North Australian Aboriginal Justice Agency

Submissions on Youth Detention

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

July 2017

About NAAJA

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal aid services for Aboriginal people in the northern region of the Northern Territory in the areas of criminal, civil and family law, prison support and through-care services. NAAJA is active in systemic advocacy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Top End to provide legal advice and advocacy.

Acknowledgements

Firstly, we are indebted to all of the courageous Aboriginal children, young people and their families who were willing to tell the Royal Commission about their experiences with Youth Detention, both through NAAJA and CICAYDAS. This is their Royal Commission, and the Commission would have been poorer without their brave and crucial involvement. We thank them for their contribution not only to the evidence put before this Commission, but also for providing us with the knowledge and deeper understanding of the injustices that they faced and the system that has failed them in such a spectacular fashion.

NAAJA has committed to assist its clients and the Aboriginal community throughout this Commission, utilising its grant of leave to appear across all the Terms of Reference. NAAJA could not have undertaken this work, providing a strong voice advocating for the rights of the Territory's most vulnerable children, if not for the unwavering commitment and passion shown by all of its staff. The number of staff and Counsel retained for NAAJA's clients who have made both enormous individual and collective contributions to NAAJA's response to the Commission are too numerous to name, but we thank them all.

Finally, special thanks must go to our Principal Legal Officer, David Woodroffe and our Counsel for the course of the Commission, Phillip Boulten SC and Dr Peggy Dwyer. Their intellect and insight, desire to uncover the truth, and to uphold the human rights of the Territory's Aboriginal children, has assisted the Commission to shine a light on the systemic failures and abuses occurring within the youth justice system and pave a path to a brighter future.

These submissions not only analyse what has occurred in the past, but are also forward looking. We aim to provide a pathway to a future where the culture, rights and wellbeing of all Aboriginal children and young people are fostered and respected, and all can achieve their full potential.

Priscilla Collins

Chief Executive Officer, NAAJA

List of acronyms

AJJA	Australian Juvenile Justice Administrators
AMSANT	Aboriginal Medical Services Alliance Northern Territory
AOD	Alcohol and other drugs
APO NT	Aboriginal Peak Organisations Northern Territory
ARDS	Aboriginal Resources and Development Services Inc.
BMU	Behavioural Management Unit
CAALAS	Central Australian Aboriginal Legal Aid Service
CLE	Community legal education
COAG	Council of Australian Governments
CPS	Collaborative and Proactive Solutions
DCF	Department of Children and Families
FASD	Foetal alcohol spectrum disorder
HSU	High Security Unit
IMP	Intensive Management Plan
IOMS	Integrated Offender Management System
NAAJA	North Australian Aboriginal Justice Agency
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NDIS	National Disability Insurance Scheme
NGO	Non-government organisation
NTER	Northern Territory Emergency Response
OPCAT	*Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
PCIS	Primary care information system
PSU	Professional Standards Unit
YJO	Youth Justice Officer

Recommendations

Recommendation 1 That the Commonwealth and Northern Territory Governments take immediate steps to properly implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Recommendation 2 That the Northern Territory Government establishes a statutory authority with responsibility for youth justice services.

Recommendation 3 That the board of the statutory authority be chaired by an Aboriginal person and comprise three Aboriginal members as well as members with relevant expertise in areas such as youth justice, child protection, law, health and education.

Recommendation 4 That the statutory authority partner with Aboriginal organisations and communities to deliver youth justice services in communities.

Recommendation 5 That the Northern Territory Government ensures that sufficient resources and support is provided to the statutory authority so that Aboriginal people are genuinely empowered to have ownership and control of service delivery.

Recommendation 6 That all partnerships between the Northern Territory Government, statutory authority, non-government organisations and Aboriginal community controlled organisations adhere to the APO NT Partnership Principles.

Recommendation 7 That all the Royal Commission's recommendations should be framed with the unique rights and vulnerabilities of Aboriginal young people at their core.

Recommendation 8 That the Aboriginal Justice Agreement specifically considers the unique rights and needs of Aboriginal children and young people and ensures every opportunity is given to Aboriginal communities to participate in and have control over the design, implementation and delivery of policies and programs that affect Aboriginal people.

Recommendation 9 That the Northern Territory Government amend the *Youth Justice Act 2005* to include an express requirement under the objects of the Act that the provisions of the Act are to be interpreted in a way that is consistent with applicable international human rights principles.

Recommendation 10 That the Northern Territory Government amends the *Youth Justice Act 2005* to make clear that the primary object of the Act is the rehabilitation of young people.

Recommendation 11 That a Human Rights Act is enacted in the Northern Territory.

Recommendation 12 That the minimum age of criminal responsibility is increased to 12 years.

Recommendation 13 That the Youth Justice Framework is framed by the recommendations arising from the Royal Commission to ensure it is grounded in therapeutic and rehabilitative principles, and recognises the importance of Aboriginal culture and decision-making.

Recommendation 14 That the Northern Territory Government take urgent action, in consultation with Aboriginal organisations, community members and other stakeholders, to ensure that the current Don Dale Youth Detention Centre is closed as soon as possible.

Recommendation 15 That no child detainee shall be transferred to an adult prison.

Recommendation 16 That s 164 of the *Youth Justice Act* is amended so that transfers to adult prison upon a detainee turning 18 years of age are by application to the Court.

Recommendation 17 That s 150(2) of the *Youth Justice Act* is amended to:

a. Require intake information to be put in a form that can be accessed at any time by a young person in detention, and
b. Include 'cognitive skills' as another factor that must be considered when determining how the explanation of the rules of the centre and a detainee's rights is delivered.

Recommendation 18 That a consistent model of care for addressing challenging behaviours that is non-punitive, non-adversarial, trauma-informed and culturally competent is implemented, and informs the approaches to both case management and classification.

Recommendation 19 That the case management and classification systems use best practice, empirically supported, evidenced based models.

Recommendation 20 The *Youth Justice Act* and/or the *Youth Justice Regulations* be amended to reflect the following:

a. The protections against use of force currently contained in the Use of Force Directive 3.2.2 be legislated.
b. The types of approved restraints and the protections surrounding their use as currently contained in the Use of Restraints Directive be legislated.
c. To separate the powers exercisable by way of discipline and those involving the use of force.
d. To require that disciplinary powers be undertaken in ways that respect the child's dignity, are proportionate to the nature of the misconduct, and have regard to the child's subjective features, explanation and vulnerabilities.
e. Prohibiting certain acts from forming part of any disciplinary action, namely, corporal punishment, physical force, isolation, verbal or physical abuse or humiliation, or withdrawal of entitlements (e.g. food, water, access to telephones and visits), or access to services (e.g. education).
f. To clearly set out the permitted purpose(s) for use of physical force being to protect a person or property from the consequences of the child's misbehaviour.
g. An obligation upon youth detention staff to report harm or suspected harm being suffered by children.

Recommendation 21 That the practice of routine strip searches ceases immediately.

Recommendation 22 Section 153(5) of the *Youth Justice Act* be amended to prohibit the seclusion or isolation of children in detention.

Recommendation 23 That Territory Families ensures its policies, procedures, programs and services are gender-sensitive and address the distinct needs of girls in detention, including their cultural needs.

Recommendation 24 That future youth justice facilities include purpose-built facilities for girls, including adequate toilet and showering facilities which ensure privacy and can be accessed without asking staff for permission.

Recommendation 25 That girls are permitted to have sanitary items in their cells.

Recommendation 26 That more women, particularly Aboriginal women, are employed as Youth Justice Officers.

Recommendation 27	That girls receive equal access to educational, vocational, cultural and recreational programs and activities while in detention.
Recommendation 28	That girls receive access to health care, including mental health care, drug and alcohol counselling, trauma counselling and therapeutic support that is tailored to their needs.
Recommendation 29	That an unrestricted supply of clean drinking water is always available to every detainee.
Recommendation 30	That the *Youth Justice Regulations* are amended to ensure that the access to drinking water is an irrevocable right of all detainees.
Recommendation 31	That the *Youth Justice Act* and *Youth Justice Regulations* are amended to ensure that the withholding of food and water from detainees for reasons of punishment or addressing behaviour is expressly prohibited.
Recommendation 32	That a right of review for school suspensions is introduced into the *Education Act*.
Recommendation 33	That all suspensions of 5 days or more, and any suspensions that result in a total of more than 15 days in any year school year require approval by the District Director (Education) and also require that the Children's Commissioner be notified.
Recommendation 34	That Northern Territory detention schools adopt best practices in relation to school suspensions and a child's right of review.
Recommendation 35	That Northern Territory detention schools adopt best practices in relation to behavioural management.
Recommendation 36	That educational staff are given training in relation to non-punitive approaches to behavioural management.
Recommendation 37	That classes should be assigned based on learning ability and achievement rather than security classification.
Recommendation 38	That comprehensive information on cognitive development, health, cultural, social and other relevant factors are gathered on admission, and best practice followed, to provide education targeted to the individual needs of detainees.
Recommendation 39	That teaching should include an Aboriginal curriculum that is supportive of a child's cultural needs.

Recommendation 40	That there are measures implemented to improve teacher-to-student ratios to best practice levels for special needs education.
Recommendation 41	That funding and access to special needs support services is improved for young people in detention.
Recommendation 42	That staff with postgraduate qualifications in special needs education are recruited.
Recommendation 43	That fundamental community legal education on rights and responsibilities is delivered in Northern Territory youth detention centres, and in particular, resumes at Tivendale School.
Recommendation 44	That improved programs are established for re-engagement with education and transition to school following detention.
Recommendation 45	That resources are provided, as a priority, for re-engagement of youths from remote Aboriginal communities or who have disabilities.
Recommendation 46	That the Council of Australian Governments establishes justice targets for Aboriginal youth as part of the 'Closing the Gap' framework.
Recommendation 47	That all governments adopt the Change the Record Coalition 'Blueprint for Change' recommendations.
Recommendation 48	That the *Police Administration Act* and *Youth Justice Act* are amended to prevent the publication of the identity of youths as police suspects and during all court proceedings.
Recommendation 49	That the Police General Orders are reviewed to align with international human rights obligations and the best interests of the child.
Recommendation 50	That police ensure robust auditing of compliance.
Recommendation 51	That government, police and private residential carers adopt a protocol for justice practices relating to children in care.
Recommendation 52	That the administrative offence of breach of bail is repealed.
Recommendation 53	That a child in police custody shall always have access to legal representation, especially in relation to applications for bail.

Recommendation 54	That a specialist Youth Court Judge shall be on call after hours.
Recommendation 55	That the *Youth Justice Act* is amended to remove the requirement of prosecutorial consent to youth diversion.
Recommendation 56	That youth diversion programs in remote communities are developed and run in partnership with or by Aboriginal communities, Elders and Law and Justice Groups.
Recommendation 57	That appropriate funding and support, including essential services are provided by government.
Recommendation 58	That Police decision making for diversion suitability must be referred to locally based Aboriginal community Elders for their consideration.
Recommendation 59	That funding and legislative change are provided to integrate Law and Justice Groups across the youth justice and child protection systems.
Recommendation 60	That funding is provided to improve court infrastructure and the appropriate use of technology in remote regions.
Recommendation 61	That management practices and systems are designed to accommodate the cultural and language needs of Aboriginal youth.
Recommendation 62	That an Aboriginal language speaker in detention shall not be denied the right to an interpreter.
Recommendation 63	That the detention educational systems, curriculum and teaching shall be designed to accommodate the cultural and language needs of Aboriginal youth.
Recommendation 64	That the custodial transfer of a detainee from their community shall be an option of last resort and all other options such as bail support, early release and periodic detention must first be considered.
Recommendation 65	That family members and support services are consulted, involved in the planning and notified of any transfer between detention facilities.
Recommendation 66	That detainees are advised and given certainty as far as possible of the date and length of their transfer.
Recommendation 67	That support services are provided to families of detainees to maintain connection with their child.

Recommendation 68 That the youth detention system becomes a culturally competent framework and practice.

Recommendation 69 That the culturally competent framework shall consist of the following features:

a. Appropriate cross-cultural education and training programs targeted for different roles and at all levels of the system
b. Mechanisms integrated across the system for the learnings from cross-cultural education and training programs to inform workplace practices and decision-making
c. Frameworks and practices that actively consider cultural competency at the individual level, organisational and systemic levels
d. Partnerships with Aboriginal educational institutions to better understand and develop a body of research and evaluations into existing frameworks and practices
e. Audit and accountability mechanisms including independent Aboriginal oversight and involvement.

Recommendation 70 That there is an identified recruitment strategy for Aboriginal and Torres Strait Islander worker staff in the youth detention system.

Recommendation 71 That there is Aboriginal identified positions at levels of middle, senior and executive levels of youth justice.

Recommendation 72 That admission processes, rules, rights and complaint mechanisms should be conducted with the assistance of an Aboriginal language interpreter where a young person's first language is not English.

Recommendation 73 That where there an Aboriginal language interpreter is required, it is recorded on data management systems.

Recommendation 74 That cultural information is recorded and used to assist in the management, case plans and programs for Aboriginal young people.

Recommendation 75 That meeting the cultural needs of female detainees is made a first order priority.

Recommendation 76 That the Elders Visiting program is provided with adequate funding and administrative support services, including facilities to enable Elders to participate in cultural activities over days or extended stays with detainees.

Recommendation 77	That Elders work with young people on their reintegration into the community and Throughcare needs.
Recommendation 78	That a study is commissioned to determine the prevalence of neurocognitive impairment of young people engaged in the child protection and youth justice systems.
Recommendation 79	That initial health assessments take place immediately upon the detainee's admission.
Recommendation 80	That comprehensive assessments are undertaken on admission that span the young person's physical and mental health, including a neurocognitive and developmental assessment, vision and hearing. Further, these assessments should obtain information on the young person's exposure to trauma, vulnerabilities, English proficiency, family, first language and culture.
Recommendation 81	That detailed policies and guidelines on best practice medical treatment and record keeping in detention are developed, implemented and regularly audited.
Recommendation 82	That treatment of children deemed at risk must align with international best practice and human rights obligations.
Recommendation 83	That a dedicated detox facility and appropriate medical treatment is available to support young people with drug withdrawal and rehabilitation.
Recommendation 84	That there is a system of care that would include in-reach programs and pre-release transition planning to improve continuity of care for detainees.
Recommendation 85	That a comprehensive suite of programs is developed to cater for the mental, social, and emotional wellbeing of detainees and that best assists their transition to the community.
Recommendation 86	That young people on remand are provided access to pro-social activities and programs.
Recommendation 87	That there is further investment in Throughcare services and associated primary support services as a priority.
Recommendation 88	That a dedicated residential treatment facility for disengaged and marginalised Aboriginal young people, controlled by a local Aboriginal organisation and supported by local Elders and community members, is funded to operate in the Top End as a priority.

Recommendation 89 That Territory Families ensure there is robust internal auditing and investigatory processes for youth detention facilities and that these processes are based on international and national best practice.

Recommendation 90 That the current Official Visitors Program be replaced with a Community Visitors Program established under an independent authority such as the Commissioner for Aboriginal Children and Young People. Further, that that there should be Aboriginal identified positions within the Community Visitors Program.

Recommendation 91 That all children in detention are informed of their right to complain, and they are assisted to do so where necessary.

Recommendation 92 That Territory Families review its internal complaints system and ensure it complies with the AJJA Standards for Juvenile Custodial Facilities and international standards.

Recommendation 93 That the Northern Territory Government amend the *Children's Commissioner Act 2013* (NT) to establish the position of Commissioner for Aboriginal Children and Young People.

Recommendation 94 That the Northern Territory Government amend the *Children's Commissioner Act 2013* (NT) to ensure that the Office of the Children's Commissioner (which will include the position of Commissioner for Aboriginal Children and Young People) has unfettered powers to access detention facilities, and unrestricted access to records, young people and staff.

Recommendation 95 That the Children's Commissioner is required to report quarterly against established criteria, and provide recommendations for improvement in relation to the management of detention centres and the treatment and conditions of children in detention. That this report is tabled in Parliament and a summary of data in relation to use of force and use of isolation should be made public.

Recommendation 96 That Northern Territory Police establish a specialist unit to investigate allegations made by young people in detention and ensures its members receive training on trauma-informed approaches to working with young people.

Recommendation 97 That Northern Territory Police ensures every young person who makes a complaint about their treatment in detention has access to a support person of their choice.

Recommendation 98 That the Commission recommends to the Commissioner of Northern Territory Police that a new investigation is conducted into the allegations raised by AT.

Recommendation 99 That Territory Families ensure there are mechanisms in place for Elders to follow up on complaints made by young people, to provide feedback to staff on the welfare of young people in detention and to participate in case management planning.

Recommendation 100 That Territory Families ensures family members have regular access to any child in detention and that family members are given an opportunity to have input into case management and behaviour management plans.

Recommendation 101 That access to family members and their involvement in case management and behaviour management plans be one of the measurable criteria reported against quarterly by the Office of Children's Commissioner.

Recommendation 102 That Territory Families ensures that children in its care who are in detention continue to receive support from their caseworker, including input into case management plans and Throughcare services.

Recommendation 103 That Territory Families establish and train a specialised workforce to work with children who are in care and detention. These workers should have small caseloads, enabling them to work intensively with young people using trauma-informed approaches.

Recommendation 104 That Territory Families takes immediate steps to 'mainstream' Aboriginal considerations across youth justice services. The Department's structure and approach should facilitate greater opportunity for Aboriginal leaders to contribute to policy, programs and services.

Recommendation 105 That Youth Justice Officers complete comprehensive training before commencing duties, and that this training includes topics such as trauma-informed approaches, mental health, de-escalation techniques and behaviour management.

Recommendation 106 That Youth Justice Officers complete regular refresher training.

Recommendation 107 That Youth Justice Officers have access to psychologists and other relevant health professionals who can provide advice about appropriate techniques and strategies for dealing with complex behaviours.

Recommendation 108 That Territory Families ensure there are robust processes in place for investigation of allegations of misconduct or inappropriate behaviour by staff and that measures are taken to promote and enforce professional standards in youth detention facilities.

Recommendation 109 That Territory Families reviews its policies and procedures relating to record keeping and ensures that all staff receive comprehensive training on record keeping requirements.

Recommendation 110 That Territory Families ensures that detention centre staff cannot permanently or irrevocably delete or alter records.

Recommendation 111 That the Royal Commission provide time frames for implementation of its recommendations to guide the Commonwealth and Northern Territory governments on priority areas for implementation.

Recommendation 112 That the Office of the Children's Commissioner becomes an independent monitor of the Northern Territory Government's response to the recommendations of the Royal Commission.

Recommendation 113 That the Office of the Children's Commissioner report annually on the Northern Territory Government's progress in implementing the Royal Commission's recommendations, and that this report is tabled in Parliament.

Recommendation 114 That the Northern Territory government commit to a co-design process with Aboriginal organisations and communities to ensure Aboriginal people have genuine input into the design of future secure youth justice facilities in the Northern Territory.

Recommendation 115 That the co-design process commences with a conference bringing together representatives from Aboriginal organisations and communities, Government and other stakeholders to discuss possible models.

Recommendation 116 That with future secure facilities in the Northern Territory are:

a. Small, purpose-built therapeutic facilities that cater for 6–10 people
b. Designed to promote rehabilitation and enable Aboriginal children and young people to maintain connection to their family, community and culture
c. Flexible spaces, including outdoor areas for culture, recreation, and family visits, as well as spaces that afford privacy for medical consultations, legal and other professional visits
d. Staffed by a range of professionals to meet the needs of young people, including psychiatrists, psychologists, Aboriginal Liaison Officers, and Youth Justice Officers
e. Governed by comprehensive Standard Operating Procedures which prohibit the use of isolation and strictly limit the use of force and use of restraints
f. Designed to accommodate the needs of different cohorts of detainees, for example, girls, young people with disabilities and those of varying ages
g. Designed to meet the climatic conditions of northern and central Australia
h. Designed to comply with the *Havana Rules*, other applicable international standards for juvenile justice facilities, and the Australasian Juvenile Justice Administrators Juvenile Justice Standards.

Recommendation 117 That secure youth justice facilities are run in partnership with Aboriginal communities and non-government organisations.

Recommendation 118 That there are is a planned and staged transition to Aboriginal-operated secure youth justice facilities.

Introduction

Witness AU:

I feel like it's been a nightmare being locked up as [a] kid. Most of the time I feared for my life at Don Dale. Every night, since I've been locked up as a kid, I have nightmares. I feel like everything that I did, and being in Don Dale meant that I haven't been able to reach my goals in life. I want to tell my story to everyone because I hope that what I did and what happened to me doesn't happen to other kids.[1]

The images of children being assaulted, stripped and mistreated in Northern Territory youth detention centres have shocked the nation and led to the establishment of this critical Royal Commission. Children in government-run detention centres have been physically and mentally abused. A culture of punishment and neglect has systematically resulted in excessive and unlawful use of force, prolonged isolation of children in inhumane conditions and denial of basic necessities of water, hygiene, education and appropriate medical and mental health care. Periods in detention have caused further trauma rather than providing the necessary supports for rehabilitating children to have fulfilling lives upon their release within the community. This Commission has been a watershed; it is an opportunity to bear witness to the experiences of these children and a mechanism for far-reaching reform that will ensure these systemic abuses can never happen again.

About these submissions

NAAJA has responded to each of the 12 topics identified by the Royal Commission in its call for submissions on detention. In making these submissions, we have not sought to exhaustively review the breadth of evidence before the Commission as many of the problems facing the youth justice system are well known, so it is not necessary to exhaustively recite the evidence.

Our submissions are forward looking and aim to assist the Commission to frame practical recommendations that will improve outcomes for Aboriginal children and young people. We draw on the evidence before the Commission about the treatment of children and young people in detention and insights from our four decades of experience in legal representation and advocacy for Aboriginal people. We have also drawn on NAAJA's unique organisational knowledge, Aboriginal understandings and expertise as a long-term legal provider of culturally competent outreach, therapeutic and social services to Aboriginal young people in Northern Australia.

We have been particularly informed by the experiences of our clients, many who have bravely come forward as vulnerable witnesses to tell their stories to the Commission and share their own ideas for change in the hope that the abuse and indignities they endured are never repeated. NAAJA endorses each of the submissions made on behalf of its clients who gave evidence to the Commission.

The evidence given by each vulnerable witness has been consistent, credible and highly probative. They speak, without embellishment or acrimony, of the experiences of Aboriginal young people and their journeys through the youth justice system during the relevant period of this Commission. It is a compelling body of evidence, 'telling it as it was' and as such is information upon which the

[1] Exhibit 128.001, Statement of AU, 18 February 2017, 11 [68].

Commission can make findings and wide-ranging recommendations that will bring about lasting change.

A continuum of care for young people

NAAJA recognises that a child's detention should not be considered in isolation from other parts of the youth justice system and that the Commission's recommendations will be informed by evidence that is yet to be received in further hearings on alternatives to detention and the child protection system.

NAAJA advocates for a continuum of care model for young people in contact with the youth justice system.[2] Detention in secure facilities is just one point along this continuum, and should be a genuine measure of last resort. Priority must be given to investing for children in earlier points along the continuum including alternatives to detention and diversionary programs. The importance of early intervention for young people at risk of entering the youth justice system and their families cannot be overstated.

Witness AG:

I have known a lot of people who have gone into youth detention. They usually have ended up in trouble with the law because there has been drug and alcohol misuse in their family, they have been abused, some have been the victims of paedophilia and some have been bullied. There are a lot of people who were taken by Welfare and put into foster care that became depressed or started having problems because they were taken away from their family or because they were abused by their foster carers.

I think that the way to stop people going into youth detention is to make sure that the youth get help for these kinds of problems early, before they start having problems with the police.[3]

AG's reflection is a poignant illustration of some of the themes to emerge from the evidence the Commission has heard so far: that the needs of young people in detention are complex and inter-related, that many suffer intergenerational trauma and harm, and that there are high levels of crossover between children in the youth justice and child protection systems. Our responses to these complexities must therefore be holistic, coordinated and focused on diverting young people from the youth justice system.

The Commission's work in context

As the Commission is acutely aware, its report will follow in the wake of many previous inquiries, commissions and reviews that have each investigated matters relevant to the Commission's terms of reference. Despite over 50 reports that have described the problems and proposed solutions,[4] the lives of Aboriginals in the Northern Territory have improved very little. Again and again, Aboriginal people have been let down because of the failure to act on these reports. As Senior Counsel Assisting

[2] Variously referred to as a continuum of interventions, continuum of support and a service response continuum.
[3] Exhibit 145.001, Statement of AG, 25 November 2016, 20 [97]–[98].
[4] Senior Counsel Assisting opening address, 11 October 2016, 2.

Peter Callaghan remarked in his opening address, an 'inquiry mentality' has pervaded to the extent that:

> … investigation is allowed as a substitution for action, and reporting is accepted as a replacement for results. The bare fact that there has been so much said and written over such a long time is suggestive of a persistent failure that should not be allowed to endure.[5]

What has been lacking is the political will to drive the systemic changes that are required. Despite repeated calls for urgent action to address the profound disadvantage and high rates of imprisonment of Aboriginal people, Aboriginal children in the Northern Territory continue to be grossly over-represented in the detention and child protection systems, representing 94% of the detention population and 89% of children in out of home care.[6]

This is a national tragedy and requires urgent action.

It is sobering to reflect that many of the 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody remain just as relevant today. The rates of Aboriginal over-representation in Northern Territory prisons remain staggeringly high and ever increasing. Indeed, that Royal Commission's observations about Aboriginal young people's contact with the criminal justice system could be describing the current circumstances in the Northern Territory which are the subject of this Commission's inquiry:

> Recommendation 62: That 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.[7]

Successive Commonwealth and Territory governments have failed to adequately implement the Royal Commission into Aboriginal Deaths in Custody's recommendations aimed at addressing the alarming rates of Aboriginal children's involvement in the youth justice and child protection systems. Practices that were criticised by that landmark Royal Commission persist in the Northern Territory today: young people routinely held in police lock-ups,[8] no recognition that detaining Aboriginal people in isolation is 'undesirable in the highest degree', and minimum standards for segregation not being met.[9] Had

[5] Senior Counsel Assisting opening address, 11 October 2016, 4.
[6] Royal Commission into the Detention and Protection of Children in the Northern Territory, Interim Report, 31 March 2017, 9–10.
[7] Exhibit 024.001, Report of the Royal Commission into Aboriginal Deaths in Custody, recommendation 62.
[8] Exhibit 024.001, Report of the Royal Commission into Aboriginal Deaths in Custody, recommendation 242.
[9] Exhibit 024.001, Report of the Royal Commission into Aboriginal Deaths in Custody, recommendation 181.

these recommendations been properly implemented, young people would not have had to suffer, more than two decades later, the oppressive conditions they did in youth detention facilities.

Recommendation 1	That the Commonwealth and Northern Territory Governments take immediate steps to properly implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

In the last ten years, successive Northern Territory governments have commissioned inquiries and reviews into matters relevant to this Commission's terms of reference, yet failed to adequately implement their recommendations and tackle the longer-term reform required. Responses have not been coordinated, holistic or sustained.

In her evidence to the Commission, Ms Pat Anderson AO, co-author of the *Little Children are Sacred* report, conveyed the frustration felt by Aboriginal people at government inaction:

> This is the nature of Aboriginal reporting in the whole of the country: very little actually happens … That's all this country does is, talk about blackfellas. There's this – some kind of opiate now: if you have a roundtable, or you have a discussion, or you do a report, it's a momentary feel good moment and then it's all left: nothing ever happens. So that's got to stop.[10]

The Commission has heard that the last ten years has seen the 'disempowerment and powerlessness of Aboriginal people and the breakdown of cultural authority in communities and families',[11] with local autonomy and decision-making by community councils being replaced by 'Super Shires' and the Northern Territory Emergency Response. In reflecting on the impact of the Intervention on Aboriginal people, Ms Anderson said:

> This disempowerment, and the way that services are provided or not provided to Aboriginal Australia, is just appalling … look, we are on our knees here. The last 10 years have just been appalling.[12]

Against this background, the work of the Commission takes on critical importance. Indeed, as Ms Anderson told the Commission:

> I would go so far as to say the very survival of Aboriginal people in the Northern Territory depends on this Commission making a real impact here, that [its report] not just be … dropped into a filing cabinet somewhere.[13]

[10] Oral evidence of Patricia Anderson, 12 October 2016, 143:43–44 and 144:6–9.
[11] Oral evidence of Patricia Anderson, 12 October 2016, 152:5–6.
[12] Oral evidence of Patricia Anderson, 12 October 2016, 149:37–41.
[13] Oral evidence of Patricia Anderson, 12 October 2016, 143:47–144:4.

We urge the Commission to listen to Aboriginal people's call for urgent action to improve outcomes for Aboriginal children and young people in the Northern Territory and ensure they are given the opportunity to thrive as part of strong families and healthy communities.

A system in crisis

Clearly the Northern Territory's imprisonment rate indicates a social, economic, and law and order crisis of devastating proportions for the Territory as a whole and for Indigenous people in particular. It has been a longstanding crisis.[14]

The evidence before the Commission paints a stark picture of a youth justice system in crisis. It is characterised by poor political leadership; woefully inadequate management and oversight; unsafe, outdated and inhumane infrastructure; deficient workforce planning and staff training; and a punitive culture where detainees were routinely mistreated rather than supported to identify and address their complex needs. There were no consistently applied policies and procedures. Records were rarely maintained to a workable standard. Rules were inconsistently and confusingly applied to young people who were not given information to help them navigate an already traumatising environment.

Governments have been aware of the problems over a long period of time but have consistently failed to act. The management of children in Northern Territory youth detention centres fell far below the standard of care expected, and required by law.

The effect of these collective failings on the children and young people in the care of the Northern Territory Department of Correctional Services has been devastating. Time in detention has caused young people further harm rather than assisting them to get their life back on track.

Witness AU:

I thought Don Dale was going to make me better but I think it just made me tougher.[15]

Witness AX:

… being locked down for all that time, and those other things that used to happen to us inmates in these places, did not make us better, they just made us worse in the head … going through these kinds of events was another part of the reason why we would go on to offend.[16]

The way forward

This Commission presents an opportunity to transform the Northern Territory's youth justice system, a change that is needed and long overdue. The starting point for addressing the gross over-representation of Aboriginal young people in detention must be the empowerment of Aboriginal

[14] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 6.
[15] Exhibit 128.001, Statement of AU, 18 February 2017, [16].
[16] Exhibit 111.001, Statement of AX, 17 February 2017, [60].

people to develop the solutions and to have ownership and control in how they are delivered in communities.

This necessitates more than just empty phrases or gestures to Aboriginal people. It will require genuine partnerships between government and Aboriginal people so that Aboriginal communities are supported and sustainably resourced to provide therapeutic, culturally relevant services and programs for young people and families that respond to the specific needs of their communities.

Empowering Aboriginal ownership and control

The importance of Aboriginal people owning solutions to the challenges facing their communities has long been recognised. The report of the Royal Commission into Aboriginal Deaths in Custody stated:

> … it is clear that in this context Aboriginal people must be permitted to find their own solutions, and be supported to the utmost extent in doing so. If there is one lesson we can learn from history, it is that solutions imposed from the outside will only create their own problems. The issue of giving back to Aboriginal people the power to control their own lives is therefore central to any strategies which are designed to address these underlying issues.[17]

Evidence shows that 'well resourced programs that are owned and run by the community are more successful than generic, short-term, and sometimes inflexible programs imposed on communities.'[18]

However, calls for empowerment of Aboriginal people have not been realised:

> … nothing was going to happen unless Aboriginal and Torres Strait Islander people are involved in the design and implementation and actually carrying out the work … This hasn't happened in Australia for at least 10 years now. Not only just here in the Northern Territory.[19]

It is only through far-reaching structural reform led by Aboriginal people to develop and deliver solutions that we can start to effectively address over-representation of Aboriginal children in the youth justice system. This reform should be underpinned by an Aboriginal Justice Agreement that recognises Aboriginal people's right to self-determination and commits the Northern Territory Government to giving Aboriginal communities every opportunity to participate in and control the design and delivery of policies and programs that affect Aboriginal people. NAAJA commends the Northern Territory Government for the steps it has taken to develop an Aboriginal Justice Agreement and looks forward to further contributing to this process.

A paradigm shift in youth justice

The current approach to youth justice in the Northern Territory has not worked. Real reform requires a wholesale circuit breaker that galvanises change and empowers Aboriginal people to drive the

[17] Exhibit 024.005, Royal Commission into Aboriginal Deaths in Custody, Final Report, 15 April 1991, Volume 4.
[18] Exhibit 018.001, Little Children are Sacred Report, 30 April 2007, 53.
[19] Oral evidence of Patricia Anderson, 12 October 2016, 151:41–45.

solutions.[20] There should be an Aboriginal-centric or Aboriginal-controlled approach at all levels of the structure, supervision and management of youth justice in the Northern Territory.

NAAJA recommends the establishment of an independent statutory authority with responsibility for youth justice services. The statutory authority should be governed by a board, comprising an Aboriginal chairperson and three Aboriginal members. Aboriginal people should be employed at all levels across the authority, including in senior leadership positions.

The statutory authority will enter into genuine partnerships with Aboriginal organisations, with the authority providing resources, training and capacity building to enable Aboriginal organisations to drive the delivery of therapeutic, culturally relevant youth justice services in communities. Aboriginal Elders should be included and actively participate in this process. Youth justice services should be delivered through a family- and community-strengthening model, with joined-up approaches to case management and service delivery.[21]

The APO NT Partnership Principles should inform any partnership between the proposed statutory authority and Aboriginal organisations and non-Aboriginal organisations. These Principles guide non-Aboriginal organisations engaged in the delivery of services or development initiatives in Aboriginal communities in the Northern Territory. NAAJA welcomes the Northern Territory Government's commitment to implement the APO NT Partnership Principles across government agencies.

NAAJA recognises that the extent of structural reform, including establishment of the statutory authority, requires a staged process that will take time. In the meantime, NAAJA recommends that the Northern Territory Government take immediate action to improve conditions for children in detention, including urgent consultation with Aboriginal organisations, communities and other stakeholders to find an alternative to the current Don Dale Youth Detention Centre.

Recommendation 2	That the Northern Territory Government establishes a statutory authority with responsibility for youth justice services.
Recommendation 3	That the board of the statutory authority be chaired by an Aboriginal person and comprise three Aboriginal members as well as members with relevant expertise in areas such as youth justice, child protection, law, health and education.
Recommendation 4	That the statutory authority partner with Aboriginal organisations and communities to deliver youth justice services in communities.
Recommendation 5	That the Northern Territory Government ensures that sufficient resources and support is provided to the statutory authority so that Aboriginal people are genuinely empowered to have ownership and control of service delivery.

[20] Oral evidence of Keith Hamburger, 5 December 2016, 342:34–38.
[21] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 7–8; Oral evidence of Keith Hamburger, 5 December 2016, 352:22–47.

Recommendation 6	That all partnerships between the Northern Territory Government, statutory authority, non-government organisations and Aboriginal community controlled organisations adhere to the APO NT Partnership Principles.

A culturally relevant system

Continuity of cultural identity for Aboriginal children and young people is vital. Culture is important to personal growth, rehabilitation, and family support and community wellbeing.

Cultural considerations should be central to a detention system where most detainees are Aboriginal. Programs and services must be culturally safe and responsive, and build on the strengths of family, community and culture.

In recognition of the importance of cultural knowledge to making decisions in a child's best interests, induction assessments and case management plans should be informed by cultural considerations such as a young person's skin relationships and whether they have been through ceremony. Input should be sought from the young person's family, Elders and Aboriginal staff. The Elders Visiting Program should be strengthened and expanded so more young people in detention have access to Elders from their community who can provide support to the young person and help them maintain connection to culture.

Bipartisan commitment to long-term investment and evidence-based reform

Addressing the failures of the youth justice and child protection systems in the Northern Territory requires bipartisan commitment and long-term investment by both the Commonwealth and Northern Territory governments. It calls for sustained approaches, driven not by election cycles but by evidence-based and community-led reform. Strong political leadership is required to ensure that the work of this Commission is not shelved to 'gather dust' with those that have come before it.

Long-term investment approaches 'recognise the future costs of inaction and the long-term benefits of improved outcomes' for children and young people.[22] They ensure investment is directed towards the interventions that make the biggest difference.[23]

The evidence is clear that punitive approaches have not worked in the Northern Territory. The Commission has heard how youth justice policy was driven by the perceived need to be seen as 'tough on crime' by the electorate rather than any long-standing evidence base.[24] This has also influenced police practices.[25] These approaches have had devastating impacts for Aboriginal children and young people, increasing their rates of detention and re-traumatising children rather than providing the therapeutic supports necessary to promote rehabilitation.

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[22] Expert Panel Final Report, Investing in New Zealand's Children and their Families, December 2015, 10.
[23] Ibid 11.
[24] See, for example, oral evidence of Kenneth Middlebrook, 26 April 2017, 2931:25–41.
[25] Oral evidence of Ian Lea, 10 May 2017, 3681:32-47; 3687:4-20.

Future youth justice policy in the Northern Territory must be grounded on evidence concerning best practice approaches. An evidence base should also inform community expectations and media reporting on youth justice issues. Public education about what works to reduce youth offending, including through resourcing campaigns such as Making Justice Work, is an important part of this endeavour. Research has shown that providing people with more detailed information results in less punitive attitudes.[26] Strong political leadership is called for to change the public conversation about youth offending and ensure it is underpinned by the research rather than negative stereotypes that demonise and alienate young people.

Embedding trauma-informed, strengths-based, therapeutic responses

It is critical that the youth justice and child protection systems in the Northern Territory are underpinned by trauma-informed, strengths-based and therapeutic responses that recognise and address the underlying trauma and vulnerabilities of children and young people encountering these systems. Trauma-informed practice is internationally recognised as a best practice model for working with vulnerable children and young people.[27]

Trauma-informed approaches are not about being 'soft on crime', but rather about recognising the impacts of trauma and providing young people with the supports they need to heal and rehabilitate.

NAAJA supports the eight core principles of trauma informed practice identified in the Aboriginal Medical Services Alliance Northern Territory (AMSANT) submission to the Royal Commission:

1. Understand trauma and its impacts
2. Create environments in which families and social groups feel physically, emotionally and spiritually safe
3. Provide culturally competent staff – staff respect specific cultural backgrounds including reflection of self as a cultural bearer
4. Empower and support clients' control
5. Share power and governance including individuals and families in the design and delivery of programs
6. Integrate and coordinate care to holistically meet the needs of individuals
7. Support relationship building as a means of promoting healing
8. Enable recovery.[28]

The Northern Territory Government's recent announcement that new Youth Justice Officers will complete training in trauma-informed approaches, including understanding the impact of trauma on young people's development is a step in the right direction.[29] Sustained training in trauma-informed approaches should be compulsory for all employees charged with the care of young people across the

[26] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 39–40 [159]–[160].
[27] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 144–145, citing Centre for Early Adolescence, *Building a more effective juvenile justice system,* 2008.
[28] Aboriginal Medical Services Alliance Northern Territory, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2016, 12.
[29] Oral evidence of Jeanette Kerr, 8 May 2017, 3529.

youth justice and child protection systems. This training should form just one part of the Government's efforts to embed trauma-informed approaches as part of broader cultural change.

World best practice follows models that are non-punitive, non-adversarial and decrease the likelihood of conflict.[30] Instead of labelling young people and 'managing' challenging behaviour, the focus should be on understanding that some young people lack the skills to handle certain demands and expectations. Youth Justice Officers should be trained to understand and help young people exhibiting challenging behaviours through collaborative and proactive problem solving techniques.

The role of Youth Justice Officers should be expanded from purely custodial operations to include training in case management so that Youth Justice Officers can positively reinforce case plan achievements and reinforce realistic and firm boundaries regarding inappropriate behaviour.

Promoting healing and rehabilitation

Children and young people in detention must be given every opportunity to heal, to learn new skills and to prepare for their return to the community.

Given the evidence the Commission has heard about the likely prevalence of disability and neurocognitive impairment among the youth detention population, including Foetal Alcohol Spectrum Disorder and hearing loss,[31] it is critical that comprehensive health and neurocognitive assessments are performed as soon as possible once a young person has entered detention. This assessment should inform the placement of a young person within the detention facility, their education, and access to other services such as drug and alcohol counselling, trauma counselling, and mental health services.

Throughcare programs that provide intensive pre- and post-release rehabilitation and reintegration services must be strengthened. Services should be delivered through a joined-up service delivery model so that young people can continue to access services after they are released from detention.

A consistent theme to emerge from the evidence of young people is the boredom they felt while in detention because they did not have access to programs or to books, television and other distractions. This had a detrimental effect on young people; too much time without stimulation has led to negative ideation of 'bad things … about myself.'[32] Young people who are in detention are at a critical point in their development and they must be engaged in developmentally appropriate, pro-social and therapeutic activities and programs. A broader range of recreational programs such as sport, arts and music should be made available in detention. Identifying Aboriginal people and organisations that can deliver these programs should be a priority.

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[30] See Dr Ross Greene's Collaborative and Proactive Solutions model: <http://www.livesinthebalance.org/about-cps>

[31] See, eg, Exhibit 038.003, Annexure 2 – Joint Report - Dr James Fitzpatrick and Dr Carmela Pestell, 7 December 2016; Exhibit 026.001, Statement of Jody Barney, 9 October 2016.

[32] Exhibit 128.001, Statement of AU, 18 February 2017, 5 [30].

Putting an end to harmful practices in youth detention

There is overwhelming evidence before the Commission that children and young people in detention in the Northern Territory have been subjected to mistreatment, including excessive use of force, prolonged periods of isolation and arbitrary strip searches. These practices were routine and unlawful.

This evidence reveals that young people's human rights were all too readily overridden by either security, financial or operational considerations. The Youth Justice Officers did not have a sufficient understanding of or respect for young people's rights, nor were young people informed of their rights. They were not provided with information about the operational rules for detainees that made an already traumatising environment more difficult to navigate.

The rights of children and young people in detention must be safeguarded. Detention centres should apply a child-focused approach and ensure the best interests of the child are a primary consideration. NAAJA supports calls for the introduction of a Human Rights Act[33] in the Northern Territory to promote and protect human rights. NAAJA also recommends amendment of the *Youth Justice Act* to strengthen human rights protections and ensure a sharper focus on rehabilitation.

Harmful practices such as the use of isolation, routine strip searches, spit hoods, threats and excessive force must be prohibited.

Stronger oversight mechanisms

Evidence before the Commission starkly demonstrates the inadequacy of existing oversight mechanisms in the youth detention system.

NAAJA recommends that the position of Commissioner for Aboriginal Children and Young People be established to strengthen oversight mechanisms for Aboriginal children and young people. The Commissioner for Aboriginal Children and Young People would be a Co-Commissioner within the Office of the Children's Commissioner and would ensure that the rights of Aboriginal children are protected and promoted.

Establishing an Aboriginal Commissioner empowered to initiate own motion investigations, including into child protection and out-of-home care practices, has relevance to other aspects of this Commission's inquiry. The role of Commissioner would ensure the development of child protection policies and practice is culturally relevant and builds on the strengths of Aboriginal culture.

NAAJA recommends that the relevant legislation is amended so that the Office of the Children's Commissioner can perform the oversight functions of an independent custodial inspector. This will require increased powers including unfettered access to detention facilities, records, young people and staff. The Office of the Children's Commissioner should be required to report quarterly to Parliament, and these reports should be published on a website, together with Government responses.

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[33] See *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Complaints mechanisms relating to the treatment of children and young people in detention must be improved. Many young people told the Commission that they didn't make complaints about their treatment because they either didn't know that they could or they didn't think their complaints were taken seriously. NAAJA recommends that rigorous complaints mechanisms be implemented in detention centres. At a minimum, the complaints process should comply with the *Australasian Juvenile Justice Administrators Standards for Juvenile Custodial Facilities*, and ensure young people are supported to make complaints regardless of their level of literacy or language skills.

* * *

During its inquiry, the Commission has heard many harrowing stories about the abuse of Aboriginal children and young people in detention facilities. Many present and former detainees are still dealing with the trauma that has resulted from, or been exacerbated by, their experience in detention.

NAAJA recommends that there should be immediate and ongoing funding for the social and emotional support of any person who was in youth detention in the Northern Territory.

The Royal Commission has also had the opportunity to hear young Aboriginal people's hope that the system will change for the better. We call on the Commission to be bold in its reform and to frame recommendations that will ensure the inherent dignity of young people in detention is respected and that genuinely empower Aboriginal people to drive the change that lies ahead.

1 Regulatory framework

1.1 Creating an Aboriginal child-centred system

Current approaches to youth justice and child protection in the Northern Territory are failing Aboriginal children.

The interim report of the Commission has shown that Aboriginal children and young people make up 94% of the detention population and 89% of those children who are in out-of-home care.[1] Although the Northern Territory Government delivers youth justice and child and family services to a majority of Aboriginal people, these service systems fail to reflect in practice and design Aboriginal culture and worldviews. Aboriginal considerations need to be mainstreamed across both the youth justice and child protection systems.[2]

Significant reform is required for the youth justice and child protection systems to meet the needs of Aboriginal people of the Northern Territory by recognising their right to self-determination and ensuring the rights of Aboriginal children to safety, culture and family are respected and protected.

Aboriginal people must be empowered to drive this reform. It is only by empowering Aboriginal people to develop the solutions and to own and control how they are delivered in communities that we can begin to address the gross over-representation of Aboriginal children in the youth justice and child protection systems.

Creating an Aboriginal child-centred system necessitates specific consideration of the unique qualities, rights, needs and vulnerabilities of Aboriginal children and young people. We urge the Commission to ensure that these considerations underpin all its recommendations. NAAJA endorses the Human Rights Law Centre's submission on this fundamental point.

Recommendation 7	That all the Royal Commission's recommendations should be framed with the unique rights and vulnerabilities of Aboriginal young people at their core.

Creating an Aboriginal child-centred system will require substantial change across the youth justice system. NAAJA's recommendations to establish an independent statutory authority for youth justice services (see Introduction and section 9.1.3) and a Commissioner for Aboriginal Children and Young People to improve oversight of Aboriginal children and young people in detention and out-of-home care (section 8.3.6) are important parts of this systems-wide reform. This section considers how the current regulatory framework for youth justice should be improved to better meet the needs of Aboriginal children and young people.

[1] Royal Commission into the Protection and Detention of Children in the Northern Territory, Interim Report, 31 March 2017, 9.

[2] Exhibit 031.002, Annexure 1 to the Statement of Keith Hamburger, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 7.

1.2 Aboriginal Justice Agreement

NAAJA welcomes the Northern Territory Government's commitment to enter into an Aboriginal Justice Agreement to address the over-representation of Aboriginal and people in the criminal justice system.

The Aboriginal Justice Agreement should be underpinned by recognition that Aboriginal communities, through their traditional culture and law, individually and collectively have the expertise to solve local safety and community justice issues. Aboriginal communities, and especially Aboriginal Elders, must be valued and given the practical support to develop the solutions that will work in their communities, for their people. The Agreement should consider how local decision-making, traditional leadership and cultural authority can be included and strengthened across the entire justice system.

An Aboriginal Justice Agreement will form an important part of the regulatory framework for the youth justice system in the Northern Territory. In developing the Agreement, specific consideration should be given to the rights of Aboriginal children and young people, including their rights to connect to family, community and culture. Targeted strategies should be developed in partnership with Aboriginal communities to reduce offending, including locally based therapeutic diversion and rehabilitation programs. Every opportunity should be given to Aboriginal communities to participate in and have control over the design, implementation and delivery of policies and programs that affect Aboriginal people.[3]

Recommendation 8	That the Aboriginal Justice Agreement specifically considers the unique rights and needs of Aboriginal children and young people and ensures every opportunity is given to Aboriginal communities to participate in and have control over the design, implementation and delivery of policies and programs that affect Aboriginal people.

1.3 Stronger recognition of human rights

An overarching principle of the *Convention on the Rights of the Child* that relates to both youth detention and child protection is that the best interests of the child shall be a primary consideration in all actions concerning children.[4] Ensuring the best interests of the child are a primary consideration means these interests cannot automatically be subsumed by other considerations.[5] A significant body of international human rights instruments protect the rights of children and young people in detention, in recognition of their particular vulnerability. The rights of children in detention include the right to facilities and services that meet all the requirements of health and human dignity (see section 2), the right to participate in cultural life (see section 6), the right to be treated with dignity and respect (see section 3), the right to education (see section 4), and the right to make complaints (see section 8).

[3] Centre for Innovative Justice, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, November 2016, 15.
[4] Exhibit 005.002, *Convention on the Rights of the Child*, art 3(1).
[5] Exhibit 004.001, Statement of Megan Mitchell, 9 October 2016, 5 [19].

There is overwhelming evidence before the Commission that the rights of Aboriginal children and young people in detention in the Northern Territory have not been sufficiently protected. Evidence before the Commission reveals a culture where young people's rights were secondary to security, operational or financial considerations. The suggestion that human rights are merely aspirational 'ideals'[6] rather than fundamental standards to be upheld and respected is contrary to Australian values and our international obligations.

Children and young people in detention have been subjected to cruel, inhuman and degrading treatment, including excessive use of force, prolonged periods of isolation and frequent strip searches. These practices were routine.[7] Children and young people have been kept in inhumane and unsanitary conditions without access to drinking water, natural light and the ability to maintain basic hygiene. Treatment of young people in detention and the conditions in which they were held are discussed in sections 2 and 3.

It is crucial that the rights of Aboriginal children and young people in detention are sufficiently safeguarded. NAAJA recommends that human rights protections are immediately strengthened by:

- amending the *Youth Justice Act 2005*, and
- the introduction of a Human Rights Act in the Northern Territory.

