



10 October 2024

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear committee chair

### **Senate Inquiry into Australia's youth justice and incarceration system**

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal advice, representation and justice related services to Aboriginal people throughout the Northern Territory. For over 50 years NAAJA has played a leading role in policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice.

Whilst we welcome this Senate Inquiry, it is clear the systemic issues underpinning these systems are well known and reflected in countless Royal Commissions, inquiries, reviews, submissions and reports. So many of these issues including evidence-based legal and policy reforms remain unaddressed and disproportionately impact the lives, health and wellbeing of Aboriginal children and young people, their families and communities.

In particular, we remind you of the work of Aboriginal led advocacy and reform efforts encapsulated in the Royal Commission into the Protection and Detention of Children in

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the Northern Territory (Don Dale Royal Commission),<sup>1</sup> including specific submissions NAAJA made on care and protection,<sup>2</sup> detention<sup>3</sup> and pre-and post-detention.<sup>4</sup> These submissions provide a detailed analysis of the factors that contribute to the over representation of Aboriginal children and young people in the child protection and youth justice systems of the NT and systemic failures in the operation and administration of these systems. The issues articulated therein and what needs to change remain today.

This is because the Northern Territory Government has either failed to act on key recommendations or reneged on promises to transform these systems in line with the evidence of what works. These transgressions have led to a significant increase in youth offending and the stigmatisation and demonisation of Aboriginal children and families and an increase in youth detention numbers since the Don Dale Royal Commission's final report was released. At the core of the problem is continuing poverty, disadvantage, trauma and homelessness in Aboriginal communities as well as embedded institutional racism and a 'tough on crime' response by authorities.

It is not an absence of inquiries, evidence, submissions or recommendations that has caused the early criminalisation, overrepresentation, harm, stigmatisation and endangerment of young Aboriginal people in the Northern Territory. Instead, the need for this Inquiry comes from the failure of governments at all levels to accept and commit to genuine implementation of recommendations and to fund the evidence-based reforms that we know will better protect and support our young people.

### **NAAJA's submission to this Inquiry**

We address the following items in the Terms of Reference of the Inquiry:

- a. the outcomes and impacts of youth incarceration in jurisdictions across Australia
- b. the over-incarceration of First Nations children
- c. the degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention
- d. the benefits and need for enforceable national minimum standards for youth.

We also include observations about compliance with human rights by police during the arrest and detention of young people in the Northern Territory.

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<sup>1</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report* (2017).

<sup>2</sup> NAAJA, *Submissions on Care and Protection* (Submission, 2017) <https://www.naaja.org.au/wp-content/uploads/2020/03/NAAJA-Care-Protection-submissions.pdf>.

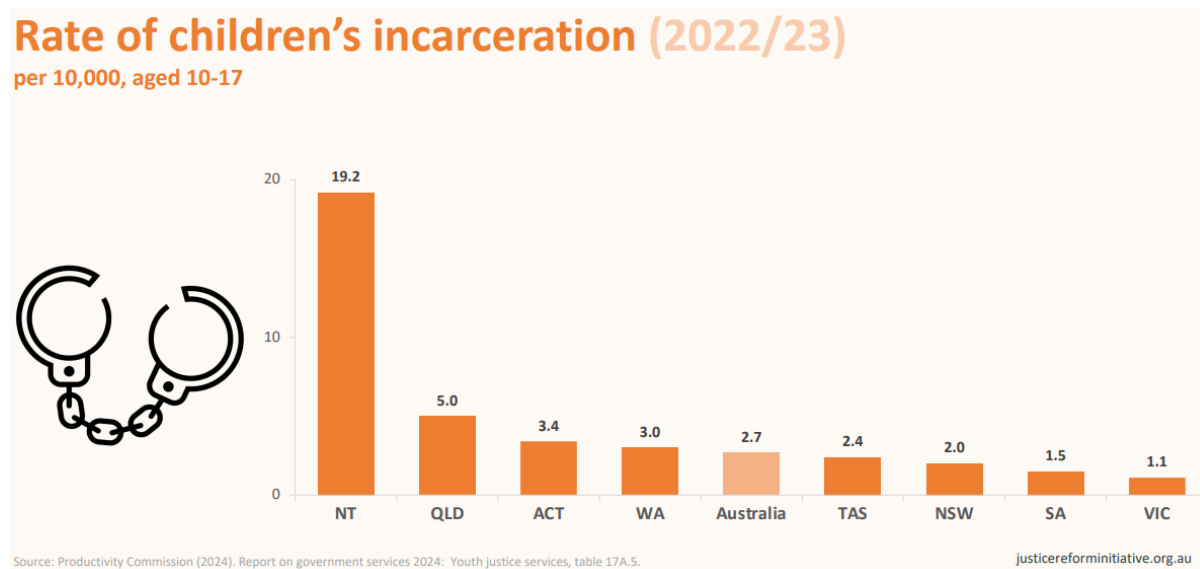
<sup>3</sup> NAAJA, *Submissions on Youth Detention* (Submission, 2017) <https://www.naaja.org.au/wp-content/uploads/2020/03/North-Australian-Aboriginal-Justice-Agency-Detention.pdf>.

<sup>4</sup> NAAJA, *Submissions on Pre and Post Detention* (Submission, 2017) <https://www.naaja.org.au/wp-content/uploads/2020/03/North-Australian-Aboriginal-Justice-Agency-Pre-Post-Detention.pdf>.

## 1. The overincarceration of First Nations children in the Northern Territory

This section sets out our current experiences of the reasons why Aboriginal young people are being incarcerated in such high numbers in the Northern Territory, and why so many of our clients continue to return to youth detention following initial sentences.

The Northern Territory incarcerates significantly more children and young people on a per capita basis than any other jurisdiction in Australia, as shown in the below table:



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The daily average number of young people held in detention in the Northern Territory is 38.5.<sup>6</sup> Aboriginal young people account for around 95% of the youth detention population, although they make up 43% of the total Northern Territory youth population.<sup>7</sup>

### Young people on remand make up the majority of youth detention populations

In 2017, the Don Dale Royal Commission highlighted: *'most children and young people held in detention in the Northern Territory are not there because they have been sentenced to detention, but because they have been remanded in custody awaiting a hearing or outcome in their case.'*<sup>8</sup>

<sup>5</sup> Justice Reform Initiative (2023), Children's Imprisonment in Australia 2023, 12.

