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

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Executive Summary

- Legislative sentencing principles plainly require that detention of youths be ordered as a last resort.
- An extensive body of literature highlights the reasons for this policy, not least that detention is a costly exercise that negatively implicates mental and physical health, and increases the likelihood of recidivism in youths.
- In practise, sentencing has not reflected these legislative principles or the corroborating research that highlights the necessity of detention as a last resort.
- Potential solutions for this disconnect between policy and practice lie in diversionary measures, implementation of alternative sentences to custody, a refocussing of sentencing on rehabilitation and better training of custodial officers.

I. INTRODUCTION

We are a group of later year law students at the Australian National University who have been conducting research into the statistics and effects of youth detention in the Northern Territory ('NT'). After our research collaboration we shared our reactions to the findings and felt moved to make this submission. We realise that the Commissioners may be aware of much of this research, but it may be that we have identified material that is new to you. Our collaboration seeks to reiterate the purposes behind youth sentencing and restate that detention should only be used as a last resort, in keeping with the provisions and purposes of the *Youth Justice Act 2005* (NT) (the '*YJA*').[1] Furthermore, we are concerned that recent recommendations from the UN Committee on the Rights of the Child have not been adequately addressed. The Committee expressed disappointment that despite its previous recommendations 'the juvenile justice system of Australia still requires substantial reforms for it to conform to international standards.'[2] The Committee also identified a number of established practices as inconsistent with human rights standards and called for changes in policies within Australian jurisdictions.

Twenty-five years on from the Royal Commission into Aboriginal Deaths in Custody, incarceration rates of indigenous youths remain extraordinarily high. This has a negative impact on detainees - both convicted offenders and those being held on remand - the community and government. The NT has a 10 percent higher rate of youth detention than the rest of Australia, and Indigenous youth are 24 times more likely to be in detention than their non-Indigenous counterparts.[3] Alarmingly,

[1] *Youth Justice Act 2005* (NT), s 4, s 81(6) .
[2] Committee on the Rights of the Child 2012, Concluding Observations – Australia (28 August 2012) CRC/C/AUS/CO/4, [82], p. 21.
[3] Australian Government Productivity Commission, *Report on Government Services 2016* (2016) Ch 16: Youth Justice Service.

instances of youth detention are only growing in the NT, with an average 42 young people detained at any one time in 2013 compared to 34 in 2011. These detainees are more likely to be held on remand than be serving sentences.[4] These statistics demonstrate a consistent disregard of the statutory purposes of youth sentencing, which prioritise child protection, rehabilitation of offenders and using detention as a last resort.

Our submission addresses two of the Commission's terms of reference: failings in the child protection and youth detention systems of the NT Government, and whether more Government action should be taken to prevent the reoccurrence of inappropriate treatment.

We aim to outline the negative effects of detention on the individual and the state, and offer possible recommendations drawing upon previously explored solutions in government reports and academic articles. Much of the research we have found looks at the situation outside the NT, including overseas, but the findings are relevant to the experience of juveniles in detention in the NT. Our main purpose is to draw attention to the fact that detention should only be considered a sentencing option as a last resort - a principle that is not being applied in the NT jurisdiction.

If needed, we are very happy to provide an annotated bibliography from which much of the material of this submission was drawn.

II. DETENTION AS A LAST RESORT

Section 81(6) of the *YJA* states that detention should only be used as a last resort, while section 4(c) provides that a youth should only be kept in custody for an offence (whether on arrest, on remand or under sentence) for the shortest period of time.[5] Part II of our submission first details the policy behind this principle, and then demonstrates the disconnect between the policy and the practical application of this principle.

A. Detention as a Last Resort: the Policy

1. Recidivism

Detention may well be a predictor of future offending behaviour.[6] Studies have demonstrated that an individual with a history of detention is more likely to offend in the future.[7] In Queensland,

[4] Northern Territory Government, *Review of the Northern Territory Youth Detention System Report* (2015) 10-11.
[5] *YJA* ss 81(6), 4(c).
[6] B B Benda and C L Toilet, 'A Study of Recidivism of Serious and Persistent Offenders Among Adolescents' (1999) 27(2) Journal of Criminal Justice 111; House of Representatives Standing Committee on Aboriginal