1.3.1 Amending the *Youth Justice Act 2005* (NT)

Incorporating human rights principles

The Northern Territory Government is currently undertaking a complete review of the *Youth Justice Act 2005*[8] and the *Care and Protection of Children Act 2007*. NAAJA welcomes the opportunity to provide input into these reviews and recognises the opportunity they present for critical reflection on the operation of the current legislative framework for youth justice and child protection.

In particular, the objects of the *Youth Justice Act* should be given a human rights focus. NAAJA recommends that there is inclusion of an express statutory requirement into the objects provision that interpretation of the provisions of the Act is consistent with applicable international human rights principles, including the *Universal Declaration of Human Rights*, *Convention on the Rights of the Child* and the *Convention Against Torture*.

[6] Exhibit 318.001, Statement of Kenneth Middlebrook, 3 March 2017, 18 [120].
[7] See, eg, oral evidence of Megan Mitchell, 11 October 2016, 29:2–3, 12–13.
[8] Oral evidence of Jeanette Kerr, 8 December 2016, 481:14–15.

Recommendation 9	That the Northern Territory Government amend the *Youth Justice Act 2005* to include an express requirement under the objects of the Act that the provisions of the Act are to be interpreted in a way that is consistent with applicable international human rights principles.

Ensuring a sharper focus on rehabilitation

One of the key themes to emerge from the evidence before the Commission is the need for culturally relevant, therapeutic, trauma-informed and rehabilitative approaches to youth justice. To embed these principles across the youth justice system, there must be a clear provision framing the system as one which looks to both welfare and justice considerations.

Youth offending should be dealt with differently to adult offending. Unless this is made clear in the Act, it will remain the case that some view the youth jurisdiction as dealing with 'miniature adults' rather than a separate and distinct jurisdiction for young people where rehabilitation must be the primary guiding principle.

Recommendation 10	That the Northern Territory Government amends the *Youth Justice Act 2005* to make clear that the primary object of the Act is the rehabilitation of young people.

1.3.2 A Human Rights Act for the Northern Territory

NAAJA endorses the Human Rights Law Centre's submission calling for the introduction of a Human Rights Act in the Northern Territory to promote and protect human rights.[9] A Human Rights Act should be modelled on the Victorian and Australian Capital Territory legislation that requires (among other things) that human rights are taken into account when developing new laws and those public authorities (such as those responsible for administration of detention centres) always act in a way that is compatible with human rights.

The importance of these protections is underscored by the Supreme Court of Victoria decision of *Certain Children v Minister for Families and Children & Ors (No 2)*[10] where Justice Dixon held that the decision to transfer young people to an adult correctional facility was unlawful as no appropriate consideration was given to certain rights enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This decision demonstrates the ability of human rights legislation to protect the rights of vulnerable children and young people in detention:

> The Charter makes clear that children are not to be treated like adults. Children in detention are particularly vulnerable by reason of their age and circumstances. The focus on a child's opportunity to continue to develop, particularly to adult maturity, is sharp and rightly so. It is fundamental that vulnerable children from disadvantaged

[9] See Human Rights Law Centre Submission, 28 October 2016, 19-21.
[10] [2017] VSC 251.

circumstances be rigorously protected by the law in a free and democratic society based on human dignity, equality and freedom.[11]

Recommendation 11	That a Human Rights Act is enacted in the Northern Territory.

1.3.3 Increasing the age of criminal responsibility

Currently the age of criminal responsibility in all Australian states and territories is 10 years, subject to the principle of *doli incapax* that assumes that children aged less than 14 years are 'criminally incapable' unless proven otherwise.

An established body of evidence shows that the brains of children aged 10 to 12 years are not developmentally mature enough for them to have the sufficient skills and capacities necessary for criminal responsibility.[12] The UN Committee on the Rights of the Child has stated that the minimum age of criminal responsibility should not be lower than 12 years on the basis that children under 12 years have not reached the necessary developmental stages to be held responsible for criminal behaviour.[13] The Committee on the Rights of the Child has repeatedly recommended that Australia raise the age of criminal responsibility.[14] The minimum age of criminal responsibility in Australia is disproportionately low when compared to many European countries where the average age is 14 years.[15] There is no agreed recommendation from neuroscientists or behavioural scientists regarding what should be the minimum age of criminal responsibility.[16]

The Commission has heard compelling accounts of the profound impact that periods of detention had on very young children, including witness AS when he was just [redacted] years old.

Witness AS:

When I first went into the Old Don Dale I was kept in my cell by myself all day except for about 15 to 30 minutes a day when they would let me out in the yard or when I went to school. I was told that this was because I was too young to be in with the rest of the boys, but that really confused me because I thought why would they put me in Don Dale in the first place if they thought I was too young to be around the other boys … Being isolated in the cells was boring, but it was also very lonely.[17]

Detention of any kind is not a suitable environment for children between the ages of 10 and 12. Considering the clear neurological evidence, and the profound impact on children in contact with the

[11] [2017] VSC 251 at [455].
[12] Jesuit Social Services, 'Too much too young: Raise the age of criminal responsibility to 12', October 2015, 2, 6.
[13] Ibid, 5.
[14] Queensland Family & Child Commission, 'The age of criminal responsibility in Queensland', 2017, 6.
[15] Ibid, 8.
[16] Ibid, 26.
[17] Exhibit 123.001, Statement of AS, 22 February 2017, 4 [20].

justice system, NAAJA recommends that the minimum age of criminal responsibility in the Northern Territory be increased to 12 years of age.

Recommendation 12	That the minimum age of criminal responsibility is increased to 12 years.

1.3.4 Youth Justice Framework

The Youth Justice Framework 2015–2020 was developed in response to the recommendations of the Carney Review of the Northern Territory Youth Justice System in 2011, which identified the need for a new youth justice strategy. NAAJA participated in the Youth Justice Framework Steering Committee. NAAJA had serious concerns about the extent to which NGO input into the Framework was considered and reflected in the final version. The Steering Committee process became about 'embedding the Minister's priorities' rather than addressing the key priorities identified by NGOs, representatives from the Department and others working in the sector.[18]

In NAAJA's submission, the Framework reflected the then Minister's 'law and order' agenda rather than emphasising rehabilitative, trauma-informed and therapeutic approaches. It fails to recognise the importance of Aboriginal perspectives, culture and local decision-making. The Framework should be reviewed in light of the recommendations arising from this Commission.

Recommendation 13	That the Youth Justice Framework is framed by the recommendations arising from the Royal Commission to ensure it is grounded in therapeutic and rehabilitative principles, and recognises the importance of Aboriginal culture and decision-making.

[18] Exhibit 355.011, Annexure 11 to the Statement of Jared Sharp.

2 Youth detention facilities

2.1 General conditions of youth detention facilities

Youth detention facilities in the Northern Territory are wholly inadequate for accommodating children and young people who are either sentenced or on remand.

The detention infrastructure in Darwin and Alice Springs has universally been described as unsuitable, including by young people, current and former staff and management, former Ministers for Corrections, the Children's Commissioner and experts in correctional management.[1] In particular, the Commission has heard detailed evidence about the inhumane conditions in which children were kept in the Behavioural Management Unit (BMU) at the former Don Dale Youth Detention Centre.

There is not the scope for these submissions to do justice to all the evidence given by former and current detainees regarding the conditions in which they were kept.

2.1.1 Young people have the right to adequate facilities

Young people deprived of their liberty have the right to facilities and services that meet 'all the requirements of health and human dignity.'[2] The *Havana Rules* provide that:

> The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities.[3]

Further, detainees must be able to meet their physical needs 'in a clean and decent manner.'[4] They must have access to sufficient light, and cells must have proper ventilation.[5] As set out below, the evidence before the Commission clearly demonstrates that youth detention facilities failed to meet accepted international and Australian standards for juvenile detention centres.[6]

2.2 Conditions at the former Don Dale Youth Detention Centre

There was unanimity in the evidence before the Commission that the former Don Dale Youth Detention Centre was not fit for purpose and was an unsuitable environment to detain young people. This has been the long-standing position of NAAJA. Among many other deficiencies, the facility was only designed to accommodate boys, the dormitories did not have flushing toilets, and the dormitory

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[1] See, eg, Oral evidence of John Elferink, 27 April 2017, 3124:20–38; Oral evidence of the Hon. Gerald McCarthy, 17 March 2017, 1350:32–33; Exhibit 139.001, Statement of AB, 1 March 2017, 5 [30]; Oral evidence of Benjamin Kelleher, 21 March 2017, 1543:46; Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, 38 [273].
[2] Exhibit 006.001, *Rules for the Protection of Juveniles Deprived of their Liberty* ('*Havana Rules*'), art 31.
[3] Ibid, art 32.
[4] Ibid, art 34.
[5] Exhibit 006.005, *Standard Minimum Rules for the Treatment of Prisoners*, art 11.
[6] See especially *Havana Rules* 31, 34, 67; Exhibit 283.232, Australasian Juvenile Justice Administrators, Juvenile Justice Standards 2009, s 7.

used to accommodate girls presented a significant fire hazard.[7] There was also no ability to adequately separate young people of different ages, which in the case of witness AS who was just [redacted] years old when he first entered Don Dale, meant he was kept in isolation or in the girls' wing.[8] Further inadequacies identified to the Commission include the education building being too small to accommodate the rising number of male detainees and the lack of purpose-built meeting rooms for conducting case management group programs.[9]

Young people described the state of the facilities as 'disgusting' and unhygienic.

Witness AB:

Every cell in there had spit on the walls, like, you would see big yellow phlegm on the wall and if you put your hand on the wall you would get it on your hands. There was dirt on the floor and walls. Some of the rooms, both the dorms and the cells, smelt like piss.

We had to do all the cleaning ourselves.[10]

Witness AG:

When I first got to Don Dale, I remember that I thought the cells were disgusting. There were all kinds of smudges and spit stains in the cells.[11]

The showering and toilet facilities were inadequate to cater for the number of girls in detention, which at times had the effect of delaying their school attendance.[12]

Witness AF:

There was only one shower and one toilet between all us girls, and there were usually about 7 girls at Don Dale at any time … Because we had the one shower between us all, we couldn't shave our legs in the shower. What we did instead was we got a bucket of water and shaved our legs in the rec room.[13]

2.2.1 Conditions in the Behavioural Management Unit

The Commission heard that the BMU cells were 'filthy' and 'horrible', 'stank',[14] were rarely cleaned, and had no fans or air conditioning. Young people were forced to shower in an area visible from some

[7] See, eg, Oral evidence of John Elferink, 27 April 2017, 3124:20–38.
[8] Exhibit 123.001, Statement of AS, 22 February 2017, 5 [24].
[9] Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, 38 [275].
[10] Exhibit 139.001, Statement of AB, 1 March 2017, 5 [30]–[31].
[11] Exhibit 145.001, Statement of AG, 25 November 2016, 3 [16].
[12] Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, 20 [124].
[13] Exhibit 131.001, Statement of AF, 25 November 2016, 5 [23].
[14] Oral evidence of Conan Zamolo, 20 March 2017, 1419:20.

of the cells, causing them to be ashamed.[15] Former Youth Justice Officer Benjamin Kelleher described the BMU as a 'shithole'[16] and said detention in the BMU would have driven him 'insane'.[17]

Witness AB:

The BMU cells were the most disgusting. There was always stains on the walls and floor from phlegm and spit. The cells were extremely small.[18]

Witness AY:

All the back cells were the same. They were concrete and had a mattress and a toilet. There was nothing for us to do. There was a camera that would be looking at us all the time. There was no air conditioning. In the wet season, and especially the build up, it would get really hot.[19]

There were no facilities for young people detained in the BMU to access drinking water, nor were there any facilities for hand washing after using the toilet or before eating meals. There were no windows to allow direct natural light or ventilation.[20]

Young people detained in the BMU were routinely subject to prolonged periods of isolation, despite the well-established evidence about the deleterious impact of isolation on young people's mental health. The *Havana Rules* identify solitary confinement as a form of 'cruel, inhuman or degrading treatment', and strictly prohibit its use.[21] The use of isolation in detention facilities is discussed further in section 3.6.

As the Commission has heard, NAAJA raised serious concerns about the use of the BMU to accommodate children with Commissioner Middlebrook and the Children's Commissioner in August 2014.[22] The Department of Correctional Services' response did not adequately address the gravity of the situation, nor convey the required sense of urgency about the need to find alternative options.[23] Nor is there evidence before the Commission to suggest that any significant efforts were made to ameliorate the harsh conditions, such as letting young people out of their cells for longer periods or

[15] See, eg, Exhibit 139.001, Statement of AB, 1 March 2017, [32], [139], [140]; Exhibit 108.001, Statement of BR, 18 February 2017, [53]; Exhibit 053.028, Office of the Children's Commissioner, Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre, 20 August 2015, 7–8.
[16] Oral evidence of Benjamin Kelleher, 21 March 2017, 1543:46.
[17] Oral evidence of Benjamin Kelleher, 21 March 2017, 1544:5–6.
[18] Exhibit 139.001, Statement of AB, 1 March 2017, 16 [116]–[117].
[19] Exhibit 341.000, Statement of AY, 28 February 2017, 2 [7].
[20] Exhibit 053.028, Office of the Children's Commissioner, Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre, 20 August 2015, 8.
[21] *Havana Rules*, art 67.
[22] Exhibit 103.001, Statement of Jonathon Hunyor, 16 February 2017, 5 [28]–[31].
[23] Exhibit 103.005, Annexure D to the Statement of Jonathon Hunyor, 16 February 2017.

facilitating visits from family. Young people were only let out of the cells for exercise for limited amounts of time.[24]

Regardless of the challenges presented by the poor physical infrastructure at the former Don Dale facility, housing children in the BMU was completely unacceptable and inconsistent with international and national standards for juvenile detention facilities.

2.2.2 Impact of inadequate physical infrastructure

The inadequate physical infrastructure at the former Don Dale facility restricted what programs could be provided. Mr Middlebrook told the Commission:

> there just wasn't too much you could do because we just didn't have the infrastructure … I've heard people refer to the old Don Dale as purpose-built … but the old Don Dale is not a purpose-built centre. It was built when youth justice was totally different to what it is now … we were limited with the activities we could do there.[25]

The infrastructure did not promote therapeutic or rehabilitative responses. The facilities had not been designed with regard to 'contemporary classification systems and the associated benefits in helping to encourage detainees to change their behaviour and thinking patterns.'[26]

The Vita Report found that the 'physical infrastructure in the Don Dale BMU was poor and not conducive to being able to separate and manage detainees on plans satisfactorily.'[27] Mr Vita identified that this 'no doubt contributed to many [of the] incidents' in the BMU.[28]

NAAJA holds that the poor infrastructure caused further trauma to young people, which was compounded by the lack of access to services and programs, the treatment of detainees by Youth Justice Officers and the lack of management and oversight (discussed in sections 3 and 9). It was inexcusable to keep children and young people in such oppressive conditions.

2.3 Transfer to the current Don Dale Youth Detention Centre

Successive Northern Territory governments have long known the inadequacy and need for a complete redesign and replacement of youth detention facilities. Mr Gerry McCarthy, the former Minister for Corrections from 2009 to 2012, acknowledged that the facilities were inappropriate and that more could have been done to improve conditions for children and young people but told the Commission he was 'working with the best he had'.[29]

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[24] Oral evidence of Kenneth Middlebrook, 28 April 2017, 3384:15–16.
[25] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2959:4–10.
[26] Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, 17 [108].
[27] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 42.
[28] Ibid.
[29] Oral evidence of the Hon. Gerald McCarthy, 17 March 2017, 1350:32–33.

In 2013, a memorandum to Commissioner Middlebrook from Ms Amanda Nobbs-Carcuro clearly documented the infrastructure deficiencies at Don Dale and contextualised these problems with broader cultural and operational concerns:

> The failings and unsuitability of the buildings and structures at Don Dale are well known and are sought to be addressed in a current submission to Cabinet. However, fixing the building, is but one of the current challenges to the Centres stability and security. As the experience in a number of jurisdictions has shown, providing suitable infrastructure is important however history proves that well designed and maintained facilities will fail if inadequate or hostile human relationships are embedded in the Centres culture. Similarly, as poor physical facilities can sometimes be successful with the right relationships between staff, detainees and management. Procedural and dynamic security at Don Dale has been declining for years.[30]

Successive governments failed to sufficiently address the grossly inadequate infrastructure. Ms Sally Cohen, former Executive Director of Youth Justice, told the Commission that the then Government's agenda 'did not provide for us to have better and suitable facilities.'[31] For example, rather than use the low-security Living Skills Unit at the old Berrimah prison, which the Commission heard was a more modern facility with a large outdoor area and training area, the Government decided to use the facility for its controversial mandatory alcohol treatment program.[32]

In this context, the decision to move youth detainees from the old Don Dale site to the former Berrimah adult prison appears to have been motivated by financial considerations rather than concern for their welfare. This decision reflects the punitive culture that persisted in youth detention. Rather than prioritise and promote rehabilitation of young people, an entirely inappropriate adult correctional model and ethos was imposed, that only served to re-traumatise young people in Corrections' care.

Furthermore, the move did not adequately consider the cultural appropriateness of accommodating Aboriginal children and young people in a facility regarded by many Aboriginal people as a place of brutality and sorrow. There was also very little effort to engage Aboriginal Elders and those with cultural authority to ensure that the facility was culturally safe for Aboriginal children.

The move to Berrimah was widely condemned at the time, including by NAAJA who with 11 other non-government organisations issued a joint statement urging the Government to commission a purpose-built youth detention facility.[33] The review by Mr Keith Hamburger, an experienced senior manager of correctional facilities, found that 'accommodating youth offenders in a facility that was condemned

[30] Exhibit 211.010, Annexure 10 to the statement of Sally Cohen, 21 February 2017, 6.
[31] Oral evidence of Sally Cohen, 30 March 2017, 2849:21–22.
[32] Oral evidence of Sally Cohen, 30 March 2017, 2847–2849.
[33] Exhibit 052.005, Annexure D to the statement of Russell Goldflam, Joint Statement 'Berrimah Prison is not good enough for Territory's most vulnerable kids', 2 October 2014.

when it housed adult prisoners is unacceptable and nothing will make the old Darwin Correctional Centre suitable for young offenders.'[34]

2.4 Conditions at the current Don Dale Youth Detention Centre

The facilities in which young people continue to be kept in detention today are still wholly inadequate.

The Commission has heard vivid descriptions from young people about the oppressive and unhygienic conditions in which they were kept.

Witness AS:

… I went into the cells and it was disgusting. I was put into a cell where I could see in the cells that there was spit and snot on the walls as well as this red stuff which I am pretty sure was blood.[35]

Witness AM:

The conditions in the isolation cells at the New Don Dale were disgusting. The cells did not have air conditioning and it was extremely hot. The cell and mattress was dirty, the buzzer did not work and the sheets I received smelt like piss. The only time I remember when those isolation cells were cleaned was when the guards would get us to clean rooms in exchange for going to the tuckshop. There was a bubbler in the cell but it was right next to the toilet and tasted really bad, like metal. In this way there was no clean water provided within the cell so I had to ask the guards to bring me some water every time I was thirsty. It would usually take the guards between ten to fifteen minutes to return with water in a foam cup. I often had a headache from the heat while I was in the cell.

… The [C-Block] cells themselves were falling apart and the metal was rusted. There were a lot of places where someone could hang themselves from. I remember when we got moved to C-Block we saw a cell where there was half a sheet that was hanging from the wall where we could see that sheet was cut in two. I think someone had tried to hang themselves with the sheet and the guards had cut them down.[36]

[34] Exhibit 031.002, Annexure 1 to the statement of Keith Hamburger, Report "A Safer Northern Territory Through Correctional Interventions", 31 July 2016, 142.
[35] Exhibit 123.001, Statement of AS, 22 February 2017, [31].
[36] Exhibit 270.001, Statement of AM, 11 February 2017, 7 [30], [40].

Mr Hamburger found that the current Don Dale Youth Detention Centre is 'totally unacceptable' accommodation for young people in detention.[37] He described his first impressions of the current Don Dale facility as follows:

> I could say categorically that people going into Don Dale, the first impression if I was a client being taken in there, would have been fearsome, unhappy, would not have been a welcoming environment.[38]

He further described Don Dale as a 'very counterproductive environment' and expressed disappointment and frustration that such a facility still exists:

> It's an old male prison. Its ambience was very poor. It's basically a prison: the young people are kept in concrete cells; … there's evidence of lack of privacy for young people; … I got the feeling it was like a guarding environment, not a therapeutic environment; people were – officers in uniform and they turned out to be correctional officers were actually guarding young people. They didn't seem to be – we didn't hear any laughter from young people, and it was not a happy place.[39]

On inspection of the Don Dale prison facility, Mr Hamburger and his review team were particularly horrified to find hanging points in cells, non-fire-retardant mattresses, 'shocking' shower facilities for girls which did not afford privacy, isolation of girls within the centre, lack of outdoor exercise areas and a general impression of 'disrepair and despair'.[40]

The current facilities do not meet the needs of children and young people who experience hearing loss:

> There is no auditory systems to support any form of sound amplification. There's no visual alarms around fire safety if there's an emergency, if sirens are going off. If your frequency of hearing loss is where you cannot hear that, then you – then you're in trouble.[41]

As Ms Jody Barney explained, it is crucial that detention centre infrastructure meets the needs of children with hearing loss and other disabilities so that they have every chance to rehabilitate:

> … detention centres need to have a holistic, universal plan. There needs to be good lighting; there needs to be good amenities for young people not just with hearing impairment but other disabilities as well. That's not happening here. And if we have to detain young people, then they need to be in a universally acceptable place where

[37] Exhibit 031.002, Annexure 1 to the Statement of Keith Hamburger, 31 July 2016, 21.
[38] Oral evidence of Keith Hamburger, 5 December 2016, 321:29–31.
[39] Oral evidence of Keith Hamburger, 5 December 2016, 314:46–47.
[40] Oral evidence of Keith Hamburger, 5 December 2016, 316:46.
[41] Oral evidence of Jody Barney, 13 October 2016, 261–262:45–2.

> they are able to participate and to rehabilitate in a way that they are able to participate fully. If that's not there, then they don't.[42]

The at-risk cells at Don Dale are especially concerning. The August 2016 Children's Commissioner report found that the physical infrastructure of the at-risk cells is inadequate and incapable of accommodating young people displaying at-risk behaviours.[43] The Children's Commissioner found that the physical condition of the cells has the 'potential to heighten the risk of self-harm and mental health issues' and does not meet all the requirements for health and human dignity as prescribed by the *Havana Rules*.[44]

NAAJA agrees with the Children's Commissioner's observation that 'a failure to therapeutically treat those young persons placed "at risk" essentially nullifies any positive effect of that classification and such "at risk" measures are punitive in nature.'[45] Further, the at-risk cells are identical to the de-escalation rooms used for young people on a Behavioural Management Plan, which creates a perception that young people are being punished for their mental health issues.

2.4.1 Conditions in the High Security Unit

NAAJA has serious concerns about the harsh conditions young people continue to be held in the High Security Unit (HSU), including the effects of prolonged periods of isolation on detainees.

Witness AS:

The cells in the HSU had smaller windows. While I was in the HSU I was not allowed to leave the block and there were no magazines, books or other things that I could use to pass the time.[46]

It was very hot in the back cells and there was nothing in the cell except a pillow and a mattress.[47]

Witness CE:

In the HSU cells, it is very hot and there are no fans … There is a bubbler in the cells in the HSU but the water is disgusting and was warm … I once asked for cold and fresh water but I was told that I could not have any because there was already a bubbler in my room.[48]

Witness AM:

It was hard to have good hygiene within the HSU because we would have to ask the guards each time we wanted a shower and sometime the guards would say no or we would not have a towel to use. It

[42] Oral evidence of Jody Barney, 13 October 2016, 261-262:4–7.
[43] Exhibit 053.029, Own Initiative Investigation Report: Services Provided by the NT Department of Correctional Services to Don Dale Youth Detention Centre, Alice Springs Youth Detention Centre, 15 August 2016, 32.
[44] Ibid.
[45] Ibid, 34.
[46] Exhibit 123.001, Statement of AS, 22 February 2017, [51].
[47] Exhibit 123.001, Statement of AS, 22 February 2017, [54].
[48] Exhibit 139.001, Statement of AB, 1 March 2017, [116]–[117].

was extremely dirty in the HSU. With the showers, there was no curtain and the guards would come in and check on us and because there was no privacy they could see us while we were showering.

[In the HSU] we were not taken out of our cells often … We were not allowed to play basketball and no other activities were provided. The space was empty. The air was pretty stale and we only got a breeze through the HSU when it was raining. The closest we came to going outside was in the courtyard but it had metal bars for a roof.[49]

Witness BH:

[The HSU was] like being in a big bird-cage. You can hardly see the sky in there. The windows in HSU cells are covered in a metal plate with holes, then a crimsafe screen, then bars, then another layer of concrete blocks with holes. You can hardly see out and there is no fresh air.[50]

These conditions seriously affected the mental health of young people.

Witness BH:

Being in the HSU or C block makes you angry. I tried to deal with it but it just made me feel angry and then it makes you go stupid. Sometimes I got really depressed and didn't want to leave my cell. It is hard.[51]

Witness AS:

I was treated very badly in the HSU, I felt different after it. I felt brain dead. I felt like they were trying to break you down and you can't do anything about it. I can't really say how bad it was, you just have to go through it to find out what it was like. I just hated every minute of it. Being in the cell all that extra time, and never actually leaving the HSU block, just made me want to go outside, there was no fresh breeze in the cells.[52]

Mr Hamburger's team observed damage to the HSU cells, which had occurred over a long period of time, indicating the lack of supervision by staff:

> For the fact that they could do that sort of damage without being observed or spoken to or – it just seemed – and it also seemed to be a culture where the supervisor sat in the control room and watched things through CCTV cameras rather than actually going to attend and interact with the young people. It was a typical, I guess, adult high security male environment type impression I got. It was nothing like what I expected

[49] Exhibit 270.001, Statement of AM, 11 February 2017, 8 [33]–[34].
[50] Exhibit 118.001, Statement of BH, 12 February 2017, [37].
[51] Exhibit 118.001, Statement of BH, 12 February 2017, [43].
[52] Exhibit 123.001, Statement of AS, 22 February 2017, [56].

> for – in this day and age for what should be a therapeutic community for young people.[53]

Section 3 considers the management of detainees and proposed recommendations for improving Youth Justice Officers' engagement with young people.

Proposed finding 2.1	The overwhelming weight of evidence supports a finding that Northern Territory youth detention facilities throughout the relevant period of the Commission's terms of reference were wholly inadequate for safely accommodating children and young people. Further the conditions were inhumane, unsafe and unhygienic, and did not promote rehabilitation or therapeutic responses.
Proposed finding 2.2	That the transfer of youth detainees to an unsuitable and unsafe adult prison was a major failing of the Government's duty of care.

2.5 Urgent action to move young people out of Don Dale

The facilities young people are currently kept in at Don Dale are completely unacceptable and require urgent action. NAAJA is particularly concerned about the number of children who continue to be housed in isolation in the HSU for operational and refurbishment reasons and who have limited access to therapeutic programs and recreational activities. NAAJA endorses Mr Hamburger's recommendation that alternatives to detaining young people at Don Dale be explored as a matter of urgency so that Don Dale can be closed as soon as possible.[54]

NAAJA recommends that the Northern Territory Government commence an urgent consultation process with Aboriginal organisations, community members and other stakeholders to identify suitable interim alternatives while the design of future youth justice facilities takes place. For instance, consideration should be given to whether the current Saltbush Mob site (formerly the Living Skills Unit) is a suitable alternative.

In the meantime, the Northern Territory Government must ensure that Don Dale is safe, equipped with adequate facilities and that all young people (regardless of classification) have access to therapeutic and rehabilitative programs.

Recommendation 14	That the Northern Territory Government take urgent action, in consultation with Aboriginal organisations, community members and other stakeholders, to ensure that the current Don Dale Youth Detention Centre is closed as soon as possible.

[53] Oral evidence of Keith Hamburger, 5 December 2016, 315:12–18.
[54] Exhibit 031.002, Annexure 1 to the Statement of Robert Keith Hamburger, 31 July 2016, 21.

2.6 Conditions at Aranda House

NAAJA endorses the submissions of the Central Australian Aboriginal Legal Aid Service (CAALAS), who is best placed to address the concerns of youths in detention at the Alice Springs Youth Detention Centre and Alice Springs Youth Holding Centre (Aranda House).

The Commission heard that Aranda House was 'falling apart', 'broken' and unsafe.[55]

Witness AY:

There were a lot of places where you could hang yourself from on the corners of the cells. Looking back now, I think it was a perfect example of how you could easily do that to yourself.[56]

The windows in the cells at Aranda House were painted over and young people accommodated in those cells had no access to natural light.

Witness AX:

To even look outside I used to have to pull myself up onto the window sill and use a screw or something like that to scratch away a bit of the paint. As there were no windows [in] the rec room, and because there was only a small part of the window I could see through, I couldn't really see the daylight while I was in Aranda House.[57]

Even the outside recreational area did not allow sunlight in. The area was covered with shade cloth, and 'all the leaves would fall on top so you couldn't see through to the sunlight.'[58] Witness BX told the Commission 'I did not see outside the whole time I was in Aranda House.'[59] A senior psychologist who attended the young people at Aranda House expressed his serious concerns about the conditions they were kept in, particularly the lack of sunlight and lack of contact with others.[60]

The cells at Aranda House contained only a bed, toilet and bubbler.[61] Young people were not permitted soap in their cells so could not properly wash their hands after using the toilet or before eating meals.[62]

NAAJA endorses the submissions made by CAALAS with respect to transfers of young people between Alice Springs and Darwin. This is also discussed in section 6.3.4.

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[55] Exhibit 341.000, Statement of AY, 28 February 2017, 11 [55].
[56] Exhibit 341.000, Statement of AY, 28 February 2017, 11 [55].
[57] Exhibit 111.001, Statement of AX, 17 February 2017, [47].
[58] Exhibit 341.000, Statement of AY, 28 February 2017, 11 [54].
[59] Exhibit 243.001, Statement of BX, 14 February 2017, 3 [20].
[60] Exhibit 111.003, Annexure B to the statement of AX, 17 February 2017, 1–3.
[61] Exhibit 243.001, Statement of BX, 14 February 2017, 3 [20].
[62] Exhibit 243.001, Statement of BX, 14 February 2017, 3 [22]; Exhibit 111.003, Annexure B to the Statement of AX, 17 February 2017, 1.

Proposed finding 2.3	The conditions at Aranda House were inhumane, unsafe, did not permit detainees to maintain basic hygiene and clearly failed to meet accepted international standards.

2.7 Transfer to adult facilities

2.7.1 Transfer to adult prison under s 154 of the *Youth Justice Act*

The Commission has heard evidence about the transfer of young people to adult correctional facilities pursuant to s 154 of the *Youth Justice Act*. In August 2014, that provision required the Superintendent to apply to a Magistrate for a transfer if the Superintendent was of the opinion that an emergency situation existed and the detainee should be temporarily transferred to a prison to protect the safety of another person. The provision only applied to detainees aged 15 years of age or older. The period of transfer was for a maximum of 24 hours; however, the Superintendent could apply to a Magistrate for extension of the order.

On the evening of 21 August 2014, six young people were transferred from the BMU to the adult prison after the gassing incident pursuant to this provision. The unlawful transfer of AD occurred in that he was below the age of 15 at the time.[63] During cross-examination, Mr Middlebrook accepted the transfer of AB and AC was unlawful and they should not have been transferred to the adult prison in circumstances where they had not participated in the incident.[64]

After this incident, Government amended s 154 of the Act to broaden the powers to transfer a child to an adult prison and reduce judicial oversight of that process. The current provision permits the Superintendent to request the Commissioner to accommodate a detainee at an adult correctional facility for a maximum period of 72 hours, if the Superintendent considers it necessary. The period can be extended to a maximum of 10 days by order of a Local Court Judge. The provision now applies to detainees under the age of 15 years if there is no 'practical alternative' to the transfer.

The *Convention on the Rights of the Child* states that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.[65] In NAAJA's view, children should not be kept in an adult prison. It is not safe for children, nor can an adult prison provide the therapeutic and rehabilitative responses required. The very fact that young people are transferred to an adult prison demonstrates a complete failure on the part of the youth justice system to adequately address the underlying causes of a detainee's behaviour and provide the necessary therapeutic and rehabilitative supports.

NAAJA recommends that s 154 of the *Youth Justice Act* be repealed so that young people in detention cannot be transferred to an adult correctional facility. NAAJA recognises that in circumstances of extraordinary emergency such as cyclone, fire or civil disruption that it may be necessary to transfer young people from a youth detention facility to a secure facility. The Northern Territory Government

[63] Oral evidence of Kenneth Middlebrook, 28 April 2017, 3385:6–12.
[64] Oral evidence of Kenneth Middlebrook, 28 April 2017, 3385:22–23.
[65] Exhibit 005.002, Convention on the Rights of the Child, art 37(c).

should explore alternatives so that young people can be accommodated securely without incarceration in an adult prison.

Recommendation 15	That no child detainee shall be transferred to an adult prison.

2.7.2 Transfer to adult prison upon turning 18

Witness AU:

When I got 18 in Don Dale I had my cake ... I only had a little bit to go on my sentence. Lisa the teacher brought me a cake. Bang, 10:00am, they took me to Berrimah. On my 18th birthday I went to Berrimah. I remember when I got there, a guard said to me 'you're a naughty boy. You're a small boy too. If you play up, I'm going to put you in a cell with the big boys.'[66]

Any impending transfer to adult prison can understandably cause significant distress to a detainee and their family. Mr Sizeland gave evidence that planning for the transfer of detainees was ad hoc and there were no formal procedures in place to alleviate the distress that may be caused.[67] Mr Sizeland agreed that there should be a formalised agreement or procedure between the youth detention and adult facilities to ensure the transfer is as smooth as possible and minimises distress to the detainee. Such a process would also enable information about the detainee's management plan to be shared in advance of the transfer and promote continuity of service provision.

There is presently, in s 164 of the *Youth Justice Act*, a requirement where a young person who turns 18 in custody must be transferred to adult prison within 28 days, unless the Commissioner decides on a case-by-case basis that the provision does not apply for a detainee who has less than six months to serve on sentence or remand. The Commissioner's decision is not subject to appeal or review. In NAAJA's submission, the default position should not be automatic transfer of a detainee to an adult correctional facility as soon as they turn 18. NAAJA recommends that s 164 of the *Youth Justice Act* is amended so that any transfer to an adult facility upon a detainee turning 18 years of age can only be made by order of the Court.[68]

Recommendation 16	That s 164 of the *Youth Justice Act* is amended so that transfers to adult prison upon a detainee turning 18 years of age are by application to the Court.

[66] Exhibit 128.001, Statement of AU, 18 February 2017, [67].
[67] Oral evidence of James Sizeland, 28 March 2017, 2007:38–40.
[68] This is consistent with other jurisdictions such as Western Australia: see *Young Offenders Act 1994* (WA) s 178.

3 The management and treatment of detainees

3.1 Overview

The management of children in Northern Territory youth detention centres, from at least 2010 onwards,[1] fell far below the standard of care expected, and required by law, of governments. The failures were fundamental and breathtaking. There were no consistently applied policies and procedures. Applicable laws and internal procedures were regularly flouted. Records were rarely maintained to a workable standard. Staff were not adequately supervised, and were undertrained and overworked. A punitive culture marked by arbitrariness and violence flourished.

The victims of these failures were the most vulnerable persons in our society: children. The Commission has heard detainees were as young as 10 to as old as 17. 98% of these children were Aboriginal and approximately 75% suffer from diagnosable mental health conditions.[2] The young people who gave evidence before the Commission, and many others like them, suffered what can be fairly described as routine physical torture and mental abuse. They were regularly subjected to excessive and unlawful force. They were not given sufficient information or assistance to navigate what was already a very daunting situation for a child (incarceration). Centre rules were inconsistently and confusingly applied. Children were left to languish in cells where the conditions were inhumane. They were denied life's necessities: fresh water, temperature appropriate facilities, basic hygiene, access to suitable medical, education and mental health care.

This reality for these children was not at all challenged or able to be challenged on the evidence before this Commission. It was known by those who worked on a daily basis with the children. It was known by middle management. It was known by senior management. It was known by senior members of the executive in the Department of Correctional Services.

As is outlined in this and other chapters, the government says it has changed and has begun implementing measures that evidence a shift towards a more humane and appropriate system. There are now standard operating procedures in place and improved case management procedures. Staff are being better trained (see section 9) and there are more health personnel available. There are plans to move from the current unsuitable facilities to new, custom-built facilities. These plans and promises must be closely examined in this Commission. This is not the first time the government has been given recommendations and endeavoured, or purported to endeavour, to follow them.

The experts are reasonably consistent and comprehensive on what is needed: a therapeutic, non-punitive and Aboriginal-centric environment. But this is not politically popular. The Northern Territory government must be given clear directions to ensure, as far as possible, that children detained in its facilities in the future are not subjected to the same trauma as those who have been detained in the recent past.

There must be a paradigm shift; it must be bipartisan, forward looking and long term. The current and future treatment and management of detainees must have at its core the human rights of the children.

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[1] Exhibit 051.001, Statement of Dylan Voller, 25 November 2016; Exhibit 108.001, Statement of BR, 18 February 2017.
[2] Oral evidence of Dr Mick Creati, 23 March 2017, 1736:5.

Never again should those human rights be seen as 'ideals' that can be displaced by other obligations that the executive, management and staff 'rank' as more important.

3.2 Management failure

Under s 151(2) of the *Youth Justice Act* (the Act) the Superintendent for the Northern Territory's youth detention centres is responsible 'for the physical, psychological and emotional welfare of detainees'. This obligation enlarges his or her common law duty of care to protect those children from harms arising in the detention environment.[3]

In July 2016, the Hamburger review found that the incidents that had been occurring at Don Dale in recent past were symptoms of a gravely flawed 'approach to the management and rehabilitation of youth offenders … a lack of leadership and supervision of staff; complacency and/or lack of staff training and understanding in the management of youth offenders.'[4] That is, the problems at Don Dale were not merely the actions of some errant staff members. Mr Hamburger considered that an absence of operational philosophy or understanding of what was trying to be achieved in the youth detention setting allowed inappropriately trained officers without appropriate interpersonal skills and knowledge to assume the Youth Justice Officer (YJO) role.[5]

Before the Hamburger review, in January 2015, the Vita report had found, inter alia: a 'lack of philosophy' driving the purpose of youth detention; 'non-existent, outdated and inadequate detention centre procedures and standard operating procedures'; critically, a 'lack of understanding and co-ordination of how risk assessment, case management, classification, pro-social modeling and the incentive scheme should work together to provide an environment that is conducive to stability, harmony, safety and security'; 'lack of consistency and direction' in behavioural management, in particular that of high risk detainees; and a lack of multi-disciplinary input into decisions.[6] This is clear evidence of fundamental failures in the system.

Mr Vita observed the need for 'strong central leadership and a clear sense of direction and values', immediate review of operational procedures, the introduction of a multi-disciplinary approach to all decision-making processes via weekly meetings, along with measures to ensure staff acted in accordance with operating philosophies, policies and standards.[7] These provide some measure, albeit not a complete one, by which the Commission may scrutinise what has occurred since.

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[3] *New South Wales v Bujdoso* (2005) 227 CLR 1, [44]–[50].
[4] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 21 [71].
[5] Oral evidence of Keith Hamburger, 5 December 2016, 404:33–36.
[6] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015.
[7] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 12, 18–19.

3.3 Case management and classification

3.3.1 Case management

Definition and purposes

Case management services are vital to meeting a young person's needs in detention and preparing them for a successful reintegration into the community in aid of their rehabilitation from crime.[8] This is in part reflected in reg 69(1) of the *Youth Justice Regulations* which requires the Superintendent to maintain a comprehensive case management system, with a focus on education, vocational training and rehabilitation.

Inconsistent and ineffective

In 2015, the Vita review found an unsound case management system. He reported that there was no acceptable or uniform risk assessment being undertaken to identify a young person's needs and case management was uncoordinated and highly subjective. More fundamentally, case management practices revealed a lack of understanding of adolescent behaviour or of behaviour initiated by trauma, mental health or other cognitive difficulties. He found this had contributed to a lack of direction in case management and inconsistency in behavioural management, particularly of high risk detainees.[9]

Intensive Management Plans

The Commission heard evidence that the management of high risk detainees occurred by way of Intensive Management Plans (IMPs) put together by case managers under Commissioner's directive No. 2.4.5, issued in August 2011.[10] That directive, which applied both to adults and children, purported to provide a framework to support the assessed risks and needs of a prisoner who is not at risk but cannot be managed within the mainstream population.[11] It permitted the isolation, restriction of privileges, lock-downs and increased classification of people whose 'attitude, conduct and behaviour continually jeopardises the good order and security of a prison, threatens the health and safety of staff, other prisoners or themselves'.[12]

These plans were extremely punitive and not informed by any accepted therapeutic philosophy. Their point was to provide an incentive for better behaviour: detainees could get out of isolation and deprivation and gradually reintegrate into the mainstream in staged increments set out in the plan, if their behaviour improved.[13] But IMPs were not used consistently, nor were they effective to that end: children were sometimes not let out when the IMP said they should be,[14] some plans did not provide

[8] Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3956:15–18.
[9] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 13.
[10] Exhibit 204.001, Northern Territory Correctional Services Directive; Oral evidence of Michael Yaxley, 29 March 2017, 2204:30.
[11] Exhibit 204.001, Northern Territory Correctional Services Directive, 2.1.
[12] Exhibit 204.001, Northern Territory Correctional Services Directive, 5.1.
[13] See, eg, in relation to AJ, Exhibit 283.169, Intensive Management Plan, 12 September 2013.
[14] Exhibit 145.001, Statement of AG, 25 November 2016, [49]; Exhibit 241.001, Statement of BV, 19 February 2017, [15].

for progress out of the BMU at all,[15] there were placements in the BMU without a plan,[16] and there were releases from the BMU after a set time regardless of a child's behaviour.[17] Also, the children reported being quite unaware of the plans[18] and while they were meant to be individualised to deal with each particular child's needs and circumstances, they were often cut and paste from one to another.[19] Accordingly, the regime was completely ineffective to manage behaviour. The IMP process facilitated increased use of the cells for isolation and for longer periods.

Witness AG:

While I was in the back cells, I was put on a Management Plan … I did not have any say in the creation of the Management Plan. The Management Plan was that if I was good for a week in the back cells I could have around half an hour out to the basketball. The longer that I was good, the more time that I got to be out of my cell. It also said that if I was god for a period of time, they would let me out of the BMU. The problem was that when I was good, they still didn't do the things they said that they would according to the management plan. I was never actually given a copy of the plan to keep …[20]

Witness AB:

I would ask the guards how long we were going to be in there [the BMU] for. The guards said things like, 'we honestly don't know' … Neither the guards nor the caseworkers ever told us what they were going to do with us. For the first week, I hardly got to see the Don Dale caseworkers. Then I did see the caseworkers, they told us the same thing as the guards, 'we don't know what's happening'.

… I felt like whether we got privileges or not depended more on how the guards were feeling on that particular day and less on any specific plan or rules …

After about two weeks of being in the BMU, one of the guards or caseworkers from Don Dale told me and the other BMU detainees that we were on a management plan and explained what was in it. We were told in a group. From what I heard, it seemed like all the BMU detainees had the same management plan.

I can't remember much about the management plan. I remember that we were allowed out of our cell for one hour a day. I do remember that there was nothing in my management plan about my dad passing away, [redacted] or about me having access to a counsellor or therapist.[21]

[15] See, eg, Exhibit 283.171, Intensive Management Plan, 8 October 2013.
[16] Exhibit 341.001, Statement of AY, 28 February 2017, [25]–[26].
[17] Oral evidence of James Sizeland, 27 March 2017, 1888:10–15.
[18] Exhibit 145.001, Statement of AG, 25 November 2016, [49]; Exhibit 139.001, Statement of AB, 1 March 2017, [148]–[155].
[19] Oral evidence of Benjamin Kelleher, 21 March 2017, 1540:30–1541:13; Exhibit 139.001, Statement of AB, 1 March 2017, [148]–[155].
[20] Exhibit 145.001, Statement of AG, 25 November 2016, [49].
[21] Exhibit 139.001, Statement of AB, 1 March 2017, [148]–[155].

3.3.2 Classification

Many vulnerable witnesses spoke of the unclear nature of the classification system. They were generally not explained upon admission to detention, or at least not in a way that ensured they were understood or able to be recalled. The rules of classification were instead mostly understood by observation, asking questions and a process of trial and error.[22]

Witness AB:

There were lots of different rules for detainees when I was at Don Dale. I thought the rules were shit because I was never really told the rules and they kept changing. There was a poster in the high security area that told you about some of the classification rules and what privileges you got. But apart from that, I had to work most of them out myself. I don't remember ever seeing or being given a Detainee Information Booklet when I was admitted ...

Classo was reviewed every week when you are on red or orange. But sometimes it would be reviewed every two weeks because the guards had not put their reports in … To my knowledge there was no formal classification review process when I was there. All the detainees would be in the dining area and the guards would just read out a list with all the classos on them. The other boys would ask, 'But why sir? Why sir?' and not get told the reason they were classified the way they were …

I can't remember the guards ever volunteering the classo rules to me. I can remember reading some of the classo rules off a poster on the walls and asking the other boys about what would happen with classo. We would also ask the guards when we would get classo and find out more about the rules that way.[23]

Witness AM:

In [redacted], I was in the HSU and I was able to move down to an orange shirt but they kept me in the HSU which was usually only for people with red shirts. While I was in there, I still had the same restrictions as everybody else, but I was given a little bit more time out of my cell.

In [redacted] when I got down to a green shirt, I was supposed to be moved to S Block but they did not move me for a couple of days. I was there for about a week when one of the guards thought that I swore at him. I did not swear at the guard or at all, and there was another inmate … who witnessed this. I was then moved back to the HSU. I was held there for a day and I was then put on an orange shirt after

[22] See Exhibit 270.001, Statement of AM, 11 February 2017, [8], [32]; Exhibit 131.001, Statement of AF, 25 November 2016, [89]; Exhibit 139.001, Statement of AB, 1 March 2017, [36]; Exhibit 108.001, Statement of BR, 18 February 2017, [22]–[23]; Exhibit 241.001, Statement of BV, 19 February 2017, [20]; Exhibit 123.001, Statement of AS, 22 February 2017, [18]–[19]; Exhibit 128.001, Statement of AU, 18 February 2017, [25]–[26]; Exhibit 179.001, Statement of BE, 18 February 2017, [17]; Exhibit 165.000, Statement of CE, 21 February 2017, [19].

[23] Exhibit 139.001, Statement of AB, 1 March 2017, [67]–[68], [73].

that. I felt really angry and frustrated by this because I didn't do what I was accused of and it had taken me a lot of work to get down to a green shirt.[24]

Rules must be unambiguous and clearly explained on admission and available to detainees to consult when they wish.[25] This is consistent with the requirements of the Act for information imparted on admission. Section 150(1) requires the explanation of the rules and the rights and responsibilities of the child upon admission. Subsection (2) requires the explanation to be given in a 'manner the youth is likely to understand' having regard to their 'age, maturity, cultural background and English skills.'

Considering the above evidence, the Commission may conclude that s 150(2) was routinely not complied with.

Classification has been particularly confusing, and thus ineffective, where it was not implemented in a predictable or consistent way. Mr Byrnes described young people seeming to be 'a cork bobbing in the sea … about classification levels'.[26] The opaque, unpredictable and arbitrary nature of the classification system is well articulated in the statement of AM. Between April to August 2015, AM was kept in the High Security Unit of the new Don Dale. His classification was not reviewed until July 2015, at least three months after his initial classification in April, despite 'try[ing] very hard to stay out of trouble and cooperate with the guards for a period of approximately four weeks'.[27] In July, the Classification Committee recommended that AM be rewarded for his good behavior, however he remained in a red shirt in the HSU until August. AM was never given a chance to question why the recommendation was not implemented by Corrections or the opportunity to request a review.[28]

Many witnesses also spoke of regressions in classification being effected for very minor infringements.[29] The frequency that this was complained of suggests that the system was susceptible to being used in a reactive and punitive manner. The Vita review found an ineffective classification system which lacked objectivity.[30]

Clearly enough, unexpected changes to classification, or failures to change it when expected, is an administrative issue that can lead to bad behaviour.[31] Consistency of approach to the application of the rules is of utmost importance. It is the only way respect for the system might be attained.[32]

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[24] Exhibit 270.001, Statement of AM, 11 February 2017, [51]–[52].
[25] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 23.
[26] Oral evidence of Terry Byrnes, 20 March 2017, 1499:1.
[27] Exhibit 270.001, Statement of AM, 11 February 2017, [47].
[28] Exhibit 270.001, Statement of AM, 11 February 2017, [49].
[29] Exhibit 241.001, Statement of BV, 19 February 2017, [25]; Exhibit 270.001, Statement of AM, 11 February 2017, [32], [47]–[52]; Exhibit 272.000, Statement of BL, 1 March 2017, [66]; Exhibit 139.001, Statement of AB, 1 March 2017, [36], [67]; Exhibit 123.001, Statement of AS, 22 February 2017, [38], [52]; Exhibit 131.001, Statement of AF, 25 November 2016, [89]; Oral evidence of Greg Harmer, 24 March 2017, 1787:1–20; Oral evidence of Terry Byrnes, 20 March 2017, 1498:30–43.
[30] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 13.
[31] Exhibit 094.001, Statement of John Rynne, 1 March 2017, [19].
[32] Oral evidence of Leilani Tonumaipea, 12 May 2017, 3881:20–28; Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 23.

