaudible laughs-

**M:** But yeah, thank you a lot. It's incredibly helpful for my research. I don't really want to touch on any other questions because they're quite unrelated to what we've been discussing. And yeah, the only last thing I'd ask is just if there's anything else you want to add any important information that you want me to voice within my thesis, any possible wordings that you think I should be careful



off Because I can do as much research as I want, but I want to make sure that yeah, I phrase things in the right way. And I'm respectful in that regards with names of places, etc.

**A:** Yeah, yeah, one thing I think I saw on one of your theme, one of your piece papers, pieces of paper, Aboriginal has capital A.

**M:** Hahh yeah that's a spelling mistake. I noticed that. -both laugh-

**A:** We ALS we use Aboriginal and Torres Strait Islander. And those First Nations, but yeah, mainly. So I think that's first thing. The second thing is, if you Google, ABC, Perth Youth Justice forum, there was a forum a week ago, and there's quite a lot of media and videos that you can just get off the AB website with me talking. But one of the things that I said that night was it was that was saying that other lawyers at commercial firms are self interested. One of the things I say that I think is important to get across is that well, two things. One is that its staff shortages are the problem. It's not the kids. And the second thing is they weren't like when we say the kids like I know that they I've seen the footage I have, I know that they can get quite serious mischief. But I've seen hundreds of kids over the last 10 years. And I've never felt unsafe, they've always been so polite and respectful to me, Miss, do you want a glass of water like thanks for coming and seeing me, they've just been really lovely. And they've got so much potential. So a lot of them as you probably know, I've got cognitive development disorders. But I said last week, one of HBS in the judgement, she could be Prime Minister, like she's so smart and such a big advocate for her friends. But she's had a really tough life with various traumas in her family, intergenerational trauma. And so I think that I don't like it when we talk about this like deficit model, like all these kids are so damaged, and they've got no no hope. Whereas I think like the they've got so much potential, they're just kids, and they could be the leaders of tomorrow. And yeah, like to try and get that across, when I'm speaking about these issues. But if any of us in that situation would be writing to be honest, you know, like, if you sit a cell for 20 hours alone. You get out so, yeah, it's not to say that they're really amazing kids. And yeah, like we're, we love working with them. And we've found them to be very easy to work with. And, you know, some of them do have extreme trauma infact most of them have an extreme trauma. But yeah, they've got potential that they could be, you know, amazing members of government or footy players or artists or rappers or, you know, whatever they want to be. But unfortunately, this emission if you institution, and we say is I've been here for a long time, we've seen so many kids progress from Banksia Hill to the adult prison, and get more and more damaged and less and less social.

**M:** Yeah, just quickly on what you just mentioned, I saw that video where you were speaking with people and said that quote about how, you know, this girl who could be Prime Minister, for example, and I really, really liked that quote, because I've been trying to, that's something I've been struggling with. I don't want to paint the kids as being just lost of hope. Right. And I don't want to paint them as being I don't think I'm anywhere near and painting them as being the problem. I think I've made that very, very clear that it's not them at all, it's the system. But I do want to try throw in elements of like, there is very clear from their side, like desire for that change to take place within themselves. And it's the system that's not allowing them to do that. Would I be allowed to use that quote from from you in? Like that direct quote from that video? from you in my Yeah. Okay.

**A:** Yeah sure go for it, and im actually seeing her on Friday, she's now in an adult prison. I hadn't after that. I've said that less publicly quite a few times. Since so publicly, so I'll speak to her about it too. I'm sure she'd be fine with it. If there's any issues. I want to say that really public about her. I think she will like it, knowing her quite well. And the other thing is like, brilliant like really the fact that they're not more like that, you know, pretty traumatised, the self harmed pretty bad but the fact that they're going okay is a testament to them and the other thing also is that we've had some clients have gone quite well at Banksia. Like before these lockdowns due to staff shortages happened, but some quite good things about Banksia quite good education, quite good programmes. So again, I think that some Yeah, some kids if they have the opportunity because they've got role models and mentoring and time out of cell. They can be rehabilitated, but not if youre locked in a cell all day.

**M:** Yeah. Yeah. It's just not conducive to anything in any regard. Okay, well, thank you very much. This is very insightful and very helpful.

**A:** If you have any other questions, just flick me an email and I'll write back. Yeah. Yeah. And we can have another quick chat.

**M:** Sure. Yeah. I might take you up on that. Because I was meant to have several interviews last week, but they didn't happen due to personal issues with the people I was interviewing. So then I might get information from them that might be relevant in regards to asking you as the lawyer side of my research.

**A:** Yeah, sure. Yeah. Yeah.

**M:** And if you want, I'm more than happy to once I mean, I'll be in contact with you before this definitely with follow ups or anything in that regards. But I'm happy to share my thesis with you once I'm done. If that's something you'd be interested in to see the approach I took with it and how I did it.

**A:** Yeah that would be great.

**M:** I finish it in November, and then we get public access to it in December. So it'll be around the end of the year that I'd be able to do that because it has to go through the whole grading system before I can send it to anyone. But yeah,

**A:** Sure. That sounds great. Thanks, again to you and look forward to hearing all about definitely, definitely.

**M:** Thank you so much for your help. **Thank you**

### *Annex 3: Tom Penglis Transcript*

**M:** Okay, perfect. All right, so I will start the recording. Yep. Okay, that's started. Alright, so I guess to start off with then could you just introduce yourself what you do for work the relevancy in your role in my thesis, etc.

**T:** So again, so my name's Tom Penglis. So I'm still relatively young, I'm a law graduate at Gilbert and Tobin, which is a big commercial law firm, a commercial national firm in Australia. Um, I guess my more more relevancy your thesis is um, I've got lived experience of WA's criminal justice system in particular, I spent seven and a half months months in prison. And then seven and a half months on parole following my imprisonment. I was imprisoned in Hakea Prison, Casuarina Prison, and Acacia prison all in the Perth metro area. On drug related charges back in 2019 and 2020. Following that, following my imprisonment I cofounded the WA Justice Association which is a student led not for profit um that aims to work with lawyers to support criminal justice advocacy and research and support other NGO's working in that space. And I also am a criminal justice advocate in my personal capacity, and also continue to do criminal justice advocacy in my role at Gilbert and Tobin, through their pro bono practice and through corporate social responsibility activities.

**M:** Ok, perfect, that's very nice and synced. Thank you for that. So then, I guess we'll move on I'm gonna kind of start with kind of like broad legal frameworks and then kind of go into more like nuance experiences and your opinion on some certain things that I want to analyse. So one question which I've been asking everyone that I've been interviewed, interviewing is, what your opinion on the role of the Western Australian legal framework plays in addressing and preventing human rights violations within juvenile detention centres.

**T:** I believe you expand on what you mean by like a framework? Do you mean just like our laws?

**M:** Yeah, laws, ways in which people are convicted, if they do commit any form of human rights violation, just anything within what the state does in order to prevent human rights violations, if you believe that they actively do anything or not.

**T:** Yeah, ok. It's a broad question, I suppose. We definitely do have some legal legal protections of human rights. I suppose like not in the case of enshrined rights. In a bill or charter is something that WA is lacking. Some of the other states and territories in Australia have a charter of rights. And there's there's a push for that in WA but yes, as at the moment, we don't have rights enshrined and so it's, I suppose the protection of human rights, it really comes down to, I guess, cultural appreciation for rights, which isn't really a legal aspect, but also, I think, is this human rights in a justice context?

