North Australian Aboriginal Justice Agency

Submissions on Pre- and Post-Detention

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

August 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.

About these submissions

These submissions respond to topics 1–10 identified by the Royal Commission in its call for submissions on pre- and post-detention. We have addressed topic 11 on legislative reform in each of the substantive topic areas.

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 have drawn on NAAJA's unique organisational knowledge, Aboriginal understandings and expertise as a long-term provider of culturally competent legal, therapeutic and social services to Aboriginal young people in Northern Australia. We have been particularly informed by the experiences of our clients, many of whom have bravely come forward to tell their stories to the Commission and share their 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.

List of acronyms

AIS	Aboriginal Interpreter Service
APO NT	Aboriginal Peak Organisations Northern Territory
ASYASS	Alice Springs Youth Accommodation and Support Services
CAALAS	Central Australian Aboriginal Legal Aid Service
CJC	Community Justice Centre
DCF	Department of Children and Families
DPP	Director of Public Prosecutions
JDAI	Juvenile Detention Alternatives Initiative
JSS	Jesuit Social Services
MOU	Memorandum of understanding
NAAJA	North Australian Aboriginal Justice Agency
NAPLAN	National Assessment Program – Literacy and Numeracy
NGO	Non-government organisation
NTER	Northern Territory Emergency Response
SCA	Supervised Community Accommodation
SYBC	Sentenced Youth Boot Camp
YDU	Youth Diversion Unit
YORET	Youth Outreach and Re-Engagement Team

Recommendations

Recommendation 1 That there is an immediate investment in early childhood intervention and risk-focused prevention services and programs for Aboriginal children and young people, from the earliest years of life onwards.

Recommendation 2 That there is a commitment to long-term investment in primary and secondary crime prevention services.

Recommendation 3 That government commits to the APO NT Partnership Principles and the creation of genuine partnerships with Aboriginal community controlled services and programs.

Recommendation 4 That the partnerships are premised on building and strengthening, rather than displacing, Aboriginal organisational capacity and control. New services and programs must be co-designed with Aboriginal communities and organisations.

Recommendation 5 That all police trainees and officers undertake youth-oriented training. All officers who interact with youth should undertake ongoing youth-oriented training as a yearly training requirement.

Recommendation 6 That police in each remote Aboriginal community undertake relevant cross-cultural training.

Recommendation 7 That there is an immediate audit of the suitability of the conditions of detention cells for young people in remote police stations and posts.

Recommendation 8 That the conditions for detention of Aboriginal children and young people in remote police cells are made appropriate for the detention of children.

Recommendation 9 That there is a statutory maximum time limit of four hours for detaining a child in custody as an 'arrested suspect' for the purpose of investigation.

Recommendation 10 That a child who is charged and in custody shall be brought before the Youth Justice Court within 24 hours or is to be released on bail.

Recommendation 11 That there is greater training in and compliance with the requirements of s 22 of the *Youth Justice Act*.

Recommendation 12 That the annual police custody training include training that focuses on police obligations for young people in custody.

Recommendation 13	That there is a mandatory legislative requirement for young people to have access to legal advice and representation.
Recommendation 14	That Northern Territory Police immediately enter into discussion for commencement of protocols with NAAJA.
Recommendation 15	That a custody notification service is introduced in the Northern Territory.
Recommendation 16	That s 18(2) of the *Youth Justice Act* and s 140 of the *Police Administration Act* are amended so that no child is questioned until they have had access to legal advice from a lawyer.
Recommendation 17	That the register of persons to act as support persons includes Aboriginal Law and Justice Groups and/or Aboriginal community bodies.
Recommendation 18	That support persons are trained in recognising the need for a child to access a lawyer prior to interview.
Recommendation 19	That the Police General Order Youth Pre-Court Diversion is reviewed in light of the recommendations arising from the Royal Commission.
Recommendation 20	That all police officers involved in youth diversion considerations receive training on the role and purpose of diversion, including trauma-informed and restorative justice approaches.
Recommendation 21	That a 'Failure to Divert Declaration' is included in all police briefs for youth matters, setting out the reasons why diversion has been refused. It should be filed with the court at the same time as charges are filed.
Recommendation 22	That traffic offences are not excluded from diversion.
Recommendation 23	That the Northern Territory Government, on the advice of the Legislative Amendment Advisory Committee and other relevant agencies, remove certain other offences prescribed as 'serious offences' in the *Youth Justice Regulations* to facilitate greater access to diversion.
Recommendation 24	That s 39(3)(c) of the *Youth Justice Act* is repealed.
Recommendation 25	That legislation expressly sets out that admission of wrongdoing is not required for diversion and that any such admission is inadmissible in criminal proceedings.

Recommendation 26 That reassessments for diversion under s 64 of the *Youth Justice Act* are conducted by an independent agency and include Aboriginal Law and Justice Groups and/or Aboriginal community bodies.

Recommendation 27 That the Northern Territory Government takes measures to ensure that information is shared between agencies responsible for delivery and oversight of diversion programs, including police, prosecutions, the courts and Territory Families.

Recommendation 28 That traditional Aboriginal mediation and dispute resolution systems and methods are formally recognised as Youth Justice Conferencing options.

Recommendation 29 That the Commonwealth and Northern Territory governments as a first order priority provide adequate training, recognition of prior learning, capacity building opportunities, resources and support for Aboriginal controlled and run Youth Justice Conferencing across the Northern Territory.

Recommendation 30 That the selection and provision of Youth Justice Conferencing providers follows the APO NT Partnership Principles.

Recommendation 31 That Aboriginal people are recruited and trained as convenors of Youth Justice Conferences.

Recommendation 32 That the *Youth Justice Act* is amended so that:

a. If a young person participates in a Youth Justice Conference and agrees to the outcome plan, the court must impose a sentence less severe than it would have imposed if the young person did not participate in the conference
b. If a young person fails to participate in a Youth Justice Conference, the court must not impose a sentence more severe than it would have if the young person had not failed to participate.
a.

Recommendation 33 That a general presumption in favour of bail for youth offenders is inserted into the *Bail Act* or in youth-specific bail provisions in the *Youth Justice Act*.

Recommendation 34 That pro-bail, youth specific provisions are inserted into the *Bail Act*, or as part of a separate bail regime for young people in the *Youth Justice Act*. These provisions should require consideration of the following Aboriginal youth-centred principles:

a. That young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them.
b. Relationships between a young person and members of their family should be preserved and strengthened wherever possible.
c. The education or employment of a young person should proceed without interruption wherever possible.
d. A young person's sense of cultural identity should be acknowledged and a young person should be able to maintain their cultural identity, including participating in ceremony.
e. The detention or imprisonment of a young person is to be used only as a last resort, only if there is no appropriate alternative and only for the shortest appropriate period of time.

Recommendation 35 That the Northern Territory Government commit to the development and implementation of a decision-making tool that will become a mandatory step in all decisions regarding young people and grants of bail.

Recommendation 36 That the Northern Territory Government immediately establish a working group, including members of the Aboriginal and wider community, to work towards the development and establishment of such an objective screening instrument.

Recommendation 37 That bail, at first instance, is decided by designated local Aboriginal community bodies and reviewed by police and courts.

Recommendation 38 That Aboriginal young people are considered for referral to Aboriginal learning and healing centres.

Recommendation 39 That Aboriginal Law and Justice Groups and community-controlled organisations are funded to assist police in locating appropriate kinship members or family as a responsible adult.

Recommendation 40 That those Aboriginal Law and Justice Groups and community-controlled organisations have standing as responsible adults for Aboriginal young people of their community if no closer relative, kin or guardian is available.

Recommendation 41 That the prompt review of police bail by a Youth Court Judge is available at any time.

Recommendation 42 That a proportionality requirement for imposition of bail conditions is included in youth-specific bail conditions in the *Bail Act* or the *Youth Justice Act*.

In imposing any conditions on a young person, the court must take into account:

a. the young person's ability to understand and to comply with those conditions, and
b. the age and maturity of the youth, including their capacity for complex decision-making, planning and the inhibition of impulsive behaviours.

a.

Recommendation 43 That a therapeutic, culturally relevant bail support program is established that provides coordinated, wraparound support to meet the individual needs of young people.

Recommendation 44 That the Northern Territory Government engages in genuine consultation with Aboriginal communities to determine sites for bail supported accommodation that cater for both females and males.

Recommendation 45 That bail support accommodation and services are provided by, or in partnership with, Aboriginal community-controlled organisations.

Recommendation 46 That the *Bail Act* is amended to remove the imposition of electronic monitoring as an option when police are considering conditions to be imposed on a child when granting bail.

Recommendation 47 That the Aboriginal Interpreter Service is funded for a permanent workforce of interpreters rather than relying on casual staff, and that interpreters are present at court on Youth Justice Court sitting days.

Recommendation 48 That all Youth Justice Court facilities have hearing loops and hearing devices available.

Recommendation 49 That Youth Justice Court proceedings are conducted in a child-friendly way, including use of plain language in court.

Recommendation 50	That all judges appointed to the Youth Justice Court receive specialist training and ongoing professional development on the youth jurisdiction, including child and adolescent development, trauma and cultural competency.
Recommendation 51	That legislation is enacted to establish the position of President of the Youth Justice Court of the Northern Territory.
Recommendation 52	That the President has jurisdiction to hear all criminal matters, including serious offences, and reviews of bail decisions and appeals.
Recommendation 53	That a Youth Justice Court Committee is established, which is chaired by the President of the Youth Justice Court and comprises representatives from the Director of Public Prosecutions, police, defence lawyers, Territory Families and the Department of Education.
Recommendation 54	That a separate Youth Justice Court is established in Alice Springs.
Recommendation 55	That new court facilities are established in all remote communities to meet the needs of Aboriginal children and young persons.
Recommendation 56	That youth matters are heard in sittings independent from adult matters in circuit courts.
Recommendation 57	That funding is provided for Aboriginal-controlled organisations or Law and Justice Groups to locate responsible adults for Aboriginal young people.
Recommendation 58	That non-government organisations receive ongoing funding to provide support services at court.
Recommendation 59	That the court employs dedicated youth justice staff and Aboriginal liaison officers to coordinate case management, facilitate information provision to the court and assist with warm referrals to support services.
Recommendation 60	That funding is provided for dedicated mental health practitioners and disability support workers based at the Youth Justice Court.
Recommendation 61	That the Youth Justice Court becomes responsible for funding reports pursuant to s 67 of the *Youth Justice Act*, and that a fund is established under the control of the Youth Justice Court to facilitate this.
Recommendation 62	Lower-end, community-based sentencing practices should be encouraged in youth justice courts.

Recommendation 63 That a broader range of non-custodial sentencing options are made available in remote communities and these options are co-designed with Aboriginal communities.

Recommendation 64 That a 'dual track system' is introduced in the Northern Territory, allowing young people under the age of 21 to serve custodial sentences in youth detention instead of adult prison.

Recommendation 65 That s 16AA of the *Crimes Act 1914* (Cth) is repealed.

Recommendation 66 That Aboriginal Elders and/or Law and Justice Groups are funded and supported to provide specialised cultural information and information about local non-custodial sentencing options for Aboriginal young people.

Recommendation 67 That the *Youth Justice Act* is amended so that all pre-sentence reports are required to include a young person's cultural information as provided by Aboriginal Elders, family and Law and Justice groups.

Recommendation 68 That Aboriginal lay advocates are introduced in the Youth Justice Court and receive training and remuneration for their role.

Recommendation 69 That the Northern Territory Government recommit to supporting Community Courts in all remote communities by providing adequate funding and support.

Recommendation 70 That specific legislation is enacted to provide a legal mandate for Community Courts.

Recommendation 71 That Community Court proceedings are conducted in language unless the community determines otherwise.

Recommendation 72 That all lawyers working in the Youth Justice Court receive specialist training on the youth jurisdiction, including child and adolescent development and trauma.

Recommendation 73 That government provides ongoing specific funding to NAAJA and CAALAS to establish specialist youth legal services, representation and support to Aboriginal young people.

Recommendation 74 That all prosecutors working in the Youth Justice Court receive comprehensive and specialist training on youth justice, including trauma-informed approaches to working with young people.

Recommendation 75 That the *Youth Justice Act* is amended so that youth justice courts are closed, unless the court directs otherwise.

Recommendation 76	That government provides sufficient and ongoing funding to ensure adequate resources and services to meet court orders under the *Youth Justice Act*.
Recommendation 77	That electronic briefs able to be accessed by police, prosecution, defence and the Court are introduced in the Youth Justice Court.
Recommendation 78	That robust and up-to-date information sharing processes are implemented across all youth services to ensure continuity of service delivery and provide children with the wraparound support they need.
Recommendation 79	That the Northern Territory Government ensures monitoring and evaluation is built into program requirements and adequately funded.
Recommendation 80	That the Northern Territory Government ensures funding is available to programs for a period of three to five years.
Recommendation 81	That community mental health services are expanded so that screening and support is available to all young people in the Northern Territory.
Recommendation 82	That flexible timelines are employed for staff of Aboriginal-controlled service providers to work towards formal qualifications concurrently with employment.
Recommendation 83	That funding for Aboriginal-controlled residential healing and drug and alcohol rehabilitation services is increased to existing services and provided to establish new services to meet demand and provide alternative options.
Recommendation 84	That a dedicated residential alcohol and other drug treatment facility for Aboriginal young people, controlled by a local Aboriginal organisation, is funded to operate in the Top End as a priority.
Recommendation 85	That funding arrangements are streamlined and coordinated to invest in and empower local Aboriginal organisations to deliver culturally appropriate youth programs and services.
Recommendation 86	That small-scale supported accommodation for youth, designed in a location specific and culturally appropriate way, is developed and implemented across the Northern Territory.
Recommendation 87	That both Territory Families and the Youth Justice Court adopt policies and practices to ensure that the caseworker who is best placed to assist the child shall be present at court to support the child.
Recommendation 88	That the caseworker shall attend the Youth Justice Court prepared to provide information that is best able to assist the child.

Recommendation 89 That Territory Families workers are precluded from performing the role of support person during police interviews.

Recommendation 90 That Territory Families fund an independent Aboriginal community-controlled organisation to provide interview support to children in the care of the CEO if family members are unavailable or inappropriate.

Recommendation 91 That a specialist team of Aboriginal pre-sentence report writers is established.

Recommendation 92 That a panel of qualified child and adolescent health practitioners is established to provide advice to the pre-sentence report writer and, where appropriate, to undertake assessments and write expert reports.

Recommendation 93 That s 51 of the *Youth Justice Act* is amended to enable the court to require the urgent provision of a s 51 report within 48 hours.

Recommendation 94 That Territory Families adopt the principles set out in the MOU as policy.

Recommendation 95 That a provision is inserted in the *Care and Protection of Children Act* prohibiting delegates of the CEO from advocating that there is no alternative placement option to detention and/or that detention is the only placement option.

Recommendation 96 That exit planning reports contain information on supporting the child's cultural identity.

Recommendation 97 That an Aboriginal-led, culturally relevant and appropriate pre-release program is developed to promote children's access to their culture and community and provide for structured post-release support mechanisms.

Recommendation 98 That a consistent, structured and holistic exit planning approach involving Territory Families caseworkers, detention centre caseworkers, and other available services such as NAAJA Throughcare is made available to each child in custody who is also in the care of the Territory Families.

Recommendation 99 That NAAJA Throughcare is funded to increase services to remote communities.

Recommendation 100 That Commonwealth and Northern Territory governments provide Throughcare with funding to enhance and expand service delivery.

Recommendation 101 That the Northern Territory and Commonwealth governments support the expansion of funding and services for exit planning and post-release support of remandees as a matter of urgency.

Recommendation 102 That a youth-specific parole board is established with the following features:

a. The board comprises a small number of representatives including an Aboriginal representative, an employee from an Aboriginal-led community organisation and a professional with youth-specific training and experience.
b. The board must meet the requirements of natural justice. At a minimum, young people, their lawyers and their responsible adult must be present when the decision is made.
c. The board must take a therapeutic and collaborative approach that aims to engage young people in the parole decision-making process.
d. The board has wide discretion to make a variety of orders including orders that meet the cultural needs of young people.

Recommendation 103 That the YORET unit is required to take a case management approach to youth justice that is culturally appropriate, trauma-informed and therapeutic. Youth Outreach and Re-Engagement Officers must receive youth-specific training that emphasises this case management approach. When employing Officers, consideration should also be given to experience or expertise working with young people.

Recommendation 104 That YORETs are funded to provide wraparound services to young people, including to engage psychologists and psychiatrists to provide reports about young people.

Recommendation 105 That the services provided by YORETs are available to children in remote communities. This could involve linking with community-based organisations and Aboriginal Law and Justice Groups in remote communities to supervise young people.

Recommendation 106 Cultural supervision should be favoured as an alternative to supervision by YORETs for young Aboriginal people when appropriate.

Introduction

The current approach to youth justice in the Northern Territory is not working. Responses are driven by the perceived need to be seen as 'tough on crime' rather than to understand and address the underlying causes of offending. Punitive, reactionary approaches have contributed to the unacceptably high rate of Aboriginal children in detention: 96 per cent of young people in detention in the Northern Territory are Aboriginal, despite being 45 per cent of the population aged 10 to 17 years.[1]

The system is fragmented, with agencies and services operating in 'silos' rather than providing holistic, coordinated responses. There is a lack of a cohesive framework setting out the shared objectives of the youth justice system and guiding the actions of government and non-government agencies towards the goals of rehabilitation, reintegration and reduction of offending.

There is now overwhelming evidence that incarceration of young people is counterproductive public policy.[2] Detention is harmful, ineffective and expensive. Aboriginal people have told the Commission about the devastating impact of incarceration on young people, families, and communities:

> Sending them to Don Dale or taking them from their family only makes things worse – for that child, for the family and for the whole community. For all our young people, young or old, jail harms them and our whole community. They lose their culture, their identity and their respect for themselves and for others.[3]

Maintaining punitive youth detention facilities only 'promotes a continued disinvestment in communities' and entrenches young people in the youth justice system rather than restoring them to their families and communities.[4]

A fundamental shift is required so that reform and investment is focused on prevention and early intervention for young people and their families. Increased and sustained efforts must be made to divert young people from the youth justice system and ensure that detention is genuinely a measure of last resort. In our Submissions on Youth Detention, we identified that this shift needs to be underpinned by a commitment to empower Aboriginal people to develop and deliver the solutions, and to bipartisan, long-term investment and evidence-based reform.

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[1] Australian Institute of Health and Welfare, Northern Territory: youth justice supervision in 2015-16, Youth justice fact sheet no. 77, 3.
[2] Exhibit 654.017, The Annie E. Casey Foundation, 'No Place for Kids: The Case for Reducing Juvenile Incarceration', 2011, 3.
[3] Exhibit 531.000, Lajamanu Kurdiji submission, 9 March 2017, 1.
[4] Exhibit 654.016, National Collaboration for Youth, 'Beyond Bars: Keeping Young People Safe at Home and Out of Youth Prisons', 8.

Empowering Aboriginal ownership and control

> The thing we want most from this Royal Commission is our power back. We want to be able to exercise Burnawarra authority over our community. Self-determination is our number one priority. Self-determination is crucial to effective youth policy.
>
> Self-determination is how we managed to live in harmony and how we managed to surivive for such a long time. We want to have formal input into policy and legislation.[5]

The Commission has heard compelling evidence about the importance of empowering Aboriginal people to develop the solutions and have ownership and control of delivery of services and programs across the youth justice system. It is only through redressing the gross failings and structural discrimination against Aboriginal people that lasting change for Aboriginal people of the Northern Territory can occur.

We urge the Royal Commission to ensure that its recommendations are informed by Aboriginal people's right to self-determination, recognition of Aboriginal cultural authority and use of traditional decision-making processes. 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. The Northern Territory should be leading the way in delivering culturally-strengthening justice programs for Aboriginal people. Efforts must be made to increase Aboriginal participation in policy and legislation development, and the design and delivery of all services and programs.

In our Submissions on Youth Detention, we recommended that funding and legislative change are provided to integrate Law and Justice Groups across the youth justice and child protection systems. The Kurdiji Law and Justice Group gave evidence about the importance of locally-driven responses:

> As the Kurdiji group we have been showing the way, showing that a strong Aboriginal group running things the way it wants for itself, can make a big difference in the community. We feel that supporting groups like ours will do a lot more to solve these problems than spending money on taking children away, sending kids to detention and putting so many of our young people in jail.[6]

NAAJA recommends that a Northern Territory Aboriginal Justice Agreement recognises the authority of Law and Justice Groups and empowers them to have greater control and meaningful input into decision-making across the whole justice system. This will require capacity building, increased resourcing and education for communities about the criminal justice system. It will also require a shift from the expectation that such groups will provide guidance, advice and services in a volunteer capacity. It will require the formalisation of such groups and appropriate remuneration for members.

In these submissions, we have recommended a number of ways in which the participation of Aboriginal people should be embedded across the youth justice system, including decisions about suitability for diversion, facilitating traditional mediation and conflict resolution processes, bail determinations, preparing pre-sentencing reports and establishing lay advocates in the Youth Justice

[5] Exhibit 526.000, Statement of Bunawarra Dispute Resolution Elders (Maningrida), 15 June 2017, 9 [51]–[52].
[6] Exhibit 531.000, Lajamanu Kurdiji submission, 9 March 2017, 2.

Court. We variously refer to Law and Justice Groups, cultural authorities and community bodies in recognition that there is opportunity for one group to perform a number of functions in community or for some of these functions to be shared among different groups. Ultimately, the specific name and composition of the group/s needs to be determined by Aboriginal communities in consultation with government, so that it best reflects the needs of each community.

Increased and sustained funding in a continuum of care for young people

In our Submissions on Youth Detention, we advocated for a continuum of care model for young people in contact with the youth justice system. A continuum of care is:

> an array of meaningful, non-residential community-based programs, supports, resources and services specifically designed to meet the individual needs of young people and their families in their homes. They cultivate the strengths of youth and families and provide them with what they might need at different stages of intensity in order to keep young people out of the juvenile justice system and confinement.[7]

There is no single solution to reducing youth offending; government must invest in a range of therapeutic, trauma-informed options across that continuum in order to ensure young people can access the support they need. Ensuring a child is given every opportunity at success often requires links to many supports. It is crucial that options along the continuum are co-designed with, or designed by, Aboriginal communities so that programs meet the needs of young people, families and communities.

Restoring young people to their community

Efforts should be made to return young people to their community, allowing them to heal, to connect with culture and to re-engage with education and training opportunities. There must be divestment from institutional responses to offending and a return of resources to the community. Successful justice reinvestment policy requires commitment from the Commonwealth and Northern Territory governments and the empowerment of Aboriginal governance structures.[8]

In order for justice to be meaningful to young people, it needs to be connected to where they come from. The Kurdiji Group told the Commission:

> We don't want our children sent away; we want them to stay in the community and receive their punishment and rehabilitation here. If we had some support from outside, our leaders and elders could mentor them, take them out bush to connect with country and teach them the knowledge they need to behave properly and to treat others with respect. We know many of our kids have problems and we've been asking

[7] Exhibit 654.016, National Collaboration for Youth, 'Beyond Bars: Keeping Young People Safe at Home and Out of Youth Prisons', 6.
[8] Oral evidence of Dr Jill Guthrie, 28 June 2017, 5241:43–46.

> government for many years to support us to work with those kids so they can be strong, happy and law-abiding.[9]

Other jurisdictions nationally and internationally have shown that youth detention numbers can be significantly reduced without compromising community safety. For example, Ontario transformed its youth justice system from a custody-focused system to one that offers a broad range of community-based options. In her evidence to the Commission, Tamara Stone attributed the significant drop in youth detention admissions from 2452 in 2003/04 to 421 in 2015/16 to the creation of community-based sentencing options that allowed young people to access therapeutic services and supports in community.[10] Community-based, culturally-strengthening programs were specifically targeted for Indigenous youth, and many were provided by Indigenous organisations.[11] Achieving change of this scale takes time and calls for dedicated, sustained effort and long-term investment. It also requires extensive consultation with all stakeholders and capacity building in the community.

Whole-of-government action

The extent of reform required across the youth justice system calls for a whole-of-government approach both by the Commonwealth and the Northern Territory. Collaboration between key Departments including youth justice, police, courts, education, health and child protection is crucial at all levels. Strong leadership and political will is needed to drive systemic change. It will require an attitudinal and cultural shift within agencies, and sustained workforce planning and training, especially in cultural competency. The Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, told the Commission:

> No matter how good your policies are, no matter how good your legislation is, no matter how many dollars you allocate, if you have poor practice that arises from institutional racism … then we will never have a good service for Aboriginal children … You just can't achieve that unless you confront and own up that there's institutional racism and bias within … the youth justice system.[12]

NAAJA recommends that an independent statutory authority is established with responsibility for youth justice and child protection. 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. Vesting responsibility for youth justice and child protection in a statutory authority distances service delivery from government and the influence of short-term election cycles, and allows space for innovative co-design and service delivery. The creation of a statutory authority for youth justice services and child protection will promote focus on prevention and early intervention for young people and their families.

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[9] Exhibit 531.000, Lajamanu Kurdiji submission, 9 March 2017, 1.
[10] Oral evidence of Tamara Stone, 30 June 2017, 5380–5381.
[11] Ibid, 5385.
[12] Oral evidence of Andrew Jackomos, 23 June 2017, 4877:28–33.

Harnessing community support

The Commission has heard that bringing the community along as part of the reform is a critical part of this endeavour.[13] Government and non-government organisations need to work together to dispel misconceptions, fear and distrust through leadership, research, education and community campaigns that engage young people directly, not stigmatise them.

This Royal Commission marks a 'moment of public reconsideration'[14] and provides an opportunity to move towards a new set of understandings and approaches that will allow Aboriginal children to thrive as part of strong families and healthy communities.

[13] Oral evidence of Dr Jill Guthrie, 28 June 2017, 5256:5–6.
[14] Exhibit 654.019, Frameworks Institute, 'Talking Juvenile Justice Reform', September 2015, 2.

1 Youth crime prevention

1.1 Introduction

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.[1]

Effective youth crime prevention therefore must begin from the understanding that the solutions to the issues facing our communities lie in coordinated action to address their social determinants, including early childhood development, housing, employment, education, exposure to trauma and health.[2]

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]

1.2 The need for early childhood intervention and risk-focused prevention

The early years of life are fundamental to the physical and emotional health of children, their social and cognitive development, and their future prosperity and wellbeing.[4] Professor Frank Oberklaid told the Commission that early exposure to 'toxic stress' and brain developmental changes provide early pathways and risk for future crime participation, aggressive behaviour and family violence.[5]

[1] NAAJA, Submission to the Parliamentary Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System, 2009.
[2] See Oral evidence of Eileen Baldry, 8 May 2017, 3484–3485.
[3] Exhibit 145.001, Statement of AG, 25 November 2016, 20.
[4] Exhibit 455.000, Précis of evidence of Frank Oberklaid, 25 May 2017, 1.
[5] See Oral evidence of Prof Frank Oberklaid, 29 May 2017, 4015.

Professor Oberklaid told the Commission that, from the perspective of formulating public policy, it is clearly preferable to take steps to address risk factors and emerging difficulties before they become entrenched. The earlier the intervention, the better.[6]

Ross Homel indicates that systematic service delivery to disadvantaged families from low income backgrounds with young children has led to longer term outcomes of successful school experiences and reduction of behavioural problems and delinquency.[7]

The introduction and provision of such services during infant health care and preschool has wide societal support. A focus on the early interventions of infant health care and preschool must be a fundamental part of successful crime prevention policies for the Northern Territory. Professor Oberklaid gave evidence to the Commission that early life interventions not only have biological benefits,[8] but also major economic benefits as promoted by the Noble Prize economist James Heckman.[9]

There is evidence emerging from the Northern Territory that preventative programs provide a high social return on investment. A recent study that evaluated preventative programs at Utopia, Hermannsburg and Yuendumu found a return of between $3.48 and $4.56 on the dollar.[10] The report found the programs improved health outcomes and self-esteem, and increased engagement with education, training, school attendance and literacy. There was a decrease in antisocial and criminal behaviour, drug and alcohol abuse and youth detention. Relationships between children and their families, the community and authorities also improved.[11]

Evaluated programs in other parts of Australia include the Pathways to Prevention project, which promotes children's positive transition to school through communication and social skills programs at preschools, play groups, behaviour management programs for parents, family support groups and community development initiatives. Evaluation of this program demonstrated that communication skills improved, difficult behaviour decreased and fewer children were at risk of severe behavioural problems, resulting in a 21% reduction in juvenile offending in the community.[12]

It is clear that further evaluation needs to be conducted to determine what early intervention approaches work best to prevent youth crime and generally improve the wellbeing of Aboriginal children and young people in the Northern Territory.

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[6] Exhibit 455.000, Précis of evidence of Frank Oberklaid, 25 May 2017, 1.
[7] Exhibit 455.001, Developmental crime prevention (2005) in Annexure A to precis of evidence of Frank Oberklaid, 25 May 2017.
[8] Oral evidence of Prof Frank Oberklaid, 29 May 2017, 4022–23.
[9] Oral evidence of Prof Frank Oberklaid, 29 May 2017, 4016.
[10] Nous Group, Investing in the future: The impact of youth programs in remote central Australia – a Social Return on Investment (SROI) analysis, May 2017, 2.
[11] Ibid.
[12] Indigenous Justice Clearing House, Promising interventions for reducing Indigenous juvenile offending, March 2011, 2.

Recommendation 1	That there is an immediate investment in early childhood intervention and risk-focused prevention services and programs for Aboriginal children and young people, from the earliest years of life onwards.

1.2.1 Reforming the discussion on crime

NAAJA is of the view that government and the media must reform the public discourse on youth crime and its prevention from one dimensional responses of 'tough on crime', increased policing and punitive measures. Bipartisan and sustained change must occur to the discourse if the wider public is to support crime prevention as a whole-of-life process, commencing with early years interventions. Please refer to section 5.4.2 of our Submissions on Youth Detention for further discussion of this issue.

1.2.2 Redirection of funding to crime prevention programs

Tertiary service delivery for the prevention of crime is currently either inadequate or overwhelmed. There must be more primary and secondary prevention programs that address the social factors underlying offending, such as housing, health and education,[13] and address existing problem behaviour before it reaches criminal levels:

> I certainly think there is a shortage of services, therapeutic type services, not only for the child but for the family, and I'm talking about the very earliest interventions so that universal space where families receive support for a number of reasons, whether it's drug and alcohol abuse, domestic violence, financial hardship, mental health issues. A range of matters that families are certainly struggling with. If we look at young people who end up in the youth justice system, or in child protection, two of the biggest triggers are poor parenting and – and little education. And so my belief is if we can place much more emphasis on the first, even the first 100 days of a child's life, and the family who are tasked with supporting that child, then we will be in a much better position, not having our systems being absolutely inundated with young people who, by the time – reach these tertiary type of systems, are seriously affected by traumatic experiences that they've already endured in quite dysfunctional living arrangements.[14]

1.2.3 Aboriginal traditional crime prevention

Strengthening the responsibility of children through moral teachings has always been part of Aboriginal culture and law. For example, the Madayin Law of Arnhem Land:

> works against lawless, disrespectful and abusive behaviour. Actions such as domestic violence, verbal abuse, assault and stealing are illegal behaviours according to the

[13] Indigenous Justice Clearing House, Promising interventions for reducing Indigenous juvenile offending, March 2011, 1.
[14] Oral evidence of Colleen Gwynne, 12 October 2016, 133.

> Madayin Law. But even before young people commit serious criminal behaviour, they are watched by the clan and family leaders.[15]

The *Mudumana Rom* of the Central Arnhem Land coast provides strong moral teaching and discipline for hundreds of young men in Arnhem Land.[16]

1.2.4 Implementing previous recommendations

A number of past inquiries have recommended a greater focus on primary and secondary prevention to institute the level of change needed to improve long-term Aboriginal youth outcomes in the Northern Territory. The Royal Commission into Aboriginal Deaths in Custody made a raft of recommendations relating to alcohol and other drugs, education, housing, health and economic opportunity.[17] The *Little Children are Sacred* report made recommendations that the 'underlying dysfunctionality where child sexual abuse flourishes needs to be attacked, and the strength returned to Aboriginal people.'[18] The *Growing Them Strong, Together* report called for significant and sustained new investment in the development and expansion of prevention services.[19]

Successive governments have failed to adequately implement the recommendations relating to prevention. Dr Howard Bath told the Commission of the response to the *Growing Them Strong, Together* report:

> [A]lthough I think that there was a broad commitment to the general nature of the reforms, very specifically some of the key reforms the government announced that they would not be pursuing … the pivotal recommendation of a major change in emphasis from tertiary services to prevention services [is an example]. That over a period of time the budget would reflect that as much emphasis was going into preventing abuse from occurring or from reoccurring – as much emphasis on that, than responding and detecting and supporting children following abuse.[20]

There has not been the required political will to implement these recommendations by making the necessary systemic changes and investing in prevention services. Addressing youth offending calls for bipartisan commitment, long-term investment and sustained approaches, driven by evidence-based and community-led reform. Strong political leadership is required to ensure that investment is directed towards the interventions that make the biggest difference.[21]

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[15] Timothy Trudgen and Roy Rruwarrinja Galiwinku, Yolngu Sacred Law and the Restitution of Law Breakers, August 2013 <www.yolngunations.org/uploads/1/7/2/5/17257560/restitution_of_law_breakers_010813.pdf>.
[16] Yolngu Nations Assembly Media Statement, 19 August 2014 <http://www.yolngunations.org/uploads/1/7/2/5/17257560/140819_muuman_rom.docx>.
[17] Exhibit 024.006, National Report – Royal Commission into Aboriginal Deaths in Custody – Volume 5.
[18] Exhibit 018.001, Little Children are Sacred Report, 30 April 2007, 21.
[19] Exhibit 113.001, Board of Inquiry Report – Growing them strong together, Promoting the Safety and Wellbeing of the Northern Territory's Children' – Summary Report, 68.
[20] Oral evidence of Howard Bath, 12 October 2016, 111.
[21] Expert Panel Final Report, Investing in New Zealand's Children and their Families, December 2015, 11.

Recommendation 2	That there is a commitment to long-term investment in primary and secondary crime prevention services.

1.2.5 A coordinated response

At present, services are poorly coordinated or only focus on a narrow or single factor of risk,[22] which can lead to patchy support being provided to young people. Dr Avery described how this issue manifests in the disability context:

> [T]he problem with disability is you might get little snippets of support, but if you move from one part of your life to the next, there's no continuity in support. And often if you move, for example, from early childhood to the school year, it's like you are resetting the clock. Because there's very demarcated siloed structures.[23]

Coordinated, holistic, multidisciplinary service provision is needed to adequately address the factors that contribute to children entering the criminal justice system. To improve continuity of services, NAAJA advocates a continuum of care model for young people,[24] which prioritises investing in support for children in early points on the continuum including early intervention for those at risk of entering the youth justice system, alternatives to detention and diversionary programs.

1.2.6 Empowering Aboriginal communities

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.'[25]

Ranger programs deliver significant cultural, social and economic benefits for Aboriginal communities, including for children and young people who are at risk of, or are in contact with the justice system.[26] For example, a recent evaluation for the Department of Prime Minister and Cabinet specifically noted the benefits of the Warddeken Indigenous Protected Area ranger program in curbing the over-representation of Aboriginal people in the justice system.[27]

The Congress After Hours Youth Services, which provides workers to engage with young people at risk in Alice Springs and refers them to social, emotional and wellbeing services, is a prime example of the

[22] Oral evidence of Prof Frank Oberklaid, 29 May 2017, 4020.
[23] Oral evidence of Scott Avery, 13 October 2016, 289.
[24] Variously referred to as a continuum of interventions, continuum of support and a service response continuum.
[25] Exhibit 018.001, Little Children are Sacred Report, 30 April 2007, 53.
[26] Department of the Prime Minister and Cabinet, Consolidated report on Indigenous Protected Areas following Social Return on Investment analyses, 2016 <http://www.socialventures.com.au/assets/Consolidated-SROI-Report-on-IPA-WoC.pdf>.
[27] Ibid.

benefits of Aboriginal-run programs.[28] Positive Aboriginal-run programs always have funding uncertainty and are at risk of de-funding by government changes and directions.[29]

Aboriginal communities must be empowered to develop the solutions and own and control service delivery in communities, with an emphasis on self-determination and locally-based solutions.

NAAJA endorses a place-based model where Aboriginal communities are supported to build capacity for services within their own community. This approach enables service delivery to recognise that connection to culture, family, community and country is fundamental to building strong Aboriginal communities, families and children.

NAAJA points to the weight of evidence before the Commission demonstrating that the starting point for building better out-of-home care, early intervention and prevention services is to give Aboriginal people control of the services that are delivering Aboriginal child and family welfare.[30] This has begun to occur in other states around Australia, starting with the Victorian Beyond Good Intentions statement, a commitment to working in partnership with Aboriginal communities to develop Aboriginal community based and controlled services and programs.[31]

Recommendation 3	That government commits to the APO NT Partnership Principles and the creation of genuine partnerships with Aboriginal community controlled services and programs.
Recommendation 4	That the partnerships are premised on building and strengthening, rather than displacing, Aboriginal organisational capacity and control. New services and programs must be co-designed with Aboriginal communities and organisations.

1.3 Housing

Housing has been identified to the Commission as the most significant issue facing remote communities in the Northern Territory.[32] This is supported by submissions to the Commission and recent reports from relevant peak organisations.[33] The evidence highlights overcrowding, homelessness and inadequate housing as key factors in young people entering the child protection and youth justice systems.

[28] Exhibit 456.000, Statement of Donna Ah Chee, 22 May 2017.
[29] Oral evidence of expert panel of Ah Chee, Walder and Balmer, 29 May 2017, 4034.
[30] See, eg, Oral evidence of Olga Havnen, 21 March 2017, 1580; Oral evidence of Muriel Bamblett, 13 October 2016, 210; Oral evidence of Colleen Gwynne, 12 October 2016, 133–134.
[31] Oral evidence of Muriel Bamblett, 13 October 2016, 210.
[32] Oral evidence of Muriel Bamblett, 13 October 2016, 205.
[33] APO NT, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017, s 4.14.

Muriel Bamblett, author of the *Growing Them Strong, Together* report, described housing conditions she encountered during her community visits in 2010:

> [W]e visited families on communities, we saw housing where up to 20 – between 20 and 30 people were living, co-sleeping. Children sleeping on the floor … It was conditions that no child should live in, but Aboriginal people in the Northern Territory live in, within our Aboriginal communities. Overcrowding, not enough housing, and not enough accommodation. Imagine being a young parent having a baby and coming home to a house where there are 20 people living, and imagine if the court orders that, you know, that family needs to undertake parenting training and how would you work with them in a house with 20 or 30 other people? How would you, you know, ensure the safety of the child when everybody's co-sleeping? So I think, you know, the Northern Territory really does need to address the chronic housing shortage and be able to address – and particularly give young parents the best opportunity to become good parents by providing them with appropriate accommodation and housing to be able to bring up children safe.[34]

This came three years after the release of the *Little Children are Sacred* report, which had described the housing situation as 'nothing short of disastrous and desperate'. The report estimated that 4000 additional houses were needed to adequately house the current Territory Aboriginal population, and at least a further 400 houses needed to be built each year until 2027, to keep up with population growth.[35] While some inroads have been made,[36] provision of housing has fallen well short of these needs, with evidence before the Commission indicating that homelessness is still the biggest issue in the Northern Territory.[37]

NAAJA refers the Commission to Aboriginal Peak Organisations Northern Territory's (APO NT) submission to the Royal Commission, which provides further commentary and recommendations with respect to housing.[38]

1.4 Family and early childhood support

The Commission has heard that existing early childhood outreach programs that provide parents and communities with culturally sensitive support and skills development, such as the Nurse-Family Partnership program, should also be expanded.[39]

NAAJA advocates strength-based models of support that recognise the unique talents, skills, culture and life events of families and children, address their specific needs and make young people feel

[34] Oral evidence of Muriel Bamblett, 13 October 2016, 205.
[35] Exhibit 014.001, Board of Inquiry Report – Growing them strong together, Promoting the Safety and Wellbeing of the Northern Territory's Children' - Volume 1, 112.
[36] See APO NT Submission to the Royal Commission, referencing a NT Dept of Housing and Community Development email update received 1 May 2017: 'Ten years on, we have seen the construction of 1,200 new houses, 2,929 rebuilds and refurbishments and 1,800 upgrades.'
[37] Oral evidence of Muriel Bamblett, 13 October 2016, 205.
[38] APO NT, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017.
[39] Oral evidence of Olga Havnen, 21 March 2017, 1588.

listened to and cared for. We refer the Commission to the Northern Territory Aboriginal Health Forum report, *Progress and Possibilities*, that outlines the services needed to improve Aboriginal childhood outcomes in the Northern Territory, including a comprehensive primary health care framework for improving early childhood development.