There should be a holistic, trauma-informed approach to classification decisions that takes into account the complex reasons behind misbehaviour and the serious impact such a decision can have on the young person's outlook.[33] Mr Vita reiterated that the aims of the system include placement of the detainee in the least restrictive custodial environment consistent with the detainee's risk, that principles of case management underpin the system, and to promote, rational, consistent and equitable decision-making.[34]

3.3.3 Incentives

Mr Vita found the Don Dale incentive scheme to be highly subjective and applied inconsistently. He recommended a formal incentive scheme that is structured, applied fairly and linked in with case management and classification processes.[35] A crucial component was that punishment for breaching the rules of the centre ought to be separate to the scheme.[36] At the Waratah prison in NSW, the types of incentives used were selected by the young people housed there. They chose incentives such as nice toiletries, more food, more activity and brief periods of leave.[37]

3.3.4 What more needs to be done

Mr Vita's recommendations for case management assessments and procedures have been adopted throughout the end of 2015 and early 2016.[38] However, evidence provided by the current head of the case management unit, CB, indicates that there are still some areas for improvement.

First, the Youth Level of Service/Case Management Inventory 2.0 assessment tool, which was implemented upon Mr Vita's recommendation, does not include an Aboriginal cultural component. Witness CB considered that cultural matters would be taken into account by the interviewer asking the right questions.[39] It is concerning that the cultural sensitivities of the risk/needs assessment are dependent on the interviewer's subjective capacity and awareness to ask the right questions and obtain the right answers. Also, a person's Aboriginal heritage is of greater import than their possible responsiveness to pre-considered approaches and programs. It should inform the content of management strategies and activities. It is unclear to NAAJA, on the current evidence, that the assessment tool is adequately adroit in that context.

Second, resourcing issues remain. The team leader of the case management team at Don Dale said it is generally unachievable to complete assessments to have all case plans prepared within a fortnight of young people coming into custody.[40] Given the centrality of casework in the detention setting, resources should be prioritised for it.

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[33] Oral evidence of Terry Byrnes, 20 March 2017, 1398:33–43.
[34] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 25.
[35] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 18, 22.
[36] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 23.
[37] Oral evidence of Leilani Tonumaipea, 12 May 2017, 3884:38–47.
[38] For Vita's case management recommendations, see Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 18, 38. For the response, see Exhibit 374.001, Statement of Amanda Nobbs-Carcuro, 24 March 2017, [15]–[33]; Exhibit 375.001, Statement of CB, 10 May 2017.
[39] Oral evidence of CB, 11 May 2017, 3859–3860:15.
[40] Oral evidence of CB, 11 May 2017, 3857:30–50; Exhibit 375.001, Statement of CB, 10 May 2017, [35].

Third, it has been commented by the experts before the Commission that the relationship between a young person and their caseworker is so germane to the child's rehabilitative success that the role should extend outside the youth detention setting so the child can connect with the same person in the community as well.[41] This type of approach to case management has led to some success in the Waratah program in New South Wales.[42] NAAJA supports that approach and submissions on this are made in section 7.1.7.

Fourth, NAAJA worker Mr Byrnes' observations up until December 2016 were that, despite the care for young people that caseworkers had, there was either a lack of training or understanding how specific the casework needs to be for each individual. In his view, specialised knowledge of their circumstances and tailored treatment was crucial:

> … this is exactly what all of the work in through care and all of the work that I did as a Youth Justice Officer was about working towards that individual young person's strengths and what their desires and wants are.[43]

He gave evidence that despite the requirement for a case plan for each young person, he had never seen one. Further, detainees were still telling him they did not know who their caseworker was a fortnight after being brought in. Others would talk about a lack of real connection with their caseworker.[44] This is consistent with the statement of Director, Programs and Services, Territory Families, Ms Nobbs-Carcuro, who described their inability to meet the goal of having a case plan for each child.[45]

Written procedures are nothing without a real dedication to the individualised care required for these extremely vulnerable and complex young people.

Accordingly, NAAJA supports Mr Hamburger's recommendation that there be an oversight unit to review case management, sentence management and classification decisions to ensure consistency.[46] That review should include qualitative assessment of the case management unit's delivery of services to the children and checks on the effectiveness of the multi-disciplinary liaison that was so central to Mr Vita's recommendations.

Fifth, there needs to be greater transparency in the classification process. That involves according procedural fairness where practicable, including the provision of written explanations of classification decisions and the ability to review them. A measure of procedural fairness is purportedly included in the review panel process discussed by Mr Williams,[47] but it is unclear on the current state of the evidence whether it is sufficient. Mr Williams' assurance that there is no need for an appeal process due to the opportunity granted to a young person to raise matters during the review procedure is

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[41] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 8, 22, 156.
[42] Oral evidence of Leilani Tonumaipea, 12 May 2017, 3883:36–3884:8.
[43] Oral evidence of Terry Byrnes, 20 March 2017, 1493:37.
[44] Oral evidence of Terry Byrnes, 20 March 2017, 1483:14–36, 1493:30–48.
[45] Exhibit 374.001, Statement of Amanda Nobbs-Carcuro, 24 March 2017, [153]–[154].
[46] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 28.
[47] Exhibit 269.001, Statement of Victor Williams, 28 February 2017, [101].

misconceived.[48] Greater objectivity and consistency of decisions will result from an appeal process. It may be that the oversight unit recommended by Mr Hamburger could also be extended to deal with classification appeals.

Sixth, it is submitted that s 150(2) ought to be strengthened to:

- Require intake information to be put in a form that can be accessed at any time by a young person in detention
- Include 'cognitive skills' as another factor that must be considered to determine the way the information is delivered.

Recommendation 17	That s 150(2) of the *Youth Justice Act* is amended to: c. Require intake information to be put in a form that can be accessed at any time by a young person in detention, and d. Include 'cognitive skills' as another factor that must be considered when determining how the explanation of the rules of the centre and a detainee's rights is delivered.
Recommendation 18	That a consistent model of care for addressing challenging behaviours that is non-punitive, non-adversarial, trauma-informed and culturally competent is implemented, and informs the approaches to both case management and classification.
Recommendation 19	That the case management and classification systems use best practice, empirically supported, evidenced based models.

3.4 Use of force

3.4.1 Legal framework

Section 153 of the *Youth Justice Act 2005* and regs 70 and 71 of the *Youth Justice Regulations* govern the use of force in youth detention centres. Those provisions have not changed in any material way over the relevant time to today.

Section 153(1) requires the Superintendent to 'maintain discipline' at a detention centre. To that end, s 153(2) permits the Superintendent to use 'force that is reasonably necessary in the circumstances'. Section 153(3) then gives some examples of force not permitted by the section, relevantly including 'striking, shaking or other form of physical violence', 'compulsion to remain in a constrained or fatiguing position' and the use of approved restraints to restrict normal movement. These powers may be delegated to staff.[49]

[48] Exhibit 269.001, Statement of Victor Williams, 28 February 2017, [103].
[49] *Youth Justice Act 2005* (NT) s 157(a).

Regulation 70(1) provides that staff must 'manage incidents of misbehaviour in the manner the member considers most appropriate, having regard to all the circumstances, including the interests of the detainee or detainees involved and the rules of the detention centre.' Regulation 70(2) provides that in the 'discipline or control of behaviour of detainees' a practice that is prohibited by the rules of the centre must not be used. There is then a legislative note referring to s 153(3). Regulation 71 then expressly permits 'physical force' but it 'must not exceed force that is reasonable in all the circumstances.'

3.4.2 A punitive culture

There is abundant evidence from the children, staff and visitors to Don Dale that a very punitive, hostile and often arbitrary culture pervaded the centre[50] even up until very recently.[51] NAAJA worker Mr Byrnes described it as follows:

> … a culture where young people were not given the rules and are not told of their rights … where Youth Justice Officers don't even know the children have rights or where they come from and don't appreciate that a focus on rehabilitation is profoundly important.[52]

Youth Justice Officer Ms Tobin described 'punitive attitudes, rarely nurturing or rehabilitative, but confrontational, inexperienced, aggressive, domineering, self-righteous, young and inconsistent'.[53] Youth Justice Officer Ms Inglis also told the Commission:

> … there was a lot of posturing and 'I'm big, I'm strong, you're little…. I've got the power over you' … there were people who turned off the intercom buttons … I'm not painting everybody with the same brush … there were certainly a number of male officers … it seemed that their sole purpose for being there was to feel good about themselves.[54]

Witness BL:

[T]he guards were always sending me to the back cells for no reason …

[50] Exhibit 152.001, Statement of Saki Muller, 10 February 2017, [18], [20]–[22]; Exhibit 154.001, Statement of Eliza Tobin, 8 February 2017, [24], [26], [28]–[30], [32], [35]; Oral evidence of Louise Inglis, 24 March 2017, 1788:15–20; Oral evidence of Greg Harmer, 24 March 2017, 1786:34; Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 28; Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 148; Oral evidence of Keith Hamburger, 5 December 2016, 314–315, 320:25; Exhibit 125.001, YJ Detention Review Sept 2014, 19 September 2014, 1–2, 7.

[51] Oral evidence of Terry Byrnes, 20 March 2017, 1482:39–1483:8. Mr Byrnes said he observed this up until the time he finished at NAAJA (December 2016): Oral evidence of Terry Byrnes, 20 March 2017, 1525:33–1526:2. He also observed 'hints of resentment' from the YJOs to young people on a visit the Sunday before he gave evidence: Oral evidence of Terry Byrnes, 20 March 2017, 1526:10–25.

[52] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, [51]–[55].

[53] Exhibit 154.001, Statement of Eliza Tobin, 8 February 2017, [35].

[54] Oral evidence of Louise Inglis, 24 March 2017, 1784:20–40.

I didn't want to go to the back cells so I picked up a plastic cricket bat and told the guards to stay away from me. I was sick of always being put in the back cells and sick of lock downs all the time. I didn't hit anyone or anything with the cricket bact. The guards, [redacted] *and one other one ground stabilised me. They were too rough with me. I had serious grazes on my arms and legs …*

After we ran amok in [redacted] *2015 things got even worse in Don Dale. I was back in HSU … During this time, I felt like I couldn't take it anymore … I was not given food or water by the guards as punishment. The guards were cruel to me and the other boys … The guards would always call me names too like 'bony cunt' and 'kid' brain …*[55]

An 'us and them' mentality was observed.[56] Rather than interacting with the young people and de-escalating incidents, there was greater resort by YJOs to separate confinement and physical force. Management decisions reflected a similar tendency. For example, the incidents in August 2014 and in January 2015[57] were relatively minor protests that became more serious when there was no meaningful attempt by YJOs to negotiate a peaceful surrender. Opportunities presented by the children to calm things down were missed and, ultimately, management authorised the deployment of extreme shows of force such as adult prison guards, dogs, gas and shields. The authorisation of increasingly intrusive restraints by the executive only fuelled the increasing hostility.[58]

In this culture, children's rights were not understood, let alone respected and protected.[59] Basic entitlements were denied and group punishments were imposed. Communications became abusive, provocative and belittling of the children. A culture of fear and favour was cultivated by the inconsistent approaches of some YJOs.[60]

Consistent with expert evidence as to the effect of such circumstances on children,[61] the children's behaviour only worsened. So too did the physical force used against them.

[55] Exhibit 272.001, Statement of BL, 1 March 2017, [49] [56]–[59], [68]–[78].
[56] Oral evidence of James Sizeland, 27 March 2017, 1993:30–35.
[57] Exhibit 272.000, Statement of BL, 1 March 2017, [29]–[36]; Exhibit 123.001, Statement of AS, 22 February 2017, [33]–[36]; Refer to submissions on behalf of witness AS, 23 May 2017, 8 [56].
[58] Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3962:1–20, 3964:44–3965:15.
[59] Exhibit 105.001, Statement of Andreea Lachsz, 10 December 2016, [14]–[16]; Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, [51]–[55]; Oral evidence of Terry Byrnes, 20 March 2017, 1492:38–1493:4.
[60] Exhibit 272.000, Statement of BL, 1 March 2017 [77]–[78]; Exhibit 128.001, Statement of AU, 18 February 2017, [28]–[29], [43]; Exhibit 270.001, Statement of AM, 11 February 2017, [18], [37]–[38]; Exhibit 139.001, Statement of AB, 1 March 2017, [150]; Exhibit 341.001, Statement of AY, 28 February 2017, [12], [17], [19]; Exhibit 241.001, Statement of BV, 19 February 2017, [40], elaborated on in oral evidence; Exhibit 118.001, Statement of BH, 12 February 2017, [34]; Exhibit 123.001, Statement of AS, 22 February 2017, [56], elaborated on in oral evidence.
[61] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 144; Exhibit 094.001, Statement of John Rynne, 1 March 2017, [17]–[18].

3.4.3 Excessive force

There is not the scope for these submissions to do justice to the number and extent of assaults or excessive uses of force described by former and current detainees in their evidence before this Commission. The references to evidence here are necessarily incomplete.

But the detail of these stories is important. Findings in respect of each child's experience of violence at the hands of their custodians should be made. Where the evidence is sufficient to satisfy the Commission of unlawful assaults and excessive force having occurred, it is important for the children to have their experiences recognised and validated. To that end, regard should be had to the individual submissions made on behalf of each of the children.

Witness AM:

Some of the guards at the Old Don Dale would come into work with the stress they had at home and take it out on us boys. These guards would kick the boys around. This happened to me once when a guard was in a bad mood and told me something and I wasn't paying attention to him, so he kicked me in the thigh.[62]

Witness BH:

[redacted]

The following observations can be made of what was described in that body of evidence.

Routine movements or subduing of the young people were frequently attended by greater force than necessary

The bulk of the incidents described involved violent and excessive force being used to restrain and control behaviour. The children describe 'ground stabilisations' by multiple officers leading to injury.

[62] Exhibit 270.001, Statement of AM, 11 February 2017, [13].
[63] Exhibit 118.001, Statement of BH, 12 February 2017, [21]–[31].

They describe roughness in grabbing and throwing them around. Often these events occurred around taking them down to the 'back cells'.[64]

While there is evidence that things are getting better, excessive force has been observed up to and during the time of the Commission.[65]

There is support for some of these assertions in the evidence from the guards and management accepting that unauthorised restraint techniques were being used.[66]

The number of incidents and the similarities observed across them may lead to the Commission accepting this body of evidence.

There were not infrequent gratuitous acts of violence not associated with any legitimate basis for physical contact

The acts described range from rough handling to assaults and throwing of objects. They were mostly observed in respect of children who presented with the most challenging and complex behaviours.[67]

These assaults are largely uncorroborated but, in the environment that existed, they are quite likely to have occurred. Care must be taken in the course of findings not to focus on only the events recorded, for example, by CCTV footage.

YJOs would threaten violence as a means of controlling behaviour

Threats of violence from the YJOs were commonplace and taken very seriously by the children. They believed they would follow through with them.[68]

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[64] Exhibit 341.001, Statement of AY, 28 February 2017, [14]–[15], [40]–[42], [79]; Exhibit 145.001, Statement of AG, 25 November 2016, [48], [85]; Exhibit 272.000, Statement of BL, 1 March 2017, [38]–[42], [58]–[60], [67A]; Exhibit 241.001, Statement of BV, 19 February 2017, [40]–[41]; Exhibit 128.001, Statement of AU, 18 February 2017, [23]; Exhibit 179.001, Statement of BE, 18 February 2017, [27]; Exhibit 108.001, Statement of BR, 18 February 2017, [19], [43]; Exhibit 270.001, Statement of AM, 11 February 2017, [19]; Exhibit 123.001, Statement of AS, 22 February 2017, [78]; Exhibit 118.001, Statement of BH, 12 February 2017, [16], [18], [21]–[31]; Exhibit 139.001, Statement of AB, 1 March 2017, [108]–[109], [115].

[65] Exhibit 241.001, Statement of BV, 19 February 2017; Exhibit 118.001, Statement of BH, 12 February 2017.

[66] Oral evidence of Benjamin Kelleher, 21 March 2017, 1568:14–1569:19; Exhibit 116.001, Statement of Leonard de Souza, 21 February 2017, [95]; Oral evidence of Leonard de Souza, 22 March 2017, 1647:4–28, 1693–1694; Oral evidence of James Sizeland, 27 March 2017, 1873:11–27.

[67] Exhibit 270.001, Statement of AM, 11 February 2017, [13]; Exhibit 179.001, Statement of BE, 18 February 2017, [30]–[31]; Exhibit 145.001, Statement of AG, 25 November 2016, [76]–[78]; Exhibit 341.001, Statement of AY, 28 February 2017, [77], [79]; Exhibit 270.001, Statement of AM, 11 February 2017, [16]–[17].

[68] Exhibit 123.001, Statement of AS, 22 February 2017, [16]; Exhibit 128.001, Statement of AU, 18 February 2017, [44]; Exhibit 139.001, Statement of AB, 1 March 2017, [114].

There is a credible body of evidence that YJOs were encouraging and facilitating child-on-child assaults

Too many children speak of this utterly inexcusable state of affairs for their evidence to be ignored in the formulation of findings.[69]

YJOs also encouraged children to undertake potentially harmful and humiliating acts upon themselves

These complaints are objectively documented.[70]

Proposed finding 3.1	That there has been endemic use of excessive force and physical violence upon children. That this mistreatment was both unlawful and inhumane.

3.4.4 How can this be prevented?

The current Use of Force directive provides some important protections for the use of force against child detainees, drawing on international human rights standards. Force must be applied as humanely as possible, with minimum discomfort to the detainee, in a manner that respects the dignity of the detainee, and for the minimum time reasonable in the circumstances to meet obligations of the *Convention on the Rights of the Child* while still meeting the duty of care obligations of the Department.[71] These protections do not appear to have been in place before 2015. They are of such a fundamental nature that they should be enshrined in the legislation. Any amendment or repeal of these types of protections ought to be publicly scrutinised.

However, there is a more fundamental problem with the Act in its provisions surrounding use of force. Corporal punishment does not form any part of Australia's criminal justice system, for good reason. There has been an abundance of compelling evidence before the Commission counselling against a punitive framework within youth detention specifically.

But the Act, in s 153, expressly links the concepts of 'discipline' and use of force. The phrase 'maintain discipline at a detention centre' would not readily be construed by a court to mean discipline of an individual detainee for bad behaviour. However, there is nothing in the Act to prevent it being construed by a layperson (or management of a detention centre) in that way. Regulation 70 uses the phrase 'discipline or control of behaviour of detainees' which is illustrative of this concern. Taken together, the Act and the Regulations permit the use of physical force for disciplinary purposes at the

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[69] Exhibit 341.001, Statement of AY, 28 February 2017, [18]; Exhibit 270.001, Statement of AM, 11 February 2017, [14]–[16]; Exhibit 272.000, Statement of BL, 1 March 2017, [79]–[81]; Exhibit 123.001, Statement of AS, 22 February 2017, [40]; Exhibit 128.001, Statement of AU, 18 February 2017, [46]–[52]; Exhibit 111.001, Statement of AX, 17 February 2017, [21]; Exhibit 179.001, Statement of BE, 18 February 2017, [30]–[34]; Exhibit 118.001, Statement of BH, 12 February 2017, [32]; Exhibit 108.001, Statement of BR, 18 February 2017, [59]. It is noted that BZ's observations of AJ also provide some support for this: Exhibit 136.001, Statement of BZ, 20 February 2017, [38].

[70] Exhibit 341.001, Statement of AY, 28 February 2017, [16]; Exhibit 139.001, Statement of AB, 1 March 2017, [110]–[111]; Exhibit 270.001, Statement of AM, 11 February 2017, [14].

[71] Exhibit 269.002, Annexure VW-1, 12 September 2016. It is dated 9 September 2016 and V1 was effective 6 May 2015. It is not known what, if any, directive was in place prior to then.

centre. That is reflected in the current Use of Force directive, which permits the use of force for two purposes:

- Maintaining discipline at the centre, and
- Protecting a detainee, other detainees or other persons.[72]

In our view, only the latter is a permissible purpose for the application of force against children. Measures to discipline a child for misbehaviour and measures to protect people and property from the consequences of a child's misbehaviour are two separate aims which should be dealt with separately. The former may be partially motivated by a need to establish behavioural standards within the centre. But the use of force against a child should only be justified when it is necessary to protect an individual or property.

Further, the confluence of discipline with use of force has meant that the power to discipline is unregulated by legislative instruments. Regulation 70(1) is insufficiently proscriptive.

That is the approach taken in Queensland,[73] and it is urged upon the Commission to recommend it in the Northern Territory.

Additionally, there was very little reporting of instances of harm towards detainees. Some staff felt powerless to do anything.[74] It is submitted that a legislative obligation should be placed on detention centre staff to report harm or suspected harm suffered by a child who is in their care.

A recent internal review has picked up non-compliance issues involving a failure to record relevant information on the Use of Force Register and IOMS or to save CCTV footage.[75] It is hoped that those issues have received due attention under the new framework. NAAJA's submissions about oversight through such records, and preservation of them are provided in section 9.4.

Finally, NAAJA's submissions on staffing and training issues are contained in section 9. However, it is important to note here Dr Creati's evidence regarding use of a de-escalation coordinator in the hospital environment who is called to provide specialist assistance when there is challenging behaviour exhibited.[76] That type of role could be undertaken within existing centre structures and may be useful.

[72] Exhibit 269.002, Annexure VW-1, 12 September 2016, 1.0 Directive.
[73] *Youth Justice Regulations 2016* (Qld) reg 16.
[74] Oral evidence of Ian Johns, 28 March 2017, 2046.
[75] Exhibit 124.005, Annexure DF-4, 17 February 2017.
[76] Oral evidence of Dr Mick Creati, 23 March 2017, 1740–1741:6–11.

3.4.5 Items of restraint

Handcuffs

There is evidence before the Commission that handcuffs have been regularly improperly, and at times unlawfully, used inside youth detention centres.[77] The Commission should consider the individual submissions made on behalf of witnesses for findings that might be made in respect of those occasions.

Spit hoods and restraint chairs

The use of spit hoods was authorised in youth detention by Mr Middlebrook in 2012,[78] however, there was no policy for when it was appropriate to use them.[79] Clear evidence reveals that spit hoods were applied to children.[80]

For the reasons set out in the Hamburger review,[81] spit hoods should never be used in the adult detention context, let alone in youth detention.

The horrific images and footage of the youth Dylan Voller strapped to a restraint chair, his head covered by a spit hood, were instrumental in convincing the Prime Minister to call for this Royal Commission.

In April 2015, Ms Cohen advised the Department that the use of a restraint chair would conflict with the *Youth Justice Act,* as well as international standards and the AJJA standards.[82] Despite this advice, Mr Middlebrook renamed the device a 'safety chair' and approved its use in youth detention subject to certain conditions.[83] In late April 2015, a Use of Restraints directive was prepared based on the directive from the adult prison.[84]

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[77] Exhibit 145.001, Statement of AG, 25 November 2016, [32]; Exhibit 272.000, Statement of BL, 1 March 2017, [67A]; Exhibit 123.001, Statement of AS, 22 February 2017, [41]; Exhibit 341.001, Statement of AY, 28 February 2017, [39]; Exhibit 108.001, Statement of BR, 18 February 2017, [62]; Exhibit 136.001, Statement of BZ, 20 February 2017, [48]; Exhibit 131.001, Statement of AF, 25 November 2016, [55], [57].

[78] Exhibit 318.001, Statement of Ken Middlebrook, 3 March 2017, [134(a)].

[79] Exhibit 053.028, Annexure 18 – Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre, 20 August 2015, 50–51.

[80] Exhibit 139.001, Statement of AB, 1 March 2017 [186]; Exhibit 043.001, Statement of AD, 22 November 2016; Exhibit 051.001, Statement of Dylan Voller, 25 November 2016.

[81] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 21, 146–7 Finding 73; Oral evidence of Keith Hamburger, 5 December 2016, 328:25–40.

[82] Exhibit 283.092, 'Re: [REDACTED]', 8 April 2015; Oral evidence of Kenneth Middlebrook, 26 April 2017, 3027:34-36.

[83] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3025:34-41; Exhibit 283.104, 'RE:', 29 April 2015.

[84] Exhibit 283.301, 'NTDCS Directive: Use of Restraints'; oral evidence of Kenneth Middlebrook, 26 April 2017, 3031:15-22.

Mr Middlebrook was unclear whether the use of the restraint chair at that time was unlawful and conceded it was 'a very grey area.'[85] Mr Middlebrook did not seek legal advice, but instead amendments to the Act were proposed to avoid any doubt.[86] It is extremely concerning that the use of restraint chairs was authorised in detention centres by amendments to the legislation in 2016. NAAJA vigorously opposed this amending legislation at the time.

Mr Middlebrook gave evidence that the chair was used on four young people, but not in youth detention facilities.[87] He said he saw the 'practical value' in the restraint chair to 'prevent somebody from self-harming for a period of time until they settle down.'[88] The use of restraint chairs in youth detention centres is unacceptable and should not be permitted.

NAAJA commends the current government for legislatively prohibiting the use of spit hoods and restraint chairs in late 2016.[89]

Legal framework

The current Use of Restraints directive appears to appropriately regulate the use of approved restraints in the youth detention setting.[90] Sections 153(4) and 155 are permissive in nature and should be restricted in the ways set out in the directive. The second basis for use of restraint set out in s 153(4), namely where it 'would reduce a risk to the good order or security of the detention centre', is too vague.

For the reasons expressed above in respect of use of force, both the types of approved restraints and the circumstances of use should be legislated.

[85] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3028:32-39; 3029:5-8.
[86] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3030:10-12.
[87] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3026:5-10; 3032:27-30.
[88] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3027:14-20.
[89] Oral evidence of Jeanette Kerr, 8 December 2016, 481:43–482:5.
[90] Exhibit 419.004, Annexure 4 to Statement of Jeanette Kerr, 30 November 2016.

Recommendation 20	The *Youth Justice Act* and/or the *Youth Justice Regulations* be amended to reflect the following: h. The protections against use of force currently contained in the Use of Force Directive 3.2.2 be legislated. i. The types of approved restraints and the protections surrounding their use as currently contained in the Use of Restraints Directive be legislated. j. To separate the powers exercisable by way of discipline and those involving the use of force. k. To require that disciplinary powers be undertaken in ways that respect the child's dignity, are proportionate to the nature of the misconduct, and have regard to the child's subjective features, explanation and vulnerabilities. l. Prohibiting certain acts from forming part of any disciplinary action, namely, corporal punishment, physical force, isolation, verbal or physical abuse or humiliation, or withdrawal of entitlements (e.g. food, water, access to telephones and visits), or access to services (e.g. education). m. To clearly set out the permitted purpose(s) for use of physical force being to protect a person or property from the consequences of the child's misbehaviour. n. An obligation upon youth detention staff to report harm or suspected harm being suffered by children.

3.5 Strip searches

3.5.1 Legal framework

Sections 161(1) and (2) of the *Youth Justice Act* authorise a strip search of 'a detainee', where the Superintendent directs it, believing on reasonable grounds that:

a) It is necessary 'in the interests of the security or good order of the detention centre', or
b) The detainee may have in his or her possession an impermissible article.

Regulation 73(1) provides that a detainee may be 'searched' upon admission to a detention centre, when temporarily leaving or returning to the centre, or when being transferred or on other occasions as directed by the Superintendent. It does not provide for a strip search at those times.[91]

[91] The Act provides separately for a search and a strip search. That is because it uses the term 'search', but also because reg 73(4) provides a further safeguard 'If the search involves stripping the detainee of clothing' and reg 73(5) requires that a detainee must not be 'stripped of clothing and searched except by direction of the Superintendent under s 161 of the Act.' Section 161(1) and (2) of the Act maintains the distinction between the terms 'search' and 'strip search', by using the phrase 'a search of the detainee's clothing and person, including a strip search.'

Regulation 73 provides the following safeguards:

a) A search must be conducted having regard to the detainee's dignity and self respect (reg 73(2))
b) If the search involves a strip search, it must be conducted by not less than 2 members of the same gender as the detainee (reg 73(4))
c) The detainee must not be stripped in the sight or presence of a person of the opposite gender (reg 73(6)(a)), and
d) The detainee must not be stripped in the presence of another detainee unless it is impracticable to move either detainee (reg 73(6)(b)).

These provisions would be construed to only permit strip searches on a case-by-case basis, and not by way of a sweeping direction for the following reasons.

Clearly, a strip search is a highly invasive procedure. The power to exercise one would be strictly construed.

The legislative regime permitted searches each time a person was admitted to a facility or left or returned from a facility. It only permitted a strip search at those times if the Superintendent formed a reasonable belief either it was necessary in the interests of the security or good order of the detention centre or because a detainee may have in his or her possession a restricted article, and then directed 'a detainee' to submit to the search.

It involves a tortuous reading of the Act to construe it to permit a direction to be made in respect of all detainees. Not only is that contrary to the plain meaning of the language used, namely 'a detainee'. But it would be impossible in fact for a Superintendent to hold a reasonably based belief as to either prescribed circumstance in respect of all admissions or all detainees being transferred to and from court or all visits.

Accordingly, routine strip searches of all detainees upon admission, upon transfer in or out of the facility or following a visit, were unlawful, whether there was a broadly framed direction from the Superintendent in existence or not.

Further, the power is one to 'direct' the detainee to submit to a search, to which direction a detainee is obliged to comply.[92] Therefore, s 161 does not authorise, at first instance and before a direction is given, a forceful search. Rather, the detainee must be provided the opportunity to comply with the direction first. If the detainee does not comply, then there may be power to use force; this would then fall within s 153.

3.5.2 The evidence

The evidence is consistent that strip searches occurred routinely:

[92] *Youth Justice Regulations 2016* (NT) reg 65.

- Before and after court appearances and visits[93]
- For transfers,[94] and
- When taken to the back cells.[95]

Some children were also subject to random strip searches, which appeared to be a form of punishment.[96]

These searches had a significant impact on the wellbeing (and behaviour) of detainees.[97] AX suffered additional disrespect and shame because he had already been through ceremony.[98] It is recognised that a strip searches is one of the most shameful events that a person going through or who has been through law can experience.[99]

Following an incident involving AS and BL in January 2015, BL was stripped by cutting his clothes with a knife while handcuffed and ground stabilised outside in full view of males and females alike. He was made to walk to the back cells naked.[100] AS had his clothes cut off in the back cells.[101]

Professor Rynne identified that stripping in these situations was the result of inadequate processes to proactively identify and address issues before they escalate:

> [I]f you look at just when the clothes are being cut off you're not looking at the whole – you are not looking at the whole issue. It could have started one, two, three or four days ago when something went wrong and the problem starts to build. That's when it should have been dealt with and dealt with in the appropriate way, before it gets to where a person is having to be held down and their clothes removed. Having their – being held down and clothes removed is not a professional control and restraint technique, it's the result of poor and inadequate processes that occurred beforehand. So it's just another sign of poor prison quality.[102]

Territory Families has only recently changed its policy so that a 'half and half' strip search is performed.[103] This involves a child removing either the lower or top half of their clothing first

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[93] Exhibit 341.001, Statement of AY, 28 February 2017, [32]; Exhibit 139.001, Statement of AB, 1 March 2017, [42]; Exhibit 123.001, Statement of AS, 22 February 2017, [46]; Exhibit 136.001, Statement of BZ, 20 February 2017, [49]; Exhibit 165.000, Statement of CE, 21 February 2017, [27]; Exhibit 270.001, Statement of AM, 11 February 2017, [19].
[94] Exhibit 111.001, Statement of AX, 17 February 2017, [28].
[95] Exhibit 118.001, Statement of BH, 12 February 2017, [15]; Exhibit 108.001, Statement of BR, 18 February 2017, [45].
[96] Exhibit 341.001, Statement of AY, 28 February 2017, [34]–[36]; Exhibit 270.001, Statement of AM, 11 February 2017 [19], [37].
[97] Exhibit 341.001, Statement of AY, 28 February 2017, [33]; Exhibit 118.001, Statement of BH, 12 February 2017, [15]–[16]; Exhibit 139.001, Statement of AB, 1 March 2017, [47].
[98] Exhibit 111.001, Statement of AX, 17 February 2017, [28].
[99] Oral evidence of John Rynne, 17 March 2017, 1307:35.
[100] Exhibit 272.000, Statement of BL, 1 March 2017, [35]–[36].
[101] Exhibit 123.001, Statement of AS, 22 February 2017, [35]–[36].
[102] Oral evidence of John Rynne, 17 March 2017, 1316:43–1317:5.
[103] Oral evidence of Barrie Clee, 15 March 2017, 1137:30–33.

and the search is conducted and then they are allowed to put that clothing back on and remove the other half of their clothing and the search is continued. Territory Families must ensure that staff are properly trained in this practice and that all measures are taken to ensure that strip searches are conducted having genuine regard to the detainee's dignity and self-respect.

Proposed finding 3.2	Unlawful strip searches occurred.

Recommendation 21	That the practice of routine strip searches ceases immediately.

3.6 Isolation

3.6.1 Legal framework

The confinement of a child by themself amounts to isolation. This is 'strictly prohibited' under the *Havana Rules*, because it constitutes cruel, inhuman or degrading treatment and has a well-established negative impact on the physical and mental health of a child.[104]

Very high numbers of child detainees in the Northern Territory are Aboriginal. The Royal Commission into Aboriginal Deaths in Custody heard considerable evidence of the extremely detrimental effects of isolation on Aboriginal persons, leading to the recommendation that 'it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.'[105]

Nevertheless, s 153(5) of the *Youth Justice Act* together with reg 72(1) of the *Youth Justice Regulations* permits isolation of children for up to one day, or up to three days with the approval of the Commissioner, if the Superintendent forms the view that isolation should occur:

a) To protect the safety of another person, or
b) For the good order or security of the detention centre.

It is NAAJA's position that the Act should be amended to prohibit isolation of children in youth detention centres.

3.6.2 The conditions in solitary

There is abundant evidence before the Commission as to the inhumane conditions that children were kept in solitary confinement in, be they in the BMU, C Block, the HSU or in the various 'at risk' cells. The cells are now called 'de-escalation cells'. Those conditions included:

[104] *Havana Rules* art 67.
[105] Exhibit 024.006, National Report – Royal Commission into Aboriginal Deaths in Custody – Volume 5, 15 April 1991, 3:334.

- Being locked down for 23 hours a day, often as much as 23 hours and 45 minutes a day
- Extreme heat
- Darkness
- Human fluids not being cleaned away, leading to bad smells and insects
- Extreme boredom through no activities and no school
- Hunger
- No access to clean drinking water without assistance from a guard
- A lack of privacy for showers and toilets
- In some cells, no access to toilets
- Limits to visits and phone calls
- Very limited interaction with the YJOs.[106]

Witness AM:

… while I was in isolation I asked on a number of times for things like water and panadol but the guards would not give me anything. I became so desperate that I thought I had no other choice but to self-harm … Only after I had attempted to hurt myself did the guards pay attention to my requests. They gave me panadol, but I dropped it on the dirty ground. The guards said that I had to pick it up and swallow it (even though it had fallen on the dirty ground) because that was all that I was getting.[107]

Staff and management personnel up to the level of the Commissioner were aware of these conditions, yet did nothing to ameliorate them. They can fairly be described as cruel and inhumane.

The children speak of not being told how long they would be there, or being told one thing and then it changing.[108]

[106] Exhibit 128.001, Statement of AU, 18 February 2017; Exhibit 043.001, Statement of AD, 22 November 2016; Exhibit 341.001, Statement of AY, 28 February 2017; Exhibit 179.001, Statement of BE, 18 February 2017; Exhibit 108.001, Statement of BR, 18 February 2017; Exhibit 136.001, Statement of BZ, 20 February 2017; Exhibit 241.001, Statement of BV, 19 February 2017; Exhibit 139.001, Statement of AB, 1 March 2017; Exhibit 270.001, Statement of AM, 11 February 2017; Exhibit 145.001, Statement of AG, 25 November 2016; Exhibit 272.000, Statement of BL, 1 March 2017; Exhibit 123.001, Statement of AS, 22 February 2017; Exhibit 111.001, Statement of AX, 17 February 2017; Exhibit 118.001, Statement of BH, 12 February 2017; Exhibit 165.000, Statement of CE, 21 February 2017; Exhibit 131.001, Statement of AF, 25 November 2016; Oral evidence of Greg Harmer, 24 March 2017, 1794:5–15.

[107] Exhibit 270.001, Statement of AM, 11 February 2017, [27].

[108] Exhibit 341.001, Statement of AY, 28 February 2017, [23], [26]; Exhibit 145.001, Statement of AG, 25 November 2016, [41]; Exhibit 270.001, Statement of AM, 11 February 2017, [22]; Exhibit 118.001, Statement of BH, 12 February 2017, [39]; Exhibit 165.000, Statement of CE, 21 February 2017, [21], [26]; Exhibit 241.001, Statement of BV, 19 February 2017, [25]–[26]; Exhibit 139.001, Statement of AB, 1 March 2017, [148]–[149]; Exhibit 272.000, Statement of BL, 1 March 2017, [49]–[53]; Exhibit 111.001, Statement of AX, 17 February 2017, [17].

3.6.3 Excessive periods of time alone

The evidence is replete with examples of detainees being placed in isolation for extended periods of time.[109] Many times it would be between three to four weeks' duration. One of the worst examples was the child AJ (now deceased), who was placed in isolation usually for up to two weeks, on occasion up to three weeks, and on one occasion spent 39 days in the BMU.[110]

Each occasion a child was secluded for more than 72 hours was demonstrably unlawful. Audits and reviews have found grave deficiencies in recording BMU placements and the details on the IMPs.[111]

3.6.4 The impact

The young witnesses have described in their statements the horrendous mental impacts of their times in isolation.

Witness AS:

I would get stressed out and go silly in the head ... hours could seem like days … my brain went blank ... boring ... very lonely … You get to used to being in the cell … When you come out here into the community, it's not right, doesn't feel right. That's why most of the boys are already back there by a month or so, 'cause it changes your mind.[112]

Witness AD:

They put me in a cell by myself … I have spent most of my life outdoors and had never been indoors for a period like this before…

The first week we were not allowed out of the cell at all … I always asked (the guards) when I was getting out and they said I would have to talk to X about that. I asked them many times but they never told me how long I was in for and when I would get out. Throughout the time I was there I used the intercom in the cell to ask to speak to X. I was always told that he was busy …

In the second week we were allowed out for 30 minutes a day to have a shower, make phone calls and exercise. They basically just ignored us …

On the 17th day I used the intercom to again try and talk to X. This time he answered. That was the first time I had spoken to him since we went into the BMU, even though I had been asking daily. He said he

[109] Exhibit 241.001, Statement of BV, 19 February 2017; Exhibit 341.001, Statement of AY, 28 February 2017; Exhibit 270.001, Statement of AM, 11 February 2017; Exhibit 179.001, Statement of BE, 18 February 2017; Exhibit 118.001, Statement of BH, 12 February 2017; Exhibit 139.001, Statement of AB, 1 March 2017; Exhibit 145.001, Statement of AG, 25 November 2016; Exhibit 043.001, Statement of AD, 22 November 2016; Exhibit 051.001, Statement of Dylan Voller, 25 November 2016; with respect to AJ: Bed records DSC.0001.0006.1136-1141 and DSC.0001.0006.1574-1573; Exhibit 283.236, Detention report, 16 April 2014.
[110] Refer to submissions on behalf of witness BZ, 23 May 2017, 3–10.
[111] See, eg, Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 41.
[112] Exhibit 123.001, Statement of AS, 22 February 2017, [20], [24], [26], [49].

would come down and see all of us that day before he went home. He never did. I called back and they said he had gone home.

That was the moment I lost it. I just snapped. All the stuff that had been building up in my head during that 17 days just exploded …[113]

The impacts are well-recognised and have been for around 20 years.[114] As explained by Professor Rynne in evidence, isolation is regarded as inappropriate for young people (up until the age of 22–23) because of the risks to the developing pre-frontal cortex of their brain. Permanent damage in the form of stunting the development of that area of the brain (which controls impulses) or causing post-traumatic stress disorder or suicidal ideation can more readily be caused to a young person. Aboriginal children or children with pre-existing trauma are even more vulnerable.[115]

The likelihood that extended periods locked down in isolation would trigger poor behavior was canvassed by experts before the Commission.[116] While Mr Sizeland found it difficult to understand the link, Mr Middlebrook did not.[117]

3.6.5 To what end?

Good order

Mr Caldwell and Mr Sizeland also raised the issue of inadequate facilities leading to increased use of isolation. Having formed a view that some children required secure placements for the good order of the centre, there were no other secure cells available to them to use.

The events of April and August 2014 serve as good examples of this.

Case study 1 – AJ, April 2014

AJ was placed in isolation in the BMU on 8 April 2014 by Assistant General Manager Sizeland on the basis that it was necessary for the good order of the centre. AJ was thought to be exercising some sway over others to attempt to escape. He attempted to punch Mr Sizeland upon being informed that he would be placed in the BMU for this.[118]

On 9 April, the Commissioner's approval was sought to place AJ in the BMU 'for a 72-hour period.[119] AJ had in fact already been in the BMU for 24 hours at that point and had only been out of the BMU

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[113] Exhibit 043.001, Statement of AD, 22 November 2016, [16]–[23].
[114] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 145; Oral evidence of Keith Hamburger, 5 December 2016, 323, 325.
[115] Oral evidence of John Rynne, 17 March 2017, 1314:32–43, 1315:5–20, 1316:12–23, 1320:30–43.
[116] Oral evidence of Dr Mick Creati, 23 March 2017, 1740:35–45; Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 148.
[117] Oral evidence of Ken Middlebrook, 26 April 2017, 2959:16–45, 3018:37, 3019:21–27.
[118] Exhibit 196.001, 'RE: [REDACTED]', 9 April 2014; Oral evidence of James Sizeland, 27 March 2017, 1935:15–50.
[119] Exhibit 196.001, Re: [REDACTED], 9 April 2014.

for four days before that. That information was not conveyed by the email and Mr Middlebrook did not make any inquiry about this.[120] Yet that information was imperative to a lawful exercise of the power under s 153(5).

In any event, Mr Middlebrook then approved AJ's placement in the BMU 'for the 72 hours', but in his approval email he added 'and after that if he is still a problem take him out for a period, say 6 to 8 hours and put him back for a further 72 hours.'[121]

Mr Middlebrook attempted, in his evidence, to disavow the clear implication that he approved sequential periods of 72 hours.[122] However, Mr Caldwell clearly understood that is what had happened. On 11 April, he recorded that, 'In recent days Ken has verbally indicated a willingness to agree to rotating 72 hours BMU placements for both [AJ and Dylan Voller].'[123]

Legal advice that Mr Caldwell had, at least by 13 April, indicated that sequential periods of 72-hour placements were lawful so long as the grounds in s 153(5)(a) and/or (b) were made out and approval given on each occasion.[124] Accordingly, Mr Caldwell considered obtaining approval for each 72-hour period.[125] However, the Commission has heard that apart from the first approval, no subsequent approval occurred.[126] AJ was then kept in the BMU for 20 days, until he was released on bail.

Case Study 2 – AA, AB, AC, and AD, August 2014

AD's description of his time in the BMU in August 2014 is excerpted above. AA, AB, and AC, who were also involved in the 2 August 2014 escape, were held in the BMU for a similar length of time prior to the 21 August incident and had a similar experience to AD. AA, AB and AC were placed in the BMU on 4 August and AD on 6 August.

AA and AD were being held in a cell together, as were AB and AC. Both AB and AD have told the Royal Commission that their caseworkers were getting angry about the length of time they were there and notifying management of their disagreement.[127]

After 17 days AD 'snapped'.[128] He was able to get himself out of his cell. He was trying to get out of the BMU area. He was angry about how long he had been kept there.

The Children's Commissioner reviewed these events and found no evidence that either AA, AB, AC or AD had been on IMPs prior to 13 or 14 August.[129] Further, there was no independent evidence that

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[120] Oral evidence of Ken Middlebrook, 26 April 2017, 3047:28–30.
[121] Exhibit 196.001, Re: [REDACTED], 9 April 2014.
[122] Oral evidence of Ken Middlebrook, 26 April 2017, 2999–3000, 3049:45–46.
[123] Exhibit 200.001, Re: Possible transfer of [REDACTED] to Don Dale, 12 April 2014.
[124] Exhibit 383.002, Annexure 2 to the statement of Amanda Nobbs-Carcuro, 11 May 2017.
[125] Exhibit 198.001, Re: Incident reports for [REDACTED], 13 April 2014.
[126] Oral evidence of Ken Middlebrook, 26 April 2017, 3047:1–10; Oral evidence of Russell Caldwell, 29 March 2017, 2110:20, 2111:25–30, 2154:43, 2114:37, 2115:8.
[127] Exhibit 043.001, Statement of AD, 22 November 2016, 4 [21].
[128] Ibid [23].
[129] Exhibit 053.028, Annexure 18 – Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre, 20 August 2015, 12.

the IMPs existed at that time, as they had been 'typed over as part of an update' on 21 August.[130] On the day AD escaped his cell, the children's IMPs were due for review. That review was delayed due to an officer leaving without speaking to the children and there is some suggestion that a YJO indicated there would be a further placement in the BMU. Three out of the six young people in the BMU were involved in covering up cameras with toilet paper, but only AD was out of his cell. One of the YJOs involved indicated that the kids in the BMU had kept asking to be released and that due to the bad conditions, he was surprised it didn't happen sooner.[131]

The response from the authorities included:

- Initial cursory attempts by Mr Sizeland and then Mr Kelleher to talk to AD.
- Attendance by adult prison officers, kitted with riot shields, gas masks, helmets, etc. Two of them were from the trained riot response team, IAT. None made attempts to talk to AD.
- The original plan was to use a dog and dog-handler but it was thought they could not get access to the BMU.
- AD saw the dog, became scared and asked to talk to officers, telling them he wanted to give up. But he was told it was too late.
- Mr Sizeland recommended the deployment of CS gas and this was authorised by the Commissioner, apparently unaware of the offer to give up. The gas was deployed on all the young people in the BMU, including those who were not involved.
- AB and AC were not involved at all during the incident. CCTV footage from the night shows them initially playing cards on the bed in their cell, and then watching the events from their cell door. AB described being extremely scared by the use of force against them. He was using the intercom trying to ask the YJOs to let him out.
- All were then washed with a hose on the basketball courts, the dog was there and barking. They were lying on their stomachs on the ground in handcuffs.

With regard to the various uses of force, restraints and isolation described in the above case studies, NAAJA adopts the submissions on behalf of AA, AB and AC, the individual submission on behalf of AB and the individual submission on behalf of BZ. Those submissions seek findings that various of the acts described above, including the use of CS gas on 21 August 2014, were unreasonable, unnecessary and unlawful.

De-escalation

Mr Williams, Don Dale's most recent Superintendent to give evidence before the Commission, speaks of the use of isolation for de-escalation purposes.[132] He says that he has put protections in place by directing that he will be informed of any detainee to be put into isolation and, from the start of this

[130] Ibid.
[131] Ibid, 14.
[132] Media reports indicate that he has now been sacked.

year, isolation will be reviewed after two hours and ended if the child has calmed down. He said he would only permit a child to be in isolation for up to 24 hours.[133]

Ms Kerr indicated that as delegate of the Commissioner, she does not authorise any period of isolation past 24 hours.[134] However, it is noted that in Ms Kerr's 21 February statement, she leaves open that possibility.[135]

Reviews of the use of escalation rooms in May and October 2016 have both found that the placements are still being used beyond the point necessary to address an emergency or threat to the detainee or others that prompted the placement. The recording of isolation details was also deficient, and in October 2016 this included lack of recording of recreation times.[136]

Punishment

Isolation was used as punishment. The Commission has heard that, 'Sometimes punishment can be disguised as behaviour management.'[137] The 'back cells' have been used for short periods over many years as punishment.[138] Mr Williams accepts that isolation has continued to be used in this way. That is, that children are moved to the de-escalation cells 'for the good order and security of the centre.' And that detainees know they will be accommodated there if put on a 'placement' and 'if rules are seriously breached they will end up in a placement cell. Detainees have on occasion been told to settle down or they will end up in de-escalation.'[139]

3.6.6 Unlawful

There is sufficient evidence for the Commission to find that the use of isolation in the youth detention environment has been routinely unlawful. It has involved excessive periods outside of the terms of the legislation and cruel conditions.

3.6.7 Where to now?

Recommendation – No isolation

NAAJA's position is that there should be no use of isolation in Northern Territory youth detention centres. This would be consistent with the approach taken internationally and in the recommendations of the Royal Commission into Aboriginal Deaths in Custody. It would recognise the counterproductive effect of isolation. It would also recognise the significant neurological and emotional harms flowing from isolation.

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[133] Exhibit 269.001, Statement of Victor Williams, 28 February 2017, [45]–[48].
[134] Oral evidence of Jeanette Kerr, 8 May 2017, 3543:15–25.
[135] Statement of Jeanette Kerr, 21 February 2017, [27.2.2], [27.2.4], [39].
[136] Exhibit 124.007, Annexure DF-7, 17 February 2017; Exhibit 124.008, Annexure DF-8, 17 February 2017.
[137] Oral evidence of Howard Bath, 12 October 2016, 118:12–24.
[138] See, eg, Exhibit 108.001, Statement of BR, 18 February 2017, [47] and the many incident reports relating to him.
[139] Exhibit 134.001, Statement of Victor Williams, 3 February 2017, [12], [15].

A Victorian study on the use of isolation and lockdowns in that state indicated that despite legislative protections – that isolation never be used as punishment – that is in fact what occurred.[140] It is impossible to predict with any confidence that isolation would not be used punitively or otherwise in ways harmful to the detainees.

Other avenues of de-escalation must be explored.

Recommendation 22	Section 153(5) of the *Youth Justice Act* be amended to prohibit the seclusion or isolation of children in detention.

Alternative Recommendation – If isolation is to be kept, it must be strictly confined

As stated by Dr Bath, if isolation is to be permitted, it must be strictly controlled and consistent with a personalised approach for the individual involved.[141] The following are some suggested methods of strict controls that should be given the force of legislation. The indications from Mr Williams and Ms Kerr, while admirable, do not bind them, let alone their successors.