**M:** Yeah

**T:** Yeah. So the office I think the Office of the Inspector and Custodial Services is a really important institution in upholding the rights of people in prisons. They inspect places of detention and publish reports on their inspections. They are, in my opinion, the main source of accountability in relation to how prisoners are treated, and by extension, whether whether they are really the main driver for the state accountable for protecting the rights of prisoners. That being said, having been in prison myself, there's not really in practice about preventing human rights abuses except for the unless it the human rights abuse ventures

into a breach of the criminal law. So, for example, someone was assaulted unlawfully detained, had their legal rights in some way infringed then by virtue of the relevance to criminal law being breached, I suppose that would protect the human rights of people in the justice context. But in terms of Yeah, I suppose, unless there's a criminal law being breached then there's no real direct preventative mechanism, um from a legal stance, but yeah, I think the Office of Custodial Services in terms of an institution is the most important in WA

M: Okay, thank you. So my thesis is focusing a lot on the role that legal mobilisation has in granting rights to imprisoned people. So that's through forms of like, strategic litigation from, like the lawyer side of it, but then also through like, modes of boycotting and protesting, and there was the because I'm focusing primarily on Banksia Hill, but and there was the protests in May after the riots broke out there. And they really bought what the human rights violations like because of the protests, it became a lot more relevant in like international discourse around juvenile detention centres and how they're treated and how people are persecuted if they do commit human rights violations against detained children. So I was wondering if you had any opinions on the role of legal mobilisation? Because I've been speaking to some lawyers at Western Australian Aboriginal Legal Services. And they were saying that protests and things help in terms of getting things into the mass media. But in terms of from the legal strategic litigation side, it can actually harm them. Because it one brings attention, which isn't always founded in the truth, because people in protests often get Yeah, they tag onto something. And that's what they fight for, which is really good. But it can harm like a court case, for example. Which, do you have any opinions on the role of legal mobilisation, whether it be the strategic litigation side or the more protesting boycotting general public aspect of it?

T: Yeah, so in terms of protecting, like the impact that it has on protecting lives, yeah.

M: And granting rights to people say if there was yeah, if if seeing as WA doesn't have like a written charter of rights, in terms of protecting people's rights. So bringing about like,

T: Inaudible

M: Sorry, you can go on

T: so yeah, I definitely agree with what the lawyers of ALS said in terms of the protests, getting media attention. And I think in WA, especially at the moment moreso when Mark McGowan was Premier, because he has such a centralised grip on political power in WA at the time, the media was really important in shaking things up and upholding the rights of kids in detention, or at the very least, shining a light on the fact that their rights were being weren't being recognised or were being upheld or respected. I think that's particularly the case in WA, because we have a pretty centralised, like, we don't have a very diverse media here. We've got one main newspaper, The West Australian. And it's pretty much like a tabloid now it's pretty much gone to shit, to be honest. So the quality of the source is very, it's like a very important newspaper. And it does, actually has quite a significant impact on politicians. So I dont know if you've had a look particularly around from this time last year when it came as a radar up until the start of this year, that is, like quite a lot of the media coverage of Banksia Hill and maintaining the justice system in general. And that, that ultimately led to like ops, that really only led to funding announcements, but it also led to, I guess,

reform within the Department of Justice. They have appointed Tim Marney to basically try and refresh. Like the strength of the strategic plan effectively on the justice system to try and make it to try and improve conditions, including recognising or limiting the amount of times limiting the frequency of human rights circumstances effectively. So I guess, the very, very indirect protest contributed to that through the media, and the media by intern influences the government. In terms of strategic litigation, I think my personal views that I think it's underutilised. I appreciate that sometimes it can be. I think it depends if you're dealing with a government like under Mark McGown but when it was quiet, it was quite, he wasn't very open to reform, he was really like a vocal and calling them terrorists like the kids terrorist. And he was just like, not having a bar of anything. When you have someone like that in power, like strategic litigation can be really effective because it goes through the course. And you can sort of try and bring about some sort of reform or uphold the rights of kids through the court system when the legislature and the executive branch of government aren't being receptive towards reform and a track record, because I think that's limited because we don't have rights entrenched in a charter of rights. But what limited rights the kids in detention do you have, for example, the Young Offenders Act, the young offenders regulations they the courts can uphold those rights. And I think flip those legal suit, right. So for example, theres the recent ALS case on the solitary confinement of kids, that was successful strategic litigation in our part for the kids rights to not be detained in that manner. That's one example of how I think strategically litigation can uphold the rights of kids? I think there's, I think it's under utilised. I personally think there's other other causes of action, other rights that can be upheld for strategic litigation. But I think ALS the Aboriginal legal service in WA is most of the most appropriate, otherwise appropriate lawyers to either to undertake that strategic litigation by virtue of their unique role in upholding the rights and advocating for Aboriginal clients. I think it's inappropriate for lawyers to come in, and then sort of do what they think is right I think needs to be done correctly. And, yeah, there's also the two class actions being run by Levitt-Robinson. And like, those are also, I think, a good illustration of strategic litigation. I think I've got legs. I think that, like the prospects of those are pretty promising. But yeah, even looking at rights on the other Racial Discrimination Act, Disability Discrimination Act, Equal Opportunity Act, those sorts of, I guess, looking outside the box looking at general protections against discrimination, and saying how they can be applied to this context. Looking at those sorts of Acts, those sorts of I guess they are like those, those acts. So the Racial Discrimination Act that's brought in to protect the rights of all people from racial discrimination. So if you can, yeah, I suppose if that can be applied to kids in detention, and it has been in the case of Levitt-Robinson their class action, like that's an example of strategic litigation upholding the rights of kids.

M: Well, that actually answered my next question, because I was going to ask you your opinion on the class actions that are taking place. So very useful.

T: I think they're really being done really well. I know there's like a lot of Council. My dad's actually, city council is a barrister here in WA and is involved in that class action. So I think when the when the state does mistreat kids, in this particular scenario, when when kids are is treated so poorly, and the state acts in a way that really has no regard for the law? I think it rubs lawyers the wrong way. And because lawyers do respect the rule of law and do respect the law I think it galvanises lawyers to do what they can be it through strategic litigation, providing

probono support to service providers helping kids out. I think it does galvanise the legal community to take action to uphold up the rights of kids or whoever it is having their rights transgressed. Or whatever makes it possible really?

M: Um, yeah, I mean, we've really touched on a lot of the themes that I wanted to touch on through answering some of the other questions I have. I have another very broad question that I like to ask everyone. I kind of start with a board and end with a board. So I had I read this in the best way. What do you think from the government side? So not taking into account actions of lawyers and stuff? What do you think the first, or I guess the next thing, the first thing they need to do in order to ensure, like, enable for places like Banksia Hill to not continue to have these strict lockdown things to have mass human rights atrocities take place on a daily basis? What do you think step one, not thinking about how like, in terms of like, what's actually like, realistically, the next thing that could happen, but what do you think the main thing that needs to happen is? Does that make sense?

T: Yeah, I mean, from a practical perspective, I guess I'll answer in two way. From a practical perspective in the immediate term, what needs to happen is this they need more staff because if they have more staff, and no matter who that is, and I think that should be people from external agencies who are willing to help because there are a lot of them. They just need more people in their staffing. So they're not constantly locked down. So that kids can actually spend more time outside, spend time in education, spend time in recreation, you know, spend time doing what they should be doing to rehabilitate and be treated and be set up as best as possible for their release. Because if there's not if there's not sufficient staffing then you're just never going to be able to provide them with the services that they actually really need. Idealistically, I think, they just the government just needs to be significantly more sensitive, and work with community, particularly Aboriginal community controlled organisations, Aboriginal people, Aboriginal communities to reach solutions that are effective. They need, I guess, overarching everything I think, youth justice policy needs to be needs to be driven by what works and what will reduce long term offending and promote long term communitiy safety. Eat. And that is not achieved through punitive measures. The reason why a significant reason why the justice system and crimmlinal justice in general is so undefined and so poorly resourced, so bureaucratic. So I guess resistance to reform is because the electorate, like the voters don't care about principles that I care about kids who are in detention, for the most part, because their viewed particularly in WA, which is, for Australia is quite a conservative state. Most people just don't care. Like they they're like, they're basically the attitudes effectively, oh, well, you did you did the crime you did the time, why should I get to she's about how his kids treated, they did the wrong thing they should be punish. And it's hard to have a very reformative, you know progressive, youth justice system through by government, when government doesn't have any incentive in terms of increased like votes, but they wont get more votes if they are reformative or progressive in that area. Because it just doesn't win votes. It's not politically popular. So I think, really what needs to change is attitudinal shift from government to just say, Okay, well, we're going to do this, even though it's not politically popular in the short term, because it's the right thing to do in terms of not only what's right for the kids in protecting their human rights and actually treating them humanely. But also, it does actually benefit the community in the medium to long term because it means that these kids

