

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

Written Submission

Comparative Youth Penalty Project

Professor Chris Cunneen, Professor Eileen Baldry, Emeritus Professor David Brown, Melanie Schwartz and Sophie Russell¹

April 2017

Faculty of Arts and Social Sciences
School of Social Sciences
University of New South Wales, Australia



UNSW
THE UNIVERSITY OF NEW SOUTH WALES

¹The authors of this submission are researchers from the Comparative Youth Penalty Project (CYPP), the Australian Prisons Project (APP) (www.cypp.unsw.edu.au), the Australians with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System (AMHDCCD) Project (www.mhdcd.unsw.edu.au), and the Australian Justice Reinvestment Project (AJRP) (<http://justicereinvestment.unsw.edu.au/>). Report prepared by Sophie Russell.

Dear Commissioners

Thank you for the invitation to provide a written submission to the *Royal Commission into the Protection and Detention of Children in the Northern Territory*.

If you would like to speak with us in any more detail about our research or any part of this submission, please contact:

Professor Chris Cunneen

Email: c.cunneen@unsw.edu.au

Phone: Privacy

Professor Eileen Baldry

Email: e.baldry@unsw.edu.au

Phone: Privacy

Contents

1. Introduction	4
2. Research Findings	4
2.1 Age of Criminal Responsibility	4
2.2 Overrepresentation of Indigenous children in youth justice.....	6
2.3 Children with mental health disorders and cognitive disabilities.....	7
2.4 Complex trauma and out-of-home care	11
2.5 Bail and remand	12
2.6 Post-release support	13
2.7 Recidivism as a measure of success.....	14
3. Experiences of Young People	15
3.1. Chaotic lives prior to incarceration.....	16
3.2. Experiences of youth detention	18
3.3. Release from youth detention and plans for the future	20
4. Oversight in Youth Detention.....	23
4.1. The Optional Protocol to the Convention against Torture (OPCAT) and the Benefits of a National Preventative Monitoring Scheme (NPN)	24
5. Changing the Criminal Process: Recommendations from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.....	25
5.1. Recommendations from Bringing Them Home	25
5.2. The role of Indigenous accredited organisations in decision-making	27
6. Overview of Recommendations.....	27

1. Introduction

This submission is informed by the authors' extensive experience in the field of juvenile justice.² The authors of this submission are researchers from the Australian Research Council (ARC) Comparative Youth Penalty Project (CYPP). The CYPP is a comparative study of youth justice law, theory, policy and practice in four focus states in Australia (New South Wales, Queensland, Victoria, and Western Australia) and in the United Kingdom (England and Wales). The CYPP applies a mixed methods approach comprising an extensive review of interdisciplinary research literature alongside a volume of reports published by government agencies and NGOs; secondary analyses of published quantitative data; and analyses of primary qualitative data. As part of this research project, we interviewed 29 Indigenous young people detained in or recently released from juvenile detention centres in New South Wales, Queensland, and the Northern Territory. We also interviewed 33 criminal justice professionals and stakeholders³ from New South Wales, Queensland, Victoria, and Western Australia. In this submission we draw on and discuss some of the key findings from the Australian aspect of this research. We make a number of key recommendations for youth justice reform in Australia and in the Northern Territory specifically.

In the final section of this submission we make some general comments on addressing the criminalisation of Indigenous children and young people, particularly in the light of the recommendations from the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.

2. Research Findings

2.1 Age of Criminal Responsibility

We should be looking at what the best practice is around the world... and most of the world would tell us that [the age of criminal responsibility] is much higher than 10...If you're saying that a 10-year-old is responsible for criminal behaviour and activity and they understand what they are doing, then I think you don't take human rights very seriously⁴

– Juvenile Justice Policy Officer

² The authors include members of the Comparative Youth Penalty Project (CYPP): an ARC Discovery project comparing approaches to youth punishment, penal culture and practice in Australia, England and Wales. The CYPP is analysing developments in the punishment of children and young people in the last 30 years. For more information see: www.cypp.unsw.edu.au

³ Including Family and Children's Court magistrates and lawyers; academics; policy officers; youth workers; children's advocates; and juvenile justice detention centre workers, managers and directors.

⁴ CYPP Interview: Policymaker

Current Australian legislation establishes 10 as the minimum age of criminal responsibility, although a presumption against responsibility exists until the age of 14 through the principle of *doli incapax*. Approximately 30 per cent of the Indigenous young people interviewed for the CYPP reported being under the age of 12 when sent to a juvenile justice facility for the first time. The Australian Institute of Health and Welfare (AIHW) has reported that children aged between 10 and 11 years supervised in Australia only account for 0.6 per cent of all children supervised both in the community and in detention.⁵ However, Indigenous children make up 87 per cent of this group.⁶ In 2013-14 seven per cent of all 10-17 year olds in detention were aged under 14 years, and 78 per cent of these young people were Indigenous.⁷ Research suggests increasing the age of criminal responsibility would contribute to addressing the overrepresentation of Indigenous young people, who generally come into the justice system at a younger age than non-Indigenous children - an issue noted by almost all CYPP interview respondents. Around half (49 per cent) of all Indigenous young people under supervision are aged 10-15, compared with less than one-third of non-Indigenous young people.⁸ Youth advocates have been calling for the minimum age of criminal responsibility to be raised, with Crofts commenting that ‘alongside police practice and use of diversionary measures, the age of criminal responsibility is the main legal barrier to the criminal justice system; it is therefore a primary point at which the Indigenous youth can be kept out of the system’.⁹

An increase to the age of criminal responsibility has the potential to reduce the likelihood of life-course interaction with the criminal justice system. It is well established that one of the key risk factors for criminal justice contact is prior contact.¹⁰ A study by the AIHW explored the correlation between early and later in life criminal justice supervision, and found children first supervised at 10-14 years are significantly more likely to experience all types of supervision – particularly sentenced detention – in their later teens when compared with children first supervised at 15-17 years.¹¹

Raising the minimum age of criminal responsibility to 12 would bring Australia into line with its obligations under the UN Convention on the Rights of the Child (CRC) and consistent with other common law jurisdictions such as Canada and Ireland. There was widespread agreement among professionals interviewed for the CYPP that the age of criminal responsibility should be higher. As a Detention Centre Director stated, children under 14 ‘can

⁵ AIHW (2014) Youth Justice in Australia 2013 – 14, Characteristics of Young People Under Supervision, Supplementary Tables S74, S78, AIHW, Canberra.

⁶ AIHW (2014) Youth Justice in Australia 2013 – 14, Characteristics of Young People Under Supervision, Supplementary Tables S74, S78, AIHW, Canberra.

⁷ AIHW (2014) Youth Justice in Australia 2013 – 14, Characteristics of Young People Under Supervision, Supplementary Tables S74, S78, AIHW, Canberra.

⁸ AIHW (2015) *Youth Justice in Australia 2013 – 14*, Bulletin 127, AIHW, Canberra.

⁹ Crofts T (2015) ‘A Brighter Tomorrow: Raise the Age of Criminal Responsibility’, *Current Issues in Criminal Justice*, 27(1), p. 123.

¹⁰ Payne J (2007) *Recidivism in Australia: Findings and Future Research*, Research and Public Policy Series No. 80, Australian Institute of Criminology, Canberra; Chen S, Matruggio T, Weatherburn D and Hua J (2005) ‘The Transition from Juvenile to Adult Criminal Careers’, *Crime and Justice Bulletin No. 86*, NSW BOCSAR, Sydney.

¹¹ AIHW (2013) *Young People Aged 10 – 14 in the Youth Justice System, 2011-2012*, AIHW, Canberra.

*and should be dealt with in another way*¹². Those we interviewed commented on the difference between the chronological age of young people in custody and their emotional, mental and developmental age. One Juvenile Justice Centre Director stated, *'I think it's very young... The youngest person who has been in one of our centres was 11 and... Whilst that young person might have had a chronological age of being 11, he could have just been 7 or 8... We really need to be looking at where these young people are functioning'*.¹³ A Detention Centre Manager commented, *'I've got 12-year-olds, 13-year-olds there that can't really link behaviour and consequences.... So I think that 10 is very, very young. I'd hate to see a 10-year-old in here'*.¹⁴ One juvenile detention centre worker similarly commented, *'When you see a 10-year-old kid in detention it's a whole lot different to seeing a 10-year-old- kid on a community-based order.... But the 10-year-olds I've seen on the few times I've been out to [detention centre], they might look 10 in their body and you look at their eyes and they're not 10, and that's quite scary'*.¹⁵

Recommendation 1

An increase to the age of criminal responsibility has the potential to reduce the likelihood of life-course interaction with the criminal justice system. In particular, raising the age of criminal responsibility is a key measure which could address the significant overrepresentation of Indigenous young people in youth detention. We recommend Australia increase the minimum age of criminal responsibility to, at least, 12 years.