We alternatively recommend that there are legislative protections in place as to when isolation may be effected in youth detention. Legislative protections should have the following features:

- Preconditions:
    - Must try verbal and other de-escalation attempts (e.g. allowing child to exercise / fresh air) first.
    - Only where necessary to protect against an immediate threat to personal safety of the individual, staff or other detainee.
    - Not for punishment.
    - Not to be used as a behavioural management tool.
- Duration:
    - Limited to the shortest period necessary.
    - Maximum 24 hours – any further, needs judicial and medical approval.
    - Can be ended upon review by non-involved senior at 30 min, 1 hour, 2 hours, 4 hours, 8 hours – unless sleeping, in which case, at 6am.
    - All YJOs have authority to take a person out of isolation.
- Conditions:
    - Must have recreational time in the fresh air[142] of at least 4 hours in a 24-hour period (not including showers and toilets).
    - Basic hygiene, access to toilets and water.

[140] 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* (March 2017) 6.
[141] Exhibit 011.001, Statement of Howard Bath, 5 October 2016, [99g].
[142] Exhibit 094.001, Statement of John Rynne, 1 March 2017, [29].

    - Have activities such as reading materials. Importance of activities for the child's mental state, social and emotional wellbeing, keeping in mind the ultimate aim of transition to the community.[143]
    - Any longer than 2 hours – offered or organised to have cultural support, mental health support.
- Notice:
    - Of decision to the child in writing including reasons, reviews and likely factors that will be considered on review – no longer than 24 hours unless court order.
    - If Indigenous, a cultural support worker must be contacted and engaged.
    - To the child's caseworker.
- Records of:
    - Initial placement and reasons.
    - What communicated to child.
    - Reviews and factors for decision to continue.
- Training, disciplinary and practical measures are implemented to ensure these steps occur.
- Periodic audits of records and of the cells themselves.
- Publication of data on isolation and lockdowns.[144]

3.7 Issues facing girls in detention

The unique needs and vulnerabilities of Aboriginal girls in detention require specific consideration by the Commission. The Committee on the Rights of the Child has observed that as girls in the youth justice system represent only a small group, their needs may be easily overlooked. This necessitates 'special attention' to the particular needs of girls, including special health needs.[145] The Beijing Rules provide that:

> Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.[146]

On the evidence before this Commission, the conditions for girls at Don Dale were even worse than those for boys.

[143] Oral evidence of Dr Mick Creati, 23 March 2017, 1750:1–10.
[144] This was recommended in Victoria on the basis that it did provide evidence that isolation was reduced in those circumstances; it was also Professor Kinner's evidence that in-hospital seclusions are also reported. See Oral evidence of Stuart Kinner, 23 March 2017, 1750:40–45.
[145] Committee on the Rights of the Child, *General Comment no. 10 Children's rights in Juvenile Justice*, UN Doc CRC/C/GC/10 (25 April 2007).
[146] Exhibit 006.002, Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), art 26.4.

The facilities in which girls were kept were completely inadequate. The cells were small,[147] and there were at times up to three girls sharing a cell, requiring girls to sleep on mattresses on the floor.[148] Girls had very little privacy, and there is some evidence boys could see into the showers.[149] The toilet and showering facilities were inadequate to cater for the number of girls in detention. This at times had the effect of delaying girls' attendance at school.[150]

Witness AF:

There was only one shower and one toilet between all us girls, and there were usually about 7 girls at Don Dale at any time … Because we had the one shower between us all, we couldn't shave our legs in the shower. What we did instead was we got a bucket of water and shaved our legs in the rec room.

In the New Don Dale, we had a shower and a toilet in our cells but there was also a window into our cells, which meant that we had less privacy.[151]

Girls had no choice of sanitary items and couldn't keep any in their rooms.[152] Because of the lack of female staff (which was a chronic issue),[153] often requests for sanitary items were answered by male YJOs.[154] Some male YJOs questioned girls about why they wanted to speak to a female officer.[155] This understandably caused girls to feel shame.[156] The lack of ready access to sanitary items is degrading and humiliating. It is also completely culturally inappropriate for Aboriginal girls to have to speak about such matters with male staff.

Girls did not have the same opportunities for programs and recreation time as the boys.[157] Mr Hamburger observed that girls were isolated at Don Dale and didn't receive the same amount of time away from their cell block.[158] Ms Inglis said that some male officers who were part of the 'boy's club' would often override an activity booked for the girls on the basketball courts and say 'well, the girls will just have to stay in their room because the boys want to play basketball.'[159] Mr Harmer observed:

[147] Exhibit 131.001, Statement of AF, 25 November 2016, 4 [20].
[148] Oral evidence of AG, 24 March 2017, 9:1–2, 15.
[149] Exhibit 341.001, Statement of AY, 28 February 2017, [34].
[150] Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, 20 [124].
[151] Exhibit 131.001, Statement of AF, 25 November 2016, 5 [23].
[152] Exhibit 152.001, Statement of Saki Muller, 10 February 2017, [29]; Exhibit 154.001, Statement of Eliza Tobin, 8 February 2017, [67]; Oral evidence of Eliza Tobin, 24 March 2017, 1775:24–27; Oral evidence of Saki Muller, 24 March 2017, 1775:33–37.
[153] See, eg, Oral evidence of Derek Tasker, 14 March 2017, 1052:4–8.
[154] Oral evidence of Saki Muller, 24 March 2017, 1775:39–42.
[155] Oral evidence of AG, 24 March 2017, 11:4–13.
[156] Oral evidence of AG, 24 March 2017, 11:4–13.
[157] Exhibit 152.001, Statement of Saki Muller, 10 February 2017, [24]; Exhibit 131.001, Statement of AF, 25 November 2016, [53]; Oral evidence of Saki Muller, 24 March 2017, 1772:25, 1773:5; Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 142; Oral evidence of Keith Hamburger, 5 December 2016, 317:5–15; Oral evidence of Greg Harmer, 24 March 2017, 1775:10–15.
[158] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 142, oral evidence of Keith Hamburger, 5 December 2016, 317:4–13.
[159] Oral evidence of Louise Inglis, 24 March 2017, 1772:19–27.

> the boys always seemed to have priority over the different programs or activities that were going to be outside and that sort of thing. So there was only one basketball court and because of the segregation policy, keeping the girls and the boys separate, the girls always had to take second seat, basically, on what was put out for that shift.[160]

Girls were also isolated at Aranda House in Alice Springs.

Witness AX:

While I was there [at Aranda House], there was one girl who was there … At that time I think she was there for 2 or 3 months. Because she was the only girl, they kept her on lock down for most of the day, only allowing her out of her cell for a shower and some exercise … She used to say how difficult it was being locked down by herself all the time. I felt really bad for her, and I think the rest of the boys did too.[161]

There is evidence before the Commission that girls did not receive the same educational opportunities as boys. For example, girls received 'basic worksheets' including colouring in while the boys had 'actual exercises, whiteboard, real teacher, everything.'[162] Ms Inglis said 'we were cramped into the back with these girls who were colouring in and doing little puzzles and it was woeful.'[163]

NAAJA is particularly concerned about the lack of regard for Aboriginal girls' cultural needs, including access to cultural programs and visits from Elders.

Witness AN:

It did seem like the boys got to do [more] things than the girls did. …. And they had male Aboriginal Elders visit them. I can't remember the girls getting these visits.[164]

The importance of female Elders visiting girls in detention was emphasised by Tiwi Elder Marius Puruntatameri:

> the men always deal with men and we … have older ladies that deal with the younger ladies. That has always been in our culture. We do not do things that is inappropriate by talking to, for example, a male talking to another female individually, that's classed as inappropriate because of cultural reasons.[165]

In section 6.4.5, we recommend that the Elders Visiting Program is strengthened and expanded. This should include ensuring female Elders visit girls in detention. More broadly, cultural programs that are specifically designed for Aboriginal girls should be developed and implemented. There must be

[160] Oral evidence of Greg Harmer, 24 March 2017, 1775:6–15.
[161] Exhibit 111.001, Statement of AX, 17 February 2017, 4 [26]–[27].
[162] Oral evidence of Louise Inglis, 24 March 2017, 1773:34–40.
[163] Oral evidence of Louise Inglis, 24 March 2017, 1773:34–40.
[164] Exhibit 159.001, Statement of AN, 17 February 2017, 11 [70].
[165] Oral evidence of Marius Puruntatameri, 31 March 2017, 2401:36–42.

concerted efforts to increase the number of Aboriginal women employed as YJOs so that they can mentor and support girls in detention.

There is concerning evidence before the Commission about the conduct of male YJOs towards girls. For example, YJO Trevor Hansen held down a girl while she was stripped of her clothes after being put on a 'cell placement'[166] and he allegedly told other staff that he had previously conducted strip searches of girls.[167] There was often sexual harassment in the interactions between girls and YJOs.[168]

Witness AG:

The male guards would often touch some of the girls inappropriately or make inappropriate sexual comments … Sometimes I would see the guards touch some girls for no reason, such as touching us on their arms. There was no purpose for the guards touching them. It was not like they were trying to take them to other areas or anything like that. Later on, those girls would tell me that they felt uncomfortable about that. This made me feel angry and disgusted … [redacted][169]

This conduct is especially concerning in light of the likelihood that girls in detention have experienced trauma and abuse. There must be robust recruitment processes and training so that professional standards of behavior are clearly articulated and reinforced. This is considered further in section 9.3.

There must be recognition across the youth justice system that the needs of girls are different to those of boys. Territory Families must ensure that its policies, procedures, programs and services are gender-sensitive. In the detention environment, this means ensuring that the health (including mental health) needs of girls are met including ensuring girls have access to pre- and post-natal care and support.

[166] Oral evidence of Trevor Hansen, 13 March 2017, 957:14–15.
[167] Oral evidence of Trevor Hansen, 13 March 2017, 970:10–44.
[168] Exhibit 145.001, Statement of AG, 25 November 2016, 4–5 [22]–[27].
[169] Exhibit 145.001, Statement of AG, 25 November 2016, 4–5 [22]–[24].

Proposed finding 3.3	The Northern Territory Government has failed to meet the particular needs of Aboriginal girls in detention.
Proposed finding 3.4	Girls in detention have been isolated and have had less opportunity for educational, recreational, cultural and other programs and activities on account of their gender.
Proposed finding 3.5	Girls' lack of ready access to sanitary items was wholly unacceptable, humiliating and degrading.
Proposed finding 3.6	There were insufficient numbers of female staff at youth detention facilities.
Proposed finding 3.7	Girls were subjected to sexual harassment by male Youth Justice Officers.

Recommendation 23	That Territory Families ensures its policies, procedures, programs and services are gender-sensitive and address the distinct needs of girls in detention, including their cultural needs.
Recommendation 24	That future youth justice facilities include purpose-built facilities for girls, including adequate toilet and showering facilities which ensure privacy and can be accessed without asking staff for permission.
Recommendation 25	That girls are permitted to have sanitary items in their cells.
Recommendation 26	That more women, particularly Aboriginal women, are employed as Youth Justice Officers.
Recommendation 27	That girls receive equal access to educational, vocational, cultural and recreational programs and activities while in detention.
Recommendation 28	That girls receive access to health care, including mental health care, drug and alcohol counselling, trauma counselling and therapeutic support that is tailored to their needs.

[redacted]

3.9 Family contact

The evidence before the Commission all agrees that contact between children in detention and their families is important to managing their health and wellbeing in detention.[175] Families may be of assistance in developing de-escalation approaches if the child is acting out. It could work to empower

[redacted]

[175] Oral evidence of Dr Mick Creati, 23 March 2017, 1749:35–40.

the communities from which the children come.[176] The Waratah program actively facilitates family contacts to assist with post-release transition.[177]

It remains the case that family liaison is left to case managers.[178] The evidence from BZ, summarised in her submissions to the Commission is that very little information or contact occurs even where the child is displaying very complex behaviours.

Present and supportive families, particularly but not exclusively for Aboriginal children, are an important source of stability for a child. NAAJA adopts the submissions made on behalf of BZ seeking a recommendation to increase and formalise the liaison between youth detention centres and family supports in the community.

3.10 The provision of food and water

3.10.1 Legal framework

Access to food and water in detention is protected under international human rights instruments. The *Mandela Rules* stipulate that every prisoner must be provided at the usual hours 'with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.'[179] The *Havana Rules* requires that each detainee 'receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements.'[180] Drinking water must be available to detainees whenever they need it.[181]

Under the *Youth Justice Regulations*, the Superintendent must ensure food supplied to detainees meets the dietary requirements of developing young people.[182] There is no discernible regulation which ensures a detainee's right to water.

3.10.2 Water

Facilities at former Don Dale

The Commission has heard that not all cells at the former Don Dale facility had running water.[183] There was no ready access to water in isolation and the BMU.[184] This failing was supported in evidence by

[176] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 10; Oral evidence of Leilani Tonumaipea, 12 May 2017, 3884:36–P3885:3.
[177] Exhibit 344.001, Statement of Leilani Tonumaipea, 9 May 2017, [44].
[178] Exhibit 375.001, Statement of CB, 10 May 2017, [46].
[179] *Mandela Rules*, art 22.1.
[180] *Havana Rules*, art 37.
[181] *Mandela Rules*, art 22.2; *Havana Rules*, art 37.
[182] *Youth Justice Regulations 2016* (NT) reg 62.
[183] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 64.
[184] Exhibit 145.001, Statement of AG, 25 November 2016, [38]; Exhibit 341.001, Statement of AY, 28 February 2017, [9]; Exhibit 108.001, Statement of BR, 18 February 2017 [48]; Exhibit 136.001, Statement of BZ, 20 February 2017, [47].

Youth Justice Officers who said that there was no access to water in the BMU[185] because the water was turned off[186] or bubblers didn't work.[187]

Water had to be delivered by an officer.[188] However, officers often refused requests for water.[189] The Commission has heard that officers may only bring water around once a day.[190] Ms Cohen told the Commission that she was aware at the time that there was very limited water.[191]

Facilities at the new Don Dale

Evidence before the Commission indicates that all accommodation rooms in the new Don Dale have running water.[192] However, vulnerable witnesses have told the Commission that the water is dirty, tastes bad and is hot,[193] particularly in the HSU where the water is so hot and unpleasant tasting that it is undrinkable.[194]

Witness BV:

I remember getting a lot of really bad headaches and feeling dizzy and stressed during that period. I think part of this was because I did not drink enough water. In HSU, the water in the cell tastes bad and the guards do not give you enough cold water. When I was in HSU for that period, I let myself get dehydrated as it was better than drinking the water in the cells.[195]

Water provided by officers

The Commission has heard of many instances where detainees were refused water.[196] Other evidence demonstrates unreasonable delays for water, where detainees told they would sometimes wait for up to an hour or would have to wait until the next officer's shift.[197] There is also very concerning evidence before the Commission that a Youth Justice Officer would only partially fill water cups to

[185] Oral evidence of Russell Caldwell, 29 March 2017, 2167.
[186] Oral evidence of Conan Zamolo, 20 March 2017, 1418.
[187] Oral evidence of Benjamin Kelleher, 21 March 2017, 1558.
[188] Oral evidence of Michael Yaxley, 29 March 2017, 2203.
[189] Exhibit 145.001, Statement of AG, 25 November 2016, [38]; Exhibit 341.001, Statement of AY, 28 February 2017, [9]; Exhibit 108.001, Statement of BR, 18 February 2017 [48]; Exhibit 136.001, Statement of BZ, 20 February 2017, [47].
[190] Exhibit 179.001, Statement of BE, 18 February 2017, [36].
[191] Oral evidence of Sally Cohen, 24 April 2017, 2855.
[192] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 64.
[193] Exhibit 123.001, Statement of AS, 22 February 2017, [53]; Exhibit 165.000, Statement of CE, 21 February 2017, [24].
[194] Exhibit 272.000, Statement of BL, 1 March 2017, [69]; Exhibit 123.001, Statement of AS, 22 February 2017, [21]; Oral evidence of Dylan Voller, 12 December 2016, 681.
[195] Exhibit 241.001, Statement of BV, 19 February 2017, [29].
[196] Exhibit 165.000, Statement of CE, 21 February 2017, [24].
[197] Exhibit 111.001, Statement of AX, 17 February 2017, [18].

exert control over detainees.[198] Given this evidence, it is possible that water was being withheld as a punitive measure.

Witness AS:

Another time… I asked the guards for water but they said that they would not bring me any water. I was thirsty and frustrated and began kicking the walls. A group of guards came into my cell, flipped me over and pushed me against the wall. It was a very uncomfortable position where I was bent over with my legs touching my shoulders. I was then taken to the back cells for 24 hours.[199]

Proposed finding 3.8	Detainees were regularly deprived of, or unreasonably limited in the provision of, water.

Recommendation 29	That an unrestricted supply of clean drinking water is always available to every detainee.
Recommendation 30	That the *Youth Justice Regulations* are amended to ensure that the access to drinking water is an irrevocable right of all detainees.

3.10.3 Food

Poor quality

There is overwhelming evidence before the Commission that food in detention is of very poor quality, with a Youth Justice Officer describing the food as 'horrible',[200] and vulnerable witnesses describing the food as 'bad' and 'shit'.[201]

Witness AF:

With the food, there were about three different meals that were constantly repeated, and we would not get anything different. I remember that the chicken always tasted really bad, like it was off and any time we got potatoes, they were always rock hard. It was so hard, I broke a plastic fork when I tried to use it to pick up the potato. I don't think they were fully cooked. The only time that the food was ok was on Saturdays.[202]

[198] Oral evidence of Conan Zamolo, 20 March 2017, 1396.
[199] Exhibit 123.001, Statement of AS, 22 February 2017 [54].
[200] Oral evidence of Eliza Tobin, 24 March 2017, 1785.
[201] Exhibit 139.001, Statement of AB, 1 March 2017, [38]; Exhibit 131.001, Statement of AF, 25 November 2016, [33].
[202] Exhibit 131.001, Statement of AF, 25 November 2016, [33].

The Commission has heard that young people are often given leftover food from the adult prison, so it was stale.[203] Sandwiches were 'wet' by the time they got to the young people at Don Dale.[204] One young person complained of raw sausage and raw steak.[205] Sometimes detainees would find cockroaches and the like in their food.[206]

Witness AG:

Inmates would often get sick from the food at Don Dale. After eating the meals inmates would often vomit because the food was not edible. On one occasion there were maggots in the hot dogs that were served. We told the guards, but they didn't do anything about it. Me and some of the girls were vomiting after that.[207]

Insufficient quantity

Vulnerable witnesses have told the Commission that they were often hungry in detention.[208] This was especially bad for detainees in the BMU[209] and HSU.[210] The Commission has heard that this is because other detainees made up the plates of food for these detainees.[211] AM gave evidence that he lost about 10–15kg in isolation because he was fed only cereal in a cup and stale toast.[212]

Food withheld as punishment

The Commission has heard that food was withheld as a punishment.[213] This fact was conveyed to the Commissioner of Correctional Services in a memorandum on 19 September 2014.[214] It is unclear on the evidence before the Commission what action, if any, was taken to ensure this practice ceased, even though it may offend the obligation under reg 62 of the *Youth Justice Regulations.*

Mr Hamburger condemned the practice:

> It should never occur. I speak with some experience there, because I can recall when I was first appointed as Director-General in 1988 I had the power to give seven days bread and water to prisoners which was something I found quite atrocious and we got rid of that from our – it was actually in our rules and regulations in Queensland at that

[203] Exhibit 111.001, Statement of AX, 17 February 2017, [38].
[204] Exhibit 179.001, Statement of BE, 18 February 2017, [38].
[205] Exhibit 179.001, Statement of BE, 18 February 2017, [37].
[206] Exhibit 139.001, Statement of AB, 1 March 2017, [38].
[207] Exhibit 145.001, Statement of AG, 25 November 2016, [53].
[208] Exhibit 145.001, Statement of AG, 25 November 2016, [52].
[209] Exhibit 179.001, Statement of BE, 18 February 2017, [36].
[210] Exhibit 272.000, Statement of BL, 1 March 2017, [65].
[211] Exhibit 139.001, Statement of AB, 1 March 2017, [121], [148].
[212] Exhibit 270.001, Statement of AM, 11 February 2017, [31].
[213] Oral evidence of Dylan Voller, 12 December 2016, 682.
[214] Oral evidence of David Ferguson, 23 March 2017, 1711; Exhibit 124.001, Statement of David Ferguson, 17 February 2017; Exhibit 125.001, YJ Detention Review Sept 2014, 19 September 2014, 4.

time. So I resonate with what you're saying. And it's awful when food is deprived from people who are in captivity.[215]

Proposed finding 3.9	That the food in DDYDC and ASYDC was often of a poor quality and did not comply with *Youth Justice Regulations* reg 62(1).
Proposed finding 3.10	That detainees were deprived of food, or given differential portions of food, based on classification and where in the detention centre they were housed.
Proposed finding 3.11	That the withholding of food and water was on occasion unlawfully used as a mechanism to punish detainees.

Recommendation 31	That the *Youth Justice Act* and *Youth Justice Regulations* are amended to ensure that the withholding of food and water from detainees for reasons of punishment or addressing behaviour is expressly prohibited.

[215] Oral evidence of Keith Hamburger, 6 December 2016, 407.

4 Education

4.1 Education in the Northern Territory

The Closing the Gap Report on Aboriginal education shows the Northern Territory has, for the past eight years, maintained the poorest record in the nation of meeting national minimum standards.[1] The National Assessment Program – Literacy and Numeracy (NAPLAN) results reveal that Aboriginal children in remote and very remote regions of the Northern Territory are the most disadvantaged in the nation in terms of literacy and numeracy.[2]

It is well known that low educational outcomes are a strong predictor of lifelong disadvantage, entry into the child protection system,[3] involvement with the justice system, admission to detention and prison, long-term unemployment or low incomes, and poor health and lower life expectancy.[4]

4.2 Challenges for education in youth detention

Evidence provided to the Commission by teachers of Don Dale and Alice Springs Schools and from the Department of Education revealed many challenges in educating children in an institutional setting. Its students were predominantly Aboriginal with low levels of literacy and numeracy, English was often not their first language and many presented with complex needs of trauma,[5] disability, substance abuse, and hearing or vision impairments. The students' previous school attendance had been infrequent or not at all, or with multiple school enrolments.[6] Most detainees were only enrolled for a short or indeterminate period, given that 70% were not sentenced and on remand, and the detention population could fluctuate significantly.

The detention centre's operational procedures could also cause challenges to a detainee's education, with classifications that prevented appropriate allocation of students to classes,[7] prioritisation of punitive custodial options such as isolation over educational needs, and the lack of support for transition to community schooling.

To meet the educational needs of all young people in detention, schools in the custodial environment must adequately address the multi-dimensional complexity of these challenges. This has not been the case in the Northern Territory.

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[1] Commonwealth of Australia, Department of the Prime Minister and Cabinet, Closing the Gap Prime Minister's Report, 2017, 40.
[2] Commonwealth of Australia, Department of the Prime Minister and Cabinet, Closing the Gap Prime Minister's Report, 2017, 39.
[3] Oral evidence of Judge Hillary Hannam, 8 May 2017, 3423 [44].
[4] APO NT, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017.
[5] Exhibit 088.001, Statement of Marion Guppy, February 2017, 26 [171].
[6] Exhibit 089.001, Statement of Brett McNair, 6 December 2016, 3 [23].
[7] Exhibit 088.001, Statement of Marion Guppy, February 2017, 25 [165].

4.3 Young people in detention have the right to an education

Education is a fundamental human right. The *Convention on the Rights of the Child* recognises a child's right to education that is directed to the development of their personality, talents and mental and physical abilities to their fullest potential.[8] This right is also articulated in the *International Covenant on Economic, Social and Cultural Rights*.[9] The *Convention on the Rights of the Child* further requires that Indigenous children:

> Shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[10]

The *Mandela Rules* and the *Havana Rules* mandate education of every young person of compulsory school age, aligned to their needs and abilities and designed to prepare them for return to society.[11] The *Havana Rules* also state that, where possible, such education should be provided outside the detention facility in community schools to ensure young people can continue their education after release, without difficulty.[12]

The *Youth Justice Act* also states, as a foundational principle, that 'a youth should not be withdrawn unnecessarily from his or her family environment and there should be no unnecessary interruption of a youth's education or employment'.[13]

4.4 Where access to education has been denied

The Royal Commission has highlighted circumstances where young people in detention have been routinely denied access to education: while being a non-English speaker, while deemed at risk, while in isolation, when sent out of school or when suspended from school.

Proposed finding 4.1	The overwhelming weight of evidence supports a finding that Northern Territory youth detention educational schools throughout the relevant period of the Commission's terms of reference failed to meet the human rights of detainees' educational needs.

[8] Exhibit 005.002, *Convention on the Rights of the Child* arts 28, 29.
[9] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR') art 13.
[10] Exhibit 005.002, *Convention on the Rights of the Child* art 30.
[11] Exhibit 006.001, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ('*Havana Rules*'), rule 38; *United Nations Standard Minimum Rules for the Treatment of Prisoners* ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev.1 [104].
[12] *Havana Rules*, rule 38.
[13] *Youth Justice Act* (NT) s 4.

4.4.1 At-risk status

In section 3, we have outlined our concerns about at-risk detainees being subject to quasi-punitive measures such as isolation. This approach appears to have also led to a blanket denial of education for young people deemed at risk of self-harm, for safety reasons.[14] While the safety of at-risk detainees is paramount, we are opposed to any one-size-fits-all approach to the safety and therapy for these young people.

The mental health benefits of education should be considered as part of a holistic approach to supporting at-risk detainees. Access to education for at-risk detainees should be assessed on a case-by-case basis and provided where possible, such as through one-on-one teaching.

4.4.2 Isolation

The negative effects of isolation to health and wellbeing, outlined in section 3.6, are compounded by the denial of education to these young persons. In our view, behavioural management in a corrections environment should not affect a child's access to education. This not only impinges on detainees' right to education, but also denies them concomitant therapeutic and behavioural benefits.

4.4.3 The impact of being sent out of school

The Commission has heard that young people in detention are generally better-behaved and more engaged while in school.[15] When young people are taken out of school, often for minor misbehaviour, they are generally poorly behaved because they want to be at school.[16] This is compounded by the lack of adequate plans for occupying and managing young people that are denied access to school:

> It created a problem … It meant that – not necessarily meant the child was bored. It meant that, you know, during that scheduled time that was supposed to be school what exactly were we going to do with this particular person.[17]

Students were often sent out of class.[18] When sent out of school, students were typically confined to their cell, and provided with no materials to occupy them.[19]

Witness BV:

I think school needs to be improved at Don Dale. At the moment, the school is pretty bad. For example, if you get up without asking, you get kicked out of school and sent to your room. You are not even allowed to go to the toilet during the day. When you are at a real school, you are allowed to go to the toilet. The school at Don Dale also feels weird because the guards sit in on the classes. That can make you feel stupid. I get kicked out of school at Don Dale almost every day. I just want to be there to keep

[14] Oral evidence of Lisa Coon, 24 April 2017, 2722:9.
[15] Oral evidence of Lisa Coon, 21 April 2017, 2717.
[16] Oral evidence of Benjamin Kelleher, 21 March 2017, 1543:27.
[17] Oral evidence of James Sizeland, 27 March 2017, 1983.
[18] Exhibit 179.001, Statement of BE, 18 February 2017, [18]
[19] Exhibit 123.001, Statement of AS, 22 February 2017, [59].

myself occupied, but I end up breaking the rules. For example, I recently got kicked out of school for two days because the teacher asked me to do something and I said something like 'Why the fuck are you aiming at me?' I did not mean to swear in a bad way, it just came out by accident.[20]

4.4.4 School suspensions

The Commission has heard that school suspensions are a tool commonly used in youth detention, as part of a 3-step behaviour management approach of 'remind, warn, act'.[21] Once suspended, the school has regarded young people as no longer their responsibility[22] and seldom engaged with the student during the suspension.[23]

There was a vacuum of responsibility for the educational needs of detainees where they were suspended or placed in the BMU. Youth Justice Officers advised that provision of education in these circumstances was a 'decision that Education would make' and 'it was up to Education to determine'.[24]

Suspensions have been imposed for minor misbehaviour like students looking up social media, and for disproportionate periods. For example, a one-month suspension (the legal maximum) was imposed for breaking a window. Despite a youth Judge expressing concern at the length of the suspension[25] and Corrections staff considering the suspension excessive and asking Principal of Tivendale School Ms Lisa Coon to reconsider, the suspension stood.[26]

> The decision to suspend AB from school for a month was made by the Principal of the Tivendale School … This period seemed excessive to me … I later spoke to the Principal and asked that she reconsider the period of time that the detainees were suspended. She was very firm in her decision that the suspension remained as is. The decision in relation to a detainee being suspended was the responsibility of the Department of Education and not NTDCS and was not a matter that I could change.[27]

This demonstrates the draconian approach to suspensions at Tivendale, where the Commission has heard there was nothing young people could do, such as behaving well, to have the decision overturned.[28] This approach runs counter to the intent of the *Northern Territory Department of Education Guidelines: Suspension*, which provides that the Principal may:

[20] Exhibit 241.001, Statement of BV, 19 February 2017, 12-13 [81].
[21] Oral evidence of Lisa Coon, 24 April 2017, 2729.
[22] Oral evidence of James Sizeland, 27 March 2017, 1984.
[23] Oral evidence of Lisa Coon, 24 April 2017, 2740.
[24] Oral evidence of Derek Tasker, 15 March 2017, 1070.
[25] Exhibit 139.001, Statement of AB, 1 March 2017, 17.
[26] Oral evidence of James Sizeland, 27 March 2017, 1983.
[27] Exhibit 171.001, Statement of James Sizeland, 17 March 2017, 2–3.
[28] Oral evidence of Lisa Coon, 24 April 2017, 2740.

> … vary or revoke a suspension if they are satisfied that the student is genuinely remorseful and has given genuine undertakings or agreed to comply with conditions appropriate for enabling the student's return to school.[29]

Unlike other Australian jurisdictions, there is no right of review for suspensions in the Northern Territory.[30]

Witness AB:

I don't really remember this but a Corrections case note shows I also got suspended from the Don Dale school for breaking the woodwork window. I do remember one of the Magistrates getting mad about me being banned from school for a month but I couldn't really remember when this happened.[31]

Witness AG:

I was often not allowed to go to the school at Don Dale because the Principal would decide that I was not allowed to go.

[Description of extended period of exclusion from school at Principal's direction and witness's understanding as to why this occurred. Describes being blamed for an incident and being excluded from school because of it, while the other detainees in fact responsible for the incident were still permitted to attend school.]

I told the guards that they couldn't do that, and that we had a right to education … Some of the guards even asked the Principal if I could go back, but I still wasn't allowed to.[32]

Recommendation 32	That a right of review for school suspensions is introduced into the *Education Act*.
Recommendation 33	That all suspensions of 5 days or more, and any suspensions that result in a total of more than 15 days in any year school year require approval by the District Director (Education) and also require that the Children's Commissioner be notified.
Recommendation 34	That Northern Territory detention schools adopt best practices in relation to school suspensions and a child's right of review.

[29] Department of Education, Guidelines: Suspensions, June 2016, 7.
[30] Oral evidence of Lisa Coon, 24 April 2017, 2740.
[31] Exhibit 139.001, Statement of AB, 1 March 2017, 17 [124].
[32] Exhibit 145.001, Statement of AG, 25 November 2016, 11 [54].

4.4.5 Emphasising collaborative problem-solving over punitive approaches

Isolation and suspension should not be used as a tool for class management. These approaches to behaviour management prioritise punitive consequences over the education needs of young people in detention. They also show a disregard for the proportionality of punishments, where minor misbehaviour can lead to major impacts to a student's education, health and wellbeing.

The *Education Act* sets out matters to be considered in behavioural management of students, including age, developmental stage, special learning needs, mental and physical health and any cultural considerations.[33] The context of youth detention, where students have many complex needs, makes it vital that the matters in s 90 of the *Education Act* are properly considered.

Principal Coon indicated that as she was working with 'some of the worst behaved young people in the Northern Territory' that she had regard to the *Education Act* but stated she worked in a different context.[34]

NAAJA insists that schools in detention centres in the Northern Territory implement therapeutic treatment models to support children with social, emotional and behavioural challenges, rather than the simplistic punish and reward approaches currently in use. An example of a successful therapeutic treatment model is Collaborative and Proactive Solutions (CPS). This model has been successfully implemented in a range of settings including families, schools, residential care and juvenile detention. The CPS model recognises that young people's challenges are often due to lagging cognitive skills and these challenges are best addressed by teaching children the skills they lack. It seeks to create alternative means of de-escalation through social problem solving, conflict resolution and anger management strategies.[35]

Witness AX:

For about the first two weeks, we did not have any school. When the school started the teachers were good. After a while, the Principal (I think his name was Lachie) started treating the inmates in the same way that the guards would treat us. He would do things like cancel sport if we didn't get our work done. I think this was unfair because a lot of us found the work difficult, especially those people who did not speak English at home. Some other people just struggled with the work. We had some tutors who were supposed to help us, but they were all young adults (not much older than we were) and they would sometimes do things like spend time on Facebook and YouTube instead of helping us. Also, sport was something that we all looked forward to because for most of us, we got to do things in that class that we never got to do when we were back home.[36]

[33] *Education Act* (NT), section 90.
[34] Oral evidence of Lisa Coon, 24 April 2017, 2728.
[35] Martin et al (2008) Reduction of Restraint and Seclusion through Collaborative Problem Solving: A Five Year Prospective Inpatient Study, Journal of Psychiatric Services, 59(12).
[36] Exhibit 112.001, Statement of AX, 20 March 2017, 5-6 [32].

Recommendation 35	That Northern Territory detention schools adopt best practices in relation to behavioural management.
Recommendation 36	That educational staff are given training in relation to non-punitive approaches to behavioural management.

4.5 Education targeted to cognitive abilities

The Commission has heard that education must be targeted to a student's cognitive abilities to be successful:

> For any significant learning to occur, it needs to be targeted at that level. It's very difficult when you have a class of people from 10 to 17, English as a fourth language you know, can't write their name, someone doing year 11 in one classroom. It's impossible to target just for their particular needs. If you had a class of young people that were at the same level, or had the same sort of needs or something like that, then you can target that curriculum directly for what their individual requirements is, with much greater success, I believe, than multi ability levels.[37]

However, trying to modulate lessons at an individual young person's level has been described as 'one of the most difficult aspects' of education in the detention environment.[38] This difficulty is due to security classification determining class arrangements and lack of information relating to students' cognitive abilities.

The Commission has heard that this led to a situation where some students found the work too easy, while others found it too hard.[39]

Witness BE:

I did not do much school work in Don Dale. The teacher was okay. There were about 20 kids in the class. When I started there, nobody asked me what school I could already do. I didn't learn anything. It was too easy.[40]

[37] Oral evidence of Lisa Coon, 24 April 2017, 2720:13.
[38] Oral evidence of Lisa Coon, 24 April 2017, 2716:7.
[39] Exhibit 179.001, Statement of BE, 18 February 2017, 7 [49]; Exhibit 111.001, Statement of AX, 17 February 2017, [32].
[40] Exhibit 179.001, Statement of BE, 18 February 2017, 7 [49].

4.5.1 Classification determining class assignments

Classes are grouped according to security classification, rather than schooling level. This approach to grouping significantly compromises education, as young people of widely varying ability and age are grouped together:

> … so anyone from 12 years old to someone 17, someone from Gunbalanya, somebody from Palmerston, somebody that can't write their name, somebody we're trying to get through year 11, all in the one classroom.[41]

It can also cause stress and embarrassment for those young people that have fallen behind:

> … we have to think as well about the young person, how they feel. If they can't read very well, it can be quite humiliating to show that in front of a 10 year old who might read better. So, you know, being in one classroom, having a space where you can actually say to someone, 'It's okay, you know, you can do that here, it's safe.' So it's not necessarily – yes, it's the ratio but it's also having that space where you can put people together, young people together based on ability, and create more of a safer environment that's more conducive to learning. It must be exceptionally hard for them to be 17 and not be able to read and write and have that sitting in class with other young people.[42]

The Principal of Tivendale, Ms Coon, has described this situation as 'extremely' frustrating:[43]

> … in a perfect world, we would stick to – we would be able to control where we put the young people in class, so that they would be by age or ability level or family ties, however that might look, in a classroom with probably no more than six to eight young people with a classroom support officer and a teacher … It would make such a difference in terms of – I believe anyway, in terms of what the young people could actually learn, if you were actually, 'Alright, you're around the same level, this is what we're doing.' I think that would make a huge difference.[44] … I can't stress enough, from our perspective as educators in juvenile, in a juvenile detention centre, if we were able to group the young people we would group them very differently.[45]

While educators are on the classification board, which allows some input into security classifications, corrections behaviour management is prioritised over education concerns. Security classifications are ultimately determined by Territory Families.[46] We submit that education concerns should be prioritised in the school environment to support the therapeutic aims of the jurisdiction. This

[41] Oral evidence of Lisa Coon, 24 April 2017, 2706.
[42] Oral evidence of Lisa Coon, 24 April 2017, 2766.
[43] Oral evidence of Lisa Coon, 24 April 2017, 2720:10.
[44] Oral evidence of Lisa Coon, 24 April 2017, 2709.
[45] Oral evidence of Lisa Coon, 24 April 2017, 2720:33.
[46] Exhibit 089.002, Annexure to Statement of Brett McNair: Tivendale School Profile, 6 December 2016, 7.

approach is supported by the evidence provided to the Commission demonstrating that young people in detention are better behaved and engaged in class.

Recommendation 37	That classes should be assigned based on learning ability and achievement rather than security classification.

4.5.2 Cognitive ability and other important information about students

Accurately assessing cognitive ability is critical to delivering appropriate teaching due to the varied backgrounds and complex needs of the students in youth detention. Teachers have access to a student's level of schooling and information about attendance at other schools, through the Student Master Index.[47] However, because most young people in detention don't attend school, the information is often minimal or outdated.[48]

Tender bundle material before the Commission indicates that students are subject to a Progressive Achievement Test and PM Benchmark test for reading to ascertain their year level.[49] It is unclear whether these tests are conducted for all students on remand and whether they are targeted to the complex special needs of many of the students. Witness BE told the Commission that when he started nobody asked him what school he could already do.[50]

Considering these complex needs, we submit that all students should also be subject to comprehensive cognitive assessments, which has support among education staff.[51]

Witness AG:

I was learning a lot more at the school in Don Dale than I did at [school name]. This is because the teacher we had there knew how to teach us. I think her name was Sharon. She was better than the teachers I had at my regular school because she really knew how to talk to us. I also learnt a lot more in Don Dale because we didn't have a choice in going. The only bad thing about the school there was sometimes when I would come back to Don Dale after being out for a while, they would give me some work that I already completed the last time I was in there. They didn't seem to keep a record of where I got up to the last time.[52]

The Commission has also heard that other information about students' circumstances and health would be valuable in supporting their education:

> Knowing about their home environment, know about where they've been living, the circumstances, any health issues, health issues of their family, of those that are raising them … They may have been in and out of care. All that is very important to be able to

[47] Exhibit 089.001, Statement of Brett McNair, 6 December 2016, 4 [25]–[29].
[48] Oral evidence of Lisa Coon, 24 April 2017, 2711:41.
[49] Exhibit 089.001, Statement of Brett McNair, 6 December 2016, 4 [25]–[29].
[50] Exhibit 179.001, Statement of BE, 18 February 2017, 7 [49].
[51] Oral evidence of Lisa Coon, 24 April 2017, 2736:16.
[52] Exhibit 145.001, Statement of AG, 25 November 2016, 12 [57].

> understand any difficulties they might be having in class.[53] I think that a more substantive health service could be provided and checks, including mental health checks, regular eye checks, hearing checks that impact on us in the classroom.[54]

There is a want by educational staff of 'easily accessible information about students, diagnosis, medical conditions and plans for release.'[55] At present, this kind of information is not routinely provided to education staff,[56] although it is requested from case managers as required.[57] Unfortunately, this means that any information gathering is reactive, so issues may be identified late or not at all – risking poorer education outcomes.

Recommendation 38	That comprehensive information on cognitive development, health, cultural, social and other relevant factors are gathered on admission, and best practice followed, to provide education targeted to the individual needs of detainees.

4.6 Incorporation of Aboriginal language and culture

The recommendations for incorporation of Aboriginal language and culture are set out in section 6.

4.6.1 An Aboriginal curriculum

The academic success of Aboriginal children is best achieved within a caring and supportive context. Educational authors Hickling-Hudson and Alquist,[58] in their discussion of an Aboriginal classroom, advocate that Aboriginal teachers shape the curriculum both to reflect the culture and interests of the students and to meet or exceed state requirements. It is recognised by all that there needs to be greater involvement of Aboriginal teachers and Aboriginal education workers who are best placed to meet the educational needs of Aboriginal students in detention.

It is necessary that teachers develop an Aboriginal curriculum that involves the children themselves and outside Aboriginal principals and teachers from Aboriginal communities. Detention schools must accommodate the bilingual needs of Aboriginal detainees.

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[53] Oral evidence of Lisa Coon, 24 April 2017, 2711-12:47.
[54] Oral evidence of Lisa Coon, 24 April 2017, 2713:4.
[55] Exhibit 089.002, Annexure to Statement of Brett McNair: Tivendale School Profile, 6 December 2016, 13.
[56] Oral evidence of Lisa Coon, 24 April 2017, 2712:25.
[57] Oral evidence of Lisa Coon, 24 April 2017, 2712:10.

[58] Contesting the curriculum in the schooling of indigenous children in Australia and the USA: from Eurocentrism to culturally powerful pedagogies. Comparative Education Review, Vol 47, No. 1, 2003, 64–89.

Ms Coon told the Commission that in general Aboriginal content was 'not supported by the department' and that 'there is a lack of resources that are culturally inclined towards indigenous students'.[59]

Recommendation 39	That teaching should include an Aboriginal curriculum that is supportive of a child's cultural needs.

4.7 Properly resourcing education in youth detention

4.7.1 Improved teacher-to-student ratio

The Commission has heard that classes in Northern Territory youth detention can have over 20 students to one teacher, depending on student numbers.[60] Other youth justice institutions across Australia have a ratio of one-to-five or one-to-six.[61]

Witness BE:

I never had any teacher helping me on my own, or with a small class.[62]

Evidence before the Commission suggests that improved teacher-to-student ratios decrease safety risk and create an environment that is more conducive to learning. It also allows more targeted grouping of classes by ability level.[63]

The Commission has heard that Tivendale did not employ relief teachers to cope with high detainee numbers or staff absences, because it was 'not worth it':

> [T]hey don't understand the requirements in a classroom. We count out pencils and count them back in before the young people leave. You can't use blue tac, because young people have used blue tac to block up locks. You can't use just skewers in art, for example, because they break them off and put them in – there's so many things that are innocuous, everyday, that people not used to working in a detention centre don't understand. The keys, you know. Having keys, security, young people have to be patted down and things like that. So it's just not worth it. [64]

NAAJA submits this has led to untenable situations where the Principal has stepped in to teach subjects where a staff member was absent. [65] Other times, students have been removed from school because it was too crowded.[66] There must either be enough full-time staff to cope with peaks in

[59] Oral evidence of Lisa Coon, 24 April 2017, 2725.
[60] Oral evidence of Lisa Coon, 24 April 2017, 2706.
[61] Oral evidence of Lisa Coon, 24 April 2017, 2706.
[62] Exhibit 179.001, Statement of BE, 18 February 2017, 7 [52].
[63] Oral evidence of Lisa Coon, 24 April 2017, 2766.
[64] Oral evidence of Lisa Coon, 24 April 2017, 2705–2707.
[65] Oral evidence of Lisa Coon, 24 April 2017, 2705–2707.
[66] Exhibit 179.001, Statement of BE, 18 February 2017, 7 [50].

attendee numbers and staff absences, or processes must be implemented to enable competent relief teachers to be trained and employed as required.

Witness BE:

There were two schools – one in high security and one in low security. Sometimes it was too crowded, and then boys would have to go. When it was too crowded, they chose the older kids to go to work because there was not enough space. The older kids would have to go and do woodwork in the shed, or sometimes mow the lawn.[67]

Recommendation 40	That there are measures implemented to improve teacher-to-student ratios to best practice levels for special needs education.

4.7.2 Improved special needs support

The Commission has heard that only one request for special support funding has been made for students at Tivendale.[68] This highlights the prevailing attitude against funding special needs support for students in detention, both at Tivendale and the Department.[69] As discussed previously, many detainees have special needs. These students should have ready access to support tools and workers to enable them to succeed at school and improve their prospects once they leave detention.

Given the transient population in youth detention, it may not be practical to submit requests for special needs support on a case-by-case basis. Instead, the option of a regular visit from Student Support Services, for example a half-day per fortnight, would be very useful.[70]

NAAJA welcomes other initiatives that recognise the preponderance of complex issues for students in youth detention, like the new process where any student in detention will automatically be considered a trauma victim, entitling them to additional departmental resources such as school psychologists.[71]

Recommendation 41	That funding and access to special needs support services is improved for young people in detention.

Evidence before the Commission indicates that there are no staff at Tivendale who have postgraduate qualifications in special needs education. This is either a requirement or a highly regarded skill in youth detention facilities in other jurisdictions. The Commission has heard that these qualifications would be very valuable for teachers in Northern Territory youth detention.[72]

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[67] Exhibit 179.001, Statement of BE, 18 February 2017, 7 [50].
[68] Oral evidence of Lisa Coon, 24 April 2017, 2718:21–37.
[69] Oral evidence of Lisa Coon, 24 April 2017, 2737–2738.
[70] Oral evidence of Lisa Coon, 24 April 2017, 2717:40.
[71] Exhibit 088.001, Statement of Marion Guppy, February 2017, 26 [171].
[72] Oral evidence of Lisa Coon, 24 April 2017, 2737:1–11.

Recommendation 42	That staff with postgraduate qualifications in special needs education are recruited.

4.7.3 Know your Rights community legal education

The Commission has heard that young people were not provided an appropriate correctional induction, which should include information on their rights and how to lodge complaints.[73] It is important that young people in detention are informed on their rights and responsibilities in detention. This should be delivered as part of the curriculum for young people in detention.

Between October 2014 and June 2015 NAAJA delivered three community legal educational (CLE) sessions on rights and responsibilities for detainees at the Tivendale School. These sessions were 'well received'[74] by children and the education staff agreed it was appropriate for detainees to be educated on their rights and how to use appropriate channels to raise issues.[75]

However, the successful NAAJA program was denied access from 2015, because staff wasn't comfortable with NAAJA taking down complaints in one of these sessions and believed it was 'inflaming relations' with detainees. In the session, Corrections and Education staff were acting inappropriately, commenting that detainees were exaggerating or lying, belittling detainees' complaints, interrupting NAAJA facilitators and making inappropriate jokes.[76]

This conduct was referred to the Children's Commissioner, and the conclusion included:

> The concerns you raised, regarding inappropriate DoE staff behaviour during an educational session provided by your organisation at the DDYDC, was referred to the Chief Executive Officer of the DoE for investigation and resolution. In response, the DoE advised that they have assessed the complaint and on the basis of their assessment, staff will be formally reminded of their obligations to uphold the values of the Code of Conduct in the carriage of their professional duties. Given this, I am satisfied with the action taken by DoE and now consider the matter finalised.[77]

NAAJA were then notified that the Department of Education would not facilitate the sessions and they needed to be run through Corrections. NAAJA negotiated through Corrections for other CLE sessions to be delivered on 8 April, 13 April and 14 April 2016, during the school holiday program. However, no

[73] Exhibit 139.001, Statement of AB, 1 March 2017, [19]; Exhibit 270.001, Statement of AM, 11 February 2017, [8]; Exhibit 123.001, Statement of AS, 22 February 2017, [18]; Exhibit 128.001, Statement of AU, 18 February 2017, [25]–[26]; Exhibit 179.001, Statement of BE, 18 February 2017, [17]; Exhibit 108.001, Statement of BR, 18 February 2017, [22]; Exhibit 241.001, Statement of BV, 19 February 2017, [20].
[74] Exhibit 105.001, Statement of Andreea Lachsz, 10 December 2016, 3–4.
[75] Oral evidence of Lisa Coon, 24 April 2017, 2742.
[76] Exhibit 105.001, Statement of Andreea Lachsz, 10 December 2016, 4.
[77] Exhibit 105.001, Statement of Andreea Lachsz, 10 December 2016, 7.

CLE sessions on rights and responsibilities in detention have been approved to be delivered by NAAJA since June 2015.[78]

NAAJA remains committed to delivering CLE sessions that help young people in detention understand their legal rights and responsibilities. We hope to establish a positive relationship with staff from Territory Families and the Department of Education, so that we can resume regular CLE sessions.

Recommendation 43	That fundamental community legal education on rights and responsibilities is delivered in Northern Territory youth detention centres, and in particular, resumes at Tivendale School.

4.8 Transition to school outside detention

Case managers are responsible for supporting transition to school following detention only as required by the student; however, few young people return to school after detention.[79] There is therefore a strong need for improved programs to encourage re-engagement with education and support the transition from youth detention to school in whichever community the young person is from.

Witness AG:

After I got out of Don Dale, I tried to get the records of me going to school there, so that I could update my resume. I was told that they did not have any of my school records for while I was in Don Dale.[80]

The student's home community can pose challenges for transition to school due to the lack of options available. For example, in remote communities there often is no specialised secondary provision or specialised transition programs. Around Darwin, a student may be able to attend Malak Re-engagement Centre, but this is the sole specialised transition option.

It is encouraging to hear that a new program has been developed to build capacity for transition, supporting transition through the youth justice system to school in new locations including Alice Springs and Palmerston.[81] Further programs must also be resourced to support young people in remote communities.

Recommendation 44	That improved programs are established for re-engagement with education and transition to school following detention.
Recommendation 45	That resources are provided, as a priority, for re-engagement of youths from remote Aboriginal communities or who have disabilities.

