AND SO IT'S COME TO THIS

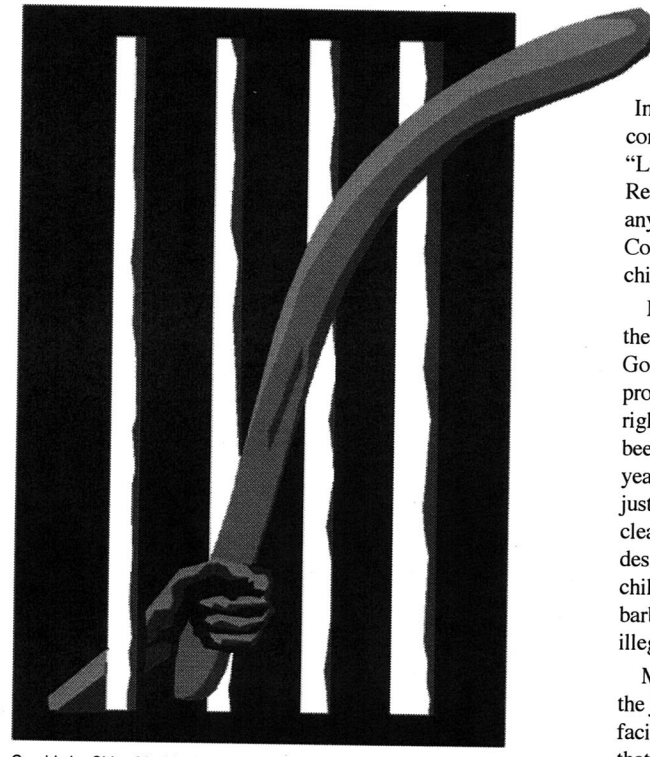
By John B. Lawrence SC*

On the sentencing and detention of Aboriginal juvenile offenders the late NT Supreme Court judge Justice James Muirhead stated in 1977 *(Jabaltjari v Hammersley 1977 15 ALR 94 at 98)*:

"In dealing with Aboriginal children one must not overlook the tremendous social problems they face. They are growing up in an environment of confusion. They see many of their people beset with the problem of alcohol, they sense conflict and dilemma when they find the strict but community based cultural traditions of their people, their customs and philosophies set in competition with the more tempting short term inducements of our society. In short the young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration. Seldom is anything solved by putting him in prison. If he becomes an offender he requires much by way of support and perhaps much by way of discipline to set him on the right track. It is with these considerations in mind that purposeful legislation, welfare and probation facilities, work release schemes, modern juvenile institutions and treatment centres have seen set up in Australia."

It wasn't until appearing in the Youth Justice Court in June this year that I realised our criminal justice system and its dealing with juveniles had reached a nadir. I was representing one of the Aboriginal children who had escaped the "new" Don Dale facility, which is in fact the reopened former Berrimah Jail. Following two days on the run, the two escapees decided to drive their stolen vehicle straight back into Berrimah through the front gates. Film of this Harry Potter Platform 9 ¾ manouvre was shown across the world .

The two juveniles charged did not appear in the court.



Graphic by Chips Mackinolty.

They appeared through a video link from the Holtze adult prison where they were handcuffed and shackled to their chairs. Behind them were two male prison officers with the door closed. I asked the Magistrate to order their release from handcuffs. Her response was that she didn't believe she had the legal power to do that. I submitted that her most important task was to ensure the juveniles received a fair trial and having them handcuffed and shackled to chairs in the adult prison prevented this happening.

The Magistrate rejected my submission, and the proceeding continued.

The evidence revealed the conditions being meted out by the NT Department of Correctional Services to some of their Aboriginal juvenile detainees: handcuffing, spit hooding, solitary confinement in a cell for 22 out of 24 hours, lasting from 7 to 17 days, which included eating their meals (some hot) with their bare hands.

I also learnt about the infamous incident in 2014 when some were subjected to a gas attack in order to break up a disturbance brought about by some detainees in such solitary confinement.

I walked out of the proceeding dumbfounded. The question that screamed, and still does, is how can we have a Department which deliberately deals with juvenile detainees in such a way?

The week 26 October to 1 November is International Children's Week. Because 2015 is the 25th Anniversary of Australia's signing The UN Convention on the Rights of the Child 1990, the theme is that children's rights are human rights which should be respected and revered.

Article 37 of The United Nations Convention on the Rights of the Child 1990 states:

(a) "No child shall be subjected to torture or other cruel, inhumane and/or degrading treatment or punishment.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age".