2.2 Overrepresentation of Indigenous children in youth justice

*I feel really sad because in the 25 years or so that I've been working in this area, the proportion of Aboriginal young people in custody has doubled*¹⁶

– Juvenile Justice Policy Officer

We note that missing from the NT Royal Commission's terms of reference is an acknowledgment of the significant over-representation of Indigenous children in NT youth detention centres, where they comprise up to 97 per cent of the juvenile justice population.¹⁷ While the number of non-Indigenous young people in detention across Australia has steadily declined over the last three decades, in part due to the introduction of legislation aimed at diversion (including cautions and youth justice conferences), Indigenous young people have not benefitted in the same way as non-Indigenous young people. According to the AIHW just over half (54 per cent) of all young people in detention centres in Australia during 2015 were Indigenous,¹⁸ making them approximately 26 times more likely to spend time in detention

¹² CYPP Interview: Detention Centre Director

¹³ CYPP Interview: Detention Centre Director

¹⁴ CYPP Interview: Detention Centre Manager

¹⁵ CYPP Interview: Detention Centre Worker

¹⁶ CYPP Interview: Policymaker

¹⁷ Vita M (2015) *Review of the Northern Territory Youth Detention System Report*, NSW Juvenile Justice.

¹⁸ AIHW (2015) *Youth Detention Population in Australia 2015*, Bulletin 131, AIHW, Canberra.

than non-Indigenous young people.¹⁹ While the number of non-Indigenous young people in detention has decreased in recent years, the same trend has not been observed for Indigenous young people.²⁰ Human rights violations that affect all young people within juvenile justice have a particularly disproportionate impact on Indigenous young people due to their significant over-representation in all Australian states and territories.

The uneven geographical distribution of incarceration is evidenced by data from the AIHW, that found young people from geographically remote areas in Australia have the highest rate of youth justice supervision. In 2015-16, young people aged 10-17 years who were from 'remote' areas were six times more likely to be under supervision on an average day than those from 'major cities', and those from 'very remote' areas were 10 times as likely.²¹ The AIHW also found that young people from the lowest socioeconomic areas have significantly higher levels of contact with the juvenile justice system. For example, 37 per cent of young people under youth justice supervision (both community based and detention) on an average day in 2015-16 were determined to be from the lowest socioeconomic areas in the country. Young people from the lowest socioeconomic areas were six times more likely to be under youth justice supervision than those from the highest socioeconomic areas.²²

Recommendation 2

We recommend an increase and expansion of diversionary options and alternatives to detention in the Northern Territory, particularly for Indigenous children. Such programs and alternatives to detention must be available in regional, rural and remote locations.

2.3 Children with mental health disorders and cognitive disabilities

*The proportion of children and young people and adults in custody with disabilities, including mental illness and cognitive deficits, is appalling high. Why is it that that's where the funnel takes them? The funnel should take them in a different direction, but what services do we have that work well with children and young people that fall in that spectrum?*²³

– Academic, Former NSW Juvenile Justice

Children in contact with the criminal justice system have significant unmet social, emotional, mental and physical health needs and are a particularly vulnerable group. Research from government bodies, non-government organisations and academics has consistently shown a concentration of disadvantage in juvenile justice populations. Juvenile detention centres are filled with the most vulnerable members of our community: these young people often have

¹⁹ Amnesty International (2015) A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia, Amnesty International, Sydney.

²⁰ AIHW (2015) Youth Detention Population in Australia 2015, Bulletin 131, AIHW, Canberra.

²¹ AIHW (2017) *Youth Justice in Australia 2015-16*, AIHW, Canberra.

²² AIHW (2017) *Youth Justice in Australia 2015-16*, AIHW, Canberra.

²³ CYPP Interview: Academic, former senior Juvenile Justice

low educational attainment,²⁴ backgrounds of economic and social disadvantage,²⁵ housing instability,²⁶ drug and alcohol addiction,²⁷ as well as victimisation and trauma, and multiple placements in out-of-home care (OOHC).²⁸ These compounding factors result in multiple and complex needs for this vulnerable population group.²⁹

The prevalence of mental health disorders and cognitive disabilities amongst juvenile offenders is well recognised, with custody health surveys in NSW from 2003, 2009, and 2015 finding that between 83–88 per cent of young people in custody have a psychological disorder and 14-18 per cent have a cognitive disability.³⁰ The most recent survey noted higher rates for Indigenous young people, with 24 per cent screening for cognitive disability.³¹ When compared with general youth populations, juvenile justice populations also have high rates of borderline cognitive disabilities, including foetal alcohol spectrum disorder (FASD), traumatic brain injury (TBI), and speech and language impairments.³² This was reiterated by a Children’s Court magistrate interviewed for the CYPP who commented: ‘*Whether it’s intellectual disability, cognitive impairment or whether it’s a very severe social disability, everything from the autism spectrum to... FASD, and then all the other aspects in between. It’s very apparent to you as a magistrate how many people struggle from these things*’.³³

²⁴ Kenny et al (2006) *NSW Young People on Community Orders Health Survey 2003-2006: Key Findings Report*. The University of Sydney; Ward S and Williams J (2014) ‘Does Juvenile Delinquency Reduce Educational Attainment?’ University of Melbourne, 1 – 41.

²⁵ Indig et al (2011) *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.

²⁶ AIHW (2012) *Children and Young People at Risk of Social Exclusion: Link Between Homelessness, Child Protection and Juvenile Justice*, AIHW, Canberra, p. vii.

²⁷ Indig et al (2011) *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.

²⁸ McFarlane K (2010) ‘From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System’, *Current Issues in Criminal Justice*, 22(2), 345 – 353.

²⁹ Baldry E (2011) ‘Navigating Complex Pathways: People with Mental Health Disorders and Cognitive Disability in the Criminal Justice System in NSW’, *HIV Australia*, 9(1), 35 – 44.

³⁰ Allerton M, Champion U, Beilby R, Butler T, Fasher M, Kenny D, Murphy M, Vecchiato C (2003) *2003 Young People in Custody Health Survey. Key Findings Report*, NSW Department of Juvenile Justice, Sydney; Indig D, Vecchiato C, Haysom L, Beilby R, Carter J, Champion U, Gaskin C, Heller E, Kumar S, Mamone N, Muir P, van den Dolder P and Whitton G (2011) *2009 Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney; NSW Health and NSW Juvenile Justice (2015) *2015 Young People in Custody Health Survey: Key Findings for All Young People*. NSW Juvenile Justice: Sydney.

³¹ NSW Health and NSW Juvenile Justice (2015) *2015 Young People in Custody Health Survey: Key Findings for All Young People*. NSW Juvenile Justice: Sydney.

³² Haysom et al (2014) ‘Intellectual disability in young people in custody in New South Wales, Australia – prevalence and markers’, *Journal of Intellectual Disability Research*, 58(1), p. 1004; Kenny et al (2007) ‘The relationship between head injury and violent offending in juvenile detainees’, *Contemporary Issues in Crime and Justice*, No. 107, 1 – 15; Standing Committee on Social Policy and Legal Affairs (2012) *FASD: The Hidden Harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, Commonwealth of Australia, Canberra; Anderson A, Hawes D, Snow P (2016) ‘Language impairments among youth offenders: a systematic review’, *Children and Youth Services Review*, 65: 195 – 203.