1.4.1 Family Responsibility Centres

Family Responsibility Centres provide important preventative and early intervention services to families to promote the safety and wellbeing of young people and to support parents (and carers) with parenting, behavioural issues and school attendance. These services involve several departments including Correctional Services, Health, Education, Police, Housing, and Children and Families.

The Vita Review commended the work of Family Responsibility Centres and encouraged the expansion of their services to become part of multidisciplinary teams that address the wellbeing of young people in contact with the youth justice system.[40]

Government service agencies may make referrals to the Family Responsibility Program, which involves Family Responsibility Agreements as a process of intensive case management to assist young people and their families to change their lives and avoid antisocial behaviour.

NAAJA is concerned about the punitive aspects of Family Responsibility Agreements and Orders, and the potential they have to further alienate and disadvantage Aboriginal families. Family Responsibility Agreements must be designed with therapeutic outcomes in mind. They must be culturally enriching rather than culturally alienating. Punitive aspects of Family Responsibility Orders should be removed, including the penalty provisions and confiscation of property.

It is crucial that therapeutic interventions involving Aboriginal young people facilitate and encourage involvement of family. NAAJA considers that Family Responsibility-type agreements can play an important role in strengthening family, and supporting a young person's family to more effectively deal with their offending, if they are designed and implemented within a non-punitive, therapeutic framework.

1.5 Racism

There is strong evidence that racism is a common experience in daily life for Aboriginal people in the Northern Territory. NAAJA has outlined some of this research in its submissions on detention and this is further addressed by APO NT's submission to the Commission.[41]

[40] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 33.
[41] See NAAJA, Submissions on Detention to the Royal Commission into the Protection and Detention of Children in the Northern Territory, June 2017, 91; APONT, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017.

Racism is a barrier to health services and employment,[42] and leads to poorer mental health outcomes, which in turn increases the likelihood of encountering the youth justice system. APO NT submitted to the Parliamentary Joint Committee Inquiry into the operation of the *Racial Discrimination Act 1975* (Cth) and the Australian Human Rights Commission that:

> The experience of racism and racial abuse alienates individuals and communities from society, feeding a sense of disillusion and disempowerment and contributing to the effects of emotional trauma.[43]

1.6 Disability

There is much evidence before the Commission about the likely prevalence of disability and neurocognitive impairment among the youth detention population, including foetal alcohol spectrum disorder and hearing loss.[44] In our Submissions on Youth Detention, we highlighted the impact that disability has on young Aboriginal people and their likelihood for encountering the youth justice system.[45] In particular, Dr Scott Avery has described how the cumulative effects of disability and disadvantage lead to a 'matriculation pathway into prison'.[46]

The Commission has heard that there is a significant under-identification of disability among Aboriginal youths because of low awareness of disability, fear of discrimination and distrust of the system due to 'past practices of institutionalisation of children with disability.'[47]

Any response to address the 'matriculation pathway' experienced by many Aboriginal people with a disability must therefore include measures for improved diagnosis and support for people with a disability and their families from an early age. At a policy level, this means taking a multidisciplinary approach to diagnosis and understanding the issues affecting Aboriginal people with a disability.

The Commission has also 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.[48] We reiterate that improved early diagnosis and 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 relevant information and make appropriate referrals.

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[42] Close the Gap Campaign Steering Committee, *Progress and Priorities Report*, 2016, 22. <https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf>

[43] APO NT, Submission to the Parliamentary Joint Committee Inquiry into the operation of the *Racial Discrimination Act 1975* (Cth) and the Australian Human Rights Commission, 23 December 2016, 5–6.

[44] 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.

[45] See NAAJA, Submissions on Detention to the Royal Commission into the Protection and Detention of Children in the Northern Territory, June 2017, 91, 126–128.

[46] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 6 [26].

[47] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 5–6.

[48] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, 9.

1.7 Education

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.[49] 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.[50]

It is well known that low educational outcomes are a strong predictor of lifelong disadvantage, entry into the child protection system,[51] involvement with the justice system, admission to detention and prison, long-term unemployment or low incomes, and poor health and lower life expectancy.[52]

1.8 Care and protection

The Commission has heard that although out-of-home care is designed to protect children from harm, it instead increases the likelihood of offending. There is a high crossover between the child welfare and juvenile detention systems, with kids in out-of-home care encountering the justice system at vastly disproportionate rates:

> [T]here's a 40 per cent correlation between children who have come into contact with the care and protection system and who commit crimes. So that gives us a greater understanding, if you like, of the socio-economic psychosocial and the health factors that drive criminal behaviour in young people.[53]

Addressing the failings of the care and protection system is a major part of improving youth crime prevention in the Northern Territory. NAAJA will cover these issues in our further submissions relating to care and protection.

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[49] Commonwealth of Australia, Department of the Prime Minister and Cabinet, Closing the Gap Prime Minister's Report, 2017, 40.
[50] Commonwealth of Australia, Department of the Prime Minister and Cabinet, Closing the Gap Prime Minister's Report, 2017, 39.
[51] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3423 [44].
[52] APONT, Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017.
[53] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3459.

2 Police

2.1 The role of police

NAAJA reiterates its position in previous submissions that Northern Territory Police have an integral role to play in the youth justice system.[1] 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 can further alienate young people at risk of 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.[2]

NAAJA has observed that policing of young Aboriginal people in the Northern Territory is often markedly different to the rest of the young population. This is borne out by detention rates, court statistics and witness evidence before the Commission. Aboriginal young people are more likely to be denied access to youth diversion, taken to court, overcharged, denied access to programs,[3] and not have their vulnerabilities or trauma recognised.[4]

2.2 Police core functions

Section 5(2) of the *Police Administration Act* sets out the core functions of the police, including to 'uphold the law and maintain social order', 'protect life and property' and 'to prevent, detect, investigate and prosecute offences'.[5]

There needs to be greater recognition that the core police function of preventing offences can occur through policies and policing that focus on early intervention, crime prevention and working in a youth-oriented way and with the community.

2.3 Police engagement with youth

2.3.1 Youth-oriented training

The Commission heard from Superintendent Ian Lea that the main component of police officer training occurs during a five-week course at Police Training College.[6] It is crucial that, at this formative stage of their career, police officers are provided with training oriented to young persons. It must include

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[1] See NAAJA Submissions on Youth Detention, s 5.4.3.
[2] 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.
[3] Exhibit 332.001, Statement of Jared Sharp, 21 March 2017, 65.
[4] Ibid 52 [244].
[5] *Police Administration Act (NT)*, s 5(2).
[6] Oral evidence of Ian Lea, 10 May 2017, 3668.

trauma-informed approaches and cross-cultural training, especially for working with Aboriginal young people and their cultural contexts. An ongoing focus on youth-oriented training must continue throughout the career of serving police officers who interact with children and young people.

2.3.2 Aboriginal youth-oriented training

It is important that officers in charge of remote police stations or policing posts in Aboriginal communities ensure community-specific cross-cultural awareness training is provided to officers, to improve their relationships with young people in those communities. The Commission heard from Tiwi Elder Marius Puruntatameri, who suggested that there should be local Aboriginal cultural advisors in every police station.[7]

2.3.3 Valuing training

Youth-oriented training needs to be valued by the organisation as supporting its core functions and incorporated into the culture of the police service. Superintendent Lea commented in evidence that 'training is given but whether people have taken it on board is another issue.'[8]

It is NAAJA's view that there should be an immediate police audit of existing Northern Territory youth-oriented training, including comparison with police services in other states and countries. Adopting the New Zealand model of training opportunities for attaining youth skills leading to improved pay scales could provide a positive incentive for Northern Territory police officers.

Recommendation 5	That all police trainees and officers undertake youth-oriented training. All officers who interact with youth should undertake ongoing youth-oriented training as a yearly training requirement.
Recommendation 6	That police in each remote Aboriginal community undertake relevant cross-cultural training.

2.4 Policing in remote Aboriginal communities

Policing of young people in remote Aboriginal communities requires individualised approaches that take into account language and cultural differences, remoteness, and lack of youth therapeutic and disability services. These factors require police to adapt to the community's needs and expectations, rather than employing mainstream approaches used in cities. It is NAAJA's long observation that there are two types of policing in remote Aboriginal communities: either adopting a 'fortress mentality' of separation from the community or becoming an active part of the community through interaction with Elders, sport and community activities with young people.

The Northern Territory Emergency Response (NTER) saw the creation of 18 new police stations and the influx of 50 additional police in remote communities.[9] The Carney report identified a doubling in

[7] Oral evidence of Marius Puruntatameri, 31 March 2017, 2416: 40–45.
[8] Oral evidence of Ian Lea, 10 May 2017, 3682.
[9] Exhibit 052.002, Statement of Russell Goldflam, 24 November 2017, [15].

youth detainee numbers in the three years following the NTER,[10] 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.[11] 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.

NAAJA has observed that there are fundamental deficiencies in remote policing. These include high turnover of police officers, little long-term connection or engagement with the community, the poor infrastructure of police cells at remote stations, and prioritisation of responses that focus on arrest, charging and removal of Aboriginal children from their community to the Don Dale Youth Detention Centre.

In NAAJA's opinion, the inadequacy of police infrastructure in remote Aboriginal communities has a direction connection to the decision to detain an Aboriginal child, the conditions in which they are detained, for how long they are detained, and in the remanding in custody in Darwin.

2.4.1 Remote police station cells

In the 20 police stations in the remote circuit that NAAJA attends, there are no cells purpose-built for the accommodation of youth prisoners. Cells in remote police stations resemble the conditions of the Don Dale Behavioural Management Unit. NAAJA has observed that the concrete cells have no air conditioning, are filthy and unhygienic, have unclean mattresses, are open to mosquitoes and midges, and are without privacy.

The *Youth Justice Act* only requires the detention and confinement of young people separately from adults 'where practicable'.[12] This is unsatisfactory. In many remote police stations, young Aboriginal persons who are in custody are often placed in cells with adult prisoners.

Recommendation 7	That there is an immediate audit of the suitability of the conditions of detention cells for young people in remote police stations and posts.
Recommendation 8	That the conditions for detention of Aboriginal children and young people in remote police cells are made appropriate for the detention of children.

2.5 Time in police custody

The Commission heard evidence of three young people being held in the Alice Springs police watch house for 29, 31 and 32 hours at a time.[13] Many Aboriginal children will be detained in remote custody cells for similar or longer periods until transportation via the police air wing or road is available. NAAJA has previously made complaints about the safety and conditions for Aboriginal children who have

[10] Exhibit 024.019, Review of the Northern Territory Youth Justice System: Report, September 2011, 115.
[11] Oral evidence of Russell Goldflam, 14 December 2017, 816.
[12] *Youth Justice Act* (NT) s 26.
[13] Oral evidence of Ian Lea, 10 May 2017, 3673.

been transported by police vehicles for distances of 900km to Darwin from a remote community. In Western Australia, police transport practices have changed in response to the tragic and avoidable death of Aboriginal Elder, Mr Ward, following transportation by private security firms. For example, it is a requirement to consider air transport instead of long distance road travel, use of technology to facilitate court appearances is encouraged, and custodial transport vehicles are air-conditioned, contain temperature monitoring systems and are fitted with refrigeration for food and cold water.[14]

Long periods in custody also regularly occur at the Darwin watch house. During the course of the Commission hearings, NAAJA has made an Ombudsman complaint on behalf of six Aboriginal youths who were held in custody without any notification to the NAAJA custody service. In one instance, a 12-year-old female with no criminal history was held in custody for 19 hours, only released after a NAAJA lawyer attended the Darwin watch house in person to demand the child's release or commencement of a writ of *habeas corpus* would follow. The young person was then released on youth diversion.

Another example involves a young NAAJA client arrested and refused police bail, who spent 28 hours in custody prior to police calling for a magistrate bail application. The magistrate refused bail and remanded her in custody until five days later, instead of the next day. NAAJA became aware that the young person was in custody and relisted the matter for a bail application, which was almost two days after the arrest. The young person was finally granted bail three days following the arrest.

Witness AB:

When I got back to Darwin, detectives came to my house and took me to the Darwin Watch House. We were kept in the Darwin Watch House for about two days. We didn't get a shower the entire time we were in there. We got food every day but the food was pretty shit. For example, the rice was stale and I didn't even know what the food was - it was just brown. The cells in the Darwin Watch House had a bubbler tap for water and a toilet and were about as clean as the cells in in detention - they had spit on the walls and that.[15]

2.5.1 Time in custody for investigations

Under s 137(2) of the *Police Administration Act*, a person may be held for a 'reasonable period' for the purpose of investigations. There is no statutory provision for determining a reasonable period for continued apprehension in custody, but decisions of the Supreme Court of the Northern Territory have found that a number of days is acceptable.[16] There is no authority on a reasonable period for holding a young person in custody in the Northern Territory.

[14] Inquiry into the Transportation of Detained Persons: The Implementation of the Coroner's Recommendations in Relation to the Death of Mr Ward and Related Matters, December 2011, 3, available at <http://www.parliament.wa.gov.au/parliament%5Ccommit.nsf/(Report+Lookup+by+Com+ID)/E0FB355792E06945482578D10006F211/$file/ev.tdp.110718.rpg.023.xx.pdf>.

[15] Exhibit 139.001, Statement of AB, 1 March 2017, [25].

[16] See, eg, *The Queen v Heiss & Kamm* [1992] NTSC 26 (7 October 1992). The case involved the investigation of an unlawful homicide by two adult offenders.

Legislation should be enacted to limit the time a child may be held in custody for the purpose of investigation and other matters prior to charging, like other jurisdictions across Australia. NAAJA advocates a limit of four hours, with a single extension of time of no longer than 12 hours available subject to an 'exceptional circumstances' test approved by a Judge of the Local Court.

Recommendation 9	That there is a statutory maximum time limit of four hours for detaining a child in custody as an 'arrested suspect' for the purpose of investigation.

2.5.2 Bringing young people before the Youth Justice Court promptly

The *Youth Justice Act* s 27(1) provides that a young person who is not released from custody must be brought before the court as soon as practicable and within seven days of the arrest. It is clear that the intention of the Act is that the detention of a child should be for the absolute minimum possible time before they are brought before the Youth Justice Court.[17] It is NAAJA's view that, where possible, Aboriginal children should be brought before the Youth Justice Court via technology such as audio-visual link to avoid their physical removal from their community.

In the situation where a child is remanded in detention, they should be brought before the Youth Justice Court on the next available sitting day. NAAJA is concerned that, in Alice Springs and Darwin, Aboriginal young people have not been promptly brought before the Youth Justice Court and have been remanded for periods of days. NAAJA has raised its concerns with the Chief Judge of the Local Court and has advised on-call Judges of the daily sitting days of the Youth Justice Court in Darwin in an effort to reduce time in custody for young people.

Recommendation 10	That a child who is charged and in custody shall be brought before the Youth Justice Court within 24 hours or is to be released on bail.

2.6 Police procedures

2.6.1 Arrest and decisions to arrest

NAAJA refers the Commission to our Submissions on Youth Detention that outline the effect that arresting practices have in contributing to the over-representation of Aboriginal young people in detention.[18] It is alarming that police often adopt punitive policing in interacting with young people. Indeed, it is recognised that where an Aboriginal child is arrested, there is a greater likelihood of either onerous bail conditions[19] or being refused bail and remanded in detention.[20]

[17] The principles of the *Youth Justice Act* state, 'a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time': s4.
[18] See NAAJA, Submission on Youth Detention, s 5.4.3.
[19] See, eg, Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 24 [89].
[20] Department of Correctional Services, *Annual Statistics 2015-16*, 35.

The *Youth Justice Act* and *Police General Orders* all provide legal requirements and guidelines stipulating that the arrest of a child is to be an option of last resort.[21] This requirement recognises the extreme vulnerabilities of children and that their detention, even for short periods, is detrimental to their wellbeing. Yet evidence before the Commission shows that, over the past decade, arrest has increased for Aboriginal girls by 1571% and 224% for Aboriginal boys.[22]

Section 22 of the *Youth Justice Act* provides criteria for police in determining whether to arrest a young person for the purpose of charging them at a police station. The provision places a heavy evidentiary burden on the police officer, as they must believe on 'reasonable grounds' the young person will not appear in court or that there is a 'substantial risk' of further offending, loss or destruction of evidence, or of harm to the young person. Given this onerous burden, one would assume such a determination would be a rare occurrence, yet this is not the case: arrest is overused for the purpose of charging.

NAAJA has raised its concerns to the Commissioner of Police regarding non-compliance with s 22 of the *Youth Justice Act* and the regular use of arrest for charging of Aboriginal children. NAAJA sees the benefits of police implementing an objective decision-making tool to improve decision-making, transparency and accountability. We discuss the use of such a tool for bail decisions in section 5.2.1.

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.[23]

Recommendation 11	That there is greater training in and compliance with the requirements of s 22 of the *Youth Justice Act*.

2.6.2 Notification of a responsible adult

Under s 23 of the *Youth Justice Act*, arresting or charging police officers must take all reasonable steps to notify a responsible adult of the arrest or charge. Further information about the court date and when the young person will appear, must be provided to that responsible adult. In NAAJA's experience, police regularly fail to notify responsible adults that a young person is in custody.[24]

2.6.3 Notification of a legal representative

Section 15(2) of the *Youth Justice Act* stipulates that, prior to a recorded interview or search, police must, unless impracticable, inform the young person of their ability to access legal advice and representation. The inclusion of the words 'unless impracticable' has created great difficulty for

[21] *Youth Justice Act 2005* (NT) s 4(c); Exhibit 359.000, Statement of Ian Lea, 5 May 2017, 37.
[22] Exhibit 045.001, Statement of Joe Yick, 14 October 2016, 31.
[23] Exhibit 123.001, Statement of AS, 22 February 2017, [85].
[24] Section 23 of the *Youth Justice Act* (NT) provides that police are required to notify the responsible adult as soon as practicable after the arrest or charge of the youth.

Aboriginal young people to obtain access to a legal advice and representation, particularly from lawyers who are already acting for them.

NAAJA is concerned that, because of these provisions, our service is only notified by police of a young person in custody either prior or subsequent to an interview or when they have been denied bail by the on-call Judge. In such circumstances, a child is denied access to legal advice, support and assistance with bail applications and in contacting a parent. NAAJA has raised these concerns with the Commissioner of Police. In response to this complaint, all police members were sent a directive to follow police guidelines.

Superintendent Lea gave evidence of annual online training requirements on custody, but it is unclear to what extent they reinforce police understanding of their obligations under s 15(2) of the *Youth Justice Act*.[25]

It is NAAJA's view that s 15(2) of the *Youth Justice Act* does not provide the protection and legal assistance children require. In our experience, gross failures to advise on access to legal advice and representation are caused by inconsistent approaches, poor training of police, and the lack of a mandated requirement of notification and access to a lawyer.

Superintendent Lea told the Commission of a protocol with CAALAS, as required under the Police General Order A7 with Aboriginal Legal Services, and could not explain why there was no protocol with NAAJA.[26] NAAJA has proposed a joint protocol and has been waiting on a response from Katherine District Command for a memorandum of understanding since November 2015.

Recommendation 12	That the annual police custody training include training that focuses on police obligations for young people in custody.
Recommendation 13	That there is a mandatory legislative requirement for young people to have access to legal advice and representation.
Recommendation 14	That Northern Territory Police immediately enter into discussion for commencement of protocols with NAAJA.

2.6.4 Requirement for a Northern Territory custody notification service

As NAAJA has repeatedly raised problems with Northern Territory Police practice, policy and management of the legal rights of Aboriginal children in custody, it is important that a mandatory custody notification system is legislated in the Northern Territory. The leading national model is the

[25] Oral evidence of Ian Lea, 10 May 2017, 3669.
[26] Ibid, 3670.

New South Wales Custody Notification Service,[27] which mandates that police contact an Aboriginal Legal Organisation prior to interview[28] and forensic procedures.[29]

NAAJA supports the Commonwealth announcement of a national custody notification system for Aboriginal persons. The Northern Territory and Commonwealth governments must act on this commitment.

A custody notification service will enable any Aboriginal young person or adult who is arrested or detained by police in the Northern Territory to access a NAAJA or CAALAS lawyer by phone for the purpose of legal advice prior to interview, and before any investigatory or forensic procedures are employed. NAAJA and CAALAS will also seek to check on the young person or adult's wellbeing, safety and treatment, which will reduce Aboriginal people's risk of harm or injury while in police custody.

Recommendation 15	That a custody notification service is introduced in the Northern Territory.

2.7 Police investigations

2.7.1 Electronic record of interviews

It is fundamental that young people are provided with legal advice and representation prior to interview, so they may make a fully informed decision on whether to participate in an electronic record of interview.

There is a clear power imbalance where adult police members question a vulnerable child in custody. This power imbalance is increased where an Aboriginal child is involved, due to language barriers, disabilities such as hearing loss and cultural deference to authority.

In NAAJA's experience, there has been an increasing use of pressure to extract confessions from young people. There has also been a practice of disregarding that an Aboriginal child is already legally represented with other ongoing matters and that no questioning should occur without contacting the child's lawyer.

Witness CE:

[T]he Police asked me to do an interview with them at the Darwin Watchhouse. I spoke to a NAAJA criminal lawyer on the phone before this happened and I asked the lawyer to ask the Police not to do an interview. I was told by the Police that I still had to do an interview. I thought that I did not have a choice so I did an interview …

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[27] Aboriginal Legal Service (NSW & ACT) Limited, *Custody Notification Services* <http://www.alsnswact.org.au/pages/custody-notification-service>.

[28] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), pt 9, s 123; *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), ss 24, 33.

[29] *Crimes (Forensic Procedures) Act 2000* (NSW), s 10.

When I got into the interview they told me that I could ask to stop the interview and that I didn't have to answer their questions. I didn't like the questions they were asking and I felt more and more uncomfortable as the interview went on so I asked to stop the video. I know the Police officer was saying it was my choice but when he said that it was my last chance to talk to them and that they would charge me with all the charges, I felt like I didn't have a choice and that I had to keep on going with the interview.[30]

Witness AS:

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.[31]

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.[32]

Recommendation 16	That s 18(2) of the *Youth Justice Act* and s 140 of the *Police Administration Act* are amended so that no child is questioned until they have had access to legal advice from a lawyer.

2.7.2 Interpreters

It is a fundamental human right that an Aboriginal child has the right to an interpreter in their own language for any dealings with police, whether it is questioning,[33] searches, obtaining forensic material,[34] arrest or custody. In NAAJA's experience, there is a wholly inadequate use of Aboriginal-language interpreters for the questioning of Aboriginal child suspects. In some communities, it is well known that some police will not interview at all to avoid use of an interpreter. Others will interview a child without an interpreter on the basis of their own determination of the child's English proficiency. These practices may lead to poor interview results and challenges to admissibility.

In 2015, Northern Territory Police in conjunction with the Aboriginal Interpreter Service (AIS) developed the Aboriginal Police Caution app that translated the caution, including right to silence, into

[30] Exhibit 365.000, Statement of CE, 21 February 2017, [33], [35].
[31] Exhibit 123.001, Statement of AS, 22 February 2017, 17.
[32] Exhibit 145.001, Statement of AG, 25 November 2016, 18.
[33] *R v Anunga* (1976) 11 ALR 412; R v Wheeler [2015] SASCFC 83 (11 June 2015).
[34] *The Queen v DA* [2017] NTSC 2 (13 January 2017).

18 Aboriginal languages of the Northern Territory. AIS Director Ms Colleen Rosas indicated that 'The level of detail in this tool ensures Aboriginal suspects who speak English as an additional language are clearly able to understand their rights and responsibilities in the same way that English speakers would'.[35] Yet it is the experience of NAAJA lawyers that in many remote Aboriginal communities the app is infrequently or not at all used in the questioning of Aboriginal children.

2.7.3 Support persons

Support persons are important for protecting the interests and wellbeing of young people being questioned by police. This is reflected in s 18(2) of the *Youth Justice Act*, which provides that an officer must not interview a youth unless a support person is present. Sections 35(1)(a)–(d) of the *Youth Justice Act* defines the classes of support persons who are eligible: a 'responsible adult',[36] 'a person nominated by the youth', 'a legal representative acting for the youth' and a person called upon from the register.[37]

NAAJA notes that during the relevant period of examination of the Commission, we have never been contacted by police to act as a support person despite our legal relationship, support and cultural knowledge of the child in custody.

NAAJA regularly sees a major failing under s 35(5) of the *Youth Justice Act,* where police do not make reasonable attempts to have a support person under subsections (1)(a)–(c) present within two hours, and will instead call upon a person from the register to be the support person. This provision should be amended, as it provides police with little incentive to obtain a family member or person exercising cultural authority under customary law. Shahleena Musk, a former NAAJA lawyer, stated:

> I am concerned that the Red Cross volunteer support persons are called in without reasonable attempts being made to contact the parent or guardian of the young person. This is especially the case if the child is in the Department's care. The frequency of this occurrence makes me very concerned whether this is a practice to enable progression of an interview as quickly as possible.[38]

Though the various non-government agencies on the register do have commendable intentions to support an Aboriginal child during police questioning, they may not be able to act in the best interests of the child where they are not adequately trained in identifying language barriers, cultural differences and in ensuring that a child has access to legal advice and representation.[39]

It is NAAJA's view that Aboriginal Law and Justice Groups are best placed to either be listed or to identify Aboriginal persons who by reason of kinship or customary law could be on the register of support persons under s 14(2) of the *Youth Justice Act*.

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[35] Northern Territory Police, Fire and Emergency Services, 'Caution App Wins Award' (21 December 2015).
[36] That includes parental responsibility in accordance with Aboriginal customary law or Aboriginal tradition.
[37] *Youth Justice Act 2005* (NT) ss 35(5), 14(2).
[38] Ibid, [80].
[39] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 21 [78],

Witness CE:

I did have a support person with me when I was interviewed but she did not say anything during the interview. She did speak to me beforehand and said I could say no comment or tell them to stop. I told her that was what I wanted to do, stop any interview, and she said to say it on tape. I did, but when the police kept going anyway, she didn't stop them. I think she should have.[40]

Recommendation 17	That the register of persons to act as support persons includes Aboriginal Law and Justice Groups and/or Aboriginal community bodies.
Recommendation 18	That support persons are trained in recognising the need for a child to access a lawyer prior to interview.

2.8 Charging

2.8.1 Overcharging

NAAJA is concerned about the common practice of overcharging young people. 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 remanded in custody for unnecessarily long periods.[41]

It is common ground by youth defence lawyers and summary prosecutors that the practice of overcharging of children and young persons has and does regularly occur. Senior Prosecutor Sandy Lau identified one incident where the laying of 169 charges resulted in a guilty plea to only 27 charges at the Youth Justice Court.[42] This failure to lay properly investigated charges with a reasonable prospect of conviction does a disservice to not only the child but also victims of crime.

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.[43]

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

[40] Exhibit 365.000, Statement of CE, 21 February 2017, [36].
[41] Exhibit 451.000, Statement of Shahleena Raquel Musk, 11 April 2017, 19.
[42] Exhibit 350.001, Statement of Sandy Lau, 2 May 2017, 42.
[43] Exhibit 145.001, Statement of AG, 25 November 2016, 19.

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.[44]

2.8.2 Police culture

The Commission heard evidence from Superintendent Craig Laidler of Taskforce Trident, a police taskforce that seeks to reduce the incidence of property crime and target known property main offenders. He described the purpose and operations of the taskforce:

> A zero tolerance attitude is to be taken with all recidivist property offenders. These offenders will be targeted relentlessly and prosecuted for any and all offences committed. Arrest is the preferred option for recidivist offenders rather than any other avenues i.e. summons, notice to appear, summons. When warranted bail should be vigorously opposed. If this is not possible or local Youth Court bail is granted members will seek strenuous and onerous bail conditions. These bail conditions must be stringently enforced to reduce the opportunity for offending.[45]

This attitude is damning, inconsistent with the principles of the *Youth Justice Act* and should not be part of the approach to youth policing in the Northern Territory. Police training and General Orders must be directed to ensuring police culture develops to meet the rehabilitative aims of youth justice.

Proposed finding	That there is a practice of punitive overcharging of children.

[44] Exhibit 270.001, Statement of AM, 11 February 2017, 16.
[45] Exhibit 361.001, Taskforce Trident 2017: Concept of Operations, 15 February 2017, 5 [3.2].

3 Diversion

3.1 Introduction

The Northern Territory has over four times the national average of child incarceration.[1] Aboriginal children represent 96 per cent of young people in detention in the Northern Territory, despite being 45 per cent of the population aged 10 to 17 years.[2] A youth justice system that perpetuates and condones such disgraceful rates of Aboriginal over-representation has failed Aboriginal young people. Child detention has significant health and socio-economic consequences for young people and the community, including increasing social exclusion and marginalisation.[3] The impact of decades-long 'tough on crime' approaches in the Northern Territory has resulted in the criminalisation of the most vulnerable.[4]

It is incontrovertible that diverting young people from the youth justice system is fundamental to reducing the high rates of Aboriginal youth detention. Research indicates that an Aboriginal child is less likely to be diverted when compared to a non-Aboriginal child.[5] This results in Aboriginal children having a higher rate of entrenchment in the more punitive aspects of the youth justice system.

In the Northern Territory, diversion programs are not sufficient to meet demand and have historically been under-resourced. NAAJA has long advocated for increased diversion programs, particularly in remote communities where diversion has not always been available. There needs to be a greater emphasis on diversion across the youth justice system. The current youth justice system is 'like a maze with many entry points but not enough pathways out.'[6] Coordinated and sustained efforts must be made to ensure that opportunities for diversion are available at critical points including prior to first contact with police, at the time of police contact and at court.

Diversion should be underpinned by therapeutic and restorative justice principles and include a range of intervention strategies such as identifying young people at risk of entering the youth justice system, diversion by police at initial contact, and referral to services like drug and alcohol counselling, culturally strengthening rehabilitation programs and youth justice conferencing.

NAAJA acknowledges the Northern Territory Government's 2017 Youth Diversion Decision and commitment to increase funding for youth diversion, including establishing a dedicated diversion workforce.[7] It is critical that Aboriginal people are given every opportunity to participate in, and have control over, the design and delivery of diversion initiatives that respond to the particular needs of

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[1] Australian Institute of Health and Welfare, Youth detention population in Australia in 2016, Bulletin 138, December 2016, 14.
[2] Australian Institute of Health and Welfare, Northern Territory: youth justice supervision in 2015-16, Youth justice fact sheet no. 77, 3.
[3] Australian Institute of Criminology, Diverting Indigenous offenders from the criminal justice system, December 2013, 4.
[4] Oral evidence of Eileen Baldry, 8 May 2017, 3486:35–37.
[5] 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>.
[6] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 22 [105].
[7] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 1 [8].

their community. In our Submissions on Youth Detention, we recommended that government provide appropriate funding and support for youth diversion programs in remote communities that are developed and run in partnership with or by Aboriginal communities, Elders and Law and Justice Groups.[8]

3.2 Police diversion

3.2.1 Availability of diversion

Diversion in the Northern Territory has historically been underfunded, with only three staff employed in the Youth Diversion Unit (YDU) in Darwin prior to April 2017.[9] The need for increased resourcing of the YDU was identified in the Carney Review in 2011, which recommended increased resources for police diversion, expanded eligibility for diversion and the establishment of additional community-based programs that have measurable rehabilitative value.[10] Successive governments have failed to adequately implement this recommendation and address the chronic under-resourcing of diversion programs.

3.2.2 Police decision-making

Section 39 of the *Youth Justice Act* creates a presumption for diversion that requires police to divert all youth offences unless certain circumstances exist or the offences are excluded from the diversion process.[11] Diversion options include a verbal or written warning, convening a youth justice conference and referral to a diversion program.

Police officers have significant discretion under s 39 about whether to apply diversion. Although the Northern Territory Police Youth Pre-Court Diversion General Order states that 'the needs of the youth are paramount in any decision',[12] NAAJA has longstanding concerns about inconsistent police decision-making, which affects Aboriginal young people's access to diversion. The Commission has heard that, in some cases, arresting officers charge and then bail a young person in circumstances where the offending behaviour constitutes a divertible offence.[13] Children are also coming before the court as first-time offenders when they should have been offered diversion pursuant to s 39.[14] These practices are contrary to the principles of the *Youth Justice Act*, which state that criminal proceedings should not be instituted against a young person if there are alternative means of dealing with the matter.[15]

Police decision-making lacks transparency. Despite 'serious offences' being prescribed in the *Youth Justice Regulations*, the Commission has heard that police sometimes deem other offences too serious

[8] NAAJA Submissions on Youth Detention, Topic 5, Recommendations 56 and 57.
[9] Oral evidence of Jeanette Kerr, 8 May 2017, 3510;44–45.
[10] Exhibit 096.017, Carney Review of the Northern Territory Youth Justice System, 30 September 2011, viii.
[11] See *Youth Justice Act 2005* (NT), s 39; Exhibit 359.008, Annexure 8 to the Statement of Ian Lea, Northern Territory Police General Order Youth Pre-Court Diversion, 22 February 2007, 6.
[12] Annexure 8 to the Statement of Ian Lea, Northern Territory Police General Order Youth Pre-Court Diversion, 22 February 2007, 6.
[13] Oral evidence of Matthew McKinlay, 10 May 2017, 3717:31-38.
[14] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 4 [12]; Oral evidence of Nicola MacCarron, 9 May 2017, 3616:12–13.
[15] *Youth Justice Act 2005* (NT), s 4(q).

to consider diversion.[16] Police overcharging, discussed in section 2.8.1, also affects diversion, as children charged with multiple offences are generally refused diversion.[17] The Commission has also heard that a punitive culture exists within the YDU, with police focused on compliance rather than restorative justice principles.[18]

NAAJA is concerned that the Police General Orders do not adequately guide police officers, giving rise to inconsistent decision-making. For example, the Youth Pre-Court Diversion General Order states it is not appropriate for officers to give a written warning for offences that 'the community regards as more serious'.[19] In NAAJA's submission, this represents an inappropriate policy-based qualification of legislation and leaves it open to the individual officer to determine community standards. It is also concerning in light of evidence before the Commission about the impact of Government 'tough on crime' policies and media reporting on policing practices.[20] Constable McKinlay acknowledged that pressures to meet community expectations to be tough on crime have in some instances outweighed a proper application of the diversion principles.[21]

NAAJA is also concerned that the General Order has not been updated in over 10 years. For example, it defines 'minor offences' as those property offences where the value of the property involved does not exceed $100.[22] Superintendent Lea acknowledged that such a constraint is problematic and agreed that discretion should be exercised flexibly and on a case-by-case basis.[23]

Police witnesses agreed there should be greater flexibility for police to divert a child from the court process.[24] In New Zealand, police deal with approximately 80 per cent of children by way of diversion.[25] Police should be encouraged to use diversion more frequently and police across the Northern Territory should be trained about the role and purpose of diversion, trauma-informed approaches and restorative justice principles.

We have previously recommended that police decision-making for youth diversion suitability must be referred to locally-based Aboriginal Elders for their consideration.[26] This will ensure that there is an additional level of oversight and that Elders have an opportunity to participate in decision-making about diversion programs.

In addition, to ensure officers turn their mind to the availability of diversion and to improve transparency of decision-making, NAAJA recommends that a 'Failure to Divert Declaration' be

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[16] Oral evidence of Nicola MacCarron, 9 May 2017, 3616:43–3617:2.
[17] Oral evidence of Anna Gill, 9 May 2017, 3617:11–13.
[18] Exhibit 373.000, Statement of Geoff Radford, 26 April 2017, 13 [85].
[19] Exhibit 359.008, Annexure 8 to the Statement of Ian Lea, Northern Territory Police General Order Youth Pre-Court Diversion, 22 February 2007, 13. See also Exhibit 359.000, Statement of Ian Lea, 5 May 2017, 11 [61].
[20] Oral evidence of Ian Lea, 10 May 2017, 3681:32–47; 3687:4–20.
[21] Oral evidence of Matthew McKinlay, 10 May 2017, 3717:46–3718:3.
[22] Exhibit 359.008, Annexure 8 to the Statement of Ian Lea, Northern Territory Police General Order Youth Pre-Court Diversion, 22 February 2007, 7.
[23] Oral evidence of Ian Lea, 10 May 2017, 3669:24, 35–37.
[24] Oral evidence of Ian Lea, 10 May 2017, 3684:25–27.
[25] Oral evidence of Judge Peter Johnstone, 8 May 2017, 3466:33–35.
[26] NAAJA Submissions on Youth Detention, Topic 5, Recommendation 58.

incorporated into police briefs provided to Aboriginal Legal Services.[27] The declaration should require the police officer to state whether the matter has been referred to Aboriginal Elders or Law and Justice Groups and why diversion has been refused under s 39 of the *Youth Justice Act*. It should be filed with the court at the same time as charges are filed and made available to defence lawyers as part of disclosure. The Commission has heard more generally about the benefits of structured decision-making models and objective screening tools.[28]

Recommendation 19	That the Police General Order Youth Pre-Court Diversion is reviewed in light of the recommendations arising from the Royal Commission.
Recommendation 20	That all police officers involved in youth diversion considerations receive training on the role and purpose of diversion, including trauma-informed and restorative justice approaches.
Recommendation 21	That a 'Failure to Divert Declaration' is included in all police briefs for youth matters, setting out the reasons why diversion has been refused. It should be filed with the court at the same time as charges are filed.

3.2.3 Eligibility for diversion

Despite expansion of eligibility for diversion forming part of the recommendations of the Carney Review in 2011, there has been no legislative amendment to the eligibility criteria since that time. The Northern Territory Government agreed that expansion of eligibility for diversion is desirable.[29] This will require the Government to commit to both legislative change and increased resourcing of diversion programs and activities.

Exclusion of certain offences

Under s 39(3) of the *Youth Justice Act*, 'serious offences' (as prescribed by the *Youth Justice Regulations*) are excluded from diversion. This includes traffic offences under Parts V and VI of the *Traffic Act*. The operation of this exclusion gives rise to circumstances where a young person who drives a stolen car unlicensed may be eligible for diversion for the stealing offence but ineligible for driving unlicensed. It is illogical that minor offending cannot be dealt with by way of diversion, the whole focus of which is keeping a child out of the criminal justice system.[30] Many witnesses before the Commission supported removal of the traffic offence exclusion, including the Northern Territory Government.[31] This has long been NAAJA's position.

[27] See Victorian Aboriginal Legal Service, 'Practical Recommendations for Diversion', 8 March 2016, 2, available at <https://vals.org.au/assets/2016/03/VALS-Diversion-Submission-2.pdf>.
[28] See, eg, oral evidence of Nate Balis, 26 June 2017, 4979.
[29] Oral evidence of Jeanette Kerr, 8 May 2017, 3514:14–15.
[30] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 5 [15].
[31] See, eg, Oral evidence of Nicola MacCarron, 9 May 2017, 3616:29–32; Oral evidence of Russell Goldflam, 14 December 2016, 817:29; Exhibit 363.000, Statement of Jennie Renfree, 1 May 2017, [141]; Oral evidence of Jeanette Kerr, 8 May 2017, 3514:42–43.