<[https://assets.nationbuilder.com/justicereforminitiative/pages/410/attachments/original/1713851456/RI\\_Children\\_Imprisonment\\_Overview\\_April24.pdf?1713851456](https://assets.nationbuilder.com/justicereforminitiative/pages/410/attachments/original/1713851456/RI_Children_Imprisonment_Overview_April24.pdf?1713851456)>

<sup>6</sup> Northern Territory Department of Territory Families, Housing and Communities, *Youth Detention Census* (Web Page, Territory Families, Housing and Communities) <https://tfhc.nt.gov.au/youth-justice/youth-detention-centres/youth-detention-census>.

<sup>7</sup> Australian Institute of Health and Welfare. (2023). *Youth justice in Australia 2021-22*. Canberra: AIHW. Retrieved from <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2021-22/contents/state-and-territory-fact-sheets/northern-territory>>

<sup>8</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2B (2017) 278.

It is disappointing that nothing has changed since that time—the majority of young people inside youth detention facilities in the Northern Territory are still on remand awaiting a sentence or outcome.<sup>9</sup> In 2024, on average approximately 28 young people were in detention on remand in the Northern Territory and 10 young people were in detention serving a sentence.<sup>10</sup>

Data shows the average remand time for youth court matters in the NT was 63 days in 2024, down from a high of 84 days in 2023.<sup>11</sup> NAAJA's youth clients spend long periods of time on remand, yet very few are given a term of youth detention when their matter is determined.

Data collected from NAAJA's youth crime practice shows that:

- Where our young clients were kept on remand for the entire duration of their court proceedings, the average time spent on remand was 137 days. Only 23% of these clients were then sentenced to a term of detention.
- For those of our clients under the age of 14 who were kept on remand until sentencing, the average time spent on remand was 197 days. 80% of these clients ultimately had their charges withdrawn or were otherwise discharged with no penalty. Only one client received a term of youth detention.
- Since 2021, four NAAJA clients under the age of 14 spent more than 250 days on remand before having the charges against them withdrawn or dismissed.

### Punitive bail laws have led to overincarceration

NAAJA considers the overincarceration of young people in the Northern Territory can be heavily attributed to reforms to the *Bail Act 1982* (NT) and the *Youth Justice Act 2005* (NT) in 2021.

The *Youth Justice Legislation Amendment Act 2021* (NT):

- removed the presumption of bail for certain prescribed serious offences (including unlawful entry and unlawful use of a motor vehicle)
- prescribed breaches of bail conditions relating to curfews and electronic monitoring devices as 'serious breaches of bail'
- required the revocation of bail with limited judicial discretion following serious bail breaches
- required breaches of bail to be considered during sentencing (collectively, **Bail Reforms**).

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<sup>9</sup> NT Local Court, Local Court Stats – to End March 2024, slide 35 "Average remand time for youth court", URL <<https://tfhc.nt.gov.au/youth-justice/youth-detention-centres/youth-detention-census>>.

<sup>10</sup> Northern Territory, *Youth Detention Census* (Web Page, Northern Territory Government) <<https://tfhc.nt.gov.au/youth-justice/youth-detention-centres/youth-detention-census>>.

<sup>11</sup> [local\\_court\\_and\\_youth\\_justice\\_court\\_criminal\\_courts\\_stats\\_to\\_end\\_march\\_2024.pdf](https://tfhc.nt.gov.au/youth-justice/youth-detention-centres/youth-detention-census) (nt.gov.au)

These amendments had an immediate impact on youth incarceration numbers in the Northern Territory, causing a 56% increase in the average daily number of young people in detention in their first year of operation.<sup>12</sup> Overall, the Bail Reforms have led to a 30% rise in the number of young people in detention over the last five years,<sup>13</sup> with Aboriginal children faring the worst.

Since the 2021 Bail Reforms, 67% of NAAJA youth clients who were immediately remanded in custody upon arrest had no prior offences and were charged with non-violent crimes that previously would not have led to incarceration in the NT.

Ten percent of those clients held in detention on remand were charged only with minor offences such as theft, possession of stolen property and disorderly behaviour in public. Facing comparative charges in another Australian jurisdiction, a young person would ordinarily attract either a station level police caution or a summons to attend court and would not be subject to remand in detention or the imposition of bail conditions.

The Don Dale Royal Commission found that the unreasonably high numbers of children in (unsentenced) custody were the result of inter-alia:<sup>14</sup>

- inadequate bail support services, such as bail accommodation services, for young people
- inappropriate and ill-tailored bail conditions being imposed on young people.

As set out below, these two issues continue to be the case for NAAJA's youth clients.

#### Inadequate bail support services for young people

In 2017, the Don Dale Royal Commission recommended the provision of bail support services for young people be provided in Darwin, Alice Springs, Tennant Creek, Katherine and Nhulunbuy as a key measure to keep young people out of custody.<sup>15</sup> Seven years on, little has been done to implement this recommendation.

Gazetted non-custodial bail accommodation options in the Northern Territory include First Step in Darwin, Juno in Tennant Creek and The Gap in Alice Springs. In Darwin, this program is often at capacity and cannot accept new clients. At times, some of these programs are also unwilling to accept clients with particularly difficult or complex circumstances.

Supported youth bail accommodation alcohol and drug programs include BushMob in Alice Springs and CAAPS in Darwin. For a young person to be bailed to one of these programs, it requires a proactive early referral and assessment by a case manager, and

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<sup>12</sup> Ibid.

<sup>13</sup> Australian Institute of Health and Welfare. (2024). *Youth justice*. Retrieved from <<https://www.aihw.gov.au/reports/australias-welfare/youth-justice>>

<sup>14</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2B (2017) 20-21, 278-291.

<sup>15</sup> Ibid 301.

then our clients regularly face wait lists of up to two months or more before gaining a position at one of these places. On one occasion recently, a client was accepted to CAAPS within a matter of days, a rare exception.