90 percent of Indigenous youths who complete a sentence are subsequently arrested.[8] In Western Australia, 80 percent of sentenced Indigenous male youths and 65 percent of females will reoffend[9] Research has highlighted that of all forms of criminal punishment available, supervisory detention in an institution has the strongest criminogenic effect. The impact of imprisonment increases 'as the type of intervention becomes more intense and constrictive.'[10] Evidently, there exists a link between recidivism and gaol time. If diverted from detention, young offenders are less likely to re-offend.[11]

Of particular concern to this submission were findings showing that the younger an individual is when they are first incarcerated the more likely they are to return.[12] This highlights that detention is particularly harmful for youths. This is explained by psychological research, which presents detention as a disruption to the development process. Such a disruption prevents the 'natural process of aging out delinquency.'[13] Additionally, youth are more susceptible than older demographics to peer influence and approval, which provides for a partial account of the causal link between detention and recidivism among youth.[14]

Thus, given findings consistently demonstrating a link between detention and recidivism, particularly where the individual is a youth, we submit that detention should be a last resort.

2. Cost of detention centres: not only financial

Detention centres are costly to the state. Parliamentary Privilege [redacted] However, the costs of detention go well beyond a pure dollar figure. As the Australian Youth Affairs Coalition argues:

> The true costs of incarceration far exceed the per day costs of housing young people in detention. Incarceration often results in the loss of employment and income, further disengagement with education or positive relationships, can exacerbate debt issues, and result in the loss of housing, such that homelessness becomes an issue on release. This is in

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and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time - Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 247-8 [7.215].

[7] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 6.

[8] Ibid 249.

[9] Ibid.

[10] Uberto Gatti, Richard E Tremblay and Frank Vitaro, 'Iatrogenic Effect of Juvenile Justice' (2009) 50(8) The Journal of Child Psychology and Psychiatry 991, 996.

[11] Australian Institute of Family Studies, Closing the Gap Clearinghouse, 'Diverting Indigenous Offenders from the Criminal Justice System' (Resource Sheet No 24, AIFS, 2013).

[12] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 6.

[13] Ibid 6.

[14] Ian Lambie and Isabel Randell, 'The Impact of Incarceration on Juvenile Offenders' (2013) 33(3) *Clinical Psychology Review* 448, citing D.S. Elliot 'Serious Violent Offenders: Onset, Developmental Course, and Termination — The American Society of Criminology 1993 Presidential Address' (1994) 32 (1) *Criminology* 1.

[15] Parliamentary Privilege [redacted]

addition to the social costs of community breakdown that has had the effect of young people to come into contact with the justice system… [16]

The significant cost of detention additionally highlights the policy behind detention as a last resort. The utility of non-custodial diversionary programs cannot be understated here, the cost effectiveness of which is examined in Part III.

3. Remand

In June 2015, approximately half of all children and young people in detention nationwide were yet to be sentenced; a rate that has remained relatively steady over the last four years.[17] The majority of young people in detention are held on remand, an excessive cost to the state. In 2014, the government spent $698.40 per person on remand per day.[18] This is particularly significant as the types of offences committed by juveniles tend to be less serious property offences such as graffiti, vandalism and shoplifting.[19] The most common outcome for a non-Aboriginal person in these cases is a formal warning, while Aboriginal youth are often arrested and charged.[20] The problematic nature of remand is clear.

4. Future opportunities diminished & Indigeneity devalued

Detention has a resoundingly negative impact on the future aspirations and expectations of young Indigenous offenders. Researchers have indicated that Indigenous youths in detention institutions demonstrate negativity and pessimism regarding their ability to exercise control over their current situation and their future.[21] As illustrated by a 1989 study, when asked where they saw themselves being in ten years time, 75 percent of young Aboriginal offenders depicted themselves as dead, drunk or in detention.[22] The highly structured, non-autonomous environment of juvenile detention centres has inextricable links to a detainee's low sense of self-esteem.

