



Reforming the Northern Territory's youth justice system

Supplementary submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory

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About this submission

The Human Rights Law Centre has made two previous submissions to the Royal Commission – the first submission on 28 October 2016 and the second, a joint submission with Aboriginal Peak Organisations NT and Danila Dilba Health Service, on 4 November 2016.

This third submission has been prepared by Shahleena Musk, Senior Policy Advocate at the Human Rights Law Centre. It draws from extensive research and Shahleena's significant experience as a senior youth justice lawyer with the North Australian Aboriginal Justice Agency in Darwin.

Executive summary

The Northern Territory (NT) youth justice system has been ineffective in its response to children who commit crimes and fails to make communities safer. In particular, it fails those most vulnerable, compounding the disadvantage and trauma of those held in youth detention.

The current system is contributing to increasing numbers of children coming into contact with the youth justice system. Inappropriate and ineffective laws and policies, including an overreliance on a punitive detention system, contributes to some of our most vulnerable and disadvantaged children becoming enmeshed in this system. Whilst youth specific legislation creates a presumption in favour of diversion, the vast majority of NT children are not offered this alternative. Instead, despite offending rates decreasing, more children are being prosecuted with an increase of 125% going through the courts since 2006-07.

Aboriginal children fare the worst in this system. Aboriginal children are over represented in youth detention accounting for 96% of the detention population, though 45% of the total NT youth population. The majority of children in detention, around 71%, are on remand waiting for their trial or sentence. These statistics reveal a system that is geared to incarcerating children rather than investing in youth specific supports and services, bail programs, accommodation options and rehabilitative alternatives.

In our previous submission, we highlighted systemic issues within the youth detention system and breaches of minimum standards in international human rights law. In order to prevent the abuses seen at Don Dale in the future, the NT Government must ensure that reform will result in a system that is evidence based and compliant with the human rights of children and minimum standards applicable to youth justice facilities.

If the NT Government is serious about making communities safer, the approach to youth justice must reflect current research and knowledge of adolescent development and neuroscience. This evidence should inform the goals, design and implementation of the NT's youth justice law and policy framework.

Responses must be appropriate to each individual child who comes into contact with the system and in turn assist them to rehabilitate and reintegrate and contribute to society. This will not come about through a 'one size fits all' model. Rather, a range of responses are needed that assist children who offend to accept responsibility for their behavior, deal with the factors contributing to offending and ensure they can reconnect and reintegrate back into their community. In recognition of the over-representation of Aboriginal children in detention, responses must be culturally safe and effective and informed by their family and Aboriginal community. Alternatives to the formal youth justice system need to involve genuine engagement with and empowerment of Aboriginal families and communities to provide culturally appropriate community driven solutions.

The NT Government must focus on age appropriate responses that will divert children and young people out of the criminal justice system and prevent their entrenchment in that system.

Recommendations

Recommendation 1: The *Youth Justice Act* (NT) principles should be reformed to ensure consistency with international human rights law, particularly the *Convention on the Rights of the Child* and *The Beijing Rules*.

Recommendation 2: The age of criminal responsibility in the NT should be raised from 10 to 12 years of age.

Recommendation 3: The *Youth Justice Act* (NT) and *Youth Justice Regulations* (NT) should be amended to:

- remove provisions that exclude traffic offences and infringement offences from the requirement to consider diversion; and
- expand the circumstances in which diversion can be considered in appropriate cases, including for serious offences and where a child has prior convictions.

Recommendation 4: The NT Government should prioritise investment in diversionary options and other alternatives to the formal youth justice system for children at all stages of contact with police and the courts.

Recommendation 5: In consultation with Aboriginal communities and organisations, the *Youth Justice Act* (NT) should be amended to ensure that Aboriginal families and communities are able to play an active role in the diversion of Aboriginal children.

Recommendation 6: The NT Government should increase investment in youth support services, with a focus on addressing factors contributing to child offending.

Recommendation 7: The NT Government should establish a youth justice division within the Children's Court, with appropriately qualified staff and a focus on assessing children at court, developing case plans, and providing referrals and support.

Recommendation 8: The Federal Government and the NT Government should properly and sustainably fund the North Australian Aboriginal Justice Agency, Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission to meet demand for holistic youth justice legal services.

Recommendation 9: In consultation with representatives of Aboriginal communities and organisations, the NT Government should establish an Aboriginal children's court model.

Recommendation 10: The NT Government should increase investment in locally-based collaborative alcohol and drug treatment programs for Aboriginal children, which take into account local community culture and situations.

Recommendation 11: The *Bail Act* (NT) should be amended to exempt children from the offence of breach of bail, and to insert specific provisions to guide decision-making in relation to determining whether to grant bail to a child.

Recommendation 12: The NT Government should invest in the creation of community-led bail support programs across the NT and youth-specific accommodation options.

Recommendation 13: The NT Government should redirect funding from the current youth detention model to a model focused on a continuum of local, community-based programs and treatment alternatives.

Context: Crime by children in the NT is decreasing

Only a very small proportion of children in the Northern Territory come into contact with police or with the formal youth justice system as offenders.

Contrary to recent media suggesting an 'epidemic' of child offending,¹ there has been a significant decrease in offending by children aged 10-17 over the last 9 years. From 2008–09 to 2015–16, the NT child offender rate decreased by 40%.² Despite this decrease, youth detention rates in the NT have continued to rise.³ Punitive laws and policies are likely to be contributing to this.

Jurisdictions like Victoria have demonstrated that both low child offending rates and low child detention rates can be achieved.⁴

Why do we need a special approach to children?

Knowledge of the developmental differences between children and adults is important to understanding why a different approach is needed to dealing with children. Just as laws in relation to voting, drinking, driving and smoking treat children differently from adults, the criminal justice system must treat them differently.

Children should be treated differently from adults

Children are different from adults especially in terms of their emotional and mental capacity. Their brains are still undergoing significant changes throughout these formative years and will do so beyond the age of 18 years. In fact recent research concerning child development and neurobiology suggests that the specific regions of the brain responsible for higher functions such as planning, reasoning, judgement, and impulse control will only fully mature in the 20s.⁵ Further brain science research also shows that when a young person's emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.⁶

Children are more likely to act impulsively, are less risk averse, have poorer problem solving skills, engage in less consequential thinking, and are more easily influenced by their peers.

¹ Xavier La Canna, *Youth crime rate in the NT under the spotlight as authorities search for answers* (5 March 2017) ABC News <http://www.abc.net.au/news/2017-03-04/youth-crime-rate-in-the-nt-under-the-spotlight/8315634>.