that are going to not only not commit crime, which means not produce further victims of crime, but they will hopefully become happy, healthy contributors to society who promote economic growth, who contribute to healthy communities, vibrant communities, all that sort of stuff. So it's just a really fundamental attitude bullshit that I think that needs to be. If I could ask for one thing it would be I think that won't realistically happen. Unless and until the community becomes more educated in this area, because I didn't know anything about like the evidence base in the space until I went to prison and got out. I had that reason to understand and like dive into it you just like don't learn it in school, you don't really learn it in the media unless you have an interest in it. The average Joe on the streets doesn't really know anything about it. So it's very hard to yeah there needs to be a fundamental shift in terms of their perception of criminal justice, and also a shift in government.

M: Yep. Yeah. Very, two very answers on both sides of it. Um, I guess then just to wrap up, because we've hit on all the different themes that I wanted to hit on. Is there anything that we haven't discussed that you'd like to discuss? Anything that you think, yeah, knowledge that you have that might be useful? Or? Yeah, just anything at all?

T: Good question,

M: you can also, think about it and shoot me an email if you think of anything, or you can obviously say no, if there's nothing you can think of, but if you want to have a little think of it, you can also do that if that's easier.

T: Awesome. Yeah. I might have a think as im sure that there's definitely a lot to talk to, I suppose another thing would be like, there needs to be a big shift towards justice reinvestment so spending, justice reinvestments a really broad term but those sorts of policies where you're investing in communities, community based solutions to prevent crime or intervening when a kid is going to start offending or is offending, not just locking them away in the justice system, but really investing heavily into those measures, as opposed to spending hundreds of 1000s of dollars looking up the same child each year. Just from an economic standpoint, it makes perfect sense to spend less money on more effective measures, which is justice reinvestment. But also in terms of achieving improved justice outcomes, it makes perfect sense to invest more in those justice reinvestment initiatives. And I think also raising the age of criminal responsibility is an extremely important measure. And that's one that's been advocated for for years now. And it's not going away. And it's one that I think we'll see movement in the coming months, I think there's going to be an announcement that the age will be raised to 12 in some jurisdictions, it's already been like raised to 12 in the Northern Territories and in the ACT it's either been raised or is going to be raised to 14 i think. So I think that's another important measure, that has to be coupled with justice reinvestment in the most appropriate measures for kids aged like 10 and 11, who will no longer be going to prison. Like we need other measures to make sure that if they do offend, they are given the support they need to rehabilitate. But I think that raising the age is critically important because if you're locking kids up at 10 years old. Especially in WA where we've got one youth detention centre. So if a kid gets arrested, they get shipped to 2000 km's way to come down here to Perth. That is a big outrageous breach of that kid's rights. So avoiding that as much as possible by raising the age I think is a really important measure. I'll have to think about other measures, like other things. I'll

have I'll have a read over the questions as well, because I think that might give inspiration on things to say. But yes, but yeah, I think for now that's probably it.

M: Okay. Well, thank you very much for your time. And yeah, you have any questions for me also, on the consent form, it says that if, at any point, there's anything, which you don't want me to include in my thesis that you stated, you can let me know, at any point. And I can remove that. So it won't be included. I just like to remind everyone of that. And if I have any questions for you, I'll also shoot you a message. I'm going to transcribe this interview tomorrow. So sometimes it's just the audio doesn't quite pick up a phrase, and I can't figure out what it is that you say. So I might have to reach out and ask, but it should be shouldn't be a problem. But in case it is. Yeah.

T: No worries at all thanks for letting me know. I'd be really keen to write your paper. It's really interesting from an international perspective, it's kinda concerning that it's like such a big deal.

M: Yeah, we hand them into November, and then they have public access in December, so I'll be able to send it over

T: Yeah, awesome can't wait, Christmas reading!

T: As well, I was going to suggest, I don't know if you're like, how stressful or how short the time you are in consultations, but I can think of a couple of contacts Megan Krakour would be really good. She's like a massive advocate in the youth justice space she's an Aboriginal woman. And she works directly with a lot of the kids in the Banksia And also, Dr. Hammock Way is an Aboriginal academic in WA. She is I can't remember She's a member of the UN Aboriginal I'll have to double check but I'll send you the profiles. And if you if you'd like to consult with them I can get you in touch.

M: I've been in touch with Megan like last month and then something came up so We never got to do an interview. But yeah, it definitely reminded me I need to get back in touch with her. But yeah, if you think of anyone, I'd be very grateful. Because I mean, I think on this topic, I'd like to just be able to speak to as many people as possible. Whenever I use everyone's interview in my analysis, I just, I don't know. But I think it's just something Why should try and get as many different points of experience as possible.



#### *Annex 4: Dana Levitt Transcript*

**M:** Okay, so, it'll just be easier for when I do my transcript. Okay? So I'm not going to go in the order that I sent the questions. And I'm also not going to cover all of them. It's just going to be like a general overview, and we'll see where it makes sense to go as we go along. Okay, so I'm gonna start with legal consciousness and legal awareness, because I think that's quite important from your standpoint. So as I stated in the question, legal consciousness and legal culture is at, like the forefront of my research, understanding where lawyers who are involved in this are coming from and their positionality and the their individual awareness, but also firms awareness on where they stand on these rights being both an indigenous issue and something that is focusing on news. So could you maybe just talk about both your personal positionality in regards to this and also the firm's positionality on how you take a stance on this?

**D:** Shawn, the firms senior partner at the firm is my father, who has laid the groundwork for a thriving human rights practice. The reason for that is because he successfully sued the Queensland Government and got a public apology for institutional racism from them in relation to the Palm Island riots, which also resulted in \$30 million worth of compensation to about 300 people, 100 people even I can't remember the exact numbers. But it was a precedent setting case, not only in terms of the compensation value, but also because of the legal principle that it advanced. And since then, he has and the firm has had a reputation for doing things that other people haven't done yet. And certainly using class actions as a vehicle to drive social change, and also hold governments to account. I think that the interview happening today is timely, and that the disability disability Royal Commission is going to hand down their report imminently. And those recommendations, a lot of them will relate to the treatment of disabled people in a detention setting, not only children, but adults. And those recommendations have been made before and they'll be made again, in the same way that you know, there's oversight bodies that go into juvenile prisons and ostensibly ensure that they're up to scratch and that children and even adult prisoners are being treated appropriately. Now, time and again, they find that, in fact, that isn't the case, and nothing happens, right. So unfortunately, oversight bodies, Royal commissions. And recommendations don't seem to result in any real change. The only thing that seems to result in change is litigation. Because when you're faced with a big bill, it's harder. And that's a court enforceable bill. It's harder to shirk your responsibilities into to pay lip service to things that people are saying and know to be true, without any real intention of carrying them carrying them out.

**M:** Okay, that's very helpful. Thank you. And I think another element of legal consciousness that goes into it is, I think speaking, maybe from your standpoint, it's the idea of like your view on the law, right. And if we're talking about both the US and indigenous people, there was a very big distrust towards the law and criminality system, because in regards to indigenous people, the way they've been persecuted over time in Australia, and the social availability towards the law, both through education systems, but also just how they've been treated. So I mean, one of the very clear examples is the stolen generation, why it brings a lack of trust in the criminal system? How would you say that these class actions, the way that both you're carrying them out, and also what they're aiming to do kind of bridges that gap between showing that the law can be used for good and

that it can be used as a tool to aid these people and show that there is trust within the law that does exist?