Research has found that significant 'unconscious devaluation of aboriginality', occurs in detention centres.[23] One explanation for this is that it undermines Indigenous holistic approaches to health which recognise the effect and importance of 'connection to land, culture, spirituality, ancestry,

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[16] Jacqueline McKenzie, *Insights from the Coalface: The Value of Justice Reinvestment for Young Australians* (Australian Youth Affairs Coalition, 2013) 12.
[17] Australian Institute of Health and Welfare, 'Youth Detention Population in Australia 2015' (Bulletin No 131, AIHW, 2015) 7.
[18] Ibid.
[19] Kelly Richards, 'What Makes Juvenile Offenders Different from Adult Offenders?' (Trends and Issues in Crime and Criminal Justice No 409, Australian Institute of Criminology, 2011) 1, 3.
[20] Chris Cunneen, Garth Luke and Nina Ralph, *Evaluation of the Aboriginal Overrepresentation Strategy – Final Report* (Institute of Criminology, University of Sydney, 2006), 11.
[21] Ibid.
[22] Ray Dunn, 'Aboriginal Youth and Offending' (Preventing Juvenile Crime: Aboriginal Youth and Offending, Australian Institute of Criminology, 1989).
[23] Chris Cunneen, 'Aboriginal Juveniles in Custody' (Custodial Issues in Juvenile Justice Seminar, Sydney University Institute of Criminology, University of Sydney, 24 April 1991).

family and community.'[24] In doing so, the removal of Indigenous youths from the cultural security of their community and families has significant implications for both the physical and mental health of the individual.

These issues of self-esteem and self-devaluation are compounded by the insufficiencies of currently operating rehabilitative measures within detention schemes.[25] [redacted] This is compounded by the subsequent difficulty of reintegration into schools and other forms of institutional education.[27] Furthermore, those with low levels of education are penalised in the workforce and thus incarceration is linked to reduced employment opportunities, lower earnings, and irregular employment.[28] Notably, Indigenous people that have been arrested in the past five years are more than twice as likely to be unemployed.[29]

This submission is concerned that detention has a marked effect on the self-esteem of the detainee, and presents limited opportunity for the detainee to undertake practical steps to improve their situation. For this reason, we submit that detention should be a last resort.

5. Detainee health

This submission is concerned that detention implicates the mental and physical health of young people. Incarceration has a profoundly negative impact on the mental health of young people. Detention may trigger mental health conditions and exacerbate existing conditions, all while failing to provide adequate care. A US study reports that, of incarcerated youth diagnosed with depression, one-third experienced onset after they began their sentence.[30] The conditions of confinement have also been found to increase the likelihood of suicide and self-harm.[31] [redacted] Similarly, Australian research suggests at least 60 percent of young offenders are at

[24] Australian Institute of Family Studies, Closing the Gap Clearinghouse, Parliament of Australia, 'Effective Strategies to Strengthen the Mental Health and Wellbeing of Aboriginal and Torres Strait Islander People' (Issues Paper No 12, AIFS, 2014) 4.
[25] Lambie and Randell, above n 14, 448 citing E P Mulvey, 'Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders' (Office of Justice Programs, US Department of Justice, 2011).
[26] [redacted]
[27] Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Justice Policy Institute, 2006).
[28] Bruce Western, 'The Impact of Incarceration on Wage Mobility and Inequality' (2002) 64(4) *American Sociological Review* 526.
[29] Smart Justice, *More prisons are Not the Answer to Reducing Crime* (22 September 2014) Smart Justice: 'Smart action for a safer community', 2-3.
[30] J H Kashani, 'Depression Among Incarcerated Delinquents' (1980) 3 *Psychiatry Resources* 185; C B Forrest et al, 'The Health Profile of Incarcerated Male Youths' (2000) 105(1) *Pediatrics* 286.
[31] D Mace, P Rohde and V Gnau, 'Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility' (1997) 12(1) *Journal of Juvenile Justice and Detention Services* 18.
[32] [redacted]

risk of significant mental health problems.[33] Poor mental health and substance misuse are the main health issues for prisoners aged 18 to 24 years and at least one-third of entrants to the detention system have been diagnosed with a mental illness.[34]

Notwithstanding the implications detention has on mental health, it also has significant effects on the physical health of individuals. Although little research has been undertaken into the status of physical health of young people in detention, the research findings on the adult population are far from positive. We submit that the research may be indicative of the physical health implications for youths in detention, the cohort with whom we are concerned . As with mental health, a high proportion experience problems, such as chronic illness and substance abuse.[35] Parliamentary Privilege [redacted][6] This is exacerbated following release by poorly overseen transitions between prison health authorities and community health.[37]

Parliamentary Privilege [redacted] Indigenous prisoners have a significantly lower survival rate after release than non-Indigenous prisoners. For example, in NSW, the mortality rate for female Indigenous prisoners is 3.4 times higher that of their peers, while for male Indigenous prisoners it is 2.9 times higher.[39]

6. The effect of solitary confinement

The practice of solitary confinement of individuals in juvenile detention continues. The use of solitary confinement causes severe, and often permanent, physical and psychological damage to individuals.