² From 5,457 to 3,288 offenders per 100,000. See further Australian Bureau of Statistics 2017, *Recorded Crime - Offenders, 2015-16, State and Territory Profiles*, Northern Territory.

³ The number of children and young people entering detention has more than doubled over ten years, in 2006-07 there were 120 and in 2015-16 this rose to 254. Joe Yick, 'Statement to Royal Commission into the Protection and Detention of Children in the Northern Territory', 14 October 2016 referenced in the Royal Commission into the Protection and Detention of children in the Northern Territory Interim Report, 12.

⁴ Police data shows that overall crime by 10-17 year olds has dropped by around 25% over the past 5 years and the number of 10-17 year olds committing crime has dropped by around 40%. See further Crime Statistics Agency, *Alleged youth offender incidents* (15 June 2016) <<https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/alleged-offender-incidents-0>>; Sentencing Advisory Council, 'Sentencing Children in Victoria: Data Update Report' (2016) 13, 53.

⁵ Judge Andrew Becroft, 'From Little Things, Big Things Grow' Emerging Youth Justice Themes in the South Pacific, 5 referring to Sir Peter Gluckman *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Wellington, Office of the Prime Minister's Science Advisory Committee, 2011), p 24. See also Kelly Richards, 'What makes juvenile offenders different from adult offenders? Trends & Issues in crime and criminal justice' (2011), 4.

⁶ *Ibid.* See further Laurence Steinberg 'Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science' (2007) 16 *Current Directions in Psychological Science* 55, 56.

Much offending by children is impulsive and transient, rather than planned and habitual. Unlike adult offending, crimes by children tend to be committed in small groups in public areas, and close to where they live. Further, offences tend to be attention-seeking, public, episodic, unplanned and opportunistic.⁷

Where children and young people continue to have ongoing contact with the justice system, this is largely linked to environmental and social factors. The factors that can lead a child or young person into the justice system are largely the same as those that can lead them into child protection⁸ – family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage.

However there are further complicating factors in dealing with children beyond development differences and immaturity. There is a growing body of research around the impact of trauma and foetal alcohol spectrum disorder (**FASD**) on a child's emotional, behavioural, cognitive, social and physical functioning.⁹ As has already been raised with the Royal Commission, assessing and assisting children, particularly Aboriginal children, with the impacts of trauma or FASD within the child protection and youth justice systems is vital in light of their vulnerability to these factors.¹⁰

Unfortunately, there appears an inability to assess and assist children suffering the effects of trauma or FASD due to a lack of agreed diagnostic tools and insufficient diagnostic services in the Northern Territory.¹¹ It is beyond the scope of this submission to expand on these factors however experts in these fields should have direct input into the future design of a youth justice policy.

Key child rights principles under international law

The Northern Territory is required under international law to comply with a number of key child rights principles including:

- In all actions concerning children, the best interests of the child shall be a primary consideration.¹²
- The arrest and detention of a child should be only as a measure of last resort for the shortest possible period of time.¹³
- Every child deprived of liberty shall be treated with humanity and respect for their inherent dignity and in a manner which takes into account the needs of their age.¹⁴

⁷ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice in Australia* (5th ed, Oxford University Press, 2015) 55.

⁸ Joint Australian Children's Commissioners and Guardians submission to the Australian House of Representatives Inquiry into the over representation of Aboriginal and Torres Strait Islander young people in the justice system (2010), 6.

⁹ Australian Government Department of Families, Community Services and Indigenous Affairs, Literature Review - a trauma-sensitive approach for children aged 0-8 years (2012).

¹⁰ Judy Cashmore, 'The Link between child maltreatment and adolescent offending, Systems neglect of adolescents' (2011) *Australian Institute of Family Studies*.

¹¹ Legislative Assembly of the Northern Territory, Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorder, *The Preventable Disability* (2015).

¹² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC') art 3.

¹³ CROC art 37(b).

¹⁴ CROC art 37(c); See also *International Convention on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') art 7 and art 10; and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT') art 2.

- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹⁵
- The unique status of children deprived of liberty requires 'higher standards and broader safeguards for the prevention of torture and ill-treatment.'¹⁶
- States must implement legislation and practices which are in the best interests of the child and which protect children from all forms of physical or mental violence, injury, abuse, neglect, maltreatment or exploitation.¹⁷
- Every child accused or found guilty of a crime shall be treated in a manner which takes into account the desirability of promoting the child's reintegration and assuming a constructive role in society.¹⁸
- If detained, the essential aim should be rehabilitation and children should be accorded age-appropriate treatment.¹⁹

The Youth Justice Act (NT)

The *Youth Justice Act (NT)* (YJA) describes a number of fundamental principles, including that rehabilitation of young offenders should be a primary goal and that detention should be a last resort. The YJA includes the following principles (amongst others):

- A child should only be kept in custody for an offence (either on arrest, remand or sentence) as a last resort, and for the shortest appropriate time (s 4(c)).
- A child should be dealt with in ways which are appropriate to their sense of time (s 4 (m)), their age, maturity (s 4(d)) and racial, ethnic and cultural background (s 4(j)).
- A child should be dealt with in such a way as to encourage them to accept responsibility for their conduct (s 4 (a)) and to develop a sense of social responsibility (s 4(b)).
- Alternative measures to criminal proceedings should be prioritised consistent with the public interest (s 4 (q)).

The objectives and principles of the YJA to a degree reflect certain key child rights principles under international law, however in some respects the YJA fails to protect or enshrine important elements. The most obvious omission is the 'best interests' principle, which should be the guiding consideration in any decision making or actions involving a child.²⁰ There should also be an explicit focus on rehabilitation as the primary purpose of the youth justice system. Sentencing principles for children must recognise that children are less emotionally and psychologically developed than adults, and are less culpable for their actions.

An age-appropriate and rehabilitative framework for responding to and dealing with child offending is essential. This requires that the objects and principles of the YJA must be brought into line with the

¹⁵ CROC art 37(a); See also ICCPR art 7 and art 10 and CAT.

¹⁶ 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 16.

¹⁷ CROC art 19.

¹⁸ CROC art 40(1).

¹⁹ ICCPR art 10.

²⁰ CROC art 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

*Convention on the Rights of the Child, UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*²¹ and other minimum child's rights standards. The primary purpose should be on rehabilitation and safeguarding the well-being and the future of the child over retributive sanctions. Strictly punitive approaches are not appropriate.²² Instead, the overarching philosophy should prioritise the best interests of the child, aim to hold them accountable and assist them to take responsibility for their behaviour and reintegrate back into the community to live a productive life.