NAAJA, as part of the Legislative Amendment Advisory Committee considering diversion (among other reforms), has recommended that certain other offences be removed from the serious offences exclusion.[32] NAAJA also recommends that, rather than a simple classificatory approach to exclusion from diversion, there is an actual objective assessment of the nature of the offending to determine the merits of whether a criminal matter should be diverted. Territory Families witness Jeanette Kerr agreed that certain types of offences against the person should be eligible for diversion.[33]

Limit on number of diversion opportunities

Young people who have on two previous occasions been dealt with by diversion are ineligible for further diversion, unless the Commissioner of Police (or their delegate) determines otherwise.[34] In practice, children who have a lengthy record or who may have previously had the opportunity of diversion appear to be immediately ruled out.[35]

In NAAJA's submission, there should be no limit on the number of times a child is offered diversion. Children often need multiple chances before they can be successfully diverted from the criminal justice system and these further opportunities should be made available.[36] As NAAJA's former Indigenous Youth Justice Worker Terry Byrnes told the Commission:

> It is important to understand how long it is going to take to make a distinct difference in their lives. It takes a lot of time. The young person might undertake a rehabilitation program and fail, come back try something else and falter again. Change happens incrementally and needs sustained time and effort.[37]

There should be a case-by-case assessment of the appropriateness of a particular matter and a particular young person for diversion. The Northern Territory Government agreed that the two previous referrals exception should be repealed.[38]

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[32] For example: *Criminal Code* ss 66(2)–(4), 96, 166(1), 211, 212(1), 226B(1), 242(2)–(3), 189A, 213.
[33] Oral evidence of Jeanette Kerr, 8 May 2017, 3514:45–47.
[34] See *Youth Justice Act 2005* (NT), ss 39(3) and (4).
[35] Oral evidence of Nicola MacCarron, 9 May 2017, 3616:16–17.
[36] Oral evidence of Ian Lea, 10 May 2017, 3684:29–31; Oral evidence of Matthew McKinlay, 10 May 2017, 3714:32–35.
[37] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 3 [15].
[38] Oral evidence of Jeanette Kerr, 8 May 2017, 3514:23–25.

Recommendation 22	That traffic offences are not excluded from diversion.
Recommendation 23	That the Northern Territory Government, on the advice of the Legislative Amendment Advisory Committee and other relevant agencies, remove certain other offences prescribed as 'serious offences' in the *Youth Justice Regulations* to facilitate greater access to diversion.
Recommendation 24	That s 39(3)(c) of the *Youth Justice Act* is repealed.

3.2.4 Requirement to make formal admissions

The Commission has heard that police commonly require a child to formally admit all elements of an offence before offering diversion.[39] This should not be a requirement for a referral to diversion. As we have discussed in our Submissions on Youth Detention, we consider this to be improper practice, as it denies a young person their fundamental right to silence.

In New South Wales, the Protected Admissions Scheme means a young person can admit to an offence, but police are not able to use the admission in any criminal proceeding for any offence under any circumstance. Use of the scheme has not been as high as anticipated, and Judge Johnstone identified training for police officers on availability of this mechanism as important to ensuring it is effectively utilised.[40]

NAAJA prefers the approach in New Zealand where police are able to offer diversion (such as warnings, cautions and conferences) irrespective of whether a child admits to an offence. There is no evidence to suggest that a young person must admit to wrongdoing before they can be effectively counselled or treated.[41]

It is important that any reform that enables police to offer diversion without an admission and deems such admissions as inadmissible provides clear direction to police about the meaning and purpose of the reforms. In Victoria, a person must 'acknowledge responsibility for the offence' (not guilt), but use of any such acknowledgement in subsequent criminal proceedings is prohibited. The Victorian Aboriginal Legal Service has noted that despite this clear indication, Victorian police have narrowed construction of the language to mean admissions in an interview. They have advocated for the qualification of the requirement to recognise that the accused can exercise their right to silence even if they have acknowledged responsibility for the offence.[42]

[39] Oral evidence of Nicola MacCarron, 9 May 2017, 3623:33–3624:21.
[40] Oral evidence of Judge Peter Johnstone, 8 May 2017, 3470:27–38.
[41] Oral evidence of Judge Peter Johnstone, 8 May 2017, 3471:13–20.
[42] Victorian Aboriginal Legal Service, Submission to the Chief Magistrate's Review of the Diversion Program (8 March 2016) 4.

Recommendation 25	That legislation expressly sets out that admission of wrongdoing is not required for diversion and that any such admission is inadmissible in criminal proceedings.

3.3 Court diversion

3.3.1 Reassessments for diversion under s 64

Under s 64 of the *Youth Justice Act*, the court may at any stage of proceedings refer a young person to be reassessed for inclusion in a diversion program or youth justice conference, with the consent of the prosecution. In our Submissions on Youth Detention, we recommended that this provision be amended to remove the requirement of prosecutorial consent to youth diversion.[43] Courts, of their own accord or on application of the child's lawyer, should be able to refer matters to diversion. Prosecutors should not be the 'gatekeepers' to such a process.

NAAJA is concerned that there is no obligation under s 64 for police to make a fresh assessment of a young person's eligibility for diversion. NAAJA supports calls for an independent agency to be tasked with conducting reassessments for diversion pursuant to s 64.[44] In the interim, police decisions regarding diversion suitability of Aboriginal children in remote communities should be referred to local Aboriginal Elders for consideration, as recommended in our Submissions on Youth Detention.[45]

NAAJA has worked with Northern Territory Police to streamline reconsiderations for diversion pursuant to s 64, however there continue to be significant waiting times for assessments.[46] Increased resourcing is required for diversion to operate effectively across the Northern Territory.

3.3.2 Improving court involvement in diversion

The Commission has heard that there is significant fragmentation within the youth justice system and insufficient judicial involvement or oversight of the diversion process.[47] Justice Hannam told the Commission that Judges were not aware of the practicalities of diversion and what specific programs and activities were available because it was solely in the hands of the police.[48]

> I just think the whole role of diversion ranging from its theoretical underpinnings to what actually happens, to the expertise of those who did it, to the nature of the programs, … there's this disconnect, really, with the court.[49]

[43] NAAJA Submissions on Youth Detention, Topic 5, Recommendation 55.
[44] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 11 [71].
[45] NAAJA Submissions on Youth Detention, Topic 5, Recommendation 58.
[46] See Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 1 [6], 4 [14]; Oral evidence of Nicola MacCarron, 9 May 2017, 3620:38–3621:4.
[47] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3438:9-10, 24–25.
[48] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3438:20-25, 45–46.
[49] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3439:28–30.

Opportunities to divert young people at court should be strengthened and expanded. Consideration should be given to programs such as the Youth Diversion Pilot Program that was initiated by the Children's Court of Victoria. The program facilitated diversion from the criminal justice system by supporting young people to forge links to family, school and community.[50] Programs such as this, that the court can access directly, have a number of benefits including an initial assessment at court on the day of referral, immediate preparation of a preliminary diversion plan and ongoing support from a dedicated diversion worker who engages with the young person and their family. The Victorian pilot program proved successful, with over 90 per cent of all finalised diversions resulting in a dismissal of the original charges.[51]

3.3.3 Information sharing

Currently, there is inadequate information sharing between police, prosecutors and the court.[52] NAAJA is aware of a number of cases in which the prosecution service was not informed about a young person having been referred or accepted into diversion, nor aware of their progress through the diversion process. This has arisen through the civilianisation of prosecutions, which has meant prosecutors do not have access to YDU databases and information. As a result, on any given day, the prosecution (and the court and defence) may have no actual knowledge of a young person going through diversion, whether they were accepted, had failed or had completed diversion. In one case, this resulted in a young person who had already completed diversion being arrested on a warrant issued based on erroneous information provided by the prosecution. The young person spent a number of days in Don Dale Youth Detention Centre as a result of this error.[53]

Youth diversion should not be a hidden process. It should be open generally, to defence lawyers, the judiciary and the public. Witnesses before the Commission have supported calls for increased understanding of diversion by the courts and defence lawyers.[54] The courts should have greater visibility of the diversion process, including the ability to monitor its progress. Defence lawyers should have access to diversion exit reports as a matter of course. Participation of a young person's lawyer and other support workers in diversion would assist a young person to better understand the process and to meet the requirements of the program, which in turn would increase the likelihood of success.

[50] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 17 [83].
[51] Ibid, 17 [87].
[52] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 5 [17].
[53] Ibid, 5 [18].
[54] See, eg, oral evidence of Justice Hilary Hannam, 8 May 2017, 3439:39–42; oral evidence of Anna Gill, 9 May 2017, 3622:23.

Recommendation 26	That reassessments for diversion under s 64 of the *Youth Justice Act* are conducted by an independent agency and include Aboriginal Law and Justice Groups and/or Aboriginal community bodies.
Recommendation 27	That the Northern Territory Government takes measures to ensure that information is shared between agencies responsible for delivery and oversight of diversion programs, including police, prosecutions, the courts and Territory Families.

3.4 Diversion programs and activities

3.4.1 Expansion of services and programs

Government funding for youth diversion programs delivered by non-government organisations (NGOs) has been insufficient,[55] and funding cuts have resulted in NGOs having to source in-house resources to cover the funding gap.[56] In particular, remote communities do not have sufficient access to diversion programs.[57] The Commission has heard that in some communities, young people are on diversion plans that are tokenistic and involve mere warnings to 'stay out of trouble and stay at home', rather than offering any therapeutic or restorative justice intervention to address the underlying causes of offending.[58]

Programs must be developed that are therapeutic and tailored to address a young person's circumstances, including drug and alcohol misuse and mental health issues. Programs should be developed that are shorter, more flexible and do not place unrealistic expectations on young people. Effective wraparound support is also crucial so young people can participate in diversion programs. For children in care, Territory Families caseworkers need to be engaged in the diversion process.[59]

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 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.

I know a couple of people who were in trouble with the Police and were able to go to diversion. Those people went to diversion programs and were able to stay out of trouble after that, so it looks like it really worked for them.[60]

[55] Oral evidence of Jeanette Kerr, 8 May 2017, 3511:1–2.
[56] Exhibit 337.049, Northern Territory investment proposals no 1_diversion_blm alts_clean.docx, 10 March 2017, 1.
[57] Oral evidence of Jennie Renfree, 10 May 2017, 3732:9–11.
[58] Oral evidence of Matthew McKinlay, 10 May 2017, 3720:15–17.
[59] Oral evidence of Jennie Renfree, 10 May 2017, 3733:14–29.
[60] Exhibit 111.001, Statement of AX, 17 February 2017, 10 [58], 11 [59].

Intensive programs that work with the whole family should also be developed. In Victoria, the Barreng Moorop program provides culturally responsive trauma-informed services to divert young Aboriginal people away from the criminal justice system. The program provides a wraparound casework-based response, including supporting family members to play an active role. Each caseworker has a maximum of four clients to ensure they can provide comprehensive support to clients and extended family.[61] Consideration should be given to adapting these types of family strengthening programs to the Northern Territory context.

3.4.2 Empowering Aboriginal ownership and control

In topic 5 of our Submissions on Youth Detention, we recommended that youth diversion programs in remote communities are developed and run in partnership with or by Aboriginal communities, Elders and Law and Justice Groups.[62] One-size-fits-all approaches will not work.[63] Programs must be developed that meet the specific needs of communities. This will require ongoing funding and support by government.[64]

The Northern Territory Government has committed to consulting with Aboriginal people about the specific diversion programs required in communities, however this consultation has not yet commenced.[65] The Government's commitment to place-based solutions is a step in the right direction, but it is crucial that diversion initiatives are community run and led.

Communities should be supported to develop culturally strengthening programs and activities that address the underlying causes of offending and help maintain a young person's connection with family, community and culture. Diversion programs and activities must be meaningful for young Aboriginal people, and the involvement of Elders and those with cultural authority in communities adds real legitimacy to this process. For example, the Commission has heard about the importance of Elders participating in youth justice conferences at Yuendumu, including making decisions about the appropriate next steps for a young person:

> I think the success of the conferences is also about the Elders deciding, at the end of that conference time, with the families and the young person, the next step for that young person. And that might be case management within community … there's times where they will clean up a mess they might have made or make reparation somehow. And maybe the Elders might decide that young person would be better off going to Mount Theo, and they might work with the police, or other mediation people as to an appropriate length of stay at Mount Theo, or community case management within community.[66]

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[61] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 20 [94]–[97]. Barreng Moorop is a partnership between Jesuit Social Services, the Victorian Aboriginal Legal Service and the Victorian Aboriginal Child Care Agency. It is in the process of being transitioned to VACCA.
[62] NAAJA Submissions on Youth Detention, Topic 5, Recommendation 56.
[63] This has been acknowledged by the Northern Territory Government: see oral evidence of Jeanette Kerr, 8 May 2017, 3532:15. See also oral evidence of Jennie Renfree, 10 May 2017, 3739:12–13.
[64] NAAJA Submissions on Youth Detention, Topic 5, Recommendation 57.
[65] Oral evidence of Jeanette Kerr, 8 May 2017, 3532:1-6, 37–42.
[66] Oral evidence of Matt Davidson, 11 May 2017, 3813:1–8.

Ms McKenzie told the Commission that Malabam Health Board Aboriginal Corporation in Maningrida intends to seek approval from the YDU for ceremony to be recognised as a diversion program.[67] Malabam intends to involve the Bunawarra Elders in this process.[68] Initiatives such as this need to be encouraged and supported.

The Commission has also heard about successful youth diversion services provided in Aboriginal communities.

Warlpiri Youth Development Aboriginal Corporation Youth Development Program

An evaluation of this program found that consistent provision of high-quality diversion programs plays a strong role in crime prevention and that it is highly likely that the consistency, high levels of activity and skilful delivery of the Warlpiri Youth Development Aboriginal Corporation youth programs results in lower levels of youth crime for those communities.[69] Mr Davidson reported that if a young person is case managed and rehabilitated on country, they are more likely to re-engage with community and find employment.[70]

Tiwi Islands Youth Diversion and Development Unit

The Tiwi Islands Youth Diversion and Development Unit is a youth diversion program that has operated for over 10 years in Wanumiyanga on Bathurst Island.[71] Young people are given the opportunity to participate in youth justice conferencing and are supported by a range of interventions to address risk factors for reoffending. An evaluation of the program found that only 20 per cent of participants had contact with police for alleged offences in the 12 months following commencement of the program, which compares very favourably with reoffending rates in other jurisdictions.[72] A key to the program's success is excellent practice in the areas of cultural competency and community involvement. It was acknowledged that the program reinforced Tiwi social and cultural authority, and employed staff with strong cultural knowledge.[73] The evaluation also found that resource limitations affected the program, leading to a heavy reliance on volunteers rather than paid staff and delays between the time of offending and participation in the program.[74] This underscores the importance of ongoing and adequate funding to ensure the sustainability of community-based diversion programs.

3.5 Involvement of victims

NAAJA supports victim involvement in diversion programs. We have seen first-hand the success of diversion programs in achieving outcomes that help young people, victims and the community.[75]

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[67] Exhibit 387.000, Statement of Noeletta McKenzie, 24 April 2017, 9 [62].
[68] Ibid.
[69] Exhibit 371.000, Statement of Matt Davidson, 26 April 2017, 8 [64].
[70] Oral evidence of Matt Davidson, 11 May 2017, 3814:19–25.
[71] Exhibit 256.001, Statement of Marius Purutatameri, 15 February 2017, 3 [17].
[72] Exhibit 337.019, Australian Institute of Criminology, Indigenous Youth Justice Programs Evaluation, vii.
[73] Ibid, 41.
[74] Ibid, 45, 47.
[75] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 2 [8].

Engaging victims in the diversion process can be empowering and promote an understanding of the reasons underlying youth offending. In turn, it provides an opportunity for young people to understand the impact of offending on victims and make reparation for harm caused.

Witness AM:

I have apologised to a lot of the people that I affected when I committed a crime against them. I did this in person, or by sending them a letter and sometimes both. Some of the people I apologised to were a bit angry when I spoke to them to begin with but by the end they accepted my apology and seemed to appreciate it.

There was one man who I sent a letter to. He saw me in the street one day and asked me if I was [AM] and I said yes. He then told me that he had read my letter and that it meant a lot to him and that he appreciated it. He also said that if he saw me around in his suburb then he would say hello to me. After that, I felt so bad about what I did I haven't been back to that suburb since.[76]

We also recognise that victim involvement in diversion programs, including youth justice conferencing, needs to be assessed on a case-by-case basis. Willingness of both the victim and offender to participate in a restorative justice process is essential to the process being meaningful and effective.[77]

The most common way that victims participate in diversion is through face-to-face conferences with the offender. The benefits of face-to-face restorative conferencing have been empirically established. Some of the benefits include:

- Victims who participate suffer less from post-traumatic stress disorder symptoms
- Restorative justice conferencing causes a modest but highly cost-effective impact on reoffending
- Victim satisfaction with the handling of their case is consistently higher among those who attend restorative conferences.[78]

In New Zealand, the youth justice model is underpinned by a strong restorative justice approach that has been found to have significantly reduced rates of recidivism in young people. A central principle of the New Zealand model is the involvement of victims as key participants, making possible a healing process for both offender and victim.[79]

[76] Exhibit 270.001, Statement of AM, 11 February 2017, 18 [80]–[81].
[77] Exhibit 339.001, Annexure 1 to the Statement of Jeanette Kerr, Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review, 2012, 5.
[78] Exhibit 339.002, Annexure 2 to the Statement of Jeanette Kerr, Face-to-face Restorative Justice Conferences are cost-effective in reducing re-offending and increasing victim satisfaction, 2017.
[79] Exhibit 339.010, Annexure 10 to the Statement of Jeanette Kerr, Youth Justice in New Zealand: A Restorative Justice Approach to Reduce Youth Offending, 62.

The Commission has heard that involvement of victims in diversion conferencing in the Northern Territory has been mixed.[80] Ms Kerr told the Commission that lack of participation by victims is linked to systemic issues of timing and information provision that contribute to victim reluctance to participate, doubt in the potential outcome of the process and fear of reprisal.[81] To address this, newly established Youth Outreach and Re-Engagement Teams (YORETs) are intended to provide dedicated victim support, including explaining the process and benefits of victim-offender conferencing and supporting victims to attend conferences.[82] A dedicated diversion workforce trained in trauma-informed approaches is a positive development. However, YORETs are intended to be based in Alice Springs, Katherine, Nhulunbuy, Tennant Creek and Darwin/Palmerston.[83] It is crucial that sustained efforts are also made to employ and train Aboriginal people in communities to perform these roles.

NAAJA agrees that police officers (even those within the YDU) are not best placed to be conducting restorative justice conferencing, as this requires specialist facilitation skills and time to effectively build trust and rapport with both the victim and offender.[84] We discuss pre-sentence Youth Justice Conferencing, including the factors that ensure its success, in section 4.

3.6 Outcomes and effectiveness

Diversion of Aboriginal young people has generally been found to be effective in reducing recidivism among program completers.[85] Reviews of youth diversion in the Northern Territory demonstrate its benefits across a wide spectrum of positive outcomes, including low recidivism rates where 76 per cent of participants did not reoffend within 12 months.[86]

Northern Territory Police data for the period 2015–2016 shows that 85 per cent of young people who participated in a diversion program offend only once.[87] Diversion is significantly more effective where a youth justice conference is conducted with family and victims.[88] Following a youth justice conference, only 15 per cent of young people reoffended, and only 6.6 per cent of young people offended more than twice.[89] These low rates of reoffending, when compared with reoffending rates for young people dealt with by the courts, are consistent with national and international experience.[90] They also reflect NAAJA's experience of the success of youth diversion:

> As to measuring the success of diversion, I have had many examples of clients where the court ordered, pursuant to section 64, that they be reconsidered for diversion. In

[80] See, eg, Oral evidence of Geoff Radford, 11 May 2017, 3834:29–33; Exhibit 371.000, Statement of Matt Davidson, 26 April 2017, 7 [56]; Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 13 [81]; Exhibit 387.000, Statement of Noeletta McKenzie, 24 April 2017, 6 [40].
[81] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 13 [81].
[82] Ibid. See also oral evidence of Jeanette Kerr, 8 May 2017, 3510:16–23.
[83] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 11 [63].
[84] Oral evidence of Geoff Radford and Jessica Watkinson, 11 May 2017, 3830–3831.
[85] Australian Institute of Criminology, Diverting Indigenous offenders from the criminal justice system, December 2013, 12.
[86] Ibid, 9.
[87] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 5 [32].
[88] Ibid, 5 [31].
[89] Ibid, 5 [32].
[90] Ibid, 5 [31].

> those cases, the youth who were dealt with outside of the formal court system received individualised treatment that best met their needs. Whilst diversion could take months, once completed and we had the files back in court, it was my general experience that time youth was discharged and all charges dismissed. The important thing to note is that to complete diversion, which could take 3 to 6 months or more, the youth had to stay out of trouble. This meant that not only were they receiving individualised treatment, making amends for their offending, learning from their mistakes, reconnecting with society but demonstrating through lack of further offending that they were rehabilitating. There is a high success rate and I think that demonstrates the benefits of diversion.[91]

Research suggests features of effective diversion initiatives include well-resourced, culturally appropriate rehabilitation programs that address the underlying causes of offending behaviour, take a holistic approach, have intervention periods of adequate duration and are targeted to individual needs.[92]

Culturally appropriate treatment initiatives and rehabilitation have been shown to improve participation in and completion of a diversionary program.[93] Further, research shows that programs that involve Aboriginal Elders or facilitators are more successful.[94] This has also been reflected in evidence before the Commission:

> One case study that demonstrates the success of the [diversion] program is a young person who resided on his grandfather's outstation. During the diversion he helped to maintain the land including: mowing, cleaning, collecting wood, fishing and hunting for dinner. He was able to complete his diversion within a month … We are hopeful of using the same outstation for other young people for diversion … During the day the young people would help maintain the outstation. At night they would spend time with elders listening to cultural stories and history. Part of their responsibilities would be hunting and fishing for food.[95]

Although there is a lack of rigorous research and evaluation evidence about the effectiveness of diversionary programs,[96] the existing evidence base supports increased and sustained investment in diversion programs that are therapeutic, holistic and culturally relevant. Improved data collection across programs and ongoing monitoring and evaluation are crucial to ensuring that programs are effective and meet the needs of communities.

As has been well documented in evidence before the Commission, diversion programs in the Northern Territory have been chronically under-resourced. Long waiting lists mean that some children wait

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[91] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 2 [9].
[92] Australian Institute of Criminology, Diverting Indigenous offenders from the criminal justice system, December 2013, 18.
[93] Ibid, 1.
[94] Ibid.
[95] Exhibit 387.000, Statement of Noeletta McKenzie, 24 April 2017, 7 [51]–8 [52].
[96] Australian Institute of Health and Welfare, Law and justice: prevention and early intervention programs for Indigenous youth, July 2014, 1.

months before they can access diversion, which compromises its meaningfulness.[97] It is crucial that young people are engaged immediately after offending to ensure they appreciate there are consequences, are held accountable and risk factors are addressed early.[98]

There is also a need for post-diversion support. The Commission has heard that young people would benefit from continued support from someone they have an established relationship with.[99] This would help ensure that the benefits of the diversion process are sustained and young people receive continuity of service provision.

Information sharing needs to improve across agencies for diversion to be effective. NAAJA supports calls for an agency-level agreement across relevant youth diversion agencies, including Government and other relevant stakeholders, to ensure that information relevant to a young person can be shared in a timely manner.[100]

[97] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 5 [23].
[98] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 4 [14].
[99] Oral evidence of Jessica Watkinson, 11 May 2017, 3839:6–15.
[100] Exhibit 372.000, Statement of Jessica Watkinson, 24 April 2017, 14 [74].

4 Youth Justice Conferencing

4.1 Overview

Youth Justice Conferencing is both a part of the diversion process (discussed in section 3) and a pre-sentencing option under s 84 of the *Youth Justice Act*. Under this provision, when a young person has been found guilty of an offence, the court may adjourn proceedings and order the young person to participate in a pre-sentencing conference.[1] A pre-sentencing conference may involve victims, family members, community representatives and any other person who the court considers appropriate.[2]

The purpose of Youth Justice Conferencing is to:

- hold young people accountable for their behaviour
- empower victims and families in the process of responding to the young person's conduct
- establish fair and effective reparation
- reconnect a young person with their family and community
- engage families and guardians in the justice process
- provide young people with a network of support to aid in their development and promote rehabilitation.[3]

The Commission has heard that Youth Justice Conferencing has a range of benefits including allowing a young person to have a voice and become an active participant in a way that is not possible in court proceedings. It also enables young people, victims and family members to adopt a problem-solving approach and to collectively explore the consequences of the offending, including participating in the development of an outcome plan.[4]

The use of Youth Justice Conferencing in other jurisdictions has proven highly effective and NAAJA supports its increased use to help young people address the underlying causes of offending and to make reparation for harm caused. However, models from other jurisdictions must be adapted to the Northern Territory context to ensure they are successful. This includes focusing on the needs of remote communities and empowering Aboriginal facilitators and organisations to be involved in Youth Justice Conferencing.

4.2 Aboriginal controlled and led community conferencing and mediation

Throughout the Top End there are a number of Aboriginal community controlled organisations who provide mediation and restorative practices for Aboriginal youth and adult offenders and victims of crime. These services are based on local traditional mediation practices of 'peaceful living' and 'order and justice' in combination with mainstream mediation practices.[5] Traditional Aboriginal mediation systems are recognised as being of high value in promoting and sustaining community harmony. The

[1] Youth Justice Act 2005 (NT) s 84(1).
[2] Ibid, s 84(2).
[3] Exhibit 386.000, Statement of Ann Lewis, 26 April 2017, 3–4 [20].
[4] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 23 [125]; Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 14 [68].
[5] In 2009, 15 Tiwi mediators attained national accreditation.

Ponki Mediators of the Tiwi Islands follow local tradition of mediation for when young people commit crime.[6] Important decisions and mediations always require the input of members of the four main skin groups or clans in the community.[7] The Ponki mediators provide regular written reports and conferencing for Tiwi youth and NAAJA clients at the Local Courts at Wurrumiyanga and Pirlangimpi.

East Arnhem Mediation practices dispute resolution, negotiation and consultation with the aim of Peace Making. This is a holistic goal derived from the important Yolŋu concept of *Mägaya* of peace, order and justice.[8] East Arnhem Mediation provides for mediation, restorative practices, conciliation and process advocacy.

The quality of information provided by the Ponki Mediators' work and reports has been recognised continuously by the Local Court Judges sitting on the Tiwi Islands and by the Supreme Court in sentencing hearings '… you can convey to them I was impressed by the way in which the report has been written in a number of respects. Firstly, it is informative. It is concise and to the point. No, I think it is a very impressive effort'.[9]

It is well recognised that Aboriginal people and organisations in their own communities are best placed to provide services such as youth justice conferencing, mediation and other restorative practices.

Recommendation 28	That traditional Aboriginal mediation and dispute resolution systems and methods are formally recognised as Youth Justice Conferencing options.
Recommendation 29	That the Commonwealth and Northern Territory governments as a first order priority provide adequate training, recognition of prior learning, capacity building opportunities, resources and support for Aboriginal controlled and run Youth Justice Conferencing across the Northern Territory.
Recommendation 30	That the selection and provision of Youth Justice Conferencing providers follows the APO NT Partnership Principles.

[6] 'Ponki' in the Tiwi language means 'welcome', 'peace' and 'it's finished'.
[7] ABC Law Report, Ponki Mediation, 17 July 2011 <http://www.abc.net.au/radionational/programs/lawreport/ponki-mediation/2924532>.
[8] Sunrise Alliance, 'East Arnhem Mediation' <http://www.sunrisealliance.org/east-arnhem-mediation.html>.
[9] Justice Mildren in *The Queen v Michael Tipungwuti* SCC 21217854 (Unreported, 9 January 2013).

4.3 Accessibility of Youth Justice Conferencing

Youth Justice Conferencing under s 84 of the *Youth Justice Act* has rarely been used due to lack of funding and resources.[10]

Prior to February 2017, the Northern Territory Government provided no dedicated funding for Youth Justice Conferencing. The Northern Territory Community Justice Centre, based in Darwin, were the sole service providing pre-sentence conferences for young people under s 84 and did so with existing resources.[11] Since 1 July 2013, the Community Justice Centre has received 24 referrals and conducted 13 Youth Justice Conferences, mostly in Darwin.[12] The Commission heard that no s 84 conferences have been convened in Alice Springs.[13]

NAAJA has used the services of the Community Justice Centre in relation to Youth Justice Conferencing and our clients have experienced significant delays in accessing this service in the past. It is NAAJA's experience that the high transition of staff, recruitment issues and limited coverage outside of Darwin are major issues in the efficacy of its services. From late 2016, there has been limited or no access to conferencing services for our clients in Darwin.

Availability has increased with government's announcement of funding for a new service provider, Jesuit Social Services (JSS), to deliver Youth Justice Conferences. As at 10 May 2017, JSS had received 17 referrals and completed six conferences. All of these referrals related to Aboriginal young people,[14] which highlights the critical importance of Aboriginal organisations and facilitators conducting the conferences to ensure they are culturally relevant and meaningful for Aboriginal young people. APO NT is engaged in discussions with JSS to ensure the organisation's adherence to the APO NT Partnership Principles and to assist JSS with the identification of a partner Aboriginal community controlled organisation to deliver Youth Justice Conferencing services into the future.

Dedicated funding for Youth Justice Conferencing is a positive development, however funding has only been provided for Darwin and Palmerston.[15] Dedicated NAAJA lawyers for the East Arnhem region have lobbied for and sourced the presence of Community Justice Centre staff to attend remote Local Court sittings at Gapuwiyak and Alyangula. The benefits of such conferences should be made available to all eligible Aboriginal children and young people throughout the Northern Territory.

4.4 Involvement of victims

Giving victims the opportunity to participate in the process of dealing with a young person who has committed an offence is one of the principles of the *Youth Justice Act*.[16] The benefits for victims of

[10] See, eg, oral evidence of Justice Hilary Hannam, 8 May 2017, 3425:39–42; Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 20 [112]; oral evidence of Sandy Lau, 10 May 2017, 3619:5–14; oral evidence of Shahleena Musk, 10 May 2017, 3619:21–43.
[11] Exhibit 386.000, Statement of Ann Lewis, 26 April 2017, 2 [11], 10 [63].
[12] Ibid, 7 [47].
[13] Oral evidence of Anna Gill, 10 May 2017, 3620:15–21.
[14] Oral evidence of Jared Sharp, 9 May 2017, 3644:35–36.
[15] Oral evidence of Jared Sharp, 10 May 2017, 3659:25–27.
[16] Youth Justice Act 2005 (NT) s 4(k).

face-to-face restorative conferencing have been empirically established. Victims who participate suffer less from post-traumatic stress disorder symptoms and have consistently higher satisfaction rates than those victims who do not attend restorative conferences.[17]

In NAAJA's experience, the involvement of victims in Youth Justice Conferences is very positive. It is a meaningful way for victims to convey how they have been affected by a young person's offending and is an opportunity for young people to repair the harm they have caused.

There has been a high rate of victim participation since government started funding s 84 conferences earlier this year, and victim feedback has been 'overwhelmingly positive'.[18] In circumstances where a victim is unable or unwilling to attend, efforts should be made to ensure that the victim is given an opportunity to participate by, for example, nominating a representative to attend or providing a written statement that can then be read at the conference. The Commission heard this approach has previously been successful.[19]

Preparation of victims before attending a conference is crucial so that they understand the purpose of the conference and how it will be conducted. Mr Sharp told the Commission that the high rate of victim participation has been due to the support of the Witness Assistance Service who are trained in restorative justice practices and have primary responsibility for victim contact and support.[20]

4.5 Family Group Conferencing

In New Zealand, youth justice is underpinned by a strong restorative justice approach that has been found to have significantly reduced rates of recidivism in young people. Family Group Conferences are fundamental to the New Zealand model. They have been widely used to produce a negotiated, community response to offending,[21] where the decision-making is transferred (at least in part) from the courts to the parties directly affected by the offending.[22] The court oversees performance plans formulated in Family Group Conferences, rather than itself determining the appropriate outcome.[23]

In the Northern Territory, delegated decision-making models such as Family Group Conferencing should be explored as a means of empowering Aboriginal people, including Elders and Law and Justice Groups, to have greater control and responsibility for young people in their community. Delegated decision-making models enable a more culturally appropriate response to offending because they

[17] Exhibit 339.002, Annexure 2 to the Statement of Jeanette Kerr, Face-to-face Restorative Justice Conferences are cost-effective in reducing re-offending and increasing victim satisfaction, 2017.
[18] Oral evidence of Jared Sharp, 10 May 2017, 3653:1–7; Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 27 [141].
[19] Oral evidence of Jared Sharp, 10 May 2017, 3653:12–20.
[20] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 27 [141].
[21] Exhibit 339.010, Annexure 10 to the Statement of Jeanette Kerr, Youth Justice in New Zealand: A Restorative Justice Approach to Reduce Youth Offending, 62.
[22] Exhibit 337.027, "From Little Things Big Things Grow" Emerging Youth Justice Themes in the South Pacific" - by Justice Becroft, 20 May 2017, 18.
[23] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 30 [155].

better reflect principles of collective responsibility and decision-making and can improve engagement in the process from young people and their families.[24]

4.6 Outcomes and effectiveness

4.6.1 Effectiveness of Youth Justice Conferencing

There is an established evidence base demonstrating that restorative practices are an effective strategy to reduce reoffending, and that they increase satisfaction for parties who participate in them.[25] An evaluation of Youth Justice Conferencing in Victoria found that within 12 months of the conference, only 16 per cent of participants had reoffended, compared to 40 per cent of those on probation from a comparable sample.[26]

NAAJA agrees with cautions against using recidivism rates as the only measure of effectiveness, as the severity of any reoffending and other benefits to both the offender and the victim should also be considered.[27] A harm minimisation approach recognises that longer periods of time between reoffending and reoffending to a lesser degree are steps in the right direction.[28] Such an approach reflects the complexity of youth offending and that effecting lasting change for complex youth offenders takes time.

There is a lack of data about the effectiveness of s 84 pre-sentence conferences because they have rarely been used. Data about youth diversion conferences (discussed in section 3) shows a low rate of reoffending following a conference, with only 15 per cent of young people reoffending following participation in a conference.[29] The effectiveness of Youth Justice Conferencing in the Northern Territory will need to be measured over time, and rigorous monitoring and evaluation should be built into program requirements.

4.6.2 Benefits of Youth Justice Conferencing

Evidence presented to the Commission by those experienced in Youth Justice Conferencing speaks to the benefits of conferencing for both offenders and victims. The Commission has heard that it is an 'extraordinarily powerful experience' for all involved:

> In a conference [young people] are held fully accountable, and must step up and take responsibility for their actions. Conferences are much more than a point-in-time intervention looking at the offence disconnected from real life. In my opinion, this is

[24] Exhibit 337.027, "From Little Things Big Things Grow" Emerging Youth Justice Themes in the South Pacific" - by Justice Becroft, 20 May 2017, 18.
[25] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 29 [151]; 30 [152]. See also Exhibit 386.000, Statement of Ann Lewis, 24 April 2017, 7 [42].
[26] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 16 [81].
[27] For example; satisfaction with the process, learning outcomes and skill or emotional development.
[28] Ibid, 16 [82].
[29] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 5 [32].

> why they are so effective … [conferences have] a much more lasting effect. It also helps restore the young person to themselves and to their community.[30]
>
> The other thing that seems to have a powerful effect is the victim becoming aware of the circumstances of the particular child … So I think it benefits on both sides, quite frankly, and I think it has got benefit in terms of stopping further offending, because it brings home to the particular offender the particular effects that the behaviour has said. So I'm greatly in favour of it, quite frankly.[31]

4.6.3 Ensuring success of Youth Justice Conferencing

Evaluations have shown that the skills and training of the convenor is a key to the success of Youth Justice Conferencing.[32] Based on NAAJA's experience participating in conferences convened through the Community Justice Centre (CJC), having a convenor who can ensure the cultural relevance of the process is integral to effective outcomes. The CJC conference coordinator was a senior Aboriginal man with extensive experience in youth conferencing. The outcome for each young person was very positive and in each case resulted in either a significant period trouble-free or no further trouble: a significant outcome given they were repeat youth offenders with complex issues. These results show the critical importance of Aboriginal convenors for Aboriginal young people. Immediate efforts should be made to train Aboriginal people to conduct Youth Justice Conferences across the Northern Territory and to provide convenors with ongoing professional development and mentoring opportunities.

Comprehensive preparation of participants by the convenor is also critical to the success of Youth Justice Conferences, including ensuring participants are linked in with relevant support services.[33] In particular, support for young people to implement the outcome plan of the conference is vital. While conferences offer an important pathway away from the more punitive aspects of the youth justice system, holistic and ongoing support for young people and their family is necessary to effect lasting change. The importance of referral programs is discussed further in section 7.

The Commission has also heard Youth Justice Conferencing is an 'extremely valuable tool' for the court to have at its disposal.[34] Youth Justice Conferencing should be more strongly embedded in the legislative framework so there are clear guidelines on attendance at conferences, confidentiality, preparation of reports and approval of service providers.[35] NAAJA supports calls for the *Youth Justice Act* to be amended so that courts are required to take participation at a Youth Justice Conference into account in sentencing, as is the case in other jurisdictions.[36] For example, in Victoria if a child participates in a group conference and agrees to the outcome plan, the court must impose a sentence

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[30] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 15 [76], [79].
[31] Oral evidence of Judge Michael Shanahan, 11 May 2017, 3759:20–37.
[32] Oral evidence of Jared Sharp, 10 May 2017, 3654:4-11; Exhibit 386.000, Statement of Ann Lewis, 24 April 2017, 7 [44].
[33] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 26 [137], [139].
[34] Oral evidence of Judge Michael Shanahan, 11 May 2017, 3759:19.
[35] The Commission has heard that regard should be had to the Victorian model: see *Children, Youth and Families Act 2005* (Vic), especially sections 415 and 480. See also Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 31 [157]–[159].
[36] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 28 [147].

less severe than it would have imposed had the child not participated in the conference.[37] If a child fails to participate in a group conference, the court must not impose a sentence more severe than it would have if the child had not failed to participate.[38]

If the Northern Territory Government is genuinely committed to promoting restorative practices such as Youth Justice Conferencing, then it must provide adequate resourcing to ensure that conferencing is available to all eligible young people across the Northern Territory. As Justice Hannam told the Commission, without adequate resourcing of mechanisms like Youth Justice Conferencing, the Act becomes nothing more than a 'statement of good intentions'.[39]

Recommendation 31	That Aboriginal people are recruited and trained as convenors of Youth Justice Conferences.
Recommendation 32	That the *Youth Justice Act* is amended so that: c. If a young person participates in a Youth Justice Conference and agrees to the outcome plan, the court must impose a sentence less severe than it would have imposed if the young person did not participate in the conference d. If a young person fails to participate in a Youth Justice Conference, the court must not impose a sentence more severe than it would have if the young person had not failed to participate.

[37] Children, Youth and Families Act 2005 (Vic), section 363(3).
[38] Ibid, s 363(4).
[39] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3425:18–19.