**D:** I think that there are two things going on here. I think that trusting people in uniform and trust in authority, trust in the people who are enforcing the law, or their misinterpretation of that law. In gender Fear and Loathing in indigenous populations both in Australia and worldwide. And rightly so. At the end of the day, people who have nothing who have nothing and have no social capital who have, who come from very disadvantaged backgrounds who don't have the capacity in the real sense, many of whom are disabled and born with into foetal alcohol syndrome and other intergenerational byproducts of colonialism have no options. And Australia, Western Australia specifically is one of the IS is one of I think it's the only place in the world that imposes mandatory sentencing on on people's you understand. So, three strikes, you steal an apple, you steal a bottle of water, and you son, some other you can meet some other petty crime in one go, that's mandatory three months detention, right. So, and then what you do is you put children who have nothing and come from nothing, and who are probably going to go back to nothing, you put them in an environment that re-traumatise them, that that is punitive in its entirety, that has no rehabilitative or therapeutic or trauma informed or age appropriate support for these kids. And they leave worse than they came in if they don't graduate to adult prison and become institutionalised for the rest of their lives. And indeed, there hasn't been a juvenile death in custody in Western Australia. Yeah, but there has been one in Tasmania and already in the Northern Territory. And it seems to me that until it doesn't even really make a difference. Even when they raise a juvenile death in custody. They're the Australian public has a unique ability to follow that away under miscellaneous, what you find here about raising social awareness and social consciousness, and there, there is a social movement, but you're really preaching to the choir to some extent, so converting people that aren't already on your side. And we're seeing this play out, we've got a referendum upcoming about the voice to Parliament, and whether indigenous people don't have a say in the laws that are made about them, which in and of itself is the most revolting, repugnant kind of paradigm. I mean, who are we to tell them whether they can have a say in the laws that affects them make the whole thing is topsy turvy. And the messaging has been topsy turvy. And what's it, it's given? factionalism a platform to thrive, and that's what we've seen. So racist people have become more racist. And unfortunately, the people on the other side who have been lobbying for the voice to Parliament haven't been using their voice when they could have been using their voice to pipe up and say, Hey, how about not torturing children in detention? Right? Or how that opening when the Special Rapporteur on torture comes to? Australian jails? How about opening the fucking door? Right? I mean, we don't allow the Australian Australia's human rights record is abominable. It's really, really, really appalling. It really is, if you consider, we've got refugees in concentration camps, we've got 10 year old kids held in sells for 23 hours a day in circumstances where if they were with their parents, they would be removed for child abuse. We've got kids that are managing to, you know, self harm and attempt suicide and be revived sometimes three times in one day. I mean, it beggars belief, but people don't know about it, and people don't want to know about it. And people don't want to know about it, because it's depressing. It's very depressing, and it's very demoralising. And the problem is so big, it's hard to know where to start. But what I think class actions do, and certainly, in terms of, you know, bridging the gap that you read that you mentioned before between

distrust of criminal justice and, and lawyers and the legal system is you galvanise and you get people who have no hope, something to believe in, and something to work towards. And like, I get calls from prisoners all the time, who are adults now who might have, you know, graduated, but they remember what happened to them as kids and they don't, and they think it's fucking wrong, and they want to do something about it. And this is a vehicle for them to have some autonomy and feel like they have some power in in circumstances where they've never ever had any.

**M:** Okay, thank you. Um, you kind of already touched on this, but

**D:** I know you get a lot out of my mouth. It's

**M:** very useful. But very, very helpful. Thank you very much. You kind of already touched on this when you're talking about like the public's legal consciousness and awareness of what's going on and their lack of willing to want to learn because of the brutality of what's really going on. Obviously, class actions, as you said, really helping this in terms of helping those within the system. But what would you say is the best way to bridge that gap between the public and what's going on because Mark McGowan's now stepped down and obviously he led a very, very harsh stance on what was going on in banks are anxious. But what would you say is the main like tool that can be used by maybe social movements? Or even lawyers to really bridge that gap and help? Or do you think that there isn't really one individual thing that could be done?

**D:** think it's, I mean, everything that I do is personal, if that makes sense. So I I'm on the coalface like I speak to clients all day long. And that's why when you know, there's riots and Banksia Hill, and there's pictures of kids being held, with bright place and rifles to their heads, I take that very personally, right. So it's takes time to establish and engender trust. And it comes down to having people it's essential to me being able to do what I can do in Western Australia or Queensland is the fact that I'm not from there, right? Because people from inside those states have been silenced into submission by threatening public disclosure boards, etc. So people are actually scared to say anything. And also people, my clients have had such a shitty time with lawyers from within their state that they don't trust them. So having someone within the community that you're trying to, you know, make it like, you have to have grass roots, or on your side, brown people and black people on your side, who believe in you and can make those introductions, and then you actually have to prove that you care about it, right? Because it doesn't take long for people to work on whether you're genuine or not. And I think the fact that people actually get to deal with me personally, right, and that I establish those personal relationships with people, is how I manage to run actions from 1000s of kilometres away, because I've got people there, who are going to go next door and get, you know, Bob to sign his paperwork, do you want I mean, yeah, so people who are actually there to logistically assist, or people who, you know, can go in and visit kids that aren't doing well, you know, and also establishing good relationships with whistle-blowers, and undercover officers that take a very long time to, to like, you know, get people to trust that you're not going to throw them under the bus and also that you're a force for good and not for evil.

**M:** Yeah. Yeah. This is very nice. You're easily linking everything together quite well. So on that, note, that you're talking about grassroots and whistle-blowers, etc. One of the large elements of legal mobilisation is lawyers working

as that translator role, especially for NGOs, I've been in contact with Aboriginal legal services, Western Australia quite a lot. And the Western Australia Justice Association, they've been like two of the main people that I've been in contact with, but I was wondering, from, like, the role of these NGOs in these class actions, like specifically what it is that your firm like, utilises them for? Because obviously you said that you have them what ALS

**D:** is not an NGO. Yeah. Government funded, right. Yeah. So ALS, ALS, his role in advocating for their clients is limited by the fact that they are government funded, right. So once they can agitate they can't agitate to the same extent that a private can, right because they're getting government money. Yes, me. Yep. Yep.

**M:** So yeah, my following question was going to be so.

**D:** Yes, so I guess als has been doing a lot of good work to advocate for their clients. On a sort of small group basis, like one or two or three clients at a time. Yeah. About very specific points in time. Right. So the what they're doing is micro, as opposed to macro, if that makes sense. So, strategy in terms of advocating for individuals versus advocating for Sikhs and like 1000s of individuals, basically, you know. So there's a fundamental difference there also. I mean, as private lawyers from outside of Western Australia, I don't we're not fettered by anyone else, we can say what we want within the scope of law. Right. So yeah, we're, we're kind of we run out. We're running our own race. And we're not, we don't just subscribe to state politics in the same way that others do it.

interesting. So another element of legal mobilisation is social movements role in bringing about awareness of what's happening. So in the case of this, I'd say a lot of that comes down to like the online presence and the maintaining what's happening in the international eye. So obviously, I'm not from Australia. But I know about all of this because of seeing on social media, for example, seeing in the news quite regularly. But I've learned that there's kind of this disconnect between the social movements and lawyers in regards to what's happening. Because some lawyers mentioned that