[78] Exhibit 105.001, Statement of Andreea Lachsz, 10 December 2016, 8.
[79] Oral evidence of Lisa Coon, 24 April 2017, 2714:33.
[80] Exhibit 145.001, Statement of AG, 25 November 2016, 12 [58].
[81] Exhibit 088.001, Statement of Marion Guppy, February 2017, 33-35 [220]–[224].

[redacted]

[redacted]

[redacted]

[redacted]

5 Over-representation of Aboriginal youth detainees

5.1 An unacceptable trend

The continued and increasing over-representation of Aboriginal children in Northern Territory youth detention is unacceptable. Aboriginal people make up 94% of the children and young people in detention in the Northern Territory, despite only making up 30% of the Northern Territory population.[1]

More than 26 years on from the Royal Commission into Aboriginal Deaths in Custody, Aboriginal young people are more likely than ever to be incarcerated. The Commission has heard that the yearly daily average number of Indigenous youth in detention has almost doubled from 26 to 47 between 2006/07 and 2015/16, including a five-times increase of female detention. Over the same period, the yearly daily average number of non-Indigenous youth in detention has fallen by one third (from three to two).[2]

Evidence before the Commission also highlights the numerous inquiries and reviews conducted and the accompanying missed opportunities to implement recommendations and decisively respond to the crisis. These are discussed in further detail in section 10 and include:

- Royal Commission into Aboriginal Deaths in Custody, 1991
- *Little Children Are Sacred*, 2007 Board of Inquiry into the Protection of Children from Sexual Abuse
- *Growing Them Strong, Together*, 2010 Inquiry into the Child Protection System
- The Carney Report, Review of the Northern Territory Youth Justice System, 2011
- The Vita Report, Review of the Northern Territory Youth Detention System, 2015.

NAAJA still endorses each of the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody, *Little Children are Sacred* and *Growing Them Stronger, Together*.

Government and departmental failures to systematically implement the recommendations of previous reviews and inquiries means there has been no coordinated, holistic response to over-representation of Aboriginal people in detention. This has led to a culture of crisis management and poor strategic direction.

Notably, the 2007 Northern Territory Emergency Response (NTER) in the wake of the *Little Children are Sacred* report has not brought substantial improvement in the lives of many Aboriginal people, or safety and protection of many Aboriginal youth and children in child protection residences and detention centres.

[1] Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report*, 31 March 2017, 9.
[2] Exhibit 045.001, Statement of Joe Yick, 14 October 2016.

5.2 Progress must be monitored

The setting of targets, together with the collection of data and monitoring and evaluation, is essential to holding governments to account and encouraging continuous improvement of the ways it interacts with Aboriginal people.

Accordingly, NAAJA endorses the calls before the Commission to include national justice targets in the Closing the Gap framework.[3] The Council of Australian Governments (COAG) 'Closing the Gap' framework has bipartisan political support and involves setting of targets and measurement of progress in partnership with Aboriginal people.

Regarding the recommendations arising from this Commission, NAAJA has also recommended, in section 10.2, that the Office of the Children's Commissioner perform the function of an independent implementation monitor.

Recommendation 46	That the Council of Australian Governments establishes justice targets for Aboriginal youth as part of the 'Closing the Gap' framework.

5.3 Addressing the causes of overrepresentation

NAAJA, in its submission to a 2009 Parliamentary Inquiry, outlined the underlying causes of Aboriginal over-representation in the youth justice system:

> The chronic cumulative effects of social and cultural disadvantage in education, employment, health and housing, together with substance abuse, are significant drivers of Aboriginal over-representation. These factors predisposed Aboriginal youth, not only to come into early contact with the criminal justice system, but – in combination with operation of the laws, policies and practices of that system – they predisposed Aboriginal youth to be arrested, held in custody and to receive sentences of detention.[4]

Evidence before the Commission, from both experts and detainees, speaks to the cumulative criminogenic effects of disadvantage:

> [B]arriers and prejudices relating to a person's Indigenous status and their disability interact with disadvantage accumulating over a person's life. I describe this as a 'matriculation pathway into prison'. This can be contrasted with the typical matriculation pathway into tertiary education, where a child is supported in obtaining an education and their success in one stage of their education sets them up for further success in subsequent stages of their education. With the 'matriculation pathway into prison', at critical points in the learning of an Aboriginal child with disability, the

[3] See e.g. Oral evidence of Russell Goldflam, 13 December 2016, 811.
[4] NAAJA, Submission to the Parliamentary Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System, 2009.

> opportunity for growth and development is often forsaken, placing them on a pathway of low education attainment and all the adverse social consequences which result, including unemployment and an increased exposure to policing.[5]

Recognising these causes of the crisis, the recommendations of the Royal Commission into Aboriginal Deaths in Custody sought to address Aboriginal disadvantage and incarceration through self-determination, better education and economic opportunities as well as improving health and housing.

Witness AG:

I have known a lot of people who have gone into youth detention. They usually have ended up in trouble with the law because there has been drug and alcohol misuse in their family, they have been abused, some have been the victims of paedophilia and some have been bullied. There are a lot of people who were taken by Welfare and put into foster care that became depressed or started having problems because they were taken away from their family or because they were abused by their foster carers.

I think that the way to stop people going into youth detention is to make sure that the youth get help for these kinds of problems early, before they start having problems with the police.[6]

5.3.1 Trauma

Leading paediatrician, Professor John Boulton discussed before the Commission how early life trauma causes a very high risk of self-harm and suicide in young persons and a high risk of mental illness in later life.[7] His evidence also presented research on the effects of transgenerational trauma, where a child's parental and grandparental trauma of malnutrition, poverty, high rates of physical disease and emotional stress often expose young people to domestic violence and drug and alcohol abuse.[8]

Intergenerational trauma is pronounced in the Northern Territory due to the recent historical effects of first contact within the last three or four generations, dispossession of land, segregation and child removal of the Stolen Generation, welfare dependency, substance abuse, poverty and lower life expectancy.

NAAJA supports the AMSANT submission to the Commission in relation to trauma and discrimination:

> The most complex health, mental health, substance use, justice and child protection issues within Aboriginal communities throughout Australia can be better understood in the context of historical and transgenerational trauma. Colonisation, dispossession and displacement from traditional lands, loss of culture, the separation of families through past government policies, high levels of incarceration, and ongoing discrimination and racism have all contributed to continuing disadvantage, poor health and poor social outcomes for many Aboriginal people. Conversely, culture and spirituality are important in addressing intergenerational trauma through supporting

[5] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 6 [26].
[6] Exhibit 145.001, Statement of AG, 25 November 2016, 20.
[7] Oral evidence of Professor John Boulton, 13 October 2016, 279.
[8] Oral evidence of Professor John Boulton, 13 October 2016, 279-280.

> resilience and positive social and emotional wellbeing. It is therefore essential that all service delivery to Aboriginal people, and especially when dealing with at risk young people, use approaches that are trauma-informed and that support and validate Aboriginal cultures and ways of being.[9]

5.3.2 Discrimination

Recent research on Aboriginal views in Darwin conducted by the Larrakia Nation and University of Tasmania found that racism, discrimination and disrespect was a daily experience. Respondents felt stereotyped, judged and patronised.[10]

Aboriginal young people are likely exposed to discriminatory and racist comments on social media including those attached to stories by major news outlets and Police. These comments include harsh and inappropriate language and are often targeted at young people associated with the justice system and their families. These comments clearly pose the risk of re-traumatising people.

The evidence of former Youth Justice Officers Eliza Tobin and Greg Harmer indicates that use of racial and derogatory language in the presence of Aboriginal detainees was an everyday occurrence in youth detention.[11]

5.3.3 Impact of disability

The Commission has heard that many young people end up in custody who would not be there if police were aware of their background cognitive or mental health issues.[12] Contributing factors include difficulties navigating through police interactions, interviews, courts, sentences and orders, detention and post release.

Improved information sharing processes across government agencies may alleviate this issue, as police and child protection workers that come into contact with young people could access information on any cognitive or mental health issues and make more appropriate referrals as a result.

The lack of specialist programs in remote and regional areas for young people with a disability often leaves courts with few options aside from detention.

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[9] Aboriginal Medical Services Alliance Northern Territory, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2016, 10.
[10] University of Tasmania and Larrakia Nation Aboriginal Corporation, *Telling It Like It Is: Aboriginal Perspectives on Race and Race Relations Early Findings*, August 2016, <http://tellingitlikeitis.com.au/wp-content/uploads/2016/12/Early-Findings.pdf>.
[11] Oral evidence of Eliza Tobin, 24 March 2017, 1783; Oral evidence of Greg Harmer, 24 March 2017, 1783.
[12] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 9.

5.3.4 Over-emphasis on unemployment as a cause of overrepresentation

Mr Hamburger's report tendered to the Commission describes the problematic reliance[13] on employment programs at the expense of other important programs that address criminogenic risks and needs.[14] The recent COAG *Prison to Work Report* outlines the complex relationship between crime and underemployment:

> People who have jobs tend to not commit violence or other serious crimes, and the longer a person is unemployed the more likely they are to become involved in crime. Studies have also shown that employment reduces the frequency of offending by young people who are predisposed to involvement in crime. However, rigorous international research on employment programmes for ex-offenders shows that programmes solely focused on job skills training, job readiness and job placements have no sustained impact on employment outcomes or reoffending … It is more likely that the same things that enable a person to get and hold down a job (such as the ability to focus, plan, regulate and adjust behaviour) are those which make them less likely to offend … a person who is experiencing the impacts of trauma, recovering from alcohol and drug misuse or lacking stable housing is unlikely to be able to get and maintain a job (or benefit from a job) without additional support.[15]

This also raises the question of why it is often necessary for Aboriginal people to be detained before they have access to employment training, rather than accessing it in the community. NAAJA supports culturally appropriate community-based options that provide Aboriginal young people with opportunities for employment.

The successful overcoming of barriers to youth employment needs to accommodate age, language, education and child protection issues. For example, the Seek Education or Employment not Detention (SEED) Program in the Northern Territory has been largely ineffectual. The training program was designed to build youth detainees' skills in education and employment to support their community reintegration and to break the cycle of reoffending, but only one person has engaged in the program to date. The age and classification of detainees, and the short time they are held in centres, has meant most young detainees are ineligible to engage in the program. Only two or three detainees have been assessed as suitable to be considered for the program for these very reasons.[16]

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[13] John Elferink described his reasoning thus: 'While unfashionable in approach I believed then as I do now that criminal activity in the Northern Territory was not related to indigeneity but rather to unemployment and so I approached recidivism had much more to do with employment and the dignity that flowed from it than anything to do with the race of the offender. After the successes of the Sentenced to a Job Program I became even more convinced of the correctness of that approach.' Exhibit 321.001 Statement of John Elferink, 30 March 2017, 164 [17].

[14] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016.

[15] Council of Australian Governments, *Prison to Work Report*, 2016, 141-142.

[16] Oral evidence of Sally Cohen, 24 April 2017, 2791-2; Oral evidence of John Elferink, 27 April 2017, 3113.

5.3.5 Change the Record

NAAJA endorses the 'Blueprint for Change' recommendations of the Change the Record Coalition. These recommendations outline how Commonwealth, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to forge agreement through COAG to:

a) Establish a national, holistic and whole-of-government strategy to address imprisonment and violence rates. This strategy should contain a concrete implementation plan and build on the National Indigenous Law and Justice Framework 2009-2015. In addition, the strategy should be linked to related areas of COAG reform including the National Framework for Protecting Australia's Children 2009-2022 and the National Plan to Reduce Violence Against Women and their Children 2010-2022.
b) Set the following justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander people come into contact with the criminal justice system:
    i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040;
    ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040; with priority strategies for women and children. In addition, these targets should be accompanied by a National Agreement which includes a reporting mechanism, as well as measurable sub-targets and a commitment to halve the gap in the above over-arching goals by no later than 2030.
c) Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development relating to Aboriginal and Torres Strait Islander imprisonment and violence rates.
d) Ensure that laws, policies and strategies aimed at, and related to, reducing Aboriginal and Torres Strait Islander imprisonment and violence rates are underpinned by a human-rights approach, and have in place a clear process to ensure they are designed in consultation and partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies.
e) Support capacity building, and provide ongoing resourcing of Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to ensure that policy solutions are underpinned by the principle of self-determination, respect for Aboriginal and Torres Strait Islander people's culture and identity, and recognition of the history of dispossession and trauma experienced by many communities.[17]

[17] Change the Record Coalition Steering Committee, *Blueprint for Change*, November 2015, 5.

Recommendation 47	That all governments adopt the Change the Record Coalition 'Blueprint for Change' recommendations.

5.4 How the criminal justice system can be improved

5.4.1 A paradigm shift in the justice system

Current approaches to youth justice in the Northern Territory have not worked. Real reform requires a wholesale 'circuit breaker' that galvanises change and empowers Aboriginal people to drive the solutions.[18] In the Introduction and sections 1, 8 and 9, we have discussed options for reform that involve a paradigm shift in youth justice to effect meaningful and long-term change, including creation of a statutory authority responsible for youth justice services including youth detention.

5.4.2 Replacing 'tough on crime' approaches with education

Evidence before the Commission indicates that youth justice policy in the Northern Territory has been driven by 'tough on crime' approaches, which have affected policing practices, 'demonised' Aboriginal and young people in the media and increased numbers in detention.

'Tough on crime' approaches tend to be punitive and do not address the underlying causes of offending. Former Northern Territory Corrections Commissioner Ken Middlebrook gave evidence to the Commission that 'tough on crime means more numbers, means overcrowding and stress on the system' that doesn't allow for adequate programs to reduce recidivism.[19]

Recent elections have seen both the Country Liberal and Labor political parties run law and order campaigns that promised more punitive justice measures including increased police numbers, expanded detention facilities, boot camps for youth offenders, stricter bail laws and mandatory sentencing. The Commission has heard that this environment has stifled exploration of policies that address the complex causes of youth offending:

> The then Minister and the then Government, with their pillars of justice law and order reform, had what is often referred to a tough on crime approach and stance. That was certainly not hidden from the public and some would perhaps even say they may have well been part of elected on that platform. That position … very rarely leads a supporter of that position to talk about the myriad of complexities and challenges and complex issues that lead to young people committing crimes.[20]

The Commission has heard that research shows people are less punitive when properly informed.[21] Reducing representation of Aboriginal young people in detention therefore requires a sustained bi-

[18] Oral evidence of Keith Hamburger, 5 December 2016, 342:34-38.
[19] Oral evidence of Ken Middlebrook, 26 April 2017, 2926.
[20] Oral evidence of Sally Cohen, 30 March 2017, 2392.
[21] See Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 39-40.

partisan political commitment to changing the media narrative and educating the public about crime trends and therapeutic alternatives to detention.

The acceptance of failings and apology offered by the former Minister of Corrections Gerry McCarthy concerning the treatment of children in detention is a positive step towards a political system seeking reform.

Naming and shaming undermines the aims of the youth justice system

The Commission has heard that open youth justice courts and exposing young people to media by allowing publication of youth offender names is anti-therapeutic[22] and has a potentially socially isolating impact:

> [I]t does disturb me, what the effect on the children who are being demonised is. So apart from the fact that demonisation is part of the political process, which can result in more punitive systems of laws and conduct, the children themselves… I'm sure it has a really corrosive effect on their self-esteem and on their sense of identity, and their sense of engagement in the community.[23]

> [M]y concern was that… if we were to continue to feed the media with these types of stories, that that would generate in itself quite a maelstrom of reaction from the community in terms of also supporting that tough on crime approach. It needs to be relevant, and it needs to be responsible.[24]

Evidence before the Commission shows that these laws have enabled name and shame practices such as the Northern Territory Police posting names and photographs of young offenders on the Northern Territory Police Facebook page, and enabling members to post comments, some of which are 'offensive and outright racist'.[25] Witness statements tendered to the Commission also highlight the disturbing related trend of vigilante groups seeking out ex-detainees, adding to their isolation and trauma, and compromising their reintegration and rehabilitation.

Witness AB:

After the tear gassing, I was put on the news. I didn't see it myself, but I have been told that the reports showed pictures of my face and the reports made out that everyone in the cells had escaped and everyone in the cells had been involved in a 'riot'. This made me feel paranoid when I would go out in public in Darwin. I still see my name on Facebook on these vigilante group pages …

This is one of the reasons my family moved away from Darwin. Too many people knew me.[26]

[22] Oral evidence of Sally Cohen, 24 April 2017, 2801.
[23] Oral evidence of Russell Goldflam, 14 December 2016, 855.
[24] Oral evidence of Sally Cohen, 24 April 2017, 2801.
[25] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 39.
[26] Exhibit 139.001, Statement of AB, 1 March 2017, 27 [209].

Witness BH:

I have heard lots of stories about vigilante groups going around and targeting kids. Kids are being stopped and hassled by groups of men. This happened to me too. One time a group of white men with baseball bats got out of a ute and walked towards me saying things like 'you little cunt, get here'. I freaked out and ran as fast as I could. They chased me but I got away. I felt really threatened when that happened.[27]

There are different jurisdictional practices across Australia for protection of identifying information. Queensland and NSW close their youth justice courts, while Victoria keeps the court open, but restricts identifying publication.

Section 50 of the *Youth Justice Act* permits the naming of young persons involved in court proceedings, except where the court makes an order to restrict the publication of those proceedings. No other jurisdiction in Australia allows prima facie publication of youth justice proceedings. This provision should be removed. It runs contrary to the fundamental principles of rehabilitation that are enunciated as the guiding principles to dealing with young people in the *Youth Justice Act*.

Recommendation 48	That the *Police Administration Act* and *Youth Justice Act* are amended to prevent the publication of the identity of youths as police suspects and during all court proceedings.

5.4.3 Policing

Police have an integral role to play in the youth justice system. Their interactions with young people can, through positive policing initiatives, create strong and trusting bonds with young people and lead to reductions in crime. Equally, negative experiences with young people can further alienate young people at risk of offending or further offending. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs noted that:

> [T]here are many stories of inspirational police officers working with Indigenous communities and elders to develop positive relationships between communities and the police force. However, when this is not the case, the outcomes for Indigenous youth can be extremely serious, and can lead to negative consequences for whole communities.[28]

NAAJA has observed that policing of young Aboriginal people is often markedly different to that experienced by the rest of the young population. This is borne out by the detention and court statistics and witness evidence presented to the Commission. Aboriginal youths are more likely to be denied access to diversion, taken to court, overcharged, denied access to programs, and not have their

[27] Exhibit 118.001, Statement of BH, 12 February 2017, 10.

[28] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system* (June 2011) <http://www.aph.gov.au/house/committee/atsia/sentencing/report/fullreport.pdf> 203.

vulnerabilities or trauma recognised.[29] In this context, fundamental considerations such as imprisonment as a last resort tend to be forgotten and detention appears to be the status quo.

Several key factors drive differential policing of Aboriginal young people, including intensive policing operations like 'Taskforce Trident', expansion of policing in remote communities, untrained and culturally ignorant practices, police interview practices, failure to exercise discretion, overcharging, over-policing and lack of prosecutorial discretion.

Importance of cultural awareness

The Commission has heard that there is a need for improved cultural awareness among police officers, particularly relating to remote Aboriginal communities. While there is some cross-cultural awareness training, community-specific training would improve relationships between police and young people in those communities. There have also been calls for local Aboriginal cultural advisors in every department to help establish appropriate diversion programs and determine what is in the best interests of Aboriginal young people.[30]

We have provided further discussion of cultural awareness issues in section 6.

Collateral impacts of intensive policing operations

Evidence provided to the Commission links intensive policing operations, such as the NTER, to unintended increases in rates of detention for young Aboriginal people.[31] The NTER saw the establishment of 18 new police stations and 50 additional police in remote communities. The Carney report identified a doubling in youth detainee numbers in the three years following the NTER and other research has shown there was an exponential increase in traffic prosecutions in remote areas of Northern Territory due to the increased police presence.[32] While the NTER was aimed at reducing sexual and violent crime, we are concerned that this evidence points to an unintended effect of increased policing of traffic and minor offences, leading to higher youth detention rates in these remote communities.

Failure to exercise discretion, police interviews and overcharging

NAAJA is concerned that police often treat young people in the same way as adults, without regard to the *Youth Justice Act*, *Youth Justice Regulations* and *Police General Orders*. This may result in arrest rather than use of the less restrictive options available under Section 22 of the *Youth Justice Act* such as summons, notice to attend or by engaging less intrusive means like contacting a parent or guardian.

Data provided to the Commission shows that youth arrests have increased over the past decade by an alarming 1571% for Indigenous females and 224% for Indigenous males.[33] These arrests commonly

[29] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017.
[30] Oral evidence of Marius Puruntatameri, 31 March 2017, 2416.
[31] See Exhibit 072.001, Statement of John Fattore, 23 February 2017, 6; Exhibit 072.009, Annexure JF-8.
[32] Oral evidence of Russell Goldflam, 14 December 2016, 816.
[33] Exhibit 045.001, Statement of Joe Yick, 14 October 2016, 31.

result in detention. NAAJA has written to the Commissioner of Police regarding this practice of arresting young people.

We are aware of instances where police have arrested young people in class during school hours. Each young person was handcuffed in front of staff and other pupils, arrested and taken to the watch house. At the time of arrest, there was no threat of a continuing offence, they were all lawfully at school, engaged in class, and no efforts had been made to contact their parents or guardians to arrange a voluntary meeting with police. In fact, none of the parents or guardians were notified the young people were wanted for questioning prior to arrest, nor were they contacted until the young people were in custody at the watch house.

Witness AS:

I was arrested at my school by the Police and taken to the watch house. I didn't like being arrested at my school (this happened once before as well) because I felt a lot of shame with the Police coming there. They could have picked me up from house. I was asked to be interviewed by the Police and was told that if I did not do the interview I would be charged with everything. I said that I would not do the interview. The Police then charged me with [numerous] offences and was refused bail. I have seen documents that were given to my criminal lawyer and it says that there was DNA evidence and CCTV footage of me. As far as I know this evidence was never given to my lawyer or to the Court. All but two of those charges were withdrawn.[34]

NAAJA has previously made complaints around police interviews, including inducements, threats and practices of overcharging. These practices tend to arise in circumstances where there is insufficient evidence to warrant a reasonable prospect of conviction. For example, police may arrest a group of young people and state that each will be charged with 'everything' or certain serious offences unless they tell police what happened in an interview.[35]

Witness AG:

While I was under 18 years old, the Police would sometimes try and get me to do an interview by telling me that if I did the interview they would drop some of the charges or give me bail.

They also would sometimes try and get me to do an interview while I was under the influence of drugs. They would also sometimes attempt to ask me questions outside an electronically recorded interview.[36]

We are also concerned with the common practice of overcharging young people, which contributes to high Aboriginal youth detention numbers. Young people are often charged with dozens of charges without sufficient evidence, which decreases the likelihood of bail and delays the matter while the inappropriate charges are negotiated against. This results in youths being wrongly remanded in custody for long periods.[37]

[34] Exhibit 123.001, Statement of AS, 22 February 2017, 17.
[35] Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 19.
[36] Exhibit 145.001, Statement of AG, 25 November 2016, 18.
[37] Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 19.

Witness AG:

They would also sometimes ask me questions about property offences that had occurred in the area without actually having any actual belief that I was involved in these offences. This also meant I got overcharged for things that I didn't do. In 2014, I got charged with more than 30 offences. A lot of the charges were about some people breaking into a car yard, but I didn't do a lot of those things they said I did. In the end, I pleaded guilty to about three of the charges that I did do and the rest of them were withdrawn.[38]

Witness AM:

The police would also overcharge me … I was charged with a lot of things I didn't do. I remember that I did an interview with the Police where the only reason that I did the interview was because the Police told me that if I agreed to an interview I would be let out of the watch house sooner. They eventually dropped the charges for the things that I didn't do.[39]

Recommendation 49	That the Police General Orders are reviewed to align with international human rights obligations and the best interests of the child.
Recommendation 50	That police ensure robust auditing of compliance.

Policing of children in care

The Royal Commission has seen evidence consistent with NAAJA's observations around frequent prosecution of young people in care for care-related offences. This includes offences that would ordinarily never come before the court if the child were not in care, because families do not ordinarily criminally prosecute children for bad or inappropriate behaviour:

> [S]ome young people who are unable to find community-based homes, they may end up in residential units and … if they play up in those environments … the police might be called and they might be escorted off to a juvenile justice facility.[40]

We believe this approach is a contributor to over-representation of Aboriginal young people in detention and, in many cases, introduces these young people to the criminal justice system. This is reflected in evidence provided to the Royal Commission,[41] including that concerning Dylan Voller's early offending in care:

> I think, that young people in Care and Protection are entering into the criminal justice system for offending whilst in care. I think that in terms of his early offending – his first offence from memory, actually – you know, had that have been dealt with by way of

[38] Exhibit 145.001, Statement of AG, 25 November 2016, 19.
[39] Exhibit 270.001, Statement of AM, 11 February 2017, 16.
[40] Oral evidence of Megan Mitchell, 11 October 2016, 34.
[41] See e.g. Oral evidence of Olga Havnen, 21 March 2017, 1584.

> not contacting police straightaway, we could have dissolved that issue. It was a very minor offence. I'm not sure whether police needed to be involved at that point in time. So, yes. So that started the ongoing contact with the – yes – police and criminal justice system.[42]

Witness BV:

When I was taken into care, DCF took me away from my family and sent me to residential placements in Alice Springs. I call these placements 'resicare'. I did not like this as Alice Springs is a long way from [home] and I did not like being away from my family. It was scary.

Resicare made me fall down all the time. By this I mean that it felt like I could not do the right thing even when I was trying. It felt like I never knew what the rules were so I was always breaking them. I did not understand what I was supposed to be doing or when I was supposed to be doing it.

When I broke the rules, the carers would call the Police and I would get locked up. When I got out, I would often be sent to a different placement. It felt like I was moving around all the time. This meant I did not get to know the carers or the other kids in the placement.[43]

NAAJA is working with Territory Families, NT Police and private residential care providers for the creation of a protocol for addressing appropriate use of discretion and restorative justice approaches for children in care.[44]

Recommendation 51	That government, police and private residential carers adopt a protocol for justice practices relating to children in care.

5.4.4 Bail

Breach of bail offence

Attaching criminal sanctions to breach of bail is inappropriate for children, and disproportionately affects Aboriginal young people. The relevant criteria for consideration of bail fails to consider Aboriginal family and living systems of care by multiple relations, highly mobile families and where homes can be in multiple communities.

In May 2011, an offence of breach of bail was introduced in the Northern Territory, which has led to increased criminalisation without improving compliance with bail. It is not unusual for NAAJA see a child with one file of offences, and eight to ten files of breach of bail charges.

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[42] Oral evidence of Antoinette Carroll, 13 December 2016, 758.
[43] Exhibit 241.001, Statement of BV, 19 February 2017, 2.
[44] See, eg, NSW Government, Joint Protocol to Reduce the Contact of Young People in Residential Out-Of-Home Care with the Criminal Justice System, May 2016 <http://www.community.nsw.gov.au/?a=408679>.

Evidence tendered to the Commission shows that between 2011/12 and 2015/16 the number of breach of bail offences per year for Indigenous people has risen from 427 to 704. The escalation of breach of bail offences for Indigenous girls is stark, with a 137% increase in the number of offences recorded since the introduction of breach of bail offences. This contrasts with declining breaches of bail for non-Indigenous young people.[45] The Commission has heard that the increases are due to onerous bail conditions[46] when consideration is given to home life and support systems,[47] and heightened policing such as operations specifically targeting young people on bail.[48]

Young people may be subject to onerous bail conditions such as curfews, school attendance, non-association with friends, and no substance abuse. We acknowledge that these conditions are intended to keep young people safe and out of trouble, however they result in more frequent police interaction, more arrests, more time spent at the watch house or on remand and ultimately more criminal charges.[49] These kinds of conditions are especially challenging for Aboriginal young people, where barriers to bail compliance include reduced mobility, remoteness, linguistic capacity, hearing difficulties, intellectual disability and mental illness.

NAAJA has consistently called for bail support programs for Aboriginal males and females such as those existing in other parts of Australia, where workers help young people comply with bail. Successful Aboriginal-specific models from other jurisdictions may be adapted here, such as the Victorian Koori intensive bail support program.

Witness AG:

When I would get bail, a lot of the time they would put a curfew as a condition of bail. I would always say that they shouldn't do that because it is just setting me up to fail. There were a couple of times that I breached bail for this reason.[50]

Where a young person is compliant with their bail obligations, inappropriate police curfew checks may unreasonably disrupt families by occurring late at night or in the early morning. It is the experience of NAAJA that unnecessary curfew checks are also occurring in instances where young people are wearing electronic monitoring devices or a curfew condition has been removed by the court.

Witness AS:

This charge went to the Supreme Court and I pled guilty. The Judge sentenced me to what my lawyer has told me is called a 'Griffith remand'. It ended up going on for a bit over a year. I remember I did not have to go to gaol but it did mean that I had conditions. One of those conditions I remember was that for most of the time I was on the remand I had a curfew, which meant that I could not be out of my house from 7 pm to 7 am.

[45] Exhibit 045.002, Statement of Joe Yick, 17 November 2016, 10.
[46] Oral evidence of Megan Mitchell, 11 October 2016, 39.
[47] Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 24.
[48] Oral evidence of Antoinette Carroll, 15 March 2017, 1164.
[49] Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 24.
[50] Exhibit 145.001, Statement of AG, 25 November 2016, 19.

The problem was that the longer it went on, the more problems I had with the curfew. For a long time after I got the curfew, I couldn't tell the time on my watch so I didn't really know what time it was and when I had to go back home. Someone had tried to teach me how to tell the time before that, but I just didn't understand. I remember I got picked up once by the Police at the Red Rooster car park at about 7.55 pm. Most of the time I missed the curfew I would get arrested by the Police and taken to the watch house. Sometimes if I got picked up during the day, I would get taken to the Supreme Court. By the end of the Griffith remand, the sentencing remarks show that I was held in detention for about 56 days in that year I was on the Griffith remand. Some of it was for breach of bail when I did other offending, but a lot of it was because of a breach of bail because I was in breach of the curfew without any other offending.

The other problem was that the Police would come to my house and check my curfew, a lot of the times it was either really late at night or really early in the morning, which would mean that me and my dad would get woken up by this.[51]

Mobility and remoteness have a greater impact on young people, particularly considering the context of remote living. Many important cultural obligations for Aboriginal young people such as ceremony, 'sorry business' and law seasons will see travel and attendance for prolonged durations.

In urban settings, young people are invariably reliant on parents or other family to transport them to court. This lack of control and agency is even more pronounced for young people in care. These young people often face challenges in complying with conditions to reside at a residential placement where they are distressed or dissatisfied with the placement. It is not uncommon for these young people to 'self-place' with biological family after being removed from their care or to move residence due to being exposed to violence.[52] This is a complex social issue that should not attract criminal sanction. Provision of culturally appropriate youth specific alternative accommodation would go a long way to improving bail outcomes where mobility and remoteness are an issue. However, there is only one bail accommodation provider in Darwin (CASY House), which is unable to service young people with criminal charges. The recent NT Government initiatives to establish supported bail accommodation options are an example of initial steps in the right direction.

The risk of a young person breaching bail, and the negative consequences that flow from that, can impact how their matter progresses and whether longer-term therapeutic options are preferable. For example, options in the best interests of young people that take time, like neurocognitive and disability assessment reports, need to be weighed against the risks of breach of bail, such as returning to custody with more charges and being subject to more victims' levies. Consequently, the threat of breach of bail sanctions reduces the utility of therapeutic rehabilitative options, which undermines the intent of the *Youth Justice Act*.

Recommendation 52	That the administrative offence of breach of bail is repealed.

[51] Exhibit 123.001, Statement of AS, 22 February 2017, 1-3.
[52] See Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 24; Oral evidence of Antoinette Carroll, 15 March 2017, 1164.

After-hours bail

Evidence provided to the Royal Commission raises issues in relation to children having bail considered after hours. Given the Northern Territory has no after-hours court, bail applications are considered over telephone by an on-call Judge, in most cases without legal representation for the young person. This has led to an imbalance where young people self-advocate, and has the potential to lead to overly long periods before a young person is brought before the court. NAAJA has written its concerns to the Court to advise Duty Judges of the practice and the sitting throughout the week of the Darwin Youth Justice Court.[53]

NAAJA and CAALAS are in discussions with the Commonwealth and Northern Territory governments for a custody notification service that will provide after-hours legal representation for adults and youths in police custody.

Witness AG:

There were a lot of times when the Police would refuse bail and would call the magistrate really late in the night, like at 2 or 3 am. When this happened, I was always refused bail.

I thought that this was because my chances of getting bail at this time of night (and most likely when the magistrate had been sleeping) weren't good. That's why I started telling the Police that I did not want them to phone the magistrate at that time of the morning but the Police did not listen to me and made the call anyway.

A lot of the time, the Police would delay the phone call to the magistrate to that time of the night. Usually the Police would ask me to do an interview and after I did, or after I refused, they would then take me away for processing which would mean it would be a couple of hours before they made the call. It would have been better if they called the magistrate as soon as I did the interview (or as soon as I refused the interview).[54]

Witness AS:

I was then arrested by the Police and taken to the watch house. The Police said they were not giving me bail and they called the magistrate to ask to put me back into Don Dale. The magistrate said that I could have bail and that I could go, but as DCF was not there the Police locked me back up in a cell. I asked the Police to let me go home. The Police said to me 'we're not a taxi service'. After about three hours I became really frustrated and angry about being locked up so I kicked the door and window. The Police came in and said that I had caused damage to the door and window and that they were going to charge me with the damage. The Police called the magistrate again and asked them to put me back into Don Dale. I was not allowed to talk to the magistrate. The magistrate agreed to put me in Don Dale on remand. I was held in Don Dale for three days, over the weekend, in HSU. I do not know

[53] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 9-10.
[54] Exhibit 145.001, Statement of AG, 25 November 2016, 19.

why I was put in the HSU straight away. I plead guilty to the damage and the punishment I got was the three days I spent on remand.[55]

Recommendation 53	That a child in police custody shall always have access to legal representation, especially in relation to applications for bail.
Recommendation 54	That a specialist Youth Court Judge shall be on call after hours.

5.4.5 Access to diversion programs

The Commission has been presented with evidence that speaks to the importance of diversion in achieving the best long-term justice outcomes for offenders, victims and the wider community. Diversion holistically responds to offending, providing a tailored approach to rehabilitating young offenders without exposing them to the stigma and alienating impacts of the criminal justice system.

In 2000, the Commonwealth and Northern Territory Governments provided youth diversion programs following the public outcry against mandatory sentencing of young people for property offences. At the time 36 of the 92 programs were based remotely. This funding ceased after several years.

Reviews of youth diversion in the Northern Territory demonstrate its benefits across a wide spectrum of positive outcomes including low recidivism rates, where 76% of participants did not reoffend within 12 months.[56]

NAAJA has always been a strong supporter of youth diversion; where police do not grant a young person diversion we always seek reconsideration through the courts pursuant to Section 64 of the *Youth Justice Act*. However, once an order for reassessment is made, it is returned to the police, who are under no obligation to make a fresh assessment. We believe that independent reassessments should be explored to prevent injustice.

Recognising that young people often fail diversion for a range of factors beyond their control, we try to assist them resolve these issues before facilitating another referral for reconsideration. Where complex factors such as family, health, housing and transport impact young people's ability to meet their diversion requirements, effective wrap-around support is critical.

Witness AX:

When I first was getting in trouble with the Police, there was a two day diversion program that I was booked into. The problem was I that I did not know where I was supposed to go on the day and because

[55] Exhibit 123.001, Statement of AS, 22 February 2017, 19.
[56] Australian Institute of Criminology, Diverting Indigenous offenders from the criminal justice system, December 2013, 9.

my mum did not have a car, I did not have a way to go see Corrections to find out or to go where I was supposed to be. Because of that, I missed the diversion and I was not given a second chance.[57]

For the most part, diversion also excludes some highly vulnerable young people, such as those with unstable accommodation or mental health issues. We need options such as shorter, more flexible diversion programs. Diversion usually takes three months and places unrealistic expectations on young people with very challenging living circumstances and insufficient family support to meet standard diversion requirements.

Recommendation 55	That the *Youth Justice Act* is amended to remove the requirement of prosecutorial consent to youth diversion.

Resourcing of diversion programs

Despite the success of diversion, the Northern Territory government has failed to properly resource these programs:

> Unfortunately, demand has far outstripped capacity. For example, in 2016 it has not been uncommon for there to be a waiting list of seventy to eighty young people in the Darwin region alone. This undermines the whole diversionary regime. Diversion can be delayed by months, by which time it does not take place in a time frame relevant for the child.[58]
>
> [I]t was so badly under-resourced that the police officer who was in charge of diversion, who was completely for it and wanted it to work, but nonetheless said that they had a waiting list sometimes of 45 young people.[59]

This lack of resourcing and long wait lists contributes to the issues around bail compliance, as offenders are required to comply with bail conditions for longer periods of time, increasing their exposure to non-compliance, being arrested and ending up in custody. It also means diversion providers often lack capacity to provide wrap-around support to help young people attend appointments.

Diversion for Aboriginal young people in their community

Research has indicated that Aboriginal young people are less likely to be diverted when compared with non-Aboriginal young people.[60] The impact of this discrepancy is that Aboriginal young people have a higher rate of entrenchment in the more punitive aspects of the criminal justice system.

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[57] Exhibit 111.001, Statement of AX, 17 February 2017, 10.
[58] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 11.
[59] Oral evidence of Terry Byrnes, 20 March 2017, 1527.
[60] Kelly Richards, Police Referred Restorative Justice for Juveniles in Australia (August 2010) Australian Institute of Criminology <http://www.aic.gov.au/documents/8/B/B/{8BB6EC00-2FDD-4CB9-A70F-DC451C3C22BD}tandi398.pdf>.

Lack of access to diversion is likely to be one of the main reasons why Aboriginal young people are diverted at a lower rate, when compared with non-Aboriginal young people. It remains the case that in many parts of the Northern Territory, diversion simply does not exist:

> I can't enunciate about specific communities, but I know it's very, very spare. There is almost none. It's a real problem when a young person is offered diversion but is going back to community. There is not anywhere near the resources that we need.[61]

NAAJA has repeatedly called for more Aboriginal designed and run diversionary programs and increased diversion programs in remote and regional areas. Increased resources must be made available to ensure that remote Aboriginal young people are offered the same opportunities for diversion that are available to young people in metropolitan areas.

NAAJA is aware and supportive of programs such as the Groote Eylandt and Tiwi Islands Youth Diversion and Development Unit, and the Mount Theo program for Walpiri young people. We support further development of remote diversion, using these community-based programs as good practice examples. Nonetheless, these programs remain under-resourced and would benefit from additional training and employing of Aboriginal staff:

> [T]he Tiwi lslands Youth Diversion and Development Unit is a youth diversion program that has operated for over 10 years in Wanumiyanga on Bathurst lsland. While the program is working very well, it has staff retention problems. Non-Tiwi people would then come into the program, meaning that we often have to go back to square one and get used to these new recruits. The government should train Aboriginal people to fill these positions so that the locals have direct involvement and input in programs that assist the community.[62]

We also need more culturally strengthening diversion programs, such as the Community Council model where a panel of Elders and Aboriginal community leaders meet with a young person, and come up with a holistic plan to address the underlying issues and help improve the young person's connection with culture and community.

NAAJA acknowledges that the recent funding of a non-government organisation to deliver youth justice conferencing is a positive step.

Recommendation 56	That youth diversion programs in remote communities are developed and run in partnership with or by Aboriginal communities, Elders and Law and Justice Groups.
Recommendation 57	That appropriate funding and support, including essential services are provided by government.

[61] Oral evidence of Terry Byrnes, 20 March 2017, 1258.
[62] Exhibit 256.001, Statement of Marius Puruntatameri, 15 February 2017, 3.

Recommendation 58	That Police decision making for diversion suitability must be referred to locally based Aboriginal community Elders for their consideration.

Exclusion of traffic offences from diversion

Traffic offences under Parts V and VI of the *Traffic Act* are excluded from diversion. Police are unable to refer a young person to diversion if their charges include an excluded traffic offence like drive unlicensed, despite other more serious offences being able to be diverted. This increases the number of young people drawn into the criminal justice system.

NAAJA agrees with evidence provided to the Commission that the harm of bringing a young person into the criminal justice system outweighs the benefit to protection of the public by requiring traffic offences to be dealt with by the courts:

> It's unusual for a first time traffic offender – except in an extremely serious case, for example where there has been a fatality from a road accident – to be sentenced to a period of detention. But going to court, having your licence disqualified, being ordered to undertake community work or pay a fine or be subject to some other sort of restriction on your liberty sets you up for breaches. Frequently, people are disqualified and then they come back with an offence of driving disqualified. The Supreme Court has made it very clear that the starting point for a drive disqualified conviction should be a sentence of imprisonment for adults … So there's a sort of a cascade of consequences for what can start off as a fairly minor traffic infringement.[63]

This means that associated policing practices can have a large impact on Aboriginal youth detention numbers. For example, as discussed above in the section on policing, research showed a steep increase in traffic prosecutions in remote areas of Northern Territory following the NTER due to the increased police presence. In these remote areas, Aboriginal people were disproportionately exposed to traffic related charges, as 'frequently … cars were being driven by people who weren't supposed to be driving, or they were in a condition they weren't supposed to be driven in, or they weren't registered or whatever.'[64]

In other jurisdictions, diversion is available and often tailored to meet this type of offending, such as driver trainer courses. NAAJA has previously written to the Northern Territory Government requesting amendment to the *Youth Justice Act* to remove this prohibition, to no avail.

5.4.6 Law and Justice Groups

NAAJA advocates the use of Law and Justice Groups to enable Aboriginal communities to have greater control and responsibility for young people in their community and have meaningful input into appropriate justice responses. This requires legislation to identify and connect these groups to

[63] Oral evidence of Russell Goldflam, 14 December 2016, 817-818.
[64] Oral evidence of Russell Goldflam, 14 December 2016, 816.

decisions in the youth justice system and funding for legal teams, such as NAAJA's Law and Justice team, to serve as a nexus between Law and Justice groups and the youth justice system.

NAAJA has worked with several communities and Law and Justice Groups in the Northern Territory to create greater positive community engagement in the justice system. These include Kurdiji in Lajamanu, the Burnawarra in Maningrida along with the Ponki Mediators in Tiwi, the Makarr Dhuni in Galiwinku and the Cultural Authority/Mala Leaders in Ramingining. Through this work, we have seen many potential benefits of Law and Justice Groups, which include:

- Decreasing the contact Aboriginal people have with the justice system and reducing the disproportionately high rates of Aboriginal detention and imprisonment.
- Facilitating culturally and regionally appropriate youth diversion activities. Many of these groups have actively facilitated mediation and restorative justice practices not known to Police and other agencies, which have prevented crime.
- Reducing crime and social problems through early intervention strategies for Elders to resolve disputes before they escalate into criminal offending.
- Increasing community members' participation in the court process, engagement with local service providers and with the local political environment.
- Providing direct support to the courts, such as submissions on relevant cultural matters for sentencing.
- Providing support to Aboriginal victims, witnesses and defendants at all stages of the legal process, especially by reconnecting Aboriginal people with their culture and identity.
- Forging strong links between government agencies and Aboriginal communities.
- Improving community members' knowledge and respect for the western legal system, governance and the rule of law.
- Improving Aboriginal community members' access to justice by improving their understanding and capacity to navigate the legal system.
- Improving the leadership, governance and crime prevention skills of authority structures.
- Working with night patrols, Corrections, courts and partner agencies to create jobs in the justice sector for Aboriginal people.

Law and Justice Groups are also valuable in child protection matters by initiating community-led responses to child safety, family group conferencing, kinship carers and Aboriginal foster carers as alternatives to child removal; providing input into care plans, case work, and early intervention; and supporting families.

There are no specific funding programs that support Law and Justice Groups. While we are aware the Northern Territory Government is currently exploring options to provide support to these groups, they are in select locations and without the resources and support necessary for systemic change.

Recommendation 59	That funding and legislative change are provided to integrate Law and Justice Groups across the youth justice and child protection systems.

5.4.7 Court infrastructure

Court infrastructure in the Northern Territory's 32 remote Aboriginal communities is inadequate for the needs of young people. Given that youth justice 'bush courts' periodically sit in remote communities, the removal of an Aboriginal young person from their community on remand should be an option of last resort. The lack of court infrastructure and ability for remote appearances via technology in remote regions creates an inflexible system where young people are removed from their supportive networks of families and responsible adults.

NAAJA recommends the adoption of the Children's Court of Western Australia *Practice Direction 1 of 2011* to ensure young persons are not unnecessarily detained over the weekend in police lockups in country areas, with rehearing of bail by video link or telephone.[65]

Recommendation 60	That funding is provided to improve court infrastructure and the appropriate use of technology in remote regions.

5.4.8 Conceptual understanding

Many Aboriginal young people lack the comprehension skills to fully understand the criminal justice process. Often Aboriginal young people sign documents they do not fully understand. The difficulties that Aboriginal young people experience in understanding high-level concepts and technical legal terms should be recognised and addressed, if youth justice is to be meaningful.

It is instructive to consider research undertaken by Aboriginal Resources and Development Services Inc. (ARDS) where 200 Yolgnu people were surveyed about their understanding of 30 legal terms, including 'conditions', 'consent', 'undertake' and 'oblige'. In analysing the results, ARDS noted that:

> The extent of the problems facing Yolgnu people when they have to interact with the Balanda (Anglo) legal system show clearly in the overall results below, with over 95% of Yolgnu surveyed unable to correctly identify the meaning of the 30 commonly used English legal terms which are commonly used in the legal context in the NT.[66]

The ARDS survey illustrates the scale of the problem that needs to be considered in assessing understanding. There is real danger that Aboriginal young people will be ill-equipped to participate in court proceedings or excluded from accessing services unless specific resources are dedicated to ensuring they clearly understand the concepts being discussed in court.

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[65] Children's Court of Western Australia, *Practice Direction 1 of 2011,* section 7.3(b).

[66] Aboriginal Resources and Development Services (Inc), *An Absence of Mutual Respect* (2008) <http://www.ards.com.au/print/Absence_of_Mutual_Respect-FINAL.pdf>.

These findings were echoed in the *Little Children are Sacred* report:

> It became clear to the Inquiry during its consultations that in many of the communities visited, the 'language barrier' and the 'cultural gap' was greater in the younger generation.[67]

While this language and cultural gap is particularly pressing in remote communities, it also affects Aboriginal young people in Darwin, Alice Springs, Katherine and other towns.

5.4.9 Intersection of the justice and child protection systems

Experts, lawyers, youth justice workers and public servants have all described to the Commission the 'crossover' effect of children in the child protection system ending up in youth detention.

> I believe a major problem is that the courts, the Department of Children and Families and lawyers often use the detention centre as a child minding centre when other options aren't available. Many of the detainees are remanded until their next court appearance or they are repatriated to their communities or families. It seems to me that the legal profession and Department seem to disagree who pays for the repatriation which can result in kids staying longer in Don Dale.[68]

> The child protection system has not met the needs of 'crossover kids', who are also in the youth justice system. One example of this has been situations where Department workers have advocated to the court to remand a young person in detention as the most suitable place for them to reside. In some cases, DCF workers have actually described Don Dale as a 'placement'. This indicates, in my view how some workers consider detention as just one of a few residential options. As a lawyer, I have frequently felt that a 'parent' would have more vigorously sought to avoid the criminogenic influences of exposing a child unnecessarily to the anti-therapeutic youth detention environment.[69]

Witness AS:

I was then remanded in Don Dale Youth Detention Centre (Don Dale), for over a month until a hearing was held.

Before the hearing, my criminal lawyer said that she thought that I might get a good behaviour bond. I have since seen my criminal files and it showed that my criminal lawyer argued in court that I should have been given a good behaviour bond because of a number of reasons, including that I was young, the fact that I often did not offend for long periods of time and I had not been on medication for ADHD

[67] Pat Anderson & Rex Wild Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse – Ampe Akelyernemane Meke mekarle ('Little Children are Sacred') (2007) 51.
[68] Exhibit 189.001, Statement of Ian Johns, 1 March 2017, 3.
[69] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 13.

when I had committed offences. During the month that I had already been in Don Dale, I had also a lot of problems when I was in there.

I remember that my DCF caseworker stood up and told the Court that that they did not have anywhere for me to go that would be appropriate. DCF asked for me to be kept in Don Dale for three to four months so that I could go to therapy. DCF did not give any report to the court or evidence showing this, the court was only told by the caseworker that they did not have a place for me to go. The judge then sent me to Don Dale for another 3 and half months.[70]

NAAJA recognises that this issue will be the subject of further Commission hearings and would welcome the opportunity to make further submissions on it.

5.4.10 Detention is a traumatic event

The traumatising effects of detention on Aboriginal young people can contribute to the cycle of reoffending. This has been addressed in sections 2, 3 and 7, which discuss relevant issues such as conditions in detention, treatment of detainees and the physical and mental health of detainees.

Witness AX:

Being choked while I was naked in the bathroom (see Annexure A) and being locked down for all that time, and those other things that use to happen to us inmates in these places, did not make us better, they just made us a worse in the head.

For me, when these things happened, I couldn't tell this sort of thing to my family and I think that was the same for other inmates. Even though a lot of the time us inmates were drunk at the time of offending (and that was part of the reason why we offended) going through these kinds of events was another part of the reason why we would go on to offend.[71]

Witness AU:

I don't remember exactly how long I was at Don Dale the first time. After a few weeks or maybe a month the Magistrate let me out in Darwin. I remember that I'd changed a bit. I thought Don Dale was going to make me better but I think it just made me tougher. I was on the streets and I was mad. I'd get in fights. All I was thinking in my mind was that I wanted to make a big name for myself. People would say, 'Look at that boy. He comes in and out of Don Dale.' They would respect me. This was a new way of thinking after Don Dale. All the boys talked like that there.[72]

[70] Exhibit 123.001, Statement of AS, 22 February 2017, 16.
[71] Exhibit 111.001, Statement of AX, 17 February 2017, 11.
[72] Exhibit 128.001, Statement of AU, 18 February 2017, 3.