³³ CYPP Interview: Children’s Court Magistrate

Young people in custody with mental illness, disability and borderline cognitive disability, are more vulnerable than other detainees and are more prone to victimisation.³⁴ Former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma has stated that young people with mental and cognitive disabilities ‘...Can face additional difficulties in adapting to a custodial environment that is rarely able to meet their needs and they face ridicule and adverse attention by other detainees who do not understanding their medical predicament’.³⁵ Interviewees for the CYPP spoke of imprisonment (and the criminal justice system more generally) being an inappropriate response for young people with complex support needs, for example one Children’s Court Magistrate commented: *‘The [Detention Centre Wing], which is supposed to be a place where they do observations of kids with behavioural or mental health issues, but it’s really the punishment wing. And they will put kids in there in effective solitary, with nothing to do.’*³⁶

Our research has found that the identification and diagnosis of disorders, disabilities and complex needs are plagued with difficult challenges including: varying definitions of cognitive impairments; a lack of standardised assessment processes; a shortage of culturally sensitive, appropriate and validated screening tools, as well as confusion as to who, when and/or which agency is best placed to undertake such assessments. Research and practice experience suggests that, in reality, the identification of disabilities often falls to schoolteachers, police officers and/or legal practitioners who rarely receive adequate training and who, more often than not, do not possess the required knowledge, skills and specialist expertise to undertake such a task.³⁷ This is particularly salient with regard to police officers – where our research has found that police officers are often not sufficiently trained to interact appropriately with young people with complex support needs. Our research has found that because of underdiagnosis and a resulting lack of appropriate service response, young people with mental and/or cognitive impairment are often written off as too difficult to manage. The effect of this is that their behaviour becomes criminalised. A Children’s Court Magistrate interviewed for the CYPP commented: *‘This boy with the Asperger’s he was very impulsive and he was also very easily led. So, all that was happening was he was inexorably heading towards the adult system where there’s probably even less services and no patience whatsoever. It’s really, really upsetting to just watch that happen.’*³⁸

Those we interviewed spoke of the need for, and current absence of, appropriate disability and mental health support for young people entwined in the juvenile justice system. For example, a Juvenile Justice Manager questioned: *‘Even if they do get diagnosed with a mild intellectual disability, what happens then? Who would support them? There’s a limited number of disability services that might be able to give those kinds of clients the amount of support they need.’*³⁹ Another interviewee considered the criminalisation of young people with disability as a key failure across a number of government departments, including

³⁴ Davis (2009) ‘People with Intellectual Disabilities in the Criminal Justice Systems: Victims and Suspects’, *The Arc*.

³⁵ Australian Human Rights Commission (2008) Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues, p. 1.

³⁶ CYPP Interview: Children’s Court Magistrate

³⁷ NSW Law Reform Commission (2012) People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion, Report 135. NSWLRC, Sydney.

³⁸ CYPP Interview: Children’s Court Magistrate

³⁹ CYPP Interview: Juvenile Justice Manager

education, health, and family support: *'The reason they're disconnected from school, the reason that they're vulnerable, that they're exploited by adults is partly because of their cognitive disability, they're not going to learn in the normal ways. We have failed them. The fact that they end up in jail means that we have failed – all those systems; housing, family support, education, health – we've all failed them, that's why they're here'*.⁴⁰

We make reference to young females as a particularly vulnerable group in the youth justice system. While females comprise a significantly smaller proportion of the total youth justice population, research indicates they are the fastest-growing population group.⁴¹ Young females in custody have particularly complex support needs. For example, the 2015 NSW Young People in Custody Health Survey found that when compared with males, females had higher rates of cognitive impairment and borderline cognitive impairment; difficulty in core language and comprehension skills; psychological disorder; and experiences of trauma and abuse that was categorised as 'severe'. The health survey also found that girls were more likely to have previously been in custody.⁴²

Indigenous females are particularly vulnerable. While there is limited research that considers Indigenous status, gender and age, the research that does exist is concerning. Indigenous females are a fast-growing prison population group: From 2011-2015, the number of Indigenous females in youth detention across Australia increased by 25 per cent.⁴³ In 2015, 63 per cent of the female juvenile justice population in custody across Australia were Indigenous.⁴⁴ Research has found Indigenous females in youth justice have significant unmet health and social welfare needs. The UNSW, Indigenous Australians with Mental Health Disorders in the Criminal Justice System Project (IAMHDCD) found that when compared with non-Indigenous women, Indigenous women with complex support needs are 2.4 times more likely to have been clients of juvenile justice. The study also found that indigenous women are 3.2 times more likely to have been in juvenile justice custody compared to non-Indigenous women.⁴⁵ A study by Jamieson et al of 42,874 inpatients administrative data at hospitals in Queensland, Western Australia, South Australia, and the Northern Territory over a 6-year period found Indigenous females were 69 times more likely to be hospitalised for a head injury than non-Indigenous females, indicating potential for higher prevalence of TBI.⁴⁶

⁴⁰ CYPP Interview: Juvenile Justice Policy Officer.

⁴¹ AIHW (2012) *Girls and Young Women in the Juvenile Justice System*. AIHW, Canberra.

⁴² NSW Health and NSW Juvenile Justice (2015) 2015 Young People in Custody Health Survey: Key Findings for All Young People. NSW Juvenile Justice: Sydney.

⁴³ AIHW (2015) Youth Detention Population in Australia 2015, Bulletin 131. AIHW, Canberra.

⁴⁴ AIHW (2015) Youth Detention Population in Australia 2015, Bulletin 131. AIHW, Canberra.

⁴⁵ See Baldry E, McCausland R, Dowse L and McEntyre E. 2015. A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System. UNSW, Sydney.

⁴⁶ Jamieson L, Harrison J, and Berry J (2008) 'Hospitalisation for head injury due to assault among Indigenous and non-Indigenous Australians, July 1999 – June 2005', *Medical Journal of Australia*, 188(1), 576 – 579.

Recommendation 3

In recognition of the large body of research indicating the significant overrepresentation of young people with mental health disorders and cognitive disabilities in the youth justice system in other states and territories in Australia, we recommend the Northern Territory introduce a system of data collection on the prevalence of disability amongst children and young people in contact with the criminal justice system. This could take the form of an annual health survey of young people on community-orders and young people in custody, similar to custody health surveys which take place in New South Wales. We also note the imperative to appropriately screen children and young people for the early identification of disability, particularly in regard to borderline impairments such as TBI and FASD.

2.4 Complex trauma and out-of-home care

For some young people... they find themselves caught up in the criminal justice system as a result of... a lack of capacity to cope with their life circumstances, most especially for some young people who find themselves in the out of home care system, and the high correlation between young people in the out of home care system also presenting with some kind of cognitive impairment, and also then the drift into criminality is not an uncommon feature, unfortunately.⁴⁷

– Youth Worker

Our research has found that young people with cognitive disability in particular often enter the youth justice system after offending in the OOHC environment. Many of the criminal justice stakeholders and professionals interviewed for our project attributed the disproportionately high numbers of young people in OOHC and/or those engaged in child protection proceedings flowing to the juvenile justice system as a result of criminalising actions from OOHC staff, such as calling to police in response to behaviour that would ordinarily be dealt with by parents in family home environments. Those we interviewed spoke of the '*crushing need to stop criminalising that sort of behavioural stuff... particularly the correlation with young people with cognitive disabilities*'.⁴⁸ One youth worker spoke about the multiple vulnerabilities of young people who go from residential care into youth detention: '*Kids with mental health issues and trauma backgrounds don't tend to go well with big changes. So when you're putting young people in houses with lots of other young people with mental health issues and with unstable families and carers that change daily or a couple of times a day, it's just really hard for them to actually settle in and do well there*'.⁴⁹

One interviewee recognised that a large number of young people enmeshed in the youth justice system '*will have a significant trauma background so that's witnessing domestic*

⁴⁷ CYPP Interview: Youth Worker

⁴⁸ CYPP Interview: Youth Worker

⁴⁹ CYPP Interview: Youth Worker

violence, being part of domestic violence, physical abuse, sexual abuse'. This respondent went on to say that there are a number of 'offences associated with unresolved trauma or mental health issues, so young people who have ... been abused by parents, they've been the victims of violence or really inappropriate discipline at home, and finally it gets too much for the young person and they lash out'.⁵⁰

Recommendation 4

We recommend the Northern Territory develop an interagency protocol to reduce the criminalisation of young people in care.