In adults, solitary confinement creates 'an agitated confusional state' which may result in severe paranoia, hallucinations, intense agitation, suicidal ideation, hypersensitivity to stimuli, and

[33] Chris Lennings, 'Assessment of Mental Health Issues with Young Offenders' (Paper presented at Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003) 2-4. N.B. international literature suggests that the rate can be as high as between 70 and 95 percent. See eg, D Lader, N Singleton and H Meltzer, 'Psychiatric Morbidity Among Young Offenders in England and Wales' (2003) 15 *International Review of Psychiatry*, 144–147.

[34] Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing 2011* (2011).

[35] Butler, Jones and Law, below n 39, 274.

[36] Parliamentary Privilege [redacted]

[37] Azar Kariminia et al., 'Suicide Risk Among Recently Released Prisoners in New South Wales' (2007) 187(7) *Medical Journal of Australia* 387.

[38] Parliamentary Privilege [redacted]

[39] Azar Kariminia, Butler, Jones and Law, 'Increased Mortality among Indigenous Persons During and After Release from Prison in New South Wales,' (2012) 36(3) *Australian New Zealand Journal of Public Health* 274.

random, impulsive, often self-directed violence.[40] While research on the mental health impacts for young prisoners is more limited, its effects are likely to be exacerbated given the cohort is already 'psychologically compromised', as noted above.[41] The available literature has also found correlations between isolation and post-traumatic stress disorder, depression, drug use, and future criminal activity.[42]

Solitary confinement also causes serious short- and long-term physical harm to young people. In a 2012 report on US prisons, Human Rights Watch concluded that young offenders in isolation faced a greater risk of poor aerobic and anaerobic fitness (due to deprivation of exercise), as well as stunted growth and weight loss (due to nutritionally inadequate meals).[43] Moreover, solitary confinement in early childhood and adolescence significantly impairs cognitive development including vital processing such as organisation of thoughts and actions.

B. Detention as a Last Resort: in Practice

Our research has highlighted that the detailed policy behind 'detention as a last resort' is often overlooked in practice. The practicability of ordering detention only as a last resort may be understood with reference to sentencing judgments. While detention orders may only be issued as a final requirement under statute, sentencing remarks, particularly at first instance, reveal occasions where judges have overlooked or afforded insufficient weight to youth sentencing principles as contained in the *YJA*. Instead, primacy has been given to other factors, such as deterrence and the risk to the community. The result is the imposition of custodial sentences, which have appeared disproportionate to the offence at hand.

Rehabilitation is consistently overlooked, while general deterrence appears to be the most cited sentencing objective, along with punishment and personal deterrence.[44] The weight given to deterrence and punishment, coupled with magistrates wishing to "send a message" to other prospective offenders, consistently results in an order of detention.[45] This highlights a disconnect between how sentencing plays out in court and the sentencing principles set out under the *YJA.* Magistrates, undoubtedly subject to enormous caseloads, argue that 'sentencing remarks delivered

[40] Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 *Washington University Journal of Law and Policy* 325, 328-9.
[41] Tamar R Birkhead, 'Children is Isolation: The Solitary Confinement of Youth' (2015) 50:1 *Wake Forest Law Review* 1, 13.
[42] Ibid 10-13.
[43] Human Rights Watch (HRW), *Growing Up Locked Down: Youth in Solitary Confinement in Jails Across the United States* (2012, HRW) cited in Tamar R Birkhead, 'Children is Isolation: The Solitary Confinement of Youth' (2015) 50:1 *Wake Forest Law Review* 1, 14-5.
[44] *Anderson v The Queen* [2014] NTCCA 18: 17 year old sentenced to detention for over 6 years. The sentence was held to appropriately reflect the sentencing objectives of denunciation, punishment, and specific and general deterrence.
[45] *R v Maralngurra* [2013] NTCCA 1: here the DPP challenged a sentence emphasising rehabilitation for being manifestly inadequate. The appeals court overturned the sentence and issued a custodial order for four years, eight months, citing support for the punitive element in sentencing at [28]; *Liddle v Davis* [2009] NTSC 32.

in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.'[46] This raises concerns about rule of law and accountability issues for sentencing judges in the NT, who have the power to dramatically affect the lives of those in their courts.