5 Bail

5.1 Introduction

The Northern Territory has the highest rate of young people remanded in custody in the nation,[1] which demonstrates system failures for police-determined and court-ordered bail decisions. Only 29% of young people in detention are serving sentences of detention, while the remaining 71% of children in detention are on remand.[2] It is evident from these statistics that refusal of bail, and more broadly how decisions are made when considering a grant of bail, is a significant contributing factor to the unacceptable numbers of young people in detention.[3]

The Northern Territory's failed bail system disproportionately affects Aboriginal children. Aboriginal young people are 26 times more likely than non-Aboriginal young people to be incarcerated.[4] Despite constituting 45% of 10 to 17 year olds in the Northern Territory, Aboriginal children make up 96% of the corresponding detention population.[5] The number of Aboriginal children remanded in custody is unacceptable, with 492 of the 521 young people on remand in 2015/16 being Aboriginal.[6] Of these 521 children on remand, only 83 were subsequently sentenced to detention.[7] This creates a significant drain on public funds as the Northern Territory Government pays $698.40 a day to detain a young person who is unlikely to be sentenced to detention by a court.[8]

The principle of using detention as a last resort is enshrined in the *Youth Justice Act*.[9] This principle reflects worldwide studies and practices that demonstrate that any period of detention is harmful to a young person.[10] For Aboriginal youths, detention is disruptive to family, community and cultural life, creates a sense of social isolation and greatly increases the chances they will engage in future offending behaviour.[11]

For many Aboriginal children, being remanded in detention sends a harmful message that they are 'too difficult' to be managed at school, by their parents or by the community, so they belong in the criminal justice system.[12] It is also true that the decision to not grant a child bail, early in their offending, can have a lifelong impact, by starting a trajectory of offending and refusal of bail which can continue into adulthood. In NAAJA's experience, Aboriginal children are often declined bail due to issues related to poverty, whether it is overcrowded housing, the limited support services and resources for youth and families (particularly for remote communities), children's vulnerabilities and

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[1] Australian Institute of Health and Welfare, 'Northern Territory: youth justice supervisions in 2015-16' (Youth Justice fact sheet no 77, Australian Institute of Health and Welfare) 1.
[2] Ibid 3.
[3] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 37 [148].
[4] Australian Institute of Health and Welfare, 'Northern Territory: youth justice supervisions in 2015-16' (Youth Justice fact sheet no 77, Australian Institute of Health and Welfare) 2.
[5] Ibid 2.
[6] Department of Correctional Services, *Annual Statistics 2015-16*, 35.
[7] Annexure CW-6 to statement of Carolyn Whyte, 9 June 2017, table 2b(iii) [WIT.0148.0003.0054].
[8] Exhibit 024.024, Review of the Northern Territory Youth Detention System Report, January 2015, 15.
[9] *Youth Justice Act 2005* (NT) s 4(c).
[10] Oral evidence of Eileen Baldry, 8 May 2017, 3488:15–30.
[11] NAAJA, submission, *Youth Justice Review Panel*, July 2011, 45 [13.4a].
[12] Oral evidence of Eileen Baldry, 8 May 2017, 3488:41–43.

disabilities that see them remanded in custody for safety or treatment, or the infrequency and inadequacy of sitting times of Youth Justice Courts in remote Aboriginal communities.

The bail system in the Northern Territory is in urgent need of reform. Legislation must be enacted to include youth-specific, pro-bail provisions that reflect the therapeutic and rehabilitative aims of the youth justice system and meet the specific needs of Aboriginal young people. Remand in custody for children and young people should be the option of last resort. Young people should not be unnecessarily detained while awaiting sentencing by a court and remand in custody should only be used in circumstances where a young person presents a real risk to the community.

5.2 Bail – grant and refusal

5.2.1 Youth-specific bail provisions

There are no youth-specific bail provisions in the Northern Territory. The *Bail Act* applies equally to young people as it does to adults. NAAJA has repeatedly called for youth-specific bail provisions that are pro-bail and encourage bail decisions that are not onerous or oppressive.[13] While the *Bail Act* mandates consideration of whether a person is a youth,[14] there is no guidance on how this is to be taken into account in bail determinations.

A presumption in favour of bail

In NAAJA's submission, the presumptions against bail in the *Bail Act* are completely unsuitable for young people because they undermine the principle of detention as a last resort in the *Youth Justice Act.* The presumption against bail for certain offences, set out in s 7A of the *Bail Act*, should not apply to youth offenders. A uniform presumption in favour of bail for alleged youth offenders would not only align with key human rights of personal liberty and the presumption of innocence,[15] but would also help ensure that the youth justice system is underpinned by therapeutic considerations and caters to young people's specific developmental needs, instead of taking a punitive approach.

A general presumption in favour of bail for youth offenders should be enshrined in the *Bail Act* or in a youth-specific bail regime in the *Youth Justice Act*. This provision could mirror the presumption for bail for children in Western Australia, where bail is granted as a matter of course unless a child is charged with an offence requiring exceptional circumstances to be proven.[16]

[13] NAAJA, submission, *Review of the Bail Act (NT)*, March 2013, 6; NAAJA, submission, *Youth Justice Review Panel*, July 2011, 8.
[14] *Bail Act 1983* (NT) s 24(1)(b)(iiib).
[15] NAAJA, submission, *Review of the Bail Act (NT)*, March 2013, 15.
[16] *Bail Act 1982* (NT) schedule 1, part C, cl 2.

Recommendation 33	That a general presumption in favour of bail for youth offenders is inserted into the *Bail Act* or in youth-specific bail provisions in the *Youth Justice Act*.

Youth-specific bail considerations that meet the needs of Aboriginal young people

The *Bail Act* is ill-adapted to encouraging bail decisions that meet the specific needs of Aboriginal young people.

Section 24 of the *Bail Act* sets out specific criteria to be considered in bail applications. The considerations include mental and cognitive impairment,[17] needs relating to cultural background and cultural obligations,[18] and whether the *Youth Justice Act* applies to the person.[19] While these are indeed some of the relevant considerations in a bail decision about an Aboriginal young person, in NAAJA's experience this provision operates to discriminate against Aboriginal people. The relevant criteria under s 24 are predicated on mainstream and western systems of property ownership, employment and stability of home life.[20] This provision fails to protect the needs of persons who are prejudiced by reason of poverty, remoteness, high mobility of families and lack of means to travel to and from court. When the risks of non-compliance with bail are weighed by the court, it is more likely that an Aboriginal child will be denied bail under this system.

The risk that bail will be breached is an unsuitable consideration for youth bail applications.[21] Young people often lack the agency and resources to meet bail conditions, so breach of bail may be likely. This should not mean bail is refused to young people but rather demonstrates that bail support is necessary. Breach of bail is further discussed at section 5.4 below.

Pro-bail, youth-specific considerations should be enshrined in legislation. Examples of pro-bail considerations can be seen in the Victorian *Bail Act*, which prescribes that certain factors be taken into account in determinations concerning Aboriginal children. The Victorian legislation encourages decision-makers to recognise the importance of stability in children's lives and the desirability of granting bail where possible.[22] Section 3A ensures that courts consider an Aboriginal person's cultural background and any resulting relationships, issues or obligations in making a bail determination.[23]

NAAJA regards the way that the Northern Territory *Bail Act* deals with cultural obligations as grossly inadequate, especially for young Aboriginal people. While s 24 does require that a person's cultural needs and obligations are considered, NAAJA's view is that this does not adequately protect the needs of young Aboriginal people – the considerations should be made specifically pro-bail.

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[17] *Bail Act 1982* (NT) s 24(1)(iiib).
[18] Ibid s 24(1)(iiic).
[19] Ibid s 24(1)(iiib).
[20] Considerations include 'the person's background and community ties, as indicated by the history and details of the person's residence, employment and family situations': *Bail Act 1982* (NT) s 24(1)(a)(i).
[21] *Bail Act 1982* (NT) s 24(1)(d).
[22] *Bail Act 1977* (Vic) s 3B.
[23] Ibid s 3A.

Recommendation 34	That pro-bail, youth specific provisions are inserted into the *Bail Act*, or as part of a separate bail regime for young people in the *Youth Justice Act*. These provisions should require consideration of the following Aboriginal youth-centred principles: f. That young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them. g. Relationships between a young person and members of their family should be preserved and strengthened wherever possible. h. The education or employment of a young person should proceed without interruption wherever possible. i. A young person's sense of cultural identity should be acknowledged and a young person should be able to maintain their cultural identity, including participating in ceremony. j. The detention or imprisonment of a young person is to be used only as a last resort, only if there is no appropriate alternative and only for the shortest appropriate period of time.

Objective decision-making criteria

Nate Balis provided expert evidence to the Commission about the Annie E Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), a key element of which is an objective screening instrument to determine a young person's suitability for bail.[24] Where it has been implemented in the United States, the JDAI approach has reduced the average number of young people held in detention each day by 43%.[25]

The screening tool aims to reduce the over-representation of racial and ethnic minorities in detention by implementing an objective decision-making standard.[26] The tool facilitates the classification of young alleged offenders by bail decision-makers as either of the highest risk and deserving of detention or able to be released conditionally or unconditionally.[27] The resulting data, reflecting the reasons for bail decisions, is then used to identify patterns in bail decision-making. NAAJA believes that such a tool would be effective in reducing inappropriate recourse to remand in the Northern Territory and the resulting over-representation of Aboriginal young people in the justice system.

[24] Exhibit 576.000, Precis of Evidence of Nate Balis, 20 June 2017.
[25] Oral evidence of Nate Balis, 20 June 2017, 4976.
[26] Exhibit 576.000, Precis of Evidence of Nate Balis, 20 June 2017, 1 [3].
[27] Ibid 3 [15].

A fundamental element of the decision-making tool is its formulation by the community to incorporate local normative ideals to determine the threshold for detaining a young person.[28] By bringing focus to the true function of detention – to protect the community – these discussions highlight and discourage detention being used for illegitimate purposes.[29] Moreover, NAAJA believes that community collaboration presents an opportunity for Aboriginal-led community organisations and Aboriginal community members to contribute to and gain a better understanding of how the justice system operates. Considering that 96% of the youth detention population is Aboriginal,[30] their involvement in this process is crucial to the legitimacy of the decision-making tool.[31]

The data-driven analysis and transparency of decision-making facilitated by this tool would be highly beneficial. Data analysis of situations in which decision-makers have chosen to override the decision-making tool has been used to reveal bail decisions predicated on a child's racial profile, their disability or lack of accommodation, rather than the seriousness of their offending behaviour.[32] The over-representation of Aboriginal young people in the remand population is often a result of these considerations, rather than due to the seriousness of their offending behaviour. The use of this tool may highlight and eliminate these biases and allow underlying issues to be addressed by appropriate bail support organisations and services.

NAAJA supports the implementation of a decision-making tool, to be used by the police and the judiciary for bail determinations.

Recommendation 35	That the Northern Territory Government commit to the development and implementation of a decision-making tool that will become a mandatory step in all decisions regarding young people and grants of bail.
Recommendation 36	That the Northern Territory Government immediately establish a working group, including members of the Aboriginal and wider community, to work towards the development and establishment of such an objective screening instrument.

5.2.2 Empowering Aboriginal participation in bail decision-making

NAAJA supports greater Aboriginal community involvement in the bail process. NAAJA recommends that a Northern Territory Aboriginal Justice Agreement recognises the authority of local Aboriginal communities and empowers them to have greater control and meaningful input into decision-making across the whole justice system. NAAJA regards the involvement of Aboriginal community bodies in bail determinations as essential.

Bail determinations should be referred to local Aboriginal community bodies at the first instance, with police and then courts having capacity to review decisions. We suggest that a designated Aboriginal

[28] Oral evidence of Nate Balis, 20 June 2017, 4980.
[29] Ibid 4976.
[30] Australian Institute of Health and Welfare, 'Northern Territory: youth justice supervisions in 2015-16' (Youth Justice fact sheet no 77, Australian Institute of Health and Welfare) 2.
[31] Oral evidence of Nate Balis, 20 June 2017, 4978.
[32] Oral evidence of Vincent Schiraldi, 27 June 2017, 5089.

community body is prescribed in the regulations for each community and regional centre. The community body should comprise those persons with cultural authority in the community and may include members of Law and Justice Groups. Ultimately, the composition of the community body should be determined by the community, in consultation with government.

Community bodies should make bail decisions in the first instance for all offences that NAAJA recommends should be eligible for diversion on the advice of the Legislative Amendment Advisory Committee and other relevant agencies (see section 3.2.3). If the offence is committed in a region or community that is not a young person's home community, then the designated community body in the place where the offence is committed should consult with the body from the young person's home community about the proposed bail decision.

There is scope for designated Aboriginal community bodies to be involved in other initiatives we recommend in these submissions, such as the preparation of Gladue Reports and as lay advocates in the Youth Justice Court (see section 6.8).

Empowering local groups to make bail decisions would reduce the inefficiencies that so often lead to remote children being held on remand due to denial of bail or the imposition of onerous bail conditions that set Aboriginal children up to fail. It would promote local decision-making and genuine participation of Aboriginal communities in the youth justice system. Local Aboriginal community bodies are also better placed to assess a child's holistic needs and direct young people to relevant local support services.

NAAJA recommends that as part of the reformed bail system, consideration is given to referring Aboriginal young people to Aboriginal learning and healing centres in the first instance. The Commission has heard of examples of successful healing camps in the Northern Territory such as Bush Mob and Balanu (discussed in sections 7.3.2 and 7.4.1). The Commission should also consider examples in other jurisdictions, such as the Baroona Healing Centre in Victoria, for guidance on how time on bail could be transformed into a productive time of learning and cultural connection for Aboriginal young people.[33] The Baroona Youth Healing Place in Echuca offers a 16-week residential program including a range of cultural and spiritual programs, services and activities to help young people address substance abuse.[34] Referrals to Baroona can be made in a number of ways, including through bail orders, police referrals and child protection referrals.[35] NAAJA further suggests the incorporation of specialised educational and psychological services into these programs to better meet the needs of young people.

[33] Njernda Aboriginal Corporation, *Baroona Healing Centre* <http://www.njernda.com.au/baroona-healing-centre/>.
[34] Ibid.
[35] Ibid.

Recommendation 37	That bail, at first instance, is decided by designated local Aboriginal community bodies and reviewed by police and courts.
Recommendation 38	That Aboriginal young people are considered for referral to Aboriginal learning and healing centres.

5.2.3 Responsible adults

The presence of a responsible adult or guardian is critical to the bail decision-making process at the time of arrest or holding of young people by police.[36] However, the Commission heard that police do not have the time or resources available to locate and notify responsible adults, which can be a difficult task.[37] If a responsible adult is not located, this may also lead to a child being remanded in custody, perhaps for weeks, while bail assessment reports, community welfare reports,[38] and bail plans by legal representatives are formulated.

The Commission heard that the Northern Territory Government had considered a funding proposal for a service to assist police in locating responsible adults, but this initiative was subsequently abandoned due to a Government portfolio reshuffle.[39] This is an example of a lost opportunity, where the Government failed to address identified problems in bail related processes and practices.

NAAJA calls for Aboriginal Law and Justice Groups and community-controlled organisations to be properly resourced to identify to police appropriate kinship relations who can undertake the role of a responsible adult and be listed on the support persons register. To overcome the remanding of Aboriginal youth and the present deficiencies in bail considerations at this stage, it is our considered view that Aboriginal Law and Justice Groups and Aboriginal community-controlled organisations should be able to undertake the responsibility of guardian for an Aboriginal child. Aboriginal community-controlled organisations have previously undertaken important roles as support persons and responsible adults for Aboriginal children in police custody. The Karu Aboriginal Child Care Agency more than adequately fulfilled this role in the 1990s until it was defunded in 2008.[40]

It is a significant issue that no support is provided for identified responsible adults to travel to court. In situations where responsible adults are located in remote communities or lack the resources to travel, it would be appropriate for technology to mitigate these costs and prevent young people from spending unnecessary time in custody. In our Submissions on Youth Detention, NAAJA recommended adopting the Children's Court of Western Australia *Practice Direction 1 of 2011* to ensure young people are not unnecessarily detained over the weekend in police lockups in country areas, with rehearing of bail by video link or telephone.[41]

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[36] *Youth Justice Act 2005* (NT) s 23.
[37] Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3979:1–5.
[38] NAAJA, submission, *Youth Justice Review Panel*, July 2011, 46 [13.4b].
[39] Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3979:20–23.
[40] Refer to SNAICC Submission to the Royal Commission into the Detention and Protection of Children in the Northern Territory, February 2017, 10.
[41] NAAJA Submissions on Youth Detention, s 5.4.7.

Recommendation 39	That Aboriginal Law and Justice Groups and community-controlled organisations are funded to assist police in locating appropriate kinship members or family as a responsible adult.
Recommendation 40	That those Aboriginal Law and Justice Groups and community-controlled organisations have standing as responsible adults for Aboriginal young people of their community if no closer relative, kin or guardian is available.

5.2.4 Overcharging

NAAJA has already discussed the practice of police overcharging in our Submissions on Youth Detention.[42] This practice disproportionately affects Aboriginal young people and can have an adverse effect on bail applications.[43]

The Commission heard from both defence lawyers and prosecutors that at the time of a bail hearing a comprehensive brief of evidence has often not been compiled, due to the short time between charging and the hearing of the application.[44] Time pressure and resultant evidence shortfalls are compounded when an excessive number of charges are laid. Prosecutors opposing bail often rely on the assertion that more evidence is forthcoming and benefit from the presumption that charges are only laid if there is a reasonable prospect of conviction.[45] This is of real concern to NAAJA, as these evidentiary practices obscure the process of overcharging from scrutiny and ensure that the actual strength of the prosecutorial case cannot be taken into account in a bail application.

It has been the experience of defence lawyers that the Youth Justice Court is not inclined to grant bail where young people have been charged with a large number of offences.[46] Although Justice Hannam testified that the number of charges is 'not necessarily persuasive' for bail decisions,[47] it is concerning that potentially groundless charges are presumed to be based on evidence and become a factor in bail decisions, especially given the impact being remanded in custody can have on young people.

5.2.5 Granting bail after hours

NAAJA has repeatedly raised concerns about the process of making an after-hours bail application and has made recommendations relating to the improvement of this process in our previous submissions to this Commission.[48] In particular, in light of the principle of detention as a last resort, it is problematic that judges are not available between 10pm and 7am unless there is an 'emergency'.[49] This results in

[42] NAAJA, Submissions on Youth Detention, s 5.4.3.
[43] Ibid.
[44] Oral evidence of Craig Laidler, 10 May 2017, 3705:13–33.
[45] Ibid 3704:0–10; Oral evidence of Shahleena Musk, 9 May 2017, 3608:10–15; Oral evidence of Nicola MacCarron, 9 May 2017, 3704:36–45.
[46] Oral evidence of Nicola MacCarron, 9 May 2017, 3704:36–45; Oral evidence of Shahleena Musk, 9 May 2017, 3608:10–15.
[47] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3436:15–25.
[48] NAAJA, Submissions on Youth Detention, s 5.4.4.
[49] Oral evidence of Craig Laidler, 10 May 2017, 3705: 20–23.

young people routinely being held in custody overnight. In our Submissions on Youth Detention, we recommended that a specialist Youth Court Judge be on call after hours.[50]

5.2.6 Improper use of bail by police

NAAJA has raised concerns about incidents in remote communities, where police have granted bail to live with distant relations in other remote Aboriginal communities. This has had the effect of banishing Aboriginal children from their own communities. This practice is especially concerning as it has occurred without any support provided to the receiving families or to the child, either to return to their community of origin or to communicate with the community they are bailed to, as in some instances the child does not speak the language of the community they have moved to. In some instances, NAAJA lawyers have only discovered this occurrence when appearing for the child at the circuit court or when a concerned parent has contacted them.

5.2.7 Need for an immediate review of police bail

Where onerous bail conditions are imposed on a young person, it is not reviewable until their next appearance at court. In many remote circuit courts, it can be many weeks or even months until the court returns. In such circumstances, onerous bail conditions may result in breaches and further charges, which increases the likelihood of bail being denied on the next occasion.

NAAJA has expressed its concerns that police bail decisions cannot be challenged before a Youth Court Judge where there are no prosecutorial charges, précis or criminal case file before the court. A youth should have the right at any time to have their bail reviewed. This is in accordance with the *Convention on the Rights of the Child* that provides:

> Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[51]

Recommendation 41	That the prompt review of police bail by a Youth Court Judge is available at any time.

5.3 Bail conditions

5.3.1 Conditions must be developmentally appropriate

The imposition of any bail condition is a restriction on liberty and therefore should be founded on an assessment of the impacts of the condition on the child, including psychological, cultural and

[50] NAAJA Submissions on Youth Detention, recommendation 54.
[51] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 3 September 1990), art 37(d).

educational dimensions. These considerations should be taken into account for the imposition of each condition, not just at the point of granting bail.

While NAAJA acknowledges that bail conditions may be appropriate in some circumstances, onerous bail conditions are unsuitable for young people given their stage of development. Loretta Crombie, Manager of the Youth Justice Practice at the Department of Justice and Attorney-General in Queensland, told the Commission:

> … developmentally we acknowledge that for young people in adolescence between the ages of 10 to 17 they are far more likely to be impulsive and less likely to be thinking about longer term consequential thinking. And so we would prefer not to have onerous bail conditions for those young people in case they breach them and are inappropriately escalated through the youth justice system.[52]

In light of this evidence, courts and police should consider whether proposed bail conditions are developmentally appropriate.

5.3.2 Proportionality of conditions

NAAJA is concerned that bail conditions are used as a way to control the lives of young people, rather than to ensure community safety from violent or dangerous offenders.[53] While NAAJA acknowledges that bail conditions may be suitable in some circumstances, only bail conditions that are commensurate with this objective should be imposed. This is especially so considering the continued existence of the breach of bail offence and its escalation of young people's contact with the criminal justice system.

NAAJA reiterates the need for a legislative proportionality requirement, whereby the reasons for imposing bail conditions are balanced against various factors. These factors could include the restrictiveness of conditions, whether the young person has the support available to comply with the conditions, whether compliance is reasonably practicable and whether the restrictions are necessary to bail being granted.[54]

Guidance can also be gleaned from Victoria's approach to the imposition of bail conditions. The *Bail Act 1977* (Vic) requires courts to impose conditions that 'are no more onerous than necessary and do not constitute unfair management of the child'.[55] Additionally, the interpretation of this legislation must be tempered by the human rights enshrined in Victoria's *Charter of Human Rights and Responsibilities*.[56] This means that a proportionality judgement for bail conditions, which ensures conditions are only imposed if they accord with the objects of the Act,[57] must be read so that 'the conditions of bail (if any) impose no greater limitation upon the liberty and human rights of the

[52] Oral evidence of Loretta Crombie, 10 May 2017, 3743:30–35.
[53] Oral evidence of Eileen Baldry, 8 May 2017, 3489-90; Oral evidence of Shahleena Musk, 9 May 2017, 3613:35–45.
[54] NAAJA, submission, *Review of the Bail Act (NT)*, March 2013, 6.
[55] *Bail Act 1977* (Vic), s 3B(g).
[56] Woods v DPP [2014] VSC 1 (17 January 2014).
[57] *Bail Act 1977* (Vic), s 3B(g).

accused than the circumstances of the case require'.[58] In our Submissions on Youth Detention, we recommended that a Human Rights Act is enacted in the Northern Territory.[59]

Relevant rights under the Victorian Charter include the right to personal liberty and security, the presumption of innocence, the freedom to not be subjected to medical treatment without consent, the right to privacy, freedom of association and cultural rights.[60] Cultural rights include the specific rights of Aboriginal people to enjoy their identity and culture with their community, maintain and use language, maintain kinship ties and maintain their unique connection with the land, waters and other resources.[61] In having to consider human rights in the imposition of bail conditions, decision-makers are encouraged to prioritise the rights and interests of the accused and only restrict those rights if necessary.

For young people, particular considerations should also be taken into account in assessing proportionality. One crucial consideration is the capacity of the young person to comply with conditions. Young people often lack the resources and agency to have meaningful control over whether they can meet bail conditions and are reliant on adults for assistance.[62] This adult support is often lacking in disadvantaged families and even more so for children in care and living in remote communities. In such circumstances, even seemingly simple bail conditions can be impossible to meet. For example, the Commission heard that children from remote communities will not return home from urban centres between their bail hearing and hearing date, despite being homeless for this period, because it is too difficult to return.[63] In these circumstances the child's particular circumstances must be taken into account and support must be provided accordingly.

For Aboriginal young people, it is also essential that their understanding of the conditions imposed upon them and the consequences of breaching those conditions is considered. Community legal education surrounding bail would assist in bridging this knowledge gap and reducing breaches of bail.[64] A good example is the NAAJA-ARDS pilot project at Ramingining Community that facilitates interpreters to work with defendants and their families to ensure general understanding of bail conditions and community orders in order to prevent breaches and return to the criminal justice system. The importance of community legal education is discussed further in our Submissions on Youth Detention.[65]

[58] Woods v DPP [2014] VSC 1 (17 January 2014), [76].
[59] NAAJA Submissions on Youth Detention, recommendation 11.
[60] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[61] Ibid s 19.
[62] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 25 [95].
[63] Statement of Matthew Wayne Hollamby, 19 May 2017, 5 [26.6] [WIT.0230.0001.0001].
[64] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3431.
[65] NAAJA Submissions on Youth Detention, s 5.4.4.

Recommendation 42	That a proportionality requirement for imposition of bail conditions is included in youth-specific bail conditions in the *Bail Act* or the *Youth Justice Act*. In imposing any conditions on a young person, the court must take into account: c. the young person's ability to understand and to comply with those conditions, and d. the age and maturity of the youth, including their capacity for complex decision-making, planning and the inhibition of impulsive behaviours.

5.3.3 Curfews

The imposition of curfews on young people is discussed in our Submissions on Youth Detention, including the problematic over-monitoring of curfews by police.[66] The suitability of imposing curfews on young people should be questioned.

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.[67]

The justification given for curfews is that being at home at night will remove 'the environmental factors or temptation to go away and commit offending behaviour'.[68] While this consideration appears to align with the objective of protecting the community, the assumption that young people will reoffend on bail is problematic and engenders expectations in young people that they are predestined to be on the wrong side of the law.[69] Superintendent Ian Lea also told the Commission that curfews can be very hard for young people to comply with because of issues relating to transport, their home situation and difficulty of comprehension of bail conditions for young people.[70]

Additionally, if a young person does commit an offence while they are out on bail, they can and ought to be charged for the commission of that offence.[71] Instead, young people who, for example, breach curfew and commit an offence are charged for that offence and the breach of bail. Superintendent Lea indicated in evidence to the Commission that the most common result in this situation was that

[66] Ibid.
[67] Exhibit 145.001, Statement of AG, 25 November 2016, 19.
[68] Oral evidence Sandy Lau, 9 May 2017, 3611:40–47.
[69] Oral evidence of Eileen Baldry, 8 May 2017, 3488:15–30.
[70] Oral evidence of Ian Lea, 10 May 2017, 3675.
[71] Oral evidence of Judge Peter Johnstone, 8 May 2017, 3473:1–13.

the charge was put aside and dismissed.[72] In these circumstances, the continuation of charging for breach of bail offences serves no social utility and is a purely punitive measure.

5.4 Breach of bail

NAAJA has repeatedly recommended that the offence of breach of bail is repealed.[73] Of the 2001 youth apprehensions by police in 2015/16,[74] 504 were of young people whose only offence was breach of bail.[75] In the years since 2011 when this offence was created, 91% of young people charged with the offence have been Aboriginal.[76] The abolition of this offence would be a significant step towards reducing the involvement of Aboriginal young people in the criminal justice system.

The offence of breach of bail is a manifestation of the punitive approach to Northern Territory youth justice that NAAJA contends is no longer appropriate and has the effect of punishing Aboriginal children for the social disadvantages they face from birth. The repeal of the breach of bail offence would align the Northern Territory's approach with those of Queensland and New South Wales, which have no breach of bail offence, and Victoria, which has no breach of bail offence for youths.[77]

Queensland's conditional bail system is a preferable approach, in which bail support is provided as part of the imposition of bail conditions on young people. In this system, conditional bail programs and case plans are tailored to young people's individual needs and imposed and approved through the court system, as early as at the bail hearing.[78] The case plans are designed to assist young people, who are assessed as having a medium-to-high risk of reoffending, by engaging them with local targeted services with the help of a youth justice officer.[79] The program also links with Aboriginal communities and Elders, as appropriate, to anchor Aboriginal young people in their broader communities.[80]

5.5 Bail support and accommodation

5.5.1 Availability of bail support

The Northern Territory currently has no bail support program. In light of the continued existence of the breach of bail offence, this lack of support for Aboriginal young people results in repeated negative interaction with the criminal justice system. As discussed, bail support is particularly important for young people, who often lack the resources, knowledge and agency to be able to comply with the conditions imposed upon them.

Lack of bail support also means that disadvantage and its symptoms, such as lack of appropriate accommodation and supervision, can discourage courts from granting bail. While this is

[72] Oral evidence of Ian Lea, 10 May 2017, 3676.
[73] NAAJA Submissions on Youth Detention, topic 5 [5.4.4].
[74] Exhibit 045.001, statement of Joe Yick, 14 October 2016, table 1.
[75] Annexure CW-2 to statement of Carolyn Whyte, 9 June 2017 [WIT.0148.0003.0021].
[76] Exhibit 045.002, statement of Joe Yick, 17 November 2016, table a.
[77] Oral evidence of Shahleena Musk, 9 May 2017, 3611:18–35.
[78] Oral evidence of Loretta Crombie, 10 May 2017, 3745.
[79] Ibid 3743.
[80] Ibid 3744.

understandable, young people should not be subjected to detention because the Government lacks safe options for them in a less punitive environment. The Northern Territory Government must act on its commitment to develop and implement a bail support program.

Given the increasing rate of contact of Aboriginal girls with the youth justice system, NAAJA is particularly concerned that Aboriginal girls have access to bail support and accommodation that meets their specific needs.

5.5.2 Youth-specific bail support program

NAAJA acknowledges that Territory Families has committed to developing and funding an integrated Bail Support Program in major town areas, based on analysis of other jurisdictions' approaches.[81] We are encouraged that the proposed model appears to take up elements of the Queensland conditional bail support program. NAAJA supports highly individualised approaches that include tailored case management plans for young people, incorporating educational, social and community-based activities and programs to address offending behaviours, education, housing and other needs.[82] However, the absence of bail support programs in remote Aboriginal communities remains a continuing concern and needs to be immediately addressed for any real change to occur.

NAAJA understands the proposed program includes a 24/7 telephone Bail Support Advisory Service to assist police, lawyers and young people facilitate services to help young people meet bail conditions.[83] In addition, a Bail Accountability Program run by YORETs is proposed to help young people engage with youth services to address their offending behaviour while on remand.[84]

The Government should consider bail support programs that partner with courts, police, families and communities.[85] Young people should have access to wraparound support services that address their particular needs, including services to address their mental health care needs and services for those with disabilities. Post-bail support such as assistance obtaining housing is also important.

The design and implementation of the proposed program must be culturally relevant and meet the needs of remote communities. Genuine consultation and partnership with Aboriginal communities should be prioritised so that bail support programs can be delivered by Aboriginal organisations that are best placed to deliver these services to Aboriginal young people.

5.5.3 Youth-specific bail accommodation

Accommodation is a particularly important element of bail support. When young people are assessed as not having access to suitable accommodation, they are remanded in custody.[86] The use of detention as backup accommodation for young people is entirely inappropriate and contrary to the principle of

[81] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 5–6.
[82] Ibid 7.
[83] Ibid.
[84] Exhibit 340.000, Statement of Jeanette Kerr, 17 March 2017, 9 [52]–[56].
[85] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, 24 [115].
[86] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 6 [38].

detention as a measure of last resort. Victoria has uniquely addressed this practice by specifically prohibiting a child's lack of appropriate accommodation being the sole reason for refusing bail.[87]

While there are currently some alternative accommodation options available for young people on bail, these services are not bail-specific so often have homeless youths, youths in care or young people who have been released from detention competing for access.[88] While these services may not be able to take young people released on bail who are violent or who have high needs, these are the young people who should be targeted by bail-support programs, as is the case in Queensland.[89]

It is crucial that the Northern Territory Government acts on its commitment to establish youth-specific bail support accommodation. Ms Kerr told the Commission that several sites are being evaluated for the purpose of housing young people while on bail.[90] Territory Families intends to engage NGOs to supervise young people residing at this accommodation, where they will be provided with access to services and support.[91] The establishment of bail support accommodation for boys at Yirra House in Darwin is a positive development; however, therapeutic accommodation options for girls are of the highest priority and should be established across the Northern Territory.

The Commission has heard concerning evidence about the lack of community consultation for proposed bail accommodation in Alice Springs. There is evidence that government intends to commission detention-like facilities and hire security personnel rather than create a home-like environment to promote therapeutic responses.[92] For children on bail, who have not been the subject of a determination of guilt, being in this punitive setting is not only unjustified but actively harmful.

Government must engage in genuine consultation with Aboriginal communities to ensure that appropriate accommodation is available in remote locations and regional centres. Bail support accommodation and services should be delivered by, or in partnership with, Aboriginal community-controlled organisations.

[87] *Bail Act 1977* (Vic) s 3B.
[88] Oral evidence of Janet Wright, 11 May 2017, 3770.
[89] Ibid 3770:28–32.
[90] Exhibit 340.000, Statement of Jeanette Kerr, 17 March 2017, 9 [54].
[91] Ibid [53].
[92] Oral evidence of Janet Wright, 11 May 2017, 3776–3777.

Recommendation 43	That a therapeutic, culturally relevant bail support program is established that provides coordinated, wraparound support to meet the individual needs of young people.
Recommendation 44	That the Northern Territory Government engages in genuine consultation with Aboriginal communities to determine sites for bail supported accommodation that cater for both females and males.
Recommendation 45	That bail support accommodation and services are provided by, or in partnership with, Aboriginal community-controlled organisations.

5.6 Monitoring of bail conditions

NAAJA has already discussed inappropriate police monitoring of compliance with bail conditions in our Submissions on Youth Detention.[93]

NAAJA calls for less intrusive bail monitoring services, such as Aboriginal community-controlled organisations in remote communities, who can provide such supervision in a more culturally appropriate and holistic manner.

5.6.1 Electronic monitoring

NAAJA has reservations about the increased use of electronic monitoring of young people by police.

Electronic monitoring should reduce police curfew checks and doorknocking, which can be unnecessarily disruptive to young people and their families.[94] However in NAAJA's experience, curfew checks by police have continued in some instances where young people have been the subject of electronic monitoring.[95]

The ability of police to remotely monitor young people on bail in remote communities with access to internet or phone connections may facilitate the grant of bail in situations where it would have previously been refused.[96] To this extent, NAAJA regards electronic monitoring as a positive step.

NAAJA is nonetheless concerned about enlarged powers conferred to police under the *Bail Amendment Bill 2017*.[97] The amendment signals that the Government and police continue to favour the imposition of restrictive conditions on young people. NAAJA is concerned that the lack of guidance and safeguards will encourage its overuse as a component of police bail, that will in turn lead to increased bail breaches.

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[93] NAAJA, Submissions on Youth Detention, s 5.4.4.
[94] *Parliamentary Debates,* Legislative Assembly of the Northern Territory, 15 March 2017, 1056 (Ms Fyles, Attorney General and Justice).
[95] NAAJA, Submissions on Youth Detention, s 5.4.4.
[96] Statement of Matthew Wayne Hollamby, 19 May 2017, 5 [26.6] [WIT.0230.0001.0001].
[97] *Bail Act 1982* (NT), s 27A.

Of particular concern is the minimal accountability requirements that police are subject to under the amendment, when compared with the courts. While court-ordered electronic monitoring is only permitted after the court has assessed a report prepared by Community Corrections, it was deemed 'impractical and inappropriate for police to conduct the same fulsome type of assessment'.[98] Instead, decisions are required to be made within four hours of charging a young person and based on information gathered within that timeframe.[99] Considering the issues that have already been discussed in this submission regarding police failings in locating responsible adults, comprehension issues and the lack of access to suitable accommodation that often accompanies youth offending, NAAJA regards the timeframe and information-gathering processes surrounding police electronic monitoring as grossly inadequate. Without comprehensive information-gathering by police about a child's accommodation, electronic monitoring has the capacity to be unfair to young people who may not have the resources available to charge the device and comply with the order.

NAAJA does not regard the present police-imposed electronic monitoring, as secured through the *Bail Act,* as suitable for children.

Recommendation 46	That the *Bail Act* is amended to remove the imposition of electronic monitoring as an option when police are considering conditions to be imposed on a child when granting bail.

[98] *Parliamentary Debates,* Legislative Assembly of the Northern Territory, 16 March 2017, 1056 (Ms Fyles, Attorney General and Justice).
[99] Ibid.

6 Youth Justice Court

6.1 A separate dedicated Children's Court for criminal and care matters

NAAJA advocates for a separate and dedicated Children's Court for all matters involving children. We support the Children's Court having separate jurisdictions for criminal matters and care and protection matters (as is the case in other Australian jurisdictions),[1] however whether it has a single or dual jurisdiction should ultimately be determined by the outcome of ongoing consultation with stakeholders, including Aboriginal communities, and the current review of the *Youth Justice Act* and *Care and Protection Act*.

Having a separate and specialist youth court recognises that young people should be dealt with separately to adults due to their stage of development and unique needs and vulnerabilities. His Honour Justice Reynolds, President of the Western Australian Children's Court, explained:

> [M]erging, especially in the Magistrates Court level of the judiciary, of adults and children is simply not conducive to good outcomes for both children and also the community.[2]

Specialist courts can better develop expertise in children's matters because the court uniformly, across all its judicial officers, is acutely aware of the objectives and principles of youth justice, particularly rehabilitation and the need for solution-based responses.[3] It promotes consistency in decision-making because judges are not 'jumping from one jurisdiction to another.'[4] The Children's Court can also drive important attitudinal cultural shifts in the broader youth justice system about approaches to dealing with children.[5]

6.1.1 Conceptual understanding

Many Aboriginal young people lack the comprehension skills to fully understand Australian law and mainstream criminal justice processes. The difficulties that Aboriginal young people often experience in understanding high-level concepts, technical legal terms and jargon (not in their own language) should be recognised and addressed, if youth justice is to be meaningful.

International standards emphasise the importance of ensuring that judicial proceedings are conducted in an atmosphere and manner that allows children to be heard, and that take into account a child's age and maturity.[6]

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[1] See, eg, oral evidence of Justice Denis Reynolds, 29 June 2017, 5308:12–13.
[2] Oral evidence of Justice Denis Reynolds, 29 June 2017, 5309:2–4.
[3] Ibid, 5309:5–16.
[4] Ibid.
[5] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3461:33–38.
[6] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013, Guideline 10, [53(h)].

Under s 61(1) of the *Youth Justice Act*, the court must satisfy itself that a youth who is the subject of proceedings for an offence understands the nature of the proceedings. Justice Hannam told the Commission:

> It deeply troubled me many aspects of what went on in court and whether … young people for whom English wasn't their first language, in particular, understood even about the basic concepts of what was going on.[7]

Justice Hannam recalled occasions where she was not satisfied the young person understood the charge due to the technical language used or hearing loss.[8] Charges should be read to young people in plain language. Breaking down a charge into elements that a child understands takes time, particularly when an interpreter is involved, and this should be taken into consideration in court listing practices. Efforts should also be made to develop educational tools to explain Youth Justice Court processes in plain English and in Aboriginal languages. Justice Johnstone told the Commission about the approach taken in the New South Wales Children's Court:

> We are dealing with children as much as possible in their language, but particularly using their vocabulary for things, giving them a voice, preparing practice notes and other orders in a child-friendly way. So we're developing, for example, a means of communicating with children by texting them their bail conditions…[9]

Ensuring that young people understand proceedings in the Youth Justice Court requires increased and sustained resourcing of interpreter services and the use of hearing loops and hearing devices in court for Aboriginal young people who have a hearing impairment.

[7] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3430:46–3431:2.
[8] Ibid, 3432:33–44.
[9] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3462:26–30.

Recommendation 47	That the Aboriginal Interpreter Service is funded for a permanent workforce of interpreters rather than relying on casual staff, and that interpreters are present at court on Youth Justice Court sitting days.
Recommendation 48	That all Youth Justice Court facilities have hearing loops and hearing devices available.
Recommendation 49	That Youth Justice Court proceedings are conducted in a child-friendly way, including use of plain language in court.