Our youth crime lawyers report that clients are regularly not in a position to make applications for bail because of the absence of availability at a non-custodial bail accommodation facility or residential program.

Where no suitable bail options are available, our youth clients continue to be held in detention on remand.

A NAAJA client was recently arrested in a remote community and flown to Darwin, with police not contacting the client's parents or other family members. NAAJA lawyers were unable to locate a responsible adult to supervise the client's bail in time for the first appearance at court. Although the judge agreed that custody was not appropriate and that it would be preferable for the young person to be back in their home community, because First Step residential youth bail accommodation was full, the judge had no other option but to place our client on remand.

NAAJA lawyers estimate that lack of availability and/or delay for a bed at a bail support facility occurs on an almost fortnightly basis in some regions.

Investments in additional safe and supported youth accommodation options would increase the availability of bail for young people in the Northern Territory. Additionally, to support applications of bail for a young person seeking to reside with a responsible adult, greater access to and availability of active case management and support services for young people would assist with these applications.

#### Bail breaches flowing from unreasonable and ill-tailored bail conditions

The Don Dale Royal Commission highlighted the problem of bail conditions being 'imposed on children and young people that are not appropriately tailored to address the individual circumstance of the young person' and recommended including additional protections in bail legislation.<sup>16</sup>

This has continued to be a problem for NAAJA's clients, particularly since the introduction of the Bail Reforms, which have resulted in the frequent remand of our clients and applications by police to revoke bail due solely to conditional breaches. Some breaches (without further offending) are considered "serious breaches" of bail under the Act. This sets a presumption against bail and means that clients are only able to receive a further grant of bail with strict conditions.

The bail conditions imposed on our clients are often not practical nor sustainable, and often set our clients up for conditional breaches of bail and further interactions with

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<sup>16</sup> Commonwealth, *Royal Commission into The Protection and Detention of Children in the Northern Territory, Final Report*, Volume 2B (2017) 290.

the justice system. Prosecutions often rely on our client's bail history and history of compliance/non-compliance in making submissions to the court on bail and sentence.

The scenarios below represent common examples of circumstances in which our clients breach their bail conditions.

- A client who lived in a remote community was prohibited from entering Alice Springs for extended periods of time, creating logistical and social challenges for both the client and their family members. Ultimately the client ended up breaching bail. In a majority of cases, our young clients' movements are dependent on their family members, who may need to visit banned locations where essential services, like supermarkets, are situated, making compliance with very broad bail conditions difficult.
- A client under 14 years of age had more than 10 non-associations listed on their bail conditions. This child had FASD and could not remember all of the people who they were not permitted to associate with and inadvertently breached bail.
- A client who lived in a remote community and suffered a chronic medical condition was prohibited from entering Darwin. NAAJA had to apply to vary the young person's bail so that they could attend Darwin to receive medical treatment.
- A client living in a remote community was required to report to a corrections officer between 9am and 4pm every Thursday. The child had no mobile phone and the community has limited phone reception and youth support services. It was clear the child found it difficult to know the time or day of the week on any given day. While the client was not arrested for breach of bail for this reason, when they were arrested for breach of bail for another reason, failure to comply with this bail condition was used to further punish our client.

As a consequence of inappropriately tailored bail conditions, by the time our clients' initial matters are heard after a prolonged waiting period, a young person has often accumulated a number of bail breaches, which in turn increases the severity of the outcome at sentencing.

#### Administrative errors leading to incorrect arrests

We regularly see instances where courts are not correctly updating bail conditions in their systems, leading to police making incorrect arrests.

We have received reports that one young person was incorrectly arrested by police for a purported breach of bail and spent five hours in custody on an incorrect charge. Police and court systems had not been updated to reflect the young person's current bail conditions.

#### Commonplace use of electronic monitoring devices are a particular problem

The Don Dale Royal Commission acknowledged that electronic monitoring devices (**EMDs**) can be stigmatising for children and may affect their rehabilitation, thereby



recommending that '*EMDs should only be considered when there is no other alternative to remanding the child or young person in detention.*'<sup>17</sup>

However, in stark contrast to these recommendations, EMDs have become an extremely common condition of our client's bail since the Bail Reforms came into effect—the *Bail Act (NT)* now requires young people to be fitted with an EMD if they are to be released on bail following any serious breach of bail.<sup>18</sup>

The Queensland Government recently conducted a trial on the use of EMDs and found that there was 'insufficient evidence and data from [its] review or other comparable jurisdictions to make definitive, evidence-based conclusions about the efficacy of electronic monitoring as a bail condition within the Queensland youth justice context'.<sup>19</sup>

The *Electronic Monitoring Trial Review Report* also found that:

- EMDs stigmatised young people and had a negative impact on their mental health and caused family conflict<sup>20</sup>
- electronic monitoring requires additional supports, after-hours support in particular, not only for the youth but also the parent/guardian and family.<sup>21</sup>

This is consistent with NAAJA's experience—the use of EMDs increase our young clients' likelihood of bail breach and detrimentally impacts their rehabilitation, increasing the likelihood of future interactions with the criminal justice system.

Firstly, many NAAJA clients struggle to comply with bail conditions requiring them to keep their EMDs charged, often for reasons outside of their control.

NAAJA's Custody Notification Service records show that, since the Bail Reforms were introduced, at least 19 of NAAJA's clients have been remanded in custody for serious breach of bail solely because of the battery on their EMDs becoming flat. On 15 of these occasions (74% of the time), our clients reported that their EMDs had gone flat for innocent reasons, these included the following:

- seven clients reported experiencing various EMD faults including, EMDs not vibrating when the battery was low, EMDs losing battery extremely quickly and much quicker than usual and EMDs going flat despite being put on their chargers
- five clients reported accidentally losing their charger, leaving it at a different location, or forgetting to charge their EMD either during the day or while they were sleeping or otherwise being unaware their EMD had gone flat (notably, three of these clients had FASD and/or ADHD)

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<sup>17</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2B (2017) 296-7.

<sup>18</sup> *Bail Act 1982 (NT)* s 7B(3).