Recommendation 1:

The *Youth Justice Act* (NT) principles should be reformed to ensure consistency with international human rights law, particularly the *Convention on the Rights of the Child* and *The Beijing Rules*.

Children under 12 who offend should receive a supportive response not a criminal justice response

Currently, children under 10 years cannot be held criminally responsible and cannot be charged or prosecuted for an alleged offence in the NT.²³ For children 10 to 14 years of age there is a rebuttable presumption that they lack criminal capacity.²⁴ Children of this age are however, routinely charged and proceeded against formally in a court.²⁵ In these circumstances the prosecution are required to prove their capacity, ordinarily through evidence at a contested hearing. Those children awaiting a contested hearing can wait months for their matters to be resolved through the courts during which they effectively become enmeshed into the system, increasing the risk of ongoing contact with police and negative peers. They are also often subject to conditional bail without having access to appropriate services or supports. These children are incredibly vulnerable.

The flow on effect is that more children under the age of 14 years are getting caught up in the youth justice system and finding their way into youth detention at an alarming rate. Of the children under youth justice supervision on an average day in 2015-16 nationally, 9% were aged 10-13 years.²⁶ The figures are particularly concerning for Aboriginal and Torres Strait Islander children – more than 1 in 8 Indigenous children under supervision nationally were aged 13 or less compared with 1 in 20 non-Indigenous children.²⁷

Recent research by the Jesuit Social Services found that early contact with the justice system increases the likelihood of poorer outcomes including being held on remand (in detention prior to trial or sentencing) rather than bailed and further offending.²⁸ The study emphasised that it is those most

²¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*. See Rule 17.

²² *Ibid*, see further commentary to rule 17.1.

²³ *Criminal Code Act* (NT), ss 38, 43AP.

²⁴ This is the legal doctrine of *doli Incapax*, which creates a presumption in law that a child is "incapable of crime". In the NT the legislative basis is s 43AQ or s 38(2) of the *Criminal Code Act* (NT) which requires that the prosecution proves that the child knew the conduct was wrong or that at the time of the alleged offence he/she had the capacity to know what he/she ought not do the act, or make the omission or cause the event.

²⁵ Joe Yick, Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 14 October 2016.

²⁶ Australian Institute of Health and Welfare, 'Youth Justice in Australia 2015-16' (2017) 7.

²⁷ *Ibid*, 10.

²⁸ Jesuit Social Services, *Thinking Outside, Alternatives to Remand for Children* (Research Report) (2013), 38-41. See further the Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016), 6.

vulnerable and disadvantaged children who come to the attention of the justice system at a young age and that the justice system's response compounds their vulnerability.

There is a strong correlation between child offending and entrenched disadvantage, indicating that the causes of offending in younger children are strongly connected to their environment and its impact on their development.²⁹

The age of criminal responsibility in the NT should be raised from 10 to 12 years of age, consistent with international human rights law. For children below 12 years of age, appropriately resourced and tailored social welfare alternatives should be pursued outside of the formal court system so as to best address risk factors and meet the needs of these children. Failure to do so increases the likelihood of reoffending and the prospect of such children becoming entrenched in the system.

Recommendation 2:

The age of criminal responsibility in the NT should be raised from 10 to 12 years of age.

Diversion and alternative approaches

Diversion offers a cheaper and more effective way of dealing with offending by children. It addresses the causes of unacceptable conduct and not merely the consequences of it. There is a vast array of alternatives that can be captured by the term 'diversion', but those best known in the Australian context include police cautions and warnings, health, treatment, education and training focused diversion programs and youth justice conferences.

Research confirms that once a child enters the formal criminal justice system, they are more likely to return, particularly if they are detained.³⁰ In contrast, diversion pathways, which operate outside the formal court system, are effective in helping children get back on track and reduce the risks of further offending.³¹ Diversionary mechanisms are intended to avoid the stigmatisation or contamination associated with involvement in the formal criminal justice system and can create better opportunities to identify family, behavioural and health problems contributing to offending behaviour.

In the Northern Territory, diversion is specifically legislated into the youth justice system through Part 3 of the YJA. The provisions create an explicit presumption in favour of diversion as the primary means for dealing with child offending, subject to a number of exceptions.³² Instead of charging a child believed to have committed an offence, police officers must consider diversionary options, set out in section 39(2) of the YJA. This practice is said to be consistent with the principle in section 4(q): "unless the public

²⁹ Jesuit Social Services, *Too much too young: Raise the age of criminal responsibility to 12* (2015), 3.

³⁰ Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016), 4, 52.

³¹ Carney J, Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report* (2011), 94-96. See further Kaye McLaren, *Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action* (Police Youth Services Group, New Zealand Police, 2011). Note that this report provides a review of research into NZ police warnings and diversionary practices but also international models. It identifies 23 principles, starting with overarching principles, followed by principles that relate to the various stages of the youth diversion process. These principles have then been distilled into 11 key findings, outlined in the report.

³² *Youth Justice Act* (NT) s 39(3).

interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter.”³³

Whilst on its face the legislation requires a police officer to divert a child, the statistics indicate this is not occurring consistently in practice. In 2015-16, just 36% of apprehensions by police resulted in a child being offered diversion.³⁴ Further, despite offending rates decreasing, there has been a 125% increase in the number of children being prosecuted through the courts since 2006-07.³⁵

Some explanation for the low use of diversion can be found in section 39(3) of the YJA, which contains exceptions to the requirement of police to prioritise diversion including:

- for serious offending;
- where a child has on 2 or more previous occasions been dealt with through diversion;
- where a child has a history that makes diversion unsuitable.

Further, section 38 excludes a significant number of traffic offences from being considered for diversion.³⁶

Barriers to diversion: police as gate keepers

The current legislative scheme supporting diversion in the NT gives police significant discretion and ensures they are ‘gate keepers’ to diversion.³⁷ Aboriginal legal services have criticised this discretionary scheme as open to misuse and bias, especially in its application to Aboriginal children.³⁸

A study by the Australian Institute of Criminology found that Aboriginal children were ‘significantly more likely’ to be referred to court than non-Aboriginal children.³⁹ The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, in its report ‘Doing Time, Time for Doing’, recommended increased community policing, including specific Aboriginal cultural awareness training, increased community police officers and liaison officers, extensive training on diversion and methods for caution/referral over arrest.⁴⁰ Those recommendations were made in 2011, however statistics demonstrate increased unequal application of diversion provisions to Aboriginal children, indicating a failure to implement the recommendations.⁴¹

Empower Aboriginal families and communities to take an active role in the diversion of Aboriginal youth

In order to address the inequality of access to (and completion of) diversion by Aboriginal children in the NT, the YJA should be amended in a number of respects to empower Aboriginal families and

³³ *Firth & Ors v JM* [2015] NTSC 20, 11-12. Section 41(1) of the YJA provides that, if diversion is completed, no criminal investigation or legal proceedings can be commenced or continued against in respect of the offence.