Furthermore, the capacity of detention centres to provide education and counselling appears to be overestimated by NT magistrates. As a result, the particular care that should be afforded to offenders with psychiatric needs is not provided in practice.[47] This further demonstrates that a greater emphasis is placed on community protection in sentencing rather than child protection. The imposition of non-parole periods can be particularly problematic considering the fragility of young people, which only increases when they are removed from their home and placed in facilities such as Don Dale.[48] When alternatives to custody have been raised, courts struggle to take into account the social factors that affect young offenders' ability to comply.[49]

The NT has consistently responded to youth offending with a "tough on crime" approach.[50] There are no youth-specific magistrates in the NT, which means that the same magistrates sit in both adult and youth jurisdictions. While some magistrates may maintain a youth friendly court, other magistrates choose to hold the Youth Justice Court in the same fashion as the adult one, treating young people as 'mini-adults' rather than 'a category of offenders who have independent and specific needs'.[51]

As this submission detailed in Part II, the research into policy considerations behind detention as a last resort is both extensive and persuasive. Nonetheless, policy considerations appear to be warily considered in courts. In Part III of this submission, we offer present solutions that the literature has raised in response to this disconnect.

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[46] *Mitchell v Gibson* [2014] NTSC 59, [12].

[47] In *Wesley v The Queen*, the psychiatric report stated that the rehabilitative outcome of the younger offender was 'hanging in the balance'. In light of this evidence, the conclusion of the trial judge, affirmed on appeal, was that the situation would clarify once the appellate had 'the benefit of further counselling and education at the Don Dale Centre' - [2014] NTCCA 17, [29]-[31].

[48] *A Youth "V" v Northern Territory Police* [2012] NTSC 28: a 14 year-old offender was sentenced to eighteen months of detention for a series of offences, including assaults involving spitting whilst being detained at the Don Dale Detention Centre. Despite a psychiatric report indicating that the offending behaviour was an 'emotionally charged attempt to control his environment in which he felt helpless and powerless', the sentencing judge proceeded to give substantial weight to the 'seriousness' of the offending conduct and 'was at pains to emphasize that he considered a structured environment to be the only suitable option,' at [30].

[49] *Mitchell v Gibson* [2014] NTSC 59: the young offender's inability to comply with previous community work orders was due to his unstable living arrangements and medical issues. Consequently, the 'lack' of suitable available alternative disposition was a relevant factor in dismissing the appeal against the sentence of 13 months imprisonment.

[50] Shanna Satya and Ruth Bella Barson. (2011). 'A contemporary snapshot of two issues upon which the RCIADIC report commented: youth justice and the over-incarceration of Aboriginal young people, and alcohol-related offences and offending' 15 *Australian Indigenous Law Review* 87, 87.

[51] Ibid 88.

III. SOLUTIONS: DISCONNECT BETWEEN POLICY AND PRACTICE

In our research we have noted some broad patterns in recommendations for change. We believe these patterns may assist the Commission in considering solutions to the problems we have identified above. In looking for solutions to the issues outlined, one only has to look to other Australian jurisdictions to find inspiration. A number of Australian states have implemented a range of strategies to both reduce the amount of young people in detention, and improve the manner in which detention centres are managed.

A. Diversion

State Supreme Courts have noted the importance of diversion. In *R v Evans*, the Victorian Supreme Court of Appeal held that it was both in the 'interests of community and young persons' to divert juvenile offenders from engagement in criminal conduct early in their lives by avoiding unnecessary or excessive custody.[52] By improving alternative options, detention becomes less of inevitability and a true last resort.