5.4.11 Access to programs in detention

The provision of a suite of culturally appropriate, therapeutic programs that address the causes of reoffending is crucial to reducing over-representation of Aboriginal in detention. We have addressed this issue and provided recommendations in section 7.2.

6 Access to culture and language

6.1 Influences of being Aboriginal

A commonality between Aboriginal detainees is their Aboriginal identity and a connection to family, country and language. An Aboriginal young person's self-concept is informed by their connection to the world's oldest culture and kinship of family and community. Many Aboriginal detainees can stand between the two cultures of their Aboriginality and the modern western world.

Being Aboriginal intrinsically shapes each young person's life through their experiences, cultural understanding and practices, and expectations of their surrounding world. These same cultural understandings, practices and expectations do not simply cease with detention and may be how they make sense (or senselessness) of their immediate custodial surroundings.

6.2 Importance of access to Aboriginal culture and language

The overwhelming majority of young people in detention are Aboriginal with many coming from remote communities and who speak English as a second, third or fourth language.[1] As a result, these young people can be extremely isolated when in detention.[2] Creating a youth justice system that meets the cultural and language needs of these young people is therefore critical to achieving the therapeutic, rehabilitative aims of the jurisdiction.

During the Commission, significant evidence has been presented that demonstrates that Aboriginal culture is an integral part of the identity of Aboriginal young people. Practice of culture is critical for personal growth, rehabilitation and reformation, family support and community wellbeing of those in the child protection and youth justice systems. The Commission has heard that it is 'imperative' that children are able to learn language, dance, songs, family and law, and that this is important to the culture as a whole.[3]

There are occasions where the justice system fails to countenance the important role of cultural obligations for Aboriginal youth.

Witness AU:

I got in trouble for missing Court … I think I broke my bail. I tried to tell them that I was at a men's ceremony that day but they didn't listen to me. So they sent me to Don Dale, which was far away from my family.[4]

[1] NAAJA, 2011 Submission to the Youth Justice Review Panel, A Review of the Northern Territory Youth Justice System, July 2011, 24.
[2] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 67.
[3] Oral evidence of Marius Puruntatameri, 31 March 2017, 2411.
[4] Exhibit 128.001, Statement of AU, 18 February 2017, 2.

A key aspect of Aboriginal cultural practice is the maintenance of links to community and country. This may include facilitating attendance for 'sorry business' and ceremony, along with strengthening links to community and family through visiting Elders and family.

> [N]ot all Aboriginal people want to live on traditional country, but all like to have some relationship and recognition of their traditional country and actually some experience out there. There are people who will grow up and leave country, but they want to come back to country for certain reasons … with young people growing up, if they are living in a particular community with parents and relatives, there is an attachment there that needs to be developed. They need to be able to grow in that area … I'm not saying that people go and live on country and stay on country, I think it's a very fluid thing these days. People will go where they want to go, but country is very important to Aboriginal people.[5]

Enabling the practice of culture and language must be an integral part of any trauma-informed, therapeutic approach to reducing offending. It not only has the potential to reduce stress for young people in detention, but also improves their engagement with other rehabilitative programs. Evidence has highlighted the therapeutic benefits of embedding culture in approaches to engaging Aboriginal young people in the Victorian context:

> [W]e use culture in every aspect of our work. We use it in healing and therapeutic. We know that Aboriginal children, when, you know, asked by psychologists what makes them feel safe, quite often an Aboriginal child – well, 85 per cent of children draw the Aboriginal flag. So for us in Victoria, we know that culture – we use culture all the time as therapeutic. So I think that in the Northern Territory, everything has to be embedded and driven by culture and we have to be able to have programs and services that build on culture, not see culture as a deficit.[6]

Indeed, evidence presented to the Commission has shown that individual staff were sometimes aware of the need for cultural considerations to be accommodated by detention management practices:

> You certainly have to understand the cultural background … I can give you an incident where one of the boys' heads was full of lice, and one of the officers said to me 'Johnsy, we need to cut his hair. It's full of lice but he won't – he said he's not allowed to.' I said I will talk to him, and I found out in his, you know, culture his grandfather said he's not allowed to shave his head. I said, 'Alright.' I personally talked to the boy. We gave him access to the phone. He talked to his grandfather, and we were allowed to cut his hair down to get rid of the lice.[7]

[5] Oral evidence of Keith Hamburger, 5 December 2016, 359.
[6] Oral evidence of Muriel Bamblett, 13 October 2016, 216.
[7] Oral evidence of Ian Johns, 28 March 2017, 2022.

Proposed finding 6.1	That the continued practice of culture and language is vital to the identity and wellbeing of Aboriginal young people.
Proposed finding 6.2	That Aboriginal culture and language is a keystone to trauma-informed therapeutic practices in the rehabilitation of Aboriginal youth.

Recommendation 61	That management practices and systems are designed to accommodate the cultural and language needs of Aboriginal youth.

6.3 Denial of practice of culture and language

This Commission has raised multiple damning examples of cultural practice being deliberately denied, ignored or not adequately considered, leading to further harm for young detainees. For example, material before the Commission gives accounts of Aboriginal young people who have expressed real distress at being denied trips for funerals,[8] where 'sorry business' has not been accommodated[9] and the lack of cultural programs available for female detainees.

The Commission heard disconcerting evidence of failing to consider cultural matters at times of a young person's loss and bereavement. Witness BF recounted the passing of his mother while in detention and being unable to comfort his brother at the hospital. When subsequently released directly from detention to attend his mother's funeral, he was not given access to earned pocket money to purchase funeral clothes. He had to attend the funeral dressed in inappropriate attire, which caused him stress and shame.[10]

6.3.1 Denial of language or interpreters in school

Articles 29 and 30 of the *Convention on the Rights of the Child* provides:

> That Indigenous children shall not be denied the right, in community with other members of their group, to enjoy culture, practices and language as part of their education.

Despite a detention population of Aboriginal young people who had English as their third or fourth tongue, the schooling practices at both Owen Springs School and Tivendale School had no regard to the use of Aboriginal interpreters. When the school principals were questioned on their use of interpreters, both gave evidence that they 'had never asked for one during school time'[11] and 'had

[8] Oral evidence of Ian Johns, 28 March 2017, 2039.
[9] Oral evidence of Ian Johns, 28 March 2017, 2039.
[10] Exhibit 068.001, Statement of BF, 20 February 2017, [56]–[66].
[11] Oral evidence of Brett McNair, 16 March 2017, 1252.

not experienced a need for it'[12] and that children were directed to only speak English in the classroom.[13]

Elder Marius Puruntatameri has labelled it a 'disgrace', the practice of banning use of Aboriginal language in school.[14] Professor John Rynne has indicated that this practice may contribute to loss of language and disengagement by students.[15] In our view, this is an unacceptable approach to managing behaviour.

Findings and recommendations relating to education and Aboriginal language needs are further addressed in section 4.6.

Recommendation 62	That an Aboriginal language speaker in detention shall not be denied the right to an interpreter.
Recommendation 63	That the detention educational systems, curriculum and teaching shall be designed to accommodate the cultural and language needs of Aboriginal youth.

6.3.2 Access to culturally appropriate medical services

For the care, consultation and medical treatment of Aboriginal young people in detention, they must be able to access culturally appropriate medical services. The peak Aboriginal legal body NATSILS in 2013 described the collective experience of Aboriginal and Torres Strait Islander Legal Services that Aboriginal language interpreters are not used in many cases and medical practitioners are often not appropriately trained in cross-cultural communication.[16] This can lead to misdiagnoses and misunderstanding of treatment, and impairs the capacity of Aboriginal detainees to provide informed consent to undertake medical examinations and treatment.

NAAJA regularly makes submissions to various Northern Territory Government agencies about failures in interpreter usage. Given the importance of the health and safety of children, the failure of health professionals and counsellors to use interpreters is particularly concerning. This is further discussed in section 7.

6.3.3 Lockdowns and isolation

NAAJA is concerned that the excessive use of lockdowns and isolation denied detainees the ability to have physical contact and to practice their culture and language with other detainees or visitors.[17]

[12] Oral evidence of David Glyde, 16 March 2017, 1253.
[13] Oral evidence of Lisa Coon, 21 April 2017, 2726.
[14] Oral evidence of Marius Puruntatameri, 31 March 2017, 2420.
[15] Oral evidence of John Rynne, 17 March 2017, 1311.
[16] NATSILS, Submission to Expert Mechanism on the Rights of Indigenous Peoples, February 2013.
[17] See Exhibit 243.001, Statement of BX, 14 February 2017; Exhibit 111.003, Annexure B to Statement of AX, 17 February 2017.

Ian Johns has told the Commission that inconsistent and inadequate staffing levels were a key reason for the frequent lockdowns at Don Dale.[18] During lockdown, detainees are unable to leave their cells.

The Youth Detention Review concluded that there had been 'excessive periods of isolation to manage behaviour'.[19] There is evidence before the Commission that children when in 'isolation, some receiv[ed] no visits at all' and had no access to Elders or visits from Aboriginal people.[20] Even family members were denied visits.[21] Isolation is further discussed in section 3.6.

Witness AG:

While we were in the back cells we were not allowed to have visitors and we were never told if people had come to visit us. We still should have been able to see our families. My mum told me afterwards that she would come to visit me but was told when she arrived that she could not have a visit with me.[22]

6.3.4 Transfers between Alice Springs and Darwin

The Commission has heard that the closure of Aranda House and use of the Alice Springs Youth Detention Centre was done so that children from Central Australia could be closer to country and their communities. Nonetheless, the practice of youth detainee transfers from Central Australia to detention in Darwin has continued due to capacity issues. Notably, girls were routinely transferred to Darwin as there was no specific female accommodation.[23] No notice was provided to detainees or family that they were being relocated. Transfers are further discussed in section 2.

Witness AY:

I was transferred to Alice Springs Youth Detention Centre. I didn't know I was going to be moved out of Don Dale down to Alice Springs. No one told me it was going to happen, they just woke me up and took me all of a sudden …

No one told my family I was moving. They used to visit me regularly at Don Dale and I don't have any family in Alice Springs. I didn't see my family for the whole time I was there.

I remember calling my mum from Alice Springs. She was crying and hurt about me being in Alice Springs. That call made me feel bad and really sad. I didn't want to contact her for a while because of that.[24]

[18] Oral evidence of Ian Johns, 28 March 2017, 2028.
[19] Michael Vita, Northern Territory Review into Youth Detention Centres, January 2015, 51.
[20] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 56.
[21] Exhibit 136.001, Statement of BZ, 20 February 2017, 4.
[22] Exhibit 145.001, Statement of AG, 25 November 2016, 11.
[23] Oral evidence of Russell Caldwell, 29 March 2017, 2138.
[24] Exhibit 341.001, Statement of AY, 28 February 2017, 10.

Recommendation 64	That the custodial transfer of a detainee from their community shall be an option of last resort and all other options such as bail support, early release and periodic detention must first be considered.
Recommendation 65	That family members and support services are consulted, involved in the planning and notified of any transfer between detention facilities.
Recommendation 66	That detainees are advised and given certainty as far as possible of the date and length of their transfer.
Recommendation 67	That support services are provided to families of detainees to maintain connection with their child.

6.4 Culturally competent staff, systems and programs

The Commission has heard evidence from Dr Damien Howard that enhanced cultural competency of staff and cultural safety of the detention system will improve communication and respect between staff and detainees, as it will reduce stress for detainees and will better facilitate rehabilitation. For example, he described how Aboriginal young people with hearing loss could be better supported through the system with culturally informed approaches and communication strategies:

> So it emphasises … the importance of culture and the importance of culturally based communication styles in supporting Aboriginal children in care and detention, but particularly indigenous Aboriginal children in care and detention who have a hearing loss. It's even more important, because otherwise the communicative breakdown is going to be far more extensive and frequent, and the implication is that when non-Aboriginal people without those communication skills and awareness are involved they need to be trained in those issues and those communication skills, if they are going to be successfully involved.[25]

6.4.1 Inadequate cross-cultural training

Material before the Commission demonstrates how inadequate and inconsistently applied the cultural awareness training regime has been for youth justice officers, with evidence from several Youth Justice Officers indicating that some received either inadequate or no cultural awareness training.[26] A particular concern voiced by Youth Justice Officer Ian Johns and Tiwi Elder Marius Puruntatameri was

[25] Oral evidence of Dr Damien Howard, 13 October 2016, 243.
[26] See Oral evidence of Conan Zamolo, 20 March 2017, 1437; Oral evidence of Ben Kelleher, 21 March 2017, 1540; Oral evidence of Ian Johns, 28 March 2017, 2034.

that the cultural awareness training delivered to staff did not adequately address the differences between Aboriginal cultures across the Northern Territory:

> [T]he bloke that did ours, was a nice bloke, did cultural awareness but he spent 20 years up on Groote Eylandt. Totally different to someone at Tennant Creek, Alice Springs ... totally different cultures.[27]

> [Y]ou would need to have an Aboriginal person with the knowledge and skills of – of the other remote Aboriginal communities and their culture.[28]

6.4.2 Cultural awareness vs cultural competency

The Commission has heard that there has at times been a focus on the cultural awareness of detention centre and related departmental staff. While cultural awareness is a preliminary step, we recommend to the Commission that true cultural competency is required for staff to adequately respond to the varied needs of Aboriginal detainees:

> Cultural awareness and cultural competency are two different things. A person can sit down for a cultural awareness training and be told this is what – how Aboriginal people live. Cultural competency implies that there is an understanding of how the person will – what is important to that Aboriginal person depending on their language group, or their skin group or their moiety, how they should be treated, what's important in their development, how they should be dealt with. So those elements of the culturally competent officer are significantly different to the cultural awareness. Cultural awareness just simply means that – well, it's taking on the notion that Aboriginal people are all the same and therefore if you do a generic program you will learn it.[29]

In our view, organisations and agencies working in a space involving Aboriginal people and culture should develop organisational practices or policies or frameworks to develop cultural competency. These frameworks must apply to all employees and parts of the system.

Recommendation 68	That the youth detention system becomes a culturally competent framework and practice.
Recommendation 69	That the culturally competent framework shall consist of the following features: f. Appropriate cross-cultural education and training programs targeted for different roles and at all levels of the system g. Mechanisms integrated across the system for the learnings from cross-cultural education and training programs to inform workplace practices and decision-making

[27] Oral evidence of Ian Johns, 28 March 2017, 2034.
[28] Oral evidence of Marius Puruntatameri, 31 March 2017, 2417.
[29] Oral evidence of John Rynne, 17 March 2017, 1308.

h. Frameworks and practices that actively consider cultural competency at the individual level, organisational and systemic levels
i. Partnerships with Aboriginal educational institutions to better understand and develop a body of research and evaluations into existing frameworks and practices
j. Audit and accountability mechanisms including independent Aboriginal oversight and involvement.

6.4.3 Aboriginal staff

A common theme in evidence provided to the Commission is the need to engage more Aboriginal staff in youth detention. The Northern Territory Review into Youth Detention Centres found that recruitment 'must include some positions that are dedicated to being youth workers of Indigenous backgrounds.'[30] Witnesses have described how beneficial it was to feel understood and its positive impact on their behaviour:

> You did have at least one good experience in Don Dale with a tutor; is that correct?--- Yes… Yes. At one stage in Don Dale they had me on a management plan where I would go to school and because since I was young and always had problems concentrating in school, and so they put me on a one on one session with a young Indigenous man, Harold ... who was working in Don Dale as a youth worker, but at the same time they had me tutoring with him. And so he would help me out tutoring, and at the same time help me out with my work, and just help me out with my behaviour altogether in Don Dale as a tutor.[31]

NAAJA acknowledges recent positive steps in recruiting 11 Aboriginal Youth Justice Officers and the introduction of the Youth Outreach and Re-Engagement Team to work with young people at risk of entering the criminal justice system across six locations in the Northern Territory.

Witness AU:

Another reason I liked Dale and Leon was that they were Aboriginal. They were the only two Aboriginal guards when I was at Don Dale. Dale taught me painting. I would sit with him and paint. He was from Jabiru and sometimes we would even talk a bit in Kunwinjku. I'm not saying I didn't like the other guards because they were white. The difference was that the Aboriginal guards understood your culture and your community. They understood our relationships with our country. I felt like they understood the sadness of being so far away from my community.[32]

[30] Michael Vita, Northern Territory Review into Youth Detention Centres, January 2015, 28.
[31] Oral evidence of Dylan Voller, 12 December 2016, 685–686.
[32] Exhibit 128.001, Statement of AU, 18 February 2017, 7.

Recommendation 70	That there is an identified recruitment strategy for Aboriginal and Torres Strait Islander worker staff in the youth detention system.
Recommendation 71	That there is Aboriginal identified positions at levels of middle, senior and executive levels of youth justice.

6.4.4 Intake procedure

The admissions process should be supported by an Aboriginal language interpreter where a young person's first language is not English. Indeed, Professor John Rynne gave evidence that an interpreter is required from the moment a young person goes to court and again at admission, when they are given the prison rules.[33] Youth witness Jamal Turner observed 'that it was harder for detainees who didn't speak English very well and in talking to workers and guards.'[34]

Witness AU:

When I arrived there were no instructions. No one taught me what the rules were. No one told me what the punishment was. No one ever told me when I had to wake up, or when we could go to bed or to eat or exercise or go to school. No one ever told me when we would be locked in our cells or how or when we could tell the guards we needed to go to the toilet. No one ever told me what the good and bad ways of behaving were, what the good ways of talking to guards was and that we weren't allowed to talk to the guards in language. I had to work out the rules by myself. The more time I did the more I saw how others would act and get treated. I had to work out how to survive.[35]

Consistent with Australian and International standards on juvenile detention, young people should receive a comprehensive assessment on admission.[36] Along with medical and psychological assessments, intake should include a full assessment of the young person's social and cultural needs by qualified professionals. This assessment may obtain relevant cultural information such as moiety, skin relationships and whether they have been initiated. This will help determine culturally appropriate accommodation placements, diet, who they can or cannot associate with, and protocols for sorry business and travel. The information should be recorded on an internal data management system such as IOMS.[37]

Witness BX:

The first time I was kept in Alice Spring Juvenile Detention Centre I was placed in a dorm with 3 other people. That was ok and there was enough room. At one stage, I had three of my cousins in the Centre

[33] Oral evidence of John Rynne, 17 March 2017, 1312.
[34] Oral evidence of Jamal Turner, 13 March 2017, 939.
[35] Exhibit 128.001, Statement of AU, 18 February 2017.
[36] United Nation Rules for the Protection of Juveniles Deprived of their Liberty, arts 27, 50; Australian Juvenile Justice Administrators Juvenile Justice Standards 2009, standard 3.2.
[37] Oral evidence of Barry Clee, 15 March 2017, 1145–1146.

with me so I asked the guards if we could all share the one dorm, which they agreed to. I was grateful for that and it worked well because we could all speak in language together.[38]

Recommendation 72	That admission processes, rules, rights and complaint mechanisms should be conducted with the assistance of an Aboriginal language interpreter where a young person's first language is not English.
Recommendation 73	That where there an Aboriginal language interpreter is required, it is recorded on data management systems.
Recommendation 74	That cultural information is recorded and used to assist in the management, case plans and programs for Aboriginal young people.

6.4.5 Elders Visiting Program

The Elders Visiting Program enables Aboriginal Elders to visit and support detainees from their local community. The program is funded and supported by the Department of Correctional Services.[39] These Elders play a key role in building positive communities, facilitating help with programs, resolving conflict and ensuring young people go through proper ceremonies.[40]

Detainees, Youth Justice Officers and Elders have all pointed to the benefits of the program, including enabling detainees to speak in language, discuss issues that they wouldn't be comfortable speaking to staff or family about,[41] maintain connection to communities outside detention and to reinforce the strengths of Aboriginal culture.

> [I]t's a good program for, like, all the young fellows in Don Dale, which there wasn't many programs coming through, and it was one of the only cultural programs that came through Don Dale. So for them to come in with some elders, I think it was from Groote Eylandt, and communities like that. They did smoking ceremonies and stuff like that, and it was good for us to be able to talk to people on the outside and talk to them about stuff that is happening on the outside and not only see people that's in jail.[42]

> I'm actually grateful to meet Marius when he come into Don Dale doing the elders program and I think having more people like him come in, like strong indigenous role models in the community and making that point. They're not – not all Aboriginal people are the same, there's people that are out there, people like who come to support me, Joe Williams, who's indigenous people taking a stand, trying to help other

[38] Exhibit 243.001, Statement of BX, 14 February 2017, 2.
[39] Council of Australian Governments, *Prison to Work Report*, 2016, 125.
[40] Oral evidence of Marius Puruntatameri, 31 March 2017, 2400–2401.
[41] Oral evidence of Marius Puruntatameri, 31 March 2017, 2405.
[42] Oral evidence of Dylan Voller, 12 December 2016, 686.

> young indigenous people to do the right thing and prove that we can all work together and all succeed.[43]

Youth Justice Officer Ian Johns reported the overall positive impact on wellbeing and behaviour to the Commission:

> [T]he boys really, and girls react because they do respect their elders and I've seen that in all the years I've … been there … [A]fter their visit you can see some of the kids are a lot more friendly towards you. [44]

Despite the success of the program, detainees would benefit from an expanded program and more frequent, regular visits. Evidence provided to the Commission indicates that visits were 'random', that there were sometimes months between visits[45] and many detainees missed out on the program. Accommodation and meeting places should be provided that enable visiting Elders to stay for multiple days to deliver expanded programs.

Witness BR:

I did hear about there being a visiting elders program but I didn't see any of my elders. There were no elders from [home]. There was one Aboriginal guard.[46]

The Commission has heard that Aboriginal young people in detention would also greatly benefit from the program following through to post-detention support, however this is not currently funded as part of the program.

> We don't [follow up] quite often and we should do that more of, but it should become part of the elder's visiting program, I guess. You know, it should be ongoing as well as in Darwin, the prison, as well as the community because, like everything else, we would like to see a follow-up of any work that we have done here in Darwin and juvenile jail as well as in the community.[47]

It must be acknowledged that there are some challenges to expanding the program and increasing the frequency of visits. It can be difficult to bring Elders together at any one time.[48] Elders have other commitments in their communities.[49] One possibility raised during the Commission is expanding the program to also involve responsible people from Aboriginal communities.[50]

[43] Oral evidence of Dylan Voller, 20 April 2017, 2680.
[44] Oral evidence of Ian Johns, 28 March 2017, 2038.
[45] Oral evidence of Ian Johns, 28 March 2017, 2038.
[46] Exhibit 108.001, Statement of BR, 18 February 2017, 5.
[47] Oral evidence of Marius Puruntatameri, 31 March 2017, 2404.
[48] Oral evidence of Ian Johns, 28 March 2017, 2038.
[49] Oral evidence of Marius Puruntatameri, 31 March 2017, 2407.
[50] Oral evidence of Marius Puruntatameri, 31 March 2017, 2407.

The role of the Elders Visiting program as an oversight and complaint mechanism is further addressed in section 8.3.8.

Recommendation 75	That meeting the cultural needs of female detainees is made a first order priority.
Recommendation 76	That the Elders Visiting program is provided with adequate funding and administrative support services, including facilities to enable Elders to participate in cultural activities over days or extended stays with detainees.
Recommendation 77	That Elders work with young people on their reintegration into the community and Throughcare needs.

7 Care and needs of detainees

7.1 Physical and mental health of detainees

The vulnerable witnesses before the Commission and young persons in detention typically have disadvantaged backgrounds, experiences of trauma, complex health needs and social problems in common. In that context, the period of a child's detention will often be one of the few opportunities to identify some of their unmet or underserved health needs and initiate care.[1]

7.1.1 Aboriginal wellbeing

Approaches to care of Aboriginal young people in detention must acknowledge the importance of social and emotional wellbeing of Aboriginal people. NAAJA endorses the AMSANT submission that urges the Commission to acknowledge the centrality of Aboriginal worldviews and understandings of wellbeing to the experience of Aboriginal young people:

> The Commission's responses and recommendations should be particularly sensitive to the unique experience of social and emotional wellbeing … [which] encompasses domains of connection to culture, body, mind and emotions, land, family and kinship, spirituality and community. Understanding the implications of disruption and connection in relation to these domains is central to developing the capacity of staff, services and organisations involved in the child protection and juvenile detention systems to become trauma informed.[2]

7.1.2 Under-identification of disability for Aboriginal young people

The Commission has heard that there is a significant under-identification of disability among Aboriginal youths for factors of low awareness of disability, fear of discrimination and distrust of the system due to 'past practices of institutionalisation of children with disability.'[3] Some disabilities may be slow to emerge, be masked by cultural or linguistic differences or be difficult to detect without proper assessment.

Mr Scott Avery has advocated to the Commission that disability be an assumed factor for all young persons interacting with the youth justice system. This means individually supporting all Aboriginal children throughout the justice process with disability advocates. Additional steps should be taken by the youth justice and child protection systems to understand the causes of a young person's behaviour, such as comprehensive neurocognitive assessments, rather than disciplinary approaches that are likely to exacerbate those behaviours rather than resolve them.[4] Disability awareness training should be a part of the formal training package for detention centre staff.

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[1] Oral evidence of Professor Stuart Kinner, 23 March 2017, 1743.
[2] Aboriginal Medical Services Alliance Northern Territory, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2016, 13.
[3] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 5-6.
[4] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 8.

7.1.3 Hearing loss

There are far greater levels of conductive hearing loss among Aboriginal children than the general population due to the incidence of otitis media (middle ear infection). Studies have shown that those with hearing loss have significant academic and occupational performance, communication and interpersonal difficulties. In 2003, testing conducted on 10 youth detainees at Don Dale indicated that a high percentage suffer from ear infections – six detainees tested had current middle ear infection.[5]

Given the prevalence of ear infection and associated hearing loss, it is crucial that testing regimes and appropriate treatment and support is provided during all stages of criminal justice interaction. Dr Howard gave evidence to the Commission about the impact hearing loss can have in this setting:

> It adversely impacts on communication with police, in court and in correctional facilities. For example, in interviews and contact with police, a person with hearing loss may be misjudged and seen as non-compliant when in fact they are not hearing or understanding what is being asked of them, or put to them. Alternatively, they may agree to propositions put to them to end conversations they don't understand, without realising the consequences of this.[6]

The Commission has heard that it is common for a child to only have hearing loss that is first identified when they enter the youth justice system. However, it remains that there is a critical absence of interpreting services in the Northern Territory, with no programs in youth detention.[7]

7.1.4 Neurocognitive impairment

The Commission has heard that there are two major causes of disruption to neurological development for children in youth detention: foetal alcohol spectrum disorder (FASD) caused by foetal exposure to alcohol and psychological trauma caused by exposure to violence in early life.[8]

These causes of neurological impairment are typically the result of continuing disadvantage and intergenerational trauma.[9] While the physiological impact of the two conditions on the brain and nervous system is different, the Commission has heard that 'there are more similarities between the conditions than there are differences' and most young people diagnosed with FASD have experienced significant early life trauma.[10]

FASD

FASD results in persistent, multiple and varied behavioural and functional deficits that cause difficulty in almost all aspects of behaviour, the most common of which relate to executive functioning, attention and self-regulation. This may result in difficulties in interpreting information, and responding

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[5] Oral evidence of Dr Damien Howard, 13 October 2016, 250.
[6] Exhibit 025.001, Statement of Dr Damien Howard, 5 October 2016, 6.
[7] Exhibit 026.001, Statement of Jody Barney, 9 October 2016, 7.
[8] Exhibit 027.001, Statement of Professor John Boulton, 6 October 2016, 3.
[9] Oral evidence of Dr James Fitzpatrick, 8 December 2016, 533.
[10] Oral evidence of Dr James Fitzpatrick, 8 December 2016, 533.

to a situation thoughtfully and appropriately. People with FASD will often react impulsively and appear wilful and oppositional.[11] Problems with cognition may cause an affected person to have a reduced IQ and memory and thus may respond inappropriately to school expectations or court orders.

FASD is often undetected because children affected may have areas of relative strength such as being socially disinhibited, charming, affable and chatty. In a young child, these behaviours can seem normal; however, when the educational and social environments become more complex a gap appears. Affected children can fail to recognise complex social nuances and they become disconnected from peers. Similarly, increasing educational challenges may mean they start falling behind and don't respond to typical educational and behavioural support strategies.[12]

Psychological trauma

Experiencing prolonged stress at high levels in early life can impair the development of neural connections which can lead to lifelong difficulties in learning, behaviour and physical and mental health.[13] Children affected by trauma often have a narrow window of tolerance for arousal states, leaving them to frequently feel under- or over-stimulated. This can either manifest in dissociating or becoming aggressive and impulsive.[14] Early life trauma is associated with lower intellectual ability and a higher risk of self-harm, suicide and anti-social criminal behaviour.[15] Children affected are also at risk of long-term problems with interpersonal relationships, poor social skills, low self-esteem, increased oppositional behaviour, rule breaking and conduct problems, serious substance abuse, depression and anxiety.[16]

Prevalence of neurocognitive impairment

It is estimated that between 10 to 23 per cent of the people in correctional and forensic settings have FASD, and several studies have suggested that a disproportionate number of indigenous persons in incarceration have a diagnosis of FASD or are suspected of having FASD.[17] Unfortunately, there are difficulties establishing prevalence rates in the Northern Territory as there is no local data on the rate of neurocognitive impairment. The only Australian study of a detention population was recently conducted in the Banksia Hill Youth Detention Centre in WA and preliminary results indicate that between 30 and 40 per cent of youth in the centre had a diagnosis of FASD.[18] A 2012 report by the Children's Commissioner of England highlighted the significantly higher prevalence of a range of neurodevelopmental disorders affecting youth in detention in comparison to the general youth

[11] Oral evidence of Dr James Fitzpatrick, 8 December 2016, 531.
[12] Oral evidence of Dr James Fitzpatrick, 8 December 2016, 531.
[13] Exhibit 038.003, Annexure 2 – Joint Report - Dr James Fitzpatrick and Dr Carmela Pestell, 7 December 2016, [48].
[14] Exhibit 038.003, Annexure 2 – Joint Report - Dr James Fitzpatrick and Dr Carmela Pestell, 7 December 2016, [49].
[15] Exhibit 027.001, Statement of Dr John Boulton, 6 October 2016, 6 [36-38].
[16] Exhibit 038.003, Annexure 2 – Joint Report - Dr James Fitzpatrick and Dr Carmela Pestell, 7 December 2016, [46].
[17] Exhibit 038.003, Annexure 2 – Joint Report - Dr James Fitzpatrick and Dr Carmela Pestell, 7 December 2016, 2.
[18] '1 in 3 young people in detention has alcohol related brain damage', Telethon Kids Institute, March 2017 <https://www.telethonkids.org.au/news--events/news-and-events-nav/2017/march/1-in-3-young-people>.

population, with some disorders estimated to occur in up to 90% of the detention population. Further, it found 'significant evidence of comorbidity of distinct conditions'.[19]

Recommendation 78	That a study is commissioned to determine the prevalence of neurocognitive impairment of young people engaged in the child protection and youth justice systems.

7.1.5 Comprehensive health assessments on admission

The health assessments presently undertaken on admission are manifestly inadequate for ensuring the immediate and ongoing holistic health care of new detainees. Under the *Youth Justice Regulations*, intake assessments must be 'comprehensive'.[20]

The Commission has heard that these health assessments of detainees undertaken in the first 24-hour period are to exclude any 'acute illnesses that may compromise their care in detention, including mental health problems and substance withdrawal.'[21] Further assessments are then undertaken by a nurse by day five of admission into detention, including testing and questioning for communicable disease, chronic disease and pregnancy for female detainees.[22]

Mr Hamburger told the Commission that he was 'horrified' that these assessments may not occur for up to 24 hours or more after admission depending on availability of nursing staff.[23] His report found that this is 'unacceptable',[24] given that:

> Many people coming into custody could have a mental illness, they could have physical illnesses that could result in them being quite ill or dying, and so there has to be an immediate medical assessment.[25]

His report recommended:

> That the process for medical assessment for youth detainees on reception is addressed as a matter of urgency to mitigate the serious risk that currently exists. Additional funding may be required.[26]

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[19] Exhibit 020.001, 'Nobody made the connection: The prevalence of neurodisability in young people who offend', Children's Commissioner of England Report, see Chapter 2.
[20] See *Youth Justice Regulations* (NT), reg 57 where the Superintendent must ensure a comprehensive medical and health assessment is carried out on each detainee within 24 hours after the detainee's admission to the detention centre.
[21] Exhibit 092.001, Statement of Christine Connors, 20 February 2017, 3 [13].
[22] Exhibit 092.001, Statement of Christine Connors, 20 February 2017, 3 [15-17].
[23] Oral evidence of Keith Hamburger, 5 December 2016, 318.
[24] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 143.
[25] Oral evidence of Keith Hamburger, 5 December 2016, 318.
[26] Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 146.

There is no evidence before the Commission that the time frames of assessments have been reduced.

Recommendation 79	That initial health assessments take place immediately upon the detainee's admission.

The assessment does not test for FASD[27] or vision impairment[28] and has only recently begun to include hearing tests.[29] The hearing tests are a basic screening that gives a pass-fail mechanism; where a fail is recorded, a formal audiology assessment is undertaken later. NAAJA welcomes this step but notes that it has yet to be implemented in Alice Springs[30] and may not be provided for short stay detainees such as those on remand.[31] These shortcomings should be addressed urgently, so appropriate support and care can be provided for detainees with hearing loss, vision impairment, FASD and other neurocognitive impairment.

Christine Connors gave evidence to the Commission that the reason for not testing for FASD in detention is that the prevalence of FASD in Northern Territory is unlikely to be high and there is no Australian consensus for diagnostic criteria.[32] We submit that no weight should be given to this opinion to the Commission. Experts in FASD in Aboriginal communities, Dr Fitzpatrick and Dr Pestell, provided a report that indicates FASD and other neurocognitive impairment is likely to occur in high levels in detention in Northern Territory.[33] After a lengthy period of consultation, research and collaboration between medical researchers and experts, an Australian diagnostic guide for FASD was released in 2016 and endorsed by the Commonwealth Government.[34]

Key features of a best practice health assessment include:

- A culturally appropriate assessment, attended by an Aboriginal health practitioner, may mean that Aboriginal young people are more comfortable and provide more information. The Aboriginal health practitioner may be better able to advise on appropriate care.[35]
- It must be developmentally appropriate given the age of detainees and the fact that a significant number of detainees are likely to have intellectual disabilities.
- Families and community should be involved where possible so that practitioners can make a full assessment. This is particularly important to assess mental health and formulate any

[27] Oral evidence of Christine Connors, 16 March 2017, 1273.
[28] Oral evidence of Christine Connors, 16 March 2017, 1281.
[29] Oral evidence of Christine Connors, 16 March 2017, 1281.
[30] Exhibit 092.001, Statement of Christine Connors, 20 February 2017, 5 [27].
[31] Oral evidence of Christine Connors, 16 March 2017, 1272.
[32] Oral evidence of Christine Connors, 16 March 2017, 1273, 1280.
[33] "Regional birth prevalence has been reported as… 0.27 per 1000 live births in Western Australia compared to 0.68 per 1000 paediatric inpatients in the Royal Darwin Hospital, Northern Territory. Where data exist for Indigenous Australian populations, prevalence is between two and 100 times higher than in non-Indigenous communities. International data indicates that between two and five percent of the general population; and between 10 and 23 percent of people in correction and justice system settings have FASD." See Exhibit 038.003, Annexure 2 – Joint Report - Dr James Fitzpatrick and Dr Carmela Pestell, 7 December 2016, 17.
[34] Oral evidence of Dr James Fitzpatrick, 8 December 2016, 534.
[35] Oral evidence of Dr Mick Creati, 23 March 2017, 1732-1733.

mental health or behavioural management plan.[36] Where in child protection, better information sharing is needed so practitioners have access to any reports held on the child protection system.

Recommendation 80	That comprehensive assessments are undertaken on admission that span the young person's physical and mental health, including a neurocognitive and developmental assessment, vision and hearing. Further, these assessments should obtain information on the young person's exposure to trauma, vulnerabilities, English proficiency, family, first language and culture.

7.1.6 Health care in detention

Accessing medical care in detention

If a detainee wishes to make a medical appointment they must fill out a form and place it in the 'medical box'. The Commission has heard that detainees do not have access to the medical box while in isolation or at risk. In this situation, they must make the request to a Youth Justice Officer. Where they are at risk, young people generally have access to a professional only once a day, though even this wasn't always the case.[37] In our view, this situation is an inadequate level of access of medical care.

There is also considerable evidence that where young people did seek medical treatment through Youth Justice Officers, the Officers did not take medical concerns seriously or would not act upon their requests. For example, AM gave evidence that in November 2015 he put in three medical request forms before he could see a nurse about sore gums.

Witness BL:

I was sick while I was in Don Dale and I asked for a medical request form but they wouldn't give me one.[38]

Witness AG:

The staff at Don Dale did not seem to take health concerns raised by inmates very seriously. Often this would mean that medical conditions that could have quickly and easily been dealt with ended up being bigger issues than they needed to be.[39]

[36] Oral evidence of Dr Mick Creati, 23 March 2017, 1733-1734.
[37] Oral evidence of Christine Connors, 16 March 2017, 1274.
[38] Exhibit 272.001, Statement of BL, 1 March 2017, 8 [86].
[39] Exhibit 145.001, Statement of AG, 25 November 2016, 14 [69].

Several vulnerable witnesses told of the lack of coordinated provision of medication for detainees, including painkillers and medication prescribed by doctors.[40] Detainees often had to ask for their medication or it otherwise would not be provided.[41]

Proposed finding 7.1	There was inadequate access to medical care in detention.

Medical incidents in detention

Material before the Commission outlines serious or ongoing medical incidents that may have been prevented with adequate care from detention centre staff. These incidents indicate a pattern of neglect and extremely poor medical care for young people in detention. Detainees had repeated instances of ringworm infection due to sharing underwear.[42] Infections required hospitalisation because they were not attended to promptly.[43]

Witness AG:

In 2014, I got an [infection] and I struggled to eat. I told the guards but they did not believe me and they told me that I was not allowed to see the nurse. I had this [infection] for about three weeks. When I was finally provided with medical attention I was taken to the Darwin Royal Hospital where I needed to undergo surgery. My family was not informed by Don Dale that I was in hospital or that I needed surgery. I eventually managed to ring them from the hospital …

When I went back to Don Dale, I was still very sick. I threw up my painkillers but the guards did not believe me and they did not let me have any more. I was in a lot of pain because of this.[44]

Recommendation 81	That detailed policies and guidelines on best practice medical treatment and record keeping in detention are developed, implemented and regularly audited.

Mental health treatment

The Royal Commission has heard that mental health is 'probably the biggest health issue for young people in custody.'[45] Unfortunately, the overwhelming weight of evidence presented to the Commission suggests that appropriate support for young people was lacking, procedures were

[40] Exhibit 241.001, Statement of BV, 19 February 2017, [44]; Exhibit 123.001, Statement of AS, 22 February 2017, [61]; Exhibit 131.001, Statement of AF, 25 November 2016, 12; Exhibit 145.001, Statement of AG, 25 November 2016, [72-75].
[41] Exhibit 131.001, Statement of AF, 25 November 2016, 12.
[42] Exhibit 139.001, Statement of AB, 1 March 2017, [35].
[43] Exhibit 145.001, Statement of AG, 25 November 2016, 14-15 [70-71]; Exhibit 131.001, Statement of AF, 25 November 2016, [61]–[76].
[44] Exhibit 145.001, Statement of AG, 25 November 2016, 14-15 [70-71].
[45] Oral evidence of Dr Mick Creati, 23 March 2017, 1736.

inflexible and punitive, and Youth Justice Officers were neglectful or ill-equipped to help detainees with mental health issues.

Witness AU:

There was nobody else to talk to about being stressed, or sad or scared. Not the teachers or the management staff. I don't think I even thought to tell them or make a complaint. I didn't even know how.[46]

Witness BE:

Once things got really bad in the BMU and I told the guards that I wanted to kill myself. I remember telling a guard called … He said 'go ahead then, do it.' They didn't put me 'at risk'. They didn't arrange for me to talk to a doctor or to talk to family. That made me feel like no-one cared about me. It made me feel like hurting myself more.[47]

Witness AB:

The other detainees and I would get offered counselling occasionally but sometimes the guards would ask us in a group or when we were playing basketball or something. Sometimes I would say 'no' because I thought it was a sign of weakness. Sometimes the other detainees would tease each other about counselling. It was a bit shame to see a counsellor.

But there were times when I wanted to see a counsellor, like when my dad was really sick and then again after he passed away.[48]

When detainees were deemed at risk of harming themselves or others due to mental health concerns, they were placed in an isolation cell for up to 23 hours per day for up to three days. During this time, they had limited contact with family and may not have seen a psychologist or counsellor for up to 24 to 48 hours after being placed in the cell.

Evidence before the Commission demonstrates that this approach to mental health treatment does not conform to universal health care standards,[49] is inflexible and may further harm young people. This institutional approach to the risk of self-harm may prevent kids expressing their feelings about their mental health because the consequence is being isolated.[50] Furthermore, the Commission has heard that 'holding a child in isolation can then also exaggerate the behaviours'.[51]

[46] Exhibit 128.001, Statement of AU, 18 February 2017, 9.
[47] Exhibit 179.001, Statement of BE, 18 February 2017, 6.
[48] Exhibit 139.001, Statement of AB, 1 March 2017, 17.
[49] Oral evidence of Dr Mick Creati, 23 March 2017, 1740.
[50] Oral evidence of Dr Mick Creati, 23 March 2017, 1754.
[51] Oral evidence of Christine Connors, 16 March 2017, 1284.

While Youth Justice Officers placed detainees at risk where they are concerned by 'quite significant behaviour',[52] this approach to mental health management had no graduated response. Dr Creati argues that responses should be targeted to developmental level[53] and need to be graduated, as was in place at Parkville Youth Justice Centre:

> [I]f the kid was at high enough risk, we put the kid on continuous observation which just means looking through the door – not in an isolated room, in a normal room – so they can be eyeballed continuously, so it doesn't have to be segregated, but can be observed, to mitigate that risk.[54] … There needs to be a 'balance of "This kid hasn't died on my watch, we've mitigated the risk," versus support for that kid'.[55]

After-hours procedures for at-risk detainees require the detainee to be taken to the Emergency Department at the local hospital for assessment and review by the Psychiatrist Registrar because there is no medical practitioner rostered on for physical visits at these times.[56] Ms Connors stated that she doesn't 'think it is the best option for the young person'.[57] This also can be a barrier to youth detainees seeking help because they may not want to be taken to hospital.

The Commission heard there was no formal training for Youth Justice Officers in mental health issues.[58] Mental health training[59] including trauma training needs to be embedded in continuous professional development practices as well as initial training. The aim should be to build on the training: 'there's training and there's culture… and leadership… we just can't do the training if it's not enforced in the workplace.'[60] Self-harm policies and practices must be subject to regular review. This is further addressed in section 8.

Witness AG:

When we went at-risk the guards would just leave non-rip clothes for us and then no one would come and check on us at all other than to give us our meals. I don't remember having any access to a counsellor or a doctor. The only time that someone would come and see us was when they decided to take us off at-risk status. The doctor from the big house would come and ask us why we had gone at-risk. We would say we do not know and that we were not going to hurt ourselves and then that would be it, there would be no further follow ups. The doctors did not take me seriously and I always thought that they thought I was just messing around.[61]

[52] Oral evidence of Christine Connors, 16 March 2017, 1284.
[53] Oral evidence of Dr Mick Creati, 23 March 2017, 1740.
[54] Oral evidence of Dr Mick Creati, 23 March 2017, 1737.
[55] Oral evidence of Dr Mick Creati, 23 March 2017, 1753.
[56] Exhibit 092.001, Statement of Christine Connors, 20 February 2017, 8 [46].
[57] Oral evidence of Christine Connors, 16 March 2017, 1277.
[58] Oral evidence of Christine Connors, 16 March 2017, 1283.
[59] Oral evidence of Christine Connors, 16 March 2017, 1276.
[60] Oral evidence of Dr Mick Creati, 23 March 2017, 1752.
[61] Exhibit 145.001, Statement of AG, 25 November 2016, 9 [45].

Witness AY:

I would go 'at risk' after being in the back cells for a long period of time (6 days sometimes). I did this because I was feeling frustrated and sad and wanted the bad things at Don Dale to stop. I would say 'I'm going to kill myself' and threaten to tie a shirt around my neck. Within a few minutes around 5 male guards would come and take me down, they would strip me naked and take everything from my cell.

Normally the doctor would have to be called and would come right away but sometimes I would be left like this 'at risk' for two to three days at a time. I think this happened because the guards would deliberately not call the doctor for a while. I would just have to wait. I would have to stay in my cell with no clothes. When food came I would have to eat with my hands because I wasn't allowed to have plastic cutlery. Sometimes the good guards would come and check on me in person. Other times I was just left alone in the cell.[62]

Witness AB:

There were lots of hanging points in the regular rooms or cells. A lot of the fellas in there have found ways to hang themselves. I have been there when people have tried… If anyone tried to hang themselves, everyone would hear about it. Word would spread through the detention centre.[63]

Being put 'at risk' means that you are a risk of harming yourself. After being put in the BMU, being put 'at risk' was the worst because you would get put in a cell in HDU (High Dependency Unit) by yourself with those little shorts on. They keep you in there until you get reviewed by a psych. You get let out throughout the day for an hour or so to get some yard time and to have a shower. When you are let out into the yard, usually you are by yourself expect for the guards but sometimes you get to mingle with other detainees. You would see a psych once after being placed 'at risk' for an assessment so you can get out. Being at risk is kind of like being in the BMU because you would be put in a room all day and only get to come out for an hour.[64]

Proposed finding 7.2	That there was inadequate staff training and responses to the mental health needs of detainees.
Proposed finding 7.3	That procedures were wholly inappropriate and inadequate for meeting the mental health needs of detainees, including use of isolation for young people deemed at risk.

Recommendation 82	That treatment of children deemed at risk must align with international best practice and human rights obligations.

[62] Exhibit 341.001, Statement of AY, 28 February 2017, 6 [29-30].
[63] Exhibit 139.001, Statement of AB, 1 March 2017, 13 [93].
[64] Exhibit 139.001, Statement of AB, 1 March 2017, 13 [96].

Facilities for drug withdrawal

Anecdotal evidence before the Commission indicates that drug use and associated withdrawal issues are becoming more prevalent among the detainee population.[65] To address this, safe procedures and facilities for drug withdrawal must be provided to detainees. However, evidence suggests that this is not the case.

Mr Caldwell gave evidence that a young person was withdrawing from the effects of ice on his admission to Don Dale in March and June 2014 and was left in the BMU on both occasions.[66] There was no drug detox regime in place at the centre and it is unknown whether the young person was provided with medical treatment in those circumstances.

Proposed finding 7.4	There was no policy, process or program developed to deal with drug withdrawal and rehabilitation.

Recommendation 83	That a dedicated detox facility and appropriate medical treatment is available to support young people with drug withdrawal and rehabilitation.

7.1.7 Continuity of care

The Commission has heard that achieving continuity of care is one of the major challenges for care in detention, as 'young people cycle in and out of detention, which means cycling in and out of two totally different health systems that don't talk very well to one another.'[67]

Information sharing

Improved information sharing between services is needed to achieve a holistic and coordinated approach to the care of young people in detention. Medical information is currently recorded on the primary care information system (PCIS), for medical records. The database does not include information gathered from the case management, child protection or education systems, even though that would be 'incredibly useful'.[68]

Coordination with external health services

Professor Kinner's evidence to the Commission is that the best engagement and retention of care, and health outcomes, are achieved with an in-reach model of care that enables young people to develop a rapport with providers in the community.[69]

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[65] Oral evidence of Sally Cohen, 24 April 2017, 2796.
[66] Oral evidence of Russell Caldwell, 29 March 2017, 2153.
[67] Oral evidence of Professor Stuart Kinner, 23 March 2017, 1739.
[68] Oral evidence of Christine Connors, 16 March 2017, 1268.
[69] Oral evidence of Professor Stuart Kinner, 23 March 2017, 1743.

People in detention are currently excluded from Medicare, NDIS and the pharmaceutical benefits scheme, so community controlled health services can't provide bulk billed services in detention.[70] This may contravene the *Mandela Rules* which state:

> Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.[71]

The Commission should consider options like the NSW Waratah Pre-Release Unit as a model to improve transition planning and continuity of care. The Waratah model is based on active participation, where young people engage in their exit planning and link with family and any relevant services. The Unit allows them to begin engaging in their exit plan while still in custody so they are supported while any issues are resolved.[72]

Recommendation 84	That there is a system of care that would include in-reach programs and pre-release transition planning to improve continuity of care for detainees.

7.2 Access to programs

Programs in detention are critical to promoting rehabilitation in accordance with the objectives of the *Youth Justice Act*. Dr Creati described to the Commission the twin aims of therapeutic programs in detention:

> You want to normalise, to the developmentally appropriate model, what a kid in the community would be doing, (1) for the mental, social, and emotional wellbeing and (2) to make that transition back to the community easier.[73]

It is important then that a suite of programs is developed that caters to these needs of all young people in detention. We understand that the Commission has visited other youth justice facilities and seen the benefits of a range of programs including sports, mentoring, yarning circles, TAFE, paid employment, work experience and community service. These and other best practice programs should be considered as part of a holistic approach to rehabilitation in youth detention in the Northern Territory.

Recommendation 85	That a comprehensive suite of programs is developed to cater for the mental, social, and emotional wellbeing of detainees and that best assists their transition to the community.