³⁴ Northern Territory Police, Fire & Emergency Services, *Annual Report 2015-16*, 49.

³⁵ Joe Yick, Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 14 October 2016, table 1.

³⁶ YJA s 38, which went on to exclude certain offences from being considered for diversion as any offence against Part V or VI of the *Traffic Act* (NT).

³⁷ See further discussion in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 202.

³⁸ *Ibid* 202.

³⁹ *Ibid* 204.

⁴⁰ *Ibid* 205.

⁴¹ Northern Territory Police, Fire & Emergency Services, *Annual Report 2015-16*, 49.

communities to take an active role. While not the sole solution, specific legislative amendment that makes it imperative to include the family and community in the rehabilitation and reintegration of a child is a positive step. In Queensland⁴², the objects of the *Youth Justice Act 1992* (Qld) include:

to recognise the importance of families of children and communities, in particular Aboriginal and Torres Strait Islander communities, in the provision of services designed to—

- (i) rehabilitate children who commit offences; and
- (ii) reintegrate children who commit offences into the community.

The Northern Territory YJA should include similar objectives.

Further, in administering a caution to an Aboriginal child as a diversionary option, a respected elder of the community could be empowered to issue the caution instead of police.⁴³ This would have the benefit of strengthening cultural connections, re-establishing broken relationships and community building.

In Western Australia, the law allows referrals from police, prosecutions or the court to Juvenile Justice Teams.⁴⁴ The Juvenile Justice Team model makes specific provision for Aboriginal community members to sit on the panel to engage and deal with the youth. This model could work well in the NT by expanding the current diversion scheme to re-establish cultural authority, positive peer relationships, cultural reconnection and social inclusiveness.

In addition, the legislation could require police to involve, consult and empower Aboriginal communities and Aboriginal community controlled organisations in the delivery of diversion options. For example, Youth Justice Conferences⁴⁵ involve bringing together a child who has offended with family members, the victim(s), police and community leaders to discuss the impact of the crime and agree to a plan for the child to make amends and avoid reoffending. These conferences, often referred to as 'restorative justice', could be used in remote communities and small townships immediately after an offence to ensure offenders learn from the consequences of their actions and work with family and community to address the challenges in their lives that led to offending, while strengthening the structures in communities to reduce youth offending rates.

An example of such a model in practice is the Tiwi Islands Youth Diversion Unit, which has been recognised as a successful and effective service due to its ability to respond and resolve family and community disputes.⁴⁶ The success of the model has been attributed to it being a locally driven service utilising key cultural values. An evaluation in 2014 found the program was culturally competent and useful in reconnecting children to cultural norms whilst directly addressing the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education.⁴⁷

⁴² *Youth Justice Act 1992* (QLD) s 2.

⁴³ *Youth Justice Act 1992* (QLD) s 17.

⁴⁴ *Young Offenders Act 1994* (WA), ss 26 – 27.

⁴⁵ *Youth Justice Act* (NT) s 39(2)(c).

⁴⁶ Australian Centre for Indigenous Knowledges & Education, Final Report, Tiwi Islands Skin Group Project, Keeping Culture Strong and Inspiring Youth to become Community Leaders (2014), 27-28.

⁴⁷ Jacqueline Stewart, Bodean Hedwards, Kelly Richards, Matthew Willis and Daryl Higgins, 'Indigenous Youth Justice Programs Evaluation' (Australian Institute of Criminology, 2014), 47.

To be effective and truly representative the planning, design and implementation of alternatives must be driven by the Aboriginal communities of the NT, and supported through Government and NGO partnerships, sufficient funding and resourcing of families and communities.⁴⁸

Allow diversion for traffic offences

In order to increase the number of children diverted from the formal criminal justice system, the YJA should be amended to remove some, if not all, of the exceptions in sections 38 and 39 that relate to traffic and driving offences.

Traffic and motor vehicle offences are some of the most commonly committed by children and historically accounted for the majority of offences for which diversion had been offered. In a submission to a review of the NT youth justice system in 2011, the Australian Institute of Criminology stated that 15.4% of offences committed by children in the NT were traffic and vehicle offences, which was consistent with national trends. The Northern Territory Police advised that prior to the commencement of the YJA in 2006, 423 youth, 80% of whom were Aboriginal, were diverted for the offence of drive unlicensed.⁴⁹

Amendment to the legislation to reinstate diversion for traffic and driving related offences would create a sensible option for many children. It would also ensure capacity to develop and offer more targeted programs that could provide children with the information, understanding and skills necessary to develop positive attitudes towards driving and safer driving behaviours.⁵⁰

In some instances, especially for children found driving without a licence, diversion could require a child undertake direct instruction and obtain the necessary driving qualifications. In relation to more serious driving offences, a diversion program could require completion of a defensive driving course, a road trauma awareness course and/or drug and alcohol awareness courses and counselling. In such circumstances the response is directly related to the nature of the offence and lead to interventions that positively influence driver attitudes and behaviour.

Recommendation 3:

The *Youth Justice Act* (NT) and *Youth Justice Regulations* (NT) should be amended to:

- remove provisions that exclude traffic offences and infringement offences from the requirement to consider diversion; and
- expand the circumstances in which diversion can be considered in appropriate cases including for serious offences and where a child has prior convictions.

⁴⁸ See further House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time– Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 51.

⁴⁹ J Carney, Northern Territory Government, Review of the Northern Territory Youth Justice System: Report (2011) 59.

⁵⁰ See for example: Streetwise Driving, *Traffic Offenders Intervention Program Gold Coast* <<http://www.streetwisedriving.com.au/traffic-offender-intervention-program/>>.

Recommendation 4:

The NT Government should prioritise investment in diversionary options and other alternatives to the formal criminal justice system for children at all stages of contact with police and the courts.

Recommendation 5:

In consultation with Aboriginal communities and organisations, the *Youth Justice Act* (NT) should be amended to ensure that Aboriginal families and communities are able to play an active role in the diversion of Aboriginal children.

Children referred to court

When a child is unsuitable for diversion or has failed to undertake or complete diversion, they will be charged and referred to the Youth Justice Court.