6.2 Composition of the court, including specialist Judges, training and a President

6.2.1 Specialist Judges and training

NAAJA advocates that specialist judges hear all youth matters. Currently, judges in Alice Springs and on remote circuit courts do not necessarily have expertise in the youth jurisdiction. Justice Hannam told the Commission:

> But the reality is that in all of the circuits, you just – whoever was allocated to the circuit did the youth justice work. In Katherine, of course, there's only one sitting magistrate and if they weren't particularly interested in it or had any expertise in it, that – there was just no alternative and, to some extent, in Alice Springs too.[10]

In NAAJA's experience, there has been a marked shift in the training, resourcing, education and knowledge base of judges operating in the Darwin Youth Justice Court in recent years. Former NAAJA lawyer Shahleena Musk observed:

> In my experience these select Youth Court Judges have chosen to inform themselves, undertake training and ongoing education around youth justice, child and adolescence development and, importantly, are trauma informed … The result has been a dramatic change in responses to dealing with youth involved in the criminal justice system, one largely driven to finding out what has happened to these youth and orders to try to assist them develop appropriately and responsibly. This new approach is more in line with the objects and principles of the *Youth Justice Act…*[11]

Dedicated training and continuing legal education for judges appointed to the Youth Justice Court should be compulsory. Training should include child and adolescent development, neurodisability and trauma. It is crucial that the Youth Justice Court is a safe environment and provides services that do

[10] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3421:40–44.
[11] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 29 [110].

not increase the level of trauma experienced by young people.[12] A trauma-informed youth justice system

> understands that youth who are chronically exposed to trauma are often hyper-vigilant and can be easily triggered into a defensive or aggressive response … Such a juvenile justice system makes system-level changes to improve a youth's feelings of safety, reduce exposure to traumatic reminders and help equip youth with supports and tools to cope with traumatic stress reactions.[13]

In light of international research indicating that there are likely to be large numbers of young people in custody with undiagnosed neurodevelopment conditions that have directly contributed to their offending behaviour,[14] it is important that judges are trained to understand how neurodisability might affect capacity to engage in court processes and the appropriateness of particular sentences and interventions.

Building and strengthening cross-cultural skills is essential for the entire judiciary and decision-makers for Aboriginal children. Cross-cultural training should be compulsory for all judges in the Northern Territory. In our Submissions on Youth Detention, we recommended that a culturally competent framework consist of the following features:

i. Appropriate cross-cultural education and training programs targeted for different roles and at all levels of the system
ii. Mechanisms integrated across the system for the learnings from cross cultural education and training programs to inform workplace practices and decision making
iii. Frameworks and practices that actively consider cultural competency at the individual level, organisational and systemic levels
iv. Partnerships with Aboriginal educational institutions to better understand and develop a body of research and evaluations into existing frameworks and practices
v. Audit and accountability mechanisms including independent Aboriginal oversight and involvement.[15]

6.2.2 President of the Youth Justice Court

NAAJA recommends that legislation is enacted to create the position of President of the Youth Justice Court of the Northern Territory. For the Northern Territory to remain the only jurisdiction in Australia without such a function is an indictment of its justice system. As in Western Australia, the President should have exclusive jurisdiction to deal with all criminal matters, including serious offences such as murder.[16]

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[12] K Buffington et al, 'Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency', National Council of Juvenile and Family Court Judges, 2010, 12.
[13] Ibid.
[14] Exhibit 020.001, Annexure 2 to the Statement of Muriel Bamblett, Children's Commissioner of England report 'Nobody made the connection: the prevalence of neurodisability in young people who offend', October 2012, 5.
[15] NAAJA, Submissions on Youth Detention, s 6.3.2.
[16] Oral evidence of Justice Denis Reynolds, 29 June 2017, 5308:27–31.

The President should also deal with reviews of sentences and bail decisions by Youth Court judges. Currently, bail reviews are determined by a Supreme Court Justice rather than a specialist youth judicial officer. President Reynolds explained that in Western Australia

> [i]f a magistrate was to refuse bail, then it comes to me as a matter of right for me to have a look at it, and so I can review both sentence and bail decisions by magistrates. And that's a relatively speedy process, so young people don't have to go to our Supreme Court on appeal, whether it's in relation to a sentence or a bail decision, so that means there's speedy resolutions of those matters internally. That has a great advantage in that the President of the court, through internal judicial leadership and decision-making, can ensure that within the court itself there's a sense of focus [on] the application of the objectives and principles for young people as set out in our Act.[17]

In New South Wales, the *Children's Court Act* creates the position of President and sets out its function, which, in addition to administering the Court, includes convening a meeting of Children's Magistrates at least once every six months, conferring regularly with community groups and social agencies on matters involving children and the Court, providing judicial leadership and overseeing the training of Children's Magistrates and prospective Magistrates.[18] Justice Johnstone told the Commission that the role also involves making recommendations to government and negotiating with government about resources.[19] President Reynolds observed that an important part of the President's role is working with government and non-government agencies to provide judicial leadership and input into the development of programs and services for children in contact with the Court.[20]

In NAAJA's submission, establishing the role of President is important, in order to promote the specialist nature of the jurisdiction, ensure the focus of the Court is firmly on therapeutic and rehabilitative approaches and enhance collaboration across the youth justice system.

6.2.3 Children's Court Committee

The Children's Court Committee in Queensland was established to address systemic issues in relation to the Court's criminal jurisdiction, including reducing the large number of juveniles held on remand in detention and delays between arrest or charging and the resolution of the matter.[21] The Committee comprises the Director of Public Prosecutions, representatives from police, child safety, youth justice services, the Public Guardian and the Department of Education.[22]

NAAJA recommends that a Youth Justice Court Committee is established in the Northern Territory to promote collaboration, information sharing and innovative practices for the Youth Justice Court.

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[17] Oral evidence of Justice Denis Reynolds, 29 June 2017, 5308:40 –5309:1.
[18] *Children's Court Act 1987* (NSW), s 16.
[19] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3459:17–37.
[20] Oral evidence of Justice Denis Reynolds, 29 June 2017, 5310:5–14.
[21] Ibid.
[22] Oral evidence of Justice Michael Shanahan, 11 May 2017, 3760:5–38.

Recommendation 50	That all judges appointed to the Youth Justice Court receive specialist training and ongoing professional development on the youth jurisdiction, including child and adolescent development, trauma and cultural competency.
Recommendation 51	That legislation is enacted to establish the position of President of the Youth Justice Court of the Northern Territory.
Recommendation 52	That the President has jurisdiction to hear all criminal matters, including serious offences, and reviews of bail decisions and appeals.
Recommendation 53	That a Youth Justice Court Committee is established, which is chaired by the President of the Youth Justice Court and comprises representatives from the Director of Public Prosecutions, police, defence lawyers, Territory Families and the Department of Education.

6.3 Separate court facilities for youth matters

Under the *Youth Justice Act*, the Minister must ensure adequate and appropriate facilities for Youth Justice Court proceedings and ensure, as far as practicable, that youth proceedings are conducted separate to adults.[23]

Apart from the Darwin Youth Justice Court, which was established in a standalone building in February 2016, youth proceedings across the Northern Territory are not conducted in separate facilities or separate from adults. For instance, in Alice Springs, youth matters are often interspersed with adult matters, young people regularly appear in the main bail and arrest courts, and young people and their families have nowhere separate and private to sit and wait for their matter to be heard.[24]

Separate facilities are critical to giving effect to the principles of a specialist jurisdiction.[25] Children's Court Justices appearing before the Commission have emphasised the importance of separate facilities, including the capacity to co-locate agencies and youth services working in that jurisdiction.[26] Co-location enables smooth referral processes, and also acts as a 'one-stop-shop' for young people to access services to help address the varied issues underlying their offending. At a minimum, services at court should include a mental health worker, disability support worker and officer from the Department of Education to assist children re-engage with school or training opportunities. This is considered further in section 7 below.

There are no separate facilities for youth matters on remote circuit courts and court facilities are inadequate. For instance, in some communities, court is held in a small concrete room attached to a police station, with poor ventilation and sound quality and limited space for family and community

[23] *Youth Justice Act 2005* (NT) s 48(2).
[24] Exhibit 354.000, Statement of Anna Gill, 2 May 2017, 6–7.
[25] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3475:5–6.
[26] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3463:19–25; oral evidence of Justice Denis Reynolds, 29 June 2017, 5309:39–45.

members. Investment in the replacement or refurbishment of court facilities in all remote communities is a matter of priority.

Facilities should be co-designed with the community, and designed to be flexible, open and child- and family-friendly spaces. Art and design should reflect the community's culture and history. The Kununurra, Warmun and Fitzroy Crossing courthouses in Western Australia are examples of courts designed to reflect the local Aboriginal community, incorporating local building materials and features of the surrounding landscape. The design and layout of facilities should not be alienating or intimidating.

6.3.1 Children's Court circuits

A separate Children's Court listing is needed for children and young persons in remote Aboriginal communities. The present situation of a circuit court dealing with youth criminal matters is inadequate in terms of time spent on matters, the lack of specialised youth training of the judges, lawyers and police prosecutors and the intermingling of the youth and adult lists in the same sitting.

In our view, until new facilities are built, the court should list all youth matters at a particular time and day, rather than having youth matters interspersed throughout the adult list. This would ensure young people are not unnecessarily exposed to the criminal justice system through spending the day waiting at court alongside adult offenders.

Recommendation 54	That a separate Youth Justice Court is established in Alice Springs.
Recommendation 55	That new court facilities are established in all remote communities to meet the needs of Aboriginal children and young persons.
Recommendation 56	That youth matters are heard in sittings independent from adult matters in circuit courts.

6.4 Holding cells

Under s 26 of the *Youth Justice Act*, young people must be separated from adults, as far as practicable, when taken to and from court. The *Convention on the Rights of the Child* recognises that every child deprived of liberty should be separated from adults unless it is considered in the child's best interest not to do so.[27]

An important part of establishing a youth justice court is having specialist and separate facilities. This includes ensuring that children are held in separate cells and not in close proximity to adults:

> I think that was at the heart of the move in Darwin to have a separate court for children was to recognise all of the damaging impacts of having children in the same cell area

[27] Exhibit 005.002, *Convention on the Rights of the Child*, art 37(c).

> as adults or in the same waiting area at court as adults. If we want to have a child-specific approach to dealing with young people, we simply have to move young people to a separate court area. And I think in Darwin it's a terrific example where the court was purposely designed with children in mind. So that even the layout of the court is child appropriate.[28]

While separate facilities in Darwin are a positive step, in Alice Springs and in other locations throughout the Northern Territory, children continue to be held in cells where they have incidental contact with adults. NAAJA has previously raised concerns about keeping young people in holding cells at the Supreme Court that are in view of adults in custody. Children should always be kept in separate holding facilities. Young people have told the Commission of the re-traumatising impact of this contact:

Witness AQ:

We were asked to line up and then we walked through past the adult cells to the Don Dale cell … When we were walked past the men, I remember they were yelling and screaming "fresh meat" … This made me scared.

The Don Dale cells was located at the other end past the men's cells. One of the adult cells was visible to us and we were visible to them. I remember many times being marched before the older male prisoners down at the Court cells with them yelling out 'you little cunts, we will rape you when you get to Berrimah', 'you gonna come to Berrimah one day'. These remarks made me feel scared, but I knew they were locked in. I remember walking past these cells and seeing the men. Some of them were big and scary and ugly looking. I was scared this was going to happen to me ... Sometimes fights would break out [in the cells] and we could hear the men yelling and screaming and this made me feel very frightened.[29]

The Commission has also heard evidence of an incident involving a 15-year-old girl held in a cell at the former Darwin Courthouse in view of a cell holding adult males. A man in the cells 'made suggestive hand gestures to her and exposed himself'.[30] This was later investigated and substantiated by police.[31] This example highlights the very real risk of re-traumatising young people by failing to provide separate holding cells and court facilities.

6.5 Role of responsible adults

A responsible adult means a person who exercises parental responsibility for a young person, and encompasses responsibility exercised in accordance with contemporary social practice, Aboriginal customary law and tradition or in any other way.[32] Under s 63A of the *Youth Justice Act*, a responsible adult must attend court and remain in attendance during proceedings against a young person for an offence. Where a young person is under a protection order that has given sole parental responsibility

[28] Oral evidence of Jared Sharp, 10 May 2017, 3658:37–44.
[29] Exhibit 180.001, Statement of AQ, 14 February 2017, 5 [41]–6 [42].
[30] Exhibit 337.054, Letter from Chief Magistrate Hilary Hannam to Attorney-General John Elferink, 6 March 2013.
[31] Ibid.
[32] *Youth Justice Act 2005* (NT) s 5.

to the CEO under the *Care and Protection Act*, the young person is expected to be accompanied by a delegate of the CEO.[33]

The court can waive the requirement for a responsible adult to be present if it would be unreasonable to require that attendance.[34] Often this will be the case where a young person has been arrested and brought in from a remote community. In NAAJA's experience, judges have historically not proceeded to deal with a matter, even bail applications or pleas to a minor matter, where there is no responsible adult in court. This has meant that matters are adjourned and young people often remanded in custody to enable enquiries to be made to locate a family member. This could take days or weeks. Ms Shahleena Musk, former NAAJA lawyer, explained:

> The young person doesn't have a phone number, we don't have contacts details for the young person and, of course, we can't pursue a bail application because the magistrate will not entertain it without a responsible adult there. And, in those circumstances, we might adjourn for a day or two and try calling anyone we know to try to get in contact with family in the hopes that they can support a bail application…[35]

This places the burden on organisations such as NAAJA to locate responsible adults. Additional funding should be provided to these organisations for this non-legal function or a dedicated service should be created to perform this role. NAAJA recommends that Aboriginal community organisations or Law and Justice Groups are funded to locate responsible adults in communities. Law and Justice Groups are best placed to locate responsible adults in a timely manner so that young people do not spend unnecessary time remanded in custody.

In recent times, some of the Darwin-based Youth Justice Court judges have been permitting a responsible adult to participate in proceedings via telephone or video link. For this to occur, NAAJA first had to seek leave and explain in detail the reasons for this course, such as financial difficulties or other family commitments. The Youth Justice Court should issue a Practice Direction that responsible adults are able to participate in court proceedings via telephone or video link.

The lack of a responsible adult may lead the court to order a report under s 51 of the *Youth Justice Act* if the court thinks the young person may be a 'child in need of protection' or there is a risk to the 'wellbeing of the youth'. In section 8.2.2 of these submissions, we discuss s 51 reports in detail and recommend that s 51 of the *Youth Justice* Act is amended to enable the court to require the urgent provision of a s 51 report within 48 hours.

[33] Practice Direction No 6 of 2012 at [3.2].
[34] *Youth Justice Act 2005* (NT) s 63A(2).
[35] Oral evidence of Shahleena Musk, 9 May 2017, 3629:27–37.

Recommendation 57	That funding is provided for Aboriginal-controlled organisations or Law and Justice Groups to locate responsible adults for Aboriginal young people.

6.6 Role of Territory Families for children in care

The role of Territory Families for children in care is discussed in detail in section 8. NAAJA has long-standing concerns about the competency of Territory Families staff in youth justice matters, including failing to obtain legal representation for children in care, failing to attend court and failing to provide comprehensive information concerning children in care. Territory Families must protect the rights and interests of children in their care and help them navigate the court process. In section 8.3, we recommend Territory Families implements a policy that ensures young people have access to legal advice and representation and contact NAAJA for Aboriginal children and young people.

6.7 Youth services at court

6.7.1 Strengthening and expanding services at court

Unlike other jurisdictions, the Northern Territory lacks a dedicated youth service at court to provide information to young people and their family about the court process and link them with relevant support services. NAAJA's youth support workers have been filling this gap by connecting young people with rehabilitation services, emergency accommodation and school or training programs, in addition to providing legal advice and representation.[36] The NAAJA Indigenous Youth Justice Worker plays an important role in supporting and advocating on behalf of young people at court:

> I do take on some young people as full-time case management, especially those who are in court repeatedly. I try to be a buffer between them, and any issues they have, with the Department, Community Corrections, school or the Don Dale Youth Detention Centre. I see the role as presenting the face of the young person to the court; who they are and what has lead them to that point, so the court sees them as not just as another offender. Sometimes this is done by writing reports to the court in which I set out the child's background, issues and what solutions we have come up with together to move forward. But I also give the court verbal submissions and updates on a young person's progress.[37]

Throughout the period that is the subject of this Royal Commission, the lack of support services for young people at court has been a chronic issue.[38] Since the commencement of this Commission, the availability of support services has improved, with agencies such as Danila Dilba, Anglicare, Mission Australia and CatholicCare providing services for young people at court.[39] The level of support at court

[36] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 7 [21].
[37] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 2 [8]–[9].
[38] Ibid, 5 [26].
[39] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 7 [21].

makes a discernible difference; for example, it can keep young people away from the courts.[40] Terry Byrnes, NAAJA's former Indigenous Youth Justice Worker told the Commission:

> There are now people and service organisations present at court. I can talk to them straight away and the young person can start to develop a rapport with them immediately. That has made an enormous difference to my work. Before the Royal Commission I virtually had no services to work with at court and felt like I was trying to do it all myself.[41]

Ongoing funding of Aboriginal-led NGOs to provide support services at court is vital to ensuring young people have access to targeted therapeutic and rehabilitative support.

In NAAJA's experience, young people are more willing to engage with services when they are at court, as they are at a time of high need and often in a vulnerable state.[42] Sustained and coordinated efforts should be made to ensure the opportunity to link young people with support services at court is maximised. Co-locating youth services, or having youth services available on youth court days, would facilitate a holistic, multi-agency response to the complex issue of youth offending. The Commission has heard that having a 'one-stop-shop' of relevant services within the court building has been successful in Western Australia, where youth justice services, mental health services, the Director of Public Prosecutions (DPP), legal aid, child protection and victim assistance services are co-located.[43]

The court should employ dedicated youth justice staff and Aboriginal liaison officers to coordinate case management, facilitate information provision to the court and assist with warm referrals to support services.[44] For instance, in New South Wales, specialist juvenile justice officers are available at court to provide tailored assessment reports to the court that address the underlying causes of offending and to provide young people and their family with information about the court process and link them to relevant support services.[45] Employing these dedicated staff would help address the fragmentation of services across the youth justice system.[46]

6.7.2 Maximising opportunities to reconnect young people with education

The majority of NAAJA's youth clients are either partially or wholly disengaged from education.[47] Improving educational outcomes for young people who offend has been identified as one of the most effective means of reducing the risk factors for criminal behaviour.[48]

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[40] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 6 [29].
[41] Ibid, 6 [27].
[42] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 8 [23].
[43] Oral evidence of Justice Denis Reynolds, 29 June 2017, 5309:42–45.
[44] A warm referral is a referral to a service where the person making the referral facilitates the contact – for example, by introducing and making an appointment for the client.
[45] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3463:8–13; oral evidence of Shahleena Musk, 9 May 2017, 3633:1–18.
[46] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3423:1–8.
[47] Oral evidence of Shahleena Musk, 9 May 2017, 3633:37–39.
[48] The Victoria Institute, 'Education at the Heart of the Children's Court: Evaluation of the Education Justice Initiative, Final Report', December 2015, v.

A representative from the Department of Education currently attends the Youth Justice Court in Darwin to provide information about a child's attendance at school.[49] However, there is scope for the Department of Education to play a greater role at court assisting children to re-engage with education:

> [I]f there was an education/justice initiative where education staff were based at the court house to meet the child and their family, to understand where they've disengaged, what level they're at … – you need trained people, educators who are able to make that assessment with information from the Department of Education, or whatever school – community school, if need be, and then map out what is going to fit the needs of that young person. And it might not be mainstream schooling, it could be ... education plan[ning] through the local engagement centre. It could be a training program. It could be ... catering, and the training program that they've got there. That just doesn't exist in the Northern Territory.[50]

For example, the Education Justice Initiative which operates out of the Children's Court in Victoria connects young people to an appropriate, supported education pathway through liaison and advocacy with schools and training providers, and engagement with relevant Department of Education staff.[51] An evaluation of the initiative found that it has substantial value for young people and their families, with 75% of participants successfully reconnected with education, mostly in a new setting.[52] Initiatives such as this should be considered and adapted to the Northern Territory context.

6.7.3 Addressing mental health and developmental needs of young people

It is essential that a youth justice system is established that addresses the complex connection between youth offending, mental illness, developmental disorders and disability. The Commission has heard there is a significant under-identification of disability among Aboriginal young people, and that disability should be an assumed factor for all young people interacting with the youth justice system.[53] As discussed in our Submissions on Youth Detention, this means individually supporting all Aboriginal children throughout the justice process with disability advocates.[54]

Additional steps should be taken by the youth justice system 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.[55] There is little benefit in cycling vulnerable young people through a youth justice system that consistently fails to address the reasons for their offending. Indeed, there is a cogent justice reinvestment argument in making more mental health resources available to the Youth Justice Court.

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[49] Oral evidence of Shahleena Musk, 9 May 2017, 3633:20–26; oral evidence of Justice Hilary Hannam, 8 May 2017, 3424:7–42.
[50] Oral evidence of Shahleena Musk, 9 May 2017, 3633:41–3634:4.
[51] The Victoria Institute, 'Education at the Heart of the Children's Court: Evaluation of the Education Justice Initiative, Final Report', December 2015, 3.
[52] Ibid, vii.
[53] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 5-6.
[54] NAAJA Submissions on Youth Detention, section 7.1.2.
[55] Exhibit 029.001, Statement of Scott Avery, 12 October 2016, 8.

Other jurisdictions have recognised the importance of addressing this issue in the youth justice system. For example, the Victorian Children's Court has an attached Children's Court Clinic, staffed by specialist psychologists and psychiatrists. Clinic practitioners provide assessments and reports recommending specific treatment needs, and also act as a referral service.[56] In New South Wales, a Children's Court clinic enables the Court to 'draw upon a panel of experts in children's issues to provide … single expert evidence rather than having competing experts' reports and cross-examination of experts.'[57]

Judges need to be able to order more psychological, neuropsychological, psychiatric and neurodevelopmental reports. At present, reports ordered pursuant to s 67 of the *Youth Justice Act* are funded by the Department of Community Corrections. Alternatively, legal defence services such as NAAJA, CAALAS or NTLAC will fund these reports.

A critical issue is that there is a lack of locally-based qualified mental health practitioners to undertake these reports, which results in delays as appropriate practitioners are sourced and undertake travel to the Northern Territory. The present situation is untenable and does not reflect the need for young people to have access to such assessments so the court can craft orders that meet their particular needs. A fund, administered by the Youth Justice Court, should be established under the *Youth Justice Act* and funded by the Court. This will allow ordering of reports to be in the best interests of the child as opposed to the current situation where the determining factor is the availability of funds from Community Corrections or a legal service provider.

Recommendation 58	That non-government organisations receive ongoing funding to provide support services at court.
Recommendation 59	That the court employs dedicated youth justice staff and Aboriginal liaison officers to coordinate case management, facilitate information provision to the court and assist with warm referrals to support services.
Recommendation 60	That funding is provided for dedicated mental health practitioners and disability support workers based at the Youth Justice Court.
Recommendation 61	That the Youth Justice Court becomes responsible for funding reports pursuant to s 67 of the *Youth Justice Act*, and that a fund is established under the control of the Youth Justice Court to facilitate this.

6.8 Sentencing – approaches and alternatives

6.8.1 Continuum of sentencing options

The *Youth Justice Act* provides a variety of lower-end sentencing options.[58] The sentencing range includes cautions, deferral of sentencing, dismissals and discharges. In NAAJA's experience, across the

[56] See <http://www.childrenscourt.vic.gov.au/jurisdictions/criminal/childrens-court-clinic>.
[57] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3463:1-3.
[58] *Youth Justice Act 2005* (NT) ss 83-89.

youth justice system, there is a lesser dispensation of lower-end sentencing options for Aboriginal young people, who are mainly sentenced similarly to adults. While lower-end sentencing options are used in the first instance for less serious offending, for more serious offending these sentencing options are often bypassed and higher sentencing options imposed, even in the first instance.

Most young offending can be categorised as episodic and responsive to particular developmental, familial or social circumstances.[59] Current sentencing practices result in offenders being quickly exposed to custodial sentences. If appropriate services were in place to allow courts to make use of the lower-end sentencing options available in the *Youth Justice Act*, there would be more opportunity for community-based interventions. Reducing the gross over-representation of Aboriginal young people in detention requires a greater commitment to non-custodial sentencing alternatives.

The main direct alternative to youth detention available in the Northern Territory is Sentenced Youth Boot Camps (SYBC).[60] Military-style boot camps should be distinguished from Aboriginal-run bush camps, which are focused on cultural knowledge and healing. Ms Kerr told the Commission that the Government does not support military-style boot camps, but favours therapeutic-style camps that build life skills.[61] Evaluations of military-style boot camps show that they do not reduce recidivism and can have a negative effect on children who have a cognitive disability, mental health disorder or have experienced trauma and abuse.[62] The recent withdrawal of BushMob from the Northern Territory Government's pilot SYBC program at Loves Creek due to ongoing safety and security concerns arising from inadequate infrastructure and technology[63] means there is an even greater lack of alternatives. In explaining BushMob's decision to withdraw from the pilot, Mr McGregor stated:

> [The breakdown in partnership with the Northern Territory Government] is fundamentally the result of difference in philosophy and expertise … Our expertise was not adequately engaged during the development or operation of the pilot … [the breakdown] has also been exacerbated by unstable department structures and responsibilities. While there is no doubt of an intent to establish an appropriate alternative to detention, this has not however, translated through the department's approach to program design, facilities and collaborative practices.[64]

The Northern Territory Government responded by engaging an interstate organisation, Operation Flinders Foundation, to deliver early intervention wilderness camps for at-risk youth. Immediate priority should be given to identifying, supporting and adequately funding local Aboriginal-controlled organisations to deliver therapeutic healing camps for young people. NAAJA is concerned about the ongoing use of interstate providers without plans to build capacity of Aboriginal organisations in the Northern Territory to deliver these programs. Government should require any non-Aboriginal organisation contracted for these services to adhere to the APO NT Partnership Principles, which

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[59] Kelly Richards, *What Makes Juvenile Offenders Different from Adult Offenders?* (February 2011) Australian Institute of Criminology, 3.
[60] Exhibit 340.000, Statement of Jeanette Kerr, 17 March 2017, 1 [5].
[61] Oral evidence of Jeanette Kerr, 8 May 2017, 3534:28–32; 3535:1–2.
[62] Oral evidence of Eileen Baldry, 8 May 2017, 3496:17–22.
[63] Erwin Chlanda, 'Bushmob absconding: no reliable phone to alert police, resort', *Alice Springs News Online*, 12 July 2017.
[64] Ibid.

provide guidance to non-Aboriginal organisations engaging in the delivery of services or development initiatives in Aboriginal communities in the Northern Territory.

Youth justice courts urgently need appropriate alternative detention options available to them for dealing with young offenders. Where the court determines that detention is necessary, greater use should be made of alternative detention orders,[65] which allow young people to remain in community rather than being incarcerated in secure detention facilities in Darwin or Alice Springs. The Kurdiji Law and Justice Group gave evidence to the Commission that:

> We don't want our children sent away; we want them to stay in the community and receive their punishment and rehabilitation here. If we had some support from outside, our leaders and elders could mentor them, take them out bush to connect with country and teach them the knowledge they need to behave properly and to treat others with respect … Sending them to Don Dale or taking them from their family only makes things worse – for that child, for the family and for the whole community. For all our young people, young or old, jail harms them and our whole community. They lose their culture, their identity and their respect for themselves and for others.[66]

Justice Johnstone observed that some of the most successful orders for Aboriginal children involved outstation work and re-engagement with culture, supervised by Elders or community justice groups:

> All of this, of course, is a matter of political will and funding, quite frankly. Many of these services are stretched to the limit … I think there are a number of different – obviously, cultural groups, language groups and solutions need – in terms of programs, need to come from them, and I would like to see the development through Youth Justice Services of more involvement in those communities in the actual delivery of the programs.[67]

BushMob's withdrawal from the SYBC pilot program underscores the importance of genuine consultation and co-design of programs with Aboriginal communities and organisations. The Northern Territory Government must act on its commitment to co-design programs and services with Aboriginal communities so that there are options available in all communities.

The Commission has heard that one of the benefits of a specialist judiciary for youth matters is that the judges are familiar with sentencing options that work for children and have a greater knowledge of the services available to children sentenced by the court.[68] The Commission has also heard about the development of a bench book in New York City that sets out a structured decision-making tool (discussed in section 5.2.1) and information on alternatives to custodial placements.[69] The judiciary, prosecutors and defence lawyers receive training in the bench book.[70] NAAJA recommends that

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[65] See *Youth Justice Act 2005* (NT) Part 6, Division 8.
[66] Exhibit 531.000, Lajamanu Kurdiji submission, 9 March 2017, 1.
[67] Oral evidence of Justice Michael Shanahan, 8 May 2017, 3768:31–43.
[68] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3458:15–18.
[69] Oral evidence of Vincent Schiraldi, 27 June 2017, 5088:11–17.
[70] Ibid.

consideration is given to developing a bench book for the Youth Justice Court that sets out information about the continuum of sentencing alternatives available in all communities of the Northern Territory.

6.8.2 Diverting young people with mental health conditions

Young people with mental health conditions should be diverted from the youth justice system. Justice Johnstone told the Commission that, in New South Wales, a deferred sentencing model of a 'Griffith remand' is used in conjunction with the *Mental Health (Forensic Procedures) Act* to allow a child with a psychological condition contributing to their offending behaviour to be diverted from the justice system to the health system:

> [W]e take the view that detention is a last resort, I mean our fundamental view is that a child will be much better served by being placed into a community program [rather than detention] where … we can address … the underlying causes of their criminogenic behaviour. So that's where we start from and some of the examples of diversion are the use of section 32 of the Mental Health Forensic Procedures Act...
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> So [young people are] treated for their condition rather than punished for their crime. So if, at the end of that program, they have treatment and they make positive progress in addressing with medical assistance, their criminal behaviour through that program, we will then discharge them at the end of the process.[71]

His Honour gave evidence that this mechanism is now used 'as much as possible' and that one of the benefits of a specialist court is that the court can develop common positions on the use of these sorts of mechanisms.[72] Use of this mechanism relies on a full-time mental health clinician at the Children's Court who performs preliminary assessment at court.[73]

6.8.3 Dual track system

In Victoria, under the *Sentencing Act 1991* (Vic), adult courts can sentence young offenders aged less than 21 years to serve custodial sentences in youth detention instead of adult prison. This 'dual track' system is intended to prevent vulnerable young people entering the adult prison system at an early age. In order to qualify, the court must be satisfied that the young person has reasonable prospects of rehabilitation, or that they are impressionable, immature or likely to be subjected to undesirable influences in adult prison.[74] Evidence before the Commission speaks to the benefits of this approach in diverting young people from the adult corrections environment.[75]

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[71] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3465:16–37.
[72] Ibid, 3465:39–45.
[73] Ibid.
[74] See https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-young-people.
[75] Oral evidence of Julie Edwards, 12 May 2017, 3931:32–46.

Recommendation 62	Lower-end, community-based sentencing practices should be encouraged in youth justice courts.
Recommendation 63	That a broader range of non-custodial sentencing options are made available in remote communities and these options are co-designed with Aboriginal communities.
Recommendation 64	That a 'dual track system' is introduced in the Northern Territory, allowing young people under the age of 21 to serve custodial sentences in youth detention instead of adult prison.

6.8.4 Aboriginal customary law

Section 16AA of the *Crimes Act 1914* (Cth) prohibits a court from taking into account any form of customary law or cultural practice in sentencing determinations as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates. NAAJA agrees with Mr Goldflam's observation that authentic engagement with Aboriginal communities, including the revival of Community Courts (discussed in section 6.8.7 below), is not achievable unless s 16AA is repealed.[76] For over a century, Northern Territory jurisprudence has accommodated and recognised Aboriginal customary law in its sentencing practices, recognising its role in Aboriginal people's lives. The Supreme Court has recognised the role ceremony plays in the development of an Aboriginal child's maturity and rehabilitation as positive factors for sentencing consideration.[77] The reduction of courts' ability to consider the importance of an Aboriginal child's cultural development and being diminishes all involved in the proceedings. All courts must be able to take into account Aboriginal customary law or cultural practice without restriction when sentencing young offenders.

Recommendation 65	That s 16AA of the *Crimes Act 1914* (Cth) is repealed.

6.8.5 Pre-sentencing reports

The Commission has heard about the use of Gladue Reports in Canada, which are pre-sentence reports written by an Aboriginal person that provide recommendations to the court about 'what an appropriate sentence might be, and include information about the Aboriginal persons' background such as educational history, child welfare removal, physical or sexual abuse, underlying developmental or health issues, such as FASD, anxiety, or substance use.'[78] Mr Sharp told the Commission:

[76] Exhibit 052.001, Statement of Russell Goldflam, 24 November 2016, 9 [47(f)].
[77] Mildren, D. Big Boss Fella All Same Judge: A History of the Supreme Court of the Northern Territory. Federation Press:2011.
[78] Native Women's Association of Canada, 'What is a Gladue Report?', available at <https://nwac.ca/wp-content/uploads/2015/05/What-Is-Gladue.pdf>.

> So a Gladue report is ordered by the court as an alternative to a conventional pre-sentence report and it has a very different focus. It looks at the background of the defendant in great detail. So a report such as this one on the screen would probably run to something like 40 pages. It provides enormous detail for the court about background issues, such as in Canada residential schools or stolen generation issues that that defendant may have experienced, or the family may have experienced, about that person's home community, about trauma that they've experienced and potential options by way of healing processes for that person to participate in.[79]

There is no comparable sentencing report available of similar quality in the Northern Territory. NAAJA recommends that Aboriginal Elders and/or Law and Justice Groups are funded and supported to provide specialised information for pre-sentencing reports relating to Aboriginal young people, having regard to the key concepts underpinning Gladue Reports. This will enable important cultural and background information to be taken into account when sentencing.

We discuss pre-sentence reports further in section 8.2.1 where we recommend the establishment of a specialist team of Aboriginal pre-sentence report writers and the creation of a standing panel of qualified child and adolescent health practitioners.

Recommendation 66	That Aboriginal Elders and/or Law and Justice Groups are funded and supported to provide specialised cultural information and information about local non-custodial sentencing options for Aboriginal young people.
Recommendation 67	That the *Youth Justice Act* is amended so that all pre-sentence reports are required to include a young person's cultural information as provided by Aboriginal Elders, family and Law and Justice groups.

6.8.6 Lay advocates

In New Zealand, when a young person appears before the Youth Court charged with an offence, the Court may appoint a lay advocate to support the young person in the proceeding.[80] A lay advocate should be someone who has 'by reason of personality, cultural background, knowledge, and experience, sufficient standing in the culture of the child or young person'.[81]

Lay advocates ensure that the Court is made aware of all cultural matters relevant to the proceedings and represents the interests of the child's *whānau*, *hapū* and *iwi* (extended family, clan/descent group and tribe) to the extent that those interests are not otherwise represented.[82] Some of the tasks performed by lay advocates include providing written reports and advice to the Court on a young

[79] Oral evidence of Jared Sharp, 10 May 2017, 3660:6–14.
[80] *Children, Young Persons and their Families Act 1989* (NZ), s 326(1). A lay advocate is not a barrister or solicitor.
[81] Ibid, s 326(2).
[82] Ibid, s 327.

person's family and cultural background and assisting young people to access programs and services that promote connection to culture.[83]

Lay advocates play an invaluable role in the court process by providing important cultural information that may not otherwise be easily accessible.[84] This enables the Court to craft orders that better meet the cultural needs of young people and their families. Mr Sharp told the Commission:

> I think it turns on its head, this presumption that we have in the Northern Territory, that our judiciary have all of this information already and don't need it. Whereas I think it's quite the reverse. We have to make sure that our judiciary can make the most expert decisions and informed decisions and be provided with this information.[85]

NAAJA recommends that the position of Aboriginal lay advocates is introduced in the Youth Justice Court. In the Northern Territory context, the role of lay advocate would provide an important mechanism for Aboriginal Elders and community members to advise the Court on cultural matters and assist the Court to make orders that are culturally relevant and tailored to a young person's needs and circumstances. The establishment of formal, remunerated pathways for Elders to participate in court processes is crucial to promoting culturally-strengthening initiatives across the youth justice system. The New Zealand experience suggests that the role of lay advocate needs to be clearly defined at the outset.[86] Comprehensive training for lay advocates is also crucial to success.[87]

Recommendation 68	That Aboriginal lay advocates are introduced in the Youth Justice Court and receive training and remuneration for their role.

6.8.7 Community Courts for young people

Following the success of Koori Courts in Victoria, Nunga Courts in South Australia, Murri Courts in Queensland and Circle Sentencing in New South Wales, the Northern Territory established a pilot Community Court program in 2005. Community Courts aimed to achieve more sustainable and culturally informed sentencing outcomes, increase understanding of the court process and promote therapeutic outcomes for the offender, victim and community.

In 2007, the *Little Children are Sacred* report recommended the development of 'language-group specific Aboriginal Courts' and discussed the importance of exploring 'alternative models of

[83] Exhibit 337.027, Justice Becroft, 'From Little Things Big Things Grow: Emerging Youth Justice Themes in the South Pacific', 20 May 2013, 21.
[84] Ibid.
[85] Oral evidence of Jared Sharp, 10 May 2017, 3657:23–27.
[86] Exhibit 337.027, Justice Becroft, 'From Little Things Big Things Grow: Emerging Youth Justice Themes in the South Pacific', 20 May 2013, 22.
[87] Ibid.

sentencing that incorporate Aboriginal notions of justice and rely less on custodial sentences and more on restoring the wellbeing of victims, offenders, families and communities.'[88]

Community Courts were intended to be expanded across the Territory in 2008 as part of the government's *Closing the Gap of Indigenous Disadvantage: A Generational Plan of Action*, but funding and resourcing of Community Courts was woefully inadequate:

> There was to be one coordinator still based in Darwin, which was strange because he was meant to service the whole of the Territory and then there were to be four part-time people in communities. They were never recruited and I don't know that there was ever enough money for them anyway and the budget really only covered the magistrate. It didn't ever cover the training of people in communities. It didn't cover the Legal Aid side, the police side, the DPP side or any of that sort of thing. Basically there wasn't enough money.[89]

The initiative was eventually defunded in 2012, despite an evaluation finding that the program allowed communities to 'join forces and partner with the Magistracy of the Northern Territory to deliver and enforce effective sentencing solutions.'[90] Community Courts had the most success hearing youth matters.[91] This is yet another example of the Northern Territory Government's failure to support and invest in initiatives of value to Aboriginal communities.

Justice Hannam told the Commission that Community Courts had assisted

> in breaking down the barriers of mistrust between the formal justice system and … Indigenous people, and to actually feel that they were being heard in part of the process of what issues were important for the community and to have that, to – I mean the actual power of sitting side-by-side the magistrate around a table and to be seen in the community as doing that, I think they did have – they did have great potential.[92]

Until they were defunded, Community Courts comprised Elders, offenders, victims (in some cases), the offender's family, the magistrate, prosecutor, Community Court Coordinator and defence lawyer. Elders actively engaged in discussion with the defendant and assisted the magistrate to arrive at the appropriate sentence.

Community Court was particularly successful in North Eastern Arnhem Land, where it was developed in partnership with the Yolŋu people to meet the specific needs of their community. The then Chief Magistrate Jenny Blokland described the process:

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[88] Exhibit 018.001, Annexure 1 to the Statement of Patricia Anderson, Little Children are Sacred Report, 30 April 2007, recommendations 39 and 74.
[89] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3444:10–16.
[90] Exhibit 337.051, 'Joining Forces: A partnership approach to effective justice –community-driven social controls working side by side with the Magistracy of the Northern Territory', August 2012, 28.
[91] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3445:47.
[92] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3444:25–30.

> Community courts commenced in Nhulunbuy (North East Arnhem Land) in about 2003/2004 after the respected Yolngu educator, linguist and community worker Raymattja Marika visited the Nhulunbuy Court's Chambers stating that 'down South' there are Koori Courts, Nunga Courts, circle sentencing and that the Yolngu wanted a 'Yolngu Court'. Being a new Magistrate at the time, I wasn't sure if I could, with any authenticity, preside in a court called a 'Yolngu Court'. With other developments occurring in Darwin (our then Chief Magistrate Mr Hugh Bradley came to an agreement with Yilli Rreung Council to trial 'circle sentencing' in Darwin, Nhulunbuy and the Tiwi Islands and make some funds available for the process), we settled on 'Community Court' to describe an informal participatory process. Subsequently there were general public meetings and education sessions involving Dr Kate Auty (formerly a Victorian Magistrate and now in Western Australia) and a number of restorative justice practitioners and educators in allied professional groups. The Community Court possesses some principles referrable to restorative justice but whether the goals of restorative justice are met, depends greatly on the level and extent of participation, the type of case and the level of engagement of all relevant parties.[93]

A challenge facing the Community Courts was the lack of a legislative framework or practice guideline.[94]

NAAJA recommends re-establishing Community Courts as an important way of fostering meaningful justice outcomes for Aboriginal young people and communities. Community Courts should be implemented as an alternative justice model (such as diversion and Youth Justice Conferencing) that can be discretionally employed on a case-by-case basis.