**D:** not with me. No, okay.

**M:** Could you elaborate on that? Because I was quite shocked when I say

**D:** I'm in your seat. Where, where, as private practitioners, we go on the record, we conduct media and panel interviews, we've done we do a lot of we do a shitload to ensure that we generate maximum attention for whatever we're trying to achieve. So like, I mean, Stuart and I were in Toowoomba, not last week, the week before for an inquest into an Aboriginal death in custody. And it we made sure that every day there was a headline every day, there were quotes that were, you know, newsworthy and noteworthy, because it's, it's the media and the press that has the power to generate awareness, not the law. So there's judgments every day about very important things, but unless they reported on, no one knows about them, and no one has, right. So by and also by maintaining, well, it doesn't work, in the case of the states in Australia that have just been well, for a number of reasons. And, and I don't know, I can send you some things for rate if you haven't read them already, that will speak to this. But in order for there to be social change, there has to be real political will, and, or some sort of public support. And you don't have that in Australia, because white people are quite happy to lock up black kids and throw away the key, right? And

people who don't live and see and, and they haven't come into contact with it through their work like I have or whatever. It just kind of get to ignorance is bliss, basically. But it's only by ensuring that you ruin people's fucking sunrise morning by making sure that you're like making headlines about you know, Banksy Hill riots about the Department of Justice lying about their things sex Tres, I did all this last earlier this year, I made sure that they couldn't peddle their bullshit around by getting, getting people that I I mean, it wasn't from me that they bought the lie didn't tell them about the six truths going on inside because I wasn't there. But detainees could tell her about that too. And I mean, so giving people a platform, and a voice and a vehicle to actually tell their truth through the media when they would otherwise have none is also empowering for people. It's like the lead applicant in the the bank CEO class action. Her name is **NICOLE**. She wanted to be named because for her, I'm like, **NICOLE**, you're making history. At the end of the day, kids will be learning about this in law school. You're not just some random white faceless acronym like v Y, Zed, you **NICOLE**, you're a champion of a cause. And you're gonna like I'm in. I want my name on his bow. So we're given the opportunity there's all the and also the other thing that happens often is that people people, especially governments, and authorities try to use the law especially the law around suppression orders and everything. Suppression of perpetrators name suppression suppression of, you know, public officers doing the wrong thing suppression suppression content. aim of containment ostensibly to protect the victim, not the perpetrator. But what actually happens is by not giving anyone a name, by having it all, you know, with acronyms that no one's gonna remember it, it doesn't have that personal cut through all that fight, right? So if you're going to connect with an issue, or you're going to connect with something that you don't know anything about, and you have no reason to know about, the way that's gonna happen is by having a Facebook ad by seeing someone's pain, and by knowing what their name is, right. And unless, and until people are given either the opportunity to do that to speak about their own experiences, it doesn't happen.

**M:** Yeah, I'm just having a look through all my questions that I had. And towards I think we've covered every, like, key thing that I really wanted to do to address because as I said, this was mainly about

**D:** the I mean, the one thing I think, the Yeah, no, no, I can, I'll send you through some stuff that I've liked some research that I've already put together. If you want, it's almost like a literature review of it'll be actually super useful for you. So happy to have you on. Yeah, definitely.

**M:** Thank you so much.

**D:** Because it's like a summary of like, a lot of stuff. And it's all referenced properly. I, like I studied for a long time. Yeah, I'll send it to you and feel free to use it. Thank you. Just don't obviously publish it or share it. Wider. Yeah, of course. Because, yeah, yeah. But I'll send it to you no problem. But the intersectionality point is a huge, it's a huge point to really move on. Because so like, obviously, between 70 and 90% of people in Banksy hill at any one time are indigenous, of that 70% To 90% 80 to 90% of them are disabled. Right? So the intersectionality between race and disability is huge. Right? Then, disability and criminality, perceived criminality also go hand in hand because the kids that have undiagnosed disabilities go into the tension are not provided with any supports are not diagnosed or not support like they're not medicated, treated, managed in any way, shape, or form. So if you're a kid, who sometimes comes from say,

Kalgoorlie, which is 1000s Western Australia's a huge state, right, so being plucked as a kid from Kalgoorlie, sometimes English is your fourth language. Aboriginal English might be you know, like the closest thing you have to English. And you also have some neurological impairment that results in a language disability, right, or an audio disability. So you're plucked from Cowboy, you're stuck on a plane by yourself. You're stuck in into a custodial environment, a very shooting one at that one that is decrepit, and falling down. And just like revolting, basically, right? poo everywhere, like it's the pits really, right? You're stuck in there. And you've got nothing to do all day, you're locked down your soul, you don't know what the fuck is going on. You don't understand what's going on, and you're locked down and yourself all day? How do you think you're gonna react, you're probably gonna look at your guard the wrong way, you're probably not gonna like, I didn't do what they tell you to do in the requisite time that they allow you. And then you accrue a whole bunch of charges for detention offences. So they things that you did wrong while you're in detention. And then that results in you getting more time to serve, and it just spirals out of control for a minute. So what you have is kids who go in and haven't done sometimes the in there on remand even haven't even been sentenced because they don't have a home to go to. And because the state hasn't been able to provide, you know, a safety net capable of housing children that have not yet been sentenced or found guilty of a crime outside of a custodial environment. That's the state's problem, right? But these kids are in there. And they get exposed to all these shared, they are traumatised, they're all fucked up. And then they never ever, ever get to a point where they leave better than they went in. It's always was. So from the moment they enter ACCION, their life is on a downward trajectory unless something extraordinarily extraordinary happens. Right? Unless they have someone extraordinary, advocating for them and pushing them to do whatever they need to do to get the support that they need. Like most of these kids in detention are disabled don't even have access to the NDIS which is the National Disability Insurance Scheme, right? That's money. That is the government has supposedly, to ensure that disabled people supported wherever they are. Right. And most of the kids in there don't have access to NDIS funding and haven't even been diagnosed with a disability, even though they all have one. So the prospects of anyone really being rehabilitated or not, are not leaving worse and they went in is negligible.

**M:** Yeah. Okay. Well. Well, on that note, I think we can wrap up because as I said, yeah, we've really touched anything in that last little point on intersectionality was very helpful. Oh, God. But yeah, we've covered all the key elements that I really wanted to discuss with you. And yeah, it was incredibly helpful. Thank you so much. Yeah.

*Annex 5: Letter Communications between ALSWA and Minister of Corrective Services*

EXP.0088.0001.0010



**Aboriginal Legal Service of Western Australia Limited**

ACN 617 555 943

14 December 2021

The Honourable Bill Johnston MLA  
Minister for Corrective Services  
*By email: [Minister.Johnston@dpc.wa.gov.au](mailto:Minister.Johnston@dpc.wa.gov.au)*

CC: The Honourable John Quigley MLA  
Attorney-General  
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Andrew Beck  
Deputy Commissioner Women and Young people  
Department of Justice  
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Colin Pettit  
Commissioner for Children and Young People  
*By email: [Colin.Pettit@ccyp.wa.gov.au](mailto:Colin.Pettit@ccyp.wa.gov.au)*

Dear Minister

**Lockdowns and conditions in Banksia Hill Detention Centre**

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The Aboriginal Legal Service of Western Australia Ltd ('ALSWA') regularly acts for young people who are detained at Banksia Hill Detention Centre ('BHDC'). We have a number of clients currently detained at BHDC and are writing to raise our concerns about the conditions there currently.

**Lockdowns and time in cell**

We have been instructed by numerous clients that there have been frequent lockdowns at BHDC recently, causing young people to spend lengthy periods of time in their cells, essentially in isolation. As you are aware, Aboriginal young people and young people with a severe neuro-disability are overrepresented at BHDC and so are suffering disproportionately from these conditions.

1

We are instructed that young people in the general units of BHDC are experiencing 'rolling lockdowns' due to insufficient staff to unlock the units. Our clients instruct that they have only been permitted to leave their cells for between 30 and 90 minutes each day. Some clients have instructed that there have been days they do not receive any time outside their cell, including over the weekend 4-5 December 2021. As a result, the young people have been unable to attend school or courses, they have been eating most of their meals in their cells, and spending most of their time alone without meaningful contact with their peers. As the young people can only make telephone calls while their cells are unlocked, the lockdowns are significantly reducing their opportunities to contact family and loved ones. The impacts of this isolation are compounded for the many young people in BHDC who are from regional areas, as telephone calls are their only way to stay connected to family.