<sup>19</sup> Queensland Department of Employment, Small Business and Training, *Electronic Monitoring Trial: Evaluation Report* (2021) 6-7.

<sup>20</sup> *Ibid* 4.

<sup>21</sup> *Ibid* 7.



- two clients reported having difficulties regularly charging their EMD due to carers confiscating the EMD charger from time to time or not allowing our clients to charge their EMDs in their bedrooms
- one client's EMD went flat due to a car breakdown (he did not have his charger on him and could not access it).

In addition, the visibility of EMDs leads to the further stigmatisation and disengagement of our clients.

NAAJA's youth justice lawyers estimate that 90% of their clients dislike wearing an EMD. The lawyers understand that this is often because their clients experience social isolation or exclusion as a result of their EMDs, particularly those living in remote communities. They understand that this exclusion can involve:

- being formally excluded from school, sports and other pro-social activities
- avoiding participation in such activities due to feelings of shame.

Recently, three young NAAJA clients reported not wanting to attend school due to fear of being isolated or other negative treatment by peers as a result of their EMDs.

One NAAJA client had been disengaged from school and while on bail they were enrolled in a new school. The client did not want to start at the new school while subject to an EMD for fear of negative perceptions that other students would have about them for wearing the device.

### Police use of arrest is inappropriate and youth diversion options are not being prioritised or properly resourced

The over-incarceration of young people in the Northern Territory is also a result of police failing to comply with their obligations in *Youth Justice Act* to:

- use arrest only as a measure of last resort<sup>22</sup>
- prioritise diversion as a response to youth offending.<sup>23</sup>

The Don Dale Royal Commission report found that Northern Territory Police often fail to use arrest as a last resort, as required by the *Youth Justice Act*, and made a suite of recommendations aimed at changing police practices relating to the unnecessary arrest of young people.<sup>24</sup> NAAJA has not seen a change in police practice since this time—police often issue immediate arrests rather than summons.

In the 2023/2024 reporting year, only 14% of NAAJA's youth clients were issued with a summons by police first rather than being arrested. In other words, 86% of NAAJA's youth clients were placed on bail or remanded in custody as a first step by police.

The Don Dale Royal Commission also found that diversion programs in the Northern Territory were inadequately resourced, inconsistently offered to Aboriginal youth as

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<sup>22</sup> *Youth Justice Act 2005* (NT) s 22.

<sup>23</sup> *Ibid* Part 3.

<sup>24</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report, Volume 2B* (2017) 230-1.

compared to non-Aboriginal youth, and experience significant delays limiting their effectiveness.<sup>25</sup> Despite the Don Dale Royal Commission's clear recommendations to resource the Northern Territory Police Youth Diversion Unit and expand the eligibility criteria for youth diversion programs,<sup>26</sup> we continue to find the same issues remain with youth diversion now.

In NAAJA's experience, the Northern Territory lacks adequate resources and processes to support youth diversion as a first step in addressing youth offending.

In the last three years, our records show that only 4% of NAAJA's youth clients have been granted diversion by the court. This is despite at least 27% of clients being charged with offences which would ordinarily make them eligible for diversion, such as theft offences, low level drug possession offences and property damage.

We have no information about the numbers of young people who are diverted by police.

#### Limited access to interpreters in the process of engaging with the justice system

The Don Dale Royal Commission found there were inadequate, or, at times, no support services attached to the court, including Aboriginal language interpreters, to facilitate the administration of justice by the Youth Justice Court.<sup>27</sup> Difficulty accessing interpreters continues to be an issue, and also affects our lawyers in seeking instructions from youth clients.

NAAJA's lawyers estimate that they are able to access Murrinh Patha interpreters about 20% of the time when taking instructions or providing legal advice. Murrinh Patha is the language spoken in Wadeye, which has high rates of youth offending and low levels of English literacy, and therefore affects the capacity of our lawyers to provide best practice legal services to many of our youth clients.

NAAJA youth lawyers advise that on numerous occasions in the past six months, clients are released on bail by police without an interpreter being present, in instances where the lawyers know the young person does not speak English. This means that clients are agreeing to bail conditions as part of the release process in situations where they are unlikely to comprehend their bail conditions. This places our clients at significant risk of future bail non-compliance and breach.

#### Underlying disadvantage and absence of early intervention services for young people

Beneath all of these factors, the underlying causative issue funnelling our clients into the youth detention system is the very high levels of disadvantage experienced by

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<sup>25</sup> Ibid, see Chapter 25.

<sup>26</sup> Ibid 276.

<sup>27</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report, Volume 2B* (2017) 318.

Aboriginal children in the Northern Territory. In a 2009 Parliamentary Inquiry<sup>28</sup>, NAAJA wrote:

***“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 predispose 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.”***

We quoted our 2009 submission in our 2017 submission to the Don Dale Royal Commission and we repeat it in this submission in 2024 because it remains true and unchanged today.

Before their first contact with the justice system, NAAJA youth clients display one and sometimes many or all of the following disadvantages: high levels of school disengagement, high involvement with the child protection system, disability, experience of domestic violence, parental incarceration and substance use.

These issues are not being properly addressed through early intervention and continue to underpin our youth clients' involvement in the youth justice system.

#### Case study

Z was placed in the care of Territory Families at an early age due to having a single parent who was routinely in and out of custody for drug related offences. Territory Families have provided little in the way of holistic or tailored support to Z throughout his childhood.

Z started drinking at an early age and quickly developed a problematic relationship with alcohol.

In late 2021 (following the Bail Reforms), Z was admitted to Don Dale youth detention centre for the first time at the age of 12. Since that time, he has been charged with a significant number of offences. Z has been in and out of Don Dale more than 30 times in the last three years, and has spent approximately a year in custody.

Numerous times, Z has been required to wear an EMD as part of his conditions of bail/release. Z suffers from FASD and ADHD, which makes it extremely difficult for him to comply with bail conditions which require him to remember to charge the EMD and wear it at all times.