Australia is presently in the middle of a Royal Commission into Institutional Responses to Child Abuse.

The Northern Territory is still, eight years on, governed by Federal Intervention legislation as a consequence of the notorious "Little Children are Sacred Report." To what extent, if any, does NT Department of Correctional Services respect children's human rights?

Notwithstanding all these features which require Governments to rigorously protect children's human rights, the debacle that has been exposed in the past two years within the NT juvenile justice system shows quite clearly that by deliberate design and policy Aboriginal children in are treated in a barbarous, inhumane and illegal way.

Multiple incidents within the juvenile detention facilities have revealed that the NT Government prosecutes policies against Aboriginal children which include spit-hooding, gassing, hand cuffing, shackling and extensive periods of unlawful solitary confinement. Treatment such as this you wouldn't think possible in any civilised nation.

Let there be no doubts as to whom we are talking about here. This is all about Aboriginal children.

The Northern Territory's adult imprisonment rate is 4/5 times higher than any other jurisdiction in Australia. The adult imprisonment rate is 903.5 per 100,000 compared with 193.5 nationally; 86% of those prisoners are Aboriginal. Internationally the NT tops all countries in the United Nations' figures for imprisonment rates. The country with the highest imprisonment rate, but below the Northern Territory, is the USA with 721 per 100,000 - a situation which President Obama has recently described as "all wrong".

With juveniles the NT detention rate is 6 times the national average, and 97% of them are Aboriginal. The numbers are calamitous enough but what has become in 2015 one of Australia's biggest human rights stains is the deliberate treatment of those NT Aboriginal children in detention.

The Vita Review commissioned by the NT government last year stated that the juvenile justice system existed in "a climate of daily crisis". Michael Vita was the former Superintendent of NSW's Long Bay Jail and Villawood Detention Centres. He was tasked to review juvenile detention in the NT as a result of the highly publicised incident on 21 August 2014 which led to kids being gassed before being hooded and transferred, some unlawfully, into the adult prison. Following on from this incident, the then NT Children's Commissioner, Dr Howard Bath, decided to carry out his own investigations.

The Vita and Bath reports are scathing about how juveniles are detained and the way Youth Justice Officers (YJOs) reacted in the various situations that were investigated.

Dr Bath found that the inappropriate reactions were largely explicable by the lack of staff qualification and training. This long standing policy reveals that both the Minister and his CEO are unfit to hold their positions.

Further, Dr Bath found that in relation to an incident in August last year, "officers had acted inappropriately in threatening a detainee and attempted to cover up the CCTV surveillance to hide this". And claims from Corrections that detainees had assaulted staff with shards of glass, bricks and steel poles were "inaccurate and misleading". Similarly, Mr. Vita found that, "despite assertions to the contrary, 90% of the staff were casual".

Let's look at the incident on 21 August 2014 within the Behavioural Management Unit (BMU) at the original Don Dale Detention Centre Six juveniles being held, for some at least, for unlawful periods of solitary confinement (7, and for some,

17 days) as a consequence of five of them having escaped a fortnight before.

Youth Justice Officers went to the cells that day to inform them their confinement was to be extended. One of the detainees, aged 14, complained. He was recorded asking, "Do you know how long I have been in here brus?" His sense of grievance and complaint escalated into a protest and one of the detainees was able to leave his unlocked cell and began smashing windows.

The matter escalated when one of the detainees deployed a fire extinguisher. The detainees then covered the CCTV camera lens with wet toilet paper and one of them tried to climb through a broken window. The recording seized by Dr Bath reveals that when one YJO tried to poke that detainee back into the BMU, a colleague said, "Let the fucker come through because when he comes through he will be off balance, I'll pulverise the little fucker. Oh shit, we are recording hey?" (laughs).

That detainee then threw a piece of aluminium, hitting one YJO in the arm, causing a minor injury that did not require medical treatment. This was the catalyst for Correctional Service s CEO Ken Middlebrook to order the gassing. There was no attempt to negotiate with the 14 year old despite the fact he said he wanted to talk to a particular YJO .

Recordings reveal a dog handler asking, "You going to gas the lot of them?" CEO Middlebrook is then heard to say to someone "...Mate, I don't mind how much chemical you use, we gotta get him out..." (last part of sentence undecipherable.)