Support and assistance for children in the court system

Once a decision is made to formally charge a child there is no obligation on police to refer the child to a support service or offer any other assistance. Unlike other jurisdictions around Australia, the Northern Territory does not have a designated youth support service that can work with vulnerable children who come into contact with the criminal justice system.

In Victoria, the Youth Support and Advocacy Service works with children and young people to comprehensively assess their needs, assist them to develop positive life goals and access other support and services as required.⁵¹ This service receives referrals from police where a young person is at risk or has committed an offence. Within 48 hours of the referral, the young person and their family receive advice and develop a plan on how to address antisocial behaviour. Young people are connected to school, training or employment and to services to address any health, drug or alcohol issues. This model ensures individualised case management and assistance to meet the needs of the young person and their family and could be adapted to the NT context.

In the Northern Territory, there is also no court-based support service or specialised youth justice staff that assist children who may need assistance to address factors linked to offending behaviour, including homelessness, drug and alcohol misuse, family violence, mental illness and disengagement from school.

Children appearing before the courts are often the most vulnerable, disadvantaged, and marginalised – immediate advice, assessment and assistance to address their needs is therefore crucial. Targeted interventions following a thorough assessment and a case plan agreed to by the child and their family could involve referrals and assistance to undertake drug and alcohol rehabilitation, mental health treatment and counselling and access to accommodation.

⁵¹ See further YSAS Youth Support Service, *A Case for Continuing Victoria's Successful Youth Diversion Service* <<https://www.ysas.org.au/>>.

A positive model that should be considered for the NT is the Children's Court Assistance Scheme in NSW.⁵² It employs youth workers at court to work with young people and their families. Youth workers provide information about court processes and outcomes, counselling and conflict resolution, and referral to services such as drug and alcohol programs and accommodation.

Another service that could be introduced within the NT youth court system is an Education Justice Initiative, like that in Victoria, to assist young people who have disengaged from school or who are not engaged in an appropriate educational or training program. Inclusion in education and training has been identified as one of the most effective means of reducing the risk factors associated with young people's criminal behaviour.⁵³ The Education Justice Initiative has been evaluated as having a dramatic impact on over half of all young people appearing in the Victorian courts by reconnecting and enabling young people to access education when previous efforts had failed, and finding an appropriate education option to meet their needs.⁵⁴

Recommendation 6:

The NT Government should increase investment in youth support services, with a focus on addressing factors contributing to child offending.

Recommendation 7:

The NT Government should establish a youth justice division within the Children's Court, with appropriately qualified staff and a focus on assessing children at court, developing case plans, and providing referrals and support.

Youth justice legal services

There are limited youth specific services available to children under investigation or charged with a criminal offence in the NT. The most accessible and highly utilised is free legal assistance services offered by the North Australian Aboriginal Justice Agency (**NAAJA**), Central Australian Aboriginal Legal Aid Service (**CAALAS**) and the Northern Territory Legal Aid Commission (**NTLAC**). These organisations have specialised youth lawyers to assist children with advice, advocacy and representation. Whilst primarily legal services, they also employ social workers who provide crucial assistance to vulnerable children in the absence of specialised youth support services.

Aboriginal legal services are not funded sufficiently to meet current and future demand.⁵⁵ In the NT, NAAJA and CAALAS are solely funded by the Federal Government, which means that there is little incentive on the part of the NT Government to 'consider how their policies impact on the demand for the services' of NAAJA and CAALAS.⁵⁶ In 2016, the Productivity Commission recommended that state

⁵² See further Legal Aid NSW, *Children's Court Assistance Program* <<http://www.legalaid.nsw.gov.au/what-we-do/community-partnerships/childrens-court-assistance-program>>.

⁵³ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 17.

⁵⁴ See further The Victoria Institute, *Education at the Heart of the Children's Court* <<https://www.vu.edu.au/>>.

⁵⁵ National Aboriginal and Torres Strait Islander Legal Services, *2016-17 Pre-Budget Submission* (2016).

⁵⁶ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, September 2014) 29.

and territory governments, including the NT Government, contribute to the funding of Aboriginal legal services and that funding be significantly increased.⁵⁷

Recommendation 8:

The Federal Government and NT Government should properly and sustainably fund the North Australian Aboriginal Justice Agency, Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission to meet demand for holistic youth justice legal services.

Over-representation of Aboriginal youth and Aboriginal court processes

As has been acknowledged by the Royal Commission, many Aboriginal children in the youth justice and child protection systems suffer significant socio-economic disadvantage, intergenerational trauma and are more likely to have problems with learning, behaviour and physical and mental health. In order to reduce the over-representation of Aboriginal children in these systems, more needs to be done to address the causative factors in consultation and collaboration with Aboriginal families and communities.

There is a significant need to integrate within the current court system, culturally appropriate processes for Aboriginal youth that in turn involves communities in the process. With the high percentage of Aboriginal children appearing before the courts, a model similar to the Koori Court in Victoria or the Murri Court in Queensland should be considered. Koori Courts have helped to reduce reoffending and reconnect Aboriginal people with their communities.⁵⁸

Access to a culturally respectful and engaging system will increase Aboriginal children's participation and acceptance of the process. The system could also ensure tailored diversion from detention and the strengthening of community ties, with the aim of reducing the risks of reoffending. In such a model Aboriginal elders and Aboriginal staff could ensure respect for cultural identity and provide connection to family, community and appropriate community supports. This model would need to have a legislative base and the design and implementation must be done in partnership with Aboriginal communities of the NT.

Recommendation 9:

In consultation with representatives of Aboriginal communities and organisations, the NT Government should establish an Aboriginal children's court model.

Youth specific drug and alcohol rehabilitation and counselling services needed

Substance misuse is commonly linked to youth offending and poses a significant risk to the health and wellbeing of children.

⁵⁷ Ibid.

⁵⁸ A Borowski 'Evaluating the Children's Koori Court of Victoria', Australian Institute of Criminology Occasional Seminar (2010), <http://www.aic.gov.au/media_library/seminars/borowski_presentation.pdf>; Mark Harris, A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program: October 2002 – October 2004 (Victorian Department of Justice, 2005).