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<sup>28</sup> 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. Compliance with the human rights of children and young people in youth detention facilities

This inquiry calls for submissions that describe compliance with the human rights of young people in detention. NAAJA's lawyers are not human rights specialists and will not seek to comment on specific breaches of the human rights of our clients. However, we outline below some of our concerns regarding the recent experiences of our clients inside Northern Territory youth detention facilities.

In 2017, the Don Dale Royal Commission found that during at least 2013-14, the management of detainees failed to achieve a balance between the security of the detention centre and the rehabilitation of the detainees, as required under the *Youth Justice Act (NT)*.<sup>29</sup> The following recommendation was made to improve the rehabilitation of young people:<sup>30</sup>

1. A case management system be implemented in all youth detention centres:
  - to manage behaviours in a therapeutic non-punitive, non-adversarial, trauma-informed and culturally competent way
  - to apply to all detainees including those on remandto include:
  - training case workers in the use of an evidence-based and culturally appropriate individual needs assessment tool, utilised from admission of a child or young person and on an on-going basis
  - give case workers access to a manual that is comprehensive, up-to-date and reviewed on a regular basis
  - training and accrediting case workers to deliver therapeutic, trauma-informed and child-centred case management to all young people within the detention centres
  - resourcing and funding an increase in the case worker to client ratio to ensure that intensive and consistent case management can be delivered to each young person
  - implementing a multi-disciplinary approach to case management engaging with relevant stakeholders, including community service providers, the young person and, where appropriate, the young person's family and/or departmental caseworkers
  - providing each young person with individually tailored rehabilitation, with appropriate programs and services, including drug and alcohol programs ensuring each young person has ongoing access to their case managers, case management programs and activities regardless of security classification ensuring young people on remand are provided with appropriately tailored case management services for release planning, and
  - ensuring case management and release planning for children and young people in detention take account of existing therapeutic and rehabilitation interventions and maintain their existing relationships with service providers.

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<sup>29</sup> Ibid, 19.

<sup>30</sup> Ibid.

2. Where appropriate, the young person's community caseworker continue as a caseworker during any period the young person is in detention.

In stark contrast to these recommendations, conditions inside Alice Springs and Don Dale Youth detention centres have continued to be of extreme concern to NAAJA.

#### Occasional use of physical restraints

While the Don Dale Royal Commission recommended a prohibition against the use of force or restraint being used for the purposes of maintaining the 'good order' of a youth detention centre or to 'discipline' a detainee,<sup>31</sup> we are aware of instances where physical restraints have been used on NAAJA youth clients in the past 12 months.

During the period of renovations in Alice Springs, when transfers of detainees were being made from Alice Springs Youth Detention Centre to Don Dale, we are aware of several instances where waist belts and handcuffs were used on youth clients during the period of their transfer. This includes in public places and around large crowds at the Alice Springs airport.

For 1-2 weeks following the incident at Don Dale in April 2024, in which damage was caused to the centre, many movements of detainees at Don Dale out of the main block involved the use of a waist restraint. Most young people were required to wear waist restraints when coming to see lawyers and give instructions. We understand that waist restraints were used on 50 occasions out of a total of 93 escorts in the one week following this incident.

On 25 June 2024, there was an incident at the Alice Springs Youth Detention Centre (ASYDC) following several weeks of rolling lockdowns due to staff shortages. NAAJA staff understand that the incident was a result of young people protesting against conditions at the centre. Damage was caused to the facility, and following the incident, NAAJA heard reports of increased minor self-harm incidents, restricted movement around the centre, and increased use of the waist-belt restraint. This incident occurred a number of weeks after the renovated ASYDC was re-opened.

#### Frequent use of lockdowns

The Don Dale Royal Commission report highlighted evidence of detainees being '*locked down for hours at a time simply because there were not enough staff on shift*',<sup>32</sup> and made recommendations that youth detention centres be sufficiently staffed to ensure that detainees not be locked down while youth justice officers take necessary breaks.<sup>33</sup>

Concerningly, little has changed for our clients.

NAAJA's youth clients report being frequently subject to centre-wide 'lockdowns', triggered by staff shortages or incidents. During these lockdowns, young people are isolated in cells for up to 23 hours a day. Periods of heavy lockdowns can last for weeks

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<sup>31</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report, Findings and Recommendations* (2017) 30.

<sup>32</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report, Volume 2B* (2017) 49.

<sup>33</sup> *Ibid*, 53.

at a time. During this time, young people are locked in their cells either alone or with others and are not allowed outside.

We also note that during lockdown periods, young people are separated from other detainees. The *Youth Justice Act 2005* includes strict rules that govern when a young person may be separated from other detainees.<sup>34</sup> These rules are exempted during *reasonable and necessary* lockdown periods.<sup>35</sup>

NAAJA is concerned that the frequency and length of lockdowns in youth detention centres go beyond what is reasonable and necessary. Lockdowns have become the first response of centre management in circumstances where staffing levels are low or issues arise.

Over the last few months in Alice Springs Youth Detention Centre, our youth crime lawyers report that detainees have been placed on lockdown at least once a week on average. At other times, detainees are locked down for multiple hours while staff take breaks.

On one day, NAAJA lawyers were advised that if their client were to appear in court in person rather than via video link, this would require the remaining detainees to be locked down due to staff shortages in the centre.

On other occasions, misconduct by a small number of detainees has had the effect of punishing all detainees.

On 3 April 2024, there was an incident at Don Dale during which damage was caused to the centre by 14 detainees. This led to conditions in the detention facility deteriorating significantly for all detainees, regardless of their involvement in the incident. One NAAJA client who did not participate in the misconduct reported to his lawyers that he and approximately 30 other young people were locked down for approximately two weeks. During this time, our client spent extended periods of time alone in his cell, had no access to therapeutic programs, education or time outdoors and had no TV in his cell.

The frequent use of lockdowns as a tool of centre management is not only an issue in the Northern Territory. In Western Australia, the Courts have found the use of lockdowns at Banksia Hill Detention Centre was unlawful and have made the following comments:

*First, confining detainees or prisoners to their sleeping quarters or cells for long hours is a distinct form of confinement which involves a significant reduction in liberty and amenity. It is a severe measure. Confining children to their sleeping quarters in a detention centre for long hours, thus effectively confining them in isolation, can only be characterised as an extraordinary measure - one that should only be implemented in rare or exceptional circumstances. Among the many reasons why it should be so characterised is*

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<sup>34</sup> *Youth Justice Act 2005*, s 155A.