2.5 Bail and remand

I do think there is still that view for some people that putting a young person in custody is a good option because they will get health services, they will get three square meals a day, they will have a safe roof over their heads. It's a bit of a failing of our society that for some young people that is seen as the best option. How we address that I guess is the hard one. We still haven't done it⁵¹

– Juvenile Justice Policy Officer

The significant numbers of young people on remand in Australia is of concern. During 2015-16, over half (57 per cent) of young people held in detention centres across Australia were on remand.⁵² The percentage of young people on remand is lowest in Victoria (43 per cent) and highest in Queensland (83 per cent). In the Northern Territory, the percentage of young people on remand is 71 per cent.⁵³ Those we interviewed for the CYPP told us that young people held on remand often don't have access to the same rehabilitation programs and services as young people who are in sentenced detention.

Our research has found that in many cases, young people in Australia are placed on custodial remand due to a lack of suitable alternative accommodation⁵⁴ or 'for their own good' in order to access programs and services which are thought to be more readily available in youth detention centres but not available for them in the community. These services though are not generally available in remand. Whilst remanding young people with complex support needs in custody was recognised by those interviewed for the CYPP as inappropriate, it was also said to be the only realistic way of getting this young person the services and support they require. For example, one Children's Court Magistrate commented

⁵⁰ CYPP Interview: Youth Worker

⁵¹ CYPP Interview: Juvenile Justice Policy Officer

⁵² AIHW (2017) Youth Justice in Australia 2015-16. AIHW, Canberra.

⁵³ AIHW (2017) Youth Justice in Australia 2015-16. AIHW, Canberra.

⁵⁴ Boyle, K. (2009) "'The more things change...': Bail and the incarceration of homeless young people." *Current Issues in Criminal Justice* 21(1): 29 – 78; Richards, K. and Renshaw, L. (2013) Bail and remand for young people in Australia: A national research project, *AIC Research and Public Policy Series No. 125*. Canberra: Australian Institute of Criminology.

that 'There would be genuinely very few magistrates, or virtually none, who would actually say, "if we can't do anything for them in the community then we will lock them up", but inevitably that's what ends up happening because if they don't get any services whatsoever then... their issues just continue'.⁵⁵

It was suggested that high levels of remand are due to overly stringent bail conditions being placed on young people, which they inevitably go on to breach. For example, one juvenile justice policy officer commented 'They're vulnerable young people, they're easily exploited, their brains are poorly developed in terms of understanding consequences, and you put a bunch of conditions on them that they don't even hear, let alone understand... so then they breach, in and out in short bursts... or quite long periods on remand where they're not getting much of anything'.⁵⁶

Recommendation 5

We recommend the Northern Territory implement strategies to limit the inappropriate and unnecessary use of custodial remand for young people, through the enactment of legislation, changes to policy and practice, and better community service and bail support provision for young people in contact with the criminal justice system.

2.6 Post-release support

The issue for me has always been that we can provide some great programs, wonderful supports, good activities here, but the day we release them and let them out the door, and they go back to shit home, no supports, poor peer interactions, no food on the table and all the rest of it, it doesn't take very long to slip back into their old habits because the reality is we only have them there for a couple of months maybe... so you can't do a lot here in that time... without the relevant supports back in the community to assist them to make appropriate decisions⁵⁷

– Youth Detention Centre Director

On an average day in 2015-16, there were 914 young people in youth detention across Australia. It is important to consider however that this number is based on a census, that is, a count made on one day of the year.⁵⁸ It does not provide for the more dramatic, volatile picture of how many young people flow in and out of youth detention over a 12-month period. Data tells us there are considerable numbers of young people cycling in and out of the criminal justice system: 50 per cent of those released from sentenced detention during 2012-13 returned to sentenced supervision within six months and 76 per cent returned within

⁵⁵ CYPP Interview: Children's Court Magistrate

⁵⁶ CYPP Interview: Juvenile Justice Policy Officer

⁵⁷ CYPP Interview: Youth Detention Centre Director

⁵⁸ AIHW (2017) Youth Justice in Australia 2015-16. AIHW, Canberra.

12 months.⁵⁹ It is therefore crucial to consider what mechanisms are in place to provide transitional throughcare and post-release support for these young people. Research indicates these young people require a holistic, integrated, intergovernmental and multi-agency approach which addresses their broad spectrum of post-release needs, across health; mental health; disability support; social development; education; training and vocation; recreation; and family and personal relationships.⁶⁰ For Indigenous young people, post-release support must be holistic and culturally appropriate, particularly for those who may have English as a second or third language. Indigenous-specific programs and services should be devised and delivered by Indigenous people.⁶¹

Recommendation 6

We recommend a model of throughcare and post-release support is required which is holistic in nature, and addresses the broad range of post-release needs of young people, including health, disability, education, employment, family and personal relationship. For Indigenous young people, post-release support must be culturally appropriate, Indigenous-specific and devised and delivered by Indigenous people.

2.7 Recidivism as a measure of success

I think a more restorative approach in the long term is going to be successful. Even if it doesn't necessarily have an immediate impact on recidivism, you hopefully will give young people skills, give their families insight that will lead to a more effective long term outcome⁶²

– Children's Court Magistrate

Recidivism studies are often used to determine the success of various criminal justice programs, and a key aim of the criminal justice system across all jurisdictions in Australia is to reduce reoffending. We note the mission of the Northern Territory Youth Justice Division is 'to break the cycle of youth offending by assisting young people who are in the youth justice system and those who are at risk of entering it'.⁶³ While reoffending rates may seem like a universal and transparent measure of juvenile justice program impact, Cunneen and Luke have acknowledged the various limitations of using recidivism as an indicator of

⁵⁹ AIHW (2015) *Young People Returning to Sentenced Youth Justice Supervision 2015*. AIHW, Canberra.

⁶⁰ Cunneen, C., Luke, G., Grix, J., Boyd-Caine, T., Ralph, N. and Luff, J. (2005) *Evaluation of the Post Release Support Program*. Institute of Criminology, Sydney.

⁶¹ Gilbert, R. and Wilson, A. (2009) 'Staying strong on the outside: improving the post-release experience of Indigenous young adults', *Indigenous Justice Clearinghouse*, Brief 4, February 2009.

⁶² CYPP Interview: Children's Court Magistrate

⁶³ Northern Territory Government (2016) *Youth Justice*. Retrieved from <https://territoryfamilies.nt.gov.au/youth-justice>

program success.⁶⁴ Cunneen and Luke have argued that a driving force behind the emphasis on measuring reoffending in the criminal justice system has been the focus on public sector requirements for measurable outcomes. The dominant view in contemporary juvenile justice is a focus on intensive, highly structured programs which often have a narrow focus and are based on psychological interventions aimed at addressing a young person's 'criminogenic needs'. An outcome of this focus on 'criminogenic needs' as Cunneen and Luke argue, is that the broader social welfare agenda of providing education, accommodation, employment and income are no longer seen as crucial to rehabilitation goals.⁶⁵

A significant body of research shows that Indigenous young people in contact with the criminal justice system experience multiple and entrenched disadvantage across education, health, housing, employment and income. Indigenous young people continue to experience the ongoing effects of colonisation, dispossession, separation from family, and decades of structural violence. The focus on 'criminogenic needs' fails to take into account the grief, anger, depression, spiritual healing, loss of culture and educational deficits as a result of these processes. Until these underlying factors are addressed, it may be impossible to address the 'criminogenic' factors directly related to offending, such as drug and alcohol addiction. For all young people, recidivism as a measure of success also fails to gauge social and emotional health and wellbeing, reductions in harmful or risk-taking behaviour, as well as other improvements in their life, such as reconnecting with family and friends. In some cases, reoffending rates also fail to recognise the frequency of reoffending or offence severity.⁶⁶

Recommendation 7

We recommend that in determining the 'success' and impact of programs, there is a need to consider alternative outcome measures besides recidivism. These include in particular outcome measures of social and emotional health and wellbeing, reductions in harmful or risk-taking behaviour, reconnection with family and friends, and (re)engagement with education, training and/or employment.

3. Experiences of Young People

The CYPP had the opportunity to interview 29 Indigenous young people with experiences of youth detention. In both NSW and QLD, we interviewed 12 young people in custody in each

⁶⁴ See Cunneen, C. and Luke, G. (2007) 'Recidivism and the Effectiveness of Criminal Justice Interventions: Juvenile Offenders and Post Release Support', *Current Issues in Criminal Justice*, 19(2), 197 – 2010.

⁶⁵ Cunneen, C. and Luke, G. (2007) 'Recidivism and the Effectiveness of Criminal Justice Interventions: Juvenile Offenders and Post Release Support', *Current Issues in Criminal Justice*, 19(2), 199.