In the Northern Territory there are limited counselling and rehabilitation services available to children and those that do exist are severely over capacity and under resourced.⁵⁹ Communities and those working in youth justice have continued to call for more government funding to support Aboriginal specific and collaborative alcohol and drug treatment services and locally based programs that respond to community needs. The current Senior Youth Judge in the Northern Territory Youth Justice Court has said:

“Drug and alcohol rehabilitation is a significant issue. I think that there is an insufficient amount of rehabilitation facilities available. The ones that are available are pretty well stretched to the limit and, generally speaking, residential rehabilitation is not available for young people.”⁶⁰

There is only one residential rehabilitation centre for children which is based in Alice Springs. There is little else available across the Territory that meets the needs of Aboriginal children, especially those that require intensive treatment. Greater investment is needed to expand drug, alcohol and youth support services to other regions of the NT in partnership with Aboriginal communities.

Additional NT Government funding is needed to support collaborative alcohol and drug treatment programs for Aboriginal children, which are locally based and take account of local community culture and situations.⁶¹ Any initiative should enhance Aboriginal social and emotional wellbeing and promote self-determination and community governance and community resilience.⁶²

Recommendation 10:

The NT Government should increase investment in locally-based collaborative alcohol and drug treatment programs for Aboriginal children, which take into account local community culture and situations.

Detention as a last resort

Whilst the number of children committing offences has been progressively going down, the numbers entering detention have not. On an average night in the June quarter 2016, the rate of children in detention ranged from 1.2 per 10,000 in Tasmania to almost 16 per 10,000 in the NT. The NT consistently had the highest rate on an average night of all Australian jurisdictions.⁶³

It is alarming that the majority of children in detention on any given day are Aboriginal. This reflects the national trend of the increasing rate of over-representation of Aboriginal and Torres Strait Islander people in youth and adult justice systems. The situation in the Northern Territory is particularly stark.

⁵⁹ J Carney, Northern Territory Government, Review of the Northern Territory Youth Justice System: Report (2011), 140.

⁶⁰ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 93.

⁶¹ See further Central Australian Aboriginal Legal Aid Service, the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission Review of Youth Detention in the Northern Territory, November 2014, 16.

⁶² See further Australian Institute of Health and Welfare and Australian Institute of Family Studies, *Effective Strategies to Strengthen the Mental Health and Wellbeing of Aboriginal and Torres Strait Islander People* (Issues paper no. 12, Closing the Gap Clearinghouse, 2014).

⁶³ Australian Institute of Health and Welfare, *Youth Detention Population in Australia* (2016), 13.

Of the total Northern Territory youth population aged 10-17 years, Aboriginal children make up 45%, but on an average day, they make up 96% of the youth detention population.⁶⁴

The majority of children in detention are on remand, waiting for their trial or sentence. On an average day in 2015-16, 71% of children in detention in the Northern Territory were on remand.⁶⁵

These collectively are an extraordinary set of figures. The Northern Territory has consistently and shamefully led the way in locking up Aboriginal and Torres Strait Islander children, including on remand.

But, as noted above, while the crime rate has been going down the rates going into detention, especially on remand, continue to rise.

The social and financial costs of detaining children

Financial considerations

Incarcerating a child in a youth detention facility in the Northern Territory is expensive: \$1,540 per young person on an average day.⁶⁶

In contrast, community based supervision costs only \$86 per young person on average per day.⁶⁷

The Northern Territory is spending too much money on detention, which takes away from opportunities to invest in strengthening families and communities.

Social impact of incarceration

The detention of children must be a last resort measure, for example where the seriousness of offending, the circumstances of the child and protection of the community warrant no other alternative. For the vast majority of children who come into contact with the criminal justice, detention is not an appropriate response and can be highly detrimental to the very objects we are trying to achieve – rehabilitation and community safety.

When a child is incarcerated they are removed from their home, family and other social supports into a foreign environment. The loss of liberty, personal identity and support mechanisms that may be available in the community can place great stress on a child, and can compound mental illness and trauma.⁶⁸ In these circumstances children in detention are particularly vulnerable to victimisation (by adults and other children), stigmatisation by the criminal justice system and negative peer contagion.⁶⁹

In particular for Aboriginal children, the social isolation and alienation from family, community and country can be more intense especially for those from remote regions. The flow on effect is also felt through family and community disharmony, reduced opportunities to form positive social, community-based relationships and reduced opportunities to participate in important cultural obligations including initiations and ceremonies.

In addition, the removal of a child from their community and positive social networks can serve to reinforce negative behavior and increase the influence of peers in the detention facility. It is accepted,

⁶⁴ Australian Institute of Health and Welfare, *Northern Territory: Youth Justice Supervision in 2015-16*, 2.

⁶⁵ *Ibid*, 3.

⁶⁶ Productivity Commission, *Report on Government Services 2017*, table 17A.24.

⁶⁷ *Ibid*, table 17A.23.

⁶⁸ Royal Australian and New Zealand College of Psychiatrists, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).

⁶⁹ Kelly Richards, 'What Makes Juvenile Offenders Different from Adult Offenders? (Trends & Issues in Crime and Criminal Justice No 409, Australian Institute of Criminology, 2011), 7.

for example that prisons are ‘universities of crime’ that enable offenders to create and maintain criminal networks, learn and improve offending techniques and strategies.⁷⁰ So rather than assisting a child to develop in socially responsible ways and address their needs, incarceration itself can increase the likelihood of offending.⁷¹

The overuse of detention as a response to child offending is counterproductive to rehabilitation and ultimately to public safety in the long term.

Reducing growing remand rates

An essential principle underpinning the youth justice system in the NT is that a youth should only be kept in custody (whether on arrest, on remand or under sentence) as a last resort and for ‘the shortest appropriate period of time’.⁷²

Whilst detention as a last resort is enshrined in the NT YJA, in reality children in the NT are detained on remand because of welfare concerns (including lack of a responsible adult), health concerns, substance misuse and because of a lack of suitable accommodation. In addition, a child may breach bail conditions, which results in their remand. NT Police are apprehending children more readily and more frequently for breach of bail than ever before. In the 2015-16, 697 children were apprehended for breaching bail, some 343 (49%) of whom were 10-14 years old. 662 (95%) of those apprehended were Aboriginal.⁷³

Absence of youth specific bail laws in the NT

There is a concerning national trend of sharp increases in the youth remand rate: 57% of all children detained nationally are on remand.⁷⁴ Of the remanded children, few are likely to receive an actual custodial sentence.⁷⁵

Unlike other Australian jurisdictions, the NT has failed to legislate for youth-specific bail considerations. The presumptions in the *Bail Act 1982* (NT) (**Bail Act**), apply in relation to children just as they apply to adults.⁷⁶ This is of concern because the presumptions against bail in the *Bail Act* conflict with the YJA principle that custody be a matter of last resort. Presumptions against bail should not apply to children. Further the offence of breach bail should not apply to children.⁷⁷

In order to address the high remand rate, there should be youth-specific pro-bail considerations inserted into the *Bail Act*. In Victoria, the *Bail Act 1977* requires a decision maker have regard to a number of youth-specific factors in addition to the general criteria applicable to any grant of bail, including:⁷⁸

- the need to consider all other options before remanding the child in custody;

⁷⁰ Ibid, 6.