<sup>35</sup> *Youth Justice Act 2005*, s 155A(1AA)(a)(ii).

*because of the very significant harm such confinement can do to children in detention, many of whom are already psychologically vulnerable.*<sup>36</sup>

### Separation of young people who are at risk

In addition, despite legislative requirements for separation from others in isolation to be a measure of last resort, we see separation being used for clients who are known to be at risk of self-harm or suicide.

#### Case study

X was placed in separation after he started self-harming. At the time of being placed in separation, he disclosed suicidal ideation to Don Dale staff.

A short time later, X was discovered unconscious on his floor after he had knocked himself out after repeatedly banging his head against the wall.

X was then transferred to Royal Darwin Hospital where he was assessed by a psychiatrist and received medical care. Although X was recommended for transfer to the Youth In Patient Unit (YIP), at the time of X's hospital admission there were no beds available in YIP. Instead, X was informed that he would be returned to Don Dale and marked 'at risk'. X's previous experiences in Don Dale told him that being marked 'at risk' meant extended periods of separation. In a state of heightened fear about further isolation in Don Dale, he escaped as he was being discharged from hospital and ran away to his nominated placement with Territory Families.

X was returned to Don Dale and placed immediately into separation.

The Youth Justice Act requires all children in separation to be given access to education and recreation materials, and to be given access to sunlight and outdoor exercise for at least 15 minutes every three hours. However, for the next 24 hours, X was only permitted to leave his cell twice, for a total of 30 minutes and was not permitted to go outside at all. During this time, X was isolated in his cell with no recreational or educational material. His mattress was also removed from his cell for a few hours as punishment after he refused to get undressed at the request of correction officers.

X reported suffering acute mental distress and having extreme thoughts of suicide because of this treatment.

### Limited access to education inside Don Dale

The Don Dale Royal Commission found that education in youth detention was not adequately tailored to individual young people's learning needs,<sup>37</sup> young people did not receive the education they were entitled to while in detention,<sup>38</sup> and that there was a failure to sufficiently recognise the benefits of using Aboriginal interpreters and interpreting services inside detention centres.<sup>39</sup>

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<sup>36</sup> *VYZ v Chief Executive Officer of the Department of Justice* [2022] WASC 274 at [71].

<sup>37</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2A (2017) 398.

<sup>38</sup> *Ibid*, 418.

<sup>39</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2A (2017) 401.



At this point in time, there is no education facility at Don Dale due to current building damage. We understand from our clients that education is currently being delivered at the blocks rather than in appropriate classrooms. In these conditions, education is often reduced to worksheets provided to young people in English. During periods of lockdowns, education is further confined to young people receiving worksheets in cells without supervision or support.

#### Lack of culturally sensitive support

The Don Dale Royal Commission highlighted the lack of cultural safety inside youth detention, finding that:

- the detention centre staff profile did not reflect the backgrounds of young people in detention<sup>40</sup>
- detention centre staff were not equipped to provide culturally appropriate support for detainees.<sup>41</sup>

This continues to be the case for NAAJA's clients.

NAAJA lawyers report that detention centres lack staff who speak the languages of all the young people. This isolates young people who do not speak English and limits the effectiveness of education, supports and interventions, particularly for minority language speakers.

One NAAJA client from a minority language group who required an interpreter was unable to communicate with anyone, including peers, for extended periods. This client was only able to meaningfully interact with their NAAJA lawyer and treating medical practitioner, as this was the only time they were afforded an interpreter.

A lack of use of interpreters has also led to injustice in transfers of detainees. The Don Dale Royal Commission recommended that a young person be detained in a detention facility nearest to their place of residence, and that consultation occur prior to any transfer in a fair and transparent manner.<sup>42</sup>

One NAAJA client was transferred from the Alice Springs Youth Detention Centre to Don Dale while the Alice Springs facility was undergoing renovations. The client had expressed concerns to us that Central Australian children experienced conflict with Top End children at Don Dale, and did not want to be transferred to Don Dale for this reason. We understand that the client was transferred without any consultation with the client's mother.

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<sup>40</sup> Ibid, 462.

<sup>41</sup> Ibid.

<sup>42</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report, Findings and Recommendations* (2017) 29.

### Legislative barriers to compensation reduce accountability

In May 2022, the Northern Territory Government passed the *Personal Injuries (Liabilities and Damages) Amendment Bill 2022 (Compensation Amendment Legislation)* which caps the compensation for institutional abuse (such as unlawful use of restraints, false imprisonment through unlawful isolation and the unlawful use of force and strip searches) suffered by detainees of correctional facilities at \$15,300. In addition, outstanding fines or government debts are deducted from compensation payouts, restricting the financial autonomy of claimants.

This legislation was passed a year after a \$35 million settlement was secured for 1200 Don Dale detainees and former detainees who were victims of institutional abuse including mistreatment, verbal abuse, humiliation and isolation between 2006 and 2017,<sup>43</sup> and two years after NAAJA successfully argued that the use of tear gas on four detainees in Don Dale was unlawful and unlocked a right to damages.

Previously, detainees' ability to seek meaningful compensation for wrongs committed against them in youth detention created a strong incentive for Corrections to comply with its duty of care to detainees.

However, the Compensation Amendment Legislation has now removed any practical right for young people who have experienced abuse in a detention centre in the NT to hold the government to account. This not only undermines important accountability mechanisms within the justice system, but also places Aboriginal young people at greater risk of harm due to diminished liabilities for mistreatment.

In two recent cases, NAAJA has advised clients against initiating court proceedings for legitimate claims of institutional abuse, because the costs and risks involved in taking the matter to trial would be too great in circumstances where the maximum compensation is \$15,300, and any award would first be used to pay off outstanding fines as per the Compensation Amendment Legislation.

### **3. Compliance with human rights by police during the arrest and detention of young people in the Northern Territory**

We also have concerns regarding the treatment of young people by police during their arrest, transportation and initial remand.