⁶⁶ Cunneen, C. and Luke, G. (2007) 'Recidivism and the Effectiveness of Criminal Justice Interventions: Juvenile Offenders and Post Release Support', *Current Issues in Criminal Justice*, 19(2), 197 – 2010.

respective state. In the Northern Territory, we interviewed five young people who were living in the community at the time but who had custodial episodes in the past. The following sections provide excerpts from the interviews with young people, organised into three key themes: experiences prior to youth detention; experiences of youth detention; and experiences of being released from youth detention.

3.1. Chaotic lives prior to incarceration

All of the young people we spoke to described chaotic lives prior to incarceration. The majority had been excluded from school at some point throughout their education (either suspended or expelled), and a significant number were not attending school or engaging in any form of work or vocational training prior to incarceration. Young people described their exclusion from school as a key point in their lives when they *'picked up on the drugs'*, *'started meeting the wrong crowd'* and began *'doing crime'*. One young person told us the consequences of him falling behind significantly in school:

When them teachers was giving us stuff... and I don't know how to do my divides. And I would have done it if I would have stayed, and I wouldn't be coming in here... When I came back... it was hard for me, that's why I didn't go to school. It's real hard for me. Teacher said, "If you need help, ask me." I'm behind in school, I'm like five years behind in school... I haven't gone to school since last year... Cos I never learn anything. That's why I just didn't go to school, and that's when I started doing crime.⁶⁷

In many cases, the young people we spoke to described multiple traumatic experiences prior to coming into contact with the criminal justice system, such as the death of a close family member, removal from their family and placement in a residential care environment, or the imprisonment of one or more family members. For example, one young person told us about the hopelessness she felt when her father went to prison and that she *'had nothing to lose'*.⁶⁸ The impacts of intergenerational imprisonment in the lives of the young people we interviewed were very apparent, with a number of young people telling us they had multiple family members (including parents, siblings and cousins) and entire groups of friends and social networks inside. One young person commented: *'Yeah, my sister's been locked up, my dad's been locked up, my mum's been locked up, my aunties have been locked up, my brothers, so pretty much the whole family.... Cousins,'*⁶⁹ and *'My mum's brother's in there. My dad's uncle... But, yeah, I got a lot of friends in there as well.'*⁷⁰ For young people with multiple family members and friends inside, going to jail was talked about as being almost a rite of passage. As one young person described it *'I was just following my mates footsteps too and trying to be like them and what they went in before. So I went in the same time.'*⁷¹

⁶⁷ CYPP Interview: Townsville 2

⁶⁸ CYPP Interview: Juniperina Youth Detention Centre 2

⁶⁹ CYPP Interview: Juniperina Youth Detention Centre 1

⁷⁰ CYPP Interview: Juniperina Youth Detention Centre 2

⁷¹ CYPP Interview: Northern Territory

A number of young people we interviewed had been removed from their families and spent time in residential care. Often this was intertwined with significantly traumatic experiences. One young person told us:

My mum passed away when I was eight. My dad's in gaol and has been for 7, 8 years... I was living with youth services... Life without Barriers. I didn't like it at all... I was living with my Nan until I was 10 and then I got moved to my foster carer's house until I was 12, and then I moved from there, cos I ran away... yeah I was pretty much moving around. I moved from there to Life without Barriers in Tamworth, and then from Life without Barriers in Tamworth to Wundarra in Coffs Harbour, and from Wundarra to up here in Sydney, Guardian Youth Care... A different service... I don't like it at all. Nup... I just want to go back home.⁷²

Similarly, to this young person, others too had generally very negative experiences of living in residential care, and a number linked their experiences in care to 'around the wrong people', increased substance use, and engaging in offending.

When I lost my family and found out I was in DOCS care... I had a really bad lifestyle, is really when I started offending... Running away and stuff like that, yeah... I had a rough childhood, you know? I never knew my father or my mum. And um, once I did I tried to find them and it just ended up bad for me. Yeah, and I just... kept coming in and out of here.⁷³

Young people described addiction to drugs and alcohol as a key factor behind coming into contact with the criminal justice system. Drug use was often described as starting very early in life (before the age of 10 years), and it was very apparent that drug and alcohol use was associated with significant unmet and unresolved trauma.

The drugs that mess with my head that make me do the wrong thing... what I want to do is get off the drugs and behave. But it's pretty hard... when I first started taking drugs I was 8, was only smoking yandy. I started smoking cigarettes when I was 8 as well. And when I turned 13 I started drinking alcohol. And then this year I started ice injecting... I lost my mum. So I started doing drugs and getting into all the heavy stuff. And then I started getting heavier this year. She had a hotshot and she died up here in Sydney in the city hospital.⁷⁴

Another young person spoke of her drug use progressing following the incarceration of her father. She told us: 'I wasn't as bad until my dad went to gaol. He's been in gaol for four years – the last four years I started, like smoking ice and chopping in and just doing things that I'd never done'.⁷⁵

For a number of young people, and particularly those who grew up in rural or remote areas, one of the key contributing factors to their offending was a lack of structured, enjoyable

⁷² CYPP Interview: Juniperina Youth Detention Centre 4

⁷³ CYPP Interview: Orana Juvenile Justice Centre 4

⁷⁴ CYPP Interview: Juniperina Youth Detention Centre 4

⁷⁵ CYPP Interview: Juniperina Youth Detention Centre 2

activities and appropriate support services available to them in their community. One young male told us that one of the reasons he started breaking the law was '*... just boredom a lot. I just come from a little remote area and yeah there's nothing to do out there, so I just, yeah, muck up, like hang around the wrong boys... Just get myself into trouble*'.⁷⁶ Another young person similarly told us: '*back then when I was 13 I couldn't find anything to do after school hours. I always loved going to school because that was the only thing I enjoyed. Out here in Katherine after school or if you're not at school you're just bored*'.

A number of the young people had excellent suggestions about what could be done in their specific community but also more generally to support young people so that they don't end up in youth detention. One young person from the Northern Territory told us that young people in contact with the criminal justice system need '*just a lot of support, they need a lot of support. Places where they can go when they're feeling down and stuff. Yeah, how I look at the Y [youth centre] is just it attracts a lot of younger kids like 15 and under, you need a place where older kids can hang out because that's the time of their life when they need to start making a change... I think they need more stuff like game shops and stuff where kids can hang out at night til whenever. Yeah, like arcade sort of thing. Like a lounge or even a bowling alley and stuff like that*'.⁷⁷ Another recommended the development of a program in rural/remote areas in which they take '*a young man camping, they go fishing, travel to other places, do like a tour or something*'.⁷⁸

3.2. Experiences of youth detention

Young people's experiences of youth detention varied considerably from interview to interview. Some found it to be a positive experience, giving them some respite from their at times chaotic lives, viewing it as a chance to detox from drug and/or alcohol use and to complete educational courses and certificates. One young person described custody as being a place of safety for her, she told us '*I don't like it when I'm in here but... as much as I hate it, I'm grateful because at times I think if I didn't get locked up I'd be dead.... It's sort of my saviour, at times... the last four years it's been hell... I haven't cared. Death doesn't bother me. Now, it does. But it didn't before*'.⁷⁹ A young man spoke positively about being in youth detention and experiencing the routine, basic living needs which all children are entitled to, such as waking up for school and receiving three meals a day. He commented: '*I've got to say like when I left the place I sort of missed it. I felt safe and that. You get so used to it, it's like so fun waking up for breakfast and then all that*'.⁸⁰

Others we spoke to had quite different experiences of youth detention. One youth told us that being in custody was greatly affecting his mental health: '*For me, this place is getting to me... on Saturday, I commit suicide. Yeah... I passed out. I was real bad. I only had a couple of seconds left until I was... disabled... I just got too depressed, and I couldn't handle this*

⁷⁶ CYPP Interview: Orana Juvenile Justice Centre 1

⁷⁷ CYPP Interview: Northern Territory 3

⁷⁸ CYPP Interview: Northern Territory 2

⁷⁹ JPDC_2, 6

⁸⁰ CYPP Interview: Northern Territory 5

place any more... Now I'm on a high observation... I'm starting to feel alright again. It's just, same environment the whole time.⁸¹ For young people who were held in youth detention many miles away from their support networks of family and friends, being in custody and not receiving many (if any) visits was a particularly isolating and lonely experience: *'It was pretty hard because Don Dale is so far away, my family can't make it to visit me or anything, and there's not much people I know in there, no Katherine people'*.⁸²