[70] Oral evidence of Professor Stuart Kinner, 23 March 2017, 1747.
[71] United Nations Standard Minimum Rules for the Treatment of Prisoners ('Mandela Rules') UN Doc E/CN.15/2015/L.6/Rev.1, rule 24.
[72] Oral evidence of Leilani Tonumaipea, 12 May 2017, 3870.
[73] Oral evidence of Dr Mick Creati, 23 March 2017, 1750.

7.2.1 Access

In 2015/16, about 70% of children and young people in detention were being held on remand.[74] This provides specific, but not insurmountable, challenges for provision of therapeutic, school and community legal education programs.

These challenges are currently not being met by the detention program framework, with patchy access to services often determined by when a young person happens to be detained. For example, the Elders Visiting Program (further discussed in sections 6.4.5 and 8.3.8) is run infrequently, so some young detainees will invariably not have this important contact. Even more concerning is that female detainees typically had access to fewer programs, which is further discussed in section 3.7.[75]

Remand detainees don't have access to many services and specialist treatment programs until they are sentenced, such as the Sex Offender Treatment Program. Other successful support programs like Adam Drake's Balanced Choices program have not been funded to provide ongoing mentoring support on release.

Mr Hamburger states that the current system isn't constituted to deal with high detainee population turnover due to remand. He provided the example of illiteracy rates of young persons in detention, pointing out that it is impossible to teach reading and writing in a short period of time.[76]

Given the patchy and poorly resourced access to programs, NAAJA and other NGOs have stepped in to fill the vacuum:

- NAAJA employee Terry Byrnes established the Serving Thyme program, a weekly cooking class for detainees that makes use of an abandoned industrial kitchen at Don Dale. The program is enjoyed by the detainees and provides them with new life skills.[77] The program is dependent on volunteers and receives no reliable funding.
- In collaboration with Indigenous Hip Hop Projects, NAAJA produced a music video called 'Break the Cycle'. It involved a weeklong intensive workshop with young people in the Don Dale Youth Detention Centre to create a legal education music video. This provided young people with the opportunity to undertake a therapeutic music program that would otherwise not be available to them.[78]
- NAAJA operates an Indigenous Throughcare project which aims to provide intensive pre- and post-release rehabilitation and reintegration services for Aboriginal prisoners from the Darwin Correctional Centre and Don Dale Juvenile Detention Centre. See section 0.

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[74] Northern Territory Department of Correctional Services, *2015-16 Annual Report*, Northern Territory Government, Darwin, 2016, 56.
[75] Exhibit 159.001, Statement of AN, 17 February 2017, 11; Exhibit 152.001, Statement of Saki Muller, 10 February 2017, [24]; Exhibit 131.001, Statement of AF, 25 November 2016, [53]; Oral evidence of Saki Muller, 24 March 2017, 1772:25, 1773:5; Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions" [REDACTED], 31 July 2016, 142; Oral evidence of Keith Hamburger, 5 December 2016, 317:5–15; Oral evidence of Greg Harmer, 24 March 2017, 1775:10–15.
[76] Oral evidence of Keith Hamburger, 6 December 2017, 434.
[77] Oral evidence of BY, 16 March 2017, 1197.
[78] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 52.

Witness AG:

When you were in Don Dale, you were given a caseworker who would help you out with things like visits with family, getting phone numbers put on the system and also, if you were sentenced, setting up programs for when you left Don Dale. These would start the day you left.

If you were only there on remand, then they would not set up programs for you, they just sent you out.[79]

Witness AB:

I did genuinely want help and I remember lots of people coming to see me when my dad passed away but I can't remember ever seeing a counsellor or therapist on an ongoing basis. That's always been the way in Darwin, people tell you they are going to come and see you, like, in a week but then they never come back.[80]

Witness BV:

I think that there needs to be more programs at Don Dale… My favourite program is the one that Adam Drake runs. He gets us to work out but also talks to use about how to change our lives to stop coming back to Don Dale. Adam is a really good bloke who makes you feel good about yourself. I also really liked it when the Aboriginal basketball player came in and talked to us about our goals. These programs are good because they make you feel good and think about what you are going to do with your life.[81]

Recommendation 86	That young people on remand are provided access to pro-social activities and programs.

7.2.2 Counselling

Evidence from several former detainees reflected on the value that they placed in having a consistent and caring relationship with their counsellor or caseworker. These witnesses believed it was important to feel comfortable and to have consistency of care. It is important that a counsellor gets to know a young person, to address their issues holistically and to be able to see change over time.

Witness AF:

While I was on bail or my suspended sentence, I had a couple of different caseworkers from Corrections … One of those workers was [worker]. I got on well with him and I think he did a good job because he really listened to me and was supportive. He would also make fair recommendations to the magistrates

[79] Exhibit 145.001, Statement of AG, 25 November 2016, 18.
[80] Exhibit 139.001, Statement of AB, 1 March 2017, 19 [131].
[81] Exhibit 241.001, Statement of BV, 19 February 2017, 12.

on my behalf. He was working with me for a while, but that ended when he got another job outside of Corrections.[82]

Witness AG:

Sometimes early in my time at Don Dale there would be the DAISY rehab program that came in and would speak to us. The program was ok but I thought that it was a bit shit how they could never really come back often enough for it to work. When they did come back, there would be different counsellors which made it hard for the program to work well.[83]

Witness AF:

I think the drug and alcohol counselling I got in the Old Don Dale was the best counselling I received. This was because it was group counselling with my friends and other inmates, where we all talked together about these things. It was good to see the other girls' experiences. They did not do this sort of thing at the new Don Dale.[84]

Witness AM:

I was eventually able to see a drug counsellor … from the DAISY program out of CatholicCare, but this only happened one day a week … I think this would have been very beneficial for me if I was able to see a counsellor earlier and more often throughout my time in Don Dale. I think it would have been a good opportunity to try and better myself within this environment, but instead while I was waiting to see a counsellor, I felt like they just left me to rot in those cells. The time it took for me to see a counsellor made me feel like it did not seem to be any intention by the guards or anyone in the Don Dale system to try and help us make our lives better.[85]

7.2.3 Throughcare

NAAJA operates an Indigenous Throughcare project that provides intensive pre- and post-release rehabilitation and reintegration services for Aboriginal prisoners from the Darwin Correctional Centre and Don Dale Juvenile Detention Centre. The project provides strength-based case management and referral services for individual prisoners to assist them with accessing opportunities when they are released from prison by addressing their diverse transitional needs including rehabilitation, accommodation, employment, education, training, health, life skills, reconnection to family, and community and social connectedness.

The program today has 13 staff, including two prison-based Throughcare Support Workers who help clients with parole and access to services to assist with their reintegration, and seven Palmerston-based Intensive Case Managers who help clients prepare to leave prison and support them once they

[82] Exhibit 131.001, Statement of AF, 25 November 2016, 19.
[83] Exhibit 145.001, Statement of AG, 25 November 2016, 2.
[84] Exhibit 131.001, Statement of AF, 25 November 2016, 20.
[85] Exhibit 270.001, Statement of AM, 11 February 2017, 13.

are released. The program is funded by the Commonwealth Government and the Healing Foundation established out of the Closing the Gap strategy.[86]

The program has been shown to reduce rates of recidivism. The program has provided support to 752 clients (both youth and adult), and only 105 (14%) of them have been returned to custody while in the Throughcare program.[87]

Witness AB:

I don't think that there were sufficient supports put in place for me for the times that I got out of Don Dale. The only things put in place are around when you get put on parole or when the Court makes you do stuff as part of your bail. If you just finish your sentence, there is nothing …

I do think it would have helped to have supports in place. I think it would be good to have someone help set you up on the outside. Like, refer you to school, employment, or wherever it is that you want to go. They should ask you what you want to do when you get out and then put things in place to help you get there.[88]

Witness BE:

When I would get out of Don Dale I was always stressed and angry… I had no money – I was not on welfare and didn't know how to get on to welfare. I used to go stealing to get money … It made me feel so bad.[89]

Witness BZ:

My impression was that a number of agencies would promise a lot of support to AJ when he was in prison, but when he got out, for one reason or another, the services did not follow. I attended meetings in Don Dale with AJ, people from DCF, other community workers and the female superintendent that I mentioned above. They said that they would give him some accommodation options, they would get him some clothes, they would help him find a job. But when he got out, either AJ would not hear from them or he would disengage from their services due to a breach of his trust.[90]

Recommendation 87	That there is further investment in Throughcare services and associated primary support services as a priority.

[86] Exhibit 378.001, Statement of Thomas Quayle, 21 April 2017, 2.
[87] Exhibit 378.001, Statement of Thomas Quayle, 21 April 2017, 6.
[88] Exhibit 139.001, Statement of AB, 1 March 2017, 12-13.
[89] Exhibit 179.001, Statement of BE, 18 February 2017, 8-9.
[90] Exhibit 136.001, Statement of BZ, 20 February, 9.

7.2.4 Specialist drug and alcohol rehabilitation programs

There are examples in the Northern Territory of culturally relevant, effective alcohol rehabilitation programs. However, most of these services are poorly funded, have huge waiting lists, do not adequately cater for young people, or persons with dual diagnoses (i.e. mental health issues), are not youth specific and are typically only located in the major centres.

The Northern Territory Government has not acted on repeated submissions to establish specialist drug and alcohol treatment options for kids in the Top End. The only specialist option is Bush Mob in Central Australia, which is inappropriate for a lot of Top End children to have to travel so far from their family and country.

Witness AM:

I did a rehabilitation program down at Bushmob Aboriginal Corporation (which I call Bushmob). I believe I got a really good report from them.

I thought it was a really good program. This is because the people who ran it were good to talk to and seemed to be really good at their job. I felt like the things were talked about really made sense to me.[91]

Witness BE:

In 2013, I was asked if I would try CAAPS to talk about drug and alcohol issues and I was keen to do that. Later I learnt that I wasn't eligible to go because I was too young. I think it's a shame that they didn't have any drug or alcohol courses I could do, because that would have really helped me. When I went back [home] after being in Don Dale, I would start drinking or using drugs again.

I have learned from the other kids about Bush Mob and that sounds really good to me, because I love animals and horticulture and plants and cutting trees and growing things. My lawyers who are taking this statement told me that there is a report that was done for me around 2013 that says Bush Mob was full around that time. I didn't know that.[92]

Recommendation 88	That a dedicated residential treatment facility for disengaged and marginalised Aboriginal young people, controlled by a local Aboriginal organisation and supported by local Elders and community members, is funded to operate in the Top End as a priority.

[91] Exhibit 270.001, Statement of AM, 11 February 2017, 18.
[92] Exhibit 179.001, Statement of BE, 18 February 2017, 8.

8 Internal and external oversight

8.1 The importance of strong oversight mechanisms

Strong oversight mechanisms are a crucial part of promoting accountability and safeguarding the rights of young people in detention in the Northern Territory. Proper mechanisms should be founded on strong governance, good risk management, and continuous improvement.[1]

NAAJA has longstanding concerns about the lack of effective oversight of custodial facilities in the Northern Territory and has advocated for the introduction of an independent custodial inspector with robust powers to access detention facilities and to access records, young people and staff.

8.2 Current oversight mechanisms are inadequate

There was general acceptance by a number of witnesses appearing before the Commission that the current oversight mechanisms for youth detention are insufficient and need to be more robust.[2] The Commission also heard there is confusion because responsibility for oversight is divided between several different bodies.[3]

The National Children's Commissioner, Megan Mitchell, summarised the current problems with oversight mechanisms as follows:

> The Northern Territory tends to rely on the children's commissioner and the Ombudsman as the main independent bodies in terms of oversight … However, it's not explicitly stated in the laws that establish them that they are allowed to have unfettered access to all areas [of the facility] … and to all children and young people. Nor to all the information that the department of facility might hold … [including] things like registers of use of force, critical incidents, use of isolation.[4]

Commissioner Mitchell identified that the biggest failing in the current oversight regime is the lack of routine access to these records, so that systemic patterns and issues can be identified.[5] The *Havana Rules* call for inspectors to have access to all records and unrestricted access to all staff and young people in the facility.[6] The Committee on the Rights of the Child has called for independent inspectors to be empowered to conduct regular and unannounced inspections, including speaking with children confidentially as part of this process.[7] The *Havana Rules* also require independent, qualified inspectors who can conduct inspections on a regular basis and undertake unannounced inspections of their own initiative, with unrestricted access to staff, young people and records.[8]

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[1] Oral evidence of Keith Hamburger, 5 December 2016, 375:7-10.
[2] See, for example, oral evidence of John Elferink, 27 April 2017, 3192:26-31; oral evidence of Megan Mitchell, 11 October 2016, 31:17-18.
[3] Oral evidence of Megan Mitchell, 11 October 2016, 40:41-43.
[4] Oral evidence of Megan Mitchell, 11 October 2016, 29:39-47.
[5] Oral evidence of Megan Mitchell, 11 October 2016, 30:2-7.
[6] Exhibit 4, Statement of Megan Mitchell, 9 October 2016, 14 [68].
[7] Exhibit 4, Statement of Megan Mitchell, 9 October 2016, 14 [67].
[8] Exhibit 006.001, Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules'), rule 72.

The Commonwealth Government ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) during the course of the Commission's inquiry is a welcome development. This will ensure the Commonwealth establishes National Preventative Mechanisms that enable detention facilities to be regularly inspected by independent bodies with the right to access information and conduct private interviews. However, as set out below, it is important that oversight mechanisms across the system are further strengthened.

Proposed finding 8.1	That current internal and external oversight of detention facilities is wholly inadequate and has proven unable to protect the rights of children and young people within those facilities.

8.3 Strengthening oversight of detention facilities

[redacted]

[redacted]

8.3.2 Professional Standards Unit

The Department of Correctional Service's Professional Standards Unit (PSU) is responsible for audits, staff misconduct investigations, critical incident investigations and facility inspection. Evidence before the Commission suggests there were serious limitations to the PSU's ability to provide adequate oversight. For example, there was no audit of Behavioural Management Plans, there was no ability to commence an own motion investigation, and PSU investigations would cease once a matter was referred to police.[15] In the context of detention, where a high level of duty of care is owed to young people in the Department's care, these inadequacies are concerning.

The Children's Commissioner also told the Commission that the youth detention system is lacking any real quality control over critical decisions:

> One is the current auditing that occurs within the agency itself. I don't see that's robust enough. At times I'm not sure there is any auditing that occurs. And any oversight in addition to that, there's … currently no provision to oversight and that needs to be – that needs to occur almost, you know, immediately that those critical decisions that are made that impact on the rights of young people, there has to be some independent oversight of those decisions and the rationale for those decisions.[16]

David Ferguson, Director of Professional Standards, gave evidence that he didn't realise the BMU was being used to detain children for periods longer than they should have been kept, nor did his audit process 'or anything in his mandate for 2014 and 2015' identify mental health concerns for these children.[17] Mr Ferguson also had no knowledge of allegations made by witness AT in May 2015 to the then Department of Children and Families that Youth Justice Officers at Don Dale Youth Detention Centre had assaulted children, encouraged young people to fight each other and filmed a detainee in the shower.[18] Mr Ferguson acknowledged that allegations of such a serious nature should have come to his attention.[19]

Jeanette Kerr told the Commission that since youth justice has become the responsibility of Territory Families, the function previously performed by the PSU has been outsourced or conducted through Territory Families' governance area. Ms Kerr told the Commission that Territory Families is 'in the process of recruiting and implementing an operational support area that will have an area independent that will work across child protection and youth justice and other internal matters.'[20]

[redacted]

[15] Oral evidence of David Ferguson, 23 March 2017, 1726:7-9, 16; 1817:20.
[16] Oral evidence of Colleen Gwynne, 12 October 2016, 137:35-41.
[17] Oral evidence of David Ferguson, 24 March 2017, 1838:39-1840:2.
[18] Oral evidence of David Ferguson, 24 March 2017, 1838:20-26.
[19] Oral evidence of David Ferguson, 24 March 2017, 1838:27.
[20] Oral evidence of Jeanette Kerr, 8 May 2017, 3538:10–15.

It is crucial that Territory Families establishes robust internal auditing and investigation mechanisms as soon as possible. These processes should delineate between child protection and youth justice functions. Detention centre processes and practices should be reviewed at regular intervals.

Establishment of any future system should consider the adoption of the NSW Juvenile Justice Centres Continuous Improvement Quality Assurance Framework Guide, which was recommended by the Vita Report. The framework assesses a range of measures including physical, psychological and emotional wellbeing of detainees; social, cultural and educational development of detainees; general control and management of the detention centre; and the conditions of the facilities.[21] Input should be sought from young people in detention, staff, stakeholders including NGOs, and official visitors to the centres.[22] In NAAJA's view, family members and Elders should also play an important part in ongoing quality assurance processes by being given an opportunity to provide feedback. This is discussed further below.

Recommendation 89	That Territory Families ensure there is robust internal auditing and investigatory processes for youth detention facilities and that these processes are based on international and national best practice.

8.3.3 Official Visitors Program

The Official Visitors Program is established under s 169 of the *Youth Justice Act*. Official Visitors are appointed by the Minister and must visit detention centres at least once every month to inquire into the treatment, behaviour and conditions for detainees.

Official Visitors are not independent of Government and do not have unrestricted access to facilities, detainees or staff. The Commission has heard concerns about the extent to which Official Visitors' functions have been performed.[23] Former Minister for Correctional Services John Elferink agreed that the reports he received from Official Visitors did not adequately identify or address the extent of the problems facing youth detention centres.[24]

In its present form, the Official Visitors Program is not sufficiently robust to ensure adequate oversight of detention facilities. NAAJA recommends the introduction of a Community Visitors Program to fall under the purview of an Aboriginal Children's Commissioner (see section 8.3.6), or the Children's Commissioner. Community Visitors should have expanded powers including the power to visit detention facilities without notice and the power to inspect documents.[25] Community Visitors should report on matters such as the appropriateness and standard of facilities, the adequacy of information provided to young people in detention and their family/guardian, the effectiveness of the complaints process and adequacy of information provided to young people about it, and staff treatment of young

[21] Exhibit 024.024, Review of the Northern Territory Youth Detention System, January 2015, 34.
[22] Ibid.
[23] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 71 [347]; oral evidence of Kenneth Middlebrook, 28 April 2017, 3354:4–16.
[24] Oral evidence of John Elferink, 27 April 2017, 3192:27–31.
[25] The Commission could have regard to models in other jurisdictions such as the Community Visitor Program established under the *Public Guardian Act 2014* (Qld).

people. Further, there should be specific provision for the appointment of Aboriginal visitors to ensure the needs and concerns of Aboriginal children in detention are adequately addressed.

The introduction of a robust Community Visitors Program to protect the rights of children in detention has broader application. As in other jurisdictions, Community Visitors should also have the power to visit children in foster, kinship and residential care to ensure they are safe and supported. NAAJA would welcome the opportunity to provide further submissions on this aspect of the Community Visitors Program during the child protection phase of the Commission's inquiry.

Recommendation 90	That the current Official Visitors Program be replaced with a Community Visitors Program established under an independent authority such as the Commissioner for Aboriginal Children and Young People. Further, that that there should be Aboriginal identified positions within the Community Visitors Program.

8.3.4 Complaints handling

Under s 163(1) of the *Youth Justice Act*, a young person in detention, or a responsible adult in respect of that young person, may complain about a matter that affects the young person. The *Youth Justice Regulations*[26] sets out the procedure for making complaints and provides, among other things, that the member of staff who receives the complaint must forward the complaint to the Superintendent without delay, and the complaint must be addressed by the Superintendent as soon as practicable.

A young person's right to make a complaint while in detention is also enshrined in the *Havana Rules*.[27] Best-practice standards for complaint procedures are set out in the AJJA Standards for Juvenile Custodial facilities which provide that centres should provide young people with 'clear, accessible and fair avenues for lodging and resolving complaints and grievances, and with the opportunity to appeal decisions.'[28]

Evidence before the Commission indicates that the mechanisms in place were not sufficient to adequately address complaints made by young people.

Witness AB:

If I wanted to make a complaint in Don Dale, I was given a coloured piece of paper with space to write my name and the reason for the complaint. I would just hand it to the guards after writing it but I don't know what was supposed to happen with them. The other detainees and I would joke that they would get chucked straight in the bin because it felt like we never heard back.[29]

[26] Regulation 66(4),(7) provides further young people must be assisted by a member of staff to make a written complaint if they cannot do so themselves and that a young person making the complaint must be informed of the outcome of his or her complaint.
[27] Exhibit 006.001, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, rules 75, 76.
[28] AJJA Standards for Juvenile Custodial Facilities, s 2.7.
[29] Exhibit 139, Statement of AB, 1 March 2017, 8 [55].

Witness AM:

I asked for complaint forms a number of times, but a lot of the time [the guards] did not provide me with them. The guards said that they would go and get one for me. After a while I would ask again, but the same thing would happen and I would not get the form. In the later times I was in Don Dale, the guards would tease me and would say why you don't make a complaint. I also asked to speak to the person that was in charge, but nobody came to speak to me to allow me to discuss my concerns.[30]

Witness BV:

I wrote down a complaint about the guard not giving me a cup of water and gave it to a guard. I cannot remember whether it was the same guard or a different guard. The guard took the form from me without saying anything. I thought he would give it to his boss and his boss would then read it.

The next day, I found my complaint in a rubbish bin in K-Block. This made me really angry and upset and I went off. I was trying to do the right thing by making a complaint and the guard just chucked it out. It made me feel like no one listened to me or cared about me and as if there is no point even trying.[31]

This evidence demonstrates a complete disregard by staff and management for the legitimate concerns of young people about their treatment and conditions in detention.

In the case of witness BL, his lawyer submitted a complaint to the Department in 2015 regarding an incident where a guard allegedly kicked BL in the face giving him a black eye.[32] Commissioner Middlebrook refused to investigate the complaint, as he accepted the accounts given in the existing incident reports.[33] The handling of this complaint is an example of the Department's wholly inadequate treatment of complaints more broadly. The Department owed a duty of care to BL. His allegations were of a serious assault and warranted investigation to determine whether there had been any wrongdoing. Even if there had not been criminal wrongdoing, an investigation might have revealed that disciplinary action should have been taken against the YJO involved, or it may have pointed to broader systemic failings that needed to be addressed to ensure that young people were treated appropriately.

In NAAJA's submission, there is sufficient evidence before the Commission to support a finding that the internal complaints system was wholly inadequate.

In addition to complaints under the *Youth Justice Act*, detainees could also make complaints to the Children's Commissioner, the Ombudsman and the Official Visitor (addressed in section 8.3.3). However, the Commission heard that young people were not aware they could make complaints to these bodies.

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[30] Exhibit 270.001, Statement of AM, 11 February 2017, 8 [36].
[31] Exhibit 241.001, Statement of BV, 19 February 2017, 9 [55]–[56].
[32] Exhibit 272.000, Statement of BL, 1 March 2017, 4 [50].
[33] Exhibit 272.001, Annexure A to the statement of BL, [redacted] 2015.

Witness AG:

When I first went to Don Dale, I didn't realise that if I had a complaint about what was happening, I could talk to the Ombudsman or the Children's Commissioner. It was about 2 years after I first went in when they started putting up signs next to the phone with the numbers of those kinds of people.[34]

Witness AF:

I didn't know that if we had a complaint we could take it to the Children's Commissioner or the Ombudsman … The guards did not have their numbers next to the phone which is what I understand they have at the adult prison.[35]

Commissioner Mitchell told the Commission that on her visit to Don Dale, many young people were concerned that if they complained there would be retribution by the staff.[36] Ms Gwynne gave evidence that 'there has certainly been young people who have expressed concerns about being targeted, from time to time, by staff there.'[37]

Young people in detention are clearly vulnerable and there is a significant power imbalance between detainees and staff. There are also significant barriers for young people making complaints. There must be mechanisms for young people in detention to complain about their treatment and conditions and whereby their complaints are addressed promptly and fairly, without fear of retribution. Complaints processes should be easy to understand and clearly communicated to detainees upon induction, taking into account their language and literacy skills. Staff should be trained in complaints procedures, including the right of detainees to make complaints.

Proposed finding 8.2	That there were systemic and individual failures resulting in inadequate and inappropriate investigations and responses to internal complaints.

Recommendation 91	That all children in detention are informed of their right to complain, and they are assisted to do so where necessary.
Recommendation 92	That Territory Families review its internal complaints system and ensure it complies with the AJJA Standards for Juvenile Custodial Facilities and international standards.

8.3.5 The Children's Commissioner

Under the *Children's Commissioner Act 2013*, the Children's Commissioner can investigate complaints about services received from 'vulnerable children', which includes children in the child protection

[34] Exhibit 145, Statement of AG, 25 November 2016, 14 [66].
[35] Exhibit 131, Statement of AF, 25 November 2016, 17 [92].
[36] Oral evidence of Megan Mitchell, 11 October 2016, 29:23–24.
[37] Oral evidence of Colleen Gwynne, 12 October 2016, 137:12–14.

system, disability services, and mental health services and youth justice.[38] The Children's Commissioner can also initiate own motion investigations on matters that may form the grounds for making a complaint.[39]

The Children's Commissioner does not have powers under the Act to permit unfettered access to detention facilities, children, staff or records. Ms Gwynne identified that the requirement to make a formal request to meet a vulnerable child that specifies a time and place for contact can cause delays, which is especially problematic where there may be urgent safety concerns.[40] This is a significant limitation on the ability of the Children's Commissioner to provide adequate oversight.

Significant cultural change is also required. Former Children's Commissioner Dr Bath observed that youth detention centre culture presented a challenge when conducting his reviews:

> My experience of youth detention was that there was a strong culture of resisting external oversight and accountability and seeking to do no more than the minimum necessary to assist external reviews. When I examined witness reports from corrections staff, it appeared to me that they had sometimes sought to collaborate in defending other staff, even when that evidence was plainly inconsistent with objective evidence such as surveillance footage.[41]

NAAJA has advocated for the establishment of an independent body to have unfettered access and oversight of custodial facilities to ensure the rights of Aboriginal people in detention are safeguarded. The Office of the Children's Commissioner should be required to report to Parliament, and these reports should be published on a website, together with Government responses. The reports should be quarterly, respond to established criteria, and a summary of the report (including data on use of force) should be made public. Publication of this information will enhance public scrutiny of these practices.

8.3.6 Commissioner for Aboriginal Children and Young People

In order to strengthen oversight mechanisms for Aboriginal children and young people, NAAJA recommends that the *Children's Commissioner Act 2013* be amended to establish the position of Commissioner for Aboriginal Children and Young People. The Commissioner for Aboriginal Children and Young People would be a Co-Commissioner under the Act to ensure that the rights of Aboriginal children and young people in detention are protected and promoted.[42]

An Aboriginal Children's Commissioner is best placed to address the unique needs and concerns of Aboriginal children and young people. Muriel Bamblett told the Commission that the Commissioner for Aboriginal Children and Young People in Victoria receives an overwhelming number of complaints and concerns from the Aboriginal community, and that his work far outweighs that of the rest of the

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[38] *Children's Commissioner Act 2013* (NT), s 10.
[39] *Children's Commissioner Act 2013* (NT), s 10.
[40] Oral evidence of Colleen Gwynne, 12 October 2016, 129:1–11.
[41] Exhibit 011.001, Statement of Howard Bath, 5 October 2016, [99b].
[42] NAAJA notes that regard could be had to the Victorian model where a Principal Commissioner for Children and Young People and an Aboriginal Commissioner for Children and Young People have been appointed.

Commission, which speaks to the importance of having an Aboriginal person representing the needs of Aboriginal children.[43]

Establishing an Aboriginal Commissioner who is empowered to initiate own motion investigations, including into child protection and out-of-home care practices, has relevance to other aspects of this Commission's inquiry. The role of Commissioner would ensure the development of child protection policies and practice is culturally relevant and builds on the strengths of Aboriginal culture. We would welcome the opportunity to address these aspects of the Aboriginal Commissioner's role in further submissions.

Recommendation 93	That the Northern Territory Government amend the *Children's Commissioner Act 2013* (NT) to establish the position of Commissioner for Aboriginal Children and Young People.
Recommendation 94	That the Northern Territory Government amend the *Children's Commissioner Act 2013* (NT) to ensure that the Office of the Children's Commissioner (which will include the position of Commissioner for Aboriginal Children and Young People) has unfettered powers to access detention facilities, and unrestricted access to records, young people and staff.
Recommendation 95	That the Children's Commissioner is required to report quarterly against established criteria, and provide recommendations for improvement in relation to the management of detention centres and the treatment and conditions of children in detention. That this report is tabled in Parliament and a summary of data in relation to use of force and use of isolation should be made public.

8.3.7 Police

Evidence before the Commission indicates that allegations made by children in detention have not been adequately investigated by Northern Territory Police. An internal review of Northern Territory Police involvement in youth detention centres revealed many deficiencies, including failure to physically speak with young people who had made a complaint, failure to make appropriate notifications under the *Care and Protection of Children Act 2007* (NT), inadequate and inaccurate record keeping, failure to pursue investigation avenues and a failure to obtain CCTV footage.[44]

NAAJA is also concerned about police failure to proceed in circumstances where a child in detention makes allegations of exploitation or harm against a staff member and later states they do not wish to proceed with an investigation.[45] Given the vulnerability of children in detention and the clear power imbalance between detainees and staff, these allegations must be properly investigated to establish whether the alleged harm occurred. Investigations should be conducted by a specialist unit trained in trauma-informed approaches. In light of their past experiences, most children in detention are

[43] Oral evidence of Muriel Bamblett, 12 October 2016, 226:5-10.
[44] Statement of Kieran Wells, 22 March 2017 at [8], [18], [22], [28], [39] and [40].
[45] Ibid [41]–[43].

suspicious of police and may not feel comfortable making complaints. Police should ensure that any young person complaining about their treatment in detention does so with the presence of a support person, whether this is a family member or another advocate such as the child's legal representative.

Investigation of allegations made by witness AT

Many of the deficiencies outlined above were highlighted in the police investigation into allegations made by witness AT.[46] AT disclosed to police that Youth Justice Officer Conan Zamolo had filmed him masturbating in the shower. He also told police about alleged assaults by YJOs, including an occasion where Mr Zamolo had hit him with a torch on the kneecaps.

Evidence before the Commission reveals that police failed to adequately investigate the allegations. In NAAJA's submission, the investigation was fundamentally flawed for the following reasons:

- The allegation regarding hitting AT with a torch on the kneecaps was never put to Mr Zamolo
- The investigation was finalised without any efforts being made to obtain CCTV footage or interview three potential witnesses
- In her finalisation report, Detective Sergeant Engels inaccurately described the evidence received and significantly downplayed its importance.[47]

The failure to take these allegations seriously was evident in Detective Sergeant Engels' evidence to the Commission where she sought to characterise the alleged assault with a torch as a 'game':

> So here you've got details that there was three hard hits at first and then continuous hitting when he curled up in a ball in his room; correct?---Yes.
>
> There's no game that you know of that involves that, is there? The game of hitting with a torch? ---Yes. I believe there can be … games that occur … yes, I can.
>
> A game between a guard and a mid-teenage boy hitting with a torch?[48]

[46] Oral evidence of Kirsten Engels, 9 May 2017, 3558:8-13, 27-32.
[47] For example, Detective Sergeant Engels recorded that 'no new details gained and minimal corroboration of information gained from AT' after an interview with witness YY in circumstances where YY had stated that he had seen Mr Zamolo film AT. Further, she recorded that witness XX 'thought' Mr Zamolo had recorded detainees having a shower in circumstances where witness XX stated he saw Mr Zamolo filming and saw an image of AT's rear naked body on Mr Zamolo's phone. Detective Sergeant Engels also recorded that 'all known matters relating to Don Dale activities were put to [Mr Zamolo]' when she failed to put the allegations regarding the assault with the torch to him: see oral evidence of Kirsten Engels, 9 May 2017, 3571:18 – 3572:14; 3572:37 – 3573:5.
[48] Oral evidence of Kirsten Engels, 17 May 2017, 3577:28–30.

Detective Sergeant Engels told the Commission that Mr Zamolo was not questioned about the alleged assault because:

> we believed … the intent wasn't there to assault AT … it seemed feasible that there was some sort of behaviour going on that he felt that he wanted to be on the level with those boys, goofing around and joking around with them all the time.[49]

Detective Sergeant Engels acknowledged in her evidence that she did not maintain any contact with AT throughout the investigation, including notifying him that it had been finalised.[50] In circumstances where a vulnerable person makes a complaint to police about alleged abuse or harm, they must be kept appraised of the process and provided with appropriate support. Failure to do so only serves to alienate young people in detention and reinforce the message that their complaints do not matter.

Proposed finding 8.3	That the Northern Territory Police's investigation into the allegations made by AT was deficient and prematurely finalised.

Recommendation 96	That Northern Territory Police establish a specialist unit to investigate allegations made by young people in detention and ensures its members receive training on trauma-informed approaches to working with young people.
Recommendation 97	That Northern Territory Police ensures every young person who makes a complaint about their treatment in detention has access to a support person of their choice.
Recommendation 98	That the Commission recommends to the Commissioner of Northern Territory Police that a new investigation is conducted into the allegations raised by AT.

8.3.8 Elders Visiting Program

The Elders Visiting Program is an important way for young people in detention to maintain connection to their community, language and culture. Section 6.4.5 outlines the positive evidence the Commission had heard about this program, including the importance of young people being able to discuss matters with Elders that they would not feel comfortable raising with staff or family.

No structures are in place to allow Elders to play a meaningful role in oversight of detention facilities. Given the central role of Elders in reinforcing the strengths of Aboriginal culture and their unique knowledge of a young person's family, cultural and spiritual connections, Elders can play an important role in informal oversight of detention facilities. For instance, Elders should be given copies of complaint forms so they can discuss the complaint with the young person to ensure the complaint has

[49] Oral evidence of Kirsten Engels, 17 May 2017, 3581:10–22.
[50] Oral evidence of Kirsten Engels, 9 May 2017, 3585:5–7.

been adequately addressed, and follow up on whether any further action is required.[51] Any reports made by staff about Elders' visits should also be made available so that Elders can report back to the community on the welfare of their young people in detention.[52]

Elders should be given every opportunity to provide feedback to staff including on cultural matters and the treatment and conditions for young people in detention. Facilitating participation from Elders recognises the importance of cultural knowledge in making decisions in a child's best interests. Elders should also participate in case management planning so that they can provide input on appropriate programs and supports for a young person.

Recommendation 99	That Territory Families ensure there are mechanisms in place for Elders to follow up on complaints made by young people, to provide feedback to staff on the welfare of young people in detention and to participate in case management planning.

8.3.9 Carers/guardians

Maintaining contact with family is an obvious and important source of support for children in detention. A child's right to maintain contact with family is enshrined in the *Convention on the Rights of the Child*,[53] and is also protected by the *Beijing Rules* which provide that parents and guardians have the right of access in the interest and wellbeing of the child who is detained.[54] The Committee on the Rights of the Child has stated that staff in youth justice facilities should:

> promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organisations.[55]

There is evidence before the Commission to suggest that families had difficulty accessing children in detention. Witness BZ told the Commission that it could be difficult to get in to see her son, AJ.

Witness BZ:

The people there would always take your visit when you rang up, but sometimes I would turn up and there would be nothing on their system for the visit for that day.

A lot of the time they would ring up just before the visit and say that the booking had been cancelled. They would not really give you a reason; they would just say that there was an incident. They would not even say if AJ was involved in that incident so I wouldn't know what had happened.[56]

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[51] Oral evidence of Marius Puruntatameri, 31 March 2017, 2415:35–38.
[52] Oral evidence of Marius Puruntatameri, 31 March 2017, 2415:15–19.
[53] Exhibit 005.002, Convention on the Rights of the Child, article 37(c).
[54] Exhibit 006.002, Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), rule 26.5.
[55] Exhibit 004.001, Statement of Megan Mitchell, 9 October 2016, 13 [60].
[56] Exhibit 136.000, Statement of BZ, 20 February 2017, 4 [31]–[32].

Witness BZ was not contacted by anyone at Don Dale to speak about her son, nor was she told about any details of incidents he was involved in.[57] When AJ displayed challenging behaviours and the staff at Don Dale were having difficulties managing him, BZ does not recall any of the staff asking her about the best way of dealing with AJ.[58]

Families are clearly an important source of information about the needs of young people and the supports they may require during detention. There is little evidence before the Commission to suggest that families were actively engaged by staff at detention facilities to assist in managing children's behaviour and ensuring the right services and supports were provided, including preparation for release. Proper engagement with families would provide an additional level of informal oversight of detention facilities. The Commission has heard that fostering relationships with family is a key feature of the Waratah Pre-Release Unit at Reiby detention centre in NSW.[59] At this facility staff encourage and facilitate family visits to young people, as well as forming relationships with families to assist with the transition process.[60]

Children must be able to maintain contact with family while in detention. Territory Families should ensure that family members have regular access to any child in detention, and that they are informed of any incidents or other information regarding a child's welfare. Territory Families should ensure that there are mechanisms in place for families of young people in detention to provide input into case management and behaviour management plans. Territory Families should also ensure that responsible adults are informed of their right to make complaints under the *Youth Justice Act*.

Recommendation 100	That Territory Families ensures family members have regular access to any child in detention and that family members are given an opportunity to have input into case management and behaviour management plans.
Recommendation 101	That access to family members and their involvement in case management and behaviour management plans be one of the measurable criteria reported against quarterly by the Office of Children's Commissioner.

8.3.10 Department of Children and Families/Territory Families

There are high levels of crossover between children in detention and those in care: the Commission has heard estimates of 40%.[61] NAAJA has concerns about the extent that the Department of Children and Families (now Territory Families) meets the needs of children in its care who are also in contact with the youth justice system. This includes caseworkers failing to visit children in detention, or not visiting frequently enough.[62] The lack of contact with children in detention obviously compromises the ability of the Department to provide effective oversight.

[57] Exhibit 136.000, Statement of BZ, 20 February 2017, 6 [52]–[53].
[58] Exhibit 136.000, Statement of BZ, 20 February 2017, 7 [54].
[59] Exhibit 377.000, Statement of Leilani Tonumaipea, 9 May 2017, 9 [46].
[60] Exhibit 377.000, Statement of Leilani Tonumaipea, 9 May 2017, 8 [44].
[61] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 12 [75].
[62] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 13 [81].

The Commission has heard concerning evidence about the lack of engagement by the then Department of Children and Families (DCF) with respect to children in its care who were also in detention.

Witness BL:

Late in [month] 2015 I was ready to be released from Don Dale. The guards woke me up at about 6am and I had breakfast at 7.30am and I was ready to be released. DCF didn't come to pick me up. They forgot about me. After breakfast, they sent me to the back cells to wait in the hot heat. I was going mad in the cell because I thought they were going to leave me there. DCF picked me up late in the afternoon about 4.30pm. I was stressing out. I felt so let down. DCF were gammon and said that they had to do something important. So what? I'm not important? [63]

This example not only demonstrates a complete failure to act in BL's best interests, but also an inadequacy in the engagement with children in detention.

James Sizeland, former Assistant General Manager at Don Dale told the Commission:

> I didn't find the service very helpful a lot of the time. I don't feel that they were very engaging … we may be putting a high level of work into engaging with someone or trying to assist someone, and there just didn't seem to be the same amount of … reception on the other side. It was very nonchalant. We're going to tick the box, this is what we're doing, and that was it.[64]

Mr Sizeland was so frustrated by his dealings with DCF that in an interview with the Children's Commissioner he said he may as well 'talk to this cup'[65] due to the level of responsiveness he experienced. The lack of continuity of service provision and support to young people in care and in detention underscores the importance of Throughcare models, which provide joined up service delivery to assist young people to transition from detention. This is discussed further in section 7.

Former Youth Justice Officer Ian Johns gave evidence that young people in the care of DCF were routinely remanded for one month in circumstances where he believed that there should have been other options.[66] In the case of witness AS, his DCF caseworker asked the Court to keep him in Don Dale for three to four months so that he could attend therapy, as DCF did not have an appropriate placement.[67] DCF did not provide the Court with any report or other evidence in support of this submission, nor was AS aware of efforts made by DCF to check whether an appropriate placement with family could be arranged.[68]

[63] Exhibit 272.001, Statement of BL, 1 March 2017, 10 [100]–[106].
[64] Oral evidence of James Sizeland, 27 March 2017, 1879:25–32.
[65] Exhibit 174.001, Part 1, Transcript of interview between the Office of the Children's Commission and James Sizeland, 64.
[66] Oral evidence of Ian Johns, 28 March 2017, 2047:18–40.
[67] Exhibit 123.000, Statement of AS, 22 February 2017 [74].
[68] Exhibit 123.000, Statement of AS, 22 February 2017, [74]–[75].

Detention should never be considered a 'placement' option and all efforts must be made to ensure that detention is the option of last resort.

> Detention is not a warehouse, the aim should be to try to get young people out of detention as fast as you possibly can. But all too often the Department actively lobbies for the most difficult young people to stay in detention, with staff stating that while they are in detention they are 'contained'. We are charged with the job of helping them, not containing them.[69]

It is essential that Territory Families remain involved when a child in its care is in detention. Admission into a detention facility does not mean that a child becomes someone else's 'problem' and the Department can abrogate its duty of care. Given that both youth justice and child protection services now fall under Territory Families, it is vital that there is a clear delineation of duties and that child protection caseworkers continue to provide support and input into case management plans, including following up any allegations of abuse and neglect. To address the complex needs of children who are in both care and detention, Territory Families should also develop a specialised workforce dedicated to working with this cohort of children. Caseworkers should receive specialised training in trauma-informed approaches and have small caseloads, allowing for intensive work with children.[70]

Recommendation 102	That Territory Families ensures that children in its care who are in detention continue to receive support from their caseworker, including input into case management plans and Throughcare services.
Recommendation 103	That Territory Families establish and train a specialised workforce to work with children who are in care and detention. These workers should have small caseloads, enabling them to work intensively with young people using trauma-informed approaches.

[69] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 7 [31].
[70] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 76 [25].

9 Administration of detention centres

9.1 Departmental management and oversight

9.1.1 Failure to recognise and address the warning signs

The Department of Correctional Services neglected its duty to young people in its care in Northern Territory detention centres. It placed young people in facilities it knew were unsafe and unsuitable.[1] It staffed those facilities with people who were not properly trained or supervised.[2] It fostered a punitive culture which re-traumatised young people.[3] Young people were routinely subject to unlawful practices such as excessive use of force, arbitrary strip searches and unauthorised and prolonged periods of isolation.[4] Policies and procedures were inconsistently applied, or not in place at all.[5] Record keeping was woefully inadequate.[6] There was little effort to support young people by providing programs and services appropriate to their needs.[7] There was a lack of leadership, and a lack of urgency, to genuinely address the unacceptable state of youth detention.

The failures have been longstanding. Mr Hamburger, an experienced senior manager of correctional facilities, remarked he would have been 'absolutely terrified' to have been in charge of Don Dale as he observed it in April–May 2016, as it was obvious that the facility had been neglected over a period of time.[8]

Evidence before the Commission reveals that the same issues were consistently raised but never properly addressed by Correctional Services.

In September 2013, an internal memorandum commissioned by Mr Middlebrook in light of an incident at Banksia Hill Detention Centre in Western Australia identified that Don Dale was exhibiting 'many

[1] See, eg, Oral evidence of Kenneth Middlebrook, 26 April 2017, 3051:45-47; Oral evidence of Russell Caldwell, 29 March 2017, 2126:15-20; Oral evidence of James Sizeland, 27 March 2017, 1887:5-30, 1992:10-15, 35; Oral evidence of Michael Yaxley, 29 March 2017, 2208:18–2209:5.
[2] See, eg, Oral evidence of Kenneth Middlebrook, 26 April 2017, 2945:40; Oral evidence of James Sizeland, 27 March 2017, 1867:19-20.
[3] Exhibit 152.001, Statement of Saki Muller, 10 February 2017, [18], [20]–[22]; Exhibit 154.001, Statement of Eliza Tobin, 8 February 2017, [24], [26], [28]–[30], [32], [35]; Oral evidence of Louise Inglis, 24 March 2017, 1788:15–20; Oral evidence of Greg Harmer, 24 March 2017, 1786:34; Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 28; Exhibit 031.002, Annexure 1 – Report "A Safer Northern Territory Through Correctional Interventions", 31 July 2016, 148; Oral evidence of Keith Hamburger, 5 December 2016, 314–315, 320:25; Exhibit 125.001, YJ Detention Review Sept 2014, 19 September 2014, 1–2, 7.
[4] Refer to sections 3.4.3, 3.5.2 and 3.6.6.
[5] Oral evidence of Leonard de Souza, 22 March 2017, 1617:11-14; Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 13; Exhibit 283.119, RE: Operational overview week 1 - (in confidence), 12 May 2015, 3; Exhibit 125.001, YJ Detention Review Sept 2014, 19 September 2014.
[6] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3048:1-2; Oral evidence of David Ferguson, 23 March 2017, 1825:41-44; Oral evidence of Sally Cohen, 24 April 2017, 2839:10-16.
[7] See, eg, Oral evidence of Leonard de Souza, 22 March 2017, 1624:9-12; Exhibit 125.001, YJ Detention Review Sept 2014, 19 September 2014.
[8] Oral evidence of Keith Hamburger, 5 December 2016, 317:39.

similar signs' to those that existed at Banksia Hill prior to that incident.[9] Don Dale was an 'unstable facility'.[10] Some of the failings highlighted included:

- dysfunctional and strained relationships between staff and management
- no defined organisational focus and purpose
- large casual workforce
- inadequate and inappropriate recruitment processes
- inadequate and antiquated training
- reactive model of detainee management
- lack of centralised record keeping or data collection
- no safety or security audits conducted.[11]

The memorandum noted that improvement would not come from 'target hardening a centre … or toughening staff responses.'[12] A holistic approach was called for that recognised security and safety are underpinned by an active rehabilitative regime and positive relationships between staff and detainees.[13] Some of the suggested approaches included strong central leadership and a clear sense of direction and values, ensuring its staff comply with policies, better case management, better programs and services, and a more proactive and less reactive model of staff/detainee engagement.[14]

The memorandum laid bare the systemic issues confronting the Department and the potential for things to erupt at Don Dale. Ms Cohen was of the opinion that the very concerning parallels between Banksia Hill and Don Dale were brought to Mr Middlebrook's attention with sufficient clarity and gravity.[15] She told Mr Middlebrook 'we are very close to having a major incident' at Don Dale.[16] A 'complete overhaul' was required.[17] The necessary additional funding for infrastructure and staffing improvements sought in 2014 as part of a budget submission were not supported by Cabinet.[18] Mr Elferink was aware of the systemic issues confronting Don Dale.[19] However, the reforms required were not politically popular. Increased expenditure on youth detention (and the welfare of young people more broadly) was not part of the Government's 'tough on crime' agenda.[20]

In September 2014, the Director of the Professional Standards Unit produced a memorandum for Mr Middlebrook based on his review of youth detention following a series of escapes and incidents in August 2014, including the gassing incident on the evening of 21 August.[21] In frank terms, Mr Ferguson

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[9] Exhibit 211.010, Annexure 10 to the statement of Sally Cohen, 21 February 2017, 7.
[10] Ibid.
[11] Ibid, 6. Ms Cohen agreed that these were issues facing the Department: oral evidence of Sally Cohen, 30 March 2329:37-39.
[12] Ibid, 7. Ms Cohen and Mr Elferink agreed with this proposition: see oral evidence of Sally Cohen, 30 March 2017, 2331:30-47; oral evidence of John Elferink, 27 April 2017, 3115:29-37.
[13] Ibid.
[14] Ibid.
[15] Oral evidence of Sally Cohen, 30 March 2017, 2341:32-37.
[16] Exhibit 211.020, Annexure 19 to the statement of Sally Cohen, 0443.
[17] Ibid.
[18] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2969:30-38.
[19] Oral evidence of John Elferink, 27 April 2017, 3166:10-41.
[20] Oral evidence of Sally Cohen, 24 April 2017, 2902:5; Oral evidence of John Elferink, 27 April 2017, 3099:25-26.
[21] Exhibit 125.001, YJ Detention Review Sept 2014.

outlined a number of serious issues that required attention, many of these reflected similar concerns to the Banksia Hill memo:

- inappropriate recruitment of staff
- inadequate staff training
- staff speaking to detainees in a condescending or abusive manner
- no consistency in rules
- 'boys club' mentality and attitude among male YJOs, who allegedly tease and threaten detainees
- no current procedures manual
- lack of leadership and direction from management
- YJOs withholding food, bedding, clothes etc. as punishment
- YJOs failing to follow rules and policies: 'they have a near enough is good enough attitude or they just do what they want'
- no enforced programs or activities in place for detainees.[22]

Mr Ferguson concluded that his review showed a 'fundamental lack of awareness of the staffing problems in detention and the complete failure of centre management to address or attempt to address the issues.'[23]

Mr Ferguson drew a causal link between the treatment of detainees by staff and the recent outbreaks and behavioural issues. He was direct in his conclusion about what was required to fix the problems:

> While the current situation has developed over a number of years, it is the responsibility of current management to resolve the problems. A large part of which could be done by active leadership and direction of which, according to staff, there is none. It appears that the issues have been allowed to just drift along and no real effort has been made to create positive change in the centre as a whole for a very long time. This has resulted in staff apathy and ongoing resentment and consequent poor behaviour from detainees.[24]

This memorandum remains a damning assessment of the state of youth detention at the time. Mr Ferguson formed his views based on discussions with Departmental staff (both youth justice and adult corrections), detainees and accessing audio and visual recordings.[25] His memorandum ought to be accepted by the Commission as reflective of the crisis in youth detention at that time.