We note that it is not only ALSWA clients who have been detrimentally affected by this. We refer to the recent article published in the West Australian on Monday 6 December 2021 (see *enclosed*) concerning a young person who had instructed his Legal Aid lawyer that he was locked down in his cell 'for almost 24 hours per day'.

#### **Critical incidents**

In addition to lockdowns due to staffing issues, we understand there have been a number of lockdowns as a result of critical incidents at BHDC. We are instructed this has included young people climbing onto fences and roofs in the Centre, instances of self-harm, and other behaviour from distressed and frustrated young people. We are especially concerned about these critical incidents given the prevalence of neurodevelopmental impairment amongst our clients at BHDC. It should not have to be said that isolation is likely to be harmful for any child, and particularly those with mental disorders. Such placement reduces opportunities to use coping techniques to manage symptoms of mental illness or distress.<sup>1</sup>

We are gravely concerned by reports of the recent conditions at BHDC, as we recall similar periods of building tension at BHDC in the past. We refer to the Inspector of Custodial Services' 2013 inspection of BHDC after the riot that year.<sup>2</sup> In that report, the Inspector commented on the ongoing issue of excessive lockdowns that had been occurring in the lead up to the 2013 riot. The Inspector formed the view that 'that regular and prolonged lockdowns had contributed to detainee frustration and to the riot itself'.<sup>3</sup>

After the riots and incidents at BHDC in late 2016 and early 2017, the Inspector conducted another inspection. Again, the Inspector found there had been a period of significant lockdowns and commented that 'both staff and young people stated that the lockdowns contributed to

<sup>1</sup> Danny Sullivan and Adam Deacon, 'Solitary Confinement: Going Down the Rabbit Hole', *Medical Issues* (2016) 24 JLM 20.

<sup>2</sup> Office of the Inspector of Custodial Services, 'Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013' (Report No 85, July 2013).

<sup>3</sup> Office of the Inspector of Custodial Services, 'Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013' (Report No 85, July 2013) 35-36.



behaviour management issues and incidents.<sup>4</sup> The Inspector also found that:

Staff shortages were common on weekends, with the centre short staffed on seven out of the nine weekends in June and July 2017. In response to those shortages the centre often implemented a program of rolling lockdowns, with only a certain number of young people allowed out of cell at a time. The number of young people allowed out of cell depended on the number of staff available to supervise them.

The conditions in BHDC in 2013 and 2016-2017 were described in remarkably similar terms to the recent instructions we have received from our clients.

#### Access to lawyers

ALSWA lawyers and court officers are also experiencing increasing difficulty contacting our clients at BHDC, with lawyers frequently unable to access BHDC due to lack of staff, lockdowns and booking issues. When ALSWA staff are able to enter the Centre, they have experienced lengthy delays having young people brought to visits, resulting in minimal time to meaningfully take instructions and advise clients. As stated above, many of our clients have neurodevelopmental impairment and it is imperative that they are given adequate time with their legal representatives to receive advice and for instructions to be taken in an appropriate way. For many of our clients, this necessarily involves meeting in person.

We also note a recent change in the accessibility for young people to contact their ALSWA lawyers. Previously, in our experience, young people in BHDC could call their lawyers directly. However, ALSWA lawyers have begun receiving emails from BHDC, requesting that lawyers book calls with clients who have requested to speak to them, often stating that the client is distressed or anxious. The process of a lawyer booking a call can take over 24 hours to arrange, which can exacerbate the young person's distress. We ask that this process be reviewed to ensure young people have access to their legal representatives in a timely manner.

We urge you to act on the above concerns as a matter of priority. We ask that you provide a full response to the concerns outlined in this letter.

Thank you for your consideration of this matter and we look forward to your response.

Yours faithfully,

**Redacted**

**Peter Collins**  
 Director Legal Services  
 Aboriginal Legal Service of WA Ltd

<sup>4</sup> Office of the Inspector of Custodial Services, '2017 Inspection of Banksia Hill Detention Centre' (Report No 116, February 2018) 23.

*Annex 6: Letter Communication between ALSWA and Minister of  
Corrective Services*

EXP0088.0001.0021



Aboriginal Legal Service of Western Australia Limited

ACN 617 555 843

4 May 2022

The Honourable Bill Johnston MLA  
Minister for Corrective Services

*By email: [Minister.Johnston@dpc.wa.gov.au](mailto:Minister.Johnston@dpc.wa.gov.au)*

CC: The Hon Simone McGurk  
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The Hon John Quigley MLA  
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The Hon Dr Tony Buti MLA  
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Andrew Beck  
Deputy Commissioner for Women and Young People  
*By email: [Andrew.Beck@justice.wa.gov.au](mailto:Andrew.Beck@justice.wa.gov.au)*

Dear Minister

**Need for trauma-informed, culturally-appropriate model of care at Banksia  
Hill Detention Centre**

I refer to previous correspondence about the conditions and ongoing lockdowns at Banksia Hill Detention Centre ('BHDC'). Thank you for meeting with us on 17 March 2022 and for your letter dated 27 April 2022.

I welcome the Government's announcement that it is investing \$25.1 million towards improving services for youth in detention as part of its 2022-23 State Budget, in particular that a newly developed contemporary model of care for children in custody will be implemented in the near future. This is most important as BHDC has been in dire need of a trauma-informed model of care for many years. Many reviews and inquiries have already scrutinised the issues and made pertinent recommendations. I write to highlight some of the considerations and recommendations I hope will be taken into account as the Department works to improve the conditions at BHDC.

1

### The children and young people held at BHDC

As you are aware, many of the children held at BHDC have significant impairments, traumatic backgrounds of abuse and neglect, and diagnosed complex neurological disorders.<sup>1</sup> In 2018, the Telethon Kids Institute found that nine out of ten children incarcerated at BHDC had some form of neuro-disability. Their research found that 89% of the children had at least one form of severe neurodevelopmental impairment, while 36% were found to have Fetal Alcohol Spectrum Disorder.<sup>2</sup>

Many children in BHDC have complex developmental trauma, caused by multiple traumatic events that occur during early childhood years and adversely affect their development. In 2018 Churchill Fellow and Senior Clinical Psychologist at the Department of Communities' Kath French Secure Care Centre, Dr Kelly Thompson published a report on care frameworks for children requiring secure care. In that report Dr Thompson states:

There are now vast amounts of research revealing that not only do these experiences shape who children become, and how they perceive themselves, others and the world, but they also change the neural structures in the child's brain. When early life experiences teach children that the world is a dangerous place, and that people can be scary, harmful and absent, these children learn a set of strategies to cope with the overwhelming feelings; often strategies that are unsafe and counterproductive. Their brain becomes wired to identify danger and react in ways to keep them safe; for some children this means constantly being switched on to 'survival mode', limiting use of the higher order brain structures.<sup>3</sup>

In a 2020 report, Human Rights Watch examined the risk of self-harm and death for adult prisoners with disability in Western Australia (*copy enclosed*). They attributed the high rate of harm to the deteriorating conditions of confinement, the inadequate access to support or mental services, and the overuse and harm of solitary confinement.<sup>4</sup> From their research, Human Rights Watch found that prison staff were not adequately trained in disability and mental health, and people with disability were often put on confinement or punishment regimes because staff could not distinguish between conduct that stems from the disability or a mental health crisis and one of defiance. Human Rights Watch further found that instead of providing psychosocial support, prison staff would reprimand or punish the prisoner for behaviour that is

<sup>1</sup> Office of the Inspector of Custodial Services, *2021 Inspection of the Intensive Support Unit at BHDC* (Report, March 2022) iv, accessible at <https://www.oics.wa.gov.au/reports/141-inspection-of-the-intensive-support-unit-at-banksia-hill-detention-centre/> ('OICS Report').