In the NT, police have an unfettered power to administer the initial diversion of young people.[53] Section 44 of the *YJA* gives police an absolute discretion over both the decision to divert a young person, and to determine whether they have successfully completed diversion.[54] This power is not appealable as section 64 excludes a right of review from police decisions to decline someone diversion.[55] Although the Court retains a referral power under section 64, the prosecution (an arm of police in summary jurisdiction proceedings) must consent to the court referral.[56] This essentially confers a veto power upon police with respect to the Court's decision to refer a young person to diversion.[57]

We note that recommendations have indicated a wariness of this extensive discretion. The Royal Commission into Aboriginal Deaths in Custody stressed that relations between police and Aboriginal young people are at a critical juncture in the entry of Aboriginal youth into the juvenile justice system and often, consequently, into the criminal justice system.[58] On the importance of diversion, the Royal Commission stated that 'the police decision to arrest a juvenile marks the point of entry into the juvenile justice system from whence it is often difficult to disentangle oneself'.[59]

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[52] *R v Evans [2003] VSCA 223*.
[53] Satya and Barson, above n 50, 88.
[54] *Youth Justice Act 2005* (NT), s 44.
[55] *Youth Justice Act 2005* (NT), s 64.
[56] Satya and Barson, above n 50, 88.
[57] Ibid.
[58] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 278 [14.4.14].
[59] Ibid [14.4.16].

Similarly, Satya and Barson argue that '[p]olice should not be the gate-keepers of whether or not a young person enters into the criminal justice system'.[60]

As a result, recommendations have consistently suggested a re-focussing of police discretion on initiating court contact as a last resort.[61] As a solution, the North Australian Aboriginal Justice Agency ('NAAJA') advocate for both police and the judiciary to have diversion referral and decision making powers, and for the *YJA* to be amended to strongly encourage diversion for certain minor offences and certain types of offenders.[62] Similarly, in their *Evaluation of the Aboriginal Overrepresentation Strategy* report from 2006, Cunneen, Luke and Ralph recommended that police officers be directed to issue on-the-spot orders that do not engage the juvenile with the court system. Examples of these types of orders include cautions, warnings and infringement notices.[63] Cunneen, Luke and Ralph also raised the need to address the discretion afforded to police officers in ordering alternative orders through greater collaboration.[64]

B. Remand and Sentencing

Data from the Australian Institute of Criminology shows that the number of young people in detention on remand in the NT is consistently higher than the number of young people serving a sentence.[65] As discussed in the 2011 *Review of the NT Youth Justice System* (the '2011 Review'), '[t]here are many reasons for this, including an inability to meet bail conditions, which is a significant factor'.[66] Parliamentary Privilege [redacted]'.[67] Notably, in its submission to the 2011 Review, the Department of Children and Families stated that 'in some cases, involvement in both systems [child protection and the Youth Justice Court] results in clients being referred from one system to another, and for detention to be considered as a temporary "safe place"'.[68]

As articulated in the joint submission from the Aboriginal Legal Services and Torres Strait Islander Legal Services to the Standing Committee, detention should be solely regarded as a criminal

[60] Satya and Barson, above n 50, 88.
[61] Australian Institute of Health and Welfare, above n 34, 10.
[62] North Australian Aboriginal Justice Agency (NAAJA), Submission No 2 to the Youth Justice Review Panel, *A Review of the Northern Territory Youth Justice System*, September 2011, 34-35.
[63] Cunneen, C, Luke, G & Ralph, N., above n 66, 11.
[64] Ibid.
[65] Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report* (2011) 49.
[66] Ibid.
[67] Parliamentary Privilege [redacted]
[68] Department of Children and Families, Submission No 5 to the Youth Justice Review Panel, *A Review of the Northern Territory Youth Justice System,* September 2011, 14.

sanction and not a 'placement' for children in need of care.[69] Having regard to the available evidence, detention increases the likelihood that a young person remains in the youth justice system and also reduces their ability to access limited treatment and rehabilitation options that exist.[70] Given that young people at risk of entry to the criminal justice system will often come from unsafe homes, the need to provide suitable accommodation, as opposed to police cells or detention centres, is obvious.[71] Thus NAAJA recommends that youth specific bail provisions should be inserted into either the *Bail Act 1982* (NT), or as part of separate bail regime for young people in the *YJA*.[72] Further, it recommends removing the power for courts to remand a young person in circumstances where he or she is unlikely to receive a term of imprisonment unless exceptional circumstances apply.[73] Essentially, NAAJA stresses that the starting point should be that remanding a young person in custody is to be the option of last resort.[74]

EXAMPLE: **Bail Support Programs (ACT)**
There have been significant developments in youth justice in the ACT in the past few years. Most notably, the population of detainees has been dramatically reduced by bail support programs, in particular, the continued delivery of the After Hours Crisis Service to assist young people in police custody by arranging suitable community-based alternatives and assisting them to comply with their bail conditions.[75]

C. Alternatives to Custody

For detention to be a last resort, adequate alternative options must be available. Some options raised within the literature re-focus sentencing on rehabilitation, restoration and strengthening the young offender's links to community.