Some four months later, Mr Vita's external review of youth detention was provided to the Department. Again, it drew Correctional Services' attention to the same fundamental deficiencies. Mr Vita found that facilities were 'struggling to maintain service level standards in the absence of a coherent operating philosophy, staff training, direction, appropriate infrastructure, leadership and

[22] Ibid.
[23] Ibid, 5.
[24] Ibid.
[25] Ibid, 1.

resourcing.'[26] Mr Vita noted the resemblances to the Banksia Hill experience and observed that despite the 'red flags' the Department had not made the necessary changes.[27]

The report found, among other things, that there was a lack of appropriate initial and ongoing training, uncoordinated case management process, ineffective classification system, lack of consistency and direction in the management of high-risk detainees, and lack of direction and consistency in the provision of a behaviour management strategy.[28] Mr Vita identified that youth detention urgently needed 'strong central leadership and a clear sense of direction and values', immediate review of operational procedures, the introduction of a multi-disciplinary approach to all decision-making processes via weekly meetings, along with measures to ensure staff acted in accordance with operating philosophies, policies and standards.[29]

In May 2015, the Deputy Superintendent told the Commissioner that Youth Justice Officers 'lack leadership, guidance, security awareness and know how, which presents significant risk regarding personal safety and the organisational risk regarding the reputation of the Department.'[30]

In April 2016, Mr Hamburger was commissioned to undertake a review of the Department. His findings echoed those of previous reviews. Mr Hamburger found that the escapes and other incidents that occurred in youth detention at that time revealed flaws in the Department's approach to the management and rehabilitation of youth offenders, shortcomings in the security of the facilities, a lack of leadership and supervision of staff, complacency and/or lack of staff training and understanding the management of youth offenders.[31] He was dismayed at the conditions at Don Dale and considered its continued use posed an unacceptable risk.[32]

These reviews provided reasonably consistent and comprehensive guidance on what needed to be done. What is striking is the absence of a concerted response, at least by 2013-14, to tackle the serious and endemic issues that were regularly raised. Senior Correctional Services staff sought to justify the circumstances by the lack of resources.[33] The Department was regularly drawing to the Minister's attention the financial difficulties it was facing.[34] Even if the Commission accepts that the lack of resources hindered the Department's ability to adequately respond to the crisis in youth detention in 2013-14, there is little evidence before the Commission to suggest that steps that might have been within the Department's reach were taken. For example, the Department was aware of the inhumane conditions in which young people were kept in the BMU[35] yet there is no evidence of attempts to

[26] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 11.
[27] Ibid.
[28] Ibid, 12–13.
[29] Ibid, 18–19.
[30] Exhibit 187.001, RE: Operational overview week 1 - (in confidence), 2 May 2015, 3.
[31] Exhibit 031.002, Annexure 1 – Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 21.
[32] Ibid, 142.
[33] See, eg, oral evidence of Sally Cohen, 30 March 2017, 2343:15-20; oral evidence of Sally Cohen, 24 April 2017, 2871; oral evidence of Kenneth Middlebrook, 26 April 2017, 2912:6; 3006:16-17.
[34] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3037:4-7.
[35] See, eg, Oral evidence of Kenneth Middlebrook, 26 April 2017, 3051:45-47; Oral evidence of Russell Caldwell, 29 March 2017, 2126:15-20; Oral evidence of James Sizeland, 27 March 2017, 1887:5-30, 1992:10-15, 35; Oral evidence of Michael Yaxley, 29 March 2017, 2208:18–2209:5.

ameliorate the conditions by cleaning the cells, employing additional staff so young people could have more recreation time, and facilitating visits from family. Mr Sizeland could not point to anything he did to reduce stress for young people kept in the BMU.[36] He failed to recognise the link between the conditions in the BMU and the difficult behaviours the young people were exhibiting at the time.[37] While Mr Caldwell accepted that the conditions in the BMU breached basic human rights, he did not say anything to that effect to his superiors in the Department.[38] Mr Middlebrook said he expected management to roster extra staff to manage the BMU in circumstances where young people were not given sufficient time out of their cells, and the additional expenditure this involved would have been approved.[39] Security clearly took precedence over the welfare of children kept in the BMU.[40] It is apparent that not only did security take precedence, but that the concept of security was informed by a default punitive response to any difficult situation.

In NAAJA's submission, senior Correctional staff ultimately accepted the circumstances they found themselves in. The Department failed to adequately respond to the serious systemic issues repeatedly identified. It did not discharge its duty of care to young people in detention.

9.1.2 Lack of Standard Operating Procedures

The lack of Standard Operating Procedures at detention centres is one example of the Department's failure to provide adequate management and oversight. Mr de Souza gave evidence that when he joined the Department in 2007, the operational manual was outdated and did not reflect the day-to-day operation of Don Dale.[41] This resulted in ad hoc responses, with different shifts doing 'what they felt was necessary at that time', resulting in 'chaos'.[42] This understandably created confusion among detainees because there was no consistency in application of the rules.

Mr de Souza completed an update of the procedures manual in September 2011 but it did not appear on the staff intranet until 2014.[43] In the interim, Mr de Souza said that the procedures in place continued to depend on the discretion of the shift supervisor.[44] This is seriously concerning in a detention environment where structured and consistent responses are necessary to support young people and address complex behaviours.

In 2015, the Vita Review found extensive evidence that Standard Operating Procedures were 'non-existent, outdated and inadequate', despite several previous reports, audits and reviews indicating this was the case.[45] Mr Vita observed it was 'obvious that several prior regimes and structures had been negligent in this respect over the years.'[46] The lack of processes and Standard Operating

[36] Oral evidence of James Sizeland, 27 March 2017, 1892:1-2.
[37] Oral evidence of James Sizeland, 27 March 2017, 1992:17-19.
[38] Oral evidence of Russell Caldwell, 29 March 2017, 2126:28-40.
[39] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2963:28-38; 2964:6-11.
[40] Oral evidence of Sally Cohen, 24 April 2017, 2809:28-30.
[41] Oral evidence of Leonard de Souza, 22 March 2017, 1617:11-14.
[42] Oral evidence of Leonard de Souza, 22 March 2017, 1617:21-27; 1633:29.
[43] Oral evidence of Leonard de Souza, 22 March 2017, 1632:22-28.
[44] Oral evidence of Leonard de Souza, 22 March 2017, 1633:25-9.
[45] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 13.
[46] Ibid, 21.

Procedures contributed to instability and incidents at Don Dale,[47] and had a negative effect on detainees.[48]

In May 2015, the Deputy Superintendent Cooper told Commissioner Middlebrook there was an 'apparent culture of learned helplessness amongst staff and management in the Don Dale Centre.'[49] He described the lack of Standard Operating Procedures as 'abhorrent'.[50]

Procedure manuals had not been reviewed since 2011 due to 'resourcing and lack of time'.[51] Ms Cohen agreed that establishing Standard Operating Procedures was critical and 'core business' for the Department but told the Commission she did not have the 'right resources and the necessary number of resources' to make it happen.[52] Plans to bring in staff from other detention centres to assist did not come to fruition.[53] The Department operated in a system of failure.

Comprehensive Standard Operating Procedures are a crucial part of detention centre operations. They should set out clear expectations for staff and promote the safety of detainees. They should be regularly updated and widely promulgated so staff are aware of their existence. The absence of procedures makes it difficult to hold staff to account for breaches of their duty of care, and hinders consistent, therapeutic responses to young people in detention.

Proposed finding 9.1	That the Department of Correctional Services' management of detention centres during the relevant period of the Commission's terms of reference was grossly inadequate.
Proposed finding 9.2	That the Department of Correctional Services failed to discharge its duty of care to young people in detention.

9.1.3 A structural circuit breaker

Evidence before the Commission about management of detention centres in the Northern Territory makes it clear that current approaches have not worked. The extent of reform required is not just 'bureaucratic table-shifting' but a structural 'circuit breaker' that galvanises change and empowers Aboriginal people to drive the solutions.[54]

[47] Ibid.
[48] Oral evidence of Leonard de Souza, 22 March 2017, 1634:27-29.
[49] Exhibit 283.119, RE: Operational overview week 1 - (in confidence), 12 May 2015, 3.
[50] Ibid.
[51] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 21.
[52] Oral evidence of Sally Cohen, 30 March 2017, 2383:4-25.
[53] Oral evidence of Sally Cohen, 30 March 2017, 2384:3.
[54] Oral evidence of Keith Hamburger, 5 December 2016, 342:34-38.

In the Introduction, NAAJA recommends the establishment of an independent statutory authority with responsibility for youth justice services. The key features of such a model include:

- A board, chaired by an Aboriginal person, that is responsible for governance and oversight of the authority.
- Board members comprising three Aboriginal people, including from remote communities, and members with relevant experience in fields such as youth justice, child protection, law, health and education.
- Genuine partnerships between the statutory authority and Aboriginal organisations, with the authority providing resources, training and capacity building to enable Aboriginal organisations to drive the delivery of therapeutic, culturally relevant youth justice services in communities. Aboriginal Elders should be included and actively participate in this process.
- Youth justice services delivered through a family- and community-strengthening model, with joined-up approaches to case management and service delivery.[55] This promotes continuity of service delivery across a continuum of interventions for young people, regardless of whether a young person is in a secure detention facility.

Partnership between the proposed statutory authority and Aboriginal organisations should be informed by the APO NT Partnership Principles, which provide guidance to non-Aboriginal organisations engaging in the delivery of services or development initiatives in Aboriginal communities in the Northern Territory. The Northern Territory Government is currently working to embed these principles across Government agencies.

In light of recent changes that have seen responsibility for youth justice move from the Department of Correctional Services to Territory Families, NAAJA recommends that the Commission considers whether such a statutory authority could have the dual functions of youth justice and child protection. The Commission has heard evidence about the Victorian Aboriginal Child Care Agency, an Aboriginal community controlled and operated organisation that responds to child protection notifications for Aboriginal children and provides a range of services to Aboriginal families such as cultural support planning, therapeutic residential care and early intervention programs.[56] NAAJA is aware of examples from other jurisdictions where Aboriginal child welfare models are managed by Aboriginal communities, including some Canadian models which have delegated service provision, governance and law-making responsibilities to First Nations.[57] We would welcome the opportunity to provide further submissions on these matters during the child protection phase of the Commission's inquiry.

NAAJA recognises that the creation of an independent statutory authority takes time and will require a staged process. In the meantime, NAAJA recommends that Territory Families take immediate steps to 'mainstream' Aboriginal considerations across youth justice services.[58] The Department's structure

[55] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 7-8; Oral evidence of Keith Hamburger, 5 December 2016, 352:22-47.
[56] Oral evidence of Muriel Bamblett, 12 October 2016, 182:25-40.
[57] See, for example, Vandna Sinha and Anna Kozlowski, 'The Structure of Aboriginal Child Welfare in Canada' *The International Indigenous Policy Journal*, 2013, 4(2), 6.
[58] Exhibit 031.002, Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 7.

and approach should facilitate greater opportunity for Aboriginal leaders to contribute to policy, programs and services.[59]

Recommendation 104	That Territory Families takes immediate steps to 'mainstream' Aboriginal considerations across youth justice services. The Department's structure and approach should facilitate greater opportunity for Aboriginal leaders to contribute to policy, programs and services.

9.2 Superintendents

Under s 151(2) of the *Youth Justice Act,* the Superintendent for youth detention centres is responsible 'for the physical, psychological and emotional welfare of detainees'. The Superintendent has specific responsibilities to promote and organise programs and activities to enhance detainees' wellbeing, as well as supervise the health of detainees.[60]

Elsewhere in these submissions, we have discussed the Superintendent's failure to meet these responsibilities. Section 3 discusses how the management and treatment of detainees, including use of unauthorised and prolonged periods of isolation and excessive use of force, was unlawful and caused detainees considerable psychological harm. In section 7, failure to meet the physical and mental health needs of young people is discussed, as well as lack of access to therapeutic and rehabilitative programs. There is abundant evidence for the Commission to conclude that successive Superintendents failed to meet their responsibilities under s 151 of the *Youth Justice Act*.

Mr Caldwell told the Commission that no one was acting in the Superintendent's position from January 2014 until April 2014.[61] Although Mr Caldwell was expected to act as Superintendent from April 2014, it wasn't until 15 September 2014 that the Commissioner formally delegated the powers of Superintendent to him.[62] Mr Caldwell said his appointment 'was made in a context of structural change where details were overlooked.'[63] The Northern Territory Government undertook to provide to the Commission evidence of when the oversight was identified by the Solicitor for the Northern Territory.[64] As far as NAAJA is aware, there is no documentary evidence before the Commission demonstrating that Mr Caldwell's appointment as Superintendent was valid between April 2014 and 15 September 2014. If this is the case, Mr Caldwell did not have the powers he purported to exercise pursuant to s 152 and s 153 of the *Youth Justice Act* during this period. Accordingly, there can be no lawful orders for isolation under s 153(5) over that period, no lawful orders for the use of restraints under s 153(4), nor the ability to lawfully delegate the Superintendent's powers and functions pursuant to either s 157 or 157A(4).

[59] Ibid.
[60] *Youth Justice Act 2005* (NT), s 151(3).
[61] Oral evidence of Russell Caldwell, 29 March 2017, 2106:4-10.
[62] Exhibit 194.001, Statement of Russell Caldwell, 13 March 2017, 32 [268].
[63] Ibid.
[64] Oral evidence of Sally Cohen, 30 March 2017, 2356:28-41.

Proposed finding 9.3	That successive Superintendents failed to meet their responsibilities under s 151 of the *Youth Justice Act*.
Proposed finding 9.4	That there is no evidence before the Commission that Mr Caldwell was validly appointed as the Superintendent under the *Youth Justice Act* between sometime in April and 15 September 2014.
Proposed finding 9.5	That as a consequence of the above finding, all purported delegations of the powers and functions of the Superintendent were invalid.
Proposed finding 9.6	And that as a result, all uses of force, restraint and isolation performed under a delegation of the powers and functions of the Superintendent during this time were unlawful.

9.3 Youth Justice Officers

Inadequacies in recruitment, staffing and training of Youth Justice Officers have been well documented before the Commission. There was ad hoc and inappropriate recruitment of staff, and criminal record checks were not routinely performed.[65] Mr Ferguson reported that new staff were 'rushed into the workplace' and the attitude was 'if they want to work give them the job, so we can have staff on the floor.'[66]

There was a high turnover of staff and overreliance on casuals.[67] Staff worked long hours and were burnt out,[68] which meant they were less likely to be able to deal with children exhibiting complex behaviours. A punitive and macho culture flourished. The impact of this punitive culture on children in the Department's care is discussed in section 3.

9.3.1 Training for Youth Justice Officers

Evidence before the Commission highlights a pattern of ad hoc and inconsistently applied training for Youth Justice Officers. From at least 2009, the Department was aware the training was deficient.[69] It had been warned there was a risk that it was not meeting its duty of care.[70]

Mr Sizeland told the Commission that a new training package had been developed, but it was put on hold as the Commissioner had 'directed that all resources be put into opening the new jail.'[71] The

[65] Exhibit 283.133, 'Criminal History Checks and Pre-Employment Questionnaire', 29 June 2015; Exhibit 125.001, YJ Detention Review Sept 2014, 1.
[66] See, for example, Exhibit 125.001, YJ Detention Review Sept 2014, 1; oral evidence of Kenneth Middlebrook, 26 April 2017, 2950, 45-47.
[67] See, for example, Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, [59].
[68] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2924:22; oral evidence of Sally Cohen, 30 March 2017, 2344:47-47.
[69] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2920:15-16.
[70] Ibid, 2920:25-26.
[71] Oral evidence of James Sizeland, 27 March 2017, 1870:25-26; 1871:39-40.

Department had sought funding for an expanded training program as part of a budget submission in 2014 but Cabinet had not approved it.[72]

In 2015, the Vita Review found that there was a 'lack of appropriate initial and ongoing training/development, especially training to keep instep with a larger and more challenging detainee population.'[73] Further, the Review left 'no doubt that the lack of appropriate training has contributed to poor decision-making during recent incidents in the detention system.'[74] It was acknowledged by Mr Middlebrook that the standard of training provided was indefensible.[75]

At the time of the Vita Review, detention centre staff undertook four days of initial training, compared to 11 weeks for adult officers in NT and 30 weeks in NSW.[76] The training package offered was Professional Assault Response Training (PART). The Vita Review found this 'grossly inadequate' and not enough to manage young, immature and challenging adolescents with complex mental health, AOD and behavioural problems.[77]

Casual staff would commence work without completing the induction training.[78] Due to understaffing, sometimes staff could not be released to attend training.[79] There was an over-reliance on inexperienced casual and temporary staff supervising young detainees with difficult and challenging behavioural problems.[80] Junior staff would sometimes be acting in a senior role within six months of commencing.[81]

The inadequate and inconsistent training regime for Youth Justice Officers meant they were not equipped to deal with the challenges of the youth detention environment. Rudimentary de-escalation and mental health training was provided at times, but not as a formal package.[82] Rather than train staff in techniques to positively engage young people exhibiting challenging behaviour, by 2014 staff were increasingly using cell placements to manage behaviour as they 'really didn't have any tools to … manage young people.'[83] Mr Middlebrook accepted that there was 'no question' the poor training and suboptimal conditions in youth detention contributed to a decline in the mental health and behaviour of children in the Department's care.[84]

The Commission also heard that although there has at times been a training focus on cultural awareness, some staff did not receive this important training.[85] We have discussed these inadequacies

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[72] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2969:16-29.
[73] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 12.
[74] Ibid, 26.
[75] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2945:40.
[76] Ibid.
[77] Ibid.
[78] Exhibit 190.001, Statement of Michael Yaxley, 2 March 2017, [59].
[79] Oral evidence of Sally Cohen, 30 March 2017, 2330:19-21.
[80] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 13.
[81] Oral evidence of Leonard de Souza, 22 March 2017, 1649:33-35.
[82] Oral evidence of Christine Connors, 16 March 2017, 1276 and 1283.
[83] Oral evidence of Leonard de Souza, 22 March 2017, 1649:1-6.
[84] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3019:22-27.
[85] See oral evidence of Conan Zamolo, 20 March 2017, 1437; oral evidence of Ben Kelleher, 21 March 2017, 1540; oral evidence of Ian Johns, 28 March 2017, 2034.

further in section 6.4, where we have recommended that staff receive ongoing cross-cultural training with a view to achieving cultural competency.

While it is encouraging that Youth Justice Officers must now hold a Certificate IV in Youth Services[86] and their initial training has been increased to a five-week intensive program, there is no evidence before the Commission on the content or adequacy of this training. NAAJA understands that this training has a strong focus on rehabilitation through life skills, training, education and personal development, and includes modules on cross-cultural awareness, drug and alcohol awareness, suicide awareness/safe talk, ethics, trauma, and foetal alcohol spectrum disorder,[87] which is a marked improvement compared to the previous regime.

It is imperative that this initial training is supported with ongoing refresher training and support, particularly on mental health, behaviour management and de-escalation techniques. Youth Justice Officers should also have access to psychologists and other relevant health professionals who can provide advice about strategies to work with children exhibiting challenging behaviours.

To propel a greater cultural shift towards holistic, trauma-informed approaches and to streamline classification and case management plans and strategies, the role of the YJO should expand from purely custodial operations to include training in case management, to become 'key workers'.[88] As part of this, YJOs would:

- Role model pro-social behaviours at all times
- Discuss behavioural achievement/issues with detainees as they occur so they understand the behaviour better
- Observe/record all relevant pro-social and problematic behaviours
- Positively reinforce expected behaviours, case plan achievements and intervention/program participation and completion as they occur
- Communicate/reinforce realistic and firm boundaries regarding inappropriate behaviour and challenging detainees when they are testing these boundaries.

NAAJA advocates ongoing training in collaborative, non-punitive approaches to these issues. A good example is the Collaborative and Proactive Solutions treatment model, focussing on non-punitive, non-adversarial, trauma-informed care discussed in sections 3 and 4. The initial ongoing training in that model provides twice weekly supervision sessions, where specific children and challenging behaviours encountered can be discussed and workshopped with experts. The training also upskills nominated staff within the organisation to provide continuous training and feedback through regular supervision sessions on an indefinite, ongoing basis.

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[86] This had been recommended by the Manison report in 2009: see oral evidence of Kenneth Middlebrook, 26 April 2017, 2920:28-32.

[87] Territory Families, 'New Youth Justice Officer recruits complete initial training', 28 April 2017 <https://territoryfamilies.nt.gov.au/news/new-youth-justice-officers-complete-initial-training>.

[88] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 37; Exhibit 031.002, Annexure 1 – Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 8, 22.

9.3.2 Culture

As set out in section 3, there is ample evidence before the Commission about the punitive culture that pervaded youth detention centres. Mr Kelleher observed that some workers were there 'just to be an arsehole to the kids' because they would do things like only pouring a small amount of water into a cup instead of filling it up, giving young people longer periods in the BMU for behaviour that didn't warrant it, and not allowing them on the basketball court for a long time just because it didn't suit the shift supervisor.[89] Mr Harmer said:

> … some officers enjoyed making the kids suffer. One officer made a comment to me once 'Why should we make these little fuckers' lives nice in here when they've caused so much torment outside?'[90]

In October 2013, Mr de Souza alerted Mr Caldwell to concerning behaviour including officers engaging in play fighting, teaching detainees how to kick and punch, racist remarks, swearing at detainees and cuddling detainees. Some of the worst offenders were reported to be Seniors and Shift Supervisors.[91] Staff acknowledged that it was confusing for a child to be punished for swearing yet then hear YJOs use it against them.[92]

This culture was also described formally in Mr Ferguson's memo to Mr Middlebrook in September 2014. Mr Ferguson spoke of:

> … a breakdown in the communication methods/skills used by staff when dealing with offenders. This has contributed to the lack of respect shown to staff by detainees … The other extreme … is not to speak or interact with the youths at all if possible. Staff and offenders report that a number of the younger male YJOs behave in this manner and when they do speak with them it is in a condescending or abusive fashion …[93]

Detainees were complaining that YJOs were lying to them to trick them into doing things.[94]

Mr Ferguson reported that there was a particular group of male YJOs, the so-called 'Jimmy's boys', who had allegedly teased, threatened and assaulted detainees in the BMU.[95] It was indicated that they did not interact with the detainees unless playing enforcer and were locking detainees up for the slightest thing, withholding food and privileges.[96] By 2013 and 2014, there was a culture at Don Dale that rules in place for officers could be ignored.[97]

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[89] Oral evidence of Benjamin Kelleher, 21 March 2017, 1543:10-31.
[90] Oral evidence of Greg Harmer, 24 March 2017, 1784:10-14.
[91] Exhibit 064.154, 'Information and slides', 17 October 2013; oral evidence of Leonard de Souza, 22 March 2017, 1654:31-36.
[92] See, eg, oral evidence of James Sizeland, 27 March 2017, 1884:9-18.
[93] Exhibit 125.001, YJ Detention Review Sept 2014.
[94] Ibid, 2.
[95] Ibid.
[96] Ibid.
[97] Oral evidence of Leonard de Souza, 22 March 2017, 1659:7-11; oral evidence of James Sizeland, 27 March 2017, 1882:20-21.

Both Ms Muller and Ms Tobin spoke about a macho culture, of men with a strong influence on the culture of the place, with a punitive bullying attitude, who were misapplying rules because they saw their role to be punitive, who would threaten sending to the 'back cells' or bully kids into compliance.[98] Ms Inglis described them as enjoying a 'power trip' – being always 'gung ho' and doing things such as preventing detainees from going to the toilet.[99] There has also been evidence from detainees of group punishments and being deprived of food, water and access to the toilet as a means of punishment.[100]

This behaviour is unacceptable. It shows a complete disregard for the pre-existing trauma suffered by children in detention and a lack of understanding that those behaviours might re-traumatise those children. As Mr Hamburger says, threatening and punitive interactions with vulnerable young people demonstratively escalates their aggressive behaviour.[101]

In NAAJA's submission, the increased focus on security rather than a therapeutic and rehabilitative environment was fostered by the appointment of managers from adult correctional backgrounds such as Mr Caldwell and Mr Sizeland.[102] For example, Mr de Souza drew a distinction between the culture at Don Dale under Mr O'Leary's management and the increasingly security focused and punitive culture, which flourished under later management. Mr O'Leary, a former psychiatric nurse with experience working with Aboriginal people, encouraged staff to establish programs at Don Dale such as gardening, carpentry, metal work, electronics and cooking programs.[103] Young people engaged positively in these programs and there was evidence that during this period there were fewer incidents and the 'back cells' were rarely used.[104]

Mr Middlebrook acknowledged concerns about the 'muscle-bound' culture,[105] but there is little evidence before the Commission to suggest that any sustained measures were taken to improve it.[106] In NAAJA's submission, the poor culture is attributable to the Department's failure to adequately manage detention centres and promote and enforce professional standards of behaviour. Intelligence provided to the Department about the suitability of YJOs, including concerning allegations of misconduct, were not adequately investigated or acted on.[107] There were inadequate systems in place to screen new staff, or to identify and properly address alleged misconduct. Mr Middlebrook acknowledged that there had been a 'dramatic systems failure' because allegations that he said he

[98] Exhibit 154.001, Statement of Eliza Tobin, 8 February 2017, [37]; oral evidence of Eliza Tobin, Saki Muller and Louise Inglis, 24 March 2017, 1772-1773.
[99] Oral evidence of Louise Inglis, 24 March 2017, 1774:20-27.
[100] See, for example, Exhibit 272.000, Statement of BL, 1 March 2017, [77]–[78]; oral evidence of Dylan Voller, 12 December 2016, 682; Exhibit 270.001, Statement of AM, 11 February 2017, 9 [37]-[38].
[101] Exhibit 031.002, Annexure 1 – Report 'A Safer Northern Territory Through Correctional Interventions', 31 July 2016, 145.
[102] See Exhibit 194.001, Statement of Russell Caldwell, 13 March 2017, 1; oral evidence of James Sizeland, 27 March 2017, 1866:25.
[103] Oral evidence of Leonard de Souza, 22 March 2017, 1620:15-23.
[104] Oral evidence of Leonard de Souza, 22 March 2017, 1621:9-11.
[105] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2974:1-4.
[106] See, eg, oral evidence of Leonard de Souza, 22 March 2017, 1626:5-6.
[107] See, eg, Exhibit 283.071; Exhibit 283.084; Oral evidence of Kenneth Middlebrook, 26 April 2017, 2942; 2976; 2978; 2982.

was unaware of, such as filming detainees in the shower, had not been brought to his attention through the established reporting chain.[108]

Proposed finding 9.7	That the training provided to Youth Justice Officers was grossly inadequate and did not equip them to manage the challenges of the youth detention environment.
Proposed finding 9.8	That the culture that pervaded youth detention facilities was punitive and macho.
Proposed finding 9.9	That this culture re-traumatised young people in the Department's care.

Recommendation 105	That Youth Justice Officers complete comprehensive training before commencing duties, and that this training includes topics such as trauma-informed approaches, mental health, de-escalation techniques and behaviour management.
Recommendation 106	That Youth Justice Officers complete regular refresher training.
Recommendation 107	That Youth Justice Officers have access to psychologists and other relevant health professionals who can provide advice about appropriate techniques and strategies for dealing with complex behaviours.
Recommendation 108	That Territory Families ensure there are robust processes in place for investigation of allegations of misconduct or inappropriate behaviour by staff and that measures are taken to promote and enforce professional standards in youth detention facilities.

9.4 Record keeping

The inadequacies of record keeping in youth detention facilities have been well documented before the Commission. Mr Middlebrook accepted that it was 'substandard'[109] and that the Department failed to maintain adequate records.[110]

[108] Oral evidence of Kenneth Middlebrook, 26 April 2017, 2974:21-25.
[109] Oral evidence of Kenneth Middlebrook, 28 April 2017, 3373:34.
[110] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3048:1-2.

Mr Ferguson, Director of the Professional Standards Unit, acknowledged that the failures were persistent:

> … most of my reviews and the reports and the statement I have given clearly show that there has been ongoing failure of recording accurate details of events in juvenile detention over this period.[111]

Correctional staff were not aware of the importance of keeping records,[112] nor did staff know how to use IOMS properly.[113]

> The record keeping was very poor, and it was one of the things that we absolutely needed to follow up in training. If staff have not been trained in appropriate record keeping, understanding why they need to do appropriate record keeping, and within the required time frames, unfortunately it is not surprising that those records aren't well kept.[114]

The Vita Report found that record keeping fell short, and recommended that it be monitored, 'particularly any behaviour management plans that are formulated and any significant periods of segregation or confinement.'[115] Poor record keeping, together with poor management and supervision, was found to have contributed to incidents at Don Dale.[116]

Deficiencies in record keeping meant that there was no accurate picture of what was occurring in the BMU.[117] There was also no central register documenting the Commissioner's decision to isolate a detainee pursuant to s 153(3) of the *Youth Justice Act*.[118] Mr Middlebrook acknowledged that such a register should have been in place.[119] This is also a requirement under regulation 72(3) of the *Youth Justice Regulations*. The Commission ought to find that this regulation was not complied with. The Department's gross failings in this regard are indicative of the little attention paid to the gravity of the decision to isolate a detainee and the serious psychological impacts of isolation on young people.

NAAJA is also concerned about evidence before the Commission about failures to maintain the Use of Force Register. Former Youth Justice Officer Ben Kelleher said he didn't necessarily know where the Use of Force Register was during the period he worked at Don Dale and acknowledged that the register wasn't reliable.[120] Youth Justice Officer Trevor Hansen told the Commission that the Use of Force Register was at times not completed because it was locked in the manager's office waiting to be signed.[121] Staff addressed the issue by making additional journals so that a spare copy could be kept in the shift supervisor's office, however this happened 'eventually' and Mr Hansen agreed that it was

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[111] Oral evidence of David Ferguson, 23 March 2017, 1825:41-44.
[112] Oral evidence of James Sizeland, 27 March 2017, 1868:39-40.
[113] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3001:30-32.
[114] Oral evidence of Sally Cohen, 24 April 2017, 2839:10-16.
[115] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 47.
[116] Ibid, 50.
[117] Oral evidence of Sally Cohen, 30 March 2017, 2367:31-32.
[118] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3047:45-46.
[119] Oral evidence of Kenneth Middlebrook, 26 April 2017, 3000:45-46.
[120] Oral evidence of Ben Kelleher, 21 March 2017, 1542:35-36.
[121] Oral evidence of Trevor Hansen, 13 March 2017, 966:22-24.

'silly' that such a simple problem had not been addressed.[122] This strongly suggests that use of force was occurring more frequently than the records suggest.

Deficiencies in the Use of Force Register were repeatedly picked up in audits conducted by the PSU,[123] however Mr Caldwell and Mr Sizeland told the Commission they weren't aware of the problem.[124] Mr Caldwell said it wasn't uncommon for him not to be made aware of audit findings, and that in the context of operational pressures, important recommendations like recording the use of force 'might have slipped through the cracks'.[125] Again, this reveals that extremely serious matters such as the use of force against young people were given scant consideration.

Keeping accurate records is clearly an important aspect of detention centre operations. It is critical to promoting transparency and ensuring staff can be held accountable for their actions and young people's rights are protected. Proper records are an essential tool for policy making, including evidence-based decision making. Failure to maintain proper records is further evidence of a careless culture where little consideration was given to the importance of young people's rights and wellbeing.

Former Children's Commissioner Dr Howard Bath encountered difficulties investigating complaints made by Dylan Voller because certain records, including CCTV footage, could not be located.[126] Record keeping systems are maintained by staff who may be the subject of complaints. NAAJA agrees with Dr Bath that staff involved in the operation of youth detention facilities should not have the ability to permanently or irrevocably delete or alter these records.[127]

In NAAJA's submission, there is sufficient evidence before the Commission to support a finding that record keeping in detention facilities throughout the period of the Commission's terms of reference was grossly inadequate.

Proposed finding 9.10	That record keeping at detention centres was grossly inadequate.

Recommendation 109	That Territory Families reviews its policies and procedures relating to record keeping and ensures that all staff receive comprehensive training on record keeping requirements.
Recommendation 110	That Territory Families ensures that detention centre staff cannot permanently or irrevocably delete or alter records.

[122] Oral evidence of Trevor Hansen, 13 March 2017, 967:25-40.
[123] See, for example, Exhibit 064.166, Audit – Use of Force Register at Don Dale Youth Detention Centre, 2 April 2014.
[124] Oral evidence of Russell Caldwell, 29 March 2017, 2107:19.
[125] Oral evidence of Russell Caldwell, 29 March 2017, 2107:21-42.
[126] Exhibit 011.001, Statement of Howard Bath, 5 October 2016, 16 [99(c)].
[127] Ibid.

10 Government responses to relevant reviews and inquiries

10.1 Missed opportunities for action

Much of the evidence before the Commission is not new. The problems facing the youth justice and child protection systems in the Northern Territory have been canvassed extensively in the reports of previous reviews and inquiries. Over 50 reports relevant to the Commission's terms of reference describe the problems and propose solutions; most have been published in the last 10 years.[1]

As Counsel Assisting Peter Callaghan SC remarked in his opening address:

> The bare fact that there has been so much said and written over such a long time is suggestive of a persistent failure that should not be allowed to endure.[2]

The inaction of successive governments has failed, and continues to fail, the Aboriginal people of the Northern Territory. It is distressing that 26 years on from the tabling of the Report of the Royal Commission into Aboriginal Deaths in Custody, many of its recommendations remain just as relevant today. The rates of over-representation of Aboriginal people in Northern Territory prisons remain staggeringly high and are increasing. There has been no recognition by the Northern Territory Government of the urgency conveyed in that Commission's recommendation with respect to reducing Aboriginal involvement in the youth justice and child protection systems:

> Recommendation 62: That 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.[3]

The Northern Territory government's response to the report's recommendations has been wholly inadequate. For example, Aboriginal young people continue to be routinely held in police lockups[4], and as the evidence before this Commission clearly demonstrates, the government has failed to recognise that it is 'undesirable in the highest degree' for an Aboriginal person to be kept in isolated detention.[5] This is unacceptable.

The Commission has also heard evidence about the more recent failures of the Northern Territory Government to respond to the *Little Children are Sacred* report. Ms Anderson told the Commission that there was a 'wall of general malaise and ennui' when Government was provided with draft

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[1] Senior Counsel Assisting opening address, 11 October 2016, 2.
[2] Senior Counsel Assisting opening address, 11 October 2016, 4.
[3] Exhibit 024.001, Report of the Royal Commission into Aboriginal Deaths in Custody, recommendation 62.
[4] Exhibit 024.001, Report of the Royal Commission into Aboriginal Deaths in Custody, recommendation 242.
[5] Exhibit 024.001, Report of the Royal Commission into Aboriginal Deaths in Custody, recommendation 181.

recommendations for consideration prior to the final report being published.[6] There was no formal Government response to the *Little Children are Sacred* report, and while some recommendations have been implemented or progressed, many have been ignored. With respect to the Government's response to the final report, Ms Anderson said:

> You know, to this day, there is not a single politician or anybody, any decision maker of any kind in the Northern Territory, or anywhere else for that matter, has had a single conversation with me. Not one. It's like it – we dropped it out there and it went into some abyss somewhere, like it didn't happen. So no one's had a conversation with me about any aspect of it.[7]

Most notably, the inquiry's primary recommendation, that governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities, has not been implemented.

In 2010, the Report of the Board of Inquiry into the Child Protection System in the Northern Territory handed down its report, *Growing Them Strong, Together*, which contained 147 recommendations for improving outcomes for children in the Northern Territory. The Inquiry emphasised the need for organisational reform of the child protection system, including 'robust concomitant commitment to developing culturally appropriate, early intervention and preventive services.'[8] Again, the Government response to this report was wholly inadequate. Dr Howard Bath told the Commission:

> Gradually my perception was it faded – the recommendations faded. Even though there was some broad commitment to the Board of Inquiry recommendations – … I think it was in 2014 there was a specific statement to the effect the government would no longer be adhering to those recommendations, or committed to implementing them.[9]

The Northern Territory government has commissioned two recent reviews of youth justice: the Review of the Northern Territory Youth Justice System conducted by Ms Jodeen Carney in 2011 and the Review of the Northern Territory Youth Detention System conducted by Michael Vita in 2015. Both reviews identified serious systemic deficiencies. For example, Mr Vita found that 'youth detention facilities in the Northern Territory are struggling to maintain service level standards in the absence of a coherent operating philosophy, staff training, direction, appropriate infrastructure, leadership and resourcing.'[10]

Responses to these reviews have been piecemeal, without urgency and, in the case of the Carney Review, delayed and deferred.[11] As the Commission has heard, NAAJA had concerns that the Youth Detention Reform Advisory Committee established by the Department of Correctional Services to

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[6] Oral evidence of Patricia Anderson, 12 October 2016, 159:2.
[7] Oral evidence of Patricia Anderson, 12 October 2016, 158:38-42.
[8] Exhibit 013.001, Board of Inquiry Report – Growing them strong together, Promoting the Safety and Wellbeing of the Northern Territory's Children - Summary Report, 1.
[9] Oral evidence of Howard Bath, 12 October 2017, 124:34-37.
[10] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 11.
[11] Oral evidence of Sally Cohen, 2321:25-56; 2344:3.

oversee implementation of the Vita Report lacked independence and the ability to execute the high level of scrutiny required.[12] Many of Mr Vita's recommendations such as introducing a new classification system and introducing evidence-based programs in detention have not been satisfactorily progressed. The persistence of these systemic issues and subsequent establishment of this Commission demonstrate the government's failure to adequately respond to a crisis it has long been aware of.

Proposed finding 10.1	That successive Northern Territory governments have failed to adequately respond to previous reviews and inquiries.
Proposed finding 10.2	That over prolonged years there has been a lack of genuine partnership and consultation with Aboriginal people and communities.
Proposed finding 10.3	That there has been no progress in the reversal of Aboriginal people's incarceration and disadvantage.

10.2 Monitoring Government responses to the Royal Commission

Against this background, NAAJA on behalf of the Aboriginal people and communities it represents strongly urges the Commission to consider mechanisms to properly monitor government implementation of its recommendations. Government must be accountable for progress. The appointment of an independent monitor to track and review the progress of government agencies in implementing the Commission's recommendations is therefore essential.[13]

Given the staggeringly high over-representation of Aboriginal young people in the youth justice and child protection systems, and the right of Aboriginal people to self-determination, it is crucial that Aboriginal people provide this oversight.

The Children's Commissioner is already responsible for monitoring the implementation of any government decision arising from an inquiry related to the care and protection of vulnerable children.[14] As discussed in section 8.3.6, NAAJA proposes that a Commissioner for Aboriginal Children and Young People is established within the office of the Children's Commissioner, and is charged with monitoring implementation of this Commission's recommendations.

NAAJA recommends that the Northern Territory Government ensure the Children's Commissioner is properly resourced to fulfil this function, and that it produce an annual report, to be tabled in Parliament, on Government's progress in implementing the Commission's recommendations.

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[12] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 50 [231].
[13] For example, the Victorian Government has established a Family Violence Reform Implementation Monitor to monitor and report to Parliament on Government's progress in implementing the recommendations of the Royal Commission into Family Violence. Similarly, a Victorian Bushfires Royal Commission Implementation Monitor was appointed to monitor and review implementation of recommendations arising out of that inquiry.
[14] *Children's Commissioner Act 2013* (NT), s 10(1)(e).

Recommendation 111	That the Royal Commission provide time frames for implementation of its recommendations to guide the Commonwealth and Northern Territory governments on priority areas for implementation.
Recommendation 112	That the Office of the Children's Commissioner becomes an independent monitor of the Northern Territory Government's response to the recommendations of the Royal Commission.
Recommendation 113	That the Office of the Children's Commissioner report annually on the Northern Territory Government's progress in implementing the Royal Commission's recommendations, and that this report is tabled in Parliament.

11 Breaches of relevant laws, duties, instruments and policies

It is NAAJA's position that numerous breaches of laws, duties, instruments and policies have occurred in the youth detention system during the relevant period. While our submissions are not exhaustive, many of those breaches are set out under the relevant topic areas. Many further breaches, including those that relate to the treatment of our individual clients, are set out in our clients' individual submissions.

The number, breadth and repetitiveness of the breaches are an indictment on the inhumane, mismanaged, dysfunctional and often unlawful youth detention system that has been operating in the Northern Territory for many years. These breaches support NAAJA's call for wholesale and immediate change to the system, both in these submissions and in our previous submissions over the last decade.

12 Future youth detention facilities

12.1 Detention as a genuine measure of last resort

NAAJA advocates for a continuum of care model for young people in contact with the youth justice system. Detention of young people in a secure facility is just one point along this continuum. In NAAJA's view, priority must be given to investing in other points along the continuum such as therapeutic and rehabilitative alternatives to detention, including diversionary programs. A new youth justice system will see services, including diversionary programs, therapeutic support services, mental health services and drug and alcohol programs, delivered on country and in community. Some of these services may have a residential component, but this should be low security.

Detention of children and young people must be a genuine last resort, and for the shortest possible period of time.[1] Immediate efforts must be made to reduce the number of children in detention, and particularly the high number on remand. The recent Northern Territory government initiatives moving towards establishing supported bail accommodation options and expanding the use of Youth Justice Conferencing are examples of initial steps in the right direction.

12.2 Investing in programs to keep children on country

The Commission has heard about the therapeutic benefits of keeping children on country. Dr James Fitzpatrick said:

> … young people who are from indigenous communities, where culture and country are very therapeutic for them and they have strong connections to culture and land, alternatives to incarceration are very promising in terms of therapeutic environments that can calm down these chronically stressed and highly anxious and agitated young people, and to take the opportunity to deliver therapies, attachment and trauma based therapies and then more sophisticated cognitive based therapies … I think one of the worst environments would be a highly charged and highly punitive detention facility where the young person's arousal state is constantly escalated and where they are very likely to tip over into antisocial behaviour if … they're provoked.[2]

Aboriginal people have called for youth justice facilities to be on country so that young people can maintain their connection to culture and family:

> Move detention centres back to community where we can keep our eye on them and occupy them with our law too, not just government law … our law has been here for centuries.[3]

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[1] Exhibit 005.002, Convention on the Rights of the Child, article 37(b).
[2] Oral evidence of Dr James Fitzpatrick, 8 December 2016, 540:12-31.
[3] Exhibit 36.002, ABC News Article - Youth detention royal commission: Call for youth to be detained in prison work camp, 22 October 2016.

Tiwi Elder Mr Marius Puruntatameri supported small-scale facilities in community:

> … the first port of call, so to speak, is asking the community what – what the resolution should be for the young offenders. And they will give you the answer, but yes, there should be a facility on the Tiwi Islands built for that purpose…[4]

Successfully establishing these services and facilities in communities will require the government to establish genuine partnerships with Aboriginal communities to empower Aboriginal people to design and deliver the specific programs and services that best meet their community's needs.

Ms Jeanette Kerr, Acting Deputy Chief Executive Officer, Territory Families, told the Commission that Territory Families is embarking on a process of co-design with Aboriginal communities for the delivery of programs and initiatives across Territory Families.[5] As Ms Kerr explained:

> … every program that we do and implement will have to be place based, and in consultation and design cooperation with the people that it impacts on.[6]

> [Co-design is] more than consultation. It's actually developing and implementing together.[7]

NAAJA welcomes the Northern Territory Government's commitment to co-design of programs and initiatives with Aboriginal organisations and communities. NAAJA recognises that the co-design process will take time, and for this reason has recommended that urgent interim action be taken to find an alternative to Don Dale Youth Detention Centre (see section 2).

NAAJA would welcome the opportunity to provide further submissions on alternatives to detention.

12.3 Future secure detention facilities

There has been unequivocal acceptance by the Northern Territory Government that current youth detention facilities need to significantly change:

> I think it's really clear that the current two detention centres are not suitable, and they have no therapeutic value and we have to do things vastly differently.[8]

[4] Oral evidence of Marius Puruntatameri, 31 March 2017, 2421:34-36.
[5] See Statement of Jeanette Kerr, 30 November 2016, 3 [15] and oral evidence of Jeanette Kerr, 8 December 2016 490:1-11.
[6] Oral evidence of Jeanette Kerr, 8 December 2016, 490:9-11.
[7] Oral evidence of Jeanette Kerr, 8 December 2016, 506:36-37.
[8] Oral evidence of Jeanette Kerr, 8 December 2016, 525:12-14.

The Northern Territory Government has committed to building new youth justice facilities in Darwin and Alice Springs.[9] The Government has acknowledged that the current budget allocations of $15 million and $7 million respectively are inadequate.[10]

Ms Kerr in her evidence agreed that planning for the construction of large detention centres is 'planning for failure'. She advised that Government's intention is to create small therapeutic facilities, separate from correctional facilities, to be used to detain children 'only as a last resort … or in exceptional circumstances.'[11]

NAAJA accepts that there may be a need to detain a very small number of young people who have been sentenced and are deemed high risk in a secure environment and that new facilities will be required for this purpose. In section 1.3.3, NAAJA recommends increasing the minimum age of criminal responsibility to 12 years old. Detention of any kind is unsuitable for children under the age of 12 years given their age and stage of brain development.

Consideration of new secure facilities must occur within a context of broader reform of the youth justice system, including increased investment in other interventions along the continuum such as alternatives to detention, as outlined above.

The design of new facilities should be subject to a co-design process with Aboriginal organisations and communities. Future youth justice facilities must not be institutional and oppressive environments comprising concrete cellblocks, fences and razor wire. In its report, the Royal Commission into Aboriginal Deaths in Custody described the reasons for the particularly destructive effects of institutionalisation on Aboriginal children:

> … because Aboriginal culture and 'institutional' culture are virtually direct opposites, the former being permissive, egalitarian, strongly interactive and kin based when the latter is authoritarian, punitive, hierarchical, individualistic and impersonal.[12]

NAAJA supports Mr Hamburger's recommendation that such a co-design process commence with a conference bringing together representatives from Aboriginal organisations and communities, Government and other stakeholders to discuss possible models, including models that have worked in other jurisdictions.

The Commission has had the opportunity to visit or hear about some of these examples. For instance, the West Kimberley Regional Prison recognises Aboriginal prisoners' cultural, kinship, family and community responsibilities and spiritual connections to land, and was commended to the Commission as a very good therapeutic model.[13] The prison comprises self-care housing units which allow for prisoners to be housed according to family ties, language groupings and security ratings. The model is

[9] Oral evidence of Jeanette Kerr, 8 December 2016, 498:21-25.
[10] Oral evidence of Jeanette Kerr, 8 December 2016, 498:21-25.
[11] Oral evidence of Jeanette Kerr, 30 November 2016, 498:33-35.
[12] Royal Commission into Aboriginal Deaths in Custody, 'Regional Report of Inquiry In New South Wales, Victoria and Tasmania', 1991.
[13] Oral evidence of Keith Hamburger, 5 December 2016, 305:3-6.

premised on enhancing a prisoner's capacity to develop living, communication and negotiation skills required on release.

Farther afield, the United States Missouri model is premised on small group homes that enable therapeutic individualised and group treatments and has been recommended for consideration to the Commission.[14] The facilities are based on a small group dormitory style model to maintain a 1:6 staff ratio. The goal is to keep young people close to home (within 100km) and allow home visits to facilitate reintegration into the community. The small facilities also enable active supervision by staff.

NAAJA recommends that future secure facilities in the Northern Territory are:

- Small, purpose-built therapeutic facilities that cater for 6–10 people
- Designed to promote rehabilitation and enable Aboriginal children and young people to maintain connection to their family, community and culture
- Flexible spaces, including outdoor areas for culture, recreation, and family visits, as well as spaces that afford privacy for medical consultations, legal and other professional visits
- Staffed by a range of professionals to meet the needs of young people, including psychiatrists, psychologists, Aboriginal Liaison Officers, and Youth Justice Officers
- Governed by comprehensive Standard Operating Procedures which prohibit the use of isolation and strictly limit the use of force and use of restraints
- Designed to accommodate the needs of different cohorts of detainees, for example, girls, young people with disabilities and those of varying ages
- Designed to meet the climatic conditions of northern and central Australia
- Designed to comply with the *Havana Rules*, other applicable international standards for juvenile justice facilities, and the Australasian Juvenile Justice Administrators Juvenile Justice Standards.

In the Introduction and section 9.1.3, NAAJA recommends that a statutory authority be established with responsibility for youth justice services in the Northern Territory. The statutory authority should be Aboriginal-led, and enter into partnerships with Aboriginal organisations and communities for the delivery of services across the continuum of care model. In time, and with the support of government, the statutory authority should take responsibility for operation of secure youth justice facilities.

Recommendation 114	That the Northern Territory government commit to a co-design process with Aboriginal organisations and communities to ensure Aboriginal people have genuine input into the design of future secure youth justice facilities in the Northern Territory.
Recommendation 115	That the co-design process commences with a conference bringing together representatives from Aboriginal organisations and communities, Government and other stakeholders to discuss possible models.

[14] See, eg, Exhibit 115, Statement of Olga Havnen, 16 February 2017; Exhibit 355.000, Statement of Jared Sharp.

Recommendation 116	That with future secure facilities in the Northern Territory are: i. Small, purpose-built therapeutic facilities that cater for 6–10 people j. Designed to promote rehabilitation and enable Aboriginal children and young people to maintain connection to their family, community and culture k. Flexible spaces, including outdoor areas for culture, recreation, and family visits, as well as spaces that afford privacy for medical consultations, legal and other professional visits l. Staffed by a range of professionals to meet the needs of young people, including psychiatrists, psychologists, Aboriginal Liaison Officers, and Youth Justice Officers m. Governed by comprehensive Standard Operating Procedures which prohibit the use of isolation and strictly limit the use of force and use of restraints n. Designed to accommodate the needs of different cohorts of detainees, for example, girls, young people with disabilities and those of varying ages o. Designed to meet the climatic conditions of northern and central Australia p. Designed to comply with the *Havana Rules*, other applicable international standards for juvenile justice facilities, and the Australasian Juvenile Justice Administrators Juvenile Justice Standards.
Recommendation 117	That secure youth justice facilities are run in partnership with Aboriginal communities and non-government organisations.
Recommendation 118	That there are is a planned and staged transition to Aboriginal-operated secure youth justice facilities.