<sup>2</sup> Carol Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 (2) *BMJ Open* 1.

<sup>3</sup> Kelly Thompson, *Creating a secure foundation for children at risk: examining care frameworks, stay duration and transition planning for children requiring secure care* (Report, 2018) accessible at <http://www.churchilltrust.com.au/fellow/kell-thomson-wa-2018/> ('Thompson Report').

<sup>4</sup> Human Rights Watch, *'He's Never Coming Back': People with Disabilities Dying in Western Australia's Prisons* (Report, 2020), accessible at <http://www.hrw.org/au/au/2020/09/15/hes-never-coming-back/>, eo, le-disabilities-dying-in-western-australias-prisons ('Human Rights Watch Report').

perceived as 'disruptive', 'disobedient' or 'acting up'.<sup>5</sup> Aboriginal Legal Service of Western Australia ('ALSWA') staff have observed almost identical approaches being adopted by BHDC staff towards disabled, mentally impaired and traumatised children detained in BHDC. In the case of Aboriginal children in BHDC, their situations often have an added layer of complexity where many have not only experienced direct trauma but also the impacts of inter-generational trauma associated with colonisation, dispossession and oppressive governmental policies.<sup>6</sup>

#### Need for trauma-informed care

The philosophy at BHDC needs to be grounded in rehabilitation and therapeutic, trauma-informed care for young people. It is important that behaviour is managed in a therapeutic, non-punitive, non-adversarial, trauma-informed way.<sup>7</sup> The Inspector of Custodial Services is of the view that there needs to be at the very least, an equal focus on welfare needs alongside custodial needs.<sup>8</sup> In particular, ALSWA is very strongly of the view that staff safety at BHDC should not be prioritised at the expense of therapeutic, non-punitive, non-adversarial and trauma-informed approaches.

Service providers working with Aboriginal children in BHDC also need to be aware of the impacts of inter-generational trauma and the need for individual therapeutic care, termed 'trauma-specific care'.<sup>9</sup> Dr Thompson is also of the view that any model of care needs to be flexible and to allow for individualised application, to reflect the varied needs of children with trauma and the fact that 'no one size fits all'.<sup>10</sup>

Professor Judy Atkinson published a resource sheet in 2013 entitled 'Trauma-informed services and trauma-specific care for Indigenous Australian children' (*copy enclosed*). In this resource sheet, Professor Atkinson outlines the core values of trauma-informed services with eight principles:<sup>11</sup>

- i. Understand trauma and its impact on individuals, families and communal groups;
- ii. Promote safety;
- iii. Ensure cultural competence;
- iv. Support client's control;
- v. Share power and governance;
- vi. Integrate care;

<sup>5</sup> *Human Rights Watch Report*, 16.

<sup>6</sup> Judy Atkinson, *Trauma-informed services and trauma-specific care for Indigenous Australian children* (Australian Government Resource Sheet No. 21 Produced for the Closing the Gap Clearinghouse. July 2013), 5, accessible at [http://www.aihw.gov.au/etmsmedia/e322914f-ac63-44f1-8c2f-4d84938fcd41/cte-rs21\\_.df.as;x?mline=true](http://www.aihw.gov.au/etmsmedia/e322914f-ac63-44f1-8c2f-4d84938fcd41/cte-rs21_.df.as;x?mline=true) ('*Atkinson trauma-informed services resource sheet*').

<sup>7</sup> *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017), Recommendation 19.1, accessible at <https://www.royalcommission.gov.au/child-detention/final-report> ('*Northern Territory Royal Commission Report*').

<sup>8</sup> *OICS Report*, iv.

<sup>9</sup> *Atkinson Trauma-informed services resource sheet*, 2.

<sup>10</sup> *Thompson Report*, 29-35.

<sup>11</sup> *Atkinson trauma-informed services resource sheet*.

- vii. Support relationship building;
- viii. Enable recovery.

At the Inquest into five deaths in Casuarina Prison, Coroner Jenkin heard evidence from Director Medical Services Dr Joy Rowland. Coroner Jenkin cited in his findings Dr Rowland's evidence where she discussed the need for 'Trauma Informed Correctional Care' ('TICC') as follows:

Dr Rowland pointed out that given higher rates of trauma histories among correctional populations as well as the increased potential for both new and re-traumatisation within correctional facilities, TICC is increasingly being considered and adopted in prisons around the globe.<sup>12</sup>

Coroner Jenkin also referred to research that suggests that prison management models based on TICC can have important positive outcomes including:

- i. Reduced trauma symptoms;
- ii. An enhanced sense of safety;
- iii. Greater collaboration among service providers;
- iv. Cost effective programming; and
- v. Increased effectiveness of services (including reduced need for acute care and crisis services).<sup>13</sup>

Coroner Jenkin recommended that:

- The Department should consult with an expert in the field of trauma informed custodial care (TICC) to determine a process for incorporating the principles of TICC into its management of prisoners at Casuarina Prison;<sup>14</sup> and
- The Department should consult with an expert in the field of mental health with a view to providing training to all staff on the features of personality disorders and common mental disorders and strategies to more effectively manage prisoners with these conditions.<sup>15</sup>

These recommendations are equally relevant to BHDC.

Any improvements to the structural environment at BHDC also need to be trauma informed and be appropriate for children with sensory sensitivities. Dr Thompson's research emphasised the need for sensory sensitive and trauma informed structural environments, with minimisation of harsh, unnatural light and sounds that could cause sensory overload. She stated: 'Children who have experienced trauma often have heightened arousal systems, and they can be more attuned or sensitive to stimuli in their environment.'<sup>16</sup>

<sup>12</sup> *Inquest into 5 Deaths in Casuarina Prison - Mervyn Kenneth Douglas Bell, Bevan Stanley Cameron, Brian Robert Honeywood, JS (Name Subject to Suppression Order) and Aubrey Anthony Shannon Wallam* (Coroner's Court of Western Australia, Coroner Jenkin, 22 May 2019) [639]- [659] ('*Casuarina Inquest Finding*').

<sup>13</sup> *Casuarina Inquest Finding* [657].

<sup>14</sup> *Casuarina Inquest Finding*, Recommendation 5.

<sup>15</sup> *Casuarina Inquest Finding*, Recommendation 6.

<sup>16</sup> *Thompson Report*, 44

Any trauma-informed model of care should include ongoing, regular, gender and culturally sensitive training for staff in how to interact with people with disabilities and impairments, particularly those with psychosocial or cognitive disabilities. Custodial staff assigned to separate confinement and crisis units should receive additional mental health and disability training.<sup>17</sup> As was recommended by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, training programmes for all management and operational workers in youth detention centres should ensure that the physical, psychological and emotional welfare of children and young people, as well as their rehabilitation, is a principal focus. The Royal Commission recommended workers should be trained in ways to exercise understanding, restraint and patience in the care, control and supervision of children and young people and in the maintenance of discipline among children and young people. The Royal Commission further recommended that staff should be trained to encourage positive behaviour among children and young people consistent with increasing their responsibility and independence.<sup>18</sup>

#### **Need for culturally-appropriate care**

The need for culturally-appropriate care for Aboriginal children cannot be overstated. Professor Judy Atkinson explains that culture plays a role in the type of trauma that individuals may experience and the efficacy of intervention and supports. She states that 'trauma approaches informed by Aboriginal culture show promise for supporting healing and recovery.'<sup>19</sup> Professor Atkinson highlights the promising practices provided by Yorgum Healing Services Aboriginal Corporation.<sup>20</sup> The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory also emphasised the importance of Aboriginal cultural competence and safety in the design and delivery of education, programs, activities and services for Aboriginal children and young people in detention.<sup>21</sup>

I welcome the Government's investment towards staffing an Aboriginal Services Unit, which will provide specific cultural support and services to help address overrepresentation of Aboriginal young people at BHDC. The Unit should be Aboriginal designed and led. I encourage the Department of Corrective Services to seek input from Aboriginal organisations, including ALSWA, in order to ensure that this is the case. Put another way, history has shown that the Department does not have all the answers and it would be most regrettable and a lost opportunity if it failed to draw on the expertise and knowledge of Aboriginal organisations, including ALSWA, to ensure that the Unit is trauma informed and culturally secure.