One girl we spoke to gave us some insights into the challenges for females in youth detention, particularly in relation to these experiences of isolation and loneliness which often compound trauma and mental health concerns. She spoke of the crucial role that youth justice officers can (and should) play in supporting young people. She told us that *'there's a handful of workers here that come here to help us, the rest come to work for a paycheck, and I hate that'*.⁸³ While this young person had experienced significant hardship during her short life, she expressed such resilience, thoughtfulness and a desire to help other vulnerable young people in the future:

*I wish I could sit down and talk with them. And tell them like "Things are going to be alright," but I can't say that, because I don't know what they're going through. But everyone who comes in here, especially the young ones, they got a lot going on in their life. And I see it, but the workers don't, they just think "she's another inmate that we gotta work with" or just another kind of kid to deal with... But the young girls... I look at them and think "Fuck", I can just imagine what's going on in their life or what they've been through, like [name of young person]. She's only 12, she's been in her room for 5 days, she hasn't come out, they won't let her. Every time they open her door, she chucks something at them... She's got a lot going on... I wish I could help them, but I dunno. I'm in the same predicament, know what I mean? I'm a detainee just like them. But one day I'll come back and work here. I swear to that. One day I will help young kids.*⁸⁴

Regarding the education and schooling in youth detention, the majority of the young people we spoke to had positive experiences, and particularly enjoyed classes which focused on practical learning. Young people often described the school in youth detention much more positively than their experiences of the mainstream education system in the community. They told us they enjoyed the intensive nature of learning within youth detention where the class sizes were often much smaller and often more than one teacher. For example, one young person commented *'I get heaps of help... It's better than the outside school. Cos I get frustrated on the outside. I just walk out from school... When I feel like I don't have help... It's just better in all sorts of different ways'*.⁸⁵ They also spoke positively of having coursework tailored to their personal needs and ability, something which often didn't happen in mainstream schools and which they described as attributing to their disengagement, boredom, and ultimately exclusion, from mainstream schools. When describing the school he attended in the community he told us *'I don't find them boring... It's just... really hard to*

⁸¹ TVL-1, 13

⁸² CYPP Interview: Northern Territory 3

⁸³ CYPP Interview: Juniperina Detention Centre 2

⁸⁴ CYPP Interview: Juniperina Detention Centre 2

⁸⁵ CYPP Interview: Brisbane Youth Detention Centre 6

concentrate when people are yelling and everything and talking to each-other and their friends and everything. And in here it's like real strict, and you're not allowed to do any of those things'.⁸⁶

A number of young people who made positive comments about their experiences in youth detention commented on the importance of having Indigenous staff employed who understand their family relationships, culture, and their social and emotional wellbeing with one youth: 'There's Indigenous staff that work here that do understand us a lot... like if I don't wanna open up to my family members, then I know that I can talk to... one of the Indigenous staff members'. She notes one Indigenous staff member in particular: 'She really understands us and... how things happen and everything, like... Indigenous cultural things and everything'.⁸⁷ Another young person told us about the importance of his Indigenous culture and the influence his elders have on him:

I'm a really cultural person... I know a lot about my culture... That's really important to me...I would never leave my culture behind for any other stuff. Like... crime, stop me a bit from doing that now... I'm starting to think about, like, I'm in here and I'm letting my culture down... So when I get out I just want learn more about my culture.. I just wanna learn a lot about my culture... When I go back... all the people around the community say, "Aw, like, we missed you and stuff." ... I feel a bit upset too, when I hear them say that... I listen to my elders. And my elders say: "Ey! Stop breaking the law and stuff." And I get upset too... I just say I'm sorry... they make us dance all day... til our legs are really weak... They give us punishment and stuff... sometimes I like dealing with stuff the old ways... I'm used to it. They make me deadly.⁸⁸

3.3. Release from youth detention and plans for the future

The transition from custody to community was recognised by several young people as a very difficult time. For the clear majority of those we spoke to controlling their drug and/or alcohol use was identified as one of the key challenges upon release. We asked one young person what she thought will be some of the biggest hurdles for her when she is released from custody and she said told us:

Stay off drugs. That'd be my biggest challenge... I thought...I could do it easy. Stay off drugs and that. I lasted for about two and half weeks when I got out... and my brother and his mates were smoking bongs... and I just smelt it. But I walked in and said "Can I have one?" and then... once I just had that taste of yandi again, it was just like, give me another one.⁸⁹

Those who felt custody had provided a period of respite expressed concern about falling into the same bad habits that had led them to the criminal justice system in the first place. Peer

⁸⁶ CYPP Interview: Brisbane Youth Detention Centre 6

⁸⁷ CYPP Interview: Brisbane Youth Detention Centre 7

⁸⁸ CYPP Interview: Townsville Youth Detention Centre 1

⁸⁹ CYPP Interview: Juniperina Youth Detention Centre 3

groups were identified as a key challenge, particularly for young people from regional, rural or remote areas where they had smaller social networks many of whom they had grown up with, and that forming a new (and perhaps more positive) social network was described as almost impossible. Relatedly, many young people felt that they were likely to breach their bail conditions if such conditions prohibited them from interacting with family members and their closest friends. One young person reflected: *'I breached because I couldn't hang around with my mates, that's the only breach that I had. I sat down and the Magistrate let me have my talk, I just stood up and said these have been my mates since I was little and you come in and try to rule us it ain't going to work. I grew up with this mob and they basically live in my house when they come over so it's hard for us young fellas to be separated from our close mates'*.⁹⁰

Many of the young people we spoke to felt regularly targeted and harassed by the police, particularly following their initial contact with the criminal justice system, for instance: *'When I was getting in trouble... I'd get in trouble for something and then once something else happened they're straight to my door asking me where I was last night. Yeah harassing me. Yeah I could be just walking down the street and they just pull me up "How are you going, what are you doing tonight, if we find you in the streets again we're going to lock you up"*.⁹¹ Another young person commented: *'I admit, if we've stuffed up, there's a reason there, but if we haven't, then leave us alone. Let us be in peace, we're just normal people, just like anyone, you know?'⁹²* A number of young people also spoke about their experiences of being over-policed while they were on bail; telling us that the police would often come to their family home in the middle of the night to check on them, and that this placed a lot of stress on their family and their social relationships. Several young people also reported being physically and verbally assaulted by the police. One young person told us that the police speak to him *'Like I'm a dog. Like we can't even just go to the park and have a game of footy without them pulling us up. We'll be in the park having a game of footy of something, not doing no crimes or nothing, away from trouble and having a game and they'll come up and arrest us. Just ask us "where have you been," you know, ask us about other stuff and crimes and that. And we never did nothing'*.⁹³

Several the young people we spoke to felt that they were targeted because of their Indigeneity. One young person said: *'I see how they treat like white people and then I see how they treat black fellas. It's disgusting... it's so different. The white fellas are on platters and the black fellas are like down in the dumps. It's putrid'*.⁹⁴ This was a sentiment reflected by a number of interviewees, with one young person telling us that the police *'...make it hardest on us Aboriginals, more than people like themselves, you know?... it's really hard for us to even come out of our house because we're being targeted that much. We been getting harassed and sometimes even bashed for no reason'*.⁹⁵ Based on these comments, we asked the young people whether they had any advice for the police, and they gave us a number of suggestions. The most common suggestions were to be more approachable and

⁹⁰ CYPP Interview: Northern Territory 2

⁹¹ CYPP Interview: Northern Territory 3

⁹² CYPP Interview: Orana Juvenile Justice Centre 4

⁹³ CYPP Interview: Orana Juvenile Justice Centre 7

⁹⁴ CYPP Interview: Juniperina Detention Centre 2

⁹⁵ CYPP Interview: Orana Juvenile Justice Centre 4

kind to young people; to use less violence and aggression; and not to target them just because of the colour of their skin. One young person advised police to '*Take it easy on young kids, be more approachable, a number of kids they could be going through tough times and stuff, they need to be more careful what they say and do*'.⁹⁶

While some young people were confident of their ability to stay out of custody, one young person who had been cycling in and out of youth detention since he was a young boy was not as optimistic. He highlighted a lack of support in the community as a major concern for him, telling us that he felt he received significantly more support while he was in youth detention:

*I just didn't have no family support, I had nothing. Nothing to live for out there. I just kept thinking about here and the support that I get here, and I just think, you know, there's no point being out here, back to juvey I go... I think it might be harder for me because I'm used to being in here... I can't comply with parole or bails, so to me I think I'm going to end up in [prison] because I'm used to it, used to this – this is my life... I haven't had visits this time...I don't really get many visits... I don't really talk to anyone at the moment. I haven't talked to my family in a while. They just don't want to talk to me because I reoffended and I keep coming back in.*⁹⁷

This brings us back to our earlier findings and comments about young people being detained in custody in order to access programs and services which are available in youth detention but not available in the community. The government has a responsibility and obligation to support these children, to keep them safe and to ensure that they are adequately cared for in the community.