#### Police dogs are being inappropriately used during police pursuits and arrests

Police dogs are being used by police in Darwin and Alice Springs to assist in arrests, and in particular when a young person tries to flee arrest.

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<sup>43</sup> Chelsea Heaney, 'NT government to pay former youth detainees \$35 million after failed bid to keep figure secret' *ABC News* (online, 28 July 2021) <https://www.abc.net.au/news/2021-07-28/youth-justice-class-action-settled-amount-35-million/100329520>

In January 2023, an unarmed teenager who attempted to run away from police was taken to hospital with injuries to his shoulder and neck after officers let a police-dog off the leash to chase down and 'subdue' the teen. Police ultimately dropped the charges against the youth.<sup>44</sup>

The NT Ombudsman's 2022/23 annual report highlighted concerns about the use of dogs in police apprehensions and called on police to review their policies regarding the Dog Operations' use of force.<sup>45</sup> The annual report highlighted one occasion in which police used a police dog to threaten a young boy who was charged with a non-violent crime. The child was handcuffed and pulled his arms away from police as he was escorted towards a police vehicle. A police officer told the child '*that the officer is going to get the dog out and if you play up the dog is going to bite you*' and '*that dog is coming for you if you don't calm the f\*\*\* down*'.<sup>46</sup>

Consistent with these reports, NAAJA's youth lawyers have seen a number of recent incidents involving police dogs seriously injuring young people.

We are aware of more than one occasion in which NAAJA youth clients have been hospitalised and required surgery as a result of incidents with police dogs.

On at least one occasion, we are aware of a dog being let off the lead to chase and bite a young person in the course of their arrest. Additionally, on at least one occasion, we have heard an account from a client that a police dog has continued to attack them when the young person was already restrained by police.

#### Transport of young people to detention

The Don Dale Royal Commission highlighted evidence of concerning and unsafe practices relating to the transport of detainees between detention centres, including a young person who, in his recount, was transferred in the back of a paddy wagon alone for 17 hours on a hot day.<sup>47</sup> The Don Dale Royal Commission report recommended that Territory Families ensure that transfers over long distances to or between detention centres should be conducted by air transport.<sup>48</sup>

Unfortunately, NAAJA lawyers hear about concerning and unsafe transfers of young people to detention centres in the back of paddy wagons in harsh weather conditions. This includes on a number of occasions in the past 12 months.

- One youth client was handcuffed and transported in a paddy wagon to Alice Springs without a seatbelt for eight hours in extremely hot weather, some of which included sections of unsealed road.

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<sup>44</sup> Amanda Parkinson, 'Teenager Sustained Injuries to His Neck and Shoulder After Police Use Dog in Arrest' *NT News* (online, 24 January 2023).

<sup>45</sup> Ombudsman NT, *Annual Report 2022/23* (2023) 49-51.

<sup>46</sup> *Ibid*, 49.

<sup>47</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2A (2017) 128.

<sup>48</sup> *Ibid*, 129.

- Another client was transferred from a remote community to Darwin in the back of a paddy wagon during floods—the client was in the paddy wagon during heavy rain for approximately four hours.

### Remand in police watch houses

In 2017, the Don Dale Royal Commission expressed concerns about the length of time that children were being held in police watch houses prior to being charged, with some young people being held for 30 hours before being released on bail.<sup>49</sup>

It is NAAJA's recent experience that young people continue to be held in watch houses with delays in police laying charges often extending to 3-4 days.

A NAAJA youth client was held in a police watch house for three days in a remote community in the past month prior to being formally charged by police.

## **4. The outcomes and impacts of incarceration**

Young people in detention often experience disproportionately high rates of mental health issues, substance misuse, and suicide and self-harm.<sup>50</sup> Incarceration not only worsens their physical and emotional well-being but also creates significant barriers to rehabilitation and reintegration into society. Disengagement with education and employment opportunities, compounded by stigma and discrimination, also makes it harder for young people who have been incarcerated to find stable work and housing.<sup>51</sup>

For these reasons, so many of our clients are trapped in a cycle of incarceration, repeatedly encountering a system that fails to address the causes of crime, fails to offer opportunities to break the cycle of repeated incarceration, and entrenches ongoing justice system involvement.<sup>52</sup>

A report commissioned by the Northern Territory Department of the Attorney-General and Justice estimates the five-year recidivism rate to be 61 per cent. This is the number of young people discharged from youth detention who are predicted to enter the adult prison system within five years in the Northern Territory.<sup>53</sup> At the national level, 66% of young people released from sentenced detention are returned to detention within

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<sup>49</sup> Commonwealth, Royal Commission into The Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 2B (2017) 232.

<sup>50</sup> Melissa Willoughby et al, 'Violence-Related Death in Young Australians After Contact with the Youth Justice System: A Data Linkage Study' (2023) *Journal of Interpersonal Violence* 1, 12.

<sup>51</sup> Parliament of Australia, 'Chapter 3: The economic and social costs of imprisonment', *Report: Value of a justice reinvestment approach to criminal justice* (Parliamentary Report, 2013)

<sup>52</sup> Justice Reform Initiative, *The Need for Alternatives to Incarceration in the Northern Territory* (Report, May 2023)

[https://assets.nationbuilder.com/justicereforminitiative/pages/337/attachments/original/1684123418/JRI\\_Alternatives\\_NT\\_Highlights\\_FINAL\\_copy.pdf?1684123418](https://assets.nationbuilder.com/justicereforminitiative/pages/337/attachments/original/1684123418/JRI_Alternatives_NT_Highlights_FINAL_copy.pdf?1684123418).

<sup>53</sup> Criminal Justice Research and Statistics Unit, *The Transition from Youth to Adult Custody in the Northern Territory* (Department of the Attorney-General and Justice, 15 April 2021).

six months, and 85% are returned within 12 months.<sup>54</sup> Australia has a recidivism rate of 61.1%, but in the Northern Territory, it is 75.4%.<sup>55</sup>

This is broadly consistent with the experiences of our clients, who, once they have experienced a period in detention, are then very likely to return to detention repeatedly during their lifetime.