Restorative options have received consistent approval in the literature. Group conferencing, where the offender, victim/s, families, police and a youth justice agency official come to an agreement on the best course of action for the young offender to 'make amends for his or her offence', is one such restorative example.[76] The Productivity Commission notes that the proportion of young offenders

[69] Aboriginal Legal Services (NSW/ACT), North Australian Aboriginal Justice Agency, Queensland Aboriginal and Torres Strait Islander Legal Service, Submission No 66 to the Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the High Levels of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System*, January 2010, 17–18.
[70] Northern Territory Government, above n 67, 52.
[71] Ibid.
[72] NAAJA, above n 64, 44-45.
[73] Ibid.
[74] Ibid.
[75] Australian Institute of Health and Welfare, *Youth justice supervision in the Australian Capital Territory*, http://www.aihw.gov.au/youth-justice/states-territories/act/.
[76] Productivity Commission, House of Parliament, *Report on Government Services 2015 (Youth Justice Services chapter, Chapter 16 Vol F).*

that engaged with group conference to reach agreement, was particularly high (ranging between 80-100 percent across states and territories).

The improvement of rehabilitative facilities may provide courts with an alternative to detention. The NT Government has identified the greater potential for rehabilitation facilities to decrease the likelihood of recidivism in young offenders. Parliamentary Privilege [redacted] The Australian Institute for Health and Welfare ('AIHW') has also noted the benefit of rehabilitative programs in that they have the capacity to be issue specific.[78] For example, given that alcohol is a major drug problem for Indigenous young people, rehabilitative programs have the potential to purposely cater to this issue.

Reports have also consistently argued for the improvement of community-based measures. As identified earlier in our submission, ensuring that the young offender is not removed from their community is crucial to maintaining the mental health of the young offender. A cross-national comparison of sentencing measures raised 'intensive supervision' as an example of a community based alternative to custody.[79] Such an order requires the offender to report to police stations on a regular basis, and thus allows the young offender to remain within their community. According to the Productivity Commission, 79.6 percent of community-based orders were successfully 'completed'.[80]

While the sentencing options we have identified as alternatives to detention are by no means conclusive or faultless, they do indicate the presence of a wide-range of options.

EXAMPLE: **Youth Attendance Orders (Victoria)**

Victoria, under the management of the Department of Health and Human Services, has the lowest rate of youth in detention in Australia.[81] This can be partly explained by a strong emphasis on non-custodial alternatives, such as Youth Attendance Orders. A Youth Attendance Order is a sentence given by the Children's Court under section 397 of the *Children, Youth and Families Act 2005* (Vic), and in accordance with the restrictions outlined in section 398. These orders are provided in lieu of detention, either where a young person has committed a serious offence or has appeared before a court numerous times. On this order, the young offender has to report to a 'youth justice unit' up to a maximum of ten hours a week. Six of these hours are spent on an agreed program activity, which may include special counselling. The other four hours go towards community service. A youth justice unit worker is responsible for supervising and supporting an

[77] Parliamentary Privilege [redacted]

[78] Australian Institute of Family Studies, Closing the Gap Clearinghouse, Parliament of Australia, *Diverting Indigenous offenders from the criminal justice system* Resource sheet no. 24 (2013), 5.

[79] Hazel, Neal. 'Cross-national comparison of Youth Justice' (2008) *Youth Justice Board*, 58

[80] Productivity Commission, House of Parliament, *Report on Government Services 2015 (Youth Justice Services chapter, Chapter 16 Vol F)*, [16.34].

[81] Australian Children's Commissioners and Guardians 'Human rights standards in youth detention facilities in Australia: the use of restraint,disciplinary regimes and other specified practices' (2016), 19.

offender's efforts in rehabilitating and maintaining the rules required to be followed under the order. They are also present to help offenders work through issues that likely contributed significantly to the original offence or offences.

In the recent Supreme Court of Victoria case, *Webster v The Queen*,[82] a 17 year old appellant, guilty of seven counts of rape, had his original sentence of two years detention set aside. Instead, he was given a Youth Attendance Order for twelve months. This was largely based on the considerable weight given to the importance of rehabilitation which, given the appellant's age, was deemed highly likely.