We asked young people from the Northern Territory who were no longer in custody what were some of the reasons they stopped coming into contact with the criminal justice system. The responses we received varied considerably. A couple of young people told us that having their sporting achievements in football recognised was a major factor keeping them 'on track': '*My footy career because when I got out I got straight into footy then I got chosen to represent NT down in Melbourne, Canberra, Sydney and Brisbane, went travelling with the NT boys. Then I went to draft camp last year for AFL*'.⁹⁸ This young person also mentioned the positive impact he had on his friends when he stopped getting into trouble: '*my mates stopped. Yeah they stopped when they saw me do footy and that. One of my mates is going in the same spot where I was, my mates turned around a similar time as me*'.⁹⁹

Becoming a parent for the first time and aspiring to be a positive role model for their children was described as another key factor which contributed to them staying out of youth detention, for example one young person told us '*the second time when I went in I found out my girlfriend was pregnant. Yeah. So I felt I had to change. The day I found out was the*

⁹⁶ CYPP Interview: Northern Territory 3

⁹⁷ CYPP Interview: Orana Juvenile Justice Centre 4

⁹⁸ CYPP Interview: Northern Territory 2

⁹⁹ CYPP Interview: Northern Territory 2

day I went in'.¹⁰⁰ Others spoke of the impact of having loving and supportive family and friends around them: *'My older brother is a good role model and they pretty much believe in me and that. My older brother two years older than me graduated school so that pushed me to graduate school... he was there for me lecturing me and stuff. Then I had a family friend... he was the youth worker in town when I met him and he became a family friend and he was a big help'*.¹⁰¹ And another one similarly responded: *'it was just the people that cared about me. I just couldn't keep on disappointing them'*.¹⁰² A number of young people spoke about their motivation to change and keep *'on the right track, stay out of jail, live a happier, better life'*.¹⁰³ The young people were self-reflective and thoughtful in their responses:

*'I've changed a lot, you know? It's more matured now. I want the best for myself now. Before I didn't really give like a shit, but now I'm growing up, I'm starting to realise... I'd rather own everything I get, rather than stealing it... I'd rather own my own car, and all that, own my own house, you know?... People work hard for their things, and you get someone like me come along and taking it... I wouldn't be happy'*¹⁰⁴

Several of the interviewees we spoke to had wonderful aspirations for their future and very firm ideas about where they wanted to go. However, it was apparent from these discussions that, like most young people, they needed encouragement, reassurance, praise, and support to help them to achieve their goals. For example, one young person told us:

*'I've got a plan – a life plan. I've had it since I was like seven years old. It hasn't changed. I want to finish my year 12. Do my HSC and then go to university or TAFE, and then do my nursing degree... And then I want to be a midwife and then get a house and have a car, and have kids and get a husband. But it probably won't turn out like that anyway.'*¹⁰⁵

4. Oversight in Youth Detention

We refer to our submission to the Australian Human Rights Commission for Australia's ratification of the *Optional Protocol to the Convention Against Torture (OPCAT)* in the context of youth justice detention centres.¹⁰⁶ We welcome the announcement of Australia's intention to ratify OPCAT by December 2017.¹⁰⁷ We support the NT Children's Commissioner's call for the federal government to ratify the OPCAT in order to prompt a

¹⁰⁰ CYPP Interview: Northern Territory 3

¹⁰¹ CYPP Interview: Northern Territory 3

¹⁰² CYPP Interview: Northern Territory 4

¹⁰³ CYPP Interview: Northern Territory 3

¹⁰⁴ CYPP Interview: Orana Juvenile Justice Centre 1

¹⁰⁵ CYPP Interview: Juniperina Detention Centre 3

¹⁰⁶ Available to read here:

<https://www.humanrights.gov.au/sites/default/files/08.%20University%20of%20New%20South%20Wales.pdf>

¹⁰⁷ Bishop, J. and Brandis, G. (2017) 'Improving oversight and conditions in detention', 9 February 2017.

national monitoring mechanism for juvenile and other secure facilities to help drive consistency and transparency of juvenile justice systems.¹⁰⁸

On the face of it, Australia has a relatively comprehensive complaints-based system for children and young people in detention. All states and territories in Australia have various investigation, review and reporting procedures in place. Inspection and monitoring bodies include the Ombudsman (in New South Wales, Victoria, Queensland, Australian Capital Territory, South Australia, Tasmania, Western Australia and the Northern Territory); Official Visitor Schemes (NSW and QLD); and the Office of the Inspector of Custodial Services (WA and NSW).

However, while all juvenile detention centres in Australian jurisdictions are monitored, Australia does not have a consistent, comprehensive system operating across all places of detention. A significant issue is that monitoring bodies tend to respond to singular events in their respective jurisdictions and do not provide a framework for addressing institutional and systemic problems which occur to varying degrees in all states and territories, such as problems of abuse, the use of excessive force and inadequate staff training. These systemic problems negatively affect Australia's compliance with children's rights. In addition to this, various oversight bodies are generally reactive to infringements of human rights in places of juvenile detention and do not prevent human rights abuses from occurring.

4.1. The Optional Protocol to the Convention against Torture (OPCAT) and the Benefits of a National Preventative Monitoring Scheme (NPN)

Children and young people deprived of their liberty are vulnerable to breaches of their human rights. There are five key benefits of establishing an NPM in Australia as identified by the Human Rights Commission,¹⁰⁹ including:

- **Preventive monitoring can identify emerging issues of concern** and rectify issues before they lead to breaches of the human rights of young people deprived of their liberty. Consistent and thorough inspections of detention centre administration records to determine the use of segregation, the use of force, and complaints made by young people would work to identify and address human rights issues at their earliest point.
- **Preventive monitoring can lead to improved protection of the rights of vulnerable children in detention**, particularly Indigenous children and those with mental health disorders, cognitive disabilities and other complex support needs whom we know are overrepresented in juvenile justice populations.
- **Preventive monitoring can lead to an improved culture within juvenile detention facilities** by promoting knowledge and understanding of Australia's

¹⁰⁸ Wild, K. (2015) 'Use of restraint chair and hood 'archaic': National Children's Commissioner', *ABC News* (online), 14 November.

¹⁰⁹ Australian Human Rights Commission (2012) Consideration of Australia's ratification of the Optional Protocol to the Convention against Torture, Human Rights Commission, Sydney.

obligations under international human rights law amongst juvenile justice staff, police officers and detainees themselves.

- **Preventive monitoring can lead to a reduction in claims for compensation**, for example, in 2011, the Public Interest Advocacy Centre (PIAC) and Maurice Blackburn commenced a class action on behalf of a number of young people wrongfully imprisoned by NSW Police due to Police COPS database malfunction.¹¹⁰ One of the young people concerned was a 14-year-old who was arrested, handcuffed and strip-searched, and held overnight in custody on three separate occasions over a two-week period, despite having no imposed bail conditions.¹¹¹ In August 2015, a settlement of \$1.85 million was reached on behalf of all of the young people involved.
- **Preventive monitoring can work to ensure consistency in standards of treatment** across all places of juvenile detention and across all states and territories in Australia. CYPP interview respondents spoke of the need to strengthen “at a national level the monitoring of what happens in closed detention centres” and that this would be “about ensuring we have more consistency across the jurisdictions and that we have a more transparent process for monitoring how people are treated in those settings”.¹¹²

5. Changing the Criminal Process: Recommendations from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families

It is well established that Aboriginal and Torres Strait Islander children are disadvantaged at each stage of the criminal process, being more likely to have more and earlier police contacts, adverse discretionary decisions made in relation accessing pre-court diversionary options, being more likely to be refused bail and more likely to receive sentencing outcomes of detention than non-Indigenous youth. In addition, access to alternatives to detention and access to post detention services are particularly limited for Indigenous young people in rural and remote areas.