For those of NAAJA's young clients who were initially remanded in custody for an alleged offence during the period of May 2021 to September 2024, 68% returned to NAAJA in relation to further police charges due to reoffending. Of those young people, 32% reoffended and returned to NAAJA for further criminal legal assistance four or more times in the period May 2021 to September 2024.

NAAJA's Youth Throughcare program employs case managers to support young people inside youth detention facilities to develop a post-release plan and provide support to young people with issues relating to housing, school or work, banking and drug and alcohol counselling.

An evaluation of NAAJA's Youth Throughcare program showed that only 13 percent of program participants re-offended or breached orders.<sup>56</sup> This is compared to the general reoffending rate of over 50 per cent.<sup>57</sup>

Each contact with the criminal justice system as it currently operates increases the likelihood of further interactions.<sup>58</sup>

Investing in Aboriginal-led programs that support and work with young people while they are in detention to address the social drivers of offending behaviour would lead to a significant reduction in recidivism and criminal justice system involvement. Brother to Another in the Top End is a strong example of an Aboriginal led program working with incarcerated young Aboriginal people to provide support and mentoring.<sup>59</sup> In the experience of our lawyers, this program provides best practice and practical support to young people to assist them in breaking the cycle of disadvantage and offending.

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<sup>54</sup> Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision* (Report, 2021) <https://www.aihw.gov.au/reports/youth-justice/young-people-returning-to-sentenced-supervision/data>.

<sup>55</sup> Australian Bureau of Statistics, *Prisoners in Australia 2022*, Table 15 (2023).

<sup>56</sup> indigenous.gov.au, "Throughcare service preventing crime in north Australia" (2013) <https://www.indigenous.gov.au/throughcare-service-preventing-crime-in-north-australia>

<sup>57</sup> Criminal Justice Research and Statistics Unit, *The Transition from Youth to Adult Custody in the Northern Territory* (Department of the Attorney-General and Justice, 15 April 2021).

<sup>58</sup> Justice Reform Initiative, *Alternatives to Incarceration in the Northern Territory*, 2.

<sup>59</sup> Smarter Justice for Safer Community (2024), *Programs that Work*, <https://smarterjustice.org.au/brother-to-another-gives-young-men-choices-beyond-the-cycle-of-offending/>.

## 5. The need for enforceable national minimum standards

This inquiry called for submissions regarding the appropriateness of a national minimum standard for young people.

We understand that Australia is in breach of its international obligations in relation to the human rights of children and young people in detention. Australia has made international commitments to uphold the Convention on the Rights of the Child (CROC). The Australian Government, by agreeing to international human rights treaties such as CROC, is required to undertake all appropriate legislative, administrative, and other measures to implement the rights guaranteed to children, and any enforceable national minimum standards must reflect this commitment.

In the Northern Territory, existing accountability and enforcement mechanisms lack the appropriate resourcing to effectively enforce these commitments.

For example, Australia signed up to the Optional Protocol to the Convention against Torture (OPCAT), and legislation was consequently passed in the Northern Territory conferring powers on the Northern Territory Ombudsman to investigate issues in the NT prison system.<sup>60</sup> The short-term funding that was provided along with these commitments led to the production of a report into the use of separate confinement in the Darwin Correctional Centre.<sup>61</sup> However the funding for this position has now come to an end, leaving the Ombudsman and the Office of the Northern Territory Children's Commissioner to share responsibility for this work without specific funding to fulfil the additional responsibilities created by the OPCAT commitments and the associated Northern Territory legislation.

For this reason, any Commonwealth initiatives seeking to create a minimum standard for youth justice would need to also identify ongoing resourcing to ensure transparency, enforceability and accountability to that standard.

Consistent with the observations we have made in this submission above regarding treatment of detainees in Northern Territory youth detention centres, the treatment of young people by police in the course of their arrest, and the experiences of young people as they process through the justice system, we have made the following observations about the potential scope and need for a minimum standard that applies in the Northern Territory.

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<sup>60</sup> *Monitoring of Places of Detention (Optional Protocol to the Convention against Torture) Amendment Act 2022.*

<sup>61</sup> Ombudsman NT (May 2024), *Separate Confinement: a thematic investigation into practices in Darwin Correctional Centre.*

Elements of an enforceable and nationally consistent standard for youth that we consider could be relevant and valuable for our clients in the Northern Territory include regulated and enforceable standards around the:

- use of physical restraints or restrictions for young people in detention, including the use of waist belts, spit hoods and hand cuffs
- use of solitary confinement for young people in youth detention centres
- minimum time a young person is able spend outside each day whilst in detention
- minimum levels of availability of education and health services to young people inside youth detention facilities
- appropriate use of police dogs in the pursuit and arrest of young people
- guidelines around the minimum requirements for the use of interpreters by justice related officers when interacting with young people for whom English is not their first language
- minimum level of legal recourse available for young people who have been physically or psychologically harmed during the period of their arrest or detention
- commitment to the adoption of youth diversion by police and courts as a first step in all youth justice matters
- use of incarceration of young people as a last resort by police and the courts.

### **Concluding remarks**

This inquiry has been called shortly after a change in government in the Northern Territory, in which crime and youth offending was a central feature of the election campaign. The incoming government will imminently lower the age of criminal responsibility from 12 to 10 years of age, create an offence for breach of bail by young people, further restrict the availability of bail for specific offences, and increase the use of EMDs for people on bail. We anticipate these changes will increase the number of young people entering youth detention centres and increase the risks of harm to young people. The incoming government has also publicly stated its intention to re-introduce spit hoods on young people inside youth detention centres.<sup>62</sup>

NAAJA would welcome the opportunity to appear before the inquiry and provide verbal evidence.

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<sup>62</sup> Roxanne Fitzgerald, 'NT Opposition Leader Lia Finocchiaro 'absolutely supportive' of reinstatement spit hoods in youth detention centres' *ABC News* (online, 3 February 2024) <https://www.abc.net.au/news/2024-02-03/nt-clp-opposition-supports-spit-hoods-in-youth-detention-centres/103413412>.