D. Rehabilitation

In the *YJA*, a key youth justice principle is reintegration. It would seem that youth reintegration would encompass the principles that the common law elsewhere has developed in relation to youth rehabilitation. But, it is curious that this is not explicit in the section 4 principles, but only the section 81 principles.

In *R v GDP*,[83] the NSW Supreme Court held that rehabilitation 'is the primary purpose in sentencing children, and assumes a greater role than other sentencing principles, such as punishment and deterrence.' Such a principle was reinforced in the recent case of *R v Lovi*,[84] which involved a youth offender found guilty for fifteen counts of using a carriage service to access child pornography, and one count for possessing of child exploitation material. Despite the seriousness of theses offences, the Queensland Court of Appeal reduced the original sentence provided and held that rehabilitation was likely. Their reasoning is very clear on the importance of rehabilitation. Indeed, they maintained that 'imprisonment for short periods of young offenders, such as the applicant, who have not been previously imprisoned, is generally recognised as potentially harmful to their rehabilitation.'

Having experienced detention once, juvenile offenders are likely to reoffend due, in part, to a lack of effective government programs directed at community reintegration and skills education to assist with employment.[85] A consistent note to recommendations is that any reform to the system must be accompanied by broader structural reform. Crucial to understanding the significance of structural reform is exemplified in the statistic that 25 percent of prisoners in Victoria come from 2 percent of postcodes.[86] Smart Justice, an advocacy coalition of community legal centres, Aboriginal and Torres Strait Islander legal services and other organisations working in criminal law, notes that investing

[82] *Webster v The Queen* [2016] VSCA 66.
[83] *R v GDP* (1991) 53 A Crim R 112.
[84] *R v Lovi* [2012] QCA 24.
[85] Northern Territory Government, *Review of the Northern Territory Youth Detention System Report*, January 2015, 15.
[86] Smart Justice, *More prisons are not the answer to reducing crime* (22 September 2014) Smart Justice: 'Smart action for a safer community', <http://www.smartjustice.org.au/resources/SJ_JusticeReinvest.pdf>.

in healthcare, housing, education and job training in these areas where disadvantage is entrenched, will serve to 'reduce crime and reoffending'.[87]

E. Training for Custodial Officers

The safety and management of Queensland's youth detention centres has continued to be a priority for the Department of Justice the Attorney General and, since 2012–13, actions have been taken to ensure the facilities are managed using a best practice framework approach. This includes the development and implementation of the 'Youth Justice Intervention Framework' to assist departmental staff and service delivery partners to produce and deliver consistent, evidence based interventions aligned with the assessed risk/needs of young people.

By contrast, in the NT there is no specific youth justice division of NT Community Corrections, and so young people are assessed, treated, and supervised by Community Corrections officers who may not have any youth specific training or an understanding of 'the specific criminogenic and developmental needs of young people in the criminal justice system'.[88] Furthermore, standards at youth detention centres vary. A 2015 report from the NT Government cites lack of proper training for correctional officers, appropriate infrastructure, and a clear operating philosophy as some reasons why youth detention centres are failing juvenile offenders, especially those requiring a high level of intervention and case management.[89] As seen in the recent Don Dale footage, this can lead to serious consequences such as human rights abuses.

IV. CONCLUSION

This submission has sought to highlight the disconnect between the policy of detention as a last resort, and the reality of a youth justice system where over-incarceration is at serious issue. As we detailed in Part II, the literature discussing the policy behind detention as a last resort is extensive. Focal reasons for this policy include the potential for detention to encourage recidivism, burdensome costs to the individual and the state, problematic nature of remand, denigration of self esteem and de-valuing of Indigeneity, and implications for physical and mental health. However, despite the available literature reiterating the purpose of the last resort principle, our research has also shown that detention is not consistently considered a last resort in practice. In Part III of this submission, we sought to point out recommendations for improvement that have appeared most consistently in the literature, judicial commentary and reporting. Throughout, we have hoped to illuminate the benefits of a youth justice system where detention is, at worst, a rarity - not an inevitability.

[87] Ibid.
[88] Northern Territory Government, above n 87, 11.
[89] Ibid.

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APPENDIX A

Annotated Bibliography: Resources in Youth Justice