⁷¹ Ibid, 7.

⁷² s4(c) Youth Justice Act NT.

⁷³ Joe Yick, Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 14 October 2016.

⁷⁴ Australian Institute of Health and Welfare, Youth Detention Population in Australia (2016); Kelly Richards, Australian Institute of Criminology, *Trends in Juvenile Detention in Australia* (May 2011).

⁷⁵ Ibid.

⁷⁶ *Bail Act* (NT) s 4(1).

⁷⁷ In both Queensland and Victoria, children cannot be charged with the offence of breaching bail conditions. In Queensland the offence to breach conditions of bail does not apply to a child: s 29(2)(a) *Bail Act 1980* (QLD). In Victoria offence to contravene certain conditions of bail does not apply to a child: s 30A(3) *Bail Act 1977* (Vic).

⁷⁸ *Bail Act 1977* (Vic) s 3B.

- the need to strengthen and preserve the relationship between the child and the child's family, guardians or carers;
- the desirability of allowing the living arrangements of the child to continue without interruption or disturbance;
- the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
- the need to minimise the stigma to the child resulting from being remanded in custody;
- the likely sentence should the child be found guilty of the offence charged; and
- the need to ensure that the conditions of bail are no more onerous than are necessary and do not constitute unfair management of the child.

The legislation goes further to mandate that bail must not be refused on the sole ground that the child does not have any, or adequate, accommodation.⁷⁹ Inserting similar provisions into the YJA could have a significant impact on the remand rates of Aboriginal children in the Northern Territory. Significant investment in bail support programs and accommodation is also required.

Exposing children to remand, a risk factor for reoffending, should only occur in rare and exceptional circumstances.

Recommendation 11:

The *Bail Act* (NT) should be amended to exempt children from the offence of breach of bail, and to insert specific provisions to guide decision-making in relation to determining whether to grant bail to a child.

Welfare considerations and police practices

Little has changed since the 2011 report, 'Doing Time, Time for Doing' and the Carney review into youth justice in Northern Territory drew attention to the correlation between welfare concerns and the increase in remand rates. Lack of suitable accommodation, inadequate parental or adult supervision, an inability to locate a responsible adult, lack of access to appropriate education and training opportunities, drug and alcohol dependence, and health concerns were among the reasons cited for children being refused bail and held in detention facilities.⁸⁰

Both reports highlighted the lack of safe and stable accommodation as a key factor in a child's inability to obtain bail or comply with bail conditions.⁸¹ Further it has been reported that a lack of support and programs has been a leading factor in decisions to refuse bail.⁸² In a joint submission to the 'Doing Time, Time for Doing' inquiry, a number of Aboriginal and Torres Strait Islander Legal Services stated:

⁷⁹ *Bail Act 1977* (Vic) s 3B(3).

⁸⁰ J Carney, Northern Territory Government, Review of the Northern Territory Youth Justice System: Report (2011), 50; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 219-229.

⁸¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 222.

⁸² *Ibid*, 222-229.

“Detention is a criminal sanction: not a ‘placement’ for children in need of care ... It is clear and predictable that young people at risk of entry to the criminal justice system will come from homes where it is unsafe for them to be. The need to provide accommodation, other than police cells or detention centres, is chronic.”⁸³

Where there are concerns about a child’s home environment or lack of accommodation, a supported bail program should be available to undertake assessments, support children in custody and provide advice, make arrangements for accommodation and refer to support services. A program in line with the Victorian state-wide Central After Hours Assessment and Bail Placement Service (**CAHABPS**)⁸⁴ could be adapted to the NT context.⁸⁵ The CAHABPS is unique in that it can access child protection records and information from Department of Human Services to inform bail options and supports. Another alternative is the After Hours Bail Service in the Australian Capital Territory that provides support for children at risk of remand including through locating accommodation, provision of transport and contacting parents.⁸⁶

There is also a lack of child emergency accommodation options available across the NT. The only service available in Darwin is CASY house which takes in children and young people aged between 15-18 years who are homeless or at risk of homelessness.⁸⁷ However this service has limited capacity and strict eligibility criteria prevent many children with complex needs accessing the service.⁸⁸ In order to ensure those most at risk are not being remanded in custody there should be a range of alternative accommodation services available to link in with a bail support program. In particular there should be greater investment in Aboriginal community controlled programs that aim to reconnect vulnerable children with culture, family and community.⁸⁹

In the design and implementation of any bail support program, support and treatment to address risk factors should be prioritised over monitoring and supervision. Voluntary participation, a holistic response based on a needs assessment, coordination across government departments and adapting responses to local conditions are all critical.⁹⁰

Recommendation 12:

The NT Government should invest in the creation of community-led bail support programs across the NT and youth-specific accommodation options.

⁸³ Ibid, 226.

⁸⁴ See further, State Government of Victoria, *Central After Hours Assessment and Bail Placement Service (CAHABPS)* (29 May 2015) Department of Human Services <<http://www.dhs.vic.gov.au/youth-justice-community-practice-manual/presentence-and-providing-court-advice/bail/central-after-hours-assessment-and-bail-placement-service-cahabps>>.

⁸⁵ See further Jesuit Social Services, *Thinking Outside, Alternatives to Remand for Children (Research Report)* (2013), 67-68. While Jesuit Social Services has supported the program, it has called for an expansion of the model, in particular, for the service to be available 24 hours per day, for children to be bailed into their care and the resources to broker secure accommodation options for children.

⁸⁶ Ibid. A review conducted within 6 months of its operation saw the number of short-term remand episodes in ACT youth justice facilities decline by 17% in comparison to the previous year.

⁸⁷ See further YWCA Darwin, *Youth Housing Programs* <<http://www.ywcaofdarwin.com.au/pages/programs/youth-housing>>.

⁸⁸ Information obtained by the author while employed with the North Australian Aboriginal Justice Agency.

⁸⁹ See further Central Australian Aboriginal Legal Aid Service, the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission, *Review of Youth Detention in the Northern Territory*, November 2014, 16.

⁹⁰ Kelly Richards and Lauren Renshaw, ‘Bail and Remand for Young People in Australia: A National Research Project’, (Research and Public Policy Series No 125, Australian Institute of Criminology, 2013), 93.