<sup>17</sup> *Human Rights Watch Report*, 6.

<sup>18</sup> *Northern Territory Royal Commission Report*, Recommendation 23.1.

<sup>19</sup> *Atkinson trauma-informed services resource sheet*, 2.

<sup>20</sup> *Trauma-informed services resource sheet*, 11.

<sup>21</sup> *Northern Territory Royal Commission Report*, Recommendation 18.1; *Human Rights Watch Report*, 6.

### Need to abolish solitary confinement

The use of solitary confinement against children is considered cruel, inhuman or degrading treatment and is strictly prohibited at international law as evidence shows that this practice can have severe, long-term and irreversible effects on a child's health and wellbeing.<sup>22</sup> Solitary confinement:

has a distinct and particularly profound impact on young people, often doing serious damage to their development and psychological and physical well-being. Because of the special vulnerability and needs of adolescents, solitary confinement can be a particularly cruel and harmful practice when applied to them.<sup>23</sup>

There is significant evidence that solitary confinement can have both psychological and physiological impacts on people, and that the issues for Aboriginal prisoners and detainees in segregation are magnified due to their specific cultural circumstances and needs.<sup>24</sup> Aboriginal prisoners and detainees separated from countrymen, family and kin - including those who are in custody with them - can suffer emotional and spiritual distress beyond that inflicted upon non-Aboriginal people.<sup>25</sup> Given this, the Royal Commission into Aboriginal Deaths in Custody recommended, 'That Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.'<sup>26</sup>

In their recent report from the 2021 Inspection of the Intensive Support Unit ('ISU') at BHDC, the Office of the Inspector of Custodial Services made a finding that 'following extensive periods of lockdown in the ISU, detainees experienced further deterioration in their behaviour and mental health.'<sup>27</sup> In that report, the Inspector noted that deterioration following confinement is well known and documented in research. He considered the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the United

<sup>22</sup> See e.g. United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev, Rule 45(2) and United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), UN Doc A/RES/45/113, para 67. See also Committee on the Rights of the Child, *General comment no. 10*, UN Doc CRC/C/GC/10 (25 April 2007); Juan E. Mendez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', UN Doc A/HRC/28/68 (5 March 2015), para 86(f).

<sup>23</sup> Human Rights Watch and the American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons across the United States*, *Report of Human Rights Watch and the American Civil Liberties Union* (Report, 2012), accessible at [http://www.hrw.org/sites/default/files/reports/us1012ForU\\_load.pdf](http://www.hrw.org/sites/default/files/reports/us1012ForU_load.pdf)

<sup>24</sup> Elizabeth Grant, *The use of segregation for children in the Northern Territory Youth Detention System: Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory* (Submission, 2016, University of Adelaide) 10 ('Grant Submission').

<sup>25</sup> Grant Submission, 10.

<sup>26</sup> *Royal Commission into Aboriginal Deaths in Custody National Report, Volumes 1- 5* (Report, 1991).

<sup>27</sup> *OICS Report*, 9.

Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) and concluded that the human rights of children being held in ISU are being breached.<sup>28</sup> Worryingly, the Inspector states:

It is fortunate that Banksia Hill has never had a death in custody or suicide. However, the likelihood of this remaining the case is diminishing as the conditions in the ISU aggravate the mental health of detainees and incidents of attempted suicide continue to increase.<sup>29</sup>

In the Inquest into five deaths in Casuarina Prison, referred to above, Coroner Jenkin considered the negative impacts of solitary confinement on adult men. In his findings, Coroner Jenkin referred to research that suggests that prisoners can suffer irreversible psychological trauma if housed in solitary confinement for periods of 10 days or more.<sup>30</sup> Any segregation, confinement or lockdowns must be minimised and ongoing solitary confinement must be abolished. The Office of the Inspector of Custodial Services has recommended that the confinement provisions of the *Young Offenders Act* and *Regulations* be replaced with a new framework, to ensure adequate protections for young people and a minimum of two hours outside their cell each day.<sup>31</sup>

#### **Use of force and strip searches should be minimised**

For the safety of both staff and children, the use of force and strip searches should only be used when absolutely necessary. Any use of force should be proportionate in the circumstances, and appropriate for the detainee's background, age, physical and mental circumstances.<sup>32</sup> Strip searches can be incredibly traumatic for children and should only be conducted where there is a reasonable belief that the search is necessary to prevent a risk of harm to detainees or staff.<sup>33</sup>

#### **Need for appropriate medical care**

Children must have access to holistic, sensitive, culturally safe, confidential healthcare that is in keeping with best practice adolescent medicine principles. Given the complex needs of the children who attend BHDC, a comprehensive medical and health assessment should be conducted on admission, including screening for all types of disabilities and impairments, including Fetal Alcohol Spectrum Disorder.<sup>34</sup>

<sup>28</sup> *OICS Report*, 1 – 5.

<sup>29</sup> *OICS Report*, 10.

<sup>30</sup> Casuarina Inquest Finding [32]; citing Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 *Washington University Journal of Law & Policy* 325.

<sup>31</sup> Office of the Inspector of Custodial Services, *Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre* (Report, June 2018), 36, accessible at <http://www.oics.wa.gov.au/reports/directed-review-of-allegations-made-by-amnesty-international-australia-about-ill-treatment-at-banksia-hill-detention-centre/>

<sup>32</sup> *Northern Territory Royal Commission Report*, Recommendation 13.5.

<sup>33</sup> *Northern Territory Royal Commission Report*, Recommendation 13.7.

<sup>34</sup> *Northern Territory Royal Commission Report*, Recommendation 15.1; *Human Rights Watch Report*, 5.



The outcomes of these assessments should then trigger the implementation of an individualised treatment plan for each child. The Royal Australasian College of Physicians published a policy paper in 2011 entitled 'The Health and Well-being of Incarcerated Adolescents' (*copy enclosed*) which sets out the relevant principles and recommendations.

### Recommendations

Many inquiries and investigations have already been undertaken in relation to custodial settings, for adults and children, resulting in recommendations pertinent to the issues at BHDC. I urge the Department to consider the below reports and implement the numerous relevant recommendations made:

- Office of the Inspector of Custodial Services, '2021 Inspection of the Intensive Support Unit at BHDC' (March 2022) and all previous OICS reports in relation to BHDC;
- 'He's Never Coming Back': People with Disabilities Dying in Western Australia's Prisons (Human Rights Watch Report, 2020);
- The Health and Well-being of Incarcerated Adolescents (Royal Australasian College of Physicians, 2011);
- Coroner's Finding from the Inquest into five Deaths in Casuarina Prison - Mervyn Kenneth Douglas BELL; Bevan Stanley CAMERON; Brian Robert HONEYWOOD; JS (Name Subject to Suppression Order) and Aubrey Anthony Shannon WALLAM (2019);
- Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017); and
- Royal Commission into Aboriginal Deaths in Custody National Report (1991).

I also urge the Department to seize this likely once in a lifetime opportunity to make tangible and sustainable change at BHDC, once and for all. I share the Inspector of Custodial Services' fears. The steps taken now could serve to be the circuit breaker that is needed to prevent the cycle of deterioration and band-aid solutions from continuing, if they are carried out in a trauma-informed and culturally-secure way.

I look forward to hearing from you.

Yours faithfully,

**Redacted**

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 Director, Legal Services  
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