Community Courts must also be linked to effective community-based rehabilitation programs to support young people to address the underlying causes of offending. Referral programs are discussed further in section 7. An evaluation of Community Courts noted that 'effective justice requires the implementation of both system components [courts and rehabilitative programs] to achieve sustainable changes to an individual offender's behaviour.'[95]

It is critical that Community Courts are community driven and community owned. In NAAJA's experience, that where Community Courts have been successful, it was almost entirely due to the relationship between the Elders and the particular defendant. This is in contrast to having a set panel of Elders, who may not be appropriate for every referred case where there is no connection with the young person. Law and Justice Groups for each community would be able to provide a panel of Elders appropriate to hear particular cases.

Community Court proceedings should be conducted entirely in language. This facilitates talking and better engagement between the Elders, other community members, the judiciary and the defendant.

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[93] J Blockland, 'The Northern Territory Experience', (Paper presented at the Australian Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4–7 September 2007) 7.
[94] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3445:8–10.
[95] Exhibit 337.051, 'Joining Forces: A partnership approach to effective justice – community-driven social controls working side by side with the Magistracy of the Northern Territory', August 2012, 28.

Conducting proceedings in English undermines the success of the Community Court. In our 2011 Submissions to the Review of the Youth Justice System, a NAAJA lawyer observed:

> At a very base level the youth needs to be engaged in the process, and with his counsel, otherwise very little will be gained. I have sat in Community Courts where a Magistrate gives their opinion and then asks if the panel members agree with their view (which of course they do!). Then the youth is lectured by the Magistrate. There is very little interaction with the youth or the family. Nothing is resolved or proposed as a solution and this approach is largely ineffective.[96]

It is encouraging that Judge Armitage recently accepted the Kurdiji Law and Justice Group members' proposal to sit with her Honour in court during the Lajamanu circuit court. NAAJA's Community Legal Education team has been supporting Kurdiji to prepare letters to the court providing important cultural information and sentencing recommendations. This information is crucial to enable the court to make culturally relevant decisions, such as adjourning matters to allow defendants to attend significant funerals.

Kurdiji's presence in court is an important step forward for the community to have a stronger voice in the criminal justice system and to have Warlpiri authority structures recognised and drawn on for individual criminal matters. For example, for one young offender, Judge Armitage asked a nominated Kurdiji member to provide support and counselling alongside a Community Corrections assessment for community work. Kurdiji sees this as an important step in having Yapa (Aboriginal) and Kardia (non-Aboriginal) law working together.

NAAJA's Community Legal Education Team also works alongside Law and Justice Groups in Galiwinku with the Makarr Dhuni, Maningrida with the Burnawarra, Wurrumiyanga with the Ponki Mediators and meets with the Binipilingmirring Djakakining Mala cultural authority in Ramingining. In our Submissions on Youth Detention, we recommended that funding and legislative change are provided to integrate Law and Justice Groups across the youth justice and child protection systems. This should include funding for Aboriginal organisations to support Law and Justice Groups in their work. As the Kurdiji told the Commission, NAAJA is best placed to perform this role.[97]

[96] See NAAJA, Submission to the Youth Justice Review Panel, July 2011, 56.
[97] Exhibit 531.000, Lajamanu Community Submission, 9 March 2017, 2.

Recommendation 69	That the Northern Territory Government recommit to supporting Community Courts in all remote communities by providing adequate funding and support.
Recommendation 70	That specific legislation is enacted to provide a legal mandate for Community Courts.
Recommendation 71	That Community Court proceedings are conducted in language unless the community determines otherwise.

6.9 Legal representation

6.9.1 Ensuring access to legal representation

Under the *Convention on the Rights of the Child*, a child has the right to be heard in any judicial proceeding affecting the child, either directly or through a representative.[98] The United Nations has recognised that provision of legal aid to children should be prioritised, and must be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.[99] Ensuring equality of access to legal representation for Aboriginal children in the Northern Territory, including those in remote communities, requires increased and sustained investment in Aboriginal legal services.

NAAJA is particularly concerned about access to legal representation for children in care. Children should have the ability to speak to a lawyer and prepare themselves for court by getting early legal advice, yet in NAAJA's experience many caseworkers fail to ensure this occurs.[100] This is considered further in section 8.3, where we recommend that Territory Families implements a policy to ensure young people have access to legal advice and representation, including contacting NAAJA where an Aboriginal young person is involved.

6.9.2 Specialist youth lawyers

Specialisation of legal practitioners appearing in the Youth Justice Court was supported by Justice Hannam and Justice Johnstone, who saw it as 'critical to the successful operation of the court.'[101] Specialist training for lawyers working with young people is recognised as international best practice:

> Legal aid providers representing children should be trained in and be knowledgeable about children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding. All legal aid providers working with and for children should receive basic interdisciplinary training on the rights and needs of children of different age groups and on proceedings that

[98] Exhibit 005.002, *Convention on the Rights of the Child*, art 12.
[99] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013, Principle 11, [35].
[100] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 8 [25].
[101] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3458:30–38; oral evidence of Justice Hilary Hannam, 8 May 2017, 3437:33–41.

> are adapted to them, and training on psychological and other aspects of the development of children, with special attention to girls and children who are members of minority or indigenous groups, and on available measures for promoting the defence of children who are in conflict with the law.[102]

NAAJA has recognised the need to provide specialist, multidisciplinary and culturally competent legal assistance and support to Aboriginal young people through the creation of its Youth Justice Team, which includes lawyers and an Indigenous Youth Justice Worker. NAAJA has made a concerted effort, with existing resources, to train the Youth Justice Team and encourage professional development on youth justice issues including child and adolescent development and trauma.

NAAJA supports dedicated training for all lawyers working in the Youth Justice Court, in recognition of the specialist nature of the jurisdiction. Justice Shanahan told the Commission that part of the Children's Court Committee's work in Queensland is establishing an education program for the legal profession (prosecution and defence) about youth justice legislation, sentencing options, pre-sentence reports and obtaining instructions from young people.[103] A Northern Territory Children's Court Committee could oversee the development of a similar training program for legal practitioners in the Northern Territory.

Recommendation 72	That all lawyers working in the Youth Justice Court receive specialist training on the youth jurisdiction, including child and adolescent development and trauma.
Recommendation 73	That government provides ongoing specific funding to NAAJA and CAALAS to establish specialist youth legal services, representation and support to Aboriginal young people.

6.10 Prosecutors and prosecutorial practices

6.10.1 Transfer of Youth Justice Court prosecutions from police to DPP

In December 2013, the DPP took over responsibility for prosecution of all summary matters from police.[104] Evidence before the Commission shows that the magistracy at the time raised concerns with the Attorney-General about the proposed transfer, citing the 'broad and valuable role' played by police prosecutors, including 'family liaison, youth engagement, frontline experience and practical solutions.'[105] Despite acknowledging the 'genuine concern that civilian prosecutors of junior rank will be unable to fill this void', there is no evidence before the Commission to suggest that steps were taken by the Government to address it.[106]

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[102] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013, Guideline 11, [58(d)].
[103] Oral evidence of Justice Michael Shanahan, 11 May 2017, 3763:28–3764:14.
[104] Exhibit 350.001, Statement of Sandy Lau, 2 May 2017, 2 [8].
[105] Exhibit 337.026, 'RE: Youth Justice Prosecutions', 5 November 2013.
[106] Ibid.

6.10.2 Embedding specialist expertise and trauma-informed approaches

Justice Hannam observed that police prosecutors in the Youth Justice Court in Darwin were generally more experienced and had a better understanding of the youth jurisdiction than prosecutors from the DPP.[107] In NAAJA's experience, police prosecutors, especially those who had spent time in the Youth Diversion Unit, had a better understanding of the importance of a rehabilitative approach to youth justice. That said, the Commission has heard that the quality of police prosecutors 'varied enormously' in the youth jurisdiction, with high turnover of officers and lack of specialist expertise.[108] This underscores the need for a stable, experienced prosecution with specialised youth expertise.

NAAJA has observed that civilian prosecutors in the Youth Justice Court are inexperienced, do not have sufficient understanding of trauma or therapeutic and rehabilitative principles, and have little to no understanding of Aboriginal culture. Inexperienced prosecutors with a limited appreciation of the specialist jurisdiction may conduct themselves in a way that is not sensitive to the needs of Aboriginal children and young people:

> People who don't understand traumatised youth are often hostile to them, seeing only the manifestation of their trauma in their behaviour and not any of the root causes.[109]

In NAAJA's experience, in the past, some civilian prosecutors understood the needs of young people, especially when recruitment focused on lawyers with a higher skill level. This made a considerable difference to outcomes for young people: submissions made by prosecutions in relation to bail and sentencing were useful, realistic and reflected Youth Justice Court principles in supporting young people's exit from the criminal justice system. This speaks to the critical importance of specialist training for prosecutors about the youth jurisdiction and especially in trauma-informed approaches to dealing with young offenders. Specialisation is critical to the successful operation of the court.[110]

Justice Johnstone told the Commission that youth matters in the New South Wales Children's Court are prosecuted by specialist police prosecutors who only practice in that jurisdiction and are located at the Court. This results in 'much better outcomes' because prosecutors 'understand the philosophy and culture of the Children's Court', including the principles of arrest and detention as a last resort and rehabilitation as the overriding sentencing principle.[111]

6.10.3 Unjustified prosecution

NAAJA is aware of numerous examples of young people being charged and prosecuted when it is not appropriate to use those powers.[112] NAAJA is particularly concerned about the prosecution of children for care-related offences. Many of these offences would not normally come before a court if the child

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[107] Ibid, 3437:8–41.
[108] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3437:8–23.
[109] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 2 [11].
[110] Oral evidence of Justice Peter Johnstone, 8 May 2017, 3458:37–38; oral evidence of Justice Denis Reynolds, 29 June 2017, 5309:36–38.
[111] Ibid, 3458:40–3459:3.
[112] For example, children being charged with minor offences such as possession of a firework outside of a prescribed period and possession of less than a gram of cannabis.

was not in care because families do not ordinarily criminally prosecute children for bad or inappropriate behaviour. This is discussed further in section 8.4 of these submissions and section 5.4.3 of our Submissions on Youth Detention, where we recommended the urgent introduction of a protocol for appropriate use of discretion and restorative justice approaches for children in care.

6.10.4 Prosecutorial discretion

NAAJA is concerned that police inappropriately influence prosecutorial decision-making about proceeding with charges against youth offenders. NAAJA is aware of cases where children have been charged with serious offences when a less serious charge was appropriate, but the charge was not withdrawn until the date of hearing because police refused withdrawal. This has resulted in children unnecessarily spending prolonged periods remanded in custody.

Case study – client 'A':

'A' was charged with arson after setting fire to a bin in his community. The appropriate charge was property damage; however, the prosecutor would not withdraw the arson charge. 'A' spent considerable time on remand until his hearing date when the prosecutor withdrew the arson charge. NAAJA made numerous verbal and written representations to this effect. The prosecutor refused to properly consider the evidence because the police officer from A's home community did not want the charge withdrawn and the prosecutor did not want to interfere.

Prosecutorial obligations include the responsibility to only proceed with prosecutions that have a reasonable prospect of conviction. It is appropriate for prosecutors to liaise with the relevant police officers (such as the arresting officer), but prosecutors should exercise their prosecutorial duties and discretion independent of police influence.

6.10.5 Delayed prosecution

NAAJA is concerned about delay in prosecution of youth offenders. NAAJA has acted in numerous cases where young people have been close to finalising their matters before the court when fresh charges are laid for dated offending. This practice means that children who have been staying out of trouble (compliant with bail conditions) are further exposed to the more punitive elements of the youth justice system through arrest and incarceration. Senior Prosecutor Sandy Lau told the Commission:

> At least once a week, a summons file is given to the DPP where the offence date and the first in court mention date are up to 12 months apart with little or no explanation as to why the file was submitted late. An example is where a complaint was made to Police immediately following an assault and a statement was taken from the victim at the time of the complaint but charges were not laid until 12 months after the event.[113]

[113] Exhibit 350.001, Statement of Sandy Lau, 2 May 2017, 5 [39].

NAAJA agrees with Senior Prosecutor Lau that this practice is inconsistent with the *Youth Justice Act* principle that a decision affecting a young person should, as far as practicable, be made and implemented within a time frame appropriate to the young person's sense of time.[114]

Recommendation 74	That all prosecutors working in the Youth Justice Court receive comprehensive and specialist training on youth justice, including trauma-informed approaches to working with young people.

6.11 Parole decisions

Consistent with our submissions in this section about the benefits of a youth-specific jurisdiction, NAAJA recommends that a youth-specific parole board is established to determine parole decisions for young offenders. Parole decision-making is discussed in section 10.1 of these submissions.

6.12 Closed court/non-publication orders

In section 5.4.2 of our Submissions on Youth Detention, we discussed how open youth justice courts and exposing young people to media by allowing publication of youth offender names is anti-therapeutic,[115] and has a potentially socially isolating impact.[116]

Under s 49 of the *Youth Justice Act*, proceedings against a young person must be held in open court, unless the court orders otherwise because it appears to the court that justice would be best served by closing the court. In NAAJA's submission, given the potentially harmful and stigmatising impact of open court proceedings on children, courts should be closed unless there are exceptional reasons for deciding otherwise. This approach is consistent with other jurisdictions and would better facilitate the rehabilitative aims of the Youth Justice Court.[117]

Recommendation 75	That the *Youth Justice Act* is amended so that youth justice courts are closed, unless the court directs otherwise.

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 presumptive publication of youth justice proceedings. As recommended in our Submissions on Youth Detention, the *Police Administration Act* and *Youth Justice Act* should be amended to prevent the publication of the identity of young people as police suspects and during all court proceedings.[118] It runs contrary to the fundamental principles of rehabilitation enunciated in the *Youth Justice Act*.

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[114] *Youth Justice Act 2005* (NT) s 4(m).
[115] Oral evidence of Sally Cohen, 24 April 2017, 2801.
[116] Oral evidence of Russell Goldflam, 14 December 2016, 855; Oral evidence of Sally Cohen, 24 April 2017, 2801.
[117] For example, in Queensland and New South Wales youth justice courts are closed.
[118] NAAJA Submissions on Youth Detention, section 5.4.2, recommendation 48.

6.13 Availability of resources and services to meet court orders

The implementation of the *Youth Justice Act* has been hampered by inadequate resourcing.[119] The Commission has heard numerous examples of provisions of the Act which are not adequately resourced:

- One of the sentencing options available to the court under s 83(e) of the *Youth Justice Act* is ordering a young person to participate in a program approved by the Minister. Justice Hannam told the Commission that no such programs existed so the provision could not be used.[120]
- As discussed in section 4.3 of these submissions, until February this year there was no dedicated funding for Youth Justice Conferencing under s 84 of the *Youth Justice Act,* which meant that the provision was rarely used.
- There are significant waiting times for re-assessments for diversion pursuant to s 64 of the *Youth Justice Act* due to insufficient resources (see section 3.3.1).[121]
- Under s 67(1) of the *Youth Justice Act*, the court may order a report on the mental condition of a young person charged with an offence if the court considers the condition may affect their criminal responsibility or ability to understand proceedings. The lack of accessible mental health practitioners to prepare these reports is a chronic issue. Ms Lau gave evidence that matters are adjourned for significant periods to await expert reports because child psychiatrists must travel from interstate.[122] In section 6.7 above and in section 7, we have recommended expanded mental health services across the Northern Territory, including dedicated mental health practitioners at court.

Insufficient resourcing of services and programs to meet court orders means NGOs such as NAAJA have to fill the gap. The Commission has heard that government policy 'clearly … dictates the way in which a Court approaches its work.'[123] If the Government is committed to a therapeutic and rehabilitative youth justice system, it needs to provide sustained funding to ensure court orders can be met, especially for children in remote communities. As Justice Hannam told the Commission, 'if you don't resource things – so they don't actually exist in reality, then the Act is nothing more than a statement of good intentions.'[124]

[119] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3425:5–19.
[120] Ibid, 3425:21–37.
[121] Oral evidence of Shahleena Musk, 9 May 2017, 3621:33–40.
[122] Oral evidence of Sandy Lau, 9 May 2017, 3630:12–20.
[123] Oral evidence of Justice Michael Shanahan, 11 May 2017, 3758:8–9.
[124] Ibid, 3425:17–19.

Recommendation 76	That government provides sufficient and ongoing funding to ensure adequate resources and services to meet court orders under the *Youth Justice Act*.

6.14 Delay

The Commission has heard about delays in bringing matters before the court due to inadequacies in police practice (see section 2).

There are also inefficiencies in the transfer of information that result in delays in defence lawyers and the prosecution receiving briefs and can delay a matter being heard. Senior Prosecutor Sandy Lau explained that arresting police submit a physical file to the Judicial Operation Section, who determines if and what charges are laid before referring matters to the Youth Diversion Unit for consideration. The physical file is then taken to the DPP registry (housed in another building), often only once a significant number of files are ready. A copy of disclosure is then made for the defence. The number of steps involved in this process delays the arrival of the prosecution file at court.[125] Ms Lau told the Commission:

> I will only get the paperwork at court when rounds deliver the files to court to me, and I will provide that to defence. So whilst Ms MacCarron [Northern Territory Legal Aid Commission lawyer] raised the issue of the delay in taking instructions and opposing bail, … prosecution are also reading the files for the first time at the bar table.[126]

NAAJA recommends introduction of electronic briefs that can be accessed by police, prosecutions, defence lawyers and the court. This would mitigate some of the delays associated with the procedural inefficiencies outlined above.

The Commission has also heard that in circumstances where a young person has not entered a plea of guilt, the practice of the Youth Justice Court is to require a preliminary brief to be disclosed at first instance. However, it is often the case that a preliminary brief is not made available or is inadequate.[127] Defence then list the matter for a case management inquiry and request a brief service order. This can cause the matter to be delayed for weeks. As Ms MacCarron told the Commission:

> [I]f matters were commenced by way of summons, once the evidence has been obtained, then perhaps we wouldn't have this delay. But however, as we've discussed previously, matters are often commenced by way of arrest, in which case the young person is brought to court and these decisions need to be made on limited evidence that is just not there.[128]

[125] Exhibit 350.001, Statement of Sandy Lau, 2 May 2017, 4 [28].
[126] Oral evidence of Sandy Lau, 9 May 2017, 3605:4 –3606:3.
[127] Oral evidence of Nicola MacCarron, 9 May 2017, 3635:2.
[128] Oral evidence of Nicola MacCarron, 9 May 2017, 3635:28–32.

The lack of a specialist court also means that youth matters are often delayed due to the large adult lists, resulting in young people spending significant periods in the cells.[129] Justice Reynolds observed that combined adult and youth jurisdictions leads to excessive delays in children's matters being dealt with, which is contrary to the principle of dealing with children's matters as expeditiously as possible.[130] Ensuring adult and youth matters are always heard separately will reduce this delay.

Recommendation 77	That electronic briefs able to be accessed by police, prosecution, defence and the Court are introduced in the Youth Justice Court.

[129] Exhibit 354.000, Statement of Anna Gill, 2 May 2017, 7 [33].
[130] Oral evidence of Justice Denis Reynolds, 29 June 2017, 5309:21–26.

7 Referral programs

7.1 Introduction

The youth justice system is fragmented and the current policy frameworks are poorly suited to the contemporary needs of young people.[1] Improving outcomes for young people requires a leadership culture that recognises the origins of youth crime, overcomes counterproductive 'tough on crime' narratives and supports a community-led youth services sector focused on addressing young people's needs.

Given the research that shows the connection between disadvantage, trauma and offending,[2] it is an indictment on current policy frameworks for youth services and programs that there is a void of therapeutic healing models across the Northern Territory. Where such programs do exist, many rely on private sector grants, the Commonwealth and donations for most of their funding.[3]

The cost of delivering effective youth programs pales in comparison to the economic and social costs of crime. This has been widely acknowledged at the state and Commonwealth level, and is evidenced by the support for justice reinvestment approaches.[4] Creation and expansion of programs should be prioritised over counterproductive punitive measures. Northern Territory Government underfunding or defunding of the few effective therapeutic youth programs that have been developed is negligent, particularly in the context of funding decisions elsewhere in the youth service sector, such as exorbitant payments made to for-profit 'resicare' group homes,[5] which are known to increase the likelihood of contact with the criminal justice system.[6] The inexcusable state of affairs that led to this Royal Commission is in part a reflection of this failure in government decision-making and funding prioritisation, with the resulting social and economic costs affecting all Territorians.

Prioritising access to community designed and led, culturally responsive, therapeutic healing programs for children and young people prior to potential contact with the youth justice system, and

[1] Oral evidence of Jared Sharp, 10 May 2017, 3655:16–19.

[2] Trauma is a widely recognised contributing factor to criminal offending and involvement with the criminal justice system. Research indicates that childhood trauma can lead to the development of antisocial and aggressive behaviour in adolescents, especially in young men and multiple pathways between trauma and juvenile offending have been identified; APO NT Submission to the Royal Commission.

[3] See, eg, funding arrangements for the Balunu and Malabam Youth Service programs outlined at ss 7.4.2 and 7.4.5.

[4] See for example, discussion in Exhibit 337.111, 'A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia' – Amnesty International, 27.

[5] $77,000 per month for one Safe Pathways home in Katherine for up to four children: oral evidence of Tracy Hancock, 20 June 2017, 4529:6–4532:5.

[6] Through commonly held practices of increased use of police charges for assaults and property damage, calling the police for disciplinary matters and challenging behaviours, and increased monitoring of strict bail conditions. See oral evidence of Olga Havnen, 21 March 2017, 1584:15–30.

for youth who are already involved with the youth justice system, will address the underlying causes of offending and reduce the risk of reoffending.[7] Julie Edwards, Jesuit Social Services CEO, stated:

> Support Services are essential if we want to help young people move away from the justice system. Youth justice is like a maze with many entry points but not enough pathways out. The children and young people in contact with the justice system are among the most vulnerable and disadvantaged in the community.[8]

Evaluations consistently show that holistic, strengths-based service models produce more positive outcomes and should be prioritised over single-focus programs that cannot meet the needs of young people with multiple and complex needs.[9] Flexible, recovery-based program models that offer culturally appropriate wraparound services will deliver the improvements to youth wellbeing and independence required to reduce offending.

7.1.1 Information sharing

Inadequate information sharing and case management between agencies and referral programs is a recurring theme in the evidence before the Commission. Resourcing early and comprehensive psychosocial and medical assessments accompanied by appropriate information sharing systems to support complex shared and sequential case management of young people would enable services to deliver improved outcomes both in detention and in the community.[10] Professor Stuart Kinner told the Commission:

> Most kids have multiple problems requiring multiple sources of care … the coordination of that care is a challenge already in the detention setting. The challenge is exponentially greater for these young people once they're returned to the community. That's where things start to unfold, that's where we see the bulk of the morbidity.[11]

Mr Sharp told the Commission that he believed less young people would be detained by police if there were better information sharing between agencies:

> In my view, a number of young people end up in police custody who would not be there if police were aware of their background cognitive and/or mental health issues.

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[7] See APO NT Joint submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, Section 4.3 Availability of trauma support & counselling for Aboriginal young people in the community.
[8] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, [105].
[9] Mission Australia, Impact measurement and Client Wellbeing report 2015 <https://www.missionaustralia.com.au/publications/research/children-and-families#Pmi8Ua6q5f78WwdI.99>
[10] Exhibit 484.000, Statement of Will MacGregor, 9 May 2017, [45]. See further examples in Exhibit 484.001, Annexure A to the statement of Will MacGregor, Bushmob Aboriginal Corporation Submission to the Royal Commission, 25.
[11] Oral evidence of Prof Kinner, 23 March 2017, 1739:6–10.

> I believe this issue could be remedied if there were better information sharing processes between different government agencies…[12]

Full case management meetings upon intake into a program and when transitioning out of a program would improve program delivery and enable young people to be supported across services.[13]

Recommendation 78	That robust and up-to-date information sharing processes are implemented across all youth services to ensure continuity of service delivery and provide children with the wraparound support they need.

7.1.2 Data collection and evaluation

Inadequate data collection and evaluation of programs is another recurring theme in evidence before the Commission. Few youth programs featured in evidence before the Commission have had enough funding to perform formal evaluations, leaving them unable to precisely calculate program effectiveness or use data to inform decision-making.[14]

Recommendation 79	That the Northern Territory Government ensures monitoring and evaluation is built into program requirements and adequately funded.

7.1.3 Short funding cycles

Evidence before the Commission indicates that short funding cycles are another barrier to the establishment of a stable and reliable youth service sector in the Northern Territory. Darren Young, Northern Territory State Director at Mission Australia, described the impact of short funding cycles and the instability it creates:

> The 12 month cycle creates uncertainty and an administrative burden on our organisation in terms of retendering for programs … the time spent doing this every 12 months is time lost actually improving and assessing the programs over longer periods of time.[15]

Longer funding cycles would enable further program development and improve outcomes for clients and the wider community.

[12] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [59].
[13] Oral evidence of J. Wright, 11 May 2017, 3775:17-45. See also Exhibit 484.001, Annexure A to the statement of Will MacGregor, Bushmob Aboriginal Corporation Submission to the Royal Commission, 25.
[14] See oral evidence of Olga Havnen, 1583:7–16.
[15] Exhibit 381.000, Statement of Darren Young, 26 April 2017, [43].

Recommendation 80	That the Northern Territory Government ensures funding is available to programs for a period of three to five years.

7.2 Availability of mental health services for youth

7.2.1 Inadequate mental health services

The Commission has heard numerous examples of insufficient availability of mental health services for young people in the Northern Territory.[16] Culturally appropriate, trauma-informed therapeutic counselling services and access to specialist services such as adolescent psychiatry are in particularly high demand.[17] Youth lawyers provided evidence regarding a lack of mental health services in the Northern Territory resulting in delays of up to five days for obtaining urgent mental health assessments through the courts.[18] They also referred to occasions where there had been no follow through with mental health assessment requests at all.[19]

The Commission has also heard examples of inadequate early intervention programs and services:

> [I]t would be great if we had some more trauma counsellors … [to] work with kids who maybe weren't charged with something but have been, you know, seen. We are seeing younger and younger kids in Alice Springs. It would be good if things were put in place to find out why they are doing these things. What things we can do to keep them from getting into the justice system.[20]

> [W]e do not have a specific child/mental health specialist in Katherine. They have to come from Darwin. They might be here for two days in a whole month. If Katherine had mental health and support services in town to case conference with families and children, this would greatly assist caseworkers in providing early intervention services.[21]

Similarly, the Commission has heard there is a particular lack of mental health, disability and neuropsychological experts available to provide reports and ongoing treatment and support for young people appearing before Youth Justice Courts across the entire Northern Territory.[22] Additionally, there is a gap in services available for the diagnosis and management of foetal alcohol spectrum

[16] Oral evidence of Adam Giles, 28 April 2017, 3304:20-30; 3305:25-31; oral evidence of Michael Yaxley, 30 March 2017, 2263:10-20; oral evidence of Salli Cohen, 30 March 2017, 2371:10-16; oral evidence of Dr Joseph McDowall, 23 June 2017, 4930:35-44.
[17] Oral evidence of Sandy Lau, 9 May 2017, 3630:12-15; Oral evidence of Dr Creati, 23 March 2017, 1732:30-1733:45; Exhibit 142.022, Precis of Evidence of Stuart Kinner, 23 March 2017, [9].
[18] Oral evidence of Shahleena Musk, 9 May 2017, 3630:33-45.
[19] Ibid.
[20] Oral evidence of J. Wright, 11 May 2017, 3773:7-12.
[21] Exhibit 523.000, Statement of Tracy Hancock, 25 May 2017, [24].
[22] Exhibit 354.000, Statement of Anna Gill, 2 May 2017, [25].

disorder.[23] This is discussed in section 6.7.3 where we recommend that a dedicated mental health worker is employed at the Youth Justice Court.

In our Submissions on Child Protection, NAAJA recommends that the Northern Territory Government give consideration to housing youth mental health services in a statutory authority responsible for service delivery across both youth justice and child welfare systems, rather than in the Department of Health.

Recommendation 81	That community mental health services are expanded so that screening and support is available to all young people in the Northern Territory.

7.2.2 Mental health alternatives to detention

There is a critical need for programs that young people who suffer from mental health or cognitive difficulties can access as alternatives to juvenile detention.[24] Incarceration is not appropriate for children and young people with neurocognitive disabilities and yet the lack of alternative options often leaves the Youth Justice Court no option other than detention. Further, although some programs may be appropriately delivered in a detention facility, mental health services are inherently more effective when delivered in a therapeutic environment, rather than a punitive setting such as a detention centre.[25]

The Northern Territory Government has acknowledged that some young people in detention would be more appropriately housed in a youth mental health facility.[26] Although requests for such services have been made,[27] there is no dedicated facility in the Northern Territory,[28] and no plans to rectify this critical gap in service provision.[29]

While options in the Northern Territory are severely limited for mental health services for youth with cognitive disabilities, evidence before the Commission indicates that appropriate housing and a dedicated caseworker for each young person with mental health difficulties on diversion or a supervised order would be a worthwhile investment:

> Housing again is essential. You must have a safe and stable place, they mustn't be moving all the time and it must be a place where the supports can come in … it depends on the level of need of the young person. Sometimes people need 24 hour support.

[23] Ibid.
[24] Research indicates at least 50% of children in detention have some form of disability and around 60% have significant mental health problems: APO NT Joint submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, Section 4.3 Availability of trauma support & counselling for Aboriginal young people in the community.
[25] Oral evidence of Eileen Baldry, 8 May 2017, 3500:25–35.
[26] Oral evidence of Jeanette Kerr, 8 May 2017, 3540:1–5.
[27] Oral evidence of M.J. Shanahan 11 May 2017, 3762:25–30.
[28] The only residential mental health option is within the Royal Darwin Hospital. See oral evidence of Jeanette Kerr, 8 May 2017. 3540:15–21.
[29] Oral evidence of Jeanette Kerr, 8 May 2017, 3540–3541.

> But we do this for middle class Australians. Why are we not doing it for Aboriginal children? So we can do it. We have the resources. We have the skills. We know how to do it.[30]

Benefits of such an approach include reduced recidivism, reduced engagement with the justice system and increased life skills, resulting in future cost savings on government services.[31]

The Commission has heard from professionals in other jurisdictions in relation to alternative facilities for youths with intellectual challenges. For example, Perry House in Victoria offers a living skills residential program for young people 17 to 25 years old with intellectual disabilities who are involved with the criminal or youth justice systems. Perry House is a four-bedroom house, staffed 24 hours per day and supports people exiting the justice system or who are at risk of homelessness to develop independent living skills through a range of activities.[32] Evidence suggests that small scale, home-like models such as this example are preferential to larger institutional models of care. A model similar to Perry House, adapted to local community-identified needs, should be considered for the Northern Territory.[33]

7.2.3 Remote communities

The lack of adequate mental health services is even more pronounced in rural and remote communities where there are no specialist child or adolescent psychiatry services available.[34] The Commission has heard that the lack of Darwin-based mental health specialists often results in interstate practitioners attending assessment appointments in remote communities via video link.[35] If treatment is required, the specialist must fly to Darwin and then out to the remote community, resulting in delays in accessing services and lengthy adjournments for court matters.

As described in APO NT's Submissions to the Royal Commission, the Child and Adolescent Mental Health Service within the Top End Mental Health Service expressly excludes children in regional and remote areas who present with neurodevelopmental disorders and developmental problems.[36] The lack of available services means that many children with cognitive difficulties do not receive the support they need, which increases the likelihood of contact with the justice system and ending up in youth detention. This risks further exposure to trauma and is a lost opportunity to engage these young people in support services that could reduce offending and recidivism.[37]

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[30] Oral evidence of Eileen Baldry, 8 May 2917, 3501:30-36. See also, oral evidence of Tracy Luke, 11 May 2017, 3801:10-15.
[31] Ibid, 3502:25–40.
[32] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, [51]–[52].
[33] Oral evidence of Janet Wright, 11 May 2017, 3771:32-3772:2, 3778:9–35.
[34] Oral evidence of Sandy Lau, 9 May 2017, 3630:10–20.
[35] Ibid.
[36] It is noted that excluded children may be managed by the adult mental health teams: APO NT Joint submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, Section 4.3 Availability of trauma support & counselling for Aboriginal young people in the community.
[37] Oral Evidence of Eileen Baldry, 8 May 2017, 3501:20–27.

7.3 Availability of drug and alcohol rehabilitation services for youth

Alcohol, tobacco and other drug use is a key driver of offending and of poor health outcomes for young people involved in the youth justice system.[38] There is a near-absence of culturally appropriate, effective detoxification and rehabilitation facilities for young people, particularly in the Top End. The high demand for youth-focused rehabilitation services is not being met by the few services that exist, and is a considerable barrier to effective intervention and treatment for Aboriginal young people.

While many programs implemented by government seem to be ineffective,[39] the Commission has heard from two holistic residential healing programs in Central Australia that exemplify the strengths and success of community-based drug and alcohol rehabilitation programs and could, with appropriate community consultation and resourcing, be effectively replicated across the Northern Territory.

7.3.1 Walpiri Youth Development Aboriginal Corporation – Yuendumu

The Mount Theo Outstation is a locally and internationally recognised[40] rehabilitation program for Walpiri youth 'based on a cultural approach to healing and wellbeing [that] seeks to address underlying issues that may have brought about a person's poor state of health or anti-social behaviour.'[41] Operated by the Walpiri Youth Development Aboriginal Corporation in Central Australia, the Mt Theo program's successful history includes a 100 per cent success rate eliminating a mid-1990s youth petrol sniffing crisis.[42]

Despite the program's successful track record, its availability is limited by cultural requirements and growth challenges.[43] For example, despite increasing demand for its services from the courts, Northern Territory Government funding has stagnated over the past four years, which has prevented the program from hiring much-needed additional staff and completing urgent infrastructure upgrades.[44]

Nevertheless, features that are credited with the program's success could be applied to the development of similar programs in other locations.[45] These features include a multi-faceted

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[38] Precis of Evidence of Stuart Kinner, 23 March 2017, [17]-[18].
[39] Refer to Topic 9 Submissions on exit planning and post release support.
[40]Exhibit 371.002, Annexure 2 of statement of Matt Davidson, Mt Theo Outstation and rehab centre program brief, [9].
[41] Exhibit 371.000, Statement of Matt Davidson, 26 April 2017, [31].
[42] Karissa Preuss and Jean Napanangka Brown, 'Stopping petrol sniffing in remote Aboriginal Australia: key elements of the Mt Theo Program' (2006) 25 Drug and Alcohol Review [189]–[193] <http://wydac.org.au/home/wp-content/uploads/2015/06/2006-Stopping-petrol-sniffing-in-remote-Aboriginal-Australia-paper.pdf>.
[43] Only young people with links to Warlpiri heritage are eligible due to the sacred site status of the location and associated program. See exhibit 371.000, Statement of Matt Davidson 26 April 2017, [34].
[44]Exhibit 371.000, Statement of Matt Davidson, 26 April 2017, [58]–[74].
[45]Karissa Preuss and Jean Napanangka Brown, 'Stopping petrol sniffing in remote Aboriginal Australia: key elements of the Mt Theo Program' (2006) 25 Drug and Alcohol Review [189]–[193] <http://wydac.org.au/home/wp-content/uploads/2015/06/2006-Stopping-petrol-sniffing-in-remote-Aboriginal-Australia-paper.pdf>

approach;[46] being community initiated, supported and owned;[47] being focused on community engagement; and building strong cross-cultural partnerships between co-workers.[48]

7.3.2 Bushmob – Alice Springs

Bushmob is the only open residential rehabilitation program for young people (aged 12 to 25) in the Northern Territory. It is an intensive, therapeutic and holistic program for high risk young people whose complex needs include alcohol and other drug use and recidivistic engagement with the youth justice system.[49] The majority of young people who attend the program are Aboriginal.[50] The program's positive reputation and effectiveness reflects a high degree of Aboriginal community engagement and oversight.[51]

The Commission has heard that delays, bureaucracy and short funding cycles have negatively affected Bushmob's ability to operate its Alice Springs and Loves Creek Station residential camp programs at full capacity.[52] In relation to the Loves Creek sentenced youth camp pilot project, Territory Families had promised the rectification of critical safety and security infrastructure problems including unreliable phone communication systems, lighting and cameras, and inadequate on-site water and power supplies.[53] Following numerous unsuccessful attempts to resolve the issues, Bushmob recently announced it will withdraw from the pilot program due to the unacceptable ongoing occupational health and safety concerns.[54]

Inadequate funding is not the only operational challenge. The program's ability to employ local Aboriginal staff familiar with local languages and kinship connections is hampered by the requirement for staff to hold formal higher education qualifications. The requirement does not adequately reflect the value of attributes that cannot be obtained in a formal course. Administrative burdens such as short six-month funding cycles also negatively impact staff recruitment, retention and training, creating unnecessary difficulties in operating Bushmob's successful programs.[55]

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[46] Comprising the use of an outstation located over 50km from the nearest major road on culturally significant land, and the provision of youth activities such as sports, discos, film nights and cultural activities.
[47] Including courageous decisions from Aboriginal elders to break with some cultural tradition to allow people other than family group members to care for children.
[48] In addition to liaising between government agencies and communities to an extent beyond which most remote Aboriginal people are willing or able to do, an important role of non-Aboriginal staff is to assist in overcoming common cross cultural challenges to petrol sniffing interventions, such as socio-cultural norms of autonomy and non-interference conflicting with zero tolerance in the community (and the associated need to require young people to attend rehabilitation, sometimes against their will.)
[49] Exhibit 484.002, Annexure B to Will MacGregor's statement, The Bushmob model of treatment, [2].
[50] Exhibit 484.000, Statement of Will MacGregor, 9 May 2017, [49].
[51] Ibid, [79]–[83].
[52] Due to funding limitations, only 15 out of 20 potential residential placements in Alice Springs are operational. Similarly, only 10 out of a potential 15 residential places are operational at Loves Creek Station.
[53] BushMob Aboriginal Corporation, Press Release, 11 July 2017.
[54] Ibid.
[55] Exhibit 484.000, Statement of Will MacGregor [57]–[61].

Recommendation 82	That flexible timelines are employed for staff of Aboriginal-controlled service providers to work towards formal qualifications concurrently with employment.

7.3.3 The need for multiple service options

The Commission has also heard that there is a need for more than one residential youth drug and alcohol treatment option:

> There is a gap in programs for young people under 18 years of age. In particular more programs addressing alcohol and drug issues is needed. There is currently only one such program in Alice Springs 'Bushmob' which does a great job, [but] we often have young mothers or kids who have experienced conflict in this residential setting and it would be good to have an alternative.[56]

Evidence before the Commission indicates that funding for Bushmob and the Drug and Alcohol Service Association was reduced in the most recent budget.[57]

Recommendation 83	That funding for Aboriginal-controlled residential healing and drug and alcohol rehabilitation services is increased to existing services and provided to establish new services to meet demand and provide alternative options.