Exposing children to harm in youth detention centres must end

The youth detention facilities operating in the NT are smaller versions of adult correction facilities. The current Don Dale Youth Detention Centre is itself the former adult Berrimah Prison. Facilities are regimented and have similar characteristics to adult prisons: razor wire, use of isolation and small cell blocks.

The Supreme Court of Victoria has twice found in the last six months that transferring children and young people to adult facilities violates their human rights. Justice Dixon of the Supreme Court stated:

To protect the child's best interests, State parties to the CROC are expected to establish separate facilities for children deprived of their liberty, which include distinct, child-centered staff, personnel, policies and practices.⁹¹

It is generally not considered to be in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.⁹²

It is not just the physical appearance of the facilities that reflect an adult correctional model but also the practices and culture, which are built on control, coercion and punishment with very little programs and services to assist rehabilitation. In addition, youth detention centres in the NT also use adult corrections officers, who bring with them training, practices and experience geared to responding to adults.

International research has condemned such models as ineffective in responding to children who offend.⁹³ Research from the United States indicates that youth prison models which reflect adult correctional facilities through an emphasis on confinement and control lack the essential elements required for healthy adolescent development: engaged adults focused on their development, opportunities for academic success and activities that contribute to developing decision-making and critical thinking skills.⁹⁴ At the same time, adult-like facilities exacerbate many of the causal factors to offending, including untreated trauma, reinforcement of poor choices and impulsive behaviour, and mistreatment and punitive responses are endemic.⁹⁵ The Royal Commission's Interim report has confirmed this to be the case in the NT detention centres.

As has been revealed during the Royal Commission, the facilities and staff in NT youth detention centres have enabled inappropriate and unlawful practices, unacceptable standards of conduct and inappropriate methods of dealing with children. Failings in staffing, training, and a lack of expertise in dealing with adolescents, particularly those with histories of trauma and significant disadvantage, have also lead to inconsistencies in management and practices, conflict, and inadequate programs and activities for children, resulting in incidents and escalation of difficult behaviours. The situation

⁹¹ Ibid, [263].

⁹² *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251, [267].

⁹³ Patrick McCarthy, Vincent Schiraldi and Mirian Shark, 'The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model' (Harvard Kennedy School, October 2016) 1-2.

⁹⁴ Ibid, 4.

⁹⁵ Ibid, 5. See further Richard A Mendel, 'No Place for Kids, The Case for Reducing Juvenile Incarceration' (The Annie E Casey Foundation, 2011).

presenting itself in the NT has been mirrored in other jurisdictions, such as Victoria⁹⁶ and Western Australia,⁹⁷ where similar pressure cooker environments have been allowed to fester.

Governments must cease exposing children to institutional environments. Instead resources should be redirected to the design and implementation of smaller purpose built facilities that reflect and implement the overarching objectives and purposes of youth justice. Internationally, there are a range of models for youth facilities that go some way to meeting these goals, yet one model cannot simply be transplanted from another jurisdiction. The NT is a unique jurisdiction, with a significant geographical landmass and high Aboriginal population.

Alternative model for youth detention

For children in detention, the aim should be to create a rehabilitative environment that reflects a specialized approach to the needs of a young person. What is needed is a model that encapsulates the essentials required for healthy adolescent development – engaged adults focused on their development, a peer group that models positive behaviour, opportunities for academic success, activities that contribute to developing decision-making and critical thinking skills, and pathways to success.⁹⁸

Large institutional adult-like facilities including the present Don Dale facility that reflect the physical infrastructure, systems and culture of prisons are the opposite of what is needed for children. Such facilities should be decommissioned and funds redirected into smaller alternatives that are more home-like and closer to family and community so as to promote connection with family, culture and community. The programs on offer within such facilities should be intensive, developmentally appropriate, emphasise positive youth-staff relationships, nurture family engagement and build community connections.⁹⁹

The mission and overarching philosophy of youth justice facilities should move from a correctional approach to one based on the tenets of positive youth development, building on each young person's strengths. The focus must always be on helping children get back on track through treatment and developmental programming that is trauma-informed; delivered by qualified and supported staff; and focused on prosocial skill development, academic or vocational instruction, work readiness, and work experience.¹⁰⁰

The Missouri Model

The Missouri model is a good practical example of innovative reform that reduces reoffending rates and promotes positive youth outcomes.¹⁰¹ In Missouri, the larger ineffective institutions were closed, which freed funds to be redirected towards smaller, more treatment-oriented programs across the state located closer to children's families and communities. Young offenders are screened to ensure

⁹⁶ See further Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria* at <<http://www.parliament.vic.gov.au/lpic/inquiries/inquiry/447>>; Commission for Children and Young People, *The Same Four Walls: Inquiry into the Use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System* (2017).

⁹⁷ Office of the Inspector of Custodial Services, *Directed Review into an Incident at Banksia Hill on 20 January 2013*.

⁹⁸ Patrick McCarthy, Vincent Schiraldi and Mirian Shark, 'The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model' (Harvard Kennedy School, October 2016) 4.

⁹⁹ *Ibid* 24.

¹⁰⁰ *Ibid*, 25.

¹⁰¹ Richard A. Mendel, 'The Missouri Model, Reinvesting the Practice of Rehabilitating Youthful Offenders' (The Annie E Casey Foundation, 2010) 2

that those who pose minimal risk to public safety are placed into community based rehabilitation and youth development programs. The small number of young offenders who pose a significant risk to the community, are placed in smaller regionally dispersed facilities with individualised treatment aimed at helping each young person make the behavioral changes necessary to get their lives back on track.

The key tenets of the Missouri model have been described as:¹⁰²

- continuous case management;
- decentralized residential facilities;
- small-group, peer-led services;
- restorative rehabilitation-centered treatment environment;
- strong organizational leadership;
- highly effective treatment strategies and approaches, and ensuring that the program consistently reflects on, improves on, and discards any ineffective initiatives; and
- larger constituency and increased buy-in from stakeholders.

In the NT context, an approach based on the Missouri model, with a continuum of community based programs that match services and supports to each child's needs, could provide a viable solution. The model could empower and invest in localised Aboriginal community based programs that strengthen family and community ties and cultural identity.

Recommendation 13:

The NT Government should redirect funding from the current youth detention model to a model focused on a continuum of local, community-based programs and treatment alternatives.

¹⁰² Patrick McCarthy, Vincent Schiraldi and Mirian Shark, 'The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model' (Harvard Kennedy School, October 2016) 25.