The Bath report found that during the gassing the children in the BMU thought they were about to die. The six were spit hooded, cuffed and moved into the male adult prison, some unlawfully. Two of the six were were seen on CCTV playing cards and had nothing to do with the disturbance.

The move of the children to the Complex Behaviours Unit (C.B.U) of the adult prison wasn't the end of the dramas. While there, five of the aboriginal children escaped from their cells and some of them got onto the roof of the CBU.

> **'...the young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration. Seldom is anything solved by putting him in prison.'**

During this period, the Minister for Corrections, Mr John Elferink and his CEO Mr Middlebrook announced that the purpose-built Don Dale Detention Centre would be shut after a life of less than 25 years.

On 29 October 2014, Minister Elferink told Parliament his reasons for closing Don Dale: "The options that are left to us are either to revamp the Don Dale Centre, which means that to bring it up to a certain standard you would have to spend many millions of dollars; or, alternatively with the expenditure of a mere $800,000, taking the old medium security section of the Berrimah prison and turning it into an effective juvenile detention facility that will meet the requirements of government into the foreseeable future. It will also enable us to deal with some of these juveniles who have caused us grief" (writer's emphasis).

And so it happened.

On the 29 December 2014 the detainees were herded into the previously decommissioned adult prison in Berrimah - which Mr Middlebrook, in evidence to a Coronial Inquest four years earlier, had described as "only fit for a bulldozer".

This year there have been further incidents in the old Berrimah Jail, related in the main to juvenile detainees demonstrating about their conditions.

In May 2015, several detainees managed to escape the old prison. They ran around Darwin for a couple of days stealing cars, before eventually deciding to return via Platform 9 ¾: from chaos to farce to comedy to scandal. But there is nothing funny about Aboriginal children being kept in the custody and guardianship of the Department of Correctional Services. Apart from the cost, ($960 per day per child), the present conditions in Berrimah breach all kinds of national and international protocols.

Throughout this loud and visible exposure of the mistreatment of Aboriginal children, the only real NT voices which have protested and opposed have been Aboriginal, from either individuals or organisations. Sadly, the fate of these Aboriginal children has attracted very little dissent from either the Labor Opposition, the Northern Territory Law Society or the Northern Territory Bar Association. Their virtual silence has been deafening and shameful.

Nevertheless Aboriginal voices continue to protest. On the 7th of October 2015 the National Aboriginal Legal Aid Service, in response to Dr Bath's ecommendations, issued a blistering statement demanding immediate change. It stated, inter alia:

"The Report provides indisputable evidence of a system that has failed and catalogues numerous breaches of the Youth Justice Act.

"The brutality exposed in this report is shocking. We call on the NT Government to immediately respond to the Children's Commissioner's report and commit to implementing each and every one of the recommendations.

The Community has lost confidence in the youth detention system. It is simply not working."

This was strongly supported by the influential Law Council of Australia on the 9 October when its Director Arthur Moses SC stated: "... it's important to remember that more than 90% of youth detainees in the Northern Territory are Indigenous. Children are, of course, the most vulnerable group in the Australian community and it's critical the NT government takes swift and effective action to implement the findings of this (Dr Bath) report. If it fails to do so, the federal government should intervene to deal with the situation."

Minister Elferink and his CEO Middlebrook must be replaced. Their decision to detain children in the old Berrimah prison must be reversed and appropriate outlays made to upgrade the original Don Dale Detention Centre. The punitive and inhumane policies against Aboriginal children is a disgrace and a blight on the entire Australian legal system. It has to end immediately. The people responsible for this embarrassment are not fit to hold office and need to be replaced immediately.

On the 30 September, the Australian Foreign Minister, Ms Julie Bishop, made a highly publicised bid at the United Nations Session in New York for Australia to be given a seat on the United Nations Human Rights Council. A decision on Australia's bid will be made in 2016. Australia's competitors are France and Spain. One can safely assume that both Spain and France will not have juvenile justice systems which involve in any way the conditions and treatment deliberately meted out to aboriginal juvenile detainees here in the Northern Territory of Australia.

*Mr **John B. Lawrence** SC is a former President of the Northern Territory Bar Association and Criminal Lawyers Association NT; as well , he's been as Director of the Law Council of Australia and the Australian Bar Association. He has lived and worked as a Barrister in the Northern Territory for over 25 years. He was formally a Senior Crown Prosecutor and then Solicitor in Charge of NAALAS before joining the independent Bar in 1997. He was appointed Senior Counsel in 2010.