7.3.4 Top End services

Despite repeated calls to establish more alcohol and other drug services in the Top End, there is currently no dedicated residential drug and alcohol rehabilitation program for young people in the Top End. The few existing non-residential rehabilitation programs are unable to meet demand.[58] The Council for Aboriginal Alcohol Program Services provides a volatile substance abuse residential program for young people aged 12 to 24 years old; however, the residential drug and alcohol program is not open to young people under 18. As outlined in previous submissions,[59] NAAJA is concerned about the escalation in youth substance misuse and related offending and has advocated for establishment of ongoing, community-based rehabilitation support programs and services to deal with the range of issues associated with substance misuse.[60]

[56] Exhibit 368.000, Statement of Janet Wright, 2 May 2017, [61].
[57] Ibid [14].
[58] Oral evidence of J. Kerr, 8 May 2017, 3524:9-36; Exhibit 370.000, Statement of Tracy Luke 30 March 2017, [160]–[166].
[59] APO NT, Submission to the NT Legislative Assembly Select Committee on the prevalence impacts and government responses to illicit use of the drug known as "ice" in the Northern Territory, 13 May 2015, 4.
[60] See APO NT Submission to the Royal Commission.

Recommendation 84	That a dedicated residential alcohol and other drug treatment facility for Aboriginal young people, controlled by a local Aboriginal organisation, is funded to operate in the Top End as a priority.

7.4 Availability of other programs for youth including residential programs

7.4.1 Community-led programs

Evidence before the Commission demonstrates that improving community consultation and supporting community-led programs and initiatives is more successful than imposing programs on communities without adequate consultation:

> I think … programs, culturally appropriate ones need to be run by those communities and by the community members. I think we have made mistakes in the past by trying to force programs on those communities without adequate consultation.[61]

Communities should be supported to develop and run programs for young people, including those on youth justice orders or diversion.[62] The Balunu and Drum Zone programs are examples of intervention programs that are therapeutically based, community led and supported and offer models upon which to base future programs.

Balunu

Balunu is an Aboriginal owned and operated charity based in Darwin offering culturally appropriate healing and therapeutic programs for at-risk, disadvantaged Aboriginal young people. It is an example of an effective therapeutic intervention and healing program that addresses issues commonly affecting youth engaged in the justice system such as substance abuse, depression and antisocial behaviour. The programs cover health, culture, education, life skills, family issues and employment, with a strong emphasis on emotional wellbeing. Primarily delivered in a multi-day healing camp format, the program enables participants to build trusting relationships and reconnect with culture in a holistically therapeutic environment.[63]

Beginning with a small private sector grant in 2005, the program was so successful it attracted Northern Territory Government funding the following year and successfully grew to running eight camps per year from 2008/09. Balanu was suddenly defunded after the change in government at the end of 2012, despite the positive evaluations from both participants and a formal program evaluation. The loss of funding forced Balunu to cut their operations in half and the current shoestring budget and heavy reliance on donations means that the future of this effective program hangs in the balance.[64]

Evidence before the Commission demonstrates that a multitude of crime reduction programs that are ill-suited, ineffective and hardly used currently receive Northern Territory Government funding.[65] It is

[61] Oral evidence of M.J Shanahan, 11 May 2017, 3768:15–16.
[62] See Topic 3 for further submissions on diversion programs.
[63] Exhibit 630.000, Statement of David Alan Cole, 24 May 2017, [7].
[64] Ibid, [28].
[65] Exhibit 375.000, Statement of CB, 10 May 2017, [74]–[93]. See also submissions on topic 9.

incumbent on the Commonwealth and Northern Territory governments to preference adequate funding of successful programs such as Balanu and other similar holistic therapeutically based programs, which are culturally safe and appropriate, well planned and highly sought after.[66]

Drum Zone

There is a need to expand therapeutic programs that address the underlying complex trauma that commonly affects young people who come into contact with the youth justice system. In the experience of witness Geoff Radford, a coordinator of youth programs with Relationships Australia, these types of programs are effective, especially for the most vulnerable clients: 'It is often the case that with this client base a tough approach is completely ineffective.'[67]

The Drum Zone Program is an example of an effective evidence-based therapeutic program that is available but underused. The drumming program is designed to engage young people, address problematic behaviours, teach social skills and build self-esteem. The program helps address complex trauma and is supported by recent developments in neurological research highlighting the benefits of rhythmic actions on primal brain systems associated with anxiety and emotional control.[68] Despite multiple successful evaluations,[69] present funding only allows for the program to run in Alice Springs two to four times per year.

7.4.2 Boredom

Evidence before the Commission shows that built environments conducive to prosocial activities and opportunities to engage in free activities are lacking for young people in the Northern Territory. Such programs would be simple, effective and relatively inexpensive to implement and may divert young people from involvement in crime. In the view of Mr Radford, 'many more people would avoid offending if there were something more interesting for them to do, and providing activities for young people that are of interest to them should be a high priority.'[70]

For example, there is a gap in funding for late night activities for young people in Alice Springs,[71] and a lack of free activities or open space for young people to use at any time of day, such as sports ovals and basketball courts.[72]

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[66] For example, David Cole recounts a conversation with a senior law man and healer from Maningrida who confided that he had been waiting for 30 years for an organisation like Balunu to come to his area. See Exh.630.000, Statement of David Alan Cole, 24 May 2017, [35]. See also oral evidence of Samantha Taylor-Hunt, 12 May 2017, 3905:15-3906:2.
[67] Exhibit 373.000, Statement of Geoff Radford, 26 April 2017, [78].
[68] Ibid.
[69] Holyoake, *Summary of Evidence – Holyoak's Drumbeat program* <https://www.holyoake.org.au/drumbeat/assets/DRUMBEAT-Summary-of-Evidence.pdf>
[70] Exhibit 373.000, Statement of Geoff Radford, 26 April 2017, [99].
[71] Ibid, [80].
[72] Ibid, [81].

7.4.3 Remote communities

There is a shortage of programs for young people in regional and remote communities; funding and support for Aboriginal-led organisations is needed to build capacity and expand programs in areas of identified need.

The Commission has heard evidence that poor program coordination, funding inefficiencies and failures to prioritise capacity building in local Aboriginal organisations has had a particularly negative effect on remote communities:

> I think governments have to get real about who are likely to be the long-term ongoing residents in those places … I think by investing in [local service providers], strengthening that capacity and capability, would deliver far better outcomes.[73]

Ms McKenzie, Manager of Youth Services for the Malabam Health Board Aboriginal Corporation at Maningrida (Malabam) gave evidence about the situation in Maningrida:

> In my opinion, our crime problem may be due to a lack of discipline imposed on young people, overcrowding within homes and boredom. Given current funding we have restricted hours and there isn't much else for young people to do in Maningrida.[74]

Ms McKenzie identified examples of gaps in basic programming such as needing an afterschool care program for children under 10, a youth counsellor for young people disengaged from school, more traineeships and cadetships, and opportunities for work experience out of school hours.[75] Given that half the population of Maningrida is under 25 years of age,[76] addressing these basic gaps in youth programming would be of significant benefit to the young people who participate and the community as a whole.

Evidence before the Commission suggests that lack of early parenting support and the defunding of women's resource programs in remote communities has had a negative impact on families' ability to learn effective skills for raising children in contemporary Australia.[77] Olga Havnen, CEO of Danila Dilba, observed that 'raising children is a really complex and difficult task, and I think Aboriginal parents need to be better supported to do that … in a way that works for them culturally as well.'[78]

Evidence suggests that, due to funding inefficiencies, remote communities receive less than 60 cents for each dollar allocated for remote programs.[79] Attention has also been drawn to numerous programs requiring improved funding and coordination. For example, the Northern Territory Government provides funding for Malabam's youth diversion program; however, the amount is not only

[73] Ibid, 1581:17–20.
[74] Exhibit 387.000, Statement of Noeletta McKenzie (Young), 24 April 2017, [18].
[75] Ibid, [59]–[65].
[76] Ibid, [17].
[77] Oral evidence of Olga Havnen, 1587:30–1588:45.
[78] Ibid, 1588:30–47.
[79] Ibid, 1579:30–34.

inadequate to cover demand for the diversion program, it also does not contribute to Malabam's general youth programs, which are attended by young people on diversion.[80]

Recommendation 85	That funding arrangements are streamlined and coordinated to invest in and empower local Aboriginal organisations to deliver culturally appropriate youth programs and services. Capacity building and co-design must be incorporated into funding arrangements.

7.4.4 Housing

To prevent entrenchment of young people in the justice system, support services must target the underlying factors that contribute to offending. Safe and affordable housing is essential to people's ability to lead productive lives and research has shown that unstable housing is the 'most significant factor' affecting rates of return to prison.[81] Professor Eileen Baldry told the Commission:

> Housing is an absolutely crucial aspect … for everybody about everything and the very poor housing circumstances of many Indigenous Australians, particularly in rural and remote places, needs to be addressed.[82]

Evidence before the Commission has highlighted the lack of housing programs available to youth, including severe gaps in transitional accommodation for young people exiting detention.[83] Transitional accommodation for young people on release from detention is crucial to prevent homelessness. Rather than large unsupported hostels, NAAJA advocates a small-scale accommodation model with intensive case management supports to assist young people with complex needs at the time of release and as needed over time.[84]

Recommendation 86	That small-scale supported accommodation for youth, designed in a location specific and culturally appropriate way, is developed and implemented across the Northern Territory.

7.4.5 Supported accommodation

As outlined in topic 5 of these submissions,[85] there is a critical need for supported youth accommodation in the Top End, especially as an alternative to remand for young people from outside the Darwin area, who make up more than half of the population of youth in detention.[86] Supported bail accommodation is also needed for young people who live in Darwin but who have unstable living

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[80]Exhibit 387.000, Statement of Noeletta McKenzie (Young), 24 April 2017, [54]–[56].
[81] Exhibit 382.000, Statement of Julie Edwards, 24 April 2017, [49].
[82] Oral evidence of Eileen Baldry, 8 May 2017, 3497:17–20.
[83] Exhibit 381.000, Statement of Darren Young, 26 April 2017, [87]. See also oral evidence of J. Wright, 11 May 2017, 3773:12–17, 3776:1–6.
[84] Exhibit 381.000, Statement of Darren Young, 26 April 2017, [87]. Oral evidence of Darren Young, 12 May 2017, 3911:25–38.
[85] Please see topic 5, section 5.5.3.
[86] Exhibit 115.001, Statement of Olga Havnen, 16 February 2017, [54-55].

arrangements that do not fit Community Corrections supervision requirements.[87] The establishment of bail support accommodation for boys at Yirra House in Darwin is a positive development. However, therapeutic accommodation options should be established across the Northern Territory.

Alice Springs Youth Accommodation and Support Services (ASYASS) is the only youth-specific homelessness service in Alice Springs. Demand currently outstrips the capacity of the service.[88] ASYASS employs an integrated service model, enabling clients to access holistic care that links in with other service providers such as education, Centrelink and job services.[89]

According to Janet Wright, CEO of ASYASS, not only does demand from eligible participants outstrip capacity, there are people whose circumstances ASYASS cannot accommodate safely and so must turn away. There is a gap in services for young people aged 21 to 25 and 11 to 14, girls under age 15, victims of domestic violence who require a secure facility, and parents with more than one child.[90] Although these gaps have been drawn to the attention of Territory Families, they have not indicated any plans to increase resources to help address these issues.[91]

The recent announcement of a new bail support facility to be built in Alice Springs and run by Territory Families is welcomed, however a rigorous consultation process must be undertaken to ensure the facility is designed and managed with therapeutic, rehabilitative principles.

Witnesses have expressed concern that there has been little consultation to date and the proposed facility may end up resembling a quasi-detention facility that is positioned too far from services and programs located in the town's centre.[92]

[87] Exhibit 370.000, Statement of Tracy Luke 30 March 2017, [162]–[163]; oral evidence of Shahleena Musk, 9 May 2017, 3614:45-47.
[88] Oral evidence of J. Wright, 11 May 2017, 3770:10–26.
[89] Ibid, 3772:25–35.
[90] Exhibit 368.000, Statement of Janet Wright 2 May 2017, [56]-[58] and oral evidence of Janet Wright, 11 May 2017, 3779:25–35.
[91] Oral evidence of Janet Wright, 11 May 2017, 3780:7–10.
[92] Exhibit 368.000, Statement of Janet Wright 2 May 2017, [59]. See also, oral evidence of Janet Wright, 11 May 2017, 3777–3778.

8 Territory Families role

8.1 Attendance at court, including as a responsible adult

8.1.1 Court attendance and sharing of information

If a child is in the care of the CEO of Territory Families,[1] Territory Families has responsibilities 'to protect children from harm and exploitation',[2] 'to maximise the opportunities for children to realise their full potential',[3] and to assist families to achieve the aforementioned objectives.[4]

Therefore, it is central to the role of a Territory Families caseworker that they are always present at every Youth Justice Court appearance of a child or young person in their care. The caseworker's foremost considerations in circumstances where they are 'responsible adult' for the child should be:

- promoting and safeguarding the wellbeing of the child[5]
- ensuring that the child is treated in a way that respects their dignity and privacy[6]
- ensuring that the best interests of the child are the paramount concern when making decisions that relate to them.[7]

The caseworker is legislatively required to provide support and assistance to the child in a way that upholds these principles.[8] The provision of support is clearly more than just mere presence – though that is a tangible and important feature. Caseworkers know the child and are able to provide information to assist Youth Court Judges, legal practitioners and other support agencies to find solutions that are in the best interests of the child.

The provision of information and support should be tailored to the specific needs of the young person and families, whether it is access to psychological, psychiatric and disability services, alternative bail accommodation, links to government and non-government agencies and positive child programs and services.

8.1.2 A history of failure

There is strong and consistent evidence before the Commission that in the past Territory Families caseworkers have not always attended court.[9] Witnesses before the Commission noted that attendance has improved since the Royal Commission began – a Territory Families worker is always at court, even if they aren't the child's particular caseworker.[10]

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[1] See the *Care and Protection of Children Act* (NT) s 67(1).
[2] Ibid, s 4(a)(i).
[3] Ibid, s 4(a)(ii).
[4] Ibid, s 4(b).
[5] Ibid, s 7.
[6] Ibid, s 9(1).
[7] Ibid, s 10(1).
[8] Ibid, s 6(2).
[9] See, eg, Oral evidence of Jeanette Kerr, 8 May 2017, 3525; Oral evidence of Anna Gill, 9 May 2017, 3626; Exhibit 332.001, Statement of Jared Sharp, 21 March 2017, 16.
[10] Oral evidence of Anna Gill, 9 May 2017, 3626.

Ms Kerr has indicated that there are no policies in place for when caseworkers should attend court. While she asserted that it is not possible for individual caseworkers to attend every court appearance, Ms Kerr acknowledged that Territory Families does need to improve in this regard. Territory Families has indicated that it will provide a court liaison support role, to undertake a quick assessment of suitability for diversion and other programs and to ensure all relevant information from caseworkers is before the court.[11] Ms Kerr told the Commission:

> In relation to specific case workers, it's not possible. But, yes, we should have a resource there, and if we don't have an adequate resource there that can provide the information, that would be a failure, if it meant that a young person was remanded in custody longer … we are absolutely committed to integration across youth justice and care and protection with one key model worker in mind.[12]

The Commission has heard that the impact of not having the young person's caseworker at court, and having a Territory Families representative who doesn't have knowledge of the particular child, is that court is adjourned while the required information is gathered.[13]

NAAJA strongly rejects this acceptance of direct caseworkers' failure to attend children or young person's court appearances. There are limited numbers of Aboriginal children and young persons who actually attend the Youth Justice Court on any given day. Any failure to address their needs through adequate resourcing, planning and rostering perpetuates a culture of failure.

Recommendation 87	That both Territory Families and the Youth Justice Court adopt policies and practices to ensure that the caseworker who is best placed to assist the child shall be present at court to support the child.
Recommendation 88	That the caseworker shall attend the Youth Justice Court prepared to provide information that is best able to assist the child.

8.1.3 Responsible adults

The role of responsible adults is vital to ensure children are treated fairly, their rights are respected and they understand what is occurring.[14] It is therefore crucial that they receive appropriate training to ensure they can fulfil their responsibilities properly and are cognisant of the kinds of issues that may face children in contact with the youth justice system such as specific vulnerabilities, mental health issues or disability.

NAAJA has set out, in sections 2.6.2 and 5.2.3, the importance of responsible adults and how in many instances Aboriginal families and persons have been excluded in favour of mainstream organisations and Territory Families as the carer of the child. Our service is aware of instances of caseworkers failing to promptly attend a police station as the responsible adult for bail. In one instance, police kept the

[11] Oral evidence of Jeanette Kerr, 8 May 2017, 3525:6–45.
[12] Oral evidence of Jeanette Kerr, 8 May 2017, 3537:30–47.
[13] Oral evidence of Jeanette Kerr, 8 May 2017, 3525:25–29.
[14] Exhibit 332.001, Statement of Jared Sharp, 21 March 2017, 7.

child imprisoned in a cell for a period of two hours, where he became frustrated, caused property damage, was further charged, denied bail and remanded in Don Dale for three days in the Behavioural Management Unit.

Where an Aboriginal child or young person is in the care of Territory Families, their caseworker has a vital role in ensuring their safety during arrest, release and attendance at Youth Court. The duty of care that Territory Families has in its care and protection of a child must extend to its obligations in being appointed by police or courts as the responsible adult in the arrest,[15] charging,[16] grant of bail and attendance at all Youth Justice Court proceedings.

8.1.4 Territory Families unsuitability for record of interviews

It is NAAJA's considered legal position that Territory Families caseworkers or Youth Outreach and Re-Engagement Officers are unsuitable to act as a responsible adult or support person in the electronic record of interview or questioning of a child suspect, as it is not in the best legal interest of the child. There is, at the very least, the perception of apparent conflict of interest for Territory Families to perform this function for the child, and the real risk of an actual conflict of interest arising. This is due to the roles currently undertaken by Territory Families, providing the support worker, caseworker, diversion worker probation manager, through-care worker as well as those employed at the youth detention centres.

Any function as a support person in questioning must be wholly independent of Territory Families.

Proposed finding	That Territory Families are unsuitable for the role of support person in the questioning of a child.

Recommendation 89	That Territory Families workers are precluded from performing the role of support person during police interviews.
Recommendation 90	That Territory Families fund an independent Aboriginal community-controlled organisation to provide interview support to children in the care of the CEO if family members are unavailable or inappropriate.

8.2 Provision of information and reports to the court

8.2.1 Pre-sentence reports

NAAJA has consistently complained about the quality, timeliness and accuracy of pre-sentence reports provided to the Youth Justice Court by the Department of Corrections. The reports are often of poor quality, slow to be obtained, contain inappropriate information, fail to use interpreters and contain irrelevant material such as the subjective opinions of unqualified workers. Fundamentally they lack relevant cultural information about an Aboriginal child appearing before the Youth Justice Court. Terry

[15] *Youth Justice Act* (NT) s 23.
[16] *Youth Justice Act* (NT) s 35.

Byrnes, a former NAAJA employee, outlined his concerns with pre-sentence reports to the Commission:

> Under the former government, and when I first began working as the Youth Justice Worker, the documents we were receiving from Corrections and Territory Families were damming and unhelpful for the young person to navigate through the court system. Worse than that they were at times openly unsympathetic to the young people. This was the environment that was fostered by the former regime.
>
> Corrections reports often adopted a disparaging tone towards the young people, offering little more than a list of appointments that the young person has not kept (which is often not the child's fault) and a litany of wayward behaviour as opposed to a plan for what we need to do to move forward and support them …
>
> The reports should concentrate on the young person's strengths with an eye to their rehabilitation and hope for the future. These reports are handed up in court and form part of the judgments, so their importance is self-evident. They routinely seemed to be weighted against the person.[17]

NAAJA recognises that the format of pre-sentence reports has recently improved to some extent under Territory Families – the reports are now strengths based. This has been brought about by the transfer of Darwin-based former Department of Corrections staff to Territory Families. However, this is limited to the Darwin region. Remoter regions are still primarily serviced by Corrections staff and, in our opinion, provide pre-sentence reports of the same previous poor quality.

A fundamental flaw of pre-sentence reports remains that they are problem-focused rather than being solution-focused and based on the suitability of programs and support services to meet the child's individual needs or vulnerabilities. There is also a tendency to address needs with services that can only be provided in detention, or in isolation from family or community when it comes to specialist mental health or health needs.

Any pre-sentence report should holistically address all dimensions of a child's health and wellbeing. NAAJA recommends that a specialist team of Aboriginal pre-sentence report writers is created to prepare pre-sentence reports for all Aboriginal young people. An Aboriginal person is best placed to write these reports and coordinate the contribution of experts to such reports. NAAJA calls for a standing panel of qualified child and adolescent health professionals to be established to provide expert consultation to the report writer about any further investigations and reports that should be undertaken to address the child's health and wellbeing needs. We envision that the members of the expert board would undertake the relevant assessment where possible.

The compilation of any pre-sentence report must include the use of Aboriginal language interpreters where the child does speak English as a first language.

[17] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 8.

It is NAAJA's view that reports should provide comprehensive and appropriately sourced cultural information and alternative options to detention that come from the community. Law and Justice Groups and Elders are examples of people who may be resourced and trained to provide input into reports on the cultural context, background material and appropriate alternatives to detention. This is recommended in s 6.8.5.

Recommendation 91	That a specialist team of Aboriginal pre-sentence report writers is established.
Recommendation 92	That a panel of qualified child and adolescent health practitioners is established to provide advice to the pre-sentence report writer and, where appropriate, to undertake assessments and write expert reports.

8.2.2 Section 51 reports

Section 51 of the *Youth Justice Act* can be an important tool for providing interventions to improve the wellbeing of young offenders. The section provides that where the court believes that a youth offender may be in need of protection or there is a risk to the wellbeing of the youth, the court may require the Territory Families CEO to investigate the circumstances of the youth, take appropriate action to promote the wellbeing of the youth and report on the youth's circumstances and the action taken to the court.

The Commission has heard that s 51 reports are not working as intended. Justice Hilary Hannam told the Commission:

> [S]ection 51 is a good section in the sense that it recognises that nexus between welfare issues and offending and I think it had great potential, but the trouble is the Department of Children and Families [DCF], I don't think, understood what their role was in this regard…[18]

Justice Hannam's testimony was that Territory Families workers would often disagree with magistrates about the need for protection or risks to wellbeing, even where they were not going to school and were engaged in offending. Often no appropriate action would be taken to address the young person's wellbeing. Justice Hannam pointed to resourcing pressures and the normalisation of risk in communities as possible reasons for these failures.[19]

In her judgment for *Police v FC and AB*, Justice Hannam also described the poor quality and inappropriate information contained in s 51 reports, which further highlights the lack of understanding Territory Families has had about the role they should play:

> Unfortunately the reports provided by the Office of Children and Families are not particularly helpful. Rather than investigate risks to the wellbeing of the youths, take action to promote their wellbeing and report on the actions, the reports simply contain

[18] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3426–3428.
[19] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3426–3428.

> general statements about the youth's offending behaviours and the youth justice system itself such as 'Wadeye Correctional Services ... will work with AB and his co-offenders after sentencing' and 'AB could greatly benefit from community schemes and programs that are available in Wadeye community aimed at reducing his risk of re-offending'.[20]

Section 51 reports must be able to be produced in shorter timeframes where circumstances require. Evidence before the commission indicates that young people are still being held in remand where no responsible adult can be contacted and while waiting for a s 51 report.[21] In our 2011 submission to the Youth Justice Review Panel, NAAJA wrote:

> NAAJA Youth Justice Court lawyers regularly encounter the situation where it is difficult to contact a responsible adult for a young person. In situation such as this, and where there are concerns for the young person's welfare, a court may order a report under section 51 of the Youth Justice Act as to whether the youth is in need of protection. At present, this leads to a situation where the young person is remanded in custody, and in our experience, it is all too often that the young person is remanded for several weeks pending the preparation of the report. It is essential that s 51 of the *Youth Justice Act* be amended to enable the court to require the urgent provision of a s 51 report within 48 hours.[22]

Recommendation 93	That s 51 of the *Youth Justice Act* is amended to enable the court to require the urgent provision of a s 51 report within 48 hours.

8.3 Access to legal representation for children in care

It is crucial that children are able to speak to a lawyer and prepare themselves for legal proceedings by obtaining early legal advice or representation. In NAAJA's experience, Territory Families does not routinely contact a young person's lawyer when notified that they are in police custody or have been bailed or summonsed to court. Ms Shahleena Musk described her experience while working for NAAJA:

> I often felt many of the case workers failed to ensure that the children had appropriate access or the opportunity to obtain legal advice and/or representation. As an example, there have been many instances of children in police custody not advised to speak to, or told that they could speak to, a lawyer or given the opportunity to do so. Another common occurrence is that even when youth had been bailed or summonsed to go to court on a future date, no attempt was made by the case manager to arrange an appointment with a lawyer beforehand to ensure they were given advice. This is even

[20] Exhibit 337.024, *Police v FC and AB* [2013] NTMC 008, 22 May 2013, 5–7.
[21] Oral evidence of Shahleena Musk, 9 May 2017, 3629:24–39.
[22] NAAJA, Submission to the Youth Justice Review Panel Review of the Northern Territory Youth Justice System, July 2011, 46.

> more concerning for youth with no prior experience with the criminal justice system, legal processes or understanding of their rights.[23]

In 2013, NAAJA initiated a memorandum of understanding (MOU) with Territory Families to ensure these young people have access to timely legal advice. Territory Families' adherence to the MOU has been inconsistent. It is NAAJA's position that Territory Families should implement a policy that ensures young people have access to legal advice, including contacting NAAJA where an Aboriginal young person is involved.

8.3.1 MOU between NAAJA and Territory Families

As a way to improve the understanding that Territory Families case managers have about the court process and their role, NAAJA advocated the MOU to clearly delineate the roles of the two organisations in supporting children in care through the criminal justice system. The MOU, signed in November 2013, seeks to reflect a commitment to working collaboratively to meet the legal and related needs of Aboriginal young people in Department care.[24]

The MOU sets out, inter alia, procedures relating to referrals, information sharing and court process, including that:

> DCF will arrange for the youth to receive prompt legal advice in relation to any criminal matters including when a youth is questioned by police, charged with an offence, arrested or served with a summons.
>
> Where a youth has been charged with a criminal offence, the DCF Case Manager will contact NAAJA to arrange an appointment for legal advice, preferably prior to the first Court data.[25]

The information sharing aspects of the MOU are important to ensure that the complex needs of young clients are identified and addressed, such as mental health, trauma, substance misuse and disengagement from school. However, it appears that the aims of the MOU are not always being met in this regard:

> The difficulty has been that over the years, with changes in staff within the Department and loss of corporate knowledge, adherence to the MOU has waned. There have been many instances when I have sought information about a youth, with the authority of that youth attached. I would remind the workers of the MOU, send a copy and continue to request the necessary information, yet the response was often very limited or met by silence.[26]

[23] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 8.
[24] Exhibit 353.003, Annexure 3 to Statement of Shahleena Musk, 11 April 2017, 1.
[25] Exhibit 353.003, Annexure 3 to Statement of Shahleena Musk, 11 April 2017, 2.
[26] Exhibit 353.000, Statement of Shahleena Musk, 11 April 2017, 8.

It is NAAJA's view, considering the necessary changes flowing from the recommendations of this Commission, that Territory Families adopts the principles set out in the MOU as policy.

Recommendation 94	That Territory Families adopt the principles set out in the MOU as policy.

8.4 Approach of Territory Families to offending by young people in care

NAAJA raised the significant issue of over-policing of young people in care in section 5.4.3 of our Submissions on Youth Detention, where we recommended the urgent introduction of a protocol for addressing appropriate use of discretion and restorative justice approaches for children in care.[27]

The role of Territory Families in this protocol needs to be promoting the safety and wellbeing of young people in care, which includes promoting practices that minimise involvement of young people in the justice system. This includes matters such as:

- Performance monitoring of residential care
- Identification of best practice for management of care and policing
- Implementation of policies and guidelines across care services
- Training for residential care workers[28]
- Working with care services, police and other relevant agencies to ensure implementation of the protocol.

The Commission has heard during the pre- and post-detention hearings that in New South Wales the protocol has led to a considerable reduction in the remand population, which is now down to about 50 per cent compared to some other jurisdictions.[29]

While a forum is in place between police, Territory Families, residential care providers and legal services to address these issues, with a view to creating a protocol similar to New South Wales, [30] the creation of the protocol must become an immediate priority.

8.5 Approach of Territory Families to bail and remand for children in care

8.5.1 Detention as a 'placement'

In our Submissions on Youth Detention, NAAJA highlighted that Territory Families has at times viewed detention as a residential option and have even advocated for some young people to be remanded as Territory Families did not have an appropriate placement.[31]

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[27] See NAAJA, Submissions on Youth Detention, ss 5.4.8 and 8.3.10.
[28] The Commission has heard that there is a need to better train residential care workers: see Oral evidence of Sandy Lau, 9 May 2017, 3626.
[29] Oral evidence of Judge Johnstone, 8 May 2017, 3460.
[30] Oral evidence of Jeanette Kerr, 8 May 2017, 3519–3520.
[31] Exhibit 123.000, Statement of AS, 22 February 2017 [74].

We reiterate that detention should never be considered a 'placement' option and all efforts must be made to ensure that detention is the option of last resort.

Recommendation 95	That a provision is inserted in the *Care and Protection of Children Act* prohibiting delegates of the CEO from advocating that there is no alternative placement option to detention and/or that detention is the only placement option.

8.5.2 Continued case management for young people in detention

The Commission has heard that case managers have tended to reduce contact with their young clients while they are in detention, as they have believed 'their general care needs are being met at that stage'.[32]

It is important that young people in care who are in detention have continuity of care and their needs continue to be addressed on an ongoing basis. The Commission has heard that Territory Families is currently endeavouring to improve case management for young people in their care that are in detention by raising awareness of the issue with case managers.[33] This should be reflected in Territory Families policies.

8.5.3 Bail placements

Evidence before the Commission indicates that Territory Families' siloed approach to placements means that its placements team cannot be engaged until bail is received. Greater information must be provided to the Youth Justice Court, including the services, care and nature of the placement, at the relevant time of bail consideration to facilitate workable and suitable placements. Inadequate planning can and has led to self-placements, running away and further breach of bail offences.

Former NAAJA worker Mr Jared Sharp described examples of poor placement planning to the Commission:

> I was told after appearing in court that a very traumatised young person would be placed in a particular out of home care placement where her friend had committed suicide;
>
> A girl in care was to be placed in an out of home care placement with all male staff; and
>
> A highly vulnerable young person with cognitive issues, was to be placed with two young people highly involved in the youth justice system and likely to pose a negative influence to that child.[34]

[32] Oral evidence of Bronwyn Thompson, 22 June 2017, 4857.
[33] Oral evidence of Bronwyn Thompson, 22 June 2017, 4857.
[34] Exhibit 332.001, Statement of Jared Sharp, 21 March 2017, 13–14.

8.6 Territory Families cultural change

There is the need for cultural change at Territory Families to remove itself from its legacy as an agency of removal and separation of Aboriginal children from their own family, culture, language, kinship and childhood.

Territory Families must reform its way of dealing with Aboriginal children and families and become more supportive, holistic and nurturing of their cultural identity. This requires Territory Families, in all circumstances, to work in partnership with Aboriginal communities, organisations, Law and Justice Groups and families.

NAAJA refers the Commission to relevant recommendations in topics 6 and 8 of our Submissions on Youth Detention.

9 Exit planning and post-release support

9.1 Exit planning for young people in detention

Exit planning is a vital part of meeting a young person's needs in detention and preparing them for successful reintegration into the community in aid of their rehabilitation from crime.[1] However, the Northern Territory youth detention system has not provided appropriate and supportive short-, medium- and long-term exit planning and post-release support. The Northern Territory has the lowest proportion of young people with case plans[2] made within six weeks of a detention sentence in Australia.[3]

In many instances of inadequate planning and release, the responsibility for care and support of children falls on NGOs such as NAAJA to ensure the safe return of the child to their community at its own cost.

Territory Families care and protection and detention case management services must prioritise improving exit planning for young people in detention, including enhancing collaboration with experienced and culturally competent support services such as NAAJA Throughcare.

9.1.1 Deficiencies in exit planning

Witness CB, a registered psychologist and the current case management team leader at Don Dale Youth Detention Centre, has acknowledged that case management, including exit planning, aims to ensure 'that the support, community connections, and preparation required for a person to step back into a community and not reoffend are in place.'[4] Despite this understanding, and case management operating procedures requiring an exit plan for detainees in custody for six weeks or longer,[5] records for 2015/16 indicate that out of 111 sentenced prisoner receptions,[6] only 19 detainees left detention with an internally prepared exit plan.[7]

The Commission has heard evidence that, as recently as January and February 2016, there has been only one case manager each at the Darwin and Alice Springs detention centres to undertake this essential process.[8] At other times, there have been no caseworkers:

> From a period of time in 2015, to the best of my recollection, there were no dedicated case managers at Don Dale. There was then a period where Corrections started

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[1] Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3956:15-18.
[2] The terms case plan and exit plan were used interchangeably in the evidence before the Commission. In these submissions where we have used the term case plan it is on the understanding that an exit plan is part of a case plan.
[3] Steering Committee for the Review of Government Service Provision, *Report on Government Services 2016* – Chapter 16 Youth Justice Services, 16.26.
[4] Exhibit 375.000, Statement of CB, 10 May 2017, [6].
[5] Exhibit 375.000, Statement of CB, 10 May 2017, [14].
[6] Northern Territory Correctional Services and Youth Justice Annual Statistics | 2015-2016 <https://www.nt.gov.au/__data/assets/pdf_file/0009/430110/2015-16-NTCS-Annual-Statistics.pdf>
[7] Exhibit 375.000, Statement of CB, 10 May 2017, [25].
[8] Ibid [16].

> utilising family responsibility care workers, whose primary role is to work with families as case managers for young people in detention. In more recent times there have been two case managers, until December 2014 there had been three dedicated case managers but these case managers did not have their contracts renewed and were not replaced … The consequences of this were that there were no individualised case plans to guide a young person's time in detention and transition back into the community.[9]

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.[10]

Witness CB acknowledged that the current two-week allocation to developing case plans for eligible detainees is 'not achievable'.[11] Case conferences to discuss the needs of detainees, involving case managers and external service providers, are only scheduled for one hour per fortnight and address multiple detainees in each session. Given the caseloads, on average only 4 to 7.5 minutes is available per detainee to discuss interventions, wellbeing needs, case plan developments, treatment and exit planning.[12] NAAJA Throughcare Manager, Thomas Quayle, noted that despite good intentions, case conferences have lately been 'ad hoc and ineffective'.[13]

Samantha Taylor-Hunt, the NAAJA Throughcare Project Coordinator who coordinates with Don Dale case management staff, gave evidence that Territory Families exit plans cannot be relied on to inform NAAJA's Throughcare service:

> [P]robably in the last 12 months the exit plans, we've probably only seen one. Again, I hesitate to say that they're not being done, but we're not seeing them, and we're not feeling like they're thorough in their putting together strong post-release plans particularly. So exit plans are designed to lead that youth back into community, is my understanding, and we rely much more heavily on our case management plans that our youth worker puts together and in collaboration with Don Dale or Territory Families.[14]

Terry Byrnes, NAAJA's former Indigenous Youth Justice Worker, recalled similar experiences:

> We have been told repeatedly over time, that an individual case plan exists for each detainee. I have asked to see them … and I have not seen a single one yet. I don't mean

[9] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [287].
[10] Exhibit 139.001, Statement of AB, 1 March 2017, [89].
[11] Exhibit 375.000, Statement of CB, 10 May 2017, [35].
[12] Ibid, [51]. CB estimates 8 to 15 detainees are discussed at each meeting.
[13] Exhibit.378.000, Statement of Thomas Quayle, 21 April 2017, [57].
[14] Oral evidence of Samantha Taylor-Hunt, 12 May 2017, 3893:8-15.

> I have not seen a good case plan, I mean I have never seen any case plan … Young people are getting out of detention with nothing.[15]

The Commission has also heard evidence that there has been poor preparation for detainees' day of release. Basic necessities have not been provided such as personal identification,[16] and appropriate clothing for a young person to attend a funeral.[17] In Alice Springs, there has been no detainee property register, which means detainee property could be lost and not returned on release.[18]

9.1.2 Detainees in the care of Territory Families

Evidence before the Commission suggests around 40% of young people in youth detention are also in the care of Territory Families.[19] Despite this high proportion, there is inadequate coordination of support for these young people, especially in planning for their release from custody.[20] This has a negative effect on these young people, both in terms of their opportunities for timely release from custody and their potential for future success.

A coordinated approach to meeting the needs of these young people is required, where specialist Territory Families caseworkers work proactively with internal detention centre caseworkers and other relevant agencies to implement a clear, structured plan to guide the child's return to the community.

There is little to no child or family involvement in the development of care plans. Nor is there planning that addresses the cultural and kinship support networks for the child, drawing on the assistance of visiting Elders, Law and Justice Groups and Aboriginal community organisations.

The Commission has also heard evidence of caseworkers failing to pick up young people at the appointed time of their release.

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? [21]

[15] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, [63]–[64].
[16] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, [66].
[17] Exhibit 068.001, Statement of BF, 20 February 2017, [56]–[66].
[18] Exhibit 064.126, Audit 26.07.2012, 29 November 2012, 5.
[19] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [75].
[20] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [75]–[81]; Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, [40].
[21] Exhibit 272.000, Statement of BL, 1 March 2017, 10 [100]–[106].

Placement coordination

Coordination between Territory Families caseworkers and the placements team is manifestly inadequate. Multiple witnesses, including former NAAJA youth lawyer Jared Sharp, have encountered young people who had no idea where they would be living on the day of their release.[22] Mr Sharp characterised the situation as 'an indictment on the ability of the Department to ensure placements that meet the individual needs of young people, and that set them up for success rather than failure.'[23]

The Commission has also heard examples of situations where inadequate exit planning by a child's care and protection case manager has resulted in longer periods of incarceration.[24] This typically occurs when caseworkers fail to identify placement options before the young person's court appearance for bail or sentencing, or in time for consideration for parole.[25] Territory Families' tendency to wait to identify placement options until after a child is granted bail or a non-custodial order means it is less likely that a child will be released from detention and, if they are released, more likely that a hastily organised placement will be unsafe or inappropriate.[26]

Proposed findings	That there has been inadequate exit planning to meet the needs of children on release. That this failure of planning has contributed to the continued over-representation of Aboriginal children in detention, and more generally in the youth justice system.

9.1.3 Improving exit planning

Enhanced coordination is needed between Territory Families and external service providers, whereby Territory Families case managers maintain regular in-person contact with young people in detention and take a proactive lead in developing exit plans. This leadership needs to oversee structured collaboration with relevant parties including the young person, support programs such as NAAJA Throughcare, and their families and communities, where appropriate.

Exit planning must begin at intake and reception – from the start, the focus needs to be on leaving detention. It is crucial that exit planning occurs well in advance of a release date or non-parole period

[22] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [88]; Exhibit 379.000 Statement of Samantha Taylor-Hunt, 10 April 2017, [58].
[23] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [88].
[24] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [77]; Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017 [51].
[25] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [82]. See also, Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017 [51].
[26] For example, a very traumatised young person was going to be placed in a particular out of home care placement where her friend had committed suicide; Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [82].

expiration to maximise the young person's chance at future success and to ensure a realistic and sustainable post-release plan is available to the Parole Board.[27]

Coordinated approach

Creating a structured, collaborative approach to exit planning between Territory Families and external service providers will enable caseworkers and service providers to improve continuity of care and linked-up service provision. Agreed processes for the coordination of services would mitigate delays, avoid the duplication of services and ensure full coverage of the necessary services to provide effective exit planning for young people in detention.