The report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home*, attempted to address these issues in various recommendations specifically related to juvenile justice. By and large these recommendations have been ignored in the 20 years since the report was tabled.

5.1. Recommendations from *Bringing Them Home*

We urge the Commissioners to reconsider the importance of the relevant recommendations from the *Bringing Them Home* report. The recommendations were based on the principle of

¹¹⁰ PIAC (2015) *Access to Justice: False Imprisonment of Young People Class Action*. PIAC: Sydney. <http://www.piac.asn.au/projects/node/64/information-1>

¹¹¹ PIAC (2015) *Court Win for Wrongful Imprisonment of Children*, 27 September, PIAC, Sydney. <http://www.piac.asn.au/news/2013/09/court-win-wrongful-imprisonment-children>

¹¹² CYPP Interview: Policymaker 1

Indigenous self-determination and recognised the need for immediate change in the level of control by Indigenous communities and organisations in the decisions that affect the future of their children and young people.

Recommendation 44 of *Bringing Them Home* is concerned with the development of national legislation that establishes national minimum standards for the treatment of all Indigenous children and young people, irrespective of whether those children are dealt with by government or Indigenous communities and organisations. Those standards are then set out in subsequent recommendations. We focus our discussion here on those standards which specifically impact on juvenile justice.

Standard 1 (Recommendation 46) sets out the factors to be considered by a decision-maker in determining the best interests of an Indigenous child, including:

1. The need of the child to maintain contact with his or her Indigenous family, community and culture,
2. The significance of the child's Indigenous heritage for his or her future well-being,
3. The views of the child and his or her family, and
4. The advice of the appropriate accredited Indigenous organisation.

Standard 3 (Recommendation 48) provides that the removal of Indigenous children from their families and communities by the juvenile justice system, including for the purposes of arrest, remand in custody or sentence, is to be a last resort. An Indigenous child is not to be removed from his or her family and community unless the danger to the community as a whole outweighs the desirability of retaining the child in his or her family and community.

Standard 4 (Recommendation 49) sets out the requirement for consultation with accredited Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous young person. In juvenile justice matters that organisation must be involved in all decisions at every stage including decisions about pre-trial diversion, admission to bail and conditions of bail. Thus, all discretionary decisions relating to Indigenous young people need to be made in consultation with Indigenous organisations.

Standards 1, 3 and 4 embed the principles that Indigenous children should not be removed from family, community and culture except as a last resort, and that accredited Indigenous organisations must play a fundamental role in making decisions affecting Indigenous children and young people in the criminal process.

Standard 8 (Recommendation 53) sets out fifteen rules relating to juvenile justice decision-making.

- Rules 1 and 2 seek to minimise the use of arrest and maximise the use of summons.
- Rule 3 requires notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained.
- Rule 4 requires consultation with the accredited organisation before any further decisions are made.
- Rules 5 to 8 provide protection during the interrogation process.
- Rules 9 to 12 ensure that denial of bail is minimized, and if denied that the young person be remanded in the custody of an accredited Indigenous organization (e.g.

Indigenous bail hostel) and that detention in police cells is eliminated except in truly exceptional circumstances.

- Rule 13 prioritises the use of Indigenous-run community-based sanctions.
- Rule 14 establishes the sentencing factors that need to be considered, including (c) the advice of the accredited Indigenous organization, (d) the principle that Indigenous children are not to be removed from their families and communities except in extraordinary circumstances.
- Rule 15 requires that custodial sentences be for the shortest possible period, and that reasons for such sentences must be stated in writing. No indeterminate or mandatory sentences.

5.2. The role of Indigenous accredited organisations in decision-making

There has been more general acceptance of the role of Indigenous accredited organisations in decision-making in child protection matters, compared to juvenile justice. For example, in NSW, Victoria and Qld child protection systems provide for accredited Aboriginal Child Care Agencies to provide advice when child protection decisions are being made (e.g. Recognised Entities in Qld).

We have also seen the limited acceptance of the principle of Indigenous involvement in decision-making in juvenile justice at the sentencing stage through the development of Koori youth courts in Victoria and NSW, and the Murri Youth Court in Qld. While we support Indigenous sentencing courts, we also acknowledge that they are severely limited in their capacity (e.g. only one Koori Children's Court for all of NSW) and are confined to one point in the criminal process (sentencing).

The importance of the recommendations from *Bringing the Home* is that they provide a systematic framework for enhancing Indigenous decision-making, not only in sentencing but also in relation to pre-court diversion and bail. Further, they prioritise the role of Indigenous organisations in providing alternatives to custodial remand and in the provision of community-based sanctions.

Recommendation 8

We recommend that the NTRC seriously consider the previous recommendations from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families as related to Indigenous children in juvenile justice, and in particular the framework provided for enhancing Indigenous decision-making throughout the criminal process.

6. Overview of Recommendations

Recommendation 1 – An increase to the age of criminal responsibility has the potential to reduce the likelihood of life-course interaction with the criminal justice system. In particular, raising the age of criminal responsibility is a key measure which could address the significant

overrepresentation of Indigenous young people in youth detention. We recommend Australia increase the minimum age of criminal responsibility to, at least, 12 years.

Recommendation 2 – We recommend an increase and expansion of diversionary options and alternatives to detention in the Northern Territory, particularly for Indigenous children. Such programs and alternatives to detention must be available in regional, rural and remote locations.

Recommendation 3 – In recognition of the large body of research indicating the significant overrepresentation of young people with mental health disorders and cognitive disabilities in the youth justice system in other states and territories in Australia, we recommend the Northern Territory introduce a system of data collection on the prevalence of disability amongst children and young people in contact with the criminal justice system. This could take the form of an annual health survey of young people on community-orders and young people in custody, similar to custody health surveys which take place in New South Wales. We also note the imperative to appropriately screen children and young people for the early identification of disability, particularly in regards to borderline impairments such as TBI and FASD.

Recommendation 4 – We recommend the Northern Territory develop an interagency protocol to reduce the criminalisation of young people in care.

Recommendation 5 – We recommend the Northern Territory implement strategies to limit the inappropriate and unnecessary use of custodial remand for young people, through the enactment of legislation, changes to policy and practice, and better community service and bail support provision for young people in contact with the criminal justice system.

Recommendation 6 – We recommend a model of throughcare and post-release support is required which is holistic in nature, and addresses the broad range of post-release needs of young people, including health, disability, education, employment, family and personal relationship. For Indigenous young people, post-release support must be culturally appropriate, Indigenous-specific and devised and delivered by Indigenous people.

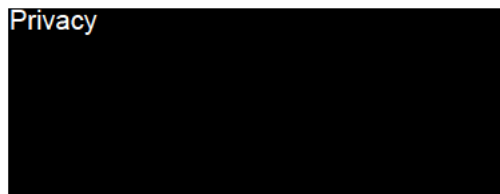
Recommendation 7 – We recommend that in determining the ‘success’ and impact of programs, there is a need to consider alternative outcome measures besides recidivism. These include in particular outcome measures of social and emotional health and wellbeing, reductions in harmful or risk-taking behaviour, reconnection with family and friends, and (re)engagement with education, training and/or employment.

Recommendation 8 – We recommend that the NTRC seriously consider the previous recommendations from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families as related to Indigenous children in juvenile justice, and in particular the framework provided for enhancing Indigenous decision-making throughout the criminal process.

Thank you for the opportunity to provide this submission.

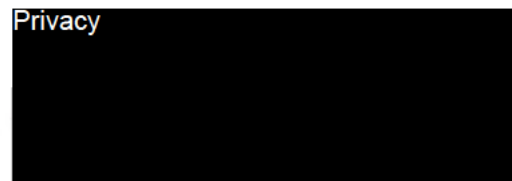
Yours sincerely,

Privacy



Professor Chris Cunneen
Chief Investigator Comparative Youth
Penalty Project, Justice Reinvestment
Project, Australian Prisons Project.

Privacy



Professor Eileen Baldry
Chief Investigator Comparative Youth
Penalty Project, Australian Prisons Project,
Australians with Mental Health Disorders
and Cognitive Disabilities in the Criminal
Justice System Project.