As an experienced, culturally competent service, NAAJA Throughcare is best placed to support Territory Families case management for young people in detention. Currently, NAAJA Throughcare caseworkers advocate on an Aboriginal child's behalf to formulate a holistic leaving care plan. This involves liaising with the young person's family and community, probation worker if the child is on a supervisory order, the Department of Education, and Territory Families where the child is in out-of-home care.[28]

Encouragingly, Territory Families has expressed interest in developing an MOU that delineates responsibilities for NAAJA Throughcare and Territory Families in supporting young people in contact with the criminal justice system and describes our joint intention to work collaboratively.[29]

Competency of case management staff

Children in detention who are also in the care of Territory Families require caseworkers who are proficient in working with young people with complex needs and specially trained and experienced in assisting young people in the youth justice system. Evidence before the Commission suggests that, in addition to reduced caseloads and increased resources, professionals working in youth justice require specialist training to ensure satisfactory case management for detainees in their care.[30] NAAJA refers the Commission to our recommendations for the establishment and training of a specialised Territory Families workforce in our Submissions on Youth Detention.[31]

Cross-cultural competency must also be a priority for departmental staff working with children in detention, given that Aboriginal children represent 96 per cent of young people in detention in the Northern Territory.[32] The involvement of Aboriginal caseworkers and other staff has been identified as greatly enhancing case management in various ways, such as engagement and connection with the child's family,[33] understanding the importance of cultural responsibilities like attending ceremonies, and having the ability to liaise with family and community to facilitate culturally relevant

[27] Exhibit 378.000, Statement of Thomas Quayle, 21 April, 2017, [59].
[28] Exhibit 379.000 Statement of Samantha Taylor-Hunt, 10 April 2017, [43]–[44].
[29] Exhibit 378.000, Statement of Thomas Quayle, 21 April, 2017, [50].
[30] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [83]; Exhibit 338.000, Statement of Eileen Baldry 3 May 2017, [48].
[31] NAAJA, Submissions on Youth Detention, Recommendation 103.
[32] Australian Institute of Health and Welfare, Youth detention population in Australia in 2016, Bulletin 138, December 2016, 14.
[33] Exhibit 332.001, Statement of Jared Sharp, 24 April 2017, [85].

engagements.[34] Caseworkers must also appreciate particular cultural and community aspects of a young person's situation. In our Submissions on Youth Detention, we recommend the establishment of a culturally competent framework, including education and training programs.[35]

Local community, Elder and family involvement

Improved exit planning must also identify and address the cultural needs of Aboriginal young people on release, in consultation with their family, to ensure there is a connection with their language, activities and kinship support.

According to criminologist Professor Eileen Baldry, programs that are not connected to detainees' life in the community have very limited effectiveness because

> any progress or development or positive outcome that might have happened in detention may not, and is very unlikely, to flow on out into the community … [programs in detention] must be then connected once the person goes out.[36]

NAAJA agrees with Professor Baldry's recommendation that a young person's community, Elders, and family members must be partners in a young person's exit plan.

Detention programs should also involve more Aboriginal people in program design and facilitation, and employment of Aboriginal mentors should be a priority.[37]

Recommendation 96	That exit planning reports contain information on supporting the child's cultural identity.
Recommendation 97	That an Aboriginal-led, culturally relevant and appropriate pre-release program is developed to promote children's access to their culture and community and provide for structured post-release support mechanisms.

Intensive pre-release programs

Evidence before the Commission illustrates the importance of prosocial community supports connecting with a young person before release, in order to build trusting relationships and increase likelihood of success following release.

The Waratah Pre-Release Unit at the Reiby Juvenile Justice Centre is an example of a successful pre-release program in New South Wales with a focus on continuity of care. Established in 2010, the Unit has been designed in recognition that most detention programs only affect behaviour if the external environment is well planned and supportive upon release. The program sets up support mechanisms so that, upon release, young people not only have the required living and coping skills, but a strong

[34] Exhibit 379.000 Statement of Samantha Taylor-Hunt, 10 April 2017, [54].
[35] NAAJA, Submissions on Youth Detention, Recommendation 69.
[36] Oral evidence of Eileen Baldry, 8 May 2107, 3493:25–30.
[37] Exhibit 378.000, Statement of Thomas Quayle, 21 April, 2017, [65]–[66].

support network, timetable and structure for a successful reintegration into the community.[38] In addition to establishing prosocial habits and community connections, the Waratah program overcomes challenges that may follow from living in detention such as institutionalisation and loss of initiative, communication skills and independent living skills by providing measures of autonomy in a safe and secure environment.

Trauma-informed care

Planning for release should begin from intake and reception in detention and be informed by therapeutic principles that assist in healing trauma. The Commission has heard evidence that the current environment at Don Dale Youth Detention Centre does not assist in preparing young people for release or in promoting rehabilitation: 'The environment is punitive rather than therapeutic. It does not promote behavioural change.'[39] As has been previously canvassed in our Submissions on Youth Detention,[40] trauma-informed care in detention is vital to the success of any exit plan or post-release support program.

Recommendation 98	That a consistent, structured and holistic exit planning approach involving Territory Families caseworkers, detention centre caseworkers, and other available services such as NAAJA Throughcare is made available to each child in custody who is also in the care of the Territory Families.

9.2 Post-release support for young people leaving detention

Aboriginal children released from detention face a series of social, economic and personal challenges, which can increase their likelihood of reoffending.[41] Many have a history of social disadvantage, physical or emotional abuse, and association with family and peers who are in contact with the criminal justice system. Further obstacles include physical or mental disabilities and health issues. Many young people are also challenged by skills deficits such as poor interpersonal skills or poor emotional functioning that make it difficult to succeed in the community.[42] According to Professor Baldry, 'with no post-release assistance, recidivism is almost inevitable.'[43]

9.2.1 NAAJA Throughcare

NAAJA Throughcare is the only service that provides intensive case management support to Aboriginal young people leaving the Don Dale Youth Detention Centre.[44] Throughcare provides coordinated support to young people in detention, continuing until they are living a safe, fulfilling and trouble-free

[38] Exhibit 377.003, Annexure 3 to the Statement of Leilani Tonumaipea, Waratah Pre-Release Program Promotional Booklet 2017, 3.
[39] Exhibit 379.000 Statement of Samantha Taylor-Hunt, 10 April 2017, [59].
[40] See NAAJA, Submissions on Youth Detention, Topic 7.
[41] Exhibit 338.000, Statement of Eileen Baldry 3 May 2017, [32].
[42] Ibid [33].
[43] Ibid [37].
[44] Exhibit.378.000, Statement of Thomas Quayle, 21 April, 2017, [11].

life in the community.[45] The NAAJA Throughcare program aims to reduce repeat offending and assists most sentenced detainees at Don Dale from up to six months before release to a year after release, or longer in some cases.[46] The model is based on voluntary participation and trusting relationships with case managers who have a high level of cross-cultural expertise.[47]

The program has been very successful at reducing recidivism, as the program's manager, Thomas Quayle, highlights:

> As per the data collected since NAAJA commenced the intensive case management service in 2010, 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.[48]

In comparison, mainstream prison statistics reveal that 57.7% of people leaving prison return within two years.[49]

Throughcare in remote locations

There is no other service than NAAJA Throughcare that provides intensive post-release support to young people living in remote communities in the Top End. NAAJA Throughcare endeavours to provide all clients with a comprehensive service, however with no permanent staff in remote communities, regularly meeting with young people and their families is a challenge.[50] Other challenges include a lack of youth-specific programs or activities and access to therapeutic support such as drug and alcohol counselling.[51] Increased funding would increase NAAJA Throughcare's capacity to provide intensive case management to assist young people reintegrating into remote communities.

Witness BE:

I had no money in [community] – I was not on welfare and I didn't know how to get on welfare. I used to go stealing to get money. I was breaking into shops and the post office. It made me feel so bad.[52]

Recommendation 99	That NAAJA Throughcare is funded to increase services to remote communities.

[45] Ibid [12].
[46] Exhibit 379.000 Statement of Samantha Taylor-Hunt, 10 April 2017, [27].
[47] Ibid [16].
[48] Exhibit.378.000, Statement of Thomas Quayle, 21 April, 2017, [30].
[49] Ibid [32].
[50] Ibid [44].
[51] See topic 7 for further discussion on referral programs.
[52] Exhibit 179.001, Statement of BE, 18 February 2017, 9 [61].

Funding sources

Despite being the only program of its kind, and assisting almost every sentenced detainee at Don Dale Youth Detention Centre, NAAJA Throughcare does not receive any Northern Territory Government funding and only recently began to receive youth-specific funding.[53] Increased Northern Territory funding would allow NAAJA Throughcare to enhance its case management and expand to areas currently not covered by existing Commonwealth funding, such as working with more remandees or those in need of substantive assistance to reapply for parole.[54]

Recommendation 100	That Commonwealth and Northern Territory governments provide Throughcare with funding to enhance and expand service delivery.

Throughcare services for youth in detention in Central Australia

NAAJA supports CAALAS' submission advocating for establishment of Throughcare services to support Aboriginal children and young people of Central Australia.

The shortage of Throughcare for young people in Central Australia is of particular concern to NAAJA because of the frequent transfers between Don Dale and Alice Springs youth detention centres. This means that clients are unable to be linked in with designated service providers in Central Australia, which severely disadvantages young people returning from Don Dale to the Alice Springs region.[55]

9.2.2 Government post-release support

The Commission has heard evidence that, despite assertions that detention centre case management interventions can extend beyond release,[56] Don Dale Youth Detention Centre case managers rely on NAAJA Throughcare to take the lead role in case management and post-release support.[57]

In addition to case management interventions, programs addressing criminogenic factors sometimes run from detention to post-release. However, these programs are limited in suitability and availability.

Seek Education and Employment not Detention (SEED) Program

The SEED program is designed to build youth detainees' skills in education and employment to support their reintegration into the community and break the cycle of offending.[58] Unfortunately, despite the

[53] NAAJA recently received $300 000 from the Healing Foundation to develop and implement a healing project between 1 January 2017 and 30 June 2018.
[54] Exhibit 378.000, Statement of Thomas Quayle, 21 April, 2017, [73].
[55] Ibid [40]–[43].
[56] Exhibit 375.000, Statement of CB, 10 May 2017, [14].
[57] Exhibit 379.000, Statement of Samantha Taylor-Hunt, 10 April 2017, [42].
[58] Exhibit 375.000, Statement of CB, 10 May 2017, [75].

part-time employment of a dedicated program officer to implement the program, implementation was not successful, and only a single participant ever completed the program.[59]

Changing Habits and Reaching Targets (CHART) program

CHART is a Throughcare-style program that can be offered in youth detention and by Community Corrections for young people on supervised orders. It was suggested in the Vita Report as a program to reduce reoffending.[60] Although the program's impact in the Northern Territory has not been formally evaluated, the team leader at Don Dale has expressed the view that the program has limited efficacy for the youth detainees in Darwin, most of whom are Aboriginal.[61] The program's focus on self-reflection and revisiting the past is difficult for cultural reasons and its reliance on worksheets is also problematic as participants may not have the required literacy skills to complete the modules.[62] These factors inhibit participation and increase feelings of shame and inadequacy. Participation is low due to resourcing limitations and the small number of eligible participants, and the program has not been available to any detainees this year.

9.2.3 Building community capacity and engagement

Communities play an essential role in both crime prevention and the rehabilitation of young offenders,[63] so local community-based approaches are needed to support successful post-release programs.[64] Studies in the United States have consistently shown that

> ex-prisoners and detainees returning to their socially disadvantaged communities are even more disadvantaged than when they went into detention unless significant social and programmatic supports such as employment training, mental health support, housing support are available.[65]

Providing additional support to the communities that detainees return to is therefore vital.

Witness BE:

I couldn't go back to school – I thought I was too old. Also it would have been hard because there was so much gunja and grog in the community and everyone was up so late at night. I would love to have a job but there were no jobs in [community].[66]

[59] Exhibit 375.000, Statement of CB, 10 May 2017, [78]; Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3966: 5–25.
[60] Michael Vita, 'Review of the Northern Territory Youth Detention System Report' (25 January 2015) 39.
[61] Exhibit 375.000, Statement of CB, 10 May 2017, [84].
[62] Ibid.
[63] Exhibit 338.000, Statement of Eileen Baldry 3 May 2017, [26].
[64] Ibid [38].
[65] Ibid [26].
[66] Exhibit 179.001, Statement of BE, 18 February 2017, 9 [60].

Need for transitional accommodation

Inadequate post-release accommodation has been identified as one of the main problems for young ex-detainees.[67] International research indicates that unsuitable housing or homelessness is a key criminogenic factor, increasing the risk of further arrest and imprisonment.[68] It also reduces a young person's ability to engage in other post-release support such as school, legal or healthcare appointments. Stable accommodation is a necessary precondition to addressing other wellbeing needs:

> [T]he Housing First model [in Queensland] is saying let's get the housing right first. Let's get someone into stable accommodation, and let's address the other issues which may relate to alcohol and other drug use, or it may relate to mental health. Let's work on those once the person has housing.[69]

The Commission has heard that a flexible and multi-level approach to housing with options for small-scale, supported post-release accommodation for youth is needed to address the broad spectrum of needs and independent living skills of youth experiencing unstable housing:

> I think there's a view, particularly for young people, that sometimes transitional arrangements might need to apply. That might mean, for instance, being involved in a group housing situation where they're still learning some of the basic skills about how to interact with others, how to do all the very basic things to look after a house … So I think there would be some different approaches and different models but certainly [for] those that need support, having people available, supporting on site, certainly does make a big difference.[70]

In NAAJA's experience, the need for supported bail and post-release accommodation is a very real problem for Aboriginal children and young people on their release from detention. In some instances, due to a complete lack of appropriate options and support services, NAAJA is required to financially support a child with emergency or temporary accommodation.

Evidence before the Commission suggests that the current availability of supported accommodation in the Northern Territory falls far short of demand for accommodation for young people in contact with the youth justice system.[71] Successful post-release supported accommodation models presented to the Commission emphasise small-scale, home-like environments with wraparound supports.

For example, the Supervised Community Accommodation (SCA) program assists young people exiting Cleveland Detention Centre in Townsville by providing accommodation for up to nine months in small, home-like environments specifically designed for young people aged 12 to 18 years. There is a maximum of four young people in each accommodation unit and 'one-on-one tailored case

[67] Ibid [51].
[68] Ibid [52].
[69] Oral evidence of Darren Young, 12 May 2017, 3909:42-47.
[70] Ibid, 3910:35-47; 3911:11-14.
[71] Exhibit 338.000, Statement of Eileen Baldry, 3 May 2017, [54].

management' is facilitated by a focus on developing independent living skills and securing stable long-term accommodation.[72] Melissa Previtera told the Commission:

> [The appearance of a normal house] is very important. Most people that reside at SCA, they've never had a bedroom or their own bedroom. They've never been able to access a fridge or sit on a lounge without being disturbed. So I think it's really important to get away from a sterile environment.[73]

In section 7.4.4, we have recommended that small-scale supported accommodation is developed and implemented across the Northern Territory.

9.2.4 Multidisciplinary, holistic care

Holistic and collaborative models of care are needed to ensure continuity of service provision for young people throughout detention and following release. NAAJA Throughcare has recently been funded by the Healing Foundation to implement a holistic service project in partnership with Danila Dilba and the Aboriginal Medical Services Alliance of the Northern Territory. The project identifies young people in the justice system who have social and emotional wellbeing challenges and connect them with therapeutic support and case management that continues on into the community.[74] Guaranteed funding for this program beyond June 2018 and establishment of other continuity of care service delivery programs would be of great benefit to young persons in the youth justice system.

9.3 Young people on remand

9.3.1 Exit planning

Under *Youth Justice Regulations* reg 69, the Superintendent of youth detention centres must assess each detainee's education, vocational training and rehabilitation needs and provide an appropriate program of activities that addresses those needs.[75] Ms Amanda Nobbs-Carcuro, Director of Programs and Services at Territory Families, gave testimony that suggested operational policies in detention were inconsistent with this regulation, as young people on remand or short sentences were not prioritised for receiving exit plans.[76]

Although this is purported to have changed,[77] NAAJA's experience is that case management in practice remains inadequate, especially for detainees on remand. Territory Families must ensure that its case managers operate within the relevant legislative framework, and that each detainee receives proper case management, regardless of the length of their detention.

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[72] Oral evidence of Melissa Previtera, 12 May 2017, 3912:10-24.
[73] Ibid, 3915:10-15.
[74] Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017, [22].
[75] *Youth Justice Regulations 2006* (NT) reg 69.
[76] Oral evidence of Amanda Nobbs-Carcuro, 12 May 2017, 3957:30–47.
[77] Ibid.

9.3.2 Post-release support

The large majority of young people in detention are on remand,[78] and yet relatively little funding and resources are devoted to their post-release support. Indeed, NAAJA Throughcare has been unable to assist remandees until receiving funding from the Healing Foundation this year, and capacity remains very limited with the current resourcing.

Evidence before the Commission indicates that post-release support for remandees is a critical gap in services.[79] Young people on remand require Throughcare assistance to provide avenues out of the cycle of offending before they become part of the sentenced population. Throughcare services also assist detainees on remand in developing suitable and realistic bail applications, which may help reduce the overall remand population.[80]

Recommendation 101	That the Northern Territory and Commonwealth governments support the expansion of funding and services for exit planning and post-release support of remandees as a matter of urgency.

[78] Up to around 70%: Oral evidence of Eileen Baldry, 8 May 2017, 3494:40.
[79] Oral evidence of Samantha Taylor Hunt, 12 May 2017, 3895:16–17.
[80] Exhibit 379.000, Statement of Samantha Taylor-Hunt, 10 April 2017, [69].

10 Parole, probation and Community Corrections

10.1 Parole and probation decision-making

In the Northern Territory, parole decisions concerning adults and young people are made by the same authority, the Parole Board.[1] The majority of probationary orders for young people are ordered by the Youth Justice Court under s 83(1) of the *Youth Justice Act* and supervised by Correctional Services.

NAAJA acknowledges that the Parole Board endeavours to make decisions differently for young people and adults.[2] While the Commission has heard that Parole Board decisions take youth justice principles into account and accordingly favour releasing young people as close to their non-parole period as possible,[3] NAAJA has concerns about the extent to which the current parole system meets the needs of Aboriginal young people. There needs to be a fundamental shift in parole decision-making in order for it to be youth-focused and culturally relevant.

NAAJA has major concerns about the adequacy of Correctional Services in meeting the needs of Aboriginal children and the lack of staffing, resources and wraparound support services to help young people successfully comply with probationary orders of the Youth Justice Court. This is considered in section 10.2 below.

10.1.1 A youth-specific parole board

NAAJA recommends that a youth-specific parole board is established in the Northern Territory. As we have maintained throughout our submissions, the youth justice system must be underpinned by a therapeutic, youth-centred approach. The *Youth Justice Act* and the establishment of a Youth Justice Court in Darwin recognise that young people warrant different treatment to adults, due to their specific developmental needs.[4] This approach must also apply to parole.

Other jurisdictions have successfully established youth-specific parole boards. Victoria and Western Australia have established these boards through their respective youth justice legislation,[5] and NAAJA advocates a corresponding approach is taken in the Northern Territory. The *Youth Justice Act* should specify membership of the board, considerations to be taken into account by the board and the orders that can be made by the board. The underlying principles and approach of the board must be fundamentally different to that taken by the adult Parole Board.

In 2015/16, nine children were considered for parole in the Northern Territory. In 2014/15, only two children were considered. [6] NAAJA acknowledges that these small numbers may make it difficult to

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[1] *Parole Act* (NT) s 3A.
[2] Oral evidence of Tracy Luke, 8 May 2017, 3808: 25–35.
[3] Oral evidence of Tracy Luke, 8 May 2017, 3808: 25–35; Parole Board of the Northern Territory, *Policy Procedures Manual*, 43 [8.17].
[4] *Youth Justice Act 2005* (NT) s 4.
[5] *Young Offenders Act 1994* (WA) s 151; *Children, Youth and Families Act 2005* (Vic) s 442.
[6] Department of the Attorney-General and Justice, *Northern Territory Correctional Services and Youth Justice Annual Statistics*, 2017, 34 [table 25].

justify a standalone youth parole board, [7] however we maintain that a youth-specific parole board could be convened on an ad-hoc basis and two different groups could operate out of detention centres in Darwin and Alice Springs.

All young people that have come before the parole board in recent years have been Aboriginal,[8] which makes genuine participation by Aboriginal people in parole decision-making critical. A youth-specific parole board, which operates independently to the courts and involves community members and Aboriginal representatives, will result in stronger outcomes for Aboriginal young people.

Evidence presented to the Commission indicates that the age of 18 is an arbitrary point of delineation between young people and adults.[9] Accordingly, NAAJA considers that it would be appropriate for prisoners up to the age of 25 to have their parole determinations made by a youth-specific board. This would also have the effect of appropriately increasing the work of a youth-specific parole board.

10.1.2 A youth-centric, collaborative approach

A youth parole board should engage collaboratively with young people. At present, the Parole Board take an impersonal and opaque approach to decision-making, but young people would benefit from interacting with the Board.[10] Prisoners and their legal representatives are generally not present at parole hearings and instead provide written submissions to the Board and are provided with a recorded copy of the Board's decision.[11] The Parole Board is specifically exempted from being required to comply with natural justice.[12]

NAAJA considers it an essential minimum requirement that young people are present for parole decisions and are told the reasons for the decision and the conditions attaching to any order that is made.[13] This would assist young people to actively engage in the parole process, thereby increasing the likelihood that they will successfully reintegrate into the community.[14] In Western Australia, the Supervised Release Review Board, which works with youths, requires that the young person agree to any order that is made before it can be imposed.[15] NAAJA supports this level of engagement of young people in the parole process.

For young people's engagement in the parole process to be meaningful, they must be properly advised and informed. For Aboriginal young people, for whom English is not their first language, it is vital that parole determinations and processes occur with the aid of an interpreter. This is crucial to avoid

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[7] Oral evidence of Thomas Quayle, 12 May 2017, 3900: 26–36.
[8] Department of the Attorney-General and Justice, *Northern Territory Correctional Services and Youth Justice Annual Statistics*, 2017, 34 [table 25].
[9] Oral evidence of Thomas Quayle, 12 May 2017, 3900–3901.
[10] NAAJA Submission to Youth Justice Review Panel, *A Review of the Northern Territory Youth Justice System*, 68 [15.4].
[11] Parole Board of the Northern Territory, *Policy Procedures Manual*, 19.
[12] *Parole Act* (NT) s 3HA.
[13] Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017, 13 [60].
[14] NAAJA, *A Review of the Northern Territory Youth Justice System,* submission to Youth Justice Review Panel, 68 [15.4].
[15] Supervised Release Review Board Western Australia, *2015/16 Annual Report: Supervised Release Review Board,* 5.

situations where parole conditions are breached and young people sent back to detention because they did not understand the obligations imposed on them.[16] It is also essential that NAAJA lawyers and a child's responsible adult are notified, able to be present at parole hearings and engaged throughout the parole process to support the young person.

We would like to see this same face-to-face approach taken when parole orders are breached, rather than the impersonal approach of a letter being sent to a young person.

10.1.3 Therapeutic jurisprudence

In NAAJA's submission, a youth-specific parole board should operate like a problem-solving court.[17] Problem-solving courts take a holistic approach to addressing criminal behaviour, by looking at the reasons behind offending behaviour, be they social, structural or psychological.[18] Adopting the approach of therapeutic jurisprudence, problem-solving courts then allow judges to attempt to remedy these issues through social or therapeutic rather than legal solutions.[19] These courts aim to ensure that the legal process does not negatively affect the psychological and emotional wellbeing of the offender.[20]

This holistic approach is consistent with what NAAJA considers to be the best approach to youth justice. A youth-specific parole board should adopt a therapeutic perspective and consider the rehabilitative effect that appropriate services and programs could have on a young person and the benefits of supported-release, compared to serving a full sentence and having no support on exit.

10.1.4 Composition of the Parole Board

The *Parole Act* stipulates that the Parole Board is made up of 18 members including a Chief Justice, the Commissioner of Correctional Services, two police officers, two medical practitioners, two people representing the interests of victims of crime and 10 people representing the community at large, including women and Aboriginal and Torres Strait Islander people.[21] Yet to make a decision regarding a person who has been given a sentence other than life imprisonment, only the Chairperson and three other members must be present.[22] Therefore, in practice, representatives from this broad range of groups are not required to be present to make decisions.

NAAJA regards Aboriginal representatives as essential attendees at parole decisions for Aboriginal young people. Consistent with other jurisdictions' approaches to youth parole boards, NAAJA submits that it would be preferable to have a smaller parole board for youths, consisting of legislated classes of members, including persons with expert youth qualifications, such as child forensic psychiatry or

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[16] Aboriginal Peak Organisation Northern Territory, APO NT joint submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 156: quoting CAALAS Submission to the Commonwealth Inquiry into Justice Reinvestment, March 2013.
[17] Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017, 13 [60].
[18] James Duffy, 'Problem-Solving Courts, Therapeutic Jurisprudence and the *Constitution*: If two is company, is three a crowd?' (2011) 35(2) *Melbourne University Law Review* 394, 395.
[19] Ibid.
[20] Ibid.
[21] *Parole Act* (NT) s 3B.
[22] Parole Board of the Northern Territory, *Annual Report 2012*, 10.

paediatrics. Each class member should have a stand-in when they are unavailable. A representative from each class would be required to be present for each decision, to ensure that their perspective on the interests of the child was able to be taken into account.

Aboriginal representatives

While the numbers of young people subject to parole determinations is small, it is significant that all parole determinations in the Northern Territory in the last three years have been in relation to Aboriginal children.[23] There must be statutory positions on the youth-specific parole board for Aboriginal Elders and representatives of Aboriginal-led organisations.[24] These perspectives will assist in foregrounding cultural considerations, such as providing input on the importance of attending cultural ceremonies or obligations, and recommending Aboriginal-led and culturally appropriate parole orders and programs.

Professionals with expertise in child development

Consistent with the principles of therapeutic jurisprudence, a youth-specific parole board should be informed by members with expertise in child development.[25] Evidence tendered to the Commission attests to the importance of understanding the fundamental neurobiological differences between young people and adults.[26] As the pre-frontal cortex of the brain is the last to develop, young people are often less capable than adults of identifying and assessing risks, regulating their emotions and impulses, and understanding the consequences of their actions.[27] These abilities can be further impacted by experiences of trauma, intellectual impairments and learning disabilities.[28]

Knowledge of the specific psychological and developmental needs of children would best be incorporated into the decision-making process by having a specialist child psychologist or psychiatrist sit on the board. This person should also have trauma-specific knowledge and significant experience working with Aboriginal young people in a culturally informed way. The incorporation of this expertise on the board would ensure that the psychological harm of continuing detention on young people is taken into account in parole decisions. It would also allow for a more nuanced approach to the assessment of young people's behaviours and capacities.

10.1.5 Flexibility in orders

In recognition of the highly individual needs of young offenders, NAAJA submits that a youth parole board should have a high level of flexibility in the orders that it can make. It is crucial that parole orders address the criminogenic influences in young people's lives. This could include drug or alcohol

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[23] Department of the Attorney-General and Justice, *Northern Territory Correctional Services and Youth Justice Annual Statistics*, 2017, 34 [table 25].
[24] In Western Australia, the *Young Offenders Act* provides that the Review Board must include at least one person with an Aboriginal background and at least one person nominated by community organisations: *Young Offenders Act 1994* (WA) s 152.
[25] Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017, 13 [60].
[26] Exhibit 337.068, Judge Johnstone Juvenile Justice Summit 5 May 17 Paper, 5 May 2017, 14 [61].
[27] Ibid.
[28] Ibid 16.

rehabilitation programs, supported accommodation, trauma counselling and other community-based activities.

Cultural supervision programs should be considered for all young Aboriginal offenders, taking the lead from the sentence delivered by Chief Justice Riley in *R v Yakayaka and Djambuy* where Aboriginal customary law was taken into account and supervision by Yolŋu Elders instead of by Community Corrections was ordered by the court.[29] Aboriginal-led organisations and programs should also be given consideration in the making of parole orders. BushMob is a great example of an Aboriginal-led rehabilitation and residential program that should be considered for Aboriginal young people. NAAJA recommends that similar programs are established and sustainably funded, which is especially important in light of Bush Mob's recent decision to withdraw from Territory Families' SYBC pilot program at Loves Creek Station. This is discussed further in section 7.3.

10.1.6 Involvement of Territory Families

It is NAAJA's experience that children in detention who are also in care have been denied parole because Territory Families has not formulated a suitable post-release plan.[30] NAAJA has previously experienced difficulties offering effective support to children in care sentenced to terms of imprisonment with non-parole periods because Territory Families has taken the position that they are the lead agency and have not collaborated with NGOs.[31] This is another example of 'crossover kids' experiencing greater disadvantage by virtue of their involvement with Territory Families. However, more recently Territory Families has shown a greater willingness to collaborate with NAAJA Throughcare.[32] We hope that this continues and has the effect of ensuring that all children in detention are adequately prepared for parole hearings with comprehensive exit plans.

[29] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 36.
[30] Exhibit 378.000, Statement of Thomas Quayle, 21 April 2017, 11 [51].
[31] Ibid.
[32] Ibid 11 [52]–[53].

Recommendation 102	That a youth-specific parole board is established with the following features: e. The board comprises a small number of representatives including an Aboriginal representative, an employee from an Aboriginal-led community organisation and a professional with youth-specific training and experience. f. The board must meet the requirements of natural justice. At a minimum, young people, their lawyers and their responsible adult must be present when the decision is made. g. The board must take a therapeutic and collaborative approach that aims to engage young people in the parole decision-making process. h. The board has wide discretion to make a variety of orders including orders that meet the cultural needs of young people.

10.2 The role of Community Corrections in youth matters

Community Corrections used to be responsible for a variety of functions under Northern Territory legislation, including preparing reports on young people, supervising youths on non-custodial orders and monitoring compliance with the conditions of orders.[33] In February this year, Community Corrections was responsible for supervising 96 young people, which accounts for less than 10% of their caseload.[34] NAAJA understands that responsibility for the Youth Justice Unit of Community Corrections has now been transferred to Territory Families,[35] specifically to the newly-created YORETs.[36] NAAJA is concerned, however, that this only relates to operations in the Darwin region and other major centres, whereas children in remote regions are still supervised by adult Probation and Parole Officers.

10.2.1 Youth Outreach and Re-Engagement Teams

NAAJA acknowledges that efforts to create a semi-operational standalone youth justice workforce is a step in the right direction from the adult-youth hybrid system of Community Corrections.[37] Although it is unclear on evidence before the Commission how YORETs will execute these functions, we do have concerns about the amount of youth justice functions that have been assigned to YORETs, including diversionary programs, bail support and community corrections.

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[33] *Youth Justice Act* (NT); *Parole Act* (NT); *Bail Act* (NT); *Sentencing Act* (NT).
[34] Exhibit 370.000, Statement of Tracy Luke, 30 March 2017, 25 [150].
[35] Ibid 33 [210].
[36] Oral evidence of Tracy Luke, 11 May 2017, 3783: 6–11.
[37] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 16; Exhibit 370.000, Statement of Tracy Luke, 30 March 2017, 25 [150]–[151].

NAAJA is also concerned that YORETs are only intended to be based in Alice Springs, Katherine, Nhulunbuy, Tennant Creek, Darwin and Palmerston.[38] In May this year, 36% of the young people who were the subject of supervision orders by Community Corrections were based in remote communities.[39] Therefore, it is essential that a strategy is developed that allows children to remain in their communities and receive the necessary supervision and youth-focused support. Given the inherent difficulties in providing support to children in remote communities,[40] consideration should be given to the role that local community organisations and Aboriginal Law and Justice Groups can play in the supervision process.

NAAJA supports the limited use of electronic monitoring devices for adults and young people as a bail mechanism, in order to reduce the large numbers of Aboriginal people on remand in detention and prison. Despite this, many remote Aboriginal communities have not been given the opportunity to use these devices, due to the lack or irregularity of Corrections staff presence.

NAAJA considers that the approach of the YORET unit needs to differ significantly from that of Community Corrections. While the Commission has heard that Community Corrections implemented positive strengths-based youth policies in the last year, it has been NAAJA's experience that Community Corrections generally did not take this approach in practice and instead treated children in the same way as adults.[41] In report writing, this approach was manifested in Corrections Officers referring to children by their last names only, reports that consisted solely of a list of appointments missed by the young person and only engaging in superficial discussion with the child.[42] Mr Sharp told the Commission that reports prepared by Community Corrections:

> too often present an unbalanced picture of the young person and do not take a strengths-based approach. The reports are based on the engagement between the Corrections workers and young people. In my experience, because this engagement is more often a compliance-focussed interaction, rather than as part of a case management relationship between the worker and the young person, this is what comes out in the report. Reports typically focus on a hyper-critical way on technical infractions rather than the holistic progress that a young person is making.[43]

The narrow compliance focus of Corrections is an unsuitable approach to take with young people. For young people, intervention at the bail, pre-sentence or parole stages should be viewed as an opportunity to reduce offending behaviours by addressing the variety of systemic and environmental factors that have caused offending. NAAJA hopes that the cultural and systemic issues that the Commission heard prevented receptivity to youth-centric policies in Community Corrections[44] will not continue in the YORET unit.

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[38] Exhibit 339.000, Statement of Jeanette Kerr, 27 March 2017, 11 [63].
[39] Supplementary Statement of Tracy Luke, 17 May 2017, 4 [11] [WIT.0158.0002.0001].
[40] Supplementary Statement of Tracy Luke, 17 May 2017, 4 [11] [WIT.0158.0002.0001].
[41] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 17 [97].
[42] Exhibit 104.001, Statement of Terry Byrnes, 10 December 2016, 8.
[43] Ibid 17 [96].
[44] Exhibit 370.000, Statement of Tracy Luke, 30 March 2017, 26 [158]–[159].

10.2.2 Youth Outreach and Re-Engagement Officers

YORETs must take a case management rather than compliance-focused approach to corrections. This should be instilled in Youth Outreach and Re-Engagement Officers through regular training that emphasises a therapeutic, strengths-based, trauma-informed, non-punitive methodology. Previous experience working with young people and a desire to work with young people should also be considered in the recruitment process, as studies have demonstrated a correlation between more skilled juvenile justice workers and lower recidivism rates.[45] Tracy Luke identified the administrative nature of Community Corrections roles as a barrier to attracting experienced or specialised staff.[46] The specialisation of the YORET unit, however, provides Territory Families with an opportunity to hire staff with specialised youth social work or psychological qualifications to fill these roles.

10.2.3 Resourcing of specialist functions

The lack of funding for psychological and psychiatric reports for the court or the Parole Board must be addressed.[47] Until now, Community Corrections sourced and paid for these reports, despite not being funded to do so.[48] This is a significant oversight, considering the value of these reports in judges' sentencing decisions and the significant cost of obtaining these reports in the Northern Territory because of the lack of local clinicians.[49] This has meant that experts often have to be flown from interstate to provide reports.[50] The already significant cost of travel is increased when travel must also be organised for children living in remote communities to their nearest airport.[51] NAAJA considers it essential that YORETs are funded to procure these reports.

Access to and funding of ongoing specialist services for children is another significant gap in Community Corrections services. While Community Corrections would fly psychological experts to the Northern Territory to provide reports on young people, this means that young people would only have one-off interactions with experts and be left with a diagnosis that could not be adequately treated.[52] Similar shortages in specialist health services and parole accommodation in the Northern Territory has meant that the needs of young people have not been met.[53]

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[45] Chris Trotter, 'Effective Community-Based Supervision of Young Offenders', Issues Paper No. 448, Australian Institute of Criminology, December 2012, 4.
[46] Exhibit 370.000, Statement of Tracy Luke, 30 March 2017, 28 [172]–[173].
[47] Ibid 10 [48].
[48] Ibid.
[49] Oral evidence of Tracy Luke, 11 May 2017, 3792.
[50] Ibid.
[51] Ibid 3792: 10–21.
[52] Ibid 3792: 30–40.
[53] Exhibit 370.000, Statement of Tracy Luke, 30 March 2017, 27.

Recommendation 103	That the YORET unit is required to take a case management approach to youth justice that is culturally appropriate, trauma-informed and therapeutic. Youth Outreach and Re-Engagement Officers must receive youth-specific training that emphasises this case management approach. When employing Officers, consideration should also be given to experience or expertise working with young people.
Recommendation 104	That YORETs are funded to provide wraparound services to young people, including to engage psychologists and psychiatrists to provide reports about young people.
Recommendation 105	That the services provided by YORETs are available to children in remote communities. This could involve linking with community-based organisations and Aboriginal Law and Justice Groups in remote communities to supervise young people.

10.3 The role of Supervised Community Orders

NAAJA understands that the supervision of young people subject to non-custodial orders will be transferred from Community Corrections to YORETs.[54]

NAAJA's submits that non-custodial orders should always be preferred to custodial sentences for young people. This is consistent with youth justice principles and a therapeutic, rather than punitive, approach to offending behaviour. The points at which supervised community orders may be imposed – at the time of bail, diversion or parole – are opportune moments for positive intervention in children's lives and to address offending behaviours before they come into contact with more punitive aspects of youth justice system. The provision of relevant, therapeutic services and programs at these times is crucial to addressing offending behaviour and supporting young people.

The potential benefits of appropriately supervised community orders will be frustrated if the conditions attached to orders continue to be strictly enforced. For example, statistics collected by the Northern Territory Parole Board show that of the 55 parolees who had their parole revoked in 2015, only 8 had reoffended, while the remaining 48 had breached a parole condition.[55] While these statistics encompass both youth and adult parolees, they are symptomatic of a broader trend, also evident in the bail process, that compliance with conditional orders in situations of disadvantage can be nearly impossible and that punishment for breaching conditions does not have a deterrent effect. For children especially, a more lenient and supported approach needs to be taken, which investigates the reasons for breaches and addresses them through the provision of services, such as supported accommodation.

[54] Oral evidence of Tracy Luke, 11 May 2017, 3783: 6–11.
[55] Parole Board of the Northern Territory, *Annual Report 2015*, 5.

10.3.1 Aboriginal cultural supervision

The involvement of Aboriginal community representatives in court sentencing has numerous positive outcomes. Aboriginal community members are best placed to tell the court about the offender in a holistic way and advise the court on what sentences would be viewed as appropriate by the community.[56] There are also benefits to offenders serving their sentence in their own communities, which can include increased support and compliance with court orders and reconciliation between the offender, victim and community.[57]

Accordingly, NAAJA submits that the supervision of an Aboriginal young person by Aboriginal Elders and communities should be preferred to supervision by Corrections/YORETs, wherever possible. In *R v Yakayaka and Djambuy*, the involvement of Yolŋu Elders in the sentencing process led Chief Justice Riley to state that the supervision of the Yolŋu offenders by Community Corrections was not 'necessary, or indeed appropriate' and to instead order supervision by Yolŋu Elders.[58] NAAJA regards this approach to sentencing and supervision as highly appropriate and beneficial for young people.

Other jurisdictions provide guidance on formalising the involvement of Aboriginal people in the making of non-custodial orders. In Canada, the decision in *R v Gladue* brought about significant positive initiatives aimed at involving Aboriginal advisors in the criminal justice system.[59] These changes meant that any Aboriginal person going before the Parole Board could request an Elder Assisted Hearing, in which an Elder would appear before the Board and provide information about the offender's Aboriginal culture.[60] Similarly, under the pilot Bail Consultation Program in Ontario, police were required to consult with Aboriginal consultants when deciding whether Aboriginal offenders should be removed from their communities upon offending or immediately released on bail.[61] In New Zealand, lay advocates have also been highly successful in ensuring the representation of Maori young people in matters before the Youth Court.[62] NAAJA considers the formalised representation of Aboriginal people in Youth Justice Court and parole proceedings as essential in assisting courts to craft orders that are culturally strengthening. This is also discussed in section 6.8 where we recommend the introduction of lay advocates and Gladue-style reports in the Youth Justice Court.

Recommendation 106	Cultural supervision should be favoured as an alternative to supervision by YORETs for young Aboriginal people when appropriate.

[56] Exhibit 532.000, Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' [2013/2014] 17(2) *AILR* 79, 88.
[57] Ibid.
[58] *R v Yakayaka and* Djambuy (Unreported, Supreme Court of Northern Territory, Riley CJ, 17 December 2012).
[59] Sebastien April and Mylene Magrinelli Orsi, *'Gladue* Practices in the Provinces and Territories', Department of Justice Canada (2013), 1.
[60] Ibid 18–19.
[61] Ibid 16–17.
[62] Exhibit 355.000, Statement of Jared Sharp, 24 April 2017, 34 